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INDIA MOVES ONE STEP FURTHER TOWARDS “ARBITRATION-FRIENDLY” JURISDICTION

By
Xinyi Shen*

I. INTRODUCTION

Parties involved in commercial transactions favor arbitration because arbitration is efficient and expeditious in resolving disputes.¹ Tension remains, however, between arbitral tribunals and domestic courts, who, charged with the duty of providing justice, play a pivotal role in supervising the process of arbitration.² Prolonged judicial proceedings after an arbitral award is rendered defeats arbitration’s purpose to resolve the disputes quickly. It is thus important for jurisdictions to properly delineate the scope of the courts’ supervisory power over arbitration. Recently, the Indian Supreme Court ruled that in an application to set aside an arbitration award, there is no need for oral evidence in the manner as in a regular civil proceeding.³ In so ruling, the Supreme Court restricted the district courts’ authority to review these cases to written documents only, and as a consequence, substantially shortened the length of judicial proceedings. The Supreme Court observed that this ruling is compatible with the intention of the 1996 Arbitration and Conciliation Act⁴ (“the 1996 Act”) to “speedy resolution of arbitral disputes.”⁵ The question is, however, whether the Supreme Court has appropriately drawn the line. This article will discuss the background of the arbitration regime in India, the ruling in *Emkay Global v. Sondhi* and the Supreme Court’s rationale, and its possible impact on domestic as well as international arbitration practice.

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¹ THOMAS E. CARBONNEAU, ARBITRATION LAW IN A NUTSHELL 23-25 (4th ed. 2017).

² See, e.g., Sidharth Sharma, *Public Policy under the Indian Arbitration Act - In Defence of the Indian Supreme Court's Judgment in ONGC v. Saw Pipes*, 26 J. INT’L ARB. 133 (2009).

³ *Emkay Glob. Fin. Servs. Ltd. v. Sondhi*, C.A. No.-008367-008367 / 2018 (India Aug. 20, 2018).

⁴ Arbitration and Conciliation Act, No. 26 of 1996, <https://indiacode.nic.in>.

⁵ *Emkay Glob.*, slip op. at 14-16.

II. BACKGROUND

A. Historical and Legislative Background of the 1996 Act

History of the development of modern Indian arbitration law has shown a struggle among Indian courts in their attitudes towards arbitration. India has a long tradition of arbitration. Back in ancient times, under Hindu law, bodies called *Panchayats* would act as arbitrators or mediators.⁶ They resolved disputes without the intervention of the courts, and their decisions were usually final and binding on the parties.⁷ Likewise, under Muslim law, bodies called *Hakam* would arbitrate disputes between the parties, whose decision, upon satisfaction of the official judge, the *Kazee*, with its legality and validity, would become effective.⁸ Modern arbitration law emerged in India during the late 18th and the 19th century when the British East India Company⁹ promulgated regulations about arbitration in Presidency towns of Calcutta, Bombay, and Madras, and the Code of Civil Procedure which provided for arbitration to all civil courts except in the Presidency towns.¹⁰ This framework, however, was far from satisfactory, and ultimately led to the enactment of the first national Arbitration Act in 1940.¹¹

The 1940 Act was born with mistrust in arbitration and hardly a success.¹² It allowed the losing party to bring suits to the court as a mechanism to delay and avoid enforcement.¹³ Long and arduous enforcement process also added pressure to limited

⁶ See Krishan S. Nehra, *The Judicial and Legislative Systems in India*, Washington: Law Library, Library of Congress, 1981, at 23-24 (in today's India, many small villages still have these bodies whose remoteness makes it difficult for their inhabitants to travel to the regular law courts in the cities. Since 75 percent of India's population live in the villages, a *panchayat* serves the useful role of dispensing quick justice for petty offenses. The district magistrate exercises general supervision over the work of the *panchayat* and may, on review, cancel orders of the *panchayat*).

⁷ Ranbir Krishan, *An Overview of the Arbitration and Conciliation Act 1996*, 21 J. INT'L ARB. 263, 264 (2004).

⁸ *Id.*

⁹ *East India Company*, ENCYCLOPAEDIA BRITANNICA (Jan. 15, 2019), <https://www.britannica.com/topic/East-India-Company> (“[E]nglish company formed for the exploitation of trade with East and Southeast Asia and India, incorporated by royal charter on December 31, 1600. Starting as a monopolistic trading body, the company became involved in politics and acted as an agent of British imperialism in India from the early 18th century to the mid-19th century.”)

¹⁰ Krishan, *supra* note 7, at 264.

¹¹ Arbitration Act, No.10 of 1940, <https://indiankanoon.org/doc/1052228> (repealed 1996).

¹² Harpreet Kaur, *The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India*, 6 HASTINGS BUS. L.J. 261, 262 (2010).

