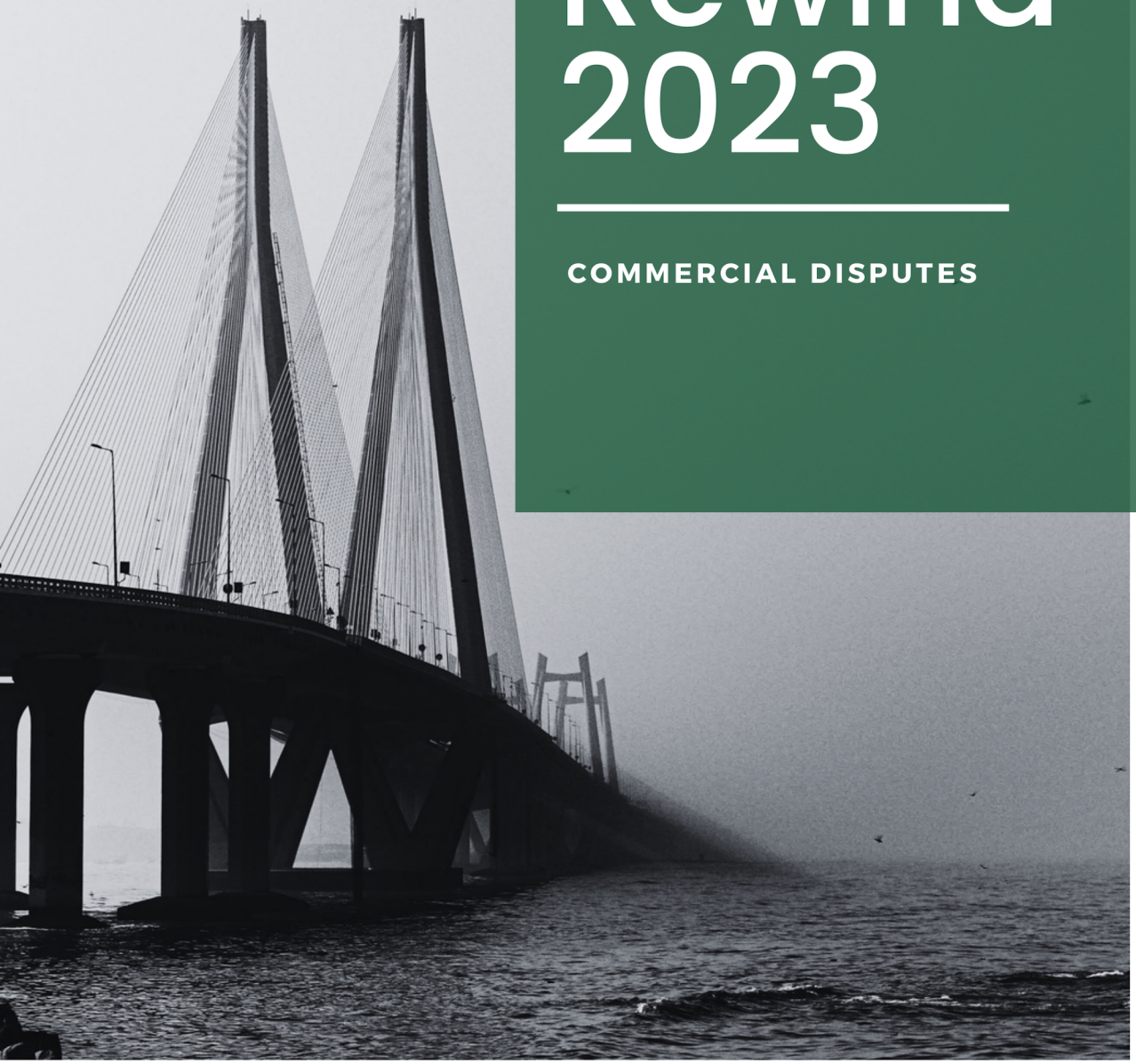
ACUITY LAW

Delivering Timely and Valuable Advice Across Industries

Yearly Rewind 2023

COMMERCIAL DISPUTES



INDEX

COMMERCIAL DISPUTES

The preceding year witnessed a transformative shift in the legal landscape both in terms of the substantial and the procedural aspects of commercial dispute resolution. The Indian judiciary has adopted a proactive stance and has been striving to resolve areas of legal ambiguity where the legislature has either been silent or has failed to clarify the uncertainties linked to a statutory provision.

The long-standing conundrum of arbitration clauses in unstamped agreements

On 13 December 2023, the Supreme Court of India (**Supreme Court**), in a landmark seven-judge bench decision titled *In Re: The Interplay between arbitration agreements under the Arbitration and Conciliation Act, 1996, and the Indian Stamp Act, 1899 (**In Re: The Interplay**),* resolved a longstanding legal debate. This judgment addressed the enforceability of arbitration clauses in agreements that are inadequately stamped /unstamped.

The Court ruled that while arbitration clauses in agreements lacking proper stamping are enforceable, they are inadmissible in evidence until the deficiency in stamping is corrected, as per the Indian Stamp Act, 1899. Importantly, the Court clarified that issues related to stamping do not fall under the purview of the courts at a pre-referral stage. Instead, the referral court's role is confined to examining the existence of the arbitration agreement. Objections concerning the stamping of the agreement are to be decided by the arbitral tribunal, establishing a clear division of jurisdiction between judicial and arbitral tribunals in such cases.

The triumph of 'group of companies' doctrine

The group of companies doctrine has been a subject of debate in India. This doctrine was first acknowledged by the Supreme Court in the case of *Chloro Controls (India) Pvt. Ltd. v. Severn Trent Water Purification Inc & Ors.* Subsequently, Indian courts have relied upon the said doctrine to compel non-signatory group companies, especially parent companies, to participate in arbitrations and fulfill arbitral awards, despite having abstained from signing the underlying arbitration agreement.

In 2022, the Supreme Court issued two notable judgments with diverging views on the doctrine. The first, in *Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd. & Anr.* (**ONGC Decision**), saw the Court uphold the doctrine's relevance in Indian law and set aside an arbitral award for not considering the doctrine's applicability. However, in *Cox & Kings Ltd. v. SAP India Pvt. Ltd. & Anr.*, the Court scrutinized the doctrine, doubting its validity in light of well-settled principles such as party autonomy and distinct corporate personality. These conflicting stands led to the referral of the doctrine's foundational aspects, scope, and application to a larger constitutional bench of the Supreme Court.

The constitutional bench of the Supreme Court in its judgment in December 2023, has resolved these ambiguities, stipulating that factors outlined in the ONGC Decision should be collectively considered when applying the doctrine. The key factors include the mutual intent of the parties, the relationship of the non-signatory with a signatory party, the commonality of the subject matter, the composite nature of the transactions, and the contract's performance.

The Supreme Court emphasized the need for a fact-specific approach, acknowledging the intricacies of modern commercial transactions. Furthermore, the Supreme Court affirmed the retention of the group of companies doctrine in Indian arbitration jurisprudence, recognizing its importance in discerning parties' intentions in complex transactions involving multiple entities and agreements. Additionally, it ruled that at the referral stage, courts should allow arbitral tribunals to determine whether non-signatories are bound by the arbitration agreement, thereby maintaining the balance between judicial intervention and autonomy of arbitral tribunals.

Unilateral appointment of arbitrators – Calcutta High Court's deviation

Under the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) the Seventh Schedule specifies relationships that may compromise an arbitrator's eligibility due to potential conflict of interest. Previously, any such relationship would render the arbitrator or their nomination ineligible, based on the legislative rationale that certain relationships could unfairly advantage one party over another, contradicting principles of arbitrator independence.

The Delhi High Court, in *Taleda Square Pvt. Ltd. v. Rail Land Development Authority*, emphasized the crucial role of an arbitral tribunal's independence and impartiality in upholding the integrity of arbitral proceedings. The Court ruled that parties should not be forced to choose their nominee arbitrators from a list maintained by the opposing party. This was further reinforced in *Margo Networks Pvt. Ltd. & Anr. v. Railtel Corporation of India Ltd.,* where the Delhi High Court deemed it impermissible for one party to have the right to appoint a majority of the arbitrators.

