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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:

The Editor

ICA Arbitration Quarterly
Indian Council of Arbitration
Federation House,
Tansen Marg, New Delhi- 110001
Email: editor.ica@ficci.com; ica@ficci.com

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FROM THE PRESIDENT'S DESK

Eminent readers of the ICA Arbitration Quarterly must be aware of the recent passage of the Arbitration and Conciliation (Amendment) Act, 2019 as a step towards the Government's objective of making India an arbitration hub. Government has already notified certain sections of the Amendment Act, 2019.

The major thrust of the Amendment Act, 2019 is to strengthen institutional arbitration in the country by providing for "Appointment of Arbitrators" by the "Arbitral Institutions" designated by the Supreme Court or High Court and where no graded arbitral institutions are available, the Chief Justice of the concerned High Court are required to maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions. Amendment Act of 2019 has also inserted a new Part 1A to the Arbitration and Conciliation Act, 1996 for the establishment and incorporation of an independent body namely, the Arbitration Council of India mainly for the purpose of grading of arbitral institutions and accreditation of arbitrators.

To further improve the arbitration process, amongst others, Amendment Act of 2019 has inserted- a new Section 42A relating to confidentiality of information by the arbitrator, the arbitral institutions and the parties; a new Section 42B relating to protection of arbitrator for action taken in good faith has also been provided; also amendment to Section 23 of the Act has been done to provide for completion of pleadings within a period of six months from the date the arbitrator receives the notice of appointment which will amend the start date for the computation of 12 month time limit of passing the award.

These are important amendments and will further strengthen arbitration landscape in India. As we move forward, certain issues and concerns will need to be set right and there is always room for further improvement.

At ICA we will continue our efforts to further popularise arbitration as a means to resolve disputes and at the same time also continue to make endeavours for professional development of our members.

I wish our members and august readers a happy festive period ahead !

N G Khaitan

N.G.Khaitan

2019 AMENDMENT ACT - A CRITIQUE

Dr. P.C. Markanda
Senior Advocate

Naresh Markanda
Senior Advocate

Rajesh Markanda
Advocate

Harpreet K. Gill
Advocate

The 1996 Act came into force on 16th August 1996([1]) superseding the Arbitration Act, 1940. Large scale changes were made for the betterment of the arbitral functioning, yet it lacked vital provisions which could infuse efficiency in arbitral system. This was made up to a very large extent by the 2015 Amendment Act which came into force on 23rd October 2015([2]). Even after various stipulations were incorporated in 2015 Amendment Act for making arbitration effective, still more provisions were needed to be added in the Act in an effort to expedite arbitration proceedings and make the same cost effective. Some salient changes have now been incorporated in the 2019 Amendment Act.([3]) Comments on some of the provisions, which are of importance, are as under:

1) Establishment of Arbitration Council of India:

There was a long felt need to establish an Arbitration Council in India, which has been fulfilled by the Amending Act. ([4]) It is expected that the Arbitration Council of India would play a vital role in giving impetus to the arbitral system all over the country and, in due course of time, be instrumental in setting up in India an international hub for arbitration. If countries like United Kingdom, Singapore, Hong Kong, Malaysia etc. can establish International Arbitration Centers in their countries, there is no reason why India cannot succeed in establishing an international hub for arbitration, even though some efforts had been made in past, in this direction, though not successfully.

[1] Notification GSR No. 375(E) dated 22.08.1996, Gazette of India, Extra, Part II, S. 1.

[2] Section 1(2) of the Arbitration and Conciliation (Amendment) Act, 2015, Act 3 of 2016.

[3] Act No. 33 of 2019 published on 9th August, 2019.

[4] Section 43A introduced by the Amending Act of 2019.

The composition of the Arbitration Council shall be as follows([5]):

a) A judge of the Supreme Court or Chief Justice of a High Court – to be appointed by the Central Government in consultation with the Chief Justice of India – who would act as Chairperson;

b) An eminent arbitration practitioner – to be nominated by the Central Government.

c) An eminent academician – to be nominated by the Central Government

d) Secretary to the Government of India in the Department of Legal Affairs or his nominee – Member, *ex officio*

e) Secretary to the Government of India in the Department of Expenditure or his nominee – Member, *ex officio*

f) A representative of a recognized body of commerce and industry – to be chosen by the Central Government

g) Chief Executive Officer – Member Secretary, *ex officio*

From the composition detailed above, it is evident that the Arbitration Council will be primarily made up of members nominated by the Central Government at its sole discretion – except the Chairperson, who would be nominated with the consent of the Chief Justice of India. It is thus, evident that the Arbitration Council would be a Government controlled body. The country has a number of councils, bodies etc. which are similarly Government controlled. Their functioning has over a period of time become bureaucratic and lethargic and also suffer from the bane of red-tapism. This would not be conducive for establishing India as a hub for international arbitrations. It would have been far better to get a more representative council – with more private participation.

Section 43(D) of the Amended Act provides the scope and powers of the Arbitration Council. While most of the powers granted to the Arbitration Council are welcome, viz. giving training to arbitrators; ensuring criterion for accreditation of arbitrators; ensuring uniform norms for satisfactory level of arbitration and conciliation etc. However, what is worrisome is the level of control granted to the Arbitration Council over the existing and future Arbitration Institutions.

The Arbitration Council would have the power to: (a) frame policies governing grading of Arbitral Institutions; and (b) review the grading of Arbitral Institutions. If exercised properly, this power would be greatly beneficial as it would lead to a professional, uniform and effective conduct of arbitrations through accredited Arbitral Institutions. However, the powers could also be misused and abused, inasmuch as the Arbitration Council would have power to recognize or de-recognize any/all Arbitral Institutions in India at any time.

2) Time limit for making award:

The 1940 Act provided for making and publishing award in a period of four months. This was impractical. There is no reported case wherein any award was made within the said period of four months. To avail extensions of four months at a time, the parties had to then knock at the doors of the Court repeatedly.

Finding that the 1940 Act had been unsuccessful *qua* making and publishing of the award within the stipulated period of four months, the Legislature did away with time limit for making an award under the 1996 Act. This did not help further the cause of arbitration in any manner. Since no time limit had been provided in the 1996 Act for making and publishing of the award, the parties, lawyers as well as arbitral tribunals took it easy. There are a huge number of cases in the country where arbitrations continued for a period of five to ten years and sometimes even more.

[5] *Section 43C introduced by the Amending Act of 2019.*

To set right this anomaly, the 2015 Amendment Act introduced Section 29A and limited the time within which an award had to be made to 1 year – with a possible extension of 6 months by the mutual consent of the parties. For further extension, it was mandated that the parties should approach the Court with valid reasons for seeking extension. Although this provision was by and large beneficial to the conduct of arbitration proceedings in India, however, it was felt – and rightly so – that the time spent in completion of pleadings should not be included in the period of one year provided under Section 29A(1).

The Amending Act of 2019 includes a welcome provision whereby through the introduction of a new Section 23(4) and by an amendment of Section 29A (1), the period of completion of pleadings has been fixed as six months from the date the arbitrator or all the arbitrators receive notice of their appointment. The period of one year for making the award would then commence after the said period of six months. It is now for the Arbitral Tribunals and Institutions to ensure that the period of six months is scrupulously adhered to and unnecessary latitude and time is not granted to any recalcitrant party, which could render otiose the provision of six months set out in the Amended Act.

It is similarly expected of the lawyers, parties and arbitral tribunals to ensure that the award is made within the period of twelve months from the date of completion of pleadings. It is hoped that, except in rare cases, there would be no need to seek extension either from the parties or the Court under Sections 29(A)(3) or 29(A)(4) respectively. It is only when all the participants in the arbitral process discipline themselves that we can hope to convert India into a hub of international arbitrations.

A lacuna, which has not been addressed by the 2019 Act is that though the legislature has retained the stipulations of the Sixth Schedule, it has not capped the number of cases which an arbitrator should be allowed to handle at any given point of time. The Sixth Schedule, in so many words, calls upon the arbitrators to declare "NUMBER OF ONGOING ARBITRATIONS". However, this is one provision which is inevitably ignored when declarations are made. The purpose of stipulation was to apprise the party whether a person who has been approached to be an arbitrator would be in a position to do justification and dispose of the arbitral matter within the period prescribed by the Act. It is hoped that the Arbitration Council would now make some rules with respect to the same. The above criticism is not to suggest that lawyers are not responsible for the delays – however, if the lawyers express inability to give dates for months on end, the arbitral tribunals have the power to discipline them. No such power is presently available, when the arbitrators' diaries do not allow fixation of dates in close proximity.

With a view to expediting the proceedings, it is time we adopted the best international practices being followed in foreign countries and by foreign Arbitral Institutions.

After completion of pleadings, documentary evidence, discovery of documents and affidavits by way of evidence, the oral arbitral hearings should be conducted on day-to-day basis. The Second Proviso to Section 24 (as introduced by the 2015 Amendment) expressly provided for conducting hearings on day-to-day basis. On an assessment, to be made with the help of the parties and by following proper case management techniques, hearings can be fixed consecutively for 7 to 10 days at a time. Fixed and non-flexible periods should be provided for the parties to state their case in the form of an opening statement, conduct cross-examination, lead expert evidence and make a closing statement. All this should be done without a break.

If the aforesaid system is adopted in India, which, of course, is necessary to make India an international hub for arbitrations, a drastic change in arbitral environment would be experienced. It will be hard to undertake such an exercise but nevertheless it has to be done one day. To ensure the success of such a system, the onus falls, to a very large extent, on the arbitral tribunals. If followed, this would open new horizons for a different arbitration system in India.

3) Qualifications of an arbitrator:

Earlier, most of the Arbitral Institutions in India did not have a clear cut rule or criterion with regard to empanelment of arbitrators. Thus, there was no uniformity for empanelling arbitrators. Now, the Eighth Schedule, which lays down the eligibility criteria, has been introduced. This is a welcome step. Henceforth, it is expected that there shall be uniformity in the standard of empanelment of arbitrators.

The Eighth Schedule stipulates that an Advocate with at least 10 years of practice experience or a Chartered Accountant with the same practice time experience or a Cost Accountant or Company Secretary with same length of experience would be eligible to be empanelled as arbitrator. Some more categories have also been introduced. A retired Officer of Indian Legal Service or a person with law degree having 10 years of experience in legal matters in the Government, Autonomous Body, Public Sector Undertaking or Senior Level Managerial position in a private sector or retired graduate Engineer with 10 years' experience as an Engineer or an officer having experience of administration in Government and lastly a person having educational qualification at degree level with 10 years' experience in scientific and technical field, would be eligible to be empanelled as an arbitrator.

Henceforth, no discretion shall be left with the Arbitral Institution empanelling arbitrators to empanel somebody who does not fall in any of the aforesaid categories.

Surprisingly, in clause (v) of the Eighth Schedule, the Legislature expects an arbitrator to be conversant with the Constitution of India, Common and Customary Laws, Commercial Laws, and Law of Tort. The situation begs a question: Which Engineer or Chartered Accountant is fully conversant with the Constitution of India or Common and Customary Laws or Commercial Laws or Law of Tort? Likewise, Accountants cannot be expected to possess robust understanding of the domestic and international legal system on arbitration and international best practices with regard thereto. Similarly, even legal officers, who have practiced in field of service law etc. may not be aware of the key elements of contractual obligation in civil and commercial disputes and be able to apply legal principles to a given situation and also to apply judicial decisions on a given matter relating to arbitration.

Thus, to give effect to the stipulations of Eighth Schedule, it is imperative that proper institutions are set up at an early date to educate and bring up a new set of competent arbitrators, who can deliver up to the requirements set out in the Eighth Schedule.

4) Conduct of an arbitrator:

An arbitrator cannot act in the manner of his choice. As per Section 19(3) of the 1996 Act "...the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate". This is a general provision. No cast-in-stone procedure has been prescribed in which the tribunal has to conduct the proceedings. Thus, arbitral proceedings are mostly conducted by the arbitrators as per their own understanding and background. Therefore, a Judge or a Lawyer conducts the hearings as an extension of the Court proceedings. An Engineer or technocrat, on the other hand, is uncomfortable with such legalese

technicalities and, generally, proceeds to hear arguments immediately upon completion of pleadings. Even though, in both these sets of proceedings, the principles of natural justice are more or less followed, however, there is now a need to regulate the proceedings and make them uniform.

The 2019 Amendment Act prescribes the general norms applicable to the arbitrators. This Amendment Act enjoins upon a person appointed as an arbitrator to have a general reputation of fairness, integrity and capacity to apply objectivity in arriving at settlement of disputes. At the same time, he is required to be impartial and neutral, and not having any financial involvement/transaction with any of the parties to the dispute. He should also not have been convicted of an offence involving moral turpitude or economic offence. As set out above, to make the present and future arbitrators aware of good arbitral practices and procedures as well as to make them aware of the law of the land, it is necessary to introduce good Arbitral Institutions, which can then run regular and uniform courses to ensure that future arbitrators fulfill the criterion and expectations set forth in the Eighth Schedule.

5) Fee structure of arbitrators:

For the first time, the Legislature, in the 2015 Amendment Act, introduced the Fourth Schedule which prescribed the model fee structure for the arbitral tribunal. Unfortunately, its applicability was limited to the fee chargeable by the arbitrators appointed by the Court. In case of ad hoc arbitrations, the arbitrators continued to fix their own fees which, in some cases, made a mockery of the Fourth Schedule. Thus, the very purpose of conducting arbitrations in India in an economical manner got defeated.

The said issue has not been addressed by the 2019 Act, which has made the following provision in Section 11(14):

> *(14)* The Arbitral Institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.
>
> *Explanation*.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an Arbitral Institution.".

Therefore, the lacuna with respect to scale of fee payable in case of ad hoc arbitrations still exists. It is hoped that this lacuna would be addressed by the Arbitration Council constituted under Section 43A of the Amending Act of 2019.

Further, even with respect to the Fourth Schedule, controversies have arisen with respect to: (a) whether the fee payable to the arbitral tribunal, where claims exceed Rs. 20 crores, should be as per the ceiling, i.e. Rs. 30 lacs or whether it should be the ceiling value of Rs. 30 lacs plus the Rs. 19.87 lacs mentioned in the said column; (b) whether fee is payable separately for claims and counter claims – thus, if both parties prefer claims of Rs. 100 crores each, then would the arbitral tribunal be entitled to payment at twice the sum set out in the Fourth Schedule, i.e. separately for claims and counter claims. The Delhi High Court has held that the term "sum in dispute" in the Fourth Schedule, includes amounts claimed both under the claim as well as the counter claim ([6]); (c) whether the fee fixed by the Fourth

Schedule is to be paid to each arbitrator individually or whether it is the composite fee for a three member tribunal – the Punjab and Haryana High Court has opined that it is composite fee payable to the entire tribunal and not individually. ([7])

The Supreme Court in *National Highways Authority of India v. Gayatri Jhansi Roadways Limited,* ([8]) has held that where parties have decided upon a fee to be paid to the arbitrators, the same would be binding and the arbitral tribunal cannot then re-determine the fee in terms of the Fourth Schedule to the Act.

Another question that arises for consideration is: If a party has bound its nominee arbitrator to a fee schedule, would the same be binding on the other party's nominee arbitrator and the presiding arbitrator? Apparently not. It could thus, lead to a strange situation wherein within the same arbitral tribunal, there could be a separate fee structure for one party's appointed arbitrator and a separate fee structure for the presiding arbitrator and the other party's nominee arbitrator. This lacuna too needs to be redressed.

