

EDITORIAL

IRI Arb remains steadfastly dedicated to influencing contemporary discussions in the field of international arbitration. This issue of IRI Arb is dedicated to Mr. Fali Nariman.

ARBITRATION IN INDIA

As India solidifies its position as a significant participant in the global arbitration discourse, arbitration law and practice in India has seen its fair share of activities leading up to this issue. In June 2023, the Ministry of Law and Justice constituted an Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996, headed by Dr. T.K. Vishwanathan, Former Secretary, Department of Legal Affairs. The long-awaited report was released in March 2024, and it has suggested numerous changes to the act, to make arbitration more efficient, flexible and commercially viable.¹

First, one of the most prominent recommendations, intentioned to restore the expediency of the arbitration process, is to introduce a mandatory timeline of 60 days for reference by the referral court under Section 8 of the Arbitration and Conciliation Act, 1996 (“Act”). Similar deadlines have been suggested for commencement of arbitration after application for interim relief under Section 9 (30 days), appointment of the arbitral tribunal by the court if parties do not appoint a tribunal (15 days), completion of pleadings (6 months) and time provided to make an appeal on an award (60 days). These deadlines, if implemented, would ensure the completion of the arbitration process within a reasonable period.

To compare these with other prominent arbitration regimes, the UK arbitration Act, 1996 (‘UK Act’)² and the Singapore Arbitration Act, 2001 (‘Singapore Act’)³ provides clear time limits for the time provided to make an appeal on an award (28 days)⁴. The Federal Arbitration Act, 1947 (‘US Act’)⁵ mandates that the award be made within 30 days of the final hearing,⁶ and challenge to be made within 3 months.⁷ Thus, the impact of this recommendation will be vital in bringing arbitration in India to the level of efficiency of arbitration worldwide. Further, it is particularly important in the Indian context, where excessive court interference has led to significant delay.

¹ Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to make it alternative in the letter and spirit. (March, 2024).

² Arbitration Act 1996 (c. 23), United Kingdom.

³ Arbitration Act, 2001, Ed. 2020, Republic of Singapore.

⁴ Arbitration Act, 2001, § 50.

⁵ Federal Arbitration Act, 1947, ch.392, §1, 61 Stat. 669, United States of America.

⁶ Federal Arbitration Act, 1947, 5 U.S. Code § 579.

⁷ Federal Arbitration Act, 1947, 9 U.S. Code § 12.

Second, an amendment has been suggested to Section 11 of the Act to make any clause prescribing unilateral appointment of an arbitrator *void ab initio*. This suggestion aims to ensure greater equality in the arbitration process by restoring the equal power of appointment to each party and militate against attempts by parties with greater bargaining power to dilute on the neutrality of the tribunal. This furthers the stance taken by the Supreme Court in the *Perkins Eastman*⁸ and other more recent judgments.⁹ The suggestion recognises that this provision may be waived if both parties consent to it in a written agreement after the dispute has arisen. The legality of unilateral appointment brings up a complex struggle between unconscionability and party autonomy.¹⁰ Party autonomy is a cornerstone of arbitration; however, no justice system can abide by unconscionable agreements where one party is oppressed by another. By disallowing unilateral appointment clauses, the recommendation will protect parties with lesser bargaining power from being strong-armed into unjust contracts, yet the waiver will uphold party autonomy and allow parties to enforce unilateral appointment clauses. Thus, the recommendation will be instrumental in making India pro-arbitration in an equitable manner.

Third, the report has suggested the introduction of a new section– 12A, with the aim of imposing the duty of impartiality and neutrality on arbitral institutions as well. This would require arbitral institutions to maintain transparency in ownership and management, ensure fair arbitrator appointments, monitor arbitration timelines, and publish a code of ethics for arbitrators to strictly adhere to. Currently, no domestic arbitration legislation or arbitral institutional rules deal with the neutrality of the arbitral institution and its employees. Even the IBA Guidelines on Conflict of Interest in International Arbitration do not deal with conflict arising within arbitral institutions. However, there is one notable exception: the Russian Arbitration Center (RAC).¹¹ It deals with employees acting as tribunal assistants, employees involved with case management activities and employees involved in other administrative functions and any conflict of interest that may arise in such instances.¹² It lays down a clear requirement for disclosing and resolving any potential conflict of interest. With the increasing popularity of institutional arbitration, this recommendation will be vital in bridging the legislative gap in conflict of interest by ensuring institutional neutrality and safeguarding arbitration proceedings from bias. However, it can be improved by specifically

⁸ *Perkins Eastman Architects DPC & Anr. v HSCC (India) Ltd* 2019 SCC Online SC 1517

⁹ *Haryana Space Application Centre v. Pan India Consultants (P) Ltd.*, (2021) 3 SCC 103; *Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers*, 2021 SCC OnLine SC 730; and *Ellora Paper Mills Ltd. v. State of M.P.*, (2022) 3 SCC 1.

¹⁰ Himanshu Raghuvanshi and Krishnanunni, *Unilateral Arbitrator Appointments in the US – A tussle between ‘Unconscionability’ & ‘Party Autonomy’*, AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (Feb 21, 2021).

¹¹ Arbitration Rules 2021, Russian Arbitration Center, Russian Institute of Modern Arbitration.

¹² Arbitration Rules 2021, Internal Rules of the RAC, Article 7.

mentioning the independence and impartiality of the administration or employees in arbitral institutions, as the RAC does.

Fourth, the report has sought to codify the concept of emergency arbitration in India, first recognised in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited and Ors.*,¹³ in the form of Section 12B. In emergency arbitration, a party can apply for urgent interim relief before an arbitral tribunal is formally constituted. For this purpose, a separate emergency arbitrator will be promptly appointed. This concept is not too new to the international arbitration arena and is codified in the rules of various institutions such as SIAC,¹⁴ LCIA,¹⁵ SCC,¹⁶ HKIAC,¹⁷ ICDR/AAA,¹⁸ etc. An oft debated question with regards to an emergency awards is whether it qualifies as an award. Some courts have accepted the argument that it is not a final determination of issues and, hence, cannot be called an award.¹⁹ Others have accepted the argument that it is final and binding for the purpose of maintaining status quo and that it pre-empts any law that limits its enforceability, so it does count as an award.²⁰ The recommendation resolves this conflict by concluding that the emergency award will be enforceable as if it were an interim order under Section 17(2) of the Arbitration and Conciliation Act, 1996.

Another issue is regarding the enforceability of emergency awards from foreign-seated arbitrations. Currently, in India, emergency awards from foreign-seated arbitrations would not be enforceable, and *Amazon v. Future Retail* did not comment on this. This gap is left empty by the recommendation as it does not deal with the validity or enforceability of emergency awards from foreign-seated arbitrations.

Fifth, it attempts to codify a concept that is yet uncodified but broadly accepted by Indian courts, i.e., third-party funding in the form of Section 18A. A third-party funder provides financial support to assist individuals or commercial entities in pursuing or defending themselves in arbitration proceedings. This practice is growing increasingly popular in India. In *Bar Council of India v. A.K. Balaji*,²¹ the Supreme Court confirmed that there is no bar on third-party funding in India. This

¹³ 2021 SCC OnLine SC 557.

¹⁴ Arbitration Rules of the Singapore International Arbitration Centre SIAC Rules (6th Edition, 1 August 2016), Schedule 1.

¹⁵ London Court of International Arbitration, Arbitration Rules, 2020, art 9B.

¹⁶ Stockholm Chamber of Commerce Rules, 2010, Expedited Rules and Appendix II.

¹⁷ Hong Kong International Arbitration Centre Administered Arbitration Rules, 2008, art. 38.

¹⁸ International Centre for Dispute Resolution of the American Arbitration Association Rules (2006), art. 37.1.

¹⁹ *Yahoo! Inc. v. Microsoft Corporation*, United States District Court, Southern District of New York, 13 CV 7237, October 21, 2013.

²⁰ *Chinmax Medical Systems Inc., v. Alere San Diego, Inc.*, Southern District of California, Case No. 10cv2467 WQH (NLS), May 27, 2011.

²¹ (2018) 5 SCC 379.

recommendation attempts to codify this concept and add safeguards to prevent misuse by stating that the identity of the third-party funder must be disclosed to the tribunal. However, regarding third-party funding, there is another issue regarding whether the third-party funder would have to bear the costs if an adverse award is received. In *Tomorrow Sales Agency Private Limited v. SBS Holdings, Inc. and Ors.*,²² the court held that the funder would not have to bear costs, distinguishing itself from the position in English law. However, this issue has not been dealt with at all in the recommendation. A related and further question of law as to whether a third-party funder is to be treated as a non-signatory party to the proceeding has also not been settled. Thus, the recommendation needs to be more elaborate to deal with all the issues of third-party funding.

Sixth, it suggests various amendments to make virtual mediation and arbitration compatible with the current regime. It suggests conducting small and medium-value claims arbitration virtually unless otherwise agreed by the parties. This recommendation has a twofold benefit, firstly it recognises the need for a simpler procedure for lower value claims and mandates the tribunal to follow a fast-track procedure for the same. Secondly, it makes the arbitration regime more accessible to individuals and smaller companies as they would be less inconvenienced by virtual proceedings.

These are welcome changes to the Arbitration Act and, if accepted by the legislature, would be able to significantly increase the efficiency of the Indian arbitration regime. However, it is not without its faults and gaps, which must be remedied.

ARBITRATION IN THE UNITED KINGDOM

There appears to be an increasing trend towards modifying the domestic arbitration regime in India and the United Kingdom. A bill amending the UK Arbitration Act, 1996, has been amended in March 2024.²³ The bill first clarifies its stance on the law governing the arbitration agreement, which is the law of the seat, if not agreed upon by the parties. This is a necessary clarification as there was extreme confusion on this matter around the world, where some courts decided on the law of the seat,²⁴ and other courts preferred the law of the matrix contract.²⁵ It also upholds an important principle of arbitration, i.e., the Doctrine of Separability, as the law of the matrix contract would not be considered in deciding the law of the arbitration agreement.

²² 2023 SCC OnLine Del 3191.

²³ Arbitration Bill, HL Bill 59, 58-4 (2024).

²⁴ *FirstLink Investments Corp Ltd. v. GT Payment Pte Ltd.*, 5 WLUK 446 (2014); *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 648; *Kabab-Ji (Lebanon) v. Kout Food Group (Kuwait)*, Court of Appeal Paris, Case No. 17/22943 (2020).

²⁵ *BCY v. BCZ SGHC* 249 (2016); *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb*, UKHC 38 (2020); *Sulamerica CIA Nacional De Seguros SA and Ors. v. Enesa Engenharia SA and Ors.*, EWCA Civ 638 (Comm) (2012).

The Act also addresses the issue of immunity of arbitrators. It limits the circumstances under which an arbitrator can be ordered to pay costs in the proceedings for their removal. Additionally, it specifies that an arbitrator's resignation does not automatically incur liability unless shown to be unreasonable. These provisions provide safeguards for arbitrators while still ensuring accountability. This provision adds specificity to the issue of immunity that has yet to be incorporated in other arbitration regimes around the world.

In terms of jurisdiction, the Act specifies that once a tribunal has ruled on a preliminary jurisdictional point, a court application on the same question should not be considered further. This is of particular importance for two reasons. Firstly, it ensures that the arbitral tribunal's competence in deciding jurisdiction is upheld. Secondly, it ensures that arbitration is not hindered at an initial stage and is allowed to proceed efficiently. This streamlines the process and avoids duplication of efforts between the tribunal and the court. It upholds one of the cornerstones of arbitration, i.e., minimal court intervention.

INDIAN ARBITRATION JUDGMENTS

The initial six months of 2024 have witnessed notable judgements in the realm of international arbitration.

NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.

In the case NBCC (India) Limited v. Zillion Infraprojects Pvt. Ltd.,²⁶ the NBC appealed the judgment of the High Court of Delhi, contesting the appointment of an arbitrator under Section 11(6) of the Arbitration & Conciliation Act 1996. The dispute arose from a construction contract with Zillion Infraprojects Pvt. Ltd. NBCC argued that the incorporation of an arbitration clause from a prior contract, i.e., a tender letter between the parties, is invalid as the parties have explicitly decided the dispute resolution method for this contract in the Letter of Intent. The Supreme Court ruled that general references do not automatically incorporate arbitration clauses from prior contracts despite being between the same two parties, particularly when specific clauses in the contract prescribe a different dispute resolution mechanism.

Gujarat Composite Ltd. v. A. Infrastructure Ltd. & Ors.

²⁶ NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd., 2024 SCC OnLine SC 323.

In *Gujarat Composite Ltd. v. A. Infrastructure Ltd. & Ors.*,²⁷ Gujarat Composite Ltd entered into license agreements with A. Infrastructure Ltd, allowing the latter to operate manufacturing plants. Later, a supplemental agreement outlined financial advancements and allowed A. Infrastructure Ltd. to mortgage the production units. A tripartite agreement involving the Bank of Baroda was also signed. Disputes arose when A. Infrastructure Ltd requested an extension of the license agreement, which Gujarat Composite Ltd rejected due to financial constraints. A legal battle ensued, with Gujarat Composite Ltd seeking arbitration, while A. Infrastructure Ltd contested the arbitrability of the dispute, leading to conflicting decisions by the Gujarat High Court and the Ahmedabad Commercial Court.

The Supreme Court dismissed Gujarat Composite Ltd.'s appeal, affirming the lower courts' decisions. It clarified that arbitration can only be compelled if the dispute falls within the scope of the arbitration agreement. Since the dispute involved parties and transactions beyond those covered by the original license agreement, the Court ruled against mandating arbitration. Additionally, it emphasized that an arbitration clause in agreements related to the dispute, such as the original license agreement, doesn't automatically extend arbitration to the subject matter. Therefore, the Commercial Court's denial of Gujarat Composite Ltd.'s application under Section 8 of the Arbitration Act was upheld.

S.V. Samudram v. The State of Karnataka

In the case of *S.V. Samudram v. The State of Karnataka*,²⁸ the Supreme Court was presented with the issue of whether the High Court was justified in confirming an order that modified an arbitral award by reducing the awarded amount. This stemmed from a contractual agreement of 1990 between S.V. Samudram, a civil engineering contractor, and the Karnataka State Public Works Department for constructing an office and residence for the Chief Conservator of Forests at Sirsi. Delays and disputes led to arbitration, where an award favoured the applicant. However, subsequent legal challenges sought to modify this award, questioning the High Court's confirmation under Sections 34 & 37 of the Arbitration & Conciliation Act, 1996.

The Supreme Court reaffirmed that courts lack jurisdiction to modify arbitral awards under Section 34 and that any such modification exceeds legal bounds. It underscored the necessity of arbitration awards being final and binding, thus emphasizing the limited supervisory role of courts in arbitration.

²⁷ *Gujarat Composite Ltd v. A infrastructure Ltd & Ors.*, 2023 SC 384.

²⁸ *S.V. Samudram v. State of Karnataka*, (2024) 3 SCC 623.

This case highlights the principle of minimal judicial intervention in arbitration and reiterates the sanctity of arbitral awards.

Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.

In *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*,²⁹ a three-judge bench of the Supreme Court allowed a curative petition against the judgement by a two-judge bench of the same court. The court set aside the judgement in question by applying the standard of ‘grave miscarriage of justice’ and affirmed the Divisional Bench judgment of the High Court, which partly set aside the arbitral award due to patent illegality under §34(2A). This judgement by the Supreme Court may appear against the goal of an arbitration-friendly environment as the SC, while allowing the curative petition, opens a possibility of a fifth stage of intervention by courts in an arbitral award and also partly sets aside the arbitral award. However, the SC sounded significant caution to the exercise of curative petitions and the narrow scope of judicial review of arbitral awards and held that such petitions can only be allowed in exceptional cases.

This edition of IRIArb starts with the memory and legacy of Mr. Fali S. Nariman in the field of Arbitration and then moves on to discuss a wide range of topics from the field of International Arbitration.

Sarosh Zaiwalla in his piece, “*A Life Dedicated to Justice: Remembering Fali Nariman*” highlights his long-standing association with Fali Nariman, dating back to their childhood in Bombay. Zaiwalla recounts working with Nariman on various cases, emphasizing their shared belief that the law should serve justice. One notable case involved reclaiming a company from a dishonest employee using a clever interpretation of the Indian Benami Act. Rooted in his Zoroastrian faith, Nariman’s integrity and commitment to fairness were unwavering. His dedication extended to international arbitration, where he served as Vice-Chairman of the ICC Court. Nariman’s legacy continues to inspire the pursuit of justice.

In “*Mastering the Art of Arbitration: Exploring the Legacy of Mr. Fali S. Nariman*,” Sudhir Mishra, Petal Chandhok, and Rupali Gupta celebrate the distinguished career of Fali S. Nariman, highlighting his profound impact on arbitration. Nariman's exceptional advocacy skills transcended national boundaries, significantly promoting arbitration as a reliable and efficient dispute resolution method. The article discusses his roles in prominent international arbitration bodies, such as Vice-Chairman of the ICC International Court of Arbitration and President of the ICCA, and his advocacy for India

²⁹ DMRC v. Delhi Airport Metro Express (P) Ltd., 2024 SCC OnLine SC 522.

as a hub for international arbitration. It also reviews five notable arbitration cases handled by Nariman, illustrating his impact on arbitration policies at both national and international levels.

Manohar Samal in his article titled *"Addressing Challenges in the Enforcement of International Arbitral Awards rendered in Smart Contract Disputes on the Blockchain"* discusses the enforceability issues of smart contracts under arbitration law. The article examines the requirement of the New York Convention for arbitration agreements to be in writing and the challenges posed by purely coded smart contracts, which may not qualify as such. It also highlights the difficulties in meeting stamping & registration requirements and furnishing authenticated copies for enforcement. The article delves into the inadequacies of the juror voting system in blockchain arbitration. Samal proposes several recommendations to tackle these issues and emphasizes the need for collaborative efforts from all stakeholders to bridge existing gaps until substantial legal advancements are made, ensuring better enforceability of awards rendered in smart contract disputes on the blockchain.

Badrinath Srinivasan in his article titled *"Dealing with LIBOR Cessation in International Arbitration: Some Suggestions"* discusses the challenges posed by the discontinuation of the London Inter-Bank Offered Rate (LIBOR), a widely used interest rate benchmark, for ongoing and future arbitration proceedings. This article also explores how international arbitral tribunals and courts have dealt with the cessation of LIBOR, as several long-term agreements and investment treaties refer to LIBOR as the applicable rate. It suggests ways for parties and tribunals to address this issue, as an award on interest can contribute substantially to the overall damages award. The author, in the end, gives an overview of how LIBOR cessation has been handled by adjudicatory forums, to assist courts, arbitral tribunals, counsel, and parties in India and elsewhere in dealing with the discontinuation of LIBOR where the underlying contracts or treaties index the interest rate to LIBOR.

Rajesh Kapoor's article titled *"The Idea of A-National Arbitral Award and an Autonomous Arbitral Order - A Critical Analysis"* explores the concept of international arbitration's independence through case reviews. The Norsolor Case involved a dispute between a Turkish company, Pabalk, and a French company, Norsolor, over an agency agreement termination. Arbitration in Vienna under ICC rules applied *lex mercatoria*, with Norsolor seeking annulment and Pabalk seeking enforcement in Paris. The Vienna Court of Appeal partially annulled the award, and the Paris Court of Appeal refused enforcement of the annulled part. However, the French Supreme Court stressed that French courts should consider enforcement under other laws, highlighting international arbitration's autonomy from the seat's legal order. The Hilmarton Case reinforced this stance. A dispute between Hilmarton, an English company, and OTV, a French company, over a consultancy agreement led to arbitration in

Geneva, resulting in an award against Hilmarton. The French court upheld the award despite its annulment in Switzerland, reiterating the autonomous nature of international arbitration.

Vanya Chhabra and Intisar Aslam in their article titled "*Judicial Guardian to the Rescue! Preventing the Abuse of Termination Proceedings in Arbitration*" examine the intricacies of arbitration proceedings under the Indian Arbitration and Conciliation Act, 1996, focusing on the termination of proceedings through final awards and arbitral tribunal orders. It argues for the inclusion of partial awards within the scope of final awards to prevent the abuse of arbitration termination processes. The article also discusses the implications of unilateral claim withdrawal, referencing the Fortminster award under UNCITRAL Arbitration Rules, which emphasizes preventing claimants from unilaterally ending arbitration without considering respondent's costs. It highlights the necessity of judicial intervention under Article 227 of the Indian Constitution to address the lack of remedies for challenging termination orders, advocating for a balance between minimal judicial interference and safeguarding constitutional rights in arbitration.

Darren Low Jun Jie's article titled "*Issue Estoppel in International Commercial Arbitration and the Effect of Foreign Judgments on Enforcement Courts: Republic of India v Deutsche Telekom*" discusses the Singapore Court of Appeal's decision in *Republic of India v Deutsche Telekom*, focusing on whether a foreign judgment on the validity of an arbitral award can create an issue estoppel. This principle prevents re-litigation of the same issues. The article explores the court's endorsement of the "Primacy Principle," which gives precedence to decisions by the courts at the seat of arbitration. The decision affirms that Singapore law recognizes issue estoppel from foreign judgments, detailing the conditions for its application. The court's ruling addresses the ongoing debate between the territorialist and delocalization theories in international arbitration. Ultimately, the decision supports the use of issue estoppel in enforcement proceedings to ensure finality in litigation and limit cross-border disputes, influencing the recognition and enforcement of foreign judgments in international commercial arbitration.

Adhiraj Lath's article titled "*Red Eagle Vies for Gold: The Tribunal in Red Eagle v. Colombia Finds Colombia not Liable for Treaty Breach While Diverging From the Tribunal in Eco Oro v. Colombia*" examines the ICSID Tribunal's decision in *Red Eagle v. Colombia*, where the Tribunal dismissed all claims by Red Eagle Exploration under the Canada-Colombia FTA, finding no breach by Colombia. The Tribunal determined that environmental exceptions could only be invoked as a defence on merits rather than as a jurisdictional objection. Lath contrasts this with *Eco Oro v. Colombia* highlighting the substantial divergence in how similar claims under the same FTA were adjudicated. In *Red Eagle*,

the Tribunal concluded that legitimate expectations do not fall within the Minimum Standard of Treatment (MST), whereas *Eco Oro* recognized them, introducing a novel two-pronged approach to MST. Lath critically analyses these inconsistencies, emphasizing the potential for fragmented treaty interpretations and their significant implications for international investment law.