

INDIAN ARBITRATION LAW: LEGISLATING FOR UTOPIA

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Abstract

The law of Arbitration in India is at a cross-road. India has spent the last twenty years pushing forward a permissive party autonomy arbitral regime which sets out a framework of provisions for arbitration and the making, challenging and enforcement of awards, whilst allowing the wishes of contracting parties to mould internal procedure to suit them. The Courts are expected to play a minimal interventionist role, only stepping in when the parties fail to act, or where specifically required by law. This was an attempt to lure international trade and investment by facilitating alternate dispute resolution & bypassing judicial systems. Theoretically, the system is workable, but it has become cumbersome and complex.

Therefore, the law of Arbitration in India requires reconsideration. In this light, this Article discusses whether the recent Arbitration and Conciliation (Amendment) Act, 2015 will do the job. It seeks to do so keeping in mind the unique problems of dispute resolution in India and the critical importance of contract enforcement. In doing so, the author considers a restrictive version of the current system whilst analysing the law and jurisprudence of other jurisdictions, wherever contextually required. In conclusion, the author proposes changes to the law and advocates a shift to a restrictive version of the current system, in the search for arbitral utopia.

I. Introduction

Man is not made for law, but the law is made for man.¹ Acts are justified by law, only if they are warranted, validated and made blameless by law.² This recognizes that man preceded law which evolved as a means of social control, in a time where accountability for actions was often incommensurate to the actions. Similarly, the

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¹ Law Commission of India, *Need for Justice-dispensation through ADR etc.*, 222nd Report, 9 (Apr. 2009). It appears that the Law Commission of India [“LCP”] drew inspiration from the words of Mark 2:27 in the Holy Bible (“*the Sabbath was made for man, not man for Sabbath*”). See also JOHN J. COUGHLIN, *LAW, PERSON, AND COMMUNITY: PHILOSOPHICAL, THEOLOGICAL, AND COMPARATIVE PERSPECTIVES ON CANON LAW 6* (Oxford Univ. Press, 1st ed. 2012) [COUGHLIN].

² COUGHLIN, *Id.* at 9.

Arbitration and Conciliation Act, 1996 [“The Act”] was also made for man and not vice-versa. This begs the question: What does the Act warrant, validate and make blameless?

The Act is inherently permissive; it grants party autonomy and allows parties to derogate from the provisions of the Act in certain matters. Where the law and the arbitration agreement are silent, the arbitrator³ assumes the responsibility to lead the way. This allows substantial flexibility which may be responsible for India’s abstruse loyalty to ad-hoc arbitration. However, this system, though flexible, is often faced with procedural hassles, delays and a low ratio of effective hearings.⁴ In this light, examining whether we need the law to be permissive, restrictive or something in between assumes importance. This is because even assuming that ad-hoc arbitration is cost-effective, considering the time value of money and the interests of investment certainty, it may be ‘cheaper’ to opt for Institutionalized Arbitration.⁵ We also see proceedings being dragged on to force parties to settle or at least, delay impending liability. Having lost the dispute, the award-debtor can try and slip the award through an enforcement loophole or drag on challenge proceedings. Such situations should be rendered impossible by law or at least be made highly unlikely.

An idyllic law that looks good in the gazette but does not work on the ground will not do either. It must keep pace with the rapid growth of international trade and investment⁶ and will be tested on the crucible of the Indian economy and investment environments. This is because there is a unique relationship between law and development; rational legal systems allow individuals to structure transactions and

³ In this Article, “Arbitrator”, “Tribunal” and “Arbitral Tribunal” are used interchangeably, which is consistent with the Act. See The Arbitration & Conciliation Act, No. 26 of 1996, § 2(l)(d), INDIA CODE (1996) “Act”].

⁴ This is a chronic problem of the Indian justice system. Reportedly, a majority of the daily cases in the Supreme Court and High Courts (80-90 per cent) are adjourned without effective hearings. Often cases are listed for hearing 30-40 times; with as low as 3-6 effective hearings. See Indira Unninaray, *Where Justice Remains Elusive*, COMMON CAUSE, http://www.commoncause.in/publication_details.php?id=147.

⁵ For insights into valuation of litigation risks based on factors such as time value of money, see R.J. Rhee, *The Effect of Risk on Legal Valuation*, 78 U. COLO. L. REV. 193 (2007), and Annika Reinemann et al., *The Valuation of Litigation, Valuation Strategies*, BRITTAN PARK (Mar./Apr. 2006), http://www.brittanpark.com/bp_pdf/bpv-the-valuation-of-litigation.pdf.

⁶ See generally K. Sarma et al., *Development and Practice of Arbitration in India -Has it Evolved as an Effective Legal Institution*, 1 CDDRL WORKING PAPERS (Oct. 2009), http://iis-db.stanford.edu/pubs/22693/No_103_Sarma_India_Arbitration_India_509.pdf.

eliminate uncertainty. Consequently, predictable dispute resolution laws facilitate economic development. Douglas C. North⁷ believes that contract enforcement is the single most important determinant of economic performance and that in *Utopia*, there would be a neutral enforcement agency adjudicating disputes, resulting in an outcome that satisfies both parties, without any costs. It is a world where no one can shirk or cheat.⁸

More so, the 2015 World Bank Report ranking India 186th out of 189 countries in contract enforcement⁹ is an alarming reminder that our dispute resolution laws need to change; especially with our overburdened judicial system seeing a continuously growing number of cases due to increasing competition and complexity of international business. Since arbitration is a preferred mode of dispute resolution in cross-border contracts, there is no better time like the present, to overhaul the Act.

II. The Proposals & The Arbitration and Conciliation (Amendment) Act, 2015: A New Era for Arbitration

The Act was meant to provide an effective and expeditious framework, inspire confidence and attract and reassure international investors. During its lifetime, it was reviewed several times, an amendment bill was proposed and withdrawn, ordinances were floated,¹⁰ and Law Commission of India [“LCI”] Reports were issued.¹¹ Last

⁷ Douglas C. North is a Joint Nobel Memorial Prize Laureate for Economics (1993).

⁸ D.C. North, *The Contribution of the New Institutional Economics to an Understanding of the Transition Problem*, ANNUAL LECTURES 1, UNU WORLD INSTITUTE FOR DEVELOPMENT ECONOMICS RESEARCH 3,4 (Mar. 1997), http://www.wider.unu.edu/publications/annual-lectures/en_GB/AL/_files/83424984784568456/default/annua-lecture-1997.pdf.

⁹ WORLD BANK, DOING BUSINESS REPORT, GOING BEYOND EFFICIENCY 192 (12th ed. 2014), *available at* <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf>. [“World Bank Report 2014”].

¹⁰ *Arbitration Notes, Amendments to the Indian Arbitration Act – now imminent?* HERBERT SMITH FREEHILLS (Feb. 2, 2015), <http://hsfnotes.com/arbitration/2015/02/02/amendments-to-the-indian-arbitration-act-now-imminent/>.

¹¹ These *inter alia* include the 176th & 246th LCI Reports; The Arbitration and Conciliation (Amendment) Bill, 2003 (Dec. 2003); the Dr. Justice B.P. Saraf Committee on Arbitration Report (Jan. 2005); Departmental Related Standing Committee on Personnel, *Proposed Amendments to the Arbitration & Conciliation Act, 1996*, 9th Report (Aug. 2005); Ministry of Law and Justice, *Proposed Amendments to the Arbitration & Conciliation Act, 1996*, Consultation Paper (Apr. 2010).

August, the Cabinet, led by our famously pro-development leader,¹² approved a proposal [“proposals”] based on the Law Commission’s recommendations to amend the Act, with the goal of making India an international commercial arbitration [“ICA”] hub by making it user-friendly and cost effective. This culminated in the Arbitration and Conciliation (Amendment) Act, 2015 [“2015 Act”], promulgated, largely on similar lines to the proposals. This is the first step towards ushering in a new era for arbitration in India.

A. *Appointment of Arbitrators*

The 2015 Act amends §11 to grant the power of appointment under §11 to the Supreme Court or the High Courts (or their designates) as the case may be,¹³ instead of their respective Chief Justices (or their designates). It has been clarified that designating a person or institution for the purposes of §11, is not a delegation of judicial power.¹⁴ This negates *SBP & Co.*¹⁵ where the Supreme Court *inter alia* held that the power under §11(6) is judicial.¹⁶ The 2015 Act also provides that no appeals will lie against orders passed under §11, including letters patent appeals. Since these are administrative orders, no appeal will lie under Article 136 of the Constitution either,¹⁷ though the option of a writ remedy may remain available against such an order. However, since the Act provides alternative efficacious remedies in some cases,¹⁸ Courts may be unwilling or at least circumspect in entertaining writ petitions on this ground.

With respect to the scope of enquiry by the Courts under §11, the LCI proposed to limit it to a *prima facie* examination of the existence and validity of the arbitration agreement, with appointments being refused only where there is no arbitration agreement or the agreement is null and void. Since this adjudication was to be on a *prima facie* basis, the final decision on such matters would be left to *kompetenz-kompetenz*.¹⁹ However, the 2015 Act adopts a different approach. It simply provides that

¹² Shri. Narendra Modi, 15th Prime Minister (current).

¹³ See 2015 Act, § 6.

¹⁴ See Act, § 11(6A).

¹⁵ *SBP Co. v. Patel Engineering Ltd. and Anr.*, (2005) 8 S.C.C. 618 (India).

¹⁶ *Id.* at ¶ 46.

¹⁷ *Id.* at ¶ 46 [only appeals under Article 136 would lie against orders under (the erstwhile) §11(6), since these orders were held to be judicial orders.]

¹⁸ See, e.g., Act, §12, 13, 16.

¹⁹ This refers to the arbitral tribunal’s powers of *kompetenz-kompetenz* or *competence de la competence* i.e. that it is for the Arbitral Tribunal itself to determine whether it has jurisdiction in the matter, subject to ultimate court-control. See *SBP & Co.*, *supra* note 15 at ¶ 95, 96 and Act §16.

notwithstanding contrary judicial opinion, such as *National Insurance v. Boghara Polyfab*,²⁰ the Courts under §11 must confine themselves to examining whether an arbitration agreement exists and leave the rest, including examining the validity of the agreement, to the tribunal.

B. *Impartiality and Independence*

The 2015 Act seeks to prevent impartial arbitration under Part I, which earlier lacked adequate safeguards to prevent or remove biased arbitrators, either at the threshold or on the initial discovery of bias. It required arbitrators to disclose circumstances which are likely to give rise to justifiable doubts about the arbitrator's independence and impartiality, but left it to the arbitrator to decide if disclosure was required.²¹ The 2015 Act specifies circumstances which will give rise to such doubts, such as direct or indirect; past or present; financial, business, professional etc. relationship with or interest in any of the parties or subject matter in dispute. A new Fifth Schedule, largely based on the Red (Waivable and Non-waivable) and Orange lists (requiring disclosure)²² of the I.B.A. Guidelines on Conflicts of Interest in International Arbitration,²³ is added to act as a guide as to what would constitute such justifiable doubts including matters such as employment, commercial, controlling influence, a close family member having financial interest in the dispute etc. While this does limit the discretion earlier enjoyed by arbitrators to avoid disclosure, in a situation where the arbitrator decides against disclosure on the basis that the circumstances stated in the Fifth Schedule would not apply to him, the parties would still have to seek his recusal and challenge his appointment under §13 of the Act.

There is also a new Seventh Schedule, which sets-out criteria which make a person ineligible for appointment as an arbitrator. This schedule reproduces the criteria in the Fifth Schedule which was taken from the Red List of the I.B.A. guidelines. An important implication of the introduction of this Schedule is that government employees will be ineligible to be appointed as arbitrators in government contracts. Further, these

²⁰ *National Insurance v. Boghara Polyfab*, A.I.R. 2009 S.C. 170 (India) at ¶ 17.

²¹ *See* Act, §12.

²² There is also a Green List which does not require disclosure which includes social media affiliations/relationships such as LinkedIn.

²³ THE IBA GUIDELINES, *available at* http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

disqualifications apply notwithstanding prior waivers, except if made after disputes arise.²⁴ However, §14 should be amended to deem that such ineligible persons are *de jure* unable to perform their functions. This would mean that the mandate of the arbitrator would *ipso facto* terminate and would require his substitution, as contemplated under §14 read with §15, without having to resort to the recusal procedure and its associated problems, discussed below. The LCI also suggested an amendment on these lines, based on its belief that the disqualifications contemplated under §12(5) are more serious than the matters contemplated under §12(1), for which disclosure requirements were better suited.

