CHAPTER 4

AN ANALYSIS OF JUDICIAL DECISIONS

The Arbitration and Conciliation Act 1996 covered both domestic arbitration as well as enforcement of foreign awards in parts I and II respectively, but did not live up to the expectations. The primary objective of reducing the role of courts remained unfulfilled and delays and pendency in litigation did not see a decline. The final awards did not see uninterrupted enforcement as they should have seen. The arbitral proceedings were continuously interfered with. The higher courts regularly intervened on applications made by the losing party to the arbitration even if the arbitration was seated outside India as per a mutually agreed upon arbitration clause. In quite a few cases, the appointment of the arbitrator would be delayed resulting in a delay in the arbitral process and finally the award. Thus, the choice of parties to arbitrate and resolve their disputes amicably without going to the court was not heeded to. Foreign parties were forced to litigate in Indian courts and got dragged into never ending litigation. Consequently, achieving the object of the Act remained a mere dream.

For a considerable time, the Hon'ble Supreme Court and various High Courts kept entertaining petitions under Part 1 of the Act even though a foreign party would be a part of the arbitration agreement. Enforcement of foreign awards had to be governed only by Part 2 as per the scheme of the Act.

The arbitration laws of Singapore and UK are similar to that of India owing to all of them being based on the UNCITRAL Model Law. There are a few deviations, but the basic principle behind the arbitration legislations is minimising the role of courts and minimising judicial intervention in arbitration matters. In India the major amendments

in arbitration law came about in 2015 and subsequently in 2019. For a vast period from 1996 to 2015 there were no major amendments or changes in the Indian arbitration law. This archaic law coupled with multiple loopholes in the legislation led to courts stepping in to fill the lacunae created by the legislation. Though it ought not to be the case in arbitration matters, and judicial intervention is to be kept at a minimum, the absence of clarity in the Arbitration Act, 1996 led to a number of disputes that went to the courts. Most commonly they were disputes under Section 9, Section 11, Section 16, Section 34 and Section 48. A few cases that paved the way for arbitration law as it exists today in India are discussed in this chapter.

4.1. Cases pertaining to appointment of arbitrator –

4.1.1 Dominant Offset v. Adamovske

Facts / arguments advanced:

In the case of *Dominant Offset v. Adamovske*146, despite there being an arbitration agreement between the parties for resolution of disputes by which the arbitration was to take place through the International Chamber of Commerce (ICC), London, the Delhi High Court entertained a petition under section 11 of the Act, for appointment of arbitrator. The arbitration concerned a foreign party that was incorporated outside India.

For consideration, the Court framed the following issues -

(I)Whether there was any agreement valid and subsisting between the parties.

(II)Whether this Court has jurisdiction to try and decide the present

146 68 (1997) DLT 157; Also see *Shin Satellite Public Company Ltd. v. Jain Studios Limited* reported in 2008 SCC OnLine Del 1127

petition.

(III)Whether the disputes raised in the petition could be referred for arbitration in terms of the arbitration clause.

Judgement:

The Hon'ble Delhi High Court in Paragraph 13 of the judgement held that the petition that was preferred by the petitioner was in fact a petition under Section 8 of the Act and not under Section 11 as mentioned. It was held by the High Court that the provisions of Section 11 will not be applicable.

In the agreement between the parties, the parties had named an arbitrator. It was for this reason that the High Court held that it would have jurisdiction over the dispute and Section 11 would not be attracted.

For Issue No. 1, the Court decided that the arbitration agreement had expired and no valid agreement subsisted between the parties.

For Issue No. 2 pertaining to jurisdiction, it was decided that the Court had the jurisdiction to try the dispute despite there being an arbitration agreement between the parties.

For Issue No. 3, the Court held that the disputes cannot be referred to arbitration.

This incorrect appreciation of the law, more particularly of Section 8 and Section 11, ended up in the court entertaining the matter despite jurisdiction vesting only with the arbitral tribunal.

4.2. Cases pertaining to the application of Part 1 to foreign arbitrations

4.2.1 Olex Focas v. Skoda Export Company

Facts / arguments advanced:

In the matter of *Olex Focas v. Skoda Export Company*147, the Delhi High Court granted an injunction under Section 9 of the Arbitration and Conciliation Act despite the fact that both the parties were foreign companies. The injunction was opposed on multiple grounds, one of them being that both the petitioner and the respondent were foreign companies and the law of Switzerland was the substantive law and even more so since the dispute between the parties was pending before the International Chamber of Commerce (ICC) as per the terms of the contract. The respondent no. 2 was an Indian company being IOCL.

Judgement:

It was held by the Hon'ble Delhi High Court that because of the inclusive nature of the definition provided under sub-section (2) of Section 2, the applicability of Part I is not excluded to arbitrations that are conducted outside India. It was further held that *"the other clauses of Section 2 clarify the position beyond any doubt that this court in an appropriate case can grant interim relief or interim injunction."*

The Court, in paragraphs 61 and 62 of the judgement passed some remarks that went a long way in destabilising the international arbitral framework in India.

147 AIR (2000) Del 161
Also see *Channel Tunnel Group Ltd. & Other vs. Balfour Beatty Construction Ltd. & Ors.* reported in (1993) 1 All ER 664
Also see *Sundram Finance Limited Vs. NEPC India Limited* reported in [1999) (1) SCALE 40]

"61. A close reading of relevant provisions of the Act of 1996 leads to the conclusion that the Courts have been vested with the jurisdiction and powers to grant interim relief. The powers of the Court are also essential in order to strengthen and establish the efficacy and effectiveness of the arbitration proceedings.

62. The arbitrators perhaps cannot pass orders regarding the properties which are not within the domain of their jurisdiction and if the Courts are also divested of those powers, then in some cases it can lead to grave injustice. Arbitration proceedings take some time and even after an award is given, some time is required for enforcing the award. There is always a time lag between pronouncement of the award and its enforcement. If during that interregnum period, the property/funds in question are not saved, preserved or protected, then in some cases the award itself may become only a paper award or a decree. This can of course never be the intention of the legislature. While interpreting the provisions of the act the intention of the framers of the legislation has to be carefully gathered."

The verdict in this case seems to be more of a lacunae-filling verdict than a verdict in which the court has usurped jurisdiction. A valid concern is raised about the power of an arbitrator to protect assets not within the jurisdiction of the arbitral tribunal. However, it seems that the powers given to the tribunal had been misinterpreted.

4.2.2 Bhatia International v. Bulk Trading SA

Facts / arguments advanced:

The finding of the Delhi High Court in *Olex Focas* was reiterated and

followed in the judgement in *Bhatia International v. Bulk Trading SA*148, delivered by the Apex Court. The Supreme Court dismissed the appellants' appeal for an injunction order that was granted by the Delhi High Court restraining the defendants under Section 9 of the Act.

