GALGOTIAS UNIVERSITY

SCHOOL OF LAW

(Established under Galgotias University Uttar Pradesh Act No. 14 of 2011)

SYNOPSIS LL.M DISSERTATION

ENFORCEABILITY OF DOMESTIC ARBITRAL AWARD WITH REFERENCE TO COMMERCIAL DISPUTES : A STUDY OF PROCEDURAL UNFAIRNESS

SUBMITTED TO
SUBMITTED BY

DR. SHIVANGI SHARMA RASHI GARG

PROFESSOR OF LAW LLM
(23GSOL2070001)

INTRODUCTION

Arbitration is the effective dispute resolution mechanisms in commercial transactions that heavily relies on the enforceability of domestic arbitral awards. It is an alternative to conventional litigation, provides parties with a more flexible and prompt means of settling disputes. The main objective of, Arbitration and Conciliation Act of 1996 is to minimize judicial intervention in arbitral process.

The enforceability of domestic arbitral awards plays a pivotal role in the efficacy of dispute resolution mechanisms within the realm of commercial transactions. Arbitration serves as an alternative to traditional litigation. The enforceability of arbitral awards ensures that the decisions rendered through this process carry legal weight and can be implemented with efficacy.

The jurisprudence of Indian arbitration law has grown significantly over the past 25 years, with a growing focus on the independence, impartiality, and neutrality of arbitrators. The approach to the independence and neutrality of arbitrators has undergone a paradigm shift since the 1996 passage of the Arbitration and Conciliation Act (Arbitration Act) and the revisions that followed. The Supreme Court of India and state high courts have rendered numerous rulings over the years that have solidified the Indian legal establishment's stance against the unanimity of arbitrators' appointments. But what happens when an arbitrator is appointed unilaterally and issues an arbitral award? Is it subject to an Arbitration Act challenge[1]?

The applicability of anti-arbitral injunctions has been a subject of debate for many years and remains unresolved. An anti-arbitral injunction is an injunctive relief granted by a court or any other competent judicial or quasi-judicial body, preventing the parties, or sometimes the Arbitral Tribunal, from commencing or continuing arbitral proceedings. Typically sought at any point before the final arbitral award is rendered, these injunctions

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address a specific set of legal concerns and introduce a delicate balance in the domain of dispute resolution. On one hand, anti-arbitral injunctions help maintain the status quo and protect the aggrieved party from the inconvenience of undergoing arbitral proceedings in matters that may be demonstrably non-arbitrable. On the other hand, their implementation risks curtailing the flexibility and party autonomy that are central to arbitration. The grant of anti-arbitral injunctions raises complex questions about the intersection of the principle of minimal judicial intervention in arbitration and the need to protect a party from being compelled to participate in vexatious arbitral proceedings that are not maintainable. This article examines the relevant judicial precedents discussing the principles that govern the grant of anti-arbitration injunctions, highlighting the nuanced considerations involved in their issuance.

STATEMENT OF PROBLEM

The study endeavors to evaluate the factors like Anti arbitration injunction, party autonomy and unilateral appointment of arbitrator creates hindrance in the execution of domestic arbitral awards and other factors that give rise to challenges in enforcement.

The primary focus is on investigating whether delays in enforcement, possibly stemming from procedural unfairness, pose a threat to the fulfillment of the objectives of the arbitration mechanism in India.

LITERATURE REVIEW

- Rebello, Ferdino Inacio, "Judicial intervention in the arbitral process with specific reference to India", Ph.D. theses, University of Mumbai, 2015

  The thesis tells about the intervention of the judiciary in the arbitral process, specifically focusing on India.
- Sanjeev K Kapoor and Saman Ahsan, Challenging and Enforcing Arbitration Awards: India, Global Arbitration review, (31st Jan. 2024,8:30) https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards

  Setting-aside proceedings in India do not have an automatic suspensive effect on the enforcement of a domestic arbitral award. A separate application seeking a stay on the operation of the award under Section 36(2) of the Act must be filed with the setting-aside application, which, if allowed by the court, will result in a stay on the operation of the award.
- Ranjit Shetty and Rahul Dev, India: Enforcement Of Domestic Arbitral Awards - The Jurisdiction Conundrum, mondaq, (31st Jan. 2024, 8:30) https://www.mondaq.com/india/arbitration--dispute-resolution/929490/enforcement-of-domestic-arbitral-awards---the-jurisdiction-conundrum

  The article is about finality and enforcement of arbitral awards and sec 36 and sec 34 of The Arbitration and Conciliation Act of 1996. The Supreme Court in Sundaram Finance case held that for the purpose of Section 36 of the Act, there is no court which passed the decree and the execution application can be directly filed anywhere in the country where the award can be executed.
- ANSHU SINGH RATHORE, Public Policy Conundrum in the Enforcement of Arbitral Award,Manupatra (1February 2024, 4:45pm) https://articles.manupatra.com/article-details/Public-Policy-Conundrum-in-the-Enforcement-of-Arbitral-Award

  The article deals with the role of public policy in enforcing the Arbitral Award is a controversial and contentious issue in the field of Arbitration

- Dheeraj Diwakar, Vidya Drolia case: Deciphering the conundrum on arbitrability and non- arbitrability of disputes and the breadth of sections 8 and 11 of the arbitration and conciliation act, 1996 (11, march 2024 3:40) https://articles.manupatra.com/article-details/Vidya-Drolia-case-Deciphering-the-conundrum-on-arbitrability-and-non-arbitrability-of-disputes-and-the-breadth-of-sections-8-and-11-of-the-arbitration-and-conciliation-act-1996
- Amrapali homebuyers, MS Dhoni's interest clash: SC notice to ex skipper, The Times of India, (July 26,2022) https://timesofindia.indiatimes.com/city/delhi/amrapali-homebuyers-ms-dhonis-interest-clash-sc-notice-to-ex-skipper/articleshow/93120615.cms (last visited on April26,2024, 05:20)

  Despite parties preferring arbitration for dispute resolution, court intervention can disrupt the process. A cricketer began arbitration against the Amrapali group for defaulting on payments for his brand ambassador services. A court-appointed receiver then took over the case and informed the court about being summoned in the arbitration. Consequently, Justices UU Lalit and Bela M Trivedi issued a stay on the arbitration proceedings and asked the arbitrator to halt further actions.
- Urmil shah, India: Resolving The Conundrum Of Arbitrability Of Disputes In Financial Services Disputes Resolution, mondaq, (last visited April.30, 2024, 1:47 pm) https://www.mondaq.com/india/arbitration--dispute resolution/1215146/resolving-the-conundrum-of-arbitrability-of-disputes-in-financial-services-disputes-resolution

  Financial sector disputes are highly litigated in both courts and administrative levels in the country. Mandating arbitration for these disputes can enhance its role in commercial dispute resolution. Consistently using arbitration as the preferred dispute resolution method can position India as a competitive global arbitration hub.

Neetika Bajaj and Kopal Mittal , Challenging The Arbitrator For Bias And Partiality: Does The Arbitration And Conciliation Act, 1996, Provide Effective Remedy?, may 17, 2023

https://www.livelaw.in/law-firms/law-firm-articles-/arbitrator-bias-arbitration-and-conciliation-act-adr-zeus-law-associates-228883

- Sunidhi Singh, Patent Illegality In Setting Aside Arbitral Awards: Is India Becoming A Robust Seat For Arbitration?, Feb 13,2023 https://www.livelaw.in/lawschoolcolumn/patent-illegality-in-setting-aside-arbitral-awards-is-india-becoming-a-robust-seat-for-arbitration-221421#:~:text=Patently%20Illegal%20means%20an%20error,country%2C%20or%20a%20statutory%20provision.
  Award would be patently illegal if it is contrary to substantive provisions of law, of the arbitration act, or terms of the contract. However, this interpretation was applied to domestic as well as international arbitral awards. After the report of the 246th law commission, the interpretation was limited to domestic awards as clearly laid down in Section 34(2A) of the Act

RESEARCH OBJECTIVE

The object of this study is to conduct a doctrinal research of the enforceability of arbitral awards, with a focus on scrutinizing the challenges and delays associated with enforcing domestic awards with special focus on procedural unfairness. The research seeks to assess the shortcomings in the implementation of domestic arbitral awards and identify the factors contributing to enforcement challenges. It aims to investigate whether procedural unfairness leads to delayed enforcement, potentially undermining the objectives of the arbitration mechanism in India.

Hypothesis

The hypothesis is whether the increasing number of appeals of arbitral awards leads to the dependency on courts of India and the factors like party autonomy, public policy, biasness of arbitrator and unilateral appointment of arbitrators involved in delayed enforcement of arbitral awards.

RESEARCH QUESTION

The research questions on which the research is focused are

- Do the Anti arbitral injunction affect the enforcement of an arbitral award?
- Whether the factors like unilateral appointment of the arbitrator and biasness of arbitrator creates hindrance in the enforcement of arbitral award
- Whether the setting aside of arbitral award under section 34 of Arbitration and Conciliation Act of 1996, on the ground of public policy and patent illegality increase the court's intervention in arbitration proceedings.

Research Methodology

The research will depend on doctrinal analysis, utilizing case studies of the Arbitration and Conciliation Act of 1996, along with a comprehensive examination of both primary and secondary sources.

CHAPTER - 2

INTRODUCTION TO COMMERCIAL DISPUTE

INTRODUCTION

As the society expands, differences in opinions naturally arise, leading to conflicts. Where there are differing perspectives, disagreements emerge, giving rise to disputes. With the increasing complexity and interconnectedness of society, the frequency of disputes is also escalating, becoming a significant concern. So, to resolve this problem and to access to justice various dispute resolution modes were introduced, this includes arbitration, conciliation, mediation, and negotiation. Of the various methods available for resolving disputes outside of traditional court systems, arbitration stands out as the most suitable form of Alternative Dispute Resolution (ADR).

Arbitration is mainly of two types – Domestic arbitration and International arbitration. While the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) does not explicitly define terms Domestic Arbitration or Foreign Arbitration within its statutes, it does provide a clear definition for International Commercial Arbitration. This Act governs both domestic arbitration involving Indian nationals on both sides, in part I and international commercial arbitration where at least one party is not an Indian national, in part II. Further the discussion will be only on Domestic Arbitration.

Domestic Arbitration in India occurs when arbitration proceedings, the contractual subject matter, and the merits of the dispute are all regulated by Indian law, or when the dispute's cause of action arises entirely within India, or when the involved parties are otherwise under Indian jurisdiction. For a dispute to qualify for domestic arbitration, its cause of action must originate entirely

within India, or the parties must be subject to Indian jurisdiction. Domestic arbitration presents an appealing avenue for resolving disputes.

International arbitration serves as a dispute resolution method akin to domestic court litigation, but with distinct features. Instead of court judges, private adjudicators known as "arbitrators" oversee the process. Additionally, international arbitration transcends national boundaries, offering a forum for resolving disputes that cross borders.

2.1 INTRODUCTION TO ARBITRATIN IN COMMERCIAL DISPUTE

Arbitration is a non-judicial or outside the court legal technique which aims at resolving disputes by referring them to a neutral party known as “Arbitrator” for a binding decision known as Arbitral Award. Commercial pertains to activities associated with the exchange of goods through buying and selling. Thus, Commercial arbitration means of settling disputes related to commercial activities by referring them to a neutral person or an arbitrator, selected by the parties in dispute for a decision based on the evidence and arguments presented to the arbitration tribunal. The parties agree in advance that the decision will be accepted as final and binding.

Arbitration agreement is one of the important or foundation aspects for conducting arbitration. Arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[2]. An arbitration agreement can be in the form of either a clause within a contract or a standalone agreement. When incorporated as a Arbitration clause within a contract, then it is the clause is a provision within the contract itself, outlining the parties' agreement to resolve any disputes through arbitration rather than traditional litigation. This clause basically specifies the rules and

[2] The Arbitration and Conciliation Act, 1996 (26 of 1996) sec. 7

procedures governing the arbitration process, including the selection of arbitrators, the location of the arbitration, and any applicable laws.

On the other hand, a separate arbitration agreement is a distinct document independent of any existing contract. It serves the same purpose as an arbitration clause within a contract but is executed as a separate legal agreement between the parties. This standalone agreement outlines the terms and conditions under which arbitration will take place, including the rights and obligations of each party, the arbitration rules to be followed, and the procedures for initiating arbitration proceedings. Both forms of arbitration agreements are legally binding and serve to resolve potential disputes in a private and expedient manner.

Indian Arbitration system is growing with a speed especially when it comes to commercial disputes. An Arbitration agreement provides parties with the flexibility to tailor the arbitration process to their specific needs and preferences, promoting efficiency and preserving confidentiality. The Arbitration proceedings are mainly preferred in commercial disputes as this method distinguishing from public court hearings where matters are accessible to the general public. Additionally, arbitral awards are not made public, further safeguarding confidentiality. Arbitration serves as a private mechanism for resolving commercial disputes, granting parties the authority to shape the arbitration process or clause through an agreement. Therefore, when drafting the primary contract, it's crucial for parties to include an arbitration clause that explicitly addresses potential delays and ensures a timely resolution. In pursuit of expediency, parties may consider waiving certain rights, such as oral examination of witnesses, directly within the arbitration clause. This step is pertinent, as one party's ability to summon numerous witnesses or prolong cross-examinations can significantly impede the arbitration process. Particularly in construction and infrastructure disputes, arbitrators often accord limited weight to oral witness testimony. Thus the parties instead of following the templates for drafting arbitration clauses, they should effectively draft the arbitration clause, so that the arbitration process can go with its ease keeping in mind the nature of the project frame.

