

NALSAR
ADR JOURNAL

NALSAR ADR JOURNAL

Vol. 2

2025

[Cite as: 2025 (2) NAJ <page no.>]



**NALSAR
ADR JOURNAL**

© 2025 – NALSAR ADR Journal

Subscription: ₹ 550.00

The NALSAR ADR Journal is provided under the terms of the Creative Commons Attribution-NonCommercial – Share Alike 4.0 Public License. The License is available at <<http://creativecommons.org/licenses/by-nc-sa/4.0>>. Subject to the above-mentioned license, the NALSAR ADR Journal is protected by the Indian Copyright Act, 1957 and/or other applicable law. Any use of the work in violation of the above-mentioned license and copyright law is prohibited. The opinions expressed in this review are those of the authors.

Published by:

NALSAR University of Law
Shamirpet, Hyderabad - 500101
Website: www.adrjournal@nalsar.ac.in

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

NALSAR ADR JOURNAL

Vol. 2

2025

PATRON AND EDITOR-IN-CHIEF

PROF. SRI KRISHNA DEVA RAO

Vice-Chancellor,

NALSAR University of Law, Hyderabad

ADVISORY BOARD

PROFESSOR JANET WALKER, CM

Chartered Arbitrator

TOBY LANDAU KC

Barrister & Arbitrator, Duxton Hill
Chambers, Singapore and London

DR. KABIR DUGGAL

Lecturer in Law, Columbia Law School,
New York

STEVEN FINIZIO

Partner, WilmerHale, London

GAUTAM BHATTACHARYA

Partner, ReedSmith LLP, London

GENEVIVE POIRIER

Partner, Lalive, London

DAVID THOMAS KC

King's Counsel, Keating
Chambers, London

PROF. STEVE NGO

BAIAC Arbitration & Mediation,
Singapore

SADHVI MOHINDRU

Senior Associate, HFW, Singapore

KIRTAN PRASAD

Counsel, RPC, London

RAJ PANCHMATIA

Partner, Khaitan & Co.

PEER REVIEW BOARD

Abhileen Chaturvedi

Partner, Cyril Amarchand Mangaldas

Hiral Gupta

Partner, Bharucha & Partners

Anindya Basarkod

Principal Associate, Khaitan & Co.

Dheeraj Murthy

Advocate

Mohit Prabhu

Principal Associate, Cyril
Amarchand Mangaldas

Isha Singh

Senior Associate, AZB & Partners

Lakshmi Dwivedi

Senior Associate, DSK Legal

**EDITORIAL BOARD
EDITORS**

Kshitij Saruparia

Kshipra Shukla

Zorawar Almeida

ASSOCIATE EDITORS

Arnav Mathur

Harsha Suthar

ASSISTANT EDITORS

Shrishti Singh
Baibhav Mishra
Pranav Saraf

Tamanna Yadav
Lovish Goyal
Mrnalini Krishnan

TECHNICAL EDITOR

Siri Adusumilli



ANUP JAIRAM BHAMBHANI

Judge
HIGH COURT OF DELHI

FOREWORD

Having dedicated a significant portion of my career to the legal field in both practice and judicial roles, I frequently contemplate the delicate equilibrium that must be achieved between established legal principles and the dynamic requirements of justice in a shifting commercial and societal framework. This balance is most acutely challenged in the realm of arbitration and alternative dispute resolution, where the autonomy, efficiency, and finality sought by parties often clash with the necessities of judicial oversight and public interest.

The articles compiled in this volume tackle this tension in a thoughtful and practical manner. The contributors analyse the legal developments, legislative updates, and comparative perspectives that influence India's arbitration law—ranging from the involvement of non-signatories, to the enforcement of emergency awards, and the legitimacy of unilateral appointments within specific contracts.

These discussions confront challenging questions: Can the judiciary step back from the arbitration process without jeopardizing parties' rights? How can India's arbitration system adjust to cross-border complexities while maintaining consistency and predictability? The papers also explore less conventional topics, such as the complicated issue of limitation in appointment proceedings.

Several contributors revisit recent landmark decisions from our Supreme Court—DMRC vs. Delhi Airport Metro Express, Gayatri Balasamy, Cox & Kings, and the CORE-II ruling—not just to summarize their outcomes but also to examine their foundational doctrines and practical consequences. In doing so, the authors fulfill a crucial role in legal scholarship: to clarify, critique, and, when necessary, challenge existing views.

As a judge, I am particularly impressed by how these writings highlight a vital truth that is often overlooked amid case pressures and procedural wrangling: viz., the main goal of any dispute resolution method, whether judicial or arbitral, is to deliver justice that is substantive, prompt, and fair. Currently, arbitration in India stands at a pivotal juncture. Our ambition to become a hub for international arbitration will not be achieved solely through legislative changes, but rather through the establishment of a cohesive, principled, and reliable legal framework. This entails exercising judicial restraint when appropriate, while also allowing for judicial intervention when necessary.

I am certain that the insights presented in this volume will be valuable not only to students, academics, and practitioners but also to fellow judges—as both, a reflection of our present trajectory and a guide for future judgments. By fostering meaningful dialogue among academia, the Bar, and the judiciary, publications like this are crucial to the holistic development of our legal system.

I commend this volume to all those interested in the systematic advancement of arbitration and Alternative Dispute Resolution in India.



Anup Jairam Bhambhani
Judge,
Delhi High Court

CONTENTS

Emergency Arbitration in India: Gaps in Enforcement and Future of Interim Relief.	1
<i>Arpit Kumar Singh & Amaan Khan</i>	
Non-Signatories to Arbitration Agreements: Inclusions or Interlopers	10
<i>Rajendra Barot, Prabhav Shroff, Madhav Maheshwari & Ruhaan Shah</i>	
CORE-II: The Fate of Unilateral Appointments in Public-Private Partnership Contracts	24
<i>Sahil Narang, Madhavam Sharma & Vidush Sinha</i>	
Judicial Review of Arbitral Awards through Curative Petitions: Reassessing Finality in Indian Arbitration	41
<i>Shalaka Patil & Harsh Khanchandani</i>	
Navigating Limitation Period: Insights from the Supreme Court's latest ruling on Appointment of Arbitrators	51
<i>Sumit Attri & Satatya Anand</i>	
The Illusion of Finality: <i>Critical Analysis of Gayatri Balasamy v. ISG Novasoft Technologies Limited</i>	61
<i>Gurmehar Singh Bedi & Nitin Kishore</i>	

EMERGENCY ARBITRATION IN INDIA: GAPS IN ENFORCEMENT AND FUTURE OF INTERIM RELIEF

Arpit Kumar Singh & Amaan Khan***

Abstract

Emergency Arbitration in essence serves as a mechanism for parties seeking urgent interim relief, prior to the constitution of an Arbitral Tribunal. Notwithstanding its prevalence across various pro-arbitration jurisdictions, its implementation in India remains in a state of flux due to gaps in the existing legislation and an uneven enforcement practice. While institutional rules have facilitated the rise of emergency arbitration globally, including the recent 2025 SIAC rules, which now allows for a Protective Preliminary Order even before filing a notice of arbitration, India's domestic framework (institutional or otherwise) has struggled to keep up. This article aims to examine the statutory framework of this mechanism, all the while ascertaining the practical challenges surrounding Emergency Arbitration. This article also analyses the impact of a lack of explicit recognition of emergency arbitration within the Arbitration & Conciliation Act, 1996, which has led to inconsistent enforcement, especially when it comes to foreign seated arbitrations with the help of notable judgments. While the Draft Arbitration Amendment Bill, 2024 marks a shift by defining "Emergency Arbitrator" and equating their orders with those passed under Section 17(2), there still remains a gap pertaining to enforcement issues in foreign seated arbitrations, which ought to be resolved, to ensure the ideal of India becoming an arbitration hub, can be fructified into a reality. With the aid of various notable judgments and framework in other jurisdictions, this article proposes a harmonized approach that eliminates the

* Principal Associate, Khaitan & Co. LLP.

** Associate, Khaitan & Co. LLP.

gap between domestic and foreign-seated arbitrations and endeavours to find parity. This Article contends that a legislative reform is imperative, aligning with international best practices, to be on track towards making India an arbitration hub.

Keywords: Emergency Arbitration, Enforcement Challenges, Interim Relief, Arbitration Bill 2024, Foreign-Seated Arbitration.

INTRODUCTION

Emergency arbitration¹ is a procedural tool designed to provide parties with urgent interim relief before the constitution of an Arbitral Tribunal. It is distinct from expedited or summary proceedings and in no manner substitutes them. Rather, emergency arbitration allows parties to seek relief within the framework of arbitration, bypassing Courts, while awaiting the formation of the Arbitral Tribunal. However, it does not allow a party to avoid the Arbitral Tribunal for the final resolution of its claims.

In the absence of emergency arbitration, a party bound by an arbitration agreement and in need of urgent relief typically has limited options, each presenting its own set of challenges.

An available recourse is to seek urgent measures from a Court. This is typically done before the Arbitral Tribunal is constituted or arbitration proceedings have commenced, though the Indian Arbitration and Conciliation Act, 1996 (“A&C Act”) allows for this recourse at any stage of an arbitration, before enforcement. The request may be made to Courts in the jurisdiction of the arbitration seat, where relevant assets or evidence are located, or another Court of competent jurisdiction. However, this option may conflict with the very reason parties choose arbitration in the first place. Many parties select arbitration to avoid purely judicial recourse, taking advantage of its perceived benefits, including confidentiality and avoiding judicial lags.

However, the enforcement of emergency arbitration awards can best be described as an “Achilles heel”, which casts a lingering shadow over its effectiveness. To this effect, an Hon’ble Judge of the Supreme Court of India

¹ The concept of emergency arbitration dates back to the International Chamber of Commerce’s 1990 Rules for Pre-Arbitral Referee Procedure, which allowed for the appointment of a referee (with prior agreement between the parties) empowered to issue interim orders before the formation of an Arbitral Tribunal; see also ICC Rules for a Pre-Arbitral Referee Procedure (Jan. 1, 1990) art. 3.1.

recently emphasised that the success and broader acceptance of emergency arbitration would depend on the consistent enforcement of emergency awards.²

A recent global statistical layout of the prevalence of emergency arbitration provides a helpful insight into why India needs a robust enforcement mechanism for emergency arbitration. In 2023, the Singapore International Arbitration Centre (“SIAC”) received 11 applications for the appointment of an emergency arbitrator, with the corporate sector accounting for 38% of these applications.³ Meanwhile, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) handled 4 emergency arbitration cases. At the International Chamber of Commerce (ICC), 28 Emergency Arbitrator applications were filed during the same year, of which 3 were fully granted, 9 were partially granted, and 13 were dismissed.⁴ Despite this global trend towards emergency arbitration, poor enforceability mechanisms in India weakens its effectiveness and leaves a gap in ensuring interim relief is meaningful.

THE EXISTING DOMESTIC EMERGENCY ARBITRATION FRAMEWORK AND ENFORCEMENT MECHANISMS

The UNCITRAL Model Law (“**Model Law**”), which forms the foundation of the A&C Act, while offering broad definitions, does not expressly address emergency arbitration. While Sections 9 and 17 of the A&C Act empower Courts and Tribunals, respectively, to grant interim relief, they now also address the enforcement of such relief. Section 9 gives Courts the authority to issue and enforce Interim Orders in accordance with the procedures established by the Civil Procedure Code, 1908 (“**CPC**”). Post the 2015 Amendment, Section 17(2) explicitly grants enforceability to interim orders issued by arbitral tribunals, placing them on par with Court orders. This amendment addressed the gap earlier noted by the Hon’ble Supreme Court in *Sundaram Finance Ltd. v. NEPC India Ltd.*⁵ and *Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*⁶. However, there remains no clear statutory recognition for the enforcement of emergency arbitral orders under the A&C Act.

² Deeksha, *Success and Wider Acceptability of Emergency Arbitration Depends on Consistent Enforcement of Emergency Awards: Justice Hima Kohli at India ADR Week 2024*, SCC TIMES (Sept. 28, 2024), <https://www.scconline.com/blog/post/2024/09/28/success-of-emergency-arbitration-depends-on-consistent-enforcement-emergency-awards-justice-hima-kohli-india-adr-week-2024/>.

³ *Annual Report 2023*, SINGAPORE INTERNATIONAL ARBITRATION CENTRE (Oct. 4, 2024), SIAC_AR2023.pdf.

⁴ Leonie Ghirardi, *Arbitral Institution Stats 2024*, ENYO LAW (July 3, 2025), <http://enyolaw.com/news/arbitral-institution-stats-2024/>.

⁵ *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 SCC 479.

⁶ *Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*, (2004) 9 SCC 619.

In 2021, the Hon'ble Supreme Court of India, in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*⁷, held that the term "*Arbitral Tribunal*" under Section 17 of the A&C Act includes an Emergency Arbitrator. The Bench therein held that Section 17(1) of the A&C Act, read with Section 21, is broad enough to include emergency arbitration proceedings, which commence when a notice of arbitration is received. In this case, Amazon sought to enforce an Emergency Order issued by a Tribunal seated in Delhi, even though the administering institution was the SIAC. The Hon'ble Supreme Court ruled that orders of an Emergency Arbitrator, as provided under institutional rules, are covered by the A&C Act. Further, the Court found that Section 9(3) of the A&C Act implies that an "*Arbitral Tribunal*" under institutional rules, including Emergency Arbitrators, can grant interim measures.

The failure to comply with interim measures has been considered primarily in two cases. In *Krishan v. Anand*,⁸ the High Court of Delhi categorized non-compliance with Section 17 orders as both "*making any other default*" and "*contempt to the Arbitral Tribunal*" under Section 27(5) of the A&C Act. However, Section 27(5) only allows an Arbitral Tribunal to request assistance from the Court in enforcing its orders, rather than directly penalising the defaulting party for contempt. The A&C Act does not explicitly provide for the direct enforcement of a Tribunal's Orders either; it merely states that an Interim Order issued by a Tribunal should be enforced as if it were an Order of a Civil Court under the CPC, a provision that grants broad enforcement powers, including attachment, security, and other remedies under the CPC framework.

In a harmonizing move, in a recent holding of the Hon'ble High Court of Delhi, conjointly reading Sections 17 and 27 of the A&C Act, found that "*if any person is guilty of contempt of the Arbitral Tribunal, during the conduct of arbitral proceedings, the punishments would be as though the said offences had taken place in suits before the Civil Court*".⁹ The Arbitral Tribunal was found to be no different from a Civil Court in respect of dealing with contempt against itself.¹⁰

FOREIGN SEATED ARBITRATION AND ENFORCEMENT RELATED DILEMMAS

However, Part II of the A&C Act, which governs foreign-seated arbitrations, does not contain provisions akin to Section 17(2) of Part I – which

⁷ *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.*, (2022) 1 SCC 209 : AIR 2021 SC 3723.

⁸ *Krishan v. Anand*, 2009 SCC OnLine Del 2472.

⁹ *Dalmia Family Office Trust v. Getamber Anand*, 2024 SCC OnLine Del 7155.

¹⁰ *Id.*

applies to India-seated arbitrations. The position that emerges is that while the final Arbitral Awards of foreign-seated arbitrations are enforceable under the New York Convention, Interim Orders (including those issued by Emergency Arbitrators), are not directly enforceable under the A&C Act.

This legislative gap forces the party seeking relief from a foreign-seated Emergency Arbitrator to approach Courts under Section 9 of the A&C Act, as demonstrated in cases like *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*¹¹ (“*HSBC*”) and *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd.*¹² (“*Raffles Design*”). In both cases, the beneficiaries of emergency awards in foreign-seated arbitrations had no direct means to enforce such a decision in India.

HSBC was one of the first rulings by the Bombay High Court to address the recognition of Emergency Arbitration orders in India. In this case, the seat of arbitration was Singapore and the proceedings were governed by the 2016 SIAC Rules, which allow parties to invoke an Emergency Arbitrator. *HSBC* sought to enforce an Emergency Arbitration Order through Section 9 of the A&C Act.

The issue before the Court was whether Section 9 of the A&C Act, which falls under Part I of the Act, could be applied to foreign-seated arbitrations. This was a significant issue, as it was previously established in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*¹³ (“*BALCO*”) that Part I of the A&C Act does not apply to foreign-seated arbitrations. However, the High Court in *HSBC* held that since the arbitration agreement between the parties was entered into before the decision in *BALCO*, the judgment in *BALCO* would not apply retroactively to the case.

Moreover, the parties in *HSBC* specifically agreed to retain the applicability of Section 9 of the A&C Act, even though the seat of arbitration was outside India. As a result, the Bombay High Court held that Section 9 was applicable and granted interim relief in line with the Emergency Arbitration order. While the Court did not directly address whether Emergency Arbitration orders were explicitly recognized under the A&C Act, it inferred that such orders were a relevant consideration for granting interim relief under Section 9, provided that the parties agreed to the same.

Raffles Design, heard by the Delhi High Court, presented similar facts to *HSBC*, but it took a different course. In *Raffles Design*, the seat of arbitration

¹¹ *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713.

¹² *Raffles Design International India (P) Ltd. v. Educomp Professional Education Ltd.*, 2016 SCC OnLine Del 5521.

¹³ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 : (2013) 180 Comp Cas 311.

was also Singapore, and the petitioner obtained an Emergency Arbitrator's order under the SIAC Rules. However, unlike the *HSBC* case, the arbitration agreement in *Raffles Design* was signed after the BALCO ruling, meaning that Part I of the A&C Act did not automatically apply unless explicitly agreed to by the parties.

The Court in *Raffles Design* considered the 2015 Amendment to Section 2(2) of the A&C Act, which marginally altered the position laid by *BALCO*. The amendment to Section 2(2) allowed specific provisions of Part I, including Section 9, to apply to foreign-seated arbitrations in the context of international commercial arbitration. This brought the A&C Act in line with the UNCITRAL Model Law which permits domestic Courts to grant interim relief in foreign-seated arbitrations under Article 9.

However, despite the 2015 Amendment, the Court took a cautious approach. It held that although Section 9 could be invoked for foreign-seated arbitrations, it would not automatically enforce an Emergency Arbitration order. Instead, the position laid was that Courts would independently examine the case and decide on interim relief without relying on the prior Emergency Arbitration order.

In *Uphealth Holdings Inc. v. Glocal Healthcare Systems (P) Ltd.*¹⁴, the Calcutta High Court held that while a foreign-seated Emergency Order could be considered as a factor under Section 9, it could not be enforced directly due to the absence of a provision akin to Section 17(2) in Part II of the A&C Act.

Therefore, the lack of an express provision in the A&C Act, coupled by the stance taken by Indian jurisprudence, has contributed to the dilemma of unenforceability of Emergency Orders/Awards in India that arise from foreign-seated arbitrations, compelling the parties to file proceedings under Section 9 in the Courts to seek interim reliefs.

The core difficulty lies not in the need to approach the Court, but in the absence of a clear statutory route for enforcing emergency awards in foreign-seated arbitrations. In some cases, as highlighted in *Raffles Design*, the emergency arbitration may even become an unnecessary step, as the Court independently assesses the merits of the interim relief requested under Section 9. Thus, this dual process raises practical concerns about the time and cost effectiveness of emergency arbitration in foreign-seated arbitrations when interim relief is sought in India.

Emergency arbitration is designed to provide quick relief, with a typical timeframe for appointing an Emergency Arbitrator ranging from one to three days, and five to fifteen days to secure the relief requested. This short timeline

¹⁴ *Uphealth Holdings Inc. v. Glocal Healthcare Systems (P) Ltd.*, 2023 SCC OnLine Cal 2442.

often makes emergency arbitration a highly efficient mechanism for securing interim measures in urgent cases.

The absence of a provision recognizing enforcement of an Emergency Award made by a Tribunal in a foreign seated arbitration, under the A&C Act, has an effect of eroding the efficacy of the process of Emergency Arbitration and the consequent Emergency Awards. This is evident from the fact, as highlighted above, that if a party wants to seek interim relief in India in a foreign seated arbitration, they would nonetheless have to approach the Indian Courts under Section 9 of the A&C Act, thus rendering any Emergency Arbitration and Emergency Award redundant.

The intent behind Section 17(2) of the Act, which aims to strengthen Tribunal orders and equate them with Court orders under Section 9, should apply equally to foreign-seated arbitrations, especially since Section 9 itself is available to such arbitrations.

POSITION OF EMERGENCY ARBITRATION AWARDS IN DRAFT ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2024

The Department of Legal Affairs has released the draft Arbitration and Conciliation (Amendment) Bill, 2024 (“**Draft Bill**”) on 18 October, 2024 based upon the recommendations of the Expert Committee chaired by Dr. V.K. Vishwanathan. The Draft Bill introduces a series of amendments aimed at fortifying institutional arbitration, minimizing judicial intervention and ensuring timely resolution of arbitration proceedings.¹⁵

The Draft Bill incorporates the concept of emergency arbitration in consonance with the principles enunciated in *Amazon.com NV Investment Holdings LLC*. This express recognition in the Bill ensures that interim relief granted by the Emergency Arbitrators attains statutory legitimacy and enforceability.

The Bill introduces clause (ea) to Section 2(1) which defines the term ‘Emergency Arbitrator’ as the one appointed under the introduced Section 12B. Furthermore, Section 9A, provides a framework for the appointment of ‘Emergency Arbitrators’ to grant interim relief as provided under Section 9 of A&C before the formal constitution of the Arbitral Tribunal.

Further, Section 9A(3) ensures that any order issued by an Emergency Arbitrator will be enforceable in the same manner as orders passed by the Arbitral Tribunal under Section 17(2) of the A&C Act. This provision ensures

¹⁵ Inviting Comments on the Draft Arbitration and Conciliation (Amendment) Bill, 2024, <https://www.scobserver.in/wp-content/uploads/2025/02/2024-Draft-Arbitration-Amendment-Bill.pdf>.

that the enforceability of such interim reliefs is at the same footing as the orders issued by the Arbitral Tribunal.¹⁶

In addition, Section 9A(4) provides that once the Arbitral Tribunal is constituted it has the authority to confirm, modify or vacate the order of the Emergency Arbitrator. The same is also reflected in the introduced Section 17(*da*) of the Draft Bill which grants the Arbitral Tribunal the power to review the emergency orders, ensuring that any temporary relief remains consistent with the ongoing arbitration proceedings.¹⁷

RECOGNITION OF EMERGENCY ARBITRATION AWARDS: INTERNATIONAL PERSPECTIVE

Introducing an enforcement mechanism for interim orders passed by foreign-seated tribunals in A&C Act would align with Article 17H of the UNCITRAL Model Law and be consistent with practices in other pro-arbitration jurisdictions, such as Hong Kong and Singapore. For instance, Section 61 of the Hong Kong Arbitration Ordinance, 2011, mandates obtaining leave from the High Court to enforce interim measures granted by foreign Tribunals. The party seeking enforcement must demonstrate that the Order qualifies as one that could be issued by an Arbitral Tribunal seated in Hong Kong. This enforcement mechanism extends to emergency arbitration under Part 3A of the Arbitration (Amendment) Ordinance, 2013.

In Singapore, the International Arbitration Act, 1994 (“IAA”) incorporates emergency arbitrators within the definition of “*arbitral tribunal*.” The IAA outlines specific grounds for refusing recognition of Emergency Arbitrator Awards, including breaches of natural justice, and overstepping the arbitrator’s jurisdiction.

In the UK, Courts are also empowered to enforce peremptory orders from Arbitral Tribunals by compelling compliance, even when the arbitration seat is outside the UK, provided a sufficient connection to England and Wales or Northern Ireland exists. The Law Commission, while reviewing Section 42 of the English Arbitration Act, 1996, suggested that this framework may extend to emergency arbitration awards.

¹⁶ Abhisar Bairagi et al., *Future of Arbitration in India: Decoding the Draft Arbitration and Conciliation (Amendment) Bill, 2024*, SCC ONLINE (Mar. 4, 2025), <https://www.scconline.com/blog/post/2024/12/10/future-of-arbitration-in-india-decoding-the-draft-arbitration-and-conciliation-amendment-bill-2024/>.

¹⁷ *Id.*

CONCLUSION

Emergency arbitration serves as a crucial mechanism for parties seeking urgent interim relief before the constitution of an Arbitral Tribunal. While globally recognized and increasingly utilized, its effectiveness in India is hampered by inconsistent enforcement mechanisms, particularly for foreign-seated arbitrations. The existing legal framework, although recognizing the concept of emergency arbitration, does not provide clear provisions for the direct enforcement of emergency awards, particularly those of foreign-seated arbitrations. This gap forces parties to resort to Section 9 of the A&C Act, even in cases involving foreign-seated arbitrations leading to complexity, time, and cost, ultimately diminishing the very purpose of emergency arbitration.

While the Draft Bill, 2024 marks a step forward by formally acknowledging the role of emergency arbitrators and ensuring the enforceability of their orders for arbitrations seated within India; however, it does not adequately address the challenges pertaining to the enforcement of foreign-seated emergency awards, which continues to create an unnecessary hurdle.

For India to remain competitive as a leading arbitration hub, aligning its legal framework with international best practices, similar to practices of countries like Hong Kong and Singapore, is crucial. Furthermore, direct enforceability of foreign-seated emergency awards, subject to safeguards against abuse would also help streamline the process. The 2025 SIAC Rules, which introduce provisions for PPO, highlight a forward approach that could serve as a model for India to ensure timely and effective interim relief.

Ultimately, the success of emergency arbitration lies in its robust action and timely enforceability. India's legal framework must adapt to ensure that emergency awards, regardless of their seat, are swiftly and effectively enforced, thereby preserving the integrity of arbitration as a fast and reliable dispute resolution method. A unified approach that bridges the gap between domestic and foreign awards is key to maximizing the potential of emergency arbitration.

NON-SIGNATORIES TO ARBITRATION AGREEMENTS: INCLUSIONS OR INTERLOPERS

*Rajendra Barot**, *Prabhav Shroff***,
Madhav Maheshwari† & *Ruhaan Shah††*

I. INTRODUCTION

Arbitration agreements, being a species of contract, are governed entirely by the parties' consent.¹ By entering into arbitration agreements, parties waive their right to ordinarily invoke the jurisdiction of otherwise competent courts, in lieu of a private mode of adjudication.² As recourse to arbitration is premised on an agreement between the parties, it follows that only those parties that are covered by the arbitration agreement, would ordinarily be party to the arbitration proceedings and be bound by the arbitral award.

However, with the advent of globalization, it has become common for transactions to span various jurisdictions and involve several connected entities, through separate contracts. As a result of such changes, the concept of who is a signatory to an agreement has increasingly become the subject-matter of disputes. Therefore, a need has arisen to revisit the traditional view (and in today's time, relatively restrictive) of 'parties' 'signatories' to arbitration agreements.

The pertinent issue that requires consideration is whether a non – signatory party, who has not formally signed an arbitration agreement, can be compelled

* Senior Partner, AZB & Partners.

** Partner, AZB & Partners.

† Associate, AZB & Partners.

†† Associate, AZB & Partners.

¹ One American Judge referred to the “abecedarian” (i.e., “rudimentary”) tenet that no-one can be forced to arbitrate absent an agreement to do so. *See* *Intergen N.V. v. Eric F. Grina*, 344 F. 3d 134 (1st Cir. 2003), addressing claims for deceit and unfair trade practices. *Intergen* (affiliated with engineering giant Bechtel) sought to litigate in Massachusetts, while *Grina* (affiliated with power generation leader Alstom) invoked an arbitration clause contained in purchase orders for gas turbines executed by entities within the two groups. In an opinion studded with erudition, Judge Selya rejected a motion to compel arbitration.

² William W. Park, *NON-SIGNATORIES AND INTERNATIONAL CONTRACTS: AN ARBITRATOR'S DILEMMA*, (Oxford University Press eBooks, January 2009), <https://doi.org/10.1093/oso/9780199551729.003.0001>.

to arbitrate. This article examines the precedents which shed light on the above question, from an Indian law perspective. On a separate note, there are certain disputes which are not arbitrable. The present article does not deal with or cover such non-arbitrable issues.

II. ABSTRACT

In 1982, the arbitral tribunal in *Dow Chemical v. Isover Saint Gobain*,³ for the first time subjected a non-signatory to the arbitral proceedings before it. The tribunal constituted under the Rules of the International Chamber of Commerce (as applicable then), while deciding an interim application, ruled that a non – signatory affiliate of a party to an arbitration agreement could be compelled to arbitrate in certain circumstances. These included where a close relationship could be shown between the signatory and non – signatory, and a linkage within the transaction in question. The tribunal also factored in the involvement of the non – signatory in discussions prior to execution of the contract and the existence of a close – knit corporate group. Pursuant to this ruling, the approach was adopted and endorsed in various jurisdictions, including Switzerland, Germany, the UK, Singapore, and the United States.

With the passage of time, continental / European scholars referred to arbitrations involving non-signatories as those which endorsed an ‘extension’ of the arbitration clause,⁴ while Anglo – American scholars viewed such proceedings to be tantamount to ‘*joining non – signatories*’.⁵ However, both these views do not accurately reflect the positions they purport to state. Taken at face value, the former of these two monikers implies that an arbitration agreement itself may be *enlarged* to include even non – consenting parties (which is contrary to the settled arbitration jurisprudence), and the latter implies that signatures are necessarily needed to create a commitment to arbitration – despite several legal systems (including India), recognizing unsigned arbitration agreements.⁶

³ *Dow Chemical France v. Isover Saint Gobain*, ICC Case No. 4131, Interim Award dated Sept. 23, 1982.

⁴ See, e.g., Pierre Mayer, *Extension of the Arbitration Clause to Non-Signatories under French Law*, 27 AM. UNIV. INT’L L. REV. 831 (2012).

⁵ See generally, ALAN SCOTT RAU, “‘Consent’ to Arbitral Jurisdiction: Disputes with Non-Signatories” in MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: PERMANENT COURT OF ARBITRATION 69 (Belinda Macmahon eds., 2009); John M. Townsend, *Non-Signatories in International Arbitration: An American Perspective*, 13 ICCA CONGRESS SERIES 359 (Kluwer Law International, 2007); BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS (2005); William W. Park, *The Arbitrator’s Jurisdiction to Determine Jurisdiction*, 13 ICCA CONGRESS SERIES 55 (2007).

⁶ See, e.g., Arbitration and Conciliation Act, §7(4)(b) and (c) (1996) which provides that a valid arbitration agreement can be effected through un-signed documents as well (exchange of letters, telex or telegram or communication through electronic means).

On the other hand, Indian law inherently recognizes that non-signatories may be joined in an arbitration and be bound by an arbitral award. For instance:

- a) Section 8 of the (Indian) Arbitration and Conciliation Act, 1996 (“**A&C Act**”) deals with the power of a judicial authority to refer parties to arbitration in cases of arbitrations under Part I of the A&C Act. Originally, Section 8 of the A&C Act was limited to applications made by a “*party*” to an arbitration agreement. This was distinct from Section 45 of the A&C Act, which applied in case of arbitrations under Part II of the A&C Act. Contrary to the language of the original Section 8 of the A&C Act, Section 45 permitted either a “*party*” or “*any person claiming through or under*” such party, to make an application under the said section. Eventually, the legislature amended Section 8 of the A&C Act in 2015 to mirror the language of Section 45 by inserting the words “*any person claiming through and under*”⁷ therein. This conformed to commercial realities, where non – signatories acting through or under the signatory parties were often required to approach the judicial authorities under the A&C Act.
- b) Section 35 of the A&C Act also alludes to non-signatories being bound by arbitral award, since it provides that domestic awards shall be final and binding on the parties and “*persons claiming under them*”.

Further, Indian courts, have also interpreted the question of who is bound by an arbitration agreement, keeping in mind its more nuanced aspects. Questions which may have first seemed theoretical (for instance, whether a non – signatory can invoke its own arbitration, or intervene in proceedings between the signatories), now have practical repercussions – and they have come to the forefront due to an evolving global business environment and complex nature of transactions.

In this article, we aim to examine views taken by the Indian judiciary regarding inclusion of non – signatories in arbitral proceedings and the evolution of this jurisprudence. The goal is to provide a starting point to help predict the views that may be taken by Indian courts in future instances, when faced with similar (if not the same) fact patterns.

⁷ The amended Arbitration and Conciliation Act, §8(1) (1996) reads as under:

8. *Power to refer parties to arbitration where there is an arbitration agreement.*— (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement **or any person claiming through or under** him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

III. INDIAN JUDICIARY: JURISPRUDENCE AND LANDMARK JUDGEMENTS

A. Pre – *Chloro Controls*: Strict bar on joinder of non – signatories

Historically, Indian courts had taken a restrictive view of limiting the scope and effect of an arbitration, to only the formal signatories of the arbitration agreement.

For instance, in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*,⁸ the Supreme Court rejected an application under Section 8 of the A&C Act and reiterated the strict bar on joinder of non – signatories. The Court held that no provision under the A&C Act allowed for an arbitration proceeding to be conducted with respect to entities that were not signatories to the arbitration agreement. Here, the Court interpreted the language of Section 8 of the A&C Act, to imply that a reference to arbitration cannot be made in cases where the matter was (i) outside the ambit of the arbitration agreement, or (ii) between entities who were not parties to the arbitration agreement.⁹

This approach softened over time, with the advent of complex commercial and business transactions requiring Indian courts to adopt a more flexible approach towards interpretation of arbitration agreements.

The approach towards third parties to arbitration agreements and proceedings gradually evolved when Indian Courts held that interim relief measures under Section 9 of the A&C Act could be granted even against third parties, who were not privy to the arbitration.

For instance, in *Girish Mulchand Mehta v. Mahesh S. Mehta*,¹⁰ the Bombay High Court considered the question whether directions under Section 9 of the A&C Act could be passed against persons, who were not parties to an arbitration between a society and its member. The Court held that while relief under Section 9 of the A&C Act may only be sought by parties to an arbitration agreement, the provision itself *does not* place fetters on the Court's jurisdiction to pass orders only against parties to an arbitration agreement. The Court held that its jurisdiction under Section 9 of the A&C Act is wide and interpreted

⁸ *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya*, (2003) 5 SCC 531 : AIR 2003 SC 2252.

⁹ This judgment was pronounced prior to the amendment of Arbitration and Conciliation (Amendment) Act, § 8 (2015), which had broadened the language to include applications filed by “parties” or “persons claiming through or under them”.

¹⁰ *Girish Mulchand Mehta v. Mahesh S. Mehta*, 2009 SCC OnLine Bom 1986 : (2010) 2 Mah LJ 657; *see also* *Gatx India (P) Ltd. v. Arshiya Rail Infrastructure Ltd.*, 2014 SCC OnLine Del 4181; and *Blue Coast Infrastructure Development (P) Ltd. v. Blue Coast Hotels Ltd.*, 2020 SCC OnLine Del 1897 : (2020) 270 DLT 260.

Section 9 of the A&C Act as being intended protect and preserve the “*subject-matter*” of the arbitration.

In another decision in *Housing Development and Infrastructure Ltd. v. Mumbai International Airport (P) Ltd.*, the Bombay High Court again considered whether an order could be passed against third parties who were not parties to the contract in question.¹¹ The Division Bench while relying on the *Girish Mulchand Mehta* case, reiterated that the purpose of Section 9 of the A&C Act is the preservation and protection of the subject matter in dispute. Hence, it is the nature of the subject matter that is of relevance, and not the identity of the parties. Interestingly, the claimant and petitioner in these proceedings had claimed that the contract therein was not a standalone agreement between the parties, but rather a part of a “*complex web of inextricably intertwined contractual relationships*” which also concerned third parties. Ultimately, the Section 9 petition was dismissed as the petitioner failed to prove that the order sought by it was correlated to the subject matter of the dispute.

B. *Chloro Controls*: Application of Group of Companies Doctrine to Arbitration

One circumstance that often necessitates examining the issue of a joinder of parties in arbitration proceedings, is a large – scale project or transactions, where multiple parties forming part of the same corporate structure enter into several distinct contracts, each governed by their respective dispute resolution provisions.

Previously, in the event disputes arose out of such transactions, parties were faced with the daunting task of initiating separate arbitral proceedings, under each individual agreement, since the signatories to these agreements were often distinct. This approach was deemed impractical, since it resulted in multiplicity of proceedings, higher overall costs of litigation, wastage of time and the probability of differing (and contradictory) verdicts rendered by different arbitral tribunals.

The Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.* (“**Chloro Controls**”),¹² developed the concept of ‘composite reference’ and laid to rest the conundrum of resolving disputes arising of multiple contracts in large scale projects. In this case, the Court dealt with a combination of multiple disputes, arising from different agreements, each containing separate dispute resolution clauses (some of which did not contain an

¹¹ *Housing Development and Infrastructure Ltd. v. Mumbai International Airport (P) Ltd.*, 2013 SCC OnLine Bom 1513.

¹² *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 181 Comp Cas 339.

arbitration clause), but all relating to the same project, or being linked with one another.

Briefly, the Court allowed the parties to pursue a ‘composite reference’, i.e., a joint reference of all disputes to a common arbitration. The Court based this finding on the ‘group of companies doctrine’ (“**GOCD**”) and held that the GOCD will apply in cases where various companies are interlinked with one another and form part of the same corporate group, or a singular economic unit. The Court, by recognizing the distinct companies as a ‘group’, permitted different parties to be a part of a single arbitration proceeding, provided that mutual intention of the parties was evident from the underlying agreements.

Particularly, in *Chloro Controls*, the Court identified the following critical factors for applying the GOCD and permitting a composite reference:

- a) the ancillary contracts ought to arise out of an overarching parent contract, and;
- b) the contracts in question ought to be entered into for a singular economic purpose.

The Court further interpreted the phrase “one of the parties or any person claiming *through or under him*” in Section 45 of the A&C Act and that the usage of the phrase “*any person*”, clearly indicated the inclusion of even non – signatories to the arbitration agreement.

C. Post – Chloro Control: Application of the GOCD

The ruling in *Chloro Controls* was a watershed moment towards furthering advancing the pro-arbitration stance India had been working to evolve and became a landmark reference which was subsequently followed in various other judgments.

In *Ameet Lalchand Shah v. Rishabh Enterprises* (“**Ameet Lalchand**”),¹³ the Supreme Court considered four inter – connected agreements, which were executed by multiple parties, with the purpose of achieving a single commercial goal. The Court, following *Chloro Controls*, allowed a composite reference to arbitration, and permitted even non – signatories (being the inter-connected parties) to participate in a composite arbitration. Similar to *Chloro Controls*, in this case one of the four inter – connected agreements did not have an arbitration clause. Despite this, a composite reference to arbitration, under all four of the agreements was allowed, since the agreements had the same controlling parties and were executed for a single economic purpose.

¹³ Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678.

The Supreme Court in *Cheran Properties Ltd. v. Kasturi & Sons Ltd.*,¹⁴ interpreted the phrase “persons claiming under them” in Section 35 of the A&C Act (which states that an arbitral award is binding on the parties and persons claiming under them). The Court held that an arbitral award could be enforced even against the nominee of a signatory party, which was a direct beneficiary of the underlying contract. Particularly, Sporting Pastime India Limited (“SPIL”), a wholly owned subsidiary of Kasturi & Sons Limited (“KSL”) had entered into an agreement with KC Palanisamy (“KCP”), KSL and another entity for transfer of shares. The transaction was structured such that SPIL was to transfer shares to KSL, and then 90% of such transferred shares would be sold to KCP and its nominees. These nominees were not a party to the contract and the contract envisaged the sale by KCP would be effected through separate share transfer agreements. One of the nominees of KCP was Cheran Properties Limited (“Cheran”) which received 95% of KCP’s 90% shares. Subsequently, owing to the disputes, the matter was resolved by arbitration. The arbitral award directed SPIL and KCP to return the documents of title and share certificates to KSL. Cheran, being a nominee of KCP and a recipient of the shares from KCP refused to make the transfer, since it was not a party to the arbitration agreement and accordingly, not bound by the award. The Supreme Court held that an arbitration agreement entered into within a ‘group of companies’ could bind even non – signatories, provided that the circumstances demonstrate a mutual intention to bind both the signatories as well the non – signatories. Hence, Cheran, as a nominee (despite not being a signatory or a party to the arbitration agreement) was held to be bound by the arbitration agreement and the subsequent award.

Similarly, the Supreme Court in *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd.*,¹⁵ held that foreign awards are binding against non – signatories to the arbitration agreement. Interpreting the provisions of Section 46 of the A&C Act, the Court observed that the term ‘persons between whom it was made’ used therein indicated that the foreign award was not limited to the parties to the arbitration agreement. It drew a distinction between Sections 46 and 35 of the A&C Act and observed that the intent of Section 46 (in relation to foreign awards) was broader than Section 35 (in relation to domestic awards). Curiously, the Court held that while non – signatories were bound by a foreign arbitral award (due to the broad language of Section 46), they could not oppose the enforcement of the award under Section 48(1)(a) of the A&C Act, since that section limits itself to ‘parties to the agreement’.

In order to determine whether a company within a group of companies is bound by the arbitration agreement, the Supreme Court in *ONGC Ltd. v.*

¹⁴ Cheran Properties Ltd. v. Kasturi & Sons Ltd., (2018) 16 SCC 413.

¹⁵ Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd., (2022) 1 SCC 753 : 2021 SCC OnLine SC 572.

*Discovery Enterprises (P) Ltd.*¹⁶ (“**Discovery Enterprises**”) laid down certain factors, which included *inter alia*: (i) the involvement of the non – signatory in performance of the contract, (ii) the mutual intent of the parties, (iii) the commonality of the subject matter, (iv) the nature of the relationship between the non – signatory and signatory and (v) the common participation in a composite transaction (i.e., linkage of the contracts).

In addition to the Supreme Court, various High Courts across the country have also built upon the foundation laid down by *Chloro Controls*.

For instance, the Delhi High Court, in *Libra Automotives (P) Ltd. v. BMW India (P) Ltd.*,¹⁷ considered an application under Section 11(6) of the A&C Act for the appointment of an arbitrator. The various agreements in question therein had differences in the agreed procedure for adjudication and the choice of forum. Accordingly, the Court held that a composite reference to arbitration would be misconceived and tantamount to rewriting the terms of the agreements. Here, though the issues in question were overlapping, the lack of a consensus on key aspects of the adjudication mechanism was held to be fatal to the idea of a composite reference. In its analysis, the Court also factored in whether the agreement was capable of being performed independent of any other agreement, regardless of the interconnected scope of work.

Similarly, the Madras High Court, in *Tamilnadu Road Sector Project II v. IRCON International Ltd.*,¹⁸ observed that in order to bind signatory parties of different agreements, to a single arbitral proceeding, it must first be ascertained whether the parties are working towards a common end. The High Court held that though the agreements were executed with commonality of purpose and the work envisioned under the agreements was intrinsically intertwined, the agreements were capable of being independently performed. Further, the procedure for appointment of arbitrators was different in each agreement and thus, unreconcilable. The Court concluded that a composite reference was not possible.

From the above, it appears that Indian courts have permitted or denied a composite reference to arbitration by basing their analysis on the inter-relation between the agreements, the scope of work envisioned under these agreements, the commonality of the composite transaction, the possibility of independent performance of the agreements and the procedures for appointment of arbitrators under the agreements.

¹⁶ ONGC Ltd.v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42.

¹⁷ *Libra Automotives (P) Ltd. v. BMW India (P) Ltd.*, 2019 SCC OnLine Del 9073 : (2019) 5 Arb LR 465 (Delhi).

¹⁸ *Tamilnadu Road Sector Project II v. Ircon International Ltd. and Sumber Mitra Jaya*, 2021 SCC OnLine Mad 181.

D. Cox & Kings: Reaffirming and Restating the Application of the GOCD

In 2022, a three – judge bench of the Apex Court in *Cox & Kings Ltd. v. SAP India (P) Ltd.*,¹⁹ *inter alia*, examined the application of the GOCD to arbitral proceedings, and considered whether the principles of party autonomy and corporate personality were adequately safeguarded in Indian jurisprudence. Ultimately, the Supreme Court referred the matter to a larger bench (as detailed below) since the issue concerned a substantial question of law.

Briefly, the dispute in this case arose out of a software licensing agreement dated December 14, 2010, entered into between Cox & Kings Limited (“C&K”), a travel company, and SAP India Pvt. Ltd. (“SAP India”), a company specializing in creating and selling software for marketing, finance and human resources. One of the agreements between the parties, namely, the General Terms and Conditions Agreement (“GTA”), contained an arbitration clause, by which the parties had agreed to be governed by the A&C Act and resolve any disputes through arbitration in Mumbai.

Subsequently, since the project faced delays, C&K reached out to SAP SE, which was the main branch of SAP India, based out of Germany. SAP SE took over the project despite not been a party to the software licensing agreement or the GTA. However, since repeated extensions were required, C&K terminated the contract and demanded a refund of monies paid until that point. SAP India disputed the termination and issued a notice of arbitration. C&K subsequently, sent a fresh notice of arbitration to SAP India, seeking to make SAP SE a party to the arbitration, despite it not being a signatory to any of the agreements.

As SAP India did not appoint an arbitrator, an application under Section 11 of the A&C Act was filed by C&K. In the application, it was argued that since SAP India was a fully owned subsidiary of SAP SE and since SAP SE had undertaken full responsibility of the project, it had provided implied consent to be bound by the agreement, despite not being a signatory.

When the matter came before a three – judge bench of the Supreme Court, led by former Chief Justice of India N.V. Ramana, he referred the case to a larger bench, i.e., Constitution Bench of the Supreme Court.

¹⁹ Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1.

E. *Cox & Kings*: Simultaneous reaffirmation and evolution of the GOCD

The Constitution Bench in *Cox & Kings Ltd. v. SAP India (P) Ltd.*²⁰ (“**Cox & Kings**”) re-examined the GOCD, and the jurisprudence that had developed up until that point. While the Court upheld the application of the GOCD in India, it took a path different from *Chloro Controls*, in arriving at the same conclusion.

Particularly, the Constitution Bench disagreed with the reasoning provided in *Chloro Controls* with respect to the distinction between “party” and person “claiming through or under”. The decision in *Chloro Controls* was held to have conflated two distinct concepts of a non-signatory:

- (i) Independent entities (forming part of a group of companies) who may still be drawn into an arbitration despite being non – signatories, and;
- (ii) Entities that have a derivative status (i.e., entities claiming “through or under” a signatory).

The Supreme Court in *Cox & Kings* segregated these concepts. It held that the non-signatories “*claiming through or under*” a signatory, refers only to successors in interest who act in a derivative capacity – and not parties which act independently in their own right.

By contrast, the GOCD is a doctrine distinct and separate from the *derivative* status enjoyed by certain non-signatories. Simply stated, the GOCD is not related to or based on the phrase “*claiming through or under*” (which appears in the A&C Act – such as Sections 8, 35 and 45) and is a distinct legal doctrine applicable as a part of the Indian arbitration jurisprudence. The GOCD is based on the mutual intention of the parties (and the non-signatory) to be bound by the arbitration agreement. It promotes efficiency and expeditious resolution of disputes by dissuading non – signatories from circumventing or frustrating arbitrations, through satellite or parallel litigations.

In conclusion, the Supreme Court upheld the applicability of the GOCD and of a composite reference to arbitration, by harmoniously reading Section 2(1)(h) and Section 7 of the A&C Act. The Court clarified that the term ‘party’ defined under Section 2(1)(h) of the A&C Act, included both signatories and non – signatories to the arbitration agreement.

The Court also reinforced that while an arbitration agreement was required to be in writing, it need not necessarily be signed. Section 7(4)(b) of the A&C Act clarified that an arbitration agreement ‘in writing’ would include

²⁰ Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : 2023 SCC OnLine 1634.

communication made through electronic means, letters or telegrams, which provide a record of the agreement. These requirements were identical with those of the GOCD and therefore, the doctrine could be subsumed within Section 7(4)(b) of the A&C Act. Further, the Court held that the GOCD was a consent – based doctrine, the application of which was dependent on not only the signatories and non – signatories being part of the same corporate group, but also, upon a mutual intention of all the parties to bind non – signatories to an arbitration agreement. The Court observed that the intent in question was to be gathered from a holistic application of factors as laid down in *Discovery Enterprises*.

Finally, the Court held that since a non – signatory was now considered a party under the A&C Act (subject to the conditions laid down), it could also seek interim measures from Indian Courts under Section 9 of the A&C Act. Further, consistent with the principle of *kompetenz-kompetenz* (i.e., an arbitral tribunal's power to rule on its own jurisdiction), it was held that the arbitral tribunal also had the power to determine the application of the GOCD.

Accordingly, the judgement rendered by the Constitution Bench set down the parameters surrounding the GOCD in India. This approach would prove helpful in various multi – party and multi – contract arbitrations.

F. Subsequent Developments: Post – Cox & Kings era

Post *Cox & Kings*, High Courts across the country have applied the ruling in differing factual circumstances, including in relation to requests for interim relief, appointment of arbitrators, and in challenges to an arbitral award.

The Bombay High Court in *Devike Constructions & Developers (P) Ltd. v. Dilip Vengsarkar Foundation*,²¹ considered a dispute arising out a Memorandum of Understanding (“MoU”) entered into between the Chairman of company and a trust. The Court held that the company itself was a non – signatory to the MoU, and therefore, could not have invoked arbitration under the MoU. The Court held that only the Chairman was the signatory of the MoU and there was no clause in the MoU which suggested that he was acting on behalf of the company, or that there was any direct relationship between the trust and the company. Reliance was placed on *Cox & Kings* in assessing the express language in the agreement, together with the surrounding circumstances of the formation, performance, and discharge of the contract. The fact that the chairman had issued cheques in his own name indicated that there was no intent to bind the company. This decision is currently pending consideration in the Supreme Court.

²¹ *Devike Constructions & Developers (P) Ltd. v. Dilip Vengsarkar Foundation*, 2024 SCC OnLine Bom 2531.

Similarly, the Delhi High Court in *Vingro Developers (P) Ltd. v. Nitya Shree Developers (P) Ltd.*,²² while dealing a request for appointment of an arbitrator, considered whether directors of a company would be bound by an arbitration agreement executed by the company. The Court observed that the crux of the verdict in *Cox & Kings* was premised on common intention of the parties. The Court held that since the directors had signed the agreement in their capacity of being authorised signatories of the company, the relationship between the directors and the company was one of agent and principal, implying that there was no intention to bind the non – signatory parties to the arbitration agreement. The Court, therefore, distinguished the case from *Cox & Kings*, holding that the lack of intent to bind non – signatories was a fatal obstacle to their attempted inclusion in arbitral proceedings.

Courts have also clarified the position with regard to challenges made to arbitral awards, basis the inclusion of non – signatories at a later stage. In *Cardinal Energy & Infra Structure (P) Ltd. v. Subramanya Construction & Development Co. Ltd.*,²³ the Bombay High Court, dealt with an application for setting aside an award under Section 34, A&C Act. In this case, the parties had entered into a Memorandum of Understanding which contained an arbitration clause. Following certain disputes, Subramanya Construction and Development Co. Ltd. (“**Subramanya**”) invoked arbitration. Subsequently, Subramanya along with respondent no. 2 filed an application to implead Cardinal Energy and Infra Structure Private Ltd. (“**Cardinal**”). However, a third respondent argued that only the High Court had the power to rule on such inclusion and not the arbitral tribunal. Despite this objection, the arbitral tribunal issued an interim award impleading Cardinal. Cardinal, as a non-signatory, challenged the authority of the arbitral tribunal before the High Court. The High Court held that, pursuant to *Cox & Kings*, even if the issue of joining a non – signatory is not raised before the referring Court, the arbitral tribunal is vested with the authority to determine this issue and permit impleadment at a later stage.

Similarly, the Delhi High Court in *Gaurav Dhanuka v. Surya Maintenance Agency (P) Ltd.*,²⁴ invoked the principle of estoppel to refer a non-signatory to an arbitration proceeding. The dispute in this case was between the owner of certain commercial real estate and three companies being the developer, maintenance agency, and property manager. The developer argued that it had no corporate relations with the other parties and had entered into no arbitration agreement with the owner. The Court however, ruled that while the developer was not connected to the other two companies (i.e., while they were not connected by virtue of the GOCD), the developer would derive direct

²² *Vingro Developers (P) Ltd. v. Nitya Shree Developers (P) Ltd.*, 2024 SCC OnLine Del 486.

²³ *Cardinal Energy & Infra Structure (P) Ltd. v. Subramanya Construction & Development Co. Ltd.*, 2024 SCC OnLine Bom 964.

²⁴ *Gaurav Dhanuka v. Surya Maintenance Agency (P) Ltd.*, (2023) 7 HCC (Del) 53.

benefits through being appointed to manage and service the commercial real estate. Accordingly, the Court allowed the inclusion of the developer in the proceedings.

Interestingly, the Supreme Court in the recent case of *ASF Buildtech (P) Ltd. v. Shapoorji Pallonji and Co. (P) Ltd.*,²⁵ held that an arbitral tribunal has the authority to consider and deal with issues relating to joining of non-signatories to arbitration. ASF Buildtech Private Limited (“ABPL”) was not a signatory to the arbitration agreement executed between Black Canyon SEZ Private Limited (“BCSPL”) and Shapoorji Pallonji and Company Private Limited (“SPCPL”). SPCPL argued that based on the GOCD, ABPL should be joined to the arbitration by the tribunal. ABPL argued that any power to bind it, as a non-signatory, only lay with the Court and not the tribunal. Further, ABPL argued that since it had not even been made party to the court proceeding under Section 11 of the A&C Act for constitution of the tribunal, the tribunal lacked the authority to implead it as a party to the arbitration. The Supreme Court dismissed ABPL’s arguments, *inter alia* holding that a referral court under Section 11 of the A&C Act, is only required to make a *prima facie* determination as to the existence of an arbitration agreement. The test for applicability of the GOCD intrinsically involves a mixed inquiry of fact and law, and a nuanced and comprehensive examination of all “*material facts and attendant circumstances*”. The Court went on to hold that given that the arbitral tribunal can examine the relevant evidence and pleadings at “*greater depth and detail*” than a court at the reference stage, the tribunal is the more appropriate forum to decide whether a non-signatory should be impleaded to the arbitration.

IV. CONCLUSION

The decision in *Cox & Kings* marks a paradigm shift for transactions involving multiple parties and contracts. The Supreme Court has now drawn a clear distinction between parties “*claiming through or under*” (in a derivative capacity) and entities which may fall within a group of companies. The former essentially constitutes persons who claim in a capacity derivative to the formal signatory, and who to that extent, already have privity of contract. The latter comprises entities who though non – signatories to the arbitration agreement may nonetheless be joined to arbitral proceedings if circumstances so warrant.

As is often the case with landmark pronouncements in the arbitration space, *Cox & Kings* presents a double – edged sword. On the one hand, the ability to include non – signatories is undoubtedly pro-arbitration, since it alleviates the

²⁵ *ASF Buildtech (P) Ltd. v. Shapoorji Pallonji and Co. (P) Ltd.*, 2025 SCC OnLine SC 1016 : 2025 INSC 616.

concern of technical objections in multi – contract and multi – party projects and is aimed at preventing multiplicity of litigation in the future.

Given that increasingly complex and large corporate structures are being deployed globally, the attendant risks that a corporation which is not signatory to the arbitration agreement may be joined to arbitral proceedings, is likely to cause uncertainty. The issue will naturally resurface when executing the award, if the domestic courts in the jurisdiction have taken a different view. By way of illustration, *Cox & Kings* appears to go against interpretation by Courts in England, where the GOCD has been expressly rejected and non – signatories cannot be bound to arbitration proceedings. In such a case, where two legal systems have contradictory views, execution of awards in international commercial arbitrations (which are often governed by multiple systems of law) becomes practically difficult. For example, consider an arbitration agreement, executed between a foreign party and a party having assets in India, with its seat being London, UK and the governing law being Indian law. In such proceedings, the foreign party successfully impleads a non-signatory into the arbitration and gets an award in its favour. It consequently files for enforcement of the award in India against the award-debtor. There is a risk then, that if the award-debtor challenges the award in the seat court (UK) and obtains a stay / set-aside on the Award on the ground that a non-signatory had been impleaded in the arbitration. This would effectively hamper all execution efforts, in India despite India recognizing the GOCD.

Another hurdle is delay in arbitration that may be caused by filing frivolous applications as a dilatory tactic. For instance, a party may file for impleadment of a non – signatory and seek bifurcation of issues relating to impleadment. This will likely protract proceedings as unwilling non-signatories may further approach courts for relief against any orders of impleadment that may be passed by an arbitral tribunal.

What is beyond doubt is that the function of the Court will now be to carry out a merit-based examination, even while dealing with *prima facie* or summary applications in order to ascertain whether a proper case of joinder has been made out.

CORE-II: THE FATE OF UNILATERAL APPOINTMENTS IN PUBLIC-PRIVATE PARTNERSHIP CONTRACTS

*Sahil Narang**, *Madhavam Sharma*** & *Vidush Sinha****

Abstract

The Constitution Bench judgment dated 8 November 2024 of the Supreme Court of India in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) (CORE—II)* has cleared the air on unilateral appointments of arbitrators in public-private partnerships (PPPs) based on curated “panels” of arbitrators maintained by Public Sector Undertakings (PSUs). The judgment will perhaps be the last in a series, which has tackled principles ranging from “broad-basing” a curated panel of arbitrators in PSUs, to the interplay between arbitration clauses and the Constitution of India, more particularly the fundamental right to equality engrafted under Article 14. Many of these debates have been settled, at least for the time being in *CORE-II*.

While establishing a categorical restriction on unilateral appointments, the judgment will possibly have major repercussions for arbitration clauses in such contracts. This short article seeks to lay out the dictum of the court in *CORE-II*, understand the reasoning behind this monumental decision, examine the dissenting opinions and chart the path ahead.

Keywords: unilateral appointments, public-private partnerships, panel of arbitrators, broad-basing, panel appointment, arbitration law, constitutional law.

* Partner, Khaitan & Co. LLP.

** Principal Associate, Khaitan & Co. LLP.

*** Associate, Khaitan & Co. LLP.

INTRODUCTION

The question of fairness and neutrality in the appointment of arbitrators lies at the heart of arbitration as an alternative dispute resolution mechanism. Arbitration which is rooted in party autonomy and is thereby designed to ensure efficiency and impartiality, cannot flourish if the process is marred by the perception of bias. This issue assumes heightened significance in the context of PPPs, which serve as vital engines of India's developmental agenda. In order to boost private investment into public projects and to provide for precision in such commercial transactions, it is necessary that a fair and expeditious process is guaranteed for the resolution of disputes between the private parties and the public undertakings.

Dispute resolution clauses contained in most PPP contracts are generally boilerplate clauses which would typically favour government or public sector undertakings (PSUs) i.e., to say such clauses would provide an edge to the government entities in the appointment process. Where disputes arise between such parties, ensuring impartiality in dispute resolution process becomes a substantive concern that implicates the broader goal of making India a global hub for business. For a rapidly developing economy reliant on PPP projects in critical sectors such as infrastructure, energy, and technology, the stakes are substantial. Accordingly, where such agreements provide for the resolution of disputes through arbitration, an arbitration clause that disproportionately favours the State entity raises troubling questions about fairness and equal treatment (as also engrafted under Article 14 of the Constitution of India), and the integrity of the arbitral process. One such critical concern, the appointment of an arbitral tribunal, has come to be addressed by a five-judge Constitution Bench of the Supreme Court of India in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)* ("**CORE-II**") through its judgment dated 08 November 2024.¹

Prior jurisprudence on the independence and impartiality in the appointment of the arbitrator(s)

Prior to the 2015 amendment to the Arbitration and Conciliation Act, 1996 ("**the Arbitration Act**"), Indian arbitration law operated under a regime that accorded primacy to party autonomy even at the cost of perceived conflicts of interest. Arbitrators were subject to general standards of impartiality and independence under Section 12(3) of the Act, but the law lacked an objective framework for disqualification, permitting considerable latitude in appointments, including the permissibility of appointing one's own employee or affiliate as arbitrator. This changed with the insertion of Section 12(5) through the

¹ *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712.

Arbitration and Conciliation (Amendment) Act, 2015, which, read with the Seventh Schedule, which instituted a statutory bar against the appointment of any person falling within enumerated relationships as an arbitrator, unless the parties explicitly waived such ineligibility in writing after the dispute had arisen. This amendment, informed by the IBA Guidelines on Conflicts of Interest, marked a categorical shift from a discretionary to a mandatory model of disqualification.

