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JUDICIAL INTERVENTION IN ARBITRATIONS (1996-2020): A STUDY

INTRODUCTION

In the Indian society, the influx of diverse perceptions and ideas across the wide range of legal, commercial and business engagements to maximize trade and profit in the post globalization era has raised the legal and contractual engagements to an alarming number. With increase in their numbers, the proportion of the inter-parties' disputes have also manifolded. Such disputes have indirectly, if not directly, affected various indices attributable for the nation's growth as well as the societal stability. Therefore, just like a car which has wheels to make it mobile, these disputes also need the wheels of sound resolution mechanism for their effective solution. Dispute Resolution Mechanism in that manner attempts to serve the said purpose.

Traditionally, the role of dispute resolution was majorly undertaken by the appropriate courts which followed the adversarial procedures to resolve the disputes. It involved the adherence to strict procedures and the discharge of the strict rules of evidence in order to resolve the disputes. With time, the same resulted in long pending litigations causing longer delay and ultimately, defeat of justice.

Therefore, an important question arose that *how well* did the adversarial mechanism stand the complex realities of the time to fulfill the purpose. It was amidst finding an answer to this which gave birth to the concept of Alternate Dispute Resolution (ADRs). Brought as a tool to do away with the flaws of litigation, arbitration, as one of the modes of the ADR, is the mechanism where the transacting parties agree by an agreement in writing to resolve their past, present or future disputes by a mutually appointed person called as an arbitrator. In India, the law which consolidates and amend the law relating to arbitrations; its commencement, conduct, proceedings and enforcement is called the Arbitration and Conciliation Act, 1996 (hereinafter "**the Act**").

It is noteworthy that even without any prior arbitration agreement, a duty is casted upon the Civil Courts to direct the parties to the suit to opt either mode of the

settlement (including arbitration) outside the Court as specified in Sub-section (1) of Section 89, CPC. Further, to obviate any dispute regarding maintainability of such arbitrations being proceeded without any prior arbitration agreement, the Hon'ble Supreme Court of India in **AFCONS Infrastructure v. Cherian Verkey Construction 2010 (8) SCC 24** has clarified the said position by holding that :-

1) Parties can enter into a separate agreement and file the same in Court or
2) Parties can file a joint application or
3) The Court may record the acceptance of opting Arbitration in the orders after obtaining signatures of the parties.

So far as the Act is concerned, the general embodiment of the principle of the exclusivity of arbitration mechanism over the traditional dispute resolution mechanism is reflected in Section 5 of the Act which lays down that notwithstanding anything (contrary) laid down in any other law for the time being in force, no judicial authority shall intervene in matters pertaining to arbitrations. However, to say that the Arbitrations as regulated by the Act are purely autonomous and untouched by the traditional courts is akin to driving a car without any brakes. Thus, Section 5 lay down that if the Act itself provides for the judicial authority to intervene then judicial authority can intervene. Therefore, the extent of judicial intervention in the arbitrations in India is allowed in situations provided by the Act itself.

For convenience, the author has drawn the following table to circumspect various such situations:

S.No.	Section	Particulars
1.	8	Power to refer parties to arbitrations where there is an arbitration agreement
2.	9	Interim measures etc. by Court
3.	11	Appointment of Arbitrators
4.	13(5) & (6), 14(2)	Remedy before the Court on grounds of biasness and disqualifications of the Arbitrator
5.	16(6)	Setting Aside of Arbitral Award by Court on grounds of lack of jurisdiction of the Arbitrator
6.	27	Court's Assistance in taking evidence
7.	29A & 29B(5)	Extension of Time by Court
8.	31A	Regime for Costs
9.	34	Application for setting aside arbitral award
10.	36	Enforcement and Stay of the Arbitral Award
11.	37	Appeals
12.	39	Application for delivery of Arbitral Award pending payment of costs to the Arbitrator
13.	41	Judicial intervention to submit matter in question before arbitration pending insolvency proceedings

Table 1

JUDICIAL AUTHORITY AND COURTS

Before starting, if we have a cursory look over various provisions of the Act (as mentioned in the above table) it would be evident that the same expressly allow the judicial intervention in certain situations either by the "*court*" or by the "*judicial authority*".

Though the term "*court*" is defined under Section 2(e) of the Act but "*judicial authority*" is nowhere defined in the Act. But the Supreme Court of India had occasions to interpret the meaning of the term "judicial authority".

In **Morgan Securities and Credit Pvt. Ltd. Vs. Modi Rubber Ltd**.[1], it was held as under:

> "28. The 1996 Act does not define the term 'Judicial Authority'. What is defined in Section 2(e) thereof is 'Court'. In its ordinary parlance 'judicial authority' would comprehend a court defined under the Act but also courts which would either be a civil court or other authorities which perform judicial functions or quasi-judicial functions.
>
> 29. In SBP & Co. v. Patel Engineering Ltd. and Anr. MANU/SC/1787/2005 : AIR 2006 SC 450, Seven Judge Bench of this Court opined:
>
> ...A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section MANU/SC/0523/2000 : AIR 2000 SC 2821 of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum.
>
> In Management Committee of Montfort Senior Secondary School v. Vijay Kumar and Ors. MANU/SC/0556/2005: AIR2005SC3549 a question arose as to whether a Tribunal under the Delhi School Education Act, 1973, is a judicial authority. It was held that a School Tribunal is a judicial Authority, as it acts judicially and exercise a judicial power.
>
> ...
>
> 32. The expression 'judicial authority' must, therefore, be interpreted having regard to the purport and object for which the 1996 Act was enacted."

Therefore, the above ratio very aptly widens the scope of the term "judicial authority". So far as the term "Court" is concerned which is defined under Section 2(e) of the Act, it includes the intervention by the principal Civil Courts and the High Court having ordinary original civil jurisdiction to hear the subject matter of the arbitration had the same was subject matter of a suit. However, for an international commercial arbitration, it means the High Court having ordinary original civil jurisdiction or wherever applicably, having civil appellate jurisdiction.

[1] (2006) 12 SCC 642

Hence, keeping in mind the above principles, with this background, let us understand more about the situations mentioned in Table 1.

I. SECTION 8: POWER TO REFER PARTIES TO ARBITRATION WHERE THERE IS AN ARBITRATION AGREEMENT

The above law which stands today is that a judicial authority is statutorily mandated and empowered to refer such matters to the arbitration which form the subject matter of an arbitration agreement. This means that whenever any action in a case (i.e. consumer case or usual civil suit or any other matter) is brought before a judicial authority, then such judicial authority can refer the parties to arbitration. But before such judicial authority does so, it has to satisfy itself of the following conditions: -

1) The party to the arbitration agreement or any person claiming through or under him has applied before the judicial authority.
2) Such application is filed not later than the date of submitting the first written statement of on the substance of the dispute.
3) There is a *prima facie* valid arbitration agreement.
4) The subject matter of the matter is forming the part of the arbitration agreement.
5) Notwithstanding any judgment, decree or order of the Supreme court or any other Court

Therefore, in view of the above, a judicial authority is within its power to intervene to refer the parties to arbitration. However, what needs to be further understood is whether such intervention is allowed to refer any or all matters to the arbitration wherever there is a prima facie arbitration agreement? Secondly, whether the judicial authority can go into the arbitrability or merits of the case to check whether the subject matter of the matter forms the part of the arbitration agreement?

To answer the first question, the reliance can be placed on the decision of the Hon'ble Supreme Court of India in **Booz Allen and Hamilton Inc. v. SBI Home Finance**

Limited and Ors[2] where it has been held that even if the parties have consented or agreed to resolve those disputes by arbitrations which are expressly or impliedly excluded by legislature to be adjudicated by public fora, the same can be refused by the judicial authority under Section 8 of the Act. Relevant portion of the judgment is as under:

> "35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, Under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.
>
> 36. The well-recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

The second question can be answered by drawing reference to Section 16 of the Act which explicitly provides inter alia that "*the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement*".

[2] (2011) 5 SCC 532

Therefore, to conclude, a judicial authority is mandated to refer the matters forming the part of the arbitration agreement to arbitration upon a prima facie satisfaction of the fact that there exists an arbitration agreement save and except those matters which are to be adjudicated by public fora as a matter of public policy.

II. SECTION 9: INTERIM MEASURES BY COURT

'Justice should not only be done but should be seem to be done' is one of the equitable principles upon which the jurisprudence of the interim reliefs is founded upon. Imagine a situation where the defaulting party is allowed to enjoy the fruits of litigation without any supervision of the judicial authorities to pass the interim orders to save or preserve the very basis of reliefs prayed by the aggrieved party. Therefore, the provision to reach an arbitral tribunal or the judicial authorities during the *interregnum* pending litigation for interim measures is quintessential for effective dispute resolution. Accordingly, the Act under Section 9 has foreseen three stages where the Court can intervene in granting such interim i.e. *firstly,* before the commencement of the arbitral proceedings, *secondly,* after the passing of the arbitral award and before it is enforced (or executed) and *thirdly, during the pendency of arbitral proceedings* where the remedy granted by the arbitral tribunal is rendered ineffective. What needs to be further understood is when the arbitral proceedings are said to be commenced? As per Section 21 of the Act, unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. This means that once a party or a claimant serves a dispute notice for reference of the dispute to arbitration, the arbitral proceedings are deemed to be commenced.