Judgement:

The Apex Court, just like the High Court of Delhi, drew a finding that it did have the power to exercise jurisdiction under Section 9 of the Act and grant interim remedies, even in cases where the parties had chosen for the arbitration to be at the International Chamber of Commerce. The Supreme Court, like the Delhi High Court in the above two cases, came to a similar conclusion asserting it had got the power to grant interim remedies even in ICC arbitrations. It is necessary to reproduce the relevant part of the judgement for perusal.

"32. To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."

4.3. Cases pertaining to the interpretation of 'public policy'

148 (2002) 4 SCC 105
Also see *National Thermal Power Corporation v. Singer Co.* (1992) 3 SCC 551

4.3.1 Renusagar Power Co. Ltd. v. General Electric Company

Facts / arguments advanced:

In the case of *Renusagar Power Co. Ltd.*149, the court was called upon to decide the meaning of public policy under Section 7(1) of the Foreign Awards Act, 1961. Section 7(1) of the Foreign Awards Act dealt with grounds for refusal of enforcement of an award. The corresponding section is Section 48 of the Arbitration Act which now deals with enforcement of foreign awards. This is intended to incorporate Article V of the New York Convention. A challenge was raised to the award on the ground that it was in contravention of the public policy of the country in which it was sought to be enforced i.e. India.

Judgement:

The Hon'ble Supreme Court of India declined to refuse enforcement of a foreign award on the ground that the award was not contrary to the 'public policy' of India. A narrow approach was taken to interpret public policy and it was held that a mere contravention of law does not tantamount to a breach of public policy.

Public policy was defined as –

a) The fundamental policy of Indian law
b) The interests of India
c) Morality and justice

It was held that something more is required in order to be classified as a

149 1994 Supp (1) SCC 644; Also see *V/O Tractoroexport, Moscow v. Tarapore & Co.* reported in (1969) 3 SCC 562; *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan* reported in (1978) 2 Lloyd's LR 223; In *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaima h National Oil Co.* reported in (1987) 2 All ER 769

contravention of the public policy of the country and a breach of the provisions of the statute does not amount to the same. This was a landmark judgement that paved the way for enforcement of foreign awards way back in the 20th century. However, subsequent decisions, not considering the ratio laid down in the case of *Renusagar*, derailed the growth of arbitration over the years.

4.3.2 ONGC v. Saw Pipes

Facts / arguments advanced:

In *ONGC v. Saw Pipes*150, a contract for supplying goods was entered into between the parties. The delivery of the goods was delayed because of a strike by mill workers in one of the countries from where the raw materials were to be supplied by the respondent. An extension of time was given by the appellant on the condition that liquidated damages would be recovered from the respondent. The amount that was withheld by the appellant while making payment to the respondent was disputed by the respondent and the matter went to arbitration. The arbitral tribunal ruled in favour of the respondent and held that the amount had wrongly been withheld.

Judgement:

The Hon'ble Supreme Court of India set aside the order of the arbitral tribunal under Section 34 holding the award to be against the public policy of India by virtue of it being patently illegal causing further damage to the arbitral regime in India.

150 (2003) 5 SCC 705

It was held by the Hon'ble Supreme Court that ‘public policy’ was required to be given a broader meaning. It was held that, it is the duty of the arbitral tribunal to dispense justice. If an award is an unjust award and has resulted in injustice to either of the parties, it is within the powers of the court to set aside such award in a challenge to the arbitral award on the ground that it is violating the public policy of India. It was further held that the term ‘public policy’ was required to be given a much wider meaning. While deciding the dispute, the court held that it had revisional/appellate powers while deciding challenges of such a nature.

Despite the narrow approach taken in the case of *Renusagar*, wherein it was held that a mere violation of Indian statutory law would not attract the bar to public policy, it was held by the court that the award could be set aside if it was patently illegal. This new ground of patent illegality was added to the three already existing grounds laid down by the court in the case of *Renusagar.*

The relevant part of the judgement is reproduced below -

“If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India.”

“Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning.” “However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be

held that the award could be set aside if it is patently illegal."

This judgement went a long way in undoing what the court did in the case of *Renusagar* and the narrow approach taken in deciding the scope of 'public policy'. The decision has been widely criticized. The principle criticism is that the decision effectively made the court a Court of Appeal under Section 34, engaging in meticulous analysis of evidence and interpretation of the contract like a first appellate court.

4.3.3 ONGC Ltd. v. Western GECO Ltd.

Facts / arguments advanced:

In *ONGC Ltd. v. Western GECO Ltd,*[151] a three-judge bench of the Hon'ble Supreme Court was called upon to decide the same question of the scope of 'public policy' and enforcement of a foreign award.

Judgement:

The Apex Court relied upon the verdict in the case of *ONGC v. Saw Pipes*, and widened the definition of public policy. It was held that the verdict in the *Saw Pipes* case did not consider the fundamental policy of Indian law. The meaning of fundamental policy of Indian law was broken down by the court under separate classifications like –

a) The duty to adopt a judicial approach
b) Following the principles of natural justice
c) The decision of the arbitral tribunal could not be perverse or unreasonable

151 (2015) AIR 363 SC

By expounding this meaning of public policy and including within its ambit almost every ground for refusing enforcement of a foreign award, the court set back the clock that had started ticking with the verdict in *Renusagar.*

The court also assumed upon itself the powers to modify and alter an arbitral award to the extent that it was perverse or illegal. By virtue of this judgement courts started examining arbitral awards on merits.152

4.3.4 Cruz City 1 Mauritius v. Unitech

Facts / arguments advanced:

In *Cruz City 1 Mauritius v. Unitech*153, the Delhi High Court had to consider the scope of the "public policy" exception under Section 48 of the 1996 Act. At the very beginning, the Court addressed the question "whether violation of any regulation or any provision of FEMA would *ipso jure* offend the public policy of India".

Judgement:

After considering the judicial precedents, the Court arrived at the conclusion that "the width of the public policy defence to resist enforcement of a foreign award is extremely narrow. And the same cannot be equated to offending any particular provision or a statute." The Delhi High Court further went on to note "*that a contravention of a*

152 Also see judgement in the case of *Associate Builders v. Delhi Development Authority* reported in (2015) AIR 620 SC.
153 2017 SCC OnLine Del 7810
Also see *International Investor KCSC* v. *Sanghi Polyesters Ltd.*, 2002 SCC OnLine AP 822;
Official Liquidator v. *Dharti Dhan (P) Ltd.*, (1977) 2 SCC 166;
Central Inland Water Transport Corporation Ltd. v. *Brojo Nath Ganguly*, (1986) 3 SCC 156

provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country."

