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ARBITRATION LAW

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I INTRODUCTION

THE ESSENCE of arbitration lies in the agreement between the parties to submit their differences for adjudication to a third person whose judgment they trust. The decision of this third person on their differences is binding upon them. This is so, not because of any coercive powers of the state but because the parties have agreed to be bound by it.[1] This private adjudication process offers many advantages to the parties over traditional adjudication including flexibility and privacy of proceedings, and the element of neutrality as regards location, governing law and constitution of the tribunal.[2] The quality of the arbitral process entirely depends upon the arbitrator's ability to reassure the parties that they have rightly reposed their faith and trust in them. This is the foundation for the principle that the arbitral process should have as little judicial intervention as possible.[3] Thus the confidence of the parties in their arbitrators and in the arbitral process is the essence of successful arbitrations. Ultimately an arbitration proceeding is only as good (or bad) as the arbitrator who conducts it.[4]

The boundaries between arbitration and other modes of dispute resolution "were not always clearly drawn in earlier times."[5] The adjudication of disputes by a private person chosen by parties has had a long acceptability even in the Indian society.[6] The first international commercial arbitration treaty in the modern era was the Montevideo Convention, signed in 1889 by several Latin American states. Though the convention may have had very little practical utility, its real contribution was

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1 Nigel Blackaby *et. al*., *Redfern and Hunter on International Arbitration*, at1 (Oxford University Press 5th edn.)

2 David St John Sutton *et. al*, *Russell on Arbitration*, at 13 (23rd edn. Thomson).

3 See S. 5, 1996 Act.

4 There is an old French saying, "Tant vaut l'arbitre, tant vaut l'arbitrage" which means "an arbitration will only be as good as the arbitrator conducting it". See Yves Derains & Laurent Levy (eds.), *Is Arbitration Only as Good as the Arbitrator?- Status, Powers and Role of the Arbitrator* (ICC Institute of World Business Law).

5 Gary B Born, International Commercial Arbitration, I (Wolter Kluwer 2009) 21.

6 AK Ganguli, "Arbitration Law" XLVI *ASIL* 31 (2010).

the initiation of a tradition of multilateral conventions that progressively improved the international legal framework for arbitration.[7]

The Hague Convention on the Pacific Settlement of Disputes (1899), is to a large extent, credited for laying down the foundation of institutional arbitration. It was under the Hague Convention that the Permanent Court of Arbitration (PCA) came to be established and entrusted with the responsibility to administer state-to-state arbitrations. In the hundred years of the PCA's existence, the frequency of recourse to it may not appear to be very impressive, but its cases have contributed greatly to the development of the law of dispute resolution.[8] Initially conceived as an institution responsible for the settlement of disputes between states, the PCA was authorized, in the 1930s, to use its facilities for arbitration of disputes between states and private parties.[9] A study of the history of the PCA would reveal that primarily, enforcement of its awards have been voluntary. An important reason for this may be the fair and transparent manner in which the PCA facilitates the entire arbitration process.

The PCA experiment has over the years been followed on a much larger scale by setting up numerous arbitral institutions for facilitating the arbitration process. The ICC's International Court of Arbitration "remains the world's leading international commercial arbitration institution" with the London Court of International Arbitration following close behind. However, it must be understood that the arbitral institutions do not themselves arbitrate the merits of the disputes between parties. This is the ultimate responsibility of arbitrators. The institutions only facilitate the arbitration process. For instance when the parties fail to agree upon an arbitrator, most institutional rules provide that it would act as an appointing authority, and select arbitrators on behalf of the parties.[10]

In India too, institutions like the Indian Council of Arbitration (ICA), the Bengal Chamber of Commerce & Industry and the Indian Merchants Chamber have left their imprint in the realm of institutional arbitration.[11] The Arbitration and Conciliation Act, 1996 itself, under section 2 (6), recognises that parties may opt for arbitration under the rules of a particular arbitral institution and designate such an institution to take decisions on their behalf.[12]

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7 Gary B Born at 59.

8 P Hamilton *et al* (ed.), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution- Summaries of Awards, Settlement Agreements and Reports,* at 22 (Kluwer Law International 1999).

9 UNCTAD, Dispute Settlement *available at:* <http://unctad.org/en/Docs/edmmisc232add26_en.pdf> noting that "the question arose in connection with an arbitration between the Chinese Government and Radio Corporation of America (RCA). RCA had concluded an agreement for the operation of radio telegraphic communications between China and the United States. RCA claimed that a subsequent agreement entered into by China with a different entity constituted a breach of its agreement. The PCA agreed, at the request of the arbitral tribunal, to provide registry services."

10 Gary B Born at 149.

11 For detailed list of Arbitral Institutions in India, see VA Mohta, Arbitration and Conciliation, at 1294 (1st edn. 2001) Anirudh Wadhwa and Anirudh Krishnan (edn.), *Justice R.S. Bachawat's Law of Arbitration and Conciliation*, I at 3721 (5th edn. 2010).

12 *Bachawat's Law of Arbitration* at 151.

A recent attempt at the institutional experiment in India has been the hugely successful Delhi International Arbitration Centre (DAC), launched in 2009 on the initiative of a former Chief Justice of the Delhi High Court. DAC operates under the supervision of the Delhi High Court with funding from the Delhi Government. The author was closely associated with the setting up of the institution. It is a matter of great satisfaction that DAC in a short span of three years has demonstrated that institutional arbitrations would play a dominant role in the arbitral process in India. DAC initially promoted only domestic arbitrations, though within a short span of time the need for it to take up international arbitrations became imperative. In March 2013, the International Chapter of DAC was inaugurated by the Chief Justice of India.[13] Since 2010, when DAC put forward its first steps, nearly 125 cases have been disposed of. The number of cases being instituted with it has increased significantly in each year of its operation. As many as 180 cases were referred to it in the year under survey.[14] Though statistics as to the enforcement of its awards are not available, it is understood that most of its awards have been voluntarily implemented by the parties.

While all arbitral awards (domestic or international) are expected to be voluntarily enforced with the parties themselves giving effect to the awards, the dividing line perhaps is the level of trust the parties have in the arbitral process. A recent international survey[15] revealed that corporates "continue to show a preference for using arbitration over litigation for trans-national disputes." The survey showed that, above all considerations, fairness was what corporates as parties looked for in a dispute resolution mechanism. One interviewee indicated that it was easier to explain to the board of directors why the company had been unsuccessful if the board felt that the process had been fair. The interviewee went on to say that arbitration, because of its neutrality, gives the sense of fairness that litigation in foreign courts sometimes may not provide.

The findings of the survey are also reflected in most of the challenges to arbitral awards that are brought to courts. The essence of such challenges is usually the failure of the arbitral tribunal to consider the points of views expressed by the parties and deprivation of an environment of fairness.

It is this environment of fairness that all modern arbitration hubs seek to provide. However, their success entirely depends upon the quality of the arbitrators that the parties choose and of those nominated by the institutions. Though the Arbitration Act, 1940, was found to have shortcomings, it was the actual functioning of the arbitral tribunals coupled with the approach of the members of the legal profession towards arbitral awards which led the Supreme Court to comment that "the

13 Alison Ross, "Delhi centre goes international" GAR Wednesday, 27 Mar. 2013 *available at:* <http://globalarbitrationreview.com/news/article/31433/delhi-centre-goes-international/>

14 DAC, *Institutional Arbitration Experience: The Delhi International Arbitration Centre* 2010-2013 (2013)

15 PWC, "Corporate Choices in International Arbitration: Industry Perspectives" (2013) *available at:* <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

proceedings under the Act have become highly technical."[16] It was to overcome these shortcomings that the 1996 Act was professed to have been enacted. Unfortunately, the 1996 Act did not come through the normal route which is followed by the Parliament for enacting legislation. Instead, the legal regime was brought in through the route of an ordinance. It was only after the three consecutive ordinances lapsed that the Parliament enacted the 1996 Act. The author has previously commented on this precarious legislative history of the 1996 Act on more than one occasion,[17] but for the present purposes, suffice it to say that by bringing in the law through the executive fiat, the Parliament missed an opportunity to debate on the proposed law and eventually to iron out the creases while enacting it. Ultimately the judiciary was called upon to make up for the deficiencies by the interpretative process. It was this endeavor of the judiciary which led to the decision in *Bhatia International*[18] in which the Supreme Court had held that part I of the 1996 Act would apply even to arbitrations held outside India, unless it was excluded, expressly or by necessary implication. Thereafter, the court in *Venture Global Engineering*[19] held that even a foreign award could be challenged under section 34 of the 1996 Act, unless the parties had excluded the application of part I of the Act. After almost a decade, a Constitution Bench of the Supreme Court in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*[20] prospectively overruled[21] the decision in *Bhatia International*,[22] in the year under survey. Since the decision of the Constitution Bench virtually chartered a new path in the law of arbitration in India, a considerable portion of the survey has been dedicated to it.

II APPOINTMENT OF ARBITRATOR

Appointment after the discharge of the contract

In *Lufthansa German Airlines* v. *Airport Authority of India*[23] the designated judge was called upon to decide whether discharge of the contract by efflux of time would *ipso facto* bring an end to the arbitration clause contained in it. The parties had entered into an agreement on 01.12.2005 under which the respondent was "to provide cargo handling services" to the applicant. Under the agreement, the respondent was liable for any loss or damage while the cargo was in its custody. The agreement was to operate till 31.03.2007. The applicant alleged that even

16 *Guru Nanak Foundation v. Rattan Singh and Sons*, (1981) 4 SCC 634.

17 AK Ganguli, "Arbitration Law" XLVI ASIL 31 (2010); AK Ganguli, "International Commercial Arbitration and Enforcement of Foreign Awards in India" in Bimal N Patel (ed.), *India and International Law* 319 (Martinus Nijhoff Publishers, 2005).

18 (2002) 4 SCC 105.

19 *Venture Global Engineering* v. *Satyam Computer Services Ltd.* (2008) 4 SCC 190.

20 (2012) 9 SCC 552.

21 See *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552, 647 para 197 wherein the court declared that "in order to do complete justice, we hereby order, that the law now declared by this court shall apply prospectively, to all the arbitration agreements executed hereafter."

22 (2002) 4 SCC 105.

23 (2012) 11 SCC 554.

though 15 packages of cargo were booked with the respondent at New Delhi for delivery at Frankfurt, one of the packages was damaged and not shipped to Frankfurt till much later. The consignee's claim for damages from the applicant was settled for US$ 51,720. Upon settlement of the claim, the applicant sought reimbursement of the amount settled with the consignee as loss and damage from the respondent on 15.09.2008 much after the contract had come to an end on 31.03.2007. The respondent by its letter dated 30.01.2009 replied that it was unable to process the claims. The applicant finally on 12.10.2009 sent a notice for arbitration. On the failure of the respondent to appoint an arbitrator, the applicant moved an application under section 11(6) of the 1996 Act before the designated judge in the Supreme Court. The respondent argued that the "petition ought to be dismissed on the ground of limitation itself" and that it was an abuse of the process of law. The designated judge rejected the argument holding: [24]

> It is not disputed by the respondent that there was a valid agreement between the parties from 1.4.2004 to 31.3.2007. Merely because the contract which contained the arbitration clause has come to an end by the efflux of time would not itself put to an end the arbitration clause. The dispute seems to have prima facie arisen during the subsistence of the agreement. It, however, seems to have spilled over to subsequent years i.e. 2008-2009…The disputes raised by the petitioner are therefore required to be referred to arbitration…

Accordingly, the designated judge, with the consent of the parties, appointed a former chief justice of the Karnataka High Court as the sole arbitrator.

This view, it is submitted, is in consonance with the scheme of the 1996 Act and particularly section 16(1) (a) which provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract." This provision was enacted to overcome the line of authorities under the 1940 Act which had held that "where the dispute is whether the … contract is void ab initio, the arbitration clause cannot operate … for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it."[25]

Belated claim

In *Al Jazeera Steel Products Co. SAOG* v. *MID India Power & Steel Ltd.*[26] the applicant, a company registered in Oman, had entered into a contract with the respondent for supply of "prime alloy steel billets of" a specific chemical and physical composition. However, upon taking delivery of the shipment supplied by the respondent, it was noticed that the billets were defective and of poor quality. On the applicant informing the respondent about the defects, the respondent assured

24 *Id.* at 556.

25 *Union of India* v. *Kishorilal Gupta and Bros.* [1960] 1 SCR 493.

26 (2012) 11 SCC 458.

the applicant that the short comings would be rectified. However, no steps were taken by the respondent for rectification. Efforts for an amicable settlement having failed, the applicant invoked the arbitration clause in the agreement and nominated a former judge of the Supreme Court to act as the sole arbitrator. Since the respondent did not respond to the notice, the applicant moved the Supreme Court under section 11 for the appointment of an arbitrator.

Before the Supreme Court, the respondent claimed that the "application is not maintainable in view of the fact that the dispute sought to be referred to arbitration is 'not a dispute arising out of contract,' but rather a dispute which has been deliberately planted post the completion of the contract to escape a liability that the applicant has already incurred." It was urged that the dispute about the defective goods was a belated attempt by the applicant "to avoid the contract" due to the "downfall of the price in the international market of steel billets."

Rejecting the argument, the designated Judge referring to the arbitration clause in the agreement which provided that "all disputes and differences" between the parties "relating to the construction meaning and operation of effect of this contract or any breach thereof" shall be settled through arbitration held that the clause covered "all disputes and differences of any kind arising between the parties." The designated judge held thus: [27]

> bona fide disputes have arisen between the parties, which are within the scope and ambit of the arbitration clause and need to be resolved through arbitration. I do not find any substance in the submission of the learned counsel for the respondent that the disputes are either belated or raised only to avoid liability under the contract. The disputes having arisen in September 2008 and the present application having been filed on 4.2.2009, the petition cannot be said to be belated.

The designated judge referred the disputes to the sole arbitrator already appointed by the applicant.

Death of the named arbitrators

In *ACC Ltd.* v. *Global Cements Ltd.*[28] the petitioner had transferred certain lease hold lands held by it in favour of the respondent. The lands belonged to the government. As the lands had been transferred without the prior permission of the collector, the possession of the lands was resumed by the government. The agreement between the parties relating to the transfer of lands contained an arbitration clause. The respondent sought to refer the disputes to arbitration. The arbitration clause provided thus: [29]

> 21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and

27 *Id.* at 464
28 (2012) 7 SCC 71.
29 *Id.* at 74.

> liabilities of the parties hereto then such question or dispute shall be referred either to Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties.

The petitioner resisted the attempt to refer the disputes to arbitration contending that, as both the arbitrators named in the arbitration clause were no more, the arbitration agreement no longer survived. The Bombay High Court allowing the application filed by the respondent under section 11, took the view that "in the absence of any prohibition or debarment, there is no reason for the court to presume an intent on the part of the parties to the effect that a vacancy that arises on account of a failure or inability of a named arbitrator to act cannot be supplied by the court under section 11."

In appeal before the Supreme Court, it was contended that the arbitration clause suggested that the parties desired to refer their disputes only to the named arbitrators and no one else. In the absence of the named arbitrators, the clause did not survive. It was pointed out that Mr. N.A. Palkhiwala was an eminent jurist of high reputation and was a former chairman of the petitioner company and the parties had specifically named him as an arbitrator because of his familiarity and in-depth knowledge of arbitration law and corporate laws. Similarly, the other named arbitrator, D.S. Seth, was a former director of the petitioner company and was familiar with the relations between the parties. It was contended that in view of the special position of both the named arbitrators, "the parties wanted their difference or dispute to be resolved only by those named arbitrators and on their death, the arbitration clause in the agreement would not survive."

The question before the court was whether the arbitration clause "outlives the lives of the named arbitrators?"

Relying on an earlier decision,[30] the court rejected the argument of the petitioner that the arbitration clause did not survive after the demise of the named arbitrator. In that case, the arbitrator named in the agreement had refused to act and in its decision, the court held that "Section 15 would be attracted and it would be for the court, under Section 11(6), to appoint an arbitrator" following "the procedure laid down in Section 11(6)" unless the contract specifically debarred "appointment of any other arbitrator in case the named arbitrator refuses to act."[31]

In the instant case, the court held that section 11(6) would not apply only "if it is established that parties had intended not to supply the vacancy occurring (sic) due to the inability of the arbitrator to resolve the dispute or due to whatever reason but that intention should be clearly spelt out from the terms of the arbitration clause in the agreement."

The wording of the arbitration clause which provided that "if any question or difference or dispute shall arise between the parties … at any time then such question or dispute shall be referred to arbitration" were held to be significant. In the court's view, the use of the phrase "at any time" implied that "those disputes and differences could be resolved during the lifetime of the named arbitrator or beyond their lifetime"

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30 *San-A Tradubg Co. Ltd.* v. *I.C. Textiles Ltd.* (2012) 7 SCC 192.
31 *Id.* at 197.

and that the "the arbitration clause would have life so long as any question or dispute or difference between the parties exists."

The court rightly gave a purposive interpretation to the arbitration agreement. There might be situations where the parties agree to refer the disputes to arbitration only according to a particular "procedure for appointing the arbitrator or arbitrators" and not otherwise. Such an intention must be clearly spelt out under the terms of the agreement. However, reliance upon section 15 of the Act, which deals with termination of mandate and substitution of arbitrator, appears to be misplaced. In order that section 15 is attracted, an arbitrator must, in the first instance, have been appointed. There can be no termination of the mandate of an arbitrator, if the arbitrator has not even been appointed.

Extinguishment of right to appoint an arbitrator

In *Denel (Proprietary) Limited* v. *Ministry of Defence*[32] the court was called upon to consider *inter alia* the question as to whether a party, who is entitled to appoint an arbitrator in terms of the arbitration clause, forfeits its right once the opposite party files an application under section 11(6) of the Act requesting the chief justice or his nominee to appoint an arbitrator. The parties to the dispute had entered into a contract for supply of "base bleed units". During the execution of the contract, disputes arose between the parties as to the quality of the goods supplied by the petitioner. The respondents had put the contract on hold and issued notice seeking refund of the amounts paid for the goods. As the disputes could not be resolved mutually between the parties, the Director General, Ordinance Factory, government of India ("DGOF") appointed the additional general manager, Ordinance Factory, Ambajhari, Nagpur, as an arbitrator in terms of the arbitration clause in the contract.

Apprehending that the arbitrator appointed by the respondents, being its employee, would be biased, the petitioner on 23.01.2009 issued a notice under section 14 of the Act terminating the mandate of the arbitrator. As the arbitrator continued with the arbitration proceedings, the petitioner approached the principal district court, Chandrapur, with an application under section 14(2) for the court to "decide on the termination of the mandate" of the arbitrator.

The district court by its order dated 21.12.2010 terminated the mandate of the arbitrator on the ground that he was biased in favour of the respondents. The court further directed that the "Director General, Ordinance Factory, Government of India is appointed as an arbitrator or he may appoint a government servant as an arbitrator … after following due procedure."

The DGOF, however, neither commenced the arbitration proceedings nor appointed any other government servant to act as an arbitrator. Consequently, the petitioner on 02.03.2011 moved an application under section 11(6) before the chief justice of India seeking appointment of an independent arbitrator. It was contended on behalf of the petitioner that the directions issued by the district court were without any authority or jurisdiction and as such were void *ab initio*. According to the petitioner, the district judge could not have directed the appointment of the arbitrator

32 (2012) 2 SCC 759.

under section 14. It was contended by the petitioner that the Director General, Ordinance Factory, was disqualified from acting as an arbitrator since the disputes were against the ordinance factory under the Ministry of Defence, government of India, and the DGOF would be bound by directions issued by the superior authorities and hence he was not in a position to independently decide the disputes between the parties. The directions given by the district judge appointing the DGOF to act as an arbitrator was also contrary to the provisions of section 12 of the Act.

The respondent resisted the application under section 11(6) *inter alia* on the ground that one Satyanarayana was appointed as a substitute arbitrator on 16.03.2011 and this fact was notified by it to the petitioner by letter dated 26.03.2011. The petitioner had objected to the appointment of Shri Satyanarayana as being contrary to the arbitration clause. The respondent also controverted the petitioner's claim that since the appointment of arbitrator was not made prior to the filing of the petition under section 11(6), the respondent had forfeited its right to make such appointment.

Nijjar J., as the designated judge, accepting the petitioner's plea that the application under section 11(6) was maintainable, following earlier decisions of the court[33] held thus: [34]

> In the facts and circumstances of this case, it would not be possible to accept the submission of Mr. Raval that the present petition filed by the petitioner under Section 11(6) of the Act is not maintainable. On the admitted facts, it is evident that the mandate of the earlier arbitrator, Mr. Arun Kumar Jain was terminated by the orders passed by the Principal District Court, Chandrapur in Civil Miscellaneous Application No.45 of 200 by an order dated 21.12.2010. A perusal of the aforesaid order would show that the petitioner had challenged the validity of Clause 19(F). The aforesaid submission was rejected by the Court with the observation that the same cannot be the subject-matter which could be resolved in a petition under Section 14(2) of the Act. The petitioner was given an opportunity to challenge the clauses in an appropriate forum. The District Judge, however, accepted the submission of the petitioner that there are justifiable reasons to indicate that the arbitrator has not acted fairly. Hence the mandate of Mr. A.K. Jain as the sole arbitrator was terminated. In accordance with Section 15(2) of the Act, the DGOF was appointed as an arbitrator. He was also given an option to appoint a government servant as an arbitrator as per the arbitration clause.

Nijjar J., further held thus: [35]

> Mr. Satyanarayana, the subsequent arbitrator was not appointed until 16.03.2011. The present petition was moved on 02.03.2011. Therefore,

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33 *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.* (2006) 2 SCC 638; *Datar Switchgears Ltd.* v. *Tata Finance Ltd.* (2000) 8 SCC 151.

34 (2012) 2 SCC 759, 766.

35 *Id.* at 766.

> the respondents had clearly forfeited their rights to make the appointment of an arbitrator. Consequently, the appointment of Mr. Satyanarayana as an arbitrator by the letter dated 06.03.2011 cannot be sustained.

It appears that the question whether in a proceeding under section 14(2) of the Act, after terminating the mandate of the arbitrator, the court would be competent to appoint a substitute arbitrator or direct such appointment of an arbitrator had not been considered, though such a contention was raised on behalf of the petitioner.[36]

On the question whether the designated judge was competent to bypass the appointment procedure laid down in the arbitration clause, *i.e.,* clause 19(F) of the contract, which contemplated that the disputes "shall be referred to the sole arbitrator of the DGOF, government of India for the time being or a government servant appointed by him," Nijjar J. held that the question was squarely decided against the petitioner in *Indian Oil Corporation case*[37] wherein it was held thus: [38]

> It is now well settled by a series of decisions that arbitration agreements in government contracts providing that an employee of the Department (usually a high official unconnected with the work or the contract) will be the arbitrator, are neither void nor unenforceable. All the decisions proceed on the basis that when senior officers of Government/statutory corporations/ public sector undertakings are appointed as arbitrators, they will function independently and impartially, even though they are employees of such institutions/organizations.

Having rejected the contention of the petitioners that the respondent cannot be permitted to insist that the court should appoint an arbitrator only in terms of the agreed procedure laid down in clause 19(F), Nijjar J. ruled: [39]

> It is true that in normal circumstances while exercising jurisdiction under Section 11(6), the court would adhere to the terms of the agreement as closely as possible. But if the circumstances warrant, the Chief Justice or the nominee of the Chief Justice is not debarred from appointing an independent arbitrator other than the named arbitrator. … I am of the opinion that in the peculiar facts and circumstances of this case, it would be necessary and advisable to appoint an independent arbitrator.

Exercising the powers under sections 11(4) and 11(6) of the Act read with paragraph 2 of the appointment of arbitrators by the chief justice of India scheme, 1996, Ashok C. Aggarwal, retired chief justice of the Madras High Court, was appointed as the sole arbitrator to adjudicate the disputes between the parties.

This, however, was not the first time that a designated Judge while dealing with a section 11 application side-stepped the procedure agreed to by the parties under the arbitration clause to ensure that an independent arbitrator was appointed.

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36 *Id.* at 763 (Para 5)

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

38 *Id.* at 531.

39 (2012) 2SCC 759, 768.

There are a series of precedents which have sprung up in the last few years which support the extreme step the court took.[40] This is in contrast with the courts' earlier thinking under the 1940 Act.[41] In order to remedy the disparity between those decisions and to give effect to the mandate of section 18 of the 1996 Act, the Law Commission of India had proposed an amendment to the 1996 Act which never saw the light of day.[42] Fortunately, the court has now taken upon itself to remedy the defect and has in fact now gone much beyond what the Law Commission recommended.

In *Dakshin Shelters (P) Ltd.* v. *Geeta S. Johari*[43] a development agreement had been entered into between the parties. As certain disputes arose, the respondent invoked the arbitration clause under the agreement. By its notice dated 10.12.2010 the respondent nominated a former judge of the Andhra Pradesh High Court as its arbitrator and called upon the petitioner to nominate its arbitrator. However, by its letter dated 10.01.2011, the petitioner responded that "the question of appointing of arbitrator does not arise either from your side or from our side. There is no arbitral dispute to be decided by the arbitrators."

The respondent, therefore, approached the chief justice of the high court with an application under section 11 of the Act. The designated judge appointed a senior advocate as an arbitrator on behalf of the petitioner. It was further observed that the arbitrator nominated by the respondent and the arbitrator appointed by the designate judge on behalf of the petitioner were required to appoint a third arbitrator.

In a special leave petition before the Supreme Court, the petitioner raised a limited contention that "instead of [the] Senior Advocate, who has been appointed as arbitrator by the designated judge, a retired High Court Judge, stationed in Hyderabad may be appointed."[44]

The respondent resisted this plea, submitting "that once an opportunity was given to the petitioner to nominate its arbitrator by notice dated 10.12.2010 and it failed to avail of the opportunity, it ceased to have any right to appoint the arbitrator

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40 See *Indian Oil Corpn. Ltd.* v. *Raja Transport Pvt. Ltd*. (2009) 8 SCC 520; *Denel (Proprietary) Ltd.* v. *Bharat Electronics Ltd.* (2010) 6 SCC 394.

41 See *Secy. to Govt., Transport Deptt.* v. *Munuswamy Mudaliar* 1988 Supp SCC 651; *Nandyal Coop. Spinning Mills Ltd.* v. *K.V. Mohan Rao* (1993) 2 SCC 654.

42 176th Report of the Law Commission of India on the Arbitration And Conciliation (Amendment) Bill, 2001 had proposed the following section to be inserted in the Act: "10A. (1) Subject to the provisions of sub-section (2), where any arbitration agreement contains a clause enabling one of such parties to appoint his or its own employee or consultant or advisor or other person having business relationship with him or it, as an arbitrator, such a clause shall be void to that extent.
(2) The provisions of sub-section (1) shall not-
(a) apply to an agreement in international arbitration (whether commercial or not).
(b) render any clause, in an arbitration agreement which enables the central or a state government or a public sector undertaking or a statutory body or statutory corporation or other public authority, as the case may be, to appoint its own employee or consultant or advisor or any other person having business relationship, as an arbitrator, void;"

43 (2012) 5 SCC 152.

44 *Dakshin Shelters (P) Ltd.* v. *Geeta S. Johari* (2012) 5 SCC 213.

in terms of the arbitration clause in the development agreement." The court agreed with this contention of the respondent holding that "the stance of the petitioners amounted to failure on its part to appoint its arbitrator on receipt of the request to do so from the respondent." In coming to this conclusion the court found support from the decision in *Union of India* v. *Bharat Battery Manufacturing Co.(P) Ltd.*[45] wherein the court had held that "once a party files an application under Section 11(6) of the Act, the other party extinguishes its right to appoint an arbitrator."

The court, therefore, held that the petitioner's right to appoint its arbitrator in terms of the arbitration clause in the development agreement ceased once it failed to appoint the arbitrator on receipt of the notice dated 10.12.2010. The appeal was therefore dismissed upholding the appointment of the arbitrator on behalf of the petitioner made by the designate judge.

However, it should be borne in mind that in terms of the law laid down in the seven judge bench decision in *Patel Engg. Ltd.'s* Case,[46] in a proceeding under section 11 of the Act, the designated judge is also required to decide whether: [47]

> … there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection.

It would therefore, be open to a party, whose right to appoint an arbitrator in terms of the arbitration clause in a contract is extinguished for failure to appoint such an arbitrator before filing of the application under section 11 of the Act, to call upon the designated judge to decide the questions mentioned in *Patel Engg. Ltd. Case*.[48] It is possible that the designated judge may agree with the contention of the respondents either with regard to absence of an arbitration agreement or the absence of live issues which could be the subject matter of arbitration, and hold that no appointment of an arbitrator is warranted.

Two tier appointment procedure

Well before the Supreme Court had reconciled its own conflicting decisions[49] by the pronouncement of a seven judge bench in *SBP & Co.* v. *Patel Engineering*

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45 (2007) 7 SCC 684. This decision relied on the decision in *Punj Lloyd Ltd.* v. *Petronet MHB Ltd.* (2006) 2 SCC 638, which itself was based on the decision in *Datar Switchgears Ltd.* v. *Tata Finance Ltd.* (2000) 8 SCC 151.