Apropos to the above, in order to balance the rights of the aggrieved and defaulting party, the Act has also compelled the aggrieved party to commence arbitration after obtaining the interim measure(s) under Section 9 by making it obligatory upon him or her to commence arbitral proceedings within 90 days from the date of such order.

Once such application under Section 9 of the Act is filed, the Court is equipped to pass appropriate orders in the interest of justice including measures such as;

i. appointment of a guardian of a minor or an unsound person for the purposes of arbitration agreement
ii. preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement
iii. securing the amount in dispute in the arbitration
iv. interim injunction or appointment of receiver
v. such other interim measure of protection as may appear to the Court to be just and convenient

It's pertinent to mention that the exercise of power of court under Section 21(1) of the Act after constitution of arbitral tribunal is made more onerous by Section 21(3), which provides that such powers can be exercised only when the court having regard to circumstances, finds that the remedy rendered under Section 17 (interim measures before the arbitral tribunal) appears to be non-efficacious.

III. SECTION 11: APPOINTMENT OF ARBITRATORS

With the introduction of the Arbitration and Conciliation (Amendment) Act, 2019, one of the provisions which is significantly amended to limit the judicial intervention to fasten the resolution of disputes through arbitration is Section 11 viz appointment of the arbitrators. Pre-amended Section 11 exclusively empowered either the High Court or the Supreme Court to appoint an arbitrator in the following circumstances: -

upon request by the party before the Supreme Court (in case of international commercial arbitration) / High Court (in case of domestic arbitration) or by their respective designated arbitral institution

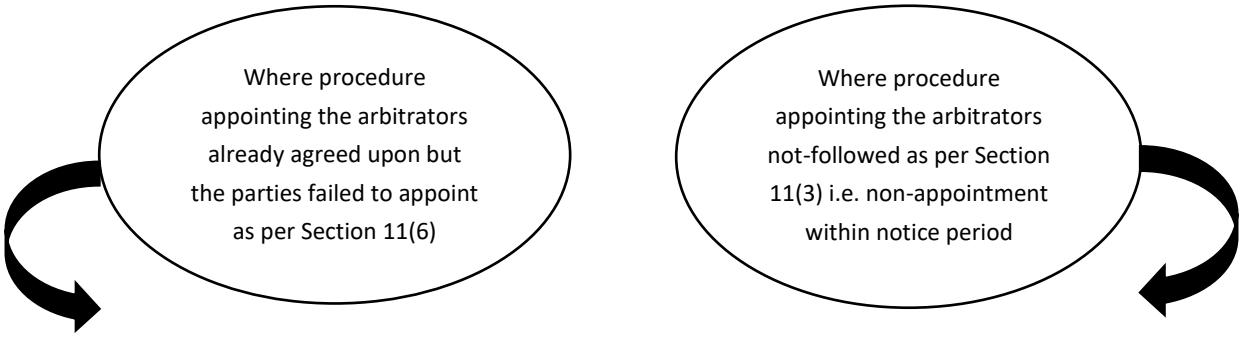
Therefore, the Courts (*which for the purposes of Section 11 means the Supreme Court in cases of international commercial arbitrations and the High Court in cases of any other arbitrations)* were frequently approached requesting appointment of the arbitrators. Further, while disposing the aforesaid requests, the *Courts* (more often than not) started adjudicating upon the 'arbitrability' of the disputes which resulted in disposal of their applications and hence, delay in commencement of arbitrations. Thus, to prevent the defeat of the object of the section, the legislature in its wisdom introduced Section 11(6A) of the Act[3] which limited the judicial intervention confined to examination of the existence of the arbitration agreement. Hence, prior to Amendment Act of 2019, the *Court's* role to intervene in arbitration was again narrowed down.

However, with the coming of the Amendment Act of 2019, the Court's power to directly appoint an arbitrator has majorly diminished. Under Section 11(3A) of the Act, the *Courts* role has become 'administrative' (rather than judicial) in the appointment process. Now, the *Courts* shall have the power to designate arbitral institutions which have been graded by a new special Council (called as the Arbitration Council of India) which will be obligated to take all such measures to promote and encourage arbitration, mediation and conciliation by formulating policies and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration.

