

ICC India Arbitration White Paper

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FOREWORD

With the growth in international trade and investments, commercial transactions are increasingly becoming cross-border and often involve multiple parties, raising complex issues about resolution of disputes. These issues are not only limited to the resolution process, but also concern enforceability and jurisdiction. Turning to local courts may not be a very business-friendly option in this scenario. Confidentiality, neutrality, impartiality, and time and cost effectiveness are the most advantageous offerings of arbitration vis-à-vis courts for settlement of commercial disputes.

Post liberalization in India, there have been notable developments in the field of arbitration – since the enactment of the Arbitration and Conciliation Act, 1996, to the coming into force of the Arbitration and Conciliation (Amendment) Act, 2021. Successive governments have placed emphasis on facilitating expeditious and effective resolution of commercial disputes through arbitration with the aim of improving ease of doing business and promoting India as an investor-friendly jurisdiction.

Though several progressive legislative actions have been taken, a lot more needs to be done to make arbitration the preferred mode of dispute resolution in India, including creating awareness of the advantages of arbitration and building a large community of practitioners.

At the ICC, we continuously seek to enhance efficiency, control time and costs, and aid enforcement and confidentiality through the use of innovative arbitration tools and procedures. This ongoing focus keeps us up to date with the interests and concerns of businesses throughout the world.

I am happy to say that the ICC arbitration rules have stood the test of time. In 2017, the ICC introduced expedited procedures for arbitration with reduced fees wherein the case is decided by one arbitrator and a final award rendered within six months. In some cases, the ICC arbitration rules also provide for seeking urgent temporary relief from an emergency arbitrator. More recently, in response to disruptions caused by Covid-19, the ICC issued guidelines for holding hearings virtually aided by the use of advanced technology by the tribunals and parties. Further, keeping a client mindset, the ICC 2021 Arbitration Rules have paved the way for greater efficiency and transparency in arbitration proceedings.

The first in ICC India's arbitration series, this white paper discusses topical and emerging issues in commercial and institutional arbitration. The authors examine the following: the approach of courts in India in identifying the seat (versus venue or place) of arbitration and the law that applies to arbitration; rules and procedures for enforcement of foreign arbitral awards in India; enforcement of interim measures and interim awards of foreign seated arbitral tribunals in India; third-party funding; and the arbitration ecosystem in India and use of technology in arbitration.

Authored by leading practitioners, I am confident that this white paper will greatly help in reinforcing the relevance of international institutional arbitration in a hyperconnected world marked by growing cross-border trade.

Imran Khan

Executive Director, ICC India

SEAT AND THE LAW OF ARBITRATION

Amar Gupta¹

In its landmark decision in *Balco*,² the Indian Supreme Court ruled that Part I of the Arbitration and Conciliation Act, 1996 (Indian Arbitration Act) will have no application to international commercial arbitration held outside India. The Court held that “*regulation of conduct of arbitration and challenge to an award would have to be done by the courts of the country in which the arbitration is being conducted*”; and that such court is then the supervisory court possessed of the power to annul the award.³ The court thus affirmed the “*Shashoua principle*”,⁴ which is now firmly established in arbitration jurisprudence in India. This principle lays down that an agreement as to the seat of arbitration brings in the law of the seat as the curial law and is analogous to the exclusive jurisdiction clause.⁵ The parties thus agree not only to the curial law of the seat but also that any challenge to an interim or final award will be made only in the court of the place designated as the seat of arbitration.

With these observations the Court ended a decade-long regime of law laid down in *Bhatia*⁶ which conferred concurrent jurisdiction to the domestic courts for deciding the challenge to an award made at a seat of arbitration outside India. The ruling in *Balco* is in accord with the judicial thinking in most jurisdictions, and will no doubt continue to hold the field. The Court, however, also ruled that “*the law of the seat or place where the arbitration is held, is normally the law to govern that arbitration. The territorial link between the place of arbitration and the law governing that arbitration is well established in the international instruments*”,⁷ and that “*the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings*”.⁸ This ruling is based on a line of decisions⁹ of English Courts and which lay down the principle that the law governing the arbitration agreement will ordinarily coincide with the law of the seat, and the parties’ choice of seat (rather than the law

¹ The author acknowledges the assistance provided by Anuj Aggarwal, Advocate in preparation of this paper.

² *Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc.* (2012) 9 SCC 552 (*Balco*) [Para 194].

³ *Ibid.* [Para 123].

⁴ Principle stated at Para 23 of *Shashoua & Ors. v. Sharma* [2009] EWHC 957 (Comm) (2009) 2 All ER 477 (Comm) (quoted at Para 110 of *Balco*), referred to as the “*Shashoua principle*” in *BGS SGS Soma*, Note 19 below [Paras 94 and 96].

⁵ *Supra*, Note 1 [Para 110].

⁶ *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105 (*Bhatia*).

⁷ *Supra*, Note 1 [Para 76].

⁸ *Supra*, Note 1 [Para 116].

⁹ *C v. D* [2007] EWCA Civ 1282 [insurance policy was governed by the law of the State of New York], *Shashoua, supra*, Note 3 [agreement was governed by the laws of India].

applicable to the main contract) will be decisive. In a recent decision in *Enka v. Chubb*,¹⁰ the UK Supreme Court questioned the premise of those decisions on the issue of determination of law governing the arbitration agreement (vis-à-vis the seat of arbitration) and has restated the rule in that regard.

Under the law laid down in *Balco*, parties' choice of seat of arbitration has significant legal consequences: it endows exclusive jurisdiction on the local court not only to supervise the arbitration proceedings but also to decide the challenge to the arbitral award resulting from it; and such choice also operates as choice of law of the seat as the law governing the arbitration. The choice of seat therefore assumes great importance in the conduct of arbitration and in the proceedings that follow it.

In this paper we will first examine the approach of courts in India in identifying the seat (versus venue or place) of arbitration and the law that applies to arbitration (including the validity and scope of the arbitration agreement). We will then examine the impact of the decision in *Enka v. Chubb* on the jurisprudence in India on this issue.

Choice of Seat

In *Balco*, the Court held that the seat of arbitration is intended to be its centre of gravity. It, however, recognised that it is not mandatory for the arbitrator to hold all the proceedings of the arbitration at the seat alone, and that it is open to the arbitrators to hold meetings at a location convenient to all.¹¹ The Court also recognised that "seat" and "place" are often used interchangeably.¹² If the parties expressly designate the seat of arbitration, no interpretation is required nor any inference is required to be drawn, and the legal consequences attached to such choice follow. However, there has been a great deal of controversy regarding the intention of the parties when they do not specify the seat, or they describe the location of the arbitration proceedings in the arbitration agreement as "venue" or "place" rather than "seat". What is the true intention of the parties in such cases with regard to the seat of arbitration? This question has engaged our courts in a number of cases.

Indian courts take into account indicia present in the contract and the surrounding circumstances for construing the true intention of the parties. In its decision in *Imax*, having regard to the parties' choice

¹⁰ *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb* [2020] UKSC 38 (*Enka v. Chubb*).

¹¹ *Supra*, Note 1 [Para 75].

¹² *Supra*, Note 1 [Para 76].

of the ICC Rules of Arbitration (ICC Rules),¹³ and the decision of the International Chamber of Commerce (ICC) (in consultation with the parties) to hold arbitration in London, which the parties accepted, the Supreme Court concluded that the parties had agreed to have the seat of arbitration in London.¹⁴ In a case where the arbitration clause provided for arbitration in accordance with the procedure prescribed by the London Maritime Arbitration Association through a tribunal comprising members of the “London Arbitration Association”, and the contract was governed by English law, the Court inferred the intention of the parties to have the seat of arbitration in London.¹⁵ The Court construed the arbitration clause providing that the “place of arbitration shall be Hong Kong”, coupled with a provision that disputes shall be resolved by “arbitration administered in Hong Kong”, to be the designated seat of arbitration by the parties.¹⁶

In *Enercon*,¹⁷ the parties had chosen Indian law as the governing law of contract, with the Indian Arbitration Act to apply to arbitration proceedings, and had designated London as the “venue” of arbitration. The Court concluded that the “seat” of arbitration was in India since the parties had agreed to apply the Indian Arbitration Act to the arbitration proceedings, and they had thus, by making such choice, agreed to apply the curial law provisions of the Indian Arbitration Act.¹⁸ In *Hardy Exploration*,¹⁹ where the contract provided Indian law as the governing law of contract, and the UNCITRAL Model Law for arbitration proceedings, the Court did not construe the designation of venue as designation of seat. It acknowledged the power of the tribunal under the Model Law to determine the seat, but found, on facts, that there had been no such determination, and therefore the seat was in India.²⁰

This rule of construction was evolved mainly to fix the seat of arbitration in international arbitration under the New York Convention involving parties of different nationalities, to ensure certainty with regard to the supervisory court and the court for post-arbitration proceedings. The Indian Supreme Court has, however, applied this rule to arbitration seated in India as well even though the Indian Arbitration Act contains a specific provision – Section 2(e) – for determining such court. Section 2(e) provides for the same rule for determination of the jurisdictional court for arbitration as if it were a suit having the same “subject-matter”. In *Balco* (Para 96), the Court interpreted the term “subject-

¹³ Choice of the ICC Rules to apply to arbitration proceedings seated in London by itself would not be sufficient to conclude that the parties intended to apply English law to arbitration. See *supra*, Note 9 [Para 115].

¹⁴ *Imax Corporation v. E-City Entertainment (India) Private Limited* (2017) 5 SCC 331 [Para 29].

¹⁵ *Harmony Innovation Shipping Limited v. Gupta Coal India Limited and Anr.* (2015) 9 SCC 172.

¹⁶ *Mankastu Impex Private Limited v. Airvisual Limited* (2020) 5 SCC 399.

¹⁷ *Enercon (India) Limited and Ors. v. Enercon GMBH and Anr.* (2014) 5 SCC 1 (*Enercon*).

¹⁸ *Ibid.* [Paras 98 and 116].

¹⁹ *Union of India v. Hardy Exploration and Production (India) Inc.* (2019) 13 SCC 472 (*Hardy Exploration*).

