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SIGNIFICANT JUDGMENTS ON ARBITRATION

AUGUST, 2020 to DECEMBER, 2020

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SOLICITORS AND ADVOCATES

MUMBAI I DELHI I BENGALURU I KOLKATA I AHMEDABAD

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In the first part of this series (available here), we had covered some significant developments in the domain of arbitration by the courts of India during the advent of the Covid-19 pandemic i.e. from May, 2020 to July, 2020.

In this part, we seek to cover the significant decisions rendered by the courts of India during the period of August, 2020 to December, 2020, expanding the ever-evolving landscape of arbitration law in the country.

Section 2(1)(e) (*definition of Court*)

1. What comprises "Court" within the meaning of Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 ("the Act") for the purposes of Section 9 of the Act when the exclusive jurisdiction of the arbitration has been vested on the courts in Kolkata?

A Single Bench of the Calcutta High Court in the case of *SREI Equipment Finance Limited v. Seirra Infraventure Private Limited*, [A.P. 185 of 2020, decided on October 7, 2020], while adjudicating an application under Section 9 of the Act, observed that under Section 10(2) of the Commercial Courts Act, 2015 ("**Commercial Courts Act**"), the Commercial Division of a High Court has the authority to hear and dispose of applications and appeals which arise out of arbitrations other than international commercial arbitrations and which have been filed in the original side of the High Court, provided the dispute is a commercial dispute of a specified value. The Court noted that, *vide* a notification dated January 16, 2019, 4 (four) Commercial Courts, including 2 (two) such courts in greater Kolkata; namely at Alipore and Rajarhat, were set up. Further, *vide* a subsequent notification dated March 20, 2020, the pecuniary jurisdiction in terms of the value of the commercial disputes was specified, as per which, the Commercial Courts within the territorial jurisdiction of the City Civil Court at Calcutta would have the exclusive jurisdiction of commercial disputes with a specified value from Rs. 3 (Three) lacs to Rs. 10 (Ten) lacs and would have concurrent jurisdiction with the Commercial Division of the High Court at Calcutta for disputes in excess of Rs. 10 (Ten) lacs to 1 (One) crore, while the Commercial Division of the High Court would have exclusive pecuniary jurisdiction exceeding 10 (Ten) lacs.

The Court thus, held that since the claim of the petitioner was above Rs. 10 (Ten) lacs and the petitioner had approached the High Court, it had the jurisdiction to entertain the application. However, the Court also noted that the discussion would have been different had the issue in the present case had been one where the petitioner was left to rely only on the seat/ venue of arbitration without the assistance of an exclusive jurisdiction clause pointing to Kolkata and in the absence of the presumption that the contract has been signed within the ordinary original civil jurisdiction of the High Court.

Section 2(2) (*scope*)

2. What would constitute as "an agreement to the contrary" in an international commercial arbitration so as to exclude the applicability of Part I of the Act?

A Single Bench of the Delhi High Court in the case of *Big Charter Private Limited* v. *Ezen Aviation Proprietary Limited*, [O.M.P.(I)(COMM.) 112/2020, decided on October 23, 2020], held that the mere conferment of exclusive jurisdiction on the courts outside India would not suffice as an "agreement to the contrary" within the meaning of the *proviso* to Section 2(2) of the Act so as to render Part I of the Act inapplicable. As per the Court, the agreement would be required to have a specific stipulation that the parties had agreed to exclude the applicability of Section 9/ Part I of the Act to the contract between them, and to disputes arising thereunder. Therefore, in absence of such a specific stipulation, a mere recital that the parties have agreed to submit themselves to the jurisdiction of foreign courts would not suffice as an "agreement to the contrary" within the meaning of the *proviso* to Section 2(2) of the Act.

Section 4 (*waiver of right to object*)

3. When can the plea of waiver be raised?

A Single Bench of the Allahabad High Court in the case of *Jain Automobiles H.P.C. Dealer v. Hindustan Petroleum Corporation Limited*, [Appeal under Section 37 of the Act No. 23

of 2020, decided on December 16, 2020], held that the question of waiver can only be raised by a party during the arbitration proceedings. The Court, thus, while noting the facts and circumstances of the instant case, enumerated that since an application under Section 9 and Section 11 of the Act had already been moved prior to the commencement of the arbitration proceedings, the question of waiver could not be considered at that stage. However, the Court noted that if the arbitration proceedings had already commenced and the application under Section 9 and/ or Section 11 of the Act had been moved during such arbitral proceedings, the question of waiver could have been considered by the Court.

Section 7 (*arbitration agreement*)

4. When there are separate arbitration clauses in two different sets of documents between the same parties, relating to the same transaction, and wherein one of the arbitration clauses has already been invoked, which arbitration clause will prevail?

A Three Judges Bench of the Supreme Court in the case of *Balasore Alloys Limited* v. *Medima LLC*, [Arbitration Petition (Civil) No. 15/2020, decided on September 16, 2020], observed that the aforesaid issue can be determined only upon the examination of the manner in which the arbitration clause was invoked and the nature of the dispute which was sought by the parties to be resolved through arbitration. Therefore, the Court held that the arbitration clause which governs the parties insofar as the nature of the dispute is concerned and which has already been invoked and pursuant to such invocation an arbitral tribunal has already been appointed, would prevail over the other.

5. In a city having multiple courts, how should an arbitration clause conferring exclusive jurisdiction on any one of such courts be drafted?

A Single Bench of the Calcutta High Court in the case of *SREI Equipment Finance Limited* v. *Seirra Infraventure Private Limited*, [A.P. 185 of 2020, decided on October 7, 2020], while analysing an arbitration clause which enumerated that, "*…Parties agree to submit to the exclusive jurisdiction of the Courts in the City of Kolkata.*", held that such clauses are vague and that they suffer from a generalised brush-stroke to broadly include any court within a given territorial boundary. The Court further noted that the vagueness particularly comes to the fore when there are multiple courts in a city like Kolkata and particularly after the enactment of the Commercial Courts Act, 2015, under which, at least 2 (two) courts have been contemplated within the territory of 'Kolkata' and a total of 4 (four) courts have been constituted within the extended territorial boundaries of the city. The Court, thus, found such generalised clauses to be misleading and insufficient for the purposes of designating a court within its jurisdiction in the context of an application under Section 9 of the Act.

6. Does a general reference to the arbitration agreement from a previous contract entered between two parties in a subsequent contract between the original party and the assignee of the other party in the previous contract satisfy the requirement under Section 7(5) of the Act?

A Single Bench of the Bombay High Court in the case of *Vishranti CHSL* v. *Tattva Mittal Corporation Private Limited*, [Arbitration Application (L) No. 3311 of 2020, decided on October 19, 2020], held that a generalized reference to the previous contract ("all terms and conditions", etc.) does not satisfy the requirement of Section 7(5) of the Act. The Court further noted that an arbitration agreement is a dispute resolution mechanism chosen by the parties and therefore, it is to be 'carried forward' to a later agreement which introduces a new contracting party and only then, the arbitral intent between the original party and the assignee of the other party would be made manifest. The Court thus, enumerated that the same can be implemented either by having a separate arbitration agreement or by incorporating the earlier arbitration agreement by specific reference to such agreement

since the assignee cannot be 'assumed' to have consented to the subsequent arbitral agreement.

7. What is the validity of an arbitration clause in a contract which has been novated/ superseded?

A Single Bench of the Delhi High Court in the case of *Sanjiv Prakash* v. *Seema Kukreja*, [Arb. P. 4/2020, decided on October 22, 2020], held that an arbitration agreement being a creation of an agreement may be destroyed by agreement. The Court observed that if one contract is superseded by another contract, the arbitration clause, being a component/ part of the earlier contract, falls with it and if the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it.

8. Can an arbitration agreement require one of the contracting parties to make a deposit of an amount as a pre-condition for invoking arbitration?

A Single Bench of the Kerala High Court in the case of *Lite Bite Foods Private Limited* v. *Airports Authority of India*, [A.R. No. 103 of 2019, decided on October 28, 2020], held that after the amendment of the Act *vide* the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**"), the law must be taken to be that any clause in an agreement that requires one of the contracting parties to make a deposit of amount as a precondition for invoking arbitration has to be seen as rendering the entire clause arbitrary for reason of being not only excessive and/ or disproportionate but also leading to a wholly unjust situation in arbitration proceedings that, ordinarily, are to be encouraged on account of the high pendency of cases in courts and the ever-increasing cost of litigation.