However, in *Mcleod Russel India Ltd. v. Aditya Birla Finance Ltd. & Ors.,* (**Mcleod decision**) the Calcutta High Court diverged from this trend. It ruled that unilateral arbitrator appointments are not inherently invalid if the parties have consented in writing and participated in the proceedings despite knowing about the unilateral appointment *(read our article **here**)*.

Subsequently, in the case of *J.S.R. Constructions v. National Highway Authority of India and Anr.,* the Delhi High Court ruled that a party is not permitted to unilaterally appoint the presiding arbitrator when the nominee arbitrators fail to agree on a candidate. The Court found that the practice of allowing the Director General of one of the parties to appoint the presiding arbitrator in such circumstances to be bad in law. The judgment emphasized that individuals who are themselves ineligible to be arbitrators should not participate in the appointment process. This procedure was criticized for lacking a balanced approach, inherently skewing the formation of the arbitral tribunal in favor of one party.

Currently, the McLeod decision stands out as a departure from the settled position of law with regards to unilateral appointment of arbitrators. Subsequent High Court rulings have generally aligned with the law laid down on unilateral appointments and suggesting that the McLeod decision may remain an exception in this legal area.

Extension of mandate of an arbitral tribunal - divergent views of High Courts

The interpretation of Section 29A(4) of the Arbitration Act concerning whether courts can extend the mandate of an arbitral tribunal after its termination, has resulted in varied opinions from different High Courts, creating a legal quandary.

The Arbitration Act provides for a 12-month deadline for domestic arbitral proceedings from the completion of pleadings. This period can be extended by mutual consent for an additional six months. Section 29A(4) allows for the court to extend this 18-month period, either before or after its expiry, but does not specify the landmark for seeking such an extension.

The Calcutta High Court in *Rohan Builders (India) Pvt. Ltd. v. Berger Paints India Ltd.*, and the Patna High Court in *South Bihar Power Distribution Company Ltd. v. Bhagalpur Electricity Distribution Company Pvt. Ltd.*, have interpreted this to mean that extension applications must be filed before the tribunal's mandate expires. On the other hand, the Delhi High Court in *ATC Telecom Infrastructure Pvt. Ltd. v. Bharat Sanchar Nigam Ltd.,* ruled that barring applications post-expiration defeats the Arbitration Act's purpose, advocating for flexibility.

The Bombay High Court, in the case of *Nikhil H. Malkan & Ors. v. Standard Chartered Investment and Loans (India) Bank*, aligned with Delhi High Court's view, differing from the Calcutta and Patna High Court's view. This inconsistency among High Courts on the legal interpretation necessitates a clarifying intervention from the Supreme Court.

Uncertainty on interim reliefs when arbitration initiated under MSME Act

Section 18 of the Micro Small and Medium Enterprises Development Act, 2006 (**MSME Act**) provides that whenever any amount due to a micro or small enterprise is in dispute, reference for adjudication of such dispute may be made to the Micro and Small Enterprises Facilitation Council (**Council**). The Council shall conduct conciliation of such disputes. Where the conciliation does not lead to any settlement, the Council itself shall either conduct arbitration proceedings in relation to the dispute or refer the dispute to any institution providing alternate dispute resolution services. The Arbitration Act shall apply to such proceedings. However, in case of inconsistency between the two Acts, the Supreme Court in 2022 in *Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods (P) Ltd.* held that given MSME Act is a special legislation, it shall have an overriding effect on the application of the Arbitration Act.

The issue of seeking interim reliefs before, during and after the arbitration proceedings before the Council presents a legal quandary, especially since the MSME Act lacks explicit provisions for such a remedy. This gap in the legislation leaves parties without a clear course of action under the MSME Act. In 2022, the Madhya Pradesh High Court in *M/s Ujas Associates v. M/s KJS Cement (India) Ltd*. ruled that interim reliefs under the Arbitration Act are only accessible after the conclusion of conciliation proceedings under the MSME Act. Conversely, in 2023, the Calcutta High Court in the case of *Indian Oil Corporation Ltd. & Anr. v. Union of India & Ors.* took a broader view. It ruled that the option for interim reliefs is always available when an arbitration agreement exists, regardless of whether the proceedings are under the MSME Act or the Arbitration Act.