The High Court also took notice of the fact that the New York Convention for Enforcement of Foreign Awards was to ensure enforcement despite arbitral awards not being as per the national legislations of the countries in which enforcement is sought. It was noted that *"the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment."*

This decision favours the enforcement of contractual obligations undertaken by the parties to the dispute. It greatly vitiates the ability of Indian parties to an agreement to take the aid of the provisions under FEMA as a way to avoid their obligations, and thus provides a morale booster and a confidence inducing attitude of Indian courts to foreign investors seeking to enforce the obligations of opponent parties.

4.3.5 Daiichi Sankyo v. Malvinder Mohan

Facts / arguments advanced:

In the verdict in *Daiichi Sankyo154,* the Delhi High Court permitted the enforcement of an international arbitration award but only in part and refused enforcement in relation to certain parties in whose favour the award was passed, but were minors. The proceedings arose out of a sale agreement of the award debtors' shares in Ranbaxy Laboratories Limited to the award creditor (Daiichi Sankyo). The arbitration was under the ICC Rules and was seated in Singapore. It was argued on behalf of the award creditor that there was fraudulent misrepresentation in order to induce it to buy shares and the creditor had awarded damages to the creditor. The enforcement of the award was challenged by the award debtor in India on the ground that the award was against the fundamental policy of India. There was a challenge to –

a) The quantum of damages awarded to the award creditor
b) Consequential damages awarded under the contract
c) The finding of the tribunal on the issue of limitation
d) The award of interest to the award creditor
e) The award of damages against minor respondents

Judgement:

All, except the last objection, were dismissed by the court. It was noted as a general principle that as per the fundamental policy of Indian law it "*does not mean provisions of the statute but substratal principles on which Indian Law is founded*." While considering the challenge of the award debtor to the award of the tribunal on damages, the court noted that, "*the quantification of the damages and the various factors that*

154 2018 SCC OnLine Del 6869;
Also see *Xstrata Coal Marketing* v. *Dalmia Bharat (Cement) Ltd in EX.P. 334/2014;* (Delhi High Court)
Shri Lal Mahal Limited v. *Progetto Grano Spa* (2014) 2 SCC 433

would have to be taken in account in the facts and circumstances of a case would necessarily be a fact based enquiry and would necessarily be within the domain of the Arbitral Tribunal". It observed that it "*is not for this Court to dwell deep into these aspects while considering objections under Section 48 of the Arbitration Act*" and the challenge to the award on damages was dismissed.

It was just on the final challenge to the enforcement of the award (which related to some of the award debtors being minors), that the court came to the conclusion that the decision of the tribunal was contrary to the fundamental policy of Indian law and it was held that a minor could not be held to have perpetrated fraud through an agent. The Court noted that minors are incapable of carrying out fraud through an agent and hence had no role to play in the fraud played upon the petitioner company inducing it to buy shares in Ranbaxy. Other Indian legislation was also considered while the court gave its reasoning on why the protection of minors was a part of the fundamental policy of Indian law and therefore the minors could not be held liable which in turn rendered the award unenforceable against the minor award debtors.

4.3.6 Vijay Karia v. Prysmian Cavi E Sistemi SRL

Facts / arguments advanced:

In the case of *Vijay Karia v. Prysmian Cavi E Sistemi SRL*[155], the Hon'ble Supreme Court was dealing with the challenge to enforcement on the grounds of misreading of the contract, a breach of the provisions of Foreign Exchange Management Act, important evidence or statements made by the parties not being considered, anomalies in the valuation of shares, etc.

155 Civil Appeal No. 1544 OF 2020

Judgement:

The Apex Court, while interpreting the definition of 'fair hearing' in the present case, has relied on the judgement in the *Ssangyong* case156 and the judgment in the case of *Sohan Lal Gupta v. Asha Devi Gupta157,* which has laid down the fundamental ingredients of a fair hearing. The Supreme Court also relied on the judgment of *Glencore International AG v. Dalmia Cement (Bharat) Limited158,* which makes a clear distinction between instances where a party is not able to put forth its case which makes the award vulnerable to challenge due to non-compliance of the principles of natural justice, and instances where the tribunal does not accept the submissions of a party and refuses to accept the case sought to be canvassed by a party. In such instances, it was held that the latter instance does not fall within the purview of Section 48(1)(b) of the Act.

Further, the Hon'ble Supreme Court also gave a narrow interpretation to the expression "*unable to present his case"* and held that it had to be read along with the first part of Section 48(1)(b), i.e., party not being given a proper notice of appointment of arbitrator or notice of the arbitral proceedings. The Court came to the conclusion that the ground can only be made applicable at the time of hearing and not once the award has been passed, as also held in *Ssanyong*. Therefore, it is necessary for the party challenging the enforcement of an award to have raised this ground of not having been able to present its case, so as to be able to challenge the enforcement of the award.

156 *Ssangyong Engg. & Construction Co. Ltd. v. NHAI* reported in (2019) 15 SCC 131
Also see *LMJ International Ltd. v. Sleepwell Industries Co. Ltd.* reported in (2019) 5 SCC 302
157 (2003) 7 SCC 492; Paragraph 23
158 2017 SCC OnLine Del 8932

The Apex Court, in February 2020, through its judgement, highlighted the principle that should be followed by courts while dealing with foreign seated arbitrations and foreign awards and should have a pro-enforcement outlook when dealing with applications for enforcement of foreign awards. This should be kept in mind especially when dealing with challenges to enforcement on the ground of public policy. Indian courts have begun to considering this ground in a very narrow sense. It has been consistently held that in order to attract the public policy bar in the statute, the enforcement of a foreign award must violate something far greater than mere provisions of an Indian statute. An almost identical approach is taken by the courts in one of the world's most favourable arbitration destinations, i.e. Singapore159 that the exception of '*public policy'* as a bar for denying enforcement of a foreign award has to be construed extremely narrowly. Just because the award was irrational or perverse or because another conclusion is possible, it could not be said that the enforcement of the award would be against the '*fundamental public policy*'. The Apex Court also looked at the provisions of the New York Convention and the judicial precedents and evolution of the jurisprudence in relation to recognition and enforcement of foreign awards by American courts160. It was observed that American courts have taken a "pro-enforcement" approach while shifting the burden of proof from parties seeking enforcement to parties objecting to the enforcement of a foreign award. This would mean that the party objecting to enforcement would have to show why and how the award is in contravention of fundamental public policy and not merely violative of the provisions of some statute. An identical pro-enforcement attitude has

159 *Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co.*, (2010) SGHC 62
160 *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, 508 F.2d 969 (1974); *Compagnie des Bauxites de Guinee v. Hammermills Inc*. (1992) WL 122712; *Certain Underwriters at Lloyd's London v. BCS Ins. Co.* 239 F.Supp.2d 812 (2003); *Karaha Bodas Co., L.L.C v. Perusahaan Pertambagan Minyak* 364 F.3d 274 (2004); *Admart AG v. Stephen and Mary Birch Foundation Inc.* 457 F.3d 302 (2006)

been adopted by the legislature in Section 48 of the Act, as also upheld by the Supreme Court in a number of judgements. The Apex Court further held that the issues would not fall within the scope of Section 48(1)(b) for assailing the enforcement of a foreign award.

4.4 Cases pertaining to court intervention in foreign awards

4.4.1 Venture Global Engineering v. Satyam Computer Services

Facts / arguments advanced:

In *Venture Global Engineering v. Satyam Computers Services*161 the arbitral tribunal had already passed the award outside India. It became a foreign award that the Hon'ble Supreme Court interfered with. Disputes had cropped up in a shareholders' agreement that were referred to arbitration. The parties approached the London Court of International Arbitration and a sole arbitrator was appointed. The arbitrator passed an award directing Venture Global to transfer shares to Satyam. This later came to be challenged before the Indian courts.

Judgement:

The Apex Court confirmed the verdict in the case of *Bhatia International*, and held that the Indian courts had been conferred jurisdiction both under Section 9 as well as Section 34 of the Act, and as such, a foreign award could be quashed and set aside by Indian courts. The Apex Court held that since the parties had not expressly excluded the application of part 1 of the Act, the provisions enshrined under part 1 would apply even to a foreign award. It was held in Paragraph 29 of the

161 (2017) SCC Online SC 1272

judgement, that-

"29) In terms of the decision in Bhatia International (supra), we hold that Part I of the Act is applicable to the Award in question even though it is a foreign Award."

Other cases –

However, there are a few verdicts that encourage arbitration as a means of dispute resolution amongst the international commercial community. These verdicts show the Indian legal system in a favourable light when it comes to respecting and enforcing foreign awards or foreign-seated arbitrations. For instance, the Calcutta High Court in *East Coast Shipping v. M/s M J Scrap*162 and in *Keventor Agro Limited V. Seagram Company Limited*163 came to the conclusion that *"provisions of Part-I were by nature of Section 2(2) of the Act made applicable only to domestic arbitrations and consequently no order can be passed under Section 9 of the Act in a case where the place of arbitration was outside India."*

In *Keventer Agro*, a Division Bench of the Calcutta High Court came to the conclusion that, in the absence of a power to grant an interim injunction in international commercial arbitrations, the court could not do so. Such a power would have to be present in the statute. The relevant part of the judgement is reproduced below -

"There is no provision in Part II Chapter I or any other portion of the 1996 Act applicable to foreign arbitrations under the New York

162 (1997) 1 Cal HN 444
Also see judgement in Punj Lloyds Ltd. V. Skoda export Ltd. (decided in A.A. No. 92/96 on 19.5.1998)
Also see Sumitomo Heavy Industries Ltd. v. ONGC Ltd. reported in (1998) 1 SCC 305
Also see Naviera Amazonica Peruana S.A. v. Compania Internacional De Seguros Del Peru reported in [1988] 1 Lloyd's Rep. 116
163 A.P.O.Nos. 490/97, 499/97 and C.S. No.592/97 decided on January 27, 1998

Convention, which gives the Court such a power."

Even the High Court of Delhi in the case of *Kitechnology v. Uncor GmBH Rahn Plastmaschinen*164, which concerned foreign parties, refused to apply part 1 of the Act.

The arbitration clause in *Kitechnology* provided for the disputes to be settled by application of the law of Germany. The venue of the arbitration proceedings was decided to be either Frankfurt/Maine. The arbitration proceedings were governed by the German Code of Civil Procedure.

The Court held that it is an international commercial arbitration covered by Part 2 of the Act and Part 1 shall not apply. With this finding, the court refused an injunction under Section 9 of the Act to the petitioner in India. It is important to note that this application was dismissed with cost to the petitioner.

In the case of *Marriot International Incorporation v. M/s Ansal Hotels Ltd.*165, the Delhi High Court came to the conclusion that Part I of the Act would apply only to Indian-seated arbitrations. In this case, a preliminary objection to the maintainability of the appeal was raised by the respondents on the ground that Section 9 falls in Part I of the Act and Part I applies only to those arbitrations where the place of arbitration is in India. Paragraph 34 of the judgement is reproduced below –

"34. Even assuming for the sake of argument that the party is left remedy less and it cannot approach the Court for taking interim measures, in our view that cannot be a ground to make Section 9 applicable to arbitrations taking place outside India. We may agree with the learned

164 (1999) 48 DRJ 316
165 AIR 2000 Delhi 337

counsel for the appellant that it may, in some cases, lead to hardship to a party, however, when the language of the statute is plain and unambiguous and admits of only one meaning, no question of construction of statute arises, for the Act speaks for itself even if the result is strange or surprising, unreasonable or unjust or oppressive as it is not for the Courts to extend the scope of the Statute beyond the contemplation of the legislature. It is entirely for the legislature to look into this question."

This goes on to show that various High Courts were passing orders as per the intention of the legislature and as per the scheme of the Act, but somehow the efforts to boost international commercial arbitration in India got undone by a handful of verdicts that were delivered by the Hon'ble Apex Court.

It took the Indian courts about 15 years to understand the nuances and appreciate the intricacies of international commercial arbitration. There seems to be a shift in attitudes and as far as international commercial arbitrations are concerned, the courts seem to have stopped entertaining and allowing applications preferred under Part 1 of the Arbitration and Conciliation Act, 1996. Going through recent judgements delivered by High Courts of various states and by the Supreme Court, a noticeable change in attitude can be seen. The verdicts that have been delivered have been in consonance with the intent of the legislature and the executive. The courts are increasingly refraining from applying Part 1 to foreign seated arbitrations or to international commercial arbitrations. Discussed below are some of the judgements that show the shift in attitude while also critically analysing the extent to which they are pro-arbitration.

4.5 Other cases that are pro-arbitration in India

4.5.1 The BALCO Judgement

Facts / arguments advanced:

One of the landmark judgements reflecting the shift in the attitude of Indian courts was the verdict of the Hon'ble Supreme Court in *Bharat Aluminium v. Kaiser Aluminium Tech Services*166. An agreement for supply of equipment etc. was entered into between the parties. The agreement had an arbitration clause and the seat of the arbitration was decided to be England. The English arbitral tribunal passed an award in favour of the Respondent. An application under Section 34 (Part 1) was preferred before the High Court of Chhattisgarh for setting aside the award.

Clause 17 of the agreement between the parties was the arbitration clause that stipulated that arbitration shall be as per English arbitration law after amicable negotiation fails. It was provided for the arbitration to be conducted by appointing one arbitrator each by the petitioner and by the respondent. The arbitrators so appointed would choose an umpire.

