DISPUTE RESOLUTIONS

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Message to the Readers

A High-Level Committee on the Institutionalization of Arbitration Mechanism in India was constituted by the Government of India in response to the increasing stress on the justice dispensing system in the country. The justice system faced challenges, including a backlog of cases in various courts, especially in commercial disputes that remained pending for years. Recognizing the need for an efficient alternative dispute resolution mechanism, the government aimed to promote arbitration as a preferred mode for settling commercial disputes.

To achieve this objective, the government took legislative and administrative initiatives, such as the Arbitration and Conciliation (Amendment) Act, 2015, which aimed to reduce court intervention, lower costs, establish timelines for expeditious dispute resolution, ensure the neutrality of arbitrators, and enforce awards promptly. These efforts were geared towards projecting India as an investor-friendly destination with a robust legal framework for arbitration and ease of doing business.

The High-Level Committee was chaired by Mr. Justice B. N. Srikrishna, a retired Judge of the Supreme Court, and included members with legal expertise, representatives from industry bodies, and officials from the Department of Legal Affairs. Their terms of reference included evaluating the effectiveness of the current arbitration mechanism, reviewing existing ADR institutions, assessing skill gaps in ADR, and suggesting measures for institutionalizing arbitration in India, both nationally and internationally. The main aim of the committee being to make India a hub for international commercial arbitration, recommend amendments to relevant laws, develop an action plan for speedy arbitrations, and strengthen research and development in the field.

In connection with the enhancement of the Arbitration and Conciliation Act, 1996 ("**ACA**"), a series of recommendations have been put forth by the Nani Palkhivala Arbitration Centre ("**NPAC**"), following a notice inviting comments from stakeholders on the areas of consideration by the Expert Committee. The objective behind these suggestions is the modernization and streamlining of the arbitration process in India and the resolution of legal intricacies that have surfaced over time, in accordance with international best practices and consistent with the recommendations under the 246th Law Commission Report ("**LCR**").

A summary of the reforms and the amendments that were suggested by NPAC to the ACA and submitted to the Expert Committee has been provided below for the benefit of our readers:

1. **Amendment to the definition of 'Arbitral Tribunal' - Section 2(1)(d):** A proposal is made to amend Section 2(1)(d) to incorporate emergency arbitrators into the definition of 'Arbitral Tribunal', thus harmonizing institutional arbitration with global benchmarks in line with the recommendations featured in the LCR.

2. **Alteration of Jurisdiction of High Courts - Section 2(1)(e)(ii):** A recommendation is extended to substitute "international commercial arbitration" with "institutional arbitration" in Section 2(1)(e)(ii), aimed at promoting institutional arbitration. Furthermore, the introduction of a proviso to Section 2(1)(e) is advised, conferring exclusive supervisory jurisdiction upon the court designated as the seat of arbitration and clarifying that Section 16-20 of CPC,1908 has no application to arbitration proceedings once the seat of arbitration has been designated. This proviso would bring the Act in conformity with the judgments of ***BGS SGS Soma JV vs. NHPC Ltd.***[1]("**BGS SGS Soma**"), ***Indus Mobile Distribution Pvt. Ltd. vs. Datawind Innovations Pvt. Ltd.***[2]("**Indus Mobile**") and ***Sundaram Finance Ltd. vs. Abdul Samad***[3] and would legislatively overrule ***Swastik Gases Pvt. Ltd. vs. Indian Oil Corporation Limited***[4] to a limited extent.

3. **Definition of 'Party' Refinement - Section 2(1)(h):** The proposal is to recognize the theories articulated in the case of ***Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. & Ors.***[5] in relation to 'parties' and 'non-signatories'. Additionally, it is presented that inclusion of non-signatories should only be based on the said theories, explicit or implied consent and judicial determination. For provisions related to the concept, few language revisions incidental to these recommendations have also been mentioned. The importance of this amendment has been stressed especially in the light of recent judgments that have opined that awards can be enforced even against non-signatories, thus leaving them remediless in the absence of such amendment.

4. **Clarification of 'Seat of Arbitration' - Section 2(1)(hh) & Section 20:** Incorporation of a new definition of 'seat of arbitration' is suggested, accompanied by the replacement of the term 'place' with 'seat' or 'venue' in pertinent Sections of the ACA. This amendment is anticipated to provide precision and consistency in determining the seat of arbitration. This is also in line with the recommendations of the LCR and the judgements in the matter of ***BALCO vs. Kaiser Bharat Aluminium Company*** and ***Indus Mobile****(supra)* and more recently in ***BGS SGS Soma*** *(supra)*.

