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Volume IX | Issue IV | February 2021

Index

Dear Readers,

The first section of this issue of the Case in Point is an article titled *"Overview of the Arbitration and Conciliation (Amendment) Ordinance, 2020"*. The article analyses the amendments introduced to the Arbitration and Conciliation Act, 1996 ("**Act**") through the Arbitration and Conciliation (Amendment) Ordinance, 2020, i.e. the provision for mandatory and unconditional stay of arbitral award in case of fraud/corruption and the deletion of the Eight Schedule to the Act that prescribed qualifications, experience and norms for arbitrators.

The second section of this issue sets out some of the recent significant decisions of the Hon'ble Supreme Court and other judicial fora. In the section, we have reviewed the decision in *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited* wherein the Hon'ble Supreme Court laid down clear tests to determine when a dispute involving allegations of fraud is arbitrable, and when it would require adjudication before a court.

We have also examined the judgment in *Arifur Khan & Aleya Sultana and Ors. v. DLF Southern Homes Pvt. Ltd.* and Ors. wherein the Hon'ble Supreme Court *inter alia* held that consumer fora set up under the Consumer Protection Act, 1986, could, where necessary, award compensation to consumers beyond contractually stipulated limits.

Further, the decision of the Hon'ble Supreme in *Government of India v. Vedanta Limited & Ors.* has also been reviewed by us wherein the Hon'ble Supreme Court *inter alia* considered the question relating to limitation for filing petitions for enforcement and execution of foreign awards in India. We have also reviewed the decision in *Vidya Drolia and Ors. v. Durga Trading Corporation* wherein the Hon'ble Supreme Court *inter alia* commented on the meaning of non-arbitrability and who (i.e. court or arbitral tribunal) should decide non-arbitrability.

We have also covered the awards (to the extent available in public domain) in *Vodafone International Holdings BV (The Netherlands) v. India* before the Permanent Court of Arbitration and separately, Cairn Energy Plc and *Cairn UK Holdings Ltd v. Republic of India* under the UK-India Bilateral Investment Treaty.

Lastly, we have covered the decision in *Future Retail Ltd. v. Amazon.com Investment Holdings LLC & Ors.*, wherein the Hon'ble Delhi High Court was *inter alia* posed with a question as to the legal status of an Emergency Arbitrator in an international commercial arbitration seated in India.

This issue of the Case in Point is concluded by a section on other legal updates.

Feedback and suggestions from our readers would be appreciated. Please feel free to send in your comments to cam.publications@cyrilshroff.com.

Regards,
CYRIL SHROFF

Managing Partner
Cyril Amarchand Mangaldas

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Volume IX | Issue IV | February 2021

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Overview of the Arbitration & Conciliation (Amendment) Ordinance, 2020

A. Introduction

1. The Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**2020 Ordinance**") was promulgated on November 4, 2020. The 2020 Ordinance makes two amendments to the Arbitration and Conciliation Act, 1996 ("**Act**") viz. (i) insertion of a second proviso to Section 36(3) of the Act, which makes it mandatory for the Court to stay the operation of an arbitral award unconditionally in certain circumstances; and (ii) substitution of Section 43-J and consequential omission/ deletion of the Eighth Schedule, which previously specified the qualifications, norms and experience for accreditation of arbitrators.

B. Mandatory Unconditional Stay of Arbitral Awards in cases of Fraud/ Corruption

2. Prior to the 2015 amendments to the Act, merely making an application for setting aside an arbitral award worked as an automatic stay on its operation during the pendency of such application. One of the celebrated changes introduced by the 2015 amendments to the Act was the elimination/ removal of the automatic stay of an arbitral award pending challenge. A separate application was made necessary if the party seeking to set aside an arbitral award was simultaneously seeking its stay. A stay on the arbitral award may be granted by the Court subject to conditions, and reasons for which must be recorded in writing. Further, where the arbitral award sought to be stayed was one for payment of money, the Court was required to have 'due regard' to the provisions for grant of stay of a money decree under the Code of Civil Procedure, 1908 ("**CPC**").

3. The provisions for grant of stay of a money decree are contained in Order XLI Rule 5 of the CPC. The relevant principles that emerge from a reading of Order XLI Rule 5 (without considering various state amendments) and judicial pronouncements thereon are: (i) a stay will be granted when there is a high likelihood of irreparable harm or injury occurring to a party as a result of execution; and (ii) it is a ***mandatory*** requirement that an applicant must provide security for due performance of the decree under challenge. In other words, although the Court may deploy its discretion to decide how and what kind of security is to be provided, it cannot dispense with the requirement of security altogether. Therefore, if the provisions for grant of stay of a money decree under the CPC were to be made applicable *mutatis mutandis* to grant of stay of an arbitral award for payment of money, the party seeking stay would necessarily have to provide security for the entire awarded amount as a condition for stay thereof.

4. However, in *Pam Developments Private Ltd. v. State of West Bengal*,[1] the Supreme Court held that the provisions of the CPC concerning grant of stay of a money decree are to be "*taken as a general guideline*" by a Court deciding under the Act and that the said provisions of the CPC are only directory and not mandatory in so far as a Court acting under the Act is concerned. The Bombay High Court, in *PFS Shipping (India) Limited v. Capt. VK Gupta and Ors.*[2] has held that the Court in appropriate cases has the discretion to grant unconditional stay of an arbitral award for payment of money. In *Ecopack India Paper Cup Pvt. Ltd. v. Sphere International*,[3] the Bombay High Court held that it was open for a Court to not impose any conditions while granting stay of an arbitral award.

5. Accordingly, even after the 2015 amendments to the Act, it is open for courts to grant unconditional stay of an arbitral award (including of arbitral awards for payment of money) in appropriate cases depending upon the facts and circumstances of each case. While this would ordinarily be done in cases where the Court was satisfied that the arbitral award is likely to be set aside, there was no mandatory requirement to arrive at any prima facie finding at the stage of grant of stay of arbitral award.

6. The change brought about by the 2020 Ordinance is the insertion of the following second proviso to Section 36(3) of the Act:

   "Provided further that where the Court is satisfied that a prima facie case is made out,–

   (a) that the arbitration agreement or contract which is the basis of the award; or

   (b) the making of the award,

   was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

7. The newly-inserted second proviso to Section 36(3) of the Act makes it mandatory for the Court to grant unconditional stay if it is satisfied that a prima facie case is made out in respect of the two situations described above. To this extent, the discretion of the Court to impose conditions for grant of stay has been curtailed because no conditions can be imposed in

1 (2019) 8 SCC 112.
2 2016 SCC OnLine Bom 10048.
3 2018 SCC OnLine Bom 540.

these two situations. However, the discretion of the Court to grant either conditional or unconditional stay in other circumstances remains unaffected. The newly-inserted proviso does not state that unconditional stay cannot be granted in any other circumstances.

8. The legislative intent behind the insertion of this proviso is aimed at providing relief to parties at the receiving end of awards induced or affected by fraud/ corruption. However, in practice, this proviso is likely to operate in very limited cases due to the reasons that follow.

9. Where the party challenging the arbitral award asserts that the arbitration agreement or contract, which is the basis of the award, was induced by fraud or corruption, it is expected that the said plea would also have been taken before the arbitral tribunal. If such a plea is rejected by the arbitral tribunal after due consideration, the Court, when deciding an application for stay of the arbitral award, would need to record a *prima facie* finding that the arbitral tribunal's finding on the said issue is perverse or otherwise liable to be set aside. If the plea that the arbitration agreement or contract which is the basis of the award was induced by fraud or corruption was not raised before the arbitral tribunal, allowing such plea to be raised for the first time while challenging the arbitral award would not be permissible if the necessary facts were either in the knowledge of the relevant party or could have been discovered with reasonable diligence.

10. The situation is different where the party challenging the arbitral award asserts that the making of the award was induced by fraud or corruption, because this plea would arise only after the award has been made and, therefore, incapable of being raised before the arbitral tribunal.

11. For instance, in *Venture Global Engineering v. Satyam Computer Services Ltd. and Ors.*[4], the Supreme Court has held that the expression "fraud in the making of the award" covers situations where an award has been obtained by concealing facts or materials. Such awards may be set aside on the ground that the making of the award was affected or induced by fraud. However, it was clarified that the concealed facts must have a causative link with the facts constituting the award.

12. Applications for setting aside an arbitral award are rarely made on the ground of fraud or corruption in the making of the award. However, the insertion of the second proviso could result in an increase in such challenges due to award-debtors wanting to take advantage of the unconditional stay. It remains to be seen whether courts respond by laying down a high threshold for forming the *prima facie* satisfaction necessary to trigger the mandatory unconditional stay under the newly-inserted proviso.

13. The 2020 Ordinance contains the following explanation in relation to the applicability of the newly-inserted second proviso to Section 36(3) of the Act:

"Explanation.– For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Ordinance, 2015."

14. The above explanation clarifies that the newly-inserted second proviso is applicable even to proceedings which are already pending before courts. Since the grounds referred to in the second proviso for setting aside an arbitral award are not new, there could be cases where the Court has, prior to the 2020 Ordinance, imposed conditions for grant of stay of an arbitral award that has been challenged on grounds of fraud or corruption either in respect of the underlying contract/ arbitration agreement or in respect of the making of the arbitral award. In such cases, parties who have challenged the award and complied with the conditions imposed for stay thereof may consider moving the Court for removal of the conditions attached to the stay on account of the newly-inserted second proviso.

C. Deletion of the Eighth Schedule containing Qualifications, Experience and Norms for Arbitrators

15. One of the changes introduced by the 2019 amendments was the insertion of Part IA of the Act containing provisions relating to the Arbitration Council of India ("**Council**"), including Section 43-J, read with the Eighth Schedule, which sought to prescribe qualifications, experience and norms for arbitrators. Although the date of coming into force of Part IA and the Eighth Schedule was not notified, some of these qualifications, experience and norms were widely viewed as encroaching upon party autonomy in arbitrator appointments. For instance, as per entry (i) of Qualifications and Experience of Arbitrator prescribed in the Eighth Schedule, foreign lawyers could not be appointed as arbitrators in arbitral proceedings under Part I of the Act. Significantly, the requirements in the Eighth Schedule also applied to international commercial arbitrations seated in

4 (2010) 8 SCC 660.

India. Another controversial qualification was entry (v) of General norms applicable to Arbitrator prescribed in the Eighth Schedule, which required that the arbitrator should be conversant *inter alia* with the Constitution of India.

16. While the amendment to Section 43-J and the omission of the Eighth Schedule may appear to be a step in the right direction, the effect of the same is one merely of form rather than substance. Prior to the 2020 Ordinance, the proviso to Section 43-J empowered the Central Government to amend the Eighth Schedule after consultation with the Council. In view of this proviso, the substantive provisions of the Eighth Schedule were not cast in stone and were meant to merely operate until modified by the Central Government after consultation with the Council.

17. The new Section 43-J provides that:

    "The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations."

18. Section 43-L of the Act empowers the Council to make regulations in consultation with the Central Government. Therefore, all that has changed is that there are no existing qualifications, experience and norms that are readily available for the Council and/or Central Government to modify. The same will now have to be framed in the form of regulations issued by the Council in consultation with the Central Government.

19. Since Part IA of the Act is yet to be notified and the Council is yet to be established, it remains to be seen whether the regulations that will eventually be framed by the Council in consultation with the Central Government will be materially different from the substantive provisions of the erstwhile Eighth Schedule. There may even be separate sets of regulations framed for domestic arbitrations and for international commercial arbitrations seated in India.

D. Concluding Remarks

20. The 2015 amendments have been largely viewed as a much-awaited pro-arbitration reform, especially the removal of automatic stay. At the same time, there were concerns expressed from certain quarters that the new regime was too harsh on parties who have suffered money awards by effectively requiring them to deposit the awarded amount pending challenge. The insertion of the new proviso to Section 36(3) of the Act appears to be aimed at addressing these concerns. It remains to be seen whether this change will merely put award-debtors on a more balance footing or trigger a fresh series of challenges to arbitral awards on grounds of fraud or corruption. A lot will depend on how courts apply this proviso in practice. The retroactive application of the proviso suggests that we will know sooner rather than later.

21. The effect of the substitution of Section 43-J and consequent deletion of the Eighth Schedule will be seen only once Part IA of the Act is notified and comes into force. The Council will then frame regulations containing the qualifications, experience and norms for arbitrators. While the Council is likely to enjoy greater flexibility in framing such regulations than it would have under the Eighth Schedule (had it been retained), there may not be much change in the substantive norms and qualifications.

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Volume IX | Issue IV | February 2021

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Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited

In ***Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*** reported at **2020 SCC OnLine SC 656**, the question which arose before the Supreme Court ("**SC**") was whether allegations of fraud can be adjudicated in arbitration, or whether they require adjudication before a court. The SC laid down clear tests to determine when a dispute involving allegations of fraud is arbitrable, and when it would require adjudication before a court.

Relevant Facts

A Share Subscription Agreement ("**SSA**") dated April 21, 2011, was entered into between Avitel and HSBC, by way of which HSBC invested USD 60 million in Avitel to acquire 7.80% of its shareholding. The SSA contained a clause providing for arbitration at the Singapore International Arbitration Centre in case of a dispute. An accompanying Shareholders' Agreement ("**SHA**") dated May 6, 2011, was also executed, which contained an identical arbitration clause. Thereafter, a dispute arose between the parties. HSBC alleged that the promoters of Avitel, namely, the Jain Family, had induced HSBC to invest in Avitel, by making a representation that Avitel was on the verge of finalising a lucrative contract with the British Broadcasting Corporation. HSBC alleged that there was no such contract, and that around USD 51 million from the USD 60 million investment had in fact been siphoned off to other companies owned or controlled by the Jain Family. Arbitral proceedings were initiated, and a final award was passed in favour of HSBC *inter alia* holding the above allegations to be true ("**Award**"). The matter reached the Supreme Court in the context of a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ("**Act**"), filed by HSBC, seeking deposit of the full claim amount of USD 60 million to protect the subject matter of the Award, pending enforcement of the same.

