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**IMC ARBITRATION COMMITTEE**

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**VIRTUAL ARBITRATION AND ITS  
CHALLENGES**

India, with the use of technology in the judicial system, is at the verge of a transformative change. The judiciary and the government are committed to improving the mechanism for Alternative Dispute Resolution (“ADR”) and Online Dispute Resolution (“ODR”) in order to facilitate dispute resolution in a more effective and expeditious manner.

In a matter of days, the COVID-19 pandemic forced the world to reimagine the dispute resolution process. In view of the social distancing requirements, parties and the arbitral tribunals were compelled to innovate and consider conducting arbitration hearings virtually, especially in a situation where physical hearings due to travel restrictions were impossible to conduct. Even the Supreme Court of India and other High Courts in India have recognized the significance of virtual hearings and are

conducting video conference hearings on urgent matters.

Thus, despite all the ruckus created due the COVID-19 pandemic, it has paved the way for a long-awaited technological revolution in the legal field. Having said that, although the virtual arbitration proceeding is a welcoming change, it comes with its own set of challenges:

**1. The reliance on technology:**

Cybersecurity and hacking are the frontrunner when we talk about the challenges of virtual arbitration. The issue of maintaining security and confidentiality, particularly in an arbitral proceeding, is one of the flip sides of reliance on technology. To address this issue, the government has undertaken remedial measures and formulated a cybersecurity strategy, but it is more on the side of prescribing guidelines alone. The functional and true execution of the same is yet to be seen.



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There are other smaller, yet important, technology-related problems, such as the problem of adaptability to the new shift. Such problems can be grouped into the "IT Challenges" that each of us faces when adapting to new technologies. Starting with the need for a secure and effective broadband connection to ensure that during the arbitration proceedings before the camera, connectivity is not lost and we participate in the proceedings without disruption.

In the digitalization of arbitration proceedings, the difficulty in accessing electricity and internet connectivity from different parts of the country, especially in villages and small towns, is obviously another major challenge. Keeping in mind that the changes brought about by due to the pandemic by way of virtual hearings, it is recommended that more efficient technologies are developed, that ensure accuracy and help in conducting face-to-face

interactions between parties, witnesses and arbitrators, without malfunctions and setbacks.

**2. Teamwork:**

Another concern with virtual arbitration is that it restricts the ability of lawyers as a team to work closely together. It is a struggle in itself to work from home or have your teammates in various places. When operating in such situations, effective communication is essential. In cooperation, everybody is expected to be alert and work efficiently. Although this might sound like a minor problem, it is a disadvantage to not have your team physically around you. For example, small things such as the ability to pass the key document to the lead advocate for use in cross-examination, may actually not happen in a virtual environment. Besides, a physical hearing would naturally be desirable in arbitrations where the records are voluminous, especially during cross-examination where the witness will have to



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be confronted with different documents. Other negative effects may be that during cross-examination, the arbitrator may not be able to see the conduct of the witness and the examiner the way it would be seen in a physical hearing. Given the challenges in such virtual arbitration, it is of paramount importance that the team works in coordination with one another.

**3. Lack of an effective framework to conduct the proceeding in matters of arbitration:**

The Arbitration & Conciliation Act, 1996, as well as the 1985 UNCITRAL Model Law, are silent on remote hearings. Since we were not prepared for the pandemic and nobody anticipated that virtual mediums will become the primary tool for conducting hearings, there is no robust virtual setup or proper guidelines for conducting such hearings.

There are Standard Operating Procedures (“SOPs”) laid down by the Supreme Court for the advocate/party-in-person and the Registry for listing and hearing of matters through video conferencing/teleconferencing before the Hon’ble Judge-in-Chambers and the Registrar’s Court. Further the National Company Law Appellate Tribunal (NCLAT) also has issued an SOP for advocates/ authorised representatives/parties-in-person for mentioning the matter for hearing through virtual mode. Recently, the Delhi High Court issued a guidance note for conducting arbitration proceedings by video conferencing and directed the Delhi International Arbitration Centre to adopt these guidelines with effect from 8<sup>th</sup> June 2020. However, it would be pertinent to note that there have been no such guidance/SOP in matters relating to arbitration that have been issued.

**Overcoming the Challenges:**



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The need for the introduction of technical innovations was seen to be important to save time and costs long before the pandemic came into being. This pandemic has required numerous modifications, including the conducting of virtual hearings. It would be interesting to note the journey of arbitration, how it has progressed, and evolved from time to time, and if we evaluate how arbitration proceedings were conducted fifteen years ago, there is a major shift based on various conditions, including the implementation of terms such as emergency arbitration, fixed time frame, etc. It is observed that to make the arbitration system more successful, arbitrations around the world have two solid pillars, namely, (i) comfort of the parties and (ii) dynamism adopted at the hearings. From that viewpoint, instead of seeing virtual arbitrations as something that has been forced on the parties, we must take virtual hearings as a development and overcome the difficulties that we might be facing at the moment.

**Challenges Faced by A General Counsel  
to Convince the Managing Director of the  
Company he Represents to Agree for  
Virtual Arbitration**

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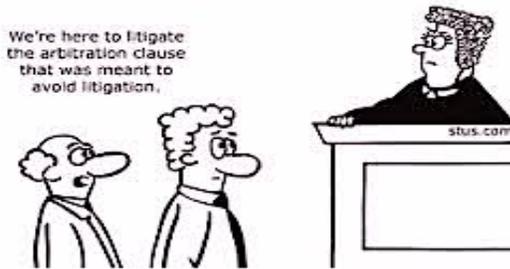
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<sup>1</sup> Cartoonstock, An office worker at the conflict resolution center is stuck between a rock and a hard place, Arbitration Clauses And Comics, (October 5, 2020, 11:26 A.M.), <https://www.cartoonstock.com/cartoonview.asp?catref=jcen2166>

<sup>2</sup> David Adelstein, Don't Include an Arbitration Provision in a Contract if You Don't Want to Arbitrate!, Florida Construction Legal Updates,

Peter looked out of the window, staring into the horizon from his cabin on the fifteenth floor, his mind whirling with thoughts that were going in infinite circles. The one thought which held prominence in his mind, were the countless ways by which COVID-19 had wreaked havoc on his disciplined world.

Before COVID-19 everything was streamlined, he thought. Before COVID-19, his typical day as the General Counsel started out with getting updates from his team on the various on-going legal matters, fighting fires with the management and then catching up with the external law firm on a couple of law suits which the company he represented was embroiled in for the past decade, that didn't seem to be going anywhere.

(October 5, 2020) at <https://www.floridaconstructionlegalupdates.com/dont-include-an-arbitration-provision-in-your-contract-if-you-dont-want-to-arbitrate/>

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With the pandemic freezing the supply chain, there was a catastrophe waiting to happen as his supplier in Poland was unable to ship the ‘Printed Circuit Board’ that was a critical raw material for the manufacture of the various models of smart phones, that the company was renowned for producing. This procurement freeze that had started in the month of March of 2020 had not yet thawed, even though they were now in the third quarter of the new financial year. Though the supply agreement between the two parties was strongly favoring the company he represented, no amount of his team poring over export-import regulations, meeting with government authorities to allow the import of the Printed Circuit Board or even searching for other vendors was able to fix the problem of the lack of supply by the Polish vendor.

The company’s senior management was ready to explore all legal options including taking the Polish vendor to court as they were constantly taken to task by angry

customers who were indifferent about this problem in the former’s supply chain. Further there were also whispers in the office grapevine about the impending threat by the company’s customers of the millions of dollars of damages they would levy due to such a delay in delivery by the company.

The lack of pro-active response from the Polish vendor was another bone of contention. The Polish vendor had stopped attending their bi-weekly online status review meetings, had stopped replying to their e-mails and the absolute last straw being that the vendor did not seem to pay any heed to responding to the legal notices that Peter’s team had so painstakingly drafted and issued to them.

His secretary’s abrupt knock on the door broke his reverie. She reminded him of his upcoming mid- morning meeting with the Managing Director of the company (“MD”). Thanking her for her reminder, he quickly brought his thoughts back to his current



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problem being to convince the senior most leadership to accept the option of virtual arbitration to adjudicate the ongoing dispute with the Polish vendor, as dragging the company through another long drawn-out courtroom litigation was not a favorable option. He knew from his previous brief discussions with the MD on the challenges ahead of him in trying to convince the company to stray down this less trodden path namely arbitration and that too virtually. He started penning down the list of questions that he anticipated from the MD:

1. Problems in conducting virtual arbitrations and any anticipated delays in the procedures including problems of different time zones.

2. The procedural documentation to be followed to bring the Polish vendor to agree to the virtual arbitration hearing.

3. The number of participants to be involved in the virtual arbitration proceeding.

4. Confidentiality and privacy concerns.

5. Cyber- security issues.

6. Manner to resolve technological glitches, hardware/ software issues and internet connectivity problems.

7. Problem of enforceability of the decision taken by the arbitral tribunal, if any.

He reminded himself that the supply agreement had an option to resolve disputes through arbitration by a panel of three arbitrators through the Rules of the International Chamber of Commerce (“ICC Rules”) with the venue and seat of arbitration in London. He also reminded himself that virtual arbitration was the best



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solution as the pandemic did not change the fundamental principles of arbitration including that, pursuant to Article 22(1) of the ICC Rules, tribunals and parties have the duty “to conduct the arbitration in an expeditious and cost-effective manner”. Further the pandemic would not necessarily delay the arbitral tribunals’ deliberations or their preparation of awards, as all these activities can be conducted remotely by using all appropriate means of communication.

He started preparing his To-Do Checklist, eagerly anticipating an approval from his MD to commence the virtual arbitration:

1. The preferred platform and technology to be used (including legal access to such platform and technology);
2. The minimum system specifications and technical requirements for smooth connectivity (audio and video), adequate visibility and lighting in each location;

3. Whether certain equipment is required in each location (phones, back-up computers, connectivity boosters/extenders, any other equipment or audio-visual aids as deemed necessary by the parties);

4. He considered the need for tutorials for participants who were not familiar with the technology, platform, applications and/or equipment to be used in the hearing;

5. Running a minimum of two mock-sessions to identify the lead speakers, with the last session being held one day before the hearing to ensure everything is in order;

6. He also thought of the contingency measures to be implemented in case of sudden technical failures, disconnection, power outages (alternative communication channels and virtual technical support for all participants);

7. Procedures for the taking of evidence

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from fact, witnesses and experts to ensure that the integrity of any oral testimonial evidence is preserved;

8. Compliance with any applicable data privacy regulations to ensure the privacy of the hearing and the protection of the confidentiality of electronic communications within the arbitration proceeding and any electronic platform;

9. He came up with multiple calendar options to tackle the issue of the different time zones to enable fixing the hearing dates, start and finish times, breaks and length of each hearing day;

10. Logistics of the location of participants including but not limited to total number of participants, number of remote locations and the procedures for verifying the presence of and identifying all participants, including any technical administrator;

11. Use of recording feature of the

electronic meeting room;

12. Use of interpreters, whether required.<sup>3</sup>

Peter's secretary knocked on his door again and walked in carrying his evening cup of coffee. The setting rays of the sun showed a happy and contented Peter. He had won the battle by receiving an approval from his MD to proceed with the virtual arbitration and he now had to prepare his team to win the war with the Polish vendor.

**Two Indian Entities, An International Commercial Arbitration?**

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<sup>3</sup> International Chamber of Commerce, ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, (October 5, 2020, 11:41 A.M.), <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>

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The Rajasthan High Court in the case of Barminco Indian Underground Mining Services LLP v. Hindustan Zinc Limited<sup>4</sup> decided on the issue of which would be appropriate court to hear the matter under Section 9 of the Arbitration and Conciliation Act, 1996, (Act) where both parties to the case are Indian entities.

Amongst other issues, the Respondent raised the issue of maintainability, whereby it questioned the matter being referred to the High Court under Section 2(1)(f) of the Act. As Section 2(1)(f) of the Act deals with

<sup>4</sup> Barminco Indian Underground Mining Services LLP vs Hindustan Zinc Limited on 20 July, 2020, S.B. Arbitration Application No. 10/2020

matters that are within the purview of an "international commercial arbitration". The Rajasthan High Court heard the Respondent's objection on the maintainability of the petition before hearing other issues, as it dealt with the very crux of the power of the court to entertain and hear the matter.

In the present case, the applicant entered into a contract with the Respondent to provide services for the development of the Rampura Agucha Mine. The work being initiated, the applicant raised invoices in this regard which were paid by the Respondent. The Respondent however did not furnish payments towards the invoices raised for the months of February 2020 and March 2020, relying on the clauses in the contract pertaining to "*force majeure*" and "Change in Law". As further negotiations between the parties were not fruitful, the Respondent unilaterally terminated the contract. On such termination, the applicant fearing invocation of the bank guarantee by the Respondent,

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filed an Application under Section 9 of the Act.

As per the agreement entered into the parties, the seat of arbitration was agreed to be Singapore, administered by Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules"). Taking into account Section 2(1)(e)(ii) of the Act, the applicant brought the petition before the High Court.