46 (2005) 8 SCC 618; See also National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267.

47 (2005) 8 SCC 618, 660-661, 663.

48 (2005) 8 SCC 618.

49 *Konkan Rly. Corpn. Ltd.* v. *Mehul Construction Co.* (2000) 7 SCC 201; *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.* (2002) 2 SCC 388.

Ltd.,[50] the Calcutta High Court had, in an unreported decision[51] while dealing with the nature of the power of the chief justice under section 11 of the Act in appointing an arbitrator, made a clear distinction between "the determination as to whether in the facts and circumstances of the case the arbitrator in fact was required to be appointed" and the "act of actual appointment" of the arbitrator.

Subsequently, a division bench of that court[52] while analyzing the scheme of the 1996 Act, particularly with reference to sections 5, 8, 11, 16 and 37(1) had made a distinction between the procedure for appointment of an arbitrator and the actual appointment of an arbitrator. The division bench was of the view that the word "appointment" used in sub-sections (2), (3), (4), (5) and (6) of section 11 of the 1996 Act must bear the same meaning. Since sub-sections (2), (3) and (4) contemplated that the parties may "appoint" the arbitrator (without the intervention of the chief justice or his nominee), by such act the parties do not "do more than name or designate him". Therefore, the chief justice while exercising the power under sub-section (5) and (6) of section 11 must be understood only to be exercising the same power *i.e.* to name or designate the arbitrator. This designation of an arbitrator, in the opinion of the division bench, must be preceded by a judicial determination of the question as to whether the appointment of an arbitrator was warranted in the case. The division bench held that: [53]

> …the Chief Justice has allocated the business of hearing matters pertaining to arbitrations to a learned Single Judge. It is for that learned Single Judge to exercise the general power referred to earlier, leaving the power of naming the arbitrator under Section 11 to the exclusive jurisdiction of the Chief Justice.

This decision led the Calcutta High Court following the practice of a two tier procedure while dealing with applications under section 11 of the Act. In the first instance, the application for appointment of an arbitrator was placed before a single judge for determination of the question as to whether the case warrants the appointment of an arbitrator and after a decision on that question was reached by the judicial determination that the application was then placed before the chief justice or his designated judge for the actual "appointment" or designation of an arbitrator.

In *Hindustan Copper Ltd.* v. *Monarch Gold Mining Co. Ltd.*[54] the Supreme Court was called upon to rule whether this two tier procedure followed by the Calcutta High Court was consistent with the law laid down by the seven judge

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50 (2005) 8 SCC 618.

51 *Harihar Yadav* v. *Durgapur Projects Ltd.* Arbitration Petition No.514 of 1998, decided on 1.9.1998 (Cal) (Unreported).

52 *Modi Korea Telecommunication Ltd.* v. *Appcon Consultants (P) Ltd.* (1999) 2 CHN 107.

53 (1999) 2 CHN 107, 119, making reference to S. 14 of the High Courts Act, 1861, Cl. 36 of the Letters Patent, Ch. V rule 1 of the original side rules and art. 225 of the Constitution.

54 (2012) 10 SCC 167.

bench in *Patel Engg. Ltd.'s C*ase.[55] During the course of the hearing, the Registrar General of the High Court of Calcutta was impleaded as a party respondent and his views on the question whether "an application under section 11(6) of the 1996 Act for appointment of an arbitrator could be considered in piecemeal by two designated judges" were sought for. The registrar general, appearing through counsel, submitted that "section 11 did not put any embargo on piecemeal consideration of the matter." It was submitted that "it is permissible that the designated judge considers the general power of the court to determine whether the preconditions for the exercise of that power have been fulfilled leaving the power of naming the arbitrator under section 11 to the exclusive jurisdiction of the Chief Justice."

The Supreme Court, however, felt that the piecemeal procedure followed by the Calcutta High Court was contrary to the law laid down in *Patel Engg. Ltd.,*[56] The court, speaking through Lodha J. held thus: [57]

> The exposition of law by a seven-Judge Bench of this court in *SBP & Co.,*[58] leaves no manner of doubt that the procedure that is being followed by the Calcutta High Court with regard to the consideration of the applications under Section 11 of the 1996 Act is legally impermissible. The piecemeal consideration of the application under Section 11 by the Designated Judge and another Designated Judge or the Chief Justice, as the case may be, is not contemplated by Section 11. The function of the Chief Justice or Designated Judge in consideration of the application under Section 11 is judicial and such application has to be dealt with in its entirety by either the Chief Justice himself or the Designated Judge and not by both by making it a two-tier procedure as held in *Modi Korea Telecommunication Ltd.*[59] The distinction drawn by the Division Bench of the Calcutta High Court in *Modi Korea Telecommunication Ltd.*[60] between the procedure for appointment of arbitrator and the actual appointment of the arbitrator is not at all well founded. *Modi Korea Telecommunication Ltd.*[61] to the extent it is inconsistent with *SBP & Co.*[62] stands overruled.

The court was, however, quick to clarify that the "orders passed under section 11 which have attained finality and the awards pursuant to such orders shall remain unaffected" by this decision.

It appears that the views expressed by the Calcutta High Court had not been considered by the seven judge bench of the Supreme Court in *Patel Engg. Ltd.'s* case.[63] If the court had the benefit of the views of the Calcutta High Court, particularly as to the dichotomy in the nature of the exercise of the powers by the chief justice

55 (2005) 8 SCC 618.
56 *Ibid*.
57 (2012) 10 SCC 167, 176-77
58 *Ibid*.
59 (1999) 2 CHN 107.
60 *Ibid.*
61 *Ibid.*
62 (2005) 8 SCC 618.
63 (2005) 8 SCC 618

which, it is submitted, reflects the correct legal position, the conflicting decisions which the seven judge bench had been called upon to reconcile could have been resolved with much ease and consistency.

The act of mere "appointment" of an arbitrator is undoubtedly in the nature of a nomination particularly when section 11 itself recognizes that the parties may "appoint" an arbitrator without the interference of the court. There is no warrant for importing different meanings to the word "appointment" appearing in different sub-sections of section 11. The judicial determination of the justification of an appointment of an arbitrator in a given case is quite distinct from the mere act of nomination of an arbitrator. This dichotomy, recognized by the Calcutta High Court, had the advantage of giving due importance to the institutional designation of arbitrators contemplated under section 11, which seems to have been rendered otiose by reason of the pronouncement of the seven judge bench in *Patel Engg.Ltd.'s C*ase.[64] The reason that weighed with the court for invalidating the two tier procedure followed by the Calcutta High Court for appointment of arbitrator was conferment of "judicial power" upon the chief justice and the designated judge, in exercise of which they were to decide on the existence of the conditions justifying the constitution of the arbitral tribunal and that the exercise of judicial power has to be an integrated one, though the court did not expressly rule so, that led to the eventual appointment of the arbitrator. It is submitted that even in the two tier procedure, the first tier involved a judicial scrutiny as to whether the pre-conditions to the exercise of the power to appoint the arbitral tribunal have been fulfilled. Depending upon the conclusion reached on this question, the second tier could be triggered, which involved a mere designation of an arbitrator and did not contemplate further exercise of judicial power either by the chief justice or his nominee. Thus, the two tier procedure did not breach the essence of the decision in *Patel Engg. Ltd.'s* Case.[65] On the contrary, that procedure had the advantage of eventually assigning a meaningful role to the arbitral institutions, who are better equipped to nominate arbitrators from out of their panel, depending upon the subject matter of the disputes to be arbitrated upon.

In *Fugro Survey (India) (P) Ltd.* v. *Ramunia International Services Ltd.*[66] the designated Judge allowed a section 11 application and appointed an arbitrator merely because "in spite of the notice having been served, none appears on behalf of the respondent. The averments made in the petition have remained uncontroverted." The order of the court does not disclose whether it undertook any judicial exercise for determining whether in terms of the decision in *Patel Engg. Ltd.'s case*,[67] "there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement."[68] This exercise, it is submitted, has to be mandatorily undertaken by every designated judge irrespective of the fact whether the respondent is present before it or not.

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64 *Ibid.*
65 *Ibid.*
66 (2012) 10 SCC 752.
67 (2005) 8 SCC 618.
68 *Id.* at 660-661, 663.

III REFERENCE TO ARBITRATION

Section 8(1) of the 1996 Act provides that a "judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration." This section is based on the principle that the right to seek arbitration is a contractual right and a contract cannot be unilaterally abrogated so as to overthrow the arbitration clause. It is only on the defendant exercising its right to go in for arbitration that the judicial authority refers them to arbitration to abide by their contract. In order to enable the judicial authority to refer the parties to arbitration, the defendant must so apply "not later than when submitting his first statement on the substance of the dispute." The expression "not later than" would imply that the defendant would make an application for referring the parties to arbitration simultaneously "when submitting his first statement on the substance of the dispute.[69] This provision does not empower the judicial authority to restrain the plaintiff from bringing an action in breach of his agreement with the defendant.

In *Krishan Lal* v. *Food Corporation of India*[70] at the hearing of the civil appeals arising out of special leave petitions filed by the appellant from an order passed by the High Court of Punjab and Haryana in 2002 dismissing a writ petition of the appellant for a direction upon the respondent to refund a sum of Rs.10,00,000/- deposited by the appellant pursuant to an earlier order of the high court dated 05.04.2001, the Supreme Court was called upon to consider whether the parties, having entered into a contract on 28.05.2001 which contained an arbitration clause, should be relegated to arbitration after a lapse of 10 years when the court had admitted the special leave petitions. The respondent there had invited tenders "for appointment of handling and transportation contracts at various depots" in the state of Haryana. As the appellant could not participate in the tender process, "being denied the requisite form for submission of the tender", it approached the high court challenging the tender. The high court allowed the writ petition and directed the respondents to hold fresh tenders, subject to the appellant depositing an amount of Rs. 10 lakh with the respondent as security. This amount was to be adjusted towards security if the work was allotted to the petitioner, otherwise it was to be refunded after the decision on the final allotment was taken.

The bid of the appellant being the lowest in the fresh tender, the work was allotted to it. The final agreement between the parties was executed on 28.05.2001. However, shortly thereafter the appellant expressed its inability to complete the work. The appellant also demanded the refund of Rs. 10 lakh which stood deposited pursuant to the directions of the high court. Upon the refusal of the respondent to do so, the appellant filed a writ petition before the high court. The high court dismissed the petition and the appellant approached the Supreme Court. One of the objections raised by the respondent before the Supreme Court was "that the appellant

69 *Ramakrishna Theatre Ltd.* v. *General Investments & Commercial Corp. Ltd* AIR 2003 Kant 502; *Ajit Singh* v. *Shri Mata Vaishno Devi Shrine Board* AIR 2002 J & K 108.

70 (2012) 4 SCC 786.

ought to have resorted to the arbitration clause under the agreement, instead of filing a writ petition in the High Court." Rejecting the contention, the Supreme Court speaking through Thakur J. observed thus: [71]

> It is true that there was an arbitration clause in the agreement executed between the parties. It is equally true that, keeping in view the nature of the controversy, any claim or refund of the amount deposited by the appellant could be and ought to have been raised before the arbitrator under the said arbitration. The fact, however, remains that the high court had entertained the writ petition as early as in the year 2002 and the present appeals have been pending in this court for the past ten years or so. Relegating the parties to arbitration will not be feasible at this stage especially when the proceedings before the arbitrator may also drag on for another decade. Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage and is accordingly rejected.

Though the court did not expressly make any reference to section 8 of the 1996 Act, it is evident from the judgment that the court had, in its decision, captured the essence of section 8, which provides that the party seeking a reference to arbitration has to apply "not later than when submitting his first statement on the substance of the dispute." In the present case the respondent had taken the objection as to the maintainability of the proceedings only at the hearing of the special leave petition before the Supreme Court, long after the high court had disposed off the writ petition.

A similar question arose before the Supreme Court in *National Seeds Corporation Limited* v. *M. Madhusudhan Reddy*[72] in the context of a complaint before the consumer forum. The respondents there were farmers from different districts in Andhra Pradesh. They filed complaints under the Consumer Protection Act, 1986 alleging that they had suffered loss due to the failure of crops supplied by the appellant, a government company, which used to supply "quality seeds of different varieties" to farmers. The district consumer disputes redressal forum allowed the complaints and awarded compensation to the farmers for their losses. As the appeals to the State Commission and the revision before the National Commission were dismissed, the appellant approached the Supreme Court contending *inter alia*, that "in view of the arbitration clause contained in the agreement the only remedy available to the respondent was to apply for arbitration and the district forum did not have the jurisdiction to entertain the complaint." The appellant argued "that in view of the arbitration clause contained in the agreements entered between the appellant and the growers, the latter could have applied for arbitration and the consumer forums should have non-suited them" in view of section 8 of the Act. Rejecting the argument the court held thus: [73]

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71 *Id.* at 792.

72 (2012) 2 SCC 506.

73 *Id.* at 535; See also Fair Air Engineers (P) Ltd. v. N.K. Modi, (1996) 6 SCC 385; Skypak Couriers Lt.d v. Tata Chemicals Ltd. (2000) 5 SCC 294.

> The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force.

Although the court had not elaborated, the reasons which weighed with it to decline the parties from being relegated to arbitration was that the remedy contemplated under the Consumer Protection Act being summary in nature, is in the true sense not an alternate to ordinary civil remedies that are otherwise available to a person.

In fact the Andhra Pradesh High Court in *Saipriya Estates* v. *V.V.L. Sujatha*[74] has held that a remedy obtained under the Consumer Protection Act will not be a bar to pursue remedies available under the 1996 Act, the nature of remedies available under the respective statutes being different. Following the decisions of the Supreme Court in *Fair Air Engineers Pvt. Ltd.* v. *M.K. Modi*[75] and in *Lucknow Development Authority* v. *M.K. Gupta*[76], Nagarjuna Reddy J. had there held thus:

> I am of the view that the 1986 Act, being a special enactment, which created an additional remedy in favour of the consumers by raising consumer disputes before the fora constituted under the said Act, Section 8 of the 1996 Act does not have the effect of taking away such a remedy from the consumers as in the case of civil suits, which are in the nature of common law remedies.

Moreover, section 3 of the Consumer Protection Act expressly provides that "the provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force."