Sc's Holding

The SC was asked to consider whether HSBC had a *prima facie* case for enforcement of the Award in India. Challenging the enforcement of the Award, it was contended on behalf of Avitel that since the allegations of fraud have been made in arbitral proceedings, involving serious criminal offences, like forgery and impersonation, such a dispute is not arbitrable then under Indian law and the award unenforceable, as a consequence. On behalf of HSBC, it was contended that non-arbitrability would be triggered only in cases where serious allegations of fraud would vitiate the arbitration agreement and not in other cases.

JURISPRUDENCE UNDER THE ARBITRATION ACT, 1940

In ***Abdul Kadir v. Madhav Prabhakar Oak*** reported at **(1962) 3 SCR 702 ("Abdul Kadir")**, the SC had to consider a ground raised which read as thus,

"the respondents had made allegations of fraud against the appellant in their application and there was also a ground for not referring the dispute to arbitration."

The SC referred to Section 20(4) of the Arbitration Act, 1940 ("**1940 Act**"), and the English cases on this issue and held that allegations as to the correctness or otherwise of entries in accounts are not serious allegations of fraud. The SC emphasised, *"It seems to us that every allegation tending to suggest or imply moral dishonesty or moral misconduct in the matter of keeping accounts would not amount to such serious*

allegation of fraud as would impel a court to refuse to order the arbitration agreement to be filed and refuse to make a reference."

JURISPRUDENCE UNDER THE ARBITRATION ACT, 1996

In ***Afcons Infrastructure v. Cherian Varkey Construction Co. (P) Ltd.*** reported at **(2010) 8 SCC 24**, the SC laid down categories of cases that are normally considered to be not suitable for ADR process due the nature of the cases. One such category was laid down to be *'cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.'*

Subsequently, the SC in ***Booz Allen Hamilton v. SBI Home Finance Limited*** reported in **(2011) 5 SCC 532** arrived at its conclusions on distinguishing *in rem* (such as mortgage suits under Order 34 of the Civil Procedure Code, 1908) and *in personam* disputes. The SC laid down the principle that *"Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not, however, a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."* In Booz Allen the SC did not categorically deem fraud to be an exception, but instead carved it out to fall under *'disputes relating to rights and liabilities which give rise to or arise out of criminal offences'*.

Thereafter, the SC in ***Ayyasamy v. Paramasivam*** reported in **(2016) 10 SCC 368** held that 'fraud simpliciter' could not be a hindrance to referring parties to arbitration. The SC distinguished between two kinds of cases: (i) cases that have serious allegations of fraud are to be treated as non-arbitrable and must be decided only by the civil court; and (ii) cases where there are allegations of fraud simpliciter and such allegations are merely alleged, in such cases it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.

Finding

After considering the existing jurisprudence on this point thus far, the SC held that *"serious allegations of fraud,"* leading to non-arbitrability would arise only if either of the following two tests were satisfied, and not otherwise.

1. Where the Court finds that the arbitration agreement itself cannot be said to exist after being vitiated by fraud; or

2. Where allegations are made against the State or its instrumentalities, relating to arbitrary, fraudulent, or *mala fide* conduct, giving rise to question of public law as opposed to questions limited to the contractual relationship between the parties.

Applying the above tests to the facts, the SC was of the opinion that the allegations of impersonation, false representations and siphoning of funds were wrongful acts that took place inter parties and had no "public flavour" so as to be non-arbitrable on account of allegations of fraud.

Arifur Khan & Aleya Sultana and Ors. v. DLF Southern Homes Pvt. Ltd. and Ors.

In ***Arifur Khan & Aleya Sultana and Ors. v. DLF Southern Homes Pvt. Ltd. and Ors.*** reported at **2020 SCC OnLine SC 667**, the question which arose before the Supreme Court ("**SC**") was whether consumer fora set up under the Consumer Protection Act, 1986 ("**Act**") ("**Consumer Fora**"), could, where necessary, award compensation to consumers beyond contractually stipulated limits. The SC was also required to decide on whether the execution of a deed of conveyance by a flat purchaser precludes him/her from raising a consumer claim under the Act for reasons that the mere sale of immovable property is not amenable to the jurisdiction of Consumer Fora.

Relevant Facts

The appellants before the SC were flat purchasers in a residential project. The respondents were developers of the residential project. The brochure for the residential project *inter alia* made certain representations about certain amenities and

facilities within the residential project. Each flat purchaser had entered into an Apartment Buyers Agreement ("**ABA**") with the developers. The ABA *inter alia* stipulated that the developers would endeavour to complete construction of the flats within a period of 36 months from the date of execution except in force majeure conditions. The ABA also stipulated that the flat purchaser would be entitled to compensation at the rate of INR 5 per square foot of the super area for every month of delay in possession. The construction of the said residential project was delayed and the developers could not hand over possession of the flats within the stipulated 36-month time period.

The flat purchasers approached the National Consumer Disputes Redressal Commission ("**NCDRC**") *inter alia* seeking additional compensation (for delay in possession of their respective flats) from the developers in excess of the rate stipulated in the ABA. The NCDRC, on facts, recorded that there was indeed an admitted delay on part of the developers. The NCDRC also held that the flat purchasers had agreed to the formula stipulated in the ABA in respect of compensation for delay i.e. INR 5 per square foot for every month of delay and that the flat purchasers could not seek compensation from the developers in excess of the amount arrived at by applying the said formula stipulated in the ABA. The NCDRC also accepted the contention by the developers that in cases where a flat purchaser had executed a deed of conveyance with the developers, any consumer claim against the developers for delayed possession was precluded.

The decision of the NCDRC was challenged before the SC by the flat purchasers.

Sc's holding

The SC noted that the failure of the developers to comply with the contractual obligation to provide the flat to the buyer within the period stipulated in the ABA amounts to a deficiency of 'service' as understood under the Act. The SC further noted that under Section 14(1)(e) of the Act, the jurisdiction of Consumer Fora extended to directing the relevant party to *inter alia* remove the deficiency in the service in question. The SC held that the jurisdiction of Consumer Forums to award 'just and reasonable compensation' as an incident of their power to direct the removal of a deficiency in service is not constrained by the terms of compensation prescribed in an unfair contractual bargain. Accordingly, the SC held that, where necessary, Consumer Fora were empowered to award compensation to consumers beyond contractually stipulated limits.

The SC also held that an earlier decision in ***DLF Homes Panchkula Pvt. Ltd. v. D S Dhanda*** reported in **2019 SCC OnLine SC 689** did not prescribe an absolute embargo on the award of compensation beyond the rate stipulated in a flat buyers' agreement, where handing over of the possession of a flat has been delayed.

