

# Commercial Courts vis-à-vis Arbitration

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National Judicial Academy, Bhopal



## Arbitration & Conciliation Act, 1996

### Applicability of Amendments

- Amendments in 2015 and 2019
- Effective for arbitrations commenced after 23/10/2015
- Commencement of arbitration – as under Section 21

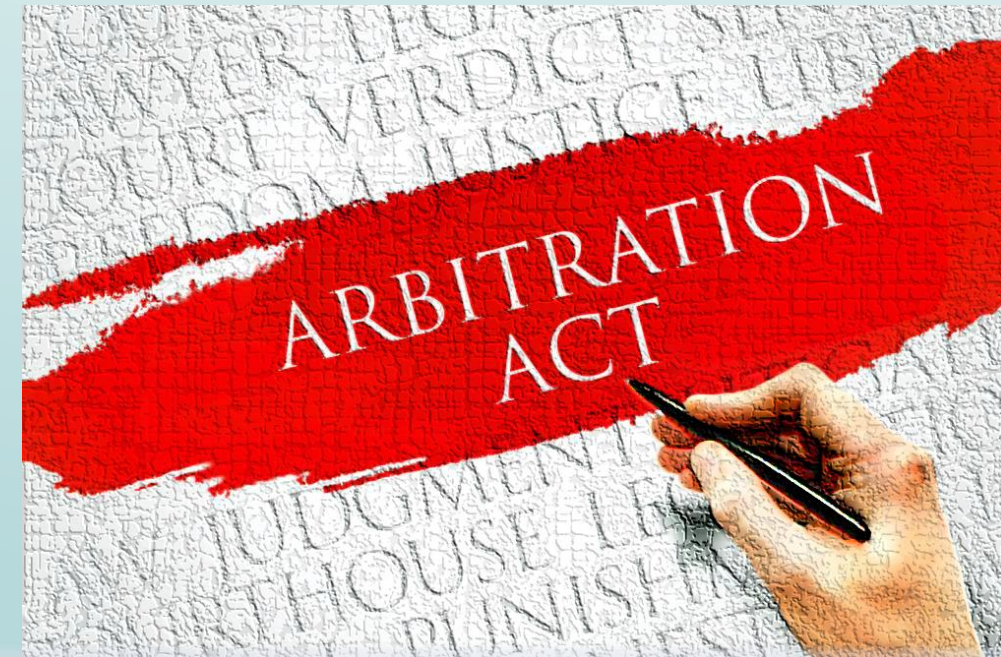




## Arbitration & Conciliation Act, 1996

- 2015 Amendment – Section 26 – made prospective effect
- Nothing contained in this Act shall apply to the arbitral proceedings commenced, before the commencement of this but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

## Applicability of Amendments



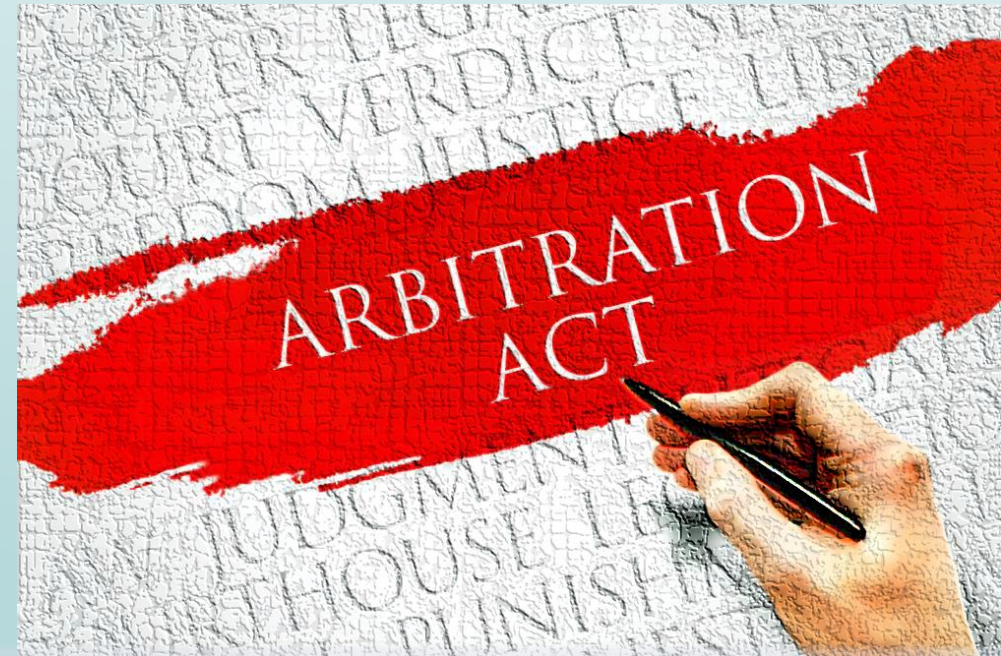
## Arbitration & Conciliation Act, 1996

**BCCI Vs. Kochi Cricket Pvt. Ltd. [2018 (6) SCC 287]**

Amendment Act would apply prospectively to:

- a) Arbitral proceedings initiated on or after 23/10/2015 i.e. the date on which the 2015 Amendment Act came into force; and
- b) Court proceedings commenced on or after 23/10/2015, irrespective of whether such court proceedings arise out of arbitration which commenced prior to 23/10/2015.