5. **Streamlining the Appointment of Arbitrators - Section 11:** The codification of principles derived from relevant judicial decisions (such as ***Perkins Eastman Architects DPC vs. HSCC (India) Limited [2019 (9) SCC OnLine SC 1517]*** and ***TRF Limited vs. Energo Engineering Projects Ltd. (2017) 8 SCC)*** pertaining to unilateral appointments of arbitrators is recommended. Furthermore, the notification of Section 11(6) is suggested for the purpose of elucidating that the court's power at the Section 11 stage is merely administrative.

   Additionally, it is suggested to clarify that the Fourth schedule will apply except in institutional arbitrations to provide visibility on costs involved in ad hoc arbitrations and it is recommended that all

[1] 2019 SCC OnLine SC 1585
[2] (2017) 7 SCC 678
[3] (2018) 3 SCC 622
[4] (2013) 9 SCC 32
[5] (2013) 1 SCC 641

High Courts should have a dedicated arbitration court where time frames are fixed for arbitration proceedings including for disposal of Section 11 Applications.

6. **Addition of Section 16(7):** A proposition is put forward to introduce Section 16(7), empowering arbitral tribunals to adjudicate on disputes entailing complex questions of law, intricate factual scenarios, or allegations of fraud, would have the effect of legislatively overruling the decision in ***A. Ayyasamy vs. A. Paramasivam & Ors.***[6]

7. **Procedural Guidelines and Evidence Rules - Section 19:** To bolster the procedural efficiency of ad hoc domestic arbitrations, the formulation of a model set of procedural guidelines and evidence rules is recommended.

8. **Recognition of Arbitrators' Power to Act - Section 27(5):** It is advised to accord legislative recognition to the arbitrators' authority to act in accordance with Section 27(5) of the ACA, concerning their remuneration.

9. **Setting Aside of Awards - Amendments to Section 34:** The proposals include:
   (a) the consolidation of interim awards with final awards to avoid challenges piecemeal, in line with the Supreme Court's judgment in ***Indian Farmers Fertilizers Cooperative Limited vs. Bhadra Products***,[7] along with the inclusion of a proviso whereby the tribunal is vested with the requisite power to stay the interim/partial award and/or direct the same to take effect along with the final award;
   (b) the elimination of the test of patent illegality to ensure that the domestic arbitrations are at par with international arbitrations;
   (c) provision of residual power to courts to effect minor modifications to awards;
   (d) Need for a uniform standard for assessing non-est filings or the point that at the very least the time prescribed by the concerned High Court rules for meeting the filing criteria needs to be made mandatory;
   (e) the requirement for legislatively overruling ***Vedanta Limited vs. Shenzhen Shandong Nuclear Power, 2019 SCC 11 465***, to clarify that there can be no place for equity in contract law and that the Supreme Court cannot increase/reduce interest in a manner that is teeth of Section 31(7).

10. **Re-visiting Sections of the ACA:** A recommendation is made for (a) the removal of the proviso to Section 36, which was introduced by the Arbitration and Conciliation (Amendment Act), 2021 as it is a regressive move; (b)deleting the application of Sections 38 and 39 of the Code of Civil Procedure, 1908 to arbitration proceedings, in line with the decision of ***Sundaram Finance Ltd. vs. Abdul Samad & Anr, (2018) 3 SCC 622***;(c) re-evaluation of Sections Section 39 (4) and Section 42 in view of recent developments and judgments.

11. **Reconsideration of Stamping Principles:** The proposal suggests a reevaluation of the recent judgment by a five-judge bench in ***N.N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd***.[8] on the matter of stamping of arbitration agreements and recommends that the judgment needs to be legislatively overruled, by considering the comments of the amicus in the matter.

12. **Third-Party Funding, Contingency Fees, and Participation of Foreign Law Firms:** The recommendation pertains to (a) the legalization of third-party funding through a separate enactment, (b) the authorization for lawyers to charge contingency fees / undertake value billing, and (c) the establishment of a framework for the engagement of foreign law firms in India.

