

# Arbitration In India

- A Story Of Growth And Opportunity



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## The Significance of Arbitration and ADR Today

Arbitration today is the default setting for commercial dispute resolution in India. Initially finding favour with foreign parties reluctant to submit to Indian court jurisdiction owing to the endemic delays in the Indian legal system and perceived interference, it was not long before Indian parties also realised the benefits of a simpler and quicker way of resolving their disputes. Indeed, the Indian Government also recognised that increasing efficiencies in arbitration and the enforcement process, was a mechanism to ratchet it up World Bank rankings for Doing Business. In the ‘World Bank Report on Doing Business 2018’, India’s ranking for ‘Enforcing Contracts’, improved several positions, i.e. from 172 in 2016, to 164 in 2017<sup>1</sup>, and 163 in 2019. Insofar as general ease of doing business is concerned, India jumped 23 places from 2018, to a ranking of 77 in 2019<sup>2</sup>.

## Development of the Arbitration Regime in India

That said, arbitration is not new to India. Even prior to the advent of the British, village elders or ‘panchayats’, routinely settled disputes between disputing members of the village. The first codification of India’s arbitration law was the Arbitration Act, 1899 (based on the English Arbitration Act, 1899). It was further codified in in Schedule II of the Code of Civil Procedure, 1908, where arbitration provisions were extended to various parts of British India. Thereafter the law governing arbitration was fragmented across different enactments – the Indian Arbitration Act, 1940 (dealing with domestic arbitration); and the Arbitration (Protocol and Convention) Act, 1937; and the Foreign Awards (Recognition and Enforcement) Act, 1961 (both dealing with recognition and enforcement of foreign

awards under the Geneva Protocol & Convention and the New York Convention, respectively).

The Arbitration & Conciliation Act of 1996 (the “Act”), modelled on the UNCITRAL Model Law on International Commercial Arbitration, consolidated the law of arbitration law in India, repealing all three earlier statutes. The Act came into force at the time of India’s economic liberalisation and intended globalisation and was expected to be a shot in the arm for a quick and cost effective form of alternative dispute resolution through arbitration. It was touted as updating the law of arbitration in India to make it more responsive to contemporary requirements and while restricting the intervention of courts, envisaged co-operation between the judicial and arbitral process.

Almost two decades later, the criticisms reached their zenith, and India’s reputation, its nadir. Indian courts were reputed as being particularly interventionist, exercising jurisdiction even over arbitration proceedings seated outside India<sup>3</sup>. The gross delays in the Indian judicial system resulted in a country which was seeking to be a star on the global stage, being shunned as a seat of arbitration at all costs. The award issued by a three member ICC tribunal in the White industries case which roundly held the Indian Government to blame for not providing White Industries with “effective means” of asserting claims and enforcing rights”, highlighted the embarrassment<sup>4</sup>.

It was evident to anyone who cared to take a look, that the Act required further amendment, clarification and some reform. The landmark Supreme Court decision in ‘BALCO’<sup>5</sup>, and two proposals for amendment of the Act<sup>6</sup>, finally culminated in the 20th Law Commission’s Report No. 246 (issued in August 2014,<sup>7</sup> with a Supplementary Report in February 2015<sup>8</sup>), on proposed amendments. The Report had

<sup>1</sup> [http://doj.gov.in/sites/default/files/Brief%20Note%20on%20Doing%20Business%20Report-2018\\_2.pdf](http://doj.gov.in/sites/default/files/Brief%20Note%20on%20Doing%20Business%20Report-2018_2.pdf)

<sup>2</sup> <http://www.doingbusiness.org/content/dam/doingBusiness/country/i/india/IND.pdf>

<sup>3</sup> Bhatia International v Bulk Trading S.A & Anr. (2002) 4 SCC 105; Venture Global Engineering v. Satyam Computer Services Ltd. & Anr., (2010) 8 SCC 660

<sup>4</sup> <https://investmentpolicyhub.unctad.org/ISDS/Details/378>, Final Award available at <https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf> (@ Par.11.4.19)

<sup>5</sup> Bharat Aluminum & Company & Ors. v. Kaiser Aluminum Technical Service Inc. & Ors. (2012) 9 SCC 552

<sup>6</sup> (i) the Arbitration & Conciliation (Amendment) Bill, 2003

(ii) the Consultation Paper on proposed amendments to the Arbitration & Conciliation Act, 1996, issued by the Ministry of Law & Justice on April 8, 2010.

<sup>7</sup> <http://lawcommissionofindia.nic.in/reports/report246.pdf>



a fresh look at the various lacunae in the Act and subsequent court rulings over the years, and suggested some long awaited and critical amendments.