IV REVOCATION OF AN ARBITRATOR'S APPOINTMENT

Period of limitation for revocation of appointment of arbitrators

Section 5 of the Arbitration Act, 1940 stipulated that "the authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court." Section 11 of the Act which dealt with the power of the court to remove arbitrators, empowered the court "on the application of any party to a reference" to "remove an arbitrator or umpire who fails to use all reasonable dispatch in entering

74 (2008) 2 Arb.LR 585: AIR 2008 AP 166.
75 (1996) 6 SCC 385.
76 (1994) 1 SCC 243.

on and proceeding with the reference and making an award." Section12(2)(a) empowered the court, "on the application of any party to the arbitration agreement," "where the authority of an arbitrator or an umpire is revoked by leave of the Court," to "appoint a person to act as sole arbitrator in the place of the person or persons displaced."

Though section 11 did not provide for a period of limitation within which an application to remove an arbitrator may be made, section 37 provided that "all the provisions of the Indian Limitation Act, 1908 (9 of 1908) shall apply to arbitrations as they apply to proceedings in court."[77]

In *Minerals & Metals Trading Corpn. of India Ltd.,* v. *Ocean Knight Maritime Co. Ltd.*[78] the parties had entered into a charter party agreement in respect of a vessel for the "carriage of a cargo of rock phosphate in bulk." However, as disputes arose between them, the arbitration clause under the agreement was invoked. The respondent appointed its arbitrator on 30.05.1989 and the appellant appointed its arbitrator on 14.08.1989. Both the arbitrators jointly appointed an umpire. The two arbitrators concluded the hearing on 12.05.1992. However, "for want of consensus" no arbitral award was given. Since the time for giving the award by the arbitrators was up to 31.03.1993, the arbitrators became *functus officio w.e.f.* 01.04.1993.

After a delay of nearly six years, on 03.07.1999, the respondent filed an application under sections 5, 11 and 12 of the 1940 Act seeking the removal of the arbitrator appointed by the appellant. Despite the objection of the appellant that the application was "beyond the prescribed period of limitation", the Delhi High Court revoked the authority of both the arbitrators and appointed a former judge of that court as the sole arbitrator.

The only question urged before the Supreme Court in appeal was "whether the application under sections 5, 11 and 12 by the respondent filed in 1999 was within limitation."

As neither the 1940 Act nor the Limitation Act, 1963 expressly provided for a period of limitation for filing of an application under sections 5, 11 and 12 of the 1940 Act; part II, third division of the schedule to the 1963 Act was attracted. This part deals with "other applications" and has only one article which prescribes the period of three years for an application for which no period of limitation is provided elsewhere. This period commences when the right to apply accrues. In view of this residual provision, the Supreme Court had no hesitation in holding that the application moved by the respondent was beyond the period of limitation prescribed under the Limitation Act. The court speaking through Lodha J. noted thus: [79]

> the right to apply for removal of Respondent 3 as a co-arbitrator or for revocation of his authority accrued on expiry of 31.03.1993 when the two

77 In terms of s. 8 of the General Clauses Act, 1897 this reference to the Limitation Act, 1908 should be construed as a reference to the Limitation Act, 1963. S. 43 (1) of the 1996 Act contains a provision identical to s. 37 of the 1940 Act which provides that "the Limitation Act, 1963 (XXXVI of 1963), shall apply to arbitrations as it applies to proceedings in court."

78 (2012) 5 SCC 420.

79 *Id.* at 424.

arbitrators became functus officio. It was thus on 1.4.1993 that Respondent 1 became entitled to apply for the reliefs claimed in the application under sections 5, 11 and 12 of the 1940 Act. Such application could have been made by Respondent 1 within three years from 1.4.1993 and not thereafter. The limitation for making application under Sections 5, 11 and 12 of the 1940 Act, thus, expired on 31.03.1996.

Institutional bias – "named arbitrator"

Section 11(2) of the 1940 Act empowered the court to "remove an arbitrator or umpire, who has misconducted himself or the proceedings." Unlike Section 12(3)(b) of the 1996 Act there was no analogous provision in the 1940 Act, which provided that "an arbitrator may be challenged" if "circumstances exist that give rise to justifiable doubts as to his independence or impartiality." However, under section 30(a) of the 1940 Act, one of the grounds for setting aside an award was "that an arbitrator or umpire has misconducted himself or the proceedings."

In *Ladli Construction Co. (P) Ltd.* v. *Punjab Police Housing Corpn. Ltd.*[80] the parties had entered into a contract for the construction of houses in Ludhiana. Time was the essence of the contract. The appellant, however, could not maintain the time schedule. As a result, the respondent rescinded the contract and gave the unexecuted work to another contractor. Disputes having arisen between the parties, the appellant moved the court for appointment of an arbitrator in terms of the agreement. The arbitration clause in the contract provided that disputes between the parties "*shall be referred for arbitration to the Chief Engineer of Punjab Police Housing Corporation, Chandigarh.*"

The sub-judge, first class, Chandigarh on 13.05.1992 ordered that the matter be referred to arbitration and in terms of the arbitration clause, directed the chief engineer of the corporation to act as an arbitrator. The respondent lodged its claim before the arbitrator and the arbitrator called upon the appellant to appear before him.

The appellant, however, did not appear before the arbitrator and instead, intimated the arbitrator on 24.06.1992 that his appointment as an arbitrator was not acceptable. On 24.07.1992, the appellant made an application before the court under sections 5, 11 and 12 for removal of the arbitrator. The appellant had prayed for the stay of the arbitral proceedings, but was not successful in getting any such order. In the absence of any stay order and non-appearance of the appellant, the arbitrator proceeded *ex-parte* and passed an award on 18.08.1992.

After filing of the award, the appellant submitted objections under section 30 *inter alia* on the ground that the "arbitrator … has misconducted himself or the proceedings" and also objected to the award being made a rule of the court. The sub-judge heard both the applications under sections 12 and 30 of the 1940 Act together and dismissed both of them, making the award a rule of the court. This order was challenged first before the district judge and then in civil revision, before the high court, but without success.

80 (2012) 4 SCC 609.

In appeal by special leave before the Supreme Court, it was contended that the appellant had a "reasonable apprehension of bias" on the part of the arbitrator as the action of cancellation of the contract was taken by the executive engineer at the behest of the chief engineer who was subsequently appointed as the arbitrator. The appellant placed reliance on the fact that the inspection of the project was carried out by the chief engineer on 26.10.1990 and he was of the opinion that the work was not being carried out in accordance with the time schedule. The arbitrator was biased, according to the appellant, as within a short span of 49 days the entire arbitral proceedings were concluded despite the appellant's application for removal of the arbitrator pending before the court.

Referring to the arbitration clause in the contract, which provided that "any dispute between the parties" shall be referred for arbitration to the chief engineer of the respondent, the court rejected the contentions of the appellant holding thus:[81]

> The contractor consciously agreed for the disputes between the parties to be referred for arbitration to the Chief Engineer of the Corporation. The contractor, at the time of agreement, was in full knowledge of the fact that the Chief Engineer is under full control and supervision of all civil engineering affairs of the Corporation, yet it agreed for resolution of disputes between the parties by him as an arbitrator.

The court emphasized that despite the fact that the chief engineer had inspected the progress of the project work on 26.10.1990 and brought to the notice of the appellant the slow progress of the work, it was the appellant who had made an application for the appointment of an arbitrator in terms of the arbitration clause. Even in the application for appointment, "no allegation of any bias or hostility was made against the named arbitrator i.e. the chief engineer" of the respondent, and instead the application prayed for the appointment of an arbitrator in terms of the arbitration clause. The court observed that "when the application came up for consideration before the sub-judge on 13.05.1992, the advocate appearing for the contractor also submitted for appointment of the arbitrator as named in the agreement. Before the court, no allegation was made that the contract was terminated at the instance or at the behest of the chief engineer." This, in the court's opinion "clearly showed that no case of bias on the part of the chief engineer was pleaded or pressed by the 'appellant' in the proceedings for appointment of the arbitrator." There was also nothing to indicate that something happened after the appointment which prompted the appellant to intimate the arbitrator that it had lost faith in him. The court noted that "no steps were taken by the contractor for removal of the arbitrator immediately. The application for removal of the arbitrator was made almost after 26 days." The court also rejected the contention that the arbitrator had proceeded with haste in concluding with the proceedings as "in the absence of any stay order from the court and non-appearance by the appellant", "the arbitrator was left with no choice but to proceed *ex-parte* and conclude the arbitral proceedings."

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81 *Id.* at 613.

The court, speaking through Lodha J. summed up its view thus: [82]

> … the contractor moved the court for appointment of the Chief Engineer as arbitrator and then chose not to appear before him. What was the intervening event after the arbitrator was appointed at his instance that prompted him to ask the arbitrator to recuse himself is not stated by the contractor. The contractor was not successful in getting any final or interim order in the proceedings initiated by it for removal of the arbitrator. The award passed by the arbitrator also does not show that he misconducted in any manner in the proceedings. He gave full opportunity to the contractor to appear and put forth its case but the contractor failed to avail of that opportunity.

There is a clear distinction between actual bias and apparent bias. In the "majority of cases it is often emphasized that the challenger does not go so far as to suggest the arbitrator is actually biased, rather that some form of objective apprehension of bias exists."[83] In the case under review, it is evident that the appellant did not succeed in obtaining an order staying the arbitral proceedings in the proceedings initiated under Sections 5, 11 and 12 of the Act for removal of the arbitrator, which led to the proceedings being continued by the arbitrator *ex-parte* against the appellant. It is difficult to visualize whether the decision of the court would have been the same had the case been decided under the 1996 Act as revealed in one of the cases considered in the survey.[84]

V STATUTORY ARBITRATION

In *Madhya Pradesh Rural Road Development Authority* v. *L.G. Chaudhary Engineers and Contractors*[85] a two judge bench of the Supreme Court was called upon to rule on the question whether the provisions of the Madhya Pradesh madhyastham adhikaran abhiniyam, 1983, (the "MP Act") which statutorily provides for the parties to the "works contract" to refer all disputes to the arbitration tribunal constituted under section 7 of the Act, would continue to operate even after coming into force of the Arbitration and Conciliation Act, 1996 enacted by the Parliament.

In a similar decision in *VA Tech Escher Wyass Flovel Limited* v. *Madhya Pradesh State Electricity Board,*[86] another two judge bench by a short order had answered the very same question holding that "the 1996 Act covers all kinds of disputes

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82 *Id.* at 616. See, however, *Bihar State Mineral Development Corporation* v. *Encon Builders (I) (P) Ltd.*, (2003) 7 SCC 418, (para 31) where it was observed that "as the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppels would have no application in such a situation"

83 Sutton and Gill, *Russell on Arbitration*, (23rd edn. 2003).

84 Denel (Proprietary) Limited v. Ministry of Defence, (2012) 2 SCC 759.

85 (2012) 3 SCC 495.

86 (2011) 13 SCC 261.

including the dispute relating to 'work contracts.' In our opinion, the 1983 Act and the 1996 Act can be harmonised by holding that the 1983 Act only applies where there is no arbitration clause but it stands impliedly repealed by the 1996 Act where there is an arbitration clause." In that case, since the works contract in question had an arbitration clause, the Supreme Court held that an application under section 9 of the 1996 Act filed by the appellant before the learned additional district judge was maintainable.

In a subsequent judgment, a two Judge Bench in *Ravikant Bansal* v. *Madhya Pradesh Rural Road Development Authority,*[87] distinguishing the earlier decision in *VA Tech's case*[88] held that "in the present case the arbitration clause itself mentions that the arbitration will be by the Madhya Pradesh Arbitration Tribunal. Hence, in this case arbitration has to be done by the Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Abhiniyam, 1983."

In the case under survey, the appellant had terminated the works contract awarded to the respondents in view of several breaches of the contract by the respondents. The appellant had encashed the bank guarantees furnished by the respondents. The respondent filed writ petitions in the high court challenging the encashment of the bank guarantee. The writ petitions were disposed off with the direction that the bank guarantee not be encashed till the disposal of the representation made by the respondents. Subsequently, the appellant rejected the representation after granting a personal hearing to the respondent.

The respondent thereafter requested the appellant to appoint an arbitrator for adjudicating the disputes between the parties. The appellant took the stand that in view of clause 25 of the works contract, which specifically provides for adjudication of the disputes by the arbitral tribunal constituted under the M.P. Act, there was no question of the appellant appointing an arbitrator for adjudication of such disputes. The respondent, however, filed an application under section 11 of the 1996 Act before the chief justice of the high court for appointment of an arbitrator. The application filed by the respondent was allowed and an arbitrator was appointed, relying upon the decision of the Supreme Court in *VA Tech's case*.[89]

The appellant preferred an appeal from the said order. Ganguli J speaking for himself held that in view of the subject matter covered by entry 13 of the concurrent list in the seventh schedule to the Constitution, the state legislature was competent to enact the MP Act of 1983.

Rejecting the contention of the respondent that the M.P. Act was repugnant to the 1996 Act enacted subsequently by the Parliament, Ganguli J held thus:[90]

> The M.P. Act of 1983 was made when the previous Arbitration Act of 1940 was in the field. That Act of 1940 was a Central law. Both the Acts operated in view of Section 46 of the 1940 Act. The M.P. act 1983 was

87 (2012) 3 SCC 513 (presided over by the same learned judge).
88 (2011) 13 SCC 261.
89 (2011) 13 SCC 261.
90 (2012) 3 SCC 495, 508.

> reserved for an assent of the President and admittedly received the same on 17.10.1983 which was published in the Madhya Pradesh Gazette Extraordinary dated 12.10.1983. Therefore, the requirement of Article 254(2) of the Constitution was satisfied. Thus, the M.P. Act of 1983 prevails in the State of Madhya Pradesh. Thereafter, the AC Act, 1996 was enacted by Parliament repealing the earlier laws of arbitration of 1940. It has also been noted that the AC Act, 1996 saves the provisions of the M.P. Act, 1983 under Sections 2(4) and 2(5) thereof. Therefore, there cannot be any repugnancy…

Following the ratio laid down by the Constitution Bench in *M. Karunanidhi* v. *Union of India,*[91] Ganguli J held thus:

> In the instant case the latter Act made by Parliament i.e. the AC Act, 1996 clearly showed an intention to the effect that the State law of arbitration i.e. the M.P. Act should operate in the State of Madhya Pradesh in respect of certain specified types of arbitrations which are under the M.P. Act, 1983. This is clear from Sections 2(4) and 2(5) of the AC Act, 1996. Therefore, there is no substance in the argument of repugnancy and is accordingly rejected.

Gyan Sudha Misra J delivered a separate judgment "concurring and endorsing the reasonings assigned in the judgment of Ganguli J" and added thus:

> I propose to add and thus partly dissent on certain aspects involved in the instant appeal which would have a bearing on the relief granted to the respondent by the High Court which appointed an arbitrator under the Arbitration and Conciliation Act, 1996 for adjudication of the dispute in regard to cancellation of the works contract between the contesting parties therein.

Construing the provisions of the M.P. Act of 1983, Misra J held thus:

> It is no doubt true that if the matter were before an arbitrator appointed under the Arbitration and Conciliation Act, 1996 for adjudication of any dispute including the question regarding the justification and legality as to whether the cancellation of works contract was legal or illegal, then the said arbitrator in view of the ratio of the judgment of the Supreme Court in *Maharshi Dayanand University v. Anand Coop. L/C Society Ltd.*[92], as also in view of the persuasive reasoning assigned in the judgment and order reported in *Heyman v. Darwins Ltd.*[93] would have had the jurisdiction to adjudicate the dispute regarding the justification and legality of cancellation of works contract also. But the same cannot be allowed to be raised under

91 (1979) 3 SCC 431
92 (2007) 5 SCC 295
93 1942 AC 356 : (1942) 1 All ER 337 (HL)

> the M.P. Act of 1983 since the definition of "works contract" unambiguously lays down in explicit terms as to what is the nature and scope of "works contract" and further enumerates the specific nature of disputes arising out of the execution of works contract which would come within the definition of a "works contract". However, the same does not even vaguely include the issue or dispute arising out of cancellation and termination of contract due to which this question, in my considered opinion, would not fall within the jurisdiction of the M.P. State Arbitration Tribunal so as to be referred for adjudication arising out of its termination.

Finally, an agreed order was passed by the two judge bench which reads thus:

> In view of some divergence of views expressed in the two judgments delivered today by us, the matter may be placed before the Hon'ble Chief Justice of India for constituting a larger Bench to resolve the divergence.

It is unfortunate that the dissenting opinion failed to consider one of the basic foundations on which the law of arbitration is laid *i.e*., "the arbitration clause constituted a self contained contract collateral or ancillary to the underlying or main contract."[94] The doctrine of separability treats the arbitration clause as having a life of its own, severable from the substantive contract and capable of surviving it so as to give the arbitrators continuing jurisdiction not only over disputes arising from events happening whilst the contract was still in existence, but also upon whether the contract has come to an end, and if so, with what consequences to the parties.[95]

VI PAYMENT OF INTEREST

Section 31(7)(b) provides that "a sum directed to be paid by an arbitral award shall, unless the award otherwise direct, carry interest at the rate of eighteen per centum per annum from the date of the award to the date of payment."

In *H.P. Housing & Urban Development Authority* v. *Ranjit Singh Rana*[96] as certain disputes arose between the parties out of an agreement concerning the construction of a residential complex, an arbitrator was appointed to adjudicate upon the dispute. The award was made on 12.08.1998. A challenge to the award under section 34(3) of the 1996 Act was accepted by the high court and the matter was remanded back to the arbitrator for giving reasons in support of the award. After the remand, the arbitrator passed another award on 14.02.2001. The appellant again challenged the award, but deposited the entire amount due under the award with the High Court on 24.05.2001. The application for setting aside the award was rejected by the single judge and intra court appeal remained pending. Meanwhile,

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94 David St. John Sutton & Judith Gill, *Russel on Arbitration*, at 30 (Sweet and Maxwell 2003).

95 Sir Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration*, at 7 (2nd edn. Butterworth 1989).

96 (2012) 4 SCC 505.

the respondent filed a petition for the execution of the award on 12.08.2008, to which the appellant filed its objection. The question before the high court was whether the respondent was entitled to interest at 18% per annum from the date of the award, *i.e*. 14.02.2001 till the date of the actual payment. The high court held that the respondent was entitled to post award interest at 18% per annum from the date of the award till the date of the actual payment. This order was challenged before the Supreme Court.

The question for determination before the Supreme Court was a limited one: what was the date of actual payment? In other words, whether the "deposit of the entire award amount by the appellants on 25.09.2001 into the high court amounts to payment to the respondent and the appellant's liability to pay interest at 18% from the date of the award ceased from that date." It was not in dispute that the entire amount due under the award had been deposited by the appellant before the High Court on 24.03.2001. Holding that "payment in terms of an award signifies satisfaction of the award," the court speaking through R.M. Lodha J., held: [97]

> the word "payment" may have different meaning in different context but in the context of Section 37(1)(b); it means extinguishment of the liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the court is nothing but a payment to the credit of the decree-holder. In this view, once the award amount was deposited by the appellants before the High Court on 24.05.2011, the liability of post-award interest from 24.05.2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond 24.05.2011.

VII PERIOD OF LIMITATION FOR CHALLENGING AN AWARD

Service of award on the agent of a party

Whether "the service of an arbitral award on the agent of a party amounts to service on the party itself" was the question for determination before the Supreme Court in *Benarsi Krishna Committee* v. *Karmyogi Shelters (P) Ltd.*[98] The question assumed significance as section 34 (3) provides that "an application for setting aside may not be made after three months have elapsed from the date *on which the party making that application had received the arbitral award*"

The appellant therein had entered into a collaboration agreement with the respondent for conversion of a cinema compound owned by the appellant into a commercial complex. As a dispute arose between the parties, an arbitrator was appointed. The arbitrator in his award held that the respondent was guilty of the breach of contract.

The copy of the arbitral award, duly signed by the arbitrator, was received by the counsel of the respondent on 13.05.2004. However, the application for setting aside the arbitral award, under section 34, was filed after a delay of 9 months on

97 *Id.* at 508.
98 (2012) 9 SCC 496.

03.02.2005. The respondent contended that even though its counsel had received the award much earlier, it had received a copy of the award only on 15.12.2004 and, hence, the application was well within the prescribed period of limitation.

The single judge of the high court dismissed the respondent's application as barred by time, and held that the expression 'party' in section 31(5) of the Act, also included an agent of the party. In appeal, the division bench reversed the decision. The division bench held that there was no justifiable reason to depart from the definition of the expression "party" under section 2(i)(h) of the Act which only meant "a party to the arbitration agreement."

In appeal before the Supreme Court, it was contended on behalf of the appellant that "service of the award on the advocate for the party was sufficient compliance" with the provisions of section 34(3) of the Act. Accepting the decision of the division bench of the high Court, the court speaking through Kabir J. (as he then was) held thus:[99]

> …it is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. The expression 'party', as defined in Section 2(1)(h) of the 1996 Act, clearly indicates a person who is a party to an arbitration agreement. The said definition is not qualified in any way so as to include the agent of the party to such agreement. Any reference, therefore, made in Section 31(5) and Section 34(2) of the 1996 Act can only mean the party himself and not his or her agent, or advocate empowered to act on the basis of a vakalatnama. In such circumstances, proper compliance with Section 31(5) would mean delivery of a signed copy of the arbitral award on the party himself and not on his advocate, which gives the party concerned the right to proceed under Section 34(3) of the aforesaid Act.

In the court's opinion, since a "signed copy of the award had not been delivered to the party itself and the party obtained the same" only on 15.12.2004, the petition under section 34 of the Act filed on 03.02.2005, was within the period of limitation contemplated under section 34(3).

Application of the limitation act to arbitrations and proceedings in court

Though section 34(3) provides that "an application for setting aside an arbitral award may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award," the proviso thereto empowers the court to entertain the application within a further period of 30 days, but not thereafter[100] if it is satisfied that "the applicant was prevented by sufficient cause from making the application within the said period of three months."

In *Assam Urban Water Supply and Sewerage Board* v. *Subash Projects and Marketing Limited*[101] though the appellant received the arbitral award on 20.08.2003,

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99 *Id.* at 502.

100 See *Union of India* v. *Popular Construction Co*. (2001) 8 SCC 470 para 12 ("In our opinion, this phrase would … bar the application of s. 5 of that Act.)

101 (2012) 2 SCC 624.

no application for setting aside the arbitral award had been made within the three month period prescribed under section 34(3), which period expired on 26.11.2003. The district court had christmas vacations from 25.12.2003 to 01.01.2004. Immediately upon the reopening of the court, the appellant made an application for setting aside the award. The question for consideration by the court was whether the period during which the district court remained closed for the vacation should be excluded for calculating the extended period of 30 days in terms of section 4 of the Limitation Act, 1963, which provides that "where the prescribed period for any … application expires on a day when the court is closed, the … application may be … made on the day when the court reopens." In other words, the question was whether the appellants were entitled to extension of time under section 4 of the 1963 Act. If section 4 applied to the application filed under section 34, the appellant's application would have been maintainable. The crucial words in the section were "prescribed period", which were defined in section 2(j) of the 1963 Act, as the "period of limitation computed in accordance with the provisions *of this Act"*. The expression "period of limitation" was defined by the same section to mean the "period of limitation prescribed for any … application *by the Schedule."*

The Supreme Court noticed that in terms of section 43(1) of the 1996 Act, the 1963 Act applied to arbitrations as it applies to proceedings in court "save and except to the extent its applicability has been excluded by virtue of the express provision contained in section 34(3) of the 1996 Act."[102]

Having regard to the scheme of the 1963 Act, the court speaking through Lodha J. held thus:[103]

> Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside an arbitral award is three months. The period of 30 days mentioned in the proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the 'period of limitation' and, therefore, not the 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the "period of limitation" or, in other words, the 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.

It appears that the opening words "an application for setting aside may not be made" in section 34(3) of the 1996 Act escaped the attention of the court while interpreting provisions in the context of sections 2(j) and 4 of the 1963 Act. The words "may not be made" in sub-section (3) of section 34 of the Act before the words "after three months have elapsed" clearly suggests a possibility of an application for setting aside not being filed after three months have elapsed from

102 *Id.* at 627-28.
103 *Id.* at 627-28.

the date on which the party had received the arbitral award. It is in that context that the proviso empowers the court to entertain an application for setting aside an arbitral award even beyond the period of three months "if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months."

The last three words "but not thereafter" in the proviso to section 34(3) are crucial as the period could not be extended beyond the further period of 30 days. Section 4 of the 1963 Act prescribes the general rule for computation of "prescribed period" for any application. When the court is closed, the expression "prescribed period" as defined in section 2(j) of the 1963 Act means the period of limitation computed in accordance with the provisions of that Act, which includes section 4 thereof. Though the court rightly observed that in terms of section 43(1) of the 1996 Act, the 1963 Act applies to arbitrations as it applies to court proceedings "save and except to the extent its applicability has been excluded by virtue of the expressed provisions contained in section 34(3) of the 1996 Act", it is respectfully submitted that only the last three words "but not thereafter" in the proviso to section 34(3) of the 1996 Act would fall within the accepted categories mentioned by the court.

In an earlier decision, a bench of two judges of the Supreme Court construing the phrase "but not thereafter" appearing in the proviso to section 34(3) ruled that "had the proviso to section 34 merely provided for a period within which the court would exercise its discretion, that would not have been sufficient to exclude sections 4 to 24 of the Limitation Act because, "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of section 5."[104]

There appears to be no justifiable reason for treating the period of 3 months stipulated in sub-section (3) of section 34, differently from the extended period of 30 days stipulated under the proviso thereto.

By this ruling, the court had deprived itself of its power and discretion to apply the extended period of 30 days, even though in a given case, the court may be satisfied that the applicant had been prevented by sufficient cause from making the application, being under the impression that like all other litigants, the applicant would be entitled to the benefit of excluding the days when the court remained closed. It raises the larger question as to whether "the court should adopt such a construction as would not render the court powerless in a situation in which ends of justice demand relief being granted."[105]

Since it is open to a litigant to satisfy the court that during the entire period of 30 days after the expiry of the period of 3 months from the date of the award, he was prevented by sufficient cause from approaching the court, it would undoubtedly cause great hardship to the litigant if due to fortuitous circumstances, the period of three months expires within the declared holidays of the court, when he could not file the application for setting aside the arbitral award.

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104 (2001) 8 SCC 470, 473 citing *Mangu Ram* v. *Municipal Corpn. of Delhi*, (1976) 1 SCC 392.

105 See *Ganesh Prasad Sah Kesari* v. *Lakshmi Narayan Gupta* (1985) 3 SCC 53.

VIII CHALLENGE TO AN ARBITRAL AWARD

In *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran,*[106] the appeal before the Supreme Court involved consideration of the following questions:

(i) firstly, whether under the relevant clause 9.3 of the terms and conditions of the contract between the parties, the appellant was right in deducting the service tax from the bills of the respondent, and
(ii) secondly, whether the interpretation of this clause and the consequent award rendered by the arbitrator was against the terms of the contract and therefore illegal, as held by the High Court, or whether the view taken by the arbitrator was a possible, if not a plausible view.

The appellant, a government of India undertaking, was engaged in the business of manufacturing of steel products and pig iron for sale in the domestic market as well as for exports. The respondent which was carrying on the business of transportation of goods was appointed by the appellant as the handling contractor in respect of the appellant's iron and steel materials at their stockyard at Kalamboli, Navi Mumbai, under a contract executed between the parties on 17.06.1998. Clause 9.3, the interpretation of which was the subject matter of the contentions between the parties in all the fora, read thus: [107]

> 9.3. The contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the tax authorities for the account of the contractor and the company shall provide the contractor with required tax deduction certificate.

Service tax was introduced for the first time under chapter V of the Finance Act, 1994. The Act provided for the levy of service tax at 5% of the value of the taxable services and only three services, namely, any service provided to an investor by a stock broker, to a subscriber by a telegraph authority and to a policy holder by an insurer carrying on general insurance business, was considered taxable. In terms of the Act, it was the provider of the service who was responsible for collecting the tax. In 1997, fifteen more services were brought within the ambit of "taxable service", including *inter alia* service to a client by clearing and forwarding agents.

Service tax on "clearing and forwarding agents" was brought into force *w.e.f.* 16.11.1997. The Service Tax Rules, 1994 as amended in 1997, made the customer or clients of clearing and forwarding agents and of goods transport operators as assessees. These amended rules were, however, struck down by the Supreme Court in *Laghu Udyog Bharti* v. *Union of India*[108] as ultra vires the Act. The court held that "service tax is levied by reason of the services which are offered" and "the

106 (2012) 5 SCC 306.
107 *Id.* at 310.
108 (1999) 6 SCC 418.

imposition is on the person rendering the service." To overcome this decision, Act 32 of 1994 was amende d with retrospective effect from 16.07.1997 by the Finance Act, 2000.

The validity of section 116 of the Finance Act 2000 by which Act 32 of 1994 was amended retrospectively *w.e.f.* 16.07.1997 was challenged by the recipients of the services rendered by the goods transport operators and clearing and forwarding agents in a batch of writ petitions filed before the Supreme Court. The court in its decision in *Gujarat Ambuja Cements Ltd. v. Union of India*[109] upheld the validity of the Act, briefly noting the circumstances that led to the fresh challenge to the validity of the Finance Act of 2003 by the customers or the clients of the service providers.[110] The court upheld the validity of Sections 116 and 117 of the Finance Act observing thus: [111]

> By sections 116 and 117 of the Finance Act, 2000, the tax is sought to be levied on the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to them.