The question remains whether the Act's challenge procedure involving recusal is sufficient to enforce such requirements. This is because the challenge procedure, unless the parties otherwise agree, is a request for recusal;²⁵ followed by a *judex in causa sua* decision of the arbitrator on the challenge (if the arbitrator refuses the request or if both parties do not agree to the challenge). If the challenge fails, the arbitration continues, without remedy to the parties, until the making of the award, when the remedy of setting aside the award under §34 read with §12 becomes available.²⁶ Setting aside such an award will be too little too late and the party may then have to re-agitate his claim in fresh proceedings. In such cases, the Court can only refuse the arbitrator his fees but cannot provide any compensatory relief to the parties that challenged the appointment. One option is a judicial appeal to a failed challenge but it would run contrary to the objective of minimizing intervention and may allow frivolous challenges to delay proceedings.²⁷ Instead it may be considered to provide certain safeguards, such as requiring the

²⁴ The LCI's rationale behind having such an exception, is to allow real and genuine party autonomy *i.e.* by allowing waivers in cases such as family arbitrations or where a party has blind faith in an arbitrator. *See* Law Commission of India, *Chapter II, Introduction to the Proposed Amendments, 246th Report, 31* (Aug. 2014).

²⁵ To be made within 15 days of the constitution of the arbitral tribunal. *See* Act, §12, 13.

²⁶ *See* Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd., (2007) 5 S.C.C. 304 (India) at ¶ 14 [If the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will always be open to the party to make an application under section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.]. *See also* Bharat Heavy Electricals Limited v. C.N. Garg. 2001 (1) RAJ 388 (Del.) at ¶ 13[Bias and prejudice are contrary to public policy].

²⁷ A judicial challenge is permitted under the Model Law, in case of a failed challenge before the arbitrator. However, this was contrary to the objectives of the Act and was accordingly, not incorporated into the law. *See* UNCITRAL Model Law on International Commercial Arbitration (1985), art. 16(3).

arbitrator to give detailed reasons for dismissing the challenge; or imposing a penalty on arbitrators who fail to make disclosures, in addition to denial of fees, as above, including, in fit cases, requiring the arbitrator to bear the costs, in whole or part, of parties who *bona fide* challenge his appointment.²⁸ To tone down the severity of these provisions, it could be considered to allow arbitrators to claim by way of defence they were not aware of the circumstances in question or that they acted in good faith.

C. Reference by Courts to Arbitration

An arbitration agreement would be redundant, if judicial proceedings are allowed to be initiated and continued on the same subject matter. Therefore, the Act provides for a referral mechanism whereby a judicial authority, seized with an arbitrable dispute, is required to refer the parties to arbitration on the application of a party, subject to certain conditions, the non-observance of which enables the authority to continue with the matter.²⁹ However, the Act was silent regarding cases which contain matters or persons outside the scope of the arbitral agreement. Accordingly, the Supreme Court in *Sukanya Holdings*³⁰ *inter alia* held that in such cases there cannot be splitting of the cause of action or parties and a part-referral to arbitration. It held that for parties in civil proceedings to be referred to arbitration, the entire subject matter of the suit and the parties should be subject to the arbitration agreement.³¹ This view is correct in principle, as parties who have not agreed to arbitrate or who intend to only refer certain disputes to arbitration, should not be forced into arbitration, even though this view favours the continuation of proceedings in Court and is consequently counter-intuitive to alternate dispute resolution. Accordingly, the LCI proposed that referral of parties who have agreed to arbitrate, should be refused if the non-parties to the arbitration agreement (impleaded in civil proceedings), are necessary parties in such proceedings.³² The effect of this proposal is that impleading a non-party to the arbitration agreement in such proceedings would not *ipso facto* defeat referral to arbitration of the parties to the arbitration agreement,

²⁸ The party who did not challenge the appointment should not be entitled to the benefit of this provision and can be left to bear its own costs.

²⁹ *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, A.I.R. 2003 S.C. 2252 (India) at ¶ 12.

³⁰ *Id.* at ¶ 12.

³¹ *Id.* at ¶12-17.

³² Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*, 246th Report, (Aug. 2014), Proposed §8.

unless such party is a necessary party in such proceedings. This has not been provided for in the 2015 Act.

However, this does not contemplate referring such non-parties to arbitration and accordingly, the LCI proposed to amend the definition of ‘Party’ under Part I to include persons claiming through or under parties, legislatively recognizing *Chloro Controls*,³³ in the context of Part I. However, the 2015 Act adopted a different approach. It amended §8 to also allow ‘persons claiming through or under parties’ to apply for referral to arbitration in line with the language of §45 and §54, notwithstanding contrary judicial opinion. This was needed to remove the uncertainty surrounding the application of *Chloro Controls* in the context of Part I. In this case the Supreme Court *inter alia* held that there may be instances where parties to arbitration, may not be signatories to both the arbitration agreement and the substantive contract containing the arbitration agreement, but may be so ‘*inextricably inter-linked*’ that they would fall within the scope of reference under §45.³⁴ They could even be subjected to arbitration without their consent, in exceptional cases such as direct relationships with signatories, direct commonality of subject matter and composite transactions,³⁵ because in such cases, parties act with a common primary object in mind. In such cases, the Courts can read the principal and supplementary agreements together as also look into the intention of the parties, attending circumstances³⁶ and circumstances which demonstrate an implied consent to arbitrate.³⁷

The uncertainty was with respect to the application of this ratio to §8. A recent decision of the Delhi High Court in *HLS Asia*,³⁸ despite noting that *Chloro Controls* was

³³ *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc. and Ors.*, (2013) 1 S.C.C. 641 (India) [“Chloro Controls”].

³⁴ *Id.* at ¶ 65 [There is a substantial variance between the language contained in §8 and §45,54, which deal with domestic and foreign arbitrations, respectively. The effect of variance is that under §45 and 54, persons who are not signatories/parties to the arbitration agreement may request a referral to arbitration, provided they claim through or under the parties, which is not permitted under §8].

³⁵ *Id.* at ¶ 68. [A composite transaction was where performance of the main agreement may not be feasible without the aid, execution and performance of the supplementary or ancillary agreements and where it would be needed to achieve a common object and collectively have a bearing on the dispute.]

³⁶ *Id.* at ¶ 68, 71.

³⁷ *Id.* at ¶ 167.

³⁸ *H.L.S. Asia Ltd. v. M/s. Geopetrol International Inc. & Ors.*, 2013 I.A.D. (Del.) 149. This was a case involving a consortium acting through an appointed representative. The recitals in the agreement in question stated that the respondent was signing the

made in the context of §45 and the New York Convention, seemed to take *Chloro Controls* as laying down a general principle of law, which may be extended to cases under Part I. It went on to hold on the facts of the case that individual members of a consortium, who had not executed the contract containing the arbitration clause, could be referred to arbitration, in view of their inter-relationship which made them necessary parties to the dispute. The author believes that this view is not correct and relies on the Bombay High Court's decision in the *Mumbai International Airport* case,³⁹ which clarified this issue, when called upon to do so in the course of arguments.⁴⁰ The Court rejected the argument that *Chloro Controls* at certain places,⁴¹ elucidates general principles of law, not specific to foreign arbitrations and held those paragraphs only permit (that too only sometimes, depending on the facts and attending circumstances) a consolidation of arbitral claims to avoid multiplicity and to ensure consistency of results.⁴² The Court refused to read *Chloro Controls* to allow, under Part I, a party to drag a person to arbitration, with whom there is no privity of contract. It went on to hold and the author agrees with this view, that there is a material distinction between §8 and §45, which fall under different parts of the Act and deal with different types of arbitrations.⁴³ There is also a clear difference in the language of §8 & §45; whilst the former only refers to the parties to the arbitration agreement, the latter also refers to a person claiming through or under such party. Yet in its wisdom, the Court noted that there may not be a universal principle to follow in cases of multi-party over-lapping agreements and therefore, did not conclusively settle the issue. *HLS Asia* was also distinguished as being a case where a consortium appointed a leader who was authorized to act on behalf of the consortium's members.⁴⁴

agreement for and on behalf of consortium. However, each individual consortium member did not execute the agreement.

³⁹ H.D.I.L. v. Mumbai International Airport Private Limited and Ors., Appeal (L) No. 365 of 2013 (November 28, 2013) ["M.I.A.L."].

⁴⁰ *Id.* at ¶17.

⁴¹ *Chloro Controls*, *supra* note 33 at ¶ 82, 87, 88 & 89.

⁴² M.I.A.L. *supra* note 39 at ¶ 17.

⁴³ This holds true with respect to §54 as well in the context of Geneva Convention on the Execution of Foreign Arbitral Awards, (Sept. 26, 1927).

⁴⁴ In a later decision of the Bombay High Court in *Rakesh S. Kathotia v. Milton Global Ltd.*, 2014 (4) Bom. C.R. 512, the Court noted that there may be instances in domestic arbitrations, where signatories may be construed to have undertaken obligations on behalf of either entity forming part of a group of companies/entities, and consequently, bind such parties, in appropriate cases. The court noted that the M.I.A.L. case (*supra* note 39) also allowed non-signatories to be bound by the arbitration agreement, in case of

In view of the language of §8, as it stood before the amendment, juxtaposed with §45 and §54, non-signatories should not be referred to arbitration under §8. However, the law must recognize that there are complex commercial arrangements where multiple-parties execute multiple documents forming one composite transaction, which may not have even one document executed by all parties. It seems that the Courts are moving in this direction. Accordingly, the amendment to §8 is welcome. Now, non-signatories may take part in arbitration proceedings, as long as it is necessary and proper to do so, being persons claiming through or under the parties to the arbitration agreement.⁴⁵

The amended §8 also allows the Court to refuse to refer the matter for arbitration, if it finds that *prima facie* no valid arbitration agreement exists. This is different from §11, which only contemplates the examination of the existence of the agreement to arbitrate, when considering applications under §11 and not its validity. This could be due to these provisions being different in nature and the remedies contemplated therein.⁴⁶ *Per contra*, though these sections are different, they are complementary and therefore, it may have been better to have a common standard of review in both cases.⁴⁷ Had the 2015 Act adopted such an approach, as also suggested by the LCI (II.A-2nd para, above), §8 and §11 would have been well aligned. However, by prescribing different criteria for both §8 and §11, there is scope for nuanced judicial interpretation.

In case of refusal under §8, a judicial appeal lies under §37. If the Court does refer the parties to arbitration, the arbitral tribunal can still exercise *kompetenz-kompetenz* under §16. Further, the pre-condition of §8(2) has also been relaxed to allow parties to

‘umbrella agreements’ and subsidiary agreements thereunder, where performance of one depends on performance of the others(s). The Court also referred to *H.L.S. Asia* (*supra* note 38) and noted that the Delhi High Court permitted the referral of a non-signatory party to arbitration, who was directly affected by the arbitrable dispute and who is a party to subsidiary agreements but not to the principal agreement, containing the agreement to arbitrate.

⁴⁵ NDA Hotline, *Arbitration reforms in India: End of the Endless Saga? Analysis of the Ordinance*, NISHITH DESAI (Oct. 27, 2015), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/Dispute_Resolution_Hotline_Oct2715.pdf.

⁴⁶ Aakanksha Kumar, *The Arbitration Ordinance, 2015 – Less isn’t always more. [Part I]*, ARBITER DICTUM (Nov. 5, 2015), <https://arbiterdictum.wordpress.com/2015/11/05/the-arbitration-ordinance-2015-less-isnt-always-more-part-i/>.

⁴⁷ Promod Nair, *When good intentions are not good enough: The Arbitration Ordinance in India*, BAR & BENCH (Nov. 4, 2015), <http://barandbench.com/when-good-intentions-are-not-good-enough-the-arbitration-ordinance-in-india/> [“P. Nair”].

file applications under §8 supported by a copy of the arbitration agreement and a petition to the Court praying that the Court call upon the respondent to produce the original or the certified copy. However, LCI's proposal to specify that pleadings filed in interim applications will not be considered a submission to jurisdiction of the Court, has been omitted. This should have been included in the 2015 Act for the sake of certainty that such pleadings will not be considered a waiver of the right to apply under §8.⁴⁸ There is also an inadvertent error in the newly inserted proviso to §8(2) which refers to the narrower term “*Court*” instead of the term “*judicial authority*” used in §8(1). This should be rectified.

D. Recourse Against Arbitral Awards

§34, 48 and 57, provide for challenges/enforcement exceptions, with respect to awards under Part I, the New York and Geneva Conventions respectively, *inter alia* on the touchstone of the public policy of India. Therefore, when the Supreme Court in *Saw Pipes*,⁴⁹ seemingly, in the context of domestic awards, held that awards can be set aside under §34 if the award suffered from patent illegality⁵⁰ as a violation of the public policy of India, it was possible to extend this view to §48 and 57 as well. Initially, Supreme Court did apply the wider *Saw Pipes* formulation in *Phulchand Exports*⁵¹ in the context of

⁴⁸ §8 of the Act *inter alia* provides that the application for referral under §8 must be made before the ‘*first statement on the substance of the dispute*’. See also *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors.*, A.I.R. 2011 S.C. 2507 (India) at ¶ 19 [Willing participation in and submission to judicial proceedings, could amount to a waiver of the right to referral to arbitration, depending on the conduct of the parties. However, defendants can defend applications for interim relief]. Followed in 2014 by *T.N. Generation and Distribution Corporation Ltd. v. P.P.N. Power Generation Co. Pvt. Ltd.*, 2014 (4) S.C.A.L.E. 560 at ¶ 51.

⁴⁹ *Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd.*, A.I.R. 2003 S.C. 262 (India) [“*Saw Pipes*”].

⁵⁰ If the award was contrary to the terms of the contract, it would be considered patently illegal. See also *Hindustan Zinc Ltd. v. Friends Coal Carbonisation*, (2006) 4 S.C.C. 445 (India) at ¶ 14. See also *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 S.C.C. 181 (India) at ¶ 59 and *Centrotech Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 S.C.C. 245 (India) at ¶ 103 (*patent illegality must go to the root of the matter, such that it is so unfair and unreasonable as to shock the conscience of the court*), *D.D.A. v. R.S. Sharma and Co.*, (2008) 13 S.C.C. 80 (India) at ¶ 21 and *J.G. Engineers (P) Ltd. v. Union of India*, (2011) 5 S.C.C. 758 (India), *MSK Projects (I) (IV) Ltd. v. State of Rajasthan*, (2011) 10 S.C.C. 573 (India), at ¶ 17.

⁵¹ *Phulchand Exports Ltd. v. O.O.O. Patriot*, 2011 (11) S.C.A.L.E. 475 at ¶ 13. R.M. Lodha, J. speaking on behalf of the Bench, noted that there is merit in the submission that the *Saw Pipes* exposition of the public policy of India, may be used in interpreting

§48. This was later over-ruled by a larger three judge bench in *Shri Lal Mahal*⁵² which applied the narrow *Renusagar*⁵³ interpretation to §48. In doing so, it held that it was safe to observe that *Saw Pipes*⁵⁴ allowed a departure from its interpretation, in matters of enforcement of foreign awards, based on the subtle distinction between the jurisdiction of a Court under §34 to challenge an award, before it becomes final and executable, in contradistinction to the enforcement of an award under §48, after it becomes final. This distinction necessitates a wider meaning of public policy including patent illegality to be adopted under §34 while a narrow meaning should be taken under §48.⁵⁵ Interestingly, both *Shri Lal Mahal* and the judgement it over-ruled *i.e. Phulchand Exports*, were delivered by R.M. Lodha, J. though speaking for two different benches, with the larger bench in *Shri Lal Mahal* prevailing.

The LCI also noted that §34 and §48, prior to the 2015 Act, were *pari materia*, though there is greater legitimacy for judicial intervention in domestic matters, contrasted with an examination of the correctness of a foreign award or an ICA award.⁵⁶ In this light, the 2015 Act specifies that domestic awards other than ICA awards may be set aside on the grounds of patent illegality, appearing on the face of the award. This directly allows judicial intervention to address patent illegality in purely domestic awards, instead of indirectly relying on an expansive construction of “public policy”.⁵⁷ However, this ground is qualified in the 2015 Act by excluding erroneous application of the law or re-appreciation of evidence, from the scope of the patent illegality ground for setting aside awards. The 2015 Act also clarifies that under §34, 48 and 57, awards in violation of public policy would mean those awards which are:

§48(2)(b), that public policy can be given wider meaning and that the award could be set aside, if it is patently illegal.

⁵² *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 S.C.C. 433 (India) at ¶ 28 [“*Shri Lal Mahal*”].

⁵³ *Renusagar Power Co. Ltd. v. General Electric Co.*, A.I.R. 1994 S.C. 860 (India) [“*Renusagar*”]. The narrow interpretation formulated in this case was expanded by *Saw Pipes* to include patent illegality. However, *Shri Lal Mahal* (*Id.* at ¶ 26), borrowed the rationale adopted by the Court in *Renusagar* to hold that §48 was to be interpreted in narrow terms, proceedings on the belief that *Saw Pipes* dealt only with domestic awards.

⁵⁴ *Saw Pipes*, *supra* note 49.

⁵⁵ *Shri Lal Mahal*, *supra* note 52 at ¶ 18, 22, 24-28 & 31.

⁵⁶ *See* 246th Report, at ¶ 34, 35.

⁵⁷ *See* 246th Report, at ¶ 36.

- i. Induced by fraud or corruption, or in violation of certain provisions of the Act;⁵⁸
- ii. Opposed to the fundamental policy of Indian law; or
- iii. It is in conflict with the most basic notions of morality or justice.⁵⁹

Whilst the exceptions of fraud, corruption and fundamental policy of Indian law have been retained, the scope of public policy has been reduced by omitting the *Saw Pipes* formulation of ‘*interest of India*’;⁶⁰ by qualifying justice or morality by adding the words ‘*the most basic notions*’ to the phrase; and by separating patent illegality from public policy. Whilst morality or justice are not new terms in the context of setting aside of arbitral awards, there is no Indian decision for guidance as to what could constitute ‘*the most basic notions of morality or justice*’;⁶¹ Accordingly, *Parsons and Whittemore*,⁶² may be referred to as a

⁵⁸ See Act, §75, 81.

⁵⁹ See *Associated Builders v. Delhi Development Authority*, A.I.R. 2015 S.C. 620 (India) at ¶ 12 [“Associate Builders”] [An award can be said to be against justice only when it shocks the conscience of the court. Morality would mean sexual morality and the scope of this term could extend beyond sexual morality, only if it shocks the conscience of the Court. The concept of morality implies deviation from standard norms of life and good conscience. (Noting *Gherulal Parekh v. Mahadeo Dass Maiya*, 1959 Supp. (2) S.C.R. 406). This necessarily depends on the evolution of civilization and therefore, no universal standard can be laid down for such a concept, which must remain fluid to meet the present needs of society. In this context, the Court noted that §23 of the Indian Contract Act, 1872, (which deals with lawful/unlawful consideration and objects for contracts) indicate legislative intention to give ‘*morality*’ a restricted meaning. This would prevent the over-lapping of the terms ‘*morality*’ and ‘*public policy*’.]

⁶⁰ *Id.* at ¶ 12 [Concerns of India as a member of the world community in its relations with foreign powers, which will have to be considered on a case by case basis].

⁶¹ See *Renusagar*, *supra* note 53 at ¶ 50-57. [Referring to the approach of the American Courts with respect to public policy, in its application to the recognition and enforcement of foreign arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), the Court referred to the decision of the U.S. Court of Appeals in *Parsons & Whittemore* (*see below at 62*), where the Court refused to enforce awards on the grounds of public policy, unless the enforcement would violate the state’s most basic notions of morality and justice.]

⁶² *Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L’industrie Du Papier and Anr.*, 508 F.2d 969 (2d Cir. 1974) [“*Parsons & Whittemore*”]. This was a case before the U.S. Court of Appeals for the Second Circuit, New York, in the context of the public policy exception to the enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). In this case, the Court refused to deny enforcement of a contract on the ground that there was a political ‘falling-out’ of the U.S. and Egypt, when in May, 1967, there was a large exodus of employees of the Plaintiff-appellant out of Egypt, due to Egyptian expressions of hostility towards Americans in Egypt, in the context of the looming Arab-Israeli war.

guiding light in interpreting this phrase. In this case, a U.S. Court held that the phrase should be construed narrowly, so as to prevent matters of international politics from becoming a public policy loop-hole to contract enforcement. The observations of J. Smith, J. in the case, may be referred to in this regard:

*“To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy’. Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.”*⁶³

Courts in Singapore⁶⁴ and Hong Kong⁶⁵ have also noted that public policy is to be construed narrowly and is not to be *‘wheeled out on all occasions’*.⁶⁶ This is pro-enforcement and comforts investors that public policy will not be invoked to re-open closed matters.⁶⁷

On June 6, 1967, the Government of Egypt broke diplomatic ties with the United States and ordered the expulsion of all Americans from Egypt, unless they apply for and obtain a special visa.

⁶³ *Id.* at 974.

⁶⁴ P.T. Asuransi Jasa Indonesia (Persero) v Dexia Bank S. A., [2006] 1 S.G.C.A 41 at ¶ 59 (Sing.) [Awards contrary to the *‘forum’s most basic notions of morality and justice’* are contrary to public policy, as awards which *inter alia* shock the conscience, or are clearly injurious to the public good, or are wholly offensive to the ordinary reasonable and fully informed member of the public. (See also Deutsche Schachbau v Shell International Petroleum Co. Ltd., [1990] 1 A.C. 295 (Lloyds’ Rep.) 246 (U.K.) at ¶ 254, referred to in *P.T. Assuransi* at para 59]. It may be noted that *Saw Pipes* (*supra* note 49) was referred to in this case (See para 56, 57) with the Court respectfully disagreeing with its decision, on the basis that there is a difference between the legislative intent behind Indian and Singaporean law and that the Singaporean legislative policy is to minimize curial intervention in international arbitrations. It also noted that the High Court of New Zealand in Wellington also disagreed with the broader view of *Saw Pipes* in *Downer-Hill Joint Venture v. Government of Fiji* [2005] 1 NZLR 554 (HC) 80 (N.Z.).

⁶⁵ Paklito Investment Ltd. v. Klockner East Asia Ltd., [1993] H.K.C.U. 0613 (H.K.). See also *A v. R*, [2009] H.K.C.F.I. 342 (C.F.I) (H.K.), *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, [1999] 2 H.K.C.F.A.R. 111 (C.F.A) (H.K.).

⁶⁶ *Id.*

⁶⁷ *A v. R*, [2009] H.K.C.F.I. 342 (C.F.I) (H.K.), per Reyes J. *“Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or should have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public*

With respect to ‘*fundamental policy of India*’, the LCI noted that the Supreme Court’s decision in *Western Geco*,⁶⁸ construed the phrase in a wide sense (noting that *Saw Pipes*⁶⁹ had not dealt with this phrase), and added three fundamental juristic principles, so deeply embedded in our jurisprudence that they can be described as part of a fundamental policy of Indian law;⁷⁰

- i. Judicial approach free from arbitrariness, caprice, whims and other extraneous considerations;
- ii. Principles of natural justice; and
- iii. The decision must not be so perverse or so irrational that no reasonable person would have arrived at such a decision.⁷¹

However, the Court did clarify that this was not an exhaustive enumeration of the fundamental policy of India law. This may even include instances where awards are not supported *inter alia* by inferences which should be drawn from the facts of the case, even if the case requires the arbitrator to exercise discretion in making awards.⁷²

policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties’ agreement to pursue arbitration.”

⁶⁸ O.N.G.C. Ltd. v. Western Geco International Ltd., (2014) 9 S.C.C. 263 (India) at ¶ 39, 40 [“Western Geco”]. It may be noted that the 246th Report of the LCI was based on the assumption that the phrases ‘*fundamental policy of Indian law*’ and ‘*most basic notions of morality or justice*’ would be construed in a narrow sense. In making its recommendations in the Report, the LCI did not have the benefit of referring to the later *Western Geco* judgement *inter alia* construed ‘*fundamental policy of India*’ in a wide sense and set-out its expanded scope. Accordingly, the LCI issued a supplementary report, to limit the possible expansion of the scope of the above phrases, by excluding adjudication on merits. See Law Commission of India, “*Public Policy*” *Developments post-Report No.246, Supplementary to the 246th Report*, (Feb. 2015).

⁶⁹ *Saw Pipes*, *supra* note 49.

⁷⁰ *Western Geco*, *supra* note 68 at ¶ 28, 29.

⁷¹ *Western Geco*, *supra* note 68. This principle was described as a salutary juristic fundamental principle. See also the principle of “reasonableness” laid down in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (Eng.), *Associated Builders*, *supra* note 59 (findings not based on evidence, taking irrelevant factors into account and ignoring vital evidence, will result in perverse decisions).