The said Arbitration Council of India is created under Part IA of the Act by the Amendment Act of 2019. By doing so, the legislature in its wisdom has signified limiting the Court's excessive judicial intervention which could have hampered the object of ADRs.

Now the procedure for appointment of arbitrator is as under:-

[3] By Arbitration and Conciliation (Amendment) Act, 2016



upon request by the party before the arbitral institution designated by the Supreme Court (in case of international commercial arbitration) / High Court (in case of domestic arbitration)

IV. SECTION 13(5) & (6), 14(2): REMEDY BEFORE THE COURT ON THE GROUNDS OF BIASNESS, DISQUALIFICATIONS OF THE ARBITRATOR

The legislature while drafting the Act in its farsightedness has visioned maximum diligence to ensure impartiality and capability of the arbitrator in his appointment procedure. As per Section 12 of the Act, whenever an arbitrator is appointed, any reasons which may affect his or her ability to complete the arbitration within 12 months or any reasons which is likely to give rise to any justifiable grounds[4] as to his or her independence or impartiality, have to be mandatorily disclosed. If such grounds exit or if the arbitrator is not qualified as per the agreement between the parties or where there is no agreement, as per the Seventh Schedule to the Act, then such appointment of the arbitrator can be challenged by the party. Though, a duty is casted upon the party to challenge the appointment of the Arbitrator before the Arbitrator himself, but upon an unsuccessful challenge, Section 13(5) has provided an additional ground to enlarge the scope of Court's interference to set aside the arbitral award after it is passed. Under Section 13(6) of the Act, the Court is also empowered adjudicate upon the entitlement of such arbitrator to his fees once an arbitral award is set aside.

[4] Explanation 1 to Section 12(1) lays down that grounds stated in the Fifth Schedule shall guide in determining such grounds

However, the above provisions have to be read in light of Section 14(2) of the Act. Section 14 lays down the grounds for automatic termination of the mandate of the arbitrator where he is, *de jure* or *de facto* unable to perform his functions or further other reasons fail to act without undue delay. If a controversy remains concerning viz a viz the above, the Party is directly entitled to approach to the Court to adjudicate on the termination of the mandate.

In **Bharat Broadband Network Limited vs United Telecoms Limited**[5], the Hon'ble Supreme Court of India has differentiated and equipped the party to approach the Court directly where the case pertains to "ineligibility" of the Arbitrator. It was held as under:-

> "The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. "

[5] Decided on 16th April, 2021 in Civil Appeal No. 3973 of 2019

V. SECTION16 (6) : SETTING ASIDE OF ARBITRAL AWARD BY COURT ON GROUNDS OF LACK OF JURISDICTION OF THE ARBITRATOR

As a matter of general rule enshrined under Section 16 of the Act, the arbitrator tribunal is statutorily conferred with the power to rule on its own jurisdiction including any ruling on objections with respect to existence or validity of the arbitration agreement or even with respect to the plea that it is acting outside the scope of its authority. Even when the court is dealing with an application under Section 8 of the Act or Section 11 of the Act, it has to respect the legislative intent of this principle of *kometenz kompetnz,* and the court cannot pervasively adjudicate upon the merits of the arbitral disputes. Here, judicial intervention is confined. This element of arbitral autonomy, though rationalizes a boundary between an adversarial dispute resolution mechanism and an alternate dispute resolution mechanism but does not, speaking more rationally, oust the judicial remedies absolutely. Once a party to an arbitral proceeding raises a plea in terms of the provisions of Section 16 of the Act- challenging the jurisdiction of the arbitral tribunal or the arbitration agreement, if such plea is rejected and the arbitral tribunal proceeds with and pass the arbitrator award, then the legislative wisdom (as manifests in 16(6) of the Act) extends the judicial intervention in enabling the party to approach the Court in accordance with Section 34 of the Act for setting aside of such arbitral award.

VI. SECTION 27: COURT'S ASSISTANCE IN TAKING EVIDENCE

Section 19 of the Act lays down another salient feature of the arbitration as an alternate dispute resolution mechanism. It provides that an arbitrator is not bound by the adversarial procedure such as the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. However, as evidence opens the way for revelation of truth which is the guiding star of effective, just and impeachable adjudication between the parties, the Act opens the way for the arbitrator or the party (with the prior approval of the arbitrator) to directly approach the Court for assistance in taking the evidence.