## Applicability of Amendments

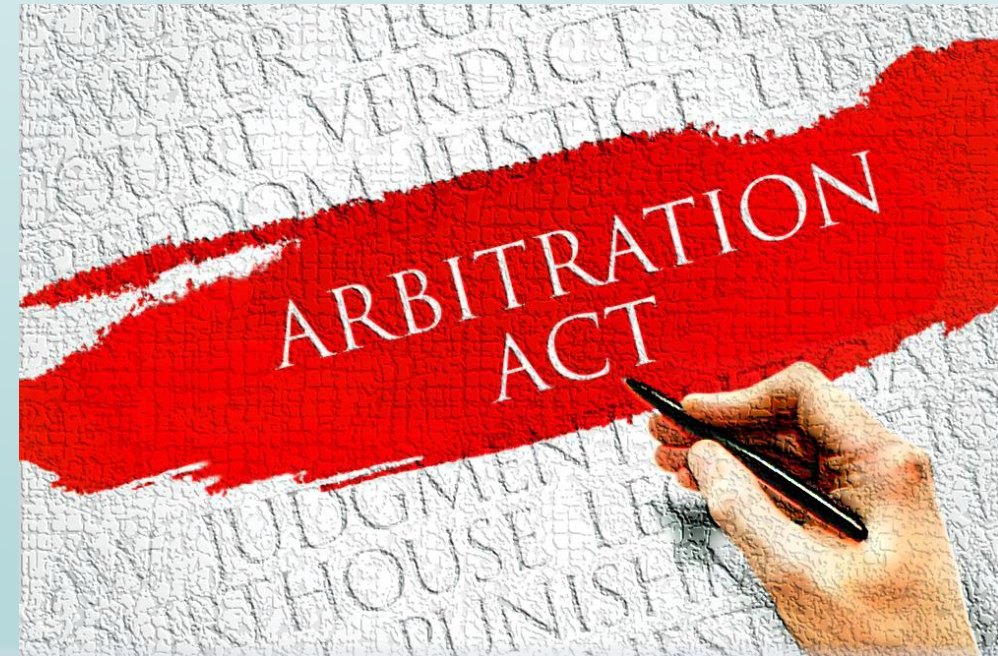




## Arbitration & Conciliation Act, 1996

- 2019 Amendment inserted Section 87 to clarify that amendment will apply only to arbitrations commenced before 23/10/2015
- Section 87 was inserted with retrospective effect from 23/10/2015

## Applicability of Amendments



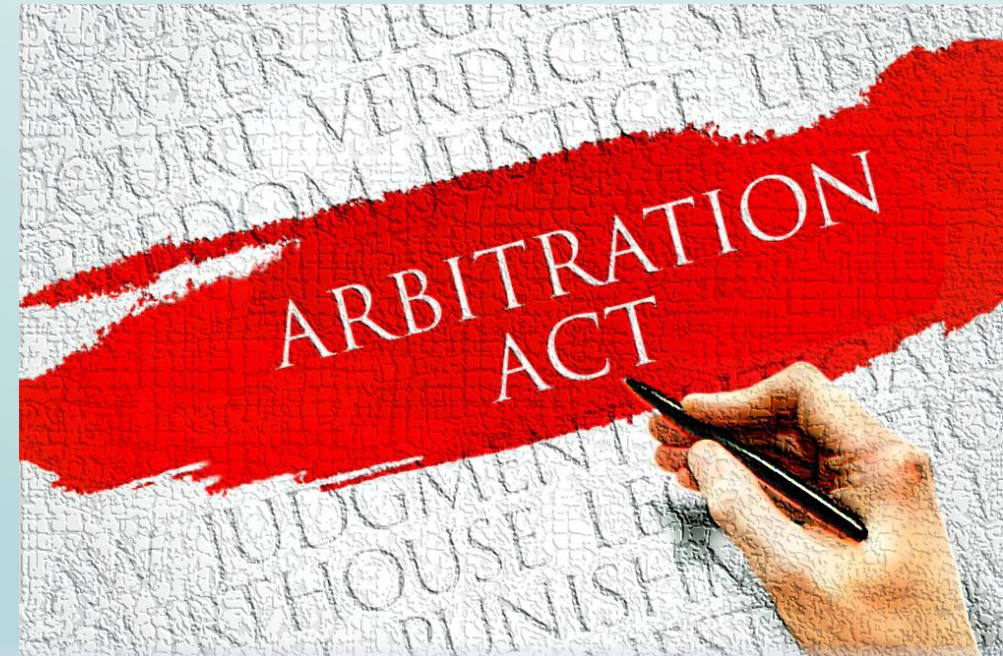
# Commercial Courts vis-à-vis Arbitration

## Arbitration & Conciliation Act, 1996

Hindustan Construction Co. Ltd Vs. Union of India & Ors.  
[2019 (6) Arb LR 171 (SC)]

- Struck down Section 87 of the 2019 Amendment Act, and restored Section 26 of the 2016 Amendment Act to the statute book and held that the BCCI judgment will continue to apply

## Applicability of Amendments





# Commercial Courts vis-à-vis Arbitration

## Commercial Courts Act, 2015

- Came into effect as on 23/10/2015
- Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a “Specified Value” not less than Rs. 3 lakhs [Section 6]
- If dispute is the subject matter of an arbitration agreement, then Section 8 of the A&C Act will apply

## Scope of Commercial Disputes



## Section 8 of A&C Act, 1996

- A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

## Disputes filed in Courts to be referred





# Commercial Courts vis-à-vis Arbitration

## Section 8 of A&C Act, 1996

**Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway  
Petroleum [2003 (6) SCC 503]**

- If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.  
In view of the mandatory language of Section 8, the court is bound to refer the dispute to arbitration.

## Disputes filed in Courts to be referred



# Commercial Courts vis-à-vis Arbitration

## Section 8 of A&C Act, 1996

**Magma Leasing & Finance Limited & Another Vs.  
Potluri Madhavilata & Another [CDJ 2009 SC 1780]**

- Section 8 is in the form of legislative command to the court and once the pre-requisite conditions are satisfied, the court must refer the parties to arbitration – no option is left to the court and the court has to refer the parties to arbitration.

## Disputes filed in Courts to be referred





# Commercial Courts vis-à-vis Arbitration

## Section 8 of A&C Act, 1996

Avitel Post Studioz Ltd. & Others Vs. HSBC Pi Holdings (Mauritius) Ltd. [CDJ 2020 SC 702]

- Allegations of Fraud touching upon the internal affairs of the party inter-se and has no implication in the public domain, the arbitration clause need not be avoided and the parties shall be relegated to arbitration.

## Disputes filed in Courts to be referred



# Commercial Courts vis-à-vis Arbitration

## Section 8 of A&C Act, 1996

**Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. & Others [2011 AIR (SC) 2507]**

- The court can refuse to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

## Disputes filed in Courts to be referred





# Commercial Courts vis-à-vis Arbitration

## Definition of Court

- Section 2(e) of the A&C Act defined court, to mean the principal civil court of original jurisdiction in a district with respect to domestic arbitration and the High Court in case of international arbitration.

## Courts in Arbitration



# Commercial Courts vis-à-vis Arbitration

## Definition of Court

As per the Section 10 of CCA, if the subject-matter of an arbitration is a commercial dispute of a Specified Value:

- In international commercial arbitration, all applications or appeals under the A&C Act that have been filed in a High Court, shall be heard and disposed of by the Commercial Division of the High Court.

## Courts in Arbitration





# Commercial Courts vis-à-vis Arbitration

## Definition of Court

As per the Section 10 of CCA, if the subject-matter of an arbitration is a commercial dispute of a Specified Value:

- In domestic arbitration, all applications or appeals under the A&C Act that have been filed before any principal civil court shall be filed, heard and disposed of by the Commercial Court in that jurisdiction

## Courts in Arbitration



# Commercial Courts vis-à-vis Arbitration

## Scope of Mediation

- 2018 Amendment inserted Section 12A in the CCA, providing for pre-litigation mediation
- Not applicable for arbitration matters, as Section 8 of A&C Act will apply





## Section 9 – Powers for Interim Measures

- If a party moves under Section 9 for any interim order of protection, before the commencement of the arbitral proceedings and if the Court passes an order for any interim measure of protection, the arbitral proceedings shall be commenced within a period of ninety days

## Role of Courts in Arbitration matters



## Section 9 – Powers for Interim Measures

- Once the arbitral tribunal has been constituted, the Court shall not entertain an application, unless the Court finds that circumstances exists which may not render remedy provided under Section 17 efficacious.

## Role of Courts in Arbitration matters





## Section 9 – Powers for Interim Measures

**Bhatia International Vs. Bulk Trading S.A. & Another**  
[AIR 2002 SC 1432]

- An order restraining a party from proceeding with the arbitration cannot be said to be an interim measure that could be granted under this section.

## Role of Courts in Arbitration matters



# Commercial Courts vis-à-vis Arbitration

## Section 9 – Powers for Interim Measures

Mikuni Corporation Vs. Ucal Fuel Systems Limited &  
Others [2008 (17) ILR(DLH) 958]

Kanta Vashist and Others Vs. Ashwani Khurana  
[CDJ 2008 DHC 2265]

- Petition under Section 9 is not maintainable against strangers to the arbitration agreement, if they have absolutely no nexus with the agreement.

## Role of Courts in Arbitration matters





## Section 27 – Assistance in taking Evidence

- If the parties need to summon a witness for giving evidence or for producing any records before the arbitral tribunal, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence.
- The Court can issue processes to witnesses, ordering that the evidence be provided directly to the arbitral tribunal.

## Role of Courts in Arbitration matters



## Section 29A - Power to extent Time-Frame of Arbitration

- Application shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days
- Where an application is pending, the mandate of the arbitrator shall continue till the disposal of the application.

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

- Application for setting aside an arbitral award shall be made before the expiry of three months
- If the court is satisfied that the applicant was prevented by sufficient cause, it may entertain the application within a further period of thirty days, but not thereafter.

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

### GROUND

Award may be set aside by the court only if the party establishes on the basis of the record of the arbitral tribunal

1. A party was under some incapacity, or
2. The arbitration agreement is not valid under the law to which the parties have subjected it; or

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

### GROUND

Award may be set aside by the court only if the party establishes on the basis of the record of the arbitral tribunal

3. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

### GROUND

Award may be set aside by the court only if the party establishes  
on the basis of the record of the arbitral tribunal

4. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

### GROUND

Award may be set aside by the court only if the party establishes  
on the basis of the record of the arbitral tribunal

5. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

### GROUND

The award can also be set aside if the court finds that:

1. The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
2. The arbitral award is in conflict with the public policy of India.

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

### GROUND

An award is in conflict with the public policy of India, only if –

- (1) The making of the award was induced or affected by fraud or corruption;
- (2) It is in contravention with the fundamental policy of Indian law;
- (3) It is in conflict with the most basic notions of morality or justice.

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

### GROUND

An award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

**K.V. Mohammed Zakir Vs. Regional Sports Centre**  
[CDJ 2009 SC 1777]

- Court should not substitute its own view for the view taken by the arbitrator while dealing with the proceedings for setting aside an award

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

**McDermott International Inc. v. Burn Standard Co. Ltd.**  
[2006 (11) SCC 181]

- The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

ONGC Ltd. Vs. Western Geco International Ltd.  
[2014 (9) SCC 263]

Interpreting the phrase “fundamental policy of Indian law”, the Court held that it include three principles:

- A. Judicial Approach:
- B. Principles of Natural Justice:
- C. Wednesbury’s Principle of Reasonableness:

## Role of Courts in Arbitration matters



## Section 34 – Challenge against the Arbitral Award

- Where an application for stay of arbitral award is filed, the Court subject to such conditions as it may deem fit, grant of the operation of such award for reasons to be recorded in writing.
- While granting stay in the case of an arbitral award for payment of money, the Court shall have due regard to the provisions for grant of stay of a money decree under the provisions of CPC.

## Role of Courts in Arbitration matters





## Section 34 – Challenge against the Arbitral Award

- But if the Court is satisfied that a prima facie case is made out that the arbitration agreement or the making of the award was induced or effected by fraud or corruption, it shall stay the award unconditionally.

(Amendment by Ordinance dated 04/11/2020)

## Role of Courts in Arbitration matters



## Section 36 – Enforcement of Arbitral Award

- Award shall be enforced in as per CPC in the same manner as if it were a decree of the Court
- Filing of an application under Section 34, shall not by itself render that award unenforceable, unless the Court grants an order of stay.

## Role of Courts in Arbitration matters





# Commercial Courts vis-à-vis Arbitration

## No additional appeal

- Under Section 13 of the CCA, aggrieved by the judgment or order of a Commercial Court, an appeal will lie to the Commercial Appellate Court or the Commercial Appellate Division

## Role of Courts in Arbitration matters



# Commercial Courts vis-à-vis Arbitration

## No additional appeal

Kandla Export Corporation and Another v OCI  
Corporation and another [CDJ 2018 SC 233]

- In case of matters under the A&C Act, there is no further right of appeal under Section 13 of the Commercial Courts Act.

## Role of Courts in Arbitration matters





*Thank  
You!*