The Respondent raised a preliminary objection that as none of the parties are foreign entities, Section 2(1)(e)(ii) of the Act which gives the power to the High Court with respect to international commercial arbitrations would not be applicable. Furthermore, the Respondent contented that as both parties are Indian entities, the jurisdiction would fall within the purview of the Principal Civil Court of Original Jurisdiction, that is, the Principal Civil Court of Udaipur and not the High Court.

The Respondent in support of its arguments relied upon the judgment of the Supreme Court in the cases of TDM Infrastructure Pvt. Ltd. vs. UE Development India Private Limited<sup>5</sup> and M/s Larsen & Toubro Ltd vs. Mumbai Metropolitan Region<sup>6</sup>, amongst others. In the case of TDM Infrastructure (Supra), the Supreme Court held, *"Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration."*

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<sup>5</sup> TDM Infrastructure Pvt. Ltd. Vs. UE Development India Private Limited, (2008) 14 SCC 271

<sup>6</sup> M/s Larsen & Toubro Ltd Vs. Mumbai Metropolitan Region, (2019) 2 SCC 271

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Taking the submissions of the parties into consideration, the Court observed that to be an International Commercial Arbitration, the pre-requisite conditions enumerated in sub-clause (i) to (iv) of Section 2(1)(f) are required to be satisfied. In the present application, as both parties were Indian the court determined that this would not be a case of an “international commercial arbitration”.

The court further went on to observe that, although according to the provisions of the Act of 1996, the present application would lie before the Principal Civil Court of Udaipur, the court cannot be oblivious to the provisions of the Commercial Court Act, 2015. Therefore, it held that in accordance with Section 10(3) of the Commercial Court Act, 2015, as all arbitration matters are required to be dealt with by the Commercial Court of the District, the present case would also lie before the competent Commercial Court, having territorial jurisdiction to deal

with the disputes/issues arising in this case, which in the present case, is Udaipur.



### **SECTION 16 AND ARTICLE 227: PERVERSITY OF AN ARBITRAL ORDER, THE DETERMINING FACTOR**

The three-judge bench of the Supreme Court comprising of Justice Rohinton Fali Nariman, Justice Navin Sinha and Justice Indira Banerjee in a Special Leave Petition (SLP), upheld the decision rendered in the case of Deep Industries Ltd. v. Oil and

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Natural Gas Corporation Ltd. & Anr.<sup>7</sup>. The Supreme Court reiterated that when an appeal is filed before the High Court against the order of an Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996, (Act), the High Court has to be extremely circumspect in interfering with the same. Therefore, in order to interfere and proceed against the order passed by an arbitrator under Section 16 of the Act, the High Court should restrict itself to those matters where there is a perversity in such an order passed due to the patent lack of inherent jurisdiction of the arbitrator.

The SLP was filed before Supreme Court in the case of Punjab State Power Corporation Limited vs. EMTA Coal Limited &

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<sup>7</sup>Deep Industries Limited vs. Oil and Natural Gas Corporation Limited and Ors. (28.11.2019 - SC) MANU/SC/1669/2019;

Another.<sup>8</sup> In the instant case, Supreme Court observed that the Petitioners questioned the authority of the arbitrator to adjudicate the matter under Section 16 of the Act and sought for quashing of the order dated 08/01/2017. The court noted that the grounds of the decision of the High Court was based on its observation that such an appeal under Article 227 was filed 2 ½ years later, and that it was filed belatedly at the time of conclusion of final arguments before the Arbitral Tribunal.

The Court concluded that for an appeal to be admitted under Article 227, the patent lack of inherent jurisdiction of the arbitrator must be so perverse that it is evident *prima facie*. The court also observed that parties such as in the present case were using the decision of the Deep Industries Ltd case to admit their matters under Article 227. The Supreme Court pointed out that High Courts should use the observations made in the

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<sup>8</sup> Punjab State Power Corporation Limited vs. Emta Coal Limited and Anr. (18.09.2020 - SC Order) : MANU/SCOR/38257/2020



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Deep Industries Ltd. case to dismiss such matters where there is no such perversity in the order that would lead to a patent lack of inherent jurisdiction and discourage such matters which waste the time of the courts. The Supreme Court also held that heavy costs should be imposed in parties bringing frivolous petitions. With these observations, the Supreme Court dismissed the SLP and imposed cost of Rs. 50,000/- to be paid to the Supreme Court Legal Services Committee.

