

## ARBITRATION LAW IN INDIA

### KEY JUDGMENTS AND UPDATES FOR THE YEAR 2021



Arbitration as a method of alternative dispute resolution is gaining ground as compared to litigation in courts due to its efficiency, efficacious and expeditious nature. The (Indian) Arbitration and Conciliation Act, 1996 (**Arbitration Act**) has been modelled on lines of the United Nations Commission on International Trade Law (**UNCITRAL**) framework of laws with the idea to modernize Indian arbitration law and bring it in line with the best global practices.

In 2021, several noteworthy judgments have been rendered by the Supreme Court of India (**SC**) and various High Courts (**HC**) to discuss the legal position and applicability of provisions of the Arbitration Act. The Indian Government also amended the Arbitration Act to ensure that alternative dispute resolution mechanisms under Indian Laws meet international standards.

They key judgments and updates on arbitration law for the year 2021 in India are summarised below:

**1. Whether an arbitration agreement would be non-existent in law, invalid or un-enforceable, if the underlying contract was not stamped as per the relevant stamp law, referred to a constitution bench.**

In *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Ors*, (passed on 11 January 2021), the SC held that the arbitration agreement would not be rendered invalid, un-enforceable or non-existent, even if the substantive contract is not admissible in evidence or cannot be acted upon on account of non-payment of stamp duty. However, the SC referred the said issue to be decided by a Constitution Bench of Five Judges, because of conflict with an earlier judgment.

**2. Arbitration Act amended.**

On 10 March 2021, the Indian Government passed the Arbitration and Conciliation (Amendment Act), 2021. The significant changes brought by this amendment are:

- a. The amendment allows an automatic stay on enforcement of any arbitral awards if the courts find any clear evidence that the award is influenced by fraud or corruption; and
- b. The Eighth Schedule from the Arbitration Act, which specified the arbitrator's qualifications, experience, and norms to be followed, has been omitted.

**3. Appeals against an order of the court under the Arbitration Act may be condoned even beyond 120 days.**

In *Government of Maharashtra v. Borse Brothers Engineers & Contractors Pvt. Ltd.*, (passed on 19 March 2021), the SC held that in case there is a delay in filing an appeal against an order of the court under Arbitration Act, the delay may be condoned even beyond 120 days. However, such delay may be condoned only in exceptional cases.

**4. By mutual agreement, parties to arbitration can change the seat of arbitration.**

In *Inox Renewables Limited v. Jayesh Electricals Limited* (passed on 13 April 2021), the SC held that a change in the 'venue' of arbitration by mutual agreement of the parties will amount to a change in the juridical 'seat' of arbitration.

**5. Two Indian parties can agree on a foreign seat of arbitration.**

In *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*, (passed on 20 April 2021), the SC held that two Indian parties can choose a foreign arbitral seat and that parties to such foreign seated arbitrations will be able to obtain interim relief from the Indian courts. To read our detailed article on the judgment, please click [here](#).

**6. SC issues directions required to be followed by all courts executing decrees for expediting the execution of decrees.**

In *Rahul S Shah v. Jinendra Kumar Gandhi and Ors.* (passed on 22 April 2021), the SC issued directions that are required to be followed by all executing courts in order to carry out the execution of decrees expeditiously and while issuing such directions observed that an executing court must dispose of the execution proceedings within 6 (six) months from the date of filing which may be extended only by recording reasons in writing for such delay.

**7. Arbitral Tribunal cannot go beyond the terms of the contract between the parties.**

In *Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd*, (passed on 16 June 2021), the Bombay HC set aside an arbitral award that went beyond the terms of the agreement between the parties. The Bombay HC held that the arbitrator's jurisdiction is limited to the agreement and can pass an order which may be the subject-matter of reference, unless the parties, by mutual consent agree to enable the arbitrator to settle a dispute by applying what they conceive is 'fair and reasonable'.





**8. A micro and small enterprise in order to avail benefits under the MSME Development Act, 2006 should have registered itself under the provisions of the said act as on the date of entering a contract**

In *Silpi Industries v. Kerala State Road Transport Corporation* (passed on 29 June 2021), the SC clarified that the provisions of Indian Limitation Act, 1963, will apply to arbitration proceedings initiated under the MSME Development Act, 2006 (“**MSMED Act**”) and counter claims are maintainable by the opposite party in such arbitration proceedings. The SC further held that to avail benefits of the provisions of the MSMED Act, the micro and small enterprises should have registration under the MSMED Act as on the date of entering into the contract.

