CHANGE TO IMPROVE, NOT TO UNHINGE—A CRITIQUE OF THE INDIAN APPROACH TO INTERNATIONAL ARBITRATION

Aditya Singh Chauhan[*] *& Aryan Yashpal*[†]

Abstract

Arbitration in India has been constantly evolving, especially since the enactment of the Arbitration and Conciliation Act, 1996. The policy surrounding arbitration and its acceptability in the Indian framework has been much debated. But the manner in which such policy is extrapolated to India often comes the expense of the rule of law. A pattern of judiciary taking the forefront in shaping the policy—even at the risk of diverging from the legislative intent—and a constant disaccord between the legislature and judiciary resulting in repeated changes to the law has been a malady afflicting arbitration in India. This has worsened in the past decade with the visible pressure by the international arbitration community towards adopting the so-called "pro-arbitration" values. The term "pro-arbitration" also remains largely subjective and the perspectives in this context often depend on which of the multiple stakeholder in the arbitral framework is viewing them. The proliferation of stakeholders and the growth of arbitration in India has not necessarily translated into it being an arbitration-friendly jurisdiction. This editorial critically analyses the causal role of the judiciary and legislature, and their discordant approach convoluting the Indian arbitration jurisprudence, and attempts to pave way for India to meet its goal of being recognised globally as an arbitration-friendly seat.

I. International arbitration and rule of law

Rule of law consists of certain formal and procedural principles that confine the exercise of power by the governmental institutions and act as a safeguard against arbitrariness.[1] Sundaresh Menon defines it as "*a set of values generally recognized as essential to the proper functioning of a legal and political system.*"[2] Its most crucial contribution is ensuring that the citizenry has faith in the legal machinery devised by the state to protect their rights and interests. In the context of international arbitration involving parties from different jurisdictions and subject to foreign substantive laws, the rule of law and procedural guarantees are pivotal. The users of arbitration require certain integrity of legal procedures to enable them to have trust and confidence in a country's legal system and the dispute resolution mechanism itself. This integrity can only be ensured if the laws are general in design and prospective in application, certain and predictable, and meet the expectations of constancy.[3] These expectations are compromised by repeatedly amending the statute, diverging from the well-thought-out recommendations by the researchers, and incorporating poorly drafted provisions.

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[*] Aditya Singh Chauhan is the Editor-in-Chief of the Indian Journal of Arbitration Law and Convenor of the Centre for Advanced Research and Training in Arbitration Law. He can be reached at c.adityasingh@outlook.com. The authors are thankful to Dr. Nidhi Gupta (Faculty Advisor, Indian Journal of Arbitration Law; Executive Director, Centre for Advanced Research and Training in Arbitration Law) for her invaluable guidance on this topic.

[†] Aryan Yashpal is the Editor-in-Chief of the Indian Journal of Arbitration Law and Convenor of the Centre for Advanced Research and Training in Arbitration Law. He can be reached at aryan.yashpal@nlujodhpur.ac.in.

[1] *The Rule of Law*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jun 22, 2016), *available at* https://stanford.io/3CMQ70M.

[2] Sundaresh Menon, *Arbitration's Blade: International Arbitration and the Rule of Law*, 38(1) J. INT'L ARB. 1, 3 (2021).

[3] Fuller has identified eight formal requirements of rule of law. *See* Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 LAW AND PHILOSOPHY 240, 240–241 (2005).

Further, in common law jurisdictions, courts play an indispensable role in the development of law. Rule of law becomes particularly relevant when we are dealing with the doctrine of precedents—with the judge-made laws filling in the gaps. As Jeremy Waldron states, "*legal practice and legal decision-making should be such as to give rise to expectations, [which] should, by and large, be respected by other legal decisionmakers.*"[4] However, the judiciary, while interpreting and applying a law, must also act within the confines of the statute. It must not assume the role of the legislature or engage in unfettered legal realism. Over the years, some courts have taken purposive interpretation of statutes to an extreme—moulding the law to not what the draftsmen of the legislation may have intended, but what is perceived as "*arbitration friendly*" or "*pro-arbitration*" internationally. In India, this has also lead to continuous back and forth between the legislature and judiciary at the expense of stability of law. Meanwhile, the assurances of party autonomy and non-interference have become all show, as many arbitral awards still get set aside after courts delve into the merits of the dispute.