2.2 ARBITRATION IN INFRASTRUCTURE DISPUTES

In Indian the government and private sector's increased involvement in infrastructure-related operations is causing a daily growth in construction and infrastructure arbitrations. In arbitration, the parties hold the authority to determine the arbitration procedure through a contract between them. Therefore, when drafting the main contract, it's essential for parties to include an arbitration clause that explicitly addresses potential delays and ensures a timely conclusion. In construction or infrastructure contracts, it's common for parties to include arbitration clauses stipulating a three-member tribunal. Each party selects one arbitrator, and the chairperson is chosen jointly. However, it's essential for parties to consider that opting for a three-member panel significantly escalates arbitration costs and time. This is because hearings must accommodate the schedules of all three arbitrators and the involved parties, leading to increased time consumption and expenses. Apart from this, as per section 11(6) of The Arbitration and Conciliation Act, 1996 if, according to the agreed-upon procedure for appointing arbitrators and the following happen:

(a) Party neglects to fulfill its obligations under that procedure;

(b) Parties or the two appointed arbitrators fail to reach an expected agreement;

(c) Person, including an institution, fails to carry out any function entrusted to them under that procedure,

Then, upon the application of the party, the appointment shall be made by the arbitral institution designated by the Supreme Court for international commercial arbitration or by the High Court for Domestic arbitration. This entity shall take the necessary steps unless the agreement on the appointment procedure specifies alternative measures for securing the appointment. An arbitration agreement serves as a provision within a contract or a separate pact where parties opt for arbitration to resolve disputes stemming from their contractual association rather than resorting to litigation. Within construction contexts, these agreements are integrated into broader construction contracts,

holding essential significance due to the intricate and multifaceted nature of disputes that commonly arise in construction projects. These conflicts typically entail various technical intricacies, and substantial financial stakes. By offering a private and potentially less confrontational setting, arbitration emerges as a preferred method for addressing these intricate disputes in the construction industry.

In construction and infrastructure contracts, parties often seek damages for delays, variations to the main contract, and quality issues in the executed work. These claims can typically be substantiated using email exchanges and other communications. Therefore, it's advisable for parties to begin collecting all communications from the outset of negotiations, organizing them chronologically. Some infrastructure companies adopt a practice of directing all project-related emails to a dedicated email address, simplifying the retrieval of communications when needed. A claimant with well-organized documentation can initiate the arbitration process easily and earlier by submitting documents, preferably during the claim stage or at the latest, during the rejoinder stage, rather than delaying until later stages along with witness examinations. In arbitration, the examination process is often shorten or even omitted altogether to circumvent the protracted delays associated with traditional court proceedings. This proactive approach allows the opposing party to respond more effectively, facilitating a better understanding of the case by the arbitrator. Consequently, arbitrators often accord greater significance to documents submitted at the onset of proceedings. Empirical analyses of disputes referred to arbitration in international construction projects highlight disagreements over payments, change orders, delays, technical issues, safety concerns and quality compliance as the predominant areas[3].

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[3] Scientific research an academic publisher, The Application of Arbitration in Resolving Disputes in International Road Construction Contracts (April21,2024, 10:20) https://www.scirp.org/journal/paperinformation?paperid=128837

The Bharat Aluminium Co. v. Kaiser Aluminium Technical Services[4]case in India exemplifies the application of arbitration in infrastructure disputes. In this instance, the respondent was tasked with supplying and installing a computer-based system for Shelter Modernization at Balco's Korba Shelter. The contract agreement included an arbitration clause for resolving disputes arising from the contract, specifying the law of India as governing law and London as the arbitration venue. The Supreme Court, guided by the principle of "party autonomy" as paramount in international commercial arbitration, interpreted the arbitration clause recognizing parties' intentions to avoid traditional court processes. Consequently, the court ruled that Indian law governed the substantive contract, while English law exclusively governed the arbitration agreement. Here the party autonomy embodies the idea that parties entering into a contract should have the autonomy to choose the governing law, arbitration rules, arbitral tribunal, and other procedural aspects of resolving their disputes. Essentially, it empowers parties to tailor the arbitration process to best suit their interests, promoting efficiency, flexibility, and confidentiality in dispute resolution.

The essential purpose of arbitration is to minimize court intervention in disputes that can be efficiently resolved through an agreed-upon arbitration process. Despite parties consenting to arbitration as their preferred method of dispute resolution, court intervention often disrupts this process. In a prominent case, a cricketer initiated arbitration proceedings against the Amrapali group due to their default in payment for his services as its brand ambassador. However, the court-appointed receiver took over the case. Subsequently, the receiver informed the court that he was receiving notices and being summoned in the arbitration proceedings. In response, a bench comprising Justices UU Lalit and Bela M Trivedi issued a stay on the arbitration proceedings and requested the arbitrator to refrain from proceeding further[5].

[4] AIR 2016 SC 1285

[5] Amrapali homebuyers, MS Dhoni's interest clash: SC notice to ex skipper, The Times of India, (July 26,2022)

Apart from, The Arbitration and Conciliation Act, 1996, the dispute relating to construction and infrastructure is also resolve through Real Estate (Regulation & Development) Act, 2016 (RERA Act) that mainly aims of safeguarding the interests of homebuyers. A frequent point of contention is whether disputes between flat buyers and developers can be resolved through arbitration if an arbitration clause exists in the flat-purchase agreement. As per Section 8 of the Arbitration and Conciliation Act, if the agreement includes an arbitration clause, it is compulsory for the parties to opt for arbitration. But what if the provision of RERA Act and A & C Act are being conflict with each other then provisions of RERA Act 2016 are said to have override effect, as it being a Special Statute. When an allottee faces an injury or grievance, they have the option to choose from the remedies available by law for redressal. This choice becomes an "election of remedies" when there are multiple concurrent remedies accessible, and the aggrieved party selects one. By doing so, they forfeit the right to pursue other remedies simultaneously for the same cause of action[6]. Hence, a flat buyer has the option to select arbitration, if the following conditions are fulfilled:

- There is a valid Arbitration Agreement in place;
- The dispute falls within the scope of arbitration;
- There are no other factors present that might prevent the initiation of arbitration.

2.3 ARBITRATION IN FINANCIAL SECTOR

In today's economy, transactions, particularly those involving financial institutions, play a crucial role. Dispute resolution principles have evolved, emphasizing confidentiality, especially in dealings with banks and financial entities. Consequently, there's a shift towards adopting arbitration over litigation, as it's seen as a more efficient and cost-effective method of resolving disputes. In

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https://timesofindia.indiatimes.com/city/delhi/amrapali-homebuyers-ms-dhonis-interest-clash-sc-notice-to-ex-skipper/articleshow/93120615.cms (last visited on April26,2024, 05:20)

[6] IREO Grace Realtech Pvt. Ltd. v. Abhishek Khanna & Others (11.01.2021-SC)

the banking sector, conflicts often arise between financial institutions and their clients, highlighting the need for an efficient resolution mechanism. Compared to traditional judicial processes, arbitration offers a streamlined approach. While judges in litigation wield considerable legal authority, arbitrators provide a more flexible and tailored approach to dispute resolution. India aims to position itself as a key player in international arbitration, capitalizing on the growing trend towards arbitration. Banks and financial institutions prefer arbitrating disputes as primary mode of disputes resolution, considering the expertise offered by the arbitrator. To illustrate, as many as 32% of arbitrations at the London Court of International Arbitration (LCIA) and 58% at the American Arbitration Association (AAA) involves financial sector entities as either claimants or defendants[7]

Arbitration in India can be categorized as either ad hoc arbitration or institutional arbitration. Ad hoc arbitration refers to a process where the procedure is determined by the parties themselves or, in the absence of an agreement, by the arbitral tribunal. On the other hand, institutional arbitration involves arbitration administered by specialized arbitral institutions, which provide a panel of arbitrators with expertise in areas such as banking and finance to facilitate the enforcement of arbitral awards. In institutional arbitration, arbitrators with extensive experience and expertise are often enlisted from diverse backgrounds. When necessary, parties and arbitrators may consult the institution's panel of arbitrators for guidance and advice. While India has shown a preference for international arbitration, particularly when foreign companies are involved in business contracts with Indian counterparts, it lacks institutions with established international arbitration institutions like The International Chamber of Commerce (ICC), Panel of Recognised International Market Experts in Finance (P.R.I.M.E.), Singapore International Arbitration Centre

[7] Urmil shah, India: Resolving The Conundrum Of Arbitrability Of Disputes In Financial Services Disputes Resolution, mondaq, (last visited April.30, 2024, 1:47 pm) https://www.mondaq.com/india/arbitration--dispute-resolution/1215146/resolving-the-conundrum-of-arbitrability-of-disputes-in-financial-services-disputes-resolution.

(SIAC), London Court of International Arbitration (LCIA), and Hong Kong International Arbitration Centre (HKIAC)[8]. However, arbitration institutions in India have taken steps to enhance the use of arbitration in the finance sector. The main office of PRIME is in Hague established in 2012, its objective is to provide arbitration and mediation services, expert opinions, as well as judicial training and education focused on complex financial transactions. PRIME consist of a panel, of expert arbitrators renowned for their profound knowledge and extensive experience in this domain[9].

From the perspective of soft governing law, various international standard-setting organizations, such as the International Chamber of Commerce (ICC), the International Swaps and Derivatives Association (ISDA), and the Panel for Recognized International Market Experts in Finance (PRIME Finance), have developed specialized arbitration rules. These rules cater specifically to the resolution of disputes in areas including derivatives, project and sovereign finance, asset management, and regulatory matters. By doing so, these organizations aim to provide a structured and efficient framework for resolving complex financial disputes, thereby promoting consistency and reliability in international arbitration practices within the financial sector[10].

There's a rising inclination towards arbitration for resolving finance disputes, driven by a perception of courts as unreliable and challenges in reaching parties through court-appointed processes when there's no specific agreement. To tackle this, various arbitration institutions have introduced rules and systems tailored to the finance sector, aiming to enhance efficiency and address the unique needs of parties involved. Consequently, arbitration has witnessed a notable surge in financial sector cases.

Arbitral institutions helps in ensuring the smooth and organized conduct of arbitration proceedings by providing fixed arbitrator's fees, managing

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[8] Shashwat Kaushik, Rise in financial institution arbitration: all you need to know, Decber1, 2023 https://blog.ipleaders.in/rise-in-financial-institution-arbitration-all-you-need-to-know/

[9] Ibid.

[10] Supra note 6

administrative expenses, maintaining a qualified arbitration panel, and establishing rules governing the arbitration process. Several prominent institutions in India offering institutional arbitration services include:

- Delhi International Arbitration Centre (DIAC) - Located in New Delhi
- Indian Council of Arbitration (ICA) - Based in New Delhi
- Construction Industry Arbitration Council (CIAC) - Headquartered in New Delhi
- LCIA India - Situated in New Delhi
- International Centre for Alternative Dispute Resolution (ICDAR) - Based in New Delhi

In domestic arbitration within the banking sector, the selection of arbitrators, arbitration procedures, and the applicable law hold significant importance. It's imperative for parties to meticulously draft their arbitration agreements, clearly outlining these aspects to prevent ambiguity and ensure the efficiency of the arbitration process. The arbitration in the banking sector has been underscored by numerous legal precedents, emphasizing its importance and practical application in resolving disputes.

One notable case is the Swiss Timing Ltd. v. Commonwealth Games 2010 Organizing Committee[11] case. In this case a petition under Section 11(4) read with Section 11(6) of the A & C Act, 1996 with a prayer to appoint the nominee arbitrator of the Respondent and to constitute the arbitral tribunal, by appointing the presiding arbitrator in order to adjudicate the disputes that have arisen between the parties. During the contract the parties enter into agreement under which, the Petitions must provide the Performance Bank Guarantee to the Respondent to secure the performance of its obligations under the agreement. According to the petitioner, the respondent defaulted in making the payment without any justifiable reasons and further the respondent asked the petitioner to

[11] AIR 2014 SC 3723

extend the Bank Guarantee. The petitioner informed the respondent that the Bank Guarantee had already been terminated and released on completion of the Commonwealth Games. It is further the case of the respondent that due to the pendency of the criminal proceedings in the trial court, the present petition ought not to be entertained. Respondent contested that in case the arbitration proceeding continues simultaneously with the criminal trial, there is real danger of conflicting conclusions by the two fora, leading to unnecessary confusion. The court held that "To dismiss arbitration at the outset would defeat the very intent behind the parties' agreement to arbitrate. Additionally, allowing arbitration to proceed concurrently with criminal proceedings poses no inherent risk of prejudice to any party involved. Therefore, the court should exercise caution and discretion when considering arguments that the main contract is void or voidable. The court should refrain from declining arbitration unless it can conclusively determine, based on a thorough examination of the contract document itself, without the need for further evidence, that the contract is void."[12]. As a result, the court affirmed the legitimacy of arbitration clauses within contracts, stressing the importance of parties adhering to these agreements. This decision underscores the efficiency of arbitration and the finality of arbitral awards. The judiciary's stance displayed a pro-arbitration approach, promoting arbitration as a preferred method for settling banking disputes. Many non-banking financial institutions choose arbitration as a method to appoint a court commissioner for the repossession of vehicles[13].