9. Can non-signatories to an arbitration agreement be bound by the 'Group of Companies Doctrine'?

A Single Bench of the Delhi High Court in the case of *KKR India Private Financial Services Limited* v. *Williamson Magor and Company Limited*, [O.M.P.(I)(Comm.) 459/2019, decided on November 23, 2020], held that, it is trite law that when the scope of an arbitration agreement entered into by a company within a group of corporate entities, is as per 'Group of Companies Doctrine', the same can, in certain circumstances, bind non-signatory affiliates as well. The Court thus, enumerated the applicability of the doctrine as follows:

a) Section 9 of the Act cannot be confined only to the parties to the arbitration agreement;
b) "Group of Companies Doctrine" is an exception whereby an arbitration agreement binds a non-party or a non-signatory as well;
c) The arbitration agreement entered into by one of the companies in the group and the non-signatory affiliate, or sister, or parent concern is held to be bound by the arbitration agreement if the facts and circumstances of the case indicate a mutual intention of all parties to bind, both, the signatories and non-signatory affiliates in the group, or;
d) The doctrine gets attracted when a non-signatory entity on the group was engaged in the negotiation or performance of the commercial contract, or made statements indicating its intention to be bound by the contract, or;
e) In cases where there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality, especially when funds of one company is used to financially support or re-structure other members of the group, or;
f) The doctrine can be invoked to bind non-signatory affiliate of a parent company or inclusion of a third party to arbitration where there is a direct relationship between the party which is a signatory to the arbitration agreement or there is direct commonality of the subject matter;

g) In a situation wherein, even if all parties to the *lis* were not signatory to all the agreements but none of the companies was a stranger to these transactions either, it will be deemed that parties intended, executed and implemented a composite transaction.

In this regard, it is also pertinent to highlight that, a Three Judges Bench of the Supreme Court in the case of *Vidya Drolia* v. *Durga Trading Corporation*, [Civil Appeal No. 2402 of 2019, decided on December 14, 2020], ("**Vidya Drolia**"), has noted that, an arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. The Court also observed that, since the prime objective of arbitration is to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, the same is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required.

10. What are the pre-requisites for a dispute resolution clause between parties so as to be regarded as an arbitration clause between them?

A Single Bench of the Bombay High Court in the case of *Dhargalkar Technoesis (I) Private Limited* v. *Mumbai Metropolitan Regional Development Authority*, [Arbitration Petition (L) No. 55 of 2020, decided on December 3, 2020], observed that mere use of the words 'arbitration' or 'arbitrator' is not a determinative factor for a dispute resolution clause to be regarded as an arbitration clause. The Court, thus, enumerated that there is a need for parties to be *ad idem* on a reference of their contractual disputes to arbitration and there must bean existence of a clear and unequivocal arbitration agreement. The Court also noted that, such an arbitration agreement must also comply with all the four elements set out in the decision by the Division Bench of the Supreme Court in the case of *Jagdish Chander* v. *Ramesh Chander*, [Appeal (Civil) 4467 of 2002, decided on April 26, 2007] ("**Jagdish Chander**"), which are as follows:

a) the agreement must be in writing;
b) the parties must have agreed to refer any present or future disputes to the decision of a private tribunal;
c) the private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving the parties due opportunity to put forth their respective cases;
d) the parties should have agreed that the decision of the private tribunal in respect of the disputes will bind them.

11. Can reserving one`s right to arbitrate be regarded as an unequivocal commitment to arbitration?

A Single Bench of the Bombay High Court in the case of *Viren Umedial Mehta* v. *Royal Food and Hospitality*, [Arbitration Petition (L) No. 6804 of 2020, decided on December 4, 2020], while relying on the decision of the Supreme Court in the case of Jagdish Chander (*supra*), held that an arbitration agreement cannot be an option at the discretion of any one of the parties and a valid arbitration agreement, demonstrating consensus and necessarily stating that the parties shall refer any disputes to arbitration, must be present. Further, the Court held that reserving one's right to arbitrate under the Act is neither an unequivocal commitment to arbitration, nor does it demonstrate the existence of an arbitration agreement.

12. What are the principles applicable to the interpretation of an arbitration clause?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) observed that, what may be true and applicable for men of commerce and business may not be equally true and apply in case of laymen and to those who are not fully aware of the effect of an arbitration clause or had little option but to sign on the standard form contract. Hence, as per the Court, broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. The Court thus, enunciating three different interpretations to state that, pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties' business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. On the other hand, the restrictive interpretation approach states that in case of doubt, the disputes shall not be treated as covered by the clause. The third approach, as per the Court, is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand.

The Court further noted that, terms like 'all', 'any', 'in respect of', 'arising out of' etc. can expand the scope and ambit of the arbitration clause. Moreover, connected and incidental matters, unless the arbitration clause suggests to the contrary, would normally be covered. Hence, the Court stated that, which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. and in case of purely commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.

Section 8 (*power to refer parties to arbitration where there is an arbitration agreement*)

13. Whether a party seeking reference to arbitration under Section 8 of the Act must make a specific request for the same, either through an application or in its first statement on the substance of the dispute?

A Single Bench of the Kerala High Court in the case of *Huawei Telecommunication (India) Private Limited* v. *Palathara Constructions*, [C.R.P. No. 954 of 2018, decided on August 19, 2020], held that, it is not incumbent upon the party seeking reference to arbitration under Section 8 of the Act to make a specific request for reference to arbitration. The Court further held that the word "so applies" in Section 8(1) of the Act cannot be used in a restrictive sense but must be given an expanded meaning, to enumerate that when a defendant brings it to the notice of a court that a suit is not maintainable because of the existence of a valid arbitration agreement by producing the original or duly certified copy of the same, and thereby, to show that the disputes can be decided only as per the said agreement, then the obligation to consider the reference of the parties under Section 8(1) of the Act immediately sets itself upon the court.

14. Whether an averment in the written statement of defense that it is being filed "without prejudice to the arbitration agreement" constitute an application under Section 8 of the Act? Does a civil court have the jurisdiction to determine the existence of an arbitration agreement under Section 8 of the Act?

A Single Bench of the Calcutta High Court in the case of *Lindsay International Private Limited* v. *Laxmi Niwas Mittal*, [G.A. 820 of 2020, decided on September 15, 2020], observed that actions taken "without prejudice" do not totally negate them or revive the reserved stand at the drop of a hat and hence, the expression cannot be a ruse to approbate and reprobate. The validity of such reservation is required to be determined in accordance with the facts of each case.

The Court thus, held that the language of Section 8 of the Act, before and after the amendments, is explicit and clear and that it requires a formal, independent, specific application before or at the time of the filing of the written statement for seeking reference to arbitration. Since the same was not done by the defendant, the Court held that the expression, "without prejudice to the arbitration agreement" is not the equivalent to an application under Section 8 of the Act and thereby, consequences of waiver of arbitration cannot be avoided.

With respect to the question of whether a civil court has the jurisdiction to determine the existence of an arbitration agreement under Section 8 of the Act, the Court held that, civil courts retain the jurisdiction to examine/ determine whether "no arbitration clause exists" or has been waived (under Section 8 in Part I of the Act) or has become null and void, inoperative or incapable of being enforced (under Section 45 in Part II of the Act). The Court further noted that such finding of waiver or whether the arbitration agreement is null and void ought to be based on *prima facie* findings.

15. Whether the defendant would lose its right to seek reference of the parties to arbitration if the application under Section 8 of the Act is filed along with the written statement?

A Single Bench of the Karnataka High Court in the case of *PricewaterhouseCoopers Service Delivery Centre (Bangalore) Private Limited* v. *Mohan Kumar Thakur*, [M.F.A. No. 8750/2019 (AA), decided on November 5, 2020], held that the term 'not later than' used in Section 8(1) of the Act permits filing of an application seeking reference of the parties along-with the written statement and, the filing of the written statement and application for reference under Section 8 of the Act simultaneously, cannot and should not, lead to an inference that the defendant had submitted to the jurisdiction of the Civil Court and has waived its right to seek reference to arbitration as provided under Section 8 of the Act.

Further, the Court also observed that the legislature has used the term 'not later than' in Section 8 of the Act, consciously and deliberately, to convey the meaning that a party is required to apply for reference to arbitration at the earliest point in time and a party, so applying, was essentially indicating his intent to abide by the terms of the agreement, which was to get the disputes resolved by means of arbitration and such an application is therefore, required to be accepted.

16. What is the scope of judicial interference under Section 8 of the Act with respect to arbitrability of a dispute?

Through a separate opinion, N.V. Ramana J., of the Three Judges Bench of the Supreme Court in the case of Vidya Drolia held that:

a) Sections 8 and 11 of the Act have the same ambit with respect to judicial interference;

b) Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it is a clear case of deadwood;
c) The court, under Sections 8 and 11 of the Act, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a *prima facie* (summary findings) case of non-existence of valid arbitration agreement by summarily portraying a strong case that he is entitled to such a finding;
d) The court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above, i.e., 'when in doubt, do refer'.
e) The scope of the court to examine the *prima facie* validity of an arbitration agreement includes only:

    i. whether the arbitration agreement was in writing or;
    ii. whether the arbitration agreement was contained in exchange of letters, telecommunication etc;
    iii. whether the core contractual ingredients *qua* the arbitration agreement were fulfilled;
    iv. on rare occasions, whether the subject matter of the dispute is arbitrable.

17. What is meant by the expression, '*prima facie*' under Section 8(1) of the Act?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) observed that, *prima facie* examination is not full review but a primary first review to weed out manifestly and *ex facie* non-existent/ invalid arbitration agreements/ non-arbitrable disputes. Thus, the Apex Court noted that, a court under Section 8 of the Act, only when it is certain that, no valid arbitration agreement exists or the disputes/ subject matter are not arbitrable, the application under Section 8 of the Act would be rejected and therefore, at this stage, the court should not get lost in thickets and decide debatable questions of facts since, referral proceedings are by nature preliminary/ summary and not a mini trial.

18. Is an order passed by a commercial court in absence of a written request under Section 8 of the Act referring the parties to arbitration, appealable under Section 37 of the Act?

A Division Bench of the Delhi High Court in the case of *Alok Kumar Lodha* v. *Asian Hotels (North) Limited*, [RFA (OS)(COMM) 13/2020, decided on December 24, 2020], held that, the existence of a written statement/ pleading, requesting the parties to be referred to arbitration, is *sine qua non* for the judicial authority to exercise its powers under Section 8 of the Act. The Court, thus, noted that, in the absence of such a written request, an order of reference to arbitration by the judicial authority under Section 8 of the Act, would be regarded as without jurisdiction and consequently, *non-est*.

The Court therefore, held that in such an aforementioned situation, the order passed by the judicial authority under Section 8 of the Act shall not attract the bar on appeal under Section 37 of the Act or in other words, will be appealable under Section 37 of the Act.

Section 9 (*interim measures, etc. by Court*)

19. What is the significance of the expression "etc." used after the expression "interim measures" under Section 9 of the Act?

A Single Bench of the Delhi High Court in the case of *Avantha Holdings Limited* v. *Vistra ITCL India Limited*, [O.M.P.(I)(Comm.) 177/2020, decided on August 14, 2020], while

adjudicating upon a petition under Section 9 of the Act seeking pre-arbitration relief, interpreted the expression "etc." used after the expression "interim measures" in Section 9 to hold that the same is required to be interpreted applying the principles of *noscitur a sociis* and *ejusdem generis* (the latter principle applying where the words preceding the word "etc." constituted a genus, and the former principle applying more universally, in all cases) *vis-à-vis* the words preceding it. Thus, the Court noted that the measures, put in place by the court, in exercise of the jurisdiction vested by Section 9, has to be in the nature of "interim measures".

Further, the Court while differentiating the scope of interim relief under Section 9 and Section 17 of the Act, held that the court, while exercising its jurisdiction under Section 9 of the Act, even at a pre-arbitration stage, cannot usurp the jurisdiction which would, otherwise, be vested in the arbitrator or the arbitral tribunal yet to be constituted. Moreover, the Delhi High Court, while proclaiming a word of caution, noted that a court is also required to ensure that Section 9 is not employed by litigants who feel that it is easier to obtain interim relief from a court rather than from an arbitrator or arbitral tribunal, or to forum shop.

20. What are the pre-requisites for granting interim protection by the court under Section 9 of the Act?

A Single Bench of the Delhi High Court in the case of *CRSC Research and Design Institute Group Company Limited* v. *Dedicated Freight Corridor Corporation of India Limited*, [O.M.P.(I)(COMM.) 184/2020, decided on September 30, 2020], enumerated the following pre-requisites for grant of interim protection by the court in an application under Section 9:

a) the existence of an arbitration clause, and manifest intent of the petitioner to invoke the said clause and initiate arbitral proceedings;
b) the existence of a *prima facie* case, balance of convenience and irreparable loss justifying such grant of interim relief to the applicant, and;
c) the existence of emergent necessity so that if interim protection is not granted by the court, even before arbitral proceedings are initiated and the chance to approach the arbitral tribunal under Section 17 of the Act manifests itself, there is a possibility of the arbitral proceedings being frustrated or rendered futile.

21. Whether an order passed by a Commercial Court under Section 9 of the Act is appealable under Section 13(1) of the Commercial Courts Act?

A Single Bench of the Kerala High Court in the case of *Pranathmaka Ayurvedics Private Limited* v. *Cocosath Health Products*, [OP(C) No. 1467 of 2020, decided on November 24, 2020], noted that, *proviso* to Section 13(1A) of the Act restricts the right of appeal only from orders that are specifically enumerated under Order XLIII of the Code of Civil Procedure and the Section 37 of the Act. The Court, thus, held that an order under Section 9 of the Act, passed by a Commercial Court below the level of a District Judge is appealable under Section 13(1) of the Commercial Courts Act.

Section 11 (*appointment of arbitrators*)

22. Can the court take into consideration the issues relating to limitation during the appointment of an arbitrator?

A Single Bench of the Madras High Court in the case of *Messrs Vantage Advertising Private Limited* v. *Coimbatore City Municipal Corporation*, [O.P. Nos. 275 and 276 of 2018, decided on August 20, 2020], while adjudicating upon a petition for appointment of a sole arbitrator noted that the Limitation Act, 1932 ("**Limitation Act**") applies to arbitrations and as per Article 137 of the Limitation Act, when there is no specific period fixed, the residuary clause will come into play. As per Article 137 of the Limitation Act, 3 (three) years is the

limitation period to initiate action. The Court, however, held that it cannot look into all other aspects including limitation during appointment of an arbitrator as per Section 11 of the Act and therefore, as long as there is an arbitration clause, the matter should be referred to an arbitrator.

23. Whether the law of limitation will apply to proceedings under Section 11 of the Act?

A Single Bench of the Madras High Court in the case of *Board of Trustees of the Port of Chennai* v. *X-Press Container Line (UK) Limited*, [O.P. No. 511 of 2009, decided on September 17, 2020], observed that the fact that proceedings under Section 11 of the Act being a request and not an application or a suit cannot be a ground to take a view that there is no limitation *qua* Section 11 of the Act. Further, the Court opined that disposal of an application under Section 11 of the Act by the arbitral tribunal would not impliedly condone any delay in presenting the said application under Section 11 of the Act. The Court thus, held that limitation will certainly operate *qua* an application under Section 11in light of Article 137 of the Limitation Act read with Section 43 of the Act.

24. Can a court still appoint an arbitrator despite the arbitration agreement/ clause being contained in an insufficiently stamped document?

A Single Bench of the Karnataka High Court in the case of *Malchira C. Nanaiah* v. *Messrs Pathak Developers Private Limited*, [Civil Miscellaneous Petition No. 113/2019, decided on October 5, 2020], was faced with the issue of an application under Section 11 of the Act arising out of an insufficiently stamped arbitration agreement. In consideration of the peculiar facts and circumstances of the case, particularly having regard to the joint submission and consent given by both the parties to proceed with the appointment of the sole arbitrator upon imposition of necessary conditions with regard to payment of stamp duty and penalty on the sale agreement by the petitioners on or before the first date of hearing before the sole arbitrator, the Court went onto appoint an arbitrator to adjudicate upon the dispute between the parties despite the arbitration agreement being contained in an insufficiently stamped document. However, the Court also enumerated that the instant decision shall not be treated as a precedent.

In this regard, it is pertinent to note that a Three Judges Bench of the Supreme Court in the case of *Messrs. N.N. Global Mercantile Private Limited* v. *Messrs Indo Unique Flame Limited*, [Civil Appeal Nos. 3802-3803/2020, decided on January 11, 2021], while overruling the decision of Division Bench of the Apex Court in the case of *Messrs SMS Tea Estates Private Limited* v. *Messrs Chandmari Tea Company Private Limited*, [Civil Appeal No. 5820 of 2011, decided on July 20, 2011], has referred the question of whether non-payment/ insufficient payment of stamp duty on contract would invalidate the arbitration clause in the contract to a Constitutional Bench while specifically referring to paragraph numbers 22 and 29 of the decision of the Division Bench of the Supreme Court in the case of, *Garware Wall Ropes Limited* v. *Coastal Marine Constructions and Engineering Limited*, [Civil Appeal No. 3631 of 2019, decided on April 10, 2019], subsequently affirmed in paragraph number 92 in the case of Vidya Drolia (*supra*).

25. Does failure by one party to appoint an arbitrator within a stipulated time period as enumerated in the arbitration agreement give the other party a right to appoint an arbitrator?

A Single Bench of the Delhi High Court in the case of *Larsen and Toubro Limited* v. *National Highways Authority of India*, [Arb. P. 208/2020, decided November 6, 2020], observed that clause (c) in Section 11 (6) of the Act provides that when under the appointment procedure agreed upon by the parties an institution fails to perform any function entrusted to it under the procedure, the appointment would, in the case of domestic arbitrations, have to be

made by the High Court. The Court thus, held that when one of the parties defaulted in appointing an arbitrator within 30 (thirty) days of receipt of notice from the other party (as per the arbitration agreement), the task devolved, by virtue of Section 11(6)(a) and (c) of the Act, on the High Court. Hence, the Court held that, the appointment of an arbitrator by the other party upon failure to appoint an arbitrator by the first party was invalid.

26. Can other courts have the power to appoint an arbitrator when an arbitration agreement *vide* an exclusive jurisdiction clause has conferred jurisdiction on a specific court to appoint an arbitrator?

A Single Bench of the Delhi High Court in the case of *Cars24 Services Private Limited* v. *Cyber Approach Workspace LLP*, [ARB P. 328/2020, decided on November 17, 2020], while relying on the principles enunciated by a Three Judges Bench of the Supreme Court in the case of *Mankastu Impex Private Limited* v. *Airvisual Limited*, [Arbitration Petition No. 32 of 2018, decided on March 5, 2020], held that, where the arbitration agreement comprises an exclusive jurisdiction clause and, especially where such a clause has conferred jurisdiction under Section 11 of the Act on a specific court, no other court located elsewhere can interfere with the same, as it would be contrary to the explicit words and intent of the exclusive jurisdiction clause.

Further, the Court also distinguished it from a situation wherein the seat of arbitration is at place X, and the exclusive jurisdiction over the subject matter of the suit is conferred on courts at place Y. The Court held that in such a situation, a petition under Section 11 of the Act would unquestionably lie before the courts at place X. However, with respect to the instant matter, the Court noted that as the exclusive jurisdiction conferred by the arbitration agreement is not in respect of the subject matter of the suit but specifically for appointment of an arbitrator, the Court vested with authority under the exclusive jurisdiction clause will have the jurisdiction to appoint an arbitrator.

27. Does the expression, 'existence of an arbitration agreement' under Section 11 of the Act, include the aspect of validity of an arbitration agreement?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) held that, the expression 'existence of an arbitration agreement' in Section 11 of the Act, would also include aspect of validity of an arbitration agreement, *albeit* the court at the referral stage would apply the *prima facie* (refer to question number *17*) and in case of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

Section 12 (*grounds for challenge*)

28. Can the applicability of Section 12(5) of the Act be waived without an "express agreement in writing"?

A Single Bench of the Delhi High Court in the case of *JMC Projects (India) Limited* v. *Indure Private Limited*, [O.M.P. (T)(Comm.) 33/2020, decided on August 20, 2020], while hearing a challenge to the mandate of the arbitrator under Section 14 of the Act, held that an "express agreement in writing", waiving the applicability of Section 12(5) of the Act, is the statutory *sine qua non* for a person who is otherwise subject to the rigour of Section 12(5), to remain unaffected thereby. The Court thus, noted that, nothing less would suffice; no conduct, howsoever, extensive or suggestive, can substitute for the "express agreement in writing" and in the absence of the same, Section 12(5) of the Act, by operation of law, invalidates the appointment of any person whose relationship with the parties to the dispute falls under any of the categories specified under the Seventh Schedule of the Act. The

Court also held that the invalidity which attaches to such a person would also, *ipso facto*, attach to his nominee.

29. Does the court have the power to determine a challenge to an arbitrator under Section 12(5) of the Act?

A Single Bench of the Madras High Court in the case of *K. Jeganathan* v. *P. Sampath*, [O.P. No. 191 of 2020, decided on September 1, 2020], held that when there is a violation of Section 12(5) of the Act, the challenge to such appointment of an arbitrator has to be decided only by the Court and not under Section 13 of the Act (*challenge procedure*) as a challenge before the same arbitrator.

30. Whether voluntary recusal of an arbitrator in one proceeding is a sufficient ground to seek recusal of the arbitrator in a different proceeding? Whether the brother of the arbitrator is a "close family member" as per Entry 10 of the Seventh Schedule?

A Single Bench of the Delhi High Court in the case of *Himachal Pradesh Power Corporation Limited* v. *Hindustan Construction Company Limited*, [O.M.P(T)(COMM) 65/2019, decided on September 25, 2020], held that voluntary recusal of the presiding arbitrator in another arbitration proceeding is not a ground for terminating the mandate of the presiding arbitrator under the instant arbitral proceedings as per the Act.

Further, the Court also held that the brother of the presiding arbitrator, who appeared as a Senior Advocate on behalf of the respondent before the Himachal Pradesh High Court in a separate unconnected matter, is not a "close family member" as defined in Entry 10 of the Seventh Schedule of the Act and therefore, the presiding arbitrator cannot be rendered ineligible as per Section 12(5) of the Act.

Section 16 (*competence of arbitral tribunal to rule on its jurisdiction*)

31. Can the principle of *kompetenz-kompetenz* arise when the disputes are not capable of being submitted to arbitration?

A Division Bench of the Delhi High Court in the case of *Dr. Bina Modi* v. *Lalit Kumar Modi*, [R.F.A. (O.S) 21/2020, decided on December 24, 2020] held that the principles of autonomy of arbitration and *kompetenz-kompetenz* will not arise when the disputes themselves are not capable of being submitted to arbitration. Further, the Court while placing reliance on the decision by the Constitutional Bench of the Supreme Court in the case of *SBP and Company* v. *Patel Engineering*, [Appeal (Civil) 4168 of 2003, decided on October 26, 2005] ["**SBP and Company**"], held that Section 16 of the Act is only an enabling provision and does not confer exclusive jurisdiction on the arbitral tribunal without rendering a decision on the issue of 'non-arbitrability' of the subject of the dispute.

Section 17 (*interim measures ordered by arbitral tribunal*)

32. Can the court under Section 17(2) of the Act, modify or vary the orders or directions given under Section 17(1) of the Act by the arbitral tribunal?

A Single Bench of the Kerala High Court in the case of *Manoj C. J.* v. *Shriram Transport Finance Company Limited*, [O.P.(C) No. 312 of 2020, decided on October 6, 2020], held that what is contemplated under Section 17(2) of the Act is only enforcement of the interim orders passed by the arbitral tribunal under Section 17(1) of the Act and thus, while exercising the jurisdiction under Section 17(2) of the Act, the Court is not sitting in appeal over the correctness or otherwise of the interim order passed by the arbitral tribunal under

Section 17(1) of the Act. Hence, as per the Court, in exercise of its powers under Section 17(2) of the Act, the Court is not entitled to modify or vary the orders passed or directions issued under Section 17(1) of the Act by the arbitral tribunal. Further, the Court also noted that an order passed under Section 17(1) of the Act by the arbitral tribunal is appealable under Section 37(2)(b) of the Act and enforcement of an order of the arbitral tribunal by the court under Section 17(2) of the Act is subject to any orders passed in an appeal under Section 37 of the Act.

Section 18 (*equal treatment of parties*)

33. Whether receiving of claim statement and supporting documents by the arbitrator in absence of the other party would amount to breach of Section 18 of the Act?

A Single Bench of the Madras High Court in the case of *T. Rajasekar* v. *IndusInd Bank Limited*, [O.P. No. 213 of 2012, decided on September 28, 2020], held that receiving the claim statement and supporting documents in the absence of one of the parties may fall foul of the principle of equal treatment of parties as ingrained in Section 18 of the Act.

34. How can equal treatment of parties be ensured in a multi-tiered arbitration?

A Single Bench of the Madras High Court in the case of *Nalini Rajkumar* v. *Geojit BNP Paribas Financial Services Limited*, [O.P. No. 681 of 2012, decided on October 1, 2020] held that if a crucial document is being relied upon in a multi-tiered arbitration, parties should be given the opportunity to comment upon the same in each tier and if one tier of the arbitral tribunal receives a document post oral hearing from an entity, examines and relies on the same, and more importantly, makes it a part of the award, it is of no avail to say that the parties were thereafter given an opportunity to comment on the document in the next tier.

The Court further noted that the objective of having a multi-tiered arbitration is to ensure that the parties get equal treatment and an equal say before each tier, so that the arbitrable dispute is decided by more than one tier. Therefore, as per the Court, if an act or omission is committed in contravention of the aforesaid principle, the same would be a case of an arbitral procedure not being in accordance with the agreement of the parties and would attract one limb of Section 34(2)(a)(v) of the Act, besides causing legal infarct of the second limb of Section 18 of the Act. Consequently, the arbitral award rendered would be capable of being set aside.

Additionally, the Court enumerated that in a multi-tiered arbitration, the second limb of Section 18 should be applied in each tier and infarct of the same in any one tier would certainly impact the arbitral award made by the last tier as there is no disputation that the award of the arbitral tribunal merges with the award made by arbitral appellate tribunal.

Section 29A (*time limit for arbitral award*)

35. Whether Section 29A of the Act, as amended by the Arbitration and Conciliation (Amendment) Act, 2019 ("2019 Amendment"), is retrospective in nature?

A Single Bench of the Orissa High Court in the case of *Messrs SARA International Private Limited* v. *South Eastern Railways*, [ARBP No. 28 of 2020, decided on December 11, 2020], while relying on the decision of a Co-ordinate Bench of the Delhi High Court in the case of *ONGC Petro Additions Limited* v. *Ferns Constructions Company Incorporated*, [OMP(MISC.)(COMM.) 256/2019, decided on July 21, 2020], observed that any change/ amendment to substantive laws, affecting the rights and liabilities of a party or imposing a disability thereof, will be prospective in nature and any change/ amendment to the provisions of statute dealing merely with the matters of procedure or procedural laws, will

be retrospective in nature, unless there exists a contrary intention of the legislature. The Court, thus, noted that while in the 2015 Amendment, a contrary intention regarding the applicability of its provisions of the 2015 Amendment was evident from Section 26 of the 2015 Amendment, there is no such contrary intention discernible from any of the provisions of the 2019 Amendment *vis-à-vis* its applicability. Therefore, the Court, held that the provisions of Section 29A, as amended by the 2019 Amendment, is retrospective in nature and hence, it is applicable to all pending arbitral proceedings which have commenced after October 23, 2015.

The Court, thus, enumerated that for domestic arbitrations, the timeline of 12 (twelve months) envisaged in the substituted provisions of Section 29A(1) of the Act for passing of the award would commence from the date of completion of the pleadings as per Section 23(4) of the Act.

Further, in the light of the aforesaid, the Orissa High Court also extended the time period for rendering the arbitral award by 6 (six) months from the date of the order by the Court, owing to the decision of by a Three Judges Bench of the Supreme Court in the case of in *Suo Motu, In re-* Cognizance for extension of limitation [*Suo Motu* W.P.(Civil) No. 03/2020, decided on May 6, 2020], extending all periods of limitation prescribed under the Act with effect from March 15, 2020 until further orders.

36. Can a party approach the court for extension of time under Section 29A more than once?

A Single Bench of the Calcutta High Court in the case of *Senbo Engineering Limited* v. *Hoogly River Bridge Commissioners*, [AP/482/2019, decided on December 21, 2020] while interpreting Section 29A of the Act, as incorporated by the 2015 Amendment and amended *vide* the 2019 Amendment, held that there is no embargo in approaching the court for extension of time more than once under Section 29A of the Act.

Section 31 (*form and contents of arbitral award*)

37. What is the appropriate rate of interest that can be awarded on the interest component of the "sum" of an arbitral award?

A Single Bench of the Jharkhand High Court in the case of *Executive Engineer, Rural Works Department, Work Division, Koderma* v. *Messrs Anil Sharma, Proprietory,* [Arb. Appeal No. 06 of 2015, decided on August 19, 2020], while determining the question pertaining to appropriateness of grant of interest on the sum (inclusive of interest) for which the award is made at the rate of 12% (Twelve Percent) per annum, referred to Section 31(7) of the Act to note that, interest can be awarded on the interest component of the "sum" of an arbitral award.

However, the Court held that an interest at the rate of 12% (Twelve percent) per annum on the interest component of the "sum" of the award is on the higher side and hence, reduced the rate of such interest on the interest component to 9% (Nine percent) per annum.

38. Can an arbitrator divide an arbitral award into different time periods/ parts for the purposes of levying interest on the "sum"?

A Single Bench of the Calcutta High Court in the case of *United Conveyor Corporation (India) Private Limited* v. *Pravash Kumar Mukherjee*, [A.P. No. 858 of 2012, decided on August 24, 2020], while interpreting the expression "sum" in an arbitral award, placed reliance on the majority opinion of the Three Judges Bench of the Supreme Court in the case of *Messrs Hyder Consulting (UK) Limited* v. *Governor, State of Orissa*, [Civil Appeal

No. 3148 of 2012, decided on November 25, 2014], to reiterate that there is no distinction between a "sum" with interest and a "sum" without interest since once the interest is included in the "sum" for which the award is made, the original "sum" and the interest component cannot be segregated or be seen independent of each other. Consequently, the interest component then loses its character of an "interest" and takes the colour of "sum" for which the award is made. The Court also acknowledged the *ratio* of the Division Bench of the Supreme Court in the case of *Ssangyong Engineering and Construction Company Limited* v. *National Highways Authority of India (NHAI)*, [Civil Appeal No. 4779 of 2019, decided on May 8, 2019], wherein the Apex Court permitted pre-reference and *pendente lite* interest to be "compounded monthly".

The Court thus, upholding the award rendered by the arbitrator, held that it was entirely within the bounds of logic and reason to divide the award into several time-periods, being the pre-award, *pendente lite* and post-award periods, each of which would have to focus on interest on the sum due at that stage. Further, the Court also noted that, since the principal awarded carried interest for the pre-litigation period, there is no bar in considering the principal sum, for the purpose of interest *pendente lite* at the next stage, to be the sum total of the pre-litigation interest added to the interest thereon. Hence, by similar logic, the Court held that each of the stages entitled the award-holder to interest and that the interest component, along with the principal of each previous stage, is to be taken as the principal "sum" for the purpose of levying interest for the next.

Section 33 (*correction and interpretation of award; additional award*)

39. Is the time period under Section 33 of the Act mandatory or directory in nature?

A Single Bench of the Punjab and Haryana High Court in the case of *Project Director, National Highways Authority of India* v. *S.D.M.-cum-Land Acquisition Collector, Pathankot*, [LPA-2037-2019, decided on December 9, 2020], held that under Section 33 of the Act, an application for rectification of a computation error, a clerical, typographical or such similar error has to be made by the party seeking such rectification, within 30 (thirty) days of the receipt of the arbitral award and once that period is crossed, a party cannot be permitted to file an application for rectification of any error. The Court further noted that the very object of the Act, which is the expeditious conclusion of disputes by the alternative mode, would be defeated if the strict timelines spelt out in Sections 33 and 34 of the Act are not adhered to.

Section 34 (*application for setting aside arbitral award*)

40. Is the time limit prescribed under Section 34(5) of the Act mandatory or directory in nature?

A Single Bench of the Allahabad High Court in the case of *Mahmood Ahmad Siddiqui* v. *Union of India*, [Matters under Article 227 No. 1407 of 2020, decided on August 14, 2020], held that Section 34(5) is directory in nature. It is pertinent to mention in this regard that a Single Bench of the Madras High Court, previously in the case of *Poornima Enterprises* v. *The Deputy Chief Materials Manager/Consumables*, [O.P. No. 150 of 2015, decided on August 3, 2020], while upholding the mandatory time limit prescribed under Section 34(6) of the Act, had also enumerated that Section 34(5) of the Act is directory in nature.

41. What is appreciation and re-appreciation of evidence in the context of Section 34 of the Act?

A Single Bench of the Madras High Court in the case of *Messrs 14 Reels Entertainment Private Limited* v. *Messrs Eros International Media Limited*, [O.P. No. 298 of 2020, decided on September 4, 2020], with the aid of an illustration wherein an adjudicating authority has to decipherthe true nature of an agreement/ document i.e. whether it amounted to a lease or a license, observed that if the original adjudicating authority, while sifting and scrutinizing the oral and documentary evidence regarding the relationship between the contracting parties, comes to a conclusion regarding their jural relationship, it can be described as 'appreciation of evidence'. However, if this decision by the original adjudicating authority is carried to appeal, the appellate authority, when it goes into the inconsistencies and contradictions in the evidence pointed out by the appellant and undertakes a clinical, forensic relook at the oral/ documentary evidence presented before the original adjudicating authority, the same can be described as 're-appreciation of evidence'. Further, the Court, while continuing the illustration, stated that if the appellate authority comes to a conclusion that the original adjudicating authority has ignored vital evidence before it, the appellate authority may hold that the original adjudicating authority has committed patent illegality and for that, re-appreciation of evidence will not be a requirement.

The Court thus, on perusal of the impugned arbitral award, held that the arbitral tribunal has taken into account and has clinically sifted through the mass of evidence (documentary and oral evidence) before it and thus, the claim of the appellant that certain documents should have been taken into account by the arbitral tribunal cannot compel the Court under Section 34 of the Act to have a re-look at the evidence before the arbitral tribunal, as the same would tantamount to violation of *proviso* to Section 34(2A) of the Act.

42. Whether an application under Section 34 of the Act is maintainable against agreements entered into and foreign awards rendered before the decision by the Constitutional Bench of the Apex Court in the case of *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Incorporated*, [Civil Appeal No. 7019 of 2005, decided on September 6, 2012] ("BALCO")?

A Division Bench of the Supreme Court in the case of *Noy Vallesina Engineering SpA* v. *Jindal Drugs Limited*, [Civil Appeal No. 8607 of 2010, decided on November 26, 2020], reiterated the *ratio* enumerated by a Three Judges Bench of the Supreme Court, *inter-alia*, in the case of *Government of India* v. *Vedanta Limited*, [Civil Appeal No. 3185 of 2020, decided on September 16, 2020] wherein the Apex Court, while adjudicating upon an agreement and an award rendered prior to BALCO, had held that an application substantially challenging the award was correctly adjudicated by the Malaysian Courts since the seat of the arbitration was in Kuala Lumpur. The Apex Court thus, in the instant matter, while noting that the parties had an unambiguous intention that the seat of arbitration was in London, where the arbitral proceedings were conducted and the award was rendered, held that the impugned judgment passed by the Bombay High Court holding thatan application under Section 34 of the Act, is maintainable against a foreign award rendered pre-BALCO, cannot be sustained and set aside the impugned order.

Section 36 (*enforcement*)

43. Do the parameters governing the release of an amount, which has been deposited before a court as a precondition for stay of a money decree as per the Code of Civil Procedure, 1908 ("CPC"), have to be strictly followed by a court under Section 36(3) of the Act?

A Single Bench of the Delhi High Court in the case of *Messrs NHPC Limited* v. *Messrs Hindustan Construction Company Limited*, [O.M.P. (COMM.) 484/2020, decided on December 4, 2020], observed that the language of Section 36(3) of the Act, does not make it binding for the Court to follow the precepts governing the stay of a money decree, but only lays down a guiding principle that the court ought to pay due regard to it. Further, the

Court also noted that Section 36(3) of the Act only deals with the power of the court to grant a stay on an award directing money payment and does not deal with the parameters for releasing the deposited amount in favour of the award-holder.

Therefore, the Court held that it is evident that the parameters governing the release of an amount, which has been deposited before a court as a precondition for stay of a money decree under the CPC, need not be strictly followed by the court in all pre-conditional deposits for stay made in petitions arising out of arbitration and thus, the power of the court to stay an award and release the amounts obtained as a precondition for such a stay, as also its power to decide the conditions thereof, still retains a discretionary characteristic, which can be exercised by the court in a judicious manner considering facts and circumstances of the case.

The Court, thus, considering the facts and circumstances of the instant case, permitted the amount deposited by the petitioner before the Court to be released in favour of the respondent without requiring to furnish any security, however, subject to the respondent issuing an undertaking to restitute the released amount with interest at the rate of 7% (Seven percent) per annum in case the petition under Section 34 of the Act succeeded.

44. Does a stay always have to be conditional, requiring a deposit or security, especially when there is a money award? In what situation could a court under Section 36 of the Act grant an unconditional stay? What must an applicant under Section 36 of the Act plead in order to obtain an unconditional stay (especially of a money award)?

A Single Bench of the Bombay High Court in the case of *Kishor Shah* v. *Urban Infrastructure Trustees Limited*, [Interim Application (L) No. 6647 of 2020 in Comm. Arbitration Petition No. 1435 of 2019, decided on December 14, 2020], answered the aforesaid questions while determining the appropriate approach of a court while adjudicating an application under Section 36 of the Act.

The Court observed that an unconditional stay of arbitral awards cannot be the norm. As per the Court, Section 36(3) of the Act permits stay of an arbitral award subject to reasons which warrants such a stay. Further, the Court noted that the *proviso* to Section 36(3) of the Act states that while considering the application for stay in the case of an arbitral award for payment of money, the court must have 'due regard' to the provisions under the CPC for stay of a money decree.

However, as per the Court, the aforesaid does not indicate that under Section 36 of the Act, the court lacks all discretion to grant an unconditional stay, if the circumstances otherwise so warrants. The Court also observed that even in a case purely under Order 41 Rule 5 of CPC, i.e. for stay of a decree rather than an award, if an exceptional case is made for staying execution of a pure money decree, the judicial discretion to do justice is not eliminated.

Hence, as per the Court, true, strong and exceptional case must be made for an unconditional stay and this is also true for an award for money, as it is for a decree, but there is no blanket prohibition on an appellate court unconditionally staying a money award or a money decree.

The Court, thus, held that, under Section 36 of the Act, a court is not to merely look at the operative part of the arbitral award under challenge, see that it is for money and automatically order a deposit or security but, the court must look at all the circumstances, and if it be shown that the award is entirely vulnerable, and within the frame of permissible challenges under Section 34 of the Act, then in a given case, a court may legitimately grant an unconditional stay. Further, the Court also observed that in every single case, a court

is not bound to order a deposit and in a fit case, for good reason, a court, can order an unconditional stay.

Therefore, the Court, while referring to the facts and circumstances of the instant case, laid down that, a party must make out a strong, exceptional and overwhelmingly compelling case for an unconditional stay of an award and if the necessary standard is not met, bearing in mind that the award under challenge is a money award, a conditional order would be issued.

In this regard, it is also imperative to note that, with the object to ensure that all stakeholders gets an opportunity to seek unconditional stay of enforcement of arbitral awards where the underlying arbitration agreement or contract or making of the arbitral award was induced by fraud or corruption, the President has promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 ("**Ordinance**") and has introduced a new *proviso* to Section 36(3) of the Act, with retrospective effect i.e. making the Ordinance applicable irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the 2015 Amendment.

Section 37 (*appealable orders*)

45. What is the scope of interference under Section 37 of the Act?

A Single Bench of the Delhi High Court in the case of *Dinesh Gupta* v. *Anand Gupta*, [Arb..A. 4/2020, decided on September 17, 2020], observed that Section 37 of the Act, on its plain reading, provides for an appeal against certain orders. However, the provision does not define the scope and extent of the said jurisdiction of the High Court in the matter of entertaining and disposing of an appeal and neither is there any other provision in the Act which enlightens on this aspect.

The Court further noted that the jurisdiction of the court, under Section 37(2)(b) of the Act, is even more limited than the jurisdiction that it exercises under Section 37(2)(a) or, for that matter, under Section 34 of the Act. Thus, the discretionary jurisdiction, as exercised by the arbitrator, merits interference under Section 37(2)(b) of the Act only where such exercise is palpably arbitrary or unconscionable. Moreover, as per the Court, the aforesaid position is additionally underscored where the order of the arbitrator is related to Section 17(1)(ii)(b) or (e) of the Act directing a furnish of security since direction to litigating parties to furnish security is purely a discretionary exercise and is intended to balance the equities.

46. Can third parties file an appeal under Section 37 of the Act against an order passed by an arbitral tribunal under Section 17?

A Single Bench of the Delhi High Court in the case of *Edelweiss Asset Reconstruction Company Limited* v. *GTL Infrastructure Limited*, [Arb.A.(COMM.) 13/2020, decided on November 18, 2020], while relying on the decision rendered by a Co-ordinate Bench of the Bombay High Court in the case of *Prabhat Steel Traders Private Limited* v. *Excel Metal Processors Private Limited*, [Arbitration Petition No. 619 of 2017, decided on August 31, 2018], held that the remedy of appeal as provided in Section 37 of the Act of an order passed by the arbitral tribunal under Section 17 of the Act is also available to third parties who are signatories to the agreement.

47. Is rejection of an application under Section 34 of the Act on the ground of being barred by limitation appealable under Section 37 of the Act?

A Division Bench of the Delhi High Court in the case of *Chintels India Limited* v. *Bhayana Builders Private Limited*, [F.A.O.(OS)(COMM.) No. 68/2020, decided on December 4, 2020] observed that Section 34(3) of the Act, by use of the words 'but not thereafter', as

interpreted by a Division Bench of the Supreme Court in the case of *Union of India* v. *Popular Construction Company*, [Appeal (Civil) 6997 of 2001, decided on October 5, 2001], restricts the power otherwise vested in the court to condone the delay beyond 30 (thirty) days and the same also creates a ground of time bar for refusing to set aside the award. Thus, as per the Delhi High Court, refusal to set aside an arbitral award on the basis of the said time bar would be a refusal within the meaning of Section 37 of the Act and hence, appealable under Section 37 of the Act.

However, the Court, in view of the *ratio* by the Three Judges Bench of the Supreme Court laid down in the case of *BGS SGS Soma JV* v. *NHPC Limited*, [Civil Appeal No. 9307 of 2019, decided on December 10, 2019], held that the instant appeal under Section 37 of the Act is not maintainable.

Further, the Court also enunciated that by reading Section 37 of the Act as not permitting an appeal against refusal to condone the delay in applying for setting aside of the award, the parties aggrieved by an arbitral award are left with no remedy but to approach the Supreme Court by way of a petition under Article 136 of the Constitution of India.

Section 44 (*definition of foreign award*)

48. Can "lack of foreign element" and "nationality of parties" be regarded as determinative factors for determining whether an award is a foreign award?

A Single Bench of the Gujarat High Court in the case of *GE Power Conversion India Private Limited* v. *PASL Wind Solutions Private Limited*, [R/Petn. Under Arbitration Act Nos. 131 and 134 of 2019, decided on November 3, 2020], enumerated that:

a) The definition, as available under Section 44 of the Act, can be held to be the sole repository for determining whether an award amounts to a foreign award;
b) Section 44 of the Act lays down exhaustively the essential ingredients for the determination of an award as a foreign award;
c) Neither inferences nor intentions to presume any other ingredients than those provided under Section 44 of the Act should be regarded as permissible for determining an award as a foreign award.

The Court, thus, held that, nationality of the parties and domestic elements involved in the award has no relevance for determining the nomenclature or nature of the award. Further, the Court also noted that, the applicability of Part II of the Act is determined solely based on two requirements namely, what is the seat of arbitration and whether the seat is in a country which is a signatory to the New York Convention.

Section 45 (*power of judicial authority to refer parties to arbitration*)

49. Can two Indian parties choose a foreign law to govern their arbitration agreement?

A Single Bench of the Delhi High Court in the case of *Dholi Spintex Private Limited* v. *Louis Dreyfus Company India Private Limited*, [CS (COMM) 286/2020, decided on November 24, 2020], observed that two Indian parties can agree to arbitrate abroad and there is no legal bar to this extent, especially where the transactions involved foreign elements, since one of the central objectives of the international arbitration agreements is to provide a neutral forum of dispute resolution. The Court thus, held that an arbitration agreement between the parties being an agreement independent of the substantive contract, and with the parties having the right to choose a different governing law for the arbitration, two Indian

parties can choose a foreign law as the law governing the arbitration. Further, the Court also noted that there being clearly a foreign element to the agreement between the parties, the two Indian parties could have agreed to an international commercial arbitration governed by the laws of England.

Section 47/49 (*evidence/ enforcement of foreign awards*)

50. What is the period of limitation for filing an enforcement/ execution petition of a foreign award under Section 47 read with Section 49 of the Act?

A Three Judges Bench of the Supreme Court in the case of *Government of India* v. *Vedanta Limited*, [Civil Appeal No. 3185 of 2020, decided on September 16, 2020], observed that the issue of limitation for the enforcement of foreign awards being procedural in nature, is subject to the *lex fori* i.e. the law of the forum (state) where the foreign award is sought to be enforced. Further, the Court noted that the limitation period for filing the enforcement/ execution petition for enforcement of a foreign award in India would be governed by Indian law. However, the Act does not specify any period of limitation for filing an application for enforcement/ execution of a foreign award and neither does the Limitation Act contain any specific provision for enforcement of a foreign award. The Court further noted that the legislature has omitted reference to "foreign decrees" under Article 136 of the Limitation Act with the intent to confine Article 136 of the Limitation Act to the decrees of a civil court in India.

The Supreme Court thus, held that, the period of limitation for filing a petition for enforcement of a foreign award under Section 47 read with Section 49 of the Act, would be governed by Article 137 of the Limitation Act, 1963 which prescribes a period of 3 (three) years from when the right to apply accrues.

Anti-Arbitration Injunction

51. What are the pre-requisites for granting an anti-arbitration injunction by the courts in a foreign seated arbitration?

A Single Bench of the Calcutta High Court in the case of *Balasore Alloys Limited* v. *Medima LLC*, [G.A. No. 871 with G.A. No. 872 in C.S. No. 59 of 2020, decided on August 12, 2020], while adjudicating upon the aforesaid issue held that the Constitutional Bench of the Supreme Court in the case of SBP and Company (*supra*), has implicitly overruled the judgment rendered by a Three Judges Bench in the case of *Kvaerner Cementation India Limited* v. *Bajranglal Agarwal*, [(2012) 5 SCC 214], ("**Kvaerner Cementation**") insofar as the incompetency of arbitral tribunal, alongside civil courts to rule on issues of jurisdiction as well as on examining the existence and validity of an arbitration agreement, is concerned. The Calcutta High Court noted that the Single Bench of the Delhi High Court in the case of *Bina Modi* v. *Lalit Modi*, [C.S. (O.S.) 84 of 2020, decided on March 3, 2020], has laid a misplaced emphasis on the dictum of the Supreme Court in Kvaerner Cementation (*supra*).

The Court thus, held that the courts in India do have the power to grant anti-arbitration injunctions in foreign seated arbitrations. However, the Court noted that this power is to be exercised sparingly and with abundant caution and as per the caveat once previously enumerated by a Division Bench of the Calcutta High Court in the case of *Devi Resources Limited* v. *Ambo Exports Limited*, [APO No. 430 of 2017, decided on February 13, 2019].

Further, the Court also went onto hold that the mere possibility that "multiplicity of proceedings" may arise is not a ground in itself for the grant of an anti-arbitration injunction against a party if such a ground is not coupled with the plea of either forum *non-conveniens*

or vexatious or oppressive proceedings being conducted before such a neutral foreign forum against the plaintiff. Moreover, as per the Court, the onus of proof for establishing the same would be on the plaintiff.

It is also pertinent to note that more recently, a Division Bench of the Delhi High Court in the case of *Dr. Bina Modi* v. *Lalit Kumar Modi*, [R.F.A. (O.S) 21/2020, decided on December 24, 2020], while enumerating the grounds on which the courts may entertain a prayer for grant of anti-arbitration injunction, reiterated the *ratio* of its Co-ordinate Bench in the case of *Mcdonald's India Private Limited* v. *Vikram Bakshi*, [FAO(OS) 9/2015, decided on July 21, 2016] wherein the Court had held that, a court would have jurisdiction to grant anti-arbitration injunction where the party seeking the injunction can demonstrably show that the agreement is null and void, inoperative or incapable of being performed.

Arbitrability

52. What is the test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*), propounded a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable. The same is as follow:

a. when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in *personam* that arise from rights in *rem*;
b. when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
c. when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable and;
d. when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

The Court, however, also noted that, the tests enumerated above are not watertight compartments and only when the answer as per the tests would be affirmative that, the subject matter of the dispute would be regarded non-arbitrable in nature.

53. Are allegations of "fraud" arbitrable?

A Division Bench of the Supreme Court in the case of *Avitel Post Studioz Limited* v. *HSBC PI Holdings (Mauritius) Limited*, [Civil Appeal No. 5145 of 2016, decided on August 19, 2020] ("**Avitel**"), while interpreting the term "serious allegations of fraud" held that such a situation arises only if two tests are satisfied, which are as follows:

a. The arbitration agreement or the clause itself cannot be said to exist in which the party against whom the breach is alleged cannot be said to have entered into the agreement relating to the arbitration at all;
b. Allegations are raised against State instrumentalities of arbitrary, fraudulent or *malafide* conduct, and thus, necessitating the hearing of the case by a writ court, in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

The Court thus, held that a dispute is arbitrable unless there are serious allegations of fraud which vitiate the arbitration clause along with the agreement, or there are allegations of fraud which are not merely inter-parties, but affect the public at large.

With reference to Section 17 of the Indian Contract Act, 1872 ("**Contract Act**"), the Court noted that the scope of the expression "*or to induce him to enter into the contract*" refers to a situation where a fraud is said to have been committed at the stage of entering into the contract and thus, held that a fraud which is practiced outside the scope of Section 17 of the Contract Act i.e. in the performance of the contract, may be governed by the tort of deceit and would lead to damages, but not recission of the contract itself. However, the Apex Court also enumerated that, both kinds of frauds, as mentioned above, are subsumed within the expression "fraud" when it comes to arbitrability of an agreement which contains an arbitration clause.

The Court, further, while analysing the judgments rendered by the Division Bench of the Court in the case of *Afcons Infrastructure Limited* v. *Cherian Varkey Construction Company Private Limited*, [Civil Appeal No. 6000 of 2010, decided on July 26, 2010], and *Booz Allen and Hamilton Incorporated* v. *SBI Home Finance Limited*, [Civil Appeal No. 5440 of 2002, decided on April 15, 2011], held that subject to the rider that the same set of facts may lead to civil and criminal proceedings, if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable ceases to be so.

Additionally, it is pertinent to mention that, a Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) while reiterating the *ratio* in the case of Avitel (*supra*), overruled the *ratio* by the Division Bench of the Supreme Court in the case of, *N. Radhakrishnan* v. *Maestro Engineers*, [Civil Appeal No. 7019 of 2009, decided on October 22, 2009], *inter-alia*, observing that, allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. However, the Apex Court also enumerated that, the same would be subject to the caveat that fraud, which would otherwise vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability.

54. Are disputes under leave and license agreement arbitrable in nature?

A Single Bench of the Karnataka High Court in the case of *Messrs Water Angels* v. *Bengaluru Metro Rail Corporation Limited*, [Civil Miscellaneous Petition No. 68 of 2020, decided on November 17, 2020], held that disputes arising out of leave and license agreements are arbitrable in nature.

55. Whether disputes under the Indian Trusts Act, 1882 ("Trusts Act") are arbitrable in nature?

A Division Bench of the Delhi High Court in the case of *Dr. Bina Modi* v. *Lalit Kumar Modi*, [R.F.A. (O.S) 21/2020, decided on December 24, 2020], while reiterating the decision of the Division Bench of the Supreme Court in the case of *Vimal Kishor Shah* v. *Jayesh D. Shah*, [Civil Appeal No. 8164 of 2016, decided on August 17, 2016], wherein the Apex Court had opined that a trust deed is not an 'arbitration agreement' as per the law, held that disputes under the Trusts Act are incapable of being submitted to arbitration.

56. Whether landlord-tenancy disputes governed by the Transfer of Property Act, 1882 ("TPA") are arbitrable in nature?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*), observed that landlord-tenant disputes governed by the TPA are arbitrable as they are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. The Court also enunciated that such actions normally would not affect third-party rights or have *erga omnes* affect or require centralized adjudication and hence, an award passed deciding landlord-tenant disputes can be executed and enforced like a decree of a civil court.

Further, the Court also noted that the provisions of the TPA do not expressly or by necessary implication bar arbitration.

The Apex Court, therefore, overruled its *ratio* laid down by the Division Bench in the case of *Himangni Enterprises* v. *Kamaljeet Singh Ahluwalia*, [Civil Appeal No. 16850 of 2017, decided on October 12, 2017], and held that landlord-tenant disputes are arbitrable as the TPA does not forbid or foreclose arbitration. However, the Court specifically enumerated that landlord-tenant disputes which are covered and governed by rent control legislations would not be arbitrable since when a specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations, such rights and obligations can only be adjudicated and enforced by the specified court/ forum and not through arbitration.

The aforesaid position of law was reiterated by a Co-ordinate Bench of the Supreme Court in the case of *Suresh Shah* v. *Hipad Technology India Private Limited*, [Arbitration Petition (Civil) No. 8/2020, decided on December 18, 2020], wherein the Court held that, insofar as eviction or tenancy relating to matters governed by special statutes where the tenant enjoys statutory protection against eviction, and whereunder, the court/ forum is specified and conferred jurisdiction under the statute, the specified court/forum can alone adjudicate such matters. However, the Court noted that if the special statutes do not apply to the premises/ property and the lease/ tenancy created thereunder as on the date when the cause of action arose to seek for eviction or such other relief, and if in such transaction the parties are governed by an arbitration clause, the dispute between the parties is arbitrable and there shall be no impediment whatsoever to invoke the arbitration clause.

57. Are sovereign functions by the State arbitrable in nature?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) held that, sovereign functions of the State being inalienable and nondelegable, are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. As per the Court, correctness and validity of the State or sovereign functions cannot be made a direct subject matter of a private adjudicatory process and sovereign functions for the purpose of the Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon etc., as distinguished from commercial activities, economic adventures and welfare activities. Similarly, the Court noted that, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. Hence, the Supreme Court enunciated that in these matters, the State enjoys monopoly in dispute resolution.

58. Does mere creation of a specific forum as a substitute for civil court or specifying the civil court, enough to accept the inference of implicit non-arbitrability?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*), noted that, implied legislative intention to exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and further lays down that all questions about the said right and liability shall be determined by the court or tribunals so empowered and vested with exclusive jurisdiction. Therefore, the Court held that, mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non-arbitrability and hence, conferment of jurisdiction on a specific court or creation of a

public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred.

59. Are disputes under the Recovery of Debts Due to Banks and Financial Institutions Act,1993 ("DRT Act"), arbitrable in nature?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*), while relying on the decision of the Division Bench of the Apex Court in the case of *Messrs Transcore* v. *Union of India*, [Appeal (civil) 3228 of 2006, decided on November 29, 2006], overruled the judgment of the Three Judges Bench of Delhi High Court in the case of *HDFC Bank Limited* v. *Satpal Singh Bakshi*, [W.P.(C) No. 3238 of 2011, decided on September 13, 2012] and held that, claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication and since, the legislation has overwritten the contractual right to arbitration.

60. Are disputes pertaining to insolvency, intracompany, patents, trademarks, criminal law, matrimony, probate etc., arbitrable in nature?

A Three Judges Bench of the Supreme Court in the case of Vidya Drolia (*supra*) held that, it is apparent that insolvency or intracompany disputes, being actions in *rem*, have to be addressed by a centralized forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. Similarly, the Court also noted that, grant and issue of patents and registration of trademarks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect and hence, are non-arbitrable.

By the same rationale, the Court also held that, criminal cases are not arbitrable as they relate to sovereign functions of the State and the violations of criminal law are offenses against the State and not just against the victim. With regard to matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights etc., the Court also held the same to be not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value but have an *erga omnes* effect. Further, the Court held that, matters relating to probate, testamentary matter etc. are actions in *rem* and are a declaration to the world at large and hence are non-arbitrable.

Emergency Arbitration

61. What is the legal status of an 'Emergency Arbitrator' under Part I of the Act?

A Single Bench of the Delhi High Court in the case of *Future Retail Limited* v. *Amazon.com Investment Holdings LLC*, [CS (COMM) 493/2020, decided on December 21, 2020], while reiterating the principle of party autonomy, held that:

a) the parties in an international commercial arbitration seated in India can, by an agreement, derogate from the provisions of Section 9/ Part I of Act;
b) in such a case where parties have expressly chosen a curial law which is different from the law governing the arbitration, the Court would look at the curial law for conduct of the arbitration to the extent that the same is not contrary to the public policy or the mandatory requirements of the law of the country in which the arbitration is held;
c) inasmuch as Section 9 of the Act along with Sections 27, 37(1)(a) and 37(2) of the Act are derogable by virtue of the *proviso* to Section 2(2) of the Act in an international arbitration seated in India upon an agreement between the parties, the Court held that, it cannot be stated that the provision of emergency arbitration under the SIAC rules (as had been agreed between the parties as the curial law

for the arbitration) are, *per se*, contrary to any mandatory provisions of the Act since the SIAC rules also permits the parties to approach the court under Section 9 of the Act for interim relief and therefore, there is no incompatibility/ conflict between the SIAC rules and Part I of the Act.

Hence, the Court held that the appointment of the 'Emergency Arbitrator' as per the SIAC rules, *prima facie*, is not *coram non judice*.

This compilation has been prepared by Arka Majumdar (Partner) and Kunal Dey (Associate).

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