The above-stated expectations from both legislature and judiciary are fundamental in parties' choice of law governing the arbitration. They come at the expense of what may be considered "*pro-arbitration*"—a term which lacks clarity and debate. George Bermann defines this term as reflected in "*the tendency of participants in international arbitration, when faced with a practice or policy of relevance to arbitration practice, to ask themselves whether that practice or policy is favourable to arbitration.*"[5] Since legal realism underpins the pro-arbitration approach, it often trades-off legitimacy. For example, extension of arbitration agreement to non-consenting non-signatories by arbitral tribunals in order to ensure efficiency and convenience.[6] It is an exercise best undertaken by courts, contrary to the prevalent practice. However, in order to retain the hint of legitimacy, the theories for extending the arbitration agreement to non-signatories are often based on consent, albeit implied.

But, at times, the limits of the pro-arbitration approach must be discussed and identified. Bermann recognises that it often entails a trade-off between competing pro-arbitration values, and "*privileging a particular pro-arbitration value may easily prejudice one or more others[.]*"[7] The result may be seemingly "*pro-arbitration*" when viewed from one lens, but anti-arbitration when viewed from another.[8] This is because the term "*pro-arbitration*" is subjective and its interpretation is often supplemented by the interests of the stakeholders in arbitration, such as arbitral institutions, arbitrators, third-party service providers, or even governments. An example of this is the call for increased transparency in commercial arbitration at the expense of confidentiality, which has contributed much to its success. There has been an attempt to force transparency into commercial arbitration by, *inter alia*, advocating for "*opt-in*" rather than "*opt-out*" confidentiality provisions[9] and including provisions making publication of awards as the default option,[10] despite the users preferring otherwise.

This editorial calls for an increased emphasis on rule of law by the Indian legislature and judiciary, and a careful and restricted approach when determining "*pro-arbitration*" values. Part II primarily

4 Jeremy Waldron , *Stare Decisis and the Rule of Law: A Layered Approach*, 111(1) MICH. L. REV. 1, 11 (2012).
5 George A. Bermann, *What does it mean to be 'pro-arbitration'?*, 34(3) ARB. INT'L 341 (2018).
6 *Id.* at 347.
7 *Id.* at 348.
8 *Id.*
9 *See, e.g.,* Constantine Partasides & Simon Maynard, *Raising the Curtain on English Arbitration*, 33 ARB. INT'L. 197, 201–202 (2017).
10 *See, e.g.,* International Chamber of Commerce (ICC), Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (Jan. 1, 2021), ¶ 58, *available at* https://bit.ly/37I84Cb.

analyses a recent instance of judicial creativism by the Indian judiciary which are passively accepted (and even welcomed) by the arbitration community as "*pro-arbitration*." Part III highlights the instability and unpredictability due to repeated amendments of the statute, and the need of forethought when drafting or amending the law. Finally, Part IV provides the concluding remarks.

II. Indeterminate position of law and creativism

The Indian judiciary, undoubtedly, has made significant contributions in development of arbitration jurisprudence in India. These contributions often are result of adoption of "*pro-arbitration*" approach by judges. This is primarily enabled by the indeterminate and continually changing position of law on a number of issues. Such decisions are widely welcomed by the arbitration stakeholders such as arbitrators, practitioners and institutions, who often claim that they would go a long way in establishing India as a global seat of arbitration. However, the manner in which these contributions are made will have consequences that are often remain unaddressed.

One such instance is the recognition and enforcement of emergency awards in India. In much heated debate in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd.*, the Indian courts (Delhi High Court and Supreme Court) enabled enforcement of emergency awards arising out of India-seated arbitrations—not recognised under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] and denied recognition by the legislature despite having many opportunities—under Section 17 of the Arbitration Act.[11] In doing so, the Courts not only placed incorrect reliance on the previous judicial pronouncements on related issues and ran counter to the legislative intent, but the stance taken also poses a question of why the enforcement of emergency awards arising out of foreign-seated arbitrations is not supported by the statutory machinery and requires indirect enforcement.[12] It compromises on the rule of law and opens the door for repeatedly changing position of law, thereby creating an unpredictable and uncertain arbitration environment that is generally avoided by the international clients seeking a neutral forum to resolve their disputes without any extraneous issues impacting such resolution. The Supreme Court has undoubtedly adopted a "*pro-arbitration*" approach with an aim to make India an arbitration-friendly jurisdiction. However, in this instance, like many others, not only is deviation from the legislative stance bit too sharp, the concerns for clarity, certainty and predictability in law have also been seriously compromised. Such an approach harms India's reputation as an arbitration-friendly jurisdiction in the long run, and invites increased scepticism towards arbitration.

This part of the editorial focuses on another such effort of the Supreme Court of India in enhancing party autonomy with a decision on the issue of whether two Indian parties can choose a foreign seat and whether an award obtained from such a foreign seated arbitration will be considered a foreign award, especially in those situations where the subject matter of the contract has no foreign element involved. Interestingly, the Court answered both the issues in affirmative although by taking a big leap in statutory interpretation and with introduction of a completely new definition of the term "*international*" for two parts of the same statute.

The Arbitration Act creates a dichotomy between India-seated and foreign-seated arbitrations. The former is governed by Part I of the Arbitration Act, while the latter by Part II which gives effect

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11 *See generally* Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., 2021 SCC OnLine SC 557 (India).

12 *See* Aditya Singh Chauhan, *Pushing Arbitral Boundaries To Pave Way For Emergency Arbitration*, 2 YOUNG MCIA NEWSLETTER (forthcoming 2022).

to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 provisions for enforcement of foreign awards. Both Parts are mutually exclusive, and only some provisions of Part I are applicable for foreign-seated arbitration by virtue of Section 2(2).[13] The definition of the term "*international commercial arbitration*" pre- and post-Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Amendment**"] suggests that an arbitration cannot be considered international merely by choice of foreign seat.[14] Further, after promulgation of the Arbitration Act, it can safely be presumed that Indian has adopted a territorial definition of foreign award envisaged under the New York Convention. This Convention, despite being concerned with international commercial arbitration, does not include definition of the term "*international commercial arbitration.*" However, it envisages that an award maybe considered a foreign award if it is obtained outside the territories of the enforcing country. Article 1 provides for the scope of the New York Convention, recognising foreign awards as binding in order to enforce them in accordance with Article III.[15] It is purposefully silent on what "*arbitral awards made in the territory of another state*" or "*arbitral awards not considered as domestic awards*" entail, leaving it to the discretion of the relevant Contracting State in which enforcement is sought.

In *PASL Wind Solutions (P) Ltd.* v. *GE Power Conversion (India) (P) Ltd.* ["**PASL**"],[16] the Supreme Court ruled on the issue of whether two Indian parties can choose a foreign seat of arbitration and the award arising out of such arbitration can be considered a foreign award enforceable under Part II of the Arbitration Act. At the outset, it must be noted that the Appellant in this case did not object to the Procedural Order allowing the arbitration between two Indian companies to be seated in Zurich. It was only after an unfavourable award was made that this issue was raised at the stage of enforcement.[17] The Respondent that had raised this issue before the tribunal, which had then ruled as stated above in the Procedural Order, albeit on a then-unsettled position of Indian law.[18]

The New York Convention applies to an arbitration agreement which results in a foreign award and if it has a "*foreign element*" or "*flavour involving international trade and commerce.*"[19] Section 44 of the Arbitration Act provides a broad definition of a "*foreign award,*" listing its common elements.[20] The

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13 Arbitration and Conciliation Act, No. 26 of 1996, § 2(2) (India) ("This Part shall apply where the place of arbitration is in India: [Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.]").

14 *Id.* § 2(1)(f) (the term "international commercial arbitration" is defined under this Section as "an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is– (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country[.]").

15 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(1), June 10, 1958, 330 U.N.T.S 38.

16 PASL Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd., 2021 SCC OnLine SC 331 (India) [*hereinafter* "PASL"].

17 *Id.* ¶ 17.

18 *Id.* ¶ 5.

19 UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK, 1958) 40 (2016) (*citing* Gas Authority Of India Ltd. v. Spie Capag, S.A., (1994) 1 Arb LR 429 (India)).

20 Arbitration Act, § 44.

section uses the expression "*unless the context otherwise requires*" to clarify that the definition provided in the section should be applied as a normal rule, but should be departed from when the context so requires. It was argued that the context of Section 44 requires the award sought to be enforced under Part II to have arisen out of an international commercial arbitration. The issue before the Court was whether the context requires it to import the definition of "*international commercial arbitration,*" as contained in Section 2(1)(f) in Part I. It held that the definition in Part I is party-centric, which cannot be imported to Section 44, which is party-neutral and seat-centric.[21] Thus, for the applicability of Section 44, nationality, domicile or residence of parties is irrelevant.

Reference was also made to Section 2(2) of the Arbitration Act, which makes certain provisions in Part I applicable to "*international commercial arbitrations,*" when the place of arbitration is outside India.[22] The Court ruled that Parts I and II are mutually exclusive, and Section 2(2) does not furnish a bridge between the two Parts.[23] It observed that the context of Section 2(2) requires the term "*international commercial arbitrations*" to be read in a seat-centric, not party-centric sense.[24] It follows that the provisions of Part I applicable to foreign-seated "*international commercial arbitrations,*" including the provision for court-ordered interim reliefs, will be applicable to foreign-seated arbitrations between Indian parties[25] or, for lack of a better term, to "*non-international foreign arbitrations.*" Thus, the term "*international commercial arbitration*" has been given different definitions in the context of Parts I and II, and also within Part I in the context of Sections 2(1)(f) and 2(2).

The multiplicity of definitions of the same term has been created despite the prior legal position not leading to any absurdity. Indeed, the approach favours party autonomy and arbitration, but at what cost? The "*definitions*" section in a statute sets forth the key terms and provides their meaning as intended by the legislature, which may even differ from their common usage. These key terms and their definitions are to be applied to the entire statute or, in the present case, at least to the relevant Chapter or Part.[26] Even otherwise, the text of the statute is construed as a whole—since statutes often contain inter-related parts—and there must be a presumption of consistent usage, i.e., a particular term bears only one possible meaning when used elsewhere in the statute wherever such meaning is compatible,[27] unless contrary is expressly specified. In fact, in this very context, in *Barminco Indian Underground Mining Services LLP* v. *Hindustan Zinc Ltd.*, the Rajasathan High Court has observed that "*[g]enerally definition clause is not restrictive of its applicability to a particular part - it applies to whole of the Act*" and otherwise would result in "*anomaly, incongruity and absurdity.*"[28] It noted the conditions that can warrant departure from plain meaning of the text,[29] and held that "*[u]pon reading*

21 PASL, 2021 SCC OnLine SC 331, ¶¶ 38, 50 (India).
22 *See* Arbitration Act, § 2(2).
23 PASL, 2021 SCC OnLine SC 331, ¶ 37 (India).
24 *Id.* ¶ 38.
25 *Id.* ¶¶ 38, 100.
26 Section 44 of the Arbitration Act uses the expression "In this Chapter," indicating that the definition of "international commercial arbitration" contained in Section 2(1)(f) might not apply to Chapter I of Part II. *See Id.* ¶ 60.
27 *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 275–283 (2012).
28 Barminco Indian Underground Mining Services LLP v. Hindustan Zinc Ltd., 2020 SCC OnLine Raj 1190, ¶¶ 87–88 (India) [*hereinafter* "Barminco"].
29 *Id.* ¶¶ 89–90 (*citing* G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 158 (14th ed. 2016), which states that "a court would only be justified in departing from the plain words of the statute when it is satisfied that : (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly, could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without determent to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly.").

of expression "Part" used in sub-section (1) of Section 2 as "Act," the definition clause will naturally be applicable to the entire Act, notwithstanding the expression used in subsection (2) of Section 2."[30] As previously noted, the *PASL* Court, in effect, accords different treatment to the definition of "*international commercial arbitration*" even within Part I of the Arbitration Act, which was not the intent of the legislature.

The Court also relied on a number of previous judicial pronouncements to support its ruling.

First, in *Atlas Exports Industries Ltd.* v. *Kotak & Co.* ["**Atlas**"],[31] where a foreign award arising out of an arbitration between two Indian parties was enforced under Foreign Awards (Recognition and Enforcement) Act, 1961. However, this decision was in the context of Sections 23 and Section 28 of the Indian Contract Act, 1872, and dealt with the contention that excluding remedy under ordinary Indian law contravened public policy.[32] The Supreme Court held that "*[t]he case at hand is clearly covered by Exception 1 to Section 28*."[33] The Court further observed that the parties did not raise this contention before or during the arbitration proceedings, before the High Court while raising objections to enforcement, or in the letters patent appeal filed before the Division Bench.[34] Thus, "*[s]uch a plea is not available to be raised by the appellant Atlas before this Court for the first time.*"[35] Further, in this case, there was at least some foreign element present as the goods were supplied from Hong Kong, by a Hong Kong-incorporated company, through an Indian-incorporated company.[36]

Second, in *Sasan Power Ltd.* v. *North American Coal Corp. Ltd.* ["**Sasan**"],[37] the Madhya Pradesh High Court held that it is permissible for two Indian companies to arbitrate out of India. The case involved an agreement between an Indian company and American company, all rights, liabilities and obligations whereof were later assigned to an Indian subsidiary of the American company by an assignment agreement.[38] Post-assignment, it was argued, that the agreement became one between two Indian companies, thereby ousting the application of Part II of the Arbitration Act.[39] However, in this case, as was also later observed by the Supreme Court, there was no question of two Indian parties choosing a foreign law governing the arbitration.[40] This is because the dispute required the examination of rights and obligations of the American company as well under the first agreement and the assignment agreement, and thereby a foreign element was involved.[41]

Third, in *GMR Energy Ltd.* v. *Doosan Power Systems India* ["**GMR Energy**"],[42] the Delhi High Court held that Indian parties can choose a foreign seat. This decision incorrectly relied on *Atlas*, which deals with Section 28 of the Indian Contract Act, 1872, and *Sasan*, which clearly involved a foreign

30 *Id.* ¶¶ 91–92.
31 Atlas Exports Industries Ltd. v. Kotak & Co., (1999) 7 SCC 61, ¶ 5 (India).
32 *Id.* ¶ 10.
33 *Id.* ¶ 11.
34 *Id.* ¶ 11.
35 *Id.*
36 *Id.* ¶ 1.
37 Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd., (2015) SCC Online MP 7417, ¶ 56 (India).
38 *Id.* ¶ 5.
39 *Id.* ¶ 8.
40 Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd., (2016) 10 SCC 813, ¶ 24 (India).
41 *Id.* ¶ 25.
42 GMR Energy Ltd. v. Doosan Power Systems India, 2017 SCC OnLine Del 11625, ¶¶ 29–33, 41–43 (India) [*hereinafter* "GMR Energy"].

element and made no determination whether Indian parties can choose a foreign seat.[43] Further, in this case, the defendant was a wholly-owned subsidiary of a Korean company, which also negotiated a payment schedule for the outstanding debt and entered into a Memorandum of Understanding with the plaintiff.[44] Thus, even this case involved a foreign element that can arguably justify two Indian parties choosing a foreign law governing the arbitration.

It can thus be concluded that *PASL* was one of the first case where two Indian parties had chosen a foreign seat with absolutely no foreign element involved,[45] except for the choice of law governing the arbitration itself constituting a foreign element. Relying on *Sasan* and *GMR Energy*, the Supreme Court also overruled *Seven Islands Shipping Ltd.* v. *Sah Petroleums Ltd.*[46]and *Addhar Mercantile Pvt. Ltd.* v. *Shree Jagadamba Agrico Exports Pvt. Ltd.* ["**Addhar**"][47] decisions of the Bombay High Court, where *TDM Infrastructure Pvt. Ltd.* v. *UE Development India Pvt. Ltd.* ["**TDM Infrastructure**"][48] was relied upon to disallow two Indian parties from choosing a foreign law governing the arbitration. *TDM Infrastructure*, while ruling that "*Section 28 of the 1996 Act is imperative in character in view of Section 2 (6) thereof,*" decided in the context of Section 11 of the Arbitration Act.[49] This was thus not seen as setting a binding precedent. But the views taken in aforesaid judgments of the Bombay High Court that relied on *TDM Infrastructure* deserved an in-depth consideration on their own merit.

Addhar involved two Indian parties and the arbitration agreement provided for the seat to be either India or Singapore, with English law to be applied in case of the latter.[50] The Bombay High Court relied on the obiter in *TDM Infrastructure* that Indian parties are not permitted to derogate from Indian law and otherwise would be opposed to public policy,[51] and ruled that the arbitration will be conducted in India and, in accordance with Section 28(1)(a), the arbitral tribunal will apply the Indian law.[52] While it was held that the seat of arbitration was India, the issue in *Addhar* pertained to the choice of substantive law and not the law governing the arbitration. The *PASL* Court was silent on whether two Indian parties can choose a foreign substantive law, but overruling of *Addhar* might be viewed by some as a cue to opt for this option in a non-international foreign arbitration.

The *PASL* Court then addressed the question of whether two Indian parties choosing a foreign seat would be opposed to public policy under Section 23 of the Indian Contract Act, 1872. It noted that "*[t]he elusive expression "public policy" appearing in section 23 of the Contract Act is a relative concept capable of modification in tune with the strides made by mankind in science and law.*"[53] Referring to a plethora

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43 *See* Shalaka Patil, *Delhi High Court's decision in GMR v. Doosan: Two steps forward, two steps back?*, KLUWER ARBITRATION BLOG (Jan. 1, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/01/01/delhi-high-courts-gmr-v-doosan-two-steps-forward-two-steps-back.

44 GMR Energy, 2017 SCC OnLine Del 11625, ¶ 5 (India).

45 *See* Barminco, 2020 SCC OnLine Raj 1190, ¶ 57 (India) (the Rajasthan High Court dealt with the issue of maintainability of an application under Section 9 of the Arbitration Act—wherein the arbitration between two Indian parties was seated in Singapore—albeit not dealing with the issue of two Indian parties choosing a foreign seat.).

46 Seven Islands Shipping Ltd. v. Sah Petroleums Ltd., (2012) 5 Mah LJ 822 (India).

47 Addhar Mercantile Pvt. Ltd. v. Shree Jagadamba Agrico Exports Pvt. Ltd., 2015 SCC OnLine Bom 7752 (India) [*hereinafter* "Addhar"].

48 TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 SCC 271 (India).

49 *See id.* ¶¶ 23, 36.

50 Addhar, 2015 SCC OnLine Bom 7752, ¶¶ 3–4 (India).

51 *Id.* ¶ 8

52 *Id.* ¶ 9.

53 PASL, 2021 SCC OnLine SC 331, ¶ 79 (India).

of judicial pronouncements,[54] it concluded that the parties' freedom of contract has to be balanced with "*clear and undeniable harm to the public,*" even when a particular dispute does not fall under the "*crystallised principles enumerated in well-established 'heads' of public policy.*"[55] As regards the provisions said to reflect public policy, it held: (1) Exception 1 to Section 28 of the Indian Contract Act, 1872 saves arbitration from being in restraint of legal proceedings, without any reference to nationality of the parties,[56] (2) Section 28(1)(a) of the Arbitration Act does not make any reference to arbitration between two Indian parties being conducted in a foreign seat and ought not be interpreted as such,[57] and (3) Section 34(2A) of the Arbitration Act would not apply when the arbitration is seated outside India, as the parties agreed to "*two bites at the cherry, namely, the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country […], and then resisting enforcement under the grounds mentioned in section 48.*"[58]

In its justification, it relied on international comity, recourse under Section 48 of the Arbitration Act, and the balancing act between freedom of contract and harm caused to public as the saving graces.[59] The Court also held that party autonomy would prevail as the agreement between the parties does not contravene any mandatory provisions of Indian law or breach fundamental policy of India.[60] But it is generally understood that grounds for setting aside or their right to challenge an arbitral award provided under Section 34 of the Arbitration Act are non-derogable and cannot be waived by parties' consent. The Indian courts are likely to favour this position. The ground of patent illegality to set aside an arbitral award, provided under Section 34(2A), is applicable in domestic arbitrations.[61] It follows the party-centric definition provided under Section 2(1)(f). Following *PASL*, by choosing a foreign seat, two Indian parties can avoid the application of the patent illegality ground. In effect, Section 34(2A) should be derogable. Why should two Indian parties then not be allowed to exclude its applicability by agreement even where India is the seat?

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The approach adopted by the Indian judiciary in this instance (and many others) is considered pro-arbitration and pro-party autonomy. However, it comes at the cost of diverging from the ordinary meaning of terms and risks running contrary to the legislative intent. It also creates many new and unresolved issues that will be subject of litigation in the future. Further, the position of law on such issues may undergo another change either by subsequent judicial pronouncements or amendments due to the tenuous reasoning adopted by the courts to validate their conclusions. In order for India to truly become a successful global seat of arbitration, its legislature and judiciary must work together towards creating a more conducive environment for arbitration in India, which has to be free from the popular opinion of which "*pro-arbitration*" values are more desirable.

54 *See id.* ¶¶ 79–88.
55 *Id.* ¶ 89.
56 *Id.* ¶ 90.
57 *Id.* ¶ 92.
58 *Id.* ¶ 100.
59 *Id.* ¶¶ 98–100.
60 *Id.* ¶¶ 88–91.
61 Arbitration Act, § 34(2A).

III. Need for well-thought-out provisions

The steps taken by Indian legislature towards arbitration has also created much instability over the past decade, which is undesirable for any jurisdiction looking to make its mark as a popular seat of arbitration globally. The occasional tussle between the legislature and judiciary resulting in repeated changes in the law has far-reaching consequences. The confusion that was created as regards the prospective application of the Arbitration and Conciliation (Amendment) Act, 2015 illustrates this point clearly.[62] The amendment removed the automatic stay on enforcement of arbitral awards and made significant changes to the grounds for setting aside arbitral awards, but did not clarify whether these changes would apply to the court proceedings in relation to arbitrations that were commenced prior to the date of its entry into force.[63] The subsequent judicial pronouncements solidified the position that it would be applicable for all such court proceedings commenced after the amendment came into force, irrespective of when the arbitrations were commenced.[64] This position was then reversed by the Arbitration and Conciliation (Amendment) Act, 2019 ["**2019 Amendment**"], which had consequences on the court proceedings related to pre-amendment arbitrations that were commenced post-amendment, after the judiciary had given the green flag.[65] For instance, the enforcement petitions in such cases, filed parallelly for awards arising out of arbitrations pending determination on annulment, became infructuous.[66] The tussle, however, still continued, as the provision of the 2019 Amendment that brought about this change was then declared unconstitutional and was accordingly struck down by the Supreme Court.[67]

Another instance, albeit not culminating into a tug of war between legislature and judiciary thus far, is the Arbitration and Conciliation (Amendment) Ordinance, 2020, which was a precursor to the Arbitration and Conciliation (Amendment) Act, 2021 ["**2021 Amendment**"]. Section 36 of the Arbitration Act was amended to state that the court "*shall stay the award unconditionally*" pending disposal of the annulment proceedings if it is satisfied that a *prima facie* case is made out that the arbitration agreement, the contract forming the basis of the award, or the making of the award was induced or effected by fraud or corruption.[68] This amendment was largely an unwelcome surprise to the arbitration stakeholders, brought about without any prior consultations and not emanating from any visible need for a change to the national arbitration law in this regard.[69] Further, it was introduced first though an ordinance, absent any apparent urgency. Its timing has been called "*suspicious,*" as it was introduced prior to the commencement of the enforcement hearings arising in relation to the Antrix Corporation Ltd. and Devas Multimedia Pvt. Ltd. arbitration, wherein the Permanent Court of Arbitration at the Hague had ruled against the Indian government.[70] The retrospective effect given to this amendment further solidifies this suspicion.[71]

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62 *See generally* Suraj Prakash, Aditya Singh Chauhan & Keshav Tibarewalla, *Recourse Against Arbitral Awards in India: Navigating Murky Waters*, 2020(2) INT'L COM. ARB. REV. 52, 61–65.

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 Arbitration and Conciliation (Amendment) Act, No. 3 of 2021, § 2 (India).

69 Payaswini Upadhyay, *A Change To The Arbitration Law Whose Purpose Is Unclear*, BQ PRIME (Nov. 24, 2020), *available at* https://bit.ly/3wIOheu.

70 *Id.*

71 *See* Arbitration Act, Explanation to the Proviso to § 36(3).

Needless to say, such an unexpected and aggressive move by the government erodes the rule of law and sets India decades backwards in its quest to be recognised as an arbitration-friendly seat.

In addition to the arbitrary nature of the aforesaid amendment, it has been drafted in haste apparently without any regard to its impact on the arbitration environment in India. A *prima facie* evaluation over allegations of fraud and corruption is typically grossly insufficient. Not only are they difficult to prove, but they also require detailed review of arguments and evidence.[72] Such an approach would encourage parties to employ dilatory tactics and derail enforcement, "*without the risk of security or other conditions acting as a check*."[73] Further, the amendment did not address any existing problem with the interpretation or application of Section 36 of the Arbitration Act. The courts, upon application by the parties, have the option to attach conditions and stay enforcement, and record their reasons in writing.[74] But while creating a separate class of cases—where fraud or corruption is involved—for the grant of stay on enforcement by including the proviso to Section 36, the legislature created new issues of interpretation. The phrase "*shall stay the award unconditionally*" may be interpreted as introducing a mandatory stay on enforcement, albeit where *prima facie* case of fraud or corruption is established to the satisfaction of the court, or as removing any judicial discretion to attach conditions when granting a stay on enforcement.[75]

Another good illustration that evinces the need for well-thought-out provisions to be introduced by the Indian legislature when amending the statute is the provision dealing with confidentiality. Section 42A of the Arbitration Act—inserted by the 2019 Amendment—imposes a duty of confidentiality on arbitrators, parties and institutions. The only exception provided is when disclosure of information in the arbitral award is necessary for its implementation or enforcement. Interestingly, public interest may additionally be introduced as an exception, despite Section 42A containing a non-obstante clause. In *R.S. Sravan Kumar* v. *Central Public Information Officer*,[76] information regarding the legal team representing Antrix Corporation Ltd., the commercial arm of Indian Space Research Organisation, in an international arbitration and the fees charged, *inter alia*, was sought through an application under Right to Information Act, 2005. The Central Information Commission allowed the application since the information concerned expenditure by a public authority,[77] which, the authors submit, is in contravention of Section 42A.

Blind advocacy of confidentiality is not appropriate; a balance needs to be struck between confidentiality and transparency, while keeping in mind the contribution of the former. In India, the confidentiality provision is severely lacking. In addition to its restricted scope, it leaves no room for party autonomy. The Srikrishna Committee Report, which recommended the provision, provides little to no guidance on the limits to confidentiality.[78] While it refers to the confidentiality provision in the Hong Kong Arbitration Ordinance and implied duty of confidentiality in

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72 Gary Born, Steven P. Finizio & Shanelle Irani, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE (Dec. 15, 2020), *available at* https://bit.ly/3MzxPE1 [*hereinafter* "Born, Finizio & Irani"].

73 *Id.*

74 Arbitration Act, § 36(3).

75 Born, Finizio & Irani, *supra* note 72.

76 R.S. Sravan Kumar v. Central Public Information Officer, Department of Space, Bengaluru, 2019 SCC OnLine CIC 9981, ¶ 2 (India).

77 *Id.* ¶ 7.

78 Ministry of Law & Justice, Government of India, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), at 71–72, *available at* https://bit.ly/3LA4SXi.

Singapore and United Kingdom,[79] Section 42A of the Arbitration Act does not provide for the common law exceptions to confidentiality or allow the courts to carve out such exceptions. This provision has been heavily criticised on numerous other inadequacies—for instance, it does not provide an opt-out option (thereby undermining party autonomy) or consequences for violation, and is inapplicable to witnesses, etc.—and is likely to be amended in the future.

As a result of similar provisions that have contributed to the ambiguity in the position of law and have been left open for interpretation by the courts, the Arbitration Act has been amended several times in one decade. This approach has often resulted in parties having to undergo lengthy court proceedings due to ambiguities in the procedural law and has made arbitration in India inefficient. These instances evince the necessity for adequate forethought to be exercised when introducing or amending provisions, and a lack thereof at present.

IV. Conclusion

As Bermann states, "*[t]he present time, in which the arbitration enterprise, rightly or wrongly, is coming under attack as just about never before, is an especially apt moment for expanding our notion of what is and what is not pro-arbitration.*"[80] In the Indian context, it is reflected in the decision-making by the Indian judiciary. While seemingly "*pro-arbitration,*" the approach highlighted in the course of this editorial harms India's prospects of being recognised globally as an arbitration-friendly seat. While arguably being influenced by and accommodating the competing interests of the various stakeholders and, in effect, appeasing the international community, the Indian judiciary has developed the Indian arbitration jurisprudence in line with the popular values, but has done so at the expense of certainty, stability, predictability and legitimacy—even going against the legislative intent at times—thereby compromising on the rule of law. The Indian legislature, on the other hand, has not only brought repeated changes to the law, but has done so in a heedless manner on many instances. This has resulted in the need for the judiciary to intervene time and again.

A stable and organised approach should be taken by both the judiciary and legislature when bringing changes to the Indian arbitration landscape. India should adopt a policy which is tailored for its own legal system and enhances arbitration's legitimacy. It is time for India to leave the pro-arbitration bandwagon and shift its focus towards rule of law, as is required in its current state. The focus should not be to ensure that India is a "*pro-arbitration*" jurisdiction, but rather a reliable jurisdiction with stable positions of law, while promoting the rule of law and not falling seriously out of step with extrinsic values which are of fundamental importance to the Indian legal system.

79 *See id.*

80 Bermann, *supra* note 5, at 352.