On facts, the SC *inter alia* held that the nature and quantum of the delay on the part of the developers is such that the measure of compensation stipulated in the ABA would not provide sufficient restitution to the flat purchasers and that accordingly, the flat purchasers were entitled to an additional compensation.

Additionally, the SC also declined to adopt the reasoning of the NCDRC that a flat purchaser forsakes the option to seek remedies before Consumer Fora by executing a deed of conveyance. The SC noted that it was true that transactions that merely involved simpliciter sale of immovable properties were not amenable to the jurisdiction of Consumer Forums. However, the SC held that having regard to the nature of the overall transaction between the developers and the flat purchasers in the present case, including representations by the developers as to facilities and amenities in the larger residential complex, it could not be said that by merely executing a deed of conveyance, the transaction takes the form of a simpliciter sale of immovable property. The SC noted that accepting the contention advanced by the developers (and accepted by the NCDRC), would lead to an absurd consequence of requiring the flat purchaser to either abandon a just claim for compensation as a condition for obtaining the conveyance or to indefinitely delay execution of the deed of conveyance (and consequently, delay possession of the flat), pending protracted consumer litigation. Accordingly, the SC held that the execution of a deed of conveyance by a flat purchaser did not impact the flat purchaser's ability to approach the Consumer Fora.

Government of India v. Vedanta Limited & Ors

In ***Government of India v. Vedanta Limited & Ors*** reported at **(2020) 10 SCC 1**, the Supreme Court considered the question relating to limitation for filing petitions for enforcement and execution of foreign awards in India.

Relevant Facts

1. In 1994, the Government of India ('**GOI/ Appellant**') entered into a Product Sharing Agreement ('**PSC**') with Vedanta Ltd ('**Vedanta**') and ONGC to develop petroleum resources in Ravva Gas and Oil Fields.
2. Under the PSC, Respondents were entitled to recover, for aforesaid development, a contractually agreed upon amount as base development costs i.e. a "cap" on the payment of the development costs for constructing 35,000 barrels of oil per

day. Respondents, however, incurred higher development costs than the "cap" agreed upon and accordingly sought to recover the same from GOI. This caused a dispute between GOI and Respondents, which was referred to a Malaysia seated arbitration.

3. In 2011, the arbitral tribunal made an award in favour of Vedanta. GOI challenged the award before the Malaysian High Court and then before the Malaysian Court of Appeals, and both the said Courts rejected the said challenge.
4. In October 2014, the Vedanta filed an enforcement petition under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 ('**Act**'), and an application for condonation of delay before the Delhi High Court.
5. GOI objected under Section 48 of the Act on the grounds that – (i) the enforcement petition was barred by limitation; (ii) the enforcement was contrary to public policy of India, and (iii) the award decided matters beyond the scope of the submission to the arbitral tribunal.
6. Delhi High Court rejected the pleas of GOI and held that the enforcement was not barred by limitation.
7. Aggrieved by this, the GOI filed an appeal against the said order before the Apex Court.

Findings

The Supreme Court *inter alia* delivered its findings on the following – (i) Issue of Limitation; and (ii) Issue of Public Policy.

1. **Issue of Limitation**

The Apex Court settled the question on issue of limitation for filing an application for enforcement of a foreign award and held the following:

(i) as there was lack of clarity in the law regarding the limitation period in which a foreign award can be enforced in India, there were enough grounds to condone the delay sought by Vedanta; and

(ii) a foreign award was not a decree of the Indian Court and, therefore, a period of 12 years of limitation (under Article 136 of the Limitation Act) would not apply to it. It is a 'deemed decree' (deemed to be a decree of 'that court' only for the purpose of enforcement and otherwise not a decree of an Indian court) and instead falls under the residuary clause (Article 137 of the Limitation Act). Therefore, the period of limitation for a foreign award would be three years.

2. **Issue of Public Policy**

After analysing Section 48 as it existed before the 2015 amendment of the Act, the Apex Court held that the award was not contrary to the public policy of India. The Court did not have the power to refuse enforcement by re-interpreting contractual provisions. The Apex Court also held that the 2015 amendment of Section 48 brought about substantial changes in the law and was therefore not retrospective in nature.

Vodafone International Holdings BV (The Netherlands) v. India

In ***Vodafone International Holdings BV (The Netherlands) v. India [Case No. 2016-35]***, the Permanent Court of Arbitration, Hague ('**PCA**'), was faced with claims arising out of a retrospective transaction tax imposed by the Government of India on the acquisition by Vodafone International Holdings BV (The Netherlands) ('**Vodafone Holdings**') of India-based Hutchison Whampoa telecoms business.

Relevant Facts:

Vodafone Holdings had, from Hutchinson Telecommunications International Limited ('**HTIL**'), acquired 100% shares in CGP Investment Holdings (Cayman Islands) ('**CGP**') for a consideration of USD 11.1 billion. Subsequently, CGP acquired about 67% of the controlling interest in an Indian Company by the name of HEL (a joint venture between Hutchinson Gathering and Essar Gathering). Through this, Vodafone Holdings gained control over *inter alia* CGP and HEL. In other words, HTIL sold its stake in CGP to Vodafone Holdings indirectly (through a chain of subsidiaries). As a result of this sale, HTIL earned capital gains tax. At the time of making a payment to the selling entity, Vodafone Holdings deducted tax at source as it did not consider such tax payable to the tax authorities in India. This acquisition of stake by Vodafone Holdings in HEL was considered liable for tax deduction at source by the Indian Tax Department under Section 195 of the Income Tax Act, 1961 ('**Income Tax Act**'). Pursuant to such payment, a demand was raised by the Indian revenue authorities on Vodafone Holdings, imposing a tax liability of INR 120 billion under Sections 201(1)(1A)/ 220(2) of the Income Tax Act.

Retrospective Legislation pursuant to Supreme Court's findings

The matter was decided in favour of the Income Tax Authority by the High Court of Judicature at Bombay, pursuant to which Vodafone Holdings filed an appeal before the Supreme Court of India. The Apex Court reversed the Bombay High Court's findings and held that the aforesaid sale of shares was not a transfer of a capital asset under the scope and meaning of Section 2(14) of the Income Tax Act. It was held that the Revenue Department had to refund INR 25 billion that Vodafone Holdings was required to deposit in abeyance of an interim order, along with 4% interest p.a. thereon.

Subsequently, the legislature amended Section 9(1) (i) and Section 195 of the Income Tax Act with retrospective effect from 1961, *inter alia* clarifying that *"an asset or a capital asset being any share or interest in a company or entity registered or incorporated outside India shall be deemed to be and shall always be deemed to have been situated in India, if the share or interest derives, directly or indirectly, its value substantially from the assets located in India"* and that the term "transfer" would include parting of an asset (directly or indirectly) by way of an agreement entered in India or outside India, regardless of whether such transfer of rights in the asset(s) was of a company registered or incorporated outside India.