While the Calcutta High Court has sought to reconcile the provisions of both Acts in a specific context, the broader legal question remains unanswered. This uncertainty highlights the need for further legal clarity on the interplay between these two significant legislations.

Arbitrability of oppression and mismanagement disputes under Indian law

The Bombay High Court's decision in *Anupam Mittal v. People Interactive (India) Pvt. Ltd. & Ors*. has brought to the forefront the complex interplay between international commercial arbitration and national legal framework. The Bombay High Court issued an anti-enforcement injunction, preventing the defendants from enforcing a permanent anti-suit injunction granted by the Singapore High Court, which had restrained Anupam Mittal from pursuing claims of oppression and mismanagement before the National Company Law Tribunal, Mumbai (**NCLT**), citing an existing arbitration agreement *(read our views **here**)*.

Subsequently, the NCLT issued an anti-arbitration injunction to halt ongoing Singapore-seated arbitration proceedings before the International Chamber of Commerce (**ICC**), highlighting the non-arbitrability of such disputes under Indian law. This decision is starkly in contrast with the Singapore Court's findings that arbitrability of disputes must be determined as per the law of the arbitration agreement, which was Singaporean law in this case.

India's stance on the non-arbitrability of oppression and mismanagement disputes, diverging from majority of countries, leads to the unpredictability for commercial parties engaged in cross-border transactions. The judgment has necessitated a need for parties to clearly define the law governing their arbitration agreements to mitigate such uncertainties.

Strengthening the enforceability of consent awards in arbitration

Arbitral proceedings do not always lead to a formal adjudication of disputes. Often, parties opt for a settlement during the arbitration process leading to a consent award. Section 30 of the Arbitration Act acknowledges such consent awards in India-seated arbitrations. However, the enforceability of consent awards from foreign jurisdictions have been a subject of debate.

The Delhi High Court's ruling in *Nuovopignone International SRL v. Cargo Motors Pvt. Ltd. & Anr*. is a landmark decision in this context. Adopting a pro-arbitration stance, the Delhi High Court dismissed the argument that foreign consent awards are unenforceable under the Arbitration Act treating them at par with

domestic consent awards. This judgement reinforces the Indian courts' commitment to enforcing consent awards and discouraging parties from undermining the validity of arbitral awards based on settlement / agreed terms.

Bombay High Court upholds substantive rights over procedural formalities in arbitration

In the case of *Palmview Investments Overseas Ltd. v. Ravi Arya and Ors.*, the Bombay High Court emphasized the primacy of substantive rights over procedural formalities in arbitration proceedings. The Court ruled that the requirement for a company to pass a board resolution authorizing an individual to initiate legal action is a procedural formality. Consequently, any shortcomings in such a resolution are deemed procedural irregularities, which should not impede the substantive rights of a party. The tribunal is empowered to allow a party to rectify these defects, and thus, a mere deficiency or defect in authorization cannot be a basis for dismissing a party's claims.

This judgment marks a significant step towards fostering a more equitable and pragmatic arbitration environment. By distinguishing between procedural irregularities and substantive rights and permitting the correction of the former, the Court has reinforced the fundamental principles of justice within the arbitration process *(read our article **here**)*.

Delhi High Court broadens the doctrine of 'piercing the corporate veil'

In *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation*, the Delhi High Court significantly broadened the application of the doctrine of piercing the corporate veil. The Court ruled that this doctrine extends beyond instances of fraud or evasion of legal obligations, and also encompasses cases where equity demands it to achieve justice. This ruling is particularly relevant in today's complex corporate landscape, characterized by multi-layered holdings and structures *(read our views **here**)*.

The Delhi High Court's decision equips parties with a powerful tool to enforce their claims. This decision by the Delhi High Court is currently under review before the Supreme Court and it will be interesting to see if the Supreme Court will endorse this expansion of the doctrine or revert to the traditional and relatively stringent criteria for its application. The outcome could significantly influence how corporate structures are navigated and scrutinized in legal proceedings.