**9. Delhi HC grants anti-enforcement injunction.**

In *Interdigital Technology Corporation & Ors. v. Xiaomi Corporation & Ors.* (passed on 29 June 2021), the Delhi HC granted a first of its kind injunction against enforcement of a foreign court’s directions. The Delhi HC was dealing with a suit instituted by Interdigital Technology Corporation seeking injunction against Xiaomi Corporation for alleged infringement of patents of Interdigital. To read our detailed article on the judgment, please click [here](#).

**10. Indian courts cannot modify an arbitral award while hearing an application to set aside the award.**

In *Project Director, National Highway Authority of India v. M. Hakeem* (passed on 27 July 2021), the SC held that the court hearing a petition to set aside an arbitral award is not empowered to modify the award, given the limited scope of judicial interference under the provisions of the Arbitration Act.

**11. Emergency Arbitration awards are enforceable in India.**

In *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd.* (passed on 06 August 2021) the SC held that an award by an emergency arbitrator in an India-seated arbitration constitutes an order under the Arbitration Act and will be enforceable in India. To read our detailed article on the judgment, please click [here](#).

**12. Foreign arbitral awards can be binding against non-signatories to the arbitration agreement.**

In *Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Ltd.* (passed on 10 August 2021), the SC held that a foreign award would be enforceable against a non-signatory who is



acting as an alter-ego to the signatory to the arbitration agreement. The SC, reemphasizing the narrow grounds on which enforcement of a foreign award could be refused by courts, held that the defence of being a non-signatory to the arbitration agreement is not a ground for Indian courts to refuse enforcement of a foreign award.

**13. Prior consent of Central Government is not required under the civil procedure code by a foreign state at the time of enforcing an arbitral award emerging from a commercial transaction.**

In *KLA Const Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan* (passed on 13 September 2021), the Delhi HC held that prior consent of central government is not necessary under civil procedure code to enforce an arbitral award against a foreign state and that a foreign state cannot claim sovereign immunity against enforcement of an arbitral award arising out of a commercial transaction.

**14. Courts can refuse to refer dispute to arbitration, where the dispute does not fall within the ambit of the arbitration agreement.**

In *DLF Homes Developers Ltd. v. Rajapura Homes Pvt. Ltd. and Anr* (passed on 22 September 2021), the SC held that even when an arbitration agreement exists between the parties, it would not prevent the Court to make a *prima facie* review and decline a prayer for reference to arbitration, if the dispute in question does not fall within the ambit of the arbitration agreement.

**15. Right of a party to invoke arbitration cannot be restricted to period lesser than that provided under law.**

In *Sagar Constructions v. Govt. of NCT, Delhi*, (passed on 06 October 2021), the Delhi HC held that a party to an arbitration agreement cannot restrict the right of the other party to invoke arbitration to a lesser period than what is provided under law.





**16. Merely having an explicit clause in an agreement will not be sufficient to make 'time essence of contract'**

In *Welspun Specialty Solutions Limited v. ONGC* (passed on 13 November 2021), the SC held that merely having an explicit clause in a contract may not be sufficient to make time the essence of the contract and the determination of 'whether time is of the essence in a contract', has to be culled out from the reading of the entire contract as well as the surrounding circumstances.

**17. Right of reference to arbitration cannot be reserved to one party only**

In *Tata Capital Finance Ltd. v. Shri Chand Construction and Apartment Pvt. Ltd.* (passed on 24 November 2021), the Delhi HC held that an arbitration agreement that confers unequal power on one party to unilaterally abandon the arbitration proceedings, would be invalid in law. Further, an arbitration agreement which provides for arbitration of the claims of one party and some other remedy for the claims of the other party would also be invalid in law.

### Our Thoughts

The arbitration landscape in India is undergoing a major reform, with both the Indian Government as well as the judiciary focused on making India an arbitration friendly regime. The SC's ruling that Indian parties can choose a foreign seat of arbitration or that award of an emergency arbitrator would be enforceable under the Arbitration Act were both welcome developments. The courts have also refused to stay arbitration awards or stop their enforcements unless the arbitrators ruling strictly falls within the limited grounds for setting aside the award, as enumerated in the Arbitration Act. If the arbitration law continues to evolve in resolving commercial disputes in India in a timely and efficient manner, India's performance on enforcement of contracts will significantly improve and risks associated with investments in India will significantly reduce.

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