By enacting sections 116 and 117 of the Finance Act, the decision of the Court in *Laghu Udyog Bharati's* case[112] had been legislatively overruled. The court held thus:

> there is thus no question of the Finance Act, 2000 overlooking the decision of this Court in *Laghu Udyog Bharati's case* as the law itself has been changed. The legislature is here to remove infirmities retrospectively and make any imposition of tax declared invalid, valid. This has been the uniform approach of this court. … On the first question we hold that the law must be taken as having always been as is now brought about by the Finance Act, 2000.

The appellant deducted 5% tax on the bills of the respondent for the period 30.11.1997 to 06.08.1999. The respondent, however, refused to accept the deductions and raised a dispute for arbitration. These disputes were referred to a sole arbitrator.

Having regard to the terms and conditions between the parties and the nature of service provided by the respondent, the arbitrator held the respondent to be a "clearing and forwarding agent" and hence, subject to the service tax regime. As to the liability to pay the tax, the learned Arbitrator held as under: [113]

> It is the respondent who is the assessee. It is also true that liability is of the respondent to pay the tax. But then, under the contract, under Clause 9.3 to be more precise, it was agreed that it would be the claimant who shall bear 'all taxes, duties and other liabilities' which accrue or become payable 'in

109 (2005) 4 SCC 214.
110 *Id.* at 224.
111 *Id.* at 232-233.
112 (1999) 6 SCC 418.
113 *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran*, (2012) 5 SCC 306, 313.

> connection with the discharge of his obligation'. Service tax was one such tax/duty or a liability which was directly connected with 'the discharge of his obligation' as the clearing and forwarding agent. It is this contractual obligation which binds the claimant and though under the law it is the respondent who is the assessee, it can and rightly did deduct the service tax from the bills of the claimant in terms of the said contractual obligation, the validity and legality of which has not been challenged before me.

This arbitral award was challenged by the respondent under section 34 before the high court of Bombay. The single Judge allowed the petition and set aside the arbitral award. The judge held the appellant to be an assessee and liable to pay the tax under the Finance Act, 1994. In the opinion of the judge, "the purpose of clause 9.3 is not to shift the burden of taxes from the assessee who is liable under the law to pay the taxes to a person, who is not liable to pay the taxes under the law." The division bench in appeal affirmed the decision of the single judge and held that it was the appellant's obligation to pay the service tax and not that of the respondent.

The appellant approached the Supreme Court contending that as the recipient of the service it was the assessee under the service tax law. However, there was no prohibition in the law in shifting the burden of tax liability as was sought to be done under clause 9.3 of the contract. The appellant contended that the position was similar to that of a case of sales tax where the assessee could shift the burden on to the customer. The appellant further contended that a decision of the arbitrator on the interpretation of the contract was not open to review by the courts even if it was erroneous.

The respondent, however, resisted the arguments of the appellant contending that clause 9.3 could not be read to imply a right to shift the tax liability. It was submitted that the appellant was the assessee for the payment of service tax. Clause 9.3 merely laid down that the respondent had to pay all taxes, which it was otherwise required to pay, and that the appellant was entitled to deduct only such taxes which it was so required by the law to deduct.

The court found much weight in the appellant's submissions and in its view "the rationale behind clause 9.3 was that the [appellant] as a public sector undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor." As regards the issue of shifting of tax liability, the court held the "service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax." The court was of the view thus: [114]

> The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between the two of them. There was nothing in law to prevent the appellant

114 *Id.* at 319.

> from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

The court held that if clause 9.3 was to be restricted to mean that the respondent would be liable only to honour its own tax liabilities, then there would have been no need for such a provision as the respondent would have otherwise also been liable for it. The court also accepted the arguments of the appellant that it was a "conventional and accepted commercial practice" to shift the tax liability to the contractor in such situations. The court considered thus: [115]

> The respondent as the contractor had to bear the service tax under Clause 9.3 as the liability in connection with the discharge of his obligations under the contract. The appellant could not be faulted for deducting the service tax from the bills of the respondent under Clause 9.3, and there was no reason for the High Court to interfere in the view taken by the arbitrator which was based, in any case on a possible interpretation of Clause 9.3.

It appears that though the decision in *Gujarat Ambuja Cements Ltd.*[116] was cited and relied upon by the respondent, neither the scope of the decision nor the declaration of law made therein to the effect that "the law must be taken as having always been as is now brought about by the Finance Act, 2000" had been considered, particularly in the context of determining whether in law, the liability to pay service tax fell on the appellant or the respondent which had significant bearing on the interpretation of clause 9.3 of the contract.

What appears to have weighed with the court to accept the interpretation of clause 9.3 as rendered in the award was its understanding that prior to the amendment of Act 32 of 1994 by the Finance Act, 2000, the liability to pay service tax was "*on the service providers*"[117] and that "after the amendment of 2000, the liability to pay service tax is on the appellant as the assessee, the liability arose out of the service rendered by the respondent to the appellant."[118]

It is with that understanding the court observed thus: [119]

> Clause 9.3 will have to be held as containing the stipulation of the contractor accepting the liability to pay the service tax, since the liability did arise out of the discharge of his obligations under the contract. It appears that the rationale behind Clause 9.3 was that the petitioner as a pubic sector undertaking should be thereby exposed only to a known and determined liability under the contract, and all other risks regarding taxes arising out of the obligations of the contractor are assumed by the contractor
>
> If that be the intention of the parties for inserting Clause 9.3 in the contract as

115 *Id.* at 321.
116 *Id.* at 316.
117 *Id.* at 319.
118 *Ibid.*
119 *Ibid*.

found by the court, it is difficult to reconcile the subsequent finding of the court that:

> as far as the submission of shifting of tax liability is concerned, as observed in para 9 of Laghu Udyog Bharati, service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax.

And the further observation to the effect that:

> If this clause (Clause 9.3) was to be read as meaning that the respondent would be liable only to honour *his own tax liabilities*, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document executed by the parties, since the respondent would be otherwise also liable for the same.

However, as the court rightly goes on to hold that even if clause 9.3 was capable of more than one interpretation, the view taken by the arbitrator was clearly a possible one, if not a plausible one and it was not open to the respondent to contend that the arbitrator had travelled outside his jurisdiction.

IX APPLICATION OF PART I TO ARBITRATION HELD OUTSIDE OF INDIA

Before analyzing the magnum opus of Indian Arbitration in *Bharat Aluminium Co.*,[120] it would be desirable to first discern the scope of the 1996 Act, as eventually enacted by the Parliament. It is well accepted that the law of arbitration is founded on the principle of party autonomy. Wherever the 1996 Act seeks to depart from this principle, it has expressly so provided. The Act recognizes party autonomy in all international commercial arbitrations at least in respect of (a) the law governing the substance of the dispute; (b) the law governing the arbitration agreement; and (c) the law governing the conduct of arbitration.

Section 28 expressly recognises party autonomy in the choice of the law applicable to the substance of the dispute by providing in clause (b) (i) that "the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute." In the absence of the parties designating the rules of law, the default provision in clause (b) (iii) operates, which provides that "failing any designation of the law under clause (a)[121] by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate, given all the circumstances surrounding the dispute"

With regard to the law applicable to the arbitration agreement, there is no provision which expressly recognizes the principle of party autonomy. However,

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120 *Supra* note 21 at 552.

121 The reference to cl. (a) seems to be an obvious error as (a) only applies to arbitrations "other than an international commercial arbitration." The reference should instead be deemed to be to cl. (b) (i).

section 34(2)(a)(ii), by implication, accepts that the parties can choose the law which would govern the arbitration agreement, as it provides that an arbitral award may be set aside by the court if "the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force." On the other hand, section 34(b) (i) does not respect party autonomy if the agreement to arbitration is not in consonance with the fundamental principles of Indian Law as it provides that an arbitral award may be set aside by the court if it finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force"[122] It must be pointed out that unlike what the Model Law intends, this provision does not refer to the "law for the time being in force in India" but only to the "law for the time being in force." Does the absence of the words "in India" indicate that the court may be required to decide the issue of arbitrability as per the law chosen by the parties to govern the arbitration agreement? In contrast, section 48 (appearing in part II of the Act) under sub section (2) (a) recognises that the enforcement of a foreign award may be refused if the "subject matter of the difference is not capable of settlement by arbitration under the law of India."

As regards the rules applicable to the conduct of the arbitration proceedings, section 19(2) of the Act expressly provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings." Sub section (3) provides that, failing an agreement between the parties, the arbitral tribunal may "conduct the proceedings in the manner it considers appropriate." Moreover, in terms of section 20 "the parties are free to agree on the place of arbitration." Sub-section (2) is the default clause and provides that failing any agreement between the parties, "the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties." An implied recognition of the parties' freedom to choose the rules of procedure applicable to the conduct of the proceedings may also be found in section 34 (a) (v) which *inter alia* provides that an arbitral award may be set aside by the court if "the arbitral procedure was not in accordance with the agreement of the parties."

Thus, so far as international commercial arbitration is concerned, the parties are free to choose (a) the law governing the substance of the contract; (b) the law governing the arbitration agreement; and (c) the law governing the conduct of arbitration.

Part II of the Act, which deals with recognition and enforcement of foreign awards, under section 48 provides that "enforcement of a foreign award may be refused" if the award 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. It is evident that this provision recognizes that a foreign award may be set aside or suspended in two jurisdictions: the jurisdiction "in which" the award was made or the jurisdiction "under the law of which" the award was made.

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122 It is interesting to note that the words "in India" after the words "law for the time being in force" seem to be missing, which, had the section been a true adoption of the Model Law, should have been there.

It is therefore open to the contracting parties to specify that the law applicable to all the three aspects in respect of an arbitration be the Indian law and that no part of the law of the country in which the arbitration is held be *ipso facto* applicable to the arbitration proceedings unless the laws of that country contain express provisions overriding the choice of the parties.

Arbitrations held outside of India

In *Bhatia International* v. *Bulk Trading S.A.*,[123] the Supreme Court had held that the provisions of part I of the 1996 Act would apply even to international commercial arbitrations held outside India "unless the parties by agreement, express or implied, exclude all or any of its provisions." This decision arose out of an application, filed under section 9 seeking interim reliefs, made by a foreign party before an Indian court, during the pendency of arbitration proceedings outside India. The decision had far reaching repercussions on the law of arbitration in India. Though the view adopted by the court gave greater autonomy to the parties to choose the system of law they wished to be governed by, it was contended that the UNCITRAL Model Law, on which the 1996 Act was based, did not contemplate such autonomy. It is suggested that the Model Law, in adopting the territorial principle, accepted that the parties should "be precluded from choosing the law of another State as the law applicable to the arbitration procedure"[124] and that the applicable law to the arbitration proceedings should depend on the place of arbitration.[125] However, no express provision was made in the Model Law precluding the parties from "choosing the law of another State" as the law applicable to arbitration proceedings.

The decision in *Bhatia International*[126] was taken to its logical conclusion in *Venture Global Engineering*[127] wherein it was held that a clause in an agreement providing that the parties "shall at all times act in accordance with the companies Act and other applicable Acts/rules being in force, in India at any time" was an indication that the parties had not intended to exclude Part I of the 1996 Act. The agreement therein was "governed by the laws of the State of Michigan, United States" and provided that the arbitration be conducted in terms of the LCIA Rules, in London. Adopting the reasoning in *Bhatia International*,[128] the court observed that "part I of the Act is applicable to the award in question even though it is a

123 (2002) 4 SCC 105.

124 Report of UNCITRAL on the work of its 18th Session in Vienna between 3-6-1985 to 21-6-1985, as cited in *Bharat Aluminium Co.* case at 552, 596.

125 The Model Law is only a prototype law as distinguished from a Convention which requires verbatim ratification from the member states. As one commentator notes "it is obvious that the ultimate goal for UNCITRAL and also for uniformity in international commercial arbitration in general, is for a state to adopt the Model Law verbatim, ideally referring to the UNCITRAL *travaux preparatoires* for interpretation. *Not surprisingly, this goal remained an illusion, and in reality a number of different types of adoption emerged …*" See Dr Peter Binder, *International Commercial Arbitration And Conciliation in UNCITRAL Model Law Jurisdictions* at 12 3rd edn. (2010).

126 (2002) 4 SCC 105.

127 *Supra* note 19.

128 (2002) 4 SCC 105.

foreign award" and held the application under section 34 of the 1996 Act challenging the award was maintainable.

Over the years there has been much criticism of these decisions and even calls for amending the Act to make the mutual exclusivity of the two parts of the Act more evident. However, despite some efforts by the executive government no fruitful results could be achieved.

Ultimately, a learned judge of the Supreme Court expressed his doubt as to the correctness of those decisions resulting in the matter being placed before the chief justice of India.[129] Incidentally, the Judge who had expressed reservation as to the correctness of these decisions had, while presiding in the Allahabad High Court[130] held that section 9 applied also to proceedings under part II of the 1996 Act, as, in his opinion, "if section 9 is treated as inapplicable to part II, it will make section 45 too harsh."

In view of the difference of opinion amongst the judges the matter was finally referred to a Constitution bench.[131] Before the Constitution bench, elaborate arguments were addressed as to the application of part I of the 1996 Act in respect of arbitrations held outside India. The Constitution Bench in its judgment[132] rendered on 6th september, 2012, differing with the conclusions recorded in the two earlier judgments of the court in *Bhatia International* and *Venture Global Engineering* held thus: [133]

> Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996.
>
> The court further held thus:
>
> In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.[134]
>
> However, in order to do complete justice, the court directed that: [135]
>
> the law now declared by this court shall apply prospectively, to all the arbitration agreements executed hereafter.

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129 *Supra* note 21 at 649.
130 *LML India* v. *Union of India* 1998 (4) AWC 658.
131 *Supra* note 21 at 648.
132 *Supra* note 124.
133 *Id.* at 647.
134 *Ibid.*
135 *Id.* at 648.

Scope of part I of the Act.

The crux of the arguments in support of the proposition that the 1996 Act was not based on the territorial principle centered on the interpretation of section 2(2) of the Act. It was contended that the 1996 Act had not adopted or incorporated the provisions of the model law but had only "taken them into account." It was pointed out that one of the strongest departures made by the Act from the model law was in section 2(2), which omitted the word 'only' found in the corresponding article 1(2) of the model law. The absence of the word, it was contended, signified that though part I compulsorily applied if the place of the arbitration was India, but it did not mean that part I would not apply if the place of arbitration was outside India.