⁷² *Western Geco*, *supra* note 68 at ¶ 30. This decision was followed by *Associate Builders*, *supra* note 59, a subsequent two-judge bench of the Supreme Court. However, the Court introduced a caveat to *Western Geco* by stating that the Courts are not required to act as Courts of appeal. Consequently, the Courts are not supposed to interfere with errors of fact, unless it is accompanied by arbitrary, capricious action on the part of the arbitrator. Where the view taken by the arbitrator, measures up in quality to a trained legal mind, the Court must not sit as a Court of appeal and correct errors of fact (para 12).

Accordingly, as was also proposed by the LCI, the 2015 Act has clarified that Courts cannot review awards on their merits when testing them for contraventions of the fundamental policy of India. The author believes that this amendment is essential, since the power to review an award on its merits would be akin to an appeal, contrary to the Act's stated objective of limiting judicial intervention.⁷³ The language of §28 (Rules applicable to substance of dispute) has also been watered down by requiring the arbitrator to decide matters taking into account the terms of the contract, as opposed to 'in accordance with' the terms of the contract and relevant trade usages, to reduce the scope of challenges to arbitral awards with respect to contraventions of the terms of the contract.⁷⁴

E. Enforcement of Awards

Before the promulgation of the 2015 Act, §34 barred the enforcement of awards until the time-limit for §34 applications ran out or, an application was made and had failed. Thus, simply filing an application under §34 within the limitation period of 30 days, acted as an automatic stay of the award. This was without providing any entry barriers to frivolous applications, such as the option to issue orders of deposit or security,⁷⁵ unlike the powers conferred on appellate Courts under the Code of Civil Procedure, 1908 ["CPC"].⁷⁶ §9 of the Act, which contemplates interim measures of protection post the making of the award (but before it is enforced under §36), is also of no assistance in this regard. This was unsuccessfully attempted by award-holders to seek deposit of the award amount in the Bombay High Court. Rejecting their contentions R.S. Dalvi, J. ruled that §9 contemplates the power of the Courts to grant interim relief to

⁷³ See Act, Statement of Objects and Reasons, at ¶ 4(v).

⁷⁴ See Law Commission of India, *Chapter II, Introduction to the Proposed Amendments*, 246th Report, 35 (Aug. 2014). See also *Saw Pipes*, *supra* note 49.

⁷⁵ See CODE CIV. PROC. 1908 O. XLI R.1(3) read with 5(5). [An appellant seeking stay of the execution of a money decree, must provide a deposit or security, if ordered, as a condition precedent, failing which the applicant is disentitled to seek a stay order. However, this would not require dismissal of the appeal or denude the appellate court of its jurisdiction to entertain the appeal on merits.] See *Kayamuddin Shamsuddin Khan v. State Bank of India*, (1998) 8 S.C.C. 676 (India) at ¶ 7, 8, followed in *M/s. Malwa Strips Pvt. Ltd. v. M/s. Jyoti Ltd.*, A.I.R. 2009 S.C. 1581 (India) at ¶ 10. See also *Union of India and Ors. v. Amitava Paul and Ors.*, A.I.R. 2015 (Cal.) 89 (India) for a detailed analysis and history of O. XLI R.1,5.

⁷⁶ *National Aluminium Co. Ltd. v. Pressteel and Fabrications Pvt. Ltd. and Anr.*, A.I.R. 2005 S.C. 1514 (India) at ¶ 10 & 11.

protect the subject-matter of the arbitration agreement and not the award amount or the Petitioner's right to the receipt of the award.⁷⁷

Accordingly, the 2015 Act mandatorily requires parties to file a separate stay application, in which a conditional order may be passed by the Courts, having due regard to certain provisions of the CPC, with reasons recorded in writing.⁷⁸ This would require the applicant to demonstrate sufficient cause, causation of substantial loss (were the application to be rejected) and satisfactorily explain delays in the application. The Court may also consider whether or not the applicant has furnished security for due performance of the decree or order. Accordingly, the Courts are now clothed with sufficient powers to allow only legitimate challenges against awards and to make sure that, frivolous attempts at frustrating or delaying enforcement will cost the applicant.

F. Delays and Time-Lines

i. Interim Relief by Courts & Arbitral Tribunals

The 2015 Act amends §9 to provide that arbitral proceedings must commence within ninety days of the order granting interim relief or within such further time as the Court may determine. This legislatively recognizes the decision of the Supreme Court in *Firm Ashok Traders v. Gurumukh Das Saluja* where it was *inter alia* held that a party that has obtained relief under §9 pre-constitution of the tribunal cannot '*sit and sleep over the relief*'; this relief is granted '*before*' *i.e.* necessarily in contemplation of arbitration and therefore unreasonable delay would snap the relationship between the relief and the proceedings; in such cases, the Court may require the party to demonstrate its intention and the steps it proposes to take to commence arbitration. It may also impose conditions on the party and recall relief in cases of breach of such conditions.⁷⁹ However, it has missed out on the opportunity, as suggested by the LCI, to provide that such relief will automatically lapse upon the expiry of this period, to create the fear of losing interim protection in the

⁷⁷ M/s. AFCONS Infrastructure Ltd. v. Board of Trustees of the Port of Mumbai, 2014 (1) Bom. C.R. 794 at ¶ 3, 26. [Though §9 allows the Court to pass interim orders of protection, even after the award is made but before it is enforced under §36, it does not mandate or allow deposit of the award amount pending its challenge. To order deposit of the award under §9 would amount aiding the execution of an award, which is unenforceable under §36].

⁷⁸ With respect to appeals against decrees for the payment of money. *See* CODE CIV. PROC. 1908 O. XLI R.1,5.

⁷⁹ *Firm Ashok Traders v. Gurumukh Das Saluja*, A.I.R. 2004 S.C. 1433 (India) at ¶ 18.

minds of the parties.⁸⁰ Going one step further, it could have also provided that fresh orders or extensions would not ordinarily be granted after the lapse of the initial order unless the applicant can demonstrate sufficient cause or that the delay was not attributable to him.

The 2015 Act also makes orders under §17 enforceable as orders of the Court; earlier these were neither enforceable by the arbitrator nor the Courts,⁸¹ though the Delhi High Court found a way around this by holding that non-compliance of such orders would amount to contempt of the tribunal under the Act.⁸² However, making the orders enforceable as above is a simpler and better solution. The 2015 Act has also given arbitral tribunals, powers *pari materia* to the powers held by the Courts under §9, to grant interim relief post-constitution of the tribunal;⁸³ with a caveat that the Courts would continue to exercise this power where obtaining interim relief from the arbitral tribunal would not be efficacious. It must be considered in this regard, that interim relief under §9 may be granted by the Courts against a person who need not be a party to the arbitration agreement or to the arbitration proceedings. This is because the power of the Courts under §9 is the same as in any other proceedings for interim relief and since the courts

⁸⁰ *Supra* note 32, at Proposed §9(2).

⁸¹ *Sundaram Finance Ltd. v. N.E.P.C. India Ltd.*, (1999) 2 S.C.C. 479 (India) at ¶ 12 [Though §17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court, and it is for this reason only that §9 of the Act gives the Courts the power to pass interim orders during the arbitration proceedings]. *See also* *M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.*, A.I.R. 2004 S.C. 1344 (India) at ¶ 59.

⁸² *See* Act, §17 read with §27(5). §27(5) provides *inter alia* that if the parties commit a default or contempt of the arbitral tribunal, such parties would be subject to all disadvantages, penalties and punishments, as would be suffered by the parties if the arbitral proceedings were judicial proceedings. *See also* *Sri Krishan v. Anand*, 2009 (112) D.R.J. 657 at ¶ 16 [“Sri Kishan”]. The question of law in this case was whether interim relief granted under §17, would preclude an application for the same relief under §9. It was held to be so, *inter alia* on the ground that once parties elect to apply for relief under §17, a §9 application for the same relief would lead to multiplicity of proceedings. Further, since proceedings for contempt are available under §17 read with 27, it cannot be said that the parties have no way to enforce the order.

⁸³ Recently, the Bombay High Court has held that it cannot grant interim relief once the claim has been dismissed; The power to grant relief under §9 extends up until the award has been enforced or time period for applying for enforcement but its purpose is to prevent frustration of the claim, pending adjudication and enforcement. There is also the requirement that interim relief must be in aid of the final relief. Both of these concepts would not apply where the claim has been rejected as there is no question of protecting the claim or claimant. *See* *Dirk India Private Limited v. Maharashtra State Electricity Generation Company Limited*, 2013 (7) Bom C.R.493 at ¶ 13,14.

have evolved a practice of issuing interim orders *qua* third parties also, this power extends to §9 as well.⁸⁴ In contrast to this, §17 can only be applied to the parties in arbitration. On shifting the powers of §9 to §17, these powers will no longer be exercisable against third parties and an argument can be made that in such cases it would not be ‘*efficacious*’ to seek relief under §17, and consequently, the Court can grant relief under §9.⁸⁵

It may also be noted that the amended §17 acts as an exception to the general rule that an arbitrator becomes *functus officio* on making the award, as it provides the power to grant interim measures even post-award but before enforcement of the award. However, there is an inadvertent drafting omission, as §32 provides that the mandate of

⁸⁴ Sri Kishan, *supra* note 82 at ¶ 7. *See also* Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd., (July 10, 2007) (SC) at § 18 [Under §9, Courts would have to consider the classical rules for the grant of such interim measures. It cannot be said that § 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction.], *See also* Embassy Property Developments v. Jumbo World Holdings Limited, (MADHC) (June 20, 2013) at ¶ 55 [§ 9 is wide in scope, extending even to third parties in whom the properties or goods are vested and even though such parties may not be a party to the arbitration clause in an agreement. Though § 9 can be invoked only by a party to the arbitration agreement, interim relief could be granted even against the third parties. Unless such a power is available, a party successful in obtaining an award may be frustrated. Section 9 is enacted only with the intention of preserving and protecting the subject matter of the arbitral proceedings, even if it is in the hands of third parties. There must be some nexus between the parties to the agreement and the subject matter of such an agreement.], *See also* Pawan Hans Helicopters Ltd. v. AES Aerospace Ltd., 2008 (2) ARB.L.R. 63 (Del.) at ¶ 12, the Delhi High Court *inter alia* held a person seeking relief under §9, must be a party to the proceedings, though relief could be granted by the court, even against third parties, who are not parties to the arbitration agreement. *See also* Axis Bank Ltd. & Ors. Applicants/Interveners, in the matter of Maharashtra Airport Development Company v. Abhijeet MADC Nagpur Energy Pvt. Ltd., Bombay High Court C.S.(L) No. 434 of 2014 in Arbitration Petition No. 452 of 2014 (Apr 10, 2014) at ¶ 12.[In an application for impleadment or in the alternative, permission to intervene, when it was argued that the applicants were neither parties to the arbitration agreement or the subject matter of the reference to arbitration, the Bombay High Court permitted a non-party to intervene in the proceedings, being a persons who is likely to be affected by the relief sought in the proceedings. In this case, the Court permitted lenders to intervene in proceedings, which had a right to recover this money from the petitioner through the respondent (the receivables of a concession agreement were assigned by the respondent to the intervener)], *see also* H.D.I.L. v. M.I.A.L., *supra* note 39.

⁸⁵ For example, injunctive relief against a bank to prevent encashment of a bank guarantee will not be permitted under §17 of the Act if the bank is not a party to the arbitration. *See* Avinash EM Projects Pvt. Ltd. v. Gail (India) Limited, 2015 (1) Arb. L.R. 24 (Del.) at ¶11.3,13.

the arbitrator terminates on the making of the award.⁸⁶ In this regard, §32 should be amended to include §17 as an exception to the termination of an arbitrator's mandate.

ii. Appointment of Arbitrators

The 2015 Act provides that Courts should endeavour to decide applications for appointment under §11 expeditiously, as far as possible, within sixty days.⁸⁷ This should have been made mandatory, with extensions to be granted only in fit cases, for fixed periods and with reasons to be recorded in writing. This period of sixty days is calculated from the date of service of notice, which often takes a long time in India. In fact, the Supreme Court recognized that delays in service of processes account for over 50% of the arrears of cases in the courts of Delhi. Accordingly, the Court permitted service by way of e-mail, in addition to the ordinary modes of service, whereby the Court's registry would transmit e-copies of pleadings, notices etc.⁸⁸ Similarly, the High Courts of Delhi and Bombay, in exercise of their powers under the CPC,⁸⁹ have also framed rules to permit e-mail service.⁹⁰ The Bombay High Court Rules Review Committee also recommended the introduction of rules relating to e-service.⁹¹ This demonstrates judicial intention to permit e-service of judicial processes, in fit cases.

