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Dedicated to Arbitration for Over Five Decades

STATEMENT OF PURPOSE

The ICA Arbitration Quarterly, published by the Indian Council of Arbitration, aims to be a scholarly journal to provide independent platform and ensure in-depth studies of the most important current issues in Domestic and International Arbitration, giving it even more urgency as a forum for original thinking, threadbare analysis and reporting on regional and global trends in order to contribute to the promotion and development of arbitration practices.

ICA, as such, welcomes the contribution from the intending writers on issues relating to domestic, maritime and international commercial arbitration. Intending writers are requested to read and understand "Guidelines for Authors" given on the inner side of the Back Cover of this Journal. The persons, intending to contribute in the Quarterly, may send article to:

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FROM THE PRESIDENT'S DESK

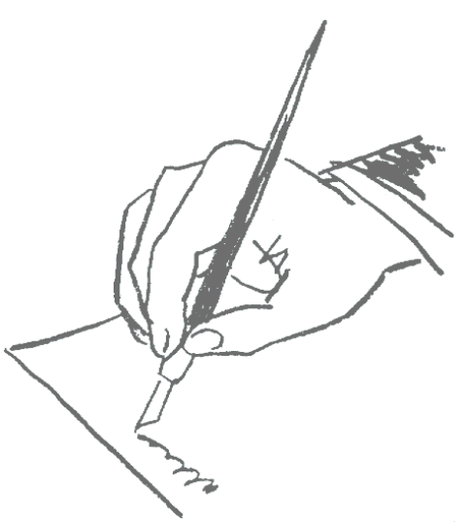
The pandemic has been with us for over a year now and the eco-system created by it has now become the new normal. Although we have successfully adapted to the new environment of working, the second wave of Covid-19 in India has given us much food for thought in terms of new strategies and way forward. In the area of conducting arbitrations, we quickly shifted from in-person to virtual hearings. We also learnt the art of examining the witnesses on a virtual platform and conclude arbitrations with effective and enforceable awards.

As we are in the unlock phase, I take this opportunity to compliment all our stakeholders, who stood up to the challenge of this huge disruption and change. The said interruptions did not deter the working of ICA and the professional development of every single person involved with the ICA fraternity. From filing a fresh case to its constitution, from the examination of any witness to the declaration of the award, ICA has been fully functional and has assisted the parties and the Tribunal in every stage of arbitral proceedings.

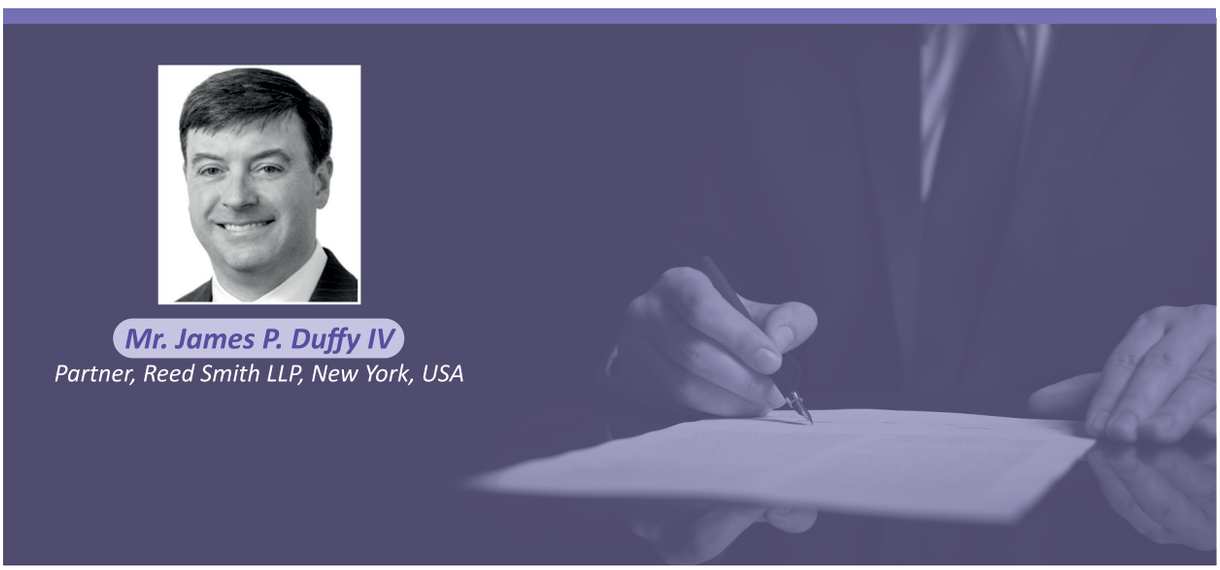
The present situation of restoration of normalcy shall enable us to gain momentum and work harder towards our aim of establishing an efficient and effective ecosystem for arbitration in India, equivalent to the Arbitral Institutes across the globe. Our relentless efforts in doing the same along with your support and cooperation during this period shall help ICA go a long way in achieving its mission!

N G Khaitan

N. G. KHAITAN
President ICA



KEY REASONS TO ARBITRATE CROSS-BORDER LIFE SCIENCES DISPUTES



Mr. James P. Duffy IV

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This article examines the key reasons why the life sciences industry should employ international arbitration as its default dispute resolution mechanism for cross-border commercial contracts and disputes.

Background The life sciences industry is one of the most significant sectors of the global economy, and as the pharmaceutical subsector alone demonstrates, the industry routinely engages in significant cross-border economic activity. For instance, the United States now imports over twice as many pharmaceutical products as it exports. China manufactures most of the world's active pharmaceutical ingredients (APIs), and India imports a significant portion of that API to make finished pharmaceutical products that India then exports around the world. Indeed, as the early days of the pandemic showed, limitations on the ability to manufacture API in China spawned export restrictions in India, which raised concerns that the United States and other countries would face antibiotic and acetaminophen shortages.

The COVID-19 crisis has also highlighted another trend that has been occurring in the life sciences industry for years-namely, long-term collaborations between companies from different countries. Three of the COVID-19 vaccines that are available in the United States and Western Europe at the time of writing this article were either developed through collaborations between companies from different countries or are otherwise dependent upon such collaborations for manufacturing and distribution, and a fourth also resulted from development and manufacturing collaborations.

Consequently, the COVID-19 crisis has starkly reinforced that the life sciences industry relies heavily on cross-border cooperation, particularly through long-term collaboration arrangements.

Despite that market reality, life sciences companies have not adopted international arbitration as a default dispute resolution mechanism as readily as companies in other industries have done. Whether that is a function of historical antipathy towards arbitration, a belief that courts are better suited to resolving certain commercial disputes, or simply a lack of awareness of the advantages that international arbitration offers, statistics from major arbitral institutions show a growing, but relatively low, overall number of life sciences arbitrations. Advantages International Arbitration Offers the Life Sciences Industry

Key Reasons to Arbitrate Commercial Cross-Border Life Sciences Disputes That reality should change, however, because international arbitration offers numerous advantages over national court litigation for resolving most cross-border commercial life sciences disputes. Eight of those advantages are:

(A) Arbitrator Expertise: The life sciences sector is one of the most complex segments of the global economy, and international arbitration permits disputes to be resolved by adjudicators that have true industry expertise, as well as cross-border commercial expertise, instead of leaving those disputes to national courts that may not have either.

(B) Confidentiality: Cross-border commercial transactions in the life sciences sector often involve trade secrets, intellectual property, and sensitive commercial information that participants want to shield from both competitors and the market, and a properly crafted arbitration clause can help ensure that the details (and sometimes the existence) of a dispute are kept confidential. That not only protects sensitive commercial information, but also facilitates settlement.

(C) Reasonable and Proportionate Disclosure: International arbitration helps ensure that the information exchanged in a crossborder commercial life sciences dispute is not only relevant to the issues, but also material to the dispute's resolution, which helps keep discovery (and the entire dispute resolution process itself) more efficient and targeted, especially when discovery is managed by an experienced arbitrator with industry expertise.

(D) Procedural Flexibility: Long-term commercial arrangements in the life sciences sector are commonplace, and those arrangements spawn a variety of disputes for which a one-size-fits-all procedural approach generally does not work. For instance, a long-term development and commercialization agreement that is designed to last for a decade or more might spawn a commercially reasonable efforts disagreement that requires voluminous submissions and more robust discovery. That same commercial arrangement, however, might generate basic royalty disputes that can be easily decided in short, documents-only arbitrations. International arbitration allows the parties to deal with each of those disputes rationally by crafting appropriate procedures for each one (frequently after the dispute has crystalized), instead of subjecting both to the same inflexible court procedures.

(E) Single Venue Proceedings: Cross-border commercial life sciences disputes frequently implicate multiple

jurisdictions, and international arbitration permits those disputes to be resolved in one forum, under a single set of procedural rules, pursuant to one governing law, with a single outcome, instead of litigating in multiple forums that might move at different speeds, pursuant to a variety of national laws that may not offer the same forms of relief, and all of which can reach different and inconsistent conclusions.

(F) Global Enforceability: Awards obtained in the single-venue proceedings described above can be globally and concurrently enforced in any of the 166 countries that have currently acceded to the New York Convention. This is particularly valuable when parties need global emergency interim relief, which they can obtain before the arbitrators and then globally enforce (with some notable exceptions that are beyond the scope of this article).

(G) Investment Protection: International arbitration permits companies that have properly structured foreign investments to bring claims directly against host states under bilateral and multilateral investment treaties if the host state improperly interferes with the investment.

For instance, if a life sciences company invests in a foreign country, and the host state takes some action that unreasonably impairs the investment (e.g., through a compulsory licensing scheme, more onerous patent legislation that the investor legitimately expected when investing, or imposing discriminatory taxes), then the foreign company may be able to bring a claim directly against the host state.

(H) Less Combative Environment: The advantages set forth above collectively result in a less combative dispute resolution environment that finally resolves disputes in a way that preserves long-term commercial relationships from which both parties economically benefit.

In short, international arbitration can help preserve long-term collaborations, whereas contentious national court litigation may permanently destroy that prospect.

Reasons To Arbitrate Commercial Cross-Border Life Sciences Disputes Conclusion The eight benefits set forth above emphasize why international arbitration should be the dispute resolution mechanism of choice for cross-border commercial disputes in the life sciences industry, and as more industry participants learn about the benefits, international arbitration will assuredly achieve that status.

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IS THE REMEDY UNDER SECTION 9 OF INDIA'S ARBITRATION AND CONCILIATION ACT, 1996 AVAILABLE POST-AWARD TO THE LOSING PARTY?

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Article 9 of the UNCITRAL Model Law (the "ModelLaw"), **Section 9 of India's Arbitration and Conciliation Act, 1996** ("the Act") entitles the parties to arbitration proceedings to obtain **interim relief** from courts. However, there is one major difference between these two provisions.

Article 9 of the Model Law allows parties to obtain interim relief from the courts at two stages, i.e. (i) before the commencement of arbitration proceedings and (ii) during the course of arbitration proceedings. On the other hand, in addition to the two stages mentioned above, **Section 9** of the Act also entitles parties to obtain interim relief from Indian courts after the arbitral award is made but prior to its enforcement.

Section 9 of the Act itself does not bar any party from approaching the court to seek interim measures under any given situation.

However, recent court judgments have consistently held that after the arbitral award is made, only the winning party in the arbitration proceedings ("successful party") is entitled to obtain interim reliefs from the courts, whereas, the losing party in the arbitration proceedings ("unsuccessful party") is not entitled to seek any remedy under **Section 9**.

This approach of the courts gives rise to a debatable issue which is currently pending for the consideration of the Supreme Court of India in ***Home Cares Retail Marts Pvt. Ltd. v. Haresh N. Sanghavi*** **(SLP (C) No. 29972 of**

2015). This post highlights the important judgments given by various High Courts regarding this issue and then briefly analyses whether an unsuccessful party in the arbitration proceedings should be entitled to seek a remedy under **Section 9** of the Act.

Key Judgments Highlighting This Issue

The Bombay High Court delivered the landmark judgement on the issue in ***Dirk India Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd.*** **(2013) ("Dirk India").** In this case, a Division Bench of the Bombay High Court observed that after an arbitral award is made, interim relief can only be sought to safeguard the fruits of the proceedings until the enforcement of the award.

> It further held that the purpose of providing interim relief after the passing but before the enforcement of the arbitral award is to secure its value for the benefit of the party that seeks the enforcement of the award. Thus, after the award is made, the remedy under **Section 9** can only be obtained as a step-in aid of enforcement of the arbitral award. On the aforesaid basis, it held that as the unsuccessful party in the arbitration proceeding has no right over the subject matter of the dispute at the stage of enforcement, such party is not entitled to seek any remedy under **Section 9** of the Act.

The Bombay High Court followed Dirk India's rationale in ***Wind world India Ltd. v. Enercon Gmbh and Ors. (2017)*** and ***Home Care Retails Pvt. Ltd. v. Haresh N. Sanghavi*** **(2015)**, and the Delhi High Court in the recent case of Technimont Pvt. Ltd. v. ONGC Petro Additions (2020).