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[6](2016) 10 SCC 386
[7](2018) 2 SCC 534
[8]Civil Appeal No(s). 3802-3803 of 2023

Among various other significant changes that are suggested, one of the pertinent matters that has been placed to be scrutinized by an Expert Committee is adoption of distinct legal frameworks for domestic and international arbitration. Ms. Payal Chawla, Director of NPAC, strikes a contradictory point for the same through her thought-provoking article titled *'Achieving Equivalence in Domestic and International Arbitration & a Case against Separate Laws'*. This perspective challenges the concept of separate laws, raising concerns about potential contradictions and patent irregularities that could arise.

Given the fact that an arbitral award could be set aside on the grounds of patent illegality as per Section 34 (2) of ACA, she suggests removing the "patent illegality" test entirely from the ACA or, at the very least, implementing a time-bound expiration for its applicability. Ms. Payal Chawla presents a thought-provoking assertion by incorporating Wednesbury principle into the definition of “public policy”, it could potentially cast a shadow over both international and domestic arbitration within India.

It is stated in the article that the perceived "quality" of arbitrators in India is often cited as one of the justifications for greater interference in domestic arbitration. If this is indeed the case, she rightly states that the focus should then be on finding mechanisms to improve the quality rather than creating a separate standard for domestic awards.

A noteworthy precedent, the ***PASL Wind Solutions Pvt. Ltd. vs. GE Power Conversion India Private Limited [(2021) 7 SCC 1]*** was referenced, which illustrates that two Indian parties can choose a foreign seat to arbitrate their disputes. Such an award will be a foreign award according to the Arbitration and Conciliation Act. For instance, by selecting Switzerland as the seat, disputing Indian parties would be treated as engaged in an international commercial arbitration and subject to a lower level of scrutiny than in a domestic arbitration in Switzerland. Therefore, Indian parties engaging in arbitration in foreign countries like Switzerland would be entitled to marginally milder scrutiny and, in countries such as England and Belgium, to no different scrutiny. Consider why two Indian parties, particularly those with the resources to arbitrate outside India, would willingly subject themselves to a higher level of scrutiny for their arbitral awards when they could potentially benefit from a comparatively milder level of scrutiny both in the seat country and during the enforcement stage in India.

The Nani Palkhivala Arbitration Centre extends gratitude to the Expert Committee for affording consideration to these recommendations. It is hoped that the suggested reforms will contribute substantively to the establishment of a more robust and streamlined arbitration.

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Director, NPAC

SEMINAR ON INTERNATIONAL TRADE AND SHIPPING, COMMODITY ARBITRATION, AND ARBITRABILITY OF CORPORATE DISPUTES

Recently, an in-person seminar titled *'International Trade and Shipping, Commodity Arbitration, and Arbitrability of Corporate Disputes'* was jointly organized by Rajah & Tann Singapore LLP, Aarna Law, Simha Law, and the Nani Palkhivala Arbitration Centre (NPAC) on July 22, 2023, at Taj Wellington Mews, Chennai.

This was widely attended by representatives from multinational corporations headquartered in India with overseas investments, legal practitioners and industry stakeholders.

The event commenced with Mr. Arvind P. Datar's opening remarks, setting the tone for a day of insightful discussions. Hon'ble Mr. Justice F.M. Ibrahim Khalifulla delivered an illuminating inaugural and keynote address, drawing on his extensive experience as a retired judge of the Supreme Court of India and the former Chief Justice of Jammu and Kashmir High Court.

Panel 1 delved into critical issues concerning international trade, shipping, and commodity arbitration, featuring presentations by industry experts and legal luminaries such as **Mr. V Bala**, Deputy Head, Shipping & International Trade, Rajah & Tann Singapore LLP; **Mr. Shreyas Jayasimha**, Co-Founder, Aarna Law LLP, India, Director, Simha Law, Singapore; **Mr. Krishnamurthy**, Founder CEO, Trimsail Digital Solutions Private Limited; and **Mr. N.L. Rajah**, Senior Advocate, Madras High Court, Director, Nani Palkhivala Arbitration Centre. The session was followed by an engaging Q&A session that allowed attendees to interact with the panelists.

Following a brief coffee break, participants reconvened for Panel 2, which explored the arbitrability of corporate disputes. Distinguished speakers shared their insights on this complex subject, providing valuable perspectives for all in attendance. Panel 2 comprised of **Mr. Avinash Pradhan**, Co-Head, South Asia Desk, Deputy Head, International Arbitration, Rajah & Tann Singapore LLP; **Ms. Kamala Naganand**, Managing Partner, Aarna Law, India Director, Simha Law, Singapore; **Mr. Srinath Sridevan**, Senior Advocate, Madras High Court; **Ms. CA Sripriya Kumar**, Partner, SPR & Co., Chartered Accountants; and **Mr. M.S. Krishnan**, Senior Advocate, Madras High Court.

Both the panels featured a diverse array of inputs and perspectives, with experts hailing from varied professional backgrounds and jurisdictions. These diverse voices enriched the discussions, offering multifaceted insights into the complex topics under discussion. Attendees benefited from the unique experiences and expertise brought forth by the panelists, creating a dynamic and inclusive environment conducive to comprehensive exploration of the subjects at hand.

Throughout the seminar, participants actively engaged with our esteemed speakers, asking questions and participating in thought-provoking discussions. This interactive atmosphere fostered a sense of collaboration and mutual learning.

LEGAL UPDATES

❖ **Calcutta High Court upholds sanctity of arbitrator's decision in a recent foreign arbitral award case**

- In a recent ruling in the case of ***Jaldhi Overseas Pte Ltd vs. Steer Overseas Pvt Ltd***, the Calcutta High Court emphasized the importance of respecting an arbitrator's decision in a case involving the enforcement of a foreign arbitral award and the existence of a valid arbitration agreement.
- Justice Shekhar B Saraf, presiding over the case, highlighted the limited discretion of the court and stressed that it should not replace the arbitrator's view with an alternate opinion unless there is clear evidence of no agreement.
- The court's role, according to the ruling, is to ensure compliance with the law and not to re-evaluate evidence or substitute its interpretation for that of the arbitrator.

  https://www.latestlaws.com/adr/arbitration/hc-upholds-sanctity-of-arbitrator-s-view-rejects-substitution-by-court-s-alternate-opinion-on-evidence-review-201398/

  https://www.barandbench.com/news/litigation/arbitrator-view-sacrosanct-calcutta-high-court

❖ **Calcutta High Court clarifies scope of challenge to Section 16 Arbitration Act Orders under Article 227**

- The Calcutta High Court, in the case of ***M.D. Creations & Others vs. Ashok Kumar Gupta***, ruled that an application under Article 227 of the Indian Constitution can only challenge an order under Section 16 of the Arbitration and Conciliation Act, 1996, on grounds of patent lack of inherent jurisdiction or exceptional circumstances or 'bad faith' of the opposite party.
- The court rejected the petitioner's argument that they had no alternative remedy, and stated: *"…in a case where the plea challenging jurisdictional competency of the arbitrator is dismissed the aggrieved party has to wait till the passing of the final award, and then he can file an application for setting aside such an arbitral award under Section 34 of the Act…Therefore, in the usual course the Arbitration Act provides for a mechanism of challenge under Section 34 of the Act and hence the aggrieved party cannot be said to be remediless in the circumstances of dismissal of application under Section 16 (2) of the Act."*
- This decision provides clarity on the avenues for challenging arbitration orders and the role of Article 227 in such cases.

  https://www.latestlaws.com/case-analysis/hc-opines-that-order-u-sec-16-of-the-arbitration-and-conciliation-act-can-be-challenged-under-article-227-only-on-the-ground-of-patent-lack-in-inherent-jurisdiction-or-exceptional-circumstances-read-judgment-201420#:~:

❖ **Delhi High court sets conditions for valid panel-based arbitrator appointments**

- In a recent judgment in the case of ***Margo Networks Pvt. Ltd. &Anr. vs. Railtel Corporation of India Ltd.***, the Delhi High Court clarified the conditions for valid panel-based appointments of arbitrators.
- The court emphasized that for such appointments to be valid, the panel must be broad-based and per the principles established in the case of ***Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Ltd***. Additionally, the right of one party to provide a panel must be counterbalanced by the other party's right to choose from that panel.
- In the present case, the Respondent had provided names of ten arbitrators who were all ex-employees of the Railways. The court opined that the panel was therefore restrictive and not 'broad-based'.

The court also stated that if one party has the right to appoint 2/3 of the arbitrators, it is impermissible under law.