Summary of the findings by the PCA

Following the aforesaid amendment, the Revenue Authorities renewed their tax demand on Vodafone Holdings. Aggrieved by this, Vodafone Holdings invoked arbitration under the India-Netherlands Bilateral Investment Treaty (BIT). India contested that the dispute was out of the scope of the BIT. On September 25, 2020, the Permanent Court of Arbitration, Hague, passed an award against India, holding that India was in breach of the fair and equitable treatment standard under the India-Netherlands BIT.

The extract available on public domain is provided below –

(3) The Respondent's conduct in respect of the imposition of the Claimant of an asserted liability to tax notwithstanding the Supreme Court Judgement is in breach of the guarantee of fair and equitable treatment laid down in Article 4 (1) of the Agreement, as is the imposition of interest on the sums in question and the imposition of penalties for non-payment of the sums in question.

(4) The finding of breach in paragraph (2) entails the obligation on the Respondent to cease the conduct in question, any failure to comply with which will engage its international responsibility.

(7) The Respondent will reimburse to the Claimant the sum of £4,327,294.50 or its equivalent is US Dollars, being 60% of the Claimant's costs for legal representation and assistance, and €3,000 or its equivalent in US dollars, being 50% of the fees paid by the Claimant to the appointing authority".

Vidya Drolia and Ors. v. Durga Trading Corporation

In ***Vidya Drolia and Ors. v. Durga Trading Corporation*** reported in **2020 SCC OnLine SC 1018**, a three judge bench of the Supreme Court ("**SC**") was required to decide on a reference made to it, doubting the correctness of a legal ratio expressed in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia*** reported in **(2017) 10 SCC 706** ("***Himangni Enterprises***"), that landlord-tenant

disputes governed by the provisions of the Transfer of Property Act, 1882 ("**TP Act**"), are not arbitrable as this would be contrary to public policy.

The SC framed the following issues to be decided pursuant to the reference: [**i**] meaning of non-arbitrability and when the subject matter of a dispute is not capable of being resolved through arbitration and [**ii**] who decides non-arbitrability i.e. whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability. The SC observed that the second issue also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised in an application under Section 8 or Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").

Sc's holding

The SC laid down the following scenarios when the subject matter of a dispute in an arbitration can be said to be not arbitrable:

(a) when cause of action and subject matter of the dispute relates to actions *in rem* (but do not pertain to subordinate rights *in personam* that arise from rights *in rem*);

(b) when cause of action and subject matter of the dispute affects third party rights; or have *erga omnes* effect; or require centralised adjudication, and mutual adjudication would not be appropriate and enforceable;

(c) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

(d) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statutory provisions.

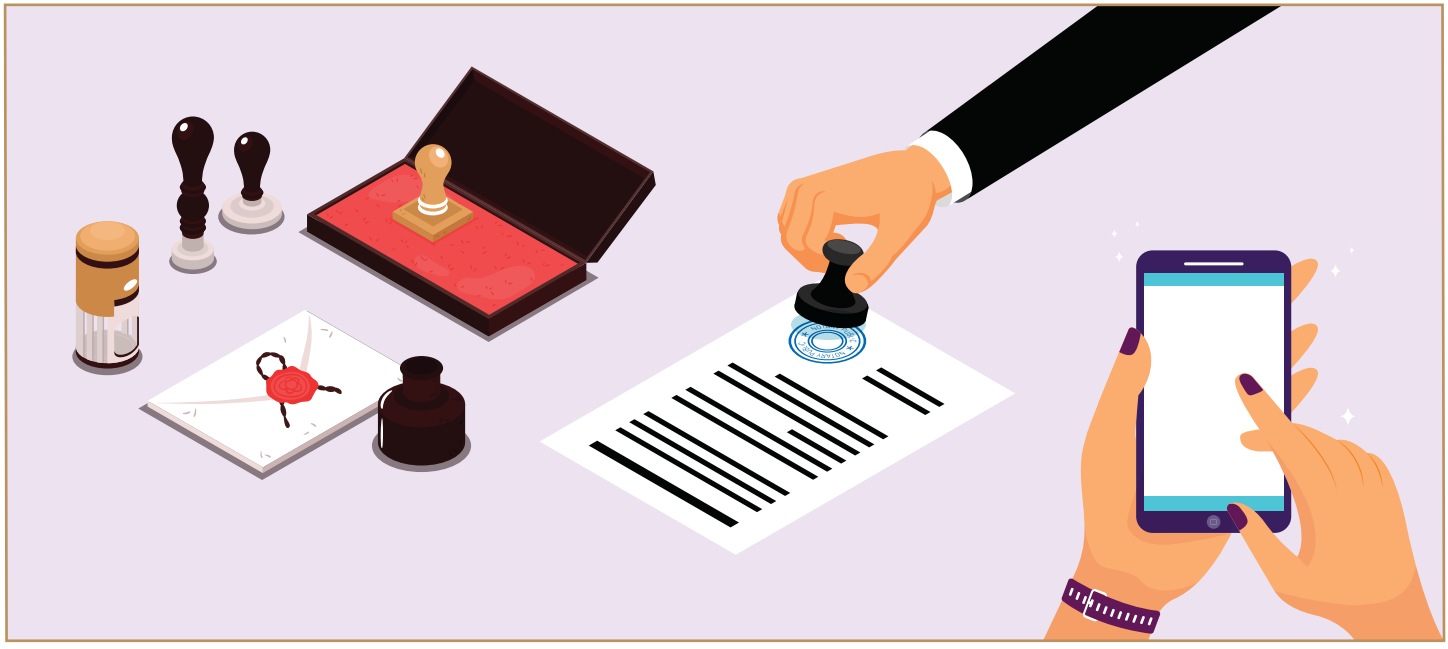
By applying the aforesaid, the SC held the following:

(a) Insolvency or intracompany disputes have to be addressed by a centralised forum (be it a court or a special forum), which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions *in rem*;

(b) Similarly, grant and issue of patents and registration of trademarks are exclusive matters, falling within sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable;

(c) Criminal cases are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offenses against the State and not just against the victim;

(d) Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc., are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect; and



(e) Matters relating to probate, testamentary matter, etc., are actions *in rem* and are a declaration to the world at large and hence are non-arbitrable.

In view of the aforesaid observations, the SC also held the following:

(a) The ratio in ***N. Radhakrishnan v. Maestro Engineers*** reported in **(2010) 1 SCC 72**, *inter alia* observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute is over-ruled. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability.

(b) The decision of the Delhi High Court in the case of ***HDFC Bank Ltd. v. Satpal Singh Bakshi,*** reported in **(2013) 134 DRJ 566 (FB)**, which holds that the disputes that are to be adjudicated by the Debt Recovery Tribunal under the Recovery of Debts and Bankruptcy Act, 1993, are arbitrable, is set-aside. Such disputes are non-arbitrable.

(c) The ratio laid down in ***Himangni Enterprises*** as to non-arbitrability of landlord-tenant disputes under the TP Act is over-ruled. Landlord-tenant disputes are arbitrable as the TP Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.