Another important point for consideration regarding this issue is whether a party whose claims are partly rejected and partly accepted in the arbitral award would be entitled to obtain interim relief from the Court under **Section 9**. The Delhi High Court addressed this issue in ***Nussli Switzerland Ltd. v. Organizing Committee Commonwealth Games*** **(2014)**

> where it was held that a party whose claims are partly rejected and partly accepted in the arbitral award, will not be entitled to seek interim relief under Section 9 if the amount of its claims subsumes into a larger amount awarded in favor of the opposite party.

This judgment impliedly clarifies that after the award is made, only the parties whose claims are pending for enforcement against the opposite party, i.e., the successful party, would be entitled to seek the remedy provided under **Section 9.**

ANALYSIS

While it seems that High Courts have largely agreed with each other on the availability of interim relief following the passing of an arbitral award, there are additional factors that these judgments have not factored in.

Firstly, as already stated, **Section 9** of the Act itself entitles 'any party' to obtain interim relief from the Court at three stages, i.e. (i) before the commencement of arbitration proceedings; (ii) during the course of the arbitration proceedings; and (iii) after the arbitral award is made but prior to its enforcement.

The term 'party' has been defined under **Section 2(1)(h) of the Act** as a 'party to an arbitration agreement'. Hence, applying the literal rule of interpretation of statutes, all parties, i.e., the successful and the unsuccessful parties, are equally entitled to approach the Court to avail the remedy provided under Section 9 at any stage.

The text of **Section 9**, thus, draws no distinction between the rights of the successful and the unsuccessful party in the arbitration proceedings to seek interim relief from the Courts. Therefore, so long as Court finds merit in the **Section 9** application filed by an unsuccessful party in the arbitration proceedings, the courts may grant appropriate relief to the unsuccessful party even after the arbitral award is made.

Secondly, the courts should not incapacitate themselves from granting interim relief in favor of the unsuccessful party in cases where the relief sought creates no negative impact on the rights

of the successful party over the subject matter of the dispute. For instance, in *Wind World (supra)*, the interim relief sought by the unsuccessful party under **Section 9** was the continuation of confidentiality of certain documents during the pendency of the **Section 34** application filed before the court for setting aside the arbitral award. However, the Bombay High Court placed reliance on *Dirk India (supra)* and dismissed the application. It is pertinent to mention that in *Wind World (supra),* the Court failed to notice that the aforesaid relief sought by the unsuccessful party did not create any hindrance on the rights of the successful party over the subject matter of the dispute. Such reliefs are preventive measures that ensure the protection of the unsuccessful party's rights in case the arbitral award is set aside by the Court. Therefore, in such situations, there can be no justified reason to completely prevent the Courts from granting interim relief in favor of the unsuccessful party.

Lastly, while hearing an application for setting aside an arbitral award under section 34 of the Act, when a Court orders a stay on the enforcement of the arbitral award during the pendency of such application, the unsuccessful party may be entitled to obtain interim relief from the court under **Section 9**.

Section 36 of the Act states that courts must have due regard to the provisions of the Code of Civil Procedure 1908 ("CPC") while granting a stay on the enforcement of the arbitral award. As per the provisions of the CPC, the courts have to be satisfied that there exists a prima facie case, irreparable harm, and balance of convenience in favor of the Petitioner before granting the interim relief on any order/decree, etc. Therefore, once the court is satisfied that the aforesaid pre-conditions are fulfilled in the case filed for setting aside the arbitral award by the unsuccessful party, the remedy under **Section 9** may be made available to the unsuccessful party.

One instance that highlights the aforesaid proposition is when a court grants a stay on the

enforcement of the arbitral award on being satisfied that the unsuccessful party has made out a prima-facie case on the ground of fraud. In such a case, it is essential to protect the rights of the unsuccessful parties by providing them with the remedy under **Section 9** even after the making of the arbitral award, in order to protect the subject matter of the dispute during the pendency of the Section 34 petition.

CONCLUDING REMARKS

In the light of the above, it can be argued that the power of the Courts to grant interim measures under **Section 9** should extend to both the parties, i.e., successful and the unsuccessful party in the arbitration proceedings, at any amongst the three stages provided under **Section 9** of the Act. An outright restriction on the Court's power to provide any interim measure to an unsuccessful party in the arbitration proceedings is neither a feasible precedent nor the intention of the legislature. However, the Courts should provide the **Section 9** remedy to the unsuccessful party only in exceptional cases and ensure that **Section 9** is not used as a tool to abuse the process of law.

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ARBITRATION & ADR ROUNDUPS

1. RAJYA SABHA PASSES ARBITRATION AND CONCILIATION BILL

The Parliament on Wednesday approved a Bill to amend the arbitration law that would ensure all stakeholders get a chance to seek an unconditional stay on enforcement of arbitral awards where an agreement is "induced by fraud or corruption". The Arbitration and Conciliation (Amendment) Bill, 2021, was passed by voice vote in the Rajya Sabha. The Bill was passed in the Lok Sabha on Feb. 12.

It will replace an ordinance issued on Nov. 4, 2020. Immediately after the passage of the Bill, Deputy Chairman Harivansh adjourned the Rajya Sabha till Monday as opposition parties continued raising slogans demanding discussion on the three Central farm laws. Earlier in the day, Rajya Sabha Chairman M Vainkaih Naidu had disallowed notices of suspension of business of the day to take up discussion on the three Central farm laws.

Earlier in the day, Rajya Sabha Chairman M Vainkaih Naidu had disallowed notices of suspension of business of the day to take up discussion on farm laws which led to the adjournment of House proceedings till 12 noon and then again till 2 p.m.

Replying to a discussion on the Bill in the House, Law Minister Ravi Shankar Prasad said it makes the provision to avoid payment of tax payers' money as an award in those cases where the agreement or contract is "induced by fraud or corruption".

"There was a provision under Sector 36 that there would not be direct stay (to the award) as somebody has to challenge that to get the stay (on award). Today we are saying that if an award is challenged and if prima facie the court finds that it is induced with fraud or corruption then the court would stay the award."

The minister further said, "I don't understand why do they get agitated by the mention of corruption. Should such (arbitration) awards be given in India which are induced with corruption and where CBI inquiry is on? Such people by collusive agreement get the award through taxpayers money."

"We only want that there should be fair arbitration in India. Our only intention is that people should not loot taxpayers' money through arbitration award." About the meaning of prima facie, Prasad explained the court has clearly said that a prima facie case does not mean it is proved to the hilt, but which can be said to be established if a court believes evidence related in its support.

"If we will dole out natural resources in such cases then? In their tenure, natural resources were doled out. Supreme Court said that those were to be auctioned. They did not auction," he added. "The larger question is that India's taxpayer money would be given in these awards. India is a free country. But will some businessmen abuse the system and take away natural resources... We brought this ordinance because we wanted to safeguard taxpayers' money. This is a national *compelling necessity to pass this bill."*

Source: As reported in Bloombergquinton 10th March ,2021 on website https://www.bloombergquint.com/law-and-policy/arbitration-and-conciliation-bill-passed-in-rajya-sabha-by-voice-vote

2. APPLE LOSES BID TO MOVE CONSUMER PRIVACY SUIT TO ARBITRATION

(Bloomberg) -- Apple Inc. must continue fighting a consumer privacy lawsuit in open court and can't move it behind the closed doors of private arbitration, a judge ruled, turning aside a request from the tech giant.

Companies generally prefer arbitration since it's quicker, they have a say in the selection of the judges and the rulings are final with only limited rights to appeal. The cases are also dealt with on an individual basis, raising the costs to plaintiffs who can't share expenses as in class-action cases, where their fees may also be contingent on winning the case.

U.S. District Judge Lorna G. Schofield in New York on Tuesday rejected Apple's and co-defendant T-Mobile USA Inc.'s argument that provisions in T-Mobile's terms and conditions require consumer disputes to be arbitrated.

Consumers claim an iPhone operating system flaw, coupled with recycled T-Mobile phone numbers, gave third parties unauthorized access to users' communications. The breach violates both companies' promise that iMessage and Facetime features were secure, they said in the complaint. Schofield said she'll make a final ruling on one plaintiff's claims against T-Mobile after further questions about hishis agreement to arbitrate with the company are resolved. She rejected Apple's attempt to push a different consumer's claims against the iPhone maker into arbitration. "Apple is not a party to the T-Mobile agreement, and Apple has not shown" that it can enforce it, Schofield ruled.

Lawyers for the consumers -- Darren Oved, Aaron J. Solomon and Christopher Rados -- hailed the ruling as a victory, saying in a statement that the judge "recognized the significant merit and far-reaching impact of plaintiffs' claims for a broad class of iPhone users."

The case is Ohanian v. Apple Inc., 20-cv-05162, U.S. District Court, Southern District of New York (Manhattan).

Source: As reported by Mr. Joel Rosenblatt on 10th March, 2021 from websitehttps://www.bloombergquint.com/onweb/apple-loses-push-to-move-consumer-privacy-suit-into-arbitration

3. CAIRN TAX CASE: U.S., U.K., 3 OTHER COURTS CONFIRM ARBITRATION AWARD AGAINST INDIA

Courts in five countries, including the U.S. and the U.K., have given recognition to an arbitration award that asked India to return $1.4 billion to Cairn Energy plc - a step that now opens the possibility of the British firm seizing Indian assets in those countries if New Delhi does not pay, sources said.

Cairn Energy had moved courts in nine countries to enforce its $1.4 billion arbitral award against India, which the company won after a dispute with the country's revenue authority over a retroactively applied capital gains tax.

Of these, the December 21 award from a three-member tribunal at the Permanent Court of Arbitration in the Netherlands has been recognised and confirmed by courts in the U.S., the U.K., Netherlands, Canada and France, three people with knowledge of the matter said.

Cairn has started the process to register the award in Singapore, Japan, the United Arab Emirates and Cayman Islands, they said. The registration of the award is the first step towards its enforcement in the event of the government not paying the firm.

Once the court recognises an arbitration award, the company can then petition it for seizing any Indian government assets such as bank accounts, payments to state-owned entities, airplanes and ships in those jurisdictions, to recover the monies due to it, they said.

So far the government has not directly commented on honouring or challenging the Cairn arbitration award, but Finance Minister Nirmala Sitharaman had last week indicated the government may appeal the award. Cairn's shareholders, who include top financial institutions of the world, want the company to go for enforcement action should New Delhi fail to pay it.

While the company spokesperson wasn't reachable for comments, Cairn had on Sunday stated that it will "begin meetings this week with shareholders in the U.K. and U.S., with the international arbitration award high on the agenda."

"The company met the Government of India last month and is taking all the necessary steps to protect their shareholders' interests," it had said.

The tribunal had on December 21 ruled that the government breached an investment treaty with the U.K. and was therefore liable to return the value of Cairn shares it had seized and sold, dividend confiscated and tax refund stopped to adjust a Rs 10,247 crore tax demand.

Cairn in its filings to the courts in the nine countries is seeking "to confirm this final and binding award under the New York Convention and commence enforcement proceedings to recover the losses caused by (India's) unfair and inequitable treatment of their investments."

THE BACK STORY

After losing in the Supreme Court a case against levying tax on capital gains made in the 2007 sale by Hutchison of its India business to Vodafone for $11.2 billion, the government had in 2012 enacted legislation that gave it powers to tax such deals retrospectively.

Thereafter, the tax department raised demands on Vodafone as well as Cairn over alleged capital gains it made on reorganising its India business prior to its listing. But unlike Vodafone, where no enforcement action was taken, the government seized and sold Cairn's residual stake in the India unit, confiscated dividends due from such holding, and stopped tax refund due to it.

The Hague panel found that a 2012 law passed by the Indian Parliament was a new tax, not a clarification of prior law that could be applied to earlier years.

Formally, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the United Nations-backed document requires courts of contracting states to allow private agreements for arbitration and to recognise and enforce resulting awards from other contracting states. The U.S. and other courts have the authority to enforce arbitration agreements under the convention.

Finance Minister Nirmala Sitharaman had on March 5 indicated the government's intent to appeal against the award when she said it is her "duty" to appeal in cases where the nation's sovereign authority to tax is questioned.

But the December 21 ruling specifically made clear that the basis of the judgment was not a challenge to the 2012 law, which gave the government powers to tax deals retrospectively, or India's sovereign right to tax.

"The issue at stake is thus not a matter of domestic tax law; it is rather whether the fiscal measures taken by the State, valid or not under its own tax laws, violate international

Source: As reported in Bloombergquint on 8th March, 2021 from website https://www.bloombergquint.com/law-and-policy/us-uk-3-other-courts-confirm-1-4-bn-arbitration-award-against-india

4. SWISS SUPREME COURT UPHOLDS THE REQUEST FOR REVISION OF AN ARBITRAL AWARD BASED ON THE SUBSEQUENT DISCOVERY OF CIRCUMSTANCES THAT JUSTIFIED THE REMOVAL OF AN ARBITRATOR

In a recent decision published on 15 January 2021, the Swiss Federal Supreme Court ("SFSC") upheld a request for revision of an arbitral award of the Lausanne-based Court of Arbitration for Sport ("CAS") regarding the Chinese swimmer Sun Yang on grounds of bias and lack of impartiality of the chairman of the CAS panel (case no. 4A_318/2021 (in French)).

FACTUAL BACKGROUND

With its decision of February 28, 2020, the CAS imposed an eight-year ban on the Chinese swimmer Sun Yang for violation of doping rules. On June 15, 2020, Sun Yang filed an appeal against the CAS award with the SFSC. In the appeal, he raised doubts against the impartiality of the chairman of the CAS panel, Franco Frattini. In support thereof, Sun Yang submitted evidence according to which in 2018 and 2019, Franco Frattini had repeatedly published comments about the treatment of

animals in China on his Twitter account, containing extreme anti-Chinese language.

Swiss Supreme Court justifies request for revision of the arbitral award after the expiry of the deadline of thirty days to challenge an award

In a first step, the SFSC examined whether the discovery of the grounds of bias after the expiry of the 30-day deadline can still be justified. A party that intends to challenge an arbitrator must state the grounds for the challenge as soon as it becomes aware of them. This jurisprudential rule, expressly stated in art. R34 of the Code of Sports-related Arbitration ("CAS-Code"), applies both to the known grounds for challenge and to any grounds that could have been known with due care. If a party is late in asserting its right to challenge an arbitrator, the right is - in general - forfeited. A party must make certain inquiries in this regard and must ultimately show that it has exercised such inquiries with due diligence.

Sun Yang argued that one of his legal counsels had conducted research to ensure the impartiality of arbitrator Franco Frattini when he was first appointed as chairman of CAS panel. According to his explanations, no problematic tweets were discovered at that time. Sun Yang further pointed out that he had no reason to suspect that the arbitrator may have made problematic comments in tweets. Therefore, he could be blamed for not having been able to identify these tweets which had been published nearly 10 months before the arbitrator's appointment. The SFSC agreed with this reasoning and even held that a party could not be required to continue its internet searches or scrutinise the messages of arbitrators on social networks during arbitration proceedings. In sum, the SFSC thus ruled that there was no lack of due diligence on Sun Yang's part.

Arbitrators' convictions expressed on social networks may lead to doubts over impartiality in extreme cases

In a second step, the SFSC examined whether the findings at hand were sufficient to raise doubts about the arbitrator's impartiality. On this occasion, it emphasized that impartiality is usually defined by the absence of prejudice or bias (referring § 141 of the judgment of October 2, 2018 of the European Court of Human Rights in the case of Mutu and Pechstein v. Switzerland). To verify the independence of a sole arbitrator or the members of an arbitral panel, the parties may also refer to the IBA Guidelines on Conflicts of Interest in International Arbitration. According to one of the principles of these Guidelines, an arbitrator must decline to sit or resign where there exist, or may arise after his or her appointment, facts or circumstances which in the view of a reasonable third party having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence (section 2 (b) of the Guidelines). The doubts are legitimate if a reasonable third party, having knowledge of the relevant facts and circumstances, would consider it more likely that the arbitrator's decision would be influenced by factors other than the merits of the case as presented in the parties' submissions (section 2 (c) of the Guidelines).

In the case at hand, the SFSC concluded that the Franco Faccini had used extremely violent anti-Chinese language on several occasions, in some cases even after his appointment as arbitrator, so that the circumstances were such as to raise doubts about the arbitrator's impartiality. In particular, he used the following terms: *'Those bastard sadicchinese [sic] who brutally killed dogs and cats in Yulin', 'This yellow face chinese [sic] monster smiling while torturing a small dog, deserves the worst of the hell', 'those horrible sadics* [sic] *are CHINESE!'* (this listing is not exclusive). Accordingly, the SFSC approved the appeal on grounds of impartiality and set aside the CAS award.

Challenge and Revision of the arbitral award provided in the newly-introduced Art. 190(a) PILA

Previously, the only remedy against an arbitral award mentioned by the law was the application to the Swiss Federal Supreme Court to have the award set aside. The revised 12th chapter of the Swiss Private International Law Act ("PILA"), which entered into force on January 1, 2021 now regulates the revision of an arbitral award.

Switzerland's CAS is seen as the sport's final court of judgment and it is rare for its decisions to be challenged by the SFSC. In the case at hand, it was justified, according to the SFSC, to close the gap in the old law and to admit the timely filed request for revision.

Source: As reported by Dr. Valentina Hirsiger-Meier and Lukas Frommelt on 8th February, 2021 from website https://globalarbitrationnews.com/swiss-supreme-court-upholds-the-request-for-revision-of-an-arbitral-award-based-on-the-subsequent-discovery-of-circumstances-that-justified-the-removal-of-an-arbitrator/

5. SHELL FILES ARBITRATION AGAINST NIGERIA OVER SPILL DISPUTE

Royal Dutch Shell Plc launched arbitration proceedings against the Nigerian government over a long-running community dispute. The oil major's Netherlands-registered holding company and a Nigerian unit filed a case at the World Bank's International Centre for Settlement of Investment Disputes on Feb. 10, according to the Washington-based organization's website. Shell brought its claim against Africa's biggest crude producer under the bilateral investment treaty between the governments of the Netherlands and Nigeria, it said. The decision follows the Anglo-Dutch energy giant's unsuccessful efforts last year to reverse a court order instructing the company to pay compensation to a community for polluting its land. While the case's victors say they are now owed more than 183 billion naira ($479 million), Shell contests that valuation and denies being responsible for the decades-old oil spill. "Given the history of this particular case, we are seeking protection of our legal rights from an international tribunal," a spokeswoman for Shell's Nigerian subsidiary said in an emailed statement. She didn't provide further details about the oil major's case.

A spokesman for Nigerian Attorney General Abubakar Malami didn't immediately respond to a request for comment. All of Shell's appeals against the ruling have been dismissed, most recently by Nigeria's Supreme Court in November.

The origin of the community's grievance against Shell dates back to a rupture in one of the firm's pipelines 50 years ago. The company blames the oil spill on "third parties" during a civil war that lasted from 1967 to 1970, and says the affected sites have been cleaned up. Shell operates the oil block at the heart of the dispute, which is known as Oil Mining Lease 11, in a joint venture with the with the NNPC, Total SE and Eni SpA.

Source: As reported in Bloombergquint by William Clowes dated 13th February, 2021 on from website https://www.bloombergquint.com/markets/shell-files-arbitration-claim-against-nigeria-over-spill-dispute

6. DISTRICT COURT CONFIRMS ENFORCEMENT OF FOREIGN ARBITRAL AWARD, DENYING ARGUMENTS THAT TRIBUNAL WAS NOT IMPARTIAL AND ENFORCEMENT WAS CONTRARY TO U.S. PUBLIC POLICY

Petitioner Pao Tatneft ("Tatneft"), previously OAO Tatneft, initiated arbitration against the Ukrainian government. The case arose out of the parties' joint ownership of CJSC Ukrtatnafta Transnational Financial and Industrial Oil Company ("Ukrtatnafta") (*Pao Tatneft v. Ukraine*, Civil Action No. 17-582, (D.D.C. 2020)

In 1998 and 1999, Tatneft made agreements with other Ukrtatnafta shareholders to vote as a 56% majority bloc. In January 2007, the Ukrainian Privat Group acquired a 1% interest in Ukrtatnafta, and subsequently obtained Ukrainian judgements purporting to invalidate the shareholder resolutions by which Tatneft had obtained its interests in Ukrtatnafta. This resulted in Tatneft being barred from management of Ukrtatnafta and ownership of its shares.

After dispute negotiations failed, Tatneft filed an arbitration demand. In it, Tatneft alleged that Ukraine had violated a Russia-Ukraine Bilateral Investment Treaty (the "Russia-Ukraine BIT" or "BIT") by failing to grant legal protection to, and allowing discrimination against, investors from Russia such as Tatneft.

The Russia-Ukraine BIT provided for arbitration by an ad hoc arbitration tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). The BIT also set out a procedure for selecting members of the arbitral tribunal. Following those procedures, each party chose one arbitrator, who in turn chose Professor Orrego Vicuña as a third arbitrator and presiding member of the panel.

Once appointed, the tribunal issued a "jurisdictional award," where it confirmed its jurisdiction over the matter. The tribunal then separately issued a "merits award," in which it awarded Tatneft $112 million, plus interest, for its claims.

In between these two awards, Tatneft's law firm appointed Vicuña as an arbitrator in *DP World v. Republic of Peru*, an unrelated arbitration. This appointment was not disclosed in the Tatneft-Ukraine arbitration. During this same period, Ukraine's law firm appointed Vicuña as an arbitrator in another unrelated arbitration, *South American Silver Ltd. v. Bolivia.* This appointment was also not disclosed.

After issuance of the merits award, Ukraine brought an action in the Paris Court of Appeal in France to annul the merits award and the jurisdictional award. Among other things, Ukraine argued that Vicuña's failure to disclose his appointment in the *DP World* case was grounds for vacating the merits award. This argument was rejected by the Paris Court of Appeal, which found that a single appointment in the course of a seven-year arbitration did not indicate a business relationship between the arbitrator and the law firm sufficient to raise a reasonable doubt about Vicuña's independence and impartiality.

While Ukraine's appeal of this decision was pending, Tatneft petitioned the U.S. District Court for the District of Columbia to confirm and enforce the arbitration award. Tatneft also commenced parallel proceedings in the United Kingdom seeking enforcement of the award.

In the U.S. proceedings, Ukraine argued against enforcement based on Vicuña's alleged partiality and claimed that enforcement would violate U.S. public policy. The district court denied both of Ukraine's arguments. First, the court denied Ukraine's argument that Vicuña's failure to disclose an arbitration appointment-that Ukraine claimed earned Vicuña nearly $300,000-demonstrated "evident partiality" as defined in Section 10(a)(2) of the Federal Arbitration Act (the "FAA").

The court recognized that because the award at issue was not a domestic award, the FAA standard of "evident partiality" would not be applicable. However, even if it were, the court found that Ukraine did not meet this standard. "Evident partiality" requires more than a mere appearance of potential bias, and no sources suggested that a single appointment in an unrelated arbitration could give rise to justifiable doubts as to impartiality or independence.

The court also considered and rejected Ukraine's argument that Article V(1)(d) of the New York Convention-which allows refusal of enforcement of awards where the tribunal was not constituted in accordance with the agreement of the parties-prevented enforcement. The UK courts had already rejected this argument, and the U.S. court agreed. Nothing in the IBA Guidelines on Conflicts of Interest in International Arbitration or in the International Chamber of Commerce guidance required disclosure of this appointment. Ukraine would also have had to show substantial prejudice-that had Vicuña disclosed the appointment, it would have been disqualifying. The court found that it would not have been disqualifying, and that Ukraine was on notice of the appointment before the final award.

Finally, the court denied Ukraine's arguments that the award should be refused enforcement under the public policy exception in Article V(2)(b) of the New York Convention. Ukraine argued that recognition and enforcement of the merits award would violate U.S. public policies against abuse of process, manipulation of corporate structures to create jurisdiction, and general wrongdoing. The court held that Ukraine's claims were conclusory and did not outweigh U.S. public policy

favoring enforcing awards. The court thus followed the French and UK courts' rejection of these arguments, and confirmed the merits award.

Source: As reported in Global Arbitration News by Jacob Kaplan and Thomas Tysowsky on 21st January,2021 from webistehttps://globalarbitrationnews.com/district-court-confirms-enforcement-of-foreign-arbitral-award-denying-arguments-that-tribunal-was-not-impartial-and-enforcement-was-contrary-to-u-s-public-policy/

7. EFFICIENCY OF ARBITRAL PROCEEDINGS WOULD DIMINISH IF COURTS ALLOWED TO INTERFERE WITH IT: SC

NEW DELHI: If courts are allowed to interfere with the arbitral process beyond the ambit of the law then the efficiency of such proceedings will be diminished, the Supreme Court said on Wednesday. The top court said the high courts should exercise its extraordinary writ power under Article 227 of the Constitution in "exceptional rarity" where one of the litigants is "left remediless" in disputes governed by the arbitration law.

The observations were made by a bench headed by Justice N V Ramana on an appeal filed by one Gujarat-based firm Bhaven Constructions against a High Court order of 2012.

The Gujarat High Court, exercising its writ power, had interjected the arbitration proceedings initiated by Bhaven Constructions against Sardar Sarovar Narmada Nigam Ltd following disputes over payment and supply of bricks to the government firm.

"It is prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This (writ) power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient," the bench, also comprising Justices Surya Kant and Hrishikesh Roy, said in the judgement.

Justice Ramana, writing the judgement, said there was no doubt that "the ambit of Article 227 is broad and pervasive".

"We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences. One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under 'Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.,' it said.

The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator, it said.

The apex court set aside the High Court's order interjecting the arbitration proceedings between the parties.

In the instant case, Respondent No. 1 (Sardar Sarovar Narmada Nigam Ltd) has not been able to show exceptional circumstance or 'bad faith' on the part of the Appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage," it said. SJK ABA MNL RKS RKS.

Source: As reported in Economic Times on 6th January, 2021 from website https://economictimes.indiatimes.com/news/politics-and-nation/efficiency-of-arbitral-proceedings-would-diminish-if-courts-allowed-to-interfere-with-it-sc/articleshow/80138124.cms

8. HC ASKS FRL TO RESPOND TO AMAZON'S PLEA TO ENFORCE EMERGENCY ARBITRATOR'S AWARD

he Delhi High Court Friday sought response of Kishore Biyani led

Future Retail LtdNSE 0.15 % (FRL) on a plea by US-based e-commerce giant Amazon seeking direction to order enforcement of the award by Singapore's Emergency Arbitrator (EA) restraining FRL from going ahead with its Rs 24,713 crore deal with Reliance Retail.

Amazon.com NV Investment Holdings LLC, in its plea, also sought detention of the Biyanis, directors of Future Coupons Pvt Ltd (FCPL) and FRL and other related parties in civil prison and attaching of their properties for alleged "wilful disobedience" of the emergency arbitrator's order.

Justice J R Midha issued notices to FRL, Future Coupons Pvt Ltd, Biyanis and other related parties and listed the matter for further hearing on February 1.

The court, which heard part arguments of the parties, asked them to respond to the brief note of submissions of each other.

Amazon has approached the high court also seeking to restrain Kishore Biyani-led Future Group from taking any steps to complete the transaction with entities that are a part of the Mukesh Dhirubhai Ambani (MDA) Group.

It also sought to restrain Future Group from taking any steps to transfer or dispose of FRL's retail assets or the shares held in FRL by the Biyanis in any manner without prior written consent of Amazon.

The Future Group and Amazon have been locked in a legal battle after the US-based company took FRL into the emergency arbitration over alleged breach of a contract between them.

The three domestic firms -- FRL, FCPL and Reliance NSE -0.92 % -- have however contended before the high court that if Amazon's claim -- that it indirectly invested in FRL by investing in FCL -- was accepted then it would amount to a violation of Indian foreign direct investment laws which permit only 10 per cent investment by a foreign entity in the multi-brand retail sector.

According to Amazon, the EA award passed under the Singapore International Arbitration Centre (SIAC) Rules is enforceable under Section 17(2) of the Arbitration and Conciliation Act.

It referred to an order passed by the high court on December 21, 2020, prima facie holding that the EA's award was valid under the Indian law.

Senior advocate Harish Salve, representing FRL, submitted that Amazon had a deal with FCPL and signed an agreement with Biyani. FCPL has a shareholding agreement with FRL which has no agreement with Amazon.

"Everyone wants to come and stand at the door," he said.

"My promoters gave me permission. The company and jobs have to be saved. Reliance said I'll keep all the jobs and business. If this transaction cancels, the shops will be closed just because this big fat American company wants to make money," he argued.

Senior advocate Gopal Subramanium, representing Amazon, urged that FRL shall not further precipitate the situation as the matter is being heard by the court.

On being asked by the court, he explained the agreements between FCPL and Amazon and said the understanding was that the US company would invest in FCPL and the monies would be transferred to FRL.

Therefore we had certain protective rights in the agreements read together, he said.

In the petition, Amazon has alleged that Future Group, Kishore Biyani and other promoters and directors have "deliberately and maliciously disobeyed" the EA award despite it being binding on them and not having challenged it in accordance with the law.

"The majority respondents' action of simply ignoring the order (of EA) and continuing with the impugned transaction (deal) is not only contumacious but calls into serious question their respect for enforceability of contracts, the rule of law and the administration of justice..," it said.

It sought to injunct Future Group and its officials from taking any steps in furtherance of the deal with Reliance.

In August last year, Future had reached an agreement to sell its retail, wholesale, logistics and warehousing units to Reliance.

The SIAC on October 25 last year, had passed an interim order in favour of Amazon barring FRL from taking any step to dispose of or encumber its assets or issuing any securities to secure any funding from a restricted party.

Subsequently, Amazon wrote to market regulator SEBI, stock exchanges and Competition Commission of India (CCI), urging them to take into consideration the Singapore arbitrator's interim decision as it is a binding order, FRL had earlier told the high court.

As per the SIAC interim order, a three-member arbitration panel needs to be set up within 90 days (from the date of the judgement) with one judge each being appointed by Future and Amazon, along with a third neutral judge.

On November 10, 2020, Amazon had told the court that it and FCL have appointed their respective arbitrators.

Source: as Reported in Economic Times dated 29th January, 2021 from website https://economictimes.indiatimes.com/industry/services/retail/hc-asks-frl-to-respond-to-amazons-plea-to-enforce-emergency-arbitrators-award/articleshow/80587931.cms

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ICA's 55th Annual General Meeting was held on 18th January , 2021 vide virtual mode and through the FICCI BIKE virtual event platform. Never had we imagined that there would arise a situation which shall encourage us to conduct the Annual General Meeting on a virtual platform. As COVID-19 pandemic had led to travel restrictions, we nevertheless would agree that the experience was somewhat distinct and unique and shall be remembered in the history of mankind.

For dispute resolution that frequently involves parties from states, the challenges posed by COVID-19 to arbitration in India was acute. COVID 19 had led to shutting down businesses, closure of borders, however, the arbitration practitioners were not alone in having to rapidly develop new ways of working.

Given that arbitration is a flexible and consensual process, it is well positioned to state that the legal fraternity responded swiftly to these challenges. In addition to the above, even Arbitral Institute such as ICA, in a short space of time, did successfully find innovative pathways to maintain access to justice in a timely and efficient manner. ICA as the Apex Arbitral Institute in India is at the forefront, to respond to the requirement of arbitration community for challenges faced due to lockdown. Hence the aim of the meeting is to cover several topics and key challenges posed due to COVID and ways to overcome it.

From determining when it is appropriate to replace a physical in-person hearing with a virtual hearing, to maintaining confidentiality and data security, from mitigating due process concerns and disruption caused by technological failures, to managing risks to the enforceability of awards, the meeting provided a glimpse of all issues at stake. It was also assured that ICA has been maintaining cyber security concerns related to online hearing and has been using secure internet connections so as to maintain the privacy of the parties. It was substantiated with the fact that ICA has been using platforms that are password protected and generate unique, automatically generated meeting IDs for each virtual hearing

The meeting concluded by highlighting the issues on COVID and urging the parties to maintain social distancing and follow proper guidelines. The present members were encouraged to see the present situation as an opportunity to work towards our aim of establishing an efficient and effective eco system for arbitration in India parallel to the ones across the globe.

It is indeed the support and cooperation during of our members during this period which shall help ICA go long way in achieving its mission!


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CASE HIGHLIGHTS

Bhaven Construction through Authorised Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Anr.

In the above captioned arbitration, the Hon'ble Court has ruled that Article 226 of the Constitution of India cannot be invoked to interfere with the Arbitral Process under the Arbitration and Conciliation Act, 1996 under ordinary circumstances, as powers under Article 226 is a discretionary power.

Briefly stated, the first respondent entered into a contract with the appellant for the manufacturing and supply of bricks. The contract had an arbitration clause. Later, some disputes arose amongst the parties, the appellant invoked the arbitration clause and sought the appointment of the sole arbitrator as per the terms of the agreement. The Respondent objected to the Appellants request for an appointment of arbitrator and filed an application under Section 16 of the Arbitration Act challenging the appointment of the sole Arbitrator and the jurisdiction of the Tribunal. It was argued that the dispute was not amenable to the Arbitration Act and contended that in light of the fact that the State of Gujarat had passed the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 the disputes between the parties could be adjudicated only in accordance with the aforesaid statute. The second contention was that the arbitration was time barred, as the clause mandated that neither party was entitled to claim if the arbitrator has not been appointed before the expiration of thirty days after the defect liability period.

Regardless of the objections raised by the first respondent, the sole arbitrator was appointed. The sole arbitrator rejected the application of the Respondent No. 1 and held that the sole arbitrator had jurisdiction to adjudicate the dispute.

Aggrieved by the aforesaid order of the Ld. Sole Arbitrator, the first respondent preferred a writ petitionunder Article 226 of the Constitution before the High Court of Gujarat. The Single Judge had dismissed the writ petition stating *"the respondent cannot appoint a sole arbitrator and thereafter cannot contend that now that the Arbitrator is already appointed and he (the arbitrator) has already exercised power under the provisions of the Arbitration and Conciliation Act, 1996, the petitioner has to wait till the arbitration award is passed, to challenge the same under Section 34 and Section 37 of the 1996 Act."*

Aggrieved by the Single Judge's decision, the first respondent preferred a Letters Patent appeal which was allowed by the Division Bench and held that the contract between the parties was a "works contract" and would be governed by the Gujarat Act, and the appellant could not have appointed a sole arbitrator.

Subsequently, the appellant challenged the decision of the Division Bench of the High Court in the present proceedings. The appellant contended that the Division Bench of the High Court erred in interfering with the Single Judge's order under Articles 226 and 227 of the Constitution. The fact that the final award has been passed by the sole Arbitrator and is now challenged under Section 34 of the Arbitration 7 Act clearly shows the attempt of Respondent No. 1 to bypass the framework laid down under the Arbitration Act.

Hence, the present case.

The Respondent has contended that since the enactment of the Gujarat Act, the Arbitration Act was substituted with respect to the disputes arising out of the works contract. It was contended that under Articles 226 and 227 of the Constitution, it was always open for Respondent No. 1 to invoke the writ jurisdiction of the High Court to set aside an arbitration which was a nullity as it was in conflict with the State enactment.

The issue before the Hon'ble Court was whether the arbitral process could be interfered under Article 226/227 of the Constitution, and under what circumstance?

At the outset, the Hon'ble Supreme Court stated that the Arbitration Act is a code in itself having definite legal consequences. One such consequence is embodied in the non-obstante clause in Section 5 of the Arbitration Act to reduce excessive judicial interference. Section 5 of the Arbitration Act, which reads as under *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."* The language in Section 5 expressly states that no judicial authority shall intervene in the arbitral process except where the law provides for it.

In the present matter, the Hon'ble Supreme Court held that the appellant had acted following the procedure laid down under the Agreement to appoint the sole arbitrator. The first respondent then challenged the sole arbitrator's jurisdiction in terms of Section 16(2) of the Arbitration Act. Thereafter, the first respondent challenged the arbitrator's order under Section 16(2) of the Arbitration Act through a petition under Article 226 of the Constitution of India. It was observed that in the usual course, the Arbitration Act provides for a mechanism of the challenge under Section 34. The Hon'ble Supreme Court opined that the use of the term "only" under Section 34 served the twin purposes of making the Arbitration Act a complete code and laying down the procedure for challenging arbitral awards.

The Hon'ble Supreme Court noted in any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right and placed reliance on the case of ***Nivedita Sharma v. Cellular Operators Association of India(2011) 14 SCC 337***. However, it was also held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. Therefore, it is prudent for a Judge not to exercise discretion to allow judicial interference beyond the procedure established under the Arbitration Act. The powers under Articles 226 and 227 of the Constitution need to be exercised in exceptional rarity, where one party is left remediless under the statute or an evident 'bad faith' shown by one of the other parties.

The Hon'ble Supreme Court also observed the decision in ***Deep Industries Ltd. v. Oil and Natural Gas Corporation Ltd. (2019) SCC Online SC 1602***,to hold that the High Court would be extremely circumspect in interfering with the arbitral process.

> *"15. Most significant of all is the non-obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed (See Section 37(2) of the Act)*
>
> *16. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non-obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us herein above so 13 that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."*

The writ jurisdiction would be invoked only in exceptional circumstances which leave the aggrieved party without a statutory remedy. If the Courts are

allowed to interfere with the arbitral process beyond the ambit of the enactment, then the efficiency of the process will be diminished.

The Hon'ble Supreme Court further held that Section 16 of the Arbitration Act sets a mandate that the issue of jurisdiction must be dealt with first by the tribunal in recognition of the *Kompetenz-Kompetenz* principle. Once the Section 16 application is dismissed, the arbitral tribunal's jurisdiction can be challenged only after the final award is passed under Section 34 of the Arbitration Act.

Further, in regard to the issue whether the Contract was a works contract under the Gujarat Act, the Hon'ble Supreme Court observed that the same was a question that goes to the merit of the case and requires contractual interpretation. It is a matter of evidence, especially when both parties had taken contradictory stands regarding the same. The Court emphasised that it was settled law that the interpretation of contracts in such cases should generally not be done in the writ jurisdiction. In this regard, the Hon'ble Court also stated that the mere fact that the Gujarat Act might apply may not be sufficient for the writ courts to entertain such pleas as that of Respondent No. 1 to challenge the ruling of the arbitrator under Section 16 of the Arbitration Act.

In the aforesaid case, the Hon'ble Supreme Court has also noted that the arbitral process is modelled upon time limitations and the sanctity of the process or the time-line should under no circumstances be compromised by a party adopting filibuster tactics of initiating parallel proceedings. One is hopeful that, going forward, this three-judge bench decision will act as a deterrent for unscrupulous litigants who attempt to undermine the legitimacy of arbitration as an effective dispute resolution mechanism and will stop regarding it as just being an alternate process.

In view of the above reasoning, the Hon'ble Supreme Court opined that the High Court erred in utilising its discretionary power available under Article 226 and 227 of the Constitution.

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