- https://www.latestlaws.com/adr/case-analysis/hc-explains-conditions-for-panel-based-appointment-of-arbitrator-to-be-valid-read-judgement-202189/

❖ **Supreme Court clarifies arbitration award interpretation standards**

- In a significant ruling, the Supreme Court of India clarified the interpretation of arbitration awards in the case of ***Konkan Railway Corporation Limited vs. Chenab Bridge Project Undertaking***. The Court emphasized that arbitration awards should not be set aside solely due to the possibility of an alternative view on facts or contract interpretation.
- This judgment establishes a clear standard for challenging arbitration awards, ensuring greater consistency and certainty in the arbitration process in India. The Court reaffirmed the limited jurisdiction under Section 34 and the scope of interference in Section 37 appeals.

  https://www.livelaw.in/supreme-court/supreme-court-arbitration-award-interpretation-contract-konkan-railway-corporation-limited-vs-chenab-bridge-project-undertaking-235606
  https://legalvidhiya.com/supreme-court-clarifies-arbitration-award-interpretation-in-konkan-railway-corporation-limited-vs-chenab-bridge-project-undertaking-case/

❖ **Calcutta High Court affirms holistic interpretation of arbitration clause and grants interim relief**

- In the case of ***Uphealth Holdings Inc. vs. Glocal Healthcare Systems (P) Ltd***, the Calcutta High Court emphasized on the importance of a holistic interpretation of arbitration clauses and on the enforceability of Emergency Arbitrator's orders in cases where both parties participated and agreed to be bound by the orders.
- The case, involving a dispute between a Delaware-based company and another party, centered on access to financial records. The Court held that the disputes fell within the scope of the arbitration clause and rejected arguments that pre-arbitral steps were mandatory by considering them as procedural formalities and not absolute requirements.
- Further the court opined that: *"Insofar as the orders of the Emergency Arbitrator are concerned,… There appears to be no illegality nor perversity nor contravention of any law shown in the order of the Emergency Arbitrator. Thus, in my view, the order of the Emergency Arbitrator is an additional factor which can be taken into account at this stage of the proceeding. This approach is also in conformity with the principle of autonomy of parties which is fundamental to the Act. (Amazon.Com NV Investment Holdings LLC vs. Future Retail Limited &Ors. (2022) 1 SCC 209)".*
- The Court granted interim relief, allowing access to financial records and directing cooperation with an accounting firm.

  https://www.scconline.com/blog/post/2023/08/28/holistic-and-common-sense-required-for-interpretation-of-arbitration-clause-calcutta-hc/#:~:

❖ **Delhi High Court: Section 34(4) cannot save arbitral awards with illegalities under Section 34(2)**

- In a recent judgment in the case of ***National Highways Authority of India vs. Trichy Thanjavur Expressway Limited,*** the Delhi High Court addressed the issue of whether Section 34(4) of the Arbitration and Conciliation Act, 1996, can save an arbitral award suffering from illegalities listed under Section 34(2)(a) or (b).

- The case involved cross petitions seeking to set aside portions of an arbitral award. The Court ruled that if an award is found to suffer from any of the illegalities stipulated in Section 34(2)(a) or (b), it must be set aside and cannot be rescued using Section 34(4).
- The Court also discussed the concept of partial setting aside, clarifying that it is a valid exercise of jurisdiction under Section 34 and would not amount to a modification or variation of the award. In doing so, the Court held that: *"…as long as the part which is proposed to be annulled is independent and stands unattached to any other part of the award and it could be validly incised without affecting the other components of the award, the recourse to partial setting aside would be valid and justified."*

https://www.scconline.com/blog/post/2023/08/29/s34-subclause4-cannot-save-aid-arbitral-award-suffering-illegalities-under-section34/
https://www.livelaw.in/pdf_upload/trichy-final-final-488275.pdf

❖ **Delhi High Court Dismisses Jurisdiction for Arbitration Injunction Petition**

- In the recent case of ***Liberty Footwear Company vs. Liberty Shoe Limited***, the Delhi High Court has dismissed a petition filed under Section 9 of the Arbitration and Conciliation Act, 1996, seeking an interim injunction to restrain the respondent from using the petitioner's "LIBERTY" marks.
- The Court ruled that the petition was not maintainable per Section 42 of the Arbitration and Conciliation Act, 1996, as the prior filing of a similar petition was done in the District Court, Karnal, which had jurisdiction over the arbitral proceedings and related applications arising from the License Agreement between the parties.
- The Court stated that: *"Therefore, even if it is assumed that both District Court, Karnal and this Court have jurisdiction predicated on 'part cause of action', the first application filed before District Court, Karnal, will anchor arbitration and this petition cannot be entertained."*

https://www.scconline.com/blog/post/2023/08/26/delhi-hc-dismiss-petition-liberty-footwear-under-section9-arbitration-having-no-jurisdiction/

