

UNDERSTANDING JURISDICTION AND RELATED ISSUES IN INTERNATIONAL COMMERCIAL ARBITRATION WITH SPECIFIC REFERENCE TO INDIA

Written by Dr. P.L. Jayanthi Reddy

Assistant Professor, ICFAI Law School, Hyderabad

“Discourage litigation persuade your neighbours to compromise whenever you can point out to them how the nominal winner is often a real loser in fees, expenses, waste of time...”

– Abraham Lincoln

ABSTRACT

Jurisdiction is fundamental to the validity of arbitration proceedings and the enforceability of arbitral awards. An arbitral tribunal, unlike a national court, derives its power, authority and jurisdiction from an arbitration agreement between parties to a contract. The available legal framework on the point provides for determination of jurisdiction having reference to each specific arbitration agreement. Due to this fact as well as the growing sophistication in the practice of international arbitration, challenges to the jurisdiction of arbitral tribunals are becoming more frequent. In the context of the complexity of this issue, this article aims to discuss the various aspects of the concept of arbitral jurisdiction, different kinds of challenges to the jurisdiction, Jurisdictional issues relating to interim measures and challenges in its enforcement, the principles and laws governing the issue, and the attitude of the courts of various state jurisdictions with special reference to Indian scenario.

Keywords: Arbitration, Jurisdiction, Commercial, Agreement, International Arbitration, Arbitral Tribunal, Arbitral Awards, Enforceability, Arbitral Proceedings, Interim Measures, Challenges and Law.

INTRODUCTION

International Commercial Arbitration involves the determination of disputes which are of commercial nature consisting of international elements. The term international here is not because sovereign nations participate, but because the parties, the facts, or the legal effects of the dispute extend beyond the jurisdiction of one state.ⁱ International commercial disputes are consistently rising all over the world, including India. International trade has expanded, and trade agreements have increased in complexity resulting in international legal disputes. In this context, it is interesting to note that, the pro-arbitration approach adopted by the Indian Courtsⁱⁱ is grabbing the attention from the international community. International commercial arbitrationⁱⁱⁱ with its utility and popularity brings also certain challenges, especially relating to the arbitral jurisdiction giving rise to debatable issues recently in the courts.

Arbitration is less formal in its procedure, protects the privacy of the parties and effectively minimizes the overall costs as well as the role and interference of courts in the administration and dispensing of justice. Through arbitration parties can have greater control over the process of dispute resolution. However, there are certain disadvantages in this system of dispute resolution such as, limited possibility to appeal on the arbitrator's decision, lack of full-fledged formal discovery process, the discretion of the arbitrator etc. Another important challenge is the issue of the arbitrator's jurisdiction especially in international arbitration cases. Since, there is no "inherent" jurisdiction in an arbitral tribunal it takes its jurisdiction to decide a particular dispute from the agreement between the parties.^{iv} The available legal framework on the point seeks to define 'jurisdiction' having reference to the existence of a valid arbitration agreement, a properly constituted tribunal and the matters that have been submitted to such tribunal as per the terms agreed upon by the parties to the arbitration agreement. Any one or more of these three elements that are basic to define the arbitrator's jurisdiction may be found disputable by the parties.

Further, certain ambiguities that could arise about the jurisdiction of the tribunal and the jurisdiction of the sovereign states as well as the application of the substantive laws of the seat of arbitration need to be clearly understood. This article endeavours to discuss the various aspects of the concept of arbitral jurisdiction, different kinds of challenges to the jurisdiction, exclusive jurisdiction clauses, the principles and laws governing the issue, the attitude of the courts of various state jurisdictions with special reference to Indian scenario, jurisdictional issues relating to interim measures and challenges in the enforcement of interim measures. The paper wraps up with suggestions to deal with the issues discussed.

JURISDICTION

Meaning and Definition of Jurisdiction

Jurisdiction is one of the key concepts in functioning of courts and the legal system. The term *jurisdiction* is formed from two Latin words namely *juris* which means *law* and *diction* which means *to speak*. Therefore, jurisdiction denotes the power “to speak the law” of a given court.^v It refers to the practical authority that a legal body is vested with to administer justice within a defined field of law/geographical area.^{vi} It is the power to exercise authority over persons and things within a territory. Jurisdiction also means the territory within which a court or government agency may properly exercise its power.^{vii} In other words, it is the power of a court to hear a case in order to adjudicate.

In the context of arbitration, the arbitration agreement grants jurisdiction to arbitrators. Jurisdiction of the arbitral tribunal means the powers conferred on arbitrators to enable them to resolve the matters submitted to them by rendering a binding decision.^{viii} Therefore, the existence of jurisdiction is a pre-requisite for any valid judgment or award that is to be given by any adjudicating authority. Jurisdiction is the first thing to be settled in any dispute resolution, since it can be challenged at any stage of the proceedings irrespective of whether it is a domestic or an international arbitration.^{ix}

Jurisdiction of the Arbitral Tribunal

The fact that the parties have entered into an arbitration agreement, means that they have submitted certain matters to the arbitrators' decision rather than have them resolved by law courts.^x This means, the parties have conferred jurisdictional powers to private individuals, the arbitrators, and they got their right to have those matters resolved by a court waived.^{xi} The parties may confer powers upon the arbitral tribunal directly or indirectly, but only within the limits of the applicable law. Any power granted over and above that is allowed by the applicable law is invalid, even if it is contained in international or institutional rules of arbitration.^{xii}

A 'direct' conferment of powers takes place when the parties agree expressly upon the powers that they wish the arbitrators to exercise. Such powers are set out in the terms of appointment of the arbitrators or a submission agreement and are likely to include the powers to order production of documents, to appoint experts, to hold hearings, to require the presence of witnesses, to receive evidence, and to inspect the subject matter of the dispute.^{xiii}

An 'indirect' conferment of powers happens when the parties have agreed that the arbitration is to be conducted according to pre-established rules of arbitration that define the powers of the tribunal. In the case of the International Chamber of Commerce (ICC), some of these powers are conferred on the ICC's International Court of Arbitration itself. For example, the place of arbitration is determined by the ICC Court, unless it has been chosen by agreement of the parties.^{xiv}

Whether direct or indirect the parties cannot confer upon an arbitral tribunal all the powers that are enjoyed by a national court. Since the national courts derive their authority from the state, they may exercise even coercive powers to ensure obedience to their orders. An arbitral tribunal does not usually possess such powers over property and persons.^{xv} In recognition of this fact, many systems of law supplement the powers of arbitral tribunals by: giving powers directly to arbitral tribunals, authorizing national courts to exercise powers on behalf of arbitral tribunals or the parties themselves or a combination of these two methods.^{xvi}

