

# THE ARBITRATION AND CONCILIATION ACT, 1996 – RECENT TREND

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Alternative dispute resolution (ADR) techniques like arbitration are used to settle conflicts out of the courtroom. One or more individuals (referred to as “arbitrators,” “arbiters,” or “Arbitral Tribunal”) will decide the issue and produce the “arbitration award.” An arbitration decision or award is enforceable in court like a civil court decree, and it is legally binding on both parties. Some of the important issues relating to The Arbitration and Conciliation Act, 1996 are being discussed in this write-up.

## Essential Features of An Arbitration Agreement

1. In **Bihar State Mineral Dev. Corpn. & Anr vs Encon Builders**<sup>1</sup> the Honorable Supreme Court cited the K.K. Modi v. K.N. Modi<sup>2</sup> & Ors decision and reduced the key components of an arbitration agreement to four:

The following constitute the fundamental components of an arbitration agreement:

- (1) There must be a difference in the present or the future in relation to some planned affair.
- (2) The parties must have the intention of using a private tribunal to resolve their disagreement.
- (3) To be bound by the tribunal’s ruling, the parties must express their agreement in writing.
- (4) The parties have to be in agreement.

2. The Hon’ble Supreme Court has ruled that even if the subject clause does not include some key elements of arbitration, such as the “final and binding” nature of the award, the Court must determine whether the parties have made it clear that they

intend to submit their dispute to arbitration and abide by the arbitrator’s ruling. So, the party autonomy in this regard deserves protection.<sup>3</sup>

## Competence Of Arbitral Tribunal to Rule On Its Own Jurisdiction

3. Section 16 of the Arbitration Act pertains to the competence of Arbitral Tribunal to rule on its own jurisdiction. The relevant sub-section 1 of Section 16 reads as under: -

*“Section 16 - Competence of Arbitral Tribunal to rule on its jurisdiction-*

- (1) *The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-*
  - (a) *an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
  - (b) *a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”*

4. It is clear from a simple reading of the aforementioned paragraph that the arbitral tribunal is qualified to make decisions on both its own jurisdiction and the existence or legality of the arbitration agreement. It also makes clear that an arbitration clause included in a contract must be viewed as a separate agreement from the contract’s other provisions and that the arbitration clause shall not automatically be deemed unlawful in the event the contract is declared void by the arbitral tribunal.

<sup>1</sup> (2003) 7 SCC 418

<sup>2</sup> (1998) 3 SCC 573

<sup>3</sup> Babanrao Rajaram Pund vs.M/s. Samarth Builders & Developers & Anr. Civil Appeal No. 6272 of 2022 (SC)

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### Doctrine Of Separability and The Doctrine Of Kompetenz-Kompetenz

5. The doctrine of separability and the doctrine of kompetenz-kompetenz encompassed in the arbitration jurisprudence, have been succinctly explained by a three-judge Bench of Hon'ble Supreme Court in the recent case of **N.N. Global Mercantile(P) Ltd. vs. Indo Unique Flame Ltd.**<sup>4</sup>:

“4. An arbitration agreement is a distinct and separate agreement that exists independently of the main terms of the commercial contract in which it is incorporated, according to established arbitration law. This is based on the idea that when parties enter into a commercial contract that contains an arbitration clause, they are entering into two different agreements, i.e. Two contracts are involved in a business transaction: (i) the substantive contract, which outlines the parties' rights and obligations; and (ii) the arbitration agreement, which binds the parties to use arbitration to settle their disputes.

*4.1 The twin ideas of separability and kompetenz-kompetenz serve as the foundation for the arbitration agreement's autonomy. Although they are related, the doctrines of separability and kompetenz-kompetenz are separate and play a significant part in fostering the independence of the arbitral process.*

*4.2. According to the doctrine of separability of the arbitration agreement, the validity of the arbitration agreement would not be impacted by the invalidity, ineffectiveness, or termination of the substantive commercial contract, unless the arbitration agreement itself is directly contested on the grounds that it is void ab initio.*

*4.3. The doctrine of kompetenz-kompetenz suggests that the Arbitral Tribunal has the authority to decide and rule on its own jurisdiction, including challenges to the existence, legality, and scope of the arbitration agreement, in the first instance, with judicial review by the courts coming later in the process. The challenge before the Court may only be maintained in accordance with the Arbitration*

*Act following the passing of the final award as specified by sub-section (6) of Section 16 of the Act. Depending on the jurisdiction, a court may review a tribunal order regarding its jurisdiction at different stages. The kompetenzkompetenz doctrine has developed in order to minimize judicial intervention at the pre-reference stage and to lower the number of unjustified objections to the jurisdiction of the Arbitral Tribunal.*

### Difference Between “Seat” And “Venue” Of Arbitral Tribunal

6. It is submitted that **BGS SGS SOMA vs. NHPC Ltd**<sup>5</sup> undisputedly constitutes the locus classicus on the subject.

7. The Honorable Supreme Court ruled in the aforementioned case that when parties choose an arbitration venue, they are effectively adopting an exclusive jurisdiction clause. The seat is the location where the arbitration would be physically anchored for the duration. It was described by Their Lordships as the center of gravity. The Supreme Court also placed a lot of emphasis on the principle of party autonomy and the fact that the fundamental legislative policy that underpinned the Act had given that principle the recognition it deserved.

8. In the aforementioned case, their Lordships also had the opportunity to think about the situation in which an arbitration's “seat” could be reduced to nothing more than a “venue.”. It was correctly noted during the explanation of the differences between the two that it must be assumed that the venue designated by an arbitration agreement serves as the seat of the arbitration.

9. Further, it was stated that it would have to be interpreted as the designation of a seat in the absence of any other “significant contrary indicia” that might show that the venue had been specified solely to be that. It becomes important to keep in mind that Section 20 of the Act deals with the venue or place of the arbitration.

4 (2021) 4 SCC 379

5 Civil Appeal No. 9307 of 2019 (SC)

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### Issue Of Non Arbitrability of A Dispute – Who Would Decide About It?

10. The question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the Courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal.

11. In **Vidya Drolia vs. Durga Trading Corporation**<sup>6</sup>, Hon'ble Supreme Court held that:

- A. *The Act's Sections 8 and 11 both cover the same ground in terms of judicial interference.*
- B. *Subject matter arbitrability typically cannot be decided at the stage of Sections 8 or 11 of the Act, unless it is a blatant instance of deadwood.*
- C. *Unless a party has established a prima facie (summary findings) case of non-existence of a valid arbitration agreement by summarily presenting a strong case that he is entitled to such a finding, the Court is required by Sections 8 and 11 to refer a matter to arbitration or to appoint an arbitrator, as the case may be.*
- D. *If the arbitrator's eligibility cannot be established on a prima facie basis as described above, the Court should refer the case to an arbitrator.*
- E. *The following are the only things the Court may prima facie consider when determining whether an arbitration agreement is valid.*
  - I) Whether the arbitration agreement was in writing or not.
  - II) Was the arbitration agreement included in correspondence, phone calls, or other communications?
  - III) Whether the arbitration agreement's terms and conditions were fulfilled?
  - IV) When a dispute arises, can it be resolved through arbitration?

12. *It is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left*

<sup>6</sup> (2021) 2 SCC 1

*to the Arbitral Tribunal. The Court may/may not take into consideration an aspect with regard to "accord and satisfaction" of the claims at the stage of deciding Section 11 applications.*<sup>7</sup>

### Issue Regarding Novation Of The Share Purchase Agreement – Is It To Be Decided By The Court Under Section 11(6) Of The Act?