Extensive amendments were brought about by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect from October 23, 2015 (“the 2015 Amendments”). The 2015 Amendments demonstrated a clear preference for institutional arbitration by making special allowances in respect thereof, for instance by exempting institutions and arbitrators appointed by them from the fees set out in the Fourth Schedule (presumably on the basis that every institution has its own schedule of fees, which is carefully considered and fixed).

## The Growth of Institutional Arbitration in India

Matters did not rest there. Side-by-side with the growth of an identifiable ‘international arbitration’ practice and procedure, there has been a spurt of interest in institutional arbitration by private parties – both Indian and foreign, and also encouragingly, the Government itself.

A NITI Aayog Report published in 2016 found that it took about 5 years even for disposal of an arbitration in the construction sector (proving the domestic arbitration was beginning to suffer from similar delays), and then an additional 2 ½ years in courts for any challenge to an award being adjudicated<sup>8</sup>. In 2009, the Law Commission had also found that the Union of India and its instrumentalities were the biggest litigant in the country<sup>10</sup>. The push for institutional arbitration was logical. In 2014, the Government issued an Office Memorandum noting that “*Adhoc arbitration proceedings often suffer from innumerable*

*legal and practical problems which cause inordinate delays and costs in actual practice. This is because adhoc arbitrations do not have the advantage of any institutional machinery set up under the comprehensive rules of an arbitral institution.*” The Trade Policy Division hence suggested that Government organisations may “opt for use of arbitration conducted by institutions”<sup>11</sup>.

Recognising the necessity for a further revamp of the Act and the benefits of institutional arbitration, the Government set up a High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India under the Chairmanship of Justice B. N. Srikrishna, Retired Judge of the Supreme Court. The Report rendered in August, 2017 recommended extensive measures to improve the overall quality and performance of arbitral institutions in India and to promote India as a viable if not preferred seat of arbitration.<sup>12</sup> Consequently, the further amendments intended by Arbitration and Conciliation (Amendment) Bill, 2018 (“the Proposed 2018 Amendments”), include most critically, the push for institutional rather than ad hoc arbitration, which seems to be suffering (much like the courts), from undue delay.

For instance, the Mumbai Centre for International Arbitration (“MCIA”), was set up in 2015 with a set of Rules which reflect international best practices, with support from the Maharashtra Government, which issued a policy note mandating institutional arbitration for all future government contracts where the value is above INR 50 million, and nominates the MCIA as the institution of choice.<sup>13</sup> The Supreme Court has also facilitated the growth of institutional arbitration, directing parties to an ad-hoc international arbitration to approach the MCIA for the appointment of an arbitrator.<sup>14</sup>

<sup>8</sup> [http://lawcommissionofindia.nic.in/reports/Supplementary\\_to\\_Report\\_No.\\_246.pdf](http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf)

<sup>9</sup> NITI Aayog Press Note ‘Initiatives to revive the Construction Sector’ available at [http://niti.gov.in/writereaddata/files/press\\_releases/Initiatives%20to%20revive%20the%20Construction%20Sector.pdf](http://niti.gov.in/writereaddata/files/press_releases/Initiatives%20to%20revive%20the%20Construction%20Sector.pdf)

<sup>10</sup> Law Commission of India Reforms in the Judiciary, Report No. 230 p 17, August 2009; Government Litigation – An Introduction, Vidhi Centre for Legal Policy, available at <https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5a86973c9140b70db77ae260/1518770007997/Government+Litigation+Final.pdf> page 1

<sup>11</sup> Office Memo. 37/1/2004-TPD (Vol II) dt. February 24, 2014 on Use of Arbitration Clause in Commercial Contracts for Resolving Commercial Disputes issued by the Government of India, Ministry of Commerce and Industry, Department of Commerce (Trade Policy Division) available at [164.100.229.55/file/2658/download?token=sjJBL58E](http://164.100.229.55/file/2658/download?token=sjJBL58E)

<sup>12</sup> <http://pib.nic.in/newsite/PrintRelease.aspx?relid=169621>

<sup>13</sup> Government Resolution No. Misc.-2016/M No. 20/S-19

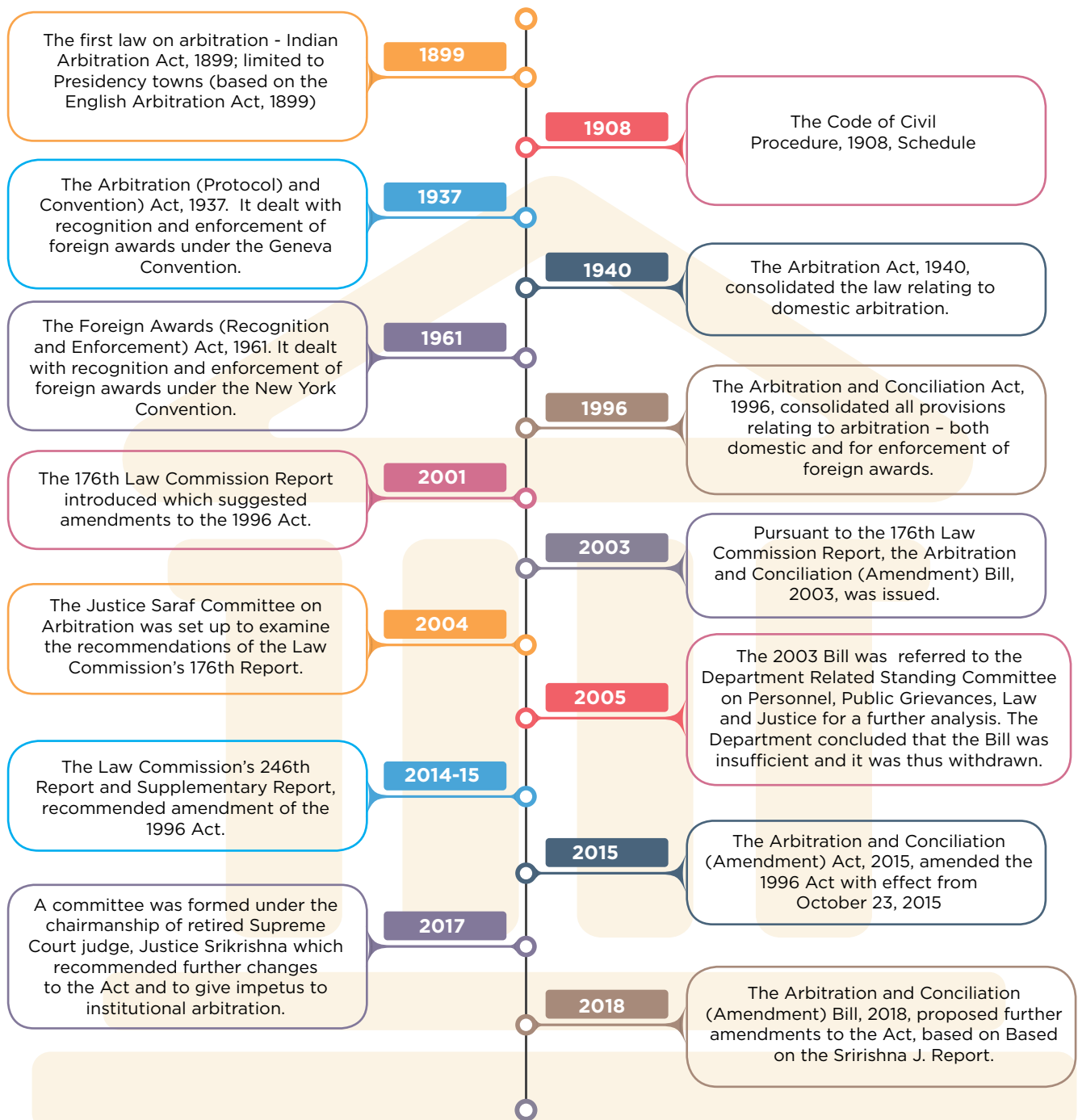
<sup>14</sup> Arbitration Case No. 33 of 2014, Sun Pharmaceuticals v. Falma Organics Ltd., Supreme Court, available at [https://www.sci.gov.in/jonew/courtncic/rop/2014/27324/rop\\_930043.pdf](https://www.sci.gov.in/jonew/courtncic/rop/2014/27324/rop_930043.pdf)

# Arbitration

The Singapore International Arbitration Centre (“SIAC”), recently opened its second liaison office in India, Indian parties being famously, amongst the top arbitration user in SIAC arbitrations. Similarly, institutions such as the International Court of

Arbitration of the International Chamber of Commerce (“ICC”), and the London Court of international Arbitration (“LCIA”) are also popular, affirming a clear preference for institutional arbitration.

## History of Arbitration in India





## The NDIAC and the ACI

Hot on the heels of the 2018 Amendment Bill, the New Delhi International Arbitration Centre (“NDIAC”) Bill, 2018, was introduced with the aim of remoulding the International Centre for Alternative Dispute Resolution (“ICADR”) into a robust international arbitration centre and declaring the NDIAC as an institution of national importance. In the first week of 2019, this bill was passed with approval by the lower house of the parliament.

The Proposed 2018 Amendments envisage the incorporation of a new and independent statutory body called the Arbitration Council of India (“ACI”) which will grade and accredit arbitral institutions and arbitrators and frame policies for such grading and accreditation (more on that later), as also for uniform professional standards.

### Key issues emanating from the 2015 Amendments and 2018 Amendments

We discuss in brief below, certain key issues that have been tackled by these key amendments to the Act.