Therefore, it is not enough simply to refer to the arbitration agreement in order to determine the powers of the arbitral tribunal; any relevant mandatory provisions of the law governing the

arbitration agreement, and of the law governing the arbitration, must also be taken into account. These provisions usually extend or may sometimes restrict the powers conferred by the parties. As mentioned earlier, powers granted by the parties to the tribunal beyond what is allowed by the applicable law are invalid, so are any orders or decisions made in reliance upon it.^{xvii}

Types of Jurisdiction

There are three main types of judicial jurisdiction, generally speaking, and they can be understood in the following way in relation to the arbitration:

Personal jurisdiction is the authority of the court over a person, irrespective of the territory. The arbitral tribunal has personal jurisdiction over the parties that are signatories to an arbitration agreement. Basically, an arbitration agreement is a substantive contract between the parties that have mutually consented to settle their disputes through international commercial arbitration.^{xviii} However, there are instances where the jurisdiction of the arbitrator could be applied to the parties that are not signatories to the arbitration agreement.^{xix} Given the consensual nature of arbitration it is not possible to join third parties to arbitration unless they consent to it.^{xx} Because consent to arbitration is fundamental, courts have asserted that “[a]rbitration agreements apply to non-signatories only in rare circumstances.”^{xxi} Joinder of a third party may be possible in accordance with an agreement containing an ICC arbitration clause. However, it depends on the timing of the joinder request and the attitude of other parties. According to Article 7 of the ICC Rules, the Secretariat may fix a time limit for the submission of a request for joinder. And no additional party may be joined after confirmation or appointment of any arbitrator, unless all parties including the person sought to be joined agree upon such joinder.^{xxii} The matters relating to the point of time of adding a new party after the arbitration begins is dealt with by Article 7 of the ICC Rules. Obviously, the joinder of a non-signatory raises the question of consent, for example, when a claimant tries to seek extension of the arbitration clause to an associate of the contracting respondent. This kind of joinder would not arise from any provisions of the ICC Rules. However, such a joinder would be possible from legal principles such as agency or estoppel, whether at national or transnational levels.^{xxiii} Once the new party is joined, he is amenable to the jurisdiction of the arbitral tribunal.

Territorial jurisdiction means the authority of the court to deal with the cases originating in a defined geographical area. It includes all the legal matters relating to persons, things and events

occurring therein.^{xxiv} The international business transactions includes sales, leases, licenses, and investments. The parties to international business deals include individuals, small and large multinational corporations, and even countries. Thus, international business refers to transactions happening between parties from at least two or more countries. While the seat of arbitration may be situated in the territorial jurisdiction of one country as per the choice of the parties to the agreement, the properties of the parties may be located in the territory of one or more countries and the business transactions may take place in several other countries.^{xxv} Hence, the nature of rights evolved in accordance with the arbitral award can be different and may be required to be enforced in a country other than the country where the rights accrued by the Arbitral Award.

In *Tata International Ltd. vs. Trisuns Chemical Industry Ltd.*^{xxvi} Bombay High Court held that, in arbitration the Court considers the subject matter of the arbitration; in the enforcement of the award the Court considers the subject matter of the award as the determining factor. For instance, if the subject matter of the arbitration is a contract or a particular property, then the territorial jurisdiction of the Court would be where the contract was entered into or where one or all the properties of the respondent were situated. Once the arbitration is completed and has to be enforced, the subject matter of the award is an important part to focus on i.e., the award may be a money award, or a declaration or other relief in relation to a contract or a property. The enforcement of such award should be sought in a Court that would be competent to enforce the same. In other words, in a Court that has territorial jurisdiction where the respondent has properties, movable or immovable, which could be attached and sold in execution of the award. It is of no consequence to move a court where the cause of action might have arisen, if the respondent had no properties in that jurisdiction neither it would be of any use to file the execution petition where the respondent resided or carried on business. Later in the case of *Wireless Developers Inc. vs. India Games Limited*^{xxvii} the Court, following the Bombay High Court held that, if the party has a foreign award in its favor it can seek to enforce the award in any part of the country as long as money is available or suit for recovery of money can be filed.

The Supreme Court of India, in the case of *Brace Transport Corporation of Monrovia, Bermuda Vs. Orient Middle East Lines Limited, Saudi Arabia & Others*.^{xxviii} observed that, the arbitration between the parties normally happens under the jurisdiction of a neutral forum but the parties may not have any assets within the jurisdiction of such neutral forum. Therefore,

the award cannot be enforced there. Instead the enforcement of the award takes place in a country where the properties of the judgment debtor are situated. Therefore, it is imperative that foreign awards are recognizable and enforceable internationally and the place of such enforcement depends upon the circumstances of each and every case leaving no option to the parties.

Exclusive Jurisdiction Clauses in Agreements

Exclusive Jurisdiction Clauses are widely used by parties to an agreement as often it may not be convenient for the parties to sue at the place at which the cause of action for the dispute may have arisen. In such cases the exclusive jurisdiction clause offers a party the opportunity to establish a convenient pre-determined place where disputes arising in regard to the contract would be referred to, if and when they arise.

The Supreme Court of India held in the case of *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited and Others*.^{xxix} that in cases where the parties include an exclusive jurisdiction clause in an arbitration agreement designating a particular place as the seat of the arbitration, the jurisdiction lies solely with the Court of the seat of the arbitration to deal with petitions in respect of non-arbitrable issues relating to such agreement, excluding the other Courts. If there is no cause of action arising within the jurisdiction of the Court sitting in the seat of arbitration, does such Court have the exclusive jurisdiction for all proceedings was the main issue before the Court. This is an issue that often arises before the court once the terms of the contract include the exclusive jurisdiction clause.

The Supreme Court in this case brought considerable clarity on the issue thereby prohibiting forum shopping once the seat of arbitration is agreed upon by the parties.^{xxx} The apex Court stated that the parties should make sure to select the seat of arbitration by carefully assessing the pros and cons as this judgment prevents forum shopping.^{xxxi}

The UNCITRAL Model Law is based on the territoriality principle with the seat of arbitration having supervisory power and control over arbitral proceedings taking place within its territory.^{xxxii} The principle embodied in Article 1(2) is that the Model Law in a given State applies only if the place of arbitration is in the territory of that State. However, as Article 1(2) puts it there are certain important exceptions to that principle. As a result, certain articles apply

irrespective of whether the place of arbitration is in the enacting State or elsewhere or, as the case may be, even before the place of arbitration is determined.^{xxxiii}