If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration[14].

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[12] Ibid.

[13] AIR 2007 SC 1349

[14] Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, AIR 2003 SC 2881

The arbitration clause in the agreement, bind all the consortium members; and in such a contract it is necessary to ensure that even though the lead members of the consortium might alone be party to an arbitration agreement, with the other party, all the consortium members are bound by the arbitration agreement and the arbitrator's award and hence non signatory agreement, can invoke the arbitration clause in the agreement, for resolution of its dispute and initiation of insolvency resolution process and the appointment of interim resolution professional, does not prohibit the applicant from invoking the arbitration clause in the development agreement for resolution of disputes arising under the agreement, and from filing the arbitration application under Section 11 of the A & C act. Even the proceedings of the NCLT, is not a bar for the applicant therein from invoking the arbitration clause and proceedings under IBC have not been initiated against the applicant [15]. Although the reach of an arbitration agreement typically extends only to the parties directly involved or those derived from them, English courts have, in specific instances, applied the "group of companies doctrine." The "Group of Companies" doctrine is a legal principle applied in international arbitration that allows non-signatory companies within a corporate group to be bound by or benefit from an arbitration agreement signed by another company within the same group. This doctrine recognizes the economic and functional unity of a group of companies and seeks to uphold the parties' intentions and the principle of good faith in arbitration agreements. The "Group of Companies" doctrine recognizes that companies within a corporate group often function as a unified economic entity, despite maintaining separate legal identities. This recognition forms the basis for justifying the binding of a non-signatory company to an arbitration agreement. Crucially, the intention of the parties involved in the arbitration agreement is a pivotal factor. If it can be demonstrated that the parties intended for the arbitration agreement to extend to the entire corporate group, including non-signatory entities, then the doctrine can be invoked. Additionally, the participation of non-signatory companies in the

[15] Indu Eastern Province Projects Private Ltd v. Telangana Housing Board (Formerly Andhra Pradesh Housing Board), AIR 2015 National Consumer Disputes Redressal

negotiation, execution, or performance of the contract containing the arbitration clause further strengthens the case for binding them to the agreement. Such involvement implies an implicit acceptance of the arbitration terms. Moreover, the doctrine operates on principles of good faith and fairness. It aims to prevent parties from evading arbitration agreements by exploiting the separate legal personalities of companies within a corporate group. Instead, it ensures that all relevant parties are treated equitably and that arbitration agreements are honored in good faith, thereby promoting the integrity and effectiveness of the arbitration process.

Primarily developed in international contexts, suggests that an arbitration agreement entered into by one company within a corporate group may also encompass its non-signatory affiliates, subsidiaries, or parent companies. Such application occurs when it's evident that all parties intended to bind both signatories and non-signatory affiliates. This theory has been invoked in various arbitration cases to justify a tribunal's jurisdiction over a party not explicitly named in the arbitration agreement[16].

Following the Supreme Court in the Vidya Drolia & Ors v. Durga Trading Corporation case[17] ruled that matters falling under the DRT Act (The Recovery of Debts and Bankruptcy Act, 1993) are not suitable for arbitration. It emphasized that allowing banks and financial institutions' claims under the DRT Act to be arbitrated would impede their specific rights and recovery mechanisms outlined in the DRT Act. Further, the court set forth a four step test to determine the arbitrability of disputes, establishing guidelines for when a dispute would not be appropriate for arbitration and it would not come under arbitration head. This interpretation has resolved various crucial issues of arbitration. The four step process is:

- When rights in personam that derive from rights in rem do not fall under the definition of actions in rem as a cause of action.

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[16] Chloro Controls(I) P.Ltd v. Severn Trent Water Purification Inc.& ors. AIR.2012, SC

[17] AIR 2019 SC 3498

- When third-party rights may be at stake in disputes that need centralized adjudication, mutual adjudication may not be suitable or enforceable.
- When mutual adjudication is unenforceable, the cause of action and the subject matter of the dispute pertain to unassailable state duties of sovereign and public interest.
- If the dispute's subject matter is expressly or implicitly declared non-arbitrable by law[18].

The essence of these judgments is that when a cause of action or a dispute's subject matter is specifically addressed by a particular statute, such as the RDB Act 1993, SARFAESI Act 2002, IBC 2016, etc., it must be adjudicated only in the designated public forums outlined by those statutes. Consequently, such claims, falling under the category of Right in Rem, are deemed non-arbitral.

Financial creditors, operational creditors, and the business debtor itself may file for bankruptcy under the IBC. A default is what sets off the insolvency process. Hence, no insolvency procedure may be started in the absence of a default by the corporate debtor. The recipients of awards are creditors in the sense of IBC. It doesn't matter if the award bearer is an operational or financial creditor because the IBC needs a defaulted debt in order to start bankruptcy procedures. The framework for claiming an arbitral award as debt under the IBC operates differently for domestic and foreign arbitral awards

In the K. Kishan case[19], the challenge under section 34 was lodged before the insolvency application was made. Consequently, the ruling would apply only to similar scenarios where the challenge precedes the insolvency application. However, the question was regarding whether an insolvency application would be accepted if the challenge to the award is submitted after the insolvency

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[18] Ibid.

[19] **Anuj Dubey** and **Amay Bahri,** Impediments to the Enforcement of Arbitral Awards under IBC, IndiaCorpLaw, (Last visited april.30, 2024, 1:47 pm) https://indiacorplaw.in/2021/07/impediments-to-the-enforcement-of-arbitral-awards-under-ibc.html

application. Insolvency proceedings cannot commence unless an award achieves finality, as only then can it be considered a ‘debt’ under the Insolvency and Bankruptcy Code (IBC). If a challenge to the award is filed within the statutory period, or if the court permits the challenge beyond the limitation period, then initiating insolvency proceedings would be premature. This is because the amount on which the insolvency application is based is not binding on the corporate debtor until the award attains finality.

Hence, for a domestic award to be grounds for initiating insolvency proceedings, it must first reach a state of finality. Hence, for a domestic award in itself to be used to initiate insolvency proceedings, it must first attain finality.

`In conclusion, the ruling in this case marks a significant milestone in evaluating the arbitrability of disputes. The Court's decision effectively prevents unnecessary complications that could impede a swift and efficient arbitration process by restricting the grounds for challenging the arbitrability of a dispute on grounds of fraud. While some inconsistencies persist and certain aspects may necessitate further clarification and elaboration by the Court in subsequent cases, the verdict represents a notable advancement in India's pro-arbitration stance. It underscores the likelihood that Indian courts will continue to adopt a similar approach in the future, thereby fostering an environment conducive to arbitration.

CHAPTER -3

ENFORCEABILITY OF DOMESTIC AWARD

Chapter VIII of the Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015, addresses the finality and enforcement of arbitral awards. Section 36(1) of the Act details the procedure for enforcing an award. It stipulates that once the time limit for challenging the arbitral award under Section 34 of the Act has elapsed, and unless there is a court-issued stay on its enforcement, the award shall be enforced according to the procedures outlined in the Code of Civil Procedure, 1908. Section 34 addresses the process for setting aside an arbitral award in court. Once an application to set aside the award is filed, the award is not automatically enforceable unless the court issues a stay in accordance with sub-section (3). In essence, the award is enforced in a manner akin to a court decree, even though the arbitral tribunal lacks the authority to execute the award. This approach ensures that the enforcement process mirrors that of a court decree, despite the award itself not being classified as a decree, as it is not issued by a civil court.

Sub-section (2) to Section 36 stipulates that the mere filing of an application to set aside an arbitral award under Section 34 does not automatically stay the enforcement of the award. This means that a party can proceed with enforcing the arbitral award even if the other party has filed an application to set it aside. The award can only be stayed if the court grants an order of stay, which requires a separate application. If such an application is filed and the court grants a stay on the arbitral award, it must provide written reasons for its decision. This provision serves as a deterrent against frivolous applications aimed at setting aside arbitral awards, while also granting courts the authority to impose conditions on the party challenging the award, including the power to order the deposit of amounts prior to the admission of the stay application. Hence the award could only be enforced once the time for making an application to set

aside the arbitral award under Section 34 had expired, or such application having been made, it had been refused.

An award holder would have to wait for a period of 90 days after the receipt of the award before they apply for enforcement and execution. The section of the award that could be challenged is indicated in the Act Section 34. After the elapsed time of the aforementioned period has come into effect in the event that a court upholds an award finding it to be enforceable whatsoever, it, at the stage of execution, can no longer be disputed.

Before the recent Arbitration and Conciliation (Amendment) Act, 2015, an application for setting aside an award would be equal to a stay in the proceedings for enforcement of the award. While now it can be thought that a party challenging an award has to move separately an application to have the enforcement of the award be stayed, by the virtue of the Amendment Act this restriction no longer is valid.

3.1 FACTORS AFFECTING ENFORCEMENT

A party may challenge an award on the following grounds. Such an award would be rendered unenforceable when:

i. The parties to the agreement were under some incapacity.
ii. The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made (especially in case of foreign awards).
iii. There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings.
iv. Award is ultra vires the agreement or submission to arbitration.
v. Award contains decisions on matters beyond the scope of submission to arbitration.
vi. Composition of the arbitral authority or the arbitral procedure is ultra vires agreement.
vii. Composition of the arbitral authority or the arbitral procedure is not in accordance with the law where the arbitration took place.

viii. The award (specifically a foreign award) has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which that award was made.

ix. Subject matter of the dispute is not capable of settlement by arbitration under Indian law.

x. Enforcing the award would contradict Indian public policy. Under Indian law, enforcement can be refused if the award violates public policy[20].

These factors collectively impact the enforcement of domestic awards in India under the Arbitration and Conciliation Act, 1996, and understanding them is crucial for parties engaging in arbitration within the country.

Section 36 of the Arbitration and Conciliation (Amendment) Act, 2015 pertains to the enforcement of domestic awards. The Amendment Act introduces sub-clause (2) to Section 36, specifying that filing an application to set aside an arbitral award under Section 34 does not automatically stay the award's enforcement. An award will only be stayed if the Court issues an order of stay based on a separate application made for that purpose. If the Court grants such an order, it must provide written reasons. This provision aims to deter frivolous applications to set aside arbitral awards and allows courts to impose conditions on the challenging party, such as ordering the deposit of amounts, before admitting the stay application. The 2021 amendment to Section 36 of the Act introduced sub-section 3, which grants courts the authority to impose an unconditional stay on the execution of arbitral awards if there is prima facie evidence of fraud or corrupt acts. This amendment significantly impacts the foundational principle of the arbitral agreement, which emphasizes the separation of the arbitration agreement from the underlying contract. By allowing courts to stay the execution of awards based on allegations of fraud or corruption, the amendment undermines the autonomy and finality that arbitration agreements are intended to provide. This change effectively challenges the integrity of the arbitration process, potentially leading to increased judicial

[20] Nishith Desai Associates, Enforcement of Arbitral Awards and Decrees in India Domestic and Foreign, 2019

intervention and diminishing the certainty and efficiency that arbitration seeks to offer as an alternative dispute resolution mechanism.

Under Section 36(3), the court has the authority to grant an unconditional stay on the execution of arbitral awards if there is prima facie evidence that the awards were obtained through fraud or corrupt acts.

In Pam Developments v. State of West Bengal[21], the Supreme Court held that, while it is generally expected that the awarded amount or a security for it should be deposited when granting a stay under Section 36, this is not a mandatory requirement. Furthermore, the government is not entitled to any special treatment in this context.

As the arbitral awards are treated as decrees for enforcement purposes, the Limitation Act of 1963 applies to them. The limitation period for enforcing such an award is twelve years. In Sundaram Finance v. A. Samad[22], the Supreme Court ruled that an enforcement or execution application under Section 36 can be filed anywhere in India where the judgment debtor's assets are located. There is no requirement to seek a transfer of the decree for execution under Sections 38 and 39 of the CPC.

In Siliguri Jalpaiguri Development Authority v. Bengal Unitech Siliguri Projects Limited[23], a question arose regarding whether the recipient of an arbitral award is entitled to retain the entire awarded sum under Section 36 of the Act while an application for setting aside the award is pending in the court. It was held that the award holder is fully liable for amount to be paid as decided by the Arbitral Tribunal including the interest and the other fees. Furthermore, the court instructed the petitioner to deposit 50% of the arbitral award, along with any accrued interests, to fulfill the requirements of the registrar of the High Court of Calcutta, either in the form of cash security or its equivalent. Subsequently, the

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[21] Pam Developments v. State of West Bengal, AIR 2019 SC 3937, (Supreme Court)

[22] AIR 2018 SUPREME COURT 965

[23] Siliguri Jalpaiguri Development Authority v. Bengal Unitech Siliguri Projects Limited, AIR 2024 Cal. HC

court dismissed the petition, outlining the directives to be fulfilled within a four-week timeframe.

3.2 Setting aside of award affecting enforcement

The grounds for setting aside an award rendered in India (in a domestic or international arbitration) are provided for under Section 34 of the Act. These are materially the same as in Article 34 of the Model Law for challenging an enforcement application. An award can be set aside if:

a) A party was under some incapacity; or

b) The arbitration agreement was not valid under the governing law; or

c) A party was not given proper notice of the appointment of the arbitrator or on the arbitral proceedings; or

d) The award deals with a dispute not contemplated by or not falling within the terms of submissions to arbitration or it contains decisions beyond the scope of the submissions; or

e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

f) The subject matter of the dispute is not capable of settlement by arbitration.

According to sub-section (3) of Section 34[24], the time limitation for filing an application to set aside an arbitral award is three months from the date the applicant receives the award. If the applicant can demonstrate sufficient reasons for being unable to file the application within this three-month period, the law permits an extension of an additional 30 days for submitting the application. This provision ensures that, under certain justified circumstances, applicants have a total of up to four months to challenge the arbitral award, thereby balancing the need for finality in arbitration with the recognition that unforeseen circumstances may occasionally prevent timely applications.

3.3 Intervention of courts

[24] The Arbitration and Conciliation Act, 1996, sec 34 Application for setting aside arbitral awards

The provision of the 1996 Arbitration & Conciliation Act, was actually borrowed from Article 5 of the UNCITRAL Model Law, to expressly set the limits of judicial intervention in part I of the statute. Judicial intervention in arbitration refers to the involvement of courts or judicial authorities in the arbitration process, which is primarily designed to be a private and party-driven method of dispute resolution. While arbitration is meant to provide parties with a flexible and efficient alternative to litigation, there are instances where judicial intervention is necessary to ensure the fairness of the process, to address certain legal issues, or to enforce arbitral awards[25].

The principle of non-interfere of court in arbitral proceedings is a fundamental theme underlying the Act. Indeed the Act envisions three specific scenarios where a judicial authority may intervene in arbitral proceedings.

- Section 11 provides for the appointment of arbitrators, where the parties' envisaged method for the same fails ;
- Section 14(2) provides ruling on whether the mandate of the arbitrator stands terminated due to inability to perform his functions or failure to proceed without undue delay; and
- Section 27, Provide assistance in taking evidence.

As would be noticed, Indian law is far more restrictive in allowing court intervention as compared to the UNCITRAL Model of Law.

The use of the term "judicial authority" in Section 5 of the Arbitration & Conciliation Act, 1996, implies that the legislature intended minimal intervention on limited grounds. The scope of the term "judicial authority" is much broader than the term "court," as it encompasses authorities and agencies vested with the judicial powers of the Government. The intervention of judicial authorities under the 1996 Act is restricted to the purposes specified within the

[25] Niharika Chauhan, Judicial Intervention In Arbitration- A Comparative Analysis, Manupatra, Marsh 3, 2022 ,
https://articles.manupatra.com/article-details/Judicial-Intervention-In-Arbitration-A-Comparative-Analysis

Act itself. The Act provides for the intervention or assistance of judicial authorities in various matters.

The terms "judicial authority" used in sections 5 and 8 of the Act of 1996, rather than "court," indicate a broader scope that requires careful understanding. To grasp the meaning of "judicial authority," it is essential to first consider the term "judicial."

In the case of Regina john M'Evoy v Dublin corporation [26] it was noted that the term "judicial" does not exclusively refer to actions taken by a judge or a legal tribunal when deciding on legal matters. Instead, for the purposes of this discussion, a judicial act can be understood as an action performed by a competent authority, based on an assessment of facts and circumstances, which either imposes a liability or impacts the rights of others[27].

Section 8, grants judicial authorities the power to refer parties to arbitration in cases covered by an arbitration agreement. A party must submit this application before providing their first statement on the dispute's substance. Additionally, the application must be accompanied by the original arbitration agreement or a duly certified copy. The Section is mandatory in nature. The Hon'ble Supreme Court stated that when an agreement between parties brought before a civil court includes a clause for arbitration, it becomes obligatory for the civil court to refer the dispute to an arbitrator. In the case of Rashtriya Ispat Nigam Ltd. v Verma Transport Company[28], the Hon'ble Supreme Court clarified that for a Judicial authority to refer a matter to arbitration, all conditions specified in the section must be satisfied. The expression "first statement on the substance of dispute" in section 8(1) does not solely refer to a "written statement"; rather, it signifies the party's submission to the jurisdiction of the judicial authority. The court must assess whether the party seeking arbitration has waived their right to invoke the arbitration clause. Furthermore, if the conditions outlined in clause (2) of section 8 are not adhered to, courts are not obligated to refer the matter to an arbitrator.

[26] 8 CLR 330 (E) (1909)

[27] Supra Note 17

[28] AIR 2006 SC 2800

Further, under the scope of limited intervention of courts in arbitral proceedings, Section 9 of the Act is pivotal as it authorizes courts to provide interim reliefs, while section 17 empowers arbitrators to grant interim measures for preserving and safeguarding parties' rights. Although both sections address interim measures, their purposes are distinct. Before granting interim protection, a party must demonstrate the existence of a prima facie case and establish that failure to provide such relief of interim protection would result in irreparable harm. The court should also consider the potential harm to both parties and assess the balance of convenience[29]. By weighing the needs of both sides, the court determines the appropriate course of action under section 9 of the Act. Actual role of the courts while dealing with such an application is to just protect the rights of adjudication before an arbitral tribunal from being frustrated. In M/s. Sundaram Finance Ltd. v. M/s. N.E.P.C. India Limited[30], the Hon'ble Apex Court clarified that the purpose of Section 9 is to facilitate the smooth conduct of arbitral proceedings. It emphasized that unscrupulous parties should be deterred from misusing this provision for ulterior motives to obstruct the proceedings[31].

To prevent the easy challenge to the jurisdiction of an arbitral tribunal on the grounds that the contract containing an arbitration clause is invalid, the doctrine of separability was developed. This doctrine posits that the arbitration clause is distinct and independent from the parent contract. Consequently, the arbitration clause must be evaluated separately from the contract in which it is embedded. Therefore, any flaw in the contract does not automatically render the arbitration agreement or clause invalid. This ensures that arbitration can proceed independently of the disputes regarding the contract's validity.

In practice, it has been observed that the doctrine seldom applies in India. Notable cases such as UOI v. Jagdish Kaur and India Household[32] and

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[29] Supra Note 17

[30] AIR 1999 SC 565

[31] Ibid.

[32] AIR 2007 ALLAHABAD 67

Healthcare Ltd. v. LG Household and Healthcare Ltd.[33] exemplify this trend. In these cases, the Hon'ble Supreme Court held that if a contract was deemed void, then the arbitration clause within that contract would also be considered void. These rulings illustrate the judicial stance that the validity of the arbitration clause is inherently tied to the validity of the overall contract, thereby rendering the arbitration clause ineffective if the contract itself is invalid. This perspective highlights a pragmatic approach in Indian jurisprudence, emphasizing that an invalid contract cannot give rise to valid arbitration proceedings[34].

Therefore, the court possesses the judicial discretion to grant or deny ad interim injunctions. The principles governing the issuance of ad interim relief in civil suits similarly apply to the exercise of this discretion. The primary objective is to protect an individual from harm due to rights infringement that cannot be remedied through financial compensation and to preserve the integrity of the case for the arbitrator. The effectiveness of enforcement is influenced by the efficiency and productivity of the Indian judicial system. Any delays or inefficiencies in the legal process can lead to difficulties in enforcement and increased costs.

3.4 Patent illegality

The concept of "patent illegality" was initially defined by the Supreme Court of India in the case of ONGC v. Saw Pipes[35]. Subsequently, in 2015, following the recommendations of the 246th report of the Law Commission, an amendment was introduced to Section 34 of the Act, 1996. This amendment broadened the interpretation of the term "public policy of India," which had previously been narrowly construed by earlier judicial decisions. As a result, there has been a significant increase in the number of cases where parties have relied on the ground of patent illegality. This shift in interpretation has led to a greater

[33] AIR 2007 SUPREME COURT 1376

[34] Supra note 22

[35] AIR 2003 SC 2629

scrutiny of arbitral awards, particularly with regard to perceived clear and obvious legal errors. The 2015 amendment provides a clear definition of the term "public policy of India" and introduces a new basis, Section 34(2A), for challenging domestic arbitral awards due to patent illegality. However, the term "patent illegality" itself remains undefined. This provision applies solely to arbitrations conducted within India and does not extend to International Commercial Arbitrations, as indicated by the exclusionary language "other than International commercial arbitration" in the section.
"Patently illegal" refers to a legal error that fundamentally affects the essence of the issue at hand. Such a legal error may involve a contradiction with common law, the constitution of the country, or a statutory provision.

In McDermott International Inc. vs. Burn Standard Co. Ltd[36], the Supreme Court clarified its role, stating that it possesses a limited supervisory function and can only intervene with the findings as established in Saw Pipes. In this case, the Supreme Court expanded the scope of "patent illegality" as defined in Saw Pipes to include instances where awards may be set aside due to evidence perversity and internal contradictions within the award itself. This interpretation has been consistently upheld in subsequent judgments, effectively introducing a legal error under the umbrella of "patent illegality." Even when courts refrain from delving into the merits of the award, the introduction of such grounds for setting aside awards prompts a review of the merits. Courts have favored applying the criteria outlined in Saw Pipes[37] and McDermott International Inc.[38] to invalidate awards through a merits review, rather than limiting such intervention to exceptional cases or employing the "judicial approach" test for merits reviews, and subsequently, if necessary, setting aside awards even in the absence of a determination that the Arbitrator's approach was arbitrary or capricious.

[36] 2006 AIR SCW 3276

[37] Supra note 32

[38] Supra note 33

In case of Associated Builder held that "Patent Illegality" would include: a) fraud or corruption; b) contravention of substantive law, which goes to the root of the matter; c) error of law by the arbitrator; d) contravention of the Act itself; e) where the arbitrator fails to consider the terms of the contract and usages of the trade as required under Section 28(3) of the Act; and f) if arbitrator does not give reasons for his decision.

3.5 Public policy

When determining whether to set aside an arbitral award, a court of law considers the public policy perspective as outlined under the Arbitration & Conciliation Act 1996.

In the case of Renusagar Power Electric Company Vs. General Electric Company[39], a pre-1996 Arbitration & Conciliation Act case concerning the enforcement of an ICC award, the Hon'ble Supreme Court interpreted the expression of public policy in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961, through the lens of private international law. An award could be set side if it is contrary to the public policy of India or the interests of India or to justice or morality. The Court reasoned that the term "public policy" should be understood narrowly, implying that merely violating Indian law is insufficient to bar enforcement. To invoke the public policy exception, the enforcement of the award must contravene (i) the fundamental policy of Indian law, (ii) the interests of India, or (iii) justice or morality. The Court also held that in proceedings for enforcement of a foreign award the scope of enquiry before the court in which the award is sought to be enforced would not entitle a party to the said proceedings to impeach the award on merits.

[39] 1994 AIR 860

Then again in case of ONGC vs. SAW Pipes Ltd.[40], the Supreme Court held that the phrase 'public policy of India' in the context of Section 34 requires a broader interpretation than in the Renusagar case. The Hon'ble Supreme Court noted that the concept of public policy pertains to matters of public good and public interest. Consequently, an award that is patently in violation of statutory provisions can be deemed contrary to public interest and thus in violation of public policy. Furthermore, the Hon'ble Supreme Court determined that the test established in SAW Pipes[41] should also apply to Section 48 of the Arbitration & Conciliation Act, 1996. This allows Indian courts to refuse enforcement of foreign arbitral awards on the ground of "patent illegality.[42]"

In the case of Shri Lal Mahal Ltd. vs. Progetto Grano Spa[43], the Hon'ble Supreme Court overruled the judgment in Phulchand Exports Ltd[44]. and reinstated the position established in Renusagar case[45] regarding the enforcement of foreign arbitral awards. The Court confirmed that the test from Renusagar would henceforth be applied to refuse enforcement of arbitral awards on the grounds of public policy. Additionally, in ONGC Ltd. vs. Western Geco International Ltd.[46], the Supreme Court had to decide whether the award violated the public policy of India. Upholding the ratio from the ONGC vs. SAW Pipes case, the Court further elaborated on the 'fundamental policy of Indian law.' It identified three distinct and fundamental juristic principles: first, the adjudicating authority must adopt a 'judicial approach' and cannot act arbitrarily or capriciously; second, the authority must adhere to the principles of natural justice; and third, decisions that are perverse or irrational, such that a reasonable person could not have reached them, must not be sustained by the court.

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[40] Supra note29

[41] Ibid.

[42] Phulchand Exports Ltd vs Ooo Patriot AIR 2011 SC

[43] AIRONLINE 2013 SC 191

[44] Supra note 34

[45] Supra note31

[46] AIR 2015 SC 363

In the case of Associate Builders vs. Delhi Development[47], the Hon'ble court emphasized the judicial approach towards arbitral awards, emphasizing that such awards must exhibit fairness, objectivity, and reasonableness. In response to the issues raised by WesternGeco, the Court aimed to alleviate some of the negative impact caused. Concerning the ground of patent illegality, the Court introduced the reasonability test to assess whether the interpretation of a contract warranted judicial intervention. Additionally, in order to prevent potential abuse of the public policy exceptions, the Court clarified the boundaries of the "justice and morality" and the "interests of India" exceptions. Furthermore, the Supreme Court clarified the interpretation scope of fundamental notions of morality and justice, asserting that an award could be challenged on grounds of 'justice' if it deeply offends the conscience of the court. Similarly, an award could be invalidated if it violates prevailing moral standards to an extent that shocks the conscience of the court, particularly concerning matters against societal norms as outlined in Section 23 of the Indian Contracts Act. The court reiterated the grounds on which an award can be challenged under the Act, including violations of fundamental policies of Indian law, considerations of India's interests, instances where justice or morality is compromised, patent illegality affecting the essence of the matter, and awards obtained through fraudulent or corrupt means[48].

In the case of Venture Global LLC and Ors. vs Tech Mahindra Ltd and Ors.[49], the Supreme Court, drawing from its ruling in Associate Builders, interpreted that contravening the provisions of the Foreign Exchange Management Act (FEMA) constitutes patent illegality, thereby violating the public policy of India. The Court emphasized that arbitral awards can only be set aside based on the grounds enumerated in Section 34 of the Arbitration and Conciliation Act, and no other. It reiterated that the Court's role is not to act as an appellate authority to

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[47] 2014 AIR SCW 6861

[48] Hon'ble Mr. Justice S.U. Khan, HANDBOOK ON ARBITRATION LAW RELEVANT FOR DISTRICT JUDGES/ADJS/COMMERCIAL COURTS, October, 202

[49] AIRONLINE 2018 SC 860

scrutinize the legality or merits of an award, but rather to confine itself to the grounds specified under the Act.

In the case of Government of India vs Vedanta Limited[50], the Hon'ble Supreme Court drew upon the interpretation of public policy as articulated in the Renusagar case and affirmed that public policy encompasses fundamental principles, the interests of India, considerations of justice, and morality. Consequently, the Court indicated that judgments rendered post the 2015 amendment of the Act appropriately circumscribe the scope of public policy, as delineated in the ONGC vs. Western Geco [51]case. The Court clarified that an erroneous interpretation of contractual provisions by the Arbitral Tribunal does not constitute grounds for challenging the award on its merits. Thus, the Court underscored the importance of adhering to the statutory grounds specified in the Arbitration and Conciliation Act for setting aside arbitral awards, emphasizing that challenges to awards should not stray into a review of their substantive merits.

Public policy is often described as a judicial interpretation doctrine that reflects societal needs and norms. Due to its nature, this doctrine requires the judiciary to address various gaps and ensure that agreements do not undermine collective societal wellbeing. Given that arbitration is still relatively new compared to more established dispute resolution methods like litigation, courts must maintain public confidence in ADR processes. As highlighted in the Saw Pipes judgment, dispute resolution is ultimately a function of the State, and the power of the courts must not be diminished by overshadowing public policy concerns. Therefore, the relationship between public policy and arbitration must strike a balance between ensuring finality in ADR processes and upholding justice.

In various jurisdictions, courts emphasize that public policy should not be conflated with domestic mandatory law. If an arbitral award contradicts the domestic mandatory law of the country where enforcement is sought, the

[50] AIRONLINE 2021 DEL 603

[51] Supra note 35

domestic court of that country may decline enforcement. However, a trend has emerged in many countries where public policy and domestic mandatory law are distinguished. These jurisdictions allow agreements between parties that may contravene mandatory provisions, considering such agreements valid for the enforcement of arbitral awards. This distinction underscores the separation between domestic public policy and international public policy, particularly in the context of international arbitration.

CHAPTER – 4
PROCEDURAL UNFAIRNESS

4.1. Biasness of arbitrator

An arbitrator can be challenged under two specific circumstances: first, if there are doubts about his independence or impartiality, and second, if he lacks the qualifications agreed upon by the parties. A challenge must be raised within 15 days of the petitioner becoming aware of either the composition of the tribunal or the grounds for the challenge. Unless the parties agree otherwise, it is the tribunal, rather than the court (as per the 1940 Act), that decides on any challenges. If a challenge is unsuccessful, the tribunal will proceed with the arbitration and issue an award, which can then be contested by a party. This approach differs from the Model Law, which allows for recourse to a court if a tribunal dismisses a challenge[52].

Independence, impartiality, and party autonomy are essential elements of an effective and fair arbitral proceeding. The rule against bias, a fundamental principle of natural justice, applies to all judicial and quasi-judicial proceedings[53]. A lack of independence or impartiality on the part of a sole arbitrator, or any member of an arbitral tribunal, can be grounds for challenging the arbitrator's mandate or the final award issued in the proceedings. These grounds and the corresponding challenge procedures are outlined in Sections 12 and 13 of the Arbitration and Conciliation Act, 1996 ("the Act").

An arbitrator's appointment can be challenged at two distinct stages. First, a challenge can be made at the time of the arbitrator's appointment, based on the

[52] Neetika Bajaj and Kopal Mittal , Challenging The Arbitrator For Bias And Partiality: Does The Arbitration And Conciliation Act, 1996, Provide Effective Remedy?, may 17, 2023 https://www.livelaw.in/law-firms/law-firm-articles-/arbitrator-bias-arbitration-and-conciliation-act-adr-zeus-law-associates-228883

[53] Ibid

mandatory disclosure of potential conflicts of interest as per the grounds listed in the Fifth Schedule of the Act. Second, a challenge can be raised during the course of the arbitral proceedings if circumstances arise that bring the arbitrator's independence or impartiality into question. This two-stage process ensures that any potential biases are addressed promptly, safeguarding the fairness and integrity of the arbitration process from the outset and throughout its duration.

The Arbitration and Conciliation Act, 1996, does not explicitly define the terms "bias" or "partiality" regarding an arbitrator. However, section 12(3) (a) of the Act addresses circumstances that may raise justifiable doubts about an arbitrator's "independence and impartiality"[54]. The Fifth Schedule of the Act provides a detailed list of grounds that guide this determination. These grounds include the arbitrator's relationship with the parties or their counsel, the arbitrator's connection to the subject matter of the dispute, and any direct or indirect interest the arbitrator may have in the outcome of the dispute. This schedule serves as a framework to assess potential biases, ensuring that arbitrators remain neutral and the arbitration process remains fair and impartial.

In the case of Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.[55], the Supreme Court of India examined the concept of "apprehension of bias." The Court held that the amended provision aims to identify the specific "circumstances" that can lead to "justifiable doubts" concerning an arbitrator's independence or impartiality. The Court emphasized that if any of these enumerated circumstances exist, they will indeed result in a justifiable apprehension of bias. The Fifth Schedule to the Arbitration and Conciliation Act outlines the grounds that may give rise to such justifiable doubts, thus providing a framework for assessing potential bias in arbitration proceedings. This approach is intended to ensure the fairness and integrity of the arbitration process by pre-emptively addressing any situations that might compromise an arbitrator's impartiality.

[54] Ibid

[55] (2017) 4 SCC 665

It is well-established that a party alleging "apprehension of bias" against an arbitrator(s) can seek remedy exclusively under Section 13 of the Arbitration and Conciliation Act, 1996. An examination of this section reveals that the aggrieved party has three options to pursue this remedy.

First, Section 13(1) of Act, allows the parties to agree on a "procedure" to challenge the arbitrator. However, in practice, it is unlikely that parties will reach an agreement on such a procedure. Typically, allegations of bias and partiality arise from an arbitrator's perceived favor towards one party, making it improbable that the party benefiting from this alleged bias would be interested in challenging the arbitrator's mandate. Consequently, reaching a consensus on the challenge procedure is virtually impossible. Additionally, there is no legal clarity or precedent on what this challenge procedure should entail. Questions arise about whether the parties should approach a neutral third party or an independent institution, and what the legal standing of an order from such an entity would be. This lack of clarity renders the first option practically ineffective.

Second, Section 13(3) of the Act, allows the arbitrator(s) accused of bias and partiality the option to recuse themselves based on a "written statement of reasons" submitted by the aggrieved party. If the arbitrator(s) choose to recuse, the challenge is successful, and a new arbitrator is appointed. The newly appointed arbitrator then decides whether to continue the proceedings from where they were left off or to start anew, based on their discretion.

4.2. Relied on unstamped documents

In arbitration, the rules for the admissibility of documents differ significantly from those in court proceedings, as they are not governed by the Indian Evidence Act, 1872, or the Code of Civil Procedure, 1908. Instead, the arbitral tribunal has the discretion to determine the rules of admissibility for materials presented before it, guided by the principle of Kompetenz-Kompetenz. This principle empowers the tribunal to decide on its own jurisdiction, including procedural issues such as the admission of evidence. As a result, the tribunal may adopt a flexible approach to determining the admissibility of documents,

taking into account factors like relevance, reliability, and fairness to both parties. This discretionary authority enables the tribunal to tailor the evidentiary rules to fit the specific circumstances of each arbitration, enhancing efficiency and flexibility in the dispute resolution process. The doctrine of Kompetenz-Kompetenz asserts that an arbitral tribunal has the authority and competence to rule on its own jurisdiction, including all jurisdictional matters and the assessment of the existence or validity of an arbitration agreement. The fundamental aim of this doctrine is to minimize judicial intervention in disputes that the parties have entrusted to the tribunal within the flexible framework of alternative dispute resolution like arbitration. This allows the arbitral process to function with greater autonomy and adaptability, promoting a more efficient resolution of disputes.

An unstamped instrument containing an arbitration agreement is considered void[56]. Such an instrument, lacking the status of a contract and being unenforceable by law, is deemed non-existent in legal terms. Consequently, the arbitration agreement within such an instrument is invalid and can only become operative once the instrument is duly stamped. The term "existence" of an arbitration agreement, as contemplated under Section 11(6A) of the Arbitration Act, refers not just to its physical presence or factual existence but also to its legal validity and enforceability.

Moreover, it was held that the doctrine of severability does not influence the enforceability of an unstamped instrument under the Stamp Act. Although the arbitration agreement is acknowledged as separate and distinct from the principal agreement containing the arbitration clause, it was concluded that the evolution of the doctrine of severability does not apply when dealing with the provisions of the Stamp Act.

The Stamps Act 1899 mandates specific stamp duties for arbitral awards, and stipulates that an unstamped or insufficiently stamped award is inadmissible for any purpose until the deficiency and penalty are paid (if it is an original

[56] Contract Act 1872, section 2(g) “Void Contract”

document)[57]. Issues regarding the stamping and registration of an award, or related documentation, may be raised at the enforcement stage under the Act, as seen in the case of M. Anasuya Devi and Anr v. M. Manik Reddy and Ors.[58] The Supreme Court also noted that the requirement for stamping and registering an award falls within the ambit of Section 47 of the CPC, not Section 34 of the Act. The amount of stamp duty varies by state; for example, under the Maharashtra Stamp Act, the stamp duty for arbitral awards is five hundred rupees, while in Delhi, according to Schedule 1A of the Stamp (Delhi Amendment) Act 2001, it is roughly 0.1% of the property's value to which the award pertains. Additionally, under Section 17 of the Registration Act, 1908, an award must be compulsorily registered if it affects immovable property, or it will be deemed invalid[59].

In the case of SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.[60], a Division Bench of the Supreme Court of India ruled that if a document is found to be unstamped or insufficiently stamped, the arbitration clause embedded within it cannot be enforced, in accordance with Section 35 of the Indian Stamp Act, 1899 ("Stamp Act"). The Court further outlined the procedure to be followed when an arbitration agreement is part of a contract that has not been duly stamped as per the scheme of the Stamp Act. This decision underscores the importance of compliance with the Stamp Act's requirements, as it directly impacts the enforceability of arbitration clauses within contractual documents. The ruling emphasizes that the legitimacy of an arbitration agreement is contingent upon the proper stamping of the underlying contract, thereby reinforcing the procedural mandates that govern arbitration agreements in India[61].

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[57] Stamps Act 1899, section 35 " Instruments not duly stamped inadmissible in evidence, etc"

[58] AIR 2003 SC 678

[59] Ibid.

[60] (2011) 14 SCC 66

[61] Ibid.

Following the judicial pronouncement, a legislative amendment was introduced. This amendment restricted the scope of judicial intervention to merely examining the existence of an arbitration agreement. After the insertion of this section, the Supreme Court held that courts have a limited role, confined to determining the existence of an arbitration agreement when deciding on an application to appoint an arbitrator.

However, this position was altered by the division bench ruling of the Supreme Court in the Garware case. The Court held that the decision in SMS Tea Estates remained unaffected by the insertion of Section 11(6A) in the Act. The Supreme Court clarified that an agreement becomes a contract only when it is enforceable by law. Since unstamped agreements are not enforceable, the arbitration agreements contained within them are also unenforceable and, therefore, cannot exist. This perspective, established in Garware, was explicitly endorsed by a three-judge bench of the Supreme Court in the Vidya Drolia case. The Court held that the concepts of existence and validity are intertwined. Consequently, an arbitration agreement would not exist if it is illegal or fails to meet the mandatory legal requirements for enforceability, such as the payment of stamp duty.

However, the long debate of admissibility of the unstamped document came to end in the case of NN Global and Indo Unique. NN Global, where section 8 of the Arbitration and Conciliation Act, 1996 (Power to refer parties to arbitration where there is an arbitration agreement), section 35 and section 33 of the Indian Stamp Act, 1899 (Instruments not duly stamped inadmissible in evidence, etc. and Examination and impounding of instruments) were involved.

In a significant decision, a five-judge bench of the Supreme Court overruled its previous three-judge bench ruling by a majority vote of 3:2. The majority opinion, authored by Justice K. M. Joseph, Justice Aniruddha Bose, and Justice C. T. Ravikuma, held that an unstamped instrument containing an arbitration agreement is deemed void under Section 2(g) of the Contract Act. Such an instrument, not being a contract and lacking enforceability in law, cannot legally

exist. Therefore, any arbitration agreement within an unstamped instrument is considered invalid and can only be acted upon after proper stamping.
The majority further emphasized that the concept of the “existence” of an arbitration agreement, as envisaged in Section 11(6A) of the Arbitration Act, encompasses not only mere facial or factual existence but also "existence in law." Consequently, the Court, when exercising its powers under Section 11 of the Arbitration Act, is obligated to adhere to the mandates of Sections 33 and 35 of the Stamp Act, which require the examination and impoundment of unstamped or inadequately stamped instruments.

Moreover, the majority ruling stressed that a certified copy of an arbitration agreement must clearly indicate the payment of stamp duty; otherwise, it will be considered as unpaid. The doctrine of severability, which typically allows for the enforcement of an arbitration agreement independent of the principal contract, was found inapplicable concerning unstamped instruments under the Stamp Act. While acknowledging the separate nature of an arbitration agreement from the underlying contract, the majority concluded that the doctrine of severability cannot be invoked in matters concerning the provisions of the Stamp Act.

4.3. Unilateral Appointment of the arbitrator

The 246th Report of the Law Commission of India1 (Law Commission Report) recommended several vital amendments to the Arbitration Act to introduce globally accepted standards of independence and neutrality of arbitrators. In the section titled “Neutrality of Arbitrators”, the Law Commission of India (Commission) emphasised that it is universally accepted that any quasi-judicial process, including arbitrations must comply with principles of natural justice. Based on the judicial trends prevalent at that time, the Commission observed that in the balance between procedural fairness and the binding nature of the contractual covenants, the Supreme Court appeared to be tilted in favour of the

latter, which as per the Commission, was "far from satisfactory"[62]. To offer an example, the Law Commission Report[63] referred to a catena of judgments wherein it was held that arbitration agreements in government contracts providing for arbitration by a serving employee of the department were valid and enforceable. While setting the context for the proposed amendments, the Commission noted that a sensible law could not permit the appointment of an arbitrator who is a party to the dispute or is employed by one party, even if this was the agreed position between the parties at dispute. It was also observed that the concept of party autonomy could not be stretched to a point where it negates the very basis of having impartial and independent adjudicators to resolve disputes. Accordingly, elaborate amendments were proposed to the provisions under the Arbitration Act concerning the impartiality and neutrality of arbitrators. Firstly, the Commission proposed the insertion of a "Fourth Schedule", which was drawn from the "red" and "orange" lists of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) to be treated as a guide to determine whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of the arbitrator. Secondly, the Commission recommended the introduction of a "Fifth Schedule" incorporating the categories from the red list of the IBA Guidelines. Further, it was suggested that if a person proposed to be appointed as an arbitrator fell within any one of the categories mentioned in the Fifth Schedule, he would be de jure ineligible to be an arbitrator[64]. The Commission, however, in its recommendations, left a foot in the door by stating that real and genuine party autonomy must be respected, and in certain situations, parties should be allowed to waive the conditions of ineligibility as set out under the Fifth Schedule. More specifically, the Commission proposed that a proviso could be added to Section

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[62]Vasanth Rajasekaran , The Conundrum Surrounding the Unilateral Appointment of Arbitrators and its Implications on the Enforceability of Arbitral Awards – An Analysis, https://www.scconline.com/blog/post/2023/06/02/the-conundrum-surrounding-the-unilateral-appointment-of-arbitrators-and-its-implications-on-the-enforceability-of-arbitral-awards-an-analysis/

[63]

[64] Ibid.

12(5) stating that the parties at dispute may waive the applicability of Section 12(5) by way of an express agreement in writing entered into after the disputes have arisen. The above recommendations of the Commission were accepted and introduced in the Arbitration Act by way of the Arbitration and Conciliation Act (Amendment) Act, 2015[65].

Even before the enactment of the current Arbitration Act, the Supreme Court had addressed the issue of unilateral appointment of arbitrators under the previous Arbitration Act of 1940. In the case of Dharma Prathishthanam v. Madhok Construction (P) Ltd.[66], the Court unequivocally stated that both the unilateral appointment of an arbitrator and the unilateral reference to arbitration are deemed illegal. However, the Court noted that if the other party submits to the jurisdiction of the arbitrator appointed unilaterally and waives its rights under such an agreement, then the appointed arbitrator may proceed with the reference. In such instances, the party participating in the proceedings before the arbitrator may subsequently be precluded from raising objections regarding the appointment of the arbitrator.

With the introduction of the current arbitration regime and the 2015 Amendment, the stance on the illegality of unilateral appointment of arbitrators has been further clarified and reinforced.

In the case of TRF Ltd. v. Energo Engg. Projects Ltd.[67], the Supreme Court delved into the implications of the introduction of Section 12(5) and Schedule 7 in the Arbitration Act. The central issue revolved around whether an individual, upon becoming ineligible to preside as an arbitrator due to the provisions outlined in Section 12(5) in conjunction with Schedule 7, could still nominate another person as an arbitrator. The Supreme Court, in response to this pivotal question, decisively ruled in the negative. The Court emphasized that once an arbitrator becomes ineligible by operation of law, they cannot nominate another arbitrator. This statutory ineligibility, as prescribed under Section 12(5) of the

[65] Ibid.

[66] AIR 2005 SC 214

[67] 2017 8 SCC 377

Act, renders the notion of such an individual nominating another as an arbitrator legally inconceivable. The Court illustrated this point vividly, likening the situation to a collapse of infrastructure leading to the collapse of the superstructure; in other words, once the identity of the Managing Director as a sole arbitrator is lost, the power to nominate someone else as an arbitrator is also obliterated. This analogy underscores the Court's assertion that any consequence stemming from an illegal and unilateral appointment of an arbitrator is inherently tainted with illegality[68].

In the case of Bharat Broadband Network Ltd. v. United Telecoms Ltd.[69], the Supreme Court addressed the issue of unilateral appointment of an arbitrator. In this case, the appellant had initially appointed the sole arbitrator unilaterally but later approached the High Court of Delhi with a petition under Sections 14 and 15 of the Arbitration Act. The appellant argued that following the pronouncement in the TRF Ltd.[70] case, the appointed arbitrator was de jure unable to perform his duties as an arbitrator. Consequently, the appellant sought the appointment of a substitute arbitrator. However, the High Court of Delhi rejected the petition, stating that the appellant, having appointed the arbitrator, was estopped from challenging the arbitrator's de jure ineligibility to continue in that role. This decision underscored the principle that a party who unilaterally appoints an arbitrator cannot later contest the arbitrator's eligibility based on de jure grounds.

The Supreme Court held that it is legally inconceivable for a person who is statutorily ineligible to act as an arbitrator to nominate someone else to act as an arbitrator. The Court further opined that a unilateral appointment could only be upheld if, after disputes have arisen, the parties agree in writing to waive the applicability of Section 12(5) of the Arbitration Act. Consequently, the Supreme Court set aside the impugned decision of the High Court of Delhi and observed

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[68] Ibid.

[69] (2019) 5 SCC 755.

[70] Supra note 65

that Section 12(5) is a provision addressing the de jure inability of an arbitrator to serve in that capacity. According to this provision, any prior agreement contrary to it is nullified by the non obstante clause in Section 12(5) as soon as a person whose relationship with the parties, their counsel, or the subject matter of the dispute falls under the Seventh Schedule. The subsection declares such a person as 'ineligible' to be appointed as an arbitrator. The only way to remove this ineligibility is through the proviso, which allows parties, after disputes have arisen, to waive the applicability of Section 12(5) by an express agreement in writing. This 'express agreement in writing' pertains to a person disqualified by the Seventh Schedule but in whom the parties, despite this disqualification, place their trust after the disputes have arisen.

The threshold for permitting the unilateral appointment of an arbitrator under the Arbitration Act is notably stringent. Parties can only agree in writing to waive the applicability of Section 12(5) of the Arbitration Act regarding the proposed arbitrator after disputes have arisen. This issue of unilateral appointment was comprehensively examined in the case of Perkins Eastman Architects DPC v. HSCC (India) Ltd.[71], where the Supreme Court, referencing its decision in TRF Ltd.[72], opined that what cannot be done directly cannot be done indirectly. Consequently, once an arbitrator has been rendered ineligible by law, he cannot appoint another person to act as an arbitrator. This principle underscores the rigorous standards imposed by the Arbitration Act to ensure impartiality and fairness in the appointment of arbitrators, emphasizing that any attempt to bypass these legal provisions, whether directly or indirectly, is unacceptable. This reinforces the Act's commitment to maintaining the integrity of the arbitration process by preventing any form of manipulation that could compromise the impartiality of the appointed arbitrator.

Over time, numerous other decisions have addressed the issue of unilateral appointment, leading to the emergence of several key principles. Generally, the

[71] 2019 (9) SCC OnLine SC 1517

[72] Supra note 65

unilateral appointment of a sole arbitrator is considered void ab initio, with any individual proposed for unilateral appointment deemed de jure ineligible to serve as an arbitrator under Section 12(5) in conjunction with the Seventh Schedule of the Arbitration Act. However, the parties in dispute can waive the applicability of Section 12(5) through a written agreement entered into after the disputes have arisen. Moreover, a person's ineligibility to act as an arbitrator fundamentally undermines the validity of the entire arbitration process, rendering any outcomes resulting from such an illegal appointment non-existent in the eyes of the law. These principles highlight the rigorous standards established by the Arbitration Act to ensure the impartiality and legality of arbitrator appointments, thereby reinforcing the integrity and fairness of the arbitration process. This stringent framework underscores the Act's commitment to preventing any form of manipulation or bias in the appointment of arbitrators, ensuring that the arbitration proceedings remain just and equitable.

CHAPTER -5

ANTI ARBITRAL INJUNCTION

5.1. Introduction to Anti Arbitral Injunction

An Anti-Arbitration Injunction ("**AAI**") is an injunction granted by courts to restrain parties or an arbitral tribunal from either commencing or continuing with arbitration proceedings.[1] An AAI is generally sought before an arbitration commences or in the course of the arbitration hearing or after the conclusion of substantive hearing but before the rendering of final award[73]. It is basically relief which is granted by a court or any other competent judicial or quasi-judicial body preventint the parties or in some instance the Arbitral Tribunal from commencing or continuing arbitral proceeding[74].

An anti-arbitration injunction is a legal action in which one party seeks to prevent or restrain the initiation or continuation of arbitration proceedings against them by another party. Typically, these injunctions are pursued through a civil suit in a court of first instance, requesting an in personam relief against the opposing party. There is no specific statute or law that outlines the grounds or procedures for granting anti-arbitration injunctions, leading litigants to frequently challenge the authority of courts to issue such injunctions. In addressing these challenges, courts have often relied on their general powers to grant injunctions as provided under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908. Furthermore, courts have referred to Sections 16 and 45 of the Arbitration and Conciliation Act, 1996 ("the Act"), to assert that an anti-arbitration injunction can be granted when the arbitration agreement is found to be null or void, incapable of performance, or inoperative. This judicial

[73] Cyrila marchand, https://corporate.cyrilamarchandblogs.com/2020/11/anti-arbitration-injunctions-judicial-trends-and-finding-the-middle-path/ , (last visited 16 April,2024)

[74] Ibid.

approach underscores the discretionary power of courts to intervene in arbitration matters under specific circumstances, despite the absence of a dedicated legal framework for anti-arbitration injunctions.

5.2. Party autonomy

The concept of arbitration is fundamentally rooted in the principle of 'party autonomy.' This term signifies the 'freedom to choose' or 'parties acting at will,' a concept deeply embedded in the jurisprudence of arbitration. Across various jurisdictions, arbitration laws are guided by this principle, allowing parties complete freedom to set the terms governing their arbitration agreement. Parties can mutually agree on crucial aspects such as the place of arbitration, the laws governing the substance of the dispute, and the procedural rules for the arbitration. This autonomy ensures that the arbitration process is tailored to the specific needs and preferences of the parties involved[75].

Sections 16 and 45 of the Arbitration and Conciliation Act, 1996, have been used by courts to justify anti-arbitration injunctions. Section 16 allows an arbitral tribunal to rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement. Section 45 pertains to international commercial arbitration and allows courts to refer parties to arbitration unless the agreement is null and void, inoperative, or incapable of being performed.

