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Dedicated to Arbitration for Over Five Decades

STATEMENT OF PURPOSE

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

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

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FROM THE PRESIDENT'S DESK

Dispute resolution process has huge impact on Indian economy and global perception of Doing Business in India. In World Bank's annual *"Doing Business 2019"* Report, India has jumped from 100 to 77 position. These rankings will further improve once India improves it's position in enforcing contracts.

Effective enforcement of contractual rights through arbitration is becoming the norm as States and non-State actors alike increasingly seek recourse to arbitration. India slowly but steadily is moving towards it's dream to become arbitration friendly jurisdiction for resolving the disputes.

In the last few years, domestic and international arbitration community has witnessed significant pro-arbitration developments both in the legislative and judicial arena with a march towards minimal court intervention and an emphasis on party autonomy.

The way forward for further strengthening the arbitration in India is to streamline the governance framework of arbitration in terms of institutionalising arbitration supported by a dedicated Bar comprising of professionals competent to conduct arbitration in accordance with rules of the Institutions.

ICA continues to make endeavours for the professional development of its members by organising training programmes, conferences, seminars etc. on different aspects of domestic and International Commercial Arbitration.

On occasion of it's 53rd Annual General Meeting, ICA organised a Conference on *"Strengthening Arbitration in India: The Way Forward"* on 02nd February 2019 at New Delhi. The Conference was graced by Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court of India, as the Chief Guest at the Conference.

To further promote the use of Arbitration in different parts of India, ICA has set up another Service Centre at Merchants Chamber of Uttar Pradesh, Kanpur. On occasion of its inauguration, ICA organized a Seminar on *"Institutional Arbitration in India: The Way Forward"* in association with Federation of Indian Chambers of Commerce and Industry (FICCI) and Merchants Chamber of Uttar Pradesh on 16th March 2019 at Kanpur. Hon'ble Mr. Justice Govind Mathur, Chief Justice, Allahabad High Court graced the Seminar as the Chief Guest and inaugurated ICA Arbitration Service Centre.

ICA will continue its efforts to reach out the business community to resort to arbitration as a means to resolve their commercial disputes and to use the services of ICA, the undisputed leader in dispute resolution.

Happy Reading!!

N G Khaitan

N.G.Khaitan

DