CONTRACTS CARVED IN STONE: SEPCO AND THE NEW ERA OF ARBITRATION IN INDIAN INFRASTRUCTURE

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ABSTRACT

The Supreme Court of India's September 2025 judgment in SEPCO Electric Power Construction Corp. v. GMR Kamalanga Energy Ltd. marks a significant turning point in Indian arbitration, particularly for the infrastructure and construction sector. The Court set aside a substantial ₹995 crore arbitral award on the ground that the tribunal had "rewritten" the contract by finding an implied waiver of a notice requirement. This finding directly contradicted an express No Oral Modification (NOM) clause.

The ruling emphatically reaffirms the principle that arbitrators must not deviate from the clear, explicit terms of the contract, as mandated by Section 28(3) of the Arbitration and Conciliation Act, 1996. Furthermore, the Supreme Court found a "glaring" violation of Section 18 (equal treatment of parties) because the tribunal waived the notice requirement for one party (SEPCO) while strictly enforcing it against the other (GMR). This unequal application was deemed so perverse that it "shocked the conscience" of the court.

By insisting on literal adherence to contract stipulations and strictly enforcing NOM clauses, the decision strongly tilts the balance toward pacta sunt servanda (agreements must be kept). This creates a more rigid environment, where procedural non-compliance (such as missing notice deadlines) can lead to the total forfeiture of otherwise valid claims.

For the domestic and international infrastructure industry, the judgment signals a retreat from flexible, equity-based arbitration toward a formalist, contract-centric approach. International contractors, accustomed to more pragmatic resolution in other jurisdictions, may face unexpected risks, potentially leading foreign investors to insist on non-Indian arbitration seats. The challenge now is to develop a framework that preserves contractual discipline without undermining the commercial realities of complex projects.

INTRODUCTION

In September 2025, the Supreme Court of India delivered a significant judgment in ***SEPCO Electric Power Construction Corp. v. GMR Kamalanga Energy Ltd.***[1] that has sent ripples through the infrastructure and project finance sector. A massive arbitral award of nearly ₹995 crore in favor of a Chinese EPC contractor (SEPCO) was set aside on the ground that the arbitral tribunal had "rewritten" the contract by deviating from explicit terms. In particular, the tribunal found an implied waiver of a notice requirement, which contradicted a No Oral Modification (NOM) clause.

The Supreme Court upheld the setting aside of the award and emphatically reaffirmed that arbitrators must not deviate from the four corners of the contract. They must decide strictly in accordance with its terms, as mandated by Section 28(3) of the Arbitration and Conciliation Act, 1996.[2] The Court further found that the tribunal had violated fundamental principles of arbitration by according unequal treatment to the parties, which contravened Section 18 of the Act.[3] The findings were so perverse, the Court observed, that they "shocked the conscience" of the court.

This judgment has sparked intense discussion about the balance between contractual sanctity and the equitable resolution of disputes in India's arbitration regime. The infrastructure sector, which includes large EPC (Engineering, Procurement and Construction) contracts, public-private partnerships (PPPs), and project finance arrangements, often involves complex contracts where strict enforcement of every term may sometimes conflict with real-world project exigencies.[4] The SEPCO ruling, by insisting on literal adherence to contract stipulations such as notice requirements, arguably tilts the balance strongly toward pacta sunt servanda (agreements must be kept) and does so at the potential expense of commercial fairness and flexibility.

This paper undertakes an in-depth analysis of the judgment and its ramifications. We examine the case background and holding, dissect the legal principles and doctrines invoked (Section 28(3), no oral modification clauses, waiver and estoppel, equal treatment, and the public policy ground for setting aside awards), review precedent Indian cases on an arbitrator's mandate in

[1] SEPCO Electric Power Construction Corp. v. GMR Kamalanga Energy Ltd , 2025 INSC 1171.
[2] Arbitration and Conciliation Act, 1996, § 28(3), No. 26, Acts of Parliament, 1996 (India).
[3] *id*.
[4] Dr. Sairam Bhat, Public Private Partnership In India A Sectoral Analysis 3-10, (National Printing Press 2019).

relation to the contract, and explore the conflicts this strict approach creates in the infrastructure domain.

BACKGROUND

In 2008, SEPCO (a Chinese state-owned EPC contractor) entered into EPC agreements with GMR Kamalanga Energy Ltd. (an Indian company) to construct a 3×350 MW coal-fired power plant in Odisha. The contracts contained standard clauses requiring the contractor to give written notice of claims (for additional costs or time) within specified periods, and a "No Oral Modification" clause (also referred to as a "No Waiver or Variation" clause) which stipulated that any alteration or waiver of contractual requirements, including the notice requirement must be evidenced by a written agreement signed by both parties. In other words, informal waivers or oral agreements would have no effect unless formally recorded. This kind of clause is common in large infrastructure contracts to prevent later disputes about whether contract conditions were waived informally.[5]

During performance, various disputes arose, particularly over delays and cost overruns. SEPCO eventually demobilized from the site in 2015, apparently after prolonged disagreements. SEPCO initiated arbitration in mid-2015, and in September 2020 the three-member arbitral tribunal rendered a large award in SEPCO's favor. The tribunal held, inter alia, that GMR was liable for project delays and had to pay SEPCO approximately ₹995 crore (net after some counterclaims) as damages and other claims. A critical aspect of the tribunal's reasoning was its finding that SEPCO's failure to strictly comply with the contractual notice-of-claims procedure did not bar its claims, because GMR had allegedly waived the notice requirement through its conduct, in particular, a 2012 email and related communications were interpreted as GMR agreeing to dispense with formal notice.