²⁰ In a later judgment in *BGS SGS Soma JV v. NHPC Ltd.* (2020) 4 SCC 234 (*BGS SGS Soma*) [Para 94], a coordinate bench has found that the court did not correctly apply the ratio of the decision in *Balco*, and therefore reached a wrong conclusion, and the seat, in fact, was in Kuala Lumpur.

matter” to include the seat of arbitration and held that “*In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.*”²¹ The Court, thus, acknowledged that under Section 2(e) there could be concurrent jurisdiction of two courts in a domestic arbitration. The uncertainty on account of the concurrent jurisdiction is removed by Section 42 which restricts the parties to one of the two courts to which the proceeding in relation to the arbitration is first brought.

Indian courts have, nevertheless, applied the *Shashoua* principle to domestic arbitration.²² This approach was approved by the Supreme Court in *BGS SGS Soma*.²³ The Court found the acknowledgment of concurrent jurisdiction of domestic courts in Para 96 of *Balco* in conflict with the rest of the judgment. It decided to disregard it based on the rule of construction that a judgment must not be construed as a statute and that it must be read as a whole.

Law of Arbitration

Beginning with *Balco*, the Supreme Court has uniformly accepted the principle that the choice of seat will generally imply the choice of law of the seat as the law governing the arbitration unless the parties have expressly provided for another law to apply.²⁴ In fact, *Balco* goes a step further and holds that even if the parties provide for application of the Indian Arbitration Act to a foreign seated arbitration, it would only mean that the “*parties have imported...those provisions which govern the internal conduct of the arbitration which are not inconsistent with mandatory provisions of English procedural law/curial law*”.²⁵ Indian courts have thus wholeheartedly embraced the principle that the choice of seat will generally imply the choice of law of the seat to govern the arbitration, i.e., the “*seat approach*”. There is little or no room in current jurisprudence in India for the “*main contract approach*”,²⁶ which advocates that in the absence of an express choice of law governing an arbitration agreement, the law governing the main contract (either expressly or by implication) ought to be construed as that law. Indian courts have leaned in favour of the seat approach, relying mainly on the

²¹ *Supra*, Note 1 [Para 96].

²² *Indus Mobile Distribution Private Limited v. Datawind Innovation Private Limited* (2017) 7 SCC 678; *Brahmani River Pellets Limited v. Kamachi Industries Ltd* (2020) 5 SCC 462.

²³ *Supra*, Note 19, *BGS SGS Soma*.

²⁴ *Eitzen Bulk v. Ashapura Minechem Limited and Anr.* (2016) 11 SCC 508 [Para 34].

²⁵ *Supra*, Note 1 [Para 117, following *Union of India v. McDonnell Douglas Corpn.* (1993) 2 Lloyd’s Law Report 48].

²⁶ In a judgment reported as (2020) 10 SCC 1 [Para 92.2] the Supreme Court, confirming this approach, held that “*the law governing Arbitration Agreement must be determined separately from the law applicable to the substantive contract*”.

line of decisions of English courts approving it²⁷ and presumed international consensus in that regard. The decision of the UK Supreme Court in *Enka v. Chubb* has challenged this approach and the presumed consensus supporting it.

Enka v. Chubb

In *Enka v. Chubb*, the UK Supreme Court was posed the question as to which national law governs the validity and scope of the arbitration agreement in the absence of an express choice by the parties, when the law governing the contract containing it is different from the law of the seat of arbitration.

The Court applied common law rules for this determination as applying any other law “*would introduce an additional layer of complexity into the conflict of laws analysis without any clear justification and could produce odd or inconsistent results*”.²⁸ The Court (by a majority decision) concluded that “*As a matter of principle and authority there are therefore strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract.*”²⁹

Two main reasons have been cited in support of the “seat approach”: one, that an arbitration agreement is separable from the rest of the contract (Separability principle); and two, that there is an overlap between the curial or the procedural law which follows the choice of seat and the substantive law governing the arbitration agreement (the overlap argument). These reasons were considered by the Court in *Enka v. Chubb*.

On a review of authorities, the Court found that the concept of separability of the arbitration agreement has been devised to ensure that discharge by frustration (or for other reasons) of the underlying contract will not discharge the parties’ agreement to arbitrate. The purpose of the Separability principle is limited to that; it is nonetheless part of the bundle of rights and obligations recorded in the contractual document. The Court, thus, concluded that as a general rule the choice of law governing the contract should properly be construed as the law governing the arbitration agreement included in it as well.³⁰ The overlap argument too was rejected by the court. The Court acknowledged that by choosing the seat, the parties “*agree that the law and courts of a particular*

²⁷ *C v. D* [2007] EWCA Civ 1282; *Shashoua*, *supra*, Note 3; and *Sulamérica Cia Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWHC 42 (*Sulamérica*).

²⁸ *Supra*, Note 9 [Para 33].

²⁹ *Supra*, Note 9 [Para 54].

³⁰ *Ibid.* [Paras 60-64].

country will exercise control over an arbitration which has its seat in that country to the extent provided for by that country's law. A choice of seat can in these circumstances aptly be regarded as a choice of the curial law."³¹ The court, however, reasoned that *"the curial law which applies to the arbitration process is conceptually distinct from the law which governs the validity and scope of the arbitration agreement. Whether a choice of the curial law carries any implication that the parties intended the same system of law to govern the arbitration agreement – and, if so, the strength of any such implication – must depend on the content of the relevant curial law."*³²

In this context, the Court examined the English Arbitration Act, 1996 – particularly Section 4(5) – and concluded that its provisions *"do not justify any general inference that parties who choose an English seat of arbitration thereby intend their arbitration agreement to be governed by English law"*.³³

The Court laid down the following rules for identifying the law governing the arbitration agreement:

- (i) The choice of the governing law of the contract will generally apply to the arbitration agreement which forms part of the contract.
- (ii) The choice of a different country as the seat of arbitration is not, without any further indication, sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.
- (iii) Additional factors which negate such inference are (a) provision in the law of the seat which mandates its application to arbitration held there; and (b) if the application of the governing law of the main contract will render the arbitration agreement invalid or ineffective.
- (iv) A clause providing for arbitration in a particular place will not by itself justify an inference that the contract (or the arbitration agreement) is intended to be governed by the law of that place. Where, however, the parties have chosen the seat of arbitration but have not made a choice of the law to govern the contract or the arbitration agreement within it, the arbitration agreement will be governed by the law to which it has the closest connection, i.e., the law of the seat.³⁴

³¹ *Ibid.* [Para 68].

³² *Ibid.* [Para 69].

³³ *Ibid.* [Paras 82 and 94].

³⁴ [Para 170], *Enka v. Chubb*.

In the facts of the case, the court concluded that the parties had not expressed their choice of law applicable to the contract before it or the arbitration clause contained in it, nor did the terms of the contract “*point ineluctably to the conclusion that the parties intended Russian law to apply*”.³⁵ The court therefore applied the default rule of identifying the law to which the arbitration agreement was most closely connected. It ruled that English law as the law of the seat was that law, and it would apply to the arbitration agreement.

Impact on Jurisprudence in India

Enka v. Chubb clearly recognises the distinction between curial law and curial jurisdiction on the one hand, and the law governing the arbitration agreement on the other. While the parties’ agreement on the seat will ordinarily imply their agreement that the law and the court of that country will regulate the arbitration, it does not always imply that such law will also govern the arbitration agreement. Choice of seat, thus, implies choice of curial law and curial court, and not always the law governing the arbitration agreement. Decisions of Indian courts do not clearly recognise this distinction. They often regard parties’ choice of seat as also their choice of law of the seat for all aspects of arbitration without any reference to choice of law for the contract. This trend was set in *Balco* as is evident from the observations quoted above.³⁶ In *Imax*, while noting that the parties had expressed their choice for the law applicable to the contract, the Supreme Court observed, “*The general principle is that, in the absence of any contradictory indication, it shall be presumed that the parties have intended that the proper law of contract as well as the law governing the Arbitration Agreement is the same as the law of the country in which arbitration is agreed to be held.*”³⁷ In *Ashapura Minechem*, the Court said, “*as a matter of fact the mere choosing of the juridical seat of arbitration attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the arbitration proceedings, since the law of the particular country would apply ipso jure.*”³⁸ The Supreme Court thus favoured the seat approach for identifying the law governing the arbitration agreement.

For these conclusions, the Court has mainly relied on the *Shashoua* principle³⁹ (noted above) which is, in turn, founded on the decisions in *C v. D*,⁴⁰ and the decision in *Sulamérica* (Commercial Court). The

³⁵ [Para 155], *Enka v. Chubb*.

³⁶ *Supra*, Note 1 [Paras 76 and 116].

³⁷ *Imax, supra*, Note 13 [Para 22].

³⁸ *Supra*, Note 23 [Para 34].

³⁹ *Supra*, Note 3.

⁴⁰ *Supra*, Note 8.

decision in *Sulamérica* was appealed and the Court of Appeal, while deciding the appeal, considered the decision in *C v. D*. Both these decisions were critically examined in *Enka v. Chubb*.

Sulamérica⁴¹

The case involved a contract governed by Brazilian law and provided for arbitration in London. The Court of Appeal concluded that English law, the law of the seat, would apply to the arbitration agreement. In *Enka v. Chubb*, the Court reviewed the decision and found that the main reason for the decision against applying Brazilian law to the arbitration agreement was that its application would have been invalid under that law. This the parties could not have intended. This was the decisive reason to construe the parties' intention to apply English law to the arbitration as an implication of choosing London as the seat. The construction was adopted to save the arbitration agreement from invalidity.⁴² In fact, the Court approved the main contract approach.⁴³

C v. D⁴⁴

In *Enka v. Chubb*, the Court questioned the correctness of this decision. It noted⁴⁵ the reservation expressed by the Court of Appeal in *Sulamérica* (at Para 24) that the rule (followed in *C v. D*) that an arbitration agreement is governed by the law of the seat even where there is a choice of law clause in the contract cannot easily be reconciled with the earlier authorities or well-established principle. It found the reason given for disapplying the law chosen by the parties to govern the insurance to the arbitration agreement contained in it, insufficient.⁴⁶

In light of the decision in *Enka v. Chubb*, courts in India may consider a more nuanced approach for determining the law governing arbitration agreements, and the rules stated in it provide useful guidance for that purpose. In pre-*Balco* cases, which are still coming to the courts, and where the decision turns on the question whether or not parties had excluded Part I of the Indian Arbitration Act by their choice of seat in a foreign country, these rules will have a particularly significant role.

