

# INTERPLAY BETWEEN COMMERCIAL COURTS ACT, 2015 AND ARBITRATION AND CONCILIATION ACT, 1996

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# Interplay of Commercial Court with arbitration

Provisions under the Arbitration and Conciliation Act, 1996 (Arbitration Act) which involve court proceedings

- Section 2 (1) (e)- Definition of Court
- Section 8 - Power to refer parties to arbitration where there is an arbitration agreement
- Section 9 - Interim measures, etc., by court
- Section 11 - Appointment of arbitrators
- Section 14 - Failure or impossibility to act
- Section 17(2) - Interim measures ordered by arbitral tribunal (deemed to be an order of the court)
- Section 27 - Court assistance in taking evidence
- Section 29A - Time limit for arbitral award
  - a) Court can extend the time period.
  - b) Court can substitute one or all of the arbitrators.
- Section 34 - Application for setting aside arbitral award
- Section 36 - Enforcement (Separate application to be filed for stay)

# Interplay of Commercial Court with arbitration

## Provisions under the Arbitration Act which involve court proceedings

- Section 37 - Appealable orders (Appeal to lie against the following orders)
  - a) refusing to refer the parties to arbitration under section 8;
  - b) granting or refusing to grant any measure under section 9;
  - c) setting aside or refusing to set aside an arbitral award under section 34
  - d) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or
  - e) granting or refusing to grant an interim measure under section 17.
- Section 47/48 – Evidence (Application for enforcement of foreign award / Objections against enforceability) and definition of Court as applicable for Part II
- Section 50 – Appealable Order - Appeal to lie against the order refusing to
  - a) refer the parties to arbitration under section 45;
  - b) enforce a foreign award under section 48

# Section 10 of Commercial Courts Act

## Jurisdiction in respect of arbitration matters

### Section 2(i), Commercial Courts Act - Specified Value

Specified Value, in relation to a commercial dispute, shall mean the value of the subject-matter in respect of a suit as determined in accordance with section 12 which **shall not be less than three lakh rupees** or such higher value, as may be notified by the Central Government.

### Section 12, Commercial Courts Act - Determination of Specified Value

(2) The aggregate value of the claim and counterclaim, if any as set out in the statement of claim and the counterclaim, if any, in an arbitration of a commercial dispute shall be the basis for determining whether such arbitration is subject to the jurisdiction of a Commercial Division, Commercial Appellate Division or Commercial Court, as the case may be.

# Section 10 of Commercial Courts Act

## Jurisdiction in respect of arbitration matters

Where the subject-matter of an arbitration is a commercial dispute of a Specified Value and—

- 1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed in a High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
- 2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that have been filed on the original side of the High Court, shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court.
- 3) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) that would ordinarily lie before any principal civil court of original jurisdiction in a district (not being a High Court) shall be filed in, and heard and disposed of by the Commercial Court exercising territorial jurisdiction over such arbitration where such Commercial Court has been constituted.

# Appealable Orders

## Section 13 of the Commercial Courts Act v. Section 37 and Section 50 of the Arbitration Act

KANDLA EXPORT CORPORATION & ANR. v. OCI CORPORATION & ANR.

Hon'ble Supreme Court - February 7, 2018 – (2018) 14 SCC 715

### FINDINGS

The Supreme Court affirmed the findings of the Commercial Appellate Division's findings and ruled that Section 13(1) of the Commercial Courts Act is a general provision vis-à-vis arbitration relating to appeals arising out of commercial disputes. Accordingly, **Section 13(1) would not apply to appeals arising out of foreign seated arbitration unless they are expressly covered under Section 50 of the Arbitration Act.**

Therefore, a party can file an appeal against a court order in a foreign seated arbitration only if the court refuses to refer the parties to arbitration (under Section 45) or refuses to enforce a foreign award (under Section 48).



# Appealable Orders

## Section 13 of the Commercial Courts Act v. Section 37 and Section 50 of the Arbitration Act

KANDLA EXPORT CORPORATION & ANR. v. OCI CORPORATION & ANR.

### BACKGROUND

Under the arbitral award, Kandla Export was obligated to pay a sum of USD 846,750 with interest. Kandla Exports preferred multiple appeals before the appellate tribunal and the Queen's Bench Division of the Commercial Court and English Court of Appeal – all of which failed.

Later, OCI initiated execution proceedings under Section 48 of the Arbitration Act, before a district court in Kutch. On December 31, 2015 the Commercial Courts Act came into effect. Thereafter, OCI filed an application before the Hon'ble Gujarat HC seeking transfer of the execution proceedings to the Gujarat HC which was allowed. Later, the Hon'ble Gujarat HC also allowed the execution petition filed by OCI.

Aggrieved by the decision of the Single Bench, Kandla Export filed an appeal under Section 13(1) of the Commercial Courts Act. The Commercial Appellate Division dismissed the appeal on the ground of maintainability holding ***that an appeal cannot lie before the Commercial Appellate Division against an order rejecting objections to enforcement.***

# Appealable Orders

## Section 13 of the Commercial Courts Act v. Section 37 and Section 50 of the Arbitration Act

KANDLA EXPORT CORPORATION & ANR. v. OCI CORPORATION & ANR.

(2018) 14 SCC 715

### APPLICABLE PROVISIONS

#### **Section 13, Commercial Courts Act - Appeals from decrees of Commercial Courts and Commercial Divisions**

1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order:

Provided that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).



# Appealable Orders

## Section 13 of the Commercial Courts Act v. Section 37 and Section 50 of the Arbitration Act

KANDLA EXPORT CORPORATION & ANR. v. OCI CORPORATION & ANR.

(2018) 14 SCC 715

### APPLICABLE PROVISIONS

#### **Section 13, Commercial Courts Act - Appeals from decrees of Commercial Courts and Commercial Divisions**

(2) Notwithstanding anything contained in any other law for the time being in force or Letters Patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.

#### **Section 50, Arbitration Act - Appealable orders**

(1) An appeal shall lie from the order refusing to (a) refer the parties to arbitration under section 45; (b) enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

# Timeline for challenge under Section 34

## SIMPLEX INFRASTRUCTURE LIMITED v. UNION OF INDIA

Hon'ble Supreme Court – December 5, 2018 – (2021) SCC OnLine SC 233

### FINDING

- Section 34 of the Arbitration Act excludes the application of Section 5 of the Limitation Act.
- No extension beyond the statutory three-month period and the extendable 30-day outer limit.
- However, Section 34 does not exclude the application of Section 14 of the Limitation Act (where time spent *bona fide* in courts without jurisdiction could be excluded while computing the statutory period for challenge).

### BACKGROUND

During the arbitration, Simplex had filed a Section 9 petition before the Hon'ble Calcutta HC. Later, Union of India (UoI) filed an application for setting aside the award before the District Judge, Port Blair. The District Judge dismissed the application stating that since an application (S. 9 petition) was filed previously before the Calcutta HC, parties should have approached the same court with any subsequent application.

Thereafter, the UoI moved the Hon'ble Calcutta HC which allowed the Section 34 application. Simplex had moved the Hon'ble Supreme Court against the said order.

# Timeline for appeal under Section 37

GOVT. OF MAHARASHTRA v. BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD.

Hobn'ble Supreme Court - March 19, 2021 - (2021) SCC OnLine SC 233

## FINDING

- Overruled *NV International*.
- If an appeal under Section 37 is preferred against an arbitral award in arbitration less than the 'Specified Value', the same would be governed by Article 116 / Article 117 of the Limitation Act. Under these provisions, the limitation period is computed in the manner recorded in the previous table.
- If an appeal under Section 37 is preferred against an arbitral award in arbitration of the Specified Value, an appeal filed under Section 37 is governed by Section 13(1A) of the Commercial Courts Act, i.e. appeal must be filed within a period of 60 days from the date of judgment / order.

# Timeline for appeal under Section 37

GOVT. OF MAHARASHTRA v. BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD.

(2021) SCC OnLine SC 233

## FINDING

- Courts can condone delay under Section 5 of the Limitation Act in filing an appeal under Section 37.
- The appellate court must condone delay by way of exception and not that of a rule and only in cases
  - (a) where a party has otherwise acted *bona fide* and not in a negligent manner,
  - (b) there is a short delay beyond the statutory period, and
  - (c) where the opposite party is not prejudiced of his rights in equity and justice arising out of the erring party's inaction and negligence.

# Timeline for appeal under Section 37

**GOVT. OF MAHARASHTRA v. BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD.**

(2021) SCC OnLine SC 233

## BACKGROUND

In an earlier verdict, a division bench of the Hon'ble Supreme Court had held that the limitation period for an appeal under Section 37 would be governed by the period stipulated under Section 34 of the Arbitration Act, i.e., 90+30 days (*NV International v. State of Assam*). The Hon'ble Supreme Court had noted that an appeal is a continuation of the original proceedings and that the thresholds for limitation period which apply to the original proceedings under Section 34 would also apply to an appeal under Section 37.

The three judge bench of the Hon'ble Supreme Court in *Borse Brothers* addressed the validity of the judgment in *NV International*.

# Timeline for appeal under Section 37

GOVT. OF MAHARASHTRA v. BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD.

(2021) SCC OnLine SC 233

## APPLICABLE PROVISIONS

Limitation Act - Article 116 (a), Article 116 (b) and Article 117

Limitation Act			
Appeal	Article	Period	From
Under the Code of Civil Procedure, 1908 to a High Court from any decree or order.	116 (a)	90 Days	Date of the decree or order
Under the Code of Civil Procedure, 1908 to any other court from any decree or order.	116 (b)	30 Days	Date of the decree or order
From a decree or order of any High Court to the same Court	117	30 Days	Date of the decree or order



# Timeline for appeal under Section 37

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**GOVT. OF MAHARASHTRA v. BORSE BROTHERS ENGINEERS & CONTRACTORS PVT. LTD.**

(2021) SCC OnLine SC 233

## APPLICABLE PROVISIONS

**Limitation Act - Section 5** of the Limitation Act provides for extension of prescribed limitation period for appeals or applications if the appellant / applicant establishes sufficient cause for not preferring the appeal or making the application within such period.

**Commercial Courts Act - Section 13** of the Commercial Courts Act provides that a person aggrieved by the judgment or order in a commercial dispute may appeal to the commercial appellate court or the commercial appellate division of the High Court, as the case may be, within a period of 60 days from the date of the judgment or order.

**Arbitration Act** - Arbitration Act does not prescribe a time limit within which an appeal can be filed under Section 37 of the Arbitration Act.

# Outstanding Issues

## I. How is an order of arbitrator under Section 17 enforced?

### APPLICABLE PROVISIONS

**SECTION 17 – Arbitration Act** - A party can apply for the following interim measures

- (i) for the appointment of a guardian or
- (ii) (ii) for an interim measure of protection in respect of (a) preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute; (c) detention, preservation or inspection of any property or thing (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

An arbitral tribunal has the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

Any order issued by the arbitral tribunal under Section 17 is deemed to be an order of a court for all purposes and shall be enforceable under the CPC in the same manner as if it were an order of the court.

# Outstanding Issues

## I. How is an order of arbitrator under Section 17 enforced?

### APPLICABLE PROVISIONS

#### **Section 27(5) – Arbitration Act - Court assistance in taking evidence**

If a person is guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, he would be subject to the like disadvantages, penalties and punishments by order of the Court as they would incur for the like offences in suits tried before the Court.

#### **Order XXXIX Rule 2A – CPC - Consequence of disobedience or breach of injunction**

If a party disobeys an injunction / commits breach of any terms of the injunction granted under O XXXIX, the court may

- a) order the property of the person guilty of such disobedience or breach to be attached and/or,
- b) order such person to be detained in the civil prison for a term of three months (maximum).

If at the end of the attachment order, the disobedience or breach continues – the court may sell property attached and award compensation to the injured party out of the proceeds.

# Outstanding Issues

## I. How is an order of arbitrator under Section 17 enforced?

### ALKA CHANDEWAR V. SHAMSHUL ISHRAR KHAN

Hon'ble Supreme Court – July 06, 2017 - 2017 SCC OnLine SC 758

- The Hon'ble Supreme Court stated that non-compliance of an arbitral tribunal's order or conduct amounting to contempt during the course of the arbitration proceedings would be triable under the Contempt of Courts Act, 1971.

### AMAZON.COM NV INVESTMENT HOLDINGS LLC V. FUTURE COUPONS PVT. LTD. & ORS.

Hon'ble Delhi High Court – March 18, 2017 - 2021 SCC OnLine Del 1279

The issue before the Hon'ble Delhi HC was whether the interim order of the emergency arbitrator is an order under Section 17(1) and is enforceable under Section 17(2) of the Arbitration Act. The Hon'ble Delhi HC allowed Amazon's petition under Section 17(2) of the Arbitration Act holding that an emergency award / order granted by an arbitral tribunal is enforceable as a court order under Section 17(2) of the Arbitration Act. The Delhi HC also attached the assets of the respondents under Order XXXIX Rule 2A (Future Group Companies and Promoters).

# Outstanding Issues

## IV. Execution of foreign award – Jurisdictional Issues

### Section 47, Arbitration Act – Evidence:

“ ...

*Explanation.—In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.”*

### Section 49, Arbitration Act – Enforcement of foreign awards:

*“Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court.”*

After the foreign award is granted enforceability, the decree becomes of the High Court, irrespective of whether that High Court exercises original jurisdiction.

# Outstanding Issues

## IV. Execution of foreign award – Jurisdictional Issues

GOVERNMENT OF INDIA V. VEDANTA LIMITED & ORS.

Hon'ble Supreme Court – September 16, 2020 – (2020) 10 SCC 1

The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code. The application under Section 47 is not an application filed under any of the provisions of Order XXI of the Code of Civil Procedure, 1908. *The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order XXI of the Code of Civil Procedure only for the purposes of execution of the foreign award as a deemed decree. ...*

... After the stages of Sections 47 and 48 are completed, the award becomes enforceable as a deemed decree, as provided by Section 49. *The phrase "that court" refers to the Indian court which has adjudicated on the petition filed Under Section 47, and the application under Section 48.*



# Outstanding Issues

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## IV. Execution of foreign award – Jurisdictional Issues

Under the CPC, for execution purposes, the court which passed a decree remains the trial court. However, under the Arbitration Act, the decree becomes a decree of that High Court, irrespective of whether it exercises original jurisdiction or not. Accordingly, it remains unclear as to which court will execute the award :

- i. Against the properties within the state, but where it is outside the original territorial jurisdiction of the High Court.

For e.g., property in Nagpur (when decree is deemed to be that of Bombay HC) or Madurai (when decree is deemed to be that of Madras HC);

- ii. Against the properties within the state, but where the High Court does not have any original jurisdiction.

(for e.g., property in Rajasthan or Gujarat);

- iii. Against the properties located in a state other than the state whose High Court recognised the award.

(for e.g., award recognized by Delhi High Court, property in Assam).

# Outstanding Issues

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## II. Payment of Interest to a foreign arbitration award-holder in execution proceedings?

RENUSAGAR POWER CO. LTD. v. GENERAL ELECTRIC CO.

Hon'ble Supreme Court – October 07, 1993 - AIR 1994 860 SC

- Issue - Grant of *pendente lite* and future interest for the period from the date of institution of proceedings for enforcement a foreign award till payment
- Held that the award of interest in respect of this is governed by *lex fori*, i.e., the law of the forum where the award is sought to be enforced. Thus, the award of interest on the amounts owned under a foreign award, from the date of initiation of enforcement proceedings in India till payment, is a matter of Indian law.

# Outstanding Issues

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## II. Payment of Interest to a foreign arbitration award-holder in execution proceedings?

The Arbitration Act does not permit the High Court to make an order for interest during such proceedings for enforcement of a foreign award. This was acknowledged by the Delhi High Court and the Bombay High Court.

### PROGETTO GRANA SPA V. SHRI LAL MAHAL

Hon'ble Delhi High Court - July 03, 2013 – (2014) 2 SCC 433

*“...Hence, the 1996 Act does not permit this Court to grant interest from the date of commencement of the proceedings till recovery. In any case, this High Court has already settled this legal position and I am bound by the same.”*

# Outstanding Issues

## II. Payment of Interest to a foreign arbitration award-holder in execution proceedings?

TOEPFER INTERNATIONAL ASIA (P.L.) v. THAPAR ISPAT LTD.

Hon'ble Bombay High Court – April 15, 1999 - 1999 (4) BomCR 415

*“Under the 1996 Act, it is no longer open to the Court to make such an order for interest. It appears to be that there is a serious lacuna in the Act, in so far as an Arbitration Award is concerned, if it does not award interest beyond the date of award and for any delay caused thereafter, the party who succeeds in the claim would be put to great loss. It would put premium on dishonest objection to the award and delay in its execution, without risk of incurring interest charges. This lacuna can be cured either by legislature or by framing of appropriate rules by the High Court in exercise of its powers under Section 82 of the Act. Admittedly, there are no rules on the subject made by the High Court still...”* (emphasis supplied)

- For domestic arbitrations – Under Section 31 of the Arbitration Act, the tribunal can award interest from the date of award to the date of payment.

# Outstanding Issues

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## III. Grant of costs by executing court

- Section 35 of the CPC provides the Court with powers determine whether costs are payable in commercial suits. Section 35(2) reads, *“If the Court decides to make an order for payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party.”*
- Section 35-A provides that the Court may award compensatory costs in respect of false or vexatious claims or defences. Section 35-B provides the Court with powers to award costs for causing delay.
- However, there is no specific provision under the CPC to empower the executing courts to award costs.





Thank You!