In the case of Vikram Bakshi v. McDonald's India (P) Ltd.[76], the plaintiffs sought an interim injunction to halt arbitration proceedings initiated by the defendant before the London Court of International Arbitration (LCIA). The plaintiffs contended that their suit was maintainable and supported their argument by referencing Supreme Court decisions in World Sport Group

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[75] Akash Singh and Nili Khandelwal, Party Autonomy – A Grundnorm To Arbitration, Mondaq, nov 18, 2021, https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/1132244/party-autonomy--a-grundnorm-to-arbitration (last visited 23rd March, 2024)

[76] AIR 2014 SCC OnLine Del 7249

(Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.[77] and Devinder Kumar Gupta v. Realogy Corp.[78], the defendant, emphasizing the kompetenz-kompetenz principle, argued that the plaintiffs should challenge the arbitration agreement's validity before the Arbitral Tribunal rather than in civil court[79]. The plaintiffs countered by asserting that the arbitration agreement was inoperative and incapable of being performed, citing ongoing disputes among the parties already pending before the Company Law Board, which had ordered the defendants to maintain the status quo. Furthermore, the plaintiffs invoked the doctrine of forum non conveniens, highlighting that both parties were based in India, operated under Indian law, and the cause of action had arisen in India, thus making London an inconvenient forum for arbitration. The defendant rebutted this by pointing out that the plaintiffs had explicitly agreed to London as the seat of arbitration, accepting any inherent inconvenience. The Single Judge concluded that the plaintiffs had demonstrated the three essential criteria for granting an interim injunction: a prima facie case, balance of convenience, and the risk of irreparable loss. Additionally, the judge determined that the arbitration agreement was inoperative or incapable of performance due to the existing suit for oppression and mismanagement filed by the plaintiff in the Company Law Board in India, which directed the defendants to maintain the status quo. The judge also agreed that the disputes were subject to forum non conveniens since all parties, except one defendant, conducted business in India. Consequently, the Single Judge issued an order restraining the defendants from pursuing arbitration until the status quo order by the Company Law Board was lifted[80].

[77] AIR 2014 SUPREME COURT 968

[78]AIR 2011 Del HC 3050

[7979] Vasanth Rajasekaran and Harshvardhan, Anti-Arbitral Injunctions: Defeating Party Autonomy or Preventing Abuse of Arbitral Process?, December 2,2023 https://www.scconline.com/blog/post/2023/12/02/anti-arbitral-injunctions-defeating-party-autonomy-or-preventing-abuse-of-arbitral-process/ (last visited 22rd March, 2024)

[80] Idib.

Aggrieved by the Single Judge's decision, McDonald's appealed to the Division Bench of the Delhi High Court in the case of McDonald's India (P) Ltd. v. Vikram Bakshi[81], Division Bench initially addressed the forum non conveniens argument, relying on several authorities to assert that the doctrine is applicable only when a court, having strict jurisdiction, determines that another court with jurisdiction would be more appropriate. The Division Bench clarified that this principle is relevant when there are competing courts with jurisdiction over the dispute. However, in this case, the Division Bench found that the principle did not apply because there was no competing court but rather a court and an Arbitral Tribunal, which is not considered a court. Additionally, the subject matter before the court, which involved an anti-arbitral injunction, was distinct from the substantive dispute before the Arbitral Tribunal. The Division Bench emphasized that the forum of arbitration, which the parties had consciously chosen as an alternative dispute resolution method, could not be deemed inconvenient. Furthermore, the Bench asserted that the principles governing anti-arbitral injunctions differ from those governing anti-suit injunctions due to the inherent nature of arbitration, including the principles of autonomy and kompetenz-kompetenz. The Division Bench also disagreed with the Single Judge’s finding that the arbitration agreement was incapable of performance due to pending proceedings before the Company Law Board. Consequently, the Division Bench concluded that an anti-arbitral injunction was unjustified in this case since the arbitration agreement was neither null, void, inoperative, nor incapable of being performed. The Division Bench highlighted that national courts and Arbitral Tribunals should coexist in a cooperative partnership, noting that while courts possess the power to enjoin arbitral proceedings, such intervention should be rare and guided by the principles outlined in Sections 8

[81] AIR 2014 Del HC 7249

and 45 of the Arbitration Act, aiming to minimize interference in the arbitral process[82].

In this case, the court held that the place or seat of arbitration, consciously chosen by the parties, could not be considered an "inconvenient place." This highlights the court's support for the concept of party autonomy, emphasizing that the primary purpose of arbitration is for the parties to resolve their disputes independently.

It is significant to highlight that Article 19 of the UNCITRAL Model Law embodies the principle of 'party autonomy,' stipulating that parties are free to agree on the procedure the arbitral tribunal will follow in conducting the proceedings. The Arbitration and Conciliation Act, 1996 (the Act) incorporates this principle through several provisions. Specifically, Section 2(6) clarifies that parties are free to authorize any person, including an institution, to determine the issue between them. Section 2(8) grants the parties the liberty to choose the applicable rules and regulations. Furthermore, Section 19(2) allows parties to agree on the procedure to be followed by the arbitral tribunal, underscoring the emphasis on party autonomy in the arbitration process[83].

5.3. Legality of Anti Arbitral Injunction

The legality of anti-arbitration injunctions in India is a complex issue that has been shaped by various judicial pronouncements. Anti-arbitration injunctions are actions where one party seeks to prevent or restrain the initiation or continuation of arbitration proceedings by another party.

In Kvaerner Cementation India Ltd. v. Bajranglal Agarwal and Another[84], suit had been filed for a declaration that there does not exist any arbitration clause and as such the arbitral proceedings are without jurisdiction. The Court held that

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[82] Supra note 73

[83] Sayan Mukherjee, A Critical Analysis Of Party Autonomy In Arbitration, September 22,2016 https://blog.ipleaders.in/critical-analysis-party-autonomy-arbitration/ (last visited20 April,2024)

[84] 2001(6)ALD 272

the arbitral tribunal has the power to decide even questions of its own jurisdiction under Section 16 of the Act, and by virtue of Section 5 that prohibits judicial interference in arbitration, an anti-arbitration injunction suit was not maintainable, requests for anti-arbitral injunctions thereof are concerned, the courts would be circumspect in granting the injunctions. The ordinary course of action would be to pass the baton to the Arbitral Tribunal be it a case of domestic arbitration or an international arbitration[85].

In the case of Bina Modi v. Lalit Modi[86], the plaintiffs filed suits seeking a declaration that the arbitration agreement contained in a restated trust deed was null and void, inoperative, unenforceable, and contrary to the public policy of India. Essentially, these suits were aimed at obtaining an anti-arbitral injunction, requesting a permanent injunction to prevent the defendant from proceeding with arbitration and seeking emergency measures from the International Chamber of Commerce (ICC). The Single Judge of the Delhi High Court referred case[87], wherein the Supreme Court emphasized that if the plaintiff had objections regarding the existence and validity of the arbitration agreement, they should move an application before the arbitrator. Such objections could not be pursued through a suit for declaration and anti-arbitral injunction. Consequently, the Single Judge refused to deviate from numerous decisions by the same Bench, which consistently held that suits aiming to declare an arbitration clause/agreement invalid or seeking to injunct arbitration proceedings, whether under Part I or Part II of the Arbitration Act, were not maintainable. Furthermore, the Single Judge observed that the Arbitration Act was a comprehensive code, precluding courts from interfering with the arbitral process by assuming jurisdiction over matters reserved for the Arbitral Tribunal. Based on these findings, the suits were dismissed as not maintainable. Aggrieved by

[85] Supra note 73

[86] AIR 2020 DEL 1762

[87] National Aluminium Co.Ltd.& Ors vs Ananta Kishore Rout & Ors 2014 AIR SCW 3448

the decision, the plaintiffs filed appeals before the Division Bench of the Delhi High Court. The Division Bench observed that the underlying suits pertained to an application for emergency measures in an arbitration initiated before the ICC, related to the 'K.K. Modi Family Trust' (Trust), established under the Trusts Act, 1882, and administered under the trust deed. The appellants argued that in India, it is well-established that disputes between (i) trustees, or (ii) trustees and beneficiaries, are not arbitrable, as such disputes fall under the exclusive jurisdiction of the courts defined by the Trusts Act, which is a comprehensive code. They further contended that the subject matter of the emergency arbitration proceedings before the ICC was covered by the Supreme Court's decisions in Vimal Kishor Shah v. Jayesh Dinesh Shah[88] and Vidya Drolia v. Durga Trading Corpn.[89], which held that disputes involving trusts, trustees, and beneficiaries arising from a trust deed under the Trusts Act are non-arbitrable, despite any existing arbitration agreement[90]. The appellants claimed that the respondent's application for emergency arbitral measures was an attempt to mischaracterize the claim as contractual, contrary to the public policy outlined in Vimal Kishor Shah. The Division Bench, referencing the decision in Mcdonald's India (P) Ltd. v. Vikram Bakshi[91], stated that a court could grant an anti-arbitral injunction if it could be shown that the arbitration agreement was null and void, inoperative, or incapable of being performed. The Division Bench held that the Single Judge erred by not exercising the court's jurisdiction to determine whether the disputes relating to the trust deed were arbitrable. Concluding that disputes under the Trusts Act were prima facie non-arbitrable, the Division Bench allowed the appeals and set aside the Single Judge's common judgment.

[88] AIR 2016 SUPREME COURT 3889

[89] Supra note16

[90] Supra note 81

[91] AIR 2016 SCC OnLine Del 3949

Again in LMJ International Ltd v. Sleepwell Industries Co. Ltd. and Another[92], in this case the Court refused to entertain a suit filed by a party to restrain the other party from taking steps for a London seated arbitration. Though the court refers to Kvaerner Cementation[93], it refused injunction on the ground that there was no evidence of any demonstrable injustice or harassment being caused by initiation of arbitral proceedings. In many scenario, the Court declined to intervene in an arbitration proceeding initiated at the Singapore International Arbitration Center, asserting that all objections should be addressed by the arbitral tribunal[94].The question of existence or validity of an arbitration agreement can be raised under Section 16 of the Act ditectly before the arbitral tribunal and the civil courts will not have jurisdiction to decide on the same. The Court confirmed the findings of Kvaerner Cementation and referred the parties to arbitration holding that an action for anti-arbitration injunction was not maintainable

In the case of World Sport Group v. MSM Satellite Singapore Limited [95], 11 SCC 639, a two-judge bench of the Supreme Court did not take into account the decision made by the larger three-judge bench in Kvaerner Cementation[96]. The Court held that while civil courts do possess the jurisdiction to grant anti-arbitration injunctions, according to Section 45 of the Arbitration and Conciliation Act, a reference to arbitration can only be refused if the court determines that the arbitration agreement is void, inoperative, or incapable of performance, and on no other grounds. The Court cautioned that it was only in exceptional circumstances where (a) no agreement exists between parties, (b) the arbitration agreement is null and void, inoperable or incapable of being performed, and (c) the continuation of foreign arbitration proceedings would be

[92] AIRONLINE 2019 SC 521

[93] Ibid.

[94] Sancorp Confectionary v. Gumlik (2013)

[95] AIR 2014 SC 968

[96] Supra note 91

oppressive, vexatious or unconscionable, can injunction be granted[97]. Though the court relied on Section 5 of the Act and limited its jurisdiction, and dismissed the anti-arbitration injunction suit, the approach taken was entirely different from Kvaerner Cementation[98].

5.4. Factors affecting Anti Arbitral Injunction

Courts in India have established that anti-arbitration injunctions can be granted under the following conditions

I. The arbitration agreement is null and void.
II. The agreement is inoperative.
III. The agreement is incapable of being performed.
IV. The arbitration proceedings are oppressive, vexatious, or inequitable.
V. The initiation or continuation of arbitration proceedings would lead to multiplicity of proceedings or inconsistent decisions

In Himachal Sorang Power (P) Ltd. v. NCC Infrastructure Holdings Ltd.[99], a Single Judge of the Delhi High Court outlined key parameters governing anti-arbitral injunctions. First, the principles for anti-arbitral injunctions differ from those for anti-suit injunctions. Second, courts are generally reluctant to grant anti-arbitral injunctions unless the initiated proceedings are deemed vexatious or oppressive. Third, a court with supervisory or personal jurisdiction over the parties can prevent the commencement of new arbitral proceedings on grounds of res judicata or constructive res judicata, declaring such proceedings vexatious and/or oppressive. This could apply to issues of law, fact, or mixed questions. Fourth, if a trial is deemed necessary to resolve the injunction application, it weighs against granting an anti-arbitral injunction. Finally, aggrieved parties should be encouraged to approach either the Arbitral Tribunal or the court with supervisory jurisdiction, promoting and supporting arbitration

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[97] Board of Trustees of the Port of Kolkata vs. Louis Dreyfus Armatures SAS & others AIR 2014 Cal HC

[98] Supra note 96

[99] AIR 2019,DHC 7575

rather than allowing parties to evade their chosen adjudicatory process. Thus, the Delhi High Court emphasizes the test of prima facie arbitrability and instances where the arbitration agreement is null and void, inoperative, or incapable of being performed when considering anti-arbitral injunctions.