❖ **World Bank arbitration tribunal rules on India-Pakistan dam dispute**

- The Permanent Court of Arbitration (PCA) based in Hague has issued a ruling that it has the competence to hear Pakistan's objection to India's Kishenganga and Ratle hydroelectric projects.
- The two countries disagree over whether the technical design features of these two hydroelectric plants contravene the Indus Water Treaty (IWT). The IWT, governing river water sharing between the two countries, lays out distinct procedures for handling disputes communication through the Permanent Indus Commission, neutral expert appointed by the World Bank, followed by a Court of Arbitration if the previous steps fail in resolving the dispute.
- India refused to participate in the proceedings of the Court of Arbitration as it has opposed its constitution, jurisdiction and competence. India argued that the neutral expert process, as earlier initiated by the World Bank, was the appropriate avenue for dispute resolution per the IWT. Despite this, the Court of Arbitration chaired by Prof. Sean D Murphy, asserted its competence to adjudicate the dispute, stating that it was properly constituted according to the IWT.
- This decision comes amid longstanding tensions over water-related issues and India's call for modifying the treaty.

https://www.latestlaws.com/adr/arbitration/court-of-arbitration-hague-rules-against-india-in-pakistan-s-objection-to-dam-projects-201711/
https://www.drishtiias.com/daily-updates/daily-news-analysis/pca-asserts-competence-in-india-pakistan-hydroelectric-projects-dispute

SATYA HEGDE ESSAY COMPETITION PRIZE WINNING ESSAYS OF 2023

*Below are the abridged versions of the three prize winning essay submissions for the Satya Hegde Essay Competition, 2023.This edition was on the topic '**Is Arbitrability of a dispute a pre-Condition for an order under Section 11 of the Act**'.*

I PRIZE: Ms. Sunidhi Kashyap, Rajiv Gandhi National University of Law, Punjab

The article puts forth the view that courts should apply a minimal curial intervention approach in order to allow arbitrators to decide questions of applicability, while reserving questions of validity for the courts. This approach seeks to maintain the effectiveness of the arbitration process while safeguarding the parties' rights. Perceived as a private dispute resolution mechanism, arbitration frequently finds itself at cross-roads with judicial intervention. In this article, the author deals with one main question - whether the courts can intervene to decide arbitrability of a dispute at the referral stage.

The problem lies in the fact that an arbitration agreement is a voluntary agreement. So, if the parties did not agree to submit a specific matter to arbitration, one may argue that it is prudent for the court to decide such disputes as a pre-condition to arbitration. However, this may defeat the purpose of choosing arbitration as a mode for non-judicial and speedy resolution of disagreements.[1]

Arbitration and Conciliation (Amendment) Act, 2015 inserted sub-section 6A which limits the power of the courts to review the arbitration agreement only to the 'existence' of the agreement. This amendment follows the approach of the *kompetenz-kompetenz* principle whereby a premium is attached to party autonomy and judicial intervention is kept to a minimum. The Supreme Court in 2022 reaffirmed the *kompetenz-kompetenz* principle in ***Mohammad Masroor Shaikh vs. Bharat Bhushan Gupta***[2] which held that the issue of non-arbitrability is to be decided by the arbitral tribunal.

As reiterated in ***Vidya Drolia***,[3] the arbitrability of the dispute can be decided by the Court to 'cut off the deadwood' and that to prevent wastage of public resources, the courts can conduct an intense yet brief review of the arbitration agreement. Few months later, the Supreme Court in ***Pravin Electricals***[4] took a contrasting stance. It held that when a deeper examination than just a prima facie review is required, the same must be left for final decision to the arbitral tribunal.

After analysing relevant aspects of judicial intervention in deciding arbitrability, the authority of courts to intervene for an Order under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Act**") is examined. Section 11 makes a case for judicial intervention if the parties are unable to act upon a mutually agreed appointment procedure.