Thus, e-service should be specifically allowed under the Act, with safeguards to ensure proper service, such as requiring a digitally authenticated service report to be provided to the Registry of the Court. This would be in keeping with International

⁸⁶ Except in certain cases; *See* Act, §33 [Corrections, interpretations of awards], §34(4) [opportunity to eliminate grounds for setting aside awards] which does not include §17.

⁸⁷ Act, §11(13).

⁸⁸ C.E.R.C. v. National Hydroelectricity Power Corporation Ltd., Civil Appeal No. 21216 of 2010 (July 26, 2010). The Court however, clarified that this facility was for the time being, only being extended in cases of commercial matters and applications for urgent interim relief.

⁸⁹ *See* O. V R. 9. [Allows service of summons to defendants by transmitting a copy by fax message or electronic mail services, in accordance with the rules framed by the concerned High Court in this regard].

⁹⁰ *See* DELHI COURTS SERVICE OF PROCESSES BY COURIER, FAX AND ELECTRONIC MAIL SERVICE (CIVIL PROCEEDINGS) RULES, 2010, *available at* http://delhihighcourt.nic.in/writereaddata/upload/Notification/NotificationFile_NCJII RHG.PDF; BOMBAY HIGH COURT APPELLATE SIDE RULES, 1960, *available at* <http://bombayhighcourt.nic.in/libweb/rules/BHCASR.html>. (in case of urgent orders on the appellate side of the Bombay High Court).

⁹¹ BOMBAY HIGH COURT, UNIFIED AND REVISED RULES (ORIGINAL SIDE AND APPELLATE SIDE) DATED DEC. 6, 2011, *available at* <http://bombayhighcourt.nic.in/latest/PDF/ltuptdbom20120317120227.pdf>.

practices in progressive jurisdictions, where in certain cases, even social media has been allowed to serve judicial processes. In the UK, Twitter was used to serve an injunction order⁹² and in Australia,⁹³ New Zealand,⁹⁴ U.S.,⁹⁵ and Canada,⁹⁶ Courts have permitted service of judicial processes via private messages on Facebook.⁹⁷ In Australia, service via text messages has also been allowed in certain cases.⁹⁸

In this regard, the Parliament may be guided by the spirit of the *New England Merchants* case,⁹⁹ with respect to technological advances, as follows:

*"I am very cognizant of the fact that the procedure which I have ordered in these cases has little or no precedent in our jurisprudence. Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut."*¹⁰⁰

⁹² BOBBIE JOHNSON, HIGH COURT APPROVES INJUNCTION VIA TWITTER, THE GUARDIAN, <http://www.theguardian.com/technology/2009/oct/01/twitter-injunction>. See also David Cran & Georgia Warren, *Service by Twitter - the UK courts embrace technology*, 21.2 ENT. L.R. 81, 81-83 (2010) ["Service by Twitter"].

⁹³ MKM Capital Property Ltd. v. Carmela Rita Corbo and Gordon Kinsley Maxwell Poyser (a bankrupt) ACTCA Case No. SC 608 (Austl.). (Austl.).

⁹⁴ *Axe Market Gardens Limited v Craig Axe* (unreported) High Court, Wellington, CIV 2008-485-2676, 16 March 2009, Gendall A J (N.Z.).

⁹⁵ F.T.C. v. PCCare247, Inc., 12 F.R.D Civ. 7189 (2013) ["FTC"]. See also Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007 (9th Cir. 2002). See also Michael C. Lynch., *You've Been 'Poked'! PCCare247' And Service of Process by Social Media*, 249 N. Y. L. J. 99 (2013).

⁹⁶ Knott v. Sutherland, (Can.). See also Ian Llewellyn, *NZ Court Papers Can Be Served Via Facebook, judge rules*, THE NEW ZEALAND HERALD (Mar. 16, 2009), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10561970.

⁹⁷ See Service by Twitter, *supra* note 92.

⁹⁸ See *Child Support Registrar Applicant v. Leigh* [2008] F.M.C.A. Fam L.R. 1424, 2008 W.L. 5543896 (Austl.), at ¶ 47 (noting that the defendant was given notice of the proceedings by text message), *Yousif v. Commonwealth Bank of Australia (No. 2)* [2011] F.C.R. 58, W.L. 364929 (Austl.) at ¶ 5-7; See also Claire M. Specht, "Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?" 53 B.C. L. REV. 1929, 1953 (2012).

⁹⁹ The New England Merchants National Bank v. Iran Power Generation and Transmission Company et al., 495 F. Supp. 73 (1980).

¹⁰⁰ *Id.*

The Government should also make appropriate clarifications and agreements¹⁰¹ with other contracting states under the Hague Convention on cross-border service¹⁰² to ensure that there are no legal impediments to service of judicial documents under the Act via e-mail. In this regard, we may note that there is judicial uncertainty as to whether U.S. Courts consider e-mail to be within India's objected modes of service under the Hague Convention. Some cases have held¹⁰³ that India's objection to Article 10 of the Hague Convention¹⁰⁴ is limited to the modes of service mentioned therein *i.e.* postal channels and judicial officers, where India is the destination country, there is no impediment to order alternative means of service including e-mail.¹⁰⁵ However, other cases have read the language of Article 10 to include e-mail and consequently, included in India's objections. In these cases, the Courts were not prepared to substitute the language of the Hague Convention, for language not contained therein, even if it would facilitate international service.¹⁰⁶

The sixty-day limit on §11 applications, supported by e-service and clarifications or agreements with contracting states under the Hague Convention, would be a comprehensive move towards expediting arbitration. However, having to approach the Courts for extensions, as above, may result in parties lining up before the Courts for seeking extensions or parties choosing foreign jurisdictions, in cases requiring detailed examination of evidence or containing complex issues of law or fact. Further, since there is no carve out for institutional arbitrations as provided for in the case of arbitrator fees,

¹⁰¹ See Art.10, 11, *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 1529 A-9432, Hague (Nov. 15 1965). This allows contracting states to permit channels of transmission other than those provided for in the Hague Convention.

¹⁰² *Id.* See also STATUS TABLE, MEMBERS OF THE ORGANISATION, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

¹⁰³ FTC, *supra* note 95.

¹⁰⁴ See DECLARATIONS, RESERVATIONS MADE BY INDIA UNDER THE HAGUE CONVENTION, http://www.hcch.net/index_en.php?act=status.comment&csid=984&disp=resn.

¹⁰⁵ FTC, *supra* note 95. See also Gurung v. Malhotra, 279 F.R.D. 215, 219 (S.D.N.Y. 2011), Anticevic, 2009 WL 361739, In re: S. African Apartheid Litig, 643 F. Supp. 2d, Philip Morris USA Inc. v. Veles Ltd, No. Civ. 2988 (GBD), 2007 W.L. 725412 (Referred to in FTC).

¹⁰⁶ FTC, *supra* note 95. See also Agha v. Jacobs, No. C 07-1800 RS, 2008 WL 2051061 (Referred to in FTC); Graphic Styles/Styles International LLC v. Men's Wear Creations & Richard Kumar, Civil Action No. 14-4283 (July 16, 2014).

requiring Court approval for extensions in institutional arbitration may be considered to be an unnecessary intrusion and may need to be reconsidered.¹⁰⁷

We may also note that the 2015 Act requires arbitrators to disclose any circumstances which are likely to affect his ability to devote sufficient time to the arbitration¹⁰⁸ and specifically whether he will be able to complete the entire arbitration within twelve months; for the sake of clarity, it may be specified that this period is to be calculated from the date of the order of appointment.

iii. Duration of Arbitral Proceedings

First proposed in the 2003 Amendment Bill [“2003 Bill”]¹⁰⁹ as also in the proposals, the 2015 Act imposes a twelve-month time-limit for making domestic awards.¹¹⁰ This may be extended by the consent of parties up to six months and thereafter, further extensions can only be granted by the Courts, who must *endeavour* to decide extension applications within sixty days, with extensions to be granted only if the parties show sufficient cause. This could prevent unnecessary delays and is likely to do wonders for investor confidence.

When granting extensions, suitable terms and conditions such as expedited time-lines, imposition of costs or penalties for delaying the matter, etc. may be imposed. However, it should also have been provided that when granting extensions, Courts must record whether the delay is attributable to any of the parties, which fact may be considered when imposing costs in the award. This would protect parties acting in good faith from deliberate delays in proceedings. However, the 2015 Act does have a general provision for imposition of actual or exemplary costs which can be put to use in this regard but would need the Courts to take a strong stand against unnecessary extensions.

If the parties do not take steps to extend the time-period as above, the 2015 Act provides that the tribunal’s mandate terminates *ipso facto*. As regards arbitrators, the Court when granting an extension has the power to reduce the arbitrator’s fees by upto 5% per month, in case the delay is attributable to the arbitrator. This is clearly inadequate and

¹⁰⁷ P. Nair, *supra* note 47.

¹⁰⁸ Act, §12(1)(b).

¹⁰⁹ THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, (DEC. 2003), §23, <http://lawmin.nic.in/legislative/arbc1.pdf> [“2003 Bill”].

¹¹⁰ To be calculated from the date of the arbitral tribunal receiving notice of the appointment in writing. See Act, §29A(1).

will have little deterrent value. An alternative could be to allow the Courts to reduce the arbitrator fees, proportionate to the period of delay attributable to him, subject to the arbitrator being given a reasonable opportunity to demonstrate sufficient cause for the delay or that the delay was not attributable to him. When considering whether the delay is attributable to the arbitrator, the disclosures with respect to ability to devote time to the arbitration¹¹¹ should also be considered.

However, the 2015 Act chose to grant the power to impose costs or suitable conditions on the parties or reduce the fees of the arbitrators or order their substitution, as above. It remains to be seen whether Courts will be readily willing to substitute arbitrators or reduce their fees, except in extreme cases or unjustifiable delays. There is also the worry that reputed ad-hoc arbitrators such as retired judges will no longer be willing to act as arbitrators merely due to the risk of embarrassment and loss of reputation by an order of fee reduction or substitution. There is also no carve-out with respect to substitution of arbitrators in cases of institutionalized arbitration, which may be viewed as unwarranted interference with their processes.

On the opposite side of the spectrum, the 2015 Act also legally incentivizes speedy arbitration, by providing that the parties may agree that an arbitrator would be entitled to additional fees for finishing the proceedings within six months.¹¹²

iv. Conduct of Arbitral Proceedings

The Act provides that unless the parties otherwise agree, the arbitral tribunal decides how to conduct proceedings including matters relating to nature of hearings, adjournments, presentation of evidence etc.¹¹³ The 2015 Act adds that evidence should be presented in oral hearings, as far as possible and that oral arguments should be scheduled on consecutive days. Further, adjournments should only to be granted for sufficient cause and frivolous adjournments may be subjected to costs, including exemplary costs.¹¹⁴ However, it should also require the arbitral tribunal to record reasons in writing for granting adjournments and provide that the sufficiency of the reasons may be considered by the Courts, when determining the reduction of fees of the arbitrator or when considering his substitution, for delays attributable to him.

¹¹¹ Act, §12(1)(b).

¹¹² Act, §29A(2).

¹¹³ Act, §24.

¹¹⁴ Act §24 2nd proviso.

Further, unless parties otherwise agree, the failure to submit the statement of defence within the specified time, is not treated as an admission of the claim. The 2015 Act grants the arbitral tribunal the discretion to treat this default as a forfeiture of the right to defend claims in the arbitration. However, in the interest of preventing uninterested or negligent respondents from introducing additional facts or issues outside the statement of claim, such failure should be treated as a mandatory forfeiture, without the option to restrict the operation of this section by mutual agreement. In such cases, the respondent may be allowed to deal with the assertions of the claimant, to the limited extent of disproving such assertions, without introducing any new facts or issues or making any positive assertions in the respondent's defence. Similar provisions are contained in the CPC, where failure to file a written statement entitles a Court to immediately pronounce judgment against the defendant or pass such order as it may think fit, in the alternative.¹¹⁵ In doing so, the Court cannot act blindly or mechanically and must ensure that if the facts set out in the plaint are treated to have been admitted, the plaintiff would be entitled to judgment without requiring proof of the contents of the plaint.¹¹⁶

v. Recourse Against Arbitral Awards

The 2015 Act requires an appellant to give prior notice to the respondent, before making an application under §34.¹¹⁷ It also provides that such applications should be disposed off within one year of the service of the notice or sooner, if possible. The author's suggestion to allow e-mail or fax service, in addition to recognized postal services, should also be considered in this regard.¹¹⁸

¹¹⁵CODE CIV. PROC. 1908, O. VIII R.10 (India).