13. Since the novation of the parties' share purchase agreement would have an impact on the merits of the dispute between the parties, the petition under Section 11(6) of the Arbitration and Conciliation Act of 1996 cannot be dismissed by deciding on that matter. Instead, it must be left to the Arbitrator to decide on that matter.<sup>8</sup>

### Arbitration Agreement in An Unstamped Commercial Contract – Whether Enforceable?

14. Hon'ble Supreme Court in **M/S N.N. Global Mercantile ... vs M/S Indo Unique Flame Ltd**<sup>9</sup> overruled the judgment in **M/S Sms Tea Estates P.Ltd vs M/S Chandmari Tea Co.P.Ltd**<sup>10</sup> and **Garware Wall Ropers Ltd. vs Coastal Marine Constructions**<sup>11</sup> and in which it was held that an arbitration agreement in an unstamped commercial contract cannot be acted upon and is unenforceable in law.

15. The Court in **M/S N.N. Global Mercantile ... vs M/S Indo Unique Flame Ltd**<sup>12</sup> ultimately referred the following issue to be authoritatively settled by a Constitution Bench of five Judges:-

*"58. We consider it appropriate to refer the following matter to a Constitution Bench for final determination.*

*Whether the statutory bar in Section 35 of the Stamp Act, 1899, which applies to in-*

<sup>7</sup> Indian Oil Corporation Ltd. Vs. NCC Limited (Civil Appeal 341/2022)(SC)

<sup>8</sup> Held in M/s Meenakshi Solar Power Pvt. Ltd. Vs. M/s. Abhyudaya Green Economic Zones Pvt. Ltd. and Ors. (Civil Appeal No. 8818 of 2022) (SC)

<sup>9</sup> (2021) 4 SCC 379

<sup>10</sup> (2011) 14 SCC 66

<sup>11</sup> (2019) 9 SCC 209

<sup>12</sup> Supra

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*struments 14 subject to stamp duty under Section 3 read with the Schedule to the Act, would also render the arbitration agreement contained in such an instrument, which is not subject to payment of stamp duty, as being nonexistent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract/instrument?*

16. The court determined that No legal obstacle prevents the arbitration agreement from being enforced while the stamp duty on the substantive contract is still owed.

17. Of course, the Constitution Bench is still deliberating on the aforementioned matter nonetheless as observed by this Court in **Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. Vs. Waterline Hotels Private Limited**<sup>13</sup> the matters which are still pending at a pre-appointment stage, cannot be left hanging until the larger Bench settled the issue.

18. The proposition laid down in **Intercontinental Hotels Group (India) Pvt. Ltd. & Anr. Vs. Waterline Hotels Private Limited**<sup>14</sup> has been followed in **Weatherford Oil Tool Middle East ... vs Baker Hughes Singapore Pte**<sup>15</sup> wherein considering the time sensitivity in the arbitration case, Hon'ble Court allowed the petition for appointment of arbitrator.

### Section 9 of the Act – Interim measures

19. According to Section 9 of the Arbitration Act, a party may apply to a court for an interim measure or protection, among other things, to (i) secure the amount that is in dispute in the arbitration or (ii) for any other interim measure of protection that the court may deem just and convenient. The court shall have the same power for making orders as it does for the purpose of, and in relation to, any proceedings before it.

20. In accordance with Section 9 of the Arbitration Act, the Court has wide powers to issue orders securing the amount at issue in arbitration, whether this occurs prior to the start of the arbitration, during the arbitration, or at any point after the arbitral award has been made, but before it is enforced in

accordance with Section 36 of the Arbitration Act. The only things the court needs to see are whether the applicant for an interim measure has a strong initial claim, whether the balance of convenience favors granting the requested interim relief, and whether the applicant has approached the court with reasonable promptness.

21. If a strong prima facie case is made out and the balance of convenience is in favor of granting interim relief, The Court exercising its authority under Section 9 of the Arbitration Act should not withhold relief on the technicality of the absence of averments, including the grounds for attachment before judgment under Order 38 Rule 5 of the CPC.<sup>16</sup>

22. Unquestionably, Section 9 gives a court the authority to issue an injunction before, during, or even after arbitral proceedings have ended or stand terminated. However, Section 9(3) instructs courts to proceed with caution and restraint in this matter, intervening only when the Section 17 remedy is found to be ineffective. This aspect was duly emphasized by the Supreme Court in **Arcelor Mittal Nippon Steel India ... vs Essar Bulk Terminal Ltd**<sup>17</sup>.

