ARBITRATION EDGE

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WELCOME TO OUR ARBITRATION NEWSLETTER

In 2024, India witnessed significant developments in its arbitration landscape, pivotal judicial decisions, and introduction of draft amendment to the Arbitration and Conciliation Act, 1996 (the "*Arbitration Act*"). Collectively, these developments in 2024 reflect India's ongoing efforts to strengthen its arbitration framework, aligning with international best practices and promoting efficient dispute resolution mechanisms.

I. SPOTLIGHT ON JUDICIAL PRONOUNCEMENTS

In the past year, the Courts in India have delivered several key rulings that significantly shaped the landscape for both domestic and international arbitration. These decisions provide much-needed clarity on crucial issues such as the limited judicial review of arbitral awards, the distinction between venue and seat in arbitration agreements when the arbitration clause is either silent or ambiguous, and that an arbitration agreement cannot bypass statutory remedies.

Limitation Period for Section 11 Applications

In the case of *Arif Azim Co. Ltd. v. Aptech Ltd.*[1], a bench comprising the former Chief Justice of India Justice D.Y. Chandrachud, Justice J.B. Pardiwala and Justice Manoj Misra held that the Limitation Act, 1963 is applicable to proceedings for appointment of arbitrator under

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Section 11(6) of the Arbitration Act and a Court may refuse to make a reference if the claims, on the date of commencement of arbitration proceedings, are ex-facie barred. The Court ruled that such applications must be filed within three years from the date of serving of the notice invoking arbitration, unless the claims to be raised therein are manifestly time-barred as Article 137 of the Limitation Act, 1963, i.e., the residual provision, would apply to these proceedings. The judgment further recommended that the Parliament amend the Arbitration Act to prescribe a specific limitation period for Section 11 applications for appointment of arbitrators. Considering the findings of the Apex Court, the Draft Bill (Arbitration and Conciliation (Amendment) Bill, 2024) suggests that parties must file a Section 11 application within 60 days from the date of failure of appointment of an arbitrator.

[1] Arif Azim Co. Ltd. v. Aptech Ltd. [(2024) 5 SCC 313]

Disputes Arising from Arbitration Clauses in Contracts

The Supreme Court addressed the nuanced issue of the presence or absence of an arbitration clause in a contract in *NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd.*[2]. The Court held and reaffirmed that incorporating arbitration clauses by reference into contracts requires specific conditions to be met. Firstly, the contract must clearly reference the document containing the arbitration clause, show intent to include it, and ensure the clause is applicable without contradicting other terms. General references to another document do not suffice; a direct mention of the arbitration clause is necessary for incorporation. Secondly, if a contract stipulates that its performance is governed by another contract's terms, only those performance-related terms are adopted unless the arbitration clause is explicitly referenced. However, standard terms from trade or professional institutions or general conditions from one party, like government contracts, can include arbitration clauses by mere reference, provided the parties acknowledge familiarity or acceptance of these terms.

In this case, the Letter of Intent (LOI) referred to the tender's terms but did not specifically make a reference to dispute resolution through arbitration. Moreover, the LOI mandated dispute resolution in civil courts in Delhi, making arbitration inapplicable. Thus, the court ruled that the arbitration clause was not incorporated.

The Court reaffirmed that arbitration is a consensual process, and any ambiguity must be avoided. The ruling underscored the importance of clarity when drafting arbitration clauses and resolving disputes via arbitration.

[2] NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd. [(2024) 7 SCC 174]

Patent Illegality and Curative Jurisdiction

In another significant ruling, the Supreme Court revisited its earlier decision through a curative petition in *DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd.*[3] The Apex Court examined a curative petition filed by the Delhi Metro Rail Corporation (DMRC) challenging the judgment passed by a two-judge bench of the Supreme Court that had restored an arbitral award in favour of Delhi Airport Metro Express Private Limited (DAMEPL), overturning the Delhi High Court's ruling that had set aside the award. The Court emphasized that the curative petition was maintainable to prevent abuse of the judicial process and to correct a miscarriage of justice. It noted that the Delhi High Court had correctly found the arbitral award to be perverse and legally flawed.