¹¹⁶ Balraj Taneja & Anr. v. Sunil Madan & Anr., A.I.R. 1999 S.C. 3381 (India) at ¶ 28-30. If the Court is satisfied that the admission of the entire contents of the Plaint, would entitle the Plaintiff to a decree, without requiring any further proof, the Court may proceed to pronounce judgement, in terms of the plaint. However, if the plaint contains disputed facts, the Court should require the plaintiff to prove the averments in the plaint. This is based on a conjoint reading of O. VIII R. 5(2) and 10, which allow the Courts, in their discretion, to require any facts contained in the plaint to be proved by the plaintiff, when a party fails to file a written statement. *See also* The Gujarat Maritime Board v. G.C. Pandya, 2015 (5) S.C.A.L.E. 212 at ¶ 13.

¹¹⁷ To be supported by an affidavit endorsing valid service, acknowledgement of receipt and compliance with this provision. This is aimed at eliminating the problems of delays in serving notices through Court.

¹¹⁸ *See 'Appointment of Arbitrators', above.*

With respect to applications for enforcement of N.Y. Convention awards, the LCI proposed to impose a three-month time-limit under §48 to object to the application, with a last-chance extension of 30 days, on showing sufficient cause.¹¹⁹ It also proposed a time-limit of one year for deciding such objections. Since the proposals referred to amendments to §56, 57 as well, amendments were expected on similar lines with respect to Geneva Convention awards. However, the 2015 Act has not included these provisions. This may be significant from the point of view of protecting India from investment treaty exposure, as discussed below.

G. Concerns in International Arbitration

i. Jurisdictional Concerns

The 2015 Act amends the definition of ‘*Court*’ in the Act to provide that in cases of ICA, only the High Court which would exercise jurisdiction over a suit on the same subject matter, original or appellate,¹²⁰ would exercise jurisdiction for the purposes of the Act. This excludes sub-ordinate Courts since the High Courts are better equipped to deal with such matters which are often quite complex. This is supported by the recent Commercial Courts Ordinance whereby specialized divisions were created in the High Courts to deal with commercial disputes.

Aside from increased investor confidence, this change is important from the stand point of limiting India’s investment treaty risks. In 2011, India burnt its fingers in the *White Industries* case,¹²¹ where after almost eight years of delays in arbitration, enforcement and related proceedings, the petitioner, an Australian company, invoked arbitration against India, under a bilateral investment treaty [“BIT”]¹²² and successfully claimed that the delays constituted a violation of the BIT. In addition to suffering a huge award, India’s own arguments in this case highlighted, on a global stage, the problems of our dispute resolution system. To offset the blame for the eight-year delay, India argued

¹¹⁹ To be reckoned from the date of receipt of the notice of the application under §47.

¹²⁰ Over the principal court of civil jurisdiction, which would have jurisdiction to entertain a civil suit on the same subject matter.

¹²¹ WHITE INDUSTRIES AUSTRALIA LTD. V. THE REPUBLIC OF INDIA, UNCITRAL AWARD (NOVEMBER, 2011), *available at* <http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>.

¹²² AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA ON THE PROMOTION AND PROTECTION OF INVESTMENTS, NEW DELHI, (Feb. 1999), *available at* <http://www.italaw.com/sites/default/files/laws/italaw6021.pdf>.

that the petitioner should have taken the conditions in India as it found them¹²³ *i.e.* that since India’s judicial system was notoriously slow, the petitioner could not claim denial of justice. As a developing country, different standards should be applied to the conduct of India’s ‘*over-stretched judiciary*’, as compared to developed countries. India embarrassingly - claimed that “*delay is a natural, well-known and entirely predictable feature in the Indian court system*”.¹²⁴ It was held that the Indian system failed to provide the petitioner with effective means of asserting claims and enforcing rights, in consequent violation of its obligations under the BIT. This serves as a reminder that dispute resolution laws have a significant impact on investment environments, which must not be forgotten when formulating the law.

ii. Determination of Nationality for ICA

The definition of ICA under the Act is three-pronged in case of non-governmental parties. It requires at least one of the parties to have a (a) foreign place of residence; (b) place of incorporation; or (c) foreign central management and control.¹²⁵ Earlier, test (b) and (c) *i.e.* the place of incorporation and central management and control tests, both applied to companies. Under the 2015 Act, test (c) *i.e.* the management and control test no longer applies to companies, which brings the definition of ICA in line with *TDM Infrastructure*,¹²⁶ this decision of the Supreme Court had put the place of incorporation test on a higher footing than central management and control (the latter applied only where the former does not and where the former squarely applies, no recourse to the latter is required). Though the end result of this decision was acceptable, the author disagrees with its basis. The Court proceeded on the basis that a company incorporated in India can only have an Indian nationality, which is true; however, such company may still be foreign managed and controlled and it is this test (c) that is considered under the definition of ICA, not the nationality of the parties. The use of the word ‘*or*’ between test (b) and (c) seemingly indicates, to my mind, the legislative intention to treat arbitrations as an ICA, so long as *any one or more* of the tests apply.

¹²³ *Id.* at ¶ 5.2.10.

¹²⁴ *Id.* at ¶ 5.2.18, 5.2.19.

¹²⁵ *See* Act, §2(1)(f). The foreign residence test only applies to individuals: [*See* 2(1)(f)(i)]. There is also a fourth criteria *i.e.* where one of the parties is a foreign government: [*See* 2(1)(f)(iv)].

¹²⁶ *T.D.M. Infrastructure v. U.E. Development India Pvt. Ltd.*, Arb. App. No. 2 of 2008 (S.C.) at ¶ 16-29 [“*T.D.M.*”].

Whilst this may not work from a tax perspective, where the actual place of business is given importance over the place of incorporation,¹²⁷ for the purposes of dispute resolution, certainty is preferable. Therefore, the place of incorporation is a better test, as it is unlikely to be a disputed fact, unlike the central management and control of a company. Accordingly, legislatively recognizing the effect of this decision in the 2015 Act is welcome, as it was possible for a larger bench of the Supreme Court to reconsider this principle.¹²⁸

iii. Seat vs. Venue of Arbitration

Substantial complexities in relation to the place of arbitration and the laws that apply to it, may be resolved by legislatively recognizing the seat and venue of arbitration separately. This could be done by amending the definition clause to define the seat of arbitration to mean the juridical seat and the venue of arbitration to mean the physical place where proceedings are conducted, with the parties having the power to provide for the seat and venue of arbitration separately.¹²⁹ §2 would also have to be amended to clarify that Part I shall only apply where the ‘*seat*’ of arbitration is in India, excepting certain provisions which would have to be expressly excluded by the parties in case of certain foreign-seated arbitrations.¹³⁰ This would re-enforce *BALCO*’s seat-centric approach.¹³¹ While this was proposed by the LCI, the proposals and the 2015 Act have not considered these amendments.¹³²

¹²⁷ *Id.* at 28.

¹²⁸ *T.D.M (Id.)* was a single-judge decision of the Supreme Court.

¹²⁹ §20 of the Act would also be amended to allow parties to do so. If the parties fail to agree, the seat/venue would be determined by the arbitral tribunal. *See also* Enercon (India) Ltd. and Ors. v. Enercon GMBH and Anr., A.I.R. 2014 S.C. 3152 (India) where the Supreme Court *inter alia* held that the mention of a foreign place as the venue of arbitration, would not necessarily imply that the seat was also in such country, as the parties had chosen Indian law the governing the substantive contract, arbitration agreement and the conduct of the arbitration. Since India had the ‘*closest and most real connection*’ with the arbitration in that case and since the seat was in India, no other Court could have supervisory jurisdiction, concurrent or otherwise. *See also* Carzonrent India Pvt Ltd. v. Hertz International Ltd., O.M.P. 193/2013 (June 30, 2015) at ¶ 21-25 (referring to *Enercon*) where the Delhi High Court also applied the ‘*closest and most real connection*’ test.

¹³⁰ Act, §9,27, 31 read with 2(2).

¹³¹ *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors.*, (2012) 9 S.C.C. 552. at ¶ 63,95,121,196,200 [“*BALCO*”] [Part I is limited in its application to arbitrations which take place in India. The choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country

However, the 2015 Act does provide in a newly inserted proviso to §2(2), that subject to an agreement to the contrary, certain provisions relating to interim relief, court assistance for evidence and appealable orders,¹³³ will apply to ICA, even if the ‘*place*’ of arbitration is outside India, provided the awards that would be made in such arbitrations would be recognized and enforceable under Part II. This legislatively overrules BALCO which provided that Part I would be inapplicable in foreign-seated arbitrations.¹³⁴ Other countries have also made similar provisions in their legislations.¹³⁵ This would provide a suitable remedy to parties in foreign-seated arbitrations, who wish to seek protection of the Indian Courts with respect to assets located in India or otherwise. It is not the case that there is no remedy in such cases.¹³⁶ It is possible for such party to obtain a foreign interim order and file a civil suit on the order in India.¹³⁷ Another equally cumbersome option is to file contempt proceedings in a foreign Court in case of non-compliance of such interim order, obtain a foreign judgment which satisfies the conditions of the CPC for execution of foreign judgments (under §44A read with 13), and then seek direct execution in Indian Courts. In this context, the thrust of this suggestion was to provide a meaningful efficacious remedy, unless the parties, in their wisdom and at their risk, decide that they do not need Indian judicial protection or assistance.

Something to note here, is that the language of the 2015 Act permits an implied exclusion of the above provisions. For the sake of clarity, it should have been provided that the parties must *expressly* exclude these provisions, which the LCI also proposed.

relating to the conduct and supervision of arbitrations will apply to the proceedings. There is no provision under the CPC or the Act for a Court to grant interim measures in terms of §9, in arbitrations which take place outside India, even though the parties by agreement may have made the Act as the governing law of arbitration. In order to do complete justice, the judgement was made to apply prospectively, to all arbitration agreements executed after the date of the judgement.]

¹³² 246th Report, Proposed §2.

¹³³ Act, §9, 27 37(l)(a) & 37(3).

¹³⁴ BALCO, *supra* note 131.

¹³⁵ See, e.g., THE ARBITRATION ACT, 1996, §2, (U.K.), <http://www.legislation.gov.uk/ukpga/1996/23/section/2> & §12A, SINGAPORE INTERNATIONAL ARBITRATION ACT, <http://statutes.agc.gov.sg/aol/search/display/view.w3p?page=0;query=DocId%3A%22fdb4f13d-0fdb-4083-806a-0c16554efd0b%22%20Status%3Ainforce%20Depth%3A0;rec=0>.

¹³⁶ See 246th Report, at ¶ 41.

¹³⁷ Foreign orders for interim relief are not recognized by India for direct enforcement, as they are not final adjudications on merits. See CODE CIV. PROC. §44A read with 13.

Further, the provisions of Part I discussed above would become applicable to arbitration agreements which did not exclude the applicability of Part I, under the impression that such exclusion was not required due to BALCO. This means that Indian Courts may now grant interim relief in such cases. In this regard, the 2015 Act clarified that it will apply prospectively from the commencement of the 2015 Act, though parties to arbitral proceedings can choose to give the 2015 Act retrospective application by way of mutual agreement. It must be noted however, that the 2015 Act applies prospectively only in relation to arbitral proceedings commenced after the 2015 Act, and not to arbitration agreements. Therefore, parties to foreign-seated ICA agreements executed prior to the 2015 Act, which did not expressly exclude Part I (since BALCO did not require such exclusion), may consider re-negotiating their arbitral bargains if they wish to ensure continued non-intervention of Indian Courts.

There is also uncertainty surrounding foreign-seated arbitrations between Indian parties. This has been the subject of two recent decisions; the Madhya Pradesh High Court in *Sasan Power*¹³⁸ and the Bombay High Court in *Addhar Mercantile*.¹³⁹ At first blush, these decisions seem to be contrary to each other, but it is not so. These decisions hinged on interpretations of *TDM Infrastructure*,¹⁴⁰ which held that Indian parties cannot derogate from Indian law as a matter of public policy; this would hold true only for §11, as the Supreme Court itself clarified.¹⁴¹ Further, the Court relied on the non-derogable nature of §28 (deals with the substantive law of the contract) read with §2(6) in support of its reasoning. It did not however refer to the *lex arbitri* and therefore even in cases under §11, the agreement would be contrary to public policy only if two Indian parties contract out of the substantive laws of India but a foreign *lex arbitri* would be permitted. Accordingly, *Sasan Power*, a decision under §45 and not §11, allowed a foreign-seated arbitration. It held that in such cases the nationality of the parties would not be relevant and two Indian parties could willingly agree to a foreign seat. However, *Addhar Mercantile*, a decision arising out of a §11 proceeding where the parties had chosen a foreign substantive law, did not allow two Indian parties to derogate from Indian law, since it

¹³⁸ *Sasan Power Ltd. v. North American Coal Corporation India Pvt. Ltd.*, First Appeal No. 310 of 2015 (Sept. 11, 2015) (India) [“Sassan Power”].

¹³⁹ *Addhar Mercantile Private Ltd. v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, Arbitration Application No. 197 of 2014 along with Arbitration Petition No. 910 of 2013.

¹⁴⁰ T.D.M., *supra* note 126.

¹⁴¹ *Sassan Power*, *supra* note 138 at ¶ 54.

was covered by *TDM Infrastructure*. Therefore, *Sasan Power* and *Addhar Mercantile* were not incongruous though the end results were different.

We may note that while *TDM Infrastructure* was made in the context of §11, *Sasan Power* effectively reads down the Supreme Court's statement that Indian parties cannot derogate from Indian law, as a matter of public policy.¹⁴² The question also remains whether it will be possible for two Indian parties to choose a foreign seat, with respect to matters which are not arbitrable as per Indian law. These matters are likely to be tested in the Supreme Court. It may also be noted that Indian Courts would not be able to grant interim relief in a foreign seated arbitration between two Indian parties, though it can now do so in foreign seated ICAs.¹⁴³

H. New Facets to the Law of Arbitration

i. Emergency Arbitration

Recognizing emergency arbitration systems in other jurisdictions,¹⁴⁴ the LCI proposed to include emergency arbitrators in the definition of arbitral tribunal. This is a special kind of arbitration which serves a limited purpose; to grant immediate and urgent interim relief within a fixed time period. The merits of this order can then be examined in detail in a full-blown arbitration and can be upheld, quashed or suitably modified, by the arbitral tribunal. The Bombay High Court, in *HSBC PI Holdings*,¹⁴⁵ has also recognized this concept, when it allowed an application under §9, made to enforce an

¹⁴² NDA Hotline, *Two Indian Parties Opting for Foreign-Seated Arbitration: No Bar?, Dispute Resolution Hotline*, NISHITH DESAI (October 14, 2015), http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/two-indian-parties-opting-for-foreign-seated-arbitration-no-bar.html?no_cache=1&cHash=038c425ae80e1dc999e1b40785cf8b42. See T.D.M, *supra* note 126 at ¶ 20.

¹⁴³ *Sasan Power*, *supra* note 138 at ¶ 71, 72.

¹⁴⁴ For example, See N. Vivekananda, *The S.I.A.C. Emergency Arbitrator Experience*, S.I.A.C. (2013), <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience>. The S.I.A.C. Rules require that the appointment of an arbitrator be made within one business day of the acceptance of the application in this regard. Once appointed, the emergency arbitrator sets out a schedule for consideration of the application within two business days. Out of 34 applications for emergency arbitration under the S.I.A.C. Rules, the average time for an interim order from the receipt of an application is 2.5 days and for an award is 8.5 days, and in certain case(s), even as short as one day.

¹⁴⁵ *H.S.B.C. PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd. and Ors.*, Arbitration Petition No. 1062/2012, High Court of Bombay, India, (Jan. 22, 2014).

emergency relief order passed by a S.I.A.C. Tribunal. Unfortunately, the 2015 Act has not provided for emergency arbitration.

The author believes that providing for emergency arbitration is much needed. However, this should not be done by simply amending the definition clause, as all the provisions of the Act will apply to such arbitrations, which could have unintended consequences. Instead, a separate set of provisions, tailor-made for emergency arbitration, should be adopted.

ii. Confidentiality

Parties having confidential or price-sensitive information are concerned that such information may end up in the public domain. This is a worry for parties in ordinary litigation. However, though the Act does not specifically deal with confidentiality issues, parties may choose to lay down rules dealing with such issues in relation to arbitral procedure.¹⁴⁶ This is unlike Hong Kong,¹⁴⁷ SIAC¹⁴⁸ etc. where there are rules which allow parties to specify confidential information which cannot be disclosed by the parties in ordinary circumstances, with exceptions in cases of self-protection, pursuit of legal rights, challenging awards, professional communication, mandatory disclosures, etc. Parties may also make representations to the Court to conceal such information. In some cases, the Courts also have the power to delay publication, up to a certain period of time¹⁴⁹ and Courts/arbitral tribunals are required to consider confidentiality agreements, before directing publication of information. Such measures should be incorporated in the Act, to assure investors that their information will be protected.

iii. Fast Track Arbitration

The Act, pre-amendment did not prohibit or impede fast-track arbitrations [“FTA”]. Its permissive language relating *inter alia* to appointments, conduct of

¹⁴⁶ This is with respect to arbitration. As regards conciliation under the Act, §70 provides that a party may submit information to the conciliator on the condition that it is kept confidential and not disclosed to the other party.

¹⁴⁷ ARBITRATION ORDINANCE, CHAPTER: 609, §16, 17 AND 18, *available at* [http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf).

¹⁴⁸ ARBITRATION RULES OF THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE, S.I.A.C. RULES §35, <http://www.siac.org.sg/our-rules/rules/siac-rules-2013>.

¹⁴⁹ *Supra* note 147, 148.

proceedings,¹⁵⁰ dispensing with oral hearings, *ex-parte* hearings etc., allows parties to adopt fast-track procedure, if it suits them.¹⁵¹ However, theoretically permitting FTA may not be enough to achieve meaningful FTA.

Recognizing this, the 2003 Bill¹⁵² sought to introduce FTA;¹⁵³ however, the Bill did not take off. A decade later, the Government proposed to introduce FTA but in the meanwhile, the 2015 Act introduced §29B to the Act. This section provides that parties may adopt FTA before or at the stage of constitution of the tribunal. This should be modified to allow parties to do so even after constitution. It provides that the parties ‘*may*’ appoint a sole arbitrator, as opposed to the compulsory unanimously appointed sole arbitrator, under the 2003 Bill. This is sensible as FTA is unlike emergency arbitration, where compulsorily providing for a sole arbitrator may make sense, as the emergency arbitration serves a limited purpose; once its purpose is discharged, a full tribunal can review the matter on its merits. On the contrary, in FTA, parties may wish to appoint a full tribunal with diverse qualifications, experience or expertise, unlikely to be possessed by a sole arbitrator, and accordingly, should be granted the discretion to so choose.

FTA proceedings are to be completed within a period of six months. With respect to extensions, certain sub-sections¹⁵⁴ of the newly introduced §29A have been incorporated by reference to FTA including matters such as extension by consent or the Courts, grounds for extensions, substitution of arbitrators, imposition of costs, etc. Further, FTA is to be decided on the basis of written pleadings, documents and submission, without any oral hearings. Oral hearings are only allowed on a unanimous request or if the tribunal considers it necessary to clarify issues. When it does have such hearings, the tribunal may do away with technical formalities and adopt appropriate procedure with respect to disposal of FTA. Taking the cue from the 2003 Bill, it should

¹⁵⁰ *I.e.*, such as fixing time limits with respect to the filing of the statements of claim, replies and counter-claims etc.

¹⁵¹ Indu Malhotra, *Fast Track Arbitration*, XLI/No. 1 ICA’S ARB. Q., ICA 8 (2006).

¹⁵² 2003 Bill, *supra* note 109.

¹⁵³ By introducing a new Chapter XI to the Act with substantive provisions supported by a new schedule containing procedural rules. Procedural rules for the entire course of FTA proceedings, such as requiring the simultaneous filing of evidence affidavits, expert opinions, applications for discovery or production of documents, counter claims etc. along with the principal pleadings, were proposed to support the substantive provisions of Chapter XI. *See* Chapter XI-Single Members Fast Track Arbitral Tribunal and Fast Track Arbitration and the First Schedule in the 2003 Bill.

¹⁵⁴ Act, §29A (3)-(9).

be provided that proceedings should be conducted on a daily basis or at least for three consecutive days on each occasion.¹⁵⁵

The 2003 Bill provided a set of non-derogable procedures in a new Schedule; these included shortened time-lines for commencement of arbitration and filing of pleadings (notably, to save time, these pleadings are to be accompanied by supporting documentary evidence, witness affidavits, expert opinions, applications for discovery, interrogatories and other supporting material) and day-to-day hearings. It also contemplated, decision-making based on written pleadings, supporting evidence and submissions and oral evidence only on a justified request by a party or if the arbitrator considers it necessary. These are all calculated at ensuring speedy arbitration. However, cogent enforcement provisions were also provided for; to ensure adherence to time-lines and implementation of interim orders and directions, FTA tribunals could pass peremptory orders and in case of undue or deliberate delays, the tribunals could impose costs, strike-out pleadings, exclude material, draw adverse inferences and even dismiss a claim for non-prosecution or pass an ex-parte award against a respondent.¹⁵⁶ With these matters being non-derogable, parties could get straight to the crux of the matter instead of wasting time trying to agree on procedural issues.

Such rules should be incorporated in the Act, either in the section itself, or by introducing a new Schedule to the Act like the 2003 Bill did. Alternatively, the Government may later frame a set of FTA rules under the Act.

iv. Proposed Cost Regime

Parties often take advantage of the fact that Indian Courts, many times do not award costs and if they do, these costs are usually nominal or parties are made to bear their own costs.¹⁵⁷ Often multiple proceedings are filed and inexpensive lawyers are engaged to carry them on, till they end in due course, without any hope of success, while the respondent, being the one with something to lose, incurs substantial legal fees and

¹⁵⁵ See 2003 Bill, First Schedule, art. 3. Oral hearings for recording evidence would only be permitted on request of a party, if the tribunal believes the request to be justified, or if the tribunal considers it necessary to do so. Similarly, at the discretion of the tribunal, oral arguments may be permitted and its duration restricted and oral evidence may also be taken under certain circumstances.

¹⁵⁶ *Id.* Proposed Chapter XI - §43C read with First Schedule.

¹⁵⁷ Salem Advocate Bar Association, Tamil Nadu v. Union of India, A.I.R. 2005 S.C. 3353 (India) at ¶ 37.

costs in *bona fide* defence.¹⁵⁸ Though these observations are in the context of civil proceedings, they ring true for arbitration as well.

Even otherwise, the cost of contract enforcement in India is high, reportedly 40% of the claim, on average.¹⁵⁹ To remedy this, the 2015 Act has granted the Courts and arbitral tribunals, the power to impose costs in proceedings under the Act including *inter alia* the quantum and time for payment.¹⁶⁰ Unless otherwise ordered by the Court or the arbitral tribunal, the losing party will suffer the costs awarded, so that costs follow the event.¹⁶¹ When awarding costs, the Court or arbitral tribunal, make take factors such as conduct of parties, frivolity of claims, settlement efforts etc. into consideration. The power to take the ‘*conduct of parties*’ into consideration when imposing costs, should be sufficient to tackle frivolous adjournments and sharp practices;¹⁶² Hopefully, this power is not overlooked and is used to deter or at least punish such practices.

Further, agreements for allocation of costs in arbitrations are only valid if made after the disputes have arisen.¹⁶³

¹⁵⁸ Puja Kakar v. Arjun Kakar, C.M. (M.) No. 9/2010 & C.M. No. 77/2010 (January 28, 2010) at ¶ 9 [“Puja Kakar”]. In this case the Delhi High Court referred to such lawyers ‘*adjournment experts*’, who are hired for the primary purpose of obtaining adjournments.

¹⁵⁹ World Bank Report 2014, *supra* note 9 at 192.

¹⁶⁰ 2015 Act, §31A read with 31(8). For the purposes of this provision, the 2015 Act requires that a reasonable standard be applied and that costs should include things such as arbitrator, court, witness, legal, administrative and other fees and expenses that may be incurred in the court or arbitral proceedings.

¹⁶¹ This is described by the LCI in its 246th Report at para 71 as an economically efficient deterrence against frivolous conduct. The LCI and the Supreme Court have also recognized the principle that costs should ordinarily follow the event. *See also* Law Commission of India, *Costs in Civil Litigation, 240th Report*, (May. 2012) AT ¶ 1.6, *available at* <http://lawcommissionofindia.nic.in/reports/report240.pdf> and the Supreme Court of India in Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and Ors., (2012) 1 S.C.C. 455 (India).

¹⁶² *See* Puja Kakar, *supra* note 158. In this case, the Delhi High Court deprecated the concept of granting adjournments for frivolous reasons [in this case, claiming that the counsel’s car containing the case papers were stolen while the counsel continued to argue tagged matters before other forums, which would not be possible if the papers of the case were stolen.] The Court also noted that a separate breed of advocates has cropped up, who are ‘*adjournment experts*’ who are deliberately engaged to ensure adjournments. *See also* Thana Singh v. Central Bureau of Narcotics, (2013) 2 S.C.C. 590 (India) at ¶ 5, where the Supreme Court of India noted adjournments are generously granted in India for varied reasons, which deserves to be completely abolished.

¹⁶³ Ostensibly, this is to protect weaker parties with little bargaining leverage or parties who may not have entered into the agreement with their eyes open.

v. Moving Away ad-hoc to institutional arbitration

As a party-autonomy legislation, the Act inadvertently favoured ad-hoc arbitration. Parties more often than not opt out of specialized institutional arbitration, missing out on the benefits of fixed procedure; specialized administrative and secretarial support, resources and infrastructure; internal reviews;¹⁶⁴ and the advantage of being globally recognized. In addition to missing out on these benefits, ad-hoc arbitration also has considerable scope for disappointment; In fact, disputes arising out of matters of procedure, impartiality and independence, are frequent and a considerable extent of the case load in sub-ordinate courts' relates to proceedings to challenge ad-hoc arbitral awards.¹⁶⁵

Arbitration clauses may not set-out detailed procedure and may only set-out the seat/venue of arbitration, substantive law and the number, qualifications and procedure for appointment of the arbitral tribunal. Therefore, parties may be required to agree on matters of procedure as they arise in the due course of arbitration. This is a difficult proposition as parties in a contentious setting are unlikely to see eye-to-eye regarding even simple procedural issues. It is better to ensure that procedural issues are settled at the outset. In this regard, the law should actively encourage institutional arbitration, whilst also allowing ad-hoc arbitration. Accordingly, the LCI proposed to amend §11 to allow the Courts to take steps to encourage the parties to refer the disputes to professional institutionalized arbitration. Instead, it may be considered to provide that within thirty days of the appointment of an ad-hoc arbitrator, the parties in consultation with the arbitral tribunal, must finalize procedural rules all the way up to the making of the award. If the parties fail or neglect to do so or cannot agree on the procedure to be adopted, the parties will be governed by a list of rules, set-out in a new Schedule to the

¹⁶⁴ Some institutions provide an internal review of draft awards before they are finalized. In this review, the draft award may be modified or the attention of the tribunal may be drawn to certain issues or points in the award which need to be reconsidered. This would reduce the risk of being overturned. For example, under the rules of the International Chamber of Commerce ["ICC"], arbitral tribunals are required to submit a draft to the ICC International Court of Arbitration, for scrutiny in accordance with the ICC Rules of Arbitration. *See* ICC Rules of Arbitration, A. 33: Scrutiny of the Award by the Court.

¹⁶⁵ JUSTICE K.G. BALAKRISHNAN, CHIEF JUSTICE OF INDIA (RETD.), INAUGURAL ADDRESS, INTERNATIONAL CONFERENCE ON 'INSTITUTIONAL ARBITRATION IN INFRASTRUCTURE AND CONSTRUCTION', NEW DELHI (OCT. 2008), [http://supremecourtfindia.nic.in/speeches/speeches_2008/16\[1\].10.08_ciac_conference.pdf](http://supremecourtfindia.nic.in/speeches/speeches_2008/16[1].10.08_ciac_conference.pdf).

Act, which should cover most situations. Like the Tables prescribed in the Companies Act with respect to the Articles of Association of a company, unless the parties specifically provide otherwise or exclude or modify the rules in the schedule, these rules will apply and fill in the gaps. In cases of inconsistency, the rules fixed by the parties, will prevail. As regards matters not provided for by either the rules fixed by the parties or deemed adopted from the Schedule, and only in such cases, the arbitral tribunal may exercise its power to determine procedure, currently housed under §19. In this way, parties can avail of the freedom and flexibility of ad-hoc arbitration, whilst at the same time having a set of rules, not unlike institutionalized arbitration, fixed at the outset.

I. *Miscellaneous Provisions*

i. **Arbitrability of Fraud, Corruption and Complex Questions**

The 2015 Act has not incorporated the LCI's proposal to legislatively recognize and clarify that the powers of the arbitral tribunal under §16 include ruling on disputes involving; (a) allegations of fraud/corruption; (b) serious questions of law; or (c) complicated questions of fact.¹⁶⁶ This would have been in keeping with the Supreme Court in *Swiss Timing*¹⁶⁷ with respect to Part I arbitrations. It may be noted that the Supreme Court in *World Sport Group*¹⁶⁸ has held that even reference to foreign arbitration under §45 would not be barred, even in cases involving allegations of fraud or malpractice.¹⁶⁹

ii. **Award of Interest**

The LCI in its 246th Report proposed that the Act should allow interest on pre-award interest, without having the benefit of referring to the Supreme Court decision in *Hyder Consulting*,¹⁷⁰ pronounced three months later.¹⁷¹ At the time, pre-award interest was

¹⁶⁶ 246th Report, Proposed §16(7).

¹⁶⁷ *Swiss Timing Limited v. Organising Committee, Commonwealth Games 2010*, A.I.R. 2014 S.C. 723 (India) at ¶ 28,31.

¹⁶⁸ *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.*, A.I.R. 2014 S.C. 968 (India).

¹⁶⁹ *Id.* at ¶ 29,30 & 32. [except as provided in §45 *i.e.* if the agreement is null and void, inoperative or incapable of being performed].

¹⁷⁰ *Hyder Consulting (UK) Ltd. v. Governor, State of Orissa*, A.I.R. 2015 S.C. 856 (India). This was a 2:1 majority decision of a three judge bench of the Supreme Court. S.A. Bobde, J., and A.M. Sapre, J. gave separate concurring decisions and H.L. Dattu, C.J., giving a dissenting opinion. *See also* *State of Haryana and Ors. v. S.L. Arora & Co.*, (2010) 3 S.C.C. 690 (India).

not allowed.¹⁷² However, *Hyder Consulting* has now declared that the Act permits the inclusion of pre-award interest in the principal sum of the award, when granting interest post-award, bringing India on par with major Arbitration hubs.¹⁷³ Additionally, interest is now to be calculated by adding 2% to the prevalent bank rates of interest,¹⁷⁴ as opposed to the fixed rate of 18% which may not match up to commercial expectations.

iii. Claims, Defence and Pleadings

The 2015 Act allows a respondent in Part I arbitrations to plead a set-off or counter-claim. This would not be fair to the other party, who may have intended that certain disputes with the other party ought not to be submitted to arbitration or to arbitration under different rules,¹⁷⁵ and therefore, such counter-claims and set-offs are allowed only if they are covered by the arbitration agreement. This prevents multiplicity of proceedings, by allowing such claims which may be outside the scope of the arbitral reference, but must be within the prescribed fairness threshold *i.e.* covered by the arbitration agreement.

Provisions requiring parties to give advance notice of their intention to submit pleadings should also be introduced as parties often seek adjournments to review pleadings, which are strategically submitted on, or close to the date of hearing so as not to allow the other party sufficient time to respond or consider their contents. Such adjournments are often granted as a matter of course resulting in a waste of fees, costs and charges. Requiring advance notice would allow the parties to avoid convening a hearing, which can be rescheduled to a later date, thereby reducing non-effective hearings and unnecessary costs. This should be included in institutionalized rules, proposed above.¹⁷⁶

¹⁷¹ The report was issued in August, 2014 whereas the judgment in *Hyder Consulting (Id.)* was pronounced in November, 2014.

¹⁷² See S.L. Arora, *supra* note 170.

¹⁷³ See, e.g., LCIA Arbitration Rules, §26.4; Arbitration Rules of the Singapore International Arbitration Centre, S.I.A.C. Rules, §28.7, Arbitration Ordinance, Chapter: 609, §79 (Sing.).

¹⁷⁴ See The Interest Act, No. 14 of 1978, INDIA CODE (1978).

¹⁷⁵ For example, based on the nature of the disputes, the party may want the arbitrator to possess certain special qualifications.

¹⁷⁶ See 'Moving Away from Ad-Hoc to Institutional Arbitration', above.

iv. Fees of Arbitrators

The 2015 Act introduces a Schedule of fees,¹⁷⁷ to act as a guide to the High Court which may frame rules with respect to the determination and manner of payment of arbitrator fees. However, this does not apply to institutional arbitration or ICA and cases where the parties agree to determine fees as per the rules of an arbitral institution. Parties to arbitration will be relieved since they used to find themselves at the mercy of arbitrators, often retired Supreme Court judges, who charge exorbitant fees with the parties keeping quiet in the fear of antagonizing such arbitrators.¹⁷⁸

III. Concluding Remarks

The law of Arbitration, as a species of dispute resolution and contract enforcement law, continues to be linked to the evolution of International business, with arbitration clauses continuing to be heavily negotiated in cross-border transactions. Recognizing this, both the Government and the Judiciary, demonstrated an inclination to make India arbitration friendly, going so far as to dream of India becoming an Arbitration hub. The 2015 Act is the first step taken towards this end by the Government, to fix a law that inadvertently warranted, validated and made blameless; delays, heavy costs, partisan decision-making and enforcement loop-holes, without recourse to adequate remedial measures. This is partly due to inherent flaws in the law and India's peculiar dispute resolution ethos.

The 2015 Act has solved some of these problems. However, there seems to be a need for deeper involvement of the law, at the cost of, but without unreasonably restricting, party autonomy. This must be achieved without increasing, or if possible, even reducing recourse to Courts. To this end, the author proposes that the Act be moulded into a hybrid system which reasonably limits party autonomy; incorporates elements of institutionalized arbitration, international practices and technological advances; and ensures continued minimal judicial intervention. In this light, the 2015

¹⁷⁷ Subject to amendments by the Central Government. *See* Act, §11(14).

¹⁷⁸ *See* the observations of the Supreme Court in *Union of India v. Singh Builders Syndicate*, (2009) 4 S.C.C. 523 (India) at ¶ 10, with respect to high fees charged by certain arbitrators. *See also* Krishnayan Sen, *India Usbers in Reforms in Arbitration Law (Finally!)*, THE FIRM (October 26, 2015), http://thefirm.moneycontrol.com/story_page.php?autono=3794361.

Act, taken with the suggestions of the author, may go a long way in solving most of the Act's foreseeable problems;

Firstly, there will be a sense of justice as parties will be protected from partisan adjudication at the threshold; there will be determent of unfair or unwanted practices by imposition of penalties, costs and reduction of fees; increasing accountability;¹⁷⁹ reducing adjournments; and stream-lining of interventionist action.¹⁸⁰

Secondly, major enforcement concerns will be addressed by clarifying the enforcement exceptions of public policy, patent illegality, fundamental policy of India and the scope of review of such exceptions; requiring stay applications as an entry barrier for recourse against awards; granting the power to impose conditions in such cases; and making interim orders of arbitrators enforceable as orders of the Court.

Thirdly, reduction in delays in arbitration by imposing time limits on appointment of arbitrators, recourse against awards, shelf-life for interim awards and measures such as facilitating counter-claims and set-offs, advance notice of pleadings, etc., will push proceedings at a faster pace.

Fourthly, international concerns will be allayed by only allowing the High Courts to entertain ICA proceedings and by re-enforcing the place of incorporation test and the seat-centricity principle; as also providing ICA carve-outs.

Fifthly, India can move towards institutionalized arbitration by requiring Courts to refer appointments of arbitrators to designated institutions and imposing procedural rules on parties, if they fail to fix the rules themselves, at the threshold of arbitration. The flexibility of ad-hoc arbitration will remain available provided this right is exercised with specified time periods, failing which the Act will fill in the gaps, leaving residuary powers to the arbitrator. Carve-outs to prevent unnecessary intrusion into institutionalized arbitration will support this move.

Sixthly, it will breathe new life into the Act by providing for emergency arbitration, FTA, protection of confidential information and allowing e-service.

¹⁷⁹ For example, by requiring recording of reasons for adjournments and linking this along with adherence to time-lines etc. with the costs regime.

¹⁸⁰ See Act, §8,11,16.

Lastly, providing for appropriate clarifications and modifications will avoid unnecessary judicial interpretational involvement as also exceptions, wherever required to tone down the tenor of the law.

It is possible that these proposals may be considered utopian. However, even if some of the proposals in this article are made into law, it will bring us closer to North's vision of a perfect dispute resolution which is neutral, costs nothing and takes no time.