⁴¹ [2012] EWCA Civ 638.

⁴² *Ibid.* [Paras 101-105].

⁴³ See Para 11 of *Sulamérica*:

“It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate” (quoted at Para 49, *Enka v. Chubb*).

⁴⁴ *Supra*, Note 8.

⁴⁵ [Para 50], *Enka v. Chubb*.

⁴⁶ [Para 119], *Enka v. Chubb*

ENFORCEMENT OF FOREIGN AWARDS IN INDIA

Amar Gupta and Pallavi Kumar

Introduction

In India, the enforcement of a foreign arbitral award is governed by the provisions of Part II of the Arbitration and Conciliation Act, 1996 (Arbitration Act). India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). While Chapter I of Part II of the Arbitration Act relates to New York Convention awards, Chapter II deals with Geneva Convention awards.

In order to be considered a “foreign award” under the Arbitration Act,⁴⁷ an award must fulfil the following requirements:

- (i) it must deal with differences arising out of a legal relationship (whether contractual or not) considered commercial under the laws in force in India; and
- (ii) the country where the award has been issued must be a country signatory to either the New York Convention or the Geneva Convention and must be notified by the Indian government as a reciprocating territory.

If either of the above requirements is not satisfied, the award will not be recognised/enforced as a “foreign award” in India.

In this paper, we will analyse the procedure for enforcement of a foreign award under the provisions of the Arbitration Act and the Code of Civil Procedure, 1908 (CPC). This paper will also examine the role of Indian courts in the process of enforcement, and the growing need to adopt a more pro-enforcement regime.

⁴⁷ Sections 44 and 53 of the Arbitration Act.

Difference between “Enforcement” and “Recognition” of Award

Before discussing the legal issues involved in the enforcement of a foreign award in India, it is important to understand the difference between “enforcement” and “recognition” of an award.

Simply put, *“An award may be recognised without being enforced. However if it is enforced then it is necessarily recognised by the court which orders its enforcement.”*⁴⁸

The purpose of “recognition” is to prevent any attempt to initiate fresh proceedings on issues which have already been decided in the arbitration that gave rise to the award whose recognition is sought. In other words, recognition alone may be asked for as a shield against reargitation of issues with which the award deals. “Enforcement” goes a step further than “recognition”. As Redfern and Hunter have noted, *“...where a court is asked to enforce an award, it is asked not merely to recognise the legal force and effect of the award, but also to ensure that it is carried out, by using such legal sanctions as are available.”*⁴⁹

In India, an award-holder is entitled to apply for recognition and enforcement of the foreign award through a common petition. A proceeding seeking recognition and enforcement of a foreign award has two stages. Provided the necessary evidence (as discussed below) is produced, in the first stage, the court determines the enforceability of the award having regard to the conditions set out in Section 48 (in the case of a New York Convention award) and under Section 57 (in the case of a Geneva Convention award) of the Arbitration Act. Once the enforceability of the foreign award is decided, in the second stage the court proceeds to take steps for the execution of the award.⁵⁰

Procedure for the Enforcement of Foreign Arbitral Awards

A foreign award is not a decree by itself, which is executable as such under the Arbitration Act. Enforcement of a foreign award takes place only after the court is satisfied that the foreign award is enforceable under Part II of the Arbitration Act.⁵¹

⁴⁸ Alan Redfern and Martin Hunter (1999), *Law and Practice of International Commercial Arbitration*, third edition., (London: Sweet and Maxwell), Chapter 10, p. 448.

⁴⁹ Redfern and Hunter, Chapter 10, p. 449.

⁵⁰ *Government of India v. Vedanta Limited & Others* (2020) 10 SCC 1 [Para 83.7].

⁵¹ *Ibid.* [Para 82].

Necessary Evidence

A party applying for the enforcement of a foreign award shall, at the time of the application for execution, produce before the court the requisite documents and evidence. In the case of a New York Convention award, Section 47 of the Arbitration Act requires that the party should produce before the court the following documents:

- (i) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which the award was made;
- (ii) the original agreement for arbitration or a duly certified copy thereof; and
- (iii) such evidence as may be necessary to prove that the award is a foreign award.

Similar requirements exist for enforcement of a Geneva Convention award under Section 56 of the Arbitration Act.

Limitation Period for Filing Application for Execution

The Arbitration Act does not specify any period of limitation for filing an application for enforcement of a foreign award. Section 43 of the Arbitration Act, however, provides that the Limitation Act, 1963 (Limitation Act) shall apply to arbitrations.

The Limitation Act too does not contain any specific provision for enforcement of a foreign award. The Supreme Court has held that the limitation of time for filing an application for enforcement of a foreign award will be governed by the residuary provision contained in Article 137 of the Limitation Act. Hence, the limitation period is three years from the date on which the right to apply accrues.⁵²

Grounds for Challenge

Sections 48 and 57 of the Arbitration Act provide the grounds to challenge a New York Convention award and a Geneva Convention award, respectively. Thus, a person against whom a foreign award is passed may resist enforcement of such award if any of the conditions mentioned in Section 48 or 57

⁵² *Ibid.* [Paras 65-67, 71 and 76].

of the Arbitration Act (as the case may be) are fulfilled. The grounds for challenge are elaborated in paragraph 19 of this paper. It is important to note, however, that the executing court is vested with the discretion to enforce the award even if one or more grounds under Section 48 or 57 of the Arbitration Act are made out.⁵³

Once the court is satisfied that the foreign award is enforceable, such award shall be deemed to be a decree of that court and will then be enforced under the relevant provisions of the CPC.

Can the Enforcement Court Set Aside a Foreign Award?

The enforcement court may “refuse” enforcement of a foreign award; however, it cannot set aside the award even if the conditions under Section 48 or 57 of the Arbitration Act are made out. The power to set aside a foreign award vests only with the court at the seat of arbitration, since the supervisory or primary jurisdiction is exclusively exercised by such court.⁵⁴

Minimising Court Intervention

Ease of enforceability of an arbitral award across jurisdictions is cited as an important reason for promoting dispute resolution through arbitration. The universality and global acceptance of international conventions in favour of enforcement play a crucial role in the success of international arbitration.

Minimal judicial intervention is essential for a pro-enforcement regime. In order to achieve that, the Arbitration Act and related statutes have been amended multiple times to ensure that the supervisory role of courts in the arbitral process is reduced. These amendments seek to minimise judicial intervention in the enforcement of foreign awards. They are, therefore, critical in promoting a pro-arbitration climate in India which is conducive to foreign investment.

Decisions of Indian courts have helped in simplifying the procedure for the execution of foreign awards. A party holding a foreign award can, now, directly apply for enforcement of the award to the court in whose jurisdiction the assets of the losing party are located.⁵⁵ Once the court finds that the

⁵³ *Ibid.* [Para 83.12].

⁵⁴ *Ibid.* [Para 83.11].

⁵⁵ *Sundaram Finance Ltd. v. Abdul Samad and Anr.* (2018) 3 SCC 622.

award is enforceable, it may be enforced in the same way as a court decree.⁵⁶ A foreign award is not required to be stamped under the Indian Stamp Act, 1899.⁵⁷ These decisions have helped in ensuring speedy enforcement of foreign awards, and that has improved India's credentials as an arbitration-friendly regime.

So far as a challenge to a foreign award is concerned, the Arbitration Act has been significantly amended to limit the grounds for challenging the correctness of an award by an unsuccessful party.⁵⁸ Essentially, the grounds for resisting enforcement of a foreign award fall into three categories: (i) grounds which affect the jurisdiction of arbitration proceedings; (ii) grounds which affect party interest alone; and (iii) grounds which are contrary to the public policy of India, as set out in Explanation 1 to Section 48(2) (in the case of a New York Convention award) and Explanation 1 to Section 57(1) (in the case of a Geneva Convention award) of the Arbitration Act.⁵⁹

The third ground for challenge to enforcement, namely, "public policy", has been a subject of extensive discussion.

Meaning of "Public Policy" of India

Prior to 2015, courts were interpreting the term "public policy" widely, paving the way to a tendency to review an arbitral award on merits. This anomaly arose as the Supreme Court accorded an expansive construction to the term "public policy" appearing in Section 34 of the Arbitration Act in its decision in *Saw Pipes*.⁶⁰ Although the decision in *Saw Pipes* was in the context of a domestic award, it had the unfortunate effect of being extended to apply equally to foreign awards, given that both Sections 34 and 48 of the Arbitration Act use the same expression – "public policy".⁶¹

This necessitated an amendment to the Arbitration Act in the year 2015,⁶² through which two explanations were inserted in Sections 48(2) and 57(1) of the Arbitration Act that clarified the meaning

⁵⁶ Section 49 (in the case of a New York Convention award) and Section 58 (in the case of a Geneva Convention award) of the Arbitration Act.

⁵⁷ *Shriram EPC Limited v. Rioglass Solar SA* (2018) 18 SCC 313 [Para 26].

⁵⁸ The grounds for challenge are provided in Section 48 (in the case of a New York Convention award) and Section 57 (in the case of a Geneva Convention award) of the Arbitration Act.

⁵⁹ *Vijay Karia and Others v. Prysmian Cavi E Sistemi SRL and Others* (2020) 11 SCC 1 [Para 58].

⁶⁰ *ONGC v. Saw Pipes Ltd.* (2003) 5 SCC 705.

⁶¹ Report No. 246 of the Law Commission of India on "Amendment to the Arbitration and Conciliation Act, 1996", dated 5 August 2014 [Paras 34-37].