**A SUMMARY ON RECENT  
ARBITRATION CASE LAWS IN INDIA**

**Introduction**

As we may be aware, almost every agreement entered into between parties, be it a rental agreement, a commercial understanding, an intellectual property assignment agreement, etc., contain a dispute resolution clause. It is even considered as one of the 'boiler plate'

clauses of an agreement, one without which, an agreement feels incomplete. A dispute resolution clause may contain a mediation clause, a conciliation clause and an arbitration clause. Having said the foregoing, an arbitration clause is almost certainly present, almost mandatory in most modern-day agreements. It is important and viable as the parties to such agreement mutually decide on how the proceedings, in case a dispute arises, will be conducted, stating certain important elements such as who will be the arbitrator deciding the dispute, where the seat of arbitration is, and where the venue of arbitration will be. Further, parties may also choose to go for arbitration as the proceedings of arbitration are not in the public domain, and hence, parties can decide the dispute without publicising the same.

Having said the above, all arbitrations may not go smoothly, and parties may sometimes dispute the arbitration award, in which case, the courts of our country will be tasked with

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settling such disputes, and enforcing/upholding the validity of such arbitration awards. Let us look into some of such recent arbitration cases, which came up before our courts, what was the principal laid out, and the conclusion(s) of the same.

#### 1. Intention of parties to enter into an arbitration - Parmeet Singh Chatwal & Ors. v. Ashwani Sahani<sup>9</sup>



#### Brief facts:

<sup>9</sup> O.M.P. 1445/2014 & I.A.No.22669/2014, Judgment dated February 14, 2020.

The petitioner was purchasing fabrics in accordance with the specifications of the respondent. The respondent raised bills in the name of the petitioner for the fabrics so purchased. As the respondent would invoice the petitioner in the name of 'M/s Mahima Exports', the same would be reflected by the respondent in his books of accounts, maintained in the ordinary course of business. As per the books of accounts of the respondent, a balance of Rs. 15,52,964/- is recorded as the outstanding amount payable by the petitioner for his purchases. The respondent also claimed that in terms of the contractual conditions mentioned in the respective invoices, interest of 24% per annum is liable to be paid on the outstanding amount on account of any delay in payment, which amounted to a sum of Rs. 11,18,124/- . The petitioner issued a cheque of Rs. 1,00,000/- to the respondent for the dues which was returned unpaid. As a result, the respondent invoked arbitration for recovery of the outstanding balance from the

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petitioner. The arbitral tribunal decided in favour of the respondents.

Aggrieved by the award rendered in favour of the respondent, the petitioner filed a petition under section 34 of the Arbitration Act, 1999 (“**Arbitration Act**”) to challenge the award and the arbitration agreement itself. It is the case of the respondent that in the invoice raised there exists an arbitration clause. The said clause 6 reads, “*We are member of Delhi Mercantile Association in case of any dispute its decision is final and binding for both the parties*”.

In another invoice, there exists another alleged arbitration clause, namely, clause 7 which reads, “*All disputes regarding this invoice will be settled by Delhi Hindustani Mercantile Association and will be binding on both parties*”.

What the Hon’ble High Court of Delhi held:

The Delhi High Court reiterated the decision of the Apex Court in *Punjab State v. Dinanath*<sup>10</sup>, wherein it was held that on a basic perusal of the definition of the arbitration agreement, it would clearly show that an arbitration agreement is not required to be in any particular form.

The court noted that on facts, there is no record of any findings in regard to the intention of the parties to agree to settle their dispute through arbitration. The award merely concluded the existence of an arbitration clause without giving any reasons. This is because the court noted that the manner of signing indicates that the person is only signing receipt of the goods rather than agreeing to the arbitration agreement between the parties and opined that, the manner in which the signatures have been affixed on the invoice does not indicate an intent on the part of the

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<sup>10</sup> (2007) 5 SCC 28.



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petitioner agreeing to settle their disputes through arbitration.

The court was further of the view that the question of the agreement to arbitrate aside, the clause itself was vaguely structured. Thus, such a clause would not be an arbitration agreement, and the parties were not ad idem in this respect. As there is no arbitration agreement, the award and the proceedings were to be treated as vitiated. Even otherwise, the claim of the petitioner was held to be barred by limitation. Hence, the court noted that it was clear that there is no arbitration agreement among the parties. Even otherwise, the claim of the petitioner was held to be barred by limitation, and the award of the arbitral tribunal, to the extent that it ignored this aspect, was held to be contrary to the fundamental policy of Indian law. The said award had been passed contrary to the statutory provision. Consequently, the court set aside the award of the arbitral tribunal and permitted the petition accordingly.

Conclusion:

Hence, any arbitration clause in an agreement must be clearly written, legible, and must be in a manner that it indicates that both the parties to the agreement intend to enter into such arbitration. If it is vague and inserted in a manner whereby a party may not even notice it, it is highly likely that such arbitration clause would not amount to a binding agreement between the parties to arbitrate the dispute.