One thing which is abundantly clear from a reading of Section 11(14) of the Amended Act is that in case of Court appointed arbitrator and arbitrators appointed by Arbitral Institutions, they shall not be entitled to fee in excess of that fixed by the Fourth Schedule.

It is submitted that in order to make arbitration system cheap, economical and workable, the Legislature or the Arbitration Council should make the fee structure as set out in the Fourth Schedule uniformally applicable to all arbitrations, whether the arbitration is conducted by an Arbitral Institution or whether it is an ad hoc arbitration conducted with or without the intervention of the Court.

India needs a dedicated bar for arbitration matters. True, that some lawyers may acquire expertise in one or more disciplines of law, but the moot point is whether such lawyers can earmark time during the course of day to appear before the arbitral tribunals, more so during the Court working hours. Everybody works for money but that should not be the only criterion if we have to take forward the arbitration system to its peak in our great country.

6) Immunity to arbitrators:

Russell in its 21st Edition (pages 172-173), while relying upon the decisions of the House of Lords and the Appeal Courts of England with respect to immunity to arbitrators, commented as under:

"There are several irreconcilable principles. First, arbitrators must be answerable for the consequences of their actions and omissions, and, in particular, arbitrators should be answerable to the parties for their professional negligence like most other professionals. When considering the issue in 1970s, the House of Lords stated, obiter, that the arbitrators were immune, but

[6] *Delhi State Industrial Development Corporation Ltd. (DSIIDC) v. Bawana Infra Development (P) Ltd., OMP (Misc) No. 5 of 2018.*

[7] *Punjab State Power Corporation Limited v. Union of India, CWP No. 3962 of 2017 decided on 21.07.2017.*

[8] *2019 SCC OnLine SC 906.*

only as secondary rule of public policy, the primary rule was the duty of care to others. The second principle of public policy is that the arbitrators should be immune from suit, like judges, and they should not be discouraged from accepting appointments by the threat of personal liability. The third principle is that disputes should be settled conclusively the first time and not be re-heard as part of secondary action against arbitrators when other parties who could be sued in the same way, the parties' counsel and expert witnesses both have limited immunity. The DAC were firmly of the view that arbitrators should have a degree of immunity, on the ground of both second and the third public policy considerations.

Immunity is necessary, in their view, to enable the arbitrator to perform an impartial decision making function. They were concerned that, unless a degree of immunity was afforded, the finality of the award could be undermined. They viewed "with dismay" the prospect of a losing party attempting to re-arbitrate the issues on the basis that a competent arbitrator would have decided them in favour of that party. They believed that the Amendment Act, 1996 provides adequate safeguards to deal with cases where the arbitral process has gone wrong.

There is no doubt that some safeguards are now in place which have never been available under English Law before, notably the definition of the duties of a tribunal and the Court's right to order repayment of fees and expenses by the arbitrator on his removal or resignation. The old common law immunity was undefined but apparently impregnable. The fact that its statutory replacement includes the bad faith exception may encourage claims that would otherwise not have been made. The combined rule of these two developments may be that there will be more litigation as well as improvement in the responsibility and quality of the arbitral process; the latter corresponds to what the House of Lords found was the primary public policy concern."

The 2019 Amendment Act has given recognition to the Arbitrators being immune from being sued by either the claimant or the respondent. ([9])

7) Confidentiality of arbitration proceedings:

Under the 2019 Amendment Act, the arbitral proceedings shall have confidentiality except the award where its disclosure is necessary for the purpose of implementation and enforcement of award. Therefore, proceedings before the arbitral forum shall enjoy privacy.([10])

A contradiction, which has to be debated upon, appears in Section 43K introduced by the 2019 Amendment Act, which empowers the Arbitration Council to maintain an electronic depository of arbitral awards made in India and other such records related thereto as may be specified in the regulations. If such electronic records are maintained, they would naturally be made available for perusal of the general public, which militates against the concept of confidentiality as set out in Section 42A. To resolve this ambiguity, and to make awards available for scrutiny and for purposes of quoting the same, the Arbitration Council and the Arbitral Institutions (graded by the Arbitration Council) would have to obtain permission from the litigants of their right to confidentiality.

[9] *Section 42B as introduced by the Act of 2019.*

[10] *Section 42A as introduced by the Act of 2019.*

8) Appointment of arbitrator:

The 2019 Amendment has made far-reaching changes in the manner of appointment of an arbitrator. The emphasis now is on the appointments to be made by designated and graded Arbitral Institutions rather than by the Courts. In fact, by the amendments made to Sections 11(4), 11(5), 11(8) and 11(9); deletion of Sections 11(6A), 11(7) and 11(10); substitution of Sections 11(11) to 11(14); and insertion of Section 11(3A), the entire modality of appointment of arbitrators would undergo a sea-change. For proper implementation of these changes, the Supreme Court would have to designate some Arbitral Institution [which has been granted recognition by the Arbitration Council under Section 43(I)] to take over the responsibility of appointment of arbitrators in international commercial arbitrations. Similarly, the High Courts have been encouraged to designate Arbitral Institutions. However, if no such graded Arbitral Institutions are in existence in that particular State, then the High Court has to maintain a panel of arbitrators from which choice could be made by the concerned Judge.

The question that then arises is that in the absence of constitution of an Arbitration Council, gradation of Arbitral Institutions cannot take place – at least in the near future. Thus, till such time the Arbitration Council is constituted and it frames its rules of procedure and then undertakes the task of gradation of Arbitral Institutions, the system presently in place, i.e. appointments by the Supreme Court (in case of international commercial arbitrations) and High Courts (in case of domestic arbitrations) shall continue.

9) Challenge to arbitral award:

Section 34 (2)(a) of the 1996 Act stipulated that the Court could set aside the award only if "the party making the application furnishes proof" of the conditions mentioned in sub-sections (i) to (v) thereof. It was not a requirement under law that the party challenging the award had to show such proof only from the arbitral record. The party challenging the award could submit proof which had not even been filed before the arbitral tribunal. Under the 2019 Amendment Act, the position has changed drastically.([11]) The party challenging the arbitral award is prohibited from producing any new document and it has to rely solely on the record available before the arbitral tribunal if it wishes to show that some grounds exist for setting aside the award. Hence, the provisions of Civil Procedure Code would no longer be available to the party seeking to challenge the award. This is a welcome step.

10) Appeal:

Section 37 (I) of the 1996 Act has now been substituted to the effect that instead of "An appeal", the words "Nothwithstanding anything contained in any other law for the time being in force, an appeal" have been substituted. The inclusion of a non-obstante provision is welcome. A non-obstante clause grants an overriding effect to certain provisions that may be found either in the same enactment or some other enactments so as to avoid the operation of contrary provisions.([12])

11) Amendments to Section 45 and Section 50 of the Act:

The provisions of Section 45 have been amended to the extent that the words "unless it finds" have been substituted by the words "unless it prima facie finds". Thus, a judicial authority, before which a suit is brought has to only return a prima facie finding, and not a finding based on thorough examination of evidence, that the agreement is null and void. This change would go a long way in expediting proceedings under Section 45.

[11] *Section 34(2)(a) as amended by the Act of 2019.*

[12] *Shin-Etsu Chemical Co. Ltd. v. Akash Optifibre Ltd., (2005)7 SCC 234.*

Section 50 of the Act has been amended in the same manner as Section 37 of the Act, i.e. a non-obstante clause has been added, and an appeal shall lie only on the basis of the said provision, irrespective of any other provision in any other law.

12) *Section 87 and its effect on the judgment in BCCI v. Kochi Cricket Association:*

The introduction of Section 87 in the Amending Act of 2019 deals a fatal blow to the judgment of the Supreme Court in *BCCI v Kochi Cricket Association*, ([13]) inasmuch as now it has been made clear that the Amending Act of 2015 shall not apply to arbitration proceedings which commenced prior to 23rd October 2015, nor shall Court proceedings arising from such arbitral proceedings be governed by the Act of 2015. The *BCCI* judgment, which held that if Court proceedings commenced in respect to an award passed after 23rd October 2015, provisions of Section 36 of the Act would apply thereto, thus, stands nullified.

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[13] *(2018)6 SCC 287.*

INTERNATIONAL ARBITRATION SECTION 45 OF THE INDIAN ARBITRATION ACT 1996 AND ITS IMPLICATIONS AFTER THE AMENDMENT OF 2019

R.K. Sanghi
Advocate

I. PREFACE:

The present article is focused on Section 45 of the Indian Arbitration Act, 1996 which is adopted from the New York Convention, Article II (3). The issue is, whether in international arbitration agreement, the national courts while referring the parties to arbitration needs to look at the agreement as *prima- facie* or in finality in determining validity of arbitration agreements? The article also highlights the 2019 Amendment to Section 45.

II. ARTICLE II (3) OF THE NEW YORK CONVENTION:

Article II (3) of the New York Convention requires national courts to refer parties to arbitration, when referred by one of the party, unless the court finds that the agreement is null and void, inoperative or incapable of being performed. Most of the member countries have adopted this proviso in respect of international arbitration in their arbitration law. How to scrutinise the arbitration agreement, whether prima facie or final before referring the parties to the arbitration is the issue.

Article II (3) of the New York Convention reads as follows:

3. *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration,* ***unless it finds that the said agreement is null and void, inoperative or incapable of being performed.***

In Article II (3), the national courts are expected to refer parties to arbitration, *"unless it finds that the said agreement is null and void, inoperative or incapable of being performed"*. However, the question here remains that whether the national courts could conduct a full or a limited review of the arbitration agreement at the pre-award stage in order to determine whether arbitration

agreement is null and void, inoperative or incapable of being performed. It will be not wrong to say that even if we read between the lines of the Article II (3) of the New York Convention, it does not throw any light for standard of review that should be maintained at the pre-award stage.

Some countries advocate that a full review of the agreement is important to assess whether the arbitration agreement is null and void, inoperative or incapable of being performed at the pre-award stage. Countries like, Italy and Germany conduct a full review of the arbitration agreement in order to refer the parties to arbitration.

However, some national courts like England, France, Philippines and Switzerland etc. have adopted prima facie examination of the arbitration agreement at the pre-award stage and principle of Kompetenz – Kompetenz is followed. Principle of "Kompetenz – Kompetenz" as widely recognised empowers arbitrators to rule on their own jurisdiction.

III. THE FOREIGN AWARDS (RECOGNITION AND ENFORCEMENT) ACT, 1961:

The said Act was effective, prior to the Indian Arbitration and Conciliation Act 1996 Act. The relevant section reads as follows:

3. *Stay of proceedings in respect of matters to be referred to arbitration.*

Notwithstanding anything contained in the Arbitration Act, 1940 (10 of 1940), or in the Code of Civil Procedure, 1908 (5 of 1908), if any party to an agreement to which Article II of the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect of any matter agreed to be referred to arbitration in such agreement, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court, ***unless satisfied that the agreement is null and void, inoperative or. incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.***

IV. SECTION 45, INDIAN ARBITRATION ACT 1996, (PRIOR TO 2019 AMENDMENT):

In India, Article II (3) of New York Convention is reflected in Section 45 of Indian Arbitration Act 1996.

The Apex Court while scrutinising the scope of judicial intervention in Section 45, in the case of Shin-Etsu Chemical Co. Ltd vs M/S. Akash Optifibre Ltd. & Anr, 2005 (7) SCC 234, opined that although nothing in the language of Article II (3) itself indicated whether a finding as to the nature of the arbitral agreement has to be ex facie or prima facie, but a prima facie finding serves better purpose. The Court further emphasized that a prima facie review of the arbitration agreement at the pre-award stage would also allow an expedited arbitral process while ensuring a fair opportunity to contest the award after full trial.

However, in *Chrolo Control (I) P. Ltd. v. Severn Trent Water Purification Inc. & Ors.,* 2013 (1) SCC 641, the Hon'ble Supreme Court of India held contrary to the judgment of Shin-Etsu Chemical, the relevant para reads as under:

124. *We are not really concerned with the merits of that case but certainly are required to deal with the limited question whether the findings recorded by the referring Court are of final nature, or are merely prima facie and thus, capable of being re-adjudicated by the arbitral tribunal.*

Where the Court records a finding that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed on merits of the case, it would decline the reference. Then the channel of legal remedy available to the party against whom the reference has been declined would be to take recourse to an appeal under Section 50(1)(a) of the 1996 Act. The Arbitral Tribunal in such situations does not deliver any determination on the issues in the case.

However, in the event that the referring Court deals with such an issue and returns a finding that objections to reference were not tenable, thus rejecting, the plea on merits, then the issue arises as to whether the arbitral tribunal can re-examine the question of the agreement being null and void, inoperative or incapable of performance, all over again. Sabharwal, J., after deliberating upon the approaches of different courts under the English and the American legal systems, stated that both the approaches have their own advantages and disadvantages. The approach whereby the courts finally decide on merits in relation to the issue of existence and validity of the arbitration agreement would result to a large extent in avoiding delay and increased cost. It would not be for the parties to wait for months or years before knowing the final outcome of the disputes regarding jurisdiction alone.

125. *However, Srikrishna, J. took a somewhat different view and noticing the truth that there is nothing in Section 45 to suggest that a finding as to the nature of the arbitration agreement has to be ex facie or prima facie, observed that if it were to be held that the finding of the court under Section 45 should be a final, determinative conclusion, then it is obvious that until such a pronouncement is made, the arbitral proceedings would have to be in limbo.*

126. *Dharmadhikari, J., the third member of the Bench, while agreeing with the view of Srikrishna, J. and noticing, "Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(a) of the Act and further appeal to this Court under Sub-section (2) of the said section." expressed no view on the issue of prima facie or finality of the finding recorded on the pre-reference stage, he left the question open.*

127. *The judgment of this Court in Shin-Etsu Chemical Co. Ltd. (supra) preceded the judgment of this Court in the case of SBP & Co. (supra). Though the Constitution Bench in the latter case referred to this judgment in paragraph 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the arbitral tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act.*

129. *We are not oblivious of the principle 'Kompetenz kompetenz'. It requires the arbitral tribunal to rule on its own jurisdiction and at the first instance.*

One school of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the Courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. (refer Fouchard Gaillard Goldman on International Commercial Arbitration)

130. *This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act.*

Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II, Chapter I is suggestive of the requirement for the Court to determine the ingredients of Section 45, at the threshold itself. It is expected of the Court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the Court in accordance with law would certainly attain finality and would not be open to question by the arbitral tribunal, even as per the principle of prudence.

It will prevent multiplicity to litigation and re-agitating of same issues over and over again. The underlining principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. (supra) takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in the case of National Insurance Company Ltd. (supra) is founded on the decision by the larger Bench of the Court in the case of SBP & Co. (supra), we see no reason to express any different view. The categorization falling under para 22.1 of the National Insurance Company case (supra) would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the arbitral tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the arbitral tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the arbitral tribunal.

131. *Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well. To illustratively demonstrate it, we may give an example. Where party 'A' is seeking reference to arbitration and party 'B' raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues*

relating to the dispute between the parties, that may finally prove to be in vain and futile.

Such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties was null and void, inoperative and incapable of being performed. The Court may also hold that the arbitral tribunal had no jurisdiction to entertain and decide the issues between the parties. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.

Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in the case of Anderson Wright Ltd. (supra) took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the Court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even, the language of Section 45 of the 1996 Act suggests that unless the Court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.

V. 246TH LAW COMMISSION REPORT:

The Ministry of Law and Justice, Department of Legal Affairs, Law Commission addressing the need of the hour published its 246th report for proposed 2016 amendment and discussing the scope of pre-arbitral judicial intervention as the relevant part of the report reads as follows:

31. *"The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.*

32. *In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in Shin Etsu Chemicals Co. Ltd. v Akash Optifibre, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.*

33. *It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996.*

The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.

In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

VI. GENEVA CONVENTION AWARD:

Section 54 in Chapter II of the Indian Arbitration Act 1996 deals with Geneva Convention Award and the said Section reads as under:

> *54. "Power of judicial authority to refer parties to arbitration.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, on being seized of a dispute regarding a contract made between persons to whom section 53 applies and including an arbitration agreement, whether referring to present or future differences, which is valid under that section and capable of being carried into effect, shall refer the parties on the application of either of them or any person claiming through or under him to the decision of the arbitrators and such reference shall not prejudice the competence of the judicial authority in case the agreement or the arbitration cannot proceed or becomes inoperative."*

There is no amendment to this Section by the Indian Arbitration and Conciliation Act 2019.

VII. 2019 AMENDMENT OF THE INDIAN ARBITRATION ACT 1996, SECTION 45:

Section 45 has now been amended to substitute the words *"unless it finds"* with the words *"unless it prima facie finds"* This amendment to Section 45 now makes it *pari-materia* to Section 8 of the Act. Amended Section 45 reads as follows:

> *"45. Power of judicial authority to refer parties to arbitration. —Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration,* ***unless it prima facie finds*** *that the said agreement is null and void, inoperative or incapable of being performed."*

Section 8 of the Indian Arbitration Act was amended to include *prima facie* w.e.f. 23rd October, 2015 by 2016 amendment, but Section 45 was not amended at that time. Section 45 was amended by the Indian Arbitration and Conciliation (Amendment) Act 2019. The Ministry of

Law and Justice has issued a Notification on 30th August, 2019 appointing this date on which the provisions of Section 1, Section 4 to 9 (both inclusive), Section 11 to 13 (both inclusive) and Section 15 will come into force. However, Section 45 is not included in the said notification, the result is that Section 45 although amended by the Amendment Act has not come into effect.

VIII. CONCLUDING REMARKS:

The amendment to Section 45 has not come into force. The Indian Courts will have to decide the issue, whether arbitration agreement is null and void, inoperative or incapable of being performed as per the Judgment of *Chrolo Control.*

It is relevant to point out that Section 16 (competence of arbitral tribunal to rule on its jurisdiction) is contained in part I of the Act which deals with the Domestic Arbitration whereas there is no similar provision in part II of the Act which deals in international commercial arbitration.

If the notification is issued for enforcing the said amendment to Section 45, in that case, the Courts will have to decide the validity of the arbitration agreement on *prima facie* basis. It can be said that this will help in expeditious disposal of the cases and the object of alternate dispute resolution mechanism will be fulfilled. The 2019 amendment is initiated to put India on world map in arbitration proceeding, making India as a hub of international arbitration facilitating settlement of commercial disputes.

However the issue whether the arbitration agreement is null and void, inoperative or incapable of being performed can be re-agitated again at the time of enforcement of award.

On the other hand, the Hon'ble Supreme Court in Chrolo Control while deciding the issue has observed if there is a final determination of the issue whether the arbitration agreement is null and void, inoperative or incapable of being performed at the pre-award stage, it will prevent multiplicity of litigation and re-agitation of the issue over and over again. Supreme Court has further observed that if the issue is not decided finally at the threshold itself it may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile and such adjudication by the arbitral tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage held that agreement between the parties is null and void inoperative and incapable of being performed.

Justice Mr. R.F. Nariman, Supreme Court of India while delivering the key note address at the 3rd ICC India Arbitration Day event on 14th September 2019, was critical of introduction of prima facie requirement in Section 45 as the law was well settled by the Supreme Court in the case of *Shin-Etsu*, 2005 (7) SCC 234, that the test of *prima facie* case will apply only if the Court is referring the parties to arbitration. If the Court is not referring the parties to arbitration, it has to decide conclusively the validity of arbitration clause, as held by the Supreme Court in *Shin-Etsu*. The amendment has done the exact opposite of what has been held by the Supreme Court and this amendment lead to absurdity.

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EMERGENCY ARBITRATIONS AND EMERGENCY ARBITRATORS

Sunil Malhotra

INTRODUCTION

Emergency Arbitration is a new and upcoming concept in the field of arbitration wherein an emergency relief is granted to those who want to protect their assets and evidence that might otherwise be altered or lost. Such arbitration is usually agreed to and arranged by the parties themselves without recourse to a Tribunal at the first instance. It is defined as a procedure by which parties seeking for an urgent interim relief may appoint an arbitrator even before the constitution of the arbitral Tribunal. In any arbitration there are instances where parties may want to protect their rights such as by freezing opposite party's assets in order to secure the amount claimed or any other relief similar in nature.

In an emergency arbitration, an application for relief is generally to be made to an arbitrator appointed by the arbitral institute (institutional arbitration), which is prior to the constitution of an arbitral Tribunal in the usual way. For example, ICC Rules provide that, "[a] party that needs urgent interim or conservatory measures that cannot await the constitution of an Arbitral Tribunal may make an application for such measure to the Emergency Arbitrator."[1]

Many arbitral institutions have acknowledged emergency arbitration as a means to provide instant interim relief to the parties wherein a prima facie case exists requiring immediate relief which if not granted will lead to irreparable damages. The objective of such an Emergency Arbitration is to provide urgent pro tem or conservatory measures to a party or parties that cannot await the formation of an Arbitral Tribunal.

The person seeking such appointment has to satisfy two elements-

1. **Fumus boni iuris**– Reasonable possibility that the requesting party will succeed on merits;
2. **Periculum in mora** – if the measure is not granted immediately, the loss would not and could not be compensated by way of damages.

[1] *Article 29(1) of the ICC Rules*

CHARACTERISTICS OF EMERGENCY ARBITRATORS

Recognised and adopted by various institutions

The important characteristics of an Emergency Arbitrator are as follows:

a. Emergency Arbitrator has powers to deal with only emergency relief applications

b. Emergency Arbitrator enjoys the same powers as the regular Arbitral Tribunal

c. Emergency Arbitrator must complete his work within 14 days

d. Emergency Arbitrator cannot continue after the formation of the Arbitral Tribunal

e. Emergency Arbitrator orders can be reviewed or altered by the Arbitral Tribunal

f. Emergency Arbitrator award can be challenged only in the seat of arbitration

g. Normally Emergency Arbitrator will not be a part of the Arbitral Tribunal

A. GLOBAL SCENARIO

The emergency arbitration was first introduced in year 2006 by International Centre for Dispute Resolution (ICDR). Many other major arbitral Institutions such as ICC[2], LCIA[3], SIAC[4], HKIAC[5], AIAC[6] thereafter, have followed by inserting the provisions for appointing the Emergency Arbitrators. SIAC has amended their rules, accordingly by which the President shall seek to appoint the Arbitrator within one day of the receipt by the Registrar of such application requested. Very recently the Malaysian Arbitration Act has been amended in 2018, which came into force w.e.f. 8th May 2018, thereby introducing changes to the Arbitration Act, 2005 by incorporating clarification of the status of an Emergency Arbitrator and orders/Awards granted by the Emergency Arbitrator.[7]

MALAYSIAN ARBITRATION ACT, 2005

The Arbitration (Amendment) Act, 2018 of Malaysian Arbitration Act stated a definitive expansion in the term 'Arbitral Tribunal'[8]. As certain Arbitration Institutes now have rules to allow the appointment of Emergency Arbitrators for urgent interim relief, the term 'Arbitral Tribunal' in the Act would now also include 'Emergency Arbitrator'.

Hence, the award passed by an Arbitral Tribunal, being binding- the same includes an award passed by an Emergency Arbitrator also[9].

SIAC RULES, 2016 ON EMERGENCY ARBITRATORS

"Award" includes a partial, interim or final award and an award of an Emergency Arbitrator;[10]

"Emergency Arbitrator" means an arbitrator appointed in accordance with paragraph 3 of Schedule 1;

"Costs of the arbitration" includes the Tribunal's fees and expenses and the Emergency Arbitrator's fees and expenses, where applicable;[11]

SCHEDULE 1 OF THE SIAC RULES, 2016 EMERGENCY ARBITRATOR

A party that wishes to seek emergency interim relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, file an application with the Registrar. The party shall at the same time send a copy of the application to all other

[2] *International Chamber of Commerce*
[3] *London Court for International Arbitration*
[4] *Singapore International Arbitration Centre*
[5] *Hong Kong International Arbitration Centre and ICC (International Chamber of Commerce)*
[6] *Asian International Arbitration Centre*
[7] *Section 2 and new Section 19H of the Act*
[8] *Section 2 of the Act*
[9] *Section 19 H of the Act*
[10] *1.3 of the Rules*
[11] *35.2 of the Rules*

parties. The Application shall include nature of relief sought, reasons why the party is entitled to such relief and statement certifying that all other parties have been provided with a copy of the application or, if not, an explanation of the steps taken in good faith to provide a copy or notification to all other parties.

The application shall be accompanied by payment of the non-refundable administration fee and the requisite deposits towards the Emergency Arbitrator's fees and expenses for proceedings pursuant to this in Schedule 1. In appropriate cases, Registrar may increase the amount of deposits, if the additional deposits are not paid within the time limit set by Registrar, the application shall be considered as withdrawn.

President shall seek to appoint an Emergency Arbitrator within one day of receipt by Registrar of such application and payment of administration fee and deposits. Seat of the proceedings for emergency interim relief shall be Singapore, without prejudice to the Tribunal's determination of the seat of the arbitration under Rule 21.1.

Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstances that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of Emergency Arbitrator must be made within two days of the communication by Registrar to the parties of appointment of Emergency Arbitrator and the circumstances disclosed. Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to dispute, unless otherwise agreed by parties.

Emergency Arbitrator shall within two days of his appointment, establish a schedule for consideration of the application. Such schedule shall provide a reasonable opportunity for the parties to be heard but may provide for proceedings by telephone or video conference or on written submissions as alternatives to a hearing in person.

> Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary, including preliminary orders that may be made pending any hearing, telephone or video conference or written submissions by the parties. Emergency Arbitrator shall give summary reasons for his decision in writing. Emergency Arbitrator may modify or vacate the preliminary order, the interim order or Award for good cause.

Emergency Arbitrator shall make his interim order or Award within 14 days from the date of his appointment unless, in exceptional circumstances, the Registrar extends the time. No interim order or Award shall be made by the Emergency Arbitrator until it has been approved by the Registrar as to its form as per SIAC Arbitration Rules.[12]

> Emergency Arbitrator shall have no power to act after the Tribunal is constituted. Tribunal may reconsider, modify or vacate any interim order or Award issued by Emergency Arbitrator, including a ruling on his own jurisdiction. Tribunal is not bound by the reasons given by Emergency Arbitrator. Any interim order or Award issued by Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or Award or when the Tribunal makes a final Award or if the claim is withdrawn.

Any interim order or Award by Emergency Arbitrator may be conditioned on provision by the party seeking such relief of appropriate security. Parties agree that an

[12] *(6th Edition, 1 August 2016) 40*

order or Award by an Emergency Arbitrator pursuant to this Schedule 1 shall be binding on the parties from the date it is made and undertake to carry out the interim order or Award immediately and without delay. The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.

Costs associated with any application pursuant to this Schedule 1 may initially be apportioned by Emergency Arbitrator, subject to the power of the Tribunal to determine finally the apportionment of such costs.

Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and not subject to appeal, review or recourse. Registrar may abbreviate any time limits under these Rules in applications made pursuant to proceedings commenced under Rule 30.2 and Schedule 1.

ICC RULES OF ARBITRATION

Article 29: Emergency Arbitrator

A party that needs urgent interim or conservatory measures that cannot await the constitution of an Arbitral Tribunal ("Emergency Measures") may make an application for such measures pursuant to Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to transmission of file to Arbitral Tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration. Emergency Arbitrator's decision shall take the form of an order. Parties undertake to comply with any order made by Emergency Arbitrator. Emergency Arbitrator's order shall not bind the arbitral Tribunal with respect to any question, issue or dispute determined in the order. Arbitral Tribunal may modify, terminate or annul the order or any modification thereto made by the Emergency Arbitrator. Arbitral Tribunal shall decide upon any party's requests or claims related to Emergency Arbitrator proceedings, including reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

Articles 29(1)-29(4) and Emergency Arbitrator Rules set forth in Appendix V shall apply only to parties that are either signatories of the arbitration agreement that is relied upon or successors to such signatories.

Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures and in appropriate circumstances even thereafter, pursuant to the Rules.

APPENDIX V: EMERGENCY ARBITRATOR RULES

Article 1: Application for Emergency Measures

A party wishing to have recourse to an Emergency Arbitrator pursuant to Article 29 of the "Rules" shall submit its Application for Emergency Measures to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules. Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for Emergency Arbitrator, and one for Secretariat. Application shall contain the information like name, description, address and other contact details of each of the parties; name, address and other contact details of any person(s) representing the applicant; description of the circumstances giving rise to the Application and of underlying dispute referred or to be referred to arbitration; statement of Emergency Measures sought; reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral Tribunal; any relevant agreements and the arbitration agreement; any agreement as to place of arbitration, applicable rules of law or the language of the arbitration; proof of payment of amount referred to in Article 7(1); and any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the

Secretariat by any of the parties to the Emergency Arbitrator proceedings prior to the making of the Application. It may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application. President shall terminate the Emergency Arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat's receipt of the Application, unless the Emergency Arbitrator determines that a longer period of time is necessary.

Article 2: Appointment of the Emergency Arbitrator; Transmission of the File

President shall appoint an Emergency Arbitrator, normally within two days from the Secretariat's receipt of the Application. No Emergency Arbitrator shall be appointed after the file has been transmitted to the arbitral Tribunal pursuant to Article 16 of the Rules. Once Emergency Arbitrator has been appointed, Secretariat shall so notify the parties and shall transmit the file to Emergency Arbitrator. Thereafter all written communications from parties shall be submitted directly to Emergency Arbitrator with a copy to other party and Secretariat. Every Emergency Arbitrator shall be and remain impartial and independent of the parties involved in the dispute. Before being appointed, a prospective Emergency Arbitrator shall sign a statement of acceptance, availability, impartiality and independence. Secretariat shall provide a copy of such statement to the parties. Emergency Arbitrator shall not act as an arbitrator in any arbitration relating to the said dispute.

Article 3: Challenge of an Emergency Arbitrator

A challenge against the Emergency Arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification. The challenge shall be decided by the Court after Secretariat has afforded an opportunity for Emergency Arbitrator and other party to provide comments in writing within a suitable period of time.

Article 4: Place of the Emergency Arbitrator Proceedings

If the parties have agreed upon the place of arbitration, such place shall be the place of Emergency Arbitrator proceedings. In the absence of such agreement, President shall fix the place of Emergency Arbitrator proceedings, without prejudice to the determination of place of arbitration pursuant to Article 18(1) of the Rules. Any meetings with Emergency Arbitrator may be conducted through a meeting in person at any location Emergency Arbitrator considers appropriate or by video conference, telephone etc.

Article 5: Proceedings

Emergency Arbitrator shall establish a procedural timetable for Emergency Arbitrator proceedings, normally within two days from the transmission of the file to Emergency Arbitrator pursuant to Article 2(3) of this Appendix. Emergency Arbitrator shall conduct the proceedings in the manner which Emergency Arbitrator considers to be appropriate, taking into account nature and urgency of the Application. Emergency Arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity.

Article 6: Order

Pursuant to Article 29(2), Emergency Arbitrator's decision shall take the form of an order. In the Order, Emergency Arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) and whether Emergency Arbitrator has jurisdiction to order Emergency Measures. Order shall be made no later than 15 days from the date on which the file was transmitted to Emergency Arbitrator pursuant to Article 2(3). President may extend the time limit pursuant to a reasoned request from Emergency Arbitrator or on President's own initiative. Within the time limit established pursuant to Article 6(4), Emergency Arbitrator shall send the Order to the parties,

with a copy to Secretariat, by any of the means of communication permitted by Article 3(2) that Emergency Arbitrator considers will ensure prompt receipt. Order shall cease to be binding on the parties upon - President's termination of Emergency Arbitrator proceedings pursuant to Article 1(6); acceptance by the Court of a challenge against Emergency Arbitrator pursuant to Article 3; Arbitral Tribunal's final award; or withdrawal of all claims or termination of the arbitration before the rendering of a final award. Emergency Arbitrator may make the Order subject to such conditions as Emergency Arbitrator thinks fit, including requiring the provision of appropriate security. Upon a reasoned request by a party made prior to the transmission of the file to arbitral Tribunal pursuant to Article 16, the Emergency Arbitrator may modify, terminate or annul the Order.

Article 7: Costs of the Emergency Arbitrator Proceedings

Applicant has to pay an amount of US$ 40,000, consisting of US$ 10,000 for ICC administrative expenses and US$ 30,000 for Emergency Arbitrator's fees and expenses. Notwithstanding Article 1(5), Application shall not be notified until the payment of US$ 40,000 is received by Secretariat. President may at any time during Emergency Arbitrator proceedings, decide to increase Emergency Arbitrator's fees or the ICC administrative expenses taking into account the nature of the case and nature and amount of work performed by Emergency Arbitrator, Court, President and Secretariat. If the Applicant fails to pay the increased costs within the time limit fixed by Secretariat, Application shall be considered as withdrawn. Emergency Arbitrator's Order shall fix the costs of Emergency Arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. In the event that the Emergency Arbitrator proceedings do not take place pursuant to Article 1(5) or are otherwise terminated prior to the making of an Order, President shall determine the amount to be reimbursed to the applicant, if any. An amount of US$ 5,000 for ICC administrative expenses is non-refundable in all cases.

Article 8: General Rule

President shall have the power to decide, at its discretion, all matters relating to administration of Emergency Arbitrator proceedings not expressly provided for. In President's absence or otherwise at President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.

B. INDIAN SCENARIO

Likewise in India, MCIA[13] has adopted provision for the appointment of Emergency Arbitrator, similarly DIAC[14] has also included the provision for 'Emergency Arbitrator' and the appointment, procedure and time period for the same. Further, most of the institutions have also put a time limit date within which the interim award is to be delivered. For example, under SIAC Rules 2016 and MCIA Rules 2016, the award is to be made within 14 day from the date of appointment of Emergency Arbitrator.

LAW COMMISSION'S REPORT[15]

In order to recognise emergency arbitrations, Law Commission proposed an amendment to Section 2(1) (d) of the Arbitration and Conciliation Act, 1996. This amendment was to ensure that institutional rules such as SIAC Arbitration Rules or ICC Rules or any other rule which provide for an appointment of Emergency Arbitrator are given statutory recognition in India:

"Section 2(1)(d): "arbitral tribunal" means a sole arbitrator or a panel of arbitrators and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an Emergency Arbitrator, includes such Emergency Arbitrator."

[13] *Mumbai Centre for International Arbitration*
[14] *Delhi International Arbitrator Centre*
[15] *Law Commission's 246th Report on amendments to the Arbitration and Conciliation Act, 1996*

It was expected that the Arbitration and Conciliation Act, 1996 [as amended by the Arbitration and Conciliation (Amendment) Act, 2015) (No.3 of 2016)] would embrace this global turn of tide and create provisions for appointment of Emergency Arbitrator. The Amendment of 2015, however, did not incorporate the recommendation of the Law Commission and does not provide at all for Emergency Arbitration.

Amendment of Section 2 - In sub-section (1), clause (d), after the words "…panel of arbitrators" add "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an Emergency Arbitrator, includes such Emergency Arbitrator;"

[NOTE: This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules, which provide for an Emergency Arbitrator are given statutory recognition in India.]

The Commission has recommended the addition of Explanation 2 to section 11(6A) of the Act with the hope that High Courts and the Supreme Court, while acting in the exercise of their jurisdiction[16] will take steps to encourage the parties to refer their disputes to institutionalised arbitration. Similarly, the Commission seeks to accord legislative sanction to rules of institutional arbitration which recognise the concept of an "Emergency Arbitrator" – and the same has been proposed by broadening the definition of an "Arbitral Tribunal."[17]

EMERGENCY ARBITRATIONS IN INDIAN CASES

The first issue relating to the emergency arbitration was discussed in the case of **HSBC PI Holding (Mauritius) Limited v. Avitel Post Studiouz Limited** dated 22.01.2014 by the **Bombay High Court**. In the present case, the seat of arbitration was Singapore i.e. outside India. The Petitioner had moved an application for the appointment of Emergency Arbitrator to seek interim measures. The Emergency Arbitrator had granted the interim measures and passed the award in favor of the Petitioner by freezing the accounts of the Respondents and required them to disclose their assets to HSBC Mauritius Limited. The Petitioner later moved an application under Section 9 of the Act before Bombay High Court to seek the same relief which was granted by Emergency Arbitrator. The Hon'ble High Court of Bombay held that since the party had moved an application under Section 9 of the Act and was not seeking to enforce the emergency award passed, the same could be granted by the Court.

It is pertinent to note that the judgment was delivered prior to the BALCO decision where it was held that the Indian Courts cannot entertain interim relief where the seat of arbitration is outside India. The amendment of 2015 introduced in the Arbitration Act a shift from the Law laid down in ***Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.***[18] qua the applicability of Part-I of the Act to the Foreign Seated Arbitrations by incorporating the proviso to Section 2(2) of the Act which reads as under:

> *"PROVIDED that subject to an agreement to the contrary, the provisions of section 9 (Interim measures etc. by court), section 27 (Court assistance in taking evidence) and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration,* ***even if the place of arbitration is outside India****, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of part II of this Ordinance."*

In the case of **Raffles Design International India Private Limited & Ors. v. Educomp Professional Education Limited & Ors.,** held by the **Delhi High Court** dated 7.10.2016 the issue of Emergency Arbitrator was again discussed. The seat of arbitration was Singapore. The interim relief was granted by the Emergency Arbitrator restraining the Respondent from taking any action that

[16] *Section 11 of the Act*
[17] *Section 2(d) of the Act*
[18] *(2012) 9 SCC 552*

would deprive the rights of the Claimants in the agreement in respect of (a) Hiring and dismissal of employees in the society and (b) functioning and management of the Society. Additionally, Respondent was restrained from instigating the terminated employees of the Society. The same was also enforced by High Court of Republic of Singapore. Later, the party for whom the order was passed in favor sought interim relief[19] stating that the opposite party had been acting in contravention to emergency award passed.

It was held that:

"99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal. Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted."

EMERGENCY ARBITRATION INSTITUTIONS IN INDIA

- **Delhi International Arbitration Centre (DIAC)**, of Delhi High Court[20] enumerates provisions of "Emergency Arbitration", 'Emergency Arbitrator'[21] and the appointment, procedure, time period and powers of an Emergency Arbitrator.
- **Court of Arbitration of the International Chambers of Commerce - India**,[22] - enumerates provisions of Emergency Arbitration and Emergency Arbitrator.
- **Madras High Court Arbitration Centre (MHCAC) Rules, 2014**[23] - enumerates provisions of Emergency Arbitration and Emergency Arbitrator.
- **Mumbai Center for International Arbitration (Rules) 2016,**[24] - enumerates provisions of "Emergency Arbitration" and "Emergency Arbitrator".

- **Indian Council of Arbitration** - enumerates the provisions of Emergency Arbitrator and Emergency Arbitrator's Fee. The Rules provide for the conduct of Domestic, International and Maritime Arbitration and also Domestic Commercial Arbitration and Conciliation.

Delhi International Arbitration Centre (DAC) Rules

EMERGENCY ARBITRATION[25]

Emergency Arbitrator[26] -

If a party is in requirement of urgent interim or conservatory measures, that cannot await formation of the Arbitration Tribunal, it may make an application to Secretariat addressed to Coordinator, with a simultaneous copy thereof to other parties to the arbitration agreement for such measures.

Party making such an application shall describe the circumstances and nature of urgency and measures sought, pay the relevant application fee for appointment of the Emergency Arbitrator, file proof of service of such application upon the opposite parties. Applicant shall deposit cash and fees prescribed in the Schedule.

[19] *Section 9 of the new amended Arbitration & Conciliation Act, 2015*
[20] *Part III of its Arbitration Rules*
[21] *Section 18A*
[22] *Article 29 of the 'Arbitration and ADR Rules' r/w Appendix V*
[23] *Part IV, Section 20 r/w Schedule A and Schedule D*
[24] *Section 3 w.e.f. 15.June.2016*
[25] *PART III-A of the Rules*
[26] *18A of the Rules*

Secretariat with the consent of Chairperson shall appoint Emergency Arbitrator within two days of making of such request.

Emergency Arbitrator so appointed shall schedule a hearing including filing of pleadings and documents by the parties within two business days of his appointment. Emergency Arbitrator shall provide reasonable opportunity of being heard to all the parties before granting any urgent interim or conservatory measures and proceed to make an Order by giving reasons. Parties shall comply with any order made by the Emergency Arbitrator. Emergency Arbitrator shall ensure that entire process from appointment of Emergency Arbitrator to making the Order shall be completed within seven (7) days. Emergency Arbitrator shall become functus officio after the Order is made and shall not be a part of Arbitral Tribunal, which may be formed subsequently and in accordance with Rule 14, unless otherwise agreed to by the parties. Order for urgent interim or conservatory measures passed by the Emergency Arbitrator shall not bind Arbitral Tribunal on the merits of any issue or dispute that the said Tribunal may be required to determine. Order passed by Emergency Arbitrator shall remain operative for a period of two months from the date of passing of the order unless modified, substituted or vacated by Arbitral Tribunal. Arbitral Tribunal will also have the power to extend the order beyond the period of two months.

Madras High Court Arbitration Center (MHCAC) Rules, 2014

EMERGENCY ARBITRATION[27]

Emergency Arbitrator[28]

A party in need of emergency interim relief prior to the constitution of the Arbitral Tribunal may apply for such relief pursuant to the procedures set forth herein below:

A party in need of emergency relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Arbitral Tribunal, make an application for emergency interim relief. The party shall notify the Registrar and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis, application shall also set forth the reasons why the party is entitled to such relief. Such notice must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties. The application shall also be accompanied by payment of any fees set by the Registrar for the proceedings.

Registrar shall seek to appoint an Emergency Arbitrator within one business day of receipt by the Registrar of such application and payment of any required fee.

Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstance that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed. Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless agreed by the parties.

Emergency Arbitrator shall within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The Emergency Arbitrator shall have the powers vested in the Arbitral Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, and shall resolve any disputes over the application.

Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary. Emergency Arbitrator shall give reasons for his decision in writing. Emergency Arbitrator may modify or vacate

[27] *PART IV- of the Rules*

[28] *20 of the Rules*

the interim award or order for good cause shown. Emergency Arbitrator shall have no further power to act after the Arbitral Tribunal is constituted. Arbitral Tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator. Arbitral Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any order or award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Arbitral Tribunal is not constituted within 90 days of such order or award or when the Arbitral Tribunal makes a final award or if the claim is withdrawn.

Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

An order or award pursuant to an application under this rule shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.

The costs associated with any application under this rule shall initially be apportioned by the Emergency Arbitrator, subject to the power of the Arbitral Tribunal to determine finally the apportionment of such costs.

These Rules shall apply as appropriate to any proceeding, taking into account the inherent urgency of such a proceeding. The Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and not subject to appeal.

Mumbai Centre for International Arbitration (Rules) 2016

EMERGENCY ARBITRATION

Emergency Arbitrator[29]

In cases of exceptional urgency, any party may apply to the Registrar in writing for emergency interim relief prior to the constitution of the Tribunal. The application shall contain together with all relevant documentation a statement briefly describing the nature and circumstances of relief sought and specific reasons why such relief is required on an emergency basis; reasons why the party is entitled to such relief; statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties; and confirmation that any fees set by Registrar for proceedings have been paid.

Chairman shall determine the application as soon as possible and, if granted, shall seek to appoint an Emergency Arbitrator within one business day of receipt by the Registrar of such application and payment of any required fee.

Prior to accepting his appointment, a prospective Emergency Arbitrator must disclose to the Registrar any facts or circumstances which may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication by the Registrar to the parties of the appointment of Emergency Arbitrator and the circumstances disclosed. (Section 12 of the Act read with fifth and sixth Schedule incorporated by 2015 amendment).

Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless agreed by all the parties.

Emergency Arbitrator may conduct proceedings in any manner as appropriate in the circumstances, taking into account nature of such proceedings and need to provide a reasonable opportunity to all parties to be heard. Emergency Arbitrator may conduct proceedings by telephone or video conference or require written pleadings as alternatives to a formal hearing. Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction and shall have the power to resolve any disputes over the application of this Rule 14 (or any part thereof). (Section 16 of the Act).

Emergency Arbitrator shall decide the claim for emergency relief but no later than 14 days following the

[29] *14 of the Rules*

Emergency Arbitrator's appointment. This deadline may only be extended by the Council in exceptional circumstances or by the written agreement of all parties to the emergency proceedings.

Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary. An order or award of the Emergency Arbitrator shall be made in writing, with a brief statement of reasons. An order or award of an Emergency Arbitrator shall comply with Rule 30.7 and, when made, shall take effect as an Award under Rule 30.12. Emergency Arbitrator shall have the power to modify or vacate the order or award for good cause shown. Any interim relief ordered or awarded by an Emergency Arbitrator shall be deemed to be an interim measure ordered or awarded by a Tribunal. Parties undertake to comply with any such interim measure immediately and without delay and they also waive their rights to any form of appeal, review or recourse to any state court in respect of any such interim measure insofar as such waiver may validly be made.

Emergency Arbitrator shall have no further power to act after the Tribunal is constituted. Any order or award of the Emergency Arbitrator may be confirmed, varied, discharged or revoked, in whole or in part, by an order or award made by the Tribunal upon application by any party or upon its own initiative, Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any order or award of emergency relief may be conditioned on the provision of appropriate security by the party seeking such relief.

The costs associated with any application pursuant to this Rule 14 shall initially be apportioned by the Emergency Arbitrator, subject to the power of the Tribunal to determine finally the apportionment of such costs.

These Rules shall apply as appropriate to any proceeding pursuant to this Rule 14, taking into account the inherent urgency of such a proceeding. Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and binding on the parties, subject to Rule 14.9.

The Indian Council of Arbitration

EMERGENCY ARBITRATION

A. RULES OF DOMESTIC COMMERCIAL ARBITRATION AND CONCILIATION

(As amended on and with effect from 1st April, 2016)

Appointment of Emergency Arbitrator:[30]

(a) If a party is in requirement of urgent interim or conservatory measures, that cannot await formation of the Tribunal, it may make an application for emergency interim relief. The party shall notify the Registrar with a simultaneous copy thereof to the other parties to the arbitration agreement for such measures.

(b) The party making such an application shall:

i) describe the circumstances and the nature of the urgency and the measures sought

ii) file proof of service of such application upon the opposite parties.

(c) The party invoking the provision of Emergency Arbitrator shall deposit the necessary fees, administrative charges and expenses decided by the Registrar in consultation with the Chairman of the Arbitration Committee within 7 days from the date of demand made by the Registrar.

(d) The Registrar, in consultation with the Chairman and in his absence in consultation with the member of the Committee designated by the Chairman, shall appoint the Emergency Arbitrator as soon as possible but not later than seven days from the date of receipt of the fee as above.

(e) The Emergency Arbitrator so appointed shall schedule a hearing including filing of pleadings as soon as possible but not later than seven days of his appointment. The Emergency Arbitrator shall

[30] *Rule 57 (b)*

provide reasonable opportunity of being heard to all the parties and upon being satisfied shall have the power to pass an interim order.

(f) The Registrar shall ensure that the entire process from the appointment of the Emergency Arbitrator to making the Order shall be completed within thirty days (excluding non-business days).

(g) The Emergency Arbitrator shall become functus officio after the Order is made.

(h) The order for urgent interim or conservatory measures passed by the Emergency Arbitrator shall not bind the Tribunal on the merits of any issue or dispute that the said Tribunal may be required to determine.

(i) An order pursuant to the appointment of Emergency Arbitrator shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.

(j) The order passed by the Emergency Arbitrator shall remain operative unless modified, substituted or vacated by the Tribunal.

(k) Emergency Arbitrator for all purposes shall be treated as ad hoc Arbitral Tribunal and shall have all the powers vested in the Arbitral Tribunal referred to in Rule 57.

B. THE MARITIME ARBITRATION RULES (Operational from 1st April, 2016)

These Rules govern the conduct for domestic and international maritime arbitrations in India.

Appointment of Emergency Arbitrator:[31]

(a) If a party is in requirement of urgent interim or conservatory measures, that cannot await formation of the Tribunal, it may make an application for emergency interim relief. The party shall notify the Registrar with a simultaneous copy thereof to the other parties to the arbitration agreement for such measures.

(b) The party making such an application shall:

i) describe the circumstances and the nature of the urgency and the measures sought

ii) file proof of service of such application upon the opposite parties.

(c) The party invoking the provision of Emergency Arbitrator shall deposit the necessary fees, administrative charges and expenses decided by the Registrar in consultation with the Chairman of the Maritime Arbitration Committee within 7 days from the date of demand made by the Registrar.

(d) The Registrar, in consultation with the Chairman and in his absence in consultation with the member of the Committee designated by the Chairman, shall appoint the Emergency Arbitrator as soon as possible but not later than seven days from the date of receipt of the fee as above.

(e) The Emergency Arbitrator so appointed shall schedule a hearing including filing of pleadings as soon as possible but not later than seven days of his appointment. The Emergency Arbitrator shall provide reasonable opportunity of being heard to all the parties and upon being satisfied shall have the power to pass an interim order as provided under Rule 14(3).

(f) The Registrar shall ensure that the entire process from the appointment of the Emergency Arbitrator to making the Order shall be completed within thirty days (excluding non-business days).

(g) The Emergency Arbitrator shall become functus officio after the Order is made.

(h) The order for urgent interim or conservatory measures passed by the Emergency Arbitrator shall not bind the Tribunal on the merits of any issue or dispute that the said Tribunal may be required to determine.

(i) An order pursuant to the appointment of Emergency Arbitrator shall be binding on the parties when

[31] *Rule 14 (4)*

rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.

(j) The order passed by the Emergency Arbitrator shall remain operative unless modified, substituted or vacated by the Tribunal.

(k) The Emergency Arbitrator for all purpose shall be treated as ad hoc arbitral tribunal.

C. RULES OF INTERNATIONAL COMMERCIAL ARBITRATION (with effect on and from 1st January, 2014)

Emergency Arbitrator:[32]

(1) If a party is in requirement of urgent interim or conservatory measures, that cannot await formation of the Tribunal, it may make an application for emergency interim relief. The party shall notify the Registrar with a simultaneous copy thereof to the other parties to the arbitration agreement for such measures.

(2) The party making such an application shall:

a) describe the circumstances and the nature of the urgency and the measures sought

b) file proof of service of such application upon the opposite parties.

(3) The party invoking the provision of Emergency Arbitrator shall deposit the necessary fees prescribed in the relevant schedule of fee within 7 days from the date of demand made by the Registrar.

(4) The Registrar, in consultation with the Chairman and in his absence the Committee shall appoint the Emergency Arbitrator as soon as possible but not later than seven days from the date of receipt of the fee as above.

(5) The Emergency Arbitrator so appointed shall schedule a hearing including filing of pleadings as soon as possible but not later than seven days of his appointment. The Emergency Arbitrator shall provide reasonable opportunity of being heard to all the parties and upon being satisfied shall have the power to pass an interim order as provided under Rule 24.

(6) The Registrar shall ensure that the entire process from the appointment of the Emergency Arbitrator to making the Order shall be completed within thirty days (excluding non-business days).

(7) The Emergency Arbitrator shall become functus officio after the Order is made and shall not be a part of the Tribunal.

(8) The order for urgent interim or conservatory measures passed by the Emergency Arbitrator shall not bind the Tribunal on the merits of any issue or dispute that the said Tribunal may be required to determine.

(9) An order or award pursuant to the appointment of Emergency Arbitrator shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.

(10) The order passed by the Emergency Arbitrator shall remain operative unless modified, substituted or vacated by the Tribunal.

Emergency Arbitrator's Fee:[33] The Emergency Arbitrator's Fee shall be between US Dollars 1,650 and 16,500 xxxxxxx as may be fixed by the Registrar in consultation with the Chairman and in his absence the Committee. Such fee shall be deposited by the party applying for the appointment of the emergency arbitrator within 7 days of the date of demand.

EMERGENCY ARBITRATION IN INDIA : LACUNAE

One of the major hurdles in the successful implementation of the provisions of emergency arbitration is in deciding whether an Emergency Arbitrator's decision is in the form of an 'award' or an

[32] *Rule 33*

[33] *Rule 36 (3)*

'order'. Furthermore, is such an interim measure ordered by an Emergency Arbitrator enforceable, when it is in fact not 'final'?

An arbitral award includes an interim award as well.[34] Therefore, any interim award given by the Emergency Arbitrator would have been enforceable in India. An interim order that is passed by the arbitral tribunal, shall be binding as an order of the court.[35] In context of the second question, an arbitral award shall always be final and binding upon the parties[36]. Hence, any arbitral award (even an interim award) would be binding and enforceable in India.

However, in India, the Mumbai Centre for International Arbitration (MCIA) Rules lay down the provisions for emergency arbitration. Rule 14.7 in very simple terms puts the controversy of whether an interim measure is in the nature of an 'order' or an 'award' to rest. It states that any interim relief ordered by the Emergency Arbitrator can be in the form of an 'order' or an 'award' which will be binding on the parties just like an interim measure ordered by a Tribunal.

Arbitral institutions in India such as Mumbai Centre for International Arbitration[37], Nani Palkhivala Arbitration Centre[38], Indian Council of Arbitration[39], Delhi International Arbitration Centre and the like, recognize emergency arbitration and have provided for specific procedure in that regard within their rules. The definition of the term "Award as per the MCIA rules reads as: "Award" includes a partial or final award and an award of an Emergency Arbitrator;"

The definition of Arbitral Tribunal in Section 2 (1) (d) of the Arbitration and Conciliation Act, 1996 [as amended by the Arbitration and Conciliation (Amendment) Act, 2015) (No.3 of 2016)] does not include Emergency Arbitrator within the ambit of Arbitral Tribunal as proposed in the 246th Report of the Law Commission of India. Therefore an interim order passed by the Emergency Arbitrator is not enforceble as an interim Award, unless the arbitration is governed under the said Institutional Rules as agreed by the Parties.

CONCLUSION

The concept of 'Emergency Arbitration' has not been so popular in India. Previously, the Indian arbitration rules and the laws were not so arbitration friendly but after the Amendment of 2015 in the Arbitration and Conciliation Act, 1996 [as amended by the Arbitration and Conciliation (Amendment) Act, 2015) (No.3 of 2016)] and the MCIA Rules 2016, India is gradually moving forward and adapting the international standards in commercial arbitration.

Though, the institutions have recognise and incorporated the concept of Emergency Arbitration, However, unfortunately, the concept of emergency arbitration and award is absent in the Indian legislation. The definition of award under Section 2 (c) of Arbitration and Conciliation Act, 1996 [(as amended by the Arbitration and Conciliation (Amendment) Act, 2015) (No. 3 of 2016)] even after the much appreciated amendments does not cover “emergency award” with in its ambit and scope. Further in Ad-hoc arbitration, institutional rules are not applicable, unless the parties agreed to be governed by such rules containing clause for appointment of Emergency Arbitrator. In order to cop with the lack of immediate relief in Arbitration and Conciliation Act, 1996 the High Level Committee Report to Review the Institutionalisation of Arbitration Mechanism in India had suggested an amendment in the Act.

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[34] *in accordance with section 2(c) of the Arbitration Act*
[35] *in accordance with section 17 of the Arbitration Act*
[36] *as per section 35 of the Arbitration Act*
[37] *MCIA*
[38] *NPAC*
[39] *ICA*

PASSAGE OF ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019

Earlier the Arbitration and Conciliation Act, 1996 (**"the Act"**) was amended by the Arbitration and Conciliation (Amendment) Act, 2015 to make arbitration process cost effective, speedy, with minimum court intervention.

Last year, a Bill, namely, the Arbitration and Conciliation (Amendment) Bill, 2018 was introduced in Lok Sabha on the 18th July, 2018 and was passed by that House on the 10th August, 2018 and was pending in Rajya Sabha. However, as the Sixteenth Lok Sabha was dissolved, the Bill got lapsed.

Accordingly, to further amend the Act, the Arbitration and Conciliation (Amendment) Bill, 2019 was introduced in Rajya Sabha by the Minister for Law and Justice, Mr. Ravi Shankar Prasad, on July 15, 2019 and the same was passed by Rajya Sabha on July 18, 2019. Thereafter, the Bill was passed by Lok Sabha on August 01, 2019. The Arbitration and Conciliation (Amendment) Act, 2019 hereinafter referred as the **"Amendment Act, 2019"** received President's assent on August 09, 2019.

The salient features of the Amendment Act, 2019 *inter alia*, are as follows :-

- **To amend section 11 of the Act relating to "Appointment of Arbitrators"** so as to change the present system of appointment of arbitrators by the Supreme Court or High Court, to a system where the arbitrators shall be appointed by the "arbitral institutions" designated by the Supreme Court or High Court. In case, where no graded arbitral institutions are available, the Amendment Act, 2019 provides that the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institutions;
- **To insert a new Part IA to the Act for the establishment and incorporation of an independent body namely, the Arbitration Council of India (ACI)** for the purpose of grading of arbitral institutions and accreditation of arbitrators, etc.

For the purposes of performing it's duties and discharging functions, ACI may (a) frame policies governing the grading of arbitral institutions; (b) recognize professional institutes providing accreditation of arbitrators; (c) review the grading of arbitral institutions and arbitrators; (d) hold training, workshops and courses in the area of arbitration in collaboration of law firms, law universities and arbitral institutes; (e) frame, review and update norms to ensure satisfactory level of arbitration and conciliation; (f) act as a forum for exchange of views and techniques to be adopted for creating a platform to make India a robust centre for domestic and international arbitration and conciliation; (g) make recommendations to the Central Government on various measures to be adopted to make provision for easy resolution of commercial disputes; (h) promote institutional arbitration by strengthening arbitral institutions; (i) conduct examination and training on various subjects relating to arbitration and conciliation and award certificates thereof; (j) establish and maintain depository of arbitral awards made in India; (k) make recommendations regarding personnel, training and infrastructure of arbitral institutions; and (l) such other functions as may be decided by the Central Government.

The ACI will consist of a Chairperson who is either: (i) a Judge of the Supreme Court; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in conduct of arbitration. Other members will include an eminent

arbitration practitioner, an academician with experience in arbitration, and government appointees.

Amongst others, a new section 43I has been inserted by the Amendment Act, 2019 which provides that the ACI shall make grading of arbitral institutions on the basis of criteria relating to infrastructure, quality and caliber of arbitrators, performance and compliance of time limits for disposal of domestic or international commercial arbitrations, in such manner as may be specified by the regulations.

Further, a new section 43J has been inserted by the Amendment Act, 2019 relating to the norms for accreditation of Arbitrators which provides for the qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule.

- **To amend section 23 of the Act relating to "Statement of claim and defence"** so as to provide that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator receives the notice of appointment;

- **To insert new section 42A relating to confidentiality of information-** A new section 42A has been inserted by the Amendment Act, 2019 which provides that the arbitrator, the arbitral institutions and the parties shall maintain confidentiality of information relating to arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of award.

- **To insert new section 42B relating to protection of action taken in good faith-** A new section 42B has been inserted by the Amendment Act, 2019 which provides protection to the arbitrator or arbitrators from any suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings;

- **To clarify that section 26 of the Arbitration and Conciliation (Amendment) Act, 2015,** is applicable only to the arbitral proceedings which commenced on or after 23rd October, 2015 and to such court proceedings which emanate from such arbitral proceedings.

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ARBITRATION & ADR ROUNDUPS

1. Pacific Radiance Wins Case Against Chinese Yard

Singapore-based offshore vessel operator Pacific Radiance has won an arbitration award against a Chinese shipyard in a case involving two cancelled platform supply vessels (PSVs).

The arbitral award provides for the refund of the pre-delivery instalment amounting to $2.8m along with contractual interest from the date of payment of the instalments until the date of refund.

The arbitration case began in November 2016 when Pacific Radiance's joint venture firm CA Offshore Investment Inc (CAOI) filed claims against Shanghai Waigaoqiao Shipbuilding & Offshore Co and China Shipbuilding Trading (Shanghai) Co in the Hong Kong International Arbitration Centre (HKIAC), for the failure of the shipyards to deliver two PSVs in accordance with the shipbuilding contracts.

"As an update to the arbitration proceedings against the Shipyards, the Company wishes to announce that the HKIAC has on 17 May 2019, in respect of the H1350 arbitration, made an award in favour of CAOI for the refund of the pre-delivery instalment amounting to US$2,775,000 together with contractual interest from the date of payment of the instalments until the date of refund," said a stock exchange announcement from the company.

Arbitration for the other vessel H1351 is ongoing. CA Offshore Investment Inc, had in November 2016 begun arbitration proceedings against the two shipbuilders and claimed, among other things, refunds for the pre-delivery instalments for the two vessels totalling US$5.55 million, plus interest.

Pacific Radiance is currently in discussion with potential investors to provide debt financing and has received indicative proposals to-date.

Source: As reported by Laxman Pai in OE Offshore Engineer dated 23rd May 2019, Website: https://www.oedigital.com/news/466474-pacific-radiance-wins-case-against-chinese-yard

2. EnscoRowan Wins Arbitration Against Samsung Heavy Industries (SHI).

Offshore drilling services provider EnscoRowan announced that an arbitration tribunal has awarded it $180 million in damages in its proceedings against South Korean shipbuilder Samsung Heavy Industries (SHI).

Further, the company will be claiming interest on this amount and costs incurred in connection with the matter.

In April 2016, EnscoRowan (then Ensco) initiated arbitration proceedings in London against SHI for the losses incurred in connection with a drilling services agreement for ENSCO DS-5 that was voided by customer Petrobras.

In January 2018, the arbitration tribunal issued an award on liability fully in EnscoRowan's favor, and the arbitral hearing on damages took place in the first quarter of 2019.

SHI may yet apply to the English High Court for leave to appeal this award within 28 days from date of award.

Source: As reported by Laxman Pai in OE Offshore Engineer dated 17th May 2019, Website: https://www.oedigital.com/news/466474-pacific-radiance-wins-case-against-chinese-yard

3. EU: New Rules Apply to Nord Stream

The European Union executive on 25th April, 2019 said its stance on Nord Stream 2 is law and will not change, despite receiving a letter from the gas pipeline threatening legal action if it is not exempt from new energy rules.

The bloc amended its energy rules to ensure they would apply to the 11 billion euro ($12 billion) project to build a gas pipeline from Russia to Germany that has come under fire from the United States and several EU nations, who fear it will increase reliance on Russia.

The changes cast doubt over the pipeline's business plan, to be both owned and operated by Russian gas export monopoly Gazprom, and threaten to slow its completion.

In a letter to the European Commission President dated April 12, Nord Stream 2 asked for assurances by May 13 that it would be exempt from the rules, arguing investments in the pipeline were made before they came into force.

It wrote that the letter, seen by Reuters, should be seen as a notice of dispute, threatening to seek arbitration.

“All the letters to the Commission president will be replied in due time," a Commission spokeswoman said. "We have the legislation in place so you should not expect any change in our position with regards to Nord Stream especially as it has been approved by all member states."

The Nord Stream 2 project is led by Gazprom, with funding provided by Germany's Uniper and BASF unit Wintershall, Anglo-Dutch firm Shell, Austria's OMV and France's Engie.

Source: As reported in OE Offshore Engineer by Alissa de Carbonnel and edited by Jason Neely dated 25th April, 20,Website: https://www.oedigital.com/news/465470-eu-new-rules-apply-to-nord-stream-2

4. Arbitration court rejects India's plea in case against Nissan

The Permanent Court of Arbitration in Singapore has rejected India's argument that the court does not have the jurisdiction to rule on a case brought against India by Japan's Nissan Motor, according to two people and documents reviewed by Reuters.

If India had won the plea, the entire case would have been thrown out, said one of the people who has direct knowledge of the matter, adding that the Indian government is now likely to file an appeal with Singapore's Supreme Court.

Nissan sent a legal notice to Indian Prime Minister Narendra Modi's administration in 2016 claiming more than ₹5,000 crore ($720 million) in a dispute over incentives it said were due from Tamil Nadu as part of a 2008 agreement to set up a car manufacturing plant in the southern state.

The Japanese car maker brought the case against India for alleged violation of a Comprehensive Economic Partnership Agreement (CEPA) the country has with Japan. The CEPA gives some protections to Japanese firms investing in India and vice versa.

India, which according to the source agreed to have the arbitration in Singapore, filed a plea in 2017 saying the arbitration court in Singapore does not have the authority to rule on the case for many reasons, including that it was a tax-related matter outside the purview of the CEPA with Japan.

The international tribunal, in a 140-page order dated 29th April, denied India's objections, saying it has the authority to rule on the matter and would hold the final hearing in February 2020 after submission of evidence and arguments from both sides.

The order has not previously been reported.
Nissan said in a statement it "continues to work with the government to resolve this matter".

The case is one of a string of arbitration proceedings against India by investors including Vodafone Group, Cairn Energy and Deutsche Telekom over issues ranging from retrospective taxation to payment disputes.

Though India has lost investment treaty arbitration cases in the past, there is no clarity yet on the legal position when it comes to enforcement of awards or rulings, said Moazzam Khan, head of global litigation at law firm Nishith Desai Associates.

In the past, however, India has either voluntarily complied or settled the dispute prior to the award, said Khan.

If India loses, the final cost to the country would depend on the merits of the case but there have been instances where it has had to pay the entire claim amount and legal costs, he said.

Settlement talks

In 2008, when Nissan and its partner France's Renault SA agreed to set up a car plant in Chennai, the state government promised several incentives, including tax breaks.

Nissan and Renault have invested ₹6,100 crore to set up the factory which has an annual production capacity of 480,000 vehicles and has created more than 40,000 jobs.

Earlier this week, Italian car maker Fiat Chrysler said it has proposed merging with Renault, in a deal which risks leaving Nissan out in the cold.

The Japanese car maker in its 2016 notice claimed ₹2,900 crore in unpaid incentives from Tamil Nadu and ₹2,100 crore in damages, plus interest and other costs.

The Tamil Nadu government, meanwhile, has been trying to settle the matter with Nissan since last year but has failed to come to an agreement on the final terms.

"All obligations would be honoured," said N Muruganandam, principal secretary to Tamil Nadu government's industries department, adding he hopes to finalise a deal within a month.

If the two decide to settle, Nissan, which has only about 1% share of India's passenger car market, has the option to withdraw its arbitration case against India.

Source: As reported in Live Mint dated 29th May, 2019 from website:https://www.livemint.com/news/india/arbitration-court-rejects-india-s-plea-in-case-against-nissan-sources-1559130803729.html

5. Federal Court Confirms Arbitration Award Against Streamline Consulting Group LLC -- Ordered to Pay Hawaiian Legacy Hardwoods LLC and Five Other Parties $273,930.14

United States District Court for the District of Hawaii confirmed an arbitration award that ordered Streamline Consulting Group LLC ("SCG") to pay Hawaiian Legacy Hardwoods LLC ("HLH") and five other parties $273,930.14.

The case was brought forward by SCG owner and principal Tiffany McCormick Potter of 1629 K Street, Suite 300, Washington, DC 20006 and was heard in October 2018 and the Final Award of Arbitration issued on November 28, 2018.

"The findings and awards made by the arbitrator in this case were based upon both the extensive testimony heard and the many exhibits introduced during the five days of hearings and arguments in this matter," said Jerry M. Hiatt, Arbitrator in this case. The Arbitrator was thus required to weigh the parties' respective credibility on the issues. The Arbitrator did so and found that Potter was particularly incredible on the issue of whether the NC [Non-circumvention Agreement] fee could be applied to her work under the SA [Services Agreement]. "Her credibility was directly undermined by her own communications, including Exhibit 21 and the history of her dealings with the Respondents," Hiatt concluded.

The arbitrator further found that the success of the carbon certification was obtained not through Potter's work, but the work of others stating, "Whether and in what amount Streamline would have ever obtained

those credits is speculative, given its failure to do so while involved in the work, and its refusal, despite requests, to provide a budget for completing the work."

The arbitrator also stated, "Streamline's work was so incomplete at the time of termination that it was not the legal cause of the certification of carbon credits by [The Gold Standard] which was ultimately obtained through the work of others."

The arbitrator also found deficiencies in SCG's work product which had to be redone at significant cost to Legacy Carbon. In addition, he concluded that SCG had erred in the calculation of the amount of carbon credits projected to be generated for Legacy Carbon. Dunster stated, "SCG's projections of carbon credits were in fact, more than double the actual amount confirmed by The Gold Standard. In addition, SCG grossly underestimated the time and costs associated with the certification process."

When SCG was terminated in August 2014, Potter sent emails threatening to notify The Gold Standard and others that the entire project was terminated. The arbitrator stated, "Termination of the project was of course, *not* Ms. Potter's decision to make. The statement that she was going to notify others to that effect was highly inappropriate."

HLH LLC CEO Jeffrey Dunster stated, "Unfortunately, some people in business choose to weaponize the legal system and use it as a bargaining chip rather than as a tool for legitimate conflict resolution. In today's economic climate, it has become more expedient to pay off frivolous claims than to fight them and risk huge legal costs and the inevitable negative press which follows. HLH however is a B Corporation and part of our pledge as a B Corporation is our responsibility to our community and not just ourselves. If we didn't fix this, we would just be passing the problem on to someone else and that is not who we are as a company."

Source: As reported in HLH, LLC dated 30th May, 2019 from website: https://www.globenewswire.com/news-release/2019/05/30/1859813/0/en/Federal-Court-Confirms-Arbitration-Award-Against-Streamline-Consulting-Group-LLC-Ordered-to-Pay-Hawaiian-Legacy-Hardwoods-LLC-and-Five-Other-Parties-273-930-14.html

6. India prevails in two BIT Arbitrations and recovers full costs

India has emerged victorious in two bilateral treaty investment (BIT) arbitrations related to the 2G spectrum case.

The arbitrations were filed by international companies that were implicated in the 2G spectrum case, wherein Indian government officials were accused of allocating telecom spectrum to mobile companies at reduced rates, in exchange for bribes.

Specifically, it was contended that the companies' investments in Sun Direct TV were kickbacks in favour of the Maran family in return for facilitating the takeover of Aircel by Malaysia's Maxis Communications in 2005. The Sun Group of companies was chaired by Kalanithi Maran, brother of then Union Minister for Communications and Information Technology, Dayanidhi Maran.

In 2016, Mauritius-based South Asia Entertainment Holdings Ltd and Astro All Asia Networks based in the United Kingdom had sent notices to the Indian government invoking the India-Mauritius and India-UK BITs respectively.

This, after the Central Bureau of Investigation (CBI) filed criminal charges against Ananda Krishnan, the owner of Astro and Maxis, as well as others. The claimants and their principals had been charged with offences under the *Prevention of Corruption Act* and the case was pending before the 2G Special Court.

In 2016, a common Arbitral Tribunal comprising **Michael Moser, Lucy Reed** and **Peter** Leaver QC was constituted to decide the issue. In the arbitration proceedings, the claimants contended that India's conduct in relation to the criminal proceedings against them was in breach of India's substantive obligations and commitments under the India-UK and India-Mauritius bilateral investment

treaties, and had resulted in harm to their investments in India.

On October 8, 2018, the Arbitral Tribunal made two awards in favour of India. The investors' claims against India were withdrawn with prejudice, shortly after India filed its final written submissions and prior to the substantive hearing that was scheduled in the cases.

On account of the withdrawal "with prejudice", India was released and discharged from the investors' claims, complaints and causes of action. India was also awarded full costs of defending itself in the proceedings. Costs have subsequently been paid by the two foreign investor-claimants.

These two arbitrations constitute the first set of cases in which India has achieved a complete victory over claims brought by foreign investors. As on date, more than 25 actions have been commenced or threatened against India for alleged violation of BIT obligations.

India's legal defence in these arbitrations was led by Arista Chambers (Promod Nair and Shivani Singhal), members of Essex Court Chambers (Salim Moollan QC and Chester Brown) and the Ministry of External Affairs (VD Sharma and George Pothan Poothicote).

The Ministry of Information and Broadcasting acted as the nodal ministry for these two matters and coordinated India's defence with inputs from the Ministry of Law, the Office of Attorney General for India **KK Venugopal**, the Department of Space, and the Central Bureau of Investigation.

Source: As reported in Bar & Bench dated 15th June, 2019 from website: https://barandbench.com/india-bit-arbitrations-recovers-full-costs/

7. JPMorgan revives forced arbitration for credit card customers

JPMorgan Chase & Co., the biggest U.S. credit-card issuer, is reviving a controversial policy that forces credit-card customers to use arbitration instead of court to resolve payment disputes.

The bank has been notifying customers of the change in recent days, by email. The revised policy affects the bulk of JP Morgan's credit cards, including the popular Sapphire Reserve, and prevents customers from banding together to bring class-action lawsuits.

The reversal comes nearly a decade after JP Morgan agreed to drop the clause from contracts for at least three and a half years to help settle an antitrust lawsuit. The banks' checking and savings accounts already include provisions for forced arbitration, according to spokeswoman Mary Jane Rogers. While banks say mandatory arbitration is faster and cheaper for the public than litigation, consumer advocates say the practice lets financial institutions avoid accountability.

Arbitration has long been a standard practice in our consumer banking and auto finance businesses, Rogers said. In consolidating our credit-card company charter into the bank, it was timely to create a consistent experience across our consumer businesses.

The federal Consumer Financial Protection Bureau finalized a rule in 2017 that would've barred the use of forced-arbitration clauses in contracts for credit cards, bank accounts, and other financial products. President Donald Trump signed a bill undoing the rule shortly after.

The change affects all but one of JP Morgans 16 credit cards. By accepting this arbitration agreement you GIVE UP YOUR RIGHT TO GO TO COURT (except for matters that may be taken to a small claims court), according to the updated agreement.

Customers can opt out if they mail a written rejection notice by August 9.

Similar arbitration clauses prevented Wells Fargo & Co. customers from joining together to challenge the bank after employees were accused of opening millions of accounts **without clients permission**.

Source : As reported in Business Line on 5th June,2019 from website:https://www.thehindubusinessline.com/money-and-banking/jpmorgan-revives-forced-arbitration-for-credit-card customers/article27486361.ece

8. Saipem Settles South Stream Dispute

South Stream Transport, which is responsible for the construction and operation of the TurkStream Offshore Pipeline, and the Italian oil and gas industry contractor Saipem have settled the arbitration concerning the South Stream offshore pipeline installation contract entered into on March 14, 2014.

The subsidiary of Italian energy company Eni said in a release that the companies have positively ended their negotiations signing an agreement to amicably settle the arbitration.

In December 2014, Russia, citing the EU's unconstructive position, gave up on South Stream in favor of a new gas pipeline toward Turkey (TurkStream). Saipem was supposed to have taken part in laying the South Stream.

The request for arbitration against South Stream Transport was served at the ICC of Paris.

The South Stream Offshore Gas Pipeline through the Black Sea will be a key link between Russia and the European Union, for a total value of approximately EUR 2 billion.

Source: As reported by Laxmi Pai in OE Offshore Engineers dated 23rd April, 2019 from website: https://www.oedigital.com/news/465351-saipem-settles-south-stream-dispute

9. Now District Court In Delhi Launches E-Filing For Arbitration Matters, Test Run On

In a major boon for lawyers and litigants, the Delhi District Courts today launched e-filing facility, limited as of now to arbitration matters. The Delhi District Court website has undergone a facelift. It has become minimalist, more organised and user-friendly. The new facility was launched by District Judge (Head Quarters) Talwant Singh.

The e-filing project is on trial basis as of now and is limited to arbitration cases only.

Anyone going for e-filing will need to file hard copies within seven days of e-filing. E-filing will not confer any right regarding limitation and the period of limitation will be calculated from the physical filing at the court complex.

It is to be noted that the Supreme Court and the High Courts have provisions for e-filing and last year, the apex court had hinted at making such facility available in district courts across the country.

V K Bansal, family court judge and chairman of the Centralised computer committee said advocates and litigants will need to create their user-id for filing and tracking their cases.

That is not all. The lawyers will be trained to make the best use of this facility.

The e-filing facility for arbitration matters is another step in the direction of courts embracing technology to provide accessible justice.

It already has the facility of getting case information by SMS.

Source: As reported in Live Law by Akanksha Jain dated 24th May, 2019 from website https://www.livelaw.in/news-updates/now-district-court-in-delhi-launches-e-filing-for-arbitration-matters-test-run-on-145254

10. Justice Sikri Appointed As Judge Of Singapore International Commercial Court

Former Supreme Court judge Justice A K Sikri has been appointed as an International Judge of the Singapore International Commercial Court.

A press release in the official website of the Singapore Prime Minister's office stated that the President of the Republic of Singapore, on the advice of the Prime

Minister, has made the appointment of Justice Sikri from August 1. His appointment is until Jan 4, 2021.

Justice Sikri, who retired on March 6, was nominated last January for appointment to the Commonwealth Secretariat Arbitral Tribunal at London, UK. However, he later chose to withdraw his consent for CSAT appointment, following the controversy arising out of the coincidence of his nomination with his participation in the committee meeting which recommended the removal of Alok Verma as CBI Director.

The SICC is a division of the Singapore High Court, dealing with international commercial disputes. It has 16 international judges in its panel.

On May 14, 2019 Justice Sikri was appointed the Chairman of News Broadcasting Standards Authority.

