25 Not Out: A Tale of Two Cities

*Vijayendra Pratap Singh and Abhisar Vidyarthi**

Abstract: *The enactment of the principal arbitration legislation in India, the Arbitration & Conciliation Act, 1996, notably coincided with the enactment of the United Kingdom's Arbitration Act, 1996. While both turned 25 years old in 2021, the two jurisdictions have seen distinct paths in the development and evolution of their respective arbitration landscapes. London, traditionally, has always been a significant seat of arbitration for parties around the world due to its consistent pro-arbitration outlook. India, on the other hand, had a questionable decade following the enactment of the Indian Arbitration Act, but is now gradually moving towards establishing itself as a preferable seat of arbitration. As India emerges as an economic power, it has taken significant strides to ensure a predictable, transparent, and reliable framework for the enforcement of contracts. In doing so, the legislative and judicial outlook in the country has been focused on building a strong arbitration culture, which emphasises giving effect to arbitration agreements and awards. There are several overlaps in the arbitration laws and practices of both India and the United Kingdom. This article discusses the comparative approach of Indian and English arbitration laws and practices. In doing so, it analyses the similarities and overlaps between the approach of courts in the two jurisdictions, particularly with respect to arbitral autonomy and the enforcement of arbitration agreements as well as foreign arbitral awards.*

I. INTRODUCTION

International arbitration, being a transnational field, necessitates a global outlook and consistent interchange and reciprocation of ideas and judicial practices between jurisdictions. A smooth exchange of ideas and values between countries assumes importance because the arbitral practices and norms prevailing in one country naturally have a direct or indirect implication on the perspectives prevailing in other countries.

India and the United Kingdom ('**U.K.**') both adopted their primary arbitration legislations in 1996, which turned 25 years old in 2021. Both the Arbitration and Conciliation Act, 1996 ('**Indian Arbitration Act**') and the Arbitration Act, 1996 ('**English Arbitration Act**') are

based on the UNCITRAL Model Law on International Commercial Arbitration, 1985.[1] Over time, however, both jurisdictions have experienced diverse and distinct paths in their quest to embrace pro-arbitration norms and practices.

With London, there is little doubt that it is not only a favourable seat but also a key market for arbitration. In fact, London is also one of the most preferred seats of arbitration for parties for their transnational contracts.[2] Traditionally, English courts have consistently and strongly supported both the practice and procedure of arbitration within their supervisory jurisdiction as well as awards rendered by tribunals. The English Arbitration Act has played a significant role to ensure that arbitration agreements are upheld and there is no undue interference with the arbitral process.[3]

India, on the other hand, has seen a more ambivalent trajectory in its approach to arbitration autonomy and process. Prior to 2010, India was often seen as an 'outlier' in international arbitration and Indian courts were infamous for adopting inconsistent standards to interfere with the arbitral process and deny enforcement of awards.[4] In recent times, however, India has taken significant strides towards adopting a pro-arbitration culture and shredding the 'outlier' tag in the international arbitration community. The Indian Arbitration Act has undergone several amendments to adopt the best international practices and streamline the arbitration practice in India.[5] New Delhi has recently grown into a seat of arbitration which can be trusted as a custodian of party autonomy and efficiency of the arbitral process. The decision in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Limited*,[6] wherein the Indian Supreme Court became the first apex court of any jurisdiction to expressly uphold enforceability of emergency awards, is a manifestation of India's prevailing pro-arbitration stance. In cricketing parlance, at 25 not-out, India is no more standing at the non-striker's end

*Vijayendra Pratap Singh is Senior Partner and Head of Practice, Dispute Resolution, AZB & Partners, New Delhi. He can be reached at vijayendra.singh@azbpartners.com. Abhisar Vidyarthi is an Advocate in New Delhi and can be reached at avividyarthi@gmail.com.

[1] UNCITRAL Model Law on International Commercial Arbitration 1985 (amended in 2006), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf> accessed 23 February 2023.

[2] White & Case and Queen Mary University of London, *2021 International Arbitration Survey: Adapting arbitration to a changing world* (2021) <https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> accessed 23 February 2023.

[3] Thomas E Carbonneau, 'A Comment on the 1996 United Kingdom Arbitration Act' (1998) 22 Tulane Maritime Law Journal 131.

[4] Abhisar Vidyarthi and Sikander Hyaat Khan, 'India: a late opening to the notion of international public policy?' (2022) 38(4) Arbitration International 249; *Bhatia Trading v Bulk Trading* (2002) 4 SCC 105 (Supreme Court); *Venture Global Engineering v Satyam Computer Services Ltd* (2010) 8 SCC 660 (Supreme Court).

[5] Vidyarthi and Khan (n 4).

[6] (2022) 1 SCC 209 (Supreme Court).

and is instead playing a more crucial role in shaping the contemporary scorecard of international arbitration.

Despite both India and the U.K. beginning their contemporary arbitral journeys in 1996, i.e., with the enactment of their principal arbitral legislations, the U.K. has traditionally been seen as a more favourable arbitral seat compared to India. India, however, continues to stride towards a more conducive environment for arbitration and bridge the gap between itself and other prominent arbitral seats, including London.

In this context, the underlying objective of this paper is to analyse the comparative journey of Indian and English arbitration laws and practices, and examine the distinctions and similarities between the two jurisdictions, with respect to enforcement of arbitration agreements as well as foreign arbitral awards. We also look at the attitude of courts in aid of arbitration, and the position with respect to binding non-signatories to arbitrations.

II. ENFORCEMENT OF ARBITRATION AGREEMENT

International commentators and practitioners often use the term 'pro-arbitration seats' to refer to jurisdictions to indicate their suitability as a preferred place for parties to conduct their arbitrations. The seat of arbitration assumes significance as it denotes the jurisdiction under which the arbitration proceeding would be anchored.[7] One of the primary considerations in this regard is whether the seat courts are willing to enforce and uphold the sanctity of arbitration agreements as well as compel contractual parties to honour their commitment to arbitrate their disputes.

A. Scope of the Agreement

Both India and the U.K. accord a liberal interpretation to arbitration agreements in relation to its scope and ensure that parties are not permitted to unduly resile from their undertakings to contractually resolve their disputes. This ensures that the scope of arbitration agreements is given the widest amplitude in terms of the disputes which can be referred to arbitration. Indian courts have adopted the rule of priority in favour of arbitrators and ensured that the sanctity of arbitration agreements is maintained by the parties.[8] The rule provides that it is the basic

[7] Abhisar Vidyarthi, 'Two Indian Parties Can Choose a Foreign Seat: Party Autonomy Prevails in India' (2022) 5 Transnational Dispute Management <www.transnational-dispute-management.com/article.asp?key=2933> accessed 23 February 2023.
[8] *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1 (Supreme Court).

requirement that the parties to the arbitration agreement should honour their undertaking to submit to the arbitration any dispute covered by the arbitration agreement. This is important to ensure that parties are restricted from wriggling out of arbitration agreements at their whim and fancies. In fact, much before the enactment of the Indian Arbitration Act, in 1984, the Indian Supreme Court in *Renusagar Power Co. Ltd*. v. *General Electric* had opined that arbitration agreements ought to be liberally construed and "*expressions such as 'arising out of' or 'in respect of' or 'in connection with' or in relation to' or in consequence of' or 'concerning' or 'relating to' the contract are of the widest amplitude and content and include questions as to the existence, validity and effect (scope) of the arbitration agreement*."[9] The liberal approach of Indian courts is also manifested in the fact that they have recognised that tort claims arising in connection with the agreement between the parties are arbitrable and would also fall within the scope of the arbitration agreement.[10]

In this regard, under English law, the seminal case is *Fiona Trust & Holding Corp and* others v. *Privalov* ('***Fiona Trust***').[11] In *Fiona Trust*, the English Court of Appeal also furthered a similar liberal construction of an arbitration agreement and held that an arbitration agreement should be interpreted with the underlying assumption that parties, as rational businessmen, would have likely intended to have any dispute arising out of the relationship into which they have entered to be decided by the arbitral tribunal. Highlighting the need to revamp the approach of English courts to arbitration agreements, the Court noted that expressions such as 'arising out of' and 'arising under' in an arbitration agreement ought to be interpreted to include any dispute arising out of the contract, including tortious claims if there is a sufficiently close-connect between the claim and a claim under the contract. Subsequent to *Fiona Trust*, the *Fiona Trust* principle has been approved and further developed through subsequent judgments, wherein it has been noted that an arbitration agreement in one contract could extend to disputes arising under another contract between the same parties in circumstances wherein as a matter

[9] *Renusagar Power Co Ltd v General Electric Company* (1984) 4 SCC 679 [25] (Supreme Court); *Gemini Bay Transcription v Integrated Sales Service* 2021 SCC OnLine SC 572 [48].
[10] *Gemini Bay Transcription Pvt Ltd v Integrated Sales Service Ltd* (2022) 1 SCC 753 [69] (Supreme Court); *Bharat Heavy Electricals Ltd v Assam State Electricity Board* (1989) SCC Online Gau 138 [23] (Gauhati High Court); *Krishan Gopal v Parveen Rajput* (2019) SCC Online Del 8330 [20] (Delhi High Court).
[11] *Fiona Trust & Holding v Privalov*,[2007] EWCA Civ 20 (EWCA); *Premium Nafta v Fili Shipping* [2007] UKHL 40 (UKHL); *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm) (EWHC); *DHL Project & Chartering Ltd v Gemini Ocean* [2022] EWCA 1555 (EWCA).

of contractual construction, the wording of the clause in one contract can be fairly capable of applying to disputes in the other contract.[12]

B. Doctrine of Severability

English courts have also been at the forefront of the doctrine of severability and upheld the validity of arbitration agreements even when the main contract has been found to be null and void.[13] In *Fiona Trust*, the English Court of Appeal read Section 7 of the English Arbitration Act to provide that an arbitration agreement is a distinct agreement, which is not affected by any invalidity of the main agreement as a whole. The Indian Supreme Court has reciprocated the English practice on severability, and has cited *Fiona Trust* to uphold the sanctity of arbitration agreements.[14] In this regard, in *A. Ayyasamy*, the Indian Supreme Court has held as follows:

> "*The arbitration agreement between the parties stands distinct from the contract in which it is contained, as a matter of law and consequence. Even the invalidity of the main agreement does not ipso jure result in the invalidity of the arbitration agreement*."

Like the U.K., the principle of severability of arbitration agreements is statutorily recognised in India under Section 16(1)(b) of the Indian Arbitration Act and is regularly upheld by Indian courts.[15] For instance, in *Reva Electric Car Company Private Ltd*. v. *Green Mobil*, the Supreme Court has noted:

> *"Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16 further provides that even if the arbitral tribunal concludes that the*

[12] *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm) [26]-[28], [30] (EWHC); *NDK Ltd* (n 11).
[13] *Harbour Assurance Ltd v Kansa General International Insurance* [1992] 1 Lloyd's Rep 81 (EWHC).
[14] *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386 [47]-[54] (Supreme Court).
[15] *Enercon (Indian) Ltd v Enercon GmbH & Anr* (2014) 5 SCC 1 [83] (Supreme Court); *Reva Electric Car Company Pvt Ltd v Green Mobil* (2012) 2 SCC 93 [50]-[54] (Supreme Court); *Today Homes and Infrastructure Pvt Ltd v Ludhiana Improvement Trust* (2014) 5 SCC 68 [14]-[15] (Supreme Court).

contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause…Section 16 (1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void."[16]

C. Anti-Arbitration Suits

Another important aspect of enforcement of arbitration agreements is to examine the approach of courts in respect of anti-arbitration suits. The reason being that allowing parties to initiate litigations in breach of the arbitration agreements dilutes the sanctity of arbitration agreements. English courts have a long-standing and well recognised practice of restraining foreign proceedings brought in violation of an arbitration agreement.[17] An injunction to restrain foreign proceedings may be granted even when an arbitration has not been initiated under the arbitration agreement.[18] Prior to granting injunctive relief against anti-arbitration suits, English courts satisfy itself that the claims in question fall within the scope of the underlying arbitration agreement.[19] Delay or lack of promptness in seeking injunctive relief against anti-arbitration suits might be a relevant consideration for English courts to deny such relief.[20]

The underlying rationale adopted by English courts is that when parties agree to arbitrate, they undertake to refrain from commencing proceedings in any other forum other than the arbitral tribunal. Courts, therefore, uphold the negative promise of parties to refrain from commencing proceedings in breach of the arbitration agreement.[21] With respect to anti-arbitration injunctions, English courts have indicated that it is only in the most exceptional cases that an

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[16] *Reva Electric* (n15) [54].
[17] *Aggeliki Charis Compania Maritima SpA v Pagnan SpA* [1995] 1 Lloyd's Rep 87 (EWHC); *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd's Rep 279 (EWHC); *XL Insurance v Owens Corning* [2000] 2 Lloyd's Rep 500 (EWHC); *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (UKSC).
[18] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 (UKSC).
[19] *Schiffahrtsgesellschaft Detlev Von Appen GmbH* (n 17); *Transport Mutual v New India Assurance Co Ltd* [1997] 2 Lloyd's Rep 279 (EWHC).
[20] *Essar v Bank of China* [2015] EWHC 3266 (Comm) (EWHC).
[21] The English Arbitration Act, 1996, s 9; *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 (UKSC); The Senior Courts Act, 1981, s 37.

injunction restraining the conduct of an arbitration proceedings with a foreign seat will be granted.[22]

Indian courts have similarly enforced arbitration agreements to refrain parties to an arbitration agreement from instituting suits which either seek to breach arbitration agreements,[23] or interdict arbitration proceedings by instituting a collateral suit to challenge the arbitration agreements.[24] Both Section 8 (domestic arbitration) and Section 45 (international arbitration) of the Indian Arbitration Act obligate the court to refer parties to arbitration when they bring an action before the court despite being parties to an arbitration agreement. While referring parties to arbitration, the court merely undertakes a *prima facie* examination of the existence and validity of the arbitration agreement. These provisions of the Indian Arbitration Act are interpreted so as to bring forth the underlying principles, ethos and spirit of the Indian Arbitration Act.[25] These provisions are necessarily intended to be interpreted in aid of arbitration to protect the internationally recognised principle of *Komptenz-Kompetenz*, which is also statutorily enshrined under Section 16 of the Indian Arbitration Act. With respect to anti-arbitration injunctions, suits instituted to seek invalidity of an arbitration agreement and to injunct arbitration proceedings have been held to be not maintainable in India.[26] In recent times, the Indian Supreme Court has repeatedly also affirmed that the Indian Arbitration Act is a complete code and any form of collateral interference with the arbitration proceedings cannot be entertained.[27]

D. Judicial Interventions

Recognising the autonomous nature of the Indian Arbitration Act, Indian courts have also adopted self-imposed limitations on their constitutional powers to supervise arbitration

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[22] *Weissfisch v Julius* [2006] EWCA Civ 218 (EWCA); *Claxton Engineering Services Ltd v Tam Olaj-Es Gazkutato* [2011] EWHC 345 (EWHC); *Ecom Agroindustrial Corporation Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm) (EWHC).