Crucially, the disqualification under Section 12(5) attaches not merely to an arbitrator's independence but to their very eligibility to be appointed. Further, if a person is ineligible to act as an arbitrator under Section 12(5), they are equally disentitled from appointing another as arbitrator. The foregoing proposition was first examined by the Supreme Court in *TRF Ltd. v. Energo Engg. Projects Ltd.*² (“*TRF*”) where disputes between two private entities were sought to be referred to arbitration. The court addressed two primary issues: (1) whether a disqualified arbitrator can appoint a substitute, and (2) whether a challenge to a party's nominated arbitrator's eligibility falls within the court's jurisdiction under Section 11(6) of the Arbitration Act.³

The dispute arose when the Respondent issued a purchase order (“*PO*”) to the Appellant, securing the contract with bank guarantees. Following the dispute between the parties, the Appellant invoked arbitration under the *PO* but objected to the procedure for the appointment of arbitrators specified therein. The arbitration clause required disputes to be referred to be adjudicated by the sole arbitrator, being the buyer's Managing Director or a sole arbitrator nominated by the Managing Director.

When the issue reached the Supreme Court, it was held that if a designated arbitrator named in the contract becomes disqualified under the Act after the 2015 Amendment to the Arbitration Act, that disqualification extends to the arbitrator's authority to appoint an alternate.⁴ In effect, the Court distinguished between cases where the nominator is not the arbitrator and cases where the nominator also serves as the arbitrator. In the former, objections can be limited to procedural and eligibility issues. In the latter, as in this case, the disqualified arbitrator's appointment of a substitute would compromise the legitimacy of the arbitral process.

In *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*,⁵ (“*Perkins*”), the Supreme Court of India extended the principle laid down in *TRF Ltd.* by holding that a person who is himself ineligible to act as an arbitrator under Section 12(5) of the Arbitration and Conciliation Act, 1996, read with the Seventh

² *TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377.

³ *Id.* at 1.

⁴ *Id.* at 54.

⁵ *Perkins Eastman Architects DPC v. HSCC (India) Ltd.*, (2020) 20 SCC 760.

Schedule, is also ineligible to unilaterally appoint an arbitrator. In this case, the underlying contract was executed between the Petitioner, an Architect firm headquartered in the USA, and the Respondent, a Government of India undertaking, containing an arbitration clause which provided that disputes would be resolved by a sole arbitrator appointed unilaterally by the Respondent's Chairman and Managing Director ("**CMD**"). When disputes arose between the parties, the Chief General Manager, and not the CMD, appointed the sole arbitrator. The Applicant challenged this appointment and filed a petition under Section 11 of the Arbitration Act before the Supreme Court of India. The Supreme Court held that disqualification principles apply when the appointing party has an inherent interest in the outcome of the dispute, regardless of whether the individual was also to act as an arbitrator.⁶ The court reasoned that allowing one party the unilateral control over constitution of the arbitral tribunal involved serious risks in undermining the impartiality of the process. Distinguishing between clauses appointing a sole arbitrator and those setting up a three-member tribunal, the court noted that the risk of partiality is exacerbated in relation to those arbitration clauses envisaging appointment of a sole arbitrator. Consequently, the court annulled the arbitrator appointment mechanism in the contract, instead appointing an independent sole arbitrator.⁷

The issue of unilateral appointment of arbitrators once again came up for consideration in *Voestalpine Schienen GmbH v. DMRC Ltd.*⁸ ("*Voestalpine*") before a two-judge bench of the Supreme Court, which held that former Government employees may serve as arbitrators in disputes involving Government contracts and that such appointments do not contravene the conflict-of-interest provisions under the Seventh Schedule of the Arbitration Act. In this case, Voestalpine, a German railway technology company, was required under its contract with Delhi Metro Rail Corporation Ltd ("**DMRC**"), a government entity, to choose an arbitrator from a panel of arbitrators provided by DMRC. Following the emergence of disputes, DMRC had offered a panel of five arbitrators, all of whom were retired engineers from various Government departments or public sector undertakings (PSUs), including Indian Railways. Voestalpine challenged this panel of arbitrators, arguing that appointment process was hit by Section 12 of the Arbitration Act, specifically Entry 1 of the Seventh Schedule, which bars persons from acting as arbitrator(s), if they are employee(s), consultant(s), or advisor(s) to a party involved in the arbitration.

The Supreme Court held that the selection of retired engineers from Government departments or PSUs did not breach Section 12(5) of the Act merely because they were former Government or PSU officers, if such individuals have no current affiliation or direct employment history with DMRC. Thus, it held that private parties cannot object to an arbitrator's nomination by

⁶ *Id.* at 21.

⁷ *Id.* at 30.

⁸ *Voestalpine Schienen GmbH v. DMRC Ltd.*, (2017) 4 SCC 665.

Government entities in disputes, provided that the nominated arbitrator has no direct association with the specific Government entity involved in the dispute.⁹ Though it was held that such curated panels of arbitrators were permissible, the Supreme Court also took notice of the fact that the panel was restricted only to former or current employees of PSUs. To instil confidence in the other side regarding impartiality, it was observed that such panels should include people from legal as well as technical backgrounds to achieve the aim of “broad-basing” appointments.¹⁰

While in view of the facts before the Supreme Court of India in *Voestelpine*, the court held that the panel of arbitrators prepared by the DMRC was sufficiently broad-based, they noted that the parties should be given a choice to nominate an arbitrator from the entire list – and not just from a list of five names forwarded by DMRC. Consequently, the Supreme Court held that:

“In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.”

However, the Supreme Court of India did not consider the constitutional validity of the appointment mechanism contained in the arbitration clause in this case, since such issues do not appear to have been raised and considered by the Court.

CORE-I AND THE REFERENCE TO A LARGER BENCH

Subsequently, in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML JV*¹¹ (**“CORE-I”**), the Supreme Court scrutinised an arbitration clause in a contract which prescribed the appointment of a

⁹ *Id.* at 26.

¹⁰ *Id.* at 29.

¹¹ *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML JV*, (2020) 14 SCC 712.

three-member arbitral tribunal composed solely of retired railway officers. The clause provided that, upon receiving a valid demand for arbitration, the Railways must provide the contractor with a panel of at least four retired railway officers, all eligible to serve as arbitrators. Within 30 days, the contractor may then select two names from this list as potential nominees. The General Manager was required to appoint at least one of the contractor's chosen nominees and simultaneously appoint the remaining arbitrators, designating one as the presiding arbitrator, thereby forming a three-member tribunal within a set timeframe.

Two key issues were at the forefront. *First*, the Supreme Court addressed whether appointing retired railway officers as arbitrators conflicted with Section 12(5) of the Arbitration Act, which limits the appointment of arbitrators with potential biases, as outlined in the Seventh Schedule. Citing *Voestalpine (2017)*, the Supreme Court concluded that Section 12(5) does not preclude former employees from serving as arbitrators merely by virtue of their prior employment.¹² The second issue involved whether the General Manager's role in appointing arbitrators violated impartiality principles established in *TRF* and *Perkins*. The Supreme Court upheld the validity of the arbitration clause citing the inapplicability of the aforesaid precedents, reasoning that the contractor's right to select two arbitrators from the list counterbalanced the General Manager's authority, ensuring the preservation of procedural fairness.¹³ Consequently, notwithstanding the limitations imposed on a party's ability to nominate an arbitrator of its choice and the State's right to appoint a majority of the arbitral tribunal, the Supreme Court affirmed the validity of the arbitration agreement.

The correctness of *CORE-I* was doubted by a three-judge bench of the Supreme Court in *Union of India v. Tania Constructions Ltd.*¹⁴ The court *prima facie* disagreed with *CORE-I* observing that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that, notwithstanding this incapacity, appointments may nonetheless be valid depending on the facts of the case.¹⁵ Accordingly, the three-judge bench directed requested the Chief Justice of India to constitute a larger bench to look into the correctness of *CORE I*. A similar direction was passed by another three-judge bench of the Supreme Court in *JSW Steel Ltd. v. South Western Railway*.¹⁶

¹² *Id.* at 27.

¹³ *Id.* at 38.

¹⁴ *Union of India v. Tania Constructions Ltd.*, (2023) 12 SCC 330.

¹⁵ *Id.* at 2.

¹⁶ *JSW Steel Ltd. v. South Western Railway*, 2022 SCC OnLine SC 1973.

Thereafter, in *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*,¹⁷ the Supreme Court held that an arbitration clause may be rendered unenforceable if it contravenes constitutional mandates, particularly those enshrined in Article 14 of the Constitution of India. The reasoning in *Lombardi* merits a more searching examination than it has thus far received in the literature, particularly given its anticipatory role in the reasoning later adopted in *CORE-II*. While the decision is often cited for its rejection of unilateral arbitrator appointments under Section 12(5) of the Arbitration and Conciliation Act, its deeper jurisprudential import lies in its invocation of Article 14 to strike down arbitration clauses that, in form or effect, permit structurally impartial process of dispute resolution.

The arbitration clause in *Lombardi* facilitated the unilateral appointment of an arbitrator by a government functionary and imposed a pre-deposit requirement of 7% of the total claim amount on the party initiating arbitration. The Court found both conditions in the arbitration clause to be unlawful. The unilateral appointment mechanism was invalidated under Section 12(5) of the Arbitration and Conciliation Act, 1996, which safeguards party autonomy and impartiality in tribunal constitution. Concurrently, the pre-deposit requirement was struck down as arbitrary, irrational, and violative of Article 14. Notably, the Court also invoked Section 23 of the Indian Contract Act, 1872, to declare such contractual terms unenforceable on grounds of unconscionability and public policy. In doing so, the judgment traversed beyond conventional arbitral doctrine, suggesting that arbitral agreements embedded with structurally unequal procedures may fall afoul of constitutional principles. The reasoning thus foreshadowed the more elaborate constitutional scrutiny later undertaken in *CORE-II*, wherein the Supreme Court entrenched the view that contractual mechanisms for arbitral appointment must adhere not merely to statutory mandates but also to the broader normative framework of constitutional equality.

Further, in the wake of the apex court's judgments in *Voestalpine* and *CORE-I*, the Expert Committee chaired by Dr. T.K. Viswanathan issued its Report in February 2024,¹⁸ noting the neutrality concerns stemming from such mechanisms for constituting arbitral tribunal, thereby recommending certain amendments to Section 11 of the Arbitration Act. The Expert Committee proposed amending Section 11 of the Arbitration Act through insertion of three new sub-sections: *firstly*, Subsection (2A) which mandated equal rights for parties in appointing arbitrators, invalidating unilateral appointment clauses unless waived in writing after the dispute has arisen; *secondly*, Subsection (2B) ensures equal access to panels of arbitrators, prohibiting one party from mandating selections from its curated list of a panel of arbitrators, with sim-

¹⁷ *Lombardi Engg. Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.*, (2024) 4 SCC 341.

¹⁸ Shri Dr. T.K. Viswanathan, *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit*, Feb. 7, 2024.

ilar waiver provisions; and *thirdly*, Subsection (2C) that bars the appointment of individuals with past or present relationships with either party unless a two-year cooling-off period is observed, allowing waivers post-dispute by written agreement.

High Court jurisprudence on independence and impartiality

There exist various High Court judgments which tackle similar pressing questions of independence and impartiality involving PPP contracts as well as private contracts between the parties.

In *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*,¹⁹ (“*BBNL*”) the High Court of Delhi upheld a unilateral appointment of an arbitrator, on the ground that the party which acquiesced to an appointment procedure which required choosing arbitrators from a panel curated by the petitioner could not have been unaware of the statutory bar of Section 12(5). On these grounds, it may not object to the appointment at a later stage.²⁰ This judgment was eventually overruled by the Supreme Court,²¹ where the apex court found that Section 12(5) required an express waiver, which had not been given by the parties.

In *SMS Ltd. v. Rail Vikas Nigam Ltd.*²² (“*SMS*”) the High Court of Delhi held an arbitration clause invalid in light of Section 12(5) of the Arbitration Act as a panel comprising of as many as thirty-seven potential arbitrators did not satisfy the ‘broad-basing’ principles in *Voestalpine*. This was due to a vast majority of this panel consisting of retired Railway employees or officers, with only eight individuals not being connected to the Railways in that manner. The sheer number of arbitrators in a proposed panel would hence not appear to be the only consideration in deciding questions of “broad-basing.”²³ Rather, the court considered that the panel should also consist of arbitrators from diverse backgrounds and knowledge.

Further, in *Iworld Business Solutions (P) Ltd. v. DMRC Ltd.*,²⁴ (“*Iworld*”) the High Court of Delhi also noted the shadow of doubt cast on *CORE-I* by *Tantia Constructions*. Despite this observation, it went on to hold a unilateral appointment clause based on a PSU-curated panel to be valid anyway, since *CORE-I* had not been overruled yet.

¹⁹ *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, 2017 SCC OnLine Del 11905.

²⁰ *Id.* at 21.

²¹ *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755.

²² *SMS Ltd. v. Rail Vikas Nigam Ltd.*, (2020) 1 HCC (Del) 304; 2020 SCC OnLine Del 77.

²³ *Id.* at 33.

²⁴ *Iworld Business Solutions (P) Ltd. v. DMRC Ltd.*, 2021 SCC OnLine Del 2730.

In *Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.*²⁵ (“**Margo**”) the High Court of Delhi found that an arbitration clause providing for a panel of ten arbitrators (all of whom were ex-railway employees) presented to the respondent by the petitioner was not sufficiently “broad-based” (as established in *Voestalpine*) and was restrictive in choice, noting that the difficulties encountered in the appointment process by the petitioner in this case were similar to the issues faced by the petitioner in *Voestalpine*. The principles in *Voestalpine* were noted to not have been overruled by *CORE-I* and it was required that as per the principles in *TRF* and *Perkins*, any failures to adhere to the *Voestalpine* principles would require intervention under Section 11 of the Act.²⁶ Regarding the number of arbitrators, it also held that permitting the respondent to effectively nominate two-thirds of the arbitral tribunal while the petitioner could only choose one-third of the tribunal from a panel of ten arbitrators, would not fulfil the counterbalancing requirement of the parties in appointment, as per *TRF* and *Perkins Eastman*.

In a similar fact situation, the High Court of Delhi in *Sri Ganesh Engg. Works v. Railways*²⁷ (“**Ganesh Engineering**”) while referring to *Margo* (supra) also held that a panel of four retired railway officers proposed by the petitioner, from which it may select only one as an arbitrator, ran contrary to the principles in *Voestalpine*, *TRF* and *Perkins Eastman*.

Relying on the High Court of Delhi’s reasoning for distinguishing *CORE-I* from *Voestalpine* in *Margo Networks*, the High Court of Delhi in *Braithwaite Burn and Jessop Construction Co. Ltd. v. Railways*²⁸ (“**Braithwaite**”) subsequently noted that providing for an arbitrator to be chosen from a panel of four retired Railway officers was manifestly not broad-based and that *CORE-I* had not overruled the application of the *Voestalpine* principles.²⁹

The law on unilateral appointment of arbitrators had become increasingly unsettled, with conflicting decisions pulling in opposite directions. While cases like *Iworld* and *BBNL* upheld such clauses, others like *Margo Networks* and *Braithwaite* rejected them as incompatible with principles of fairness. This divergence created confusion, particularly for public-private partnership stakeholders, who depended on clear, predictable dispute resolution mechanisms. Accordingly, the referral to a Constitution Bench was both timely and necessary. *CORE-II* thus emerged as a decisive effort to bring clarity and coherence to a fractured area of arbitration law.

²⁵ *Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.*, 2023 SCC OnLine Del 3906.

²⁶ *Id.* at 26, 35.

²⁷ *Sri Ganesh Engg. Works v. Railways*, 2023 SCC OnLine Del 7574.

²⁸ *Braithwaite Burn and Jessop Construction Co. Ltd. v. Railways*, 2023 SCC OnLine Del 8176.

²⁹ *Id.* at 14.

CORE-II: ANALYSIS OF MAJORITY JUDGMENT

A five-judge Constitution Bench of the Supreme Court in *CORE-II* was constituted by the Chief Justice of India to address the various issues on the unilateral appointment of arbitrators. The issues and the findings of the Constitution Bench are summarized below:

- A. *Issue 1: Whether an appointment process which allows a party who has an interest in the dispute to unilaterally appoint a sole arbitrator, or curate a panel of arbitrators and mandate that the other party select their arbitrator from the panel is valid in law?*

The Supreme Court emphasised that an arbitration clause which allows one party, particularly a party with a direct interest in the dispute, to unilaterally select a sole arbitrator or restrict the other party's choices by curating a panel of arbitrators for choice of the opposite party violates the principles of fairness and equal participation.

i. **The unilateral appointment of a sole arbitrator is impermissible**

The Supreme Court's analysis relating to this issue hinged on the concept of party autonomy, wherein it recognised that while parties are generally free to determine the number of arbitrators, their choice inherently affects the procedural fairness of the arbitral proceedings.

It was held that the unilateral appointment of a sole arbitrator poses significant concerns regarding the impartiality and fairness of the arbitration process. The Supreme Court reasoned that such appointments could lead to a perceivable risk of bias, which is particularly detrimental to the party which does not yield any power in relation to the appointment procedure of the sole arbitrator. This risk is accentuated when the appointing party holds a financial stake in the arbitration's outcome, which could potentially steer the proceedings in a manner that could compromise the arbitrator's neutrality.³⁰ The Supreme Court highlighted that even the mere possibility that the arbitrator, owing to its position in relation to one party, might avoid rendering decisions that displease such an appointing party, is sufficient to manifest a real threat of bias.

The Supreme Court emphasised that equal treatment of the parties at the appointment stage is essential for ensuring impartiality throughout the proceedings.³¹ The ability of one party to unilaterally appoint a sole arbitrator was deemed contrary to these principles, as it precludes balanced participation of the parties in the appointment process. Consequently, the bench also held that clauses allowing unilateral appointments of sole arbitrators are invalid as they

³⁰ See *Supra* note 1 at 128.

³¹ *Id.* at 129.

contravene the foundational principles of impartiality and equal treatment in arbitration.³²

ii. Parties cannot be compelled to nominate all of its arbitrators from a panel of arbitrators maintained by the other party

Clauses providing for a three-member arbitral tribunal generally permit each party to nominate an arbitrator, with the third arbitrator selected through mutual agreement, ensuring balanced participation and adherence to due process. This arrangement upholds impartiality by allowing each party an equal stake in the tribunal's composition.

However, in cases of the arbitration agreements in disputes such as *Voestalpine* and *CORE-I*, the one-sided curation of a panel would inherently skew this balance in favour of the party that maintains such a panel. When a party must choose its arbitrator from a panel or a list which is pre-determined by the opposing party, the autonomy and the principle of equal treatment under Section 18 of the Arbitration Act get constrained and such scenarios cannot be considered as provision of an effective choice of arbitrators. This practice denies the second party any meaningful involvement in the process of nominating an arbitrator of its choice, which creates an asymmetry which fosters justifiable doubts about the arbitrators' independence and impartiality.³³

The Supreme Court specifically addressed clauses that restrict one party from choosing its arbitrator from a list curated by the opposing party (such as in *CORE-I*). This restriction limits the contractor's choices, further exacerbated when the General Manager, an interested party, exercises final selection power over arbitrators, including the presiding arbitrator. The court held that such arrangements lack procedural fairness and are inherently biased, thereby undermining the integrity of the arbitral tribunal. Consequently, the act of curation of such a panel by an interested party, coupled with a mandatory selection of the tribunal from such a panel, inherently risks perceptions of partiality.

While the Supreme Court concluded that the Arbitration Act does not prohibit public sector undertakings (PSUs) from creating panels of arbitrators, it bars arbitration clauses which mandate the selection of arbitrators exclusively from such panels. To preserve procedural neutrality, parties may only impose such limitations if the other party expressly waives its right to an independent tribunal after the disputes having been arisen in between them, thereby affirming the *nemo judex* rule.³⁴

³² *Id.*

³³ *Id.* at 132.

³⁴ *Id.* at 137.