It was further clarified that Indian law shall govern the agreement whereas English law shall govern the arbitration proceedings.167

Judgement:

In this case, the Hon'ble Supreme Court did not interfere in the execution and enforcement of the award that was already passed by the tribunal and

166 (2012) 9 SCC 649

167 Niyati Gandhi, Vyapak Desai; *What finally happened in BALCO v. Kaiser Technical Services*, February 12, 2016 accessible at: https://nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/what-finally-happened-in-bharat-aluminium-co-balco-v-kaiser-technical-services.html?no_cache=1&cHash=74884506c712af347b732a489c4b61de

held that an application under Section 9 will not apply to international commercial arbitrations. The Supreme Court further held that since Section 9 is a part of Part 1 of the Arbitration Act, 1996, it would not apply to arbitrations that are held outside India. It was observed by the court that Part 2 of the Act does not contain a provision like Section 9. It is relevant to reproduce a part of the judgement in order to see the pro-arbitration approach taken by the court in this case.

"161. Schematically, Section 9 is placed in Part I of the Arbitration Act, 1996. Therefore, it cannot be granted a special status. We have already held earlier that Part I of the Arbitration Act, 1996 does not apply to arbitrations held outside India. We may also notice that Part II of the Arbitration Act, 1996, on the other hand, does not contain a provision similar to Section 9. Thus, on a logical and schematic construction of the Arbitration Act, 1996, the Indian Courts do not have the power to grant interim measures when the seat of arbitration is outside India. A bare perusal of Section 9 would clearly show that it relates to interim measures before or during arbitral proceedings or at any time after the making of the arbitral award, but before it is enforced in accordance with Section 36. Section 36 necessarily refers to enforcement of domestic awards only. Therefore, the arbitral proceedings prior to the award contemplated under Section 36 can only relate to arbitrations which take place in India. We, therefore, do not agree with the observations made in Bhatia International (supra) in paragraph 28 that "The words in accordance with Section 36 can only go with the words after the making of the arbitral award." It is clear that the words "in accordance with Section 36" can have no reference to an application made "before" or "during the arbitral proceedings". The text of Section 9 does not support such an interpretation."

It was also observed by the court that the definition of "foreign awards" in Sections 44 and 53 of the Arbitration Act, 1996 intentionally limited it

to awards made in agreements covered by the New York Convention, 1958 or the Geneva Protocol, 1923. It observed that no remedy was provided for the enforcement of the 'non convention awards' under the 1961 Act. The Court therefore came to the conclusion that non-convention awards cannot be incorporated into the Arbitration Act, 1996 by a process of interpretation. The task of removing any perceived lacuna or curing any defect in the Arbitration Act, 1996 lay only with the Parliament.168

4.5.2 Shri Lal Mahal v. Progetto Gramo Spa

Facts / arguments advanced:

A dispute arose between an Indian party and an Italian party over a supply agreement for the supply of wheat. The arbitral tribunal was formed under the Grain and Feed Trade Association in London and ruled in favour of the Italian buyer. An appeal before the Appellate Board under the GAFTA was rejected. A subsequent appeal before the High Court of Justice in London under the English Arbitration Act was also rejected. The Italian party sought to enforce the award in India and filed an application for enforcement before the Delhi High Court, where the seller opposed the enforcement. After the Delhi High Court refused to intervene and examine the merits of the award, the dispute reached the Hon'ble Supreme Court. The judgement of the Hon'ble Supreme Court in the case of Shri Lal Mahal v. Progetto Gramo Spa169 is another example of a pro-arbitration judgement that shows the reluctance of the Supreme Court when it comes to intervening in the execution of foreign awards.

Judgement:

168 *Supra Note 13*
169 (2014) 2 SCC 433

The Hon'ble Court reiterated the principles laid down in the *Renusagar* case and narrowed the interpretation of 'public policy'. In simpler terms, it was further held that the courts cannot second guess a foreign award on merits. It was held that, *"Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy."*

In a major booster to international commercial arbitrations in India, the Court also held in Paragraph 45 of the judgement that when the court was considering the enforceability of a foreign arbitral award, the court wouldn't be exercising revisional or appellate jurisdiction and it is not within the purview of the court to see whether an error has been committed by the arbitral tribunal.

4.5.3 Plulchand Exports v. Ooo Patriot

Facts / arguments advanced:

The mainly contested issue in *Phulchand Exports v. Ooo Patriot*170 was whether enforcement of the arbitral award passed by the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of Russian Federation, Moscow in favour of the respondent was contrary to the public policy of India under Section 48(2)(b) of the

170 (2011) 10 SCC 300

Arbitration and Conciliation Act, 1996. When the award was passed, the Arbitral Tribunal did not find any merit in the defences set up by the sellers. It held that the sellers broke the terms of the Contract (Article 4) and shipped goods on January 29, 1998 - 16 days later than the stipulated time and the vessel freighted by the sellers left the port of Kandla (India) on February 20, 1998 - 38 days later than the time of departure stipulated in the contract. The Arbitral Tribunal, therefore, split the amount of losses between the parties - buyers and sellers - in equal parts and ordered that the sellers shall pay the amount of USD 138,402.03 to the buyers. The Arbitral Tribunal awarded interest to the tune of USD 2,562.71 payable by the sellers to the buyers and also directed the sellers to pay the amount of USD 4,869.00 to recover the claimant's expenses to pay registry and arbitrage fees.

An arbitration petition was filed before the High Court of Judicature at Bombay under Sections 47 and 48 of the Act for enforcement of the above award and was contested on the ground that the subject award was contrary to the principles of public policy and, therefore, the award was unenforceable.

Judgement:

The Hon'ble Supreme Court refused to quash or set aside the award or interfere with the enforcement of the award and the Court asserted that the arbitral tribunal has only awarded reimbursement of half the price paid by the buyers to the sellers and therefore the award cannot be said to be contrary to the public policy of India. It is not in any way unjust, unreasonable or unconscionable.

4.5.4 Antrix Corp. v. Devas Multimedia

Facts / arguments advanced:

The main issue in *Antrix Corp v. Devas Multimedia*171 was whether it was within the power of the Chief Justice of India to constitute another arbitral tribunal, when one arbitral tribunal was constituted, and the arbitration agreement provided for a choice between two different sets of rules, being the ICC rules and the UNCITRAL rules, and one of the parties to the arbitration agreement had unilaterally initiated arbitration under the ICC Rules. The other party had approached the Court for appointment of an arbitrator under the other set of rules.

Judgement:

The Supreme Court held that once an arbitrator was appointed under the ICC Rules, an application under Section 9 of the Act would not be maintainable. It was further held that when an arbitral tribunal is already having jurisdiction and is deciding the dispute between the parties, constituting another tribunal is not what is envisaged under the legislation. In this matter, the Hon'ble Supreme Court drew a distinction between the law governing the arbitration agreement and the law governing the arbitration proceedings. In common legal parlance, the distinction is known as the distinction between the *lex fori* and the *lex arbitri*.