Constituting as one of the rarely found procedural provisions in the Act, Section 27 empowers the Court to exercise its own competence according to its rules on taking evidence and execute the request by ordering any witness or any document (so sought by the party) to be examined or produced directly before the arbitral tribunal. While exercising its powers under Section 27, the Courts are further empowered to issue the same processes (including summonses or commissions) to witnesses as it may issue in suits tried before it.

Interestingly, the Court can also be approached to initiate contempt or like proceedings where any such witness or persons fail to act as per the above

VII. SECTION 29A AND 29B(5)- EXTENSION OF TIME BY COURT

One of the most contentious provisions brought about by the Arbitration and Conciliation (Amendment) Act, 2015 is that of the introduction of a time limit before which the arbitral award has to be rendered in case of all domestic arbitrations.

Section 29A(1) provides that in all cases, an arbitral award must be rendered within 12 months from the date of entering upon the reference. But, the parties are authorised under Section 29A(3), to extend this period by 6 months. Section 29A(4) provides that the mandate of the arbitrator shall terminate, if the award is not made within the specified or extended period.

However, Section 29A(4) empowers the court to further extend the specified or extended period under Section 29A(1) and 29A(3) respectively, on an application made by any of the parties under Section 29A(5), for sufficient cause and on such terms and conditions as may be imposed by the court. As per Section 29A(9), court is duty bound to dispose of an application filed under 29A(5) as expeditiously as possible and endeavour to dispose it within a period of sixty days from the date of service of notice on the opposite party shall be.

The court is also empowered under Section 29A(6) to substitute one or all of the arbitrators and to reduce their fee under Section 29A(4) if it finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal. And, in such a scenario the arbitral tribunal is deemed to be reconstituted and shall be deemed to be in continuation of the previously appointed arbitral tribunal. Therefore, Section 29A(6) provides that arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

The Act treats the courts on the same footing in case of fast-track arbitrations as well. Section 29B(4) of the Act has capped the time limit for making an award under fast track arbitrations at 6 months from the date the arbitral tribunal enters upon the reference. Therefore, Section 29B(5) says that if the award is not made within 6 months, the provisions of Section 29A(3)-29A(9) shall apply to the proceedings under fast track arbitrations.

VIII. Section 31A- Regime for costs

Section 31(8) of the Act as originally enacted dealt with costs in arbitration proceedings. Precedents that evolved therefrom led to a dissatisfied state of affairs regarding the regime on costs allocation in arbitration and arbitration related court proceedings. The chief complaint was that the provision was too open textured and allowed unnecessarily enormous discretion in awarding of costs. In most cases, tribunals and courts failed to award costs and provide reasons for their decision.

The Law Commission of India recommended certain changes to the Act for updating the law on costs in line with the best international practices. Pursuant to the recommendations, the Indian legislature enacted the Arbitration and Conciliation (Amendment) Act, 2015.

The amended Act contains detailed provisions on costs in Section 31A. Section 31A(1) empowers the court or arbitral tribunal, as the case may be, to award costs in relation to any proceeding under the Act.

It reads:

> *"In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure,1908, shall have the discretion to determine— (a) whether costs are payable by one party to another; (b) the amount of such costs; and (c) when such costs are to be paid…"*

The wordings of Section 31A(1) is a cause for concern, though. The use of the word "discretion" could be construed to mean that the Court or the tribunal has the option to choose not to pass any order on costs.

Similar is the case of Section 31A(2) as well. It reads:

> *"If the Court or arbitral tribunal decides to make an order as to payment of costs,— (a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or (b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing."*

This sub-section begins with the term "if" as if to suggest that making an order as to payment of costs, is a matter of choice of the Court or the arbitral tribunal, as the case may be. This construction is incongruent to the purpose for which the new regime on costs was introduced, as noted by the Law Commission.

A perusal of the decisions in the post-2015 suggests that there has not been a change, especially by the courts, in awarding of costs. This leads to the inference that the introduction of Section 31A was a pointless exercise.