Source: As reported by Live Law News Network in Livelaw.in dated 15th July, 2019 from website https://www.livelaw.in/top-stories/justice-sikri-appointed-as-judge-of-singapore-international-commercial-court-146375

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Photo Gallery

Proposed 3 Day Certified Training Course by Indian Council of Arbitration (ICA) in Collaboration with Chartered Institute of Arbitrators (CIArb)

Mr. Arun Chawla, Advisor, ICA, held discussions with Ms. Camilla Godman, Director-Asia Pacific, CIArb to introduce a 3-day certified training course on arbitration aiming to provide training for lawyers, in-house counsels, and other professionals, interested in dispute resolution. Trainers from Chartered Institute of Arbitrators and arbitration experts from India will be joining hands to impart training. Date of the Training Course will be announced soon once an agreement is signed between ICA & CIArb.

Certificate Course in Contractual Dispute Resolution by All India Management Association (AIMA) in association with Indian Council of Arbitration (ICA) sponsored by World Bank

Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA and Dr. Gurbandini Kaur, Associate Professor & Program Director, Procurement Programs, Centre for Management Education, All India Institute of Management Association (AIMA) along with successful candidates of Certificate Course in Contractual Dispute Resolution for the year 2018-2019, organised by AIMA in association with ICA & with technical support from World Bank. 1st and 2nd Batch of the said course for the year 2018-19 finished successfully and the same was announced at the 24th AIMA Convocation held on 19th August 2019 at New Delhi. Joint certificate of accomplishment bearing logo of ICA , AIMA and World Bank was also provided to the successful candidates.

CASE HIGHLIGHTS

Gammon Engineers and Contractors Pvt. Ltd. Vs. National Highways Authority of India

In this case, one of the issues before Hon'ble Supreme Court of India was whether arbitrators are entitled to charge their fees in accordance with Fourth Schedule to the Arbitration and Conciliation Act as amended by the Amendment Act of 2015 (**Act**) or the Fee Schedule as agreed by the parties.

Arbitral Tribunal (**AT**) constituted in this matter passed an order and stated that the fees of the AT shall be regulated as per provisions of the Fourth Schedule of the Arbitration and Conciliation (Amendment) Act, 2015.

Against the said order, the Respondent moved an application before the AT stating that as the arbitral fees has been fixed by the agreement and that, therefore, the fee may be fixed in terms of the Respondent Circular as amended in 2017 and not as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

AT while passing the order on the application of the Respondent stated that *"..in view of the latest provision in the amended Act, the AT is competent to fix the fees regardless of the agreement of the parties. This is as per judgment dated 11.09.2017 of the Hon'ble High Court in the matter of NHAI v. Gayatri Jhansi Roadways."*

Aggrieved by the order of the AT, the Respondent moved an application under Section 14 of the Act before Hon'ble High Court of Delhi, to terminate the mandate of the arbitrators, for willfully disregarding the agreement between the parties. In the meanwhile, the AT passed another order stating that it had no objection to payment of any fees as would be decided in the pending proceedings by the Hon'ble High Court of Delhi.

Hearing the application of the Respondent, Hon'ble Delhi High Court stated that the Fourth Schedule of the Arbitration Act not being mandatory, whatever terms are laid down as to arbitrator's fees in the agreement, must be followed. It is important to note that while passing the judgment, Hon'ble Delhi High Court disagreed with judgment dated 11.09.2017 in *National Highways Authority of India v. Gayatri Jhansi Roadways Limited* in which it was held that arbitrator's fees would have to be fixed in accordance with the Fourth Schedule of the Arbitration Act dehors the agreement between the parties.

Thereafter, the matter was raised before Hon'ble Supreme Court on the issue of applicability of Fourth Schedule to the Act as amended by the Amendment Act of 2015 for the purposes of payment of fees to the Arbitrator to the case in hand. Hon'ble Supreme Court observed that *"the fee Schedule that is contained in the Circular dated 01.06.2017, substituting the earlier fee schedule, will now operate and the arbitrators will be entitled to charge their fees in accordance with this Schedule and not in accordance with the Fourth Schedule to the Arbitration Act."*

On the issue of removal of the arbitrator, Hon'ble Supreme Court of India observed that *"the arbitrators merely followed the law laid down by the Delhi High Court and cannot, on that count, be said to have done anything wrong so that their mandate may be terminated as if they have now become de jure unable to perform their functions. The learned Single Judge, in allowing the Section 14 application, therefore, was in error and we set aside the judgment of the learned Single Judge on this count."*

However, Hon'ble Supreme Court of India agreed with the Hon'ble Delhi High Court that *"the change in language of Section 31(8) read with Section 31A which deals only with the costs generally and not with arbitrator's fees is correct in law. It is true that the arbitrator's fees may be a component of costs to be paid but it is a far cry thereafter to state that Section 31(8) and*

31A would directly govern contracts in which a fee structure has already been laid down." Hon'ble Supreme Court of India also observed that declaration of law by judgment in Gayatri Jhansi Roadways Limited that the arbitrator's fees needs to be fixed in accordance with Fourth Schedule of the Act regardless of the agreement between the parties is not a correct view of the law. Through this judgment, Hon'ble Supreme Court laid down the law that if the parties to an arbitration have agreed to a fee schedule of arbitrators, then arbitrators will be entitled to charge their fees in accordance with the agreed schedule of fees and not in accordance with the Fourth Schedule of the Act.

Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engineering Ltd.

In this case, Hon'ble Supreme Court of India, considered the existence of arbitration clause forming part of unstamped agreement and held that an arbitration clause in an unstamped agreement does not exist in law and hence cannot be acted on by Court for the purposes of appointment of arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 (**Act**).

Briefly stated, in this matter, dispute arose between parties in relation to sub-contract given by the Appellant (Garware Wall Ropes Ltd) to the Respondent (Coastal Marine Constructions & Engineering Ltd.) in respect of work to be done for installation of a geo-textile tubes embankment with toe mound at village Pentha in Odisha for protection against coastal erosion. Respondent invoked the arbitration clause as contained in the contract and approached Bombay High Court for appointment of Arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 which was allowed. Challenging the decision of the Bombay High Court, Appellant approached the Supreme Court.

Issue before Hon'ble Supreme Court of India related to the effect of an arbitration clause contained in a contract which required to be stamped. Also, the Hon'ble Court considered the judgment passed by Hon'ble Supreme Court in ***SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*** wherein it was held that *"where an arbitration Clause is contained in an unstamped agreement, the provisions of the Indian Stamp Act, 1899 require the Judge hearing the Section 11 application to impound the agreement and ensure that stamp duty and penalty (if any) are paid thereon before proceeding with the Section 11 application."*

Keeping in mind the aforesaid judgment in SMS Tea Estates, Hon'ble Supreme Court in the case in hand was also posed with the question as to *"whether Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015, has removed the basis of this judgment, so that the stage at which the instrument is to be impounded is not by the Judge hearing the Section 11 application, but by an arbitrator who is appointed under Section 11, as has been held by the impugned judgment."*

Hon'ble Supreme Court noted that judgment in ***SMS Tea Estates (P) Ltd***. continues to apply even after the introduction of section 11 (6A) in the Act. At para 16 of the judgment, Supreme Court observed that *"...the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue.* ***SMS Tea Estates*** *(supra) has taken account of the mandatory provisions contained in the Indian Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6A) would show that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6), and comes across an arbitration Clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration Clause contained in such agreement or conveyance so as to give it an independent existence, as has been contended for by the Respondent. The independent existence that could be given for*

certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in ***SMS Tea Estates*** *(supra) when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration Clause contained therein. It is clear, therefore, that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in* ***SMS Tea Estates*** *(supra), which continues to apply even after the amendment of Section 11(6A)."*

Hon'ble Supreme Court also observed that agreement only becomes a contract if it is enforceable by law. As per Indian Stamp Act, an agreement does not become a contract (not enforceable in law) unless it is duly stamped. Hon'ble Supreme court at para 19 of the judgment observed as follows *".....Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration Clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that* ***SMS Tea Estates*** *(supra) has, in no manner, been touched by the amendment of Section 11(6A)."*

Allowing the appeal and setting aside the judgment of the Bombay High Court, Hon'ble Supreme Court remitted the matter to the Bombay High Court to dispose of the same in the light of this judgment.

Spentex Industries Ltd. Vs Louis Dreyfus Commodities India Pvt. Ltd.

In this case, Hon'ble High Court of Delhi decided the preliminary issue of maintainability of petition under section 34 of the Arbitration and Conciliation Act, 1996 (**Act**) relating to challenge of award passed by the Arbitral Tribunal in light of jurisdictional clause contained in the contract between Petitioner (Spentex Industries Ltd) and Respondent (Louis Dreyfus Commodities India Pvt. Ltd.).

Main contention of the Petitioner was that the contract had an exclusive jurisdiction clause, which vested jurisdiction in the Courts in Delhi and hence petition under section 34 of the Act was maintainable before Hon'ble Delhi High Court. Whereas, the Respondent contended that since the arbitration was conducted under the Rules and Bye-laws of the Cotton Association of India (CAI) and proceedings were held in CAI's office in Mumbai, hence, only Courts in Mumbai can entertain a challenge to the award.

In this regard, it is pertinent to note that the relevant clause contained in the contract providing for exclusive jurisdiction clause relating to arbitration, and the same is reproduced as under:

"ARBITRATION
All disputes will be resolved through arbitration in accordance with the rules and by laws of the Cotton Association of India, Mumbai.
……..

JURISDICTION
The Court in New Delhi alone will have the exclusive jurisdiction to deal with any matter arising out of arbitration proceedings or the award. This contract incorporates all terms printed overleaf."

After perusing the relevant clause in the contract, Hon'ble Delhi High Court analyzed the usual clauses in the contract viz. (i) Arbitration clause and (ii) Court jurisdiction clause. Hon'ble Court noted that arbitration clause related to adjudication of disputes through arbitration and the court jurisdiction clause dealt with courts general jurisdiction under the contract.

In relation to the case in hand, Hon'ble Delhi High Court observed that *"…The jurisdiction clause is not a clause which vests the Courts in Delhi with jurisdiction to deal with matters in respect of general disputes which arise out of the contract, as is usually the case with a Court jurisdiction clause. The jurisdiction clause here uses the words "alone" and "exclusive jurisdiction" for Courts in Delhi, "to deal with any matter arising out of arbitration proceedings or the award". This is clear and categorical that Courts in Delhi alone will have jurisdiction, not in*

respect of general disputes arising out of the contract, but in respect of the arbitration proceedings and the award. To this extent, the clause is unusual, but reflects the intention of the parties, at the time of execution of contract."

For deciding the issue, Hon'ble High Court of Delhi took cognizance of the intent of the parties at the time of contract and concluded that seat and venue of the arbitration are separate and held that the section 34 petition was maintainable. Hon'ble Delhi Court ruled out the preliminary objection as to the jurisdiction of the Court in Delhi in relation to arbitration proceedings and award and held that the Court had jurisdiction to entertain the petition under section 34 as the jurisdiction clause in the contract had clearly depicted the intention of the parties to vest exclusive jurisdiction in favour of the Courts in Delhi to deal with any matter arising out of arbitration proceedings or the award.

Bharat Broadband Network Limited Vs. United Telecoms Limited

In this case, Hon'ble Supreme Court of India dealt with interpretation of section 12 (5) of the Arbitration and Conciliation Act, 1996 (Act) as amended by the Arbitration and Conciliation (Amendment) Act, 2015 read with Seventh (VII Schedule) dealing with persons ineligible to be appointed as arbitrator and it's earlier judgment in ***TRF Limited v. Energo Engineering Projects Limited***.

Briefly stated, the Appellant, Bharat Broadband Network Ltd. had floated a tender inviting bids for a turnkey project for supply, installation, commissioning, and maintenance of GPON equipment and solar power equipment and the Respondent was the successful bidder who in turn was issued Advance Purchase Order (APO)-the contract, by the Appellant. Clause III. 20.1 of the General (Commercial) Conditions of Contract (GCC) provided for arbitration. The said Clause reads as under:

"III.20 ARBITRATION
III.20.1

In the event of any question, dispute or difference arising under the agreement or in connection there with (except *as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors."*

As disputes and differences arose between the parties in terms of APO, the Respondent invoked the arbitration clause as contained in GCC and called upon the Appellant's Chairman and Managing Director to appoint an independent and impartial arbitrator for adjudication of disputes.

Pursuant to the request of the Respondent, the Chairman and Managing Director of the Appellant vide letter dated 17th January 2017 nominated Shri K.H. Khan as sole arbitrator to adjudicate and determine disputes that had arisen between the parties.

However, on 3rd July, 2017, Hon'ble Supreme Court, by its judgment in ***TRF Ltd. v. Energo Engineering Projects Ltd.,*** held that since a Managing Director of a company which was one of the parties to the arbitration, was

himself ineligible to act as arbitrator, such ineligible person could not appoint an arbitrator, and any such appointment would have to be held to be null and void.

In view of the aforesaid judgment of Hon'ble Supreme Court, a prayer before the sole arbitrator was made by Appellant through an application that, since he was de jure unable to perform his function as arbitrator, he should withdraw from the proceedings to allow the parties to approach the High Court for appointment of a substitute arbitrator in his place. However, the Sole Arbitrator dismissed the Appellant's application without giving any reasons. Aggrieved by the order of the Sole Arbitrator, Appellant moved an application before the Hon'ble High Court under Sections 14 and 15 of the Act stating that the arbitrator has become de jure incapable of acting as such and that a substitute arbitrator be appointed in his place.

Hon'ble High Court rejecting the petition stated that *"the very person who appointed the arbitrator is estopped from raising a plea that, such arbitrator cannot be appointed after participating in the proceedings. Under the proviso to Section 12(5) of the Act, as the Appellant itself has appointed Shri Khan, and the Respondent has filed a statement of claim without any reservation, also in writing, the same would amount to an express agreement in writing, which would, therefore, amount to a waiver of the applicability of Section 12(5) of the Act."*

Aggrieved by the decision of the Hon'ble High Court, Appellant approached Hon'ble Supreme Court of India contending that the appointment of the Sole Arbitrator was void *ab initio*.

For the purposes of disposing of the petition, Hon'ble Supreme Court of India discussed the scheme of the Act in relation to appointment of arbitrator and challenge thereof and noted that *"……Section 12(1), as substituted by the Arbitration and Conciliation (Amendment) Act, 2015 ["Amendment Act, 2015"], makes it clear that when a person is approached in connection with his possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality. The disclosure is to be made in the form specified in the Sixth Schedule, and the grounds stated in the Fifth Schedule are to serve as a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator. Once this is done, the appointment of the arbitrator may be challenged on the ground that justifiable doubts have arisen under Sub-section (3) of Section 12 subject to the caveat entered by Sub-section (4) of Section 12. The challenge procedure is then set out in Section 13, together with the time limit laid down in Section 13(2). What is important to note is that the arbitral tribunal must first decide on the said challenge, and if it is not successful, the tribunal shall continue the proceedings and make an award. It is only post award that the party challenging the appointment of an arbitrator may make an application for setting aside such an award in accordance with Section 34 of the Act."*

Thereafter, Hon'ble Supreme Court of India looked into Section 12 (5) of the Act, relating to the de jure inability of an arbitrator to act as arbitrator. In relation to ineligibility of the person to be appointed as arbitrator as provided under section 12 (5), Hon'ble Supreme Court noted in detail the scheme of the Act as provided under section 12 (5) read with Seventh Schedule in the following words *"…any prior agreement to the contrary is wiped out by the non-obstante Clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The Sub-section then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this Sub-section by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by*

parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule."

Elaborating further, Hon'ble Supreme Court noted the scheme of Sections 12, 13, and 14 of the Act and following conclusions were drawn *".....therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise Under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them."*

Hon'ble Supreme Court of India also discussed about the applicability of the proviso to Section 12(5) relating to waiving of the applicability of section 12 (5) of the Act when parties expressly agree in writing to waive applicability of section 12 (5) subsequent to dispute having arisen between them with reference to the facts of this case. In this regard, Hon'ble Supreme Court noted that *"Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of Sub-section (5) of Section 12 by an express agreement in writing."*

Allowing the appeals and setting aside the impugned judgment of the Hon'ble High Court it was held by Hon'ble Supreme Court of India that Shri Khan, Sole Arbitrator had become de jure unable to perform his function as an arbitrator and hence mandate of the Arbitrator stood terminated and accordingly observed that the High Court may appoint a substitute arbitrator with the consent of both the parties.

Zenith Drugs & Allied Agencies Pvt. Ltd. Vs. Nicholas Piramal India Ltd.

In this case, Hon'ble Supreme Court of India observed that the parties can be referred to arbitration in an application filed under Section 8 of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act of 2015 only if the subject matter of the action before the judicial authority relates to dispute which is the subject matter of the arbitration agreement.

In the case in hand, Appellant (Zenith Drugs & Allied Agencies Pvt. Ltd.) aggrieved by order passed by the Guwahati High Court allowing the revision petition preferred by the Respondent (Nicholas Piramal India Ltd.) and referring the parties to arbitration filed the appeal to the Hon'ble Supreme Court of India.

Briefly stated, the Appellant had earlier filed a Title Suit No. 241 of 2001 *inter alia* praying for declaration that the contract between the Appellant and M/s. Rhone

Poulene India Limited (which later merged with Respondent) was valid, subsisting, legal and continuing and for further declaration that M/s. Rhone Poulene India Limited cannot terminate the Appellant as clearing and forwarding agents in any manner in case of merger with the Respondent Company. In the said suit, the parties had compromised the matter and on the basis of compromise deed jointly filed by the parties, Title Suit No. 241 of 2001 was decreed. In terms of the said compromise, Respondent had agreed to make the payment of Rs. 23,50,000/- to the Appellant and also as a part of compensation package appointed the Appellant as its stockist for their products at Guwahati and Agartala.

Since, Respondents refused to honour the terms and conditions of the compromise decree, Appellant accordingly filed Title Execution case No. 4 of 2002 for execution of the compromise decree passed in Title Suit No. 241 of 2001. In the meanwhile, as the differences further arose between the parties on the alleged diversion of stocks criminal complaint was filed against Appellant and application under Section 151 Code of Civil Procedure praying for setting aside/recalling of compromise decree was also filed on the ground that the compromise decree was obtained by Appellant by false inducement and misrepresentation and the same is vitiated on account of fraud.

Thereafter, in 2003, Appellant filed Money Suit No. 73 of 2003 for claiming compensation for rupees twenty crores alleging intentional acts of omission and commission by Respondent which resulted in huge financial loss as well as loss of goodwill and reputation in the market. In the said suit, Respondent relying upon Clause 17 of the agreement dated 01.05.1997, filed an application under Section 8 of the Act for referring the parties to arbitration. However, the trial court dismissed the application filed under Section 8 of the Act by holding that the earlier suit in Title Suit No. 241 of 2001 filed by the Appellant was decreed on compromise between the parties and therefore, in view of the law laid down in ***Nathani Steels Ltd. v. Associated Constructions 1995 Supp. (3) SCC 324***, the Respondent cannot invoke the arbitration clause pertaining to the same dispute and the suit was directed to be proceeded.

Aggrieved by the order of the Trial Court, the Respondent filed Civil Revision Petition before the High Court challenging the order of the trial court. On hearing the revision petition, the High Court allowed the revision petition and referred the dispute to arbitration and observing that the existence of arbitration Clause had been admitted by the Appellant and accordingly relying on the decision of ***Konkan Railway Corporation Ltd. and Anr. v. Rani Construction Pvt. Ltd. (2002) 2 SCC 388*** and other decisions, held that the Civil Court had no jurisdiction to decide whether the subject matter of the suit attracted the arbitration clause or not and observed that it is for the arbitrator to decide on its own jurisdiction in terms of Section 16 of the Act as to whether arbitration clause applied to the subject matter of the suit or not.

Being aggrieved by the order of the High Court in revision petition, the Appellant preferred appeal before Hon'ble Supreme Court. After going through the case record, Hon'ble Supreme Court at para 13 of the judgment observed that the parties have substituted a new agreement by way of compromise and held that when the parties have settled their differences and compromised the matter, in the dispute subsequently arising between the parties, arbitration clause in the prior agreement cannot be invoked.

Hon'ble Supreme Court also noted that *"Since the agreement dated 01.05.1997 (agreement for appointing the Appellant as clearing and forwarding agent) and the compromise (appointing the Appellant as stockist) are different, the arbitration Clause in the agreement dated 01.05.1997 cannot be read into the terms of the compromise as per which the parties have entered into a new arrangement and this has not been kept in view by the High Court. The High Court erred in holding that the existence of the arbitration Clause has been admitted by the Appellant-Company and it is for the arbitrator to decide Under Section 16 of the Act whether the arbitration Clause applied to the subject matter of the suit or not."*

Hon'ble Supreme Court of India taking note of the provisions contained under Section 8 of the Act observed that the parties can be referred to arbitration

in an application filed under Section 8 of the Act only if the subject matter of the action before the judicial authority relates to dispute which is the subject matter of the arbitration agreement.

Hon'ble Supreme Court also laid down the following conditions that need to be satisfied for referring the parties to arbitration: (i) there is an arbitration agreement; (ii) a party to the agreement brings an action in the court against the other party; (iii) subject-matter of the action is the same as the subject-matter of the arbitration agreement; (iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

Further, Hon'ble Supreme Court observed that while deciding an application under Section 8 of the Act Courts should see *"if the subject matter of the suit is also the same as the subject matter of arbitration. In other words, only those disputes which are specifically agreed to be resolved through arbitration can be the subject matter of arbitration; and upon satisfaction of the same, the Court can refer the parties to arbitration."*

Allowing the Appeal, Hon'ble Supreme Court of India observed that the High Court erred in referring the matter to arbitration on an application filed by the Respondent under section 8 of the Act on the basis that the dispute falls within the ambit of the agreement dated 01.05.1997 and that the Appellant admitted the existence of the arbitration Clause. Accordingly, the impugned judgment of the Hon'ble High Court was set aside.

Union of India Vs. Parmar Construction Company

In this case, Hon'ble Supreme Court of India while hearing batch of appeals in special leave petition, laid down the law relating to the procedure to be followed with respect to appointment of an independent arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (**Act**).

Main contention of the Appellant in the case in hand was that the Hon'ble High Court had passed order in exercise of its powers under Section 11(6) of the Act in appointing an independent arbitrator without adhering to the mutually agreed procedure under the agreement executed between the parties.

Following issues were raised before the Hon'ble Supreme Court:

- Whether the High Court was justified in invoking amended provision which has been introduced by Arbitration and Conciliation (Amendment Act), 2015 with effect from 23rd October, 2015 ;
- Whether the arbitration agreement stands discharged on acceptance of the amount by the Appellant in relation to work performed and signing of no claim/discharge certificate; and
- Whether it was permissible for the High Court under Section 11(6) of the Act (prior to the Amendment Act, 2015) to appoint third party or an independent Arbitrator when the parties have mutually agreed for the procedure vis-a-vis the authority to appoint the designated arbitrator?

Briefly stated, Respondent were allotted various kinds of construction works by the Appellant. However, at the time of submission of Final Bill, dispute arose when the Appellant refused to pay the amount unless Respondent signed a no- claim certificate. Accordingly, Respondent invoked the arbitration clause contained under Clause 64(3) of the General Conditions of Contract (GCC) and pursuant thereto a demand notice was sent to the Appellant to appoint an arbitrator. However, on failure to appoint arbitrator by the Appellant, Respondent filed application before Hon'ble High Court under Section 11(6) of the Act for appointment of an independent arbitrator. Hon'ble High Court after hearing the parties allowed the application of the Respondent and appointed a retired judge of the High Court as an independent arbitrator to arbitrate the proceedings.

Hon'ble High Court while deciding the application under Section 11 (6) of the Act, took into account the independence and neutrality of arbitrator as envisaged under Section 12(5) of the Amendment Act, 2015 and

observed that *"……the amended provisions of Act, 2015 shall apply to the pending proceedings and mere furnishing of no claim certificate would not take away the right of the parties and it is open for adjudication before the arbitrator and appointed a retired Judge of the High Court as an independent sole arbitrator under the impugned judgment in exercise of power under Section 11(6) of the Act, 1996. Indisputedly, the request for the dispute to be referred to arbitration in the instant batch of appeals was received by the Appellants much before the Amendment Act, 2015 came into force (i.e. 23rd October, 2015)."*

On the issue whether the High Court was justified in invoking amended provision which has been introduced by Arbitration and Conciliation (Amendment Act), 2015 with effect from 23rd October, 2015, Hon'ble Supreme Court noted that *"the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree."* Supreme Court also observed that *"In the instant case, the request was made and received by the Appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the Principal Act, 1996. In our considered view, the applications/requests made by the Respondent contractors deserves to be examined in accordance with the Principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015."*

As regards the issue whether the arbitration agreement stands discharged on acceptance of the amount by the Appellant and signing no claim/discharge certificate, Hon'ble Supreme Court of India observed that the arbitral dispute subsists and the contract had not been discharged as being claimed by the Appellants employer(s) i.e. Respondent and all the contentions in this regard are open to be examined in the arbitral proceedings.

While deciding the issue whether it was permissible for the High Court under Section 11(6) of the Act (prior to the Amendment Act, 2015) to appoint third party or an independent Arbitrator when the parties have mutually agreed for the procedure vis-a-vis the authority to appoint the designated arbitrator, Hon'ble Supreme Court looked into the relevant clause 64 (3) of the GCC relating to appointment of arbitrator. The said Clause reads as under:

***"64.** (3) Appointment of Arbitrator:*

***64.** (3) (a) (i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000 (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. {Authority: Railway Board's letter No. 2012/CE-I/CT/ARB./24, Dated 22.10./05.11.2013}*

***64.** (3) (a)(ii) In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from*

amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator."

In the present case, Hon'ble Supreme Court of India observed that *".....it was the duty of the High Court to first resort to the mechanism in appointment of an arbitrator as per the terms of contract as agreed by the parties and the default procedure was opened to be resorted to if the arbitrator appointed in terms of the agreement failed to discharge its obligations or to arbitrate the dispute which was not the case set up by either of the parties."*

Allowing the appeal, Hon'ble Supreme Court observed that the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under Clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

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RE-ACT

Dear Editor,

I am very thankful to you for sending the copy of the aforesaid journal published by ICA. It is a masterpiece of ICA journals and credit goes to you for your meticulous efforts to publish such a scholarly edition. The credit also goes to the eminent arbitration practitioners for contributing their scholarly articles. I am a life individual member of ICA. I have attended the 3 days Training Program conducted by ICA and Swiss Arbitration Academy in Mumbai. It was a great learning experience for me. The training course was most diligently conducted, covering all aspects of domestic and international arbitration and was very practice oriented. Please do conduct such training program in Mumbai again. Thanks once again for publishing such a masterpiece on arbitration.

Regards.

Mohan S.Panse

Dear Editor,

Glad to have ICA Quarterly report. Photo gallery. Case Highlights are very good. Thanks.

Regards.

R.Paranjothi

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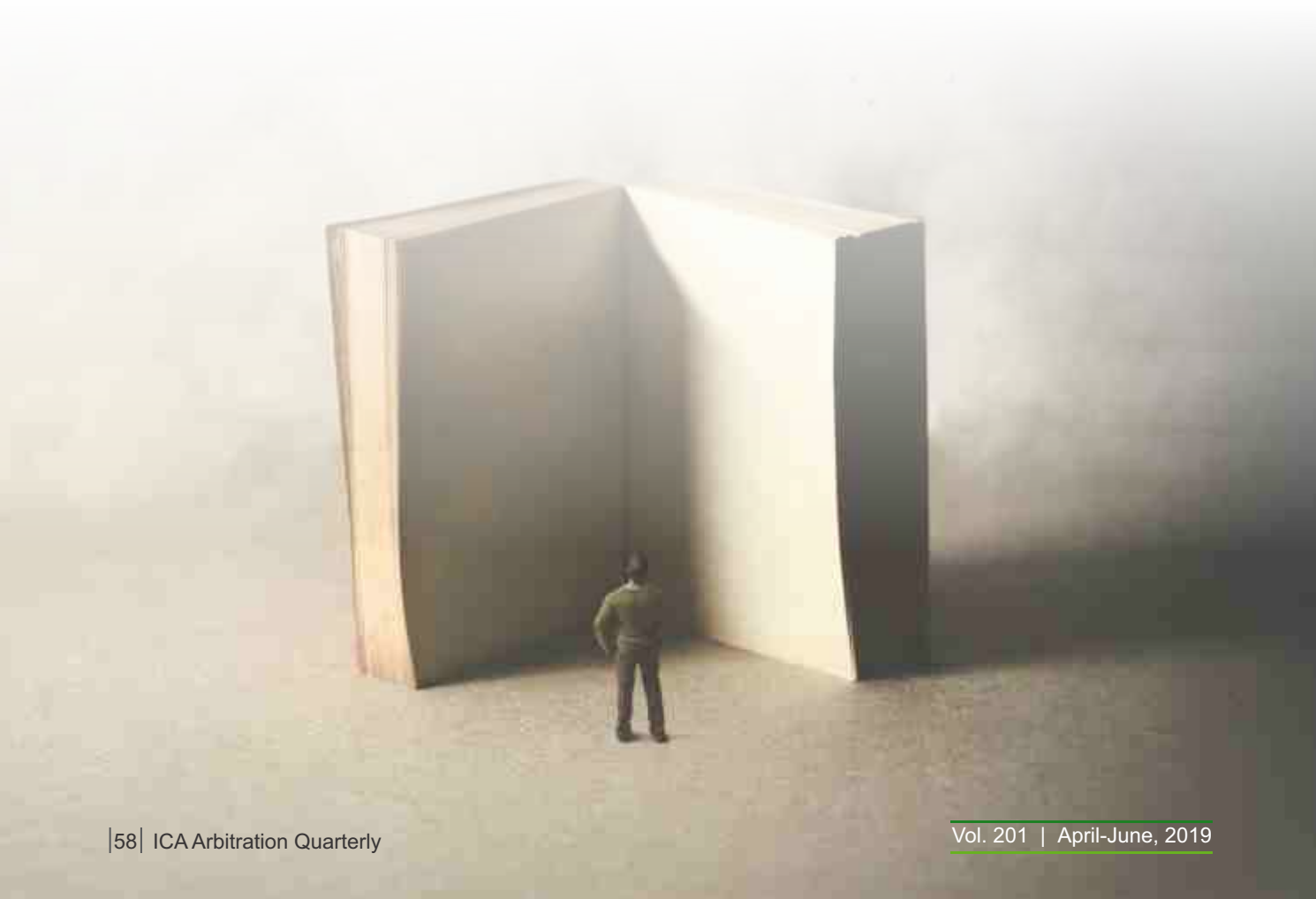

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Indian Council of Arbitration

Federation House, Tansen Marg, New Delhi – 110 001

Ph.: 91-11-23738760-70, 23319849, 23319760, Fax: 23320714, 23721504

E: ica@ficci.com; W: www.icaindia.co.in