⁶² The Arbitration and Conciliation (Amendment) Act, 2015, dated 31 December 2015.

of “public policy”. Explanation 1 states that an award is in conflict with the public policy of India only if:

- (i) the making of the award is induced or affected by fraud or corruption or is in violation of Section 75 or 81 of the Arbitration Act; or
- (ii) it is in contravention of the fundamental policy of Indian law; or
- (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2 makes clear that the test as to whether there is a contravention of the fundamental policy of Indian law shall not entail a review of the merits of the dispute.

After the 2015 amendment, courts have consistently followed the principle of minimal judicial intervention while deciding petitions for enforcement of foreign awards.⁶³

The shift towards a more pro-enforcement stance by Indian courts is evident in a recent decision of a three-judge bench of the Supreme Court in *Vijay Karia*, where the court reiterated that “awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48”⁶⁴ and that “the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.”⁶⁵

At the same time, if the grounds mentioned in Section 48 (in the case of a New York Convention award) or Section 57 (in the case of a Geneva Convention award) of the Arbitration Act are made out, courts do not hesitate to set aside such an award. In a recent decision of the Delhi High Court in *Campos Brothers Farms*,⁶⁶ the court set aside a foreign award as it was found that the arbitrator had ignored the submissions of one of the parties in totality. It was held that the award could not be enforced as it violated the principles of natural justice and contravened public policy.

⁶³ *Cruz City I Mauritius Holdings v. Unitech Limited* (2017) 239 DLT 649 [Paras 86-100 and 109]; *GEA EGI Contracting Ltd v. Bharat Heavy Electricals Limited* (2016) 233 DLT 661 [Paras 26-29]; *Xstrata Coal Marketing v. Dalmia Bharat (Cement) Ltd.* (2017) 236 DLT 524 [Paras 42 and 52]; *Daiichi Sankyo Company Limited v. Malvinder Mohan Singh* (2018) 247 DLT 405 [Paras 55-61].

⁶⁴ *Vijay Karia (supra)* [Para 81].

⁶⁵ *Vijay Karia (supra)* [Para 83].

⁶⁶ *Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Ltd* (2019) 261 DLT 201 [Para 56].

Generally, the approach is to enforce foreign awards subject to certain well-defined and narrow exceptions. Courts are not permitted to have a “second look” at the award on merits.⁶⁷ Nevertheless, courts have been prompt in refusing enforcement where the grounds for challenging an award under the Arbitration Act are clearly attracted.

Streamlining the Procedure for Execution

As mentioned above, once the court is satisfied that an award is enforceable, it is deemed to be a decree of that court. It is then enforced as a decree of the civil court. Separate proceedings for the enforcement of the award and execution are not required under the Arbitration Act.⁶⁸ The concerned court would then enforce the award following the procedure laid down in Order XXI of the CPC.⁶⁹

Order XXI of the CPC provides a detailed procedure for the execution of a decree. It lays down various modes of execution, such as attachment/sale of property, arrest, appointment of receiver, etc. Order XXI of the CPC is, thus, a complete code for the process of execution of a decree.

There is, however, an immediate need to streamline the procedure prescribed under Order XXI of the CPC to make the process of execution simpler and quicker. At present, the procedure for execution under the CPC has many loopholes, which makes the process extremely cumbersome. Executing courts have been given wide discretionary powers, for instance, under Order XXI Rule 17 of the CPC, to reject the execution application in case of any defect in the application.

Further, the executing court has also been given the power (under Order XXI Rule 26 of the CPC) to stay the execution of a decree to enable the judgment-debtor to apply for an order of stay before an appellate court. All these provisions make the process of execution of an award complicated and time-consuming. As a result, a successful litigant must wait for an inordinately long time for the enforcement of the award. The amendments made to the Arbitration Act for enhancing the ease of enforcing an arbitral award will fail in their purpose unless corresponding changes are made in the procedure for execution under the CPC.

Conclusion

⁶⁷ *Shri Lal Mahal Limited v. Progetto Grano SPA* (2014) 2 SCC 433 [Para 45].

⁶⁸ *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356 [Para 31].

⁶⁹ As per Section 10 of the Commercial Courts Act, 2015, the concerned court is the High Court.

Over the last few years, the legislature has systematically amended the law of enforceability of foreign awards to limit the scope of judicial review. Indian courts too have increasingly adopted a pro-enforcement approach. The Arbitration Act provides an efficient and swift method for recognition and enforcement of a foreign award. However, for India to achieve its dream of becoming a global arbitration hub, it is necessary to further streamline and simplify the process of enforcement laid down in the CPC.

ENFORCEMENT OF INTERIM MEASURES AND INTERIM AWARDS OF FOREIGN SEATED ARBITRAL TRIBUNALS IN INDIA

Sanjeev Kapoor, Sneha Janakiraman, Madhav Khosla

Interim measures of protection are critical to ensure that the interests of parties are not adversely affected pending the final determination of a dispute. This has seen the emergence of rules and procedures for grant of urgent interim reliefs even prior to the constitution of an arbitral tribunal. Prominent arbitral institutions like the International Chamber of Commerce (ICC),⁷⁰ the London Court of International Arbitration (LCIA),⁷¹ the Singapore International Arbitration Centre (SIAC),⁷² and major Indian arbitral institutions⁷³ have amended their rules to enable parties to seek such urgent reliefs.

On the domestic front, the scheme for enforcement of interim measures of protection ordered by India seated arbitral tribunals is clear. Such orders are deemed to be orders passed by a domestic court and, in case of non-compliance by a party, can be enforced as such.⁷⁴ However, there is no provision in the Indian Arbitration and Conciliation Act, 1996 (Arbitration Act) providing similar recognition to interim orders passed by foreign seated arbitral tribunals or foreign courts. This creates difficulties for enforcing in India interim measures of protection granted by foreign seated tribunals.

However, it is not that an interim order passed by a foreign seated arbitral tribunal cannot be enforced in India. The options generally available to a party that has obtained an interim order from a foreign seated tribunal for enforcement are as under:

- (a) institute a fresh civil suit in India to enforce the right granted by the interim order. This is because the interim measure would not be directly enforceable in India through an execution petition since it would not qualify as a “judgment” or “decree” as recognised for enforcement in India; or

⁷⁰ Article 29 of the ICC Rules of Arbitration, 2021.

⁷¹ Article 9B of the LCIA Arbitration Rules, 2020.

⁷² Article 30.2 read with Schedule 1 of the Arbitration Rules of the Singapore International Arbitration Centre, 2016 (SIAC Rules).

⁷³ Rule 14 of the Arbitration Rules of the Mumbai Centre for International Arbitration, 2016; Part E of the Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018.

⁷⁴ Section 17(2) of the Arbitration Act.

- (b) have the interim measure confirmed by an order of the appropriate court at the seat of arbitration and in case of further non-compliance, institute contempt proceedings before the relevant seat court or enforce such judgment as a judgment passed by a foreign court in India;⁷⁵ or
- (c) institute a petition under Section 9⁷⁶ of the Arbitration Act for an independent adjudication by the appropriate Indian court in respect of grant of similar interim reliefs as passed by the foreign seated arbitral tribunal.

The first and second options are not efficient or practical ways of enforcing an interim order as they are inherently time-consuming. The third option thus remains by far the most efficient and practical option under Indian law to enforce an interim order.

The Delhi High Court in *Raffles Design International India Private Limited & Anr v. Educomp Professional Education Limited & Ors*⁷⁷ had occasion to consider the enforceability of an emergency award passed by a Singapore seated emergency arbitral tribunal, under the Arbitration Act. The agreement in this case was governed by the laws of Singapore, with the arbitration to be held in Singapore as per the SIAC Rules. An emergency arbitral tribunal was constituted and emergency reliefs granted in favour of the petitioners. The petitioners even sought and obtained an enforcement order for the emergency relief granted by the tribunal from the courts in Singapore.

Since the directions passed by the emergency arbitrator were being breached, the petitioners in this case filed a petition under Section 9 of the Arbitration Act before the Delhi High Court seeking interim reliefs akin to directions passed by the emergency arbitrator. The Delhi High Court held that Indian courts have jurisdiction to entertain a Section 9 petition, unless by an explicit or implied agreement between the parties such jurisdiction has been ousted. The Court held that since the SIAC Rules permit the parties to seek interim reliefs from judicial authorities, the parties had impliedly agreed that it would not be incompatible for them to approach Indian courts for the same. The Court further noted that Section 17H of the 1985 UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law) that contains express provisions for enforcement of interim measures of foreign seated tribunals has not been incorporated into the Arbitration Act and that Section 17 of the Arbitration Act⁷⁸ is not applicable to foreign seated arbitrations. It consequently concluded that

⁷⁵ In terms of Sections 13 and 44A of the Indian Code of Civil Procedure, 1908.

⁷⁶ Section 9 of the Arbitration Act allows parties to approach Indian courts for seeking urgent interim reliefs even in foreign seated arbitrations.

⁷⁷ (2016) SCC OnLine Del 5521.

⁷⁸ Section 17 of the Arbitration Act confers powers on an India seated arbitral tribunal to grant interim reliefs and specifies that such orders of the arbitral tribunal may be enforced as a decree of a civil court in India.

emergency orders by foreign seated tribunals are not enforceable under the Arbitration Act and the same can be enforced only by way of a civil suit. The Court, however, held that a party seeking interim measures cannot be precluded from doing so simply because a similar relief has been obtained from a foreign seated arbitral tribunal. Therefore, a petition under Section 9 of the Arbitration Act seeking similar interim relief is maintainable before Indian courts. However, grant of such relief would have to be considered by the Indian courts independently of the interim order of the foreign seated arbitral tribunal.