'Writ' jurisdiction not bound by 'seat'

In arbitration agreements, the 'seat' is defined as the legal jurisdiction that governs the arbitration proceedings. 'Jurisdiction' refers to a court's authority to hear and decide cases based on the subject matter and applicable laws. Specifically, in the context of a writ court, 'jurisdiction' determines the court's legal capacity to adjudicate certain types of cases, such as constitutional or administrative matters *(read more **here**)*.

Complexities emerge when an arbitration agreement specifies a 'seat' and, simultaneously, another court holds 'jurisdiction' under constitutional law. In *Durgapur Freight Terminal Pvt. Ltd. & Anr. v. Union of India Ministry of Railways & Ors.*, the Delhi High Court ruled that a writ petition's maintainability is exclusively determined by constitutional law norms, independent of the designated seat under the arbitration agreement. A writ is maintainable if the cause of action arises, wholly or partly, within the territorial jurisdiction of the writ court, thus negating the influence of arbitration agreements on the jurisdictional authority of writ courts *(read our views **here**)*.

Delhi High Court on arbitration in Intellectual Property Rights (IPR) disputes

The Delhi High Court in *M/s. Liberty Footwear Company v. M/s. Liberty International* clarified that certain IPR disputes can be resolved through arbitration. In this case, the Delhi High Court ruled that the dispute was about enforcing a right to use the trademark within the scope of a partnership deed between the parties, rather than about the trademark's registration or grant. As a result, it fell under the category of arbitrable disputes and the Court allowed the matter to be resolved through arbitration as per the arbitration clause in the partnership deed.

This ruling is significant as it shows that not all IPR disputes need to go to court; some can be settled through arbitration, depending on the nature of the dispute *(read our views **here**)*.

Mediation Act 2023: Codifying the future of dispute resolution

Traditionally, Indians have leaned heavily on court-driven litigation and, to a lesser extent, arbitration for settling commercial disputes. The role and effectiveness of mediation in facilitating amicable resolutions, however, has been significantly underutilized and undervalued, with its application largely confined to family disputes and matters involving nominal amounts.

Mediation serves as an alternate dispute resolution method that avoids adversarial proceedings. It involves a structured, voluntary, and interactive negotiation facilitated by an impartial mediator who employs specialized communication and negotiation skills to assist parties in settling their disputes. This process is tailored to the specific interests, needs, and rights of the disputing parties. On 15 September 2023, the Government of India brought into force The Mediation Act, 2023, to formalize the framework for mediation as a distinct alternate dispute resolution mechanism *(read more **here**)*.

According to the National Judicial Data Grid, approximately 11 million civil disputes remain unresolved in Indian courts as of December 2023 *(read over **here**)*. In the fiscal year from April 2022 to March 2023, a record 412,990 cases were directed to mediation, resulting in the resolution of 92,446 cases *(read more **here** and **here**)*. This marks a success rate of 22.38%. The trend towards mediation has continued to rise, with 49,618 cases successfully mediated between April and September 2023, highlighting an increasing reliance by parties on mediation in India *(read more **here**)*.

Shift from ad hoc to institutional arbitration

In India, there's a marked preference for *ad hoc* arbitrations, with parties frequently seeking court intervention for appointment of arbitral tribunals as per the Arbitration Act. However, recent initiatives have been focused on enhancing institutional arbitration in the country, recognized for its numerous benefits over *ad hoc* approaches. Institutional arbitrations offer established procedural rules, aids in arbitrator appointments, and provides administrative support.

India hosts several arbitral institutions, including the International Centre for Alternative Dispute Resolution (**ICADR**) with its main office in Delhi and branches in Hyderabad and Bangalore, and the Nani Palkhiwala Arbitration Centre in Chennai. The Indian Council for Arbitration (**ICA**), established in 1965, also operates nationally. The Mumbai Centre for International Arbitration (**MCIA**) is a recent addition, established by the Government of Maharashtra alongside domestic and international stakeholders. Global entities like the Singapore International Arbitration Centre (**SIAC**), the ICC, and the Kuala Lumpur Regional Centre for Arbitration (**KLRCA**) have a presence in India, with SIAC and ICC maintaining liaison offices in Mumbai and Delhi, respectively.

While we anticipate the release of statistics regarding institutional arbitrations held in the year 2023 by institutional arbitration centers, the data on *ad-hoc* arbitrations remains undisclosed due to confidentiality reasons. The MCIA has published its 2022 annual report, showcasing promising statistics *(read more **here**)*. The report reveals a significant 20% increase in caseload compared to the previous year and a total dispute value exceeding 1 billion USD. Other notable achievements include 24 new filings, swift resolution of two emergency arbitrations within 14 days, completion of 92% of arbitrations within 18 months. Additionally, the MCIA has made strides in gender diversity, appointing women as 38% of its arbitrators. These developments are indicative of India's evolving status as a pro-arbitration jurisdiction, reflecting the growing sophistication and efficiency of its arbitration landscape.

Wishlist for 2024

2023 is a pivotal year in determining India's reputation as a pro-arbitration jurisdiction. Should this year mirror the successes of 2022 *(read our views **here**)*, it would affirm that India has indeed passed a critical test, reflecting the collective efforts of courts, the government, and arbitral institutions over the past decade to establish the

country as a mature arbitration jurisdiction. Nonetheless, as with each passing year, there remains a set of aspirations and goals for 2024 to refine and strengthen India's arbitration framework.

Extension of mandate of arbitral tribunals

The Indian legal landscape is currently facing a significant point of contention regarding the timing for applications to extend the mandate of arbitral tribunals. As mentioned above, different High Courts across the country have diverged in their interpretations of when such applications should be made under the Arbitration Act. However, this issue is now under the scrutiny of the Supreme Court in the case of *Vridavan Advisory Services LLP v. Deep Shambhulal Bhanusali*. Notably, the Supreme Court has stayed the order of the Calcutta High Court. The outcome of this case is expected to have substantial implications for the functioning and mandate of arbitral tribunals.

As the Supreme Court is yet to establish a definitive ruling on this matter, it is currently prudent for parties to err on the side of caution. To avoid potential legal complications, it is advisable for parties to seek an extension of the arbitral tribunal's mandate before it expires, rather than after the statutory period has lapsed.

Success of mediation in India

According to a 2020 report of Vidhi Centre for Legal Policy *(read more **here**)*, in Italy, out of 1,748,384 new civil and commercial cases in 2015, 139,870 were subject to mandatory mediation with a 44% success rate, and 16,288 were voluntarily mediated with a 60% success rate. As per the report, the United States of America has increasingly adopted mandatory mediation to reduce court caseloads, with many courts and federal agencies implementing mandatory programs. Australia's federal system uses mandatory mediation in various civil disputes, with high settlement rates in cases like retail tenancy disputes, achieving over 80% settlement. These examples highlight how mandatory mediation can effectively reduce court workloads and expedite dispute resolution.

Mediation offers considerable promise, and there is optimism that it will thrive in India. However, it is important to recognize that mediation is not a one-size-fits-all solution for the challenges faced by an overburdened court system. It should be viewed as one component in a broader strategy of legal reforms aimed at enhancing the health of our judicial system. Experience from various jurisdictions has shown that mediation can significantly alleviate the workload of courts while offering an efficient avenue for dispute resolution.

Resolving third-party funder liability: A Supreme Court decision awaited

The Supreme Court is set to address the contentious issue of third-party funder's (**TPF**) liability in the case of *SBS Holdings, Inc. v. Tomorrow Sales Agency Private Ltd. & Ors*[*]. This follows a significant ruling by the Division Bench of the Delhi High Court, which recognized the role of TPF in enhancing access to justice for claimants in arbitration cases. The Delhi High Court had ruled that a TPF, not being a party to the arbitration agreement, proceedings, or award, should not bear liability for an arbitral award and, consequently, is not obligated to provide security for its enforcement. The Supreme Court is set to decide the issue regarding liability of a TPF where a funded party is obligated to pay adverse costs in a foreign seated arbitration.

[*]*Disclaimer: Acuity Law is representing the Petitioner in the said case before the Supreme Court.*

Lack of enforceability of foreign-seated emergency arbitration in India

Parties are increasingly relying upon emergency arbitration procedures for seeking interim awards prior to constitution of the arbitral tribunal. Given the short time period within which an emergency arbitrator is required to provide the findings, a number of parties prefer to approach an emergency arbitrator instead of approaching domestic courts.