It was further held by the Court that, *"once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act."*

4.6 Cases pertaining to arbitrability of fraud

171 (2014) 11 SCC 560;
Also see *Som Datt Builders Pvt. Ltd. v. State of Punjab [2006 (3) RAJ 144 (P&H)]*

4.6.1 World Sport Group (Mauritius) v. Msm Satellite (Singapore) Pte & similar cases

Facts / arguments advanced:

The Board of Control for Cricket in India (for short 'BCCI') invited tenders for IPL (Indian Premier League) Media Rights for a period of ten years on a worldwide basis. The bid of World Sports Group India ('WSG India') was accepted by BCCI. By a pre-bid arrangement, however, the respondent was to get the media rights for the sub-continent for the period from 2008 to 2010. Accordingly, on 21st January 2008, BCCI and the respondent entered into a Media Rights License Agreement for the period from 2008 to 2012 for a sum of US$274.50 million. After the first IPL season, BCCI terminated the agreement dated 21st January 2008 between BCCI and the respondent for the Indian sub-continent and commenced negotiations with WSG India.

Subsequently, WSG and MSM mutually agreed by way of a Facilitation Deed that WSG would relinquish these rights and MSM would be free to obtain the rights from the BCCI directly and that MSM would pay approximately USD 30 million to WSG for relinquishment of rights.

It was alleged by the lawyers appearing on behalf of MSM that WSG, in a fraudulent manner, relinquished rights that it did not even have, in exchange for valuable consideration. A suit was filed by MSM before the High Court of Bombay with a prayer to declare the Facilitation Deed null and void since it was induced by fraudulent misrepresentation. WSG relied on the arbitration clause in the Deed and initiated arbitration in Singapore under the ICC Rules. Upon an application by MSM, the Bombay High Court granted an injunction over the arbitration proceedings in Singapore on the grounds that since issues of fraud and

corruption were involved, the court would be the proper forum to adjudicate such disputes. WSG approached the Hon'ble Supreme Court and challenged the decision of the Bombay High Court.

Judgement:

In the judgement rendered in the case of *World Sport Group (Mauritius) v. Msm Satellite (Singapore) Pte*172, the Supreme Court abstained from interfering with the arbitration and held that in international commercial arbitration, the tribunal could even decide issues of fraud.

However, an important factor that stands out is that while the decision of the Supreme Court in the *World Sport Group* judgement only applies to international commercial arbitrations, the judgement in the case of *N Radhakrishnan v. Maestro Engineering*173 still holds the field in India when it comes to referring issues of fraud to the arbitral tribunal. The approach taken by the Supreme Court in the case of *Sukanya Holdings* is along the same lines wherein the Hon'ble Supreme Court decided on signatories to an arbitration agreement and on the arbitrability of fraud. The question of non-signatories to an arbitration agreement came up for adjudication for the first time before the Hon'ble Supreme Court. In *Sukanya,* an application under Section 8 was filed by the claimant against the respondent who was a party to the partnership deed that contained the arbitration clause. There were twenty-three other parties who were non-signatories to the partnership deed containing the arbitration clause, but were defendants, being purchasers of the flats.

The Supreme Court held that where a suit is commenced in respect of "a matter" which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the

172 Decision of the Supreme Court dated 24 January 2014 in Civil Appeal No. 895 of 2014.
173 2010 (1) SCC 72

agreement while some are not, the subject matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The court refused to join the non-signatories and refer them to arbitration. Reading into the language of Section 8 literally, the decision could not have been more appropriate. The word used in Section 8 is "party" and according to Section 2(h) "party" means a party to an arbitration agreement. So, non-signatories cannot be made party to arbitration. However, there are situations in practice, where it would obviously be convenient if the third party could be brought into arbitration, since the entire dispute could be resolved in a single arbitration, thus avoiding conflicting judgments. Viewed from the above perspective, the decision discourages arbitration. Although a three judge bench in *Chloro Controls*[174] departed from the view in *Sukanya Holdings*, it refused to overrule *Sukanya Holdings* by making it applicable only to domestic arbitrations.

Although by virtue of this decision non-signatories cannot be referred to domestic arbitration, the Supreme Court has made some important clarifications diluting the scope of *Sukanya Holdings.* In *Indowind Energy Services v. Wescare Ltd*[175]., the Court held that a non-signatory may bind itself to the arbitration agreement through "incorporation by reference" or in accordance with the provisions of Section 7 and in *P.R. Shah Shares and Stock Brokers Ltd. v. BHH Securities Pvt. Ltd.*[176], the Court held that third parties can be joined, if the parties are inter-related and their claims are inextricably linked.

The 2015 Amendment has virtually watered-down *Sukanya Holdings*, by amending Section 8 by adding the words "or any person claiming through or under him" after the words "party to the arbitration

174 (2013) 1 SCC 641
175 (2010) 5 SCC 306
176 (2012) 1 SCC 594

agreement", which would allow non-signatories being referred to domestic arbitration.

However, various courts regularly continue to distinguish *Sukanya Holdings* from the Amendment when faced with similar questions. The Hon'ble Gujarat High Court, in *Shantilal Shivabhai Jadav v. Kaushikbhai Hiralal Siddhiwala* reported in 2018 (3) GLH 1, observed as under –

"7.1 Though Mr. Maulik Shah has relied on a decision of the Supreme Court in the case of *Ameet Lalchand Shah* (supra), which according to him, distinguishes the judgment rendered in *Sukanya Holdings* (supra), appreciation of facts in the case of *Ameet Lalchand Shah* (supra) would suggest that all the contracting parties though had separate agreements, they were connected to a main agreement which interconnection obliged them to be amenable to an arbitration clause. The question therefore was answered by the Supreme Court in the context of the interconnected dispute between the parties arising out of a contract though not between the signatories to the arbitration agreement but which was integrally connected with the commissioning of land which was the focus of the contract. Mr. Anshul Shah, learned advocate appearing on behalf of the respondent therefore is right in contending that *Sukanya Holdings* (supra) still holds the field and the amendment to the Arbitration Act as contended to apply to the other party which is discussed in *Ameet Lalchand* (supra), would not apply in the context of the facts on hand. Secondly, apparent and serious allegations of fraud have been made which is a virtual case of criminal offence revealing complicated allegations of fraud which can only be decided by a Civil Court."

The judgement of the Hon'ble Supreme Court in the case of World Sport Group is a much welcome decision which will eventually minimise the chances of court intervention in foreign-seated arbitrations. The inclination of the court to consider the international position on foreign-

seated arbitrations and to consider the international position, and restrict itself to the main issue at hand, was a good sign for international commercial arbitration in India and is in consonance with the pro-arbitration regime that the 2015 Act is ushering in.