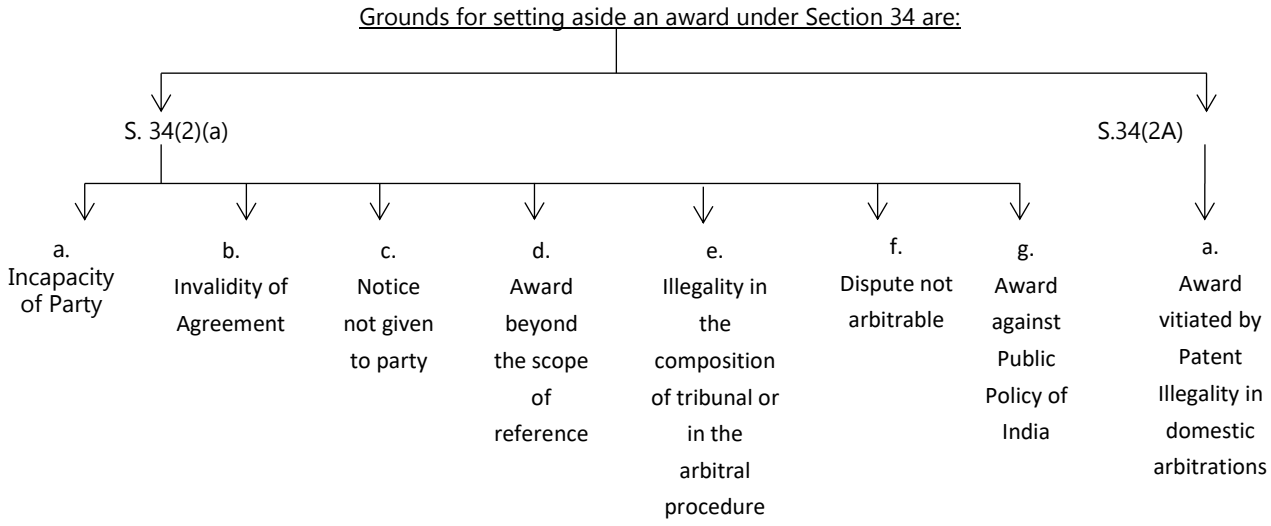
The recent decision of **Larsen and Toubro Limited Scomi Engineering BHD v. Mumbai Metropolitan Region Development Authority**, **MANU/SC/1151/2018,** is

a typical example where the court did not even deal with costs in a petition for constituting the tribunal. The petition was ultimately dismissed on the ground that the arbitration was not an international commercial arbitration warranting constitution of the arbitral tribunal by the apex court rather than by the relevant High Court.

IX. SECTION 34- APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

Section 34 provides the grounds and circumstances when an arbitral award may be set aside by the court. Setting aside of award means that it is rejected as invalid by court on the grounds mentioned in the Act. The applications under Section 34 are summary proceedings and shall be disposed of expeditiously within a period of one year from the date on which the notice under Section 34(5) is served upon the other party.

Section 34(1) provides that recourse to a court may be made only by an application for setting aside an award on the basis of grounds mentioned under section 32(2).



The grounds in Section 34(2)(a) are precise, so the courts cannot widen their scope of interference with arbitral awards. The only open-ended expression which has left some ambiguity is Section 34(2)(b)'s "public policy of India". No other ground has been subject to such debate or the subject of so much judicial intervention.

The Supreme Court's decision in ***Ssangyong Engineering & Construction Co Ltd v National Highways Authority of India, 2019 SCC OnLine SC 677,*** led to some notable developments. The judgment sums up the position following the 2015 amendment to the Act as follows:

- The interpretation of the term 'public policy of India' was narrowed by the 2015 amendment and the amendments to Section 34 of the 1996 act, especially the removal of the wide interpretation of the term, were substantive in nature. Thus, the post-amendment position does not apply to applications relating to Section 34 which were instituted before the 2015 amendment, unless otherwise agreed by the parties.
- 'Public policy of India' now means the 'fundamental policy of Indian law'. However, the principles of natural justice, as contained in Sections 18(25) and 34(2)(a)(iii) of the 1996 act, remain grounds on which an award can be challenged.
- 'Public policy of India' is now constricted to mean that a domestic award must be contrary to the fundamental policy of Indian law.

Insofar as domestic awards are concerned, an additional ground is now available under Section 32(2A), which was added to Section 34 by the 2015 amendment act. For this ground to apply, there must be patent illegality appearing on the face of the award. Such illegality must go to the root of the matter and must not amount to mere erroneous application of the law. In short, the contravention of a statute which is not linked to public policy or public interest will not lead to the setting aside of an award on the ground of patent illegality. The Supreme Court explained the concept of patent illegality following the 2015 amendment and expanded its ambit through an interpretation of Section 28(3) of the 1996 act. If an arbitrator looks beyond the contract and deals with matters outside their jurisdiction, they will commit an error of jurisdiction. This ground of challenge falls within the new ground added under Section 34(2A). While no longer a ground for challenge with respect to the public policy of India, if a decision is perverse, it will amount to patent illegality. Thus, a finding based on no evidence or an award which ignores vital evidence will be perverse and liable to be set aside on the ground of patent illegality.