As to the issue concerning 'who decides arbitrability', the SC held the following:

(a) Ratio of the decision in ***SBP & Co. v. Patel Engineering Ltd.,*** reported in **(2005) 8 SCC 618**, on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act is no longer applicable, given the amendments to the Arbitration Act in 2015 and 2019.

(b) Scope of judicial review and jurisdiction of the court under Section 8 and Section 11 of the Arbitration Act is identical, but extremely limited and restricted.

(c) The general rule and principle, in view of the legislative mandate clear from amendments to the Arbitration Act in 2015 and 2019, and the principle of severability and competence-competence, is that the arbitral tribunal is the preferred first authority to determine and decide all questions related to non-arbitrability. The court has been conferred with the power to have a "second look" on aspects of non-arbitrability, post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

(d) Rarely as a demurrer, the court may interfere at the Section 8 or Section 11 stage, when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal, but to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

Further, Justice N.V. Ramana authored a concurring opinion, wherein, he held:

(a) Section 8 and Section 11 of the Arbitration Act have the same ambit with respect to judicial interference.

(b) Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or Section 11 of the Arbitration Act, unless it's a clear case of deadwood.

(c) The Court, under Section 8 and Section 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

(d) The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.

(e) The scope of the Court to examine the prima facie validity of an arbitration agreement includes only the following issues: whether the arbitration agreement was in writing; whether the arbitration agreement was contained in exchange of letters, telecommunication, etc; whether the core contractual ingredients qua the arbitration agreement were fulfilled; and on rare occasions, whether the subject-matter of dispute is arbitrable.

Cairn Energy Plc and Cairn UK Holdings Ltd v Republic of India

Relevant Facts

Cairn UK Holdings Limited ('**Cairn UK**') is a holding company incorporated in the United Kingdom in June 2006. Cairn India Holdings Limited ('**Cairn New Jersey**) is a wholly owned subsidiary of Cairn UK, incorporated in New Jersey in August 2006. Cairn India Limited ('**Cairn India**') is a wholly owned subsidiary of Cairn UK, incorporated in India, also in August 2006. By and under a share purchase agreement, Cairn UK transferred all the shares constituting the entire issued share capital of nine subsidiaries of the Cairn group held by it directly and indirectly to Cairn New Jersey. In October 2006, by and under a subscription and share purchase agreement and a share purchase deed, Cairn UK sold to Cairn India the shares of Cairn New Jersey in an internal group structuring for a consideration that was paid by Cairn India in part by transfer of its shares and in part by cash. In December 2006, Cairn India issued an IPO and divested 30.5% of its shareholding, which resulted in Cairn UK receiving INR 6,101 crores approximately. In December 2011, Vedanta Resources Plc ('**Vedanta UK**') acquired 59% stake in Cain India. Cairn India then merged with Vedanta UK's subsidiary *viz.*, Vedanta Ltd. ('**Vedanta India**') and under the terms of the merger, Cairn Energy was created (as a subsidiary of Vedanta UK), which received ordinary and preferential shares in Vedanta India (which resulted in a holding of approx. 5% plus interest in preference shares) in exchange for the residual shareholding of approximately 10% in Cairn India.

Dispute

After the retrospective amendments made to the Income Tax Act, 1961 ("**Income Tax Act**"), in January, 2014, by way of the Finance Act, 2012, the Revenue Authorities of India reinitiated proceedings related to income that escaped assessment under Sections 147 and 148 of the Income Tax Act to assess the aforesaid transaction, which according to the Revenue Authorities had been undertaken to facilitate the IPO of 2007. Additionally, Cairn UK was also restricted from selling its shareholding of 10% of approximately USD 1 billion in Cairn India. An assessment order was passed by the Revenue Authorities assessing the principal tax due on the 2006 Transaction as INR 102 billion (not including interest plus applicable penalties).

Claim

After challenging the assessment order before the Indian Courts, on March 2015, Cairn Energy invoked arbitration against the Republic of India under the India-UK BIT, *inter alia* alleging breach of fair and equitable treatment and protections against expropriation afforded by the Treaty and seeking restitution of the value seized by the Income Tax Department since January 2014. Cairn Energy also questioned the punitive retrospective penalties applied on transactions that were already assessed and closed by the Government of India initially.

Actions taken pendente lite

In March 2015, a draft assessment order was passed against Cairn India for a tax demand of INR 102 billion (USD 1.6 billion), plus applicable interest and penalties, for its failure to deduct tax on alleged capital gains arising during transaction that took place in 2006 in the hands of Cairn UK.

Between 2016 and 2018, the Income Tax Department seized Cairn UK's shares in Vedanta India (approx. USD 1 billion), which restrained Cairn UK from selling them. The Income Tax Department also sold a part of Cairn UK's shares in Vedanta India to recover part of the tax demand and realised an amount of USD 216 million.

In view of the aforesaid seizure and recovery, Cairn UK *inter alia* pleaded for (i) nullification of the effects of the tax assessment; and (ii) reimbursement of the loss of value of shares, resulting from attachment of Cairn UK's shares in Cairn India and withholding the tax refund for an aggregate claim of approximately USD 1.3 billion.

Findings

The extract available of the award passed on December 21, 2020, in the public domain is provided below:

"X. DECISION

2032. For the foregoing reasons, the Tribunal:

1. *Declares that it has jurisdiction over the Claimant's claims and that the Claimant's claims are admissible;*
2. *Declares that the Respondent has failed to uphold its obligations under the UK-India BIT and international law, and in particular, that it has failed to accord the Claimants' investments fair and equitable treatment in violation of Article 3(2) of the Treaty; and finds it unnecessary to make any declaration on other issues for which the Claimants request relief under paragraph 2(a), (c) and (d) of the Claimants' Updated Request for Relief;*
3. *Orders the Respondent to compensate the Claimants for the total harm suffered by the Claimants as a result of its breaches of the Treaty, in the following amounts:..."*

Future Retail Ltd. v. Amazon.com Investment Holdings LLC & Ors.

The Delhi High Court ("**Delhi HC**") in ***Future Retail Ltd. v. Amazon.Com Investment Holdings LLC and Ors.***, reported in **2020 SCC OnLine Del 1636**, was *inter alia* posed with a question as to the legal status of an Emergency Arbitrator in an international commercial arbitration governed by Part I of the Arbitration and Conciliation Act, 1996 ("**Act**").

Backdrop

Future Retail Ltd. ("**FRL**") filed a suit before the Delhi HC wherein Amazon.com NV Investment Holdings LLC ("**Amazon**") was the contesting defendant. FRL also filed an interlocutory application in the said suit, *inter alia* seeking interim injunctions restraining Amazon from taking any steps that would constitute an interference with a certain transaction *inter alia* between FRL and certain entities of the Mukesh Dhirubhai Ambani (Reliance Industries) Group ("**Disputed Transaction**"). In particular, FRL sought an interim injunction restraining Amazon from taking any steps interfering with the Disputed Transaction by way of relying upon/acting in furtherance of an order dated October 25, 2020, passed by an Emergency Arbitrator ("**EA Order**"), constituted pursuant to an arbitration agreement *inter alia* between Amazon and a certain entity of the Future Group.