B. *Issue 2: Whether the principle of equal treatment of parties applies at the stage of the appointment of arbitrators?*

The Supreme Court addressed the issue of equal treatment at the stage of appointment of the arbitral tribunal by analysing the scope and applicability of Section 18 of the Arbitration Act which mandates that “*parties shall be treated with equality*,” thereby embedding principles of natural justice into the arbitral process. Citing *Union of India v. Vedanta Ltd.*,³⁵ the Court noted that fair and equal treatment forms a non-derogable foundation of the arbitral process, which applies comprehensively across all procedural aspects of arbitration, including the appointment of arbitrators.³⁶

Referencing global arbitral jurisprudence, the court noted that certain countries, including Germany, Spain, and the Netherlands, permit judicial intervention when an asymmetrical appointment clause disadvantages one party. The court also referenced precedents like *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*³⁷ delivered prior to the 2015 amendment, wherein a clause allowing one party to appoint its own employee as sole arbitrator was upheld. While the two-judge bench in *Raja Transport* held that Sections 11, 12, and 18 did not disqualify employees of parties from serving as arbitrators, the court emphasised that Section 12(5) of the Arbitration Act, post-amendment, now prohibits such appointments.³⁸

Additionally, relying upon *Union of India v. Madras Bar Assn.*,³⁹ the Court reasoned that Article 14 extends procedural equality to quasi-judicial forums like arbitral tribunals, before which equal treatment of parties ensures access to an impartial adjudicatory process.⁴⁰ Arbitration’s adversarial nature, as the court explained, necessitates “formal equality” to prevent any imbalance in arbitrator appointments, as the existence of unequal influence could skew the adjudicative outcome of the dispute.

Consequently, the Court posited that without procedural equality at the appointment stage, one party may lack an equal voice in securing an unbiased tribunal. A reading of Sections 12(1), 12(5), and 11(8) of the Arbitration Act collectively mandate that both parties participate equally to achieve such independence and impartiality in the arbitral process. The Supreme Court concluded that equal treatment of parties in the conduct of the arbitration proceedings, as is mandated by Section 18 of the Arbitration Act, also inherently applies to the procedure of constitution of arbitral tribunals. Accordingly, it

³⁵ *Union of India v. Vedanta Ltd.*, (2020) 10 SCC 1.

³⁶ *Id.* at 67.

³⁷ *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520.

³⁸ *Id.* at 79.

³⁹ *Union of India v. Madras Bar Assn.*, (2010) 11 SCC 1; (2010) 156 Comp Cas 392.

⁴⁰ *Id.* at 70.

follows that no party may unilaterally shape the composition of the arbitral tribunal.⁴¹

C. Issue 3: Whether an appointment process in a public-private contract which allows a government entity to unilaterally appoint a sole arbitrator or majority of the arbitrators of the arbitral tribunal is violative of Article 14 of the Constitution?

While the Supreme Court recognises that arbitration is a fundamentally private dispute resolution mechanism, it reasoned that when ensnared in the statutory framework, arbitration must conform to the principles of equality and fairness as dictated by both the Arbitration Act and the Constitution of India. The Supreme Court's reasoning pivots on the jurisprudence that while arbitration agreements are commercial in nature and generally immune to disparities in bargaining power, they must nevertheless align with the non-arbitrariness mandate when involving governmental entities. Citing *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*⁴² the court observed that contracts which are opposed to the public policy are void, thereby extending the analysis in *Brojo Nath Ganguly* to arbitration agreements, scrutinising it to decipher for unconscionability under Section 23 of the Indian Contract Act, 1872.⁴³

The court reasoned that in public-private contracts, by opting for arbitration, the government and its entities commit to resolving disputes with private contractors through this mechanism. Given the public nature of government activities, it is essential that any such contract, including arbitration agreements contained therein, adhere to fair and non-arbitrary practices. Resultantly, every act of a public authority or any action involving a public element must embody fairness and non-arbitrariness, thereby obligating government agencies to maintain these principles in all aspects of arbitration, including in the process of the constitution of an arbitral tribunal.

The court emphasised the inherent risk of bias when a government entity is permitted to unilaterally appoint a sole arbitrator or control the majority of the arbitration panel. The court noted that such unilateral appointment clauses fail to serve as a genuine alternative to traditional judicial proceedings, which compromises the integrity which is expected of quasi-judicial functions performed by arbitral tribunals. Furthermore, these clauses were criticised for violating the *nemo iudex* rule, which safeguards against any decision-maker in a judicial process having a vested interest in the outcome. As a result, the court held that unilateral appointment clauses in public-private arbitration

⁴¹ *Id.* at 74.

⁴² *Central Inland Water Transport Corpn. v. Brojo Nath Ganguly*, (1986) 3 SCC 156: (1986) 60 Comp Cas 797.

⁴³ *Id.* at 143.

agreements are in conflict with Article 14 of the Constitution due to their arbitrary nature.⁴⁴

SEPARATE OPINIONS

The judgment of the Supreme Court was not unanimous. Justice Hrishikesh Roy and Justice Narasimha dissented from the majority on various points. Justice Hrishikesh Roy in his separate opinion noted the distinction between the concepts of ineligibility of an arbitrator and that of unilateral appointments. He reasons that arbitration agreements which provide for the unilateral appointment of arbitrators are also a manifestation of the concept of party autonomy. Consequently, so long as an arbitrator's appointment does not violate the terms of the Seventh Schedule, such a unilateral appointment clause would not be invalid. Additionally, he observed that the independence and impartiality of the arbitral tribunal has to be examined within the four corners of the Arbitration Act – and not tested on constitutional principles at the stage of Section 11. He also cited Section 5 read with Section 11(6A), to reason that the legislative intent behind the Arbitration Act was to limit judicial intervention in arbitration.⁴⁵

While agreeing with the majority on the limited point that the principle of equality pervades the entire scheme of the Arbitration Act, he disagrees with the idea of importing constitutional principles into the Arbitration Act and instead cites Sections 11(8) and 12 of the Arbitration Act, which require mandatory disclosures by the arbitrator. In his view, these two provisions sufficiently take care of concerns of impartiality, independence and therefore, the equality of the parties.⁴⁶ His view opposes using constitutional principles for interventions in the arbitral process at the stage of deciding a Section 11 application under the Arbitration Act. He noted in his opinion that India had outlawed unilateral appointment clauses under Section 12(5). However, such a bar may be waived by parties with mutual and express agreement, as per the proviso to Section 12(5). His opinion states that the Arbitration Act does not *per se* outlaw such clauses, and there would have been no need to insert a proviso allowing for a waiver of the ban on such clauses through agreement of the parties. As long as an arbitrator is 'eligible' (as distinguished from being unilaterally appointed) under the Seventh Schedule, the unilateral appointment is permissible.⁴⁷

Similarly, Justice Narasimha broadly differs from the majority in two aspects: *First*, an arbitration agreement which does not establish an

⁴⁴ *Id.* at 145.

⁴⁵ *Id.* at 174, separate opinion of J. Roy.

⁴⁶ *Id.* at 22.

⁴⁷ *Id.* at 41.

independent, impartial tribunal may be void under Section 23 of the Indian Contract Act, 1872. However, principles such as the likelihood of bias which have evolved in the context of public law (constitutional law and administrative law) should not be applied to test the validity of arbitration agreements.⁴⁸ *Second*, he posits that the court ought not to have passed a blanket declaration invalidating all such arbitration agreements which provide for unilateral appointment or which force one party to constitute the tribunal from a list curated by them. According to Justice Narasimha, the determination of invalidity of an arbitration agreement, must be done by a court on a case-to-case basis, on an application of the parties under Sections 11, 14 or 34. He espoused the view that courts must guide themselves by reading Section 12 along with the Fifth and Seventh Schedule in such cases to determine whether a unilateral appointment is opposed to the principle in public policy of “access to justice.” A defence of party autonomy or binding contract is not a defence to such a public policy violation. The courts must hence decide on a case-to-case basis whether a unilateral appointment goes against this public policy duty incorporated into the scheme of the Arbitration Act, and the usage of constitutional or administrative law principles is unnecessary.

It emerges from the above reasoning that the minority opinions resisted the application of public law to the process of constitution of arbitral tribunals in PPP contracts and its introduction into the realm of arbitration and contract law. This reasoning offered in the minority judgments may be contrasted with the court’s analysis in *Lombardi* where the court held that Article 14 of the Constitution occupies a higher normative position than the Arbitration and Conciliation Act, 1996 or any contractual clause. On that basis, the Court invalidated a clause permitting unilateral appointment, treating equality under the Constitution as a controlling principle. Notably, the dissenting opinions in *CORE-II* did not engage with *Lombardi*, a case that squarely addressed the intersection of constitutional law and arbitral procedure. The omission is significant as *Lombardi* demonstrates that the invocation of constitutional guarantees, such as the right to equality, within the arbitral framework is not without precedent.

CONCLUSIONS OF THE COURT IN *CORE-II*

It emerges that the five-judge Constitution Bench of the Supreme Court has broadly agreed on the idea that impartiality of an arbitrator and the equality of parties should pervade in the whole arbitration process. This extends to the appointment process as well. There is some divergence on how this equality is to be achieved, keeping in mind the dissenting opinions. Regarding the empanelment of potential arbitrators by public sector / government enterprises, there has not been an explicit restriction on the aforesaid practice. The majority has,

⁴⁸ *Id.* at 270, separate opinion of J. Narasimha.

however not permitted a situation where arbitrators are to be selected only from such a panel curated by such government / public entities.

Further, the majority of the Constitution Bench has chosen to hold unilateral appointments to be bad in law, since it hinders equal participation in the appointment process by both parties and casts doubts over the tribunal's independence and impartiality. Disagreeing with the law laid down in *CORE-I*, the majority held that forcing a party to select arbitrators from a curated panel is against equal treatment of parties and fails to adequately counterbalance party interests. Going into constitutional law, it then held that such unilateral appointment clauses also went against Article 14 of the Constitution in case of a PPP contract.

Specifically on unilateral appointments, the majority ruled that the requirement of an express waiver by parties under Section 12(5) of the Arbitration Act also extends to situations where a unilateral appointment is challenged on grounds of bias. Parties, however, can waive the allegation of bias and not apply the *nemo iudex* rule after the dispute arises.

CRITICAL COMMENTS

In the United States of America, the enforceability of arbitration agreements which provide rights to a party to unilaterally appoint arbitrator(s) is subject to application of general contract law. Consequently, such agreements may be declared as void for unconscionability on a case-to-case basis. The position as of recent times, remained grey, as some courts have refused to enforce such agreements,⁴⁹ whereas other courts have upheld the validity of arbitration clause providing for the unilateral right to appoint arbitrators,⁵⁰ where parties had equal bargaining power.⁵¹ Conversely, the landmark ruling by the French *Cour de Cassation*, in *Dutco v. BKMI and Siemens*⁵² held that a clause requiring more than one counter-party to jointly nominate an arbitrator was contrary to French public policy and thus unconscionable in law due to the violation of the principle of party equality. However, such an appointment could be waived subsequent to the arising of a dispute. Similarly, in Germany, the strict equality of the parties in the appointment of an arbitral tribunal is considered as a

⁴⁹ *Trout v. Organización Mundial de Boxeo, Inc.*, 965 F. 3d 71 (1st Cir. 2020); *Murray v. United Food & Commercial Workers International Union*, 289 F. 3d 297 (4th Cir. 2002); *Beltran v. Aupaircare, Inc.*, 907 F. 3d 1240 (10th Cir. 2018); *Sonic-Calabasas A., Inc. v. Moreno*, 311 P. 3d 184 (Cal. 2013).

⁵⁰ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1808 (3rd edn., Kluwer L. Int'l 2020); *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012).

⁵¹ Himanshu Raghuvanshi & Krishnanunni U., *Unilateral Arbitrator Appointments in the US – A Tussle between “Unconscionability” & “Party Autonomy”*, *Am. Rev. Int'l Arb.* (Feb. 22, 2021).

⁵² *Siemens AG & BKMI Industrienlagen GmbH v. Dutco Consortium Construction Co. Ltd.*, *Cass. Ire civ.*, Jan. 7, 1992, Nos. 89-18.708 & 89-18.726 (Fr.).

matter of public policy. In cases where neither the arbitration agreement nor the relevant arbitration rules included specific provisions to guarantee this strict equality in the appointment process, Section 1034(2) of the Code of Civil Procedure (ZPO) is generally applied by the courts to appoint the entire tribunal. This is similar to the position of law now in India, in view of the Judgment in *CORE-II*.

In the case of PPP contracts, the Supreme Court has built upon this principle of equality and put to rest the practice of mandating the choice of arbitrators from curated panels. The Supreme Court's dictum in invalidating the mechanism of appointment in arbitration agreements which mandate the unilateral appointment of arbitrators is likely to have massive repercussions for PPP contracts entered into by PSUs. It is undeniable that a catena of disputes have arisen from such unilateral clauses, particularly in cases where public entities relating to the Railways or PSUs are parties. Given that the Supreme Court has now settled the position of law on this issue, in the PPP arrangements which contain an arbitration agreement, private concerns, including foreign concerns, are likely to see India as a jurisdiction which promises and respects equality and party autonomy as a principle of foremost importance. The same is also likely to boost the confidence amongst the foreign entities and potential investors in the public projects. It would be interesting to see the impact of the same and potential challenges which will likely be faced owing to arbitration clauses with unilateral appointment present in the existing PPP contract. More interesting would be to see the effect of CORE II on the challenges and enforcement proceedings, against / for the arbitral awards passed by arbitral tribunal(s) (unilaterally constituted) in the pre-CORE era.

JUDICIAL REVIEW OF ARBITRAL AWARDS THROUGH CURATIVE PETITIONS: REASSESSING FINALITY IN INDIAN ARBITRATION

Shalaka Patil & Harsh Khanchandani***

Abstract

The Supreme Court's judgment in DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd. marks a significant shift in India's arbitration jurisprudence by revisiting the permissible extent of judicial intervention in arbitral awards, particularly through the rarely invoked curative petition. In this decision, the Supreme Court for the first time permitted the invocation of its curative jurisdiction to set aside a commercial arbitral award, which remains an unprecedented invocation in the arbitration context. This case redefines the judicial boundaries traditionally observed in arbitration law, raising critical questions about finality, patent illegality, and procedural fairness. The Court held that while curative petitions are extraordinary remedies meant only for exceptional circumstances, their use is justified in instances of egregious miscarriage of justice. Here, the Court concluded that its prior decision reinstating an arbitral award was flawed, as the award ignored crucial contractual terms and statutory evidence, making it perverse and patently illegal. While the judgment attempts to clarify when curative jurisdiction may be exercised, it also opens a new front of debate about the consistency and predictability of judicial intervention in arbitration. This decision, therefore, serves as both a doctrinal recalibration and a cautionary tale for parties relying on the conclusiveness of arbitral outcomes.

* Partner, Trilegal.

** Associate, Trilegal.

Keywords: Arbitration, Curative Petition, Patent Illegality, Judicial Intervention, Finality of Arbitral Award.

I. INTRODUCTION

The decision in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*¹ marks a pivotal judgment in India's arbitration landscape. This landmark ruling by the Supreme Court examined the scope of the Supreme Court's jurisdiction to review arbitral awards, particularly in light of curative petitions. This is a somewhat unique and new proposition for Indian arbitration jurisprudence, which had not, until now, seen many curative petitions in arbitral award challenges. Although curative petitions allow for extraordinary remedies intended to correct grave miscarriages of justice, they have historically been rare in any context, and virtually unheard of in arbitration. By allowing one in this case, the Court has opened the door, at least slightly, to a new layer of judicial scrutiny in arbitral matters.

This move has understandably sparked debate. One of the cornerstones of arbitration is finality: the idea that once a dispute is resolved through arbitration, the matter should be put to rest. The Preamble to the Arbitration and Conciliation Act, 1996 ("**1996 Act**") and the 246th Law Commission Report emphasise minimal court intervention as key to maintaining the arbitral process's speed, efficiency, and autonomy.² Adding curative petitions to the list of potential post-award remedies may risk undermining this foundation by introducing another round of litigation, precisely what arbitration is designed to avoid. Seen either way, this case has significant implications for Indian arbitration law since it examines with renewed vigour the often-used ground of "patent illegality" and the circumstances under which the Supreme Court can intervene.

II. FACTS OF THE CASE

In 2008, Delhi Airport Metro Express Pvt. Ltd ("**DAMEPL**" or "**concessionaire**") signed a contract ("**Concession Agreement**") for the construction, operation and maintenance of the Delhi Airport Metro Express Ltd. ("**AMEL**"), forming a public-private partnership to provide metro rail connectivity between New Delhi Railway Station and Indira Gandhi International

¹ *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357.

² JUSTICE R.S. BACHAWAT, *LAW OF ARBITRATION AND CONCILIATION* (6th edn., LexisNexis, New York, 2017); Arbitration and Conciliation Act of 1996 (India), Statement of Objects and Reasons; Arbitration and Conciliation Act, § 5 (1996) (India); UNCITRAL Model Law on International Commercial Arbitration (1985) art. 34; LAW COMMISSION OF INDIA, *Amendments to the Arbitration and Conciliation Act, 1996* (Law Commission No. 246, 2014).

Airport. The public-private partnership was formed as a framework that typically places significant construction, operational, and financial risks on the private concessionaire during the concession period, with the ultimate transfer of assets back to the public authority.

On July 8, 2012, DAMEPL ceased operations due to safety concerns. On July 9, 2012, it sent a notice to Delhi Metro Rail Corporation (“**DMRC**”), listing eight defects attributed to deficient designs and faulty construction (“**cure notice**”), which DAMEPL claimed materially impacted its obligations under the Concession Agreement. The notice required DMRC to cure the defects within 90 days, indicating that failure would result in a “material breach” and a “DMRC event of default” as per the Concession Agreement entitling DAMEPL to terminate the agreement. On October 8, 2012, DAMEPL issued a termination notice for the Concession Agreement.

Subsequently, the dispute led to the initiation of arbitration proceedings on the legality of the termination notice under the Concession Agreement. On May 11, 2017, a three-member Arbitration Tribunal rendered a unanimous award in favour of DAMEPL (“award”). The award entitled DAMEPL to a total of ₹2,782.33 crores as a termination payment, along with various reimbursements and fees.

III. PROCEDURAL HISTORY

Against the arbitral award, DMRC filed an application under Section 34 of the 1996 Act in the Delhi High Court. The single judge dismissed this petition, prompting DMRC to appeal under Section 37 to a division bench. In its ruling, the division bench partially set aside the award, determining that it was tainted by perversity and patent illegality.

Subsequently, DAMEPL filed a special leave petition under Article 136 of the Constitution of India, 1950, against the division bench’s decision. A two-judge bench of the Supreme Court granted the appeal and reinstated the award. Subsequently, DMRC filed a review petition challenging this decision, which was later dismissed, prompting the filing of a curative petition.

The curative petition raised three key issues:

- (i) Was the curative petition maintainable?
- (ii) Whether the Supreme Court acted justifiably in reinstating the arbitral award set aside by the High Court’s division bench on the grounds of patent illegality.
- (iii) Whether the High Court’s division bench rightly exercised its jurisdiction under Section 37 in setting aside the award for patent illegality.

IV. COURT'S HOLDING AND OUR ANALYSIS

A. Maintainability of the Curative Petition

The Court, while affirming the maintainability of the curative petition, emphasised its limited scope while considering such petitions as established in *Rupa Ashok Hurra v. Ashok Hurra*.³ Significantly, in the decision of *Rupa Ashok*, the Supreme Court established stringent procedural safeguards to govern the exercise of curative jurisdiction and prevent its abuse. These safeguards include a certification by a senior advocate confirming that the petition meets the threshold criteria for invoking curative jurisdiction and a preliminary consideration in chambers by the Court's three senior-most judges and the judges who delivered the impugned judgment, if any. These procedural requirements are intended to maintain the remedy's exceptional nature while ensuring that curative petitions do not become a routine stage of litigation.

The Court noted in the decision that such petitions are intended to prevent the abuse of judicial processes, rectify significant miscarriages of justice, and uphold principles of natural justice. Thus, such curative petitions should only be entertained in exceptional circumstances where a failure to do so would be oppressive to judicial conscience and could lead to irreparable injustice. Additionally, the Court referenced a concurrent opinion by Justice Banerjee in *Rupa Ashok*, which outlined a similar criterion of manifest injustice for exercising jurisdiction under Article 142 when considering a curative petition.

The Supreme Court's decision on the maintainability of curative petitions emphasises that, while the judiciary must be accessible, it must also be prudent in revising final decisions. The principles established in *Rupa Ashok* continue to guide the Court in ensuring that curative petitions are reserved for the most exceptional of instances, protecting the sanctity of decisions by the courts while offering a tool for resolving egregious and grave injustices. This leads to the critical question: Was this case appropriate for invoking the Court's curative jurisdiction? What facts of the case made it such a fit case? The Supreme Court answers this question by stating that its prior ruling, which overturned the division bench's judgment of the High Court, resulted in a miscarriage of justice. The division bench had correctly applied legal standards, finding the arbitral award afflicted by perversity and patent illegality, supported by the evidentiary record. Supreme Court's intervention through a special leave petition under Article 136 reinstated a faulty arbitral award that placed an excessive financial burden on a public utility.