X. SECTION 36- ENFORCEMENT AND STAY OF THE ARBITRAL AWARD

A swift and smooth enforcement of domestic arbitral awards is unquestionably an ideal prospect, but can be elusive at times due to the framework for court proceedings involved in enforcing an award.

Section 36(1) of the Arbitration Act provides that a domestic arbitral award shall be enforced in the same manner as if it were a decree passed by the court, once the time prescribed for making an application to set aside the award under Section 34 of the Arbitration Act had expired or an application made for this purpose had been refused.

Prior to its amendment in 2015, the Act did not specifically address the issue of whether the operation of a domestic arbitral award would be stayed while a challenge to the award under Section 34 of the Arbitration Act was pending. Therefore, the time taken and procedures involved in enforcement proceedings have drawn substantial criticism over the years, paving the way for the amendments in 2015 and 2019 to the Act.

Under the old regime, merely filing an appeal challenging the arbitral award resulted in an automatic stay of the award. This prevented the successful party from enforcing the award and delayed the execution process.
The amended Section 36(2) provides that an award would not be stayed automatically by merely filing an application for setting aside an award under Section 34. As per Section 36(2), only a specific order from the court under Section 36(3) staying the execution of award on an application made for the said purpose by one of the parties would led to stay of enforcement of arbitral award.

The Arbitration and Conciliation (Amendment) Act, 2019 introduced a new Section 87 in the Arbitration Act which provided that the 2015 Amendment: (i) will apply to arbitration proceedings commenced on or after the Effective Date and to court

proceedings arising out of or in relation to such arbitration proceedings; and (ii) will not apply to arbitration proceedings commenced prior to the Effective Date or to court proceedings arising out of or in relation to such arbitration proceedings (irrespective of whether such court proceedings commenced prior to or after the Effective Date).

The sequitur to the 2019 Amendment was, inter alia, that the amended Section 36 of the Arbitration Act no longer applied to arbitral awards issued in arbitration proceedings commenced prior to October 23, 2015. This could lead to potentially absurd situations where (i) an award-debtor whose application for stay of the award was rejected by a court could now claim refuge under the automatic stay rule, and (ii) award-debtors who had been unsuccessful in obtaining a stay of the operation of the award pursuant to the amended Section 36 now sought refunds of decretal amounts paid under the award.

The constitutional validity of the new Section 87 of the Arbitration Act was at challenge before the Supreme Court in ***Hindustan Construction Company Limited & Anr. v. Union of India & Ors. (Writ Petition (Civil) No. 1074 of 2019)***. The Supreme Court declared Section 87 of the Arbitration Act unconstitutional. The Supreme Court's view was based on, inter alia, findings that it was arbitrary to reinstate through Section 87 the mischief that the 2015 Amendment had sought to correct.

The immediate consequence of the judgment in Hindustan Construction is that the automatic stay rule would no longer be available, irrespective of whether the arbitration proceedings in which an award is issued commenced prior to or after the Effective Date.

XI. SECTION 37- APPEALS

Section 37 of the Act specifies the scope of appeal to courts against the order of court and arbitral tribunal. No period of time is, however, specified for filing an appeal under the Act. But, the provision of Article 116 of the Limitation Act, 1963 will apply in matters of appeals under Section 37.

After the 2015 Amendment, the following orders of the court are appealable under Section 37(1):

i. Refusing to refer the parties to arbitration under Section 8,
ii. Granting or refusing to grant any measure under Section 9,
iii. Setting aside or refusing to set aside an arbitral award under Section 34.

As per Section 37(1), only the court authorised by law are hear the abovementioned orders of the court have the jurisdiction to entertain the appeals.

It has been held in ***State of Maharashtra v. Hindustan Construction Co. Ltd., (2010) 4 SCC 518*** that an appeal, seeking to add absolutely new ground for which no foundation had been laid in the application for setting aside award, would be rightly rejected.

Sub-section (2) further provides for an appeal to court against the order of the Arbitral Tribunal accepting the plea referred to Sections 16(2) and 16(3) or granting or refusing to grant an interim measure under Section 17.

However, second appeals are barred under this section. Section37(3) provides that no second appeal shall lie from an order in appeal. However, the right to appeal to the Supreme Court is not affected.

XII. SECTION 39- APPLICATION FOR DELIVERY OF ARBITRAL AWARD PENDING PAYMENT OF COSTS TO THE ARBITRATOR

Section 31A of the Act stipulates that unless otherwise agreed between the parties, the costs of an arbitration including the fees and expenses of an arbitrator are to be fixed by the arbitrator himself. In the event that one party refuses to pay his share, the other party may pay that share. There may be other scenarios for e.g., where either both the parties refuse to pay their respective shares or where one party pays his own share but refuses to pay the share of the other party. In both the said situations, the arbitrator would be within his right to suspend or terminate the arbitral proceedings in terms of the second proviso to Section 38(2) of the said Act.

However, this untimely halting of the arbitral proceedings would not only prejudice the interests of the Claimant, but also hamper the reliability on arbitration as a robust alternative to litigation before courts.

To deal with such a scenario, the Act vests the arbitrators with a special right i.e., to exercise a right of lien on the arbitral award in terms of Section 39(1) of the Act without the need to halt the arbitral proceedings.

The sole purpose of the principle of 'lien on arbitral award' is to protect the rights of the arbitrators to receive their fees and other costs before the physical copies of the arbitral award are handed over to the parties. In fact, as apparent from the scheme of the Act, Section 39 of the Act balances the rights of the arbitrators as well the parties, by ensuring a mechanism for payment of unpaid fees and costs without hampering the on-going proceedings but restricting both the award-holder and award-debtor from availing remedies under Section 36 (enforcing the arbitral award) and Section 34 (challenging the arbitral award) respectively until the dues of the arbitrators are cleared by the parties.

At the outset, it is imperative to understand the appropriate stage at which an arbitrator can exercise the right of lien on the award for unpaid costs of arbitration,

which includes the unpaid fees of the arbitrator. The Arbitration Act does not expressly mention the stage at which this right of lien of the arbitrator can be exercised, however, it can be implied from the use of the phrase "delivery of award" in Section 39(2) of the said Act.

The use of the word "delivery" in itself has significant implications and for which it is necessary to understand the intent and purpose behind use of this word "delivery" in Section 39(2) of the Act. The legislature seems to have drawn a distinction between use of the phrases "making of an award" and "delivery of an award". The process of writing and preparing an award has been termed as "making" of the award. Once the award is so prepared or made, the Act stipulates "delivery" of the award as a physical delivery of the award by the arbitrator to the parties.

The manner in which the phrase "delivery of an award" is used in Section 39(2) of the Act seems to reflect a conscious and specific intent of the legislature of distinguishing it from the phrase "making of an award". This intent of the legislature can be understood from the fact that lien, by its definition, is the right to retain possession of a thing which belongs to another until certain demands are satisfied. In the context of an arbitrator, he has a right of lien on the "arbitral award", which presupposes the existence of the arbitral award at the time the arbitrator exercises his said right.

Where an arbitrator has refused to deliver the award, any party can take recourse to court under Section 39(2) of the Act, and for invoking this Section 39(2) of the Act, the conditions of Section 39(1) of the Act must have also been met i.e., (a) the arbitral award must be in existence; (b) the arbitrator must have exercised his lien on such award made, but not physically delivered the signed copy of the award to the parties; and (c) notice must have been given to the parties for payment of unpaid costs. For the same reason as explained above, even Section 39(2) of the Act cannot be triggered by any party until an arbitral award is "made" by the arbitrator and no court can

interfere unless an arbitrator has exercised lien in terms of Section 39(1) of the Act and issued notice to parties to that effect. As per Section 39(3), an application under Section 39(2) cannot be made by (a) any person other than parties, and (b) any party who has fixed the fees under a written agreement with the arbitral tribunal.

XIII. SECTION 41: JUDICIAL INTERVENTION TO SUBMIT MATTER IN QUESTION BEFORE ARBITRATION PENDING INSOLVENCY PROCEEDINGS

Section 41 of the Act deals with issues pertaining to insolvency matters. Section 41(2) provides that if the matter in dispute has to be decided for the purpose of carrying out the insolvency proceedings and the dispute has arisen by virtue of a contract which provided for arbitration, the receiver or the other party may apply to the court for an order. The court has been given full discretion to pass orders under Section 41 as per its observations. The court, under this section, shall pass an order only if it appears to the court that having regard to all circumstances of the case, the matter should be decided by arbitration.

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