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The Faux Pas of Automatic Stay Under the Indian Arbitration Act, 1996 - The HCC Dictum, Two-Cherry Doctrine, and Beyond

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THE FAUX PAS OF AUTOMATIC STAY UNDER THE INDIAN ARBITRATION ACT, 1996 - THE HCC DICTUM, TWO-CHERRY DOCTRINE, AND BEYOND

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ABSTRACT

In the matter of *Hindustan Construction. Co. v. Union of India*, the Honorable Supreme Court of India ("SCI") was presented with an opportunity to adjudicate upon a petition challenging the constitutional validity of Section 87 of the Arbitration and Conciliation Act of 1996 ("1996 Act") as inserted by Section 13 of the Arbitration and Conciliation (Amendment) Act of 2019 ("2019 Act").[3] The legislative insertion stated that amendments made to the 1996 Act by the Arbitration and Conciliation Act of 2015 ("2015 Act") would not apply to court proceedings arising out of, or in relation to, arbitral proceedings initiated before the commencement of the 2015 Act, i.e., October 23, 2015,

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[3] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

irrespective of whether such court proceedings were commenced prior or after the 2015 Act.[4] As is so often the case with constitutional challenges, following an expansive and intricate analysis, the SCI, by its decision dated November 27, 2019, struck down Section 87 of the 1996 Act on grounds of it being contrary to the fundamental essence behind the implementation of the 1996 Act and violative of Article 14 of the 1950 Constitution of India ("1950 Constitution").[5] Through this research, the authors attempt to analyze the possible ramifications of the aforesaid judgement against the backdrop of the United Nations Commission on International Trade Law (UNCITRAL) Model Law ("UNCITRAL Model Law"), Indian Arbitration law, and relevant applicable constitutional principles of India.[6] The authors also attempt to expound upon the two-cherry doctrine and its relevance in the context of Indian arbitral jurisprudence while juxtaposing it with the position of the UNCITRAL Model Law.[7]

INTRODUCTION

This research attempts an incisive analysis of a landmark decision in the arbitral jurisprudence of India rendered by the SCI that conclusively settled the debate concerning the applicability of the amended provisions of the 2015 Act to arbitration and court proceedings. In *Hindustan Construction Co. v. Union of India* ("*HCC*"),[8] the SCI, while opining that Section 87 of the 2019 Act reversed the beneficial effects of the 2015 Act,[9] declared the

[4] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[5] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[6] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[7] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[8] AIR 2020 SC 122 (India).
[9] Section 87 was introduced after deleting Section 26 of the 2015 Act, which stipulated that the 2015 Act will not:

> apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply

abovementioned statutory provision as contrary to the ethos of the statute and the progressive arbitral jurisprudence in India. The *rationale* of the SCI, inter alia, was premised on: (i) Section 87 of the 1996 Act is in contravention to Article 36(2) of the UNCITRAL Model Law; (ii) the mischief caused by Section 87 of the 1996 Act resulting in "automatic stay" was against the aims and objectives of the 1996 Act; (iii) Section 87 of the 1996 Act underhandedly makes Section 35 of the 1996 Act otiose by questioning the finality of arbitral awards; and (iv) Section 87 of the 1996 Act is violative of Article 14 of the 1950 Constitution by depriving an award-holder from enjoying the benefits of a successful arbitration.[10]

This research is set out as follows: Section I sets out the timeline leading to the *Hindustan Construction Co.* decision, including the position before and after the enactment of the 1996 Act and the 2015 Act. Section II describes the two-cherry doctrine as postulated in the judgement vis-à-vis the 1996 Act. Section III focuses on the constitutionality aspect of the judgement. Section IV identifies the statutory avenues for the award-debtor and the award-creditor in presenting their respective applications for relief. Section IV also attempts to map a methodology for the exercise of discretion by the Indian courts drawing guidance from international judicial practice.

Notably, *Hindustan Construction Co.* addressed the constitutionality and scope of Section 36 of the 1996 Act entailing automatic suspension on the execution of the award following the existence of an application challenging the award per Section 34 of the 1996 Act.[11] This issue was also previously considered by the SCI and the Gujarat High Court respectively in two separate judgements. In *National*

> in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

The Arbitration and Conciliation (Amendment) Act, 2015, §26.

[10] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

[11] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

Aluminum Co. v. Pressteel & Fabrications Ltd., the SCI, while considering the scope of Section 36, observed that automatic stay defeated the objective of the 1996 Act.[12] However, the Court reserved its opinion on the matter and merely recommended the legislature consider an amendment to the aforesaid provision:

> 11. However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the Ministry concerned to Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.[13]

In *Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bimani Chemicals Private Ltd.*, Section 36 of the 1996 Act was unsuccessfully challenged for being beyond the statute's

[12] Nat'l Aluminum Co. v. Pressteel & Fabrications Ltd., (2004) 1 SCC 540 (India); *see also* Afcons Infrastructure Ltd. v. Port of Mumbai, (2014) 1 ARBLR 512 (Bombay) and Radheshyam Shaw v. Union of India, AIR 2009 (NOC) 309 (Calcutta). While *National Aluminum Co.* ("*NALCO*") discussed the powers of the Supreme Court to order under Section 42 of the 1996 Act, the Bombay High Court in *Afcons Infrastructure Ltd*., while deciding upon a Section 9 application for interim relief, observed that admission of a Section 34 petition paralyzed the process for the winning party/award-creditor. Afcons Infrastructure Ltd. v. Port of Mumbai, (2014) 1 ARBLR 512 (Bombay).

[13] Nat'l Aluminum Co. v. Pressteel & Fabrications Priv. Ltd., (2004) 1 SCC 540 (India).

scope and objectives.[14] The Gujarat High Court observed that the respondent failed to illustrate any inconsistency in the legislative competence of Parliament or in relation to any other provision of the 1950 Constitution after finding agreement with the legislative wisdom of allowing for enforcement of the arbitral award.[15] It is also noteworthy that following the decision of the SCI in *National Aluminum Co.*,[16] two judgements of the Calcutta High Court and Delhi High Court categorically mirrored the view of the SCI in calling for a radical revamp of the provisions of the 1996 Act.[17] The Calcutta High Court in *Sarkar & Sarkar v. State of West Bengal* observed that the exercise, prima facie, of the right to appeal available to the unsuccessful litigant under Section 37 of Act, 1996 does not operate as an automatic stay on the execution, and that such order be obtained *by the unsuccessful litigant* before the court.[18] The Delhi High Court's observation in *Décor India Private Ltd. v. National Building Construction Corp.*,[19] seemingly a precursor to *Hindustan Construction Co.*, echoed a similar opinion:

> 15. Now if the execution of the Decree followed by [the] Award is to be delayed by treating the pendency of Appeal as automatic stay then the new legislation i.e., the Arbitration & Conciliation Act, 1996[,] instead of being an efficient and speedy

[14] Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bimani Chems. Priv. Ltd., (2009) 2 ARBLR 287, 291 (Gujarat); Nat'l Bldg. Constr. Corp. v. Lloyds Insulation India Ltd., (2005) (Supp) ARBLR 563 (India).
[15] Madhavpura Mercantile Co-op Bank Ltd. v. Shah Bimani Chemicals Priv. Ltd., (2009) 2 ARBLR 287, 291 (Gujarat).
[16] Nat'l Aluminum Co. v. Pressteel & Fabrications Ltd., (2004) 1 SCC 540 (India).
[17] Sarkar & Sarkar v. State of W. Bengal, (2006) 4 ARBLR 379 (India); Décor India Priv. Ltd. v. Nat'l Bldg. Constr., (2007) 3 ARBLR 348 (India).
[18] Sarkar & Sarkar v. State of W. Bengal (2006), 4 ARBLR 379 (India) (emphasis added).
[19] Décor India Priv. Ltd. v. Nat'l Bldg. Constr. Corp., (2007) 3 ARBLR 348 (India).

> remedy[,] would be reduced to a remedy worse than what we already had, that is the civil suits and the deep routed procedural delays till passing of the decree and even thereafter. [ ] [W]e may hasten to add that even in civil suits' decrees[,] there is no automatic stay on pendency of the Appeal[.] [S]tay[—]even if granted in execution of civil suits' decrees[—] is more often than not . . . conditional [ ] and preferably subject to deposit of the decretal amount. Had the legislature intended to give the provision of stay of execution on filing of an Appeal under Section 37 of the Act, it would have given the provision in the Act itself, in pari materia with Order XLI Rule 5 of the Code of Civil Procedure. Since it has not been done by the legislature, in our view, it will not be possible to provide unconditional automatic stay under the principle of merger. So[,] from whatever angle we examine this proposition, the interpretation, in our view, falls in favour of non-automatic stay.[20]

In the backdrop of the aforesaid judgments, this research attempts to analyze the *Hindustan Construction Co.* decision and its impact on the enforceability of arbitral awards in India.

I – ARBITRATION – THROUGH THE ANNALS OF THE LAW

This research is premised upon an assertion that the arbitration law in India has, despite the stated legislative purpose to the contrary, envisaged an extensive role for the

[20] Décor India Priv. Ltd. v. Nat'l Bldg. Constr. Corp., (2007) 3 ARBLR 348 (India); Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

courts often coupled with discretion, and this feature is evident in the legislative provisions and their interpretation.[21] Towards establishing this assertion, the research within this part attempts to map the arbitration law, including its historical antecedents, to trace the role of the courts throughout the lifecycle of the arbitration and at the time of challenges under Section 34 of the 1996 Act, especially in determinations related to the time and nature of the challenges.

The earliest known law on the regulation of arbitration in colonial India was the Bengal Regulation of 1772.[22] The Indian Arbitration Act of 1899—modelled on the English Arbitration Law—followed and applied within the Presidency towns of Bombay, Madras, and Calcutta.[23] In 1908, the Civil Procedure Code was revised to include provisions related to arbitration.[24] In 1937, the Arbitration (Protocol and Convention) Act of 1937 ("1937 Act") was enacted to give effect to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the

[21] The legislation has identified the role of the courts in India, rather expansively, in the following aspects: Reference to arbitration (S.8, 45 &54); Appointment of arbitration (S.11); Interim measures (S.9); Challenge to arbitrators (S.12, 13 & 14); Challenging the arbitration awards (S.34); Seeking Courts assistance with regard to Witnesses (S.27); Contempt Proceedings (S.27); Enforcement of awards (S.36, 49&58); and Appealable orders (S.37 and S.59). In P. Anand Gajapati Raju v. P.V.G. Raju, (2000) 4 SCC 539 (India) at 541 the SCI held that the 1996 legislation envisaged minimal judicial intervention in the tribunal's proceedings. The Court referred to Section 5 of the legislation - Extent of judicial intervention: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except so provided in this Part".

[22] Ben Steinbruck, *International Arbitration in India,* INTERNATIONAL COMMERCIAL ARBITRATION: A HANDBOOK 448, (Stephan Balthasar ed., 2016); Xinyi Shen, *India Moves One Step Further Towards "Arbitration-friendly" Jurisdiction*, 11 ARB. L. REV. 266, 267 (2019); Amelia C. Rendeiro, *Indian Arbitration and "Public Policy"*, 89 TEX. L. REV. 699, 701 (2011).

[23] Steinbruck, *supra* note 22, at 449.

[24] Steinbruck, *supra* note 22, at 448

Execution of Foreign Awards of 1927.[25] A comprehensive arbitration law was enacted in 1940, and it substantially allowed judicial intervention in the arbitral process.[26] The Foreign Awards (Recognition and Enforcement) Act of 1961 implemented India's commitment to the 1958 United Nations New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("NYC").[27] Thus, the law and practice of arbitration was governed by the Indian Arbitration Act of 1940 ("1940 Act") and the Foreign Awards (Recognition and Enforcement) Act of 1961 ("1961 Act") which replaced the 1937 Act.[28]

The 1940 Act allowed multiple opportunities for litigants to approach the court for intervention during the lifecycle of the arbitration and after, thus compounding delays and thereby rendering arbitrations inefficient and unattractive.[29] Courts could be approached to set the arbitration proceedings in motion.[30] The existence of an agreement and a dispute was required to be proved in court.[31] Pending arbitral proceedings, courts could be approached for an extension of time for making an award.[32] Finally, awards could be enforced only after the courts converted them into a ruling of their own.[33] This has been a singular concern regarding the enforcement of arbitral awards in India, and its impact on the arbitration law has sustained despite the

[25] A. F. M. Maniruzzama & Ijaz Ali Chishti, *International Arbitration and Public Policy Issues in the Indian Subcontinent: A Look Through the English Common Law and International Lenses*, MANCHESTER J. OF INT'L ECON. L. (forthcoming).
[26] Steinbruck, *supra* note 22, at 448.
[27] Steinbruck, *supra* note 22, at 448.
[28] Steinbruck, *supra* note 22, at 448.
[29] Aloke Ray & Dipen Sabharwal, *Indian Arbitration at a Crossroads*, WHITE & CASE 1, 1 (2007), https://static1.squarespace.com/static/537e8bcbe4b09ac6c31f0ae6/t/53daf516e4b0e65009ffa151/1406858518409/LM_Arbitration+in+India.pdf.
[30] Steinbruck, *supra* note 22, at 448.
[31] Steinbruck, *supra* note 22, at 448.
[32] Steinbruck, *supra* note 22, at 448.
[33] Steinbruck, *supra* note 22, at 448.

enactment of a new arbitration law, based upon the UNCITRAL Model Law and much harmonization with the best practices in this domain.[34] As will be discussed in the foregoing narrative, the role of the courts has placed a question on the enforceability of the award, despite the law itself proclaiming that the award ought to be considered at par with the decree of the court. The 1940 Act dealt with only domestic arbitration,[35] however, there were instances that the law continued to be applied to foreign arbitral awards as well: a) an award resulting in an arbitration agreement between parties one of whom is not a citizen/corporate of India may provide for an arbitration in India to be governed by the 1940 Act;[36] and b) an award resulting from a reference to arbitration in a dispute involving a foreign element could still be decided as per the 1940 Act as reference to arbitration by the trial court was based on the said legislation and its validity was not open to any objections.[37] These decisions exemplified the enhanced role of the courts in arbitration—domestic and international—envisaged within the Indian law prior to 1996.

India ratified the NYC on July 13, 1960, albeit with the reservation on reciprocity.[38] It is interesting to note that early disputes regarding enforcement in India of U.S.-seated arbitral awards were decided under common law,[39] and not under the NYC as the United States did not accede to the NYC until 1971.[40] The SCI held awards non-enforceable

[34] Steinbruck, *supra* note 22, at 448.
[35] Harpreet Kaur, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261, 262 (2010).
[36] Michel Golodetz v. Serajuddin & Co., AIR 1959 Cal 603 (India); W. Woods & Son Ltd. v. Bengal Corp., AIR. 1959 Cal 8 (India). The following provisions of the legislation are applicable: The Arbitration Act, 1940, §§ 14, 17, 31, 32.
[37] Nachiappa Chettiar v. Subramaniam Chettiar, AIR 1960 SC 307 (India).
[38] Steinbruck, *supra* note 22, at 448.
[39] Badat & Co. v. E. India Trading Co., AIR 1964 SC 538 (India).
[40] The United States became the thirty-seventh Contracting State through accession on September 30th, 1970.

except as judgments rendered upon the award.[41] It opined, "[i]f the law of the country in which it was made gives finality to judgment based upon an award and not to the award itself, the award can furnish no cause of action for a suit in India."[42]

The 1940 Act also envisaged a significant role for the courts with regard to decisions on challenges to arbitral awards—they could be set aside for being "improperly procured . . . or otherwise invalid"—allowing, therefore, an interpretational role for the courts including an opportunity to inquire into the merits of the award[43] and extensively articulated provisions on the jurisdiction of the courts.[44]

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[41] Steinbruck, *supra* note 22, at 448.

[42] Badat & Co. v. E. India Trading Co., AIR 1964 SC 538, 558 (India).

[43] The Arbitration Act, 1940, §30.

> Grounds for setting aside award. An award shall not be set aside except on one or more of the following grounds, namely:-
>
> (a) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
>
> (c) that an award has been improperly procured or is otherwise invalid.

The Arbitration Act, 1940, §30.

[44] The Arbitration Act, 1940, §31.

> Jurisdiction.
>
> (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.
>
> (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.
>
> (3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings

The 1996 Act,[45] guided by the UNCITRAL Model Law, specifically aimed for speedy and efficacious dispute resolution mechanisms regarding arbitration and enforcement of arbitral awards.[46] Towards this, the law addressed the concern against the intervention of courts and set on the path of course correction.[47] Courts continued to have a role in facilitating arbitration, but importantly, under the 1996 Act, the arbitral award is now treated as a decree, and enforceable as such, unlike the 1940 Act that required an arbitral award to be decreed by the court as final and binding.[48]

Part I of the 1996 Act enlisted a few provisions identifying the role of the court in the context of arbitration before commencement of the arbitration proceedings.[49] Under Section 8, a party to an arbitration agreement or anyone claiming through such party can apply to the courts to refer the parties to arbitration unless the court finds that no valid prima facie arbitration agreement exists.[50] The SCI

> shall be made to the Court where the award has been, or may be, filed, and to no other Court.
> (4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that Court and in no other Court.

The Arbitration Act, 1940, §31.

[45] The 1996 Act applied to domestic and international arbitration. The Arbitration and Conciliation Act, 1996.

[46] Steinbruck, *supra* note 22, at 448.

[47] Steinbruck, *supra* note 22, at 448.

[48] Steinbruck, *supra* note 22, at 448.

[49] The Arbitration and Conciliation Act, 1996.

[50] Note that this section is significantly different from Section 34 of the 1940 Act that prescribed the following twin conditions for reference to arbitration be satisfied: (i) that there is sufficient reason for referring the matter to arbitration in accordance with the arbitration agreement; and (ii) that the applicant was, at the time when the proceedings were commenced, and still continues to be, ready and willing to do all things necessary for the proper conduct of the arbitration. The Arbitration and Conciliation Act, 1996, §34.

has consistently held that the language of Section 8 is *peremptory* and it is *obligatory* for the courts to refer the parties to arbitration by the terms of their arbitration agreement,[51] unlike the 1940 Act, wherein courts exercised discretionary powers in this regard.[52] In *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.*, the SCI emphasized the presumptive validity of an arbitration clause and held that the courts ought to construe the arbitration agreement in favor of upholding the same.[53] In *Hindustan Petroleum Corp. v. Pinkcity Midway Petroleums*, the SCI, articulating upon the civil court's role, observed that an objection on the applicability of the arbitration clause to the dispute should be heard only by the Arbitral Tribunal under Section 16 of the 1996 Act and the civil court shall not examine the issue through a Section 8 application.[54]

In relation to arbitration proceedings, parties can approach the court only: (a) for any interim measure of protection or injunction or any appointment of receiver etc.,[55] and (b) for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or such party-appointed arbitrators fail to agree upon the choice of a chairperson for the tribunal. While handling such requests for appointment, courts shall confine their examination of

[51] P. Anand Gajapati Raju v. P.V.G. Raju, (2000) 4 SCC 539 (India); Konkan Ry. Corp. v. Rani Constr. Priv. Ltd., (2002) 2 SCC 388 (India); Smt. Kalpana Kothari v. Smt. Sudha Yadav & Orgs., (2002) 1 SCC 203 (India); Sukanya Holdings Priv. Ltd. v. Jayesh H. Pandya & Anr. (2003) 5 SCC 531 (India); Magma Leasing & Fin. Ltd. & Anr. v. Potluri Madhavilata & Anr. (2009) 10 SCC 103 (India).

[52] The Arbitration Act, 1940.

[53] India Household & Healthcare Ltd. v. LG Household & Healthcare Ltd., (2007) 5 SCC 510 (India).

[54] Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 (India).

[55] The Arbitration and Conciliation Act, 1996, §11, as amended by The Arbitration and Conciliation (Amendment) Act, 2015—applications for the same shall be moved before the commercial division in the High Courts, as per Section 10(3) of the Commercial Courts Act of 2015.

the existence of the arbitration agreement to the pre-reference stage.[56]

Further, Section 27 of the 1996 Act specifies that the arbitral tribunal or a party with the approval of the tribunal may apply to the court seeking its assistance in taking evidence.[57] However, the Indian law, unlike the UNCITRAL Model Law, also provides for penalties for failure to comply with the processes so issued as if they were orders issued in suits before the courts.[58] Courts may either appoint a commissioner for taking evidence or order that the evidence be provided directly to the arbitral tribunal.[59]

AWARDS – ENFORCEMENT AND SETTING ASIDE APPLICATIONS

Similar to Article 34 of the UNCITRAL Model Law, Section 34 of the 1996 Act specified that designated courts may be approached for applying to set aside arbitral awards.[60] However, the Indian law provided for an enhanced role of the courts by tweaking the content that could be ascribed to a public policy exception with local

[56] The Arbitration and Conciliation Act, 1996, §11(6A); The Arbitration and Conciliation (Amendment) Act, 2015; Acts of Parliament, 2016 (India); *see* Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2019) 6 L.R. 237 (India); WAPCOS Ltd. v. Salma Dam Joint Venture & Another, (2019) 6 L.R. 247 (India); Union of India v. BM Constr. Co., (2019) 6 L.R. 284 (India).

[57] The Arbitration and Conciliation Act, 1996, §27(5).

[58] The Arbitration and Conciliation Act, 1996, §27(5).

[59] The Arbitration and Conciliation Act, 1996, §§27(3) & (6).

[60] *See* The Arbitration and Conciliation Act, 1996, §34.

> [I]n the case of an arbitration other than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes[.]

The Arbitration and Conciliation Act, 1996, §2(1)(e).

flavor.[61] The Law Commission of India expressed disfavor with judicial intervention through expansive content to public policy exception, lamenting that courts could at their discretion pursue enhanced scrutiny of the awards.[62]

Awards become executable and enforceable after three months of their receipt,[63] by when the time to challenge them as per Section 34 (1) expires.[64] An award-holder would have to wait for a period of three months following receipt of the award, and were a Section 34 challenge application filed by the award-debtor, until it has been resolved.[65] Thus, a *bona fide* award-holder was prevented

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[61] *See* The Arbitration and Conciliation Act, 1996. Interestingly, the earliest understanding on public policy in arbitration was founded upon a narrow construction of the curial role of the courts in Renusagar Power Co. v. Gen. Elec. Co., AIR 1994 SC 860 (1993) (India). However, later jurisprudence following the enactment of the 1996 Act saw the courts adopting an expansive content to this exception; *see* ONGC v. Saw Pipes (2003), 5 SCC 705 (India); NPCC v. Rajdhani Builders, (2006) (2) ARBLR 219 (Delhi); McDermott Int'l Inc. v. Burn Standard Co., (2006) 11 SCC 181 (India) (citing with approval from State of Rajasthan v. Basant Nahata, (2005) 12 SCC 77 (India)); *see generally* Fali Nariman, *Ten Steps to Salvage Arbitration in India: The First LGIA-India Arbitration Lecture*, 27(2) ARB. INT'L 115 (2011); Daniel Mathew, *Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance* 3(1) J. OF NAT'L L. UNIV. 105 (2015); JUSTICE R.S. BACHAWAT, LAW OF ARBITRATION & CONCILIATION, 1 (6th ed. 2017).

[62] LAW COMMISSION OF INDIA, REPORT NO. 246 AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT 1996 (2014); LAW COMMISSION OF INDIA, SUPPLEMENTARY TO REPORT NO. 246 TO ARBITRATION AND CONCILIATION ACT, 1996 (2015).

[63] Courts retain the power to extend this period by another 30 days upon satisfaction of the reasons for delay. The Arbitration and Conciliation Act, 1996, §34(3).

[64] The Arbitration and Conciliation Act, 1996, §34(3).

[65] The Arbitration and Conciliation Act, 1996, §34.

> Application for setting aside arbitral award—
> (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
> (2) An arbitral award may be set aside by the Court only if—
> (a) the party making the application furnishes proof that—

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

from reaping the fruits of the arbitral award because of an "automatic stay" on proceedings for execution of the

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(iii) it is in conflict with the most basic notions of morality or justice. [(inserted by 2015 Amendment Act)]

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. [(inserted by 2015 Amendment Act)]

(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. [(inserted by 2015 Amendment Act)]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The Arbitration and Conciliation Act, 1996, §34.

award on account of the losing party filing a setting aside application under Section 34 of the 1996 Act.[66]

Section 36 of the amended 2015 Act addresses the impact of Section 34 on the enforceability of the award; the party challenging an award shall apply separately for stay on execution.[67] Courts—as per the amended Section 36(2) and (3)—shall exercise discretion to order a stay of execution and prescribe the conditions for its operation.[68] Section 26 of the 2015 Act expressly provides that the Act would apply to arbitral proceedings which commence on or after the date of commencement of the 2015 Amendment; i.e., October 23, 2015 ("Cut-Off Date").[69] An automatic stay remained operative on the enforcement of all arbitral awards in cases

[66] The Arbitration and Conciliation Act, 1996, §34.
[67] The Arbitration and Conciliation Act, 1996, §36.

> (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.
> (2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.
> (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:
> Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

The Arbitration and Conciliation Act, 1996, §36.
[68] The Arbitration and Conciliation Act, 1996, §36(2–3).
[69] The Arbitration and Conciliation (Amendment) Act, 2015, §26.

where a petition under Section 34 of the 2015 Act was pending as of the Cut-Off Date.[70]

Pertinently, the issue of retrospective application of the 2015 amendment was discussed within the Justice Srikrishna Committee's Report.[71] Applauding the amendment for ushering changes that minimize judicial intervention in the arbitral process through, among others, an amendment to Section 36, the Report observed that removal of automatic stay of the award helps prevent parties from engaging in dilatory tactics through unnecessary involvement of the courts.[72] However, it was aware of the detrimental impact that the continued confusion regarding the retrospective applicability the amended 2015 Act could foster.[73] It recommended that the applicability of Section 26 of the 2015 Act be limited to arbitrations commenced on or after the Cut-Off Date and related court proceedings.[74]

On at least two occasions, higher judiciary in India has attempted to articulate on the applicability of Section 26 of the 2015 Act.[75] In *Ardee Infrastructure v. Anuradha Bhatia*, the Delhi High Court held Section 26 is applicable only to those arbitral proceedings which were initiated after the commencement of the amendment and to court proceedings arising out of them.[76] The Court reasoned that the right to have an award enforced included the negative

[70] Khaitan & Co, *Arbitral Awards- Automatic Stays, On? And Casus Omissus for IBC,* LEXOLOGY (December 24, 2019), https://www.lexology.com/library/detail.aspx?g=64bce580-f3ee-4df5-9806-2b8106952f52.
[71] *See* JUSTICE B.N. SRIKRISHNA, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA, (2017).
[72] SRIKRISHNA, *supra* note 71, at 21.
[73] SRIKRISHNA, *supra* note 71, at 23.
[74] SRIKRISHNA, *supra* note 71, at 61–62.
[75] *See* Ardee Infrastructure Priv. Ltd. v. Anuradha Bhatia, 2017 (2) ARBLR 163 (Delhi); Kochi Cricket Priv. Ltd. v. Board of Control for Cricket in India, 2017 (2) Bom CR 113 (India).
[76] Ardee Infrastructure Priv. Ltd. v. Anuradha Bhatia, 2017 (2) ArbLR 163 (Delhi).

right to not have it enforced until challenges or objections to the same were disposed.[77] Section 34 of the 1996 Act thus created a vested right for automatic stay of the award for parties to an arbitral proceeding which commenced before the 2015 Act pending a decision on challenge to the award.[78] The Bombay High Court differed though.[79] In *Kochi Cricket Private Ltd. vs. Board of Control for Cricket in India*,[80] a challenge to the award was filed before the commencement of the 2015 Act but the execution application for the award was filed after the commencement of the 2015 Act.[81] The appellants challenged the execution application by applying the un-amended Section 36 to the facts and pleaded for an automatic stay on the award.[82] However, the Single Judge ruled that the amended Section 36 would apply, thus there would be no automatic stay, and ordered execution.[83]

The SCI addressed the question of interpretation of Section 26 of the 2015 Act and its applicability to the proceedings pending prior to such amendment in *Board of Control for Cricket in India vs. Kochi Cricket Private Ltd.* ("*BCCI*"), a set of appeals that included an appeal from the abovementioned Bombay High Court decision.[84] Characterising Section 36 of the 1996 Act as a procedural

[77] Ardee Infrastructure Priv. Ltd. v. Anuradha Bhatia, 2017 (2) ArbLR 163 (Delhi).
[78] *See* Muskan Arora, *Indian Supreme Court Strikes Down Automatic Stay Provisions for Good*, WOLTERS KLUWER (February 15, 2020), http://arbitrationblog.kluwerarbitration.com/2020/02/15/indian-supreme-court-strikes-down-automatic-stay-provisions-for-good/.
[79] Kochi Cricket Priv. Ltd. v. Bd. of Control for Cricket in India, 2017 (2) BomCR 113 (India).
[80] Kochi Cricket Priv. Ltd. v. Bd. of Control for Cricket in India, 2017 (2) BomCR 113 (India).
[81] Kochi Cricket Priv. Ltd. v. Bd. of Control for Cricket in India, 2017 (2) BomCR 113 (India).
[82] Kochi Cricket Pvt. Ltd. v. Bd. of Control for Cricket in India, 2017 (2) BomCR 113 (India).
[83] Kochi Cricket Pvt. Ltd. v. Bd. of Control for Cricket in India, 2017 (2) BomCR 113 (India).
[84] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

provision, the Court held that an award-debtor cannot enjoy the substantive vested right of an automatic stay on the execution of an arbitral award upon filing a setting aside petition under Section 34 of the 1996 Act.[85] The Supreme Court also observed that the phrase "*has been*" in subsection two of Section 36 referred to petitions filed under Section 34 of the 1996 Act before the Cut-Off Date.[86] The Court further clarified that the substituted Section 36 would apply to arbitral awards in cases where a petition under Section 34 of the 1996 Act has already been filed as of the Cut-Off Date.[87]

The 1996 Act was further amended in 2019 to regulate its application based upon the timeline of the arbitral proceedings and the proceedings in the court based upon the arbitration.[88] Section 87, inserted through the 2019 Act, provided that the 2015 amendment applied only to the arbitral proceedings that commenced on or after the Cut-Off Date and to such court proceedings that emanate from such arbitral proceedings.[89] Moreover, Section 15 of the 2019 Act deleted Section 26 of the 2015 Act.[90] The insertion thus

[85] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[86] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[87] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[88] *See* Subhiksh Vasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?*, WOLTERS KLUWER (August 25, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/.
[89] Shaneen Parikh & Shalaka Patil, *The Saga Continues in 2019- Applicability of the 2015 Amendments in light of the 2019 Amendments*., CYRIL AMARCHAND MANGALDAS (August 28, 2019), https://corporate.cyrilamarchandblogs.com/2019/08/applicability-of-the-2015-amendments-2019-amendments-arbitration-conciliation/.
[90] Padmaja Kaul & Yugank Goel, Aman Chaudhary, *India: The Supreme Court Strikes Down Section 87 Of The Arbitration And Conciliation Act, 1996 – Reinstates BCCI v. Kochi Cricket*, MONDAQ (December 11, 2019), https://www.mondaq.com/india/trials-appeals-compensation/873536/the-

resulted in nullifying the impact of the Supreme Court's decision in *BCCI* by restoring the pre-2015 amendment position: automatic stay on execution of awards for set-aside applications filed under Section 34 before the Cut-Off Date.[91] The following section discusses the delineation of the SCI in the *HCC* dictum wherein it addressed the constitutionality-related challenges to Section 87 of the 2019 Act and the status of the stay vis-à-vis the arbitral award.[92]

II. THE TWO-CHERRY DOCTRINE VIS-À-VIS THE INDIAN ARBITRATION ACT, 1996:

One of the crucial aspects of the *HCC* judgment, in the view of the authors, was the discussion revolving around the two-cherry doctrine wherein the SCI engaged in an incisive comparative analysis of the enforcement procedure and finality of arbitral awards.[93] The enforcement procedure relating to domestic awards under the 1996 Act, unlike the 1940 Act, enunciates that an arbitral award shall be enforced under the Civil Procedure Code of 1908 ("1908 CPC") in the same manner as if it were a decree of the Court.[94] Further, in Section 36 of the 1996 Act, unlike in the 1940 Act, an obligation is cast upon the enforcing party to satisfy the court that "what is sought to be executed is an award[,]" and that

supreme-court-strikes-down-section-87-of-the-arbitration-and-conciliation-act-1996--reinstates-bcci-v-kochi-cricket.

[91] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

[92] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

[93] *See* Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

[94] The Arbitration and Conciliation Act, 1996, §36.

> Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

The Arbitration and Conciliation Act, 1996, §36. Also, for a comparative understanding of section 36 as per the 2015 amendment, *see* Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

the same satisfies other legal requirements such as registration, impleading of necessary parties, etcetera.[95]

The SCI observed that Articles 34 and 35[96] of the UNCITRAL Model Law postulated for two bites at the cherry: (i) during setting aside applications,[97] and (ii) during recognition and enforcement applications.[98] In comparison, as per the SCI, Section 35 and Section 36 of the 1996 Act do not follow the two-cherry doctrine.[99] When an award is made in India, it automatically becomes final and binding as a decree under the 1908 CPC, thereby rendering no recourse when it comes to recognition and enforcement.[100] The court explained that such deviation was necessary to ensure that when the time limit for making an application elapses or such an application is rejected, the award shall be enforced

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[95] Diddi Kumaraswamy v. Pathakala Bhaskar, (2008) 2 ArbLR 573. In the instant case the existence of an arbitration agreement was not evidenced; the award which was dealing with transfer of immovable property was not on stamped paper.

[96] UNCITRAL MODEL L. ON INT'L ARB. ARTICLE 35 (UNITED NATIONS 1985).

> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of Article 36.
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in Article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

UNCITRAL MODEL L. ON INT'L ARB. ARTICLE 35 (UNITED NATIONS 1985).

[97] One of the grounds for refusal to recognize foreign awards is when the award is not binding.

[98] Hindustan Construction Co. v. Union of India, AIR 2020 SC 122 (India).

[99] The Arbitration and Conciliation Act, 1996, §35. "Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively." The Arbitration and Conciliation Act, 1996, §35.

[100] Code of Civil Procedure, 1908, §33; The Arbitration and Conciliation Act, 1996, §9.

under the 1908 CPC as if it were a decree of the court.[101] The authors agree with the SCI in its observation that the 1996 Act has not followed the framework stipulated in the UNCITRAL Model Law.[102] Section 36 of the 1996 Act provides for a more robust enforcement regime similar to the German ZPO[103] and Japanese Arbitration Law.[104]

A perusal of the *travaux préparatories* of the UNCITRAL Model Law pertaining to the term "*binding*"[105] indicates that the Secretariat suggested two proposals viz.: (i) introduction of the term "*between the parties*" to signify that the award cannot bind other persons;[106] and (ii) specifying the exact point in time when an award shall be recognized as binding.[107] However, the Working Group declined to heed to the abovementioned suggestions on grounds that "there was no need for express statements" on these points.[108] Subsequently, the Secretariat, in its

[101] Hindustan Construction Co. v. Union of India, AIR 2020 SC 122 (India).
[102] The Arbitration and Conciliation Act, 1996.
[103] Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1055. Section 1055 of the German ZPO states that the arbitral award has the same effect between the parties as a final and binding court judgment. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1055; *see also* GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 1113–87 (2d ed. 2014).
[104] [Arbitration Law], Law No. 138 of 2003, art. 45, para. 1 (Japan). Article 45(1) of the Japanese Arbitration Law states that "[a]n arbitral award (irrespective of whether or not the place of arbitration is in the territory of Japan . . .) shall have the same effect as a final and conclusive judgment." *See also* BORN, *supra* note 103.
[105] *Report of the Working Group on International Contract Practices on the Work of its Seventh Session*, U.N. GAOR Supp. No. 17, at 36, U.N. Doc. A/CN.9/246 (1984). Pursuant to much discussion and a proposal by the Soviet Union, it was decided that for foreign awards, the point in time when the award becomes binding is governed by the law under which the award was made.
[106] HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, LEGISLATIVE HISTORY AND COMMENTARY 1006–52 (1st ed. 1989).
[107] HOLTZMANN & NEHAUS, *supra* note 106; *see also Studies and Reports on Specific Subjects*, [1983] 14 Y.B. Int'l Trade L. 92, U.N. Doc. A/CN.9/WG.II/WP.42 ("not yet . . . binding" in Article V(1)(e) of the NYC is commonly interpreted as meaning "still open to ordinary means of recourse").
[108] U.N. GAOR, *supra* note 105, at 36.

commentary on the Working Group's draft, interpreted the above term to connote that even though not expressly stated, an award is binding between the parties and from the date of the award.[109] Pertinently, a subtle difference highlighted when comparing Article 35 of the UNCITRAL Model Law and the NYC, according to the authors, is the useful distinction drawn between enforcement and recognition.[110] Even though the essence of Article 35 was modelled on the parallel requirements of the NYC, sub-clause one of Article 35 makes it clear that recognition may occur independently of enforcement and it is only for the purposes of enforcing an award that a separate application may be made.[111]

Further, the Working Group explained that recognition was an abstract legal effect which could be obtained automatically without necessarily being requested by a party.[112] The authors are of the opinion that domestic arbitral legislations commonly provide that the award obtains its executory force by an "*exequatur*,"[113] although the procedure may vary from one state to the other. From a comparative standpoint, in international practice, if an arbitral award is not vacated, the award creditor will seek enforcement of the award which will probably involve commencing legal proceedings under local laws of the state where the award is sought to be enforced.[114] Often, however, an award must be "*confirmed*" by a local court in

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[109] *Analytical Commentary on the Draft Text of a Model Law on International Commercial* Arbitration, U.N. GAOR Supp. No. 18, at 76, U.N. Doc. A/CN.9/264, (1985).
[110] U.N. GAOR, *supra* note 108.
[111] U.N. GAOR, *supra* note 105, at 35.
[112] U.N. GAOR, *supra* note 105, at 35.
[113] "Exequatur" refers to court-granted leave to enforce an arbitral award. "Double-exequatur" refers to the procedure whereby leave to enforce an arbitral award might have to be obtained both in the state where it was made along with the state where enforcement was sought; *see also* HOLTZMANN & NEUHAUS, *supra* note 106, at 1006–52.
[114] HOLTZMANN & NEHAUS, *supra* note 106.

a particular forum before it may be coercively enforced in that forum.[115] Pursuant to such confirmation, an award may be "*recognized*" through judicial proceedings.[116]

The significance of the absence of the two-cherry doctrine in India is highlighted by the fact that premising itself on the above, the court declared the *ratio* of *NALCO*[117] and *Fiza Developers v. AMCI*[118] as *per incuriam* for its failure to take into due consideration Section 9, Section 35, and the second part of Section 36 of the 1996 Act and declaring the law incorrectly. The authors are of the view that the SCI noting the interplay of these statutory provisions heralded the removal of the automatic stay feature in India's arbitration law.[119] Following an extensive analysis of these provisions and their legislative intent, the SCI observed that the assumption of non-executability of an award owing to a challenge under Section 34 was "plainly incorrect."[120] In relation to the nature of Section 36, the SCI remarked that *"*the amended Section, being clarificatory in nature merely restates the position that the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the CPC, 1908."[121]

According to SCI, Section 36 did not in any way infer an automatic stay on the enforcement of awards.[122] Such an interpretation, as per SCI, is also consistent with the fundamental tenets enshrined in Section 9 of the 1996 Act, which enables a party to apply to a court for relief "after the

[115] BORN, *supra* note 103, at 703–78.
[116] BORN, *supra* note 103, at 59.
[117] Nat'l Aluminum Co. v. Pressteel & Fabrications Priv. Ltd., (2004) 1 SCC 540 (India).
[118] Fiza Devs. v. AMCI, (2009) 17 SCC 796 (India).
[119] Fiza Devs. v. AMCI, (2009) 17 SCC 796 (India).
[120] Nat'l Aluminum Co. v. Pressteel & Fabrications Priv. Ltd., (2004) 1 SCC 540 (India) or Fiza Devs. v. AMCI, (2009) 17 SCC 796 (India).
[121] Fiza Devs. v. AMCI, (2009) 17 SCC 796 (India).
[122] Nat'l Aluminum Co. v. Pressteel & Fabrications Priv. Ltd., (2004) 1 SCC 540 (India) or Fiza Devs. v. AMCI, (2009) 17 SCC 796 (India).

making of the arbitration award but before it is enforced in accordance with Section 36."[123] To reinforce this observation, it relied upon the *ratio* in *Dirk India Private Ltd vs. Maharashtra State Electricity Generation Co.*:

> 12. The second facet of Section 9 is the proximate nexus between the orders that are sought and the arbitral proceedings. When an interim measure of protection is sought before or during arbitral proceedings, such a measure is a step[-]in aid to the fruition of the arbitral proceedings. When sought after an arbitral award is made but before it is enforced, the measure of protection is intended to safeguard the fruit of the proceedings until the eventual enforcement of the award. Here again the measure of protection is a step[-]in aid of enforcement. It is intended to ensure that enforcement of the award results in a realisable claim and that the award is not rendered illusory by dealings that would put the subject of the award beyond the pale of enforcement.[124]

The court observed that the stated purpose of Section 36 was for a different, well-illustrated purpose in *Leela Hotels vs. Housing and Urban Development Corp.*:

> 45. Regarding the question as to whether the award of the learned arbitrator tantamounts to a decree or not, the language used in Section 36 of the Arbitration and Conciliation Act, 1996, makes it very clear that such an award has

[123] The Arbitration and Conciliation Act, 1996, §9.
[124] Dirk India Priv. Ltd. v. Maharashtra State Elec. Generation Co., 2013 (7) Bom CR 493 (India).

> to be enforced under the Code of Civil Procedure in the same manner as it were a decree of the court. The said language leaves no room for doubt as to the manner in which the award of the learned arbitrator was to be accepted.[125]

In *BCCI*,[126] the SCI specifically addressed the status of Section 34 petitions filed before the commencement of the 2015 Act, i.e. the veritable interpretation of Section 26 of the 2015 Act.[127] The court deliberated on whether the Amendments introduced by the 2015 Act applied to court proceedings arising out of arbitrations that were initiated before the Cut-Off Date. In response, it attempted to ascertain the constituent elements of "enforcement" under the 1996 Act.[128] It opined that the legislation stated an award be deemed a decree of the court and is enforceable as such under provisions of Order XXI and Order LXI, Rule 5 of the 1908 CPC.[129]

The Court's response to the moot question – the applicability of Section 26 of the Act, 2015 to Section 34 petitions – can be summarized as:

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[125] Leela Hotels v. Hous. & Urb. Dev. Co., (2012) 1 SCC 302 (India); *see also* Vipul Aggarwal v. Atul Kanodia & Co., AIR 2004 All 205 (India), wherein the Petitioner contended that pending disposal of his appeal, the Award was not final and hence could not be enforced. The High Court opined that since stay was not granted by the SCI, the execution should proceed as there is no automatic stay due to pendency of the appeal.

[126] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India). (This was a pre-Amendment, 2019 decision of the SCI.).

[127] *See generally* Canara Nidhi Ltd. v. M. Shashikala, AIR 2019 SC 4544 (India) (holding that an application under Section 34 of the Arbitration Act, 1996 is a summary proceeding not in the nature of a regular suit).

[128] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India). (This was a pre-2019 Act decision of the SCI.).

[129] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

> (a) The amended 2015 Act would apply to arbitral proceedings commenced on or after the Cut-Off Date mentioned therein;
> (b) The amended 2015 Act would apply to court proceedings arising out of arbitrations filed on or after the Cut-Off Date, even where the arbitral proceedings were commenced before the amendments came into force; and
> (c) The amended 2015 Act would apply to applications pending on the Cut-Off Date.[130]

The Court further clarified,

> [s]ince it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.[131]

Further, the SCI bifurcated arbitral proceedings and court proceedings arising out of arbitral proceedings and observed that court-related proceedings cannot be construed as a continuation of arbitral proceedings but would be viewed separately.[132] The Court also recommended the legislature take note of the 1996 Statement of Objects and Reasons of the Act while implementing the proposed Section 87 indicated in the Government's press release dated July 3,

[130] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[131] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[132] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

2018.[133] It cautioned against amendments that could undo the positive changes ushered in by the 2015 Act and result in unwarranted interference by courts that could defeat the objects of the 1996 Act.[134]

Following the decision in the *BCCI* case and the subsequent changes ushered by the 2019 Act, the SCI's decision in the *HCC* case assumed significance for the arbitral jurisprudence of India.[135] The 2019 Act, via Section 13, introduced Section 87:

> 87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall-
>
> (a) not apply to-
>
> (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
>
> (ii) court proceedings arising out of or in relation to such arbitral proceedings
>
> irrespective of whether such court proceedings are commenced prior

[133] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[134] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[135] The Arbitration and Conciliation (Amendment) Act, 2019; Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).; Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).

> to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;
>
> (b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.[136]

Further, Section 15 of the 2019 Act omitted Section 26 of the 2015 Act:[137]

> 15. Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 shall be omitted and shall be deemed to have been omitted with effect from the 23rd October, 2015.[138]

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[136] The Arbitration and Conciliation (Amendment) Act, 2019, §87(a–b).

[137] The Arbitration and Conciliation (Amendment) Act, 2019, §15.

> Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

The Arbitration and Conciliation (Amendment) Act, 2019, §26.

[138] The Arbitration and Conciliation (Amendment) Act, 2019, §15.

> Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral

Observing that it was aware of the recommendations of the Srikrishna Committee Report,[139] the SCI noted the impact of Section 87 stated herein below:

> 78. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons ". . . have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act," and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after

proceedings commenced on or after the date of commencement of this Act.

The Arbitration and Conciliation (Amendment) Act, 2015, §26.

[139] SRIKRISHNA, *supra* note 71.

> 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act . . . It can thus be seen that the scheme of Section 87 is different from that of Section 26, and is explicit in stating that court proceedings are merely parasitical on arbitral proceedings.[140]

In light of this, the SCI opined that the "*mischief of misconstruction*" of Section 36 of the 1996 Act, which was corrected by legislative intervention in 2015, would be undone by the "retrospective resurrection" of an automatic stay that was antithetical to the object and reasons of the 1996 Act.[141]

III. CONSTITUTIONAL CHALLENGE TO THE 2019 AMENDMENT ACT, 2019

Before the enactment of the 2015 Act, the filing of an application under Section 34 of the 1996 Act would automatically stay execution proceedings of an award under Section 36 of the 1996 Act.[142] The 2015 Act removed this automatic stay and mandated the filing of a separate application to seek a stay on the execution proceedings.[143] The aforesaid application, per Section 19 of the 2015 Act, required a deposit to be made and would be only granted at the discretion of the courts.[144]

The *BCCI ratio* specified that the amended provisions of Section 36 of the 1996 Act were applicable to

[140] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[141] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[142] The Arbitration and Conciliation Act, 1996, §34(1–6).
[143] The Arbitration and Conciliation (Amendment) Act, 2015, §19(2).
[144] The Arbitration and Conciliation (Amendment) Act, 2015, §19(2–3).

pending arbitration proceedings.[145] As such, irrespective of the commencement of arbitration before the amendments were enacted, no automatic stay will apply to court proceedings arising out of such arbitrations even if such court proceedings are filed after the Cut-Off Date.[146] The date, definitive for the operation of the 2015 Amendment, nevertheless signified the date of the 2015 Act coming into force and nothing more.[147]

Notably, Section 87 of the 2019 Act prescribed two timelines, retrospectively effective from the Cut-Off Date viz.: (i) arbitral proceedings and court proceedings arising out of such arbitral proceedings initiated before the Cut-Off Date and (ii) arbitral proceedings and court proceedings arising out of such arbitral proceedings initiated on or after the Cut-Off Date.[148] Section 87 of the 2019 Act thus resurrected the "automatic stay," which was removed by the amendments introduced by the 2015 Act.[149]

In *HCC*, the SCI examined the constitutional validity of Section 87 introduced into the 1996 Act by the 2019 Act, and the deletion of Section 26 of the 2015 Act as against well-established principles envisaged in the constitutional jurisprudence of India.[150] The fulcrum of the arguments on constitutionality rested upon Articles 14, 19(1), 21, and 300-A of the 1950 Constitution.[151]

The Petitioners (Appellants) contended that Section 87 of the 2019 Act was violative of Articles 14, 19(1)(g), 21, and 300-A of the 1950 Constitution, as:

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[145] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[146] *See* The Arbitration and Conciliation Act, 1996, §36.
[147] The Arbitration and Conciliation (Amendment) Act, 2015.
[148] The Arbitration and Conciliation (Amendment) Act, 2019, §87.
[149] *See* The Arbitration and Conciliation (Amendment) Act, 2015.
[150] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[151] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

(i) it defeated the purposes and objectives of the Act, 1996;
(ii) operate[s] against the award creditor's right to enforce the arbitral award;
(iii) undermines the binding nature of an arbitral award; and
(iv) operates against the *ratio* laid down in the *BCCI* and is therefore unreasonable, excessive, disproportionate, and arbitrary.[152]

The Petitioners further contended that in a situation where an award-creditor is unable to enforce the award on account of the automatic stay, it could possibly lead to absurd situations, exemplified in the situation in the *HCC* case.[153] To reinforce their argument, the Petitioners also attempted to highlight an anomaly in the retrospective resurrection of the automatic stay by arguing that the same allows a window of opportunity for award-debtors to claim refunds of monies already paid to an award holder pending application under Section 34 of the 1996 Act.[154]

Per contra, the thrust of Respondents' argument was that merely signifying a cut-off date in the 2019 Act[155] cannot be considered to be violating the Constitution as it is Parliament's prerogative to fix such a cut-off date and courts cannot interfere in policy matters.[156] The Attorney General for India, defending the repeal of Section 26 of the 2015 Act

[152] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[153] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India). The petitioners alluded to the financial difficulties faced by the award-holder yet unable to make payments due leading to actions under the Insolvency and Bankruptcy Code of 2016. Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[154] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[155] The effective cut-off date in the present context is October 23, 2015. Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[156] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India); UOI v. Parameswaran Match Works, (1975) 1 SCC 305, ¶ 102 (India); Govt. of A.P. v. N. Subbarayudu, (2008) 14 SCC 702 (India).

and the insertion of Section 87 of the 2019 Act, referred to *BCCI* to argue that interpretation of Section 26 of the 2015 Act was merely declaratory in nature.[157] Further, the Respondents averred that since *BCCI* does not set aside any executive action, "nor any provision of statute, it does not require a validating act to neutralize its effect."[158] They argued that Parliament retained the power to clarify the legislative intent were it to find that the SCI's *ratio* did not reflect the same.[159] They further argued that identifying the definitive date of enforcement remained within the exclusive domain of the Parliament.[160]

The Court prefaced its analysis with a verbatim reference to the Srikrishna Committee Report's recommendation on the introduction of Section 87:[161]

> However, Section 26 has remained silent on the applicability of the 2015 amendment Act to court proceedings, both pending and newly initiated in case of arbitrations commenced prior to 23 October 2015. Different High Courts in India have taken divergent views on the applicability of the 2015 Amendment Act to such court proceedings. Broadly, there are three sets of views as summarised below:
>
> (a) The 2015 Amendment Act is not applicable to court proceedings (fresh and pending)

[157] Bd. of Control for Cricket in India v. Kochi Cricket Priv. Ltd., AIR 2018 SC 1549 (India).
[158] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[159] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[160] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[161] SRIKRISHNA, *supra* note 71, at 60–61.

> where the arbitral proceedings to which they relate commenced before 23 October 2015.
> (b) The first part of Section 26 is narrower than the second and only excludes arbitral proceedings commenced prior to 23 October 2015 from the application of the 2015 Amendment Act. The 2015 Amendment Act would, however, apply to fresh or pending court proceedings in relation to arbitral proceedings commenced prior to 23 October 2015.
> (c) The wording "arbitral proceedings" in Section 26 cannot be construed to include related court proceedings. Accordingly, the 2015 Amendment Act applied to all arbitrations commenced on or after 23 October 2015. As far as court proceedings are concerned, the 2015 Amendment Act would apply to all court proceedings from 23 October 2015, including fresh or pending court proceedings in relation to arbitration commenced before, on or after 23 October 2015.[162]

Thus, it is evident that there is considerable confusion regarding the applicability of the

[162] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

> 2015 Amendment Act to related court proceedings in arbitration commenced before October 23, 2015. The Committee is of the view that a suitable legislative amendment is required to address this issue. . . . Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitration commenced on or after 23 October 2015 and related court proceedings.[163]

The SCI adopted a three-pronged approach to address the averments of the Parties.[164] In the first prong of its analysis, the Court observed that Section 34 of the 1996 Act envisaged summary proceedings in the court.[165] The result, in essence, is that courts do not sit on an appeal while hearing the *causae*.[166] Such being the case, the SCI remarked that an anomaly occurs upon insertion of Section 87 into the 1996 Act.[167] The anomaly that the Court was referring to was Order XLI Rule 5 of the 1908 CPC.[168] This Order stipulates

[163] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[164] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[165] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 181 (India); *see also* Ssangyong Eng'g & Constr. Co. v. NHAI, AIR 2019 SC 504, 563 (India) (holding that after the 2015 Act, the SCI cannot interfere with an arbitral award on merits).
[166] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India); *see also* Associated Constr. v. Pawanhans Helicopters Ltd., 16 SCC 128, 153 (2008) (India) (holding that a court reviewing an arbitral award under Section 34 does not sit in appeal over the award, and if the view taken by the arbitrator is possible, no interference is called for).
[167] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[168] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India); Code of Civil Procedure, 1908, Ord. XLI Rule 5:

> (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.
> [Explanation—An order by the Appellate Court for the stay of execution of the decree shall be effective from the date

that merely filing an appeal from a decree does not act as an automatic stay.[169] Rather, to obtain a stay the party has to file an application seeking the discretion of the appellate courts.[170] In comparison, the insertion of Section 87 of the 2019 Act ensured that arbitral awards are subject to a different rule and threshold than the rule stipulated in Order XLI Rule 5.[171] This is due to the invocation of an automatic stay when an application under Section 34 of the 1996 Act

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> of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.].
> (2) Stay by Court which passed the decree-Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.
> (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-
> (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
> (b) that the application has been made without unreasonable delay; and
> (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
> [(4) Subject to the provisions of sub-rule (3)], the Court may make an ex parte order for stay of execution pending the hearing of the application.
> [(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree.].
>
> Code of Civil Procedure, 1908, Ord. XLI Rule 5

[169] Code of Civil Procedure, 1908, Ord. XLI Rule 4.
[170] Code of Civil Procedure, 1908, Ord. XLI Rule 4.
[171] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

has been filed.[172] The juxtaposition between Order XLI Rule 5 of the 1908 CPC and Section 87 of the 2019 Act—which the Court attempted to highlight—is encapsulated in the proviso of Section 36 of the 2015 Act.[173] This section stipulates that the Court, "when considering an application for grant of stay in the case of an arbitral award for payment of money, [will] have due regard to the provisions for grant of stay of a money decree under the Code of Civil Procedure, 1908."[174] Thus, according to the SCI, the aforesaid anomaly makes Section 87 manifestly arbitrary to Article 14 of the 1950 Constitution, so it was therefore liable to be struck down.[175] Notably, the SCI observed "when the mischief of the misconstruction of Section 36 was corrected after a period of more than [nineteen] years by legislative intervention in 2015, to now work in the reverse direction and bring back the aforesaid mischief itself results in manifest arbitrariness."[176] The Court therefore held that the legislature, by its failure to duly note the development of law on the issue of automatic stay and amending the law in complete disregard of the legal jurisprudence developed by the 2015 Act—especially *BCCI*—had acted in contravention to the objects and purposes of the 1996 Act.[177] The Court observed that the legislature, before pursuing the amendment leading to the insertion, could have drawn insights from *BCCI*—which had alerted against the introduction of Section 87 and did not urge reliance upon the Srikrishna Committee

[172] Singh & Associates, *Automatic Stay of Enforcement Of The Arbitration Award Upon Admission of Challenge Under Section 34 Of The Arbitration And Conciliation Act*, MONDAQ (Feb. 11, 2020), https://www.mondaq.com/india/trials-appeals-compensation/880262/automatic-stay-of-enforcement-of-the-arbitral-award-upon-admission-of-challenge-under-section-34-of-the-arbitration-and-conciliation-act.
[173] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[174] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 160 (India).
[175] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 182 (India).
[176] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 182 (India).
[177] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).

Report.[178] The Court noted that said amendment to the 1996 Act could lead to excessive judicial interference, and therefore was unreasonable, arbitrary, and against public interest.[179]

In its second prong of the analysis, the SCI stated that Section 87 of the 2019 Act does not consider the implications and economic hardships imposed upon an award holder under the Insolvency and Bankruptcy Code of 2016.[180] Under the Insolvency and Bankruptcy Code, award creditors are unable to recover operational debts under an award owing to the operation of automatic stay, thereby having to bear the brunt of an insolvency application from their creditors.[181] Accordingly, the SCI summed up its above observations by holding that Section 87 of the 1996 Act violated Article 14 of the 1950 Constitution because it imposed unwarranted economic hardships on the award creditor and resurrected a window for judicial interference.[182]

In its last prong of the analysis, the SCI held that all of the Respondent's averments that were directed towards fixing the Cut-Off Date were misguided because the date was merely the point in time in which the 2015 Act came into force.[183] Instead, the non-bifurcation of Court proceedings and arbitration proceedings with reference to the date of October 23, 2015—the date on which the 2015 Act was brought into force—is manifestly arbitrary as it unduly results in putting the positive changes introduced by the 2015 Act on a "backburner."[184]

The application of constitutional principles to various facets of arbitration has assumed significance

[178] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122 (India).
[179] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 128, 180 (India).
[180] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 183 (India).
[181] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 183 (India).
[182] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 183–84 (India).
[183] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 185 (India).
[184] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 182 (India).

because emerging trends suggest that courts have not hesitated in resorting to the usage of constitutional principles to protect public interest and ensure the effective implementation of the aims and objectives of the 1996 Act.[185] For example, in *Icomm Tele Ltd. v. Punjab State Water Supply*, the arbitration clause[186] stipulated a pre-deposit of ten percent of the amount claimed until the announcement of the award with the goal of reducing frivolous claims.[187] The clause further postulated that in the

[185] *Mohammad Kamran, Ashish Kabra, & Vyapak Desai, Return of the Jedi: Supreme Court Strikes Down Section 87 of the Arbitration Act*, NISHITH DESAI ASSOCIATES (Dec. 5, 2019), http://nishithdesai.com/information/news-storage/news-details/article/return-of-the-jedi-supreme-court-strikes-down-section-87-of-the-arbitration-act.html.

[186] Clause 25(viii) of the contract, which entailed the arbitration clause is as follows:

> It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a Schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t. the amount claimed and the balance, if any, shall be forfeited and paid to the other party.

Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 363 (SC) (India).

[187] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359 (SC) (India). The arbitration clause Clause 25(viii) states:

> viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a Schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t. the amount claimed and the

event of a favorable award, the deposit made before the commencement of arbitration would be refunded in the proportion of the amount awarded, and the remaining balance would be forfeited and paid to the other party.[188] On appeal, the SCI held that the requirement of a pre-deposit was without any direct nexus to the filing of frivolous claims, as the pre-deposit was to be paid at the threshold before commencing arbitration proceedings.[189] In light of the aforesaid, the Court remarked that the arbitral clause in the contract was not only arbitrary under Article 14 of the 1950 Constitution, but it was also unfair and unjust, as there existed no discernible way for the law to ascertain whether a claim was frivolous or not.[190] The terminology employed in the arbitration clause of the contract, according to the SCI, not only failed to align with the aims and objectives of the 1996 Act, but also rendered the entire clause arbitrary as it was not only excessive, but also invariably led to an unjust result.[191]

Therefore, for the reasons enumerated above, the SCI ultimately held that the *ratio* of *BCCI* stood on firm legal ground, thereby necessarily implying that the automatic stay resurrected by the 2019 Act was struck down,

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> balance, if any, shall be forfeited and paid to the other party.

Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359 (SC) (India).

[188] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 360 (SC) (India).

[189] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 375 (SC) (India).

[190] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 370–71 (SC) (India) (quoting ABL Int'l Ltd. v. Export Credit Guarantee Corp. of India, 3 SCC 553 (2004) (India)).

[191] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 379 (SC) (India) (observing that "deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of ten percent would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.").

and all amendments made by the 2015 Act would continue to apply to all court proceedings after October 23, 2015.[192] Notably, a key finding of *BCCI*—which finds reaffirmation in this decision—is that the introduction of Section 87 would result in an inordinate delay in the disposal of arbitration proceedings, as well as increased judicial intervention—contrary to the objects of the 1996 Act.[193] Lastly, having already held that Section 87 violated Article 14 of the 1950 Constitution, the SCI deemed it unnecessary to examine the constitutional challenge to the 2019 Act based on Article 19(1)(g), 21 and 300-A of the 1950 Constitution.[194]

IV. ENFORCING ARBITRAL AWARDS – WAY FORWARD FOR THE AWARD DEBTOR AND AWARD CREDITOR

The HCC decision ensured that awards are enforceable per se as envisioned in the objects and purposes of the 1996 Act; courts henceforth shall decide applications for adjourning enforcement pending an application for setting aside the award.[195] In saying so, the dictum reiterated that any opinion contrary to the above-stated principle would only highlight the futility of the arbitral process and result in the denial of the benefits derived from the award.[196]

Noting the possibility of the award debtor and the creditor rushing to the court for their respective applications for relief, this research attempts to understand the rights of the respective parties to an arbitration when applying for post-award relief. The following narrative identifies the relevant legal provisions and the procedure for making such applications. The authors suggest, exemplifying through jurisprudence from common law jurisdictions such as England and Hong Kong, that Indian courts could exercise

[192] Hindustan Constr. Co. v. Union of India, AIR 2020 SC 122, 182 (India).
[193] Hindustan Constr. Co. v. Union of India, AIR SC 122, 180 (2020) (India).
[194] Hindustan Constr. Co. v. Union of India, AIR SC 122, 185 (2020) (India).
[195] Hindustan Constr. Co. v. Union of India, AIR SC 122 (2020) (India).
[196] Icomm Tele Ltd. v. Punjab State Water Supply and Sewerage Bd., 2019 (2) ARBLR 359, 360 (SC) (India).

the discretion on staying enforcement of the arbitral awards—sparingly, and for well-founded reasons—with adequate security for the enforcement when the application to set-aside remains *sub-judice*.

Pending a decision upon an enforcement application by the award-creditor, the award-debtor could utilise a few legal provisions for relief.[197] The first step in this regard is the authority on interim measures.[198] Section 9 of the 1996 Act helps preserve the various pursuits and rights of the parties to the arbitration.[199] As evidenced by the text of this provision, the parties can apply for post-award interim measures; however, such an application could also be pursued in conjunction with an application under section 34

[197] Kartikey Mahajan, *Making the Case for Post-Award Interim Relief for Award Debtor*, 3 INDIAN J. ARB. L. 14, 14 (2014).
[198] Mahajan, *supra* note 197, at 15.
[199] The Arbitration and Conciliation Act, 1996, §9.

> Interim measures, etc., by Court.—A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court—(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:—(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the court to be just and convenient, And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

The Arbitration and Conciliation Act, 1996, §9.

of the 1996 Act for declaration of the arbitral award as a nullity.[200] An interim order helps secure the immediate purpose of protecting the subject matter of the arbitration.[201] These orders help prevent the claim from being frustrated in arbitration.[202] The award-debtor could consider applying for interim measures to secure the arbitral claim from being alienated or rendered otiose while the court considers the Section 34 application in order to protect its interests.[203] The importance of an application for interim protection measures is heightened by the possibility that were the award-debtor to be successful in a proceeding to set aside the arbitral award, it would still not be of any material value if the subject matter itself has been irretrievably lost.[204] The award-debtor could also take the benefit of a Section 9 application when the court has, per section 34(4) of the 1996 Act, decided to adjourn the proceedings and return the award to the tribunal for reconsideration.[205] In *Firm Ashok Traders v. Das Saluja*,[206] the SCI held that a Section 9 application could be made by any party to an arbitration agreement as per the requisites specified therein.[207]

> "Party" is defined in Clause (h) of Sub-section (1) of Section 2 of A & C Act to mean a party to an arbitration agreement. So, the right conferred by Section 9 is on a party to an arbitration agreement. The time or the stage for invoking the jurisdiction of Court under Section 9 can be (i) before, or (ii) during arbitral proceeding, or (iii) at

[200] Mahajan, *supra* note 197, at 18.
[201] Mahajan, *supra* note 197, at 17.
[202] Mahajan, *supra* note 197, at 16.
[203] Mahajan, *supra* note 197, at 17.
[204] Mahajan, *supra* note 197, at 17.
[205] Mahajan, *supra* note 197, at 17 n. 14; *see also* Cybernetics Network, Priv. Ltd. v. Bisquare Techs., Priv. Ltd., (2012) 188 D.L.T. 172 (India).
[206] Firm Ashok Traders v. Das Saluja, (2004) 3 SCC 155 (India).
[207] Kartikey Mahajan, *Making the Case for Post-Award Interim Relief for Award Debtor*, 3 INDIAN J. ARB. L. 14, 19 (2014).

> any time after the making of the arbitral award but before it is enforced in accordance with Section 36.[208]

The Delhi High Court in *NHAI v. China Coal Construction Group Corp.* relied on the abovementioned precedent when it ruled that a Section 9 application of the parties to the arbitration agreement is available until the enforcement application is decided upon under Section 36 of the 1996 Act.[209]

> Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application under Section 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.[210]

The award-debtor could also apply for setting aside the arbitral award under Section 34.[211] Setting aside procedures act as a check on the arbitrators, to prevent them from acting beyond the scope of their authority.[212] The law requires that all arbitral awards shall be spoken orders and mandates recorded for the same reasons.[213] In *State Trading*

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[208] Mahajan, *supra* note 197, at 19 (alteration in original) (quoting Arbitration and Conciliation Act § 9).
[209] NHAI v. China Coal Constr. Group Corp., AIR 2006 Delhi 134 (India).
[210] NHAI v. China Coal Constr. Group Corp., AIR 2006 Delhi 134 (India).
[211] The Arbitration and Conciliation Act, 1996, §43.
[212] K.D. Kerameus, *Waiver of Setting-Aside Procedures in International Arbitration*, 41 AM. J. COMPAR. L. 73, 73–74 (1993).
[213] The Arbitration and Conciliation Act, 1996, §31.

> 31. Form and contents of arbitral award.— . . . . (3) The arbitral award shall state the reasons upon which it is based, unless—
>
> (a) the parties have agreed that no reasons are to be given, or
>
> (b) the award is an arbitral award on agreed terms under section 30.

Corp. of India v. Toepfer International Asia, Private Ltd.,[214] the Delhi High Court explained that an order to set aside an arbitral award "operates to negate a decision, in whole or in part, thereby depriving the portion negated of legal force and returning the parties, as to that portion, to their original litigating positions."[215] This shall be attempted based upon the record of the *lis,* and there shall be no evidence adduced by the court.[216] In *P.R. Shah, Shares & Stock Brokers, Private Ltd. v. B.H.H. Securities, Priv. Ltd.,*[217] the Court observed,

> A court does not sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating the evidence. An award can be challenged only under the grounds mentioned in section 34(2) of the Act. . . . Therefore, in the absence of any ground under section 34(2) of the Act, it is not possible to re-examine the facts to find

The Arbitration and Conciliation Act, 1996, §31.

[214] State Trading Corp. of India v. Toepfer Int'l Asia, Priv. Ltd., 2014 ARBLR 105 (Delhi) (India).

[215] State Trading Corp. of India v. Toepfer Int'l Asia, Priv. Ltd., 2014 ARBLR 105 (Delhi) (India); *see also* Krishna Bhagya Jala Nigam, Ltd. v. Reddy, AIR 2007 SC 817 (India) (discussing the position of setting aside partial awards). The Supreme Court *has modified arbitral awards by reducing the rate of interest.* Krishna Bhagya Jala Nigam, Ltd. v. Reddy, AIR 2007 SC 817 (India). *But see* Chief Eng'r v. Chandragiri Constr. Co. 2011 (2) CTC 669 (India); (the Madras High Court modifying the decision of the district court by dismissing the petition for setting aside the award by reducing the rate of interest awarded by the Tribunal)*; see also* Poysha Oxygen, Priv. Ltd. v. Suri, ILR (2009) Supp. (3) Delhi 223.

[216] In *Sial Bioenergie v. SBEC Sys.*, the High Court of Delhi *inter alia* held "the whole purpose of the 1996 Act would be completely defeated by granting permission to the applicant/JD to lead oral evidence at the stage of objections raised against an arbitral award. The 1996 Act requires expeditious disposal of the objections and the minimal interference by the Court. . . ." AIR 2005 Del 95 (India).

[217] P.R. Shah, Shares & Stock Brokers, Priv. Ltd. v. B.H.H. Secs., Priv. Ltd., (2012) 1 SCC 594 (India).

> out whether a different decision can be arrived at.[218]

Section 34 provides "for annulment only on the grounds affecting the legitimacy of the process of decision as distinct from substantive correctness of the contents of the decision."[219] A Section 34 application, therefore, necessarily does not result in the court becoming an appellate forum for relief.[220] In *Associate Builders v. Delhi Development Authority*,[221] the SCI explained that:

> An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.[222]

Given the legislative objectives and the emphasis against judicial intervention, the award-debtor could consider applying to the court for remission of the award to the tribunal.[223] Informed by Article 34(4) of the UNCITRAL Model Law, section 34(4) of the 1996 Act provides for the suspension of setting aside proceedings by the court for a period determined by it, where appropriate and so requested by a party, to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will

[218] P.R. Shah, Shares & Stock Brokers Priv. Ltd. v. B.H.H. Sec. Priv. Ltd. (2012) 1 SCC 594 (India).
[219] Delhi Dev. Auth. v. Bhardwaj Brothers, AIR 2014 DELHI 147 (India).
[220] Delhi Dev. Auth. v. Bhardwaj Brothers, AIR 2014 DELHI 147 (India).
[221] Assoc. Builders v. Delhi Dev. Auth., 2014 (4) ARBLR 307 (SC) (India).
[222] Assoc. Builders v. Delhi Dev. Auth., 2014 (4) ARBLR 307 (SC) (India).
[223] *See* The Arbitration and Conciliation Act, 1996, §43.

eliminate the grounds available for setting aside an award.[224] In *Dyna Technologies, Private Ltd. v. Crompton Greaves, Ltd.*,[225] the award was found to be unintelligible and inadequately reasoned, and the SCI explained that the legislative intention of section 34(4) of the 1996 Act "was to make the award enforceable, after giving an opportunity to the arbitral tribunal to undo curable defects."[226]

Remission applications could also be made when the arbitration tribunal overlooked a particular "claim on which the parties led evidence and addressed arguments."[227] A party denied the opportunity to present its case i.e., to deal with a document relied upon by the arbitral tribunal, could also apply for remission.[228] The SCI in *Radha Chemicals v. Union of India* explained that parties seeking remission as

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[224] The Arbitration and Conciliation Act, 1996, §34; *see also* U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, at 20, U.N. Sales No. E.08.V.4 (2008).

[225] Dyna Techs., Priv. Ltd. v. Crompton Greaves, Ltd., 2019 SCC OnLine SC 1656 (India).

[226] Dyna Techs., Priv. Ltd. v. Crompton Greaves, Ltd., 2019 SCC OnLine SC 1656 (India).

[227] *See generally* Geojit Fin. Servs., Ltd. v. Nagpal, (Appeal No. 35 of 2013 in Arbitration Petition No. 47 of 2009 Bombay HC). In Reliance Indus., Ltd. v. Union of India, the English Commercial Court considered a remitted award under the English Arbitration Act of 1996. [2020] EWHC (Comm) 263 (Eng.). In a dispute concerning issues of cost recovery in relation to two production sharing contracts, the court laid a roadmap, elaborating upon the Tribunal's task when addressing remitted issues. Reliance Indus., Ltd. v. Union of India, [2020] EWHC (Comm) 263 (Eng.). The principles specified in the decision were: (a) in spite of an intention to reject a case, the Tribunal was still obligated to issue an award containing that decision which should take into account any evidence which was on the record but not considered by the Tribunal; and (b) the issues to be remitted to the Tribunal have to be explicitly specified in the court's order of remission. Reliance Indus., Ltd. v. Union of India, [2020] EWHC (Comm) 263 (Eng.)*; see also* Andrew Cannon & Hannah Ambrose, *English Court considers challenges to a further award made after Remission to the Tribunal following an earlier successful challenge,* HBF (June 4, 2020), https://hsfnotes.com/arbitration/2020/06/04/english-court-considers-challenges-to-a-further-award-made-after-remission-to-the-tribunal-following-an-earlier-successful-challenge/.

[228] MMTC v. Vicnivass Agency, 2009 (1) MLJ 199 (India).

per section 34(4) of the 1996 Act must do so before the court decided upon the set-aside application in the Section 34 proceedings.[229]

Subsection (3) of Section 34 specifies that an application for setting aside the award may be made within a period of three months from the date of delivery of the award; the award-debtor could apply for an extension of this period by thirty days to the court which may satisfy itself as to the explanation for the delay.[230] In *Union of India v. Popular Construction Co.*, the Court was called to decide upon the applicability of the Limitation Act of 1963 ("1963 Act") to an application for setting aside the arbitral award under section 34.[231] Noting, apart from other provisions of the 1996 Act, the intention of the legislature as evident in the wording of the proviso of Section 34(3) which states "but not thereafter[,]" the Court held against such application of the 1963 Act.[232] Where an application for correction or modification of the award, as per Section 33,[233] is pending

[229] Radha Chems. v. Union of India, (Order dated Oct. 10, 2018, Sup. Ct. in Civ. Appeal No. 10386 of 2018) (India); *see also* Mullick v. Das Damani, (2018) 11 SCC 328 (India).

[230] The Arbitration and Conciliation Act, 1996, §34:

> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

The Arbitration and Conciliation Act, 1996, § 34; *see* Exec. Eng'r v. Satya Prakash & Brothers, Priv. Ltd., 2018 (4) ARBLR 241 (Allahabad) (India).

[231] Union of India v. Popular Constr. Co., AIR 2001 SC 4010 (India).

[232] Union of India v. Popular Constr. Co., AIR 2001 SC 4010 (India).

[233] The Arbitration and Conciliation Act, 1996, §33:

> Correction and interpretation of award; additional award—

before the arbitral tribunal, the limitation would start running from the date on which the request has been disposed of by the tribunal.[234]

Section 37 of the 1996 Act specifies the statutory right to appeal against certain orders explicitly mentioned in

> (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties—(a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award; (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
>
> (2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.
>
> (3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under sub-section (4) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
>
> (6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub-section (2) or sub-section (5).
>
> (7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

The Arbitration and Conciliation Act, 1996, §33.

[234] Himachal Pradesh v. Himachal Techno Eng'rs, (2010) 12 SCC 210 (India) (citing The Arbitration and Conciliation Act, 1996, §34(3)).

the aforesaid provision.[235] It is important to note that the phrase "an appeal shall lie from the following orders (and from no others)" leads to the inescapable conclusion that the legislature has taken away the right to appeal against all orders except as specified in sub-clauses (1) and (2).[236] Notably, the appealable orders allowed by the section are: (i) granting or refusing to grant any interim measure of protection by the court under section 9; (ii) setting aside or refusing to set aside an arbitral award by the court under section 34; (iii) accepting the plea of lack of its jurisdiction by the arbitral tribunal under section 16(2); (iv) accepting the plea of excess of scope of its authority by the arbitral tribunal under section 16(3); and (v) granting or refusing to grant an interim measure of protection by the arbitral tribunal under section 17.[237]

For the present research, the authors will analyze the overlap and interplay between the 1963 Act and Section 37 of the 1996 Act to highlight specific time constraints which an aggrieved award-debtor and award-creditor must adhere to. It is important to note that the limitation prescribed under Section 34(3) for an application to set aside an award is four months, including a gratis of thirty days in case the applicant shows sufficient cause.[238] Similarly, in *Union of India v. Varindera Construction Ltd*,[239] the SCI found the delay to be 142 days in filing the appeal and 103 days in refiling the appeal.[240] Observing that there was no sufficient cause made out explaining the delay, and that the appeal was filed after the expiry of 120 days, the SCI refused to entertain the appeal.[241] It opined,

[235] The Arbitration and Conciliation Act, 1996, §43.
[236] The Arbitration and Conciliation Act, 1996, §43.
[237] The Arbitration and Conciliation Act, 1996, §37.
[238] The Arbitration and Conciliation Act, 1996, §34(3).
[239] Union of India v. Varindera Const. Ltd, (2020) 2 SCC 111 (India).
[240] Union of India v. Varindera Const. Ltd, (2020) 2 SCC 111 (India).
[241] Union of India v. Varindera Const. Ltd, (2020) 2 SCC 111 (India).

> any delay beyond 120 days in the filing of an appeal under § 37 from an application being either dismissed or allowed under § 34 of the Arbitration and Conciliation Act, 1996 should not be allowed as it will defeat the overall statutory purpose of arbitration proceedings being decided with utmost dispatch.[242]

The SCI echoed this position in a recent decision in *N.V. International v. State of Assam*,[243] wherein it expressed disfavor for condoning any delay beyond 120 days in filing an appeal under Section 37 of the 1996 Act. The Court observed,

> [w]e may only add that what we have done in the aforesaid judgment is to add to the period of ninety days, which is provided by statute for filing of appeals under [Section] 37 of the Arbitration Act, a grace period of thirty days under Section 5 of the Limitation Act by following Lachmeshwar Prasad Shukul and Others (supra), as also having regard to the object of speedy resolution of all arbitral disputes which was uppermost in the minds of the framers of the 1996 Act, and which has been strengthened from time to time by amendments made thereto. The present delay being beyond 120 days is not liable, therefore, to be condoned.[244]

Section 34(2)(b)(ii) of the 1996 Act allows courts to address the award through the lens of public policy, however the term itself remained undefined except for guidance provided in the explanation stating that an award induced by

[242] Union of India v. Varindera Const. Ltd, (2020) 2 SCC 111 (India).
[243] N.V. International v. State of Assam, 2020(1) ARBLR 472 (SC) (India).
[244] N.V. International v. State of Assam, 2020(1) ARBLR 472 (SC) (India).

fraud or corruption would infringe upon India's public policy.[245] The 1940 Act did not mention public policy, though Section 30 said that an award could be set aside if the same "had been improperly procured or was otherwise invalid."[246] The Act borrowed the content of public policy, as applied to arbitration, from the Indian Contract Act of 1872.[247] In *Central Inland Water Transport Corp. v. Brojonath Ganguly*, the SCI explained the content of public policy as a dynamic concept guided by public interest, public good, and above all, the constitutional principles of fundamental rights and directive principles.[248]

The contours of public policy in the context of arbitration were subjected to extensive articulation in *ONGC v. Saw Pipes*,[249] which remained the precedent on many occasions.[250] In that case, the arbitral tribunal ordered liquidated damages, as agreed in the contract, in favor of the Respondent, which the Court found erroneous for being violative of the express provisions of the Indian Contract Act of 1872 concerning liquidated damages.[251] Consequently, according to the SCI, the arbitral award suffered from patent error of law, and was therefore liable to be set aside for contravening the public policy of India.[252] Explaining that the domestic award could be annulled if it was opposed to (a) fundamental policy of Indian law, (b) the interest of India, (c) justice or morality, or (d) if it is patently illegal,

[245] The Arbitration and Conciliation Act, 1996, §34(2)(b)(ii).
[246] The Arbitration and Conciliation Act, 1996, §34(2)(b)(ii).
[247] The Arbitration and Conciliation Act, 1996, §34(3).
[248] Cent. Inland Water Transp. Corp. v. Brojonath Ganguly., (1986) 3 SCC 156 ¶ 95 (India).
[249] ONGC v. Saw Pipes, (2003) 5 SCC 705 (India).
[250] Hindustan Zinc Ltd v. Friends Coal Carbonisation, (2006) 4 SCC 445 (India); *see also* Shipping Corp. of India v. Mare Shipping Inc., (2011) 8 SCC 39 ¶ 25 (India) (reasoning "it was indicated therein that if the Award passed by the Arbitral Tribunal was contrary to any of the provisions of the Act or the substantive law governing the parties or was against the terms of the contract, the same could be set aside.")
[251] ONGC v. Saw Pipes, (2003) 5 SCC 705 (India).
[252] ONGC v. Saw Pipes, (2003) 5 SCC 705 (India).

the SCI thus added a new ground within public policy, i.e., patent illegality, while clarifying that the illegality had to go to the root of the matter and not be of trivial nature.[253] The Court justified the inclusion on the ground that an award that patently infringed provisions of substantive law would "adversely affect the administration of justice" and therefore invariably be contrary to the public interest.[254] The Delhi High Court in *NPCC v. Rajdhani Builders* clarified that an arbitral award would be patently illegal if it were contrary to (a) substantive provisions of law, (b) provisions of the Arbitration and Conciliation Act 1996, or (c) the terms of the contract.[255] In *Associate Builders v. DDA*, the Supreme Court held patent illegality to include: (i) a contravention of the substantive law of India, such contravention being patent and substantive as to be violating Section 28(1)(a); (ii) a violation of the 1996 Act; or (iii) ignoring the terms of the contract or failing to take into account usages of trade applicable to the transaction in contravention of Section 28(3).[256]

Following the 2015 Act, patent illegality, as a ground for setting aside an award, received statutory force in Section 34(2A).[257] The Supreme Court in *Ssangyong*

[253] ONGC v. Saw Pipes, (2003) 5 SCC 705 (India).
[254] ONGC v. Saw Pipes, (2003) 5 SCC 705 (India).
[255] NPCC v. Rajdhani Builders, (2006) (2) ARBLR 219 (Delhi).
[256] Assoc. Builders v. Delhi Dev. Auth., 2014 (4) ARBLR 307 (SC) 31–34 (India).
[257] The Arbitration and Conciliation Act, 1996, §34.

> [Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice.
>
> Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental

Engineering & Construction Ltd. v. National Highways Authority of India explained that the new criterion does not apply to the contravention of a statute not linked to public policy or public interest, which is not subsumed within the fundamental policy of Indian law.[258] Affirming *Ssangyong* with regard to patent illegality, the SCI in *Patel Engineering Ltd. v. North Eastern Electric Power Corp.* explained that an arbitral award would be in contravention of point (iii) in Explanation One of Section 34(2)(b) if the Court finds the decision of the arbitrator to be "perverse, or, so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, the view of the arbitrator is not even a possible view," then the Court is required to set aside the reward as being patently illegal.[259] This subhead of patent illegality, which is to be read together with point (iii), would be in addition to point (ii).[260]

The award-creditor, per Section 9, is entitled to file an application for interim measures to protect or conserve the subject matter of the award, as such measures envisaged are intended to prevent an arbitral claim from being frustrated.[261] Applications for such relief in the case of pre-

> policy of Indian law shall not entail a review on the merits of the dispute.]
> [(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence.]

The Arbitration and Conciliation Act, 1996, §34.

[258] Ssangyong Eng'g and Constr. Ltd. v. Nat'l Highways Auth. of India, AIR 2019 SC 5041 (India).

[259] Patel Eng'g Ltd. v. N. E. Elec. Power Corp., Order dated May 22, 2020 in Special Leave Petition (C) Nos. 3584-85 of 2020 (India).

[260] *See generally* Patel Eng'g Ltd. v. N. E. Elec. Power Corp., Order dated May 22, 2020 in Special Leave Petition (C) Nos. 3584-85 of 2020 (India).

[261] The Arbitration and Conciliation Act, 1996, §9.

enforcement of an arbitral award are intended to protect the value of the proceedings until the eventual enforcement of the arbitral award. In *Dirk India Private Ltd*,[262] the Bombay High Court noted that the enforcement of an award accrues to the benefit of the party who has secured an award in the arbitral proceedings and observed that the enforceability of an award under Section 36, therefore, has to take note of the relative presence of these two time frames.[263] It, therefore, held contextually "the scheme of Section 9 postulates an application for the grant of an interim measure of protection after the making of an arbitral award and before it is enforced for the benefit of the party which seeks enforcement of the award."[264]

DECIDING APPLICATIONS FOR STAY ON ENFORCEMENT – WAY FORWARD

Given that the *HCC* dictum removed the "automatic stay" upon enforcement of an arbitral award as per Section 36 of the 1996 Act,[265] courts now retain discretion to order stay on enforcement pending disposal of an application for challenge, provided the award-debtor has applied for such relief of stay on enforcement.[266] Subsection 3 specifies that courts may, for reasons recorded, order a stay of enforcement pending disposal of an application for setting aside the arbitral award while imposing such conditions as it may deem fit.[267] Subsection 4 specifies that the courts take note of the provisions related to money decrees within the 1908 CPC,[268] whilst ordering such stay on enforcement of

[262] Dirk India Priv. Ltd v. Maharashtra State Elec. Generation Co., 2013 (7) Bom CR 493 (Bombay).
[263] Dirk India Priv. Ltd v. Maharashtra State Elec. Generation Co., 2013 (7) Bom CR 493 (Bombay).
[264] Dirk India Priv. Ltd v. Maharashtra State Elec. Generation Co., 2013 (7) Bom CR 493 (Bombay).
[265] As per the 2015 Act. The Arbitration and Conciliation (Amendment) Act, 2015.
[266] The Arbitration and Conciliation Act, 1996, §36.
[267] The Arbitration and Conciliation Act, 1996, §36(3).
[268] The Code of Civil Procedure, 1908, Ord. 21, Rule 1.

an arbitral award for payment of money. Section 36, as applied in *HCC*, is now aligned with the pro-arbitration approach enunciated in the UNCITRAL Model Law.[269] That said, there is little guidance with regard to the interpretation of the provisions related to exercise of discretion as per Section 36(2) and concerning the imposition of conditions for grant of stay as per Section 36(3).[270] The authors would like to suggest that Indian courts could gain useful insights from the development of law in other jurisdictions; they suggest a few such instances that offer interesting comprehensions on state practice in this regard.

In *L v. B*,[271] the Hong Kong Court of First Instance granted a stay on the enforcement of the award pending set-aside proceedings. Though the dispute arose in a foreign-seated arbitration and proceedings were initiated in relation to declaration of the award's nullity, the Court took jurisdiction over the applications—one by the applicant seeking security for enforcement, and the other by the respondent seeking stay of enforcement of the award pending disposal of the challenge to the award at the seat (the Bahamas).[272] The Court took note of the following legal principles:

- Strength of the argument that the award is invalid—if the award is manifestly invalid, there should be an adjournment and no order for security, whereas if it is manifestly valid, there should either be an order for immediate enforcement or else an order for substantial security; and

[269] Holtzmann & Neuhaus, *supra*, note 106.
[270] The Arbitration and Conciliation Act, 1996, §36(2) & (3).
[271] L v. B, [2016], HCCT 41/2015, (C.F.I.).
[272] L v. B, HCCT 41/2015.

- Ease or difficulty of enforcement of the award—consideration of whether enforcement of the award will be rendered more difficult if enforcement is delayed.[273]

The Court noted the nature of the set aside challenge presented by the Respondent in the curial jurisdiction to be of a minor irregularity, and therefore ordered a four-month stay of the enforcement proceedings on condition that the Respondent deposited the requested security within twenty-one days.[274] The Applicant's costs of the application for security were granted on an indemnity basis.[275]

For reasons of comity and on an assessment of managing unwarranted delays in enforcement of awards through ordering security for such enforcement, an English court in *AIC Ltd. v. Federal Airports Authority of Nigeria* decided to adjourn the enforcement of an award in England and order security pending the outcome of a set-aside application before a foreign court.[276] An award rendered in Nigeria, and the subject matter of judicial proceedings therein, was sought to be enforced in England.[277] Against the claimant's application for enforcement, the defendant applied for adjournment of the proceedings pending decision in the Nigerian proceedings.[278] Section 103(5) of the English Arbitration Act of 1996 gives the English court the power to adjourn a decision on enforcement if an application

[273] L v. B, HCCT 41/2015.
[274] L v. B, HCCT 41/2015.
[275] L v. B, HCCT 41/2015.
[276] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212; *see* Melanie Martin, *English Court Adjourns Enforcement of Nigerian Arbitral Award*, KLUWER ARB. BLOG (Oct. 14, 2019), http://arbitrationblog.kluwerarbitration.com/2019/10/14/english-court-adjourns-enforcement-of-nigerianarbitralaward/?doing_wp_cron=1591390468.7894361019134521484375.
[277] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.
[278] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.

to set aside or suspend an award has been made in the country of arbitration.[279] In such circumstances, the court also has the power to make it a condition of the adjournment that security is provided.[280] Weighing the possibility of the defendant's successful pursuit in having the arbitral award declared a nullity and the need to ensure protection against deterioration in its prospects of enforcement in England, and the award together with interest was a large sum of money for it to be deprived of, the court ordered the adjournment to be conditional on the defendant providing security of $24 million which represented 50% of the award or approximately three years' worth of interest on the award.[281] The decision articulated an important methodology for courts to adopt in identifying the factors to consider when exercising discretion with regard to deciding applications related to stay and adjournment.[282] These factors hold valuable guidance that Indian courts could benefit from in deciding competing applications for stay and enforcement, so that courts may ensure the integrity of the arbitral process not be at risk:

- Acknowledgement of the expansive discretion with regard to adjournment applications;
- Assess the legitimacy of the set-aside application, insulate against dilatory tactics;
- Assessment of the possibility of the set-aside application being successful determined on a "sliding scale" whether the facts suggested

[279] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212; *see* Arbitration Act 1996 (UK).
[280] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.
[281] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.
[282] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.

a "manifestly invalid" or "manifestly valid" award;

- The stronger the merits of the foreign proceedings, the stronger the case for an adjournment and the weaker the case for security (and vice versa);
- The possible prejudicial impact of the stay on the party seeking enforcement; and
- Such assessment related to prejudice should make a comparative assessment of the position of the enforcing party were the enforcement allowed to proceed as against the position if the enforcement was delayed, the quantum of the security reflecting the degree of prejudice.[283]

In conclusion, courts in India could draw inspiration from the jurisprudence on Article VI, NYC wherein it has been stated that a court of a contracting state "may, if it considers it proper, adjourn" proceedings and "may also . . . order the other party to give suitable security."[284] In light of the "permissive language" of Article VI, courts have full discretion to

[283] AIC Ltd. v. Fed. Airports Authority of Nigeria [2019] EWHC 2212.

[284] U.N. COMM'N ON INT'L TRADE L., UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, at 263, U.N. Sales No. E.16.V.7 (1958); *see* Emmanuel Gaillard & Benjamin Siino, *The Guide to Challenging and Enforcing Arbitration Awards: Enforcement Under the New York Convention*, GLOBAL ARB. REV. 1, 86 (2019) https://res.cloudinary.com/fieldfisher/image/upload/v1574347192/PDF-Files/PDFs%20from%20old%20website/6-due-process-and-procedural-irregularities-challenges_azwhjh.pdf; Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L ARB. J. 69, 77 (2005).

adjourn enforcement proceedings or order the defendant to provide security.[285] As noted by the Supreme Court of Hong Kong,[286] use of the term "may" indicates that the application for adjournment is a matter of discretion. Noting the stated purposes of the 1996 Act and the subsequent law reform ushering more commitment to the same, Indian courts should contribute to that commitment as well by exercising the discretion related to ordering stay on enforcement of awards while cautiously ensuring that they would not unduly interfere with the arbitral process.[287] They have much inspiration from other jurisdictions in that regard.

[285] U.N. COMM'N ON INT'L TRADE L., *supra* note 284.
[286] Hebei Import & Export Corp v. Polytek Eng'g Co., [1996] 3 H.K.C 725; *see also* Europcar Italia, S.p.A. v. Maiellano Tours, 156 F. 3d 310, 315 (2d Cir. 1998).
[287] The Arbitration and Conciliation Act, 1996.