The case arose from a challenge to an arbitral award imposing an exorbitant liability on a public utility. The Court exercised its curative jurisdiction under Article 142 of the Constitution of India in terms of *Rupa Hurra*[4] and concluded that the award suffered from patent illegality, and the restoration of such an award had resulted in a miscarriage of justice, particularly because it saddled DMRC, a public utility, with excessive liabilities. Therefore, it restored the decision of the Delhi High Court while overturning the Supreme Court Division Bench's decision. The arbitral tribunal

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had failed to justify why the steps taken by DMRC were ineffective within the contract's terms, thus rendering the award unreasoned and irrational. The judgment further highlighted that curative petitions should be an exceptional remedy and not used routinely to revisit arbitral awards. This decision emphasizes the Supreme Court's cautious approach to intervening in arbitral matters, preserving the finality of arbitration decisions.

[3] DMRC Ltd. v. Delhi Airport Metro Express (P) Ltd. [(2024) 6 SCC 357]
[4] Rupa Ashok Hurra v. Ashok Hurra, [(2002) 4 SCC 388]

Scope of Appellate Court's Powers under Section 37 of the Arbitration Act

The principle of limited judicial interference in arbitration under the Arbitration Act was reaffirmed by the Supreme Court in the case of *Punjab State Civil Supplies Corporation Ltd. v. Sanman Rice Mills*[5]. The dispute arose when the rice mill, contracted to mill paddy, returned a lesser quantity of rice than agreed, leading to an outstanding financial amount. An arbitrator ruled in favour of the Corporation, ordering the rice mill to pay INR 2.67 crore with interest. The rice mill challenged the award under Section 34, but the Additional District Judge upheld the award. The Rice Mill then appealed to the Punjab & Haryana High Court, which set aside both the award and the District Court's judgment, observing that the arbitrator had misinterpreted the contract.

The Supreme Court ruled that the High Court had exceeded its powers under Section 37 by re-evaluating the evidence and substituting its interpretation of the contract. It emphasized that judicial review of arbitral awards is extremely limited, and courts cannot reappraise evidence or substitute their findings unless the award violates public policy or fundamental legal principles. The Court upheld the arbitrator's decision, reinforcing the principle that courts should respect the autonomy of arbitration and intervene only in exceptional cases where the award conflicts with public policy or the law.

[5] Punjab State Civil Supplies Corporation Ltd. v. Sanman Rice Mills [2024 SCC OnLine SC 2632]

Venue vs. Seat of Arbitration

The distinction between "*venue*" and "*seat*" of arbitration has always been a critical point in international and domestic arbitration agreements. In *Arif Azim Co. Ltd. v. Micromax Informatics FZE*[6], the Supreme Court of India clarified key aspects of international arbitration, focusing on the distinction between '*seat*' and '*venue*'. The case involved a dispute between an Afghanistan-based company and a UAE-based subsidiary of an Indian firm, with the agreement specifying Dubai as the "*venue*" of arbitration but not explicitly mentioning the "*seat*." The Court distinguished between the two concepts, affirming that the seat determines the legal jurisdiction and supervisory authority over the arbitration proceedings. Despite the reference to Dubai as the venue, the Court concluded that Dubai was the seat of arbitration due to the application of UAE law and the absence of any contradictory evidence, thereby reinforcing the jurisdiction of Dubai courts.

The Supreme Court of India addressed three key issues in this case: the applicability of Part I of the Arbitration Act, the doctrine of concurrent jurisdiction, and the determination of the seat of arbitration. It clarified that Part I applies only to arbitrations seated in India, and does not extend to foreign-seated arbitrations, even if the agreement predates the *BALCO*[7] decision. The Court ruled that Dubai, as the designated venue and with UAE law governing the arbitration, was the juridical seat of arbitration, rejecting the notion of concurrent jurisdiction in favour of the seat-based approach. The Supreme Court emphasized that once the seat is determined, courts at that seat, in this case, Dubai, have exclusive jurisdiction, and Indian courts cannot entertain the petition for arbitrator appointment, especially when Dubai is the more appropriate forum under the "*Forum non Conveniens*" doctrine. The decision reinforced that jurisdiction clauses indicating the seat of arbitration imply exclusive jurisdiction, even if not explicitly stated.

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The ruling underscores the principle of party autonomy, emphasizing that the clear designation of the seat and the governing law of the arbitration agreement governs the jurisdictional determination. This decision serves as a crucial reminder for parties involved in cross-border transactions to draft precise arbitration clauses to avoid jurisdictional uncertainties.

[6] Arif Azim Co. Ltd. v. Micromax Informatics FZE [2024 SCC OnLine SC 3212]
[7] Bharat Aluminium Co v. Kaiser Aluminium Technical Services ('BALCO') [(2012) 9 SCC 552]

Nomination of Arbitrators and Party Autonomy

In another landmark decision in *Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV)*[8], the Supreme Court, in a five-judge bench decision, addressed the validity of unilateral appointment clauses in public-private contracts, ruling that such clauses violate the principle of equality and impartiality in arbitration. In the case, the Court examined the situation where one party, particularly a government entity, had the authority to unilaterally appoint a sole arbitrator or curate a panel for the other party to select an arbitrator. The Court held that these clauses undermine the integrity of the arbitration process, as they create doubts about the impartiality and independence of the appointed arbitrator. "*The Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs.*", it observed. The ruling emphasized the principle of equal treatment of parties applies at every stage of the arbitration, including the appointment of arbitrators, and concluded that unilateral appointment clauses in public-private contracts are unconstitutional, violating Article 14 of the Constitution. As a result of this ruling, such arbitration clauses can now be contested if they compromise impartiality or breach the principle of equal treatment. While the majority opinion agreed on the unconstitutionality of such clauses, Justice H. Roy concurred with the focus on party autonomy in arbitration but disagreed with invoking constitutional law principles to enforce equality in arbitration.

He emphasized that fairness in the appointment process should be grounded in the Arbitration Act itself, particularly sections dealing with challenges to arbitrator appointments. Justice P. S. Narasimha, on the other hand, stressed the importance of an independent and impartial tribunal as an inviolable public policy requirement, pointing out that arbitration agreements not fulfilling this essential condition are void under the Contract Act. Overall, the judgment reinforces the need for fairness and impartiality in the arbitration process, particularly regarding the appointment of arbitrators in public-private disputes.

[8] Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) [2024 SCC OnLine SC 3219]

Post-Award Jurisdiction and Interest

In the case of *North Delhi Municipal Corporation v. S.A. Builders Ltd.*[9], the Supreme Court clarified two important aspects of post-award jurisdiction. Firstly, the Court confirmed that while an Arbitral Tribunal becomes functus officio after delivering an award, it still retains the authority to correct errors or clarify ambiguities under Section 33 of the Arbitration Act. Secondly, the Court ruled that the awarded sum would comprise of the principal amount and the interest accrued from the date of the cause of action until the date of the award as per section 31(7) of the Arbitration Act.

The Court emphasized that the "*sum*" awarded by the Arbitrator would include any interest granted, and if no interest was awarded, the sum would carry a mandatory interest as prescribed under section 31(7) of the Arbitration Act from the date of the award to the date of payment. It was noted that the granting of interest was discretionary under certain clauses, but mandatory under others if the arbitrator did not grant interest. This judgment ensures that the enforcement of arbitral awards pertaining to payment of interest aligns with the legislative intent behind Section 31(7) of the Act, which mandates the payment of interest on sums due under an award.

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[9] NDMC v. S.A. Builders Ltd. [2024 SCC OnLine SC 3768]

Statutory Rights in Employment Disputes

In a decision that has far-reaching implications for employment disputes, the Supreme Court in the case of *Dushyant Janbandhu v. Hyundai Autoever India (P) Ltd.*[10] reaffirmed that exclusive statutory rights related to wages and employment take precedence over arbitration clauses in employment contracts. The Court ruled that contractual agreements to arbitrate cannot override exclusive statutory protections available under labour laws, thereby ensuring that arbitration cannot be used to bypass statutory remedies. This judgment reinforces the primacy of workers' rights, especially in matters involving statutory protections in employment disputes.

[10] Dushyant Janbandhu v. Hyundai Autoever India (P) Ltd. [2024 SCC OnLine SC 3691]

Narrow sense of "*Public Policy*"

In the case of *Avitel Post Studioz Ltd. & Ors v HSBC Pi Holdings (Mauritius) Ltd.*[11], the Supreme Court of India upheld the Bombay High Court's decision facilitating the enforcement of a final arbitral award issued by the Singapore International Arbitration Centre (SIAC). In 2015, HSBC sought to enforce the award against Avitel in the Bombay High Court. Avitel opposed enforcement, claiming the award violated India's public policy due to alleged bias by the presiding arbitrator, who had failed to disclose his role as a non-executive director of a company having ties to an HSBC affiliate under Section 48 of the Arbitration Act. The Court emphasized that judicial intervention in the enforcement of foreign awards should be minimal, in line with India's obligations under the New York Convention. It clarified that allegations of bias could only be considered in exceptional cases where it violated "*most basic notions of morality or justice*" under the concept of "*public policy of India*".

The Court adopted an internationally recognized narrow standard of public policy for addressing bias claims, stressing that such claims should be resolved by the courts of the jurisdiction where the arbitration took place. It further held that only in exceptional circumstances could the enforcement be refused on the ground of bias. Noting that the appellants had failed to substantiate their bias allegations and had attempted to evade earlier court orders, the Supreme Court found no grounds to refuse enforcement. It upheld the High Court's ruling and emphasized the importance of expeditiously enforcing foreign awards, ensuring minimal judicial interference.

[11] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.., [(2024) 7 SCC 197]

Applicability of Arbitration Act Over Institutional Arbitration Rules

The Bombay High Court in the case of *Era International v. Aditya Birla Global Trading India (P) Ltd.*[12] addressed a challenge to the appointment of an arbitrator by Era International under the Mumbai Centre for International Arbitration (MCIA) rules, in a dispute involving Aditya Birla. Era objected to the appointment, arguing that the selected arbitrator, a partner at a law firm with prior ties to Aditya Birla, lacked impartiality, and the arbitration process violated the Arbitration Act. Era sought termination of the arbitrator's mandate and requested the appointment of an independent arbitrator. The Court analysed the provisions of the Arbitration Act, particularly Sections 11, 12, 13, and 14, emphasizing that the statutory requirements for disclosure and impartiality applied even in institutional arbitration. The Court highlighted that institutional arbitration through MCIA did not exclude the applicability of the Arbitration Act and affirmed that the Court retained jurisdiction to address issues such as the termination of an arbitrator's mandate, regardless of institutional rules.

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The Court clarified that the existence of institutional arbitration rules, such as those of the MCIA, did not override the statutory powers of the Court under the Arbitration Act. It ruled that the statutory provisions for the challenge and removal of an arbitrator were still applicable, and MCIA's rules could not bar the Court from intervening in cases of justifiable doubts regarding an arbitrator's impartiality. Since Era had not waived the applicability of the Arbitration Act's provisions, the Court found the challenge to the arbitrator's appointment justified and rejected the finality of MCIA's decision. The Court directed MCIA to appoint an independent arbitrator and continue the arbitration proceedings, reinforcing that institutional arbitration remains governed by the Arbitration Act's provisions.