In effect, the arbitrators treated GMR's conduct as creating an equitable estoppel or implied waiver: even though the contract said "no claim without written notice and no waiver except by signed writing," the tribunal believed it could find a waiver by conduct (here, an email exchange and meetings) that excused SEPCO's non-compliance with the notice condition. This finding was not specifically pleaded by SEPCO in its claim as SEPCO had not explicitly argued

[5] Supra note 1, ¶ 4-8.

"the notice clause was waived by an oral agreement" but the tribunal nonetheless based its award on that theory.

GMR (the Indian party) challenged the award under Section 34 of the Arbitration and Conciliation Act, 1996[6] before the Orissa High Court (Single Judge). GMR argued that the award was vitiated by patent illegality and contrary to public policy, since the tribunal "created an un-pleaded case" of waiver, in direct contradiction to the express contract terms. Specifically, GMR pointed to the No Oral Modification clause (Article 25.5 of the contract) which barred any waiver of notice except through a written amendment signed by both parties. GMR contended that by relying on an informal email and conduct to find a waiver, the tribunal had acted beyond its mandate and in manifest disregard of the contract. Moreover, GMR highlighted a glaring inconsistency that the tribunal excused SEPCO's claims for lack of notice, but conversely rejected GMR's counterclaims on the ground that GMR failed to issue the required notices for those counterclaims. Thus, one party (SEPCO) was relieved from the strict notice requirement, while the other (GMR) was held strictly to it.

The Single Judge of the High Court initially dismissed GMR's Section 34 petition in June 2022, declining to interfere with the award. GMR then appealed to a Division Bench of the Orissa High Court under Section 37 of the Act. In a detailed judgment dated 27 September 2023, the Division Bench reversed the Single Judge and set aside the arbitral award. The High Court found that the tribunal had indeed transgressed the contractual limitations and violated fundamental principles of justice.[7]

DECISION

1. The tribunal's inference of waiver via a 2012 email directly contradicted the NOM clause, and there was no mutual intent in writing to waive the notice requirement. By doing so, the tribunal altered the substantive contract without authority, which "a tribunal, being a creature of the contract, cannot do". This was held to violate Section 28(3) of the Act (duty to decide in accordance with contract terms).

2. The tribunal's creation of a waiver sua sponte (on its own volition) when it was never pleaded by SEPCO was especially criticized. This meant GMR had no opportunity to

[6] Supra note 2, §34.
[7] Supra note 1, ¶ 14.

address or rebut the waiver theory during arbitration, implicating due process concerns. The High Court saw this as a breach of natural justice and Section 18 (equal opportunity to present case).

3. There was clear unequal treatment as SEPCO was forgiven its procedural default (no notice) while GMR's similar lapse (no notice for counterclaims) was fatal to GMR's claims. The Division Bench labeled this "glaring…unequal treatment" in violation of Section 18, noting that no party could have anticipated such one-sided relaxation of terms.

4. The award contained factual errors and findings deemed perverse or unsupported by evidence. For example, awarding payment for a Performance Guarantee Test of Unit 1 despite the tribunal's own finding that the prerequisite test (Unit Characteristic Test) had failed, meaning the condition for payment was not met. Awarding such a claim "impermissibly modified the express terms" (since payment was only due if tests were passed). This was one of several instances where the tribunal's conclusions were so at odds with the contract and record that they "shocked the conscience" of the court.

5. The Division Bench concluded the award was contrary to the fundamental policy of Indian law and amounted to a "patent illegality". It set aside the award in its entirety (and consequently, the Single Judge's order).

SEPCO then appealed to the Supreme Court of India, leading to the September 2025 judgment under discussion. The Supreme Court's judgment strongly underscored several legal propositions which we detail in the next section. In summary, the Court held that:

1. Arbitral tribunals have no power to deviate from or reinterpret the contract beyond its clear terms. Awards "must be within the parameters of the agreement". The tribunal here overstepped its mandate by effectively rewriting a core term (notice requirement) through an unpleaded waiver theory. This was a direct breach of Section 28(3) of the 1996 Act.

2. The presence of a No Oral Modification clause in the EPC contract made it impermissible to find any oral or implied waiver. The only valid waivers or variations had to be in a written amendment signed by both parties. The 2012 email relied on by

the tribunal plainly did not meet this criterion, and treating it as a waiver was legal error. The Supreme Court agreed that Rock Advertising Ltd. v. MWB Business Exchange (UK, 2018) and other authorities illustrate that NOM clauses are to be strictly enforced absent an extremely clear, intentional departure by both parties. No such evidence existed here.

3. Waiver and estoppel doctrines were misapplied by the tribunal. The Court noted that under Indian law, waiver is the voluntary relinquishment of a known right, requiring clear intent, while equitable estoppel (Section 115, Evidence Act) requires a representation by one party and a detrimental reliance by the other. SEPCO neither pleaded nor proved the elements of any such waiver/estoppel, on the contrary, the contract explicitly negated unwritten waivers. Thus, the tribunal's invocation of "waiver by conduct" was unfounded in fact and law.

4. The tribunal's unequal application of the notice requirement was indeed a serious violation of natural justice and Section 18. The Supreme Court termed it a "glaring example of unequal treatment" that the Single Judge should not have swept aside. By accepting SEPCO's claims without notice but rejecting GMR's for want of notice, the arbitrators denied GMR equal opportunity and surprised it with a one-sided relaxation of terms. The Supreme Court found the Single Judge's failure to consider this issue "perverse".

5. On the standard of review, the Court acknowledged that scope under Section 37 (appeal) is narrower than Section 34 (original set-aside petition). However, it noted that in this case the Single Judge's refusal to interfere was based on a patent error: the award, on its face, disclosed "gross violations" of fundamental principles (Sections 18 and 28(3)) that even a minimal review should have caught. The Division Bench was therefore justified in not being a "mere spectator" to such egregious flaws. The Supreme Court agreed that courts should generally refrain from interfering unless an error of law is apparent, but here the errors were evident on a bare reading of the award (thus meeting even a strict threshold).

6. Ultimately, the Supreme Court held the award was in conflict with the fundamental policy of Indian law and basic notions of justice, thus meeting the test for being set aside under Section 34(2)(b)(ii) (public policy). The bench explicitly stated that not

setting aside the award "would have hampered the fundamental policy of Indian law as well as the public policy of India". The appeal was dismissed and the award remained nullified.

7. In concluding the case, the Court delivered a strong message: an arbitrator in India is a product of the parties' agreement and cannot indulge in idiosyncratic notions of equity or contract revision. Even if the arbitrator's reasoning or view of the facts is faulty, courts will tolerate it to uphold finality "until an error of law is evident from the award itself or in a document that forms an integral part thereof". Here, because the arbitrator's departures from the contract and unequal treatment were evident in the award, judicial intervention was not only permissible but necessary.

IMPLICATIONS OF THIS DECISION ON THE INDIAN CONSTRUCTION AND INFRASTRUCTURE INDUSTRY

The Supreme Court's ruling in ***SEPCO Electric Power Construction Corp. v. GMR Kamalanga Energy Ltd***. is a landmark decision that has reshaped the contours of arbitral jurisprudence in India. The judgment's insistence on strict adherence to contractual terms, particularly in infrastructure and EPC contracts, represents a shift away from flexible, equity-based arbitration towards a formalist, contract-centric approach. This has serious implications for the Indian construction and infrastructure industry, where contractual obligations often collide with real-world exigencies and commercial practice. The ruling affects a broad spectrum of issues, ranging from notice compliance and arbitral discretion to project finance, investor confidence, and risk allocation.

Procedural Rigidity

One of the most immediate and direct implications of the SEPCO judgment is the elevation of procedural compliance from a recommended best practice to an uncompromisable legal necessity.[8] Infrastructure contracts, particularly those based on international standards such as FIDIC, often include strict requirements for written notices, claim submissions, and approval protocols. Prior to SEPCO, Indian arbitral practice allowed some latitude for interpreting

[8] Prerona Banerjee and Vishal Sinha, What Comes First After the Award: The Relief or the Stay?, SCC Online (Apr 29, 2023), https://www.scconline.com/blog/post/2023/04/29/what-comes-first-after-the-award-the-relief-or-the-stay-a-case-comment-on-sepco-electric-power-construction-corpn-v-power-mech-projects-ltd/

compliance liberally, especially where conduct indicated mutual understanding or where parties acted upon informal exchanges. Tribunals and courts would sometimes uphold claims even when procedural lapses occurred, provided there was no substantial prejudice.

In ***Bharat Coking Coal Ltd. v. Annapurna Construction***[9], the Supreme Court struck down an arbitral award because the arbitrator granted relief not envisaged by the contract. This precedent shows that even prior to SEPCO, Indian courts were inclined to respect express contractual terms. However, post-SEPCO, that inclination has turned into a judicial mandate. The Court's ruling that the tribunal acted beyond its jurisdiction by recognizing an implied waiver of notice despite an express "No Oral Modification" clause underscores that equity cannot trump explicit contractual terms.

Consider a hypothetical scenario: a contractor faces repeated delays due to the employer's indecision on site clearance. The contractor documents these delays internally and discusses them in weekly meetings, but does not issue the formal notices within the 14-day period prescribed in the contract. Later, the contractor raises a claim for compensation. Under the SEPCO framework, unless these delays were notified in strict conformity with the contract, and unless the employer signed off on a waiver, the claim could be dismissed outright regardless of its substantive merit.[10] This has far-reaching implications in the Indian context where many infrastructure contracts involve daily coordination between contractors and public officials, often resulting in a large amount of undocumented or informally resolved changes.

Additionally, smaller contractors who lack sophisticated contract management teams may be disproportionately affected. They may struggle to document each event in real-time or may be unaware of the severe consequences of non-compliance.[11] This creates a disparity between large and small market players, reinforcing an ecosystem where procedural proficiency becomes more important than actual performance or delivery.

Erosion of Commercial Flexibility

The judgment sharply reduces the interpretative latitude of arbitrators in resolving disputes

[9] Bharat Coking Coal Ltd. v. Annapurna Construction, (2003) 8 SCC 154
[10] Ellen Dannin, Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and their Effects on State and Local Governance, 6 NW. J. L. & SOC. POL'y 47 (Winter 2011).
[11] Joshua Reddaway, Commercial and contract management: Insights and Emerging best practice, National Audit Office, https://www.nao.org.uk/wp-content/uploads/2016/11/Commercial-and-contract-management-insights-and-emerging-best-practice.pdf

arising from infrastructure contracts. Traditionally, arbitration was preferred in this sector precisely because it allowed subject-matter experts to incorporate commercial reasonableness into decision-making. Arbitrators would frequently look beyond the four corners of a contract to assess intent, course of dealing, and practical outcomes. SEPCO marks a decisive retreat from this model. The Supreme Court made it clear that arbitrators cannot read into a contract what is not there, even if doing so would ensure fairness or resolve ambiguity.

In ***Ssangyong Engineering v. NHAI,***[12] the arbitrators substituted a contractual formula for price adjustment with another index. The Court set aside the award, saying the tribunal had re-written the contract. SEPCO builds on this by emphasizing that even equitable reasoning, like estoppel or waiver inferred from conduct, cannot override express terms. This case was a turning point in understanding the limits of arbitral discretion in contract-based disputes.

Imagine an arbitration where a contractor has continuously informed the project engineer verbally and via emails of a change in scope. Payments were made for some of this work. However, the contractor never secured a signed variation order. The arbitrator, sympathetic to the contractor, awards compensation.[13] Post-SEPCO, this would be struck down as the contractor failed to obtain formal variation in writing. Arbitrators no longer have the space to apply commercial fairness in contravention of clear procedure.

Procedural Non-Compliance as a Complete Bar to Claims

Perhaps the most chilling message from SEPCO is that non-compliance with procedural clauses, particularly notice periods and documentation requirements, can lead to total forfeiture of claims, even when the underlying claim is substantively valid.

In ***Indian Oil Corp. v. Shree Ganesh Petroleum***[14]***,*** the Supreme Court invalidated an award where the arbitrator granted interest above the rate prescribed in the contract. This ruling, like SEPCO, reinforces that deviation from contract terms, even if seemingly justified, is impermissible. The case sets the tone that once a contract includes a provision on interest, damages, notice period, or procedural step, tribunals cannot bypass it without express written

[12] Ssangyong Engineering v. NHAI, 2019 SCC OnLine SC 677
[13] Tjaart van der Walt, Contracts for Infrastructure Projects: An International Guide to Application, 17 CONST. L. INT'l 55 (September 2022)
[14] Indian Oil Corp. v. Shree Ganesh Petroleum, 2022 SCC OnLine SC 131

relaxation.

In a hypothetical case, suppose a contractor delays submission of a time extension claim by one day due to an internal communication error. If the contract includes a strict 28-day deadline and a NOM clause, then post-SEPCO, tribunals cannot accept the claim even if the delay was minor and the employer was already aware of the issue. This imposes a black-and-white rule where minor lapses can nullify years of legitimate work.

Another scenario could involve a contractor in a smart city project, who incurred extra costs due to a change in underground cable alignment. The contractor informed the supervisor informally but did not submit the revised claim in writing. Even if the client eventually approved some work verbally, the final claim could be dismissed in arbitration for lack of proper notice. This turns procedural compliance into a gatekeeper for justice.

Shift in Risk Allocation and Strategic Behavior by Employers

A more subtle but powerful consequence of the judgment is the shift in bargaining power toward employers, particularly government entities. Public sector employers can now insist upon strict procedural compliance knowing that courts will likely support them. This could incentivize risk-averse behavior, where employers take a technical view of disputes and reject otherwise legitimate claims on the ground of procedural irregularity.[15]

In ***State of Rajasthan v. Nav Bharat Construction***[16] (2006), the Supreme Court invalidated an award because the arbitrator ignored a clause which made certain determinations by the engineer final and non-arbitrable. SEPCO echoes this judicial sentiment and expands it to procedural aspects. The trend suggests a greater willingness by courts to uphold employer defenses rooted in technical contract terms.

Employers might now build layered defenses. First, they could object to admissibility of claims on procedural grounds. Second, they could reject claims for lack of quantified notices. Third, they could argue lack of third-party approvals where required. The cumulative effect would be to shift the burden of compliance entirely onto contractors, even in cases of employer default.

This incentivizes contractors to become hyper-defensive. In many cases, contractors might

[15] Harry T. Edwards, Emerging Duty to Bargain in the Public Sector, The , 71 MICH. L. REV. 885 (April 1973).
[16] State of Rajasthan v. Nav Bharat Construction 2005 SCC 11 197.

issue notices for every delay, however minor, to avoid estoppel. This can overwhelm project communications, lead to friction between teams, and reduce efficiency. The underlying trust that makes complex infrastructure partnerships workable may deteriorate.

Project Finance and Lender Rights

Project finance structures depend on the predictability of cash flows and enforceability of contracts. Lenders, including multilateral institutions, often insist on the inclusion of arbitration clauses to ensure neutral and efficient resolution of disputes.[17] SEPCO enhances enforceability but simultaneously increases the risk that valid claims may be lost due to procedural faults, thereby affecting revenue realization.

In ***Delhi Airport Metro Express v. DMRC***[18], the Court upheld an arbitral award despite allegations of incorrect interpretation, emphasizing that plausible views should not be disturbed. SEPCO, by contrast, shows that procedural flaws visible on the face of the award, like unequal application of notice requirements, are non-negotiable. This distinction is critical for lenders and financial advisors.

Suppose a special purpose vehicle (SPV) executing a highway under a hybrid annuity model (HAM) is unable to recover ₹200 crore due to a procedural lapse. The SPV still owes monthly annuity payments to lenders, but its working capital is constrained due to unrecovered costs. This increases the risk of default and triggers debt restructuring. Lenders may respond by demanding periodic legal audits, contract compliance certificates, and reserve accounts to insulate themselves from procedural lapses. This adds costs and bureaucracy to infrastructure financing.

Lenders might also re-evaluate their appetite for projects where the public authority has a rigid or bureaucratic history. In effect, the SEPCO ruling could influence how financial institutions assess government risk, especially when contracts are silent on waiver possibilities. This has implications for the cost of capital and the risk premium attached to Indian infrastructure projects.[19]

[17] Franco Ferrari , Matthieu de Boisseson , Inka Hanefeld , Mark Kantor, Ryan Reetz & Laurence Shore, Multi-Party Arbitration Issues in International Project Finance Arbitration, 9 N.Y.U. J.L. & BUS. 759 (Summer 2013).
[18] Delhi Airport Metro Express v. DMRC, 2024 SCC OnLine SC 522.
[19] Supra note 17.

INTERNATIONAL PERSPECTIVE

The SEPCO v. GMR judgment is one of the most consequential rulings in Indian arbitration jurisprudence, particularly for the construction and infrastructure sector where international contractors, joint ventures, and financiers are heavily involved. The Court emphasized strict adherence to contract terms, holding that arbitrators cannot infer waiver or modification contrary to contractual stipulations. For international parties, this judgment raises complex issues: how will foreign contractors navigate Indian-seated arbitrations, how will foreign awards be enforced in India, and how does this strict approach compare to global arbitration norms? This analysis expands on these questions in the context of construction and infrastructure contracts, integrating relevant case law, doctrines, and hypothetical illustrations.

Procedural Rigidity and International Contractors in EPC Disputes

One of the most pressing consequences of SEPCO for international parties is the rigid judicial insistence on procedural compliance. Infrastructure contracts often impose strict notice requirements for extension of time (EOT) and cost claims.[20] FIDIC conditions, commonly used in international projects, require contractors to give notice within 28 or 30 days. International contractors operating in India may expect that if an employer has actual knowledge of delays or has acknowledged claims in meetings, strict compliance with notice provisions may not be fatal.[21] In jurisdictions like England or Singapore, tribunals and courts often recognize conduct or estoppel in such cases. However, SEPCO underscores that Indian courts will not allow arbitrators to infer waiver of procedural requirements when an NOM clause is in place. This creates serious risks for international EPC contractors accustomed to more flexible enforcement.

Consider a hypothetical metro project in Bangalore undertaken by a Spanish contractor. During execution, delays arise due to the government's failure to acquire land. The contractor raises claims in emails and at project meetings but does not issue formal notices as required by the contract. A tribunal awards compensation based on the employer's acknowledgment of delays. Under SEPCO, such an award could be annulled because implied waiver is impermissible. For the contractor, this represents not only financial loss but also a shock when compared to

[20] Mehmet Ata Sarikatipoglu, Timur Arif Capkin & Fatma Karaalioglu, Material Procurement Structures in EPC Contracts, 14 GSI ARTICLETTER 43 (2016).
[21] Patricia D. Galloway, The Art of Allocating Risk in an EPC Contract to Minimize Disputes, 38 CONSTR. LAW. 26 (Fall 2018).

arbitration-friendly jurisdictions that prioritize commercial fairness. Cases such as ***Krishna Bahadur v. Purna Theatre***[22] in India stress that waiver must involve clear intent, making reliance on conduct inadequate. International contractors may therefore find themselves penalized for assuming that industry practice and conduct are sufficient to preserve claims.

No Oral Modification Clauses and Foreign Expectations of Flexibility

Another major issue concerns the enforcement of No Oral Modification clauses. These clauses, which stipulate that contract terms can only be changed through formal written amendments, are increasingly common in infrastructure contracts. International parties often rely on flexibility, especially in long-term projects where unforeseen conditions require pragmatic adjustments. In ***Rock Advertising Ltd v. MWB Business Centres Ltd***[23], the UK Supreme Court upheld NOM clauses but allowed tribunals to interpret conduct and enforce oral variations as errors of law rather than jurisdictional breaches. English courts defer to arbitral awards, treating disregard of NOM clauses as a legal mistake rather than as excess of jurisdiction.

Indian courts, however, have taken a stricter stance. In SEPCO, the Supreme Court ruled that disregarding the NOM clause amounted to the tribunal exceeding its jurisdiction under Section 28(3). This is a striking divergence from international norms. Consider a highway BOT project where a German contractor and an Indian state authority orally agree to extend deadlines after severe monsoon flooding. In London-seated arbitration, the tribunal could accept such oral modification as valid based on commercial conduct, and courts would be reluctant to interfere. In India, however, a tribunal that awards compensation on this basis risks annulment for exceeding its mandate.[24] For international contractors, this means that even good-faith accommodations and oral agreements recognized in other jurisdictions may carry no weight in Indian arbitrations.

Equal Treatment and Fair Opportunity in International Projects

Section 18 of the Indian Arbitration Act[25] requires equal treatment and full opportunity for parties to present their case. In SEPCO, the Court found that the tribunal's handling of

[22] Krishna Bahadur v. Purna Theatre, 2004 INSC 478.
[23] Rock Advertising Ltd v. MWB Business Centres Ltd, [2018] UKSC 24.
[24] Gary B. Born , International Commercial Arbitration (Third Edition), 3rd edition (© Kluwer Law International; Kluwer Law International 2021) pp. 2601 – 2758.
[25] Arbitration and Conciliation Act, 1996, § 18, No. 26, Acts of Parliament, 1996 (India).

procedural objections violated this principle. International contractors face unique challenges in this context. Large-scale construction arbitrations involve voluminous documentation, technical reports, and expert evidence.[26] Arbitrators frequently manage proceedings by limiting evidence, rejecting late submissions, or focusing hearings to prevent inefficiency. In Singapore, the Court of Appeal in ***BLC v. BLB***[27] held that arbitral discretion to streamline procedure does not breach natural justice unless substantial prejudice occurs. In India, however, tribunals run the risk that any limitation could be characterized as denial of equal treatment.

Public Policy and Enforcement of Foreign Awards in India

Another significant consequence for international contractors concerns enforcement of foreign arbitral awards. Under Section 48 of the Arbitration Act, Indian courts can refuse enforcement if an award violates public policy. In ***Renusagar v. GE***[28], the Supreme Court defined public policy narrowly, focusing on fundamental principles of law, morality, and justice. However, in ***NAFED v. Alimenta***[29] and SEPCO, Indian courts expanded public policy to include disregard of contract terms and procedural stipulations. For international contractors, this means even foreign-seated awards may not be enforceable in India if they appear to disregard strict procedural requirements.

Consider a tribunal seated in Paris that grants damages to a Korean EPC contractor against an Indian authority for delays acknowledged through correspondence. In France, the award would be respected under ***Tecnimont v. Avax***[30], where French courts emphasized arbitral autonomy in contract interpretation. Yet, when enforcement is sought in India, the Indian authority could resist by citing SEPCO, arguing that waiver was impermissibly inferred. Indian courts may refuse enforcement on public policy grounds. For foreign contractors, this unpredictability undermines the very purpose of selecting neutral foreign seats.

Kompetenz-Kompetenz and Judicial Intrusion into Tribunal Authority

Globally, the kompetenz-kompetenz doctrine ensures that arbitral tribunals decide their own

[26] Shubhang Setlur & Zehaan Trivedi, Pre-Arbitration Procedures (Section 1 - Section 15) of the 1996 Arbitration Act: A Comparative Analysis between the UNCITRAL Model Law and the Indian Judicial (Mis) Interpretations of the Pre-Arbitration Procedures of the Indian Arbitration Act, 1996, 1 NLIU L. REV. 123 (2010).
[27] BLC v. BLB, [2014] SGCA 40.
[28] Renusagar Power v. Genral Electric Company, AIR 1994 SC 860.
[29] NAFED v. Alimenta S.A., (2020) SCC OnLine SC 381 (India).
[30] Tecnimont v. Avax, Judgment of the Reims Court of Appeal 10/02888, 2 Nov 2011(France).

jurisdiction.[31] Swiss and French courts treat procedural preconditions, such as time limits or dispute board referrals, as matters of merits.[32] Indian courts, however, are increasingly treating such issues as jurisdictional in nature. In SEPCO, the Supreme Court ruled that the tribunal exceeded its jurisdiction by interpreting waiver contrary to the NOM clause. For international contractors, this blurs the line between jurisdictional defects and interpretative choices, exposing awards to annulment on grounds that would not be available in other jurisdictions.

Waiver, Estoppel, and Conduct in Construction Contracts

Construction projects frequently depend on waiver and estoppel, especially when employers approve additional works, pay interim certificates, or issue oral directions. International contractors expect tribunals to recognize these doctrines. In ***ICC Case No. 9333***[33], a tribunal upheld additional cost claims based on correspondence despite lack of formal notice. However, SEPCO sharply restricts the use of waiver and estoppel in India. The Court held that implied waiver was invalid in the presence of an NOM clause. For international contractors, this creates practical challenges. Imagine a Japanese contractor executing a metro project with an Indian authority. The authority pays regularly for extra works without issuing formal variation orders. In arbitration, the contractor argues estoppel, claiming the authority cannot later deny liability. Under SEPCO, an award granting such claims could be annulled, since reliance on conduct is insufficient. This consequence directly undermines the use of doctrines central to construction practice.

Impact on Public-Private Partnerships and Foreign Investment in Infrastructure

Perhaps the most significant consequence of SEPCO is its effect on public-private partnerships and foreign investment in infrastructure. PPPs in highways, metros, airports, and renewable energy depend on foreign contractors and financiers. These contracts often include clauses on force majeure, change in law, and early termination, which require flexible application. SEPCO limits arbitral ability to interpret these clauses pragmatically. For example, in a renewable energy PPP where an Italian contractor faces regulatory delays, oral agreements to extend

[31] Thomas E. Carbonneau, Judicial Approbation in Building the Civilization of Arbitration, 113 PENN ST. L. REV. 1343 (Spring 2009).
[32] Huw R Watkins, Kompetenz-Kompetenz: Should the Arbitral Tribunal Exclusively Determine Whether a Right to Arbitrate Has Been Waived?, Kluwers Arbitration (April 5, 2023) https://legalblogs.wolterskluwer.com/arbitration-blog/kompetenz-kompetenz-should-the-arbitral-tribunal-exclusively-determine-whether-a-right-to-arbitrate-has-been-waived/.
[33] ICC Award No. 9333, 10 ICC Bull. No. 2, 1999, at 102 et seq.

timelines may be recognized abroad but invalidated in India. French courts, as in ***Tecnimont v. Avax***[34], respect arbitral discretion in construction disputes. By contrast, SEPCO signals that Indian courts will not tolerate arbitral adaptation to commercial reality. This divergence discourages foreign participation and may lead to demands for non-Indian seats, raising costs and sidelining Indian arbitration institutions.

Sectoral Hypotheticals Demonstrating International Consequences

Consider three hypothetical projects to illustrate the consequences further. In a hydropower project involving a Canadian contractor and an Indian state authority, informal extensions of time are acknowledged in site meetings. A Delhi-seated tribunal grants relief. The award is annulled under SEPCO for ignoring formal notice requirements. In a highway BOT project involving a German contractor and an Indian authority, oral agreements to extend completion deadlines are recognized by a London tribunal. The award survives in England but may face enforcement hurdles in India due to SEPCO. In a metro rail project involving a Japanese contractor, continuous payment for additional works without variation orders creates estoppel. A tribunal seated in Singapore grants compensation. Enforcement in India may still fail if courts apply SEPCO reasoning. These hypotheticals show that international contractors cannot rely on practices accepted elsewhere if Indian law or enforcement is involved.

CLARIFYING CONTRACTUAL DISCIPLINE WITHOUT UNDERMINING COMMERCIAL REALITY

The first element of the framework should be to distinguish between mandatory contractual terms that safeguard fundamental rights and procedural requirements that are designed for efficiency but may be relaxed without undermining the bargain. Indian courts must identify clauses that are jurisdictional in nature, such as arbitration agreements and governing law, versus clauses that are procedural, such as time-barred notice provisions. Tribunals should be given discretion to interpret and relax procedural requirements if parties have acted consistently with commercial fairness. This approach reflects international practice, where English courts under the Arbitration Act 1996 intervene only for serious irregularity under Section 68, and errors of law are appealable only under Section 69 if the parties expressly agree.[35] The UNCITRAL Model Law, adopted in Singapore and Hong Kong, also grants tribunals broad

[34] Supra note 30.
[35] Arbitration and Conciliation Act, 1996, § 68, Acts of Parliament, 1996 (England).

powers over procedural matters, emphasizing efficiency and fairness rather than rigid formality.

Harmonizing the Role of NOM Clauses in Construction Disputes

No Oral Modification clauses pose a recurring challenge in infrastructure contracts. While they protect contractual certainty, they often conflict with on-site adjustments that are unavoidable in large projects.[36] The framework should recognize that NOM clauses should not automatically preclude tribunals from considering conduct-based variations. Instead, tribunals should be empowered to distinguish between substantial amendments to contract terms, which must be written, and operational modifications, which may be inferred from conduct and documented in project records. Courts should treat disputes over NOM clauses as matters of interpretation, not jurisdiction. This would align Indian arbitration with English law following ***Rock Advertising v. MWB Business Centres***[37], where NOM clauses were upheld but the analysis was framed as contract law rather than arbitral excess of power. It would also align with the approach in the United States under the Federal Arbitration Act[38], where arbitral awards are rarely disturbed for contract interpretation issues, and in ICC practice, where arbitral tribunals often uphold modifications inferred from the conduct of the parties in construction disputes.[39]

Strengthening Natural Justice While Preserving Tribunal Efficiency

Equal treatment of parties must remain a cornerstone of arbitration. However, its application must be nuanced in construction disputes where the volume of evidence and documentation is massive.[40] The framework should establish that arbitral discretion in case management, including limiting late submissions or excluding repetitive evidence, does not constitute denial of natural justice unless clear prejudice is demonstrated. This reflects international approaches. In Singapore, under the International Arbitration Act and the UNCITRAL Model Law, courts defer to tribunal discretion unless the breach materially prejudices a party. Swiss law under the

[36] Lee Crook and Gwendoline Davies, No Oral Modification/anti-variation in commercial contracts, Walker Morris (27th May 2022) https://www.walkermorris.co.uk/comment-opinion/no-oral-modification-anti-variation-in-commercial-contracts-latest-guidance/ .
[37] Rock Advertising Ltd v MWB Business Exchange Centres Ltd, [2018] UKSC 24.
[38] Federal Arbitration Act, 1926, No. 23, Acts of Congress, 1996 (USA).
[39] Rishabh Jogani et al, Construction arbitration in India, Global Arbitration Review (20 August 2025) https://globalarbitrationreview.com/guide/the-guide-construction-arbitration/sixth-edition/article/construction-arbitration-in-india.
[40] Asf Buildtech Private Limited V. Shapoorji Pallonji And Company Private Limited, 2025 INSC 616.

Private International Law Act (PILA) similarly requires prejudice before setting aside an award for lack of equal treatment.[41] Article 18 of the UNCITRAL Model Law, adopted globally, mandates equality of treatment but balances it with tribunal autonomy in case management.[42]

Narrowing the Scope of Public Policy Review in Enforcement of Awards

For India to be seen as a reliable arbitration jurisdiction, the scope of public policy under Sections 34 and 48 of the Arbitration Act must be narrowed.[43] The alternative framework should codify the principle from Renusagar that public policy review is limited to fundamental principles of law, morality, and justice. Courts should be barred from re-examining contract interpretation or procedural findings under the guise of public policy. This mirrors the position in England, where Section 103 of the Arbitration Act 1996[44] implements the New York Convention with a narrow interpretation of public policy, and in Singapore, where the courts emphasize minimal curial intervention. French courts have also consistently applied a restrictive view of public policy when enforcing awards, as seen in the ***Hilmarton***[45] and ***Putrabali***[46] cases, reinforcing a strong pro-enforcement bias.

Reinforcing Kompetenz-Kompetenz and Limiting Judicial Overreach

The kompetenz-kompetenz doctrine must be preserved in its true sense. Indian courts should refrain from treating issues of contract interpretation, such as waiver of notice or compliance with preconditions, as jurisdictional errors. The framework should establish a clear boundary between jurisdictional defects, which courts may review, and merits-based determinations, which are solely within the tribunal's authority. This approach is consistent with Article 16 of the UNCITRAL Model Law, which explicitly recognizes the tribunal's competence to rule on its jurisdiction, subject to limited review by courts.[47] French law under the Code of Civil Procedure is similarly deferential, requiring courts to uphold the principle of negative kompetenz-kompetenz, leaving tribunals to decide first. Swiss courts also distinguish sharply between jurisdictional errors and issues of contract interpretation, ensuring tribunals retain

[41] Swiss Private International Law Act 1987, § 190, Federal Assembly, 1987 (Switzerland).
[42] UNCITRAL Model Law on International Commercial Arbitration, art. 18 (1985).
[43] Arbitration and Conciliation Act, 1996, § 34, 48, No. 26, Acts of Parliament, 1996 (India).
[44] Arbitration and Conciliation Act, 1996, § 103, No. 23, Acts of Parliament, 1996 (England).
[45] Hilmarton Ltd. (U.K.) v. Omnium de Traitement et de Valorisation-OTV (France), [1994] 20 Y.B. Comm. Arb. 663 (1995).
[46] Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices Case No. 05-18.053.
[47] UNCITRAL Model Law on International Commercial Arbitration, art. 16 (1985).

autonomy in resolving construction disputes.[48]

Recognizing Waiver and Estoppel in Infrastructure Projects

Construction contracts involve continuous adjustments. Doctrines such as waiver and estoppel must be preserved to reflect commercial realities. The framework should specify that while formal amendments must comply with NOM clauses, conduct-based acceptance of claims or variations can be recognized where supported by contemporaneous records such as interim payments, meeting minutes, or progress certificates. This aligns with international arbitration practice, where tribunals frequently apply waiver and estoppel to prevent unjust enrichment. In ICC Case No. 9333, waiver by conduct was recognized, demonstrating that rigid formalism is not the international standard.[49] In the United States, doctrines of waiver and estoppel are similarly applied in construction disputes, ensuring that employers cannot deny liability for variations they have accepted in practice.

Safeguarding Public-Private Partnerships and Foreign Investment

The framework must also address the investment climate. PPPs attract international contractors and financiers, who demand predictability in dispute resolution. The framework should guarantee that disputes over force majeure, change in law, or early termination are treated with flexibility, allowing tribunals to adapt to evolving project conditions. This mirrors the approach in France, where courts consistently uphold arbitral discretion in interpreting complex infrastructure contracts, as in ***Tecnimont v. Avax***.[50] Singapore also follows a deferential approach, reinforcing party autonomy and tribunal discretion. By adopting similar principles, India would reassure investors that arbitral awards in PPP disputes will not be annulled for pragmatic adjustments, thereby harmonizing with the global trend of supporting investment arbitration.

Institutional and Legislative Reform Measures

Finally, institutional reform is critical. Indian arbitral institutions should adopt sector-specific rules for construction disputes, incorporating international best practices such as the Society of

[48] Ashley Cook, Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz, 2014 Pepp. L. Rev. 17 (2014).
[49] ICC Award No. 9333, 10 ICC Bull. No. 2, 1999, at 102 et seq.
[50] Supra note 30.

Construction Law protocols. Legislative amendments should clarify the narrow scope of judicial review, codify the principles of kompetenz-kompetenz, and restrict public policy challenges. Comparative models exist in the UK Arbitration Act 1996, the Singapore International Arbitration Act, and the Swiss PILA, all of which restrict judicial intervention and emphasize finality. Judicial training in construction arbitration is also necessary to ensure consistent application of principles. Adopting these reforms would place India in line with arbitration-friendly jurisdictions and enhance its credibility as a seat of arbitration and enforcement.

CONCLUSION

The SEPCO v. GMR Kamalanga ruling represents a decisive moment in India's arbitration jurisprudence, especially within the construction and infrastructure sector where procedural flexibility has often been a practical necessity. By emphasizing the sanctity of contract terms and the binding force of clauses such as No Oral Modification and strict notice provisions, the Supreme Court has sought to create a regime of certainty and predictability. The judgment strengthens investor confidence in the enforceability of contracts, aligns with a broader global trend toward contractual discipline, and reaffirms that arbitral tribunals are creatures of the agreement and cannot disregard express terms under the guise of equity. At the same time, it highlights the limits of arbitral discretion and signals that tribunals must not rewrite or reinterpret obligations beyond the four corners of the contract.

For the infrastructure industry, the consequences are more nuanced. Large EPC contracts and public private partnership arrangements are executed in complex environments where day to day realities often necessitate informal adjustments. The insistence on strict procedural compliance risks undermining legitimate claims and disproportionately affects smaller contractors with limited legal resources. By transforming procedural requirements into jurisdictional barriers, the ruling tilts the balance of risk heavily against contractors and shifts bargaining power toward employers, particularly public authorities. This recalibration may encourage defensive practices, increase transaction costs, and erode the collaborative trust needed in long term infrastructure projects. The judgment therefore enhances legal certainty but at the cost of commercial flexibility, creating a paradox in which the pursuit of predictability may generate inefficiencies and disputes.

The international implications are equally significant. Foreign contractors accustomed to more

pragmatic approaches in jurisdictions such as England, Singapore, or France may face unexpected risks in Indian seated arbitrations or in the enforcement of awards in India. The ruling underscores the divergence between India's contract centric approach and global practices that allow arbitral discretion to balance strict formality with commercial fairness. This divergence may lead foreign investors to insist on non Indian seats or stronger procedural safeguards, potentially sidelining Indian arbitration institutions. At the same time, the ruling gives Indian courts a more prominent role in shaping arbitral outcomes, raising concerns about judicial intervention and predictability for cross border stakeholders.

Ultimately, the SEPCO decision is a reaffirmation of pacta sunt servanda in its strictest sense. It secures the principle that contracts are to be enforced as written and signals to both domestic and international players that Indian courts will not tolerate deviations by arbitral tribunals. Yet it also exposes the tension between legal formality and commercial practicality in infrastructure disputes. The challenge going forward lies in developing an alternative framework through legislative reform, institutional practices, and judicial calibration that preserves contractual discipline without undermining the commercial realities of complex projects. Only then can India reconcile its need for certainty with its ambition to be an attractive hub for infrastructure investment and international arbitration.