The arbitration agreement underlying the EA Order was provided for an arbitration seated in New Delhi and to be conducted in accordance with the arbitration rules of the Singapore International Arbitration Centre ("**SIAC**") dated August 1, 2016 ("**SIAC Rules**").

Relevant arguments before the Delhi HC

FRL *inter alia* contended that Amazon should be restrained from relying on the EA Order as the concept of an Emergency Arbitrator is outside the scope of Part I of the Act. FRL argued that under Part I of the Act, the only modus of seeking interim relief prior to the constitution of an arbitral tribunal was before a Court under Section 9 of the Act. FRL argued that accordingly, the EA Order is wholly without jurisdiction, invalid and lacked legal status under Part I of the Act. FRL argued that the parties could not have, even by consent, conferred authority on the Emergency Arbitrator.

FRL also contended that under Section 2(1)(d) of the Act, the term 'arbitral tribunal' cannot deem to include an Emergency Arbitrator as the same was recommended by the Law Commission, but the Parliament did not accept the recommendation and no consequent amendment was brought to Section 2(1)(d) of the Act.

FRL also relied upon Section 2(6) of the Act to contend that the said provision grants freedom to the parties to authorise any person, including an institution, to determine a certain issue, only when Part I of the Act allows the parties to do so. FRL submitted that since Part I of the Act does not grant parties the freedom to approach any other person except the Court under Section 9 and a constituted tribunal under Section 17 for grant of interim relief, it is apparent that the concept of an Emergency Arbitrator is incompatible with the provisions of the Act. FRL further relied on Section 2(8) of the Act and contended that although this provision also recognises the agreement of parties as to arbitration rules, but such rules cannot override the provisions of Part I of the Act itself.

Amazon argued that the since the parties to the relevant arbitration agreement voluntarily chose the SIAC Rules and the SIAC Rules expressly contemplate appointment of an Emergency Arbitrator and the ability of parties to seek interim relief from such an Emergency Arbitrator, it cannot be said that the EA Order is without jurisdiction or otherwise invalid. Amazon also argued that the Parliament's inaction on the recommendation of the Law Commission as to the definition of 'arbitral tribunal' under Section 2(1)(d) of the Act cannot have a bearing on the interpretation of the provision in the Act.

Delhi HC's holding

The Delhi HC expressly clarified that it was not dealing with the legality on merits of the EA Order as the EA Order was not in challenge before the Delhi HC.

The Delhi HC held that in light of the law settled by the Supreme Court in ***National Thermal Power Corporation v. Singer***

Company, reported in **(1992) 3 SCC 551**, and ***Sumitomo Heavy Industries Ltd. v. ONGC Ltd.,*** reported in **(1998) 1 SCC 305**, it is perfectly legal for the parties to choose procedural rules that would govern the arbitration such as the SIAC Rules so long as the provisions of such procedural rules were not contrary to the public policy of India. The Delhi HC further held that the provisions for Emergency Arbitration under the SIAC Rules are not in any manner contrary to/repugnant with the public policy of India, or with the mandatory requirements of the procedural law under the Act.

In particular, the Delhi HC held: *"[t]he Court finds that there is nothing in the [Act] that prohibits the contracting parties from obtaining emergency relief from an emergency arbitrator. An arbitrator's authority to act is implied from the agreement to arbitrate itself, and the same cannot be restricted to mean that the parties agreed to arbitrate before an arbitral tribunal only and not an Emergency Arbitrator. Further the parties having deliberately left it open to themselves to seek interim relief from an emergency arbitrator, or the Court in terms of Rule 30.3 of SIAC Rules, the authority of the said emergency arbitrator cannot be invalidated merely because it does not strictly fall within the definition under Section 2(1)(d) of the [Act]."*

The Delhi HC also relied on the decision of the Supreme Court in ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd***. ("**Avitel Post**"), reported in ***2020 SCC Online SC 656***. The Delhi HC noted that the Supreme Court in ***Avitel Post*** had held that the development of law by the Supreme Court cannot be thwarted merely because a certain provision recommended in a report by the Law Commission was not enacted by the Parliament. Accordingly, the Delhi HC held that in view of the decision in ***Avitel Post***, it cannot be held that an Emergency Arbitrator is outside the scope of Section 2(1)(d) of the Act, because the Parliament did not accept the recommendation of the Law Commission to amend Section 2(1)(d) of the Act to include an 'Emergency Arbitrator'.

Further, the Delhi HC held that Section 9 of the Act can be excluded in an international commercial arbitration (even under Part I of the Act) and that this indicates that Section 9 is not a mandatory provision. The Delhi HC also found no merit in the contention of FRL, with respect to Section 2(6) and 2(8) of the Act, in view of the finding that the SIAC Rules, relating to Emergency Arbitration are not contrary to the mandatory provisions of the Act.

The Delhi HC summarised its holding on the issue as follows:

(a) Firstly, the parties in an international commercial arbitration seated in India can by agreement derogate from the provisions of Section 9 of the Act;

(b) Secondly, in such a case where parties have expressly chosen a curial law, which is different from the law governing the arbitration, the court would look at the curial law for conduct of the arbitration to the extent that the same is not contrary to the public policy or the mandatory requirements of the law of the country in which arbitration is held;

(c) Thirdly, in as much as Section 9 of the Act, along with Sections 27, 37(1)(a) and 37(2) are derogable by virtue of the proviso to Section 2(2) in an international commercial arbitration seated in India upon an agreement between the parties, it cannot be held that the provision of Emergency Arbitration under the SIAC rules are, per se, contrary to any mandatory provisions of the Act.

Accordingly, the Delhi HC held that the Emergency Arbitrator *prima facie* is not a *coram non judice* and the consequential EA Order was not invalid on this count.

In a subsequent development, in January 2021, Amazon instituted a separate legal proceeding before the Delhi HC against FRL and others. Amazon filed a petition, bearing number O.M.P.(ENF)(COMM) 17/2021, under Section 17(2) of the Act before the Delhi HC for enforcement of the EA Order passed in the arbitration proceedings initiated by Amazon. In the said enforcement petition, by an order dated February 2, 2020 ("**Status Quo Order**"), a single judge bench of the Delhi HC reserved orders in the petition and directed FRL and others to maintain status quo in relation to the Disputed Transaction until the pronouncement of the reserved order. In the said Status Quo Order, the single judge *inter alia* noted that the court was of the prima facie view that the Emergency Arbitrator was an 'Arbitrator' as contemplated under the Act and that the EA Order was not a nullity. The single judge further noted that the court was of the view that the EA Order was appealable under Section 37 of the Act and enforceable as an order of the court under Section 17(2) of the Act.

On February 3, 2021, FRL and others filed an appeal against the Status Quo Order before a division bench of the Delhi HC, and the appeal is pending as on February 4, 2021.

case in point .