In the case of ADM International Sarl v. Sunraja Oil Industries (P) Ltd.[100], the Madras High Court addressed the principal conditions for granting an anti-arbitral injunction. This case involved two companies, Sunraja Oil (P) Ltd. (Sunraja) and Gem Edible Oil (P) Ltd. (Gem), which had entered into separate contracts with ADM International Sarl (ADM), a Swiss-based company, to acquire Crude Sunflower Oil (CSFO) of edible grade. Disputes arose, prompting Sunraja and Gem to file separate suits against ADM and the Federation of Oil Seeds and Fats Association (FOSFA). The suits sought to declare the arbitration proceedings initiated by ADM as void and contrary to Indian public policy. They also sought declarations that their contracts with ADM were null and void, and a permanent injunction against the arbitral proceedings, along with damages. Although both Sunraja and Gem acknowledged the presence of arbitration clauses in their contracts with ADM, they argued that these clauses were biased and illegal. They contended that FOSFA was controlled by major oil seed sellers like ADM and that its rules prohibited representation by an advocate. The Madras High Court, referencing McDonald's India (P) Ltd. v. Vikram Bakshi[101], noted that the threshold for granting an anti-arbitral injunction is more stringent than for an anti-suit injunction. The court highlighted three principal considerations under Section 45 of the Arbitration Act: (i) the existence of an arbitration agreement; (ii) whether the agreement is null and void; and (iii) whether the agreement is inoperative or incapable of being performed. Despite the claims of bias and lack of neutrality against the arbitral institution, the court found that Sunraja and Gem failed to provide actionable evidence. Upon examining the facts, the court concluded that they did not demonstrate that the arbitration agreement was null and void, inoperative, or incapable of being

[100] AIR 2021 SCC OnLine Mad 16535

[101] Supra note 91

performed. Consequently, the court determined there was no basis to continue the anti-arbitral injunction[102].

In January 2023, the Singapore Court of Appeal upheld an anti-suit injunction against Anupam Mittal, preventing him from pursuing oppression and mismanagement proceedings before the National Company Law Tribunal. The injunction was based on the arbitration clause in the shareholder's agreement between the parties, with the court stating that such disputes could be arbitrated under Singapore law. Anupam Mittal challenged this decision in the Bombay High Court through an anti-enforcement action in the case Anupam Mittal v. People Interactive (India) (P) Ltd.[103]

In response, the Bombay High Court issued a temporary anti-enforcement injunction, preventing the defendants from enforcing the Singapore Court's injunction. Subsequently, the National Company Law Tribunal in Mumbai (NCLT) issued an anti-arbitral injunction to halt the arbitral proceedings seated in Singapore and administered by the ICC. The NCLT's decision was based on two main factors:

1. Asserting its authority under Section 430 of the Companies Act, 2013, and Rule 11 of the NCLT Rules, 2016, the NCLT justified the anti-arbitration injunction.
2. The NCLT found that Anupam Mittal had established a prima facie case, demonstrated irreparable harm, and showed a favorable balance of convenience, similar to the considerations made by the Bombay High Court in granting the anti-enforcement injunction[104].

The jurisprudence surrounding anti-arbitral injunctions in India reflects a delicate balance between upholding the autonomy and flexibility of arbitration while preventing abuse of the arbitral process. Through an analysis of key

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[102] Supra note 79

[103] AIR 2023 SCC OnLine Bom 1925

[104] Supra note 79

decisions from the Supreme Court and various High Courts, a discernible pattern emerges, showcasing both overarching principles and nuanced perspectives. The Supreme Court, as evidenced in cases like Kvaerner[105] and the NALCO case[106], consistently emphasizes the principle of kompetenz-kompetenz, affirming the Arbitral Tribunal's authority to rule on its own jurisdiction. These decisions underscore the limited role of courts in intervening with the arbitral process, highlighting the importance of respecting arbitration's autonomy. However, the approach of the High Courts reveals nuanced perspectives. For instance, while the Delhi High Court, in Mcdonald's India (P) Ltd. v. Vikram Bakshi[107], emphasized the distinction between anti-arbitral and anti-suit injunctions and upheld the autonomy of arbitration, the Calcutta High Court, in LMJ International Ltd.[108], seemed to treat anti-arbitral injunctions similarly to anti-suit injunctions. This divergence highlights the evolving nature of judicial interpretations on this subject. Recent decisions from the Bombay High Court and the NCLT, particularly in the Anupam Mittal case[109], exemplify the complexity inherent in cross-border disputes and the challenge of harmonizing decisions across jurisdictions. These cases underscore the need for a nuanced approach to address the intricacies of international arbitration. In summary, the evolving jurisprudence on anti-arbitral injunctions in the Indian legal landscape is marked by a constant conflict between respecting the autonomy of arbitration and safeguarding against potential abuse. As this jurisprudence continues to develop, it is crucial for courts to strike a delicate balance, ensuring that anti-arbitral injunctions are granted judiciously and in alignment with the overarching principles of arbitration law.

Based on judicial precedents, Indian courts possess the authority to grant anti-arbitration injunctions both in domestic and international arbitration

[105]Supra noe 96

[106] Supra note 87

[107] Supra note 91

[108] Supra note92

[109] Supra note 100

proceedings, pursuant to Section 45 of the Arbitration Act. Such injunctions may be issued under certain conditions. Firstly, if the arbitration initiated is deemed vexatious or oppressive, the court may intervene to prevent its continuation. Secondly, if fresh arbitration proceedings would be barred by res judicata or constructive res judicata, potentially leading to vexatious or oppressive proceedings, an injunction may be warranted. Thirdly, if an existing arbitral tribunal is already seized of the disputes between the parties, rendering any other arbitral tribunal lacking jurisdiction, an injunction could be appropriate. Additionally, if egregious fraud has been committed by the party seeking to initiate or pursue the second arbitral reference, the court may intervene to prevent it. Lastly, if the party seeking the injunction is under some incapacity or faces overwhelming inconvenience, the court may grant relief. These conditions serve as guidelines for courts in determining whether to issue anti-arbitration injunctions, ensuring the integrity of the arbitration process while safeguarding against abuse or injustice.

If all jurisdictional issues are resolved by the supervisory court prior to the arbitration process, there is a reduced likelihood that the award ultimately rendered by the arbitral tribunal will be successfully challenged or stayed on the same jurisdictional grounds. This procedural improvement has been facilitated by the recent Arbitration and Conciliation (Amendment) Ordinance, 2020. Resolving jurisdictional matters beforehand undeniably provides greater certainty to the negotiating parties, ensuring that the award, once made, will be enforceable without undue delay. This preemptive resolution of jurisdictional issues strengthens the arbitration process by minimizing potential legal obstacles that could impede the enforcement of the arbitral award, thus enhancing the efficiency and reliability of arbitration as a dispute resolution mechanism[110].

[110] Aman Chandola & CAM Disputes Team, Anti-Arbitration Injunctions: Judicial trends and finding the middle path, November 27,2020 , https://corporate.cyrilamarchandblogs.com/2020/11/anti-arbitration-injunctions-judicial-trends-and-finding-the-middle-path/

In India, the absence of a specific statutory framework for anti-arbitration injunctions has led to ambiguity. However, courts have leveraged their general injunction powers and provisions of the Arbitration and Conciliation Act, 1996, to grant such injunctions under specific conditions. Judicial decisions have been instrumental in shaping this legal landscape, ensuring that anti-arbitration injunctions are only granted in exceptional circumstances where the arbitration agreement or proceedings are fundamentally flawed. Through these decisions, courts have established a precedent that emphasizes the importance of upholding the integrity of arbitration agreements while also safeguarding against abuse or injustice. This approach underscores the cautious and selective nature of granting anti-arbitration injunctions, aiming to maintain a delicate balance between promoting arbitration's autonomy and addressing concerns of fairness and equity in the arbitration process.

CHAPTER - 6

CONCLUSION

The arbitration clause in an agreement typically binds all consortium members, enabling even non-signatory members to invoke the arbitration clause for dispute resolution and insolvency proceedings initiation. Despite the absence of specific statutory provisions for anti-arbitration injunctions in India, courts have the authority to grant them under certain conditions, ensuring the integrity of the arbitration process while preventing abuse. English courts have applied the "group of companies doctrine," allowing arbitration agreements entered by one company to encompass its non-signatory affiliates under certain circumstances. However, the Supreme Court has ruled that matters under specific statutes, such as the DRT Act, are not suitable for arbitration, establishing a four-step test to determine the arbitrability of disputes. Insolvency proceedings under the IBC can only commence after an arbitral award achieves finality, preventing premature initiation of insolvency proceedings. The ruling in the K. Kishan case represents a significant development in evaluating the arbitrability of disputes, enhancing India's pro-arbitration stance while ensuring a swift and efficient arbitration process.

Anti-Arbitration Injunction argues that this remedy strips the arbitral tribunal of its power to determine its own jurisdiction (the kompetenz-kompetenz principle), increases judicial intervention, and can be exploited by unscrupulous parties to evade or delay the agreed arbitration mechanism. On the other hand, proponents of AAI contend that it is a well-recognized legal concept that streamlines the arbitration process by weeding out cases where the arbitration agreement may be vitiated by fraud, lacks validity, or where proceeding with arbitration could be considered vexatious, oppressive, or unconscionable. This approach effectively assists in saving costs and time by resolving such issues at an earlier stage rather than during the setting aside or enforcement of awards. Both sides of the debate present valid arguments, highlighting the need to balance the preservation of the arbitral tribunal's autonomy with the practical benefits of early judicial intervention in certain circumstances[111].

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[111] Supra note 110

In India, the jurisprudence surrounding anti-arbitral injunctions reflects a delicate balance between upholding the autonomy of arbitration and preventing abuse of the arbitral process. Judicial decisions from both the Supreme Court and various High Courts have established overarching principles while also revealing nuanced perspectives. The Supreme Court consistently emphasizes the principle of kompetenz-kompetenz, affirming the Arbitral Tribunal's authority to rule on its own jurisdiction, thereby highlighting the limited role of courts in intervening with the arbitral process. However, High Courts exhibit differing views, with some emphasizing the autonomy of arbitration while others treat anti-arbitral injunctions similarly to anti-suit injunctions. Recent cases demonstrate the complexity of cross-border disputes and the challenge of harmonizing decisions across jurisdictions. Indian courts possess the authority to grant anti-arbitration injunctions under certain conditions, ensuring the integrity of the arbitration process while safeguarding against abuse or injustice. Despite the absence of a specific statutory framework for anti-arbitration injunctions, courts have relied on general injunction powers and provisions of the Arbitration and Conciliation Act, 1996, to grant such injunctions judiciously. Through these decisions, courts aim to strike a balance between promoting arbitration's autonomy and addressing concerns of fairness and equity in the arbitration process.

Therefore, Kompetenz-Kompetenz unavoidably plays a significant role in the effectiveness of arbitral procedures. It lessens one very important drawback of having courts decide a case on its merits. Arbitration is becoming a more popular means of resolving disputes, thus it's critical that the values that support its core values continue to be respected.

The Group of Companies doctrine can significantly impact international arbitration by broadening the scope of who is bound by or can benefit from an arbitration agreement. This doctrine highlights the importance of understanding the parties' intentions and the economic reality of corporate operations, recognizing that corporate groups often operate as a single economic entity despite the formal separation of legal personalities within the group. Its application, however, must be carefully considered to balance the principles of separate legal personality and the equitable treatment of all parties involved. On one hand, it allows for the inclusion of affiliated companies in arbitration agreements,

ensuring that disputes involving the economic unit as a whole can be resolved effectively and comprehensively. On the other hand, it must respect the legal autonomy of each entity, preventing the imposition of arbitration obligations on companies that have not expressly agreed to them. This delicate balance ensures that the doctrine does not undermine the fundamental principle of consent in arbitration. In conclusion, the Group of Companies doctrine is a pivotal concept in international arbitration, promoting fairness and the effective resolution of disputes within corporate groups. It underscores the necessity of thoroughly understanding the parties' intentions and the operational realities of corporate entities when determining the applicability of arbitration agreements. By doing so, it ensures that arbitration remains a viable and just mechanism for resolving complex disputes in the context of modern corporate structures, where multiple entities may be intertwined both economically and operationally.

The concept of "public policy" in the context of enforcing foreign and domestic arbitration awards has evolved significantly in Indian jurisprudence. In the 1994 Renusagar Power Electric Co. case, the Supreme Court of India established that the public policy of India should be narrowly construed in private international law, allowing foreign awards to be set aside only if they violated fundamental policy, national interest, or justice and morality. However, in the 2003 ONGC v. Saw Pipes Ltd. case, the Court expanded the scope, introducing the concept of "patent illegality," which allowed for the review and potential setting aside of awards that contravened the Arbitration & Conciliation Act, 1996, or were patently illegal.

In 2019, the Supreme Court in Ssangyong Engineering & Construction Company Limited v. National Highways Authority of India clarified that the doctrine of patent illegality does not apply to international awards and stated that awards beyond the scope of the agreement are patently illegal and can be set aside. In 2021, in Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd, the Court further refined this doctrine, asserting that patent illegality must stem from the core of the issue. The Court emphasized that not every legal error qualifies as patent illegality, and intervention is

warranted only if the arbitrator's decision is based on no evidence, ignores vital evidence, or involves an unreasonable interpretation of the contract[112].

[112] Sunidhi Singh, Patent Illegality In Setting Aside Arbitral Awards: Is India Becoming A Robust Seat For Arbitration?, Feb 13,2023 https://www.livelaw.in/lawschoolcolumn/patent-illegality-in-setting-aside-arbitral-awards-is-india-becoming-a-robust-seat-for-arbitration-221421#:~:text=Patently%20Illegal%20means%20an%20error,country%2C%20or%20a%20statutory%20provision.