The division bench of the Delhi High Court in another more recent case, *Ashwani Minda v. U-Shin Ltd*,⁷⁹ also had the occasion to consider a situation wherein interim relief was declined by a foreign seated emergency arbitral tribunal and the unsuccessful party thereafter approached the Indian Court seeking the same relief. In this case, a petition was filed under Section 9 of the Arbitration Act seeking interim reliefs which reliefs had already been declined by an emergency arbitral tribunal constituted at the request of the petitioner under the Rules of the Japan Commercial Arbitration Association (JCAA Rules) and seated in Japan. The Court held that unless a party can demonstrate that no efficacious remedy would be available before the foreign arbitral tribunal, if constituted, a petition under Section 9 of the Arbitration Act would not be maintainable in India. The Court further found that the arbitral tribunal constituted under the JCAA Rules had ample power to grant interim relief and thus declined to entertain the Section 9 petition. It also took into account the fact that a similar relief had been sought and refused by the foreign seated tribunal. The decision of the Division Bench of the Delhi High Court was further appealed to the Supreme Court by way of a Special Leave Petition, but the same was dismissed.⁸⁰

Therefore, it is evident that as a matter of extant Indian law, a party benefiting from an interim order or emergency award of a foreign seated arbitral tribunal may file a petition under Section 9 of the Arbitration Act seeking similar reliefs as long as parties have not by agreement, expressly or impliedly, barred such remedy. Such a proceeding is maintainable and an efficacious remedy under Indian law. While such a petition is not in the nature of enforcement of the interim order or emergency award of the foreign seated tribunal, the party may seek grant of similar interim reliefs which the Indian court will independently adjudicate. However, Indian courts will not permit an unsuccessful party that has chosen to obtain interim remedies from a foreign seated tribunal to reagitate issues before a court in a petition under Section 9 of the Arbitration Act.

⁷⁹ (2020) SCC OnLine Del 721.

⁸⁰ *Ashwani Minda and Anr. v. U-Shin Ltd. and Anr.*, 2020 SCC OnLine SC 1123.

While the above cases dealt with awards passed by emergency arbitrators in arbitrations which were seated outside India, recently a question also came up before the Delhi High Court on the issue of whether an emergency award passed by an emergency arbitral tribunal in an arbitration seated in India is enforceable under the Arbitration Act.⁸¹ This issue arose for consideration of the Court in a civil suit (along with an application for interim relief) filed by the emergency award debtor. Although the emergency award debtor was not seeking a declaration of invalidity of the emergency award, the legal status of the emergency arbitrator and the consequential validity of the emergency award were in issue. The emergency award debtor primarily sought a permanent injunction against the emergency award holder interfering with the disputed transaction which formed the subject matter of the emergency award. The emergency award debtor argued that the concept of emergency arbitrator is outside the scope of the Arbitration Act and therefore any interim order passed by an emergency arbitrator will be without jurisdiction and a nullity. It was contended that under the Arbitration Act, in both domestic and international commercial arbitrations seated in India, emergency arbitration is barred. The only remedies which are available for seeking an interim relief are either approaching the arbitral tribunal once constituted or approaching an Indian court under Section 9 of the Arbitration Act. These cannot be bypassed to seek appointment of an emergency arbitral tribunal in any India seated arbitration.

The Single Judge of the Delhi High Court while deciding the application for interim relief filed in the above civil suit held that emergency arbitral proceedings are maintainable under the Arbitration Act. The Court found that appointment of an emergency arbitrator is not *per se*, contrary to any mandatory provisions of the Arbitration Act. The Court also noted that the parties had chosen the SIAC Rules that grant them freedom to approach the court under Section 9 of the Arbitration Act to obtain interim relief and to that extent there is no incompatibility between Part I of the Arbitration Act⁸² and the SIAC Rules. The Single Judge further held that the parties, by virtue of adopting the SIAC Rules, had the liberty of approaching either the emergency arbitral tribunal for reliefs or an Indian court under Section 9 of the Arbitration Act. This decision of the Single Judge has been appealed before a Division Bench of the Delhi High Court.

By way of a separate proceeding, the emergency award holder also applied for the enforcement of the emergency award under the Arbitration Act. A Single Judge of the Delhi High Court has in these

⁸¹ *Future Retail Limited v. Amazon.com Investment Holdings LLC & Ors.*, 2020 SCC OnLine Del 1636.

⁸² Part I of the Arbitration Act regulates the conduct of arbitrations seated in India.

enforcement proceedings arrived at a finding that the order of the emergency arbitrator is enforceable under the Arbitration Act.⁸³ The order of the Single Judge in the enforcement proceedings was appealed before a Division Bench of the Delhi High Court and finally taken to the Supreme Court

The Supreme Court has authoritatively held that the order of an emergency arbitrator is “*exactly like*” (emphasis supplied) an interim order of a properly constituted arbitral tribunal.⁸⁴ The Supreme Court further held that by agreeing to the SIAC Rules and the award of the emergency arbitrator, mandatory provisions of the Arbitration Act have not been bypassed. There is nothing in the Arbitration Act that prohibits contracting parties from agreeing to emergency arbitration proceedings. The Supreme Court therefore held that an emergency arbitrator’s award is akin to an interim order under Section 17(1) of the Arbitration Act and is therefore enforceable under Section 17(2) in the same manner as a court order, under the Indian Code of Civil Procedure, 1908.⁸⁵

Pertinently, the Supreme Court based its reasoning concerning the validity of proceedings before an emergency arbitrator on the principle of party autonomy, reasoning that having agreed to be bound by an emergency arbitrator’s decision under institutional rules, and having participated in the emergency arbitration proceedings, a party cannot challenge the validity of such proceedings as a nullity under law.⁸⁶ Going one step further, the Supreme Court has also held that there can be no appeal from an order of enforcement of the emergency arbitrator’s award as made under Section 17(2) of the Arbitration Act. Therefore, the position as far as enforcement of India seated emergency arbitral awards is concerned, seems to have been clarified. However, interestingly, the emergency award debtor in this case had chosen to file a separate appeal before the Supreme Court⁸⁷ seeking a stay against the order of the Single Judge of the Delhi High Court⁸⁸ directing attachment of assets. In this appeal, the Supreme Court had temporarily stayed the enforcement of the emergency arbitrator’s award, and all other proceedings pending before the Delhi High Court and related regulatory proceedings concerning the disputed transaction, since proceedings seeking the vacatur of the emergency arbitrator’s award had been moved before the SIAC.⁸⁹ Notably, the arbitral tribunal

⁸³ *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*, 2021 SCC OnLine Del 279; *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*, 2021 SCC OnLine Del 1279.

⁸⁴ *Amazon.com NV Investment Holdings LLC v Future Retail Ltd. & Ors.*, 2021 SCC OnLine SC 557.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Future Coupons Private Limited & Ors. v. Amazon.com NV Investment Holdings LLC & Ors.*, Petitions for Special Leave to Appeal (Civil) Nos. 13547-13548 of 2021.

⁸⁸ *Amazon.com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.*, 2021 SCC OnLine Del 1279.

⁸⁹ *Supra* n.18.

constituted by SIAC has confirmed the emergency arbitrator's award.⁹⁰ Appeals filed before the Delhi High Court challenging the order of the arbitral tribunal and the Supreme Court challenging enforcement proceedings concerning the emergency award have been remanded for fresh consideration to a single judge of the Delhi High Court.⁹¹ The outcome of these proceedings will be an interesting corollary to the dispute.

While the position concerning enforceability of emergency awards in India seated emergency arbitrations has been clarified by the Supreme Court, given that the Arbitration Act does not incorporate a provision akin to Section 17H of the UNCITRAL Model Law with its 2006 Amendments (2006 Model Law) or contain a provision akin to Section 17 of the Arbitration Act in Part II,⁹² there is no clear provision for direct enforcement of an award granting interim measures passed by a foreign seated arbitral tribunal in India. However, India is not alone in this apparent inconsistency. Internationally, varying approaches seem to have been adopted to resolve this problem.

The most significant means for enforcement of awards in international commercial arbitration are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and national arbitration laws, many of which are based on the UNCITRAL Model Law. However, the New York Convention lacks clarity on its applicability to interim measures and only references "awards". The root of the problem therefore lies in whether such interim measures may be treated as an "award". In fact, most national arbitration legislations do not deem provisional measures to be "awards" and thus not enforceable *per se*.

Over 30 countries have now adopted the 2006 Model Law,⁹³ but some of the important arbitration jurisdictions such as the United Kingdom, Singapore, France, Switzerland, and most jurisdictions within the United States have not done so.⁹⁴

For instance, in countries such as the United States that have a federal structure, differing approaches have been adopted with respect to the enforcement of interim measures by foreign arbitral tribunals. Some states such as the State of Florida have adopted the 2006 Model Law, whereas many other

⁹⁰ *Future Coupons Private Limited & Ors. v Amazon.com NV Investment Holdings LLC & Ors.* 2022 SCC Online SC 126 at para 25.

⁹¹ *Ibid* at paras. 50 and 51.

⁹² Part II of the Arbitration Act is concerned with enforcement of foreign awards in India.

⁹³ UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006. Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed on 23 September 2021).

⁹⁴ *Ibid*.

states have not done so.⁹⁵ Consequently, no uniform position emerges across the United States as far as enforceability of interim measures granted by foreign seated arbitral tribunals is concerned. Courts in the United States have declined the enforcement of interim measures ordered by foreign seated tribunals on the grounds that this would amount to judicial interference in the arbitral process by courts outside the seat of arbitration and violate the spirit of the New York Convention.⁹⁶ However, certain American courts have also held that the New York Convention does not preclude enforcement of interim measures ordered by arbitral tribunals.⁹⁷

On the other hand, English courts tend to look at the substance of the interim measure rather than how the order is labelled and are only likely to enforce it either in terms of the New York Convention or the English Arbitration Act, 1996, if found to be final and binding. If the interim measure is not final or binding, the order will not be enforceable in an English court.⁹⁸

By contrast, Hong Kong,⁹⁹ Singapore,¹⁰⁰ and Germany¹⁰¹ provide more certainty with respect to the enforcement of interim measures by foreign seated arbitral tribunals. Hong Kong, considered one of the leading arbitration hubs in Asia, has chosen to adopt the 2006 amendments to the UNCITRAL Model Law. Under the Hong Kong Arbitration Ordinance, L.N. 38 of 2011, promulgated on 1 June 2011, interim measures granted by an arbitral tribunal are enforceable in the same manner as an order or direction of a court, with the requirement being that leave of the court is to be obtained for such enforcement.¹⁰² Such leave in the case of enforcement of orders of interim measures passed by foreign tribunals, however, is not to be given unless the party seeking to enforce such order can demonstrate that it falls within the description of an order or direction that may be made by an arbitral tribunal seated in Hong Kong.¹⁰³ By virtue of the Arbitration (Amendment) Ordinance, 2013, Hong Kong extended this mechanism to the enforcement of interim measures ordered by emergency arbitrators, albeit subject to certain checks aimed to ensure that the emergency award would be primarily aimed at maintaining the status quo pending determination of the dispute and thereby

⁹⁵ *Ibid.*

⁹⁶ Stephen Benz, "Strengthening Interim Measures In Inter-National Arbitration", 2019, *Georgetown Journal of International Law*, p. 172.