The court traced the genesis of the word 'only' found in article 1(2) of the model law from the discussions held "on the scope of application of article 1" at UNCITRAL.[136] These discussions showed that "it was felt necessary to include the word "only" in order to clarify that except for Articles 8, 9, 35 and 36, which would have extra-territorial effect if so legislated by the State, the other provisions would be applicable on a strict territorial basis." The court observed that the word 'only' "would have been necessary in case" the exceptions mentioned in article 1(2) had also been incorporated in section 1(2). As the Parliament did not consider it necessary to incorporate the exceptions found under article 1(2), "the word 'only' would have been superfluous."

In coming to this conclusion, the court found support from the fact that India was "not the only country which has dropped the word 'only' from its national arbitration law." The court emphasised that the word 'only' was also missing from the Swiss Private International Law Act, 1987[137] and the English Arbitration Act, 1996[138].

The special case of statutory and other arbitrations.

Reference was also made to sections 2(4) and 2(5) of the Act, both of which, it was submitted, applied to all arbitrations, irrespective of where they were held. Section 2(4) relates to statutory arbitrations and provides that part I "shall apply to every arbitration under any other enactment for the time being in force … except in so far as the provisions of this part are inconsistent with that other enactment or with any rules made there under."[139] It was contended that the use of the phrase "every arbitration" in the section implied that it applied to all statutory arbitrations whether held in India or outside India. Rejecting this contention the court held that

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136 At the 330th meeting of the UNCITRAL on Wednesday, 19th June, 1985.

137 Art. 176(1) of that Act provides that "the provision of this chapter shall apply to any arbitration if the seat of the Arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."

138 S. 2(3) of the English Act provides inter alia that the powers conferred by S. 43 & 44 of the Act shall apply "even if the seat of arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined. S. 44 expressly authorizes the courts in England inter alia to grant interim injunctions or appoint a receiver in relation to arbitration proceedings."

139 Except SS. (1) of s. 40, 41 and 43.

"there seems to be no indication at all in section 2(4) that can make Part I applicable to statutory or compulsory arbitrations which take place outside India."

Section 2(5) of the Act provides that "save in so far as is otherwise provided … in any agreement in force between India and any other country or countries this part shall apply to all arbitrations and all proceedings relating thereto."[140] This provision primarily dealt with arbitration between sovereign states and such provisions for arbitration are commonly found in almost all bilateral investment treaties. The plain language of this provision seems to indicate that such arbitration, unless "otherwise provided," shall be governed by part I of the Act irrespective of the place of arbitration. In the court's opinion "the phrase 'all arbitrations' in section 2(5) means that part I applies to all where Part I is otherwise applicable*"* and that "there is no indication in Section 2(5) that it would apply to arbitrations which are not held in India."

With great deference, it is submitted that the reasoning of the court moves in circles and does not take into account the scope of the comprehensive expression that "this Part shall apply to all arbitrations and to all proceedings relating thereto" appearing in Section 2(5). The observations of the court regarding the interpretation of sub-section (5) of section 2 seem to be based on an apprehension of inconsistency between sub-section (5) and sub-section (2). The language of sub-section (5) seems to indicate that unlike sub-section (2), the arbitrations contemplated by this sub-section, unless otherwise provided in the agreement in force between India and any other country, shall be subject to part I of the Act (irrespective of whether they are held in India or outside India). This, however, may not affect the interpretation of sub-section (2).[141] In its zeal to avoid an apprehended inconsistency, it is submitted that the court has unfortunately strayed into an arena that led to its interpretation of sub-section (4) and (5) of section 2 of the Act, patently contrary to the plain language employed therein.

What is a domestic award?

Section 2(7) of the Act provides that "an arbitral award made under this part shall be considered as a domestic award." This provision, the court held, did not relax the territorial principle adopted by the 1996 Act. The object of section 2(7), the court pointed out, "is to distinguish the domestic award covered under part I of the" Act "from the 'foreign award' covered under part II of the" Act. The provisions, in the court's view, "highlights, if anything a clear distinction between part I and part II as being applicable in completely different fields and with no overlapping provisions."

Section 2(7), it is submitted, must be read along with section 2(2). A domestic award would be one which arises out of proceedings "where the place of arbitration is in India." A domestic award could therefore arise from an arbitration held in

140 This SS. is subject to SS. (4) of s. 2.

141 In *Automobile Transport* v. *State of Rajasthan* [1963] 1 SCR 525 the Supreme Court had noted that "it would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms." (S.K. Das J.)

India where none of the parties to the arbitration are of foreign nationality or an International Commercial Arbitration where at least "one of the parties" is a foreign national or for that matter an arbitration where none of the parties to the arbitration is Indian, so long as the proceedings are held in India. In fact the nationality of the parties hardly makes any difference to the determination of the question as to whether part I would apply or not.

The reasoning of the court suggests (though the court expressed no opinion on this point) that two Indian parties can opt out of the provisions of part I of the Act with a view to defeat the Indian courts' jurisdiction over the dispute, if the place of arbitration chosen by them is outside India. To what extent, however, this proposition can be stretched is anybody's guess.

Whether seat is relevant in domestic arbitrations.

It had been contended that the 1996 Act was primarily subject matter centric and not exclusively seat centric. Seat was not, therefore, the centre of gravity so far as the 1996 Act was concerned. In support of this contention, reference was made to section 2(1)(e) of the Act, which defined the expression "court" to mean: "the Principal Civil Court of Original Jurisdiction in a district … having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit…"

It was contended that this provision recognized jurisdiction of Indian courts even in respect of an arbitration held outside India, if a part of the cause of action arose in India. Rejecting the argument, having regard to the use of the phrase "subject matter of the arbitration" and the "subject matter of a suit" in the section 2(e), the court held that "the legislature has intentionally given jurisdiction to two courts *i.e.* the court which would have jurisdiction where the cause of action" arose and the court "where the arbitration takes place" (irrespective of whether the cause of action had arisen there). Overlooking that the 'seat' of arbitration was not decisive of the competence of the courts in arbitrations held in India, the court gave an illustration of the application of this interpretation thus: [142]

> For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the courts of Delhi being the courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the courts would have jurisdiction i.e. the court within whose jurisdiction the subject-matter of the suit is situated and the courts within the jurisdiction of which the dispute resolution i.e. arbitration is located.

142 (2012) 9 SCC 552, 606.

These observations of the court have rightly come under immense criticism from certain circles.[143] The model law, on which the 1996 Act is based, was intended to apply only to "International arbitrations" and hence, it may not be appropriate to incorporate the underlying principles of the Model Law to all aspects of "domestic arbitrations."

Party's choice as to the application of the 1996 Act

As to the effect of a clause in an arbitration agreement providing that the arbitration would be governed by part I of the Act even in respect of the arbitration proceedings to be held outside India, the court held thus: [144]

> …if the arbitration agreement is found or held to provide for a seat/place of arbitration outside India, then the provision that the Arbitration Act, 1996 would govern the arbitration proceedings, would not make Part I of the Arbitration Act, 1996 applicable or enable the Indian courts to exercise supervisory jurisdiction over the arbitration or the award. It would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the English procedural law/curial law. This necessarily follows from the fact that Part I applies only to arbitrations having their seat/place in India.

In the court's opinion, "if the agreement is held to provide for a "seat"/"place" outside India, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement purports to provide that the Arbitration Act, 1996 shall govern the arbitration proceedings." After an analysis of all the leading English decisions governing the field, the court concluded "that the choice of another country as a seat of arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitration will apply to the proceedings."

To what extent the principles of party autonomy survive in view of these observations, is a question which remains to be ascertained. Since the decision only lays down the principles in general terms, it did not delve into how to determine what the mandatory provisions of the law of the place of arbitration would be and to what extent the provisions of part I, which have been incorporated in an arbitration agreement, survive.

Though the court rejected the contention that Section 28 is "another indication" of the intention of Parliament that part I of the Act was not confined to arbitrations held in India, its analysis of the provisions under section 28 appears to be somewhat ambiguous when it held thus: [145]

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143 V. Niranjan and Shantanu Naravane, "Bhatia International Rightly Overruled: The Consequences of Three Errors in BALCO" (2012) 9 SCC J 6.

144 (2012) 9 SCC 552, 618.

145 *Id.* at 619.

> The section merely shows that the legislature has segregated the domestic and international arbitration. Therefore, to suit India, conflict of law rules have been suitably modified, where the arbitration is in India. This will not apply where the seat is outside India. In that event, the conflict of law rules of the country in which the arbitration takes place would have to be applied.

The court has, however, rejected the contention that the expression "where the place of arbitration is situated in India" appearing in section 28 was indicative of the fact that the Parliament decided to confer extra territorial operation to part-I of the Act.

Scope of part II of the act

To emphasize that part I and part II of the Act were overlapping, it was contended that part II of the Act was only supplementary since "part I prescribes the entire procedure for the conduct of an arbitration and part II is only to give recognition to certain foreign awards," and hence, the two parts have to be read harmoniously in order to make the Indian arbitration law a complete code." It was contended that the provisions of part I, which are necessary for the conduct of arbitration, are not to be found in part II.

Dealing with these contentions, the court pointed out that regulation of arbitration consists of four steps. (a) Commencement of arbitration; (b) conduct of arbitration; (c) challenge to the award; and (d) recognition or enforcement of the award. In the court's view, these divisions were self evident in both part I and part II of the Act. Whereas part I regulated arbitration at all the four stages, part II regulated arbitration only in respect of commencement and recognition or enforcement of the award. Elaborating this aspect, the court observed thus: [146]

> In Part I, Section 8 regulate the commencement of arbitration in India, Sections 3, 4, 5, 6, 10 to 26, 28 to 33 regulate the conduct of arbitration, Section 34 regulates the challenge to the award, Sections 35 and 36 regulate the recognition and enforcement of the award. Sections 1, 2, 7, 9, 27, 37, 38 to 43 are ancillary provisions that either support the arbitral process or are structurally necessary. Thus, it can be seen that Part I deals with all stages of the arbitrations which take place in India. In Part II, on the other hand, there are no provisions regulating the conduct of arbitration nor the challenge to the award. Section 45 only empowers the judicial authority to refer the parties to arbitration outside India in pending civil action. Sections 46 to 49 regulate the recognition and enforcement of the award. Sections 44, 50 to 52 are structurally necessary.

Enforcement of foreign awards – section 48(1)(e)

Section 48 of the Act, which is found in part II, deals with the conditions for enforcement of foreign awards. This section, in so far as it is relevant for the present purposes, provides that the "enforcement of a foreign award may be refused at the request of a party against whom it is invoked only if that party furnishes to the court

146 (2012) 9 SCC 552, 621.

proof that … the award has not yet become binding on the parties, or has been set aside for suspended by a competent authority of the country in which or under the law of which that award was made." It was contended that, by necessary implication, a foreign award which is sought to be enforced in India, could also be challenged on merits in Indian courts. It was contended that both the courts of the country "in which the award was made" (first alternative) as well as the courts of the country "under the law of which the award was made" (second alternative) would be competent to suspend or annul a foreign award.

The court, however, rejected this contention noting that though the provision merely recognized that courts of two nations would be competent to annul or suspend an award, it did not "*ipso facto* confer jurisdiction on such courts for annulment of an award made outside the country. Such jurisdiction has to be specifically provided in the relevant national legislation of the country in which the court concerned is located." To accept the contention, the court held, would entail incorporating the provisions contained in section 34 of the Act, which was placed in part I, in part II of the Act. The court also rejected the submission that the two countries identified as "alternative one" and "alternative two" would have concurrent jurisdiction to annul the award." Having regard to the view expressed by a law professor in an article[147] on the issue, the court took the view that "the second alternative is an exception to the general rule. It was only introduced to make it possible for the award to be challenged in the court of the second alternative, if the court of the first alternative had no power to annul the award under its national legislation."

The implication of these observations is, however, far from clear. Would a situation where only limited grounds of challenging an award are available under the laws of the seat of arbitration, give the option to the party to approach the courts of the second alternative? These observations, taken on their plain meaning, do tend to indicate that. However, the further observation of the court that the expression "under the law of which the award was made" refers only to the "procedural law of the arbitration" rather than the "law governing the arbitration agreement" appear to be doubtful. Though these observations of the court do have the support of certain commentators and judicial decisions, the international opinion in this regard is far from unanimous. In fact the commentator,[148] on whom the court placed its reliance, has himself noted that "many, but not all courts" have concluded that the second alternative refers to the procedural law of arbitration.[149]

Interim reliefs

As a last ditch attempt it was also contended that, irrespective of the fact that whether part I applied to arbitrations held outside India or not, section 9, which dealt with interim measures, was a *sui generis* provision and would apply to such

147 Hans Smit, "Annulment and Enforcement of International Arbitral Awards" 18 Am. Rev. Int'l Arb. 297 (2007). as cited in (2012) 9 SCC 552, 626.

148 Gary B. Born *International Commercial Arbitration.*

149 As to the scope of art. I and the interrelationship between art. V (1) (e) of the convention see AK Ganguli, "International Commercial Arbitration and Enforcement of Foreign Awards in India", *Supra* note 17.

proceedings. It was submitted that the provisions contained in section 9 did not impede the arbitral process. Their only purpose was to provide an interim relief necessary for protecting the subject matter of arbitration pending the conclusion of the proceedings. Moreover, as interim orders of foreign courts were not by themselves enforceable in India, absent section 9, a party would be left remediless in several situations.

The submission was rejected holding that section 9 was limited in its application to arbitrations which take place in India. In the court's view, extending the applicability of section 9 to arbitrations which take place out of India, would do violence to the scheme of the 1996 Act. The court held thus: [150]

> Schematically, Section 9 is placed in part I of the Arbitration Act, 1996. Therefore, it cannot be granted a special status. We have already held earlier that Part I of the Arbitration act, 1996 does not apply to arbitrations held outside India. We may also notice that Part II of the Arbitration Act, 1996, on the other hand, does not contain a provision similar to Section 9. Thus, on a logical and schematic construction of the Arbitration Act, 1996, the Indian courts do not have the power to grant interim measures when the seat of arbitration is outside India.

The court also rejected the argument that a party might be left remediless in a foreign seated arbitration if section 9 was not held to apply to such proceedings, as in its view, "merely because the remedy in such circumstances may be more onerous from the view point of one party is not the same as a party being left without a remedy." In the court's opinion, once the party has chosen voluntarily that the seat of arbitration shall be outside of India, they are impliedly understood to have chosen the necessary incidence and consequences of such choice.

Prospective overruling

In its concluding paragraph the Constitution bench observed that **"**in order to do complete justice" the "law now declared by this Court shall apply prospectively, to all the arbitration agreements executed" after 6th september, 2012. In effect the decisions in *Bhatia International* and *Venture Global* would continue to hold the field in respect of all arbitration agreements executed before the pronouncement of the judgment by the court.

There has been some criticism of this part of the court's decision overruling the decisions in *Bhatia International* and *Venture Global*. It is argued that the *Bharat Aluminium* case was not a fit one for evoking the doctrine or in any case the doctrine should have been applied only to the limited extent of excluding pending applications and proceedings. However, these criticisms are misplaced. The criticisms assume that the law prior to the decision in *Bhatia International* was settled and that somehow that decision changed a settled understanding of law. The position however was not so. There was apparent ambiguity in the law, which, for the first time, has been crystallized by the decision in *Bhatia International*. Moreover, as the

150 (2012) 9 SCC 552, 636.

Constitution bench itself notes, more than a decade had passed since the decision in *Bhatia International,* which had consistently been followed by all the high courts.[151]

The way ahead

If the law applicable to the arbitration agreement is other than the law of the seat of arbitration, then the conflict of law principles are attracted and the resultant award would have to be tested in terms of the law of the country where it would most likely be enforced. However, the Constitution bench decision gives no answer to the question as to what would be the governing law when issues of arbitrability and public policy in relation to an arbitral proceeding would have to be decided. Whether the courts of the place of arbitration alone would have the jurisdiction, or the Indian courts could exercise jurisdiction in all such cases where the parties have designated that they would be bound by the laws of India considering that the award would ultimately have to be enforced in India? One concrete example of the consequences of the decision would be evident from the decision of the Supreme Court in *Gujarat Urja Vikas Nigam Ltd*. The question for determination before the Court in *Gujarat Urja Vikas Nigam Ltd.*[152] was whether an application under section 11 of the Act of 1996 was maintainable in view of the statutory provisions contained in the Electricity Act of 2003 providing for adjudication of disputes between the licensee and the generating companies regarding fixation of "tariff". The court, holding that only the statutory authorities could adjudicate the claim, observed thus:[153]

> In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30-5-1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10-6-2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10-6-2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it.

Thus, the disputes relating to fixation of electricity tariff were held to be not arbitrable under the laws of India except under the statutory mechanism provided in the 2003 Act. Could the parties easily overcome this hurdle by holding the proceedings for arbitration outside India? This was the case in *Tamil Nadu Electricity*

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151 See *supra* note 21 at 552, 633 noting "this Court has proceeded on a number of occasions to annul an award on the basis that parties had chosen Indian law to govern the substance of their dispute.The aforesaid view has been expressed in *Bhatia International* and *Venture Global Engg."*

152 (2008) 4 SCC 755.

153 *Id.* at 772.

Board v. *ST-CMS Electric Co Private Ltd,*[154] where the parties by holding arbitration proceedings in London ended up making the very same dispute arbitrable under the English law, even though in terms of the decision in *Gujarat Urja Vikas Nigam Ltd.*[155] it would not have been arbitrable under the laws of India.

Unfortunately, these questions can only be answered more appropriately when a concrete case raising these issues comes before the court. It would therefore not be appropriate to suggest, as many commentators have, that the decision in *Bharat Aluminium Co. Case*[156] has answered all unanswered questions on the applicability of part I to arbitrations held outside India.

X CONCLUSION

Once the parties express their willingness to have their disputes resolved by arbitration the courts make every effort to ensure that the intention of the parties is given full effect to. This endeavour of the courts was evident in *ACC Ltd.* v. *Global Cements Ltd*[157] wherein it was held that the death of an arbitrator named in the arbitration clause would not extinguish the arbitration agreement itself and that it would still be open to the chief justice or the designated judge, under section 11 of the 1996 Act, to appoint an arbitrator by giving a purposive interpretation to the arbitration clause.

To preserve the sanctity of the arbitration agreement and to hold the parties bound by their commitment to arbitrate, the court in *Denel (Proprietary) Limited* v. *Ministry of Defence*[158] went a step further and held that when the arbitration agreement obligated the parties to appoint an arbitrator and if a party declines to nominate or appoint an arbitrator in terms of the arbitration clause, such party would forfeit its right to make an appointment once the other party moves an application under section 11(6). This, view, however, overlooks that a party's refusal to appoint an arbitrator may be a bonafide act if it was based on any one of the grounds that the chief justice or the designated judge were required to adjudicate in the proceedings under section 11 of the Act. That right would be lost if the party is compelled to appoint an arbitrator on the other party's request, for fear of extinguishment of its right.[159] This decision, however, makes a significant advancement in the law in another aspect, by departing from the earlier precedents and recognising "institutional bias" to be a disqualification for the appointment of an arbitrator.

The two tier appointment procedure adopted by the Calcutta High Court consistently since 1999 appears to be more consistent with the fundamental principles underlying the distinction between a mere ministerial act of appointment of an arbitrator and a judicial decision reached by an adjudicatory process as to the

154 (2008) 1 Lloyds Rep 93.
155 (2008) 4 SCC 755.
156 (2012) 9 SCC 552.
157 (2012) 7 SCC 71.
158 (2012) 2 SCC 759.
159 *Dakshin Shelters (P) Ltd.* v. *Geeta S. Johari*, (2012) 5 SCC 152.

desirability of the appointment of an arbitrator.[160] It appears, that this view was not canvassed before the larger bench of seven Judges in *SBP & Co.* v. *Patel Engineering Ltd*.[161] which was constituted to reconcile the conflicting decisions on the question whether the appointment of an arbitrator under section 11 of the 1996 Act was an administrative act or a judicial one. The two tier procedure followed by the Calcutta High Court was consistent with the law that declared that the act of "appointment" was not a "judicial act" but an administrative act or only a nomination, which could well be performed even by "other institutions" not necessarily discharging judicial functions. Acceptance of this procedure would have lent sanctity to the mandate of the Parliament expressed in sub-sections (4), (5), (6) and (7) of section 11 where the role of "institutional arbitration" has been expressly recognised. The decision in *Patel Engg. Ltd.'s case*[162] has rendered these provisions otiose. Such consequences could have been avoided by adopting the two tier procedure evolved and followed by the Calcutta High Court for over a decade, which has now been overruled on the ground of not being in conformity with *Patel Engg. Ltd.'s* case.[163]

On the scope of the period of limitation prescribed under section 34(3), the court appears to have taken a rather sympathetic view in one case[164] by holding that the service of an award on the advocate for the party would not be sufficient compliance with the law, while on the other[165] taking a very restricted view as regards the applicability of the benefit of section 4 of the Limitation Act 1963 to an application for setting aside an award filed within the extended period of 30 days. The court should have construed the provisions of section 4 liberally to allow its benefit to a litigant who has been, due to unforeseen circumstances, prevented from moving the court before it closed for vacation but moved the court on the re-opening day after the vacation.

The most significant decision rendered by the court pertained to the ruling on the jurisdiction of Indian courts in respect of proceedings and awards rendered by foreign seated arbitral tribunals.

In *Bhatia International*[166] a three judge bench, in the context of jurisdiction of Indian courts to entertain an application under section 9 for grant of interim reliefs in respect of an arbitration which was held in Paris in accordance with the ICC Rules, had ruled that part I of the 1996 Act applied even to international commercial arbitrations held outside India "unless the parties by agreement, express or implied, exclude all or any of its provisions." The court noticed that the 1996 Act made a departure in section 2(2) from article 1(2) of the model law by omitting the word "only". A reading of the scheme of the Act in its totality persuaded the court to uphold the jurisdiction of Indian court in respect of foreign seated arbitration. The

160 *Hindustan Copper Ltd.* v. *Monarch Gold Mining Co. Ltd* (2012) 10 SCC 167.
161 (2005) 8 SCC 618.
162 (2005) 8 SCC 618.
163 (2005) 8 SCC 618
164 *Benarsi Krishna Committee* v. *Karmyogi Shelters (P) Ltd.* (2012) 9 SCC 496.
165 *Assam Urban Water Supply and Sewerage Board* v. *Subash Projects and Marketing Limited* (2012) 2 SCC 624.
166 (2002) 4 SCC 105.

legislative history of the enactment of the 1996 Act would provide the real clue for the reasons due to which the attention of the Parliament escaped this aspect.[167]

These principles were extended to proceedings under section 34 for setting aside an arbitral award in *Venture Global Engineering*[168] where, in the context of an arbitral award rendered in London following the LCIA rules of arbitration, the court held that as the parties did not derogate from the Indian law, the application for setting aside the award filed before the Ist Additional Chief Judge, city civil court, Secunderabad, was maintainable. The court held that the overriding provisions contained in sections 11.05(b) & (c) of the shareholders' agreement, which declared that the parties could not derogate from the Indian law, were a clear intention of the parties to subject themselves to the jurisdiction of the Indian courts.

Subsequently, the two judges constituting the bench in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*,[169] differed in their approach as regards the questions decided in *Bhatia International*[170] and *Venture Global*.[171] In view of the difference of opinion, the matters stood referred to the Constitution Bench, however, without formulating the questions on which the reference was made. This led the Constitution bench in *Bharat Aluminium Co*. v. *Kaiser Aluminium Technical Services Inc.*[172] to consider generally a large number of questions concerning the jurisdiction of the Indian courts with respect to arbitrations where the seat of arbitration was outside India.

The Constitution Bench, while hearing the reference, also did not formulate any questions, but ruled that it was the seat or the place of arbitration that would determine the applicability of the provisions of part I of the Act.

Unfortunately, the court lost sight of the fact that the seat of arbitration had no relevance to the domestic arbitrations in respect of which the jurisdiction of a particular court within the country would have to be determined depending upon the court "having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit." The seat of arbitration may or may not provide a cause of action for initiation of the proceedings under the Act.

An overemphasis on the seat of arbitration, by the court, led it to conclude that even if the contracting parties in a foreign seated arbitration expressly choose to apply the provisions of part I of the 1996 Act, the courts in India would still have no jurisdiction.

A significant omission in the decision is the non-consideration of the question regarding the governing law on arbitrability of the disputes in a foreign seated arbitration where the parties to the contract are required to execute the contract, in accordance with the award, in India which may or may not involve initiation of

167 AK Ganguli, "Arbitration Law" XLVI ASIL 31 (2010), *Supra* note 17.
168 *Supra* note 19.
169 (2012) 9 SCC 649; (2012) 9 SCC 648
170 (2002) 4 SCC 105.
171 (2008) 4 SCC 190.
172 (2012) 9 SCC 552.

formal proceedings for enforcement of an award under part II of the 1996 Act.[173]

The court, though adverted to article V of the New York Convention which clearly postulates that a foreign seated award could be set aside either in a country "in which" or "under the laws of which" it is made, but, referring to an opinion of a law professor, who viewed such distinction as a rare eventuality, held that a remedy against an arbitral award would lie only in the courts of the country where the seat of arbitration was situated. The judgment, however, did not advert to the question whether the absence of the remedy, in the country where the seat of arbitration is situated, would also include cases where an award could not be challenged in the country where it is rendered, on the ground that it is opposed to the public policy of the country in which the parties have to put the contract into execution.

Although the court has played a major role in adopting a pro-active stance in the matter of interpretation of statutes and has extended its powers beyond "ironing of the creases" by adopting a progressive and purposive interpretation, yet it declined to construe the provisions of section 2(2) of the Act in the light of article 1(2) of the model law though it acknowledged that for protection of subject matter of the arbitration even in respect of foreign seated arbitration, Indian courts should be held to have jurisdiction to grant interim reliefs if the subject matter of the proceedings happens to be in India. Taking a narrow view on the role of the court, it has left the ultimate remedy in the hands of the legislature.

The direction, in the decision in *Bharat Aluminium Co.'s Case*[174] that the law declared by it would only operate prospectively to arbitration agreements executed after the date of the pronouncement of the judgment, is well founded as the decisions in *Bhatia International*[175] and *Venture Global*[176] have been consistently followed by the high courts over the years. One wonders whether certain aspects of the decision, for instance, ramifications of an arbitration agreement with an agreed 'seat' of arbitration or an exclusive jurisdiction clause would have to be revisited in view of the developments in law in Europe and elsewhere. The approach of the English courts in recent times with respect to anti-suit injunctions being issued on the basis of the seat of arbitration has not found favour with the rest of the members

173 A clear conflict in the decisions and the approach of the English Courts and that of the Supreme Court of India is evident from *Tamil Nadu Electricity Board* v. *ST-CMS Electric Co. Private Ltd* (2008) 1 Llyods Rep 93 and *Gujarat Urja Vikas Nigam Ltd.* v. *Essar Power Ltd.* (2008) 4 SCC 755, but remain unresolved. If the issues of arbitrability have to be adjudicated upon, applying the law of the country, following the choice of seat of arbitration made by the parties, the "underlying motivation of the New York Convention … to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award" emphasized by the Court in *Bharat Aluminium Co*. Case (*id.* at.631) itself would be defeated, in the event the laws of the country, where the enforcement of the award is sought, do not recognize that the issues arbitrated upon are arbitrable.

174 (2012) 9 SCC 552.

175 (2002) 4 SCC 105.

176 (2008) 4 SCC 190.

of the European Union and the court of justice of the European Communities.[177]

Though the decision of the Constitution bench is undoubtedly a step in the right direction, one wonders whether the court was justified in following the principles evolved by the English courts which are not accepted by the civil law countries, particularly those who are part of the European Union. It is true that the court has clarified many concepts which had heretofore remained unanswered or ambiguous, but there still remain major areas where only the legislature can effectively shed a light. It is only hoped that the legislature does not again wait till eternity to bring in suitable amendments to settle all uncertainties.

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177 While confirming that as a matter of English Law, a contractual obligation or exclusive jurisdiction clause will provide a good ground for the English Court to restrain a person by issuing an "anti-suit" injunction from pursuing proceedings in a foreign court when the English court considers the conduct of that person as unconscionable in the eyes of English Law, the House of Lords in *Turner* v. *Grovit*, [2002] I.WLR 107, had referred to the European Court of Justice the question that: "is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 Sep. 1968 (subsequently acceded to by the UK) for the courts of the UK to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?" The reference was made after explaining that under the English law, the applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. As to what would constitute a legitimate interest of the applicant, it was held that "where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration cl.), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract."The question came to be answered by the court of justice of the European Communities in (2004) 3 WLR 1193 thus: "the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a contracting state prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting state, even where that party is acting in bad faith with a view to frustrating the existing proceedings." The reason that persuaded the European court to answer the question in the negative was that "any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention." Negativing the contention that an 'anti-suit' injunction regarded as necessary to safeguard the integrity of the proceedings pending before the court which issues it, the European Court held that: "even if it is assumed that, as has been contended, an injunction may be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention."