

ARB
DOSSIER

AN EMPIRICAL STUDY OF CHALLENGES TO
ARBITRAL AWARDS DECIDED BY THE BOMBAY
HIGH COURT BETWEEN 2019-2021

TABLE OF CONTENTS

- About the Authors** 3
- Methodology** 4
- Introduction** 5
 - 1. Time Taken for Disposal of Section 34 Application 6
 - 2. Grant Of Stay Pending Final Disposal..... 7
 - 3. Length of the Final Order..... 8
 - 4. Composition Of The Tribunal In Awards Challenged 9
 - 5. Probability of Setting Aside of Award under Section 34 10
 - 6. Common Grounds Accepted By The Court In Challenges To Awards 11
 - 7. Award of Costs..... 12

ABOUT THE AUTHORS

Authors

Sanchitta Sridhar, LL.M (International & Comparative Law) National University of Singapore is an arbitration practitioner and is qualified to practice in India.

Devarsh Saraf, ACI Arb (B.A.,LL.B NALSAR University of Law) is an associate at Federal & Company and practices as an advocate in India.

Contributors

Viraj Puri is a third year student of the five year integrated BA.LL.B (Hons.) program at NALSAR University of Law, Hyderabad. He is interested in pursuing a career in international arbitration.

Research Assistants

The authors are thankful for the contribution of Aditya Matolli, Khushi Mittal and Manav Ganapathy third and second year students pursuing their B.A.LL.B from NALSAR University of Law, for their valuable assistance.

METHODOLOGY

The study has analysed applications filed to challenge arbitral awards under Section 34 of the Arbitration and Conciliation Act, 1996 that were disposed of between June 2019 and May 2021 in the Bombay High Court. This study has endeavoured to account for and examine every such application that was finally decided and disposed in the said time frame. The authors have extracted this data from filing and daily orders information available on the official website of the Bombay High Court www.bombayhighcourt.nic.in . The authors have not verified these orders against certified or authenticated hard copies of orders which are routinely issued by the High Court department for official purposes. The applications examined as part of the study should not be treated as an exhaustive list of all the Section 34 applications disposed between June 2019 and May 2021. The orders examined as part of the study are restricted to the application of the first instance and do not reflect any directions or orders passed in appeals.

INTRODUCTION

This report presents empirical data pertaining to applications under Section 34 of the Arbitration and Conciliation Act, 1996 (“the Act”) seeking setting aside of the arbitral awards, filed before the Bombay High Court and disposed of between June 2019 and May 2021. The aim of the study is to provide an overview of, *inter alia*, the outcomes of such Section 34 challenges and grounds on which the Bombay High Court has set aside arbitral awards. The report also presents data on the average timeline for the disposal of Section 34 applications before the Bombay High Court.

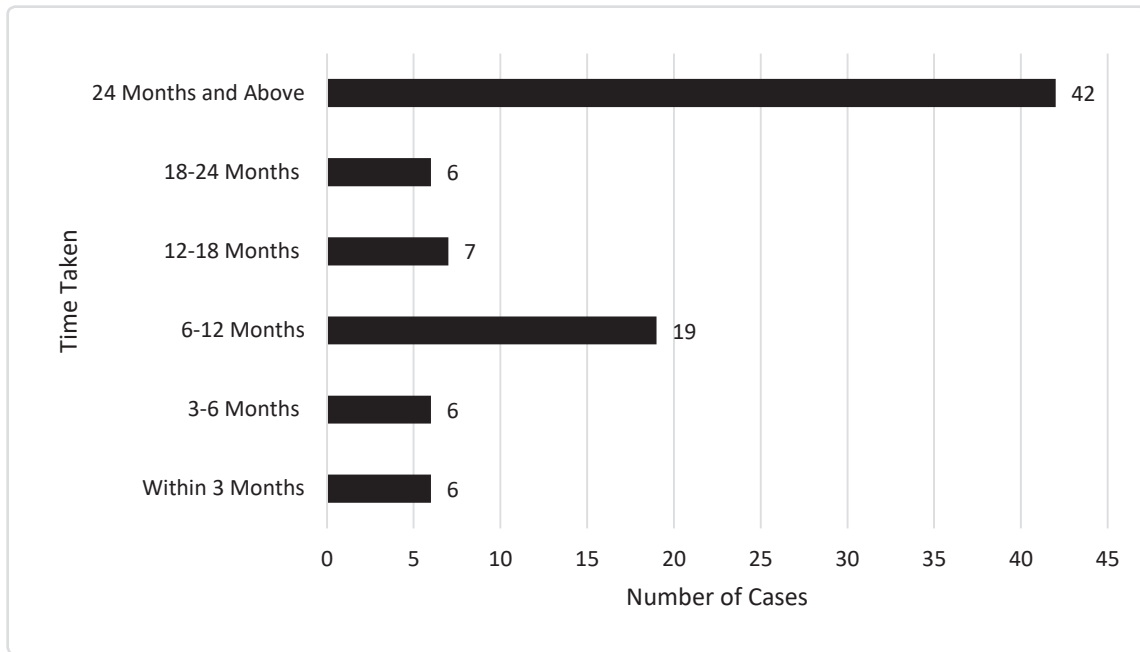
Section 34 of the Act stipulates the grounds on which an arbitral award may be challenged by an aggrieved party. Section 34 is modelled on Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (“the Model Law”). The Act provides supervisory jurisdiction with respect to arbitral awards to Indian national courts, and limits the extent to which the courts can intervene in the arbitral process.¹ Like the Model Law, Section 34 does not empower a court to modify or vary an arbitral award. Further, an award may only be set aside either in whole or in part under the grounds specified under Section 34(2) and (2A), and in doing so, the Court isn’t empowered to review the substantive reasoning or merits of the award. Similar to Article 34(4) of the Model Law, Section 34(4) of the Act enables the court to remand an award back to the arbitral tribunal to eliminate the grounds for setting aside the award.

In 2015, the Indian parliament significantly amended this provision on the basis of the suggestions of the 246th Law Commission Report. The amendment *inter alia* clarified and narrowed down certain grounds on which arbitral awards could be set aside and removed the automatic stay of an arbitral award on a Section 34 application being filed.

Section 34 of the Act is applicable only to domestic Indian arbitrations, since Section 2(2) of the Act states that this provision would be applicable to those arbitrations whose place of arbitration is India.

¹ MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163.

1. Time Taken for Disposal of Section 34 Applications

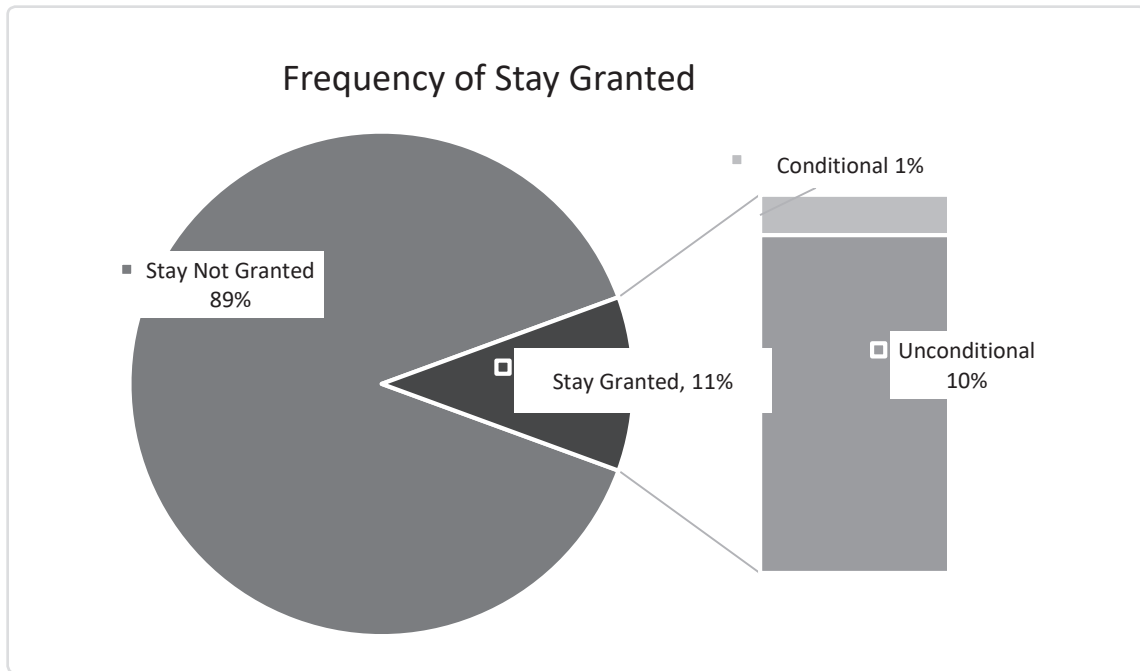


Note - The number of days referred to in the bar chart above indicates calendar days and does not account for court holidays and other non-working days.

The data demonstrates that 51% of Section 34 applications were disposed of by the Bombay High Court within two years from the date of filing of the application. Out of these, 36% of the applications were disposed of within a year and 14% within six months of filing. It was only in 7% of the cases that final disposal was achieved within three months from the date of filing. The remaining 49% took more than two years to be disposed.

On calculating the mean of the results obtained in the graph above, it is found that on average, it took 23 months and 7 days (706 days) for the final disposal of a Section 34 application decided by the Bombay High Court between June 2019 and May 2021.

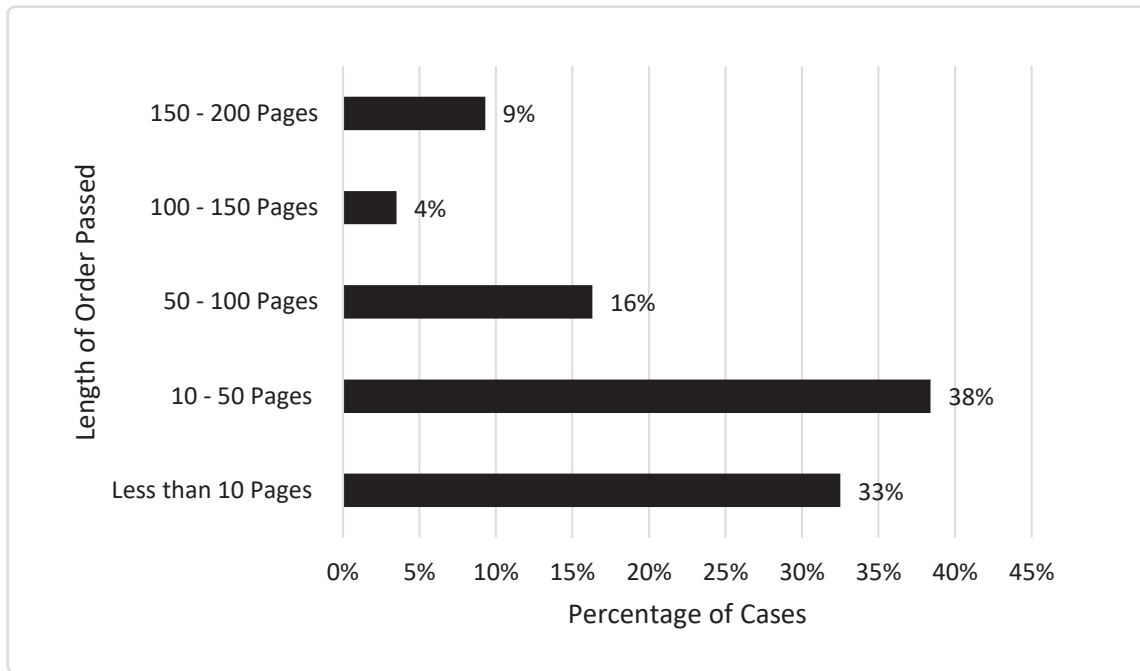
2. Grant Of Stay Pending Final Disposal



Parties filing a Section 34 Petition often seek the stay of the arbitral award pending the final disposition of the application. This interim stay on the arbitral award is often crucial, since the time taken by the Bombay High Court for the final disposal of the 34 application is on average about 23 months and 7 days, as evident from the previous graph.

As demonstrated above, in a majority of the cases (89%), the Bombay High Court rejected the request for the stay of the award challenged in the application. In a meagre 11% of the cases, the court was inclined towards granting the stay of the award being challenged. Among these, in 10% of the applications, an unconditional stay of the award was granted. It was found that the court granted a conditional stay in only one instance.

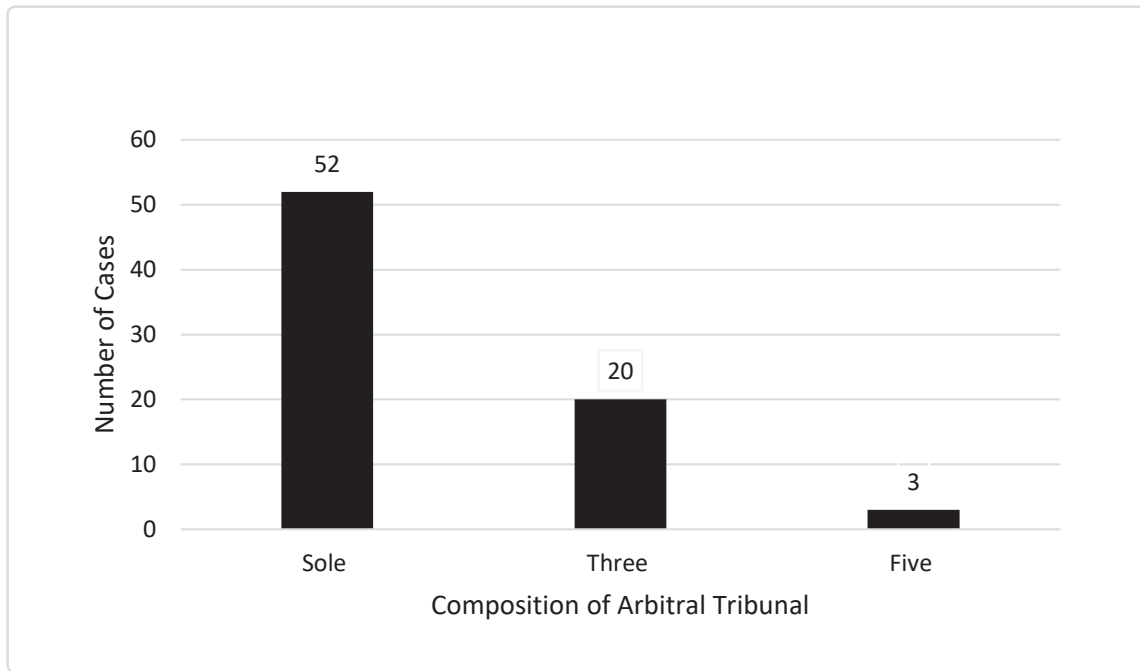
3. Length of the Final Order



The study revealed that the final judgment in 71% of the applications was less than fifty pages, while the final judgment in 33% of applications was less than ten pages. Only in 9% of the cases did the orders extend to 150 – 200 pages. The average length of a final order deciding a Section 34 application is approximately 40 pages.

Examining the number of pages of the final judgment is helpful in understanding the Court’s approach in deciding an application that isn’t an appeal on merits which the High Court routinely decides in Civil and Commercial disputes, but a restricted challenge under narrow grounds prescribed by the Arbitration Act. The length of the final judgment is indicative of the extent to which the High Court delved into the merits of the dispute before deciding the matter. It is pertinent to keep in mind that the legislative intent behind Section 34, reiterated several times by Indian courts, is to provide for a summary challenge mechanism.

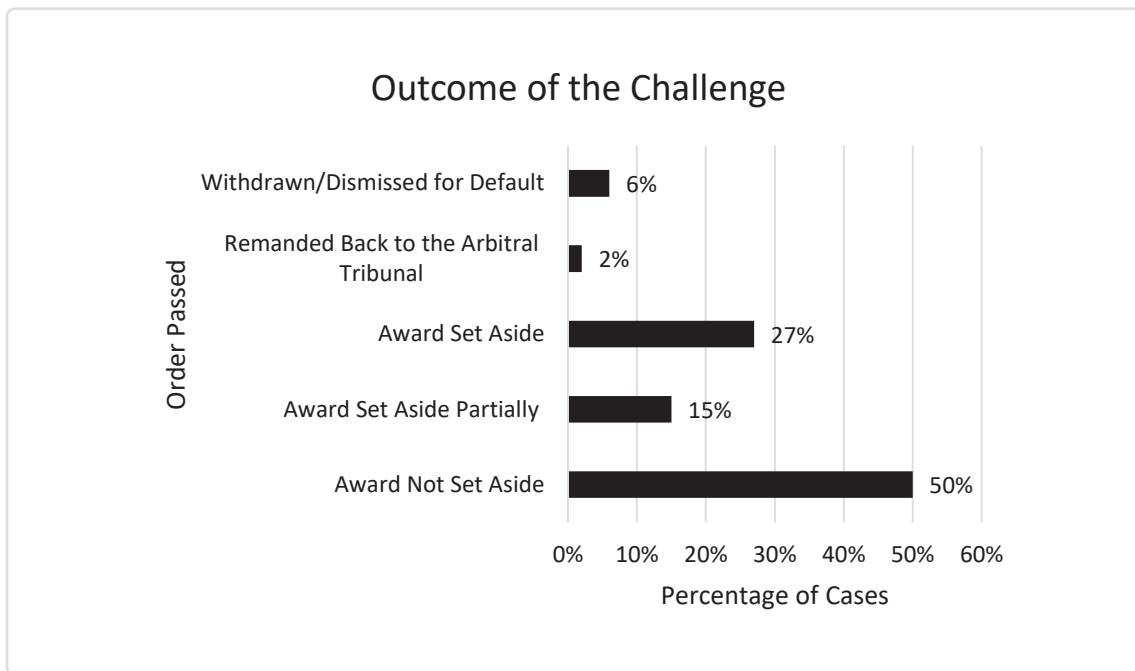
4. Composition Of The Tribunal In Awards Challenged



Note – Data on the composition of the arbitral tribunal was discernible in 75 out of the total 86 applications studied.

The graph above represents the division among cases where there was a sole arbitrator or tribunals comprising three and five arbitrators. There is a clear trend that most of the challenges under Section 34 (69%) arose from awards passed by sole arbitrators, which is unsurprising given that ArbDossier’s previous study found that the Bombay High Court appoints sole arbitrators under Section 11 in a significant majority of the applications adjudicated. Awards passed by three member and five member tribunals constituted only 27% and 4% of applications decided in the said two-year span. It also appears that the Bombay High Court (between 2019-2021) was statistically more likely to set aside an award passed by a Sole Arbitrator over that passed by a multi-member tribunal.

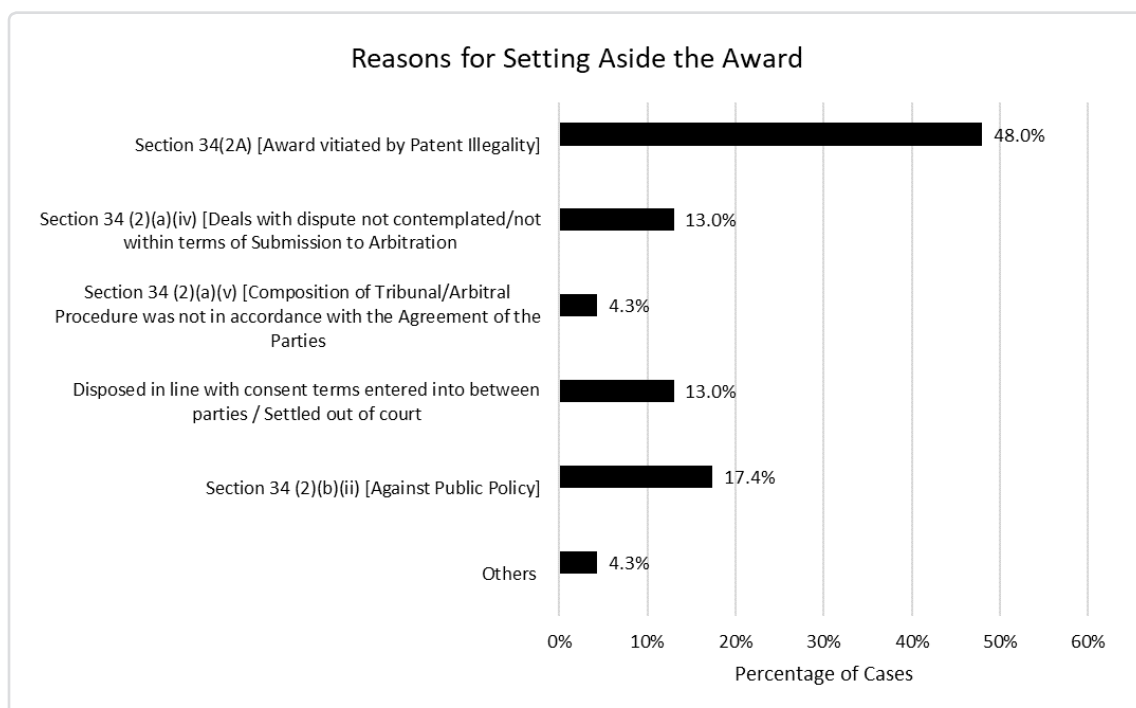
5. Probability of Setting Aside of Award under Section 34



The data collected from applications decided between June 2019- May 2021 shows that the court refused to set aside the award in approximately half of the applications. Amongst the others, the Court partially set aside 15% of the cases while completely setting aside the award in 27% of the cases. There were also minimal instances (2%) of the court remanding the matter back to the Arbitral Tribunal for a reconsideration on limited aspects. 6% of the applications were either withdrawn by the parties or dismissed preliminarily by the court on technical grounds.

When seen along with graph no. 2 above, which deals with interim stay, parties in an arbitration proceeding are likely to have to wait a long time before any sort of relief is available in the event that the arbitral award suffers from a defect rendering it liable to be set aside. This would make the process of appointment of the arbitrator and the conduct of the arbitration proceedings attain a high degree of importance, and in some ways may justify the arbitration proceedings being conducted under the aegis of an arbitral institution.

6. Common Grounds Accepted By The Court In Challenges To Awards

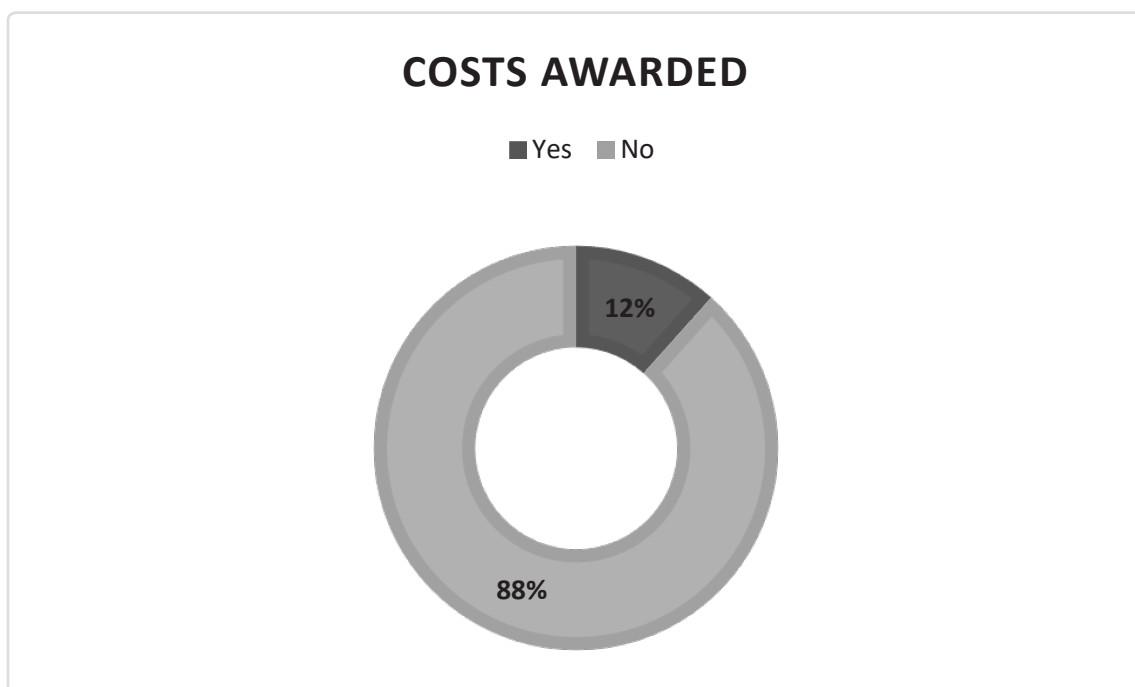


Applications which were successful in a partial or complete set aside or remission to the tribunal were studied further to examine the grounds beneath the applicant's success.

Of the grounds stipulated in the Act, Section 34(2A) (the award being vitiated by patent illegality) was the most used (48%) by the Bombay High Court while setting aside arbitral awards. The next most popular ground on the basis of which arbitral awards have been set aside is the arbitral award being contrary to the public policy of India, under Section 34(2)(b)(ii) (17.4%). The dispute not being contemplated by the arbitration agreement [Section 34(2)(a)(iv)] and the composition of the arbitral tribunal or the arbitral procedure not being in accordance with the agreement [Section 34(2)(a)(v)] both together accounted for 8.3% of the total cases. Furthermore, a significant amount of cases (13%) were also set aside with the consent of parties/ as a result the matter being settled out of court.

It is pertinent that the most common ground used by the Bombay High Court to set aside arbitral awards (patent illegality) arguably allows the greatest discretion and is controversial for being closest to an appeal on merits. Any attempt to decrease the number of awards being set aside – either by the legislature or judiciary should commence with a relook at the ground of patent illegality as understood by Indian courts.

7. Award of Costs



Of the 43 (50%) instances where an application challenging an arbitral award was unsuccessful, the authors report that the Bombay High Court awarded costs in only 5 cases. It can be concluded despite the moderate approach of the Bombay High Court in allowing applications for setting aside an award, costs were not found to have been frequently imposed on unsuccessful applicants between June 2019 and May 2021.

With the high statistical probability of success for a Section 34 applicant and the low risk of costs being imposed, parties who opt to challenge arbitral awards have a lot to gain and not much to lose.

10th January 2022