⁹⁷ *Carolina Power & Light Company v. Uranex*, 451 F. Supp. 1044 (N.D. California 1977); *Southern Seas Navigation Limited of Monrovia v. Petroleos Mexicanos of Mexico City*, 606 F. Supp. 692 (S.D. New York 1985); Gary B. Born, *International Commercial Arbitration*, Second Edition, Kluwer Law International, 2014.

⁹⁸ Charlie Lightfoot and James Woolrich, *Guide to Enforcement of Foreign Arbitral Awards and Court Judgments in England & Wales*, Practice Series, Jenner & Block LLP, 2017, p. 20.

⁹⁹ Hong Kong Arbitration Ordinance, 2011.

¹⁰⁰ Singapore International Arbitration Act, 1994 (as amended).

¹⁰¹ *Supra* n. 26, p. 167.

¹⁰² Section 61 of the Hong Kong Arbitration Ordinance, 2011.

¹⁰³ Section 61(2) of the Hong Kong Arbitration Ordinance, 2011.

avoiding prejudice to either party.¹⁰⁴ Therefore, while Hong Kong provides for measures of enforcement of interim orders passed by foreign seated arbitral tribunals and emergency arbitrator awards, it has in place the above checks to safeguard its public policy interests. Similarly, Singapore also permits enforcement of interim measures ordered by foreign arbitral tribunals under the New York Convention if they are measures that domestic tribunals can order under the Singapore International Arbitration Act, 1994.¹⁰⁵ Like Hong Kong, Singapore also stipulates that leave of the High Court is required for the tribunal's order to be enforced, and therefore provides safeguards for permitting such enforcement. Germany also provides for the enforcement of interim measures ordered by arbitral tribunals through its national courts, regardless of whether these tribunals are seated within or outside Germany.¹⁰⁶

Further, relatively recently, on 2 April 2019, the Supreme People's Court (SPC) and the Department of Justice (DOJ) of the Hong Kong Special Administrative Region (HKSAR) signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the Arrangement) whereby specified institutional arbitrations (such as those administered by the Hong Kong International Arbitration Centre and the China International Economic and Trade Arbitration Commission), seated in Hong Kong will benefit from the terms of the Arrangement.¹⁰⁷ In terms of the Arrangement, courts of each jurisdiction may award interim measures in support of arbitrations seated in the other territory.¹⁰⁸

Therefore, it is evident that various commercial jurisdictions are moving towards a more arbitration-friendly approach in devising mechanisms to permit enforcement of interim measures of protection ordered by foreign seated arbitral tribunals, albeit with relevant safeguards from a national public policy perspective.

¹⁰⁴ Section 22B of the Hong Kong Arbitration (Amendment) Ordinance, 2013.

¹⁰⁵ James H. Carter (ed.), *The International Arbitration Review*, Ninth Edition, Law Business Research Ltd, 2018, p. 422.

¹⁰⁶ *Supra*, n. 26.

¹⁰⁷ Wei Sun (Zhong Lun Law Firm), "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures: Interpretations from a Mainland China Perspective – Part I" (Kluwer Arbitration Blog, 24 July 2019). Available at: <<http://arbitrationblog.kluwerarbitration.com/2019/07/24/arrangement-concerning-mutual-assistance-in-court-ordered-interim-measures-interpretations-from-a-mainland-china-perspective-part-i/>> (last accessed on 23 September 2021); Peter Yuen and Others, 'Mainland China–Hong Kong Interim Measures Arrangement Swiftly Put into Use' (Kluwer Arbitration Blog, 26 October 2019). Available at: <<http://arbitrationblog.kluwerarbitration.com/2019/10/26/mainland-china-hong-kong-interim-measuresarrangement-swiftly-put-into-use/>> (last accessed on 23 September 2021).

¹⁰⁸ *Ibid.*

Given the prevalence of foreign seated arbitrations involving subject matter located in India or parties situated in India, it is necessary for India to consider what would be the best approach to enforce interim measures. Though Section 9 of the Arbitration Act remains an available remedy, in certain instances it may not be the most efficient approach given that re-adjudication would be required for grant of interim reliefs and that would lead to loss of time and duplication of proceedings. In the recent past, India has taken very progressive measures towards ensuring that it is seen as a global arbitration hub including through legislative reforms and the arbitration-friendly approach of the judiciary. It would certainly commend its position in this regard if parties to foreign seated arbitrations involving subject matter in India could ensure compliance with interim measures ordered by foreign seated arbitral tribunals with ease and efficiency.

The most efficacious enforcement mechanism would be adoption of Section 17H of the 2006 Model Law or similar measures. The examples of Hong Kong and Singapore illustrate that the provision for an enforcement mechanism for interim measures by foreign seated tribunals need not be without suitable safeguards. In fact, Articles 17H and 17I of the 2006 Model Law themselves provide for safeguards such as:

- (a) permitting the court of the State where recognition or enforcement is sought to order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security;¹⁰⁹ or
- (b) specifying the grounds on which recognition and enforcement of interim measures may be refused by courts.¹¹⁰

Therefore, Indian courts, parties, and practitioners need not be apprehensive that such an amendment would result in foreign arbitral tribunals granting interim measures inconsistent with Indian law because adequate safeguards can always be built into the process to ensure a balance between principles of party autonomy and public policy in India. Adoption of such measures with relevant safeguards will make the process of enforcement of interim measures passed by foreign tribunals faster and easier in India.

¹⁰⁹ Article 17H of 2006 Model Law.

¹¹⁰ Article 17I of 2006 Model Law.

THIRD-PARTY FUNDING IN INDIA

Sanjeev Kapoor

Third-party funding of litigation and arbitration in disputes pertaining to high-value, complex commercial transactions is now globally prevalent. This trend appears to be growing, especially as the effects of Covid-19 disruptions on business transactions and relationships emerge in 2021. With widespread economic distress resulting in liquidity crunches, businesses are looking for cost-effective measures to proceed with their claims. There is also a perceptible increase in interest from Indian companies seeking third-party funding for their disputes.

Typically, third-party funding is an agreement or arrangement between a party to the dispute and a funder (who is not a party to the dispute), where the latter agrees to finance the costs of the legal proceedings for the former in return for some share in the proceeds/outcome of the legal proceedings.¹¹¹ It is rather interesting that the public law element in such funding arrangements was the essential factor in their development. As an asset class, litigation funding was aimed at providing access to justice to parties with limited or no resources, ensuring that meritorious claims were ably pursued by the financially weaker party. Funding arrangements worked towards levelling the playing field against a counterparty with resources. The provision of non-recourse capital to the funded party by a funder was the highlight of the funding arrangement. Globally, funding is now used not just by individuals, but also by companies to pursue their legitimate claims. It is utilised by financially afloat businesses to conserve cash to meet immediate business needs, keep ongoing litigation expenses off their bottom lines, and to completely avoid the risk of an adverse outcome.¹¹² The growing adoption of third-party funding as an effective means to finance commercial disputes can be attributed to the expansion of global markets and arbitration becoming an increasingly preferred method of dispute resolution in international commercial relationships.

To develop India as an investment destination, various efforts have been made to streamline the legal regime in the country, including for speedy, efficient, and robust resolution of commercial disputes through arbitration. The 2017 Report of the High Level Committee to Review the Institutionalisation

¹¹¹ International Council for Commercial Arbitration, Queen Mary University of London, 2018 Report of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration, (April 2018). Available at: https://www.arbitrationicca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf

¹¹² *Ibid.*

of Arbitration Mechanism in India by the Government of India¹¹³ suggested reforms in the Indian arbitral mechanisms with the intent to streamline it and work towards making India an arbitration hub. In this context, the report observed that measures recognising third-party funding in India as done in Singapore and Hong Kong, with suitable modifications, could give a boost to arbitration in India.

Though Indian law does not explicitly bar third-party funding or legal financing of disputes, the ambiguity on its validity and legality under Indian law has seemingly impacted the development and growth of third party funding as a credible alternative in the country. The primary reason appears to be the “public law” trappings of legal financing that require funding arrangements to pass the test of “public policy” requirements. It is apprehended that such financing contracts would constitute a champertous contract, i.e., one where the return/consideration is contingent on the outcome of the case and thus a breach of the “public policy” of India.

However, a review of the precedents reveals that third-party funding of litigation in India is not a new concept and is known to have existed for centuries. Such arrangements have reached courts for decision on their validity, scope, and applicability and have been held to be legally valid. One of the earliest cases which approves a funding arrangement dates back to 1852,¹¹⁴ wherein while dealing with a contract of third-party funding, the Court clearly held that there was no law in India which prohibited as illegal for one party to receive and the other to give funds for carrying on a suit on promise of a certain consideration in the form of a share of the property sued for. Also, the Privy Council (as it was in 1874) in *Chedambara Chetty v. Renga Krishna Muthu*¹¹⁵ held that the common law concepts of maintenance and champerty did not find any statutory recognition in India.

In the landmark case of *Ram Coomar Condo v. Chunder Canto Mookerjee*¹¹⁶ (still a good law) the Privy Council in 1876 clarified that recovery under an agreement to supply funds to pursue a civil case in consideration of a share of the property or compensation received by a party would not automatically be regarded as being opposed to public policy or illegal. In fact, it went a step further and said that the said arrangement would be in furtherance of the right to justice, and necessary to prevent oppression as a person who had just rights to a property and no means except for the property itself

¹¹³ Department of Legal Affairs, 2017 Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India by the Government of India (30 July 2017). Available at: <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>

¹¹⁴ *Kishen Lal Bhoonick v. Pearee Soondree* S.D.A. 1852, Beng. 394.