¹³ *Id.*

judicial resources.¹⁴ In *Guru Nanak Foundation v. Rattan Singh & Sons*¹⁵ and *Raipur Development Authority v. Chokhamal Contractors*¹⁶, even the Supreme Court criticized the 1940 Act for its indeterminable, time-consuming, complex, and expensive proceedings. As Justice D.A. Desai remarked, “the way in which the proceedings under the 1940 Act are conducted and without exception challenged in the Courts, has made lawyers laugh and legal philosophers weep.”¹⁷

Another issue with the 1940 Act was that it only governed domestic arbitration.¹⁸ Before 1996, arbitration law rested in three different statutes, the Arbitration Act of 1940, the Arbitration (Protocol and Convention) Act of 1937, and the Foreign Awards (Recognition and Enforcement) Act of 1961. The Arbitration (Protocol and Convention) Act 1937 was passed to implement the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. The Foreign Awards (Recognition and Enforcement) Act 1961 was enacted to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”).¹⁹ A uniform regime was called for by both foreign parties and domestic parties, who were interested in attracting foreign investment, to meet the urgent need for an efficient and reliable dispute resolution mechanism.²⁰

In 1996, Congress repealed all previous statutes and enacted the Arbitration and Conciliation Act of 1996.²¹ The purpose of the 1996 Act was to correct and standardize arbitration law and bring it in line with international principles.²² The 1996 Act set out its main objectives. Among others, there were “to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration”, “to minimize the supervisory role of courts in the arbitral process”, and “to provide that every

¹⁴ TUSHAR KUMAR BISWAS, INTRODUCTION TO ARBITRATION IN INDIA: THE ROLE OF THE JUDICIARY 8 (2014) (India has an adversary system. “Procedural wrangles and multiplicity of appeals/revisions are some of its factors, which leave a litigant bitter and frustrated while waiting for justice for years.”)

¹⁵ *Guru Nanak Foundation v. Rattan Singh & Sons*, AIR 1981 SC 2075 (India).

¹⁶ *Raipur Development Authority v. Chokhamal Contractors*, AIR 1990 SC 1426 (India).

¹⁷ Kaur, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 262-63.

²¹ Arbitration and Conciliation Act, No. 26 of 1996, <https://indiacode.nic.in>.

²² Krishan, *supra* note 7, at 265.

final arbitral award is enforced in the same manner as if it were a decree of the court.”²³ For that purpose, the 1996 Act endeavored to ensure party autonomy allowing parties to craft their own rules of arbitration.²⁴ Section 5 of the 1996 Act specifically provides that for matters governed by Part I (Arbitration)²⁵, “[n]o judicial authority shall intervene except where so provided in this Part.”²⁶

An important feature of the 1996 Act is that it implemented the UNCITRAL Model Law²⁷ in India. In Statement of Objects and Reasons of the 1996 Act, Congress indicated that although the Model Law mainly deals with international commercial arbitration, it “could, with appropriate modifications, serve as a model for legislation on domestic arbitration and conciliation,”²⁸ and that the 1996 Act seeks to consolidate arbitration law “taking into account the said UNCITRAL Model Law and Rules.”²⁹ The close relationship between the 1996 Act and the Model Law was also confirmed by the Supreme Court, which in the *Sundaram Finance Case*³⁰ conceived the Model Law as an interpretative guide to the 1996 Act.³¹

²³ LAW COMMISSION OF INDIA, REPORT NO. 246-II (2014), <http://lawcommissionofindia.nic.in/reports/Report246-II.pdf>.

²⁴ For e.g., the 1996 Act contains provisions to allow parties to agree on the manner in which written communications are deemed received (§ 3(1)); determine the number of arbitrators (§ 10(1)); determine the procedure for arbitrator appointment (§ 11(2)); agree on a procedure for arbitrator challenge (§ 13(1)); agree on a procedure for conduct of arbitral proceedings (§ 19(2)); determine the languages to be used (§ 22(1)); agree to the manner and time frames governing of claims (§ 23(1)); agree to oral hearings (§ 24(1)); agree as to defaults (§ 25) and experts appointed by the tribunal (§ 26); and choose the law(s) which will govern the proceedings (§ 28(1)).

²⁵ The 1996 Act contains four Parts: Part I Arbitration, Part II Enforcement of Certain Foreign Awards, Part III Conciliation, and Part IV Supplementary Provisions.

²⁶ Arbitration and Conciliation Act § 5.

²⁷ U.N. Docs. A/40/17 annex I and A/61/17 annex I.

²⁸ REPORT NO. 246-II, *supra* note 23.

²⁹ *Id.*

³⁰ *Sundaram Finance Ltd. v. NEPC India Ltd.*, (1999) 2 SCC 483, 497 (India).

³¹ Akash Pierre Rebello, *Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India*, 6 CAMBRIDGE STUDENT L. REV. 274, 277 (2010).

B. Disputes About Section 34(2)(a) of the 1996 Act

Section 34 of the 1996 Act provides that the only recourse to a court against an arbitral award was by an application for setting aside such awards.³² An arbitral award may be set aside only if the party making the application “furnishes proof” of one of the five grounds enumerated therein,³³ or upon finding of the court, the subject matter is not arbitrable, or the award is otherwise in conflict with the public policy of India.³⁴ The party seeking to set aside the award must make the application within three months (extendable by not more than thirty days).³⁵

The language of Section 34 was almost identical to Article 34 of the Model Law. Neither of the statutes, however, has given an interpretation of the words “furnish proof.” The vagueness allows the losing party to argue before the court that proceeding rules applicable to other civil cases should be equally applicable to cases under Section 34. In *Fiza Developers & Inter-Trade vs Amci (India) P.Ltd. & Anr.*³⁶, the Supreme Court answered the question whether issues, as contemplated under Order 14 Rule 1 of the Code of Civil Procedure (“CPC”), should be framed in applications under Section 34 of the 1996 Act. The applicant argued that the court should frame the issues to focus the attention of the parties on the specific questions in controversy requiring adjudication so that evidence can lead with reference to the issues.³⁷ The respondent, on the other hand, contended that according to the Act, such proceedings are summary in nature, and therefore, the court is under no obligation to frame issues.³⁸

In *Fiza Developers*, the Supreme Court agreed with the respondent and found that “the scheme and provisions of the Act disclose two significant aspects relating to courts vis-vis arbitration,” that is, minimal interference by courts and promptness in disposing

³² Arbitration and Conciliation Act § 34(1).

³³ *Id.* § 34(2)(a) (specifically, the five grounds are (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) 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 (iv) 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 (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties).

³⁴ *Id.* § 34(2)(b).

³⁵ *Id.* § 34(3).

³⁶ *Fiza Developers & Inter-Trade P. Ltd. v. Amci (I) P. Ltd. & Anr.*, (2009) 17 SCC 796 (India).

³⁷ *Id.* at ¶ 4.

³⁸ *Id.* at ¶ 5.

arbitral matters.³⁹ Furthermore, under then applicable law, “the very filing and pendency of an application under Section 34, in effect, operates as a stay of the enforcement of the award.”⁴⁰ Bearing these considerations in mind, the Supreme Court then went on to examine whether there is a need to frame issues in the proceedings under Section 34. The Supreme Court reasoned that because the grounds for setting aside the award are specific, a petitioner who applies to set aside an award will have to plead the facts necessary to make out the ingredients of any of the grounds mentioned in Section 34 and prove the same.⁴¹ Therefore, the only issue for adjudication in such proceedings is whether any of the specific grounds exists for setting aside the award; in other words, an application under Section 34 is a single issue proceeding.⁴² The Supreme Court concluded that framing of issues is necessary only where different types of material propositions of fact or law are affirmed by one party and are denied by the other, and “when this exercise has already been done by the statute, there is no need for framing the issues.”⁴³ “Any further exercise to frame issues will only delay the proceedings.”⁴⁴

That being said, the Supreme Court affirmed that proceedings under Section 34 of the 1996 Act “differ from regular civil suits in a significant aspect” in that they are summary in nature,⁴⁵ which later became the standpoint in assessing the line of cases in dispute with Section 34 proceedings. The Supreme Court noted, however, that “when it is said issues are not necessary, it does not mean that evidence is not necessary.”⁴⁶ This statement possibly led to inconsistent practices in some High Courts, where they have

³⁹ *Fiza Developers*, (2009) 17 SCC at ¶ 9.

⁴⁰ *Id.* (at the time *Fiza Developers* was decided, Section 36 of the 1996 Act provided that an award shall be enforced in the same manner as if it were a decree of the court, but only on the expiry of the time to set aside the arbitral award under Section 34, or such application having been made, only after it has been refused. Thus, there is an implied prohibition of enforcement of the arbitral award under Section 34. *Id.* In 2016, Congress amended Section 36 to “where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.” Therefore, there is no longer prohibition of enforcement once a Section 34 application is filed, unless otherwise requested by the party. Arbitration and Conciliation (Amendment) Act, 2016, No. 3, Acts of Parliament, 2016 (India)).

⁴¹ *Fiza Developers*, (2009) 17 SCC at ¶ 10-11.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶ 13.

⁴⁶ *Id.* at ¶ 7.

insisted on conducting Section 34 proceedings in the same manner as a regular civil suit with leading evidence,⁴⁷ and ultimately led to the case giving rise to this article.

III. *EMKAY GLOBAL FINANCIAL SERVICES LTD. V. SONDHI*

In *Emkay Global*, the Supreme Court was finally called upon to decide whether leading evidence is necessary at the Section 34 stage.⁴⁸ To put it simply, leading evidence means giving evidence, including oral and documentary evidence.⁴⁹ A regular civil proceeding begins with one party filing a complaint, the defendant filing a written statement, along with supporting documentary evidence, and followed by framing of issues based on the above material by the court.⁵⁰ After framing the issues and determining the burden of proof, the parties will then lead evidence subject to their respective burden of proof, filing affidavits, summoning and cross-examining witnesses.⁵¹ Thereafter, the parties make final arguments, summarizing their respective contentions and defenses. The court hears arguments and, ultimately, decides the matter.⁵²

In *Fiza Developers*, the Supreme Court found that framing the issues is not required in a Section 34 application.⁵³ Subsequently, in *Emkay Global* the Supreme Court turned to examine the necessity for parties to lead evidence in the so-claimed “single issue” proceeding.