23. Despite the fact that the Tribunal has been established and is in possession of the entire dispute, Section 9(3) still asks the court to decide whether its intervention is necessary. Thus, the mere fact that a court has the authority granted by Section 9 would not warrant the consideration of a petition filed pursuant to said provision.

Interim measures to be ordered by Arbitral Tribunal

24. A comparison of the current powers contained in Sections 9 and 17 would show that, in addition to the temporary safeguards listed in clauses (a) through (d), the Tribunal now has the power and jurisdiction to pass any interim measures that it deems to be “just and convenient.” This power comes from clause (e).

25. The provision now and in unambiguous terms state that the “...The Arbitral Tribunal shall have the same power for making orders as the Court has

13 (2022) 7 SCC 662

14 Supra

15 Arbitration Petition No. 03 of 2022 (SC)

16 Essar House Private Limited vs. Arcelor Mittal Nippon Steel India Limited

Civil Appeal No. 6574 of 2022 (Arising out of SLP (C) No. 3187 of 2021)

17 Civil Appeal No. 5700 of 2021 (SC)

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for the purpose of and in relation to any proceedings before it” further strengthens the authority granted to the Tribunal on lines identical to those of a court under Section 9.

26. The aforementioned position is strengthened further by Section 17(2), which grants an order issued by the Tribunal terms equivalent to those of a court and renders it enforceable in accordance with the pertinent provisions of the Code of Civil Procedure, 1973.

27. As a result, it would be incorrect to consider or comprehend the scope of the authority granted to the Arbitral Tribunal by virtue of Section 17 as being less than the authority granted to a court by Section 9 of the Constitution.

28. The legislative goal of giving the Tribunal authority that is comparable to and akin to that granted to a court is embodied in the amended Section 17.

29. It is further held that this aspect also stands duly highlighted in the decision of the Supreme Court in **Arcelor Mittal Nippon steel India vs. Essar Bulk Terminal Ltd**<sup>18</sup>. The provision as it now stands thus enables the Tribunal to frame injunctions and orders of protection in terms identical to those conferred upon a court exercising powers under Section 9.

30. These aspects were also noticed by Hon'ble Supreme Court in a recent decision rendered in **Pacific Development Corporation vs. Delhi Metro Rail Corporation Ltd**<sup>19</sup>.

### Disqualification by virtue of Section 12(5) of the Act

31. It is submitted that **Perkins Eastman Architects DPC vs. HSCC (India) Ltd**<sup>20</sup> is a binding decision of the Hon. Supreme Court supporting the idea that once a named employee or officer is rendered ineligible to serve as an arbitrator under Section 12(5) of the Act, they also forfeit the right to make an appointment. The following submissions from the aforementioned decision were cited by learned counsel to support his argument: -

19. Thus, it was decided that once the Managing Director lost his status as the sole arbitrator, his ability to nominate another person to serve in that

capacity was also eliminated. This was because the Managing Director had lost his legal right to serve as an arbitrator by operation of law.

20. *We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. v. Energo Engg. Projects Ltd*<sup>21</sup> : *Where the Managing Director is designated as an arbitrator and has the additional authority to name any other person. In the second category, the Managing Director is not required to serve as an arbitrator himself but is instead free to select or appoint any other individual as an arbitrator.*

*If the Managing Director was found to be incompetent in the first category of cases, it was because he was deemed to be interested in how the dispute would turn out or turn out. As a result, the element of invalidity would be directly related to and result from the interest he would have in such a result or decision.*

*If that were the standard, even the second category of cases would always suffer from a similar invalidity. Whether the case falls under the first or second category of cases, if the interest he has in the dispute's resolution is considered the basis for the possibility of bias, it will always be present.*

### Power Of Arbitral Tribunal to Award Interest

32. The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before Hon'ble Supreme Court in many cases including in the cases of **M/S Hyder Consulting(Uk) Ltd. vs Governer State Of Orissa Tr.Chief**<sup>22</sup> and **Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation**<sup>23</sup>.

33. The Arbitral Tribunal has the discretion to include interest on the entire amount of the award or just a portion of it for the entire or just a portion of the time between the date the cause of action arose and the date the award was made, according to clause (a) of subsection (7) of Section 31 of the 1996 Act.

34. The section would then become clear

<sup>18</sup> Supr

<sup>19</sup> 2023 SCC OnLine Del 521

<sup>20</sup> Arbitration Application No.32 of 2019 (SC)

<sup>21</sup> (2017) 8 SCC 377

<sup>22</sup> (2015) 2 SCC 189

<sup>23</sup> 2022 SCC OnLine SC 549

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that interest must be paid at a rate that the Arbitral Tribunal deems appropriate. When an arbitral tribunal has the authority to award interest at a rate it deems reasonable, it is then required to explain why it thinks that rate of interest is reasonable.

### Fees Of the Arbitration Tribunal

35. In **ONGC Ltd. vs. Afcons Gunanusa JV**<sup>24</sup>, Hon'ble Supreme Court passed directions relating to various issues under the Act i.e. relating to fees of arbitrators, authority to determine their own fees, fees on claim and counter claim and regarding the fee structure provided in Fourth Schedule to the said Act.

The Hon'ble Court answered the above-mentioned issues in the following terms:

- (i) *Arbitrators are not permitted to make decisions about their own fees unilaterally and in a way that is binding and enforceable. The doctrine of the prohibition of in rem suam decisions ( i.e., the arbitrators cannot be a judge of their own private claim) and the principles of party autonomy are both violated by a unilateral determination of fees.*
- (ii) *The Fourth Schedule of the Arbitration Act refers to the “sum in dispute” in a claim and counterclaim separately, not cumulatively. As a result, when the Fourth Schedule’s fee structure is made applicable to the ad hoc arbitration, arbitrators may charge separate fees for the claim and the counterclaim in the proceeding; both fees will be subject to the Fourth Schedule’s fee ceiling.*
- (iii) *The total of the base amount (of Rs. 19,87,500) and the variable amount over and above it is subject to the ceiling of Rs. 30,00,000 in the entry at Serial No. 6 of the Fourth Schedule. Consequently, Rs. 30,00,000 will be the highest fee that is payable; and.*
- (iv) *In cases where the Arbitral Tribunal consists of three or more arbitrators, this cap only applies to each individual arbitrator and not to the Arbitral Tribunal as a whole. Of course, in accordance with the Note to the Fourth Schedule, a sole arbitrator shall be compensated at a rate of 25% more than this sum.*

- (v) *Whether an arbitrator serves as a sole arbitrator or is a member of a multimember tribunal, each individual arbitrator must pay the fee specified in the Fourth Schedule to the Arbitration Act.*

### Conclusion

In conclusion, the Arbitration and Conciliation Act in India has undergone significant changes in recent years to make the arbitration process more efficient, cost-effective, and time-bound. The 2019 amendments to the Act have introduced several new provisions, including the establishment of an Arbitration Council of India, the introduction of an expedited arbitration process, and the creation of a framework for the appointment of arbitrators.

The recent trends in the Act indicate a greater emphasis on promoting institutional arbitration, improving the quality of arbitration, and strengthening the enforcement of arbitration awards. It has also been established by the Supreme court through a catena of judgements that Arbitral Tribunal is competent to rule on its own jurisdiction and also to rule on the issue of the existence or validity of the arbitration agreement, The difference between Seat and Venue of an Arbitral Tribunal has been cleared out,

However, challenges remain in the implementation of the Act, such as the need to ensure the independence and impartiality of arbitrators, to minimize delays in the arbitration process, and to address issues related to the enforceability of arbitration awards.

Overall, the recent trends in the Arbitration and Conciliation Act in India reflect a positive shift towards promoting arbitration as a preferred mode of dispute resolution and enhancing the credibility of the arbitration process. The continued focus on improving the quality and efficiency of arbitration proceedings will be critical to the success of the Act in the years to come.

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<sup>24</sup> Arbitration Petition (Civil) No. 05 of 2022 (SC)