¹¹⁵ *Chedambara Chetty v. Renga Krishna Muthu* 1874 SCC OnLine PC 10.

¹¹⁶ *Ram Coomar Condo v. Chunder Canto Mookerjee* 1876 SCC OnLine PC 19.

should be assisted in the matter. It held that a funding arrangement would be considered illegal only if it was demonstrably unconscionable, or extortionate, or entered into for an improper object or to foment litigation which was unrighteous.

In a later case, of 1955, the Supreme Court of India held that the rigid English law rules of champerty and maintenance do not apply in India and held that “A contract where one party agrees to fund litigation for certain benefits would be legally unobjectionable if no ‘lawyer’ was involved and it was between third parties.”¹¹⁷

Again, as late as in 2018, in *Bar Council of India v. AK Balaji*, the Supreme Court clarified the legal permissibility of funding arrangements when it observed that “there appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation”.¹¹⁸

It is interesting to note that even though no legal provision explicitly recognises the presence, validity, and manner of deployment of third-party financing in India, the concepts of champerty, funding, and financier of a suit have been explicitly recognised in amendments made to Order XXV of the (Indian) Code of Civil Procedure (CPC) in certain states. Order XXV of the CPC deals with security on costs from a plaintiff in a litigation. Many state amendments¹¹⁹ to such a security provision deal with a situation where a plaintiff for the purpose of being financed in the suit has transferred or agreed to transfer a share or interest in the property. The law in such a situation provides for a mechanism in which a security for the cost of litigation can be directed to be given in favour of the defendants to the suit. This clearly is acceptance of the concept of third-party financing in a statutory enactment.

Therefore, it can be summarised that litigation financing is not barred in India and the “public policy” arguments often raised against funding arrangements require to be adapted in view of the legal precedents.

However, it is relevant to add here that the precedents also lay down that a court can examine the scope and validity of a funding arrangement which would, *inter alia*, depend on testing considerations like lack of the funder’s direct interest in the merits of the suit, appropriateness and proportionality

¹¹⁷ *Re: Mr. ‘G’, a Senior Advocate* (1955) 1 SCR 490.

¹¹⁸ *Bar Council of India v. AK Balaji* 2018 SCC OnLine SC 214.

¹¹⁹ Amendments by the states of Andhra Pradesh, Madhya Pradesh, Madras, Orissa, Bombay to the (Indian) Code of Civil Procedure, 1908.

of the funder's share, objects of funding the dispute by the funder, manner of deployment of funds, etc.

Therefore, even though third-party funding is not barred in India and a historic framework of case law provides guidance on its operation, there is no identified set of rules or guidelines for the regulation of funders and funding arrangements. The guidance in the form of precedents deals more with individuals funding some sporadic cases rather than with instances of the methodical and organised funding approach that is prevalent today. There is no established definition of unconscionability or standards of extortionate proceeds for funding arrangements and their validity thus hangs in the precarious balance depending on principles being evolved by courts. This lack of clarity impacts the confidence of third-party funders to invest their resources in arbitrations/litigations in India, with apprehensions that such agreements might be construed as illegal by the courts on account of the slightest discrepancies.

India thus needs to learn from what is happening in the litigation financing ecosphere around the world. We are slowly seeing the emergence of a relative homogeneity in third-party funding across jurisdictions. Such alignment with established rules and principles, at least with respect to the procedural aspects of arbitration, is about fostering confidence in the process. The 2021 edition of the rules of the International Court of Arbitration of the International Chamber of Commerce explicitly deal with certain issues arising out of third-party funding arrangements. The rules of the Singapore International Arbitration Centre (2016) and the Hong Kong International Arbitration Centre Rules (2018) both have provisions that regulate various aspects of third-party funding arrangements. In certain jurisdictions, like Singapore and Hong Kong, specific legislations have been enacted to regulate the deployment of third-party financing arrangements in arbitration proceedings.

India is seeing a rapid increase in commercial arbitration and it therefore needs to formulate a credible regulatory module in the third-party funding space. Modes of regulation can involve a light-touch legislation or adoption of institutional rules that lend clarity to aspects of third-party financing. This approach can also encourage adoption of a self-regulation model by funders as in the United Kingdom. A mix of such approaches can also be attempted. The proposed regime should address issues integral to the ethics of funding arrangements, such as disclosure of funding requirements, extent and scope of funder's interference in an ongoing arbitration, issues related to legal privilege applicable in funded claims, funding disclosure requirements in respect of the arbitrator's duty to disclose their conflict of interest and impartiality, among others. Once established, such a regime will lend clarity to the

operational and ethical issues related to third-party funding. This would certainly provide comfort to the arbitral ecosystem and the courts when awards of funded arbitrations are presented for enforcement. This will also reduce, if not fully eliminate, the obvious grounds for challenge to an award in funded arbitrations on grounds of mere use of third-party funding.¹²⁰ An institutional or regulatory oversight of financing arrangements in India along with existing precedents will go a long way in instilling confidence in parties in third-party financing arrangements and will take India closer to realising its ambition of becoming a global arbitration hub.

¹²⁰ *Norscot Rig Management Pvt. Ltd. v Essar Oilfields Services Ltd.* Commercial Arbitration Petition (L) No.1062 of 2018 before the High Court of Bombay.

ARBITRATION ECOSYSTEM IN INDIA AND USE OF TECHNOLOGY IN ARBITRATION

Tejas Karia

QUALIFICATION OF ARBITRATORS UNDER INDIAN LAW

The 2017 Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (HLC Report) identified the “*poor quality of domestic arbitrators and their lack of professionalism ... as a problem affecting the growth of arbitration in India*”.¹²¹ Against this backdrop, the 2019 amendment to the Arbitration and Conciliation Act, 1996 (Arbitration Act) inserted Section 43J which related to the “qualification, experience, and accreditation of arbitrators”, as also the Eighth Schedule which laid down certain qualifications and experience required for a person to act as an arbitrator. The Eighth Schedule was not notified by the Government of India and was eventually omitted by the Arbitration and Conciliation (Amendment) Act, 2021.

The Eighth Schedule

The Eighth Schedule, introduced vide the 2019 amendment to the Arbitration Act, laid down strict qualification criteria and general norms applicable to an arbitrator. The Schedule included, *inter alia*, the requirement to be an advocate within the meaning of the Advocates Act, 1961, with ten years of practice experience as an advocate; has been an officer with a law degree with ten years of experience in legal matters in the government; or has been an officer with senior-level experience of administration in the central government or state government or having experience of senior-level management of a public sector undertaking or a government company or a private company of repute. However, the Eighth Schedule faced criticisms on various grounds as examined below.

Conflict with Party Autonomy

As Alan Redfern and Martin Hunter succinctly point out: “*International trade disputes are too varied and too numerous for it to be sensible to identify any general rule as to the kind of person who should or*

¹²¹ Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (30 July 2017), p. 53. Available at: <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

should not be chosen to act as arbitrator. Parties must make up their own minds as to the qualifications they require of an arbitrator.”¹²²

The above statement emphasises the need for party autonomy in appointing an arbitrator. Significantly, the assurance of party autonomy in the appointment of arbitrators is also recognised in Section 11(1) of the Arbitration Act, which provides that a person of any nationality may be an arbitrator.

In the United Kingdom especially, parties frequently choose to appoint arbitrators who do not have a background in law, most commonly seen, for instance, in the construction, shipping and commodities industries. Often, arbitrators with experience in international shipping or the maritime industry are appointed because their commercial background is more relevant to adjudicating the dispute than a purely legal background.¹²³ A background in the concerned industry is preferred as it is thought to enable the arbitrator to better understand the context and the specifics of the dispute. By specifying in stringent terms the qualifications of an arbitrator, the Eighth Schedule drew criticism for taking away the autonomy of parties to decide on an arbitrator of their choice.

Lack of Choice of Foreign Arbitrators

Apart from Section 11(1), Section 11(9) of the Arbitration Act states that in the case of the appointment of a sole or third arbitrator in an international commercial arbitration, the arbitral institution designated by the Supreme Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. Further, parties arbitrating in India may seek to appoint an arbitrator who is conversant with and experienced in the laws of a foreign jurisdiction or with transnational instruments of law.

The list of mandatory qualifications in the Eighth Schedule did not have scope for lawyers trained or experienced in the laws of a foreign jurisdiction to be appointed as arbitrators. Further, amongst the general norms applicable to arbitrators, the Eighth Schedule stated that “*the arbitrator shall be conversant with the Constitution of India*”. These factors indicated that foreign qualified lawyers could not qualify as arbitrators and, instead, the Eighth Schedule had the potential to render Section 11(1) nugatory. Arguably, the Eighth Schedule also ran contrary to the Supreme Court’s judgment in *Bar Council of India v. A.K. Balaji*, which permitted foreign lawyers to conduct arbitration proceedings in

¹²² Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, Third Edition, 1999, p. 205.

¹²³ Wendy Miles, “Practical Issues for Appointment of Arbitrators”, *Journal of International Arbitration* 20(3), p. 220.

India in cases where institutional rules were applicable.¹²⁴

Limited Scope of the Eighth Schedule

The Eighth Schedule also came under criticism for failing to meet its purported objectives. The HLC Report noted that an existing decentralised system of accreditation was already in place, whereby various professional bodies and arbitral institutions had evolved norms for grading and appointing professional arbitrators.¹²⁵ The HLC Report had observed the falling standards of arbitrators in India, and had recommended following a system of accreditation.¹²⁶

The Eighth Schedule did not comport with the HLC Report's observation and instead prescribed statutory criteria for the qualification of arbitrators. The Schedule took the conservative approach of considering seniority and a basic professional degree or service in the government as criteria for eligibility.¹²⁷ It did not take into account various other and more pertinent factors such as knowledge of arbitration law, membership in a professional arbitration institution, experience of conducting or participating in arbitrations, etc., which determine a person's capability as an arbitrator. Thus, the Eighth Schedule made it impossible for prospective arbitrators to qualify by virtue of skill or effort alone. Instead, the Schedule created an arbitrary and exclusionary barrier of qualification based on duration of experience rather than quality and range of experience.