[23] The Indian Arbitration Act, 1996, ss 8 and 45.

[24] *A Ayyasamy* (n 14) [12.2]; *Kvaerner Cementation India Ltd v Bajranglal Agarwal* (2012) 5 SCC 214 [1]-[6] (Supreme Court); *NALCO Ltd v Subhash Infra Engineers Pvt Ltd* (2020) 15 SCC 557 [10]-[20] (Supreme Court); *Chatterjee Petrochem v Haldia Petrochemicals* (2014) 14 SCC 574 [31]-[33], [35]-[36], [38]-[41] (Supreme Court); *Bhushan Steel v SIAC* ILR (2010) VI Delhi 295 [20], [35] (Delhi High Court); *Roshan Lal Gupta v Parasram Holdings* (2009) SCC Online Del 293 [23], [25] (Delhi High Court).

[25] *Shailesh Dhairyawan v Mohan Balkrishna Lulla* (2016) 3 SCC 619 [31]-[33] (Supreme Court); *A Ayyasamy* (n 14) [53].

[26] *Dr Bina Modi v Lalit Modi* (2020) SCC Online Del 901 (Delhi High Court).

[27] *Amazon v Future* (n 6) [41], [44], [46], [89]; *Fuerst Day Lawson Ltd v Jindal Exports* (2011) 8 SCC 333 [89]-[90] (Supreme Court); *Deep Industries v ONGC* (2020) 15 SCC 706 [15]-[20], [22], [24] (Supreme Court); *Bhaven Construction v Sardar Sarovar Narmada Nigam Ltd* (2022) 1 SCC 75 [12]-[27] (Supreme Court); *R Raghavan v R Venkitapathy* (2013) SCC Online Mad 356 [12]-[16] (Madras High Court).

proceedings under Article 227 of the Constitution of India.[28] Indian courts exercise their constitutional mandate to interfere with arbitral proceedings only in extreme circumstances where a party can show that an order passed by an arbitral tribunal patently lacks inherent jurisdiction. Recently, in the much-publicized dispute between *Future Coupons Private* Limited v. *Amazon.com NV Investment Holdings LLC*, the Delhi High Court reaffirmed this position and dismissed petitions filed by the Future Group against certain orders passed by an arbitral tribunal in an international commercial arbitration seated in New Delhi, governed by the Rules of the Singapore International Arbitration Centre (SIAC).[29] In doing so, the Delhi High Court clarified that the scope of interference with arbitral proceedings under Article 227 of the Constitution of India is extremely circumspect and a party cannot maintain an action against non-appealable interim orders passed by the arbitral tribunal under the garb of being rendered remediless. It was noted that parties are at liberty to challenge the final award once rendered by the tribunal, however, the autonomous nature of the arbitration agreement ought to be maintained during the pendency of the arbitral proceedings. The Delhi High Court notably held:

> "*Clipping of arbitral wings is against the basic ethos of the 1996 Act. Allowing free flight to arbitration is the very raison d'etre of the reforms that the UNCITRAL arbitral model sought to introduce. The 1996 Act, founded as it is on the UNCITRAL model, is pervaded by the same philosophy.*"[30]

E. Arbitrability

The Indian Supreme Court has also delineated a limited test of arbitrability in favour of enforcement of arbitration agreements, while ensuring a balance with public interest.[31] In *Vidya* Drolia v. *Durga Trading* ("***Vidya Drolia***"), the Court propounded a four-fold test to determine when the subject-matter of dispute is not arbitrable.[32] In this case, the Supreme Court was concerned with the arbitrability of disputes between landlords and tenants arising out of the

[28] *Deep Industries* (n 27) [15]-[20], [22], [24]; *Bhaven Construction* (n 27) [12]-[27].
[29] *Future Coupons (P) Ltd v Amazon.com NV Investment Holdings LLC* (2022) SCC Online Del 3890 (Delhi High Court).
[30] ibid [87].
[31] *Booz Allen and Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532 (Supreme Court); *Vidya Drolia v Durga Trading* (2021) 2 SCC 1 (Supreme Court).
[32] *Vidya Drolia* (n 31).

Transfer of Property Act, 1882. As per the four-fold test, a dispute would not be arbitrable when:

1) It relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.

2) It affects third party rights, have *erga omnes* effect, require centralised adjudication, and mutual adjudication would not be appropriate.

3) It relates to inalienable sovereign and public interest functions of the State.

4) It is expressly or by necessary implication non-arbitrable under a specific statute.[33]

It is in these limited circumstances that the court can decide to decline reference to arbitration in terms of an arbitration agreement. Notably, the above tests are not watertight compartments, and dovetail and overlap with each other. When applied pragmatically and holistically, these tests would ensure greater certainty on the law on arbitrability and assist courts to decide questions of subject-matter arbitrability in India. The underlying basis of the above tests is to understand the nature of right in determination between the parties. Arbitration being a private dispute resolution mechanism ordinarily excludes disputes which involve determination of a right in rem, i.e., a right enforceable against the world at large.

As a matter of public policy, adjudication of disputes which partake a public character are reserved by the legislature exclusively for public institutions. This includes those category of cases wherein the law confers exclusive jurisdiction on a specified/special court or tribunal. Accordingly, in India, disputes such as those relating to criminal offences, matrimonial disputes, guardianship matters, insolvency and winding up matters, etc. are considered not arbitrable.[34] On the other hand, disputes which require a determination of rights in *personam* i.e., rights inter-se between the parties, would be amenable to arbitration. Indian courts have however clarified that subordinate rights arising out of rights *in rem*, such as tenancy rights, would be capable of being resolved through arbitration.[35] This has paved the path for private adjudication of statutory claims in India.

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[33] ibid.
[34] *Booz Allen* (n 31); *Vidya Drolia* (n 31).
[35] *Vidya Drolia* (n 31).

While *Vidya Drolia* streamlined the test for arbitrability in India, it did leave certain questions unanswered. First, the judgment does not examine or interpret the transnational provisions of arbitration in Part II of the Indian Arbitration Act. It is therefore unclear whether the test for arbitrability for foreign seated arbitrations would also be governed by the four-fold test prescribed in *Vidya Drolia*. It is arguable that the test for arbitrability of disputes for foreign awards ought to be narrower to give effect to international comity and provide a predictable framework for global business and trade. Second, the exclusion of disputes from the ambit of arbitration merely because a specialised forum is statutorily created for their adjudication is inconsistent with its own findings that the need to apply mandatory law, the public policy objective of the statute, and the complexity of disputes do not preclude arbitration.[36]

While the test of arbitrability in the U.K. is not as clearly defined as it is in India, English courts have been prepared to interpret arbitration agreements broadly to encompass non-contractual as well as contractual disputes.[37] A review of English cases would provide that there are certain limited circumstances in which disputes may be held to be not arbitrable. These include statutory claims wherein the law provides for a specified statutory tribunal for adjudication of disputes[38] or other matters, such as insolvency matters, which are governed by statutory regimes.[39] While criminal matters are not arbitrable in the U.K. as well, courts have held that civil claims involving allegations of criminality may be arbitrable.[40] Similar to India, English courts have also not favoured matters of public interest, where the public fora would be the suitable forum to decide matters *in rem*, to be referred to arbitration.[41]

F. Governing Law

Lastly, with respect to the applicable law of the arbitration agreement, both jurisdictions provide different approaches in cases where the parties have not specifically agreed on governing law for their arbitration agreement. English law gives primacy to the law of main contract when the arbitration agreement is contained in the main contract. Otherwise, the

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[36] *Vidya Drolia* (n 31) 39-41.
[37] *Fiona Trust* (n 11).
[38] *Clyde & Co LLP v Bates van Winkelhof* [2011] EWHC 668.
[39] *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm) (EWHC).
[40] *The London Steamship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* [2015] EWCA Civ 333 (EWCA).
[41] *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 (EWCA); Stavros Brekoulakis and Margaret Devaney, 'Public-Private Arbitration and and the Public Interest under English Law' (2017) 80(1) Modern Law Review 22.

English law practices the closest connection test, wherein the system of law with which the arbitration agreement is most closely connected will be the law of the seat of the arbitration.[42] On the other hand, in the absence of party agreement, Indian courts primarily treat the venue of the arbitration as the parties' implied choice of seat,[43] and in certain cases rely on the closest connection test to decide the seat of the arbitration.[44] Indian courts also recognise the 'fastest finger first' principle, wherein in the absence of any agreement between the parties, the court before whom the first application is moved by the parties would then be the court having exclusive jurisdiction over the arbitral proceedings.[45]

III. GRANT OF INTERIM RELIEF IN AID OF ARBITRATION

While arbitration is a private dispute resolution mechanism, it requires a certain degree of judicial supervision to ensure that the arbitral process remains effective and efficacious. The permissible degree of judicial intervention in arbitral proceedings may be a contentious issue. It is, however, generally accepted that any interference by the court in arbitral proceedings ought to be in aid of arbitration, and not otherwise. Interim or conservatory reliefs are a necessary component in arbitral proceedings, and the tendency of courts to grant such relief prior to constitution of the tribunal is an important consideration for parties when deciding the seat of arbitration. Both the Indian Arbitration Act and the English Arbitration Act recognise the instances wherein courts may intervene in or act in aid of arbitral proceedings. In this regard, one of the primary circumstances in which judicial intervention is permissible, and is in fact recommended, is to pass interim orders in aid of arbitration, such that the substratum of the dispute is not rendered futile during the pendency of the arbitral proceedings.

A. Interim Relief

Section 44 of the English Arbitration Act provides the court with the power to pass interim orders in aid of arbitration proceedings to *inter alia* take and preserve evidence and assets. While this power appears broad, urgency is an instrumental criteria for English courts to allow an application for interim relief under Section 44. In view of Section 44(5), English courts can

[42] Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38 (UKSC); *Sulamérica Cia Nacional de Seguros SA v Enesa* 2012 EWCA (Civ) 638 (EWCA).
[43] *BGS-SGS SOMA JV v NHPC Limited* (2019) SCC Online SC 1585 (Supreme Court); *Harmony Innovation v Gupta Coal* (2015) 9 SCC 172 (Supreme Court).
[44] *Enercon (India) Ltd* (n 15).
[45] *BBR (India) Pvt Ltd v SP Singla Constructions Pvt Ltd* (2022) SCC Online SC 642 (Supreme Court); *BGS-SGS SOMA JV* (n 44).

interfere in the arbitration proceeding and pass an interim order only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.[46] If the court finds that the case is not of urgency, the court shall act on the application only once notice of arbitration is issued to the parties and to the tribunal. In addition to urgency, in grant of interim injunction by English courts is guided by the principles stipulated in *American Cyanide Co.* v. *Ethicon Ltd*., also known as the 'American Cyanide guidelines'.[47] This includes: (a) whether there is a serious question to be tried; (b) what would be the balance of convenience of each party should the order be granted; (c) whether there are any special factors.[48] English courts are known to grant interim and conservatory reliefs in view of safeguarding the rights of parties in arbitrations in English seated arbitrations.[49]

The corresponding provision under Indian law is Section 9 of the Indian Arbitration Act, which recognises the court's power to pass interim orders before or during arbitration proceedings or at any time after the making of the arbitral award but before it is enforced. This power is again limited in nature and is expected to be exercised in the event that circumstances exist which may render the remedy which may be given by the arbitral tribunal ineffective. Indian courts while exercising the power under Section 9 have to check if there is a manifest intention on the part of the applicant to take recourse to the arbitral proceedings at the time of filing application. An interim protection order is granted by the court to protect the interest of the party seeking such order until its rights are finally adjudicated by the arbitral tribunal and to ensure that the award passed by the arbitral tribunal is capable of enforcement.[50] The arbitral proceedings have to commence within a period of ninety days from the date of such order or within such further time as the court may determine.[51]

Section 9(3), which was inserted by an amendment to the Indian Arbitration Act in 2015, provides that the court shall not entertain an application under Section 9 unless the court finds that the remedy sought from an arbitral tribunal under Section 17 would be 'inefficacious'.[52]

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[46] The English Arbitration Act, 1996, ss 44(4) and s 44(5).
[47] *American Cyanide Co v Ethicon Ltd* [1975] UKHL 1 (UKHL).
[48] ibid.
[49] John McKendrick, 'Interim Measures: Attempting to Trace the Line of Deference Shown By English Courts to Arbitral Tribunals, 8th Annual Arbitration and Investment Summit' <www.outertemple.com/wp-content/uploads/2020/01/Interim-and-Precautionary-Measures-in.pdf> accessed 25 February 2023.
[50] *National Shipping Co of Saudi Arabia v Sentras Industries Ltd* AIR 2004 Bom 136 (Bombay High Court); *Reliance Infocomm Ltd v BSNL* 2005 (1) RAJ 52 (Del) (Delhi High Court); *Kumaradas v Indian Medical Practitioners' Co-op Pharmacy & Stores Ltd* 2007 (4) RAJ 272 (Del) (Delhi High Court).
[51] The Indian Arbitration and Conciliation Act, 1996, s 9(2).
[52] *Arcellor Mittal Nippon Steel India Ltd v Essar Bulk Terminal* (2022) 1 SCC 712 (Supreme Court).

This position is similar to Section 44(5) of the English Arbitration Act and is intended to give primacy to the relief available to parties before the arbitral tribunal.

In *PASL Wind Solutions (P) Ltd*. v. *GE Power Conversion (India) (P) Ltd.*, the Indian Supreme Court held that subject to an agreement to the contrary, where, in an arbitration seated outside India, assets of one of the parties are situated in India and interim orders are required with respect to such assets, including preservation thereof, a Court may pass such orders under Section 9 of the Arbitration Act.[53] The object is to ensure protection of the property which is the subject matter of arbitration or to ensure that the arbitration proceedings do not become infructuous and the final award does not become a paper award, of no real value.[54] Arbitration laws in the U.K. also recognise that courts may grant reliefs in aid of arbitration even in cases of foreign seated arbitrations.[55]

Generally, in India, the right conferred to approach the court for interim relief is a right conferred on a 'party' to an arbitration agreement. A court can pass appropriate orders even against the person who is not party to the agreement but especially when such a third party is claiming protection or right through the party who is the consenting party to the arbitration agreement.[56] In India, there is no blanket rule governing the issuance of interim orders against third parties, and it depends on the facts and circumstances of each case. Relief against third parties may be granted if a *prima facie* case is made out that the subject-matter of arbitration or part of it, is with the third party having no independent right in relation thereof.[57] To the contrary, if the property of the third party has no concern with the subject matter of the arbitration, then such order cannot be made against the third party.[58] The position in the U.K. was earlier similar, wherein courts exercised powers under Section 44 to pass orders against third parties. In recent times, English courts have however opined that its powers in support of arbitral proceedings under Section 44 of the English Arbitration Act may not be exercised against third-parties to the arbitration agreement.[59] The English courts will not ordinarily grant

[53] *PASL Wind Solutions (P) Ltd v GE Power Conversion (India) (P) Ltd* (2021) 7 SCC 1 [38] (Supreme Court).
[54] *Arcelor Mittal* (n 54).
[55] *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] EWHC 260 (Comm) (EWHC).
[56] *Heritage Lifestyles and Developers Pvt Ltd v Amar Villa Co-op Housing Society Ltd* 2011 (4) RAJ 229 (Bom) (Bombay High Court).
[57] *Tapadiya Construction Ltd v Sanjay Suganchand Kasliwal* 2016 (1) Arb LR 399 (Bom) (Bombay High Court).
[58] ibid.
[59] *A, B v C, D, E* [2020] EWHC 258 (Comm) (EWHC); *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm); *Dtek Trading SA v. Morozov*, [2017] EWHC 94 (Comm); *Trans-Oil International SA v. Savoy Trading* KP [2020] EWHC 57 (Comm).

relief under Section 44 against third parties and in particular not against those who are based abroad.[60]

Recently, on September 22, 2022, the Law Commission of England and Wales published a consultation paper expressing its belief that the court can make orders under Section 44 against third parties, but in lieu of reaching a firm conclusion on the issue, the Commission has asked consultees to provide views on whether Section 44 should be amended to provide this explicitly. Interestingly, the Commission provisionally proposed that, where orders are indeed made against third parties, those third parties should have the usual full right of appeal, rather than the restricted right of appeal which applies to parties to arbitration.[61]

B. Emergency Arbitration

Emergency arbitration, which is another mechanism for granting interim measures in aid of arbitration prior to constitution of the tribunal, has recently received a significant push in India. In *Amazon.com NV Investment Holdings LLC* v. *Future Retail Limited*, the Indian Supreme Court upheld the enforceability of emergency awards under Section 17(2) of the Indian Arbitration Act, holding the same as equivalent to interim orders of the arbitral tribunal. This was the first judgment of this kind by any supreme court across jurisdictions and will act as a lodestar for jurisdictions wherein the enforceability of emergency awards remains uncertain. In the UK, while emergency arbitration has been recognised, the decision of an emergency arbitrator will be enforceable only if it is issued in the form of an award.[62]

In India, the grounds considered for grant of interim relief are similar to the American Cyanide guidelines and Indian courts are guided by the trinity test: (a) whether there is a strong *prima facie* case in favour of the applicant; (b) whether irreparable injury will be caused if the relief is not granted; and (c) whether the balance of convenience is in favour of the applicant. Indian

[60] *DTEK Trading SA v. Mr Sergey Morozov and another*, [2017] EWHC 94 (Comm).
[61] Review of the Arbitration Act, Law Commission Consultation Paper 257, September 2022, < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf> accessed 24 February 2023.
[62] Victoria Clark, 'The emergency arbitrator is officially a teenager', Practical Law Arbitration Blog, <http://arbitrationblog.practicallaw.com/the-emergency-arbitrator-is-officially-a-teenager/> accessed 1 January 2023.

courts also consider the conduct of the parties as a consideration for grant of interim relief to parties.[63]

IV. POSITION WITH RESPECT TO NON-SIGNATORIES

The increasing complexity of layered commercial transactions regularly poses challenges with respect to enforceability of arbitration agreements against non-signatory parties. Commercial parties often enter into transactions wherein the party signatory to the contract is not necessarily the party performing the contract. In such circumstances, to circumvent liability avoidance, it is essential to adopt a commercial interpretation of arbitration agreements to extend them to non-signatories in cases where the circumstances demonstrate that the mutual intention of all the parties was to bind both, signatories as well as non-signatory affiliates. Recognising the same, various jurisdictions have developed theories to bind non-signatories if circumstances exist to demonstrate their intent to be a party to the arbitration agreement.[64] These theories include both purely consensual theories (e.g., agency, implied consent, assumption, assignment, third party beneficiary) and non-consensual theories (e.g., estoppel, alter-ego).[65] The underlying objective of these theories is to stay true to the commercial realities of modern business transactions, which commonly involve multi-party and multi-agreement arrangements.

The Indian Supreme Court has been at the forefront of an increasing international consensus on the manner in which courts and tribunals can bind intimately related non-signatory parties to arbitrations.[66] The joinder on non-signatory parties to arbitration proceedings has been a significant and integral part of the Indian arbitration jurisdiction. In fact, India has been one of the few jurisdictions which have strongly embraced the 'group of companies' doctrine to hold that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns if the circumstances demonstrate that the mutual intention of all the parties was to bind both, signatories as well as non-signatory affiliates.[67] The Indian Supreme Court has held that such circumstances could

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[63] *Gujarat Bottling Co. Ltd. v. Coca Cola Co*., (1995) 5 SCC 545.
[64] Vijayendra Pratap Singh et. al, 'Whose Arbitration is it anyway? Non-signatories?' GNLU SRDC ADR Magazine 2021 2(2): 10-15 <https://gnlusrdc.files.wordpress.com/2021/09/gnlu-srdc-adr-magazine-vol.-ii-issue-ii-1.pdf> accessed 1 January 2022.
[65] ibid.
[66] ibid.
[67] *Chloro Controls v. Severn Trent* (2013) 1 SCC 641; *Ameet Lalchand Shah v. Rishabh Enterprises*, (2018) 15 SCC 678; *Ayyasamy v. A. Paramasivam* (2016) 10 SCC 386; *Cheran Properties v. Kasturi and Sons* (2018) 16 SCC 413; *MTNL v. Canara Bank* (2020) 12 SCC 767; *ONGC Ltd. v. Discovery Enterprises*, 2022 SCC OnLine

include: (a) direct relationship with the party signatory to the arbitration agreement; (b) direct commonality of the subject matter; (c) the agreement between the parties being a composite transaction; and (iv) parties, especially the non-signatory, engaging in conduct which demonstrates its consent to be bound by the arbitration agreement.[68] Under Indian law, the applicability of the group of companies doctrine is recognised to be premised on gauging the common intention of the parties and examining whether the performance of the agreements in question is intrinsically intermingled or interdependent on each other for achieving a common object.

The Indian approach to binding non-signatories to arbitration proceedings has been more liberal compared to the approach of English courts. While there have been cases under English law where courts have joined non-signatories to arbitration agreements by way of principles such as agency, assignment, incorporation, etc.,[69] they have been more restrained in their approach compared to Indian courts. In *Peterson Farms Inc.* v. *C & M Farming Ltd.*, the English High Court partly set aside an award holding that the group of companies doctrine does not form a part of English law. In doing so, the English High Court further held as follows:

> "*In commercial terms, the creation of a corporate structure is by definition designed to create separate legal entities for entirely legitimate purposes which would often if not usually by defeated by any general agency relationship between*."[70]

In *City of London* v. *Sancheti*, the Court of Appeal has further observed that "a causal or commercial connection" is insufficient to bind non-signatories to an arbitration agreement.[71] In doing so, the Court of Appeal overturned the stand taken in *Roussel-Uclaf* v. *GD Searle & Co.*, wherein the Chancery Division held that where the claims against the parent and subsidiary are closely connected, the subsidiary could establish a claim in arbitration as a party

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SC 522; *see also HLS Asia Ltd. v. Geopetrol International Inc.* (2012) SCC Online Del 5833; *Purple Medical Solutions Private Limited v. MIV Therapeutics Inc. & Anr* (2015) 15 SCC 622; *Reckitt Benckiser v. Reynders Label Printing* (2019) 7 SCC 62; *Babaji Automotive v. Indian Oil* (2005) SCC Online Cal 291; *Carvel Shipping Services Private Limited v. Premier Sea Foods Exim Private Limited* (2019) 11 SCC 461; *Shapoorji Pallonji & Co. v. Rattan India Power Ltd*. 2021 SCC OnLine Del 3688; *GMR Energy v. Doosan Power* (2017) SCC Online Del 11625.

[68] *Chloro Controls v. Severn Trent* (2013) 1 SCC 641.

[69] André Pereira da Fonseca, 'Status of non-signatory in maritime arbitration London and New York Compared' <https://www.arbitragem.pt/xms/files/Estudos_da_APA/status-non-signatory-parties-maritime-arbitration-london-ny-compared-andre-pereira-da-fonseca.pdf> accessed 20 December 2022.

[70] *Peterson Farms Inc. v. C & M Farming Ltd*, [2004] EWHC 121 (Coram).

[71] *City of London v. Sancheti*, [1978] 1 Lloyd's Rep 225.

claiming 'through or under' the signatory. It further held that a wholly owned subsidiary subcontracting from its parent could also be joined in an arbitration concerning the main agreement. In overturning this stand, the Court of Appeal held:

> "*I do not consider that Roussel-Uclaf v GD Searle & Co assists Mr Sancheti. In my judgment, it was wrongly decided on this point and should not be followed. A stay under Section 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient."*[72]

Therefore, while intricate and proximate relationships between companies and their role in performance of contracts has been a crucial factor to bind non-signatories to arbitration in India, courts in U.K. have rejected reliance on the same as a measure to decipher consent to arbitrate in cases of non-signatories.

In a crucial yet sudden chance of events, in *Cox & Kings Ltd.* v. *SAP India (P) Ltd* ('***Cox & Kings***'),[73] the Indian Supreme Court has doubted the correctness of its earlier judgments and referred several questions to a larger bench of the Supreme Court regarding the scope, validity and applicability of the group of companies doctrine in India. In doing so, the Court has noted that the application of the group of companies doctrine in India may be based more on economics and convenience rather than law. Notably, in doing so, the Supreme Court has also taken note of the position in the U.K. to support its apprehensions against the group of companies doctrine. During the pendency of consideration of these questions by a larger bench, the position on the group of companies doctrine, as laid down in earlier Indian cases discussed above, continues to hold the field and remain good law in India.[74]

While the concerns raised in *Cox & Kings* have temporarily unsettled the strong support for the group of companies doctrine in India, there is a strong legal basis for the Indian Supreme Court to uphold the doctrine. The group of companies doctrine has travelled a long distance in the Indian arbitral jurisprudence and accords a business sense and commercial interpretation to arbitration agreements, taking into account the mutual consent of the parties. While the position

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[72] *City of London v. Sancheti*, [1978] 1 Lloyd's Rep 225.
[73] *Cox & Kings Ltd. v SAP India (P) Ltd.*, 2022 SCC OnLine SC 570.
[74] *MS Bhati v. National Insurance*, (2019) 12 SCC 248, [10]; *National Insurance v/ Saju Paul*, (2013) 2 SCC 41, [24]-[26].

in U.K. remains restrictive, English courts may consider drawing inspiration from the Indian practice while dealing with composite and integrated transactions and agreements. The approach taken in India with respect to the *ratione personae* jurisdiction of a tribunal is pragmatic, wherein the factual circumstances are considered to examine if there is a composite transaction involving affiliated entities who are not only intimately involved in the same transaction but also have a collective bearing on the dispute.[75] While principles of separate legal personality of companies and party autonomy require that a strict and circumspect approach is adopted while dealing with joinder of non-signatories, such joinder ought to be allowed to restrict liability avoidance, when the facts and circumstances manifestly evidence mutual consent of the parties to bind non-signatories.

V. POSITION WITH RESPECT TO THE ENFORCEMENT OF FOREIGN AWARDS

While international arbitration is now globally accepted as the foremost choice for dispute resolution for contractual disputes, its efficacy is largely vested in the capability of the parties to enforce the award rendered in their favour by the arbitral tribunal.[76] Undue hurdles and limitations in the enforcement of awards renders the arbitral process ineffective and inefficacious. Both India and the U.K. are signatories to the Convention on Recognition and Enforcement of Foreign Arbitral Awards ('**New York Convention**'), which is widely accepted as the most successful treaty for enforcement of awards in private international law. Under the New York Convention, member states are obligated to enforce foreign awards subject to certain limited exceptions. The foremost ground for denying enforcement to foreign awards is the public policy defence which the New York Convention provides to its member states, wherein the states can deny enforcement to awards which are contrary to their notions of public policy.

A. English Doctrine on Enforceability

Public policy is subjective in nature and courts in India and the U.K. have laid down their respective scope and guardrails of the public policy defence. The statutory scheme of the English Arbitration Act recognises the right of parties to enforce awards under the New York Convention. English courts may refuse to enforce a New York Convention award on the

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[75] Vijayendra Pratap Singh et. al, 'Whose Arbitration is it anyway? Non-signatories?' GNLU SRDC ADR Magazine 2021 2(2): 10-15 < https://gnlusrdc.files.wordpress.com/2021/09/gnlu-srdc-adr-magazine-vol.-ii-issue-ii-1.pdf> accessed 1 January 2022.

[76] Abhisar Vidyarthi, 'Moving Towards a Common Definition of Public Policy', TDM 4 (2020), < https://www.transnational-dispute-management.com/article.asp?key=2753> accessed 24 February 2023.

grounds set out in Section 103 which reflects Article V of the New York Convention. The grounds contained therein are construed narrowly and do not permit courts to conduct a re-examination of the underlying merits of the dispute decided by the arbitrator. The burden lies on the party challenging an award to demonstrate and prove on a balance of probabilities that any one of the six grounds of challenge in Section 103(2) of the English Arbitration Act are met. The issue of arbitrability as well as public policy, which are the twin grounds of challenge found in Section 103(3) of the English Arbitration Act, may be considered by English courts of its own motion.

Public policy in the U.K. has been opined to include legal principles of honesty, natural justice, and violations of due process.[77] The rule that English courts will deny enforcement of awards which would be contrary to the English public policy is not strictly observed in the context of foreign awards.[78] Alternatively put, while domestic awards would be denied enforcement if they contravene the English public policy, some awards which would be considered against the English public policy will be enforceable if they arise out of foreign seated arbitrations.[79] To this extent, there is an acceptance of the notion of international public policy in the U.K., wherein foreign awards are denied enforcement when the awards fall within the category of cases to be universally repugnant.[80] For instance, when the arbitral tribunal has considered allegations of illegality and found that there is no illegality under the governing law of the contract, but there is illegality under English law, the public policy defence will be engaged by English courts only when the illegality reflects considerations of international public policy rather than domestic public policy.[81]

In *Westacre Investments Inc* v. *Jugoimport-SPDR Holding Co. Ltd.*,[82] the Court of Appeal allowed the enforcement of a foreign award despite public policy considerations relating to alleged illegality. The English High Court in *Honeywell International Middle East Limited* v.

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[77] *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2014] EWHC 1288 (Comm); *Malicorp Ltd v. Government of the Arab Republic of Egypt and ors* [2015] EWHC 361(Comm); *Nikolay Viktorovich Maximov v. OJSC 'Novolipetsky Metallurgichesky Kombinat'* [2017] EWHC 1911 (Comm).
[78] *Westacre Investments Inc v. Jugoinport-SDPR Holding Co. Ltd.,* [2000] Q.B. 288 at 289.
[79] A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England', International Construction Law Review < http://corbett.co.uk/wp-content/uploads/Enforcing-Arbitration-Awards-Contrary-to-Public-Policy-in-England.pdf> accessed 1 January 2023.
[80] ibid.
[81] *RBRG Trading (UK) Ltd v. Sinocore International Co Ltd* [2018] EWCA Civ 838.
[82] *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd and others* [2000] Q.B. 288; *see also* Oliver Marsden and Rebecca Zard, Challenging and Enforcing Arbitration Awards: United Kingdom – England & Wales <https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/united-kingdom> Accessed 2 January 2023.

Meydan Group LLC has further observed "*whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable*".[83] This again demonstrates a deferential approach to the recognition and enforcement of foreign awards and the very restrictive interpretation given to public policy in the context of foreign awards in the U.K.[84] English courts strictly refrain from going beyond the findings of a fact by the arbitral tribunal and do not re-examine findings of the arbitral tribunal, unless there is an allegation that the award permits a universally repugnant act.[85]

B. Indian Doctrine on Enforceability

In India, for the enforcement of a foreign arbitral award, a three-step procedure is followed, wherein first that the party who is the award holder shall move an application under Section 47 of the Indian Arbitration Act along with all supporting documents. Once the application for enforcement is filed before the court, the opposite party is given the option to raise a challenge under Section 48 of the Indian Arbitration Act to the enforcement of the award. Once the court is satisfied that the foreign award is enforceable, the award is deemed to be a decree of that court in terms of Section 49 of the Indian Arbitration Act. This position is similar to Section 101 and 102 of the English Arbitration Act.

Section 48 of the Indian Arbitration Act, which is based on Article V of the New York Convention, provides that the enforcement of a foreign award may be refused, *inter alia*, on the following grounds:

1) The parties to the agreement were under some incapacity.

2) The agreement in question is not in accordance with the law to which the parties have subjected it, or under the law of the country where the award was made.

3) There is a failure to give proper notice of appointment of arbitrator or arbitral proceedings.

4) The award is *ultra vires* the agreement or submission to arbitration.

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[83] *Honeywell International Middle East Ltd v. Meydan Group LLC* (2014) EWHC 1344 (TCC) at p.93.
[84] *Honeywell International Middle East Ltd v. Meydan Group* LLC (2014) EWHC 1344 (TCC) at p.185.
[85] *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [2000] Q.B. 288.

5) The award contains decisions on matters beyond the scope of submission to arbitration.

6) Composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement between parties or failing such agreement, was not in accordance with the laws of the country where arbitration was held.

7) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

8) The subject matter of the dispute is not capable of settlement by arbitration under Indian law.

9) Enforcement of the award would be contrary to the public policy of India.

The parameters of Section 48 of the Arbitration Act for resisting enforcement of a foreign award have been interpreted to be extremely narrow and are exhaustive.[86] Moreover, similar to the U.K., the burden of proof to establish that a foreign award cannot be enforced on any of the grounds set out in Section 48 of the Arbitration Act is cast on the party against whom the enforcement is invoked. The expression 'proof' in Section 48 of the Arbitration Act has been interpreted to mean "*established on the basis of the record of the arbitral tribunal*" and such other matters as are relevant to the grounds contained in Section 48.[87]

In recent times, courts in India have adopted a pro-enforcement approach and apply principles of strict interpretation in examining grounds based on Section 48. In most cases, the primary ground invoked to challenge enforcement of foreign awards is that the foreign award is opposed to the public policy of India. In this regard, courts in India have opined that they do not exercise appellate review over a foreign award nor do they re-examine evidence or inquire at the stage of enforcing a foreign award whether, while rendering a foreign award, the arbitral tribunal committed an error.[88] It is also now settled under Indian law that a party cannot successfully resist enforcement of a foreign award under Section 48 of the Arbitration Act on the basis of a mere violation of an enactment unless it establishes that such violation is opposed to the most basic values and principles which form the substrata tenets and the bedrock of laws in the

[86] *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433, 47; *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1, [39]-[44].
[87] *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd*., (2022) 1 SCC 753, [40].
[88] *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433, [47].

country.[89] While India does not expressly recognise international public policy,[90] an implicit effort is visible to uphold the underlying spirit of international public policy by refusing to review foreign awards on the basis of the national laws or regulations.[91]

In the context of contravention of the fundamental policy of Indian law, the Indian Supreme Court has, in a plethora of judgements, reiterated that Section 48 of the Arbitration Act, does not permit the court to conduct a review of the foreign award on merits.[92] In *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*, the Court opined:

> "*Moreover, Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award-enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy*."[93]

The scope of public policy was first dealt with by the Indian Supreme Court in the landmark case of *Renusagar* v. *General Electric* ('***Renusagar***'),[94] wherein the public policy in the context of foreign awards was interpreted to include: (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. Notably, the Supreme Court opined that the notion of public policy in the context of foreign awards does not cover the field covered by the words 'laws of India'. The idea furthered by the Supreme Court was that the public policy applied to such awards should be construed in the context of private international law as against municipal law. Importantly, the Supreme Court also acknowledged the distinction between international public policy and the national public policy. However, it concluded that as there

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[89] *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1, [39]-[44].
[90] *Renusagar Power v General Electric*, AIR 1994 SC 860, [63].
[91] Abhisar Vidyarthi and Sikander Hyaat Khan, 'India: a late opening to the notion of international public policy, Arbitration International', aiac015, <https://doi.org/10.1093/arbint/aiac015> accessed 25 December 2022.
[92] *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433, 47; *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1, [39]-[44]; *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644; *Ssangyong Engineering & Construction Ltd. v. National Highways Authority of India*, AIR 2019 SC 5041, [12].
[93] *Shri Lal Mahal Ltd. v. Progetto Grano SpA*, (2014) 2 SCC 433, [45].
[94] *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644

was no workable definition of international public policy, 'public policy', as applicable to foreign awards in India, could not be termed as 'international public policy'.

With the ruling of the watershed case of *BALCO Employees' Union* v. *Union of India*, it became further clear that domestic awards and foreign awards stand on a different footing and the procedure stipulated under Part I of the Indian Arbitration Act only applies to arbitrations seated within India and not to foreign awards. This judgment acted as a catalyst for a noticeable shift in judicial attitude, as well as a transformation in India's present status as an enforcement-friendly country.[95]

In subsequent years, the grounds of public policy adopted by the Indian Supreme Court in *Renusagar* has been regularly upheld[96] and has also been given statutory backing by the amendment to the Indian Arbitration Act in 2015. Post 2015, as per the understanding of public policy in India, a foreign award can be refused enforcement if the same is induced or affected by fraud or corruption; or in contravention with the fundamental policy of Indian law; or in conflict with the most basic notions of morality or justice. Patent illegality which is a ground for setting aside domestic awards has not been included as a ground for denying enforcement to foreign awards in India. Therefore, while the notion of international public policy is not recognised in India, as opposed to the U.K., an implicit effort can be seen from the Indian courts to uphold the underlying spirit of international public policy by refusing to review foreign awards on the basis of the national laws or domestic regulations in India.[97]

In *Unitech Ltd.* v. *Cruz City I Mauritius Holdings*,[98] the Delhi High Court relied upon *Renusagar* to hold that the public policy defence in the context of foreign awards is to be construed narrowly and foreign awards will only be held unenforceable if they contravene the basic rationale, values, and principles which underpin Indian laws. It further held that an alleged contravention of a provision of Indian law is not synonymous with contravention of the fundamental policy of India. The judgments in *Vijay Karia* v. *Prysmian Cavi E Sistemi SRL* ('***Vijay Karia***') again highlighted the current trend of Indian courts' toward a more pro-

[95] *BALCO Employees' Union v. Union of India*, (2008) 4 SCC 190.
[96] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* 2013 (3) ARBLR 1 (SC), [31]; Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131, [12].
[97] Abhisar Vidyarthi and Sikander Hyaat Khan, 'India: a late opening to the notion of international public policy, Arbitration International', aiac015, <https://doi.org/10.1093/arbint/aiac015> accessed 25 December 2022.
[98] *Unitech Ltd. v. Cruz City I Mauritius Holdings*, 2018 SCC OnLine SC 3619.

enforcement regime,[99] wherein the Indian Supreme Court encouraged the hands-off approach while enforcing foreign awards in India.

Indian courts are increasingly adopting a policy of minimal interference in arbitration matters, especially pursuant to the amendment to the Indian Arbitration Act in 2015, for the following reasons.

First, to ensure finality of arbitral awards and arbitral process, which is of paramount importance to reduce pendency before Indian courts and ensure effectiveness of arbitration as a dispute resolution process.

Second, to uphold party autonomy and the sanctity of arbitration agreements, wherein parties are not allowed to resile from their contractual commitment to resolve disputes through arbitration.

Third, to ensure effectiveness and expediency of the arbitral process, such that there is minimal judicial intervention in a manner prescribed by the Indian Arbitration Act.

For these reasons, courts generally do not permit a dissatisfied party to seek a second bite of the cherry on the basis of objections which do not fall within any of the "*neat legal pigeonholes*" contained in Section 48 of the Indian Arbitration Act. Subject to Section 48 of the Indian Arbitration Act, enforcement of a final award under Sections 47 and 49 of the Indian Arbitration Act, is thus, a robust remedy under Indian law. In this regard, it is essential for Indian courts to avoid isolated cases of divergence from this settled position to ensure a predictable and reliable mechanism for enforcement. For instance, merely months after *Vijay Karia*, the pro-enforcement trend in India had been put to question by the Supreme Court in *NAFED* v. *Alimenta S.A*,[100] wherein the Supreme Court refused to enforce the foreign award on the ground of violation of public policy of India. In doing so, the Court proceeded to conduct a review of the award on merits and held that an absence of permission to export a commodity would be against Indian law. Importantly, cases such as *Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper*,[101] and *Govt. of India* v. *Vedanta Ltd.*,[102] have reinforced the pro-

[99] *Vijay Karia v. Prysmian Cavi E Sistemi SRL*, (2020) 11 SCC 1; *Govt. of India v. Vedanta Ltd* (2020) 10 SCC 1.
[100] *National Agricultural Co-Operative Marketing Federation of India (NAFED) v. Alimenta S.A.*, AIR 2020 SC 2681, [68].
[101] *Centrotrade Minerals & Metals Inc. v. Hindustan Copper*, 2020 SCC OnLine SC 497.
[102] *Govt. of India v. Vedanta Ltd* (2020) 10 SCC 1.

arbitration stand taken in *Renusagar* and *Vijay Karia*, which remains the prevailing position in India.

For domestic awards, both jurisdictions adopt a different approach when compared to foreign awards. In the U.K., a domestic award may be challenged before the English courts on grounds of lack of substantive jurisdiction or serious irregularity under Section 67 and Section 68 respectively.[103] Incidentally, Section 69 of the English Arbitration Act also provides parties with the right to appeal to the English courts on questions of law arising out of the award. There is no similar provision to Section 69 of the English Arbitration Act under the Indian Arbitration Act. Challenges to domestic awards in India are made under Section 34 of the Indian Arbitration Act. Section 34, in addition to the grounds to challenge a foreign award, also provides patent illegality as a ground to challenge domestic awards, which includes a contravention of the substantive law of India, contravention of the Indian Arbitration Act itself or contravention of the terms of the contract.[104] Both jurisdictions therefore provide substantive safeguards for parties to challenge domestic awards while also limiting a re-examination or reopening the merits of the arbitral award.

In view of the above, as a whole, the approach taken in India may now be seen to be consistent with the position in the U.K. as Indian courts have moved away from its historical image of adopting inconsistent standards to public policy to refuse enforcement to foreign awards. Both jurisdictions can be trusted to accord a predictable regime for enforcement of foreign awards, wherein enforcement of the foreign awards are unlikely to suffer any unwarranted interference by courts.

VI. CONCLUSION

There is no gainsaying that London has always been an extremely popular seat of arbitration given its steadfast commitment to ensuring efficacy of the arbitral process. The English Arbitration Act strives to enforce arbitration agreements and English courts are committed to upholding the ethos of the English Arbitration Act by limiting the scope for its intervention in arbitral proceedings. A review of the prevailing position in the U.K. clearly shows that the supervisory jurisdiction of English courts has been sparingly exercised to serve the pro-

[103] [English] Arbitration Act, 1996, ss 67 and 68; *(a company incorporated in Country A) v. D (a company incorporated in Country B) and others* [2019] EWHC 1277 (Comm); *WSB v. FOL* [2022] EWHC 586 (Comm).
[104] *Associated Builders v Delhi Development Authority*, 2014 SCC OnLine SC 937

arbitration outlook of the U.K. As previously stated, London is not only a preferred seat of arbitration for domestic disputes but also for foreign parties, including Indian parties, despite having no connection with London. This is triggered on account of the obvious pro-arbitration and enforcement friendly culture practiced in the U.K., wherein arbitration is furthered as an impartial, efficacious, and autonomous system for dispute resolution.

As discussed in this article, contemporary arbitral practice in India not only compares well with the arbitration friendly practices in the U.K. but also exceeds it in some areas in its own special way, such as joining non-signatory parties to arbitration and enforceability of emergency awards. There are several similarities at the core of arbitral practices in both jurisdictions as both focus on enforcing arbitration agreements and upholding underlying principles of consent-based resolution of disputes. Recent judgments delivered by the Indian Supreme Courts express a positive shift in the judicial attitude of Indian courts, wherein they are committed to the principle of non-interference with arbitral proceedings in line with the ethos of UNCITRAL Model Law as well as the New York Convention.

One area in which India may still have some distance to cover with the position the U.K. is in relation to the institutionalisation of arbitration. London, over time, has developed robust and state of art arbitration infrastructure, wherein the best arbitration practices are institutionalised. The London Court of International Arbitration (LCIA) is one of the most renowned and trusted arbitration centres globally, adding to London's suitability as a seat of arbitration. India, on the other hand, is still in a transition period, wherein institutional arbitration is still not the norm in India. In recent times, the situation has improved with institutions such as the Mumbai Centre for International Arbitration (MCIA) and New Delhi International Arbitration Centre coming up and adopting best international institutional practices. Having said that, there are several positives in India's contemporary arbitration outlook. London may also take inspiration from Delhi's commitment to steadfastly adopting and embracing arbitral innovation, which is evident from its stand on emergency arbitration as well as binding non-signatories to arbitration in cases of complex multi-party and multi-contract disputes.