However, the question of 'when can the courts intervene' stands unanswered due to inconsistent court decisions. It is best to have a categorical methodology for both - arbitrators and judges. Inspired from the ***Dell Computer case***[5] in Canada, a distinction can be made between 'applicability' and 'validity' of the arbitration agreement. Challenges which concern the 'validity' should be dealt by the courts and disputes which simply concern the 'applicability' can be resolved by the arbitrators. Another solution of clearly dividing the role of arbitrators and judges can include a distinction between law and fact. Questions of law regarding arbitrability will come under the courts' jurisdiction and mixed questions of law and fact would go to the arbitrator.

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[1] David Williams, Arbitration and Dispute Resolution, New Zealand Law Review, pp 119-148, (2005).
[2] Mohammad Masroor Shaikh vs. Bharat Bhushan Gupta (2022) SC 120
[3] Vidya Drolia vs. Durga Trading Corporation (2020) SC 939
[4] Pravin Electricals vs. Galaxy Infra and Engineering Private Ltd (2021) SC 190
[5] Dell Computer Corp. vs. Union des consommateurs (2007) 284 D.L.R.

So, for an application under Section 11, deciding the arbitrability of the dispute would be a condition precedent for arbitration, while keeping in mind the division of roles to facilitate a more harmonious mode of dispute resolution.

II PRIZE: Ms. Natasha Singh, NALSAR University of Law, Hyderabad

The term 'arbitrability' refers to whether a dispute is capable of being adjudicated upon and settled through arbitration.[1] Though arbitration is a private dispute-resolution mechanism, parties still rely on national courts to pass certain orders related to the arbitral proceedings. Consequently, certain disputes are either legislatively and/or judicially categorized as inarbitrable, and courts may decline to pass orders in these disputes.

Although the Arbitration and Conciliation Act, 1996 ("**Act**") does not reference arbitrability expressly, there is an implied recognition. Section 2(3) of the Act provides that if a law mandates that a dispute must be presented before a certain court, the jurisdiction of the arbitral tribunal is statutorily ousted. In this way, the concept of arbitrability has been legislatively recognized. The remaining gaps in the statute have been filled through judicial pronouncements.

On the basis of the Act and case laws, it can be seen that a dispute can be inarbitrable in three ways.

A dispute cannot be referred to arbitration if the agreement between the parties does not contain an arbitration clause. Where an arbitration agreement is present, it must comply with both the Act and the Indian Contract Act[2], 1972.Based on the Law Commission's 246th Report[3], the legislature inserted Section 11(6A) into the Act which stipulated that while the court was appointing an arbitrator, it had to "*confine the examination to the existence of an arbitration agreement*."[4] However, a lot of confusion was caused by the term 'existence.' The 2019 Amendment repealed Section 11(6A). Now, the scope of judicial enquiry under Section 11 is governed by judicial precedent. In ***Pravin Electricals***,[5] the Supreme Court held that if it was *prima facie* satisfied that there was an arbitration agreement that the parties intended to be bound by, then it would make an order under Section 11.

Similarly, if two parties have only agreed to submit certain disputes to arbitration, any dispute lying outside this category is inarbitrable. As per *DLF Home Developers*,[6] a court could assess whether the impugned dispute fell within the scope of the arbitration agreement.

Certain disputes are inarbitrable because of their subject matter (eg: criminal offences, insolvency proceedings, etc). The most important case for this is ***Vidya Drolia vs. Durga Trading Corporation (2021)***[7] which furnished a four-pronged test to decide on the arbitrability, creating an authoritative precedent on the issue.[8]

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[1] Article II (1), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) 330 UNTS 38
[2] 246th Report on Amendments to the Arbitration and Conciliation Act, 1996, Law Commission of India (August 2014)
[3] Arbitration and Conciliation (Amendment) Act, No. 3 of 2016.
[4] Arbitration and Conciliation (Amendment) Act, No. 33 of 2019, §11(6A)
[5] Pravin Electricals Pvt. Ltd. vs. Galaxy Infra and Engineering Pvt. Ltd, 2021 5 SCC 671.
[6] DLF Home Developers Ltd. vs. Rajapura Homes Private Ltd, 2021 SCC OnLine SC 781
[7] Vidya Drolia and Others vs. Durga Trading Corporation, 2021 2 SCC 1
[8] *Ibid.*

In view of the above, it may be concluded that inarbitrability is of two kinds: objective (dispute is always inarbitrable) and subjective (inarbitrability due to circumstances). The law is well-settled that no Section 11 order will be passed for the former. Insofar as the latter is concerned, the judiciary can apply its mind and prima facie review the agreement. Though the courts will decline to make a Section 11 order in obviously inarbitrable disputes, they will allow arbitration to proceed in other cases. This is consistent with the principle of *kompetenz-kompetenz* and minimal judicial intervention. A phrase from the Vidya Drolia summarizes it succinctly: "When in doubt, do refer." Therefore, the prima facie arbitrability of a dispute is a precondition under Section 11.

III PRIZE: Ms. Neha Maria Antony, The National University of Advanced Legal Studies, Kochin

The concept of arbitrability is sought to be understood and imagined in the context of Section 11 to arrive at the position that India supports today, as well as the potential way forward.

Notably, the Indian legislation neither defines arbitrability nor does it specify what may be arbitrable or not. However, the importance of the concept of arbitrability is evident because of the effect of Section 34(2)(b)(i) and Section 48(2) of the Arbitration and Conciliation Act, 1996 ("**Act**") whereby an arbitral award may be set aside or refused to be enforced when the subject matter of the dispute is not capable of settlement by arbitration. It is sought to be analysed as to whether arbitrability is a pre-condition for an order under Section 11 of the Act.

The understanding garnered from the present wordings of the Act, particularly that of Section 11, is that the scope of judicial interference in the appointment of arbitrators is to be minimized.[1] As reflected to an extent in section 11(6A) and several decisions including that of ***Mayavati Trading (P) Ltd. vs. Pradyuat Deb Burman***,[2] the power under section 11 is restricted to ascertaining the existence of the arbitration agreement. In ***Vidya Drolia*** courts were called on to undertake a primary first review to weed out manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes.

In ***United India Insurance vs. Hyundai Engineering and Construction***,[3] the court stresses on a strict interpretation of the arbitration clause and while considering the application for the appointment of an arbitrator, it was held that the claim was not arbitrable and refused to appoint an arbitrator. This points to rendering arbitrability as a pre-condition for a dispute. Further, in ***DLF Home Developers***[4] the scope was significantly widened and the Supreme Court held that courts, while appointing an arbitrator, must not act mechanically and relegate the parties to arbitration. They must examine the arbitration agreement to ensure that it correlates to the dispute and that courts could decline the reference if there is no correlation. Arbitrability therefore becomes a quandary that plagues section 11.

Recently in ***VGP Marine Kingdom Pvt Ltd vs. Kay Ellen Arnold***[5] while referring to ***Vidya Drolia***, the Supreme Court categorically held that while considering an application under Section 11 of the Act, the dispute with respect to arbitrability should be left to the arbitrator, unless on the face it is found that the dispute is not arbitrable. This seems to evolve a prima facie arbitrability standard for courts to consider as a pre-condition for section 11, though the lines are significantly blurred.

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[1] Varun Kasthuri, The Anomalous Case of Sections 8 and 11 of India's Arbitration and Conciliation Act, 1996, KLUWER ARBITRATION BLOG, (Apr.15, 2021), https://arbitrationblog.kluwerarbitration.com/2021/04/15/the-anomalous-case-of-sections-8-and-11-of-indias-arbitration-and-conciliation-act-1996/

[2] Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, 2019 SCC OnLine SC 1164, ¶ 20

[3] United India Insurance Co. Ltd. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors. AIR 2018 SC 3932

[4] DLF Home Developers Limited v. Rajapura Homes Private Ltd., 2021 SCC OnLine SC 781

[5] VGP Marine Kingdom Pvt Ltd v. Kay Ellen Arnold, 2022 LiveLaw (SC) 914 | CA 6679 OF 2022

The way forward is thus visibly lined with issues. The solution could perhaps be found in the two-fold measure of first defining the scope and ambit of arbitrability such as appending a schedule to the Act clarifying the guidelines to ascertain arbitrability and a non-exhaustive list of non-arbitrable matters, and second, to evolve an expedited procedural framework for orders under section 11.

The assessment of arbitrability as a pre-condition can be beneficial since it happens at a stage prior to the process of appointment, and if found non-arbitrable at a later stage of setting aside or enforcement, then the entire process would have been rendered fruitless.

A balance needs to be struck, preferably from the legislative side, at weighing the decision to continue endorsing arbitrability as a pre-condition for an order under section 11, keeping in mind the larger goals that India seeks to achieve through mainstreaming arbitration.