⁴⁷ JUSTICE B.N. SRIKRISHNA, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA 65 (2017); *See* HDFC Bank Limited v. Ram Singh and another, MANU/PH/0989/2012; Rule 7 of the High Court of Himachal Pradesh (Arbitration and Conciliation) Rules, 2002; Schedule to the Punjab, Haryana and Union Territory, Chandigarh Arbitration and Conciliation Rules, 2003; Rule 8 of the High Court of Jharkhand (Arbitration and Conciliation) Rules, 2010 (Part of Civil Court Rules of the High Court of Jharkhand).

⁴⁸ *See* Evidence Act, No. 1 of 1872, § 5, <http://indiacode.nic.in>. (“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”)

⁴⁹ Sandeep Jalan, *Leading Evidence During Trial*, COMMONLAW-SANDEEP.BLOGSPOT.COM (Mar. 22, 2016), <http://commonlaw-sandeep.blogspot.com/2016/03/leading-evidence-during-trial.html>.

⁵⁰ Vijay Pal Dalmia, India: Process of Trial Of Civil Cases/Suits In India, VAISH ASSOC. ADVOC. (Dec. 11, 2017), <http://www.mondaq.com/india/x/654652/Civil+Law/Process+Of+Trial+Of+Civil+Cases+Suits+In+India>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Fiza Developers*, (2009) 17 SCC at ¶ 14.

A. Summary of Facts

The dispute arose between a registered broker, Emkay Global Financial Services, and its client, Girdhar Sondhi. In 2008, the parties entered into an agreement, which provided that the parties “shall . . . abide by the provisions relating to arbitration and conciliation specified under the Bye-Laws,”⁵⁴ and “agree to submit to the exclusive jurisdiction of the courts in Mumbai in Maharashtra (India).”⁵⁵ In 2009, the respondent, Sondhi, initiated an arbitration proceeding against the appellant, Emkay Global. The sole arbitrator held sittings in Delhi and rendered an award against the respondent.

On March 17, 2010, the respondent filed a Section 34 application under the 1996 Act before the District Court, Karkardooma, Delhi. The district court judge stated that it would have no jurisdiction to review the merits of the case due to the exclusive jurisdiction clause contained in the agreement, and rejected the respondent’s Section 34 application.⁵⁶ In an appeal to the Delhi High Court, the appellate court judge remanded the case to the district court for a full-addressed hearing on a “disputed question of fact” relating to the territorial jurisdiction. It held that it is necessary that the “disputed question of fact” be decided by the district court after framing an issue to this effect and permitting the parties to lead evidence on the same.⁵⁷ It also reminded the district court that “if part of cause of action is proved to have arisen in Mumbai and there is an exclusivity clause conferring territorial jurisdiction of the Mumbai courts, then even if Delhi courts otherwise have jurisdiction, possibly the courts at Delhi would not exercise territorial jurisdiction.”⁵⁸

The appellant, Emkay Global, relied upon the exclusive jurisdiction clause contained both in the agreement as well as the bylaws of the National Stock Exchange.⁵⁹ Further, it argued that when Section 34 speaks of a party making an application which “furnishes proof” of one of the grounds therein, such proof should only be by way of affidavit of facts not already contained in the record of proceedings before the Arbitrator.⁶⁰ It argued that a mini-trial at this stage is not contemplated, as otherwise, the whole purpose

⁵⁴ *Emkay Glob. Fin. Servs. Ltd. v. Sondhi*, C.A. No.-008367-008367 / 2018, slip op. at 2 (India Aug. 20, 2018) (the bylaws here referred to are the National Stock Exchange bylaws. Under the bylaws, certain disputes regarding dealings by trading members are subject to the exclusive jurisdiction to the civil courts in Mumbai).

⁵⁵ *Id.* at 1-2.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 3-4.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*

⁶⁰ *Emkay Glob.*, slip op. at 4.

of speedy resolution of arbitral disputes would be nullified.⁶¹ The respondent, Sondhi, on the other hand, contended that as the seat of arbitration was at Delhi, the courts at Delhi would have jurisdiction despite the exclusive jurisdiction clause contained in the agreement.⁶² The Supreme Court found that the effect of an exclusive jurisdiction clause was already dealt with by a series of cases,⁶³ and there should be no doubt that a Section 34 application, under the circumstances of the instant case, can and only can be filed before the Mumbai courts.⁶⁴ However, “the matter does not rest here.”⁶⁵ The Supreme Court felt obliged to interpret the meaning by the expression “furnishes proof” in Section 34(2)(a) of the 1996 Act further in *Emkay Global*.

B. Holding and the Supreme Court’s Rationale

In its holding, the Supreme Court made it clear that an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the Arbitrator.⁶⁶ However, if there are matters not contained in such record, and are relevant to the determination of issues arising under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties.⁶⁷ Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary.⁶⁸

The main reason for the holding was interest in the speedy resolution of arbitral awards. The Supreme Court pointed to various High Court case laws⁶⁹ to this effect and its

⁶¹ *Emkay Glob.*, slip op. at 4.

⁶² *Id.* at 4-5.

⁶³ *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd. and Ors*, (2017) 7 SCC 678 (India). (ruling that the arbitration was to be conducted at Mumbai and was subject to the exclusive jurisdictions of Mumbai courts only. The Supreme Court ruled that a reference to “seat” is a concept by which a neutral venue can be chosen by parties to an arbitration clause; and, the moment “seat” is determined, the fact that the seat is at Mumbai would vest Mumbai courts with exclusive jurisdiction for purposes of regulating arbitral proceedings arising out of the agreement between the parties. Interestingly, in the instant case of *Emkay Global*, the arbitration was held sitting in Delhi, and the Supreme Court considered Delhi only as a convenient venue appointed by the National Stock Exchange based on its bylaws).

⁶⁴ *Emkay Glob.*, slip op. at 6-8.

⁶⁵ *Id.* at 8.

⁶⁶ *Id.* at 15.

⁶⁷ *Id.*

⁶⁸ *Id.* at 15-16.

⁶⁹ *Sandeep Kumar v. Dr. Ashok Hans*, (2004) 3 Arb LR 306; *Sial Bioenergie v. SBEC Systems*, AIR 2005 Del 95; *M/s Punjab State Industrial Development Corporation v. Mr. Sunil K. Kansal*, 2012 SCC OnLine P&H 19641 [CR No. 4216 of 2011 (decided on 11.10.2012)]; *WEB Techniques and Net Solutions Pvt. Ltd.*

own 2009 decision in *Fiza Developers*.⁷⁰ The Supreme Court also noted that after the decision in *Fiza Developers*, Congress amended Section 34 in 2016, with subsections added to say that parties must file the applications under the section with prior notice to the other party accompanied by an affidavit and that the court shall dispose of the applications “expeditiously, and in any event, within a period of one year.”⁷¹ According to the Supreme Court, it is “quite [obvious], if issues are to be framed and oral evidence taken in a summary proceeding under Section 34, this object will be defeated.”⁷²

The court also quoted the recent report of a committee by Justice BN Srikrishna that was established by the government to review the progress towards institutional arbitration in India. The committee recommended amending the section to substitute the words “furnishes proof that” with the words “establishes on the basis of the arbitral tribunal’s record that.”⁷³ The Arbitration and Conciliation (Amendment) Bill of 2018, being Bill No.100 of 2018, was said to include this proposed amendment. The Supreme Court warned that if the Bill is passed, then evidence at the stage of a Section 34 application will be “dispensed with altogether.”⁷⁴ It had confidence that “truth will emerge on a reading of the affidavits filed by both parties.”⁷⁵

C. Assessment of the Rationale

In general, the Supreme Court based its rationale on policy concerns favoring speedy resolution of arbitral disputes. Although it confirmed that *Fiza Developers* “was a step in the right direction,”⁷⁶ it did not strictly follow the line of reasoning in *Fiza Developers*. *Fiza Developers* said that Section 34 proceeding is summary in nature, that the only issue in such proceedings is whether the arbitral award may be set aside on any of

v. M/s. Gati Ltd. and Anr., 2012 SCC OnLine Cal 4271 [C.O. No. 1532 of 2010 (decided on 02.05.2012)]; Cochin Shipyard Ltd. v. Apeejay Shipping Ltd., (2015) 15 SCC 522.

⁷⁰ *No oral evidence needed for request to set aside, rules Indian Supreme Court*, GLOBAL ARBITRATION REVIEW (Aug. 21, 2018), <https://globalarbitrationreview.com/article/1173307/no-oral-evidence-needed-for-request-to-set-aside-rules-indian-supreme-court>.

⁷¹ Arbitration and Conciliation Act §§ 34(5)-34(6), No. 26 of 1996, <https://indiacode.nic.in>.

⁷² *Emkay Glob.*, slip op. at 13, 14-15.

⁷³ JUSTICE B.N. SRIKRISHNA, REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA 66 (2017).

⁷⁴ *Emkay Glob.*, slip op. at 15.

⁷⁵ *Id.* at 15-16.

⁷⁶ *Id.* at 15.

the specific grounds, and thus the issues are not required to be framed under Section 34.⁷⁷ Under this reasoning, oral evidence may be allowed if it can prove the existence or non-existence of any fact relating to the very issue in an application under Section 34.⁷⁸ In fact, the court in *Fiza Developers* was of the opinion that “where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit.”⁷⁹ Policy concerns such as minimal court intervention and expeditious disposition did matter in drawing the conclusion.⁸⁰ The main cause for dispensing issue framing, however, was that Section 34, in essence, was a summary proceeding with provision for objections by the respondent, followed by an opportunity to the applicant to “prove” the existence of any ground under Section 34(2).⁸¹ *Emkay Global*, in contrast, based its reasoning primarily on the one-year limitation imposed by the 2016 Amendment, in light of which *Fiza Developers* shall now be read.⁸²

In addition, the Supreme Court concluded that there is no need for oral evidence in a Section 34 proceeding might be dicta. The issue the High Court remanded back to the District Court was not a Section 34 issue. In other words, the issue in dispute was not whether the arbitral award rendered by the arbitrator might be set aside on any of the grounds under Section 34(2). The parties were in disagreement with the exclusive jurisdiction of the courts to adjudicate such an issue.⁸³ The High Court’s judgment clearly intended the district court to decide on its own jurisdiction after framing an issue and permitting the parties to lead evidence to this effect.⁸⁴ Therefore, the Supreme Court may well miss the point in deciding that no oral evidence was needed at the stage of Section 34(2)(a), since the stage was still yet to come.

⁷⁷ See *supra* Part II, B. Disputes About Section 34(2)(a) of the 1996 Act.

⁷⁸ See Evidence Act, No. 1 of 1872, § 5, <http://indiacode.nic.in>. (“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.”)

⁷⁹ *Fiza Developers*, (2009) 17 SCC at ¶ 14.

⁸⁰ *Id.* at ¶ 9.

⁸¹ *Id.* at ¶ 13.

⁸² *Emkay Glob.*, slip op. at 15.

⁸³ See *supra* Part III, A. Summary of Facts.

⁸⁴ *Emkay Glob.*, slip op. at 3-4 (citing the Delhi High Court’s holding “[i]t is necessary that the disputed questions of fact as regards existence of territorial jurisdiction of the courts at Delhi be decided by the court below after framing an issue to this effect . . .”).

IV. ARBITRATION AFTER *EMKAY GLOBAL V. SONDHI*

Emkay Global took place almost ten years after *Fiza Developers*. As we have seen from the case law, the Indian Supreme Court has been deferential to the legislation with regard to facilitating arbitration and reducing judicial intervention. This convergence, however, is not the whole picture. Indian arbitration law does not follow international commercial arbitration principles particularly with regard to its interpretation of legal provisions concerning setting aside of domestic arbitral awards (Section 34) and refusing enforcement of foreign arbitral awards (Section 48).⁸⁵ For instance, the expansive interpretation given to the “public policy” ground for setting aside of domestic arbitral awards⁸⁶ and its extension to foreign arbitral awards⁸⁷ created a climate where parties seeking to enforce arbitral awards in India had no certainty as to its enforcement. Recent judicial decisions, which have restricted the use of the “public policy” ground to undertake a review on merits, appear to have changed this perception to some extent.⁸⁸

A. Impact on Domestic Arbitration under Section 34

1. Legislative and judicial progress on Section 34

Both case law and legislation have proven that the provision of quick and easy means for the resolution of commercial disputes has been a priority for India for some time now.⁸⁹ In this regard, despite the flaw in reasoning, *Emkay Global* was in the right direction to expedite the judicial process under Section 34 of the 1996 Act.

Numerous provisions have been enacted or amended to this effect. Section 34(3) requires the parties to make an application to the court within three months after the award has been rendered (extendable by no more than thirty days).⁹⁰ Newly added Section 34(5) and 34(6) provides that the court should adjudicate an application to set aside an award within one year.⁹¹ And Section 36, which prior to 2016 served an automatic stay on the

⁸⁵ JUSTICE B.N. SRIKRISHNA, *supra* note 73, at 66.

⁸⁶ *ONGC v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (India); *ONGC v. Western Geco International Ltd.*, (2014) 9 SCC 263 (India).

⁸⁷ *Phulchand Exports Ltd v. O.O.O. Patriot*, (2011) 10 SCC 300 (India).

⁸⁸ TUSHAR KUMAR BISWAS, *INTRODUCTION TO ARBITRATION IN INDIA: THE ROLE OF THE JUDICIARY* 17 (2014).

⁸⁹ JUSTICE B.N. SRIKRISHNA, *supra* note 73, at 3.

⁹⁰ Arbitration and Conciliation Act § 34(3), No. 26 of 1996, <https://indiacode.nic.in>.

⁹¹ *But see* *The State of Bihar and Ors v. Bihar Rajya Bhumi Vikas Bank Samiti*, C.A. No.-007314-007314 / 2018 (India July 30, 2018) (holding that the period of one year is directory).

operation of the award under Section 34,⁹² now provides that the arbitral award is presumably enforceable when an application to set aside the arbitral award has been filed to the court, unless the party filed a separate application to stay the operation and the court so ordered.⁹³

Some amendments were suggested to further amend Section 34, including (a) the time limit for challenge, should be reduced to 30 days; (b) there should be a condition of a 75 percent pre-deposit of the sum awarded; and (c) the challenge petition should be disposed of in 60 days (extendable by another 30 days) with no further challenge.⁹⁴ There should also be a dedicated court for hearing arbitration matters or national arbitration court equivalent to Supreme Court of India, or a specialist arbitration bench similar to jurisdictions such as Singapore, Hong Kong, and the UK.⁹⁵ Commercial court, commercial division, and commercial appellate division⁹⁶ judges should be provided with courses in arbitration law and practice before and after being appointed to such benches.⁹⁷

2. *The New York Convention, the UNCITRAL Model Law, and Other Countries*

The judgment in *Emkay Global* that explicitly disallowed any oral evidence in trial unless “absolutely necessary” to set aside an arbitral award might not be perfectly consistent with the practice in an international setting. As suggested in Part II above, Section 34 has its origin in Article 34 of the UNCITRAL Model Law, titled “Application for setting aside as exclusive recourse against arbitration award.”⁹⁸ The wording in Subsection (2) of the Article 34 is similar to that in Section 34 of 1996, providing that an arbitral award may be set aside on specified grounds if the party making the application “furnishes proof.”⁹⁹ Article V(1) of the New York Convention, which deals with the refusal

⁹² See *supra* note 38 and accompanying text.

⁹³ Arbitration and Conciliation Act §§ 36(2)-36(3).

⁹⁴ JUSTICE B.N. SRIKRISHNA, *supra* note 73, at 33-34.

⁹⁵ *Id.* at 59.

⁹⁶ Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No. 4 of 2016, <http://indiacode.nic.in/> (this act created these courts).

⁹⁷ JUSTICE B.N. SRIKRISHNA, *supra* note 73, at 59.

⁹⁸ U.N. Docs. A/40/17 annex I and A/61/17 annex I Art. 34.

⁹⁹ *Id.* Art. 34(2).

of enforcement of foreign awards, uses the same expression.¹⁰⁰ In a hypothetical draft convention in 2008, however, the author suggested substituting the word “furnishes . . . proof” with “asserts and proves.”¹⁰¹ He wrote in an explanatory note that the introductory language of Article V(1) of the New York Convention would be clearer “in respect of the distinction between an assertion and proof for the assertion.”¹⁰² The change in wording suggests the author’s opinion that mere assertion of the existence of any of the grounds listed thereunder is not enough to satisfy the requirement under Article V(1), and that the party making the application shall bear the burden to prove such assertion to have the arbitral award set aside. Therefore, it differs from the opinion of the Indian Supreme Court, who in *Emkay Global* was reluctant to allow any evidence rather than affidavits filed by both parties, and anticipated that evidence at the stage of a Section 34 application might “be dispensed with altogether.”¹⁰³

Countries differentiate the standard of proof by the actual ground on which the party has alleged in the setting aside proceedings. In Germany, there is no review of the arbitral award for legal or factual defects (*révision au fond*).¹⁰⁴ However, section 1059(2) no.2 b) of the German Code of Civil Procedure provides for the setting aside of an arbitral award owing to breach of German *ordre public*, as this cannot be determined without a review of the content of the arbitral award.¹⁰⁵

In China, on the other hand, the arbitration law distinguishes domestic awards and foreign-related awards. For domestic awards, the court reviews not only procedural issues but also substantive issues.¹⁰⁶ This distinction is originated from the historical background of an unwarranted prejudice against the dispute settlement system by arbitration and

¹⁰⁰ Art. V(1), New York Convention, 330 U.N.T.S. 38 (“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . .”).

¹⁰¹ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, N.Y. ARB. CONV. (May 29, 2008), <http://www.newyorkconvention.org/11165/web/files/document/1/6/16017.pdf>.

¹⁰² Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards, Explanatory Note*, N.Y. ARB. CONV. (May 29, 2008), <http://www.newyorkconvention.org/11165/web/files/document/1/6/16015.pdf>.

¹⁰³ *Emkay Glob. Fin. Servs. Ltd. v. Sondhi*, C.A. No.-008367-008367 / 2018, slip op. at 15 (India Aug. 20, 2018).

¹⁰⁴ Franz-Jorg Semler, German Arbitration Law, 18 J. INT’L ARB. 579, 585 (2001).

¹⁰⁵ *Id.*

¹⁰⁶ Zhongcai Fa (仲裁法) [Law on Arbitration] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 58.

mistrust of Chinese domestic arbitration institutions.¹⁰⁷ It should be noted, however, that under Chinese law application for setting aside an award should be made within six months after the party received the arbitral award, and the court should decide whether to set aside the said award within two months.¹⁰⁸

Though no law suggests that courts in the United States can only review limited types of evidence in adjudicating an application to enforce or vacate an arbitral award, they nevertheless face similar dilemmas between the expedient resolution of arbitral disputes and upholding justice as their counterparts in India.¹⁰⁹ Perhaps the reason lies in the similarity of their adversary judicial systems. Most courts in the United States acknowledge a strong presumption in favor of enforcement, with exceptions only in circumstances of extreme procedural unfairness or arbitrator partiality or fundamental incompetence.¹¹⁰ Despite this, voices are calling for the reconsider and restructure of the enforcement process to avoid any extensive replay of the arbitral proceedings in a court.¹¹¹ Limiting court scrutiny to a facial examination of the award and associated documents might be an approach.¹¹² In this regard, *Emkay Global* would be somewhat referable.

B. Impact on enforcement of foreign awards under Section 48

Emkay Global may have limited impact on the enforcement of foreign awards under Section 48 of the 1996 Act. Section 48 (contained in Part II) concerns enforcement of foreign awards under the regime of New York Convention.¹¹³ Like Section 34 (contained in Part I), a foreign award may be refused enforcement either at the request of the party if the party “furnishes to the court proof” on one of the five grounds enumerated therein,¹¹⁴

¹⁰⁷ Woo-Jung Jon, *Interim Measures in Arbitration and Enforcement of Arbitral Awards in Korea and China*, 26 J. ARB. STUD. 67, 79-85 (2016).

¹⁰⁸ Zhongcai Fa (仲裁法) [Law on Arbitration], *supra* note 106, art. 59, art. 60.

¹⁰⁹ THOMAS E. CARBONNEAU, *ARBITRATION LAW IN A NUTSHELL* 273-74 (4th ed. 2017) (indeed, challenges to enforceability require some type of discovery. The defendant’s objections to the award need to be substantiated by evidence as do the plaintiff’s responses. This process could be very costly for parties both in terms of time and in terms of money).

¹¹⁰ *Id.* at 269.

¹¹¹ *Id.* at 274.

¹¹² *Id.*

¹¹³ Arbitration and Conciliation Act § 48, No. 26 of 1996, <https://indiacode.nic.in>.

¹¹⁴ *Id.* § 48(1) (specifically, the five grounds are (i) a party was under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (ii) 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 upon finding of the court, the subject matter is not arbitrable, or the award is otherwise in conflict with the public policy of India.¹¹⁵ These two sections are thus closely related.

The question whether the interpretation of the meaning of “furnishes proof” contained in Section 34 applies to Section 48 has not been addressed by the courts. Historically, some provisions of Part I were applicable to Part II, including Section 34. In *Bhatia International v. Bulk Trading S.A.*, the Supreme Court ruled that provisions for providing interim relief contained in Part I could be applied to the Part of the Act that dealt with foreign awards (Part II).¹¹⁶ It reasoned that the provisions of Part I were general provisions governing domestic as well as foreign arbitrations and would not need to be repeated in every part of the Act.¹¹⁷ Later in *Venture Global Engineering v. Satyam Computer Services Ltd.*,¹¹⁸ the Supreme Court expanded the scope to all of the provisions of Part I, regardless of whether the provisions were general or specific. In particular, the Supreme Court held that the provision under Part I of the 1996 Act which permits a court to set aside an award (Section 34) was also applicable to Part II (Section 48), which governed foreign arbitrations.¹¹⁹

The international arbitration committee strongly criticized *Venture Global* for the increase of the power of Indian courts to intervene in the arbitral proceeding and the conservative and distrustful attitude of the Indian Supreme Court towards arbitration. In 2012, the Supreme Court overruled *Venture Global* in *Bharat Aluminum Co v. Kaiser Aluminum Technical Service, Inc.*¹²⁰ It restated the rule as follows:

“A plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India . . . Parliament by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily

or (iii) 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 (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or (v) 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).

¹¹⁵ Arbitration and Conciliation Act § 48(2).

¹¹⁶ *Bhatia International v. Bulk Trading S.A.* (2002) 4 SCC 105.

¹¹⁷ Akash Pierre Rebello, *Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India*, 6 CAMBRIDGE STUDENT L. REV. 274, 278-79 (2010).

¹¹⁸ *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 (India).

¹¹⁹ Akash Pierre Rebello, *supra* note 117, at 280.

¹²⁰ *Bharat Aluminum Co v. Kaiser Aluminum Technical Service, Inc.*, (2012) 9 SCC 552 (India).

therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.”¹²¹

In conclusion, since provisions under Part I are now only applicable to arbitration seated in India, the interpretation of the expression “furnishes proof” explained in *Emkay Global* cannot automatically apply to Section 48 about the refusal of enforcement of foreign awards. It is possible, however, that were cases with similar issues as *Emkay Global* presented before the Supreme Court regarding Section 48, the Supreme Court might refer to *Emkay Global* and come to a similar conclusion favoring documentary evidence, as expedient enforcement of foreign awards and avoidance of excessive judicial intervention are designed purposes of the 1996 Act.¹²²

V. CONCLUSION

Emkay Global v. Sondhi has ruled that no oral evidence will be allowed in future Section 34 proceedings to set aside arbitral awards unless absolutely necessary. The Supreme Court decided the case in line with a series of cases and legislative moves intended to “speedy resolution of arbitral disputes.” By dispensing oral evidence, the proceedings under Section 34 will probably be terminated within the statutory limit of one year imposed by the 2016 Amendment of the 1996 Act.

This ruling, however, may have limited impact on domestic arbitration as well as international arbitration. Interpretation of the wording “furnishes proof” originated in the UNCITRAL Model Law as sole records and affidavits is not a common practice in the international community. Though fully valid as local law, it is likely that this type of interpretation will only appeal to countries that have a similar legal system to India. Moreover, according to the case law, the interpretation of Section 34 is probably not applicable to Section 48, which governs the enforcement of foreign awards in India. Nevertheless, an expedient arbitral proceeding may render India a more “arbitration-friendly” jurisdiction and attract more foreign investors to arbitrate with a seat in India.

¹²¹ TUSHAR KUMAR BISWAS, *supra* note 88, at 118.

¹²² *See supra* text accompanying note 21.