**2. Seat of an arbitration needs to be followed strictly - Hindustan Construction Company Ltd. v. NHPC Ltd. & Anr.<sup>11</sup>**

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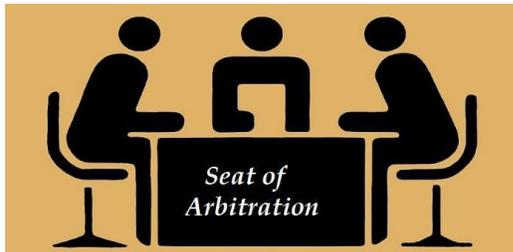
<sup>11</sup> Transfer Petition (C) NO. 3053 OF 2019, Judgment dated March 4, 2020.

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#### Details of the case:

By an order dated 14/11/2019 passed by the learned Additional District Judge-cum-Presiding Judge, Special Commercial Court at Gurugram, in Arbitration Case No. 252 of 2018, the learned Judge on construing the arbitration clause in the agreement between the petitioner and respondent parties, arrived at the finding that the seat of arbitration New Delhi. However, by virtue of the ratio laid down in *Bharat Aluminium Company and Ors. vs. Kaiser Aluminium Technical Services, Inc. and Ors.*<sup>12</sup> [Balco], both Delhi as well as the Faridabad Courts would have jurisdiction over the dispute as the contract

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<sup>12</sup> (2012) 9 SCC 552

was executed between the parties at Faridabad. Furthermore, since the Faridabad Court was invoked first on the facts of this case, Section 42 of the Arbitration Act, 1999 would kick in as a result of which, the Faridabad Court would have jurisdiction.

#### What the Hon'ble Supreme Court held:

The Hon'ble Supreme Court, referencing to its earlier judgement in the case of *BGS SGS Soma JV vs. NHPC Ltd.*<sup>13</sup>, and relying on the backdrop of para 96 of the *Balco* (supra), which judgment read as a whole declares that once the seat of arbitration is designated, such clause then becomes an exclusive jurisdiction clause as a result of which only the courts where the seat is located would then have jurisdiction to the exclusion of all other courts, made the following observation:

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<sup>13</sup> CIVIL APPEAL NO. 9307 OF 2019



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*Given the finding in this case that New Delhi was the chosen seat of the parties, even if an application was first made to the Faridabad Court, that application would be made to a court without jurisdiction. This being the case, the impugned judgment is set aside following BGS SGS Soma JV (supra), as a result of which it is the courts at New Delhi alone which would have jurisdiction for the purposes of challenge to the Award.*

As a result of the BGS SGS Soma JV judgment, the Section 34 application that was filed at the Faridabad Court in the present case would stand transferred to the High Court of Delhi at New Delhi. Further, the Hon'ble Supreme Court held that any objections taken on the ground that such objection filed under Section 34 is out of time hence cannot be countenanced. Therefore, the appeal was disposed of accordingly, and the Apex Court transferred the Section 34 petitions to the High Court of Delhi.

Conclusion:

Once the seat of arbitration is designated, and parties approach the courts having jurisdiction over the seat of arbitration, then those courts alone have exclusive jurisdiction to the exclusion of all other courts.

**3. Challenge on the enforcement of a foreign award in India - Vijay Karia v. Prysmian Cavi E Sistemi SRL & Ors.<sup>14</sup>**

*Note: This case has been examined only to the extent that it relates to validity and enforcement of the foreign arbitral award.*

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<sup>14</sup> Civil Appeal No. 1544 OF 2020 (Arising Out Of SLP (CIVIL) NO.8304 OF 2019), Judgment dated February 13, 2020.

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#### Brief Facts:

Appellant No.1 namely Shri Vijay Karia, and Appellants No.2 to 39 (who are represented by Appellant No.1) are individual, non-corporate shareholders of Ravin Cables Limited (“**Ravin**”). On 19/01/2010, the Appellants and Ravin entered into a Joint Venture Agreement (“**JVA**”) with Respondent No.1 namely Prysmian Cavi E Sistemi SRL – a company registered under the laws of Italy. By this JVA, Respondent No.1 acquired a majority shareholding (51%) of Ravin’s share capital. The arbitration clause of the JVA stated that any dispute arising out of or relating to or in connection with the JVA shall be settled

exclusively by arbitration under the Rules of Arbitration of the London Court of International Arbitration (“**LCIA**”).

