Clickwrap Agreements and International Commercial Arbitration: Rethinking Contract Enforcement in the Digital Era

ABSTRACT

India's Arbitration and Conciliation Act, 1996 (the 1996 Act)1 is structured into four parts. Part I governs arbitrations seated in India, while Part II deals with the enforcement of awards passed in foreign-seated ICAs. When the award debtor in a foreign-seated arbitration is an Indian entity, the foreign party must adhere to the procedures and rules outlined in Part II of the 1996 Act.
Parties often opt for institutional arbitrations such as those administered by the Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), or International Chamber of Commerce (ICC). This choice is typically made to resolve commercial disputes through a neutral third party when parties hail from different jurisdictions, thereby mitigating the risk of bias that might exist in national courts. Institutional arbitrations offer convenience and certainty, providing their own established rules, procedures, panels of arbitrators, and expert facilities for efficient dispute resolution.

Ultimately, the future of arbitration in India depends on maintaining a principled balance: courts must act as gatekeepers of fairness without transgressing into the substantive domain reserved for arbitral tribunals. While judicial intervention is indispensable to preserve access to justice and check abuse of process, its exercise must remain confined to the statutory contours envisioned under the Act. A faithful adherence to these principles will not only boost confidence in the arbitral process but also elevate India's standing as a pro-arbitration jurisdiction in line with global best practices.
Even the judicial interpretation of clickwrap agreements, such as Capgemini Business Services (India) Ltd. v. CIT or Feldman v. Google, Inc., has suggested that clear notice of use and true assent from the user can prevent enforcement. Some of the possible ways to mitigate issues in clickwrap agreements come with clearer terms, enhanced transparency of provisions in the ability to review and assess the terms, a better understanding of eligibility verification through Aadhar, and, in more remote contexts, a blockchain approach to agility in accessing agreements as permanent records. Addressing clarity of terms, accessibility of agreements, and collection and use of data, clickwrap agreements can become a predominant form of e-contract, singularly representing service delivery needs of both the users and the digital commerce service providers, in not only India but on an international stage.

INTRODUCTION TO INSTITUTIONAL INTERNATIONAL COMMERCIAL ARBITRATION

India's Arbitration and Conciliation Act, 1996 (the 1996 Act)[1] is structured into four parts. Part I governs arbitrations seated in India, while Part II deals with the enforcement of awards passed in foreign-seated ICAs. When the award debtor in a foreign-seated arbitration is an Indian entity, the foreign party must adhere to the procedures and rules outlined in Part II of the 1996 Act.

Parties often opt for institutional arbitrations such as those administered by the Singapore International Arbitration Centre (SIAC), London Court of International Arbitration (LCIA), or International Chamber of Commerce (ICC). This choice is typically made to resolve commercial disputes through a neutral third party when parties hail from different jurisdictions, thereby mitigating the risk of bias that might exist in national courts. Institutional arbitrations offer convenience and certainty, providing their own established rules, procedures, panels of arbitrators, and expert facilities for efficient dispute resolution.

A crucial precondition for enforcing foreign-seated awards under Part II[2] of the 1996 Act is that the country where the foreign party is situated must be a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),[3] to which India is also a signatory. Currently, 172 countries have signed this treaty.

According to Black's Law Dictionary, "Arbitration is a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding."[1] Arbitration stands at the intersection of party autonomy and judicial oversight, offering a compelling alternative to conventional litigation, particularly in commercial disputes. It is often praised for its efficiency, confidentiality, and the ability to tailor procedures to the specific needs of the parties involved. The principles of party autonomy and minimal court intervention form the cornerstone or the golden thread that runs across of the Arbitration and Conciliation Act[1] (hereinafter referred to as 'the Act of 1996'). Central to its functioning is the doctrine of *Kompetenz-kompetenz*, which grants arbitral tribunals the authority to rule on their own jurisdiction, including any challenges to the existence or validity of the arbitration agreement. In this context, judicial engagement at the pre-arbitral stage, particularly under Sections 8 and 11 of the Act of 1996, poses a site of friction. While these provisions are intended to expedite referral to arbitration and facilitate tribunal formation, courts have often undertaken expansive inquiries into the substantive merits of disputes, well beyond the preliminary question of whether a valid arbitration agreement exists. Such interventions have the potential to derail arbitration before it begins, transforming what should be a summary examination into a quasi-trial on jurisdictional issues. The legislative

1 The Arbitration and Conciliation (Amendment) Act, 2016, No. 3, Act of Parliament, 2016 (India).

amendments introduced in 2015 and 2019 to the Act of 1996 aimed to reinforce this limited scope, bringing Indian arbitration law closer in line with the standards of the "UNCITRAL Model Law on International Commercial Arbitration" [3]. These reforms sought to restrict judicial scrutiny at the referral and appointment stages and empower arbitral tribunals to address jurisdictional issues as a first instance.

In recent times, E-contracts have revolutionized the formation of contracts and execution, offering unparalleled convenience and efficiency, making it highly reliable for online businesses. These agreements streamlined traditional contracting processes by eliminating the need for physical documentation and signatures. Further classifications in these e-contracts give rise to specific types of e-contracts like shrink wrap, browse-wrap, and clickwrap as their major division. These types are associated with different forms of taking assent from the user and how they further redirect them with specific results. Narrowing the aspect further, this paper will focus on the clickwrap agreements and their implications.

Clickwrap (also known as click-accept, click-to-sign, or clickthrough) agreement is an online agreement that users agree to by clicking a button or checking a box that says "I agree". The act of signing via an electronic signature is replaced with the act of clicking[2]. These agreements are widely used in software installations and e-commerce platforms during the checkout processes, as well as subscription-based services like music and streaming platforms, social media platforms, cloud services and financial applications. Among all types of e-contract methods, with the advent of technological advancement, clickwrap agreements are the fastest-growing category in the agreement space, projected to grow at a CAGR(Compound Annual Growth Rate) of 26.8% from 2024 to 2030.[3]Certain essentials for a contract also apply to the clickwrap agreement, i.e., those discussed under Section 10 of the Indian Contract Act, requiring free consent, competent parties, lawful consideration, and lawful object, and those should not be declared void. Though all these circumstances are fulfilled in the case of the clickwrap, the competent parties and the non-negotiable terms for using the service always remain the area of discussion.

Smart Contract In Global Context

The clickwrap agreements have been globally governing with the same general governance principles as the electronic contracts. *Various countries and international organisations, taking note of the radical shift in the e-contract, formulated laws to deal with the same; prominent amongst them being the - EU E-Commerce Directives ("EU Directives"), UN Convention on the Use of Electronic Communications in International Contracts ("UN*

2 Ironclad, What Is a Clickwrap Agreement?, IRONCLAD (Apr 12, 2025), https://ironcladapp.com/ journal/contract-management/what-is-a-clickwrap-agreement/.

3 Certinal, Understanding Clickwrap Agreement, Certinal (April 12, 2025), https://www.certinal.com/ blog/understanding-clickwrap-agreement.

Convention") and UNCITRAL Model Law on Electronic Commerce ("UNCITRAL Model Law").[4]

The enforceability in countries like the USA has been firmly upheld with cases like Feldman v. Google, Inc.[5], where the court emphasised the importance of providing reasonable notice of terms and manifested assent of the contract, the same type of agreements was also discussed in Hotmail Corp. V. Van$ Money Pie Inc[6], where the court recognised the binding nature and enforceability of the clickwrap agreements, validating assent through a click as a valid acceptance. Further in the development, the UNICTRAL model remains a pioneer in recognising these types of contracts and providing the foundational principle for the e-contract. It provides that a contract shall not be denied validity solely based on electronic form if the same follows the foundational principle of the contract. UCIT(Uniform Computer Information Transactions Act), from the National conference of Commissioners on uniform State Laws (NCCUSL) also makes clear that click-wrap agreements that allow a user to convey his or her assent through an on-screen "click" are legally binding as long as the user had an opportunity to review the terms before assenting

OTHER E-CONTRACTS

Other than the clickwrap contracts, different types of e-contracts, like browse wrap, shrink wrap, and other agreements, have also been prevalent today. These have also been used when parties do not meet each other.

Browse Wrap

The agreement will be binding upon the contracting party using the website. These include the user policies and terms of service of websites such as Flipkart or eBay and are in the form of a "terms of use", a "user agreement" or "terms of service", which can be found at the corner or bottom of the website.Courts have often questioned their validity and, in certain circumstances, refused to enforce such terms due to insufficient visibility. Unlike clickwrap, the user is not required to agree actively- the mere use of the website is considered acceptance.

Shrink Wrap

These agreements are used initially in software purchases and are enclosed within product packaging. They aim to create an enforceable electronic agreement by requiring users of

4 Shashank Shekhar, Note, The Enforceability of Electronic Click Wrap and Browse Wrap Agreements, 6.1 NLIU L. REV. 77 (2017)

5 Feldman v. Google, Inc., 513 F. Supp. 2d 229 (E.D. Pa. 2007)

6 Hotmail Corp. v. Van$ Money Pie, Inc., No. C-98-20064 JW, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998)

websites and other electronic media to accept the website's terms of use.13 These are also accepted in many jurisdictions, especially when the user can return the product after reviewing the terms.

Other than these two, there are also e-contracts done in the form of e-mail, smart contracts, sign-in wrap, phone calls, messages, and others. The only requisites that remain the same throughout them all are the contracts' fundamentals, which need to be followed for a valid contract.

SECTION 16 OF ARBITRATION AND CONCILIATION ACT, 1996

Section 16 of the Act of 1996, encapsulates the dual framework of empowering the arbitral tribunal to adjudicate upon objections concerning the existence or validity of the arbitration agreement. This procedural safeguard ensures that the tribunal, rather than the courts, is the primary forum for resolving jurisdictional disputes, thereby preserving the efficiency and autonomy of the arbitral process. This provision reinforces both the doctrine of *Kompetenz-kompetenz* and the principle of separability, affirming the arbitral tribunal's authority to determine its own jurisdiction even in situations where the validity of the main contract is in question. Substantively, the doctrine asserts that the arbitration clause operates independently of the main contract, thereby allowing the tribunal's jurisdiction to survive even if the underlying agreement is declared void or has been terminated. This legal structure upholds the integrity of the arbitral framework and reflects a legislative intent to prevent premature judicial interference. Furthermore, while Section 16(2) permits parties to raise jurisdictional objections, it does so with procedural discipline by requiring that such objections be submitted no later than the filing of the statement of defense. In doing so, the provision strikes a careful balance between preserving the tribunal's competence and protecting procedural fairness, ultimately fostering an arbitration system that is both robust and responsive. When an arbitral tribunal overrules an objection to its jurisdiction, it must proceed with the arbitration and render a final award, as mandated by Section 16(5) of the Act of 1996. No interim judicial review is permissible on the sole ground that the tribunal has assumed jurisdiction; the aggrieved party is required to await the issuance of the award before mounting any challenge under Section 34 of the Act on limited grounds. Indian courts have consistently affirmed that an order rejecting a jurisdictional plea cannot be appealed until the arbitral award becomes final. Consequently, a petition under Section 34 of the Act, challenging the final award constitutes the only avenue for relief.

SECTION 8 OF ARBITRATION AND CONCILIATION ACT, 1996

Section 8 of the Act of 1996, functions as a pivotal referral mechanism, mandating judicial authorities to direct parties to arbitration when the dispute brought before the court is governed by a valid arbitration agreement. Anchored in the principle of party autonomy, this provision reinforces the contractual obligation to arbitrate, thereby curtailing judicial interference at the pre-arbitral stage. The original text of Section 8, as enacted in 1996, drew upon Article 8 of the UNCITRAL Model Law on International Commercial Arbitration.

The Indian judiciary adopted an expansive approach while interpreting Section 8. Judicial authorities were inclined to assess not merely the existence of an arbitration agreement, but also to engage with questions of arbitrability, public policy, and, at times, the substantive merits of the dispute. Such interpretations diluted the doctrine of *Kompetenz-kompetenz* and encroached upon the arbitral tribunal's jurisdictional domain.

Effect of Amendment of 2015 on Section 8 of the Act of 1996

The Arbitration and Conciliation (Amendment) Act, 2015[5] constituted a pivotal reform initiative aimed at strengthening the foundational objectives of the Act of 1996. Central to this amendment was the effort to mitigate procedural delays arising from unwarranted judicial intervention, thereby reinforcing the overarching goal of promoting efficiency and finality in arbitral proceedings.

Section 8 of the Act of 1996:

> *"A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him…., notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."*

Key Changes Introduced by the Amendment:

a. Prima Facie Standard: The amendment restricted the court's role to determining only whether a valid arbitration agreement prima facie exists, without engaging with broader questions of arbitrability or enforceability.

b. Non obstante Clause: The insertion of the "notwithstanding any judgment" clause was intended to override judicial precedents that had previously expanded the court's discretion under Section 8.

c. Expanded Scope of Applicability**:** The provision was expanded to apply to "any person claiming through or under" a party to the arbitration agreement, thereby extending the scope of its applicability, particularly in complex or multi-party disputes.

d. Commencement/ Continuation of arbitration proceedings when Section 8 application is pending: Sub section 3 of section 8 of the Act allows the tribunal to commence or continue the arbitration proceedings even if the application of section 8 is pending before a judicial authority.

Section 8 of the Act has made a departure from Article 8 of UNCITRAL Model Law as the former uses the expression 'judicial authority' rather than court and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed” mentioned in Article 8 do not find place in Section 8.

Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and *kompetenz-kompetenz* and Section 34 of the Act of 1996, referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.

These amendments curtailed the scope of judicial examination at the appointment stage and sought to streamline the process of referral to arbitral tribunals.

SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Section 11 of the Act of 1996, governs the appointment of arbitrators and constitutes a foundational component of the arbitral framework. The provision sets out the procedural mechanism by which parties, in the event of failure to reach a mutual agreement, may seek court intervention to appoint arbitrators and thereby constitute the arbitral tribunal. The efficacy of this provision is critical, as the formation of the tribunal is a prerequisite for initiating arbitration proceedings. In its underlying philosophy, Section 11 reflects the principles of party autonomy, procedural efficiency, and restrained judicial involvement.

At the time of its enactment, Section 11 conferred the power of appointment upon the Chief Justice of India or the Chief Justice of the relevant High Court. However, this formulation gave rise to interpretative uncertainty regarding the nature of this function, whether the Chief Justice was exercising administrative authority or adjudicatory power.

This ambiguity was conclusively addressed by the Supreme Court in “*SBP & Co. v. Patel Engineering Ltd.”*[7], wherein the Court held that the power under Section 11 is judicial in character:

> **“***The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power. The power under Section 11(6) of the*

7 SBP & Co. v. Patel Engineering Ltd (2005) 8 SCC 618.

Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court. In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute."

The declaration of the judicial nature of this power had far-reaching implications. Courts began to undertake detailed inquiries at the pre-arbitral stage, including questions relating to the existence and validity of arbitration agreements, as well as the arbitrability of disputes. This judicial scrutiny, while rooted in safeguarding legal integrity, often led to significant procedural delays and undercut the efficiency of the arbitral process.

Recognising these challenges, and with a view to harmonising Indian arbitral practice with global standards, the legislature introduced substantial amendments to Section 11 through Amendment of 2015 followed by the Amendment of 2019.

Effect of Amendment of 2015 on Section 11 of the Act of 1996

The 2015 Amendment, aimed at reducing judicial delay, introduced Section 11(6***A***) to narrow the scope of court intervention. The inserted provision read:

> *"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4), (5), or (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*[8]

This legislative intervention marked a pivotal shift in the approach to Section 11, expressly curtailing the previously expansive judicial inquiry. In effect, it superseded precedents such as "*SBP & Co. v. Patel Engineering Ltd."*[9] and "*National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd."*[10], which had permitted a substantive evaluation of jurisdictional questions at the referral stage. The legislative objective was to entrust such determinations to the arbitral tribunal, as enshrined in Section 16 of the Act of 1996.

The Supreme Court in *Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman*[11], affirmed this

8 SBP & Co. v. Patel Engineering Ltd, supra note 6.

9 National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd (2009) 1 SCC 267.

10 Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burma (2019) 8 SCC 714.

11 Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Act of Parliament, 2019, (India).

legislative shift, observing:

> *"The position of law prior to the 2015 Amendment, as laid down in Patel Engineering, is no longer applicable. Post amendment, the scope of power under Section 11 is confined only to the examination of the existence of the arbitration agreement."*

5.1 **Amendment of 2019 and the Omission of Section 11(6A)**

With a view to further institutionalizing arbitration in India, the Arbitration and Conciliation (Amendment) Act, 2019[12] proposed significant structural changes. Notably, it introduced Section 11(3A), which envisaged the appointment of arbitrators by designated arbitral institutions rather than by the courts. Section 11(3A) stated:

> *"The Supreme Court or the High Court shall designate arbitral institutions... for the purpose of performing the functions of appointment of arbitrators."*

The Amendment of 2019, proposed the omission of Section 11(6A). However, crucially, this omission has not been brought into force through a formal notification.

The legal consequence of this legislative inaction was clarified by the Supreme Court in *In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act*[13], where it held:

> *"Since Section 11(6A) has not been deleted by notification, it continues to operate and governs the scope of judicial review under Section 11."*

Accordingly, despite the legislative intent signaled by the 2019 Amendment, the substantive law governing judicial scrutiny under Section 11 remains unchanged. Courts are still bound to undertake only a prima facie examination of the existence of the arbitration agreement, reaffirming a restrained and facilitative judicial role in the arbitral process unless and until Section 11(6A) is formally omitted.

12 Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Act of Parliament, 2019, (India).

13 Ibid

CONCLUSION

The legal framework governing arbitration in India has undergone a transformation, particularly in curbing judicial intervention during the pre-arbitral stage. Anchored in the principle of party autonomy and guided by the doctrine of Kompetenz-Kompetenz, the Arbitration and Conciliation Act, 1996, especially post its 2015 and 2019 amendments has sought to recalibrate the role of courts as facilitators rather than gatekeepers in arbitral proceedings. Sections 8 and 11, which were grounds for expansive judicial inquiry, have been deliberately narrowed in scope to mandate only a prima facie examination of the existence of a valid arbitration agreement. This legislative choice is both doctrinally significant and practically necessary to uphold arbitration as a time-efficient and procedurally autonomous dispute resolution mechanism.

The proposed Arbitration and Conciliation (Amendment) Bill, 2024, which introduces timelines and appealability at the referral stage, further reflects an intent to inject certainty and structural integrity into the arbitral process. However, there is a need to notify the amendment of 2019, with respect to Section 11 (3A) of the Act. Doing so would facilitate a structural transition from ad hoc to institutional arbitration, relieve the courts of procedural burdens, and reinforce the principle of minimal judicial interference at the pre-arbitral stage.

Ultimately, the future of arbitration in India depends on maintaining a principled balance: courts must act as gatekeepers of fairness without transgressing into the substantive domain reserved for arbitral tribunals. While judicial intervention is indispensable to preserve access to justice and check abuse of process, its exercise must remain confined to the statutory contours envisioned under the Act. A faithful adherence to these principles will not only boost confidence in the arbitral process but also elevate India's standing as a pro-arbitration jurisdiction in line with global best practices.

Even the judicial interpretation of clickwrap agreements, such as Capgemini Business Services (India) Ltd. v. CIT or Feldman v. Google, Inc., has suggested that clear notice of use and true assent from the user can prevent enforcement. Some of the possible ways to mitigate issues in clickwrap agreements come with clearer terms, enhanced transparency of provisions in the ability to review and assess the terms, a better understanding of eligibility verification through Aadhar, and, in more remote contexts, a blockchain approach to agility in accessing agreements as permanent records. Addressing clarity of terms, accessibility of agreements, and collection and use of data, clickwrap agreements can become a predominant form of e-contract, singularly representing service delivery needs of both the users and the digital commerce service providers, in not only India but on an international stage.