#### a) Applicability of the 2015 Amendments

Pursuant to various conflicting decisions of various High Courts as to which court proceedings the 2015 Amendments would apply (owing to perhaps some ambiguous wording in Section 26 of the Amendment Act<sup>15</sup>), the Supreme Court held that the 2015 Amendments would apply to all court proceedings pending on or commenced after October 23, 2015, the date on which the 2015 Amendments came into effect (whether or not they were in relation to arbitral proceedings commenced prior thereto).<sup>16</sup>

The critical consequence of the Apex Court’s ruling has been that, while prior to the 2015 Amendments there was an automatic stay of enforcement of awards upon a challenge being filed, the position that now applies is that there is no such automatic stay, and this position has also

become applicable to pending set aside applications. As such, even in pending set aside proceedings where a stay of the award was in effect, in order for the stay to continue, a specific application has to be made and the stay may be granted only conditionally, usually upon deposit of the awarded amount or other security in court.

The proposed 2018 Amendments clarify the intended position and are however stated not to apply to pending proceedings. They are to apply only to arbitrations commenced after October 23, 2015, and court proceedings emanating therefrom. Notably, this is contrary to the aforesaid decision of the Supreme Court, which had suggested that a copy of its judgment and the interpretation taken therein, be circulated to the Law Ministry (in a bid to ensure that its interpretation is clearly adopted in the eventual 2018 Amendments).

#### b) Recourse to Indian courts even in foreign seated arbitrations

One of the most welcome 2015 Amendments was the recourse that was afforded to parties in foreign seated arbitrations, to Indian courts for the purposes of interim relief; something that was not available prior thereto (post the 2012 ruling in BALCO). This amendment brought India’s arbitration law in line with global practice and other comparable jurisdictions such as the UK and Singapore, the two most popular foreign seats for India related disputes.

The concept of the seat, with its specific juridical connotation (the courts of the seat have jurisdiction over the arbitral proceedings), as distinguished from mere venue (of hearings), has been subject to considerable jurisprudence and debate over the last few years. Where parties have not expressly specified the seat, the tribunal will determine the same based on the circumstances of the case, the convenience of parties, and which place has the closest and most intimate connection with the dispute.<sup>17</sup>

The Act prescribes that where the place of arbitration is India, in an arbitration between Indian parties, the substantive law for the time being in force in India shall be applicable. There is however no specific bar against Indian parties choosing a foreign seat (whether or not one considers

<sup>15</sup> Section 26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

<sup>16</sup> Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287

<sup>17</sup> Enercon (India) Ltd. v. Enercon GmbH, (2014) 5 SCC 1.



such a choice to be logical). Courts have been divided on this issue, with some ruling that the choice of a foreign seat (and the attendant jurisdiction of foreign courts and foreign law to the arbitral proceedings), would amount to Indian parties contracting out of Indian law, something that would be contrary to Indian public policy. Other courts have ruled (perhaps correctly), that there is no such prohibition and so upheld party autonomy to choose a preferred seat. While there was an opportunity for the 2018 Amendments to clarify this issue, it has not been addressed and it remains now for the Supreme Court to decide. Pending clarity from the Supreme Court, parties to such contracts wishing to avoid the risk of an award being set aside on the grounds of public policy, should consider retaining India as the seat of arbitration.

## c) Appointment of Arbitrators

The push for institutional arbitration and speeding up of the process is also found in the manner of appointment of arbitrators through the court process. It is envisaged that the Supreme Court (in the case of international commercial arbitrations) / High Courts, may designate specific arbitral institutions (who must obviously be accredited – see more on that below), which will be mandated to make the relevant appointments. This encourages institutional arbitration as also streamlines the process by taking away some part of the burden from the court.

One of the most valuable characteristics of arbitration is the party autonomy that is afforded to them to choose arbitrators and devise a procedure that best suits them. Indeed, the ability to choose their own arbitrators was cited as the fourth most valuable characteristic of arbitration.<sup>18</sup>

Well intentioned as it may be, the 2015 Amendments included as the Fifth and Seventh Schedules to the Act, standards for appointment and eligibility of arbitrators, lifted from the IBA Guidelines on Conflicts of Interest in International Arbitration, 2014. While the IBA Guidelines are only 'soft law, or 'guidelines', the inclusion of these conditions in the Act, render them statutory in nature. While the grounds set out in the Fifth Schedule (drawn from the Red List and Orange List of the IBA Guidelines)

are purported to "guide" when "determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator", the mere fact of their inclusion would suggest that if such conditions exist, they are certain to affect such independence or impartiality, and any arbitrator disclosing such conditions would almost certainly be challenged. This could lead to practical problems; for instance Ground 22, is "The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties." As many know, we do not have a wide pool of qualified arbitrators to deal with small disputes efficiently. Companies which conduct retail services and deal with hundreds of consumers, for example, credit card companies, airlines etc., may find it impossible to get different arbitrators for their cases, particularly given that the frequency of cases may be high, while quantum may be low.