On the same day, under a separate ‘Control Premium Agreement’, Respondent No. 1 (claimant in the arbitration) paid substantial consideration to the appellant (respondent in the arbitration) as ‘control premium’ towards the acquisition of the share capital of Ravin. As per the terms of the JVA, until the expiry of the integration period, Ravin was to be jointly managed by the CEO & Managing Director and after the efflux of the integration period, Managing Director was solely responsible for managing Ravin. However, during the integration period the existing CEO (earlier appointed by Respondent No.1) was removed and replaced by the Board of Directors (at the instance of the appellants). Thereafter, the appellants’ directors opposed the appointment of a CFO whose appointment was assented to by Respondent No.1. The interference in the management and control

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of Ravin led to disputes between the parties, following which Respondent No. 1 invoked arbitration proceedings against the appellants, alleging that there have been material breaches committed under the JVA.

Considering the various issues were raised by the respective parties at different stages, the sole arbitrator passed three interim arbitral awards and thereafter a final arbitral award in favour of Respondent 1 (claimant in the arbitration) and rejected the counter-claims of the appellants. The Arbitral Tribunal allowed all the reliefs sought by Respondent No.1 and directed the appellants to transfer 10,252,275 shares held by them to Respondent No.1. The Appellants were further directed to reimburse the legal costs of the arbitration as determined by the LCIA Court. The final award was never assailed by the appellants before the English Courts and only when the award-holder brought the arbitral award to India for the purpose of its enforcement, the appellants raised certain grounds under Section 48 of the Arbitration

and Conciliation Act, 1999 (the “Act”). The single judge of the Bombay High Court after dealing with the objections raised by the appellants, stated that the final arbitral award must be recognised and enforced, and the objections raised by the appellants do not fall under the pigeonholes contained in Section 48 of the Act. Since Section 50 of the Act, does not provide an appeal when a foreign award is recognised and enforced by a judgment of a single judge of a High Court, the appellants filed an appeal before the Supreme Court under Section 136 of the Constitution of India.

Grounds raised by the Appellants:

- a. The party was unable to present its case before the Tribunal;
- b. The Tribunal failed to deal with the contentions raised by the appellants [under Section 48(1)(b)]; and



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c. The foreign award is against the public policy of India [under Section 48(2)(b)].

Details of the case:

a. Section 34 of the Act sets out the grounds on which arbitral awards passed in domestic arbitrations and international commercial arbitrations seated in India can be set aside. As regards foreign awards (i.e. arbitral awards passed in foreign seated arbitrations), whilst the same cannot be challenged in India, the enforcement of the same in India can be validly objected to by the award debtor on grounds that are set out in Section 48 of the Act. The grounds for setting aside arbitral awards passed in domestic arbitrations and international commercial arbitrations seated in India under Section 34 of the Act and the grounds for refusing enforcement of foreign awards in India under Section 48 of the Act are substantially identical.

b. The legislative policy so far as recognition and enforcement of ‘foreign’ arbitration awards, is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award. The Act does not provide for an appeal against an order recognising and enforcing an award. This is in consonance with the fact that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**the New York Convention**”) and intends – through this legislation – to ensure that a person who belongs to a convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible. Bearing this in mind, it is important to remember that the Supreme Court’s jurisdiction under Article 136 should not be used to circumvent the legislative policy so contained. The court noted that it should be very slow in interfering with such judgments, and should



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entertain an appeal only with a view to settle the law if some new or unique point is raised which has not been answered by the Supreme Court before, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award however, inelegantly drafted the judgment may be.

c. Further, the court noted that US cases show that given the “pro-enforcement bias” of the New York Convention, which has been adopted in Section 48 of the Act, the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement. In the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator’s interpretation of the agreement of the parties; the challenge procedure in the

primary jurisdiction gives more leeway to the courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award’s enforcement is resisted.

d. The court went on to hold that enforcement of a foreign award under Section 48 of the Act may be refused only if the party resisting enforcement furnishes to the court proof that any of the stated grounds has been made out to resist enforcement. The said grounds are watertight, i.e. no ground outside Section 48 can be looked at. Also, the expression used in Section 48 is “may”. The court further noted that the expression “may” in Section 48 can, depending upon the context, mean “shall” or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out.

e. The Hon’ble Supreme Court stated that a clear distinction needed to be drawn



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between cases where a party is unable to present its case, rendering the arbitral award susceptible to challenge as falling foul of the minimal standards of due process/ natural justice, and, cases where the arbitral tribunal does not accept the case sought to be set up by a party. It is in the latter case that does not give rise to a ground as mentioned in Section 48(1)(b) of the Act, even if the decision of the arbitral tribunal is erroneous. Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, it is clear that the expression “was otherwise unable to present his case” would apply at the hearing stage and not after the award has been delivered.

f. If a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter-claim in its entirety, the award may shock the conscience of the Court and may be set aside, as was done by the Delhi High Court in *Campos Brothers Farm v. Matru Bhumi*

*Supply Chain Pvt. Ltd.*<sup>15</sup> on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country.