While entertaining the curative petition, the Court reiterated that this jurisdiction is reserved for extraordinary cases, emphasising its function as an

³ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

exceptional remedy rather than a standard appellate mechanism. The judgment emphasises that intervention by curative petition should be limited to circumstances where errors could not be addressed through the regular appellate process, as extending it otherwise undermines the finality of judgments and risks promoting endless litigation.

V. SCOPE OF INTERFERENCE OF COURTS WITH ARBITRATION AWARDS

The Court, while addressing the issue of whether it justifiably reinstated an arbitral award set aside by a division bench of the High Court, emphasised the significance of exercising caution when adjudicating special leave petitions under Article 136 of the Constitution. The Court emphasised its limited role, stating that it should intervene only in exceptional circumstances, distinguishing this process from the powers exercised under Section 37 of the 1996 Act, which is akin to Section 34. The Court reiterated that while its powers under Article 136 are broad, their exercise in arbitral matters is guided by restraint, intervening only in cases of egregious legal error or miscarriage of justice.

This indicates a narrower scope of review compared to the broader powers available under Section 34, which allows for setting aside an arbitral award on specific grounds.

(i) Patent illegality and its constituents

The Court, while addressing the third issue on whether the division bench of the High Court was justified in setting aside the arbitral award on the grounds of patent illegality, held that the ground of patent illegality is a valid basis for setting aside a domestic arbitration award if the arbitrator's decision is found to be perverse or so irrational that no reasonable person would arrive at it. The Court, while relying upon the decisions of *Associate Builders v. DDA*⁴, *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*⁵ and *Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.*,⁶ noted that patent illegality includes instances where the interpretation of the contract is such that no fair or reasonable person would adopt it, or where the arbitrator's view is not even a plausible one. It is important to note here that the ground of patent illegality under Section 34(2A) is confined exclusively to domestic arbitration awards and is not available in the context of international commercial arbitration seated in India. This distinction, introduced through the 2015 amendments, reflects a deliberate legislative intent to impose a higher threshold for judicial

⁴ *Associate Builders v. DDA*, (2015) 3 SCC 49.

⁵ *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*, (2019) 15 SCC 131.

⁶ *Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd.*, (2020) 7 SCC 167.

interference in international awards, thereby aligning Indian arbitration law with the pro-enforcement bias under the New York Convention.⁷

Furthermore, the Court specified that an award based on no evidence or one that disregards crucial evidence is considered perverse and can be set aside on the grounds of patent illegality. Keeping these principles in mind, the Court acknowledged a fundamental error in its earlier approach while adjudicating the Special Leave Petition challenging the High Court's division bench decision. In exercising its jurisdiction under Article 136, the Supreme Court failed to adequately evaluate the High Court's findings pursuant to Section 37 of the Arbitration Act. The division bench rightly concluded that the arbitral award disregarded essential facts and evidence pertinent to the dispute, rendering it perverse and patently illegal, as established in the judgments of *Associate Builders v. DDA*⁸ and *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*.⁹

In this case, the division bench determined that the arbitral award was perverse and patently illegal under Section 34 because it ignored crucial facts and evidence necessary for resolving the issues before the Arbitral Tribunal. The award's flaws necessitated judicial interference for the following reasons:

- (i) Ignoring Clause 29.5.1(i) regarding "Effective Steps": The clause stated unequivocally that if DMRC took effective steps to cure defects during the cure period, the right to terminate the contract would not exist. However, the Tribunal failed to distinguish between "curing defects" and "taking effective steps," treating both interchangeably, which was an unreasonable interpretation.
- (ii) The Tribunal disregarded the Commissioner of Metro Rail Safety ("CMRS")'s statutory safety certification, which was directly relevant to the safety-related termination grounds presented by DAMEPL. The Tribunal's conclusion that the CMRS certificate was irrelevant disregarded crucial evidence, resulting in an erroneous conclusion. The Tribunal's dismissal of this certification thus raises concerns under the doctrine of patent illegality, as laid down in *Associate Builders v. DDA*¹⁰, and *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*.¹¹ Where disregard of public policy norms or mandatory statutes has been held to constitute grounds for judicial interference under Section 34(2A) of the 1996 Act, in such contexts, the arbitrator's view may be regarded as not even plausible, thereby justifying judicial intervention.

⁷ Arbitration and Conciliation (Amendment) Act of 2015 (India).

⁸ *supra* note 4.

⁹ *supra* note 5.

¹⁰ *supra* note 4.

¹¹ *supra* note 5.

These oversights contributed to a fundamentally faulty conclusion, resulting in an irrational choice that ignored established contractual terms and relevant evidence. The Tribunal's failure to define "effective steps" and analyse how DMRC's activities fit into this criterion made its interpretation unreasonable. Furthermore, by declaring the CMRS certificate irrelevant without justification, the Tribunal disregarded substantial evidence that could have affected its decision. Such disregard for crucial contractual terms and facts indicates patent illegality, revealing a decision-making process that no rational person could accept.

A. Interpretation of the termination clause by the Tribunal was unreasonable

In its judgment, the Court deemed the Tribunal's interpretation of Clause 29.5.1(i) unreasonable. This clause explicitly permits the concessionaire to terminate the Concession Agreement if DMRC fails to "cure such breach or take effective steps for curing such breach" within the cure period. The Tribunal concluded that the existence of defects at the end of the cure period indicated that no effective steps had been taken. However, the Supreme Court emphasised that this interpretation combined the separate expressions "cure" and "effective steps to cure," implying that only the total removal of defects was necessary. The Court emphasised that the Tribunal's approach disregarded the importance of taking effective steps, which could prevent termination even if all defects were not completely rectified. Therefore, in conclusion, the Court effectively decided that the interpretation given by the Tribunal was not even a possible one, given how perverse or unreasonable it was.

According to the Supreme Court, the Tribunal's view eventually undermined this contractual provision, a position that no reasonable person would adopt. The Supreme Court stated that the Tribunal's decision failed to consider the relevance of the CMRS certificate in the context of "effective steps." The CMRS certificate, issued under the Metro Railways (Operations and Maintenance) Act of 2002, is significant since it reflects the statutory authority's satisfaction with the safety of metro operations. Under Section 15 of the 2002 Act, metro services cannot begin without prior approval from the Central Government, which must be based on the CMRS's inspection report confirming that the metro railway can function securely without endangering public safety. Since the cure notice stated safety issues as a reason for termination, the CMRS certificate was critical evidence of whether enough safety measures had been implemented. The Tribunal's inability to examine this statutory requirement resulted in an unreliable assessment of the termination's validity, undermining the award's legality. Instead, the Tribunal applied an improbable interpretation of the termination clause, disregarding its clear and plain text and rendering the term "effective steps" meaningless.

B. The award overlooked vital evidence and matters on the record

The Supreme Court found fault with the Arbitral Tribunal's interpretation of the termination clause in the Concession Agreement, particularly its failure to consider the CMRS certificate, which was crucial evidence for assessing the project's safety and structure. The Court noted that the CMRS certificate was directly relevant to the central issue of the validity of termination, which was based on safety concerns highlighted in the cure notice.

The Supreme Court criticised the Tribunal for focusing on the Commissioner's conditions regarding speed and inspections while ignoring the significance of the CMRS certificate. Although the Tribunal claimed that defects were not fully cured, the Court observed that DMRC took steps toward curing these defects, leading to the resumption of operations.

VI. CONCLUSION

In conclusion, the Supreme Court's exercise of curative jurisdiction in this case highlights important considerations concerning the finality of arbitral awards and the permissible scope of judicial intervention under Sections 34 and 37 of the 1996 Act. Curative petitions, which are intended to protect against serious miscarriages of justice, must be used sparingly and cautiously to preserve the sanctity of final judgments and prevent reopening matters determined through arbitration – this principle is well settled. However, in practice, it may be argued that their use may not always be as sparing.

The Supreme Court's willingness to revisit its decisions through curative petitions in arbitration creates some doctrinal uncertainty. Such unpredictability may have unintended consequences, discouraging foreign investors and commercial parties from using Indian arbitration forums if the finality of arbitral awards is perceived to be vulnerable to extended judicial intervention. The Court's reliance on established principles from *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*¹², *PSA Sical Terminals (P) Ltd. v. V.O. Chidambramar Port Trust*¹³, and *Associate Builders v. DDA*¹⁴, reinforces that an arbitral award can only be set aside on narrow grounds, such as public policy violations or procedural irregularities. The scope of judicial intervention under Sections 34 and 37 of the 1996 Act does not permit reappreciation of evidence or a review of merits.

¹² *supra* note 5.

¹³ *PSA Sical Terminals (P) Ltd. v. V.O. Chidambramar Port Trust*, (2023) 15 SCC 781.

¹⁴ *supra* note 4.

The judgment in *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*¹⁵, reaffirmed the principles laid down in *Associate Builders v. DDA*¹⁶, on the limited scope of judicial interference with domestic arbitral awards. The Court clarified that an award may be set aside for patent illegality if it is based on no evidence or if the arbitral tribunal ignores vital evidence material to the dispute. Further, if the arbitrator relies on documents or material not presented to the parties, the resulting decision will lack an evidentiary foundation and be deemed perverse.

The Supreme Court reaffirmed the aforesaid principle in the decision of *PSA Sical Terminals (P) Ltd. v. V.O. Chidambranar Port Trust*¹⁷. In this case, the Court clarified that while a perverse decision may not necessarily constitute a challenge under the ground of public policy, it will still qualify as a patent illegality if it appears on the face of the award. Specifically, if an award is based on no evidence or ignores crucial evidence that is essential to the decision, it would be considered perverse and, therefore, subject to being set aside on the grounds of patent illegality. The merits and demerits of this decision and approach are, of course, separate matters that are not the subject matter of this piece.

As a matter of policy in the context of arbitration, this decision prompts a critical examination of whether an interventionist approach is ultimately advantageous. While correcting manifest errors in arbitral awards that lead to gross injustice is paramount, a careful balance must be maintained. In this dance of achieving that fine balance, all judgments lie. Intervening in cases of clear perversity is not inherently objectionable, as it upholds principles of fairness and justice. However, excessive judicial interference, particularly through the curative petitions, risks introducing uncertainty and destabilising the foundational principle of finality in arbitration proceedings.

Lastly, the Supreme Court's decision expands the judicial remedies available against arbitral awards in a significant but cautious way, affirming the maintainability of curative petitions in exceptional cases. While curative petitions are explicitly intended as an extraordinary constitutional safeguard to prevent gross miscarriages of justice, their inclusion in arbitration proceedings raises concerns about potential abuse. The possibility that parties will seek curative relief in greater numbers may call into question the fundamental principle of finality in arbitration, potentially leading to longer litigation and undermining arbitration's efficiency. The Court, however, emphasised that such petitions should be used sparingly and with strict procedural safeguards to preserve their unique character.

¹⁵ *supra* note 5.

¹⁶ *supra* note 4.

¹⁷ *supra* note 13.

It is also important to distinguish between the mechanisms of appeal, review, and curative petition, which serve distinct functions. Appeals involve substantive reconsideration by a higher forum but are generally excluded in arbitration to preserve the finality of awards. Review petitions allow limited reassessment of judgments based on errors apparent on the face of the record, without a full rehearing.¹⁸ Curative petitions, as laid down in *Rupa Ashok*, are an extraordinary remedy that is available only after a review petition is dismissed. They are intended to correct procedural violations or grave errors resulting in a miscarriage of justice.¹⁹ Accordingly, the Supreme Court's present decision signals that while curative petitions remain exceptional, they may now serve as a constitutional mechanism to correct patent illegality or grave injustice in arbitral awards, indicating a nuanced but significant evolution in Indian arbitration jurisprudence.

Another question that cases like this raise is, what parameters does a court apply to intervene? There is no exact science, which is where the devil lies – in subjectivity. The concern lies in the inherently subjective and uneven application of such an exceptional remedy, which may lead to inconsistent judicial outcomes.

¹⁸ Union of India v. Sandur Manganese & Iron Ores Ltd. 2013 AIR SCW 2905.

¹⁹ *supra* note 3.

NAVIGATING LIMITATION PERIOD: INSIGHTS FROM THE SUPREME COURT'S LATEST RULING ON APPOINTMENT OF ARBITRATORS

Sumit Attri & Satatya Anand***

Abstract

This essay examines the intricate relationship between limitation law and the appointment of arbitrators in the context of arbitration proceedings. It synthesizes insights from legal scholarship, landmark judicial decisions, and international conventions to provide a comprehensive analysis of the applicability of statutory limitation periods to applications for arbitrator appointments. The essay explores the judicial interpretation of triggering events that commence the limitation period, particularly focusing on the “cause of action” and the “breaking point” concepts. It further delves into the detrimental effects of delays in arbitrator appointments, including the potential for time-barred disputes, increased costs, and erosion of confidence in the arbitration process. By considering the diverse approaches adopted across various jurisdictions and examining the role of international instruments like the New York Convention, the essay underscores the urgent need for harmonization and legislative reforms. It advocates for a streamlined and predictable legal framework that balances the expeditious nature of arbitration with the fundamental right to a fair and impartial process, ultimately aiming to enhance the efficacy of arbitration as a preferred dispute resolution mechanism.

Keywords: Appointment of Arbitrator, Limitation period and Section 11.

* SA Law Chambers.

** SUMMUS Law Offices.

I. INTRODUCTION

Arbitration has firmly established itself as a preferred method for resolving commercial disputes, offering a flexible, confidential, and potentially more efficient alternative to traditional litigation. Central to the effectiveness of arbitration is the timely and proper appointment of arbitrators who will adjudicate the dispute. However, the process of appointing arbitrators is often intertwined with the complexities of limitation law, which dictates the time frame within which legal actions must be initiated. This essay explores the multifaceted relationship between limitation law and the appointment of arbitrators, drawing upon a comprehensive analysis of legal principles, judicial pronouncements, and international perspectives.

The essay will begin by establishing the legal framework governing the appointment of arbitrators, with a particular focus on jurisdictions where specific statutory provisions, such as Section 11(6) of the Indian Arbitration and Conciliation Act, 1996 (“ACA”), exist with laws like the Indian Limitation Act, 1963 (the Limitation Act). It will then analyze the critical issue of determining the triggering events that initiate the limitation period, examining how courts have interpreted concepts like “cause of action” and “breaking point” in the context of arbitration. Subsequently, the essay will explore the significant repercussions of delays in appointing arbitrators, considering the impact on parties’ rights, the efficiency of the process, and the overall integrity of arbitration.

Furthermore, the essay will delve into a comparative analysis of limitation laws across different jurisdictions, highlighting the lack of uniformity and the resulting challenges for international arbitration. It will consider the role of international conventions and treaties, such as the New York Convention and the ICSID Convention, in shaping the landscape of limitation periods in arbitration. Drawing upon this analysis, the essay will then advocate for harmonization and legislative reforms, proposing specific measures to streamline appointment procedures, clarify triggering events, and empower arbitral institutions. Finally, it will conclude with a synthesis of the findings and a call for a more cohesive and predictable legal framework that upholds the principles of justice and expediency in arbitration proceedings.

II. LEGAL FRAMEWORK: APPLICABILITY OF LIMITATION LAW TO ARBITRATOR APPOINTMENTS

A. Statutory Provisions

The legal framework governing the appointment of arbitrators varies across jurisdictions. In many countries, specific statutory provisions dictate

the procedure for such appointments. For instance, in India, Section 11 of the ACA outlines the process. Section 11(6) is particularly relevant as it provides a recourse for parties to approach the court for the appointment of an arbitrator when they fail to agree on an appointment procedure or when the agreed procedure fails.¹ However, a crucial aspect of Section 11(6) is that it does not prescribe a specific time limit within which such an application must be filed.

This absence of a time frame in Section 11(6) has led to significant legal debate regarding the applicability of general limitation laws to these applications. In India, the Limitation Act, 1963, governs limitation periods for various legal actions. Section 43(1) of the ACA expressly states that the Limitation Act shall apply to arbitrations as it applies to court proceedings.² This section was inserted to clear earlier judicial confusion. However, the Limitation Act does not contain a specific provision dealing with applications for the appointment of arbitrators under Section 11(6) of the ACA.

In the absence of a specific provision, legal practitioners and courts have often turned to Article 137 of the Limitation Act, which is the residuary provision that applies to scenarios for which no specific limitation period is provided elsewhere in the Limitation Act. Article 137 prescribes a limitation period of three years from the date when the “right to apply accrues.”³ The interpretation of when this “right to apply” accrues in the context of Section 11(6) applications has been a subject of considerable judicial scrutiny.

Under the present regime, upon triggering of cause of action, the three year limitation period commences and the application for the appointment of arbitral tribunal shall be filed within the limitation period.

B. Judicial Interpretation

The Indian Supreme Court has played a pivotal role in clarifying the applicability of limitation law to arbitrator appointments. In *BSNL v. Nortel Networks India (P) Ltd.*, the Court held that Article 137 of the Limitation Act applies to applications under Section 11(6) of the ACA, establishing a three-year limitation period.⁴ The Court further elaborated that the period of limitation would commence from the date when a valid notice invoking arbitration is sent, and there is a failure or refusal to comply with the notice.

The Supreme Court’s decision in *Arif Azim Co. Ltd. v. Aptech Ltd.* further refined this position.⁵ In this case, the Court reiterated the applicability

¹ Arbitration and Conciliation Act of 1996, § 11(6).

² Arbitration and Conciliation Act of 1996, § 43(1).

³ Limitation Act of 1963, § 137.

⁴ *BSNL v. Nortel Networks India (P) Ltd.*, (2021) 5 SCC 738.

⁵ *Arif Azim Co. Ltd. v. Aptech Ltd.*, (2024) 5 SCC 313; 2024 SCC OnLine SC 215.

of Article 137 and emphasized that the limitation period begins to run when the “breaking point” is reached, i.e., when any reasonable party would abandon efforts to arrive at a settlement and contemplate referral of the dispute to arbitration.⁶ This “breaking point” is considered the date on which the cause of action arises for the purpose of limitation.

The Court in *Arif Azim* also addressed the issue of whether courts could refuse to refer a dispute to arbitration if the claims were *ex facie* time-barred. Citing *Vidya Drolia v. Durga Trading Corpn.*⁷ and *Geo Miller and Company (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*,⁸ the Court held that while a detailed examination of the merits is not required at the referral stage, courts could refuse to make a reference if the claims were demonstrably “deadwood” due to limitation.⁹ This approach aims to prevent the futility of referring clearly time-barred claims to arbitration, while still respecting the principle of minimal judicial intervention at the pre-arbitration stage.

C. International Context

While the Indian legal framework provides a specific context, the issue of limitation periods in arbitrator appointments is also relevant in international arbitration. The New York Convention, primarily focuses on the recognition and enforcement of foreign arbitral awards.¹⁰ It does not explicitly address limitation periods for appointing arbitrators. However, the Convention’s emphasis on predictability and enforceability indirectly supports the need for clear limitation rules in arbitration proceedings.

The ICSID Convention, which governs investment disputes between states and foreign investors, provides specific time limits for various stages of the arbitration process, including the appointment of arbitrators.¹¹ This demonstrates a recognition of the importance of time limits in ensuring the efficient conduct of arbitration. However, the application of limitation laws in international arbitration can be complex due to the potential conflict between applying them as substantive or procedural matters, which can create uncertainty for arbitral tribunals.¹²

⁶ *Id.*

⁷ *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1.

⁸ *Geo Miller and Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, (2020) 14 SCC 643.

⁹ *Arif Azim Co. Ltd. v. Aptech Ltd.*, (2024) 5 SCC 313; 2024 SCC OnLine SC 215.

¹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) 330 UNTS 38.

¹¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

¹² *Limitation Periods in International Arbitration*, PINSENT MASONS (July 21, 2021), <https://www.pinsentmasons.com/out-law/analysis/limitation-periods-in-international-arbitration#:~:text=A%20limitation%20period%20is%20a,for%20enforcing%20an%20arbitral%20award.>

Furthermore, it's worth noting that parties often include provisions in their arbitration agreements that specify time limitations. This highlights importance of party autonomy, which allows parties to structure their agreements as they see fit, and the need for limitations to ensure efficiency and fairness in the arbitration process.¹³ The concept of “compatibility” of arbitration agreements is also relevant here, as differences in the method of appointment of arbitrators can lead to delays and complications.¹⁴

Moreover, arbitral institutions like the ICC Court play a significant role in confirming or appointing arbitrators. The ICC Court considers factors such as the prospective arbitrator's nationality, residence, availability, and ability to conduct the arbitration in accordance with the rules.¹⁵

III. TRIGGERING EVENTS FOR THE LIMITATION PERIOD

A. The Concept of “Cause of Action” in Arbitration

A critical aspect of limitation law is determining the precise event that triggers the commencement of the limitation period. In general legal terms, this is often referred to as the “cause of action.” It is important to distinguish between the underlying contractual cause of action and the cause of action for seeking appointment of arbitrator.¹⁶ In this scenario, we are only concerned with the cause of action for seeking appointment of arbitrators.

In the context of appointment of arbitrators, the “cause of action” is generally understood to arise when one party asserts a claim or invokes the arbitration agreement, and the other party either disputes the claim or fails to comply with the agreed-upon procedure for appointing an arbitrator. However, the precise point at which this occurs can be difficult to ascertain, particularly when there are ongoing negotiations or attempts to settle the dispute amicably.

B. Judicial Precedents on Determining the “Breaking Point”

The Indian Supreme Court has provided significant guidance on determining the triggering event for limitation in the context of Section 11(6) applications. In *Geo Miller and Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam*

¹³ Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24(3) JOURNAL OF INTERNATIONAL ARBITRATION 327-39 (2007), <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/24.3/JOIA2007023>.

¹⁴ *Comparative Legal Guide United States: Arbitration*, ARNOLD & PORTER (Nov. 2017), <https://www.arnoldporter.com/-/media/files/perspectives/publications/2017/11/comparative-legal-guide-united-states-arbitration.pdf>.

¹⁵ 2021 Arbitration Rules (ICC, 2021), <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/>.

¹⁶ *Arif Azim Co. Ltd. v. Aptech Ltd.*, (2024) 5 SCC 313; 2024 SCC OnLine SC 215.

Ltd., the Court introduced the concept of the “breaking point.”¹⁷ The “breaking point” is defined as the point at which any reasonable party would abandon efforts to arrive at a settlement and contemplate referral of the dispute to arbitration. This “breaking point” is then treated as the date on which the cause of action arises for the purpose of limitation.

In *B & T AG v. Ministry of Defence*, the Supreme Court further elaborated on this concept, emphasizing that the determination of the “breaking point” requires a fact-specific inquiry into the conduct of the parties and the circumstances of the case.¹⁸ The Court highlighted that mere correspondence or discussions between the parties would not necessarily extend the limitation period unless they genuinely indicated a continuing effort to resolve the dispute amicably. The court emphasized on developing an ‘objective assessment’ instead of relying on intentions of the Party, which are highly subjective.

The Arif Azim case applied these principles to a specific factual scenario. The Court held that the Petitioner’s right to bring a claim crystallized on March 28, 2018, when the Respondent had denied the claim.¹⁹ This denial was deemed the “breaking point,” and the cause of action for invoking arbitration was considered to have arisen on that date. The Court further clarified that the subsequent invocation of pre-institution mediation did not extend the limitation period, as the mediation proceedings were separate from the arbitration process.

C. Variations Across Jurisdictions and the Need for Clarity

While the Indian Supreme Court has provided valuable guidance on determining the triggering event, there is a lack of uniformity across jurisdictions. Different legal systems may adopt different approaches to defining the “cause of action” in the context of arbitration. This can lead to uncertainty, particularly in international arbitration where parties from different jurisdictions may have differing expectations regarding the applicable limitation period and its commencement.

The lack of a universally accepted definition of “cause of action” in arbitration highlights the need for greater clarity and harmonization.²⁰ Clearer guidelines on determining the triggering event would promote predictability and consistency in the application of limitation periods, thereby enhancing the efficiency and fairness of the arbitration process.

¹⁷ *Geo Miller and Co. (P) Ltd. v. Rajasthan Vidyut Utpadan Nigam Ltd.*, (2020) 14 SCC 643.

¹⁸ *B & T AG v. Ministry of Defence*, (2024) 5 SCC 358; 2023 SCC OnLine SC 657.

¹⁹ *Arif Azim Co. Ltd. v. Aptech Ltd.*, (2024) 5 SCC 313; 2024 SCC OnLine SC 215.

²⁰ *Setting the Clock: Proposing a Limitation Period for an Application to Appoint Arbitrators*, LIVE LAW (Aug. 28, 2023), <https://www.livelaw.in/lawschool/articles/setting-clock-proposing-limitation-period-application-appoint-arbitrators-267650>.

IV. CONSEQUENCES OF DELAYS IN ARBITRATOR APPOINTMENTS

A. Impact on the Parties' Rights and Access to Justice

Delays in the appointment of arbitrators can have severe consequences for the parties involved in a dispute. One of the most significant repercussions is the potential for claims to become time-barred. If the limitation period expires before an arbitrator is appointed and the arbitration proceedings commence, the party seeking to assert its rights may be effectively denied access to justice. This can be particularly problematic in cases where the underlying dispute involves substantial financial interests or critical business relationships.

Furthermore, delays can undermine the fundamental principle of party autonomy in arbitration. Parties choose arbitration for its perceived advantages, including speed and efficiency. When the appointment process is delayed, it frustrates the parties' expectations and erodes their confidence in the arbitration process as an effective means of dispute resolution.

B. Erosion of Efficiency and Increased Costs

Arbitration is often touted as a more efficient alternative to traditional litigation. However, delays in arbitrator appointments can significantly diminish this advantage. The time sensitive nature of Arbitration Proceedings has also been emphasized by the Apex Court.²¹ Prolonged delays can lead to increased costs for the parties, as they may need to incur additional legal fees and expenses associated with navigating the appointment process. Moreover, delays can disrupt business operations and create uncertainty, particularly when the underlying dispute involves ongoing contractual obligations or time-sensitive projects.

C. Potential Loss of Evidence and Prolonged Uncertainty

Delays can also have a detrimental impact on the quality of evidence available for the arbitration proceedings. As time passes, witnesses' memories may fade, documents may be lost or destroyed, and physical evidence may deteriorate. This can compromise the ability of the arbitral tribunal to make a fair and informed decision based on the best available evidence.

Furthermore, prolonged delays can create a state of uncertainty for the parties, particularly when the dispute involves significant financial stakes or ongoing business relationships. This uncertainty can hinder business planning, investment decisions, and the overall ability of the parties to move forward. The longer the appointment process drags on, the more protracted and

²¹ Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755.

damaging this uncertainty becomes. Factors influencing the time taken by arbitrators to issue awards include case complexity, evidence volume, and arbitrator availability.²² Delays can also arise from adjournments, with arbitrator discretion in granting or denying them impacting timeliness.²³

V. COMPARATIVE ANALYSIS OF LIMITATION LAWS

A. Statutory Time Limits in Different Jurisdictions

A comparative analysis of limitation laws across various jurisdictions reveals a diverse landscape with varying approaches to statutory time limits for appointing arbitrators. As discussed earlier, India has a three-year limitation period for applications under Section 11(6) of the ACA, derived from the application of Article 137 of the Limitation Act.²⁴

However, not all jurisdictions have explicit statutory time limits for such applications. This lack of uniformity can create uncertainty and potentially hinder the efficiency of arbitration proceedings.²⁵ In some jurisdictions, the absence of specific time limits may lead to reliance on general principles of laches or unreasonable delay, which can be subjective and unpredictable.

B. Approaches to Triggering Events

Similarly, different jurisdictions adopt varying approaches to determining the triggering event that commences the limitation period. While the Indian Supreme Court has developed the “breaking point” concept, other jurisdictions may rely on different criteria, such as the date of the arbitration agreement, the date when the dispute arose, or the date when a formal demand for arbitration was made.

²² Allen Ponak, Daphne G. Taras & Piers Steel, *Personality and Time Delay Among Arbitrators* in PAUL D. STAUDOHAR & MARK I. LURIE, EDS., *ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING*, NATIONAL ACADEMY OF ARBITRATORS, PHILADELPHIA, PENNSYLVANIA, May 26-29, 2010 (Arlington, VA: BNA, 2011).

²³ Tracey B. Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide a Cost-Effective and Expeditious Process*, 17 CARDOZO J. OF CONFLICT RESOL. 155 (2015), https://www.adr.org/sites/default/files/document_repository/Frisch%20Article.pdf.

²⁴ *An Analysis of Limitation for Appointment of Arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996*, DISPUTE RESOLUTION BLOG (Feb. 14, 2024), <https://disputeresolution.cyrilamarchandblogs.com/2024/02/an-analysis-of-limitation-for-appointment-of-arbitrator-under-section-11-of-the-arbitration-conciliation-act-1996/>.

²⁵ *To Bar or Not to Bar – The Indian Supreme Court on Limitation and Applications for Appointment of Arbitrators* HERBERT SMITH FREEHILLS (May 8, 2024), <https://www.herbertsmithfreehills.com/notes/arbitration/2024-05/to-bar-or-not-to-bar-the-indian-supreme-court-on-limitation-and-applications-for-appointment-of-arbitrators>.

For example, some jurisdictions may follow a more formalistic approach, tying the commencement of the limitation period to the date of the arbitration agreement or the date when a formal demand for arbitration is made. This approach provides greater certainty but may not adequately account for situations where parties engage in prolonged negotiations before resorting to arbitration.

C. Role of International Conventions and Treaties

International conventions and treaties play a limited but significant role in shaping the landscape of limitation periods in arbitration. The New York Convention, while primarily focused on the recognition and enforcement of arbitral awards, indirectly supports the need for clear limitation rules by promoting predictability and enforceability in international arbitration.²⁶

The ICSID Convention, on the other hand, provides specific time limits for various stages of the arbitration process, including the appointment of arbitrators.²⁷ This demonstrates a recognition of the importance of time limits in ensuring the efficient conduct of investment arbitration.

However, the application of limitation laws in international arbitration remains complex due to the potential conflict between applying them as substantive or procedural matters.²⁸ This can create uncertainty for arbitral tribunals and parties, particularly when the arbitration involves parties from different jurisdictions with varying approaches to limitation periods.

The enforcement of annulment judgments in different jurisdictions can be complex, with courts considering factors such as international comity and fundamental notions of justice.²⁹ This complexity underscores the need for harmonization and greater clarity in the application of limitation laws in international arbitration.

VI. CONCLUSION

The interplay between limitation law and the appointment of arbitrators is a complex and critical aspect of arbitration. This essay has demonstrated that the

²⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) 330 UNTS 38.

²⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

²⁸ *Limitation Periods in International Arbitration* PINSENT MASONS (July 21, 2021), <https://www.pinsentmasons.com/out-law/analysis/limitation-periods-in-international-arbitration#:~:text=A%20limitation%20period%20is%20a,for%20enforcing%20an%20arbitral%20award.>

²⁹ *Comparative Legal Guide United States: Arbitration*, ARNOLD & PORTER (Nov. 2017), <https://www.arnoldporter.com/-/media/files/perspectives/publications/2017/11/comparative-legal-guide-united-states-arbitration.pdf/>.

applicability of limitation periods to applications for arbitrator appointments, the determination of triggering events, and the consequences of delays in the appointment process have a profound impact on the efficiency, fairness, and overall effectiveness of arbitration.

The analysis of statutory provisions, judicial pronouncements, and international conventions reveals a diverse landscape with varying approaches to limitation periods and their commencement. The lack of uniformity across jurisdictions creates uncertainty, particularly in international arbitration, and underscores the need for harmonization and legislative reforms. The Indian Supreme Court's jurisprudence, particularly the development of the "breaking point" concept, provides valuable insights into determining the triggering event for limitation. However, challenges remain in balancing the need for expeditious dispute resolution with the parties' right to a fair and impartial process.

Delays in appointing arbitrators can have severe repercussions, including increased costs, erosion of confidence in the arbitration process, and the loss of valuable evidence. These consequences highlight the importance of streamlining appointment procedures and ensuring timely initiation of arbitration proceedings.

The findings of this essay strongly support the call for a more streamlined and predictable legal framework governing limitation periods in the appointment of arbitrators. Legislative reforms should aim to harmonize limitation periods, clarify triggering events, simplify appointment procedures, empower arbitral institutions, and address issues related to pre-arbitral interim measures and jurisdiction challenges.

By implementing these reforms, jurisdictions can enhance the attractiveness and effectiveness of arbitration as a preferred method for resolving disputes. A predictable and efficient legal framework will instill greater confidence in the arbitration process, encourage parties to choose arbitration, and ultimately contribute to a more robust and just system of dispute resolution.

Policymakers should engage in ongoing dialogue with legal practitioners, academics, and arbitral institutions to develop and implement effective reforms. This collaborative approach will be crucial to ensure that limitation laws and appointment procedures are aligned with the evolving needs of the international arbitration community and uphold the fundamental principles of justice and expediency. The ongoing evolution of international arbitration requires constant vigilance and adaptation to maintain its integrity and effectiveness in resolving disputes. Through continued research, open dialogue, and a commitment to reform, the legal community can ensure that arbitration remains a powerful tool for resolving disputes fairly and efficiently.

THE ILLUSION OF FINALITY: CRITICAL ANALYSIS OF GAYATRI BALASAMY v. ISG NOVASOFT TECHNOLOGIES LIMITED

Gurmehar Singh Bedi & Nitin Kishore***

Abstract

The Supreme Court's ruling in Gayatri Balasamy v. ISG Novasoft Technologies Ltd. delves into the controversial issue of modification of arbitral awards by courts under Section 34 of the Arbitration and Conciliation Act, 1996, a power omitted by the 1996 Act in contrast to its 1940 predecessor. While the majority opinion, penned by Chief Justice Sanjiv Khanna affirms a limited power to modify awards in particular circumstances, the dissent by Justice KV Vishwanathan emphatically opposes this view, cautioning against judicial overreach into the merits of arbitral awards and highlighting its implications on the enforcement of foreign arbitral awards under the New York Convention.

This article analyses the Court's application of the doctrines of severability, omne majus continet in se minus, and merger. It highlights the semantic conflation between partially setting aside and modifying arbitral awards, challenges the notion that setting aside includes the power to modify, and brings to the fore the absence of statutory provisions for the doctrine of merger. The article, in keeping with Section 5 of the 1996 Act, argues that courts ought to fight shy of undermining finality of arbitral awards and eroding party autonomy, particularly at the international stage. It argues that the dissent preserves statutory integrity and upholds India's commitment to becoming a global arbitration hub.

* Third year law student at National Law University, Jodhpur, gurmeharsingh.bedi@nlujodhpur.ac.in

** Third year law student at National Law University, Jodhpur, nitin.kishore@nlujodhpur.ac.in

Keywords: Gayatri Balasamy, Section 34, Modification, Severability, Doctrine of Merger.

I. INTRODUCTION

The notion of dispute resolution, Courts or otherwise, finds its roots in ancient civilisations such as Egypt, Greece and Mesopotamia.¹ Over time, this concept was institutionalised and has fructified into the judiciary. However, even a formal judiciary is accompanied by a litany of problems such as inordinate delays, procedural barriers, and minimal party autonomy. Arbitration, as an alternative form of dispute resolution, emerged as a response to these obstacles. There are three fundamental tenets of arbitration – party autonomy, finality of awards, and non-intervention by courts.²

The interplay between these tenets becomes critical when deliberating on the question of the court's power to modify an award under Section 34 of the Arbitration and Conciliation Act, 1996 [**"1996 Act"**].³ The jurisprudence with regard to such power is littered with divergence. While some benches strongly opposed modification, others adopted a more lenient approach. In the 2000s, courts frequently modified awards, particularly in relation to interest rates,⁴ and even upheld trial court decisions doing the same.⁵ This trend had further continued with courts intervening, most often on the grounds of improper rates of interest.⁶

This question of law arose in *McDermott International Inc v. Burn Standard Co. Ltd.* [**"McDermott"**].⁷ While the Court modified the award, it emphasised the principle of minimal court intervention when deliberating upon the issue of modification under Section 34.⁸ In fact, even prior to *McDermott*, the Supreme Court had modified an award in *Tata Hydro-Electric Power Supply v. Union of India*, albeit without considering the question of law.⁹

¹ Abida Hassan & Dil Muhammad Malik, *Evolution of Dispute Resolution Processes: From Informal to Formal and Back to Informal*, 5 GLOBAL SOCIAL SCIENCES REV. 327 (2020).

² GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 3 (3rd edn. 2021).

³ Arbitration and Conciliation Act, No. 26 of 1996, § 34 (India) [hereinafter, A&C Act, 1996].

⁴ See *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy*, (2007) 2 SCC 720; *Royal Education Society v. LIS (India) Construction Co. (P) Ltd.*, (2009) 2 SCC 261.

⁵ See *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 SCC 445; *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*, (2007) 8 SCC 466.

⁶ See *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, (2019) 11 SCC 465.

⁷ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 : 2006 Supp (2) SCR 409.

⁸ *Pure Helium India (P) Ltd. v. Oil & Natural Gas Commission*, (2003) 8 SCC 593; *Mukand Ltd. v. Hindustan Petroleum Corpn. Ltd.*, (2006) 9 SCC 383 : (2006) 4 Scale 453.

⁹ *Tata Hydro-Electric Power Supply Co. Ltd. v. Union of India*, (2003) 4 SCC 172.

On the other hand, courts have unequivocally held that awards cannot be modified, a view pioneered in *NHAI v. M. Hakeem*, where the Supreme Court clarified that the term ‘set aside’ under Section 34 does not include the authority to modify an award.¹⁰ The Court also undertook a comparative analysis of the Arbitration Act, 1940 [“**1940 Act**”] and the 1996 Act, emphasising that the latter aligned with the United Nations Commission on International Trade Law Model Law [“**UNCITRAL Model Law**”],¹¹ that excluded the power of modification. This position was then reaffirmed by recent case law, which held that the power to modify was consciously omitted by the legislature.¹²

The Supreme Court finally settled the position of law given its conflicting jurisprudence by answering the question of modification in the affirmative in the case of *Gayatri Balasamy v. ISG Novasoft Technologies*.¹³ Through this case comment, we provide an analysis of the judgment and its impact on the evolution of arbitration in India.

II. SCHEME OF THE ARBITRATION ACT

A. Early Stages of Arbitration in India: The Arbitration Act, 1940

The historical roots of arbitration in India can be traced back to decentralised models of governance, such as the village panchayats, where community elders settled disputes.¹⁴ The first formal legislative codification was the Arbitration Act, 1899. However, a more substantive framework was introduced in the form of the Arbitration Act, 1940.

The drafting of the 1940 Act was modelled primarily on English legislation, at a time when arbitration was in its infancy. Although the 1940 Act recognised the spirit of party autonomy and the consensual nature of the process, it reflected legislative scepticism towards the efficacy of arbitral mechanisms. This is evident from the scheme of the 1940 Act, which vested significant powers in the courts at nearly every step of the arbitral process, ranging from the appointment of arbitrators to the enforcement of the award.¹⁵ Importantly, under Section 15, courts had the power to modify the tribunal’s award under

¹⁰ *NHAI v. M. Hakeem*, (2021) 9 SCC 1 : (2021) 5 SCR 368, ¶¶ 14, 40.

¹¹ Model Law on International Commercial Arbitration, Dec. 11, 1985, U.N. Doc. A/40/17, annex. I.

¹² *S.V. Samudram v. State of Karnataka*, (2024) 3 SCC 623; *Larsen Air Conditioning & Refrigeration Co. v. Union of India*, (2023) 15 SCC 472.

¹³ *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, (2025) 7 SCC 1 : 2025 INSC 605 [hereinafter, *Gayatri Balasamy*].

¹⁴ Dr. V.N. Alok, *Panchayats and Dispute Resolution: A Report* 32 (2003).

¹⁵ See for instance, Arbitration and Conciliation Act, No. 10 of 1940, § 14 (India) (Award to be signed and filed) [hereinafter, *Arbitration Act of 1940*]; § 17 (Judgment in terms of award); § 20 (Application to file in Court arbitration agreement); § 43 (Power of the Court to issue processes for appearance before arbitrator).

the 1940 Act – a separate and distinguished power from the power to set aside the award.¹⁶ Furthermore, the courts were also empowered to remit the matter back to the tribunal for reconsideration on certain grounds.¹⁷

Moreover, the 1940 Act only dealt with domestic arbitration; therefore, international arbitration was governed by two distinct statutes – The Arbitration (Protocol and Convention) Act, 1937 and The Foreign Awards (Recognition and Enforcement) Act, 1961.¹⁸ However, the growth of arbitration highlighted the need for a comprehensive framework globally.

The UNCITRAL, therefore, envisioned the creation of a global framework keeping in mind international arbitration needs.¹⁹ It unveiled the UNCITRAL Model Law on International Commercial Arbitration, 1985, which aimed to serve as a unified legal framework on the law of arbitral procedures.²⁰

B. Comprehensive Framework: The Arbitration and Conciliation Act, 1996

India adopted the UNCITRAL Model Law as well as the UNCITRAL Conciliation Rules, 1985, through the 1996 Act, with certain modifications tailored to suit both domestic and international commercial arbitration. The statement of objects and reasons *inter alia* highlights a minimal and supervisory role of courts as codified under Section 5 of the 1996 Act.²¹

The principle of non-intervention is closely tied to the notion of arbitration being a party-driven process. Arbitration agreements excluding the jurisdiction of courts are also a recognised exception to the Contract Act, which regards agreements in restraint of legal proceedings as void.²² Thus, Section 5 espouses legislative intent and must have bearing both when the court intervenes and when it interprets any provision of the 1996 Act.

In line with this general principle, the legislature, departing from the 1940 Act, no longer recognised the power of the Court to modify the award under the 1996 Act. The rationale behind such an omission can be attributed to preserving party autonomy and respecting the decisions of arbitrators, thereby preventing a superimposition of judicial opinion on tribunals, barring exigent circumstances as provided under the statute. Thus, its power at the post-award

¹⁶ Arbitration Act of 1940, *supra* note 15, § 15.

¹⁷ Arbitration Act of 1940, *supra* note 15, § 16.

¹⁸ Arbitration (Protocol and Convention) Act, No. 30 of 1937 (India); Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961 (India).

¹⁹ Commonwealth Secretariat, UNCITRAL Model Law on International Commercial Arbitration: Explanatory Documentation Prepared for Commonwealth Jurisdictions 3 (1999).

²⁰ *Id.*

²¹ Arbitration and Conciliation Act of 1996, *supra* note 3, § 5.

²² Contract Act, No. 9 of 1872, § 28 (India).

stage was limited to setting aside the award without interfering with the merits of the matter under Sections 34 and 37. Moreover, this omission cannot be attributed to a mere drafting lapse since the legislature did incorporate Section 16 of the 1940 Act in the form of Section 34(4) of the 1996 Act, which allows courts to remit the award back to the tribunal for review. The question that remains then is whether the power of modification can be read into Section 34.

III. BACKGROUND OF THE JUDGEMENT

The present case is a reference that arose from a workplace sexual harassment allegation by one Gayatri Balasamy. Balasamy, an employee at ISG Novasoft, tendered her resignation, alleging that she was sexually harassed by the CEO. Thereafter, she filed a criminal complaint; however, the Supreme Court eventually referred the matter to arbitration.

The tribunal passed an award in favour of the petitioner, awarding her a sum of Rs. 2 crores. Unsatisfied with its quantum, she moved the Madras High Court seeking to set aside the award. A single bench of the High Court deemed the compensation insufficient and provided an additional sum of Rs. 1.6 crore. However, a division bench reduced the additional sum to merely Rs. 50,000. Balasamy finally moved the Supreme Court by way of Special Leave.

The matter was finally referred to a five-judge bench to clarify the question of law. The then Chief Justice Sanjiv Khanna penned the majority decision, stipulating that the Court had a limited power to modify awards under Sections 34 and 37 of the 1996 Act in certain circumstances, namely, if the valid and invalid portions of the award are severable; if there are any clerical, computational or typographical errors; if the post-award interest needs to be modified; or by applying Article 142 of the Constitution with great care and caution.²³

Conversely, Justice Vishwanathan dissented, holding that the Court under Sections 34 and 37 does not have the power to modify the award.²⁴ This comment primarily considers three prongs of the judgment – severability of an award, *omne majus continet in se minus* (the greater contains the lesser), and the doctrine of merger.

IV. SEVERABILITY

The proviso to Section 34(2)(a)(iv) provides that if the part of the award which contains decisions on matters submitted to arbitration can be separated

²³ Gayatri Balasamy, *supra* note 13, ¶ 85.

²⁴ Gayatri Balasamy v. ISG Novasoft Technologies Ltd., (2025) 7 SCC 1 : 2025 INSC 605, ¶ 157 (Vishwanathan, J., dissenting) [hereinafter, Dissenting Opinion].

from decisions on matters not submitted to arbitration, then the latter may be set aside without any impact on the former. This is referred to as the power of the court to sever the award or partially set aside the award.

The Court, in its majority opinion and dissent, recognised that such severance is not tenable when valid and invalid parts are interlinked, indistinguishable or inseparable from each other.²⁵ The recourse then would be to set aside the award in its entirety. However, in circumstances where the parts of the award are distinguishable and independent of each other, the award may be partially set aside.

The majority posits that despite a semantic difference in ‘modification’ and ‘setting aside’, the practical implication of partially setting aside an award would be in effect modifying the award.²⁶ Hence, it states that the modification of the award is permissible.²⁷

The conflation of ‘modification’ and ‘partially set aside’ is problematic, not merely due to their semantic differences, but even *qua* their practical effect. The Delhi High Court addressed this distinction, stating that, provided a portion of the award is substantially independent, such that it acts as a separate award, the same may be severed and partially set aside. This would not amount to modification since there is no variation in the award.²⁸ The necessary inference then is that, when partially setting aside the award, the respective portion is deemed to be annulled, rendering that part unenforceable. However, modification would not render the modified portion of the award unenforceable on the grounds of annulment.

Therefore, a matter not governed by the arbitration agreement may be severed; however, modifying it would mean actively engaging with the award. Modification entails a positive implication on behalf of the Court as opposed to partially setting aside, which would be a negative implication. Hence, the proviso under Section 34(2)(a)(iv) cannot be extended to modification of awards.

V. OMNE MAJUS CONTINET IN SE MINUS

Omne majus continet in se minus, a legal maxim arising from criminal law jurisprudence, states that a broader offence necessarily includes a minor offence.²⁹ The question before the Court was whether the maxim can be used to assert that the supposedly broader power to set aside an award under

²⁵ Gayatri Balasamy, *supra* note 13, ¶ 35; Dissenting Opinion, *supra* note 24, ¶¶ 144-46.

²⁶ Gayatri Balasamy, *supra* note 13, ¶ 38.

²⁷ Gayatri Balasamy, *supra* note 13, ¶ 39.

²⁸ NHAI v. Trichy Thanjavur Expressway Ltd., 2023 SCC OnLine Del 5183, ¶ 25.

²⁹ Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577.

Section 34, encompassed the seemingly narrower power to modify the award. The majority decision accepted the transposition of the maxim to Section 34 by stating that a contrary interpretation would be inconsistent with the statute and impractical.³⁰

However, for this maxim to apply, the genus, or the nature of the broader and the narrower power, must be the same.³¹ Crucially, the majority decision acknowledges the difference between a procedural review and a substantive review of the dispute's merits.³² In his dissent, Justice Vishwanathan holds this to be the difference between setting aside the award and modifying it, respectively.³³ Thereby, he asserts that they are not of the same genus.

An award may be set aside basis the procedural grounds laid out under Section 34. Furthermore, even when determining whether an award may be set aside on grounds of contravention of public policy under Section 34(2) (b), Explanation 2 stipulates that the test will not entail a review of the merits. Conversely, to modify an award, the court would inevitably have to examine the facts and circumstances, that is, the merits of the matter to accurately delineate the parts of the award that require modification and the extent of the said modification. Therefore, a clear variance exists between the constituent elements of the two powers, making the aforesaid legal maxim inapplicable.

Further, Section 151 of the Code of Civil Procedure, 1908 provides for the inherent power of courts to conduct a procedural review.³⁴ This is in contrast to the power to examine the merits, which requires a statutory mandate.³⁵ Therefore, the genus of the two powers is inherently different, meaning that modification, which requires an examination of merits, cannot occur without an express statutory mandate.

The Viswanathan Committee, tasked with suggesting reforms to the 1996 Act, had infact recommended the inclusion of such a statutory mandate as has been done in other jurisdictions.³⁶ For instance, Section 67 of the English Arbitration Act, 1996, and Section 47 of the Singapore Arbitration Act, 2001 allow Courts to modify awards.³⁷ However, despite numerous opportunities to

³⁰ Gayatri Balasamy, *supra* note 13, ¶ 34.

³¹ *Supra* note 29.

³² Gayatri Balasamy, *supra* note 13, ¶ 50.

³³ Dissenting Opinion, *supra* note 24, ¶ 91.

³⁴ Civil Procedure Code, No. 5 of 1908, § 151 (India).

³⁵ *Grindlays Bank Ltd. v. Central Govt. Industrial Tribunal*, 1980 Supp SCC 420.

³⁶ Expert Committee on Arbitration Law, *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act, 1996 to Make it Alternative in the Letter and Spirit* (2024) (chaired by Dr. T.K. Viswanathan, Retd. Judge).

³⁷ Arbitration Act (GB), c. 23, § 67 (1996) (United Kingdom); Arbitration Act (SG), § 47 (2001) (Singapore).

do so in 2015, 2019 and 2021, such an amendment has not been made to the 1996 Act. Moreover, even the Arbitration and Conciliation (Amendment) Bill, 2024,³⁸ published subsequent to the Viswanathan Committee's report, does not incorporate the power to modify an award.

Ultimately, even if an examination into the merits of the matter is deemed necessary, then the Court may remand the matter back to the tribunal under Section 34(4) and record its reasons. If no change occurs basis the recorded reasons, the Court may set aside the award. Apart from ensuring statutory integrity, such a process will uphold party autonomy since the parties have expressly opted for arbitration to resolve the dispute, limiting court interference, especially on the merits of the matter.

VI. THE DOCTRINE OF MERGER

The doctrine of merger stipulates that any previous orders passed by an inferior authority will be subsumed by the ruling of the superior forum subsequently approached.³⁹ The *raison d'être* is that there should not be two (or more) simultaneous operative orders governing a subject-matter.⁴⁰ However, the caveat for its application is that the nature and scope of the subsequent proceeding should be identical to or broader than that of the prior proceeding.⁴¹ If applicable, this doctrine would result in the modified award being subsumed by the original award rather than being a distinct court order.

The majority accepted the application of the doctrine to orders modifying the award.⁴² Justice Vishwanathan, however, holds that the doctrine will not apply in the absence of a statutory enablement.⁴³ Crucially, this doctrine cannot apply to an order modifying the award since the nature and ambit of such an order by the subsequent forum (court) is not aligned with that of the preceding forum (tribunal). This is because the court's power under Section 34 is limited and does not permit a review on the merits, unlike the arbitral tribunal's broader mandate. The result of such a modification is that the modified award becomes a court order, rather than an arbitral award.

Allowing modification would pose a challenge to the enforcement of foreign awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [**"New York Convention"**],⁴⁴

³⁸ Draft Arbitration and Conciliation (Amendment) Bill, 2024.

³⁹ Gojer Bros. (P) Ltd. v. Ratan Lal Singh, (1974) 2 SCC 453.

⁴⁰ *Id.*

⁴¹ State of Madras v. Madurai Mills Co. Ltd., 1966 SCC OnLine SC 140 : (1967) 1 SCR 732.

⁴² Gayatri Balasamy, *supra* note 13, ¶ 66.

⁴³ Dissenting Opinion, *supra* note 24, ¶ 125.

⁴⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958), 330 UNTS 3 [hereinafter, New York Convention].

because only arbitral awards and not court orders, can be enforced under this convention.⁴⁵ However, the majority decision had dismissed this contention by holding that Section 48(1)(e) of the 1996 Act gives primacy to the law of the seat rather than the New York Convention on questions of enforcement.⁴⁶ It held that if the court reads the power to modify into Section 34, then the modification will no longer contravene the law of the seat, making it enforceable.

The lacuna inherent in this view is that Section 48(1)(e) does not accord primacy to the law of the seat on questions of enforcement and merely states that one of the grounds to refuse enforcement is if the award is set aside by a court at the seat of arbitration. Therefore, enforcement of foreign awards will still be governed by the New York Convention, which India has ratified.

At a foundational level, three reasons exist as to why, particularly within the Indian legal framework, the New York Convention confines enforceability to awards alone. First, from a historical lens, the purpose of the Convention was to promote the use of arbitration in international commercial disputes.⁴⁷ Second, it was meant to optimise the pre-existing framework under the Convention on the Execution of Foreign Arbitral Awards signed in Geneva, 1927,⁴⁸ to deal with foreign arbitral awards.⁴⁹ Third, India adopted this Convention with the understanding that it would govern the recognition and enforcement of foreign awards.⁵⁰

Therefore, a court order cannot be enforced akin to an arbitral award under the New York Convention. This is because a contracting state to the New York Convention has a Public International Law obligation under Article III to enforce a foreign arbitral award.⁵¹ However, no such obligation exists on national courts to enforce a foreign court's order. Hence, any modification of the award would render it unenforceable.

To avoid this predicament, other jurisdictions have incorporated the doctrine of merger into their statutes. For instance, Section 71(2) of the UK English Arbitration Act states that a “*variation has effect as part of the tribunal's*

⁴⁵ Dissenting Opinion, *supra* note 24, ¶ 123.

⁴⁶ Gayatri Balasamy, *supra* note 13, ¶ 61.

⁴⁷ Renato Stephan Grion & Thiago Del Pozzo Zanelato, Historical Aspects of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Perspectives on the Resolution of International Commercial Disputes, 87 Arb. Int'l J. Arb., Mediation & Disp. Mgmt. 153 (2021).

⁴⁸ Convention on the Execution of Foreign Arbitral Awards (1927), 92 LNTS 301.

⁴⁹ Philippe Fouchard, Suggestions to Improve the International Efficacy of Arbitral Awards *in* Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 602 (VAN DEN BERG ED., 1999).

⁵⁰ Sahil Tagotra & Ishita Mishra, Recent Developments in the Enforcement of New York Convention Awards in India, KLUWER ARB. BLOG (2020).

⁵¹ New York Convention, *supra* note 44, art. 3.

award.”⁵² Other countries have also codified the doctrine of merger through similar provisions.⁵³ Until such a provision is legislated, enforcement of modified arbitral awards will be hampered in India.

VII. CONCLUSION

This judgment is delivered at a time when India continues to search for its identity in the evolving field of international arbitration. The majority decision follows an unfortunate string of decisions that highlight a judicial trend of courts espousing their judicial willingness to intervene in the arbitral process.⁵⁴ The approach of the Supreme Court to modify awards is a similar sorrow. It takes away party autonomy, challenges the finality of awards, and threatens the efficiency of the arbitral process.

The Court, by offering the green light to modification of awards, has raised questions on the commitment to arbitration’s fundamental principles. The conflation of the power to set aside, whether partially or in whole, with the power to modify an award cannot be sustained, neither through the lens of legislative intent nor party autonomy. Notably, the Court has failed to consider the absence of statutory provisions in the Act that enable the application of the doctrine of merger, thus raising enforceability concerns under the New York Convention.

Justice Vishwanathan’s dissenting opinion serves as a necessary reminder to the institutional responsibility of courts – to respect the boundary between necessary judicial intervention and unnecessary judicial overreach. The dissenting opinion encapsulates the statutory intent evident from the scheme of the 1996 Act and foundational principles of arbitration.

In conclusion, while attempts to act in the interest of justice are commendable, there needs to be a delicate balance between party autonomy and judicial oversight. Unless significant institutional coherence is restored across all branches, India’s aspiration to become a global arbitration hub will remain a distant and fractured vision.

⁵² Arbitration Act of 1996 (GB), c. 23, § 71(2) (UK).

⁵³ Arbitration Act of 2001 (SG), § 51(2) (Singapore); Arbitration Act of 2012, § 39(5) (Kenya).

⁵⁴ See *Alpine Housing Development Corpn. (P) Ltd. v. Ashok S. Dhariwal*, 2023 SCC OnLine SC 55; *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*, (2024) 6 SCC 357 : 2024 INSC 292.

(FORM IV)

STATEMENT ABOUT OWNERSHIP
AND OTHER PARTICULARS

(See Rule 8)

- | | | |
|----|-----------------------------|---|
| 1. | Place of Publication: | NALSAR ADR Journal,
Hyderabad - 500101 |
| 2. | Periodicity of Publication: | Annual |
| 3. | Printer: | Editorial Board, NALSAR ADR
Journal |
| | Nationality | Indian |
| | Address: | Shamirpet, Hyderabad - 500101 |
| 4. | Publisher: | Registrar, NALSAR University of Law,
Hyderabad |
| | Nationality: | Indian |
| | Address: | NALSAR ADR Journal,
Hyderabad - 500101 |
| 5. | Editor: | Kshitij Saruparia |
| | Nationality: | Indian |
| | Address: | Jodhpur, Rajasthan - 342001 |
| 6. | Ownership: | NALSAR ADR Journal,
Hyderabad |

I, Kshitij Saruparia, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-

Kshitij Saruparia



NALSAR ADR JOURNAL

SUBMISSION GUIDELINES

- Kindly note that all submissions made to the NALSAR ADR Journal must mandatorily comply with the following guidelines:
 - The maximum number of authors for each submission shall be 2.
 - All submissions must be accompanied by a 250-word abstract and 5-8 keywords.
 - Footnotes are to be in accordance with the BlueBook (20th edition).
- The submissions must be in compliance with the following formatting requirements ;
 - Body of the Submission – Times New Roman, Font Size 12, 1.5 Line Spacing, Justified Alignment and 1-inch margins on each side.
 - Footnotes – Times New Roman, Font Size 10 and Single Line Spacing.
 - Authors must ensure that the submissions are original works. All submissions will be thoroughly scrutinized for plagiarism and the finding of any plagiarized content will lead to the submission being directly rejected. Further, the decision of the Editorial Board shall be final in this regard.
- The submissions must not contain any information which may lead to the identification of the author/authors. Information such as the name of the author/ authors, contact details, designation and institutional affiliation must be provided separately in the cover email for the submission.
- Any information leading to the identification of the author/authors, if found, shall result in the submission being rejected. Further, the decision of the Editorial Board shall be final in this regard.

SUBMISSION PROCEDURE

- Authors are hereby requested to comply with the following procedure:
- All submissions shall be sent to adrjournal@2025 in doc or . docx format.
- The subject of the email shall be as follows – “Submission for Volume I, Issue I | Name of the Author/ Authors – Title of Submission”
- The soft copy of the submission shall be in the following format– “[Name of the Author/ Authors] – Title of Submission ”
- The submission should be accompanied by a cover email that includes the following details:
 - Name of the Author / Authors Contact Details
 - Designation
 - Institutional Affiliation

MANDATE

- All submissions made to The Journal must fall under the ambit of Arbitration Law (both domestic and international) and/or Alternate Dispute Resolution.

EDITORIAL POLICY

- All submissions will be subjected to a Two-Stage Blind Review Procedure. Further, all submissions will be thoroughly anonymized before the review process commences.
- Submissions published earlier or under consideration for publication in any other place at the time of submission will be directly rejected.
- Further, if a submission is accepted elsewhere while being under consideration by The Journal, the author/authors must duly inform the Editorial Board and withdraw their submission immediately.
- The Editorial Board reserves its discretion to make any changes to the Editorial Policy as it deems necessary, and the Editorial Board will duly communicate any change so affected.

ORDERING COPIES

Price (inclusive of shipping) of the NALSAR ADR Journal is as follows:

Hard Copy for 2025	Rs. 550
Hard Copy for 2024	Rs. 450

Order online: www.ebcwebstore.com

Order by post: send a cheque/draft of the requisite amount in favour of 'Eastern Book Company' payable at Lucknow, to:

Eastern Book Company,
34, Lalbagh, Lucknow- 226001, India
Tel.: +91 9935096000, +91 522 4033600 (30 lines)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission.

The published works in this issue may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational and research purposes provided that such use is duly acknowledged.

© 2025 – NALSAR ADR Journal