Taking it a step further, the Seventh Schedule sets out grounds which render a person ineligible to be appointed as an arbitrator, lifted almost entirely from the Red List of the IBA Guidelines, imposing them with statutory effect. Courts have held that the existence of such grounds would not only disqualify a person from appointment as arbitrator,<sup>19</sup> but also disqualify him from nominating or appointing an arbitrator. While the Seventh Schedule incorporates both 'waivable' and 'non-waivable' items in the Red List, the 2015 Amendments allow parties to waive the applicability of all such items by an express agreement in writing "subsequent to disputes having arisen between them", although it is difficult to see why a defendant would agree to waive such conditions, which would otherwise work to his advantage.

## d) The Arbitration Council of India ("ACI") - Accreditation (of arbitrators and arbitral institutions) and Regulation

The Arbitration Council of India ("ACI"), is expected to "lay down standards, make arbitration process more party friendly, cost effective and ensure timely disposal of arbitration cases."<sup>20</sup> The ACI will grade and accredit arbitral institutions and arbitrators and frame policies for such grading and

<sup>18</sup> 2018 International Arbitration Survey: 'The Evolution of International Arbitration' - conducted by the School of International Arbitration, Queen Mary University of London and White & Case

<sup>19</sup> TRF Ltd. vs. Energo Engineering Private Ltd. (2017) 8 SCC 377

<sup>20</sup> Press Release dated March 7, 2018, from Press Information Bureau of India, 'Cabinet Approves the Arbitration & Conciliation (Amendment) Bill, 2018' available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=177117>



accreditation, as also for uniform professional standards.

The norms for accreditation of arbitrators are set out in a new Eighth Schedule to the Act, criticized for being an exhaustive rather than being an inclusive list of conditions / qualifications. The Eighth Schedule consists of a statutory list of persons eligible to be an arbitrator and anyone not qualifying, shall “not be qualified to be an arbitrator”. The qualifications appear to rely primarily on seniority, a basic professional degree, or number of years of employment in a government service, rather than being relevant to a person’s knowledge of or experience in arbitration. The list does not render eligible persons who may be recognized as qualified arbitrators by any other professional body (such as the well-known Chartered Institute of Arbitrators (“CIArb”)), thus also (presumably), ruling out foreign qualified and experienced arbitrators.

Not only accreditation, but regulation – the ACI is empowered to “*frame policy and guidelines*” for and in respect of all matters relating to arbitration, and is also empowered to make “*regulations*” in consultation with the Central Government for the discharge of its functions and duties under the Act. By empowering the ACI in such manner, though well intentioned, the 2018 Amendments make yet another regulator.

## e) Arbitrability

The Act does not specifically exclude any category of disputes as being non-arbitrable, i.e. not amenable to arbitration, although, it clear that an arbitral award will be set aside or enforcement refused if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. This being the position, determination and clarity on the arbitrability of a dispute prior to its adjudication becomes crucial for the enforcement of any award.

Whether or not a dispute is arbitrable, depends on: (i) whether the dispute can be resolved by a private forum chosen by parties, or it pertains to an issue in rem (i.e. in relation to a right exercisable against the world at large, as contrasted from a right in personam, i.e. in relation to an interest protected solely against specific individuals<sup>21</sup>), in which case it will

fall within the domain of public fora; (ii) whether there is any statutorily constituted court or tribunal with exclusive jurisdiction to deal with such disputes, for example rent control, insolvency etc., in which case the dispute will not be arbitrable; (iii) whether in the facts of the case, the dispute is covered by the arbitration agreement and / or whether the dispute falls within the term of reference.

Certain disputes which are not arbitrable under Indian law, may be arbitrable in other jurisdictions; for example, disputes relating to shareholder rights against oppression and mismanagement. These are not arbitrable, such issues falling within the exclusive jurisdiction of the National Company Law Tribunal (“NCLT”), under the Companies Act, 2013. On the other hand, there is no such preclusion under Singapore law. Singapore, being the most preferred seat for many India-related disputes, the question arises as to whether a tribunal sitting in Singapore would agree to consider such a dispute, and if so (on the basis that Singapore being the seat, Singapore law would apply on issues of arbitrability), whether an ensuing award would be enforced given that oppression / mismanagement disputes are not capable of settlement by arbitration under Indian law.

Fraud is another (slightly) grey area. Where a case involves serious allegations of fraud, a civil court is deemed to be a more appropriate forum to adjudicate the dispute than and arbitral tribunal, owing to the issues demanding extensive evidence. This is a peculiarity of Indian law; other jurisdictions do not discriminate against fraud in this regard, save to the extent that it may be a criminal offence and so not amenable to arbitration. However, to safeguard against defendants who may raise the bogey of fraud only to avoid arbitration, it is made clear that bald allegations of fraud in the pleadings will not be a ground to hold that the matter is incapable of settlement by arbitration or to nullify an arbitration agreement. An exception would only be made for serious allegations<sup>22</sup>. Keeping this in mind, in the 2015 Amendments provide that a judicial authority must refer parties to arbitration if a valid arbitration agreement is in existence, “*notwithstanding any judgment, decree, or order of the Supreme Court or any Court*”, referring to the judgment of the Supreme Court which held that fraud is not arbitrable,<sup>23</sup> and thus negating its effect.

<sup>21</sup> Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors. (2011) 5 SCC 5 32.

<sup>22</sup> A. Ayyasamy v. A. Paramasivam - 2016 (9) SCALE 688; Ameet Lalchand v. Rishabh Enterprises – 2018 (6) SCALE 621

<sup>23</sup> N. Radhakrishnan v. Maestro Engineers, 2010 1 SCC 7

## f) Interim relief and emergency arbitrators

While enhancing the jurisdiction of Indian courts to grant interim reliefs even in relation to foreign seated arbitrations, the 2015 Amendments also enhanced the powers of the arbitrator to order interim measures of protection.

Once the tribunal is constituted, an application for relief must be made only to such tribunal, unless the remedy granted by the tribunal will not be efficacious. Further, to avoid a (relatively common), situation where an applicant sits happily on an injunction for months, but delays commencement of the arbitration, the applicant must commence arbitration within 90 days of the court's order.

Additionally, in a bid to empower the arbitral tribunal and curtail court intervention, the arbitral tribunal has powers co-existent with that of a court to grant interim relief and an order of the tribunal may be enforced as if it were an order of an Indian court, thus doing away with further applications to the court.

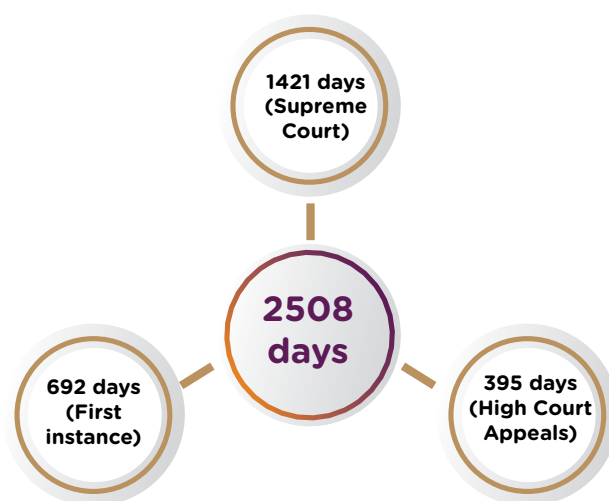
Although recommended in the 246<sup>th</sup> Law Commission Report, neither the 2015 nor the 2018 Amendments contain provisions for emergency arbitrators, or for enforcement of orders of awards of emergency arbitrators. As a result, such orders / awards cannot be enforced, whether they are passed by arbitrators seated in India or outside. The substitute for strict 'enforcement' by a court, would be to apply for identical interim relief from an Indian court, using the emergency arbitrator's order / award for persuasive value.<sup>24</sup> There is nothing however that mandates the court to grant the same reliefs as granted by the emergency arbitrators and it may well refuse, or modify the reliefs so granted. For such reason, particularly in the Indian context, it is common for parties to apply directly to an Indian court for interim relief (indeed quick as most of the arbitral institutions are, such reliefs may be sought and granted overnight), so that enforcement is automatic.

## g) Speeding up the process

The difference in practice and procedure between ad hoc domestic arbitration in India and 'international arbitration',

has widened, although the Act when it was introduced in 1996 and the 2015 Amendments sought to create a fair an efficient process in line with international practice. In fact, the 24th Law Commission Report (the precursor to the 2015 Amendments) noted that, *"The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated."* As such, the Law Commission also noted the "urgent need to revise certain provisions of the Act".<sup>25</sup>

As the table on next page taken from a NITI Ayog study shows, it takes 24 months to resolve challenges to an award in lower courts, 12 months in High Courts and 48 months in Supreme Court; overall taking an average period of a whopping 2508 days!<sup>26</sup>



<sup>24</sup> HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd & Ors, 2014 SCC OnLine Bom 102

<sup>25</sup> <http://lawcommissionofindia.nic.in/reports/report246.pdf>, Chapter II, at Paragraphs 3 & 4

<sup>26</sup> Bibek Debroy and Suparna Jain, Strengthening Arbitration and its Enforcement in India – Resolve in India, NITI Ayog, available at [https://niti.gov.in/writereaddata/files/document\\_publication/Arbitration.pdf](https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf)





It was in this context that the 2015 Amendments provided that an award must be made within 12 months from entering upon the reference by the tribunal, extendable to a period of 18 months by the consent of the parties, failing which the mandate of the arbitrators would terminate. Any extension over 18 months could only be obtained with the permission of the Court. The newly inserted provision though well-intentioned was met with criticism. In practice, 18 months is an ambitious target for most complex, commercial disputes and it is common for international arbitrations to take between 18-24 months, if not more.<sup>27</sup>

The High Level Committee Report noted that international arbitral institutions had criticized the timelines introduced in the 2015 Amendments for passing of an award, on the

basis that the conduct of the proceeding is best left to the institutions and had as such proposed that the 12 month (extendable to 18 months) timeline should not apply to international commercial arbitrations on the basis that they were impractical. Under the 2018 Amendments, the 12 month period will start running from the date of completion of pleadings (which usually takes between 3 to 6 months in ad hoc arbitrations), and notably, excludes international commercial arbitrations from this provision. This is presumably on the basis that an international commercial arbitration will in all likelihood be under the auspices of an arbitral institution which will have its own timelines and will monitor speed and efficiency, but that is not a certainty, and this proposed amendment then discriminates against a purely domestic arbitration. Other timelines were included, as set below:

	Timeline	Action
1.	<b>90 days</b> - from the date of passing an order for interim relief.	To commence arbitration after an order for interim relief is made by a court.
2.	<b>60 days</b> - from the date of service of notice on the opposite party.	To dispose of an application made to the court for appointment of an arbitrator.  N.B. The 2018 Amendments state that an application for appointment of an arbitrator to an arbitral institution shall be disposed of within 30 days from the date of service of notice on the opposite party.
3.	<b>12 months</b> - from the date the tribunal enters upon reference.  Extendable by 6 months, i.e. to <b>18 months</b> by mutual consent of the parties.  After the expiry of this 12 or 18 month period, as the case may be, parties have to approach the Court for extension of time.	Time limit for the arbitral tribunal to pass an award.  N.B. 2018 Amendments propose the time frame for passing an award commencing from completion of pleadings.
4.	<b>60 days</b> - from the date of service of notice on the opposite party of an application for extension.	For disposal of an application for extension of time to pass an award.
5.	<b>1 year</b> - from the date on which the notice is served upon the other party.	To dispose of an application to set aside an award.

Fast-track arbitration is now also an option (much like the expedited procedure available under most institutional rules). The dispute must be decided in 6 months and without any oral hearings (though an application for an oral hearing may be made to the tribunal). This may be a useful provision for small, relatively straightforward claims.

## h) Costs

Part of the bid to increase efficiency and speed up the process, the provisions for costs following the event (which though recognized in principle, was not always followed), ratifies the rule that an unsuccessful party must pay the

<sup>27</sup> How Long is Too Long to Wait for an Award?, GAR News, The International Journal of Commercial and Treaty Arbitration, February 18, 2016, available at [https://vannin.com/press/pdfs/18-2-16\\_How\\_long\\_is\\_too\\_long\\_to\\_wait\\_for\\_an\\_award\\_.pdf](https://vannin.com/press/pdfs/18-2-16_How_long_is_too_long_to_wait_for_an_award_.pdf)

costs of the successful party (unless otherwise ordered for reasons recorded in writing). The imposition of costs for seeking adjournments, has also ensured that delays will be disincentivized.

## i) Challenge of an arbitral award

The grounds on which an award may be set aside are limited and pertain primarily to the procedure of the arbitration and principles of natural justice.

A crucial amendment was the inclusion of specific wording in relation to the scope of the public policy challenge - perhaps the most abused provision in the Act. The amendments clarify that an award will be in conflict with the public policy of India only if: (a) the making of the award was induced or affected by fraud or corruption or was in violation of confidentiality provisions or admissibility of evidence provisions in the Act; (b) it is in conflict with the most basic notions of morality or justice; or (c) it is in contravention with the fundamental policy of Indian law. Specifically, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

An additional ground of challenge available only to purely domestic awards, is patent illegality appearing on the face of the award. Once again, there is a differentiation between purely domestic and international commercial arbitrations, though both are seated in India; both may be institutional arbitrations - or not; both may have arbitrators qualified in the same manner (whether the ubiquitous retired Indian Judge, or Indian Senior Counsel, or Queens Counsel); the only difference between the two being that one of the parties is a foreign party. The Law Commission recommended this insertion on the basis (rightly or wrongly), that, *“The legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.”* And further that, *“given the circumstances prevalent in our country, (there is) legitimately so, greater redress against purely domestic awards.”*<sup>28</sup> This suggests an assumption that the purely domestic arbitration will be ad hoc, and / or that it

will therefore be inefficient, and / or that the arbitrators may not be sufficiently qualified or experienced to deal with the dispute in an appropriate manner, and that therefore such judicial intervention is justified (in our view, perhaps not).

The 2015 Amendments clarify that even in relation to the ‘patent illegality’ challenge, that shall not imply a mere incorrect interpretation of law or mis-appreciation of evidence by the arbitrator, ensuring that a challenge to an award cannot entail a review on merits.<sup>29</sup> This position has been followed by court, proving India to be quickly becoming a very pro-arbitration jurisdiction. It is settled now that a mere contravention or misapplication of Indian law will not tantamount to a violation of public policy and have also upheld the narrow construction of public policy<sup>30</sup> as envisaged by the legislature (and in line with India’s ratification of the New York Convention).<sup>31</sup>

Circumscribing even further, any attempt to review an award on merits or examine the facts or merits of a case, the 2018 Amendments propose that a challenge to an award must be maintained and established only *“on the basis of the record of the arbitral tribunal”*.

## The case for foreign lawyers

India ranks among the top 10 host economies for foreign direct investment attracting USD 22 billion in the first half of 2018, according to the UNCTAD 2018 World Investment Report.<sup>32</sup> Many of them are foreign affiliates of global companies, who have their own set out lawyers out of their head office. From the point of view of familiarity with their business and trust, it is not unreasonable that should a dispute arise, they would want one of their panel lawyer firms to be involved in strategy and advice should a dispute arise. Indian regulation has grappled with the issue of whether foreign lawyers should be allowed to practice in India. (Notably, Indian professional regulations impose various restrictions over Indian ‘advocates’, such as a 20 partner limit for a partnership firm; prohibition of contingency or success fees, preclusion against advertising, etc., which are not imposed in various other common law jurisdictions).

<sup>28</sup> <http://lawcommissionofindia.nic.in/reports/report246.pdf>, Chapter I, at Paragraphs 34 & 35

<sup>29</sup> *Venture Global Engineering LLC & Ors v Tech Mahindra Ltd. & Ors* [2017] 13 SCALE 91 (SC)

<sup>30</sup> *Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, 239 (2017) DLT 649

<sup>31</sup> *Sulej Construction v. The Union Territory of Chandigarh* [2017] 14 SCALE 240 (SC)

<sup>32</sup> [https://unctad.org/en/PublicationsLibrary/wir2018\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf), at



The issue was set at rest by the Supreme Court in 2018, in the case of *Bar Council of India v. AK Balaji*,<sup>33</sup> when it clarified that only advocates enrolled with the Bar Council would be entitled to practice law in India. Observing that the practice of law included both litigation and non-litigation matters (such as advisory opinions, drafting of instruments, participation in conferences involving legal discussion etc.), even visits of foreign lawyers on a ‘fly-in and fly-out’ basis, could amount to practice of law done on a regular basis. However, a ‘casual’ visit for giving advice (which could only be determined on a case by case basis), would not be so covered. As such, “there was no bar for the foreign law firms or foreign lawyers to visit India for a temporary period on a *“fly in and fly out” basis for the purpose of giving legal advice to their clients in India regarding foreign law or their own system of law and on diverse international legal issues,*” and that foreign lawyers would therefore not be debarred from coming to India to conduct arbitrations in respect of disputes arising out of a contract relating to international commercial arbitration.<sup>34</sup>

### Third Party Funding

With common law jurisdictions such as the United States, UK, Hong Kong, Singapore and Australia, recognising third party funding in both litigation and arbitration, it now remains for India to follow suit. The Supreme Court,

in *Balaji* (supra), noted (albeit as obiter), that there appeared to be no restriction on third party funding by non-lawyers,<sup>35</sup> and we expect the Indian market to quickly adopt this benefit.

### Conclusion and the road ahead

With the introduction of several changes in the law, new case law, governmental impetus and the clear preference for arbitration in resolving commercial disputes, India is exorcising the ghosts of its past. The Amendments have been a long time in coming and put in place several measures to establish that India is indeed, an arbitration friendly jurisdiction. The success of the new provisions and the ultimate ability of India to attract parties as a viable arbitration destination, will depend largely on its practical implementation and the co-operation of parties and courts in its process. The interplay of courts and the tribunal in this regime is crucial and the present amendments attempt to strengthen this relationship. The use of block-chain, artificial intelligence in arbitrator selection and document collation mechanisms, new arbitral institutions streamlining the process and increased prevalence of arbitration across business, arbitration is likely to get more sophisticated and efficient over time. While India is still making progress with developments in the law of arbitration, the present signs of changes in the field makes us optimistic.

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Disclaimer: This article is not intended to serve as legal advice and the position of law expressed in the article is only valid as on 20<sup>th</sup> February 2019.

<sup>33</sup> AIR 2018 SC 1382

<sup>34</sup> Id. At Paragraphs 44 and 45

<sup>35</sup> Id. At Paragraphs 35



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