Volume IX | Issue IV | February 2021

cyril amarchand mangaldas
ahead of the curve

Companies (Amendment) Act, 2020

The Companies (Amendment) Act, 2020 ("**Amendment**"), received the assent of the President on September 28, 2020. The key highlights of the Amendment are as follows:

(i) Rationalisation of penalties and decriminalisation of certain compoundable offences by recategorising several offences into four different categories such that serious violations of law would be dealt with under criminal law, and other procedural, technical or minor non-compliances would be dealt with under civil law.

(ii) Amendment to existing definition of listed companies to empower the Central Government in consultation with the Securities and Exchange Board of India to provide for a class of companies (which have listed or intend or list certain class of securities) to be excluded from the category of 'listed companies'.

(iii) The provision concerning payment of remuneration to executive directors in cases of no profits or inadequacy of profits is made applicable to non-executive directors as well.

(iv) Modifying certain Corporate Social Responsibility ("**CSR**") related provisions such as to *inter alia* exempt companies with CSR liability of up to INR 50 lakh a year from the requirement of setting up CSR Committees and generally permit all companies spending any amount in excess of their CSR obligation in a financial year to set off such excess amount towards CSR expenditure obligations in subsequent financial years.

(v) Insertion of a provision empowering the Central Government to identify certain classes of unlisted companies that will be *inter alia* required to prepare financial results and to complete audit and review of such financial results.

(vi) Empowering the Central Government to permit certain classes of public companies to list certain classes of securities in foreign jurisdictions.

(vii) Insertion of a new Chapter in relation to Producer Companies.

Insolvency and Bankruptcy Code (Second Amendment) Act, 2020

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2020 ("Amendment"), received the assent of the President on September 23, 2020. The Amendment is deemed to have come into force on June 5, 2020, and replaced the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020. The Amendment *inter alia* provides that notwithstanding anything contained in Sections 7, 9, and 10 of the Insolvency and Bankruptcy Code, 2016, the initiation of corporate insolvency resolution process of a corporate debtor shall remain suspended for six months (or such further period not exceeding one year) from March 25, 2020. The Amendment also stipulates that no corporate insolvency resolution process shall ever be initiated against a corporate debtor for default occurring during the said period. The Amendment further clarifies that the aforesaid suspension shall not apply to any default committed by a corporate debtor prior to March 25, 2020.

On September 24, 2020, i.e. a day after the promulgation of the Amendment, the Central Government, by notification, extended the period of suspension of initiation of corporate insolvency resolution process in terms of the Amendment for a further

period of three months from September 25, 2020. On December 12, 2020, the Central Government, by notification, further extended the said period of suspension by another three months from December 25, 2020. Accordingly, the period of suspension in term of the Amendment, read with the two aforesaid notifications, would expire on March 25, 2021.

The Occupational Safety, Health and Working Conditions Code, 2020

The Occupational Safety, Health and Working Conditions Code, 2020 ("**Amendment**"), received the assent of the President on September 28, 2020. The Amendment has subsumed several key pieces of legislation on the working conditions of labour and consolidated it into one comprehensive act, including, *inter alia*, the Contract Labour (Regulation and Abolition) Act, 1970, the Factories Act, 1948, etc. The Amendment is an exercise in ensuring streamlining of the labour laws in the country. The key highlights of the Amendment are as follows:

(i) It was clarified that wages do not include (a) bonus; (b) value of accommodation or light, water, medical attendance; (c) employer contribution towards any pension or provident fund; (d) conveyance allowance; (e) sum paid to employed person to defray special expenses; (f) house rent allowance; (g) overtime allowance and (h) gratuity, etc.

(ii) The definition of "*workers*" under this Amendment, while similar to the definition of "*workmen*" under the Contract Labour (Regulation and Abolition) Act, 1971, excludes from its ambit any person who is employed in a supervisory capacity, drawing a wage exceeding Rs. 18,000/- (Rupees Eighteen Thousand only) per month or such other amount as may be notified by the Central Government.

The Code on Social Security, 2020

The Code on Social Security, 2020 ("**Amendment**"), received the assent of the President on September 28, 2020. This Amendment is enacted to amend and consolidate the laws relating to social security, with the goal to extend social security to all employees and workers either in the organised or unorganised or any other sectors. The Amendment consists of new rules for contribution to social security and payment of employee benefits, including retirement benefits.

The Industrial Relations Code, 2020

The Industrial Relations Code, 2020 ("Amendment"), received the assent of the President on September 28, 2020. The Amendment seeks to consolidate and amend the laws relating to Trade Unions, conditions of employment in industrial establishment or undertaking, investigation and settlement of industrial disputes. One of the significant amendments include the change in definition of 'strike' to mean concerted casual leave by fifty percent or more workers employed in the industry. The Amendment further prohibits strikes and lockouts in all industrial establishments without notice. No unit shall go on strike in breach of contract without giving 60 days' notice before the strike, or within 14 days of giving such a notice, or before the expiry of any date given in the notice for the strike.

Banking Regulation (Amendment) Act, 2020

The Banking Regulation (Amendment) Act, 2020 ("Amendment"), received the assent of the President on September 29, 2020. The Amendment is deemed to have come in to force on June 26, 2020, subject to certain exceptions. The Amendment replaces the Banking Regulation (Amendment) Ordinance, 2020 ("**Ordinance**"). The key highlights of the Amendment are as follows:

(i) Prior to the Amendment and the Ordinance, co-operative banks were not subject to various provisions of the Banking Regulation Act, 1949 ("**Principal Act**"). The Amendment extends some of the provisions under the Principal Act to co-operative banks.

(ii) The Amendment enables co-operative banks to issue equity shares and certain other securities to the public, with prior approval of the Reserve Bank of India ("**RBI**").

(iii) The Amendment enables the RBI to initiate a scheme of reconstruction or amalgamation of a bank without imposing a moratorium in relation to the bank.

Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 ("**Amendment**"), received the assent of the President on September 29, 2020. The Amendment seeks to enact legislative amendments in direct and indirect tax laws, which were introduced by the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 (Ordinance), as a COVID-19 pandemic relief measure. The Amendment legislates subsequent relaxations/ notifications/ amendments announced by the Government and the Faceless Assessment Scheme introduced by the Government, as part of its vision for a 'Transparent Taxation - Honouring the Honest'.

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Key Contacts

Cyril Shroff
Managing Partner
cyril.shroff@cyrilshroff.com

Shaneen Parikh
Partner
shaneen.parikh@cyrilshroff.com

Contributors

Adarsh Saxena
Partner

Shreya Jha
Senior Associate

Mohankrishna C
Associate

Mitakshi Lakhani
Associate

Cyril Amarchand Mangaldas
Advocates & Solicitors

100 years of legacy | **750**+ Lawyers | **Over 130** Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai – 400 013, India
T +91 22 2496 4455 **F** +91 22 2496 3666 **E** cam.mumbai@cyrilshroff.com **W** www.cyrilshroff.com
Presence in Mumbai | New Delhi | Bengaluru | Ahemdabad | Hyderabad | Chennai