4.7 Cases pertaining to pathological arbitration clauses

4.7.1 Pricol v. Johnson Controls Enterprise

Facts / arguments advanced:

In Pricol v. Johnson Controls Enterprise177 the Supreme Court declined to quash a partial arbitral award. In this case, the disputing parties had entered into a Joint Venture Agreement on December 26, 2011("JVA"). The JVA contained an arbitration clause as below-

"*In case of such failure, the dispute shall be referred to sole arbitrator to be mutually agreed upon by the Parties. In case the parties are not able to arrive at such an arbitrator, the arbitrator shall be appointed in accordance with the rules of arbitration of the Singapore Chamber of Commerce."*

The agreement also provided for the arbitration proceedings to be held at Singapore; and for it to be governed by the Indian law.

Amongst other issues including the discrepancy between the *lex arbitri* and the curial law, the reference to an institution for arbitration that didn't even exist, – the "Singapore Chamber of Commerce" – was the crux of the controversy before the Hon'ble Apex Court.

177 (2015) 4 SCC 177

Judgement:

The Hon'ble Supreme Court did not interfere in an international arbitration with the Singapore International Arbitration Centre (SIAC) as the appointing authority, and respected the parties' chosen form of dispute resolution in a reasoned judgement which is keeping up with current international practices of encouraging arbitration and minimising judicial interference.

The Hon'ble Supreme Court in an application for appointment of arbitrator filed by Pricol, held that the reference to the "*Singapore Chamber of Commerce*", which was a non-existent arbitration institution and not having its own rules for appointment of arbitrators, actually meant SIAC, while giving a more reasonable meaning, construction and approach to the arbitration agreement. The Court did not deal with Pricol's submissions pertaining to the issue of the curial law that would govern the arbitration proceedings between the parties, and noted that the SIAC proceedings were prior in time and that the SIAC had already appointed an arbitrator who had already passed a preliminary award on the issue of jurisdiction. The Court held that such developments couldn't be brought into question in an application filed under Section 11 (6) of the Act. If that were to happen, it would tantamount to the Supreme Court sitting in appeal over an SIAC decision of arbitrator appointment as well as its decision on the issue of jurisdiction by way of a partial award, which would be inappropriate.

4.7.2 Enercon v. Enercon GMBH

Facts / arguments advanced:

This case concerned a poorly drafted arbitration clause that led to confusion over what was the seat and venue of arbitration. On the facts,

the Apex Court asserted the supervisory jurisdiction of the Indian courts over the dispute holding that it was an Indian-seated arbitration, and that London was merely the 'venue' of the arbitration proceedings. In arriving at this conclusion, the Court was conscious of the fact that the governing law that was chosen by the parties to the dispute to apply to the contract were the laws of India. London was merely designated as the place for the conduct of the arbitral proceedings, apart from which London, or English law, had no significance whatsoever. There was nothing else that connected the dispute to London jurisdiction. It was because of all these factors that the Apex Court held that the English courts did not have jurisdiction over the contract.

Judgement:

In the judgement in *Enercon v. Enercon GMBH*178 and *Union of India v. Reliance Industries*179, the Hon'ble Supreme Court led by example by not interfering in applications for appointment of arbitrator, or in applications challenging the enforcement of foreign awards. In the judgement in *Enercon*, the Indian Supreme Court applied the principle of severability. It was held that the arbitration clause was a separate agreement and was different from the underlying contract and the Hon'ble Supreme Court referred the dispute to arbitration despite there being a few flaws in the way the arbitration clause was drafted.

The decision of the court to uphold and seek to enforce a poorly drafted arbitration agreement is another welcome approach that is seen by Indian courts and one must applaud the Supreme Court's willingness to respect and uphold the choice of the parties to resolve their disputes through arbitration, despite there being certain irregularities in the main agreement. Interestingly, before the English courts, in *Enercon v EIL*, Mr.

178 (2014) 5 SCC 1
179 (2015) 10 SCC 213

Justice Eder had opined that the seat of arbitration would be London. However, he held that it would not be proper on the part of the courts in England to assume supervisory jurisdiction especially when the courts in India were seized of the matter, for reasons of international comity.180

Various High Courts have also embraced this change in their attitude. In the judgements of the Delhi High Court in *Cruz City 1 Mauritius v. Unitech*181 , *Daiichi Sankyo v. Malvinder Mohan* and in *Convention Hotels India v. Ager Hotels*, the Delhi High Court refused to interfere in the process of execution and enforcement of a foreign award seated in Singapore under ICC Rules.

4.8 Other important judicial pronouncements

In as much as the judgements of the Indian courts, when it comes to enforcement of a foreign award, are relevant in driving forward the pro-arbitration ideology, the way domestic awards are treated is also an equally relevant factor. International investors are bound to lose faith in the Indian arbitration system if the domestic companies do not have faith in the arbitration mechanism and the courts, when it comes to enforcing the preferred choice of the parties and non-interference in the arbitral process. Hence, it is imperative to consider a few other decisions that made key developments into the way the Arbitration and Conciliation (Amendment) Act, 2015 came to be interpreted and implemented.

One of the first important judgements was the verdict in *Sundaram Finance Ltd. v. NEPC India Ltd.*182 wherein, it was held that as per Section 41 (b) of the Arbitration Act of 1940, an application seeking interim relief couldn't be moved unless an arbitration proceeding was

180 (2012) EWHC 689 (Comm)
181 MANU/DE/0965/2017

182 (1999) 2 SCC 479

already pending. Hence, if a party sought interim relief, he had to commence arbitration first, and then prefer an application under Section 41(b). However, the Arbitration Act of 1996 adopted Section 9 from the UNCITRAL Model Law and granted wider powers under Section 9 so as to uphold the interest of the aggrieved party. Section 9 of the 1996 Act permits an application for interim relief "before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced". The Hon'ble Supreme Court of India, in Sundaram Finance reversed a decision of the Madras High Court that held there is no difference between the 1940 Act and the 1996 Act. According to the Hon'ble Supreme Court, importance has to be placed on the wording of the section that reads as "before or during arbitral proceedings". The Court interpreted this to mean that it's a two-stage relief, i.e. one before, and one during arbitral proceedings. A literal interpretation was given to the wordings in Section 9 and that was clarified in the judgment.

Though the decision of the Supreme Court is correct and in tune with the 1996 Act, the concern expressed by the Madras High Court in its judgment, that a party securing interim relief in its favour may unnecessarily delay commencement of arbitral proceedings and may drag its feet, was unfortunately found to be true. In order to combat this loophole, the Law Commission in its 246th Report recommended that arbitration proceedings shall commence within 60 days from the date of grant of interim relief, failing which, the relief shall stand vacated. The 2015 Amendment, vide insertion of Section 9(2) extended the time limit to 90 days, but did not mention about automatic vacating of interim relief if such time limit expires.

Upon the commencement of arbitral proceedings, interim reliefs can be sought by the parties before the arbitral tribunal. The court would only entertain a petition under Section 9 if the party is able to prove that the relief granted by the tribunal would be insufficient and that the court

would have wider powers to grant relief.

In situations where third party rights are involved such as an injunction against the encashment of bank guarantees, an application for interim reliefs would lie only before a court even if an arbitral tribunal were constituted. The insertion of such a time-bound mechanism aims at limiting the role of the courts in granting interim reliefs once the arbitral tribunal has been constituted as it was deemed suitable to empower the tribunal to hear all applications pertaining to interim measures, upon its constitution. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all applications for interim protection183.

In a judgment of the Delhi High Court in *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd*, the question before the court was whether the court would have to relegate an application for interim measures pending before it, to an arbitral tribunal upon its constitution. The Division Bench of the Delhi High Court upheld the finding of the Single Judge and observed that,

"If the argument were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application becomes coram non-judice, it would create a serious vacuum as there is no provision for dealing with pending matters. All the powers of the Court to grant interim measures before, during the arbitral proceedings or at any time after the making of the arbitral award but prior to its enforcement in accordance with Section 36 are intact (and, have not been altered by the amendment) as contained in Section 9(1) of the said Act. Furthermore, it is not as if upon the very fact that an

183 Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996 (Report No. 246, August 2014) 44 <http://lawcommissionofindia.nic.in/reports/report246.pdf> accessed 22 December 2018

Arbitral Tribunal had been constituted; the Court cannot deal with an application under sub-section (1) of Section 9 of the said Act. Section 9(3) itself provides that the Court can entertain an application under Section 9(1) if it finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.... there is no provision under the said Act which, even as a transitory measure, requires the Court to relegate or transfer a pending Section 9(1) application to the Arbitral Tribunal, the moment an Arbitral Tribunal has been constituted."184

Thus, to avoid a situation where a party is left without an interim order in respect of proceedings for interim measures pending before a court which have not been transferred to the tribunal upon its constitution, the court may continue with the same and grant appropriate reliefs, where necessary.

In *Datar Switchgears Ltd. v. Tata Finance Ltd.*185, it was held that the right to appoint an arbitrator under Section 11(6) does not get automatically forfeited after 30 days. Unlike Sections 11(4) and 11(5), where the time limit prescribed is thirty days for the appointment of an arbitrator by the party, Section 11(6) does not prescribe any time limit. A question then arises whether the party, to whom a demand for appointment is made for purposes of Section 11(6) but does not appoint an arbitrator within thirty days, forfeits his right to do so. The Court in this case answered in the negative and held that in cases arising under Section 11(6), the right to make appointment is not forfeited but continues, even though the opposite party has not made an appointment within 30 days of demand. However, a demand has to be made before an application is filed under Section 11 seeking appointment of an arbitrator.

184 *Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.*, 2017 SCC OnLine Del 7226 (para 25, 27)
185 (2000) 8 SCC 151

The right of the opposite party ceases only if the opposite party has not made an appointment within 30 days of demand. This position has been repeatedly affirmed by the Court and is now formally embedded in Indian arbitration law.186

In *P. Anand Gajapathi Raju v. P.V.G. Raju* reported in (2000) 4 SCC 539, it was held that if the conditions of Section 8 are satisfied, it is mandatory to refer the parties to arbitration. Under the old Arbitration Act of 1940, more particularly under Section 34, the Court had the discretion to either continue or stay the suit when legal proceedings are commenced by a party to an arbitration agreement. Section 8 of the Arbitration Act of 1996 did away with the old Section 34. The objective being minimal intervention of the courts envisaged by the Act of 1996, the Court in *Anand Gajapathi Raju* (supra) held that the language of Section 8 is absolute in nature and that once the requirements of Section 7 are satisfied by the arbitration agreement, the Court will obligatorily have to refer the parties to arbitration as per the terms of the arbitration agreement.

The conditions that are required to be satisfied under sub-sections (1) and (2) of Section 8 before the Court can exercise its powers are:

a) The validity of an arbitration agreement;

b) A party to the agreement brings an action before a judicial authority against the other party;

c) Subject matter of the action that is brought is the same as the subject matter of the arbitration agreement;

186 *Punj Lloyd Ltd. v. Petronet MHB* (2006) 2 SCC 638; *Deep Trading Company v. Indian Oil Corporation*
(2013) 4 SCC 35; *North Eastern Railway v. Tripple Engineering Works* (2014) 9 SCC 288.

d) The other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

This view has been repeatedly followed by the Supreme Court in many cases187.

4.9 Conclusion

The 2015 Amendment has negated the effect of the *Saw Pipes* judgment in three important ways. Firstly, Section 28 (3) has been amended and the words "in accordance with the terms of the contract" have been omitted. This overrules that part of the *Saw Pipes* judgment which says that any contravention of the terms of the contract renders the award violative of Section 28(3) of the Act and is therefore subject to the Court's interference under Section 34.

Secondly, two Explanations have been added to Section 34 (2) (b), which say that:

(1) An award is in conflict with the public policy of India only if the award: "was induced or affected by fraud or corruption or in violation of Section 75 (confidentiality) or Section 81 (admissibility of evidence of conciliation proceedings in other proceedings), is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality and justice; [Explanation 1]

(2) It has been clarified that no review on merits can be done by a court for determining whether the award is in contravention with the fundamental policy of India. [Explanation 2]

187 *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums* (2003) 6 SCC 503; *Branch Manager, Magma Leasing and Finance Ltd. v. Potluri Madhavilata* (2009) 10 SCC 103; *Sundaram Finance Ltd. v. Thankam* AIR 2015 SC 1303

Thirdly, Section 34 (2A) has been added to provide that an award in a domestic arbitration can be set aside if it is vitiated by patent illegality appearing on the face of the award. However, it has been clarified that an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciation of evidence.

All of the afore-discussed cases summarise the shifting attitude and welcome environment in India in matters of international commercial arbitration. The State High Courts and Supreme Court in most of these cases refrained from interfering with an arbitral process that had already commenced or for enforcement of an award where the arbitration was foreign-seated. The Supreme Court has narrowed the scope for challenging the enforcement of a foreign award by clearly laying down each of the grounds provided under Section 48 of the Act. The Hon'ble Supreme Court has taken a holistic view and has not just considered and limited its enquiry to the Indian judgments and precedents, but has also analysed foreign judgements and the outlook of courts in favourable arbitration destinations and placed reliance on judgments of those jurisdictions to arrive at an amicable global consensus on a number of issues that are involved in challenging enforcement of foreign arbitral awards.