[12] Era International v. Aditya Birla Global Trading India (P) Ltd., [2024 SCC OnLine Bom 835]

II.INDIA'S PROPOSED ARBITRATION REFORMS

In October 2024, the Government of India introduced the draft Arbitration and Conciliation (Amendment) Bill, 2024, with the objective of strengthening institutional arbitration, reducing judicial interference, and ensuring the swift resolution of disputes. The Department of Legal Affairs sought public feedback on the proposed amendments, inviting comments until November 3, 2024.

Introduction of the Arbitration and Conciliation (Amendment) Bill, 2024, in October 2024: Key Amendments

Building on the earlier reforms of 2015, 2019, and 2020-21, the Department of Legal Affairs has released the Arbitration and Conciliation (Amendment) Bill, 2024 ("*Draft Bill*"), in October 2024, aiming to further enhance India's arbitration framework. The Draft Bill proposes several measures to streamline arbitration processes, reduce court involvement, and position India as a global arbitration hub.

Key reforms include the establishment of an Appellate Arbitral Tribunal, which would allow challenges to arbitral awards to be resolved by arbitral institutions, thereby reducing the burden on Indian courts. This new appellate structure is expected to expedite the process and minimize the delays associated with award set-aside petitions.

"*34A. Appellate Arbitral Tribunal. – (1) The arbitral institutions may, provide for an appellate arbitral tribunal to entertain applications made under Section 34, for setting aside an arbitral award. (2) The appellate arbitral tribunal while deciding an application under Section 34 shall follow such procedure, as may be specified by the Council*."

Additionally, the Draft Bill provides clearer definitions of arbitral institutions as "*a body or organisation that provides for conduct of arbitration proceedings under its aegis, by an arbitral tribunal as per its own rules of procedure or as otherwise agreed by the parties*" and grants them expanded powers, including the authority to extend time limits for issuing awards and to manage arbitrator fees.

These changes are designed to enhance the credibility and efficiency of institutional arbitration in India.

Another main feature of the Draft Bill is its alignment with the Mediation Act, 2023. Section 30(2) of the Draft Bill now requires that any settlement reached during arbitration be enforced under the Mediation Act 2023. This amendment highlights the increasing significance of mediation as a key method of dispute resolution and establishes a more organized framework for enforcing settlement agreements, creating a more cohesive dispute resolution process.

The proposed amendment to Section 34(2-A) eliminates the distinction between domestic and international commercial arbitration regarding the grounds for challenging awards based on patent illegality and thereby extends the patent illegality test to international commercial arbitrations.

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Other significant provisions include stringent time limits for various stages of arbitration, such as 60 days for Section 8 applications, 30 days for jurisdictional objections, and 60 days for filing of appeals under Section 37. The Draft Bill further also introduces "*emergency arbitration*" (Section 9-A), permitting interim measures before the formation of the tribunal. The emergency arbitrator will follow procedures set by the Arbitration Council of India, and any order made by the emergency arbitrator will be enforceable like an order made by the arbitral tribunal under Section 17(2) of the Arbitration Act. The emergency arbitrator's order can later be confirmed, modified, or vacated by the arbitral tribunal. Furthermore, the Draft Bill also recognises the role of technology in Arbitration and proposes to allow arbitration to be conducted through audio-video means and recognizing arbitration agreements executed using digital signatures.

CONCLUSION

The Court's rulings in 2024 in conjunction with the ambitious reforms proposed in the Draft 2024 Bill underscore India's unwavering dedication to enhancing its arbitration ecosystem. These transformative changes not only address existing impediments but also establish a robust foundation for India to emerge as a preeminent global arbitration hub, renowned for its impartiality and reduced judicial intervention. The evolving trajectory of Indian arbitration legislation heralds a more predictable, transparent, and streamlined dispute resolution process for both domestic and international parties.

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