The court noted that the most important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counterclaims of the parties, enforcement must follow.

Conclusion:

After considering the facts and pleading, the Hon’ble Supreme Court confirmed the ruling of the sole arbitrator and dismissed the appeals with heavy costs. The Court stated that their jurisdiction under Article 136 of the Constitution is very limited. On a conjoint reading of the objective of Article

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<sup>15</sup> 2019 SCC OnLine Del 8350.



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V of the New York Convention along with the objectives of the Act, the Supreme Court through the present judgment, has ironed the wrinkles under Section 48 of the Act. The Supreme Court has adopted a balanced approach while dealing with the scope of judicial interference at the time of enforcement of foreign award and exercising its jurisdiction under Article 136 of the Constitution.

**Emergency Arbitration and the challenges to its enforcement in India: Future Group & Reliance's new deal is unacceptable to amazon, approaches emergency arbitrator to hold transaction**

In the months of August and September this year, Reliance Retail Ventures Limited (RRVL) was in the news for making a \$3.38 billion (Rs. 24,713 Cr) deal with Future Retail Group. This deal would help RRVL to acquire the assets and businesses of

Future Retail Group. Amazon had earlier invested Rs. 1,431 crore in one of the holding companies Kishore Biyani's Future Group. The new acquisition deal between RRVL and Future group was unsettling to the Retail giant Amazon. Amazon claims that the transaction violated the shareholders' agreement entered into with the promoters of the Future Group. In early October this year, Amazon had approached Singapore International Arbitration Centre (SIAC) over its dispute with Future Coupons, citing breach of terms due to its sale of retail assets to RRVL. Amazon also sought interim relief before the Emergency Arbitrator appointed under the SIAC Rules to prevent completion of this transaction. A legal notice in this regard was also issued by Amazon to Future Group citing breach of



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terms. Amazon has also initiated arbitration proceedings before SIAC.

**The Emergency Arbitrator** under Schedule I of the SIAC Rules, is appointed within one day of the receipt of request along with payment of applicable fees, and the application for interim order sought is ordinarily considered within 14 days. **In this matter, the Emergency Arbitrator ruled in favor of Amazon and ordered stay of transaction** between RRVL and Future Group.

**Challenges to enforcement of an Emergency Arbitrator's award in India:**

Interim orders passed by Emergency Arbitrators is not recognized by the Arbitration and Conciliation Act, 1996, ("*Arbitration Act*") of India. Despite the

Law Commission in its 246<sup>th</sup> Report, recommending recognition to awards passed by Emergency Arbitrators for the purpose of enabling enforcement of the same, the amendment of 2015 did not make provision for the same. If the RRVL and Future Group chose not to comply with the Emergency Arbitrator's award, the enforcement of the same is still a grey area in law as it appears today. In all these years of commercial litigation with the seat of arbitration outside of India, the law remains inconclusive on whether the emergency award would be enforceable directly. The lack of an authoritative precedent in this regard has made the interpretation harder for litigators.

**Some courts appreciative of emergency arbitrator's award and some are not:**



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Although the enforceability of such emergency awards could be a challenge in India, a party who has suffered an Award, may hesitate to go against the Award as the parties are yet subject parties to the Arbitration and the Arbitrator may take note of the conduct of the party in the event of any violation of the Award. It is also crucial to note that in the case of *HSBC v. Avitel* 2014 SCC OnLine Bom 102, the Bombay High Court granted interim relief on the same lines as that of a SIAC appointed emergency arbitrator. On the other hand, in *Raffles Design Int'l India Pvt. Ltd. v. Educomp Professional Education Ltd. & Ors.*, (2016) 234 DLT 34 the court has clearly set out that an Emergency Arbitrators' orders are not enforceable under Indian law.

However, the persuasive value placed of these awards may not be completely ruled out as an order from an emergency arbitrator could certainly help in assisting the court when an application under Section 9 of the Arbitration and Conciliation Act is filed.

**Committee Member for Bulletin:  
Mr. Prashant Popat**