The Supreme Court, in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. and Ors.*, held that an emergency arbitrator's order in an Indian-seated arbitration is enforceable in the country, akin to any interim award passed by an arbitral tribunal *(read our views **here**)*. However, the enforceability of such an award in foreign-seated arbitrations is subject to debate. Under Part II of the Arbitration Act, which governs foreign-

seated arbitrations, there is no mechanism for enforcing an interim award such as an emergency arbitrator's order.

Indian parties in foreign seated arbitrations have been relying upon the emergency arbitrator's order to seek interim relief from domestic courts under Part I of the Act. This was explored in the Delhi High Court's 2016 *Raffles Design International India Pvt. Ltd. & Anr. v. Educomp Professional Education Ltd. & Ors.* case, involving a Singapore-seated arbitration. The Court concluded that it could not enforce the foreign-seated emergency arbitrator's order directly but could grant interim relief independently, provided the parties had not excluded Part I's applicability to their foreign-seated arbitration.

The Calcutta High Court adopted a similar approach in its 2023 judgment of *Uphealth Holdings Inc. v. Glocal Healthcare Systems Pvt. Ltd. & Ors.* where a party in a Chicago-seated arbitration sought for interim relief under Part I of the Arbitration Act before the Calcutta High Court. The Court acknowledged the lack of a specific provision for enforcing emergency arbitrator's orders in foreign-seated arbitrations. Nevertheless, it noted that if both parties participated in the emergency arbitration, consented to be bound by the emergency arbitrator's order, and if the order was legal and unchallenged, it should not be disregarded. The Court thus granted interim reliefs, treating the emergency arbitrator's order as an additional factor in its decision-making process.

Since a number of Indian parties are engaged in foreign-seated arbitrations, there is an urgent need for the legislature to consider amending the law to allow enforcement of interim awards / orders passed by foreign seated arbitral tribunals. Until then, parties may have to rely on this indirect approach, using the emergency arbitrator's award as a supplementary factor for Indian courts to consider while granting interim reliefs or approach Indian courts directly for obtaining interim reliefs.

Making India Online Dispute Resolution (ODR) ready

ODR is emerging as a transformative solution for India's dispute resolution challenges. Traditionally, resolving disputes in India has been confined to courtrooms, but the COVID-19 pandemic has accelerated the shift towards technology-driven alternatives. With artificial intelligence advancements, ODR can offer automated resolutions and cater to specific disputes, making it cost-effective, efficient, and less biased.

India's journey towards ODR readiness is promising, with judiciary support and legislative backing. In 2021, the Supreme Court launched India's first AI-driven research portal 'SUPACE/ - Supreme Court Portal for Assistance in Court's Efficiency. Through this portal, the Supreme Court intends to leverage machine learning to deal with the amount of data received in the filing of cases. in 2023, the Securities and Exchange Board of India (**SEBI**) amended various regulations *vide* the SEBI (Alternative Dispute Resolution Mechanism) (Amendment) Regulations, 2023 (**Amendment**) to introduce ODR mechanism for redressal of grievances *(read our views **here**)*. However, to fully realize ODR's potential, India needs to enhance digital literacy and infrastructure, train more ODR professionals, and encourage private sector innovation. By integrating ODR, India can significantly improve its legal ecosystem, making dispute resolution more efficient and accessible for all.

LEADERSHIP

SOUVIK GANGULY

MANAGING PARTNER & HEAD - CORPORATE PRACTICE

DENI SHAH

PARTNER- INDIRECT TAX & GLOBAL TRADE

VIDUSHI MAHESHWARI

PARTNER - DIRECT TAX

RENJITH NAIR

PARTNER - DISPUTES

CONTRIBUTORS

ALTAMASH QURESHI | BODHISATTWA MAJUMDER | RICHA PHULWANI | VISHESH GUPTA

For any queries, please feel free to contact us at al@acuitylaw.co.in

ACUITY LAW

506 Marathon Icon, Off Ganpatrao Kadam Marg,
Lower Parel, Mumbai 400013, India
+91 22 6666 7001
al@acuitylaw.co.in