Effects of the Arbitration and Conciliation (Amendment) Act, 2021

The Arbitration and Conciliation (Amendment) Act, 2021 came into effect from 4 November 2020. The 2021 amendment omitted the Eighth Schedule and amended Section 43J of the Arbitration Act to state that the qualifications, experience, and norms for accreditation of arbitrators shall be such as may be provided by regulations.

This step is partly welcome as the omission of the Eighth Schedule restores the principle of party autonomy, allowing parties to select arbitrators as per their requirements, including foreign lawyers. Nevertheless, it remains to be seen what kind of regulations the government is likely to specify, and whether the qualification requirements would be mandatory or directory in nature. This leaves open

¹²⁴ (2018) 5 SCC 379.

¹²⁵ HLC Report, p. 53.

¹²⁶ *Ibid.*

¹²⁷ Ajar Rab, "Accreditation of Arbitrators in India: A New License Requirement?", Kluwer Arbitration Blog (11 October 2018). Available at: <http://arbitrationblog.kluwerarbitration.com/2018/10/11/accreditation-of-arbitrators-in-india-a-new-license-requirement/>.

for discussion whether the government must even prescribe arbitrator qualifications in the first place.

Role of the Government in Prescribing Qualifications of Arbitrators

Perhaps it is time to acknowledge that the role of the legislature and/or the government ought to be minimal in deciding on an arbitrator's qualifications. The HLC Report noted that the "*establishment of another body (for accreditation of arbitrators) would only result in the duplication of efforts and involve substantial financial commitment from the Government. Instead what may be desirable is the recognition of professional institutes providing for accreditation ...*"¹²⁸ The "top-down" approach which involves setting stringent criteria by way of legislation for the qualification of arbitrators should be avoided. The government should leave it to the arbitral institutions to carry out this function instead of trying to reinvent the wheel. Such a position would provide flexibility to parties to mould the arbitral process in accordance with their background and requirements and, consequently, promote India as the preferred seat of arbitration.

USE OF TECHNOLOGY IN ARBITRATION

Use of Technology in Arbitration Amidst the Covid-19 Pandemic

While the arbitration community has wanted to employ technology predominantly for virtual hearings and document management, attention is now also shifting to enabling wider outreach of technology, fostering greater capabilities in users, and protecting them against any inadvertent harm that may arise from its use. All these factors must be looked at in order to determine what would constitute "emerging trends" in the use of technology in arbitration.

Increasing Emphasis on Cybersecurity and Data Protection

Important and privileged data can be leaked or hacked, which can cause immense harm to parties. Businesses can suffer both financial and reputational damage as a result of data breaches. By way of an example, a data breach in 2017 cost credit reporting company Equifax, Inc. \$275 million in legal and associated costs.¹²⁹ The risk becomes even higher during the ongoing Covid-19 pandemic, as core arbitration processes such as hearings and document management are moved online. The ICCA-NYC

¹²⁸ HLC Report, p. 56.

¹²⁹ John McCark and Jim Finkle, "Equifax Breach Could be Most Costly in Corporate History", Reuters (2 March 2018). Available at: <https://www.reuters.com/article/us-equifax-cyber/equifax-breach-could-be-most-costly-in-corporate-history-idUKKCN1GE257?edition-redirect=uk>.

Bar-CPR Cybersecurity Protocol for International Arbitration released in 2020¹³⁰ contains a set of directory principles which help in mitigating security risks. It provides a comprehensive framework to guide parties, arbitrators, and arbitral institutions as to the measures that can be adopted to safeguard their arbitral process. This emphasis on cybersecurity and data protection is a welcome step, especially as it enhances the legitimacy of arbitration as a method of dispute resolution.

Case Management Systems

Case management systems serve to effectively manage various documents that are produced and shared in arbitral proceedings. These systems allow documents to be submitted and stored on a single platform and also allow arbitrators to make their observations and communicate with the parties. Issues arising with email communication are also avoided, such as long threads and limited file size capacity. Case management systems facilitate ease of access to important documents, and also have flexibility to restrict the said access.

The Covid-19 pandemic has caused serious difficulties in sharing documents physically. Case management tools have assumed added importance as arbitral institutions have been aggressively promoting their use due to the greater efficiencies they lead to.¹³¹ Several institutions have been utilising these platforms for communication and filings. The ICC has also committed to introduce its own case management software for the benefit of its clients.¹³²

ICC's Role in the Adoption of Technology in International Arbitration

There are a wide range of technological tools that facilitate and optimise the use of arbitration as a time- and cost-effective method of dispute resolution. ICC is a major contributor in increasing the adoption of technology in international arbitration.

Report of the ICC Commission on Arbitration and ADR

In 2004, the ICC Commission on Arbitration and ADR published a report on how information technology (IT) was used in international arbitration and also highlighted the benefits accruing from the information processing capabilities of IT and the associated risks. In 2017, the commission

¹³⁰ Available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc-bar-cpr-cybersecurity-protocol-for-international-arbitration-print-version.pdf.

¹³¹ "International Arbitration in the Time of Covid-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions", Cleary Gottlieb Alert Memorandum (10 July 2020). Available at: <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/international-arbitration-in-the-time-of-covid19.pdf>.

¹³² *Ibid.*

published a report titled “An Updated Overview of Issues to Consider when Using Information Technology in International Arbitration”.¹³³ The objective of the report was to equip arbitration users with more up-to-date knowledge of IT tools and how they assist in the arbitral process.

ICC Arbitration Commission Report on Managing E-Document Production

The ICC published a report on managing e-document production in 2012¹³⁴ which emphasised that the International Bar Association Rules on the Taking of Evidence in International Arbitration are a valuable resource to assist parties and arbitrators with document production, and suggested a co-operative approach by which parties can work together and reduce time and costs of arbitration through effective management of electronic documents.

ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic on ICC Arbitrations

On 9 April 2020, the ICC International Court of Arbitration issued a note providing guidance to parties, arbitrators, and counsels on measures aimed at mitigating the effects of the Covid-19 pandemic on ICC arbitrations, keeping in mind the health and safety of the parties and the arbitrators.¹³⁵ The note encourages parties to manage arbitrations in a fair, expeditious, and cost-effective manner through thoughtful use of case management tools that are already available through the Arbitration Rules of the ICC.

The ICC has also implemented certain administrative measures to streamline its processes and increase efficiency. The ICC Secretariat’s communication dated 17 March 2020 requires new requests for arbitration to be filed in electronic format. Tribunals and parties are also encouraged to sign terms of reference in electronic form. Further, communication with and from the Secretariat is required to be shared electronically as well.

¹³³ An Updated Overview of Issues to Consider when Using Information Technology in International Arbitration – Report of the ICC Commission on Arbitration and ADR (2017). Available at: <https://iccwbo.org/publication/information-technology-international-arbitration-report-icc-commission-arbitration-adr/>.

¹³⁴ Managing E-Document Production, ICC Commission Report (2012). Available at: <https://iccwbo.org/publication/icc-arbitration-commission-report-on-managing-e-document-production/>.

¹³⁵ The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic (9 April 2020). Available at: <https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>.

Need for Standardisation in the Use of Technology in Arbitration

Many parties and practitioners differ on the manner and extent of employing technology, thereby giving rise to the need for standardisation of the use of technology.

Under the Arbitration and Conciliation Act, 1996 (Arbitration Act), many issues are likely to manifest themselves as due process concerns. Section 18 of the Arbitration Act provides that “*the parties shall be treated with equality and each party shall be given a full opportunity to present his case*”. Consequently, there is a need to ensure that adequate procedural requirements are met, even in a virtual hearing. Due process concerns are raised where one party may get additional time over the other, or the flow of communication is lost due to technical disruptions.¹³⁶

Further, parties have the option to challenge an award or resist the enforcement of an award where they believe that they have been unable to present their case.¹³⁷ In this regard, the Supreme Court has held that a party is unable to present its case where “*factors outside the party’s control have combined to deny the party a fair hearing*”.¹³⁸ Therefore, technical failures can raise fair hearing concerns.

It is reasonable to presume that newer technologies would be better realised and find greater acceptance if they are accompanied by systems which facilitate and standardise their use, which will also take care of fair hearing concerns. Such systems can be as elementary as instruction manuals or guides on how to effectively incorporate these technologies into the arbitration process. Practitioners are likely to derive greater satisfaction if they have the assurance that their technology is tried and tested, along with being well optimised.

There are various standardised instruments from leading arbitral institutions that serve as high-value model templates for the resolution of a number of practical problems that may arise with the use of technology in arbitration. For example, Article 6 of the Seoul Protocol on Video Conferencing in International Arbitration encourages testing of electronic equipment and holding a test conference with all participants in advance of the actual proceedings.¹³⁹ Once parties are reassured that common difficulties occurring with the use of technology have already been foreseen and accounted for, they

¹³⁶ Saniya Mirani, *Due Process Concerns in Virtual Witness Testimonies: An Indian Perspective*, KluwerArbitration Blog (17 November 2020). Available at: <http://arbitrationblog.kluwerarbitration.com/2020/11/17/due-process-concerns-in-virtual-witness-testimonies-an-indian-perspective/>.

¹³⁷ See Section 34(2)(iii) of the Arbitration Act.

¹³⁸ *Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India Limited*, 2019 SCC OnLine 677.

¹³⁹ Available at: http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURR_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024.

are more likely to incorporate technology into the arbitration process. Technological instruments also serve to resolve various inequalities that may arise between parties. The ICC's 2017 report encourages the arbitral tribunal to carefully assess the availability and usability of technological tools prior to incorporating them into the arbitral process. Thus, standardisation is necessary to avoid the various technical glitches that may emerge as newer technology is deployed in arbitration practice.

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