In *Bharat Aluminium Co v. Kaiser Aluminium Technical Services Incorporated*^{xxxiv} ('BALCO') a five Judge Constitution Bench of the Supreme Court of India reaffirmed the territorial principle as has been incorporated in the Arbitration and Conciliation Act, 1996 and limited the applicability of Part I of this Act to domestic arbitrations which take place in India. In this land mark case, the court *overruled* its prior judgments in *Bhatia International*^{xxxv} and *Venture Global Engineering*^{xxxvi} and declared that, "it is the seat of arbitration that now governs the jurisdiction once the parties decide to have arbitration outside India'. Part I of Indian Arbitration Act, 1996 will have no applicability over international commercial arbitrations held outside India with respect to arbitration agreements entered into thereafter." Thus, the Court restricted the application of the Part I of the Arbitration Act to the arbitrations taking place within India only. Consequently, in a foreign seated international commercial arbitration, applications for interim relief are not maintainable under any provision of the said Act.^{xxxvii} This judgement overruled the earlier judgment and operates prospectively making the law laid down in 'BALCO' applicable to all the future arbitration agreements.^{xxxviii} The law will be as it stood in respect of the arbitration agreements executed prior to the BALCO's judgment i.e., Part I will be applicable to international commercial arbitrations held outside India unless expressly and/or impliedly excluded by the parties concerned.^{xxxix}

Subject matter jurisdiction refers to the authority of the court over the subject of the legal questions arising in the case.^{xi} The arbitral court's power to decide upon *any commercial matter* that has been referred to arbitration comes under the subject matter jurisdiction of the tribunal. Subject to certain exceptions,^{xii} it is an established legal principle that all disputes relating to rights in *persona* are considered to be amenable to arbitration and all disputes relating to rights in *rem* are required to be heard and decided by courts and public tribunals. It is precisely because arbitration is a private proceeding with public consequences^{xiii} that some types of disputes are reserved for national courts, the proceedings of which are generally in the public domain. This is why they are not 'capable of settlement by arbitration'.^{xiiii} Determination of the type of disputes that may be resolved by arbitration and those that are to be exclusively dealt with by the domain of the courts is referred to as *arbitrability*.^{xliv} Arbitrability is one of the

issues that have to be primarily dealt with regarding the contractual and jurisdictional facets of international commercial arbitration.^{xlv}

Relationship between of International Commercial Arbitration Jurisdiction and Sovereign State Jurisdiction

Territory (land), *people* (nation) and *recognition* by other sovereign states are the three necessary elements of one of the most accepted definitions of *sovereign state*. Sovereignty is the supreme authority over a geographic region and group of people.^{xlvi} Therefore, *exclusivity of jurisdiction* has been emphasized as a key element of sovereignty.^{xlvii} Being a supreme authority within a certain territory also implies the supremacy of the legislature and the judiciary of such territory. The observation made by the House of Lords as early as 1865 reflects this idea, which states that, “*Parties cannot by contract agree to oust [except] the jurisdiction of the courts to deal with their rights under the contract...*”^{xlviii} However, this strict legal theory had to give way, particularly after the industrial revolution, to cater to the needs of the people for fast, cheap and confidential methods to settle their disputes. Eventually, the alternative dispute resolution became vital for sustaining the new type of economy.^{xlix} Thus, modern sovereign states began to accept arbitration as an exception to the jurisdiction of their courts with some very functional “safeguards”.¹ As a kind of defensive system in order to protect the jurisdiction of their courts sovereign states have placed “limitations” and “restrictions” on the arbitral process. State courts intervene in the arbitral process to protect these interests by placing certain limits on the powers of the arbitral tribunal, arbitrability as well as public policy.^{li} “*National court involvement in international arbitration is a fact of life as prevalent as the weather. National courts become involved in arbitration for a whole host of reasons, but do so primarily because national laws are permissive and parties invite or encourage them to do so.*”^{lii}

An arbitral tribunal, unlike a national court, derives its power, authority and jurisdiction from an arbitration agreement or an arbitration clause in a contract between the parties to a contract. The arbitral proceedings are subject to judicial supervision and control of the relevant national law. A national court plays a supportive role in making the arbitral adjudication more effective.^{liii} The court, generally, directs back to the arbitration a party who is a signatory to a valid arbitration agreement and is not willing to arbitrate. It gives effect to the arbitration

agreement by staying local judicial proceedings. Finally, when the award is made a court converts the arbitral award into a judgment to enable the winning party to obtain its recognition and enforcement.^{liv}

Though international arbitration has become the standard method of resolving significant cross-border commercial disputes, the national courts of the sovereign states still play a very important role and assist the parties by providing interim measures of protection to safeguard their rights during the pendency of international arbitration proceedings. Among other things, parties may seek interim relief to ensure the preservation of assets, to seek security to cover the costs of the arbitration, to preserve evidence, to safeguard the confidentiality of the arbitration, or to ensure the procedural effectiveness of the arbitration and the powers of the arbitral tribunal.^{lv}

LAWS GOVERNING INTERNATIONAL COMMERCIAL ARBITRATION JURISDICTION

An arbitral tribunal established to determine an international dispute operates in an entirely different context from that of a judge sitting in a national court. Their jurisdiction is clearly established in the law governing the proceedings and the extent to which decisions in relation to jurisdiction may be reviewed by an appellate court also is provided by such laws.^{lvi} In case of international arbitration, the powers, duties, and jurisdiction of an arbitral tribunal arise from a complex mixture of the will of the parties, the law governing the arbitration agreement, the law of the place of arbitration, and the law of the place in which recognition or enforcement of the award may be sought.

According to International arbitral rules, generally, the parties concerned can enter into an arbitral agreement that contains an arbitration clause to choose the substantive law that governs their dispute.^{lvii} The parties, normally, indicate that "general principles of law" shall apply, though they have an option to choose the law of a particular jurisdiction.^{lviii} In case a consensus could not be obtained on the applicability of substantive law of any specific jurisdiction then the parties may prefer the choice of general principles. In fact, some parties believe that the outcomes will be neutral if their dispute is governed by general principles. However, the

benefits of choosing a neutral forum are less because of substantial uncertainty about the content of these general principles.^{lix}

Many countries have arbitration laws that provide a legal framework for the conduct of arbitrations. However, barring the mandatory requirements of the applicable law, parties may prefer to have a mutually agreed upon procedure for their arbitration or may simply accept the default procedure under the law of the country. Rather than drafting a customized procedure for each contract, parties usually adopt, and modify as appropriate, a set of tried and tested ready-made arbitration rules. These rules, as amended or supplemented by the parties, are then to be interpreted against the backdrop of the arbitration law of the seat i.e. the law of the place of arbitration.^{lx}

The UNCITRAL Model Law on International Commercial Arbitration^{lxi} covers all stages of the arbitral process, namely, formation of arbitration agreement,^{lxii} the composition^{lxiii} and jurisdiction^{lxiv} of the arbitral tribunal and the limitations of court intervention in recognition and enforcement of the arbitral award.^{lxv} India adopted a new legislation modelled on the “Model Law” in the form of the Arbitration and Conciliation Act, 1996 to address raising concerns and with a primary purpose to encourage arbitration as a cost-effective and time-efficient mechanism for the settlement of commercial disputes in a national and international sphere.^{lxvi} Part I of this Act contains provisions for domestic and international commercial arbitration in India. It provides that irrespective of the nationalities of the parties concerned, all arbitrations held in India would be governed by Part I of the Act. Part II provides for enforcement of foreign awards. Further, Part II basically restricts itself to the enforcement of foreign awards governed by the New York Convention or the Geneva Convention.

Arbitration in India suffered for a long time with issues including excessive cost, prolonged proceedings leading to extensive delays. To alleviate such challenges and encourage the parties to designate India as a seat for arbitration, the (Amendment) Act of 2015 had brought several consequential changes in the Arbitration & Conciliation Act, 1996. The most important of such changes are making arbitration cost effective and providing a fixed time period for disposal of disputes. According to the Amendment, the definition of “Court” differs for the purposes of an international commercial arbitration and domestic arbitration. In relation to domestic arbitration "Court" means the same as has been defined in the 1996 Act. On the other hand,

“Court” means “only the High Court” of competent jurisdiction for the purposes of international commercial arbitration. Therefore, in accordance with the amended law, the district court will not have jurisdiction in respect of an international commercial arbitration. Thus, the new law benefits the parties by facilitating speedy and effective determination of their issues through the High Courts which are more efficient in handling commercial disputes.

However, there are still certain drawbacks in the 2015 Amendment Act. Among other things, there is no mention in the Act about the significance of institutional arbitrations. The international institutions such as ICC, LIAC, SIAC, and HKIAC are now a days playing key role in resolution of disputes through arbitration. Another problem that is creating legal hurdles is the question of its applicability to court proceedings initiated pursuant to arbitrations invoked prior to BALCO. Hence, a further amendment was absolutely imperative to clear the obscurity created by the amendments introduced in 2015. Fortunately, these flaws of 2015 have been identified and are sought to be rectified in the Arbitration & Conciliation (Amendment) Bill, 2018.

JURISDICTIONAL CHALLENGES

The arbitrators’ jurisdiction i.e., the authority of arbitrators to determine the merits of a dispute arises out of a valid and enforceable arbitration agreement. However, if one or more of the party’s challenge/s the arbitrators’ jurisdiction, their decision-making power may become an issue. Challenges to the jurisdiction of an arbitral tribunal may fall under two categories, namely, partial and total.^{lxvii} A *total challenge*, questions the validity of the arbitration agreement itself.^{lxviii} An arbitral tribunal that derives its authority from a submission agreement is unlikely to face a total challenge to its jurisdiction. The purpose of a submission agreement is to give the arbitral tribunal jurisdiction to determine specific disputes between specific parties. Total challenges to jurisdiction are therefore likely to arise in practice only where the authority (or purported authority) of the arbitral tribunal is derived from an arbitration clause.^{lxix}

In the case of a *partial challenge* the question of jurisdiction is limited to one or more of the claims or counterclaims that have been submitted to the arbitral tribunal. A partial challenge does not amount to a fundamental attack on the jurisdiction of the tribunal.^{lxx} As it is

impossible to predict and find a way out for every single situation concerning jurisdictional challenges, the International Arbitration Practice Guideline on Jurisdictional Challenges, 2015^{lxxi} sought to raise awareness of the key issues that regularly arise. The relevant principles to apply while determining the most frequent challenges also have been laid down by the said Guidelines. According to the Guideline, the most common challenges which arise, to the jurisdiction of the arbitrator can be broadly put under 4 categories namely, the existence of the arbitration agreement, validity of the arbitration agreement, the scope of the arbitration agreement; and enforceability of the arbitration agreement.

Best Point of Time for a Jurisdictional Challenge

To find out whether or not a jurisdictional challenge is permissible, it is very important to appreciate the distinct nature of each jurisdictional challenge and the objects underlying Section 16 of the Arbitration and Conciliation Act, 1996. According to Section 16(2), objections to the jurisdiction of the tribunal can only be raised prior to the submission of the statement of defence. The important objectives of this provision could be observed here. *Firstly*, raising the challenge at the beginning of the proceedings saves time and expense of the parties. *Secondly*, deciding the question of jurisdiction at an earlier point of time reduces the supervisory role of Courts. Therefore, the time limit prescribed in Section 16 (2) makes the parties alert and encourage them to raise jurisdictional challenges promptly. And they will do so since they understand from the provision that the Courts cannot revisit certain questions of jurisdiction at a later point of time. Any interpretation of Section 16 should not lose sight of these objectives that are in line with the very basic purpose of the arbitration as a cost-effective speedy method of dispute resolution.

Ironically, however, the Supreme Court of India gave a different interpretation in the case of *Lion Engineering Consultants and Others vs. State of Madhya Pradesh*^{lxxii} and allowed the plea of the State of Madhya Pradesh challenging the jurisdiction of the arbitral tribunal for the first time in a proceeding for setting aside of an arbitral award under section 34 of the Arbitration and Conciliation Act, 1996. The only reason for this conclusion by the Supreme Court is that setting-aside proceedings are independent of proceedings before an arbitral tribunal. However, these observations are obviously against the objectives of Section 16, as has already been discussed above, which allows jurisdictional challenges to be raised only before

the arbitral tribunal and not after the award has been given by the tribunal. The ruling of the Supreme Court clearly contradicts its previous decision in the case of *Narayan Prasad Lohia vs. Nikunj Kumar Lohia and others*,^{lxxiii} where the court observed that, “Such a challenge must be taken under Section 16(2), **not later than the submission of the statement of defence**... If a party chooses not to object, there will be a deemed waiver under Section 4.”

Later in the case of *M/S. Gas Authority of India Ltd. vs. M/S. Ketu Construction (I) Ltd.*^{lxxiv} the Supreme Court observed that, since the objective of the Act is to secure expeditious resolution of disputes, such challenges must be made before the arbitral tribunal itself. But the court permitted GAIL to make a fresh jurisdictional challenge during setting-aside proceedings stating that, “*If a plea of jurisdiction is not taken before the arbitrator as provided under Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown.*” The condition laid down by the court that ‘*if good reasons were shown*’... such a challenge as a permissible one seems to have not been considered in Lohia’s case probably because GAIL was decided by a smaller bench of two judges.

Again more recently in another case *MSP Infrastructure Ltd., vs. Madhya Pradesh Road Development Corporation*^{lxxv} the Supreme said that under Section 16(2) *a jurisdictional challenge must be taken under Section 16(2), not later than the submission of the statement of defence...*” In stating so the Court strictly followed the correct position of law relating to permissibility of raising jurisdictional challenge for the first time in a setting-aside proceeding. These decisions by the apex court of India are evidently confusing laying down contradictory opinions on the issue.

Determination of Jurisdiction Challenges

Under Section 16 of the Act, the Arbitral Tribunal has the competence to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. This is a power inherent in the appointment of an arbitral tribunal. Indeed, it is an essential power if the arbitral tribunal is to carry out its task properly. An arbitral tribunal must be able to look at the arbitration agreement, the terms of its appointment, and any relevant evidence in order to decide whether or not a particular claim, or series of claims, comes within its jurisdiction.^{lxxvi}

The doctrine of '*competence-competence*' confers jurisdiction on the Arbitrators to decide challenges to the arbitration clause itself. The aim is to prevent proceedings being stayed or delayed.^{lxxvii} In *S.B.P. and Co. v. Patel Engineering Ltd. and Another.*,^{lxxviii} the Supreme Court has held that where the Arbitral Tribunal was constituted by the parties without judicial intervention, the Arbitral Tribunal could determine all jurisdictional issues by exercising its powers of *competence competence* under Section 16 of the Act. The arbitral tribunal's decision on the issue may be reviewed subsequently by a competent national court—but it is commonly accepted that this does not prevent the tribunal from making the decision in the first place.

Remedies available where jurisdiction is denied

If the arbitral tribunal rules that it does not have jurisdiction, the ruling can be challenged before a court. However, if the arbitral tribunal rules that it does have jurisdiction, no immediate appeal or challenge is available and the only option would be to challenge the final award passed by the arbitral tribunal on the ground of lack of jurisdiction. An exception to this rule under the Indian law is, if a court is approached to refer a matter to arbitration and during the course of such a reference the court decides any issue pertaining to the jurisdiction of the tribunal or the validity of the arbitration agreement, the decision of the court is binding on the tribunal. In recent times, courts have significantly narrowed the scope of their interference. Therefore, the circumstances in which a decision of the court is binding on the arbitral tribunal continues to be narrowed over time.^{lxxix}

CHALLENGES IN THE ENFORCEMENT OF INTERIM MEASURES

Interim measures which are also known as "provisional measures", "conservatory measures", "preliminary injunctions" or "emergency/interim reliefs" are those remedies or reliefs that are aimed at safeguarding the rights of parties to a dispute pending its final resolution.^{lxxx} Interim measures are always handled on an urgent basis before the arbitral tribunal is constituted or during the arbitration proceedings.

Originally, in arbitration, interim relief was only available through national courts as opposed to arbitral tribunals.^{lxxx} With the exception of a few jurisdictions it is today recognized in most

modern arbitration laws and under the rules of the major arbitral institutions that arbitral tribunals and state courts have *concurrent jurisdiction* to order provisional or protective measures.^{lxxxii} In other words, parties to an arbitration agreement who are in need of immediate protection are free to seek interim relief either from the arbitral tribunal or from a competent court.^{lxxxiii} Most arbitration rules now positively provide for such concurrent jurisdiction.^{lxxxiv} However, in each case consideration needs to be given to the relevant arbitration rules and the procedural laws applicable to determine whether the power to grant the relief sought is conferred upon the arbitral tribunal or the courts and whether an application is best made to the one or the other.^{lxxxv}

Usually, interim measures are awarded up on an oral application made by one of the parties^{lxxxvi} during a hearing or at any other time in writing supported by evidence. Before considering whether or not to grant an interim measure, the arbitrators should make sure that they have *prima facie* jurisdiction over the dispute,^{lxxxvii} should be satisfied on the information before them that the applicant has a reasonably arguable case^{lxxxviii} and that the party applying for an interim measure is likely to suffer harm if the measure is not granted. Arbitrators need also to consider any harm likely to be caused to the opposing party if they grant the interim measure. Any harm caused by granting the measure should be weighed against the likely harm to the applicant if the measure is not granted.^{lxxxix} Arbitrators may require a party applying for an interim measure to provide security for damages as a condition of granting an interim measure.^{xc} If the harm can be adequately compensated for by an award of monetary damages (that is likely to be honoured) it may not be appropriate to grant the interim measure.^{xc1}

In international commercial arbitration, the key enforcement mechanisms are provided by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the applicable domestic arbitration laws, many of which are based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).

In the Indian context, one of the significant amendments that the Arbitration and Conciliation (Amendment) Act 2015 has introduced is applicability of Section 9. In pursuance of this provision it is possible to seek interim measures from Indian courts in a foreign seated international commercial arbitration. Parties to an international commercial arbitration seated

in a foreign country and governed by foreign law can approach the Indian Courts for such interim relief provided they have not excluded the applicability of Section 9 of the 1996 Act, either expressly or impliedly. Part I applies if the arbitration takes place in India. Here it is pertinent to note what powers are available to the Indian courts if the arbitration takes place outside India.

Jurisdictional Issues Relating to Interim Measures

Before considering the issue of grant an interim measure, arbitrators should determine whether they have *prima facie* jurisdiction over the dispute. This includes an examination of the evidence as to whether there is a valid arbitration agreement. This is usually satisfied by clear evidence of the existence of a written agreement to arbitrate between the parties.^{xcii}

Even if there is a pending jurisdictional challenge to the arbitrators' authority, which they have not ruled on, arbitrators may still consider an application for interim measures and issue such measures, so long as they are satisfied that there is *prima facie* basis to assert jurisdiction.^{xciii}

If arbitrators consider there is need for an interim measure, for example, to protect the status quo and/or to preserve evidence, then they can right away decide upon it without having to wait for the decision on the full jurisdictional challenge which is pending. The reason for this is that the decision as to whether to order an interim measure is not a final determination on jurisdiction.^{xciv} If, however, arbitrators consider that there is little or no chance that they will have jurisdiction, they should first consider the jurisdictional challenge before dealing with the application for interim measures.^{xcv}

Enforceability

There is yet another question to be dealt with after successfully securing an interim relief from an emergency arbitrator, i.e., the question of enforcement. With the exception of Singapore and Hong Kong, in no other country orders of emergency arbitrators have received statutory recognition.^{xcvi} The Law Commission of India deliberated on this issue while suggesting amendments to the arbitration Act; however, ultimately no such amendment was made giving no room for enforcing the orders of emergency arbitrators in India.^{xcvii} However, it makes no difference for enforcement in India, as permitted by certain rules, whether an emergency relief is granted in the form of an *award* or just an *order*.^{xcviii}

Though there are certain concerns regarding the enforceability of emergency reliefs in India, they are just as crucial as elsewhere in Indian related commercial arbitrations. To start with, orders of emergency arbitrators may be extremely helpful if the respondent has assets in the jurisdiction where such orders are enforceable.^{xcix} In practice, it is usual for that parties to voluntarily comply with emergency orders.^c

Further, to enhance the chances of effective enforcement, the party that is approaching the Court for the interim measure needs to attend to the form of relief it is asking for.^{ci} While interim measures can take numerous forms, they often consist of non-monetary relief, generally an injunction to one party to do (or refrain from doing) something. However, the efficacy of such injunctive relief mainly depends on the tools available in each jurisdiction to force compliance with the judicial injunction or to sanction a party's failure to comply.^{cii}

Parties asking for interim relief should make sure that the measure requested from the arbitral tribunal is a known form of relief in the place or places where enforcement is probable.^{ciii} The case of *CE International Resources*,^{civ} illustrates the concerns relating to the non-availability of a certain type of relief in the place of enforcement. There may be a risk of refusal to enforce the orders of the tribunal granting interim measures, where such measures are not compatible with the public policy of the place of enforcement. For instance, in relation to an Egyptian case^{cv} an anti-suit injunction of the type issued by the arbitral tribunal in Paris was contrary to 'the right to seek relief against a third party' that was ensured by the Egyptian Constitution and thus to Egyptian public policy.^{cvi} Similarly, some jurisdictions consider that disproportionate damages are contrary to their international public policy^{cvi} and may thus frown upon interim measures that are accompanied by particularly heavy sanctions in the case of non-compliance.

CONCLUSION

International commercial arbitration is based on and dependent on relevant laws viz, national laws on the subject, international conventions and treaties and the substantive law of the seat of arbitration. Different national laws governing international commercial arbitration have been modernized prompted by the growing recognition of the commercial importance of

arbitration in the international scenario. Consequently, this liberal trend has limited the court interference in such cases. However this intervention is not necessarily disruptive of the arbitration process; it may equally be supportive.

It is a fundamental concept in law that jurisdiction must exist if a valid judgment or award is to be rendered by an adjudicative body. It is crucial to determine the issues relating to jurisdiction at the earliest point of time in any dispute resolution mechanism, particularly in arbitrations irrespective of whether national and international, because it can be challenged at any stage of such proceedings.^{cvi}

The Indian judiciary has been strongly in favour of arbitration as an alternative dispute settlement method. However, the courts have not been consistent in their stand on the issue of interpretation of the legal provisions that deal with the time of permissibility of jurisdictional challenges. The Supreme of India has given judgments that were contradictory to one another and not very much in line with the provisions of the relevant law nor the objectives of the arbitration system itself. The decisions, however, lean in favour of permitting the challenge at any stage of arbitration proceedings. Therefore, some constructive steps need to be taken to bring in some clarity and consistency on the issue.

As the jurisdiction of the arbitral is derived from the arbitration agreement the parties should take utmost care in drafting the arbitration clause or the submission clause as the case may be in clear and unambiguous terms. This will minimize the challenges that are likely to arise during the arbitration proceedings.

Should any such challenge arise the parties must be alert to bring it to the court at the earliest point of time during the proceedings as has been incorporated in the relevant provisions of law. Allowing the jurisdictional challenges at post-award stage causes time loss and money loss and defeats the very purpose of arbitration as a dispute settlement mechanism as an alternative to the regular prolonged and expensive proceedings in the courts. In case courts start allowing jurisdictional challenges to be raised for the first time at post-award stage, it would give rise to unnecessary and prolonged litigation which should be avoided at all costs for preserving the spirit of the arbitration process.

One vital factor that is crucial to international arbitration as a form of international dispute resolution and even for litigation is the grant of interim measures. There are quite a number of policy factors that determine the arbitral tribunal's powers to grant interim measures. Unless the parties have agreed otherwise, the tribunal may recommend provisional measures that are necessary to protect the rights of the parties during the proceedings. Both the national courts and arbitrators possess concurrent jurisdiction to grant these types of measures. Article 26 of the 2010 UNCITRAL Arbitration Rules addresses the subject of interim measures. The provision confers the tribunal with the power to grant interim measures, if requested by the parties.

The arbitrators must ascertain that they have *prima facie* jurisdiction over the dispute before considering the grant of interim measures. The enforcement of such measures is dependent upon the seat of arbitration, the place where the assets of the parties are situated and the compatibility of laws of the jurisdiction where the interim relief has to be enforced. Unless the harmonization of the various regimes governing the grant of interim or provisional measures is achieved, national laws of the place of arbitration and the place of enforcement cannot be completely excluded from international arbitration.

Limiting the judicial interference to the maximum possible extent is another important change that is necessary. The amendment brought to the 1996 Act is certainly a positive step towards making arbitration expeditious, efficacious and cost-effective remedy. The new amendments seek to curb the practices leading to wastage of time and making the arbitration process a less costly affair.

It is not uncommon that arbitrators take up arbitrations beyond their capacities thereby causing inordinate delay in the disposing the matters before them thereby defeating one of the main purposes of dispute settlement by arbitration. Therefore, it is crucial to make the arbitrators responsible for delay in the arbitration proceedings wherever the reasons for such delay can be attributable to them. Such a deterrent strategy would encourage self-discipline and control amongst the arbitrators. However, with the recent amendments to the 1996 Act, the tireless efforts of the legislature have been certainly fruitful to a larger extent in minimizing the judicial interference.

REFERENCES

- i Ali Kahalid, 'Choice of Law in International Commercial Arbitration, India Law Journal', https://www.indialawjournal.org/archives/volume3/issue_3/article_by_ali.html
- ii Herbert Smith Freehills, 18 September, 2018, https://hsfnotes.com/arbitration/2018/09/18/recent-developments-in-india-related-international-arbitration-12/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original
- iii Section 2 sub-section 1 clause (f) The Arbitration and Conciliation Act, 1996- definition of International Commercial Arbitration. 'Commercial' should be construed broadly having regard to the manifold activities which are an integral part of international trade today (R.M. Investments & Trading Co. Pvt. Ltd. v. Boeing Co., AIR 1994 SC 1136).
- iv Jurisdictional Challenges, International Commercial Arbitration Guideline, Chartered Institute of Arbitrators, London, UK. <https://www.ciarb.org/media/4192/guideline-3-jurisdictional-challenges-2015.pdf>
- v The Problem of Jurisdiction, https://saylordotorg.github.io/text_introduction-to-the-law-of-property-estate-planning-and-insurance/s06-02-the-problem-of-jurisdiction.html
- vi The rationale behind introducing the concept of jurisdiction in law is that a court should be able to try and adjudicate only in those matters with which it has some connection or which fall within the geographical or political or pecuniary limits of its authority.
- vii Jurisdiction, Legal Information Institute (LII), <https://www.law.cornell.edu/wex/jurisdiction>. For a detailed explanation of the meaning of the term 'jurisdiction' see *Hriday Nath Roy v. Ram Chandra AIR 1921 Cal 34 (FB); Official Trustees West Bengal Vs. Sachindra Nath Chatterjee reported in AIR 1969 SC 823; In the matter of : Sri Sushanta Malik @ Susanta Malik Vs. Srei Equipment Finance Limited and Anr. C.O. No. 136 of 2015.*
- viii Dispute Settlement, International Commercial Arbitration, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 2005, p4. https://unctad.org/en/Docs/edmmisc232add39_en.pdf
- ix Mitchell L. Lathrop, 'Jurisdiction Issues in International Arbitration' 2 *The Global Business Law Review* 29 (2011).
- x *Ibid. supra* note 8.
- xi *Ibid. supra* note 8.
- xii Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (6th Ed) 2015, 5.8.
- xiii *Id.*
- xiv ICC Rules, Art. 18.1.
- xv *Id. supra* note 12.
- xvi Murat Sumer, 'Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship', *Jurisdiction and Arbitration, Ankara Bar Review*, 55-65; *Id. supra* note 12.
- xvii *Id. supra* note 12.
- xviii Bharucha, Sneha Jaisingh & Shreya Gupta, 'The Extension Of Arbitration Agreements To Non-Signatories – A Global Perspective' *M.P. Indian Journal Of Arbitration Law* 35. http://ijal.in/sites/default/files/IJAL%20Volume%205_Issue%201_M.P.%20Bharucha%20et%20al.pdf
- xix Kyle Olson and David Zaslowsky, 'U.S. Supreme Court holds it has personal jurisdiction over non-signatory to an arbitration agreement'. *Recom Corp. v. Miller Bros.*, No. 16-3320, (D.N.J. Aug. 16, 2018) <https://globalarbitrationnews.com/u-s-district-court-holds-it-has-personal-jurisdiction-over-non-signatory-to-an-arbitration-agreement/>
- xx Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (Cambridge University Press, UK 2008)
- xxi *Bridas SAPIC v. Turkmenistan*, 345 F.3d347, 358 (5th Cir.2003), citing *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002).
- xxii William Park, 'Challenging Arbitral Jurisdiction: The Role of Institutional Rules', Scholarly Commons at Boston University School of Law Faculty, Scholarship 10-2015 available at https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1010&context=faculty_scholarship accessed on 23-11-2019.
- xxiii *Ibid.*
- xxiv Jurisdiction, USLegal.com., <https://civilprocedure.uslegal.com/jurisdiction/>

- xxv Article 1 of UNCITRAL Model Law on International Commercial Arbitration, 1985 as amended 2006
- xxvi 2002(2) B.C.R. 88
- xxvii 2012(3) MhLj449
- xxviii AIR1994 SC1715
- xxix Civil Appeal Nos. 5370-5371 Of 2017; April 19, 2017, decision of a two-judge bench of the Supreme Court.
- xxx Vikrant Rana and Akshay Gupta, India: Supreme Court Provides Clarity on Exclusive Jurisdiction Clause In Arbitration Agreement, 28 June 2017.
http://www.mondaq.com/article.asp?article_id=606024&signup=true
- xxxi Forum Shopping is the practice of choosing the court in which to bring an action from among those courts that could properly exercise jurisdiction based on a determination of which court is likely to provide the most favorable outcome
- xxxii Jain, Sankalp, 'Framework Governing International Commercial Arbitration: UNCITRAL Model Law and Principles' (November 10, 2015). Available at SSRN: <https://ssrn.com/abstract=2777728> or <http://dx.doi.org/10.2139/ssrn.2777728>
- xxxiii *Id.*
- xxxiv (2012) 9 SCC 649
- xxxv Bhatia International v. Bulk Trading S.A. [(2002) 4 SCC 105]
- xxxvi [2008] 4 SCC 190.
- xxxvii *Id.*
- xxxviii On or after 6 September 2012
- xxxix *Id.*
- xl *Id. supra* note 24.
- xli The Supreme Court enlisted the non-arbitrable disputes *Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others*. [Civil Appeal No. 5440 of 2002]
- xlii Like the recognition and enforcement of the award.
- xliii *Id. supra* note 8. Both the New York Convention and the Model Law are limited to disputes that are 'capable of settlement by arbitration'. New York Convention, Arts II(1) and V(2)(a); Model Law, Arts 34(2)(b)(i) and 36(1)(b)(i).
- xliv For a general discussion of 'arbitrability' in the sense of 'legally capable of settlement by arbitration', see Sanders, 'The domain of arbitration', in Cappelletti (ed.) *Encyclopedia of International and Comparative Law*, Vol. XVI (Brill, 1987), ch. 12, pp. 113ff; see also Hanotiau, 'The law applicable to arbitrability' (1998) 9 ICCA Congress Series 146.
- xlv New York Convention, Arts II(1) and V(2)(a); Model Law, Arts 34(2)(b)(i) and 36(1)(b)(i).
- xlvi Stanford Encyclopedia of Philosophy.
- xlvii *Id. supra* note 16.
- xlviii *Scot v. Avery and others*, HL, 10 July 1856.
- xlix *Id. supra* note 16.
- l *Id.*
- li Richard B. Lillich, and Charles N. Brower (eds). *International Arbitration in the 21st Century: Towards 'Judicialisation' and Uniformity?* (Transnational Publishers, New York, 1994)
- lii Lew, Julian D M. "Does National Court Involvement Undermine the International Arbitration Processes?" *American University International Law Review* 24, no. 3 (2009): 489-537. Citations dropped.
- liii William W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration', 32 INT'L & COMP. L.Q. 21, 30 (1983) as quoted by Lew, Julian D M. 'Does National Court Involvement Undermine the International Arbitration Processes?' *American University International Law Review* 24, no. 3 (2009): 489-537;
<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1094&context=auilr>
- liv Richard B. Lillich, and Charles N. Brower (eds). *International Arbitration in the 21st Century: Towards 'Judicialisation' and Uniformity?* (Transnational Publishers, New York, 1994).
- lv Rachael D. Kent and Amanda Hollis, *Concurrent Jurisdiction Of Arbitral Tribunals And National Courts To Issue Interim Measures In International Arbitration - Chapter 05 - Interim And Emergency Relief In International Arbitration - International Law Institute Series On International Law, Arbitration And Practice*, Juris-Legal Information, Arbitration Law.

- <https://arbitrationlaw.com/library/concurrent-jurisdiction-arbitral-tribunals-and-national-courts-issue-interim-measures>
- lvi *Id. supra* note 12.
- lvii *Id.*
- lviii Deutsche Schachtbau - Und Tiefbohrgesellschaft v. R Al-Khaimah National Oil Co, 1 AC 295 (1990)
- lix Note, General Principles of Law in International Commercial Arbitration, 101 Harv.L.Rev. 1987/88, at 1816 et seq. https://www.trans-lex.org/127400/_/note-general-principles-of-law-in-international-commercial-arbitration-101-harvlev-1987-88-at-1816-et-seq/
- lx Latham and Watkins, *Guide to International Arbitration*, p12.
- <https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017>
- lxi Adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, at the close of the Commission's 18th Annual session. The General Assembly, in its resolution 40/72 of 11 December 1985, with recommended "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice."
- lxii Articles 7-9 of UNCITRAL Model Law on International Commercial Arbitration
- lxiii *Id.* Articles 10-15
- lxiv *Id.* Article 16
- lxv *Id.* Articles 35-36.
- lxvi Before 1996, India had three enactments which governed the process of arbitration. These were the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961.
- lxvii *Supra* note 12 at 5.92; The Court identifies two types of jurisdictional challenges, namely, the inherent lack of jurisdiction and defects in the jurisdiction. *Ledgard v. Bull* is a leading case in which the Court drew a distinction between *inherent want of jurisdiction* or the competence of the Court and *irregularities in the initial procedure*, and certain general propositions were laid down. The Privy Council in this case observed that, though a consent or waiver may cure a defect in the jurisdiction, it cannot cure an inherent lack of it. Therefore, jurisdictional challenges raised due to a defect in the jurisdiction must be distinguished from those based on an inherent lack of it.
- lxviii *Id.*
- lxix *Id.* 5.98
- lxx *Id.*
- lxxi *Id. supra* note 4.
- lxxii (2018) 16 SCC 758. Decided by 3 judge bench.
- lxxiii Civil Appeal No. 1382 of 2002 INSC [2003]INSC 30 (28 January 2003) Decided by 3 judge bench.
- lxxiv Civil Appeal 2440 of 2007. Decided by 2 judge bench.
- lxxv Civil Appeal No. 10778 of 2014
- lxxvi *Id. supra* note 12 at 5.104
- lxxvii Law and Recent Developments in India International Commercial Arbitration, Law and Recent Developments, International Commercial Arbitration With inputs from - Singapore International Arbitration Centre (SIAC)© Nishith Desai Associates 2019.
- lxxviii 2005 (8) SCC 618.
- lxxix [https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=\(sc.Default\)&firstPage=true & bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true & bhcp=1)
- lxxx Ali Yesilirmak, Provisional Measures in International Commercial Arbitration 5 (2005); Ozen Athhan, The Main Principles Governing Interim Measures In the Pre-Arbitral Proceedings - Specifically, The ICC Emergency Arbitrator Rules (2012) <https://www.journals.istanbul.edu.tr/tr/index.php/hukuk/article/.../1608> where Interim measures were described as temporary remedies aiming to avoid unjust results before the final awards are rendered.
- lxxxi INTERNATIONAL ARBITRATION PRACTICE GUIDELINE, Applications for Interim Measures, Chartered Institute of Arbitrators, p1. <https://www.ciarb.org/media/4194/guideline-4-applications-for-interim-measures-2015.pdf>
- lxxxii Lévy, 'When Time Matters - Provisional Measures, Preliminary Injunctions and Interim Relief', Paper presented at the 8th IBA International Arbitration Day, at p 3.
- lxxxiii Bernd D. Ehle, 'Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief', https://www.lalive.law/wp-content/uploads/2019/10/beh_Concurrent_Jurisdiction_2007.pdf

- lxxxiv For example, Article 23 of the 1998 Rules of Arbitration of the International Chamber of Commerce (ICC Rules); The ICSID Arbitration Rules, Article 39; the UNCITRAL Arbitration Rules, Article 26.
- lxxxv *Id.* note 83.
- lxxxvi *Id.* Article 1. See Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Juris 2014) for a detailed overview of the availability of interim measures in support of arbitration in 43 different jurisdictions worldwide.
- lxxxvii *Id.* note 81 Article 1.
- lxxxviii ICC Interlocutory Award 10596 (2000) (unpublished) and Order for Interim Measures and Arbitral Award 2002 in SCC Case No. 096/2001 in Yesilirmak, n 2, p. 180. See also, Julian D. M. Lew, 'Commentary on Interim and Conservatory Measures in ICC Arbitration Cases' (2000) 11 ICC Bulletin, p. 27.
- lxxxix *supra* note 81 at p7.
- xc *Id.* Art. 2 (4)
- xcii Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (Kluwer Law International 2005), p. 180; David D. Caron and Lee M. Caplan, 'Chapter 17: Interim Measures', *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, Oxford University Press 2013), p. 537.
- xciii See generally CI Arb Guideline on Jurisdictional Challenges, 2015.
- xciv See e.g., ICC Case 12361 (2003), (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, p. 61.
- xcv ICSID Case No. ARB/05/22 of 31 March 2006) at para. 70 ("It is also clear...that a party may be exposed to provisional measures even though it contends that ICSID has no jurisdiction.") also Ibrahim F. I. Shihata and Antonio R. Parra, 'The Experience of the International Centre for Settlement of Investment Disputes', (1999) 14 ICSID Review 326.
- xcvi *Id.* *Supra* note 81 p 7.
- xcvii Rishab Gupta, Aonkan Ghosh, *Choice Between Interim Relief from Indian Courts and Emergency Arbitrator*, 2017. <http://arbitrationblog.kluwerarbitration.com/2017/05/10/choice-between-interim-relief-from-indian-courts-and-emergency-arbitrator/>
- xcviii *Id.* The Law Commission of India has submitted its 246th Report in August, 2014.
- xcix *Id.* see Schedule 1(6) of the SIAC Rules with Article 29(2) of the new ICC Rules.
- c e.g. Singapore and Hong Kong
- ci *Supra* note 96.
- cii James E Castello and Rami Chahine, 'Enforcement of Interim Measures' *The Guide to Challenging and Enforcing Arbitration Awards - First Edition*, <https://globalarbitrationreview.com/chapter/1178692/enforcement-of%E2%80%89-interim-measures>
- ciii *Id.*
- civ *Id.*
- cv *CE International Resources Holdings LLC v. SA Minerals Ltd et al.*, 2012 US Dist. LEXIS 176158, 6, 7 (SDNY).
- cvi Cairo Court of Appeal, 7th Commercial Circuit, Case No. 44/134 JY, Decision dated 9 May 2018, paras. 20, 21.
- cvi See Ibrahim Shehata, 'Are Arbitral Anti-Suit Injunctions Enforceable before Egyptian Courts?', *Kluwer Arbitration Blog*, 23 January 2019.
- cvi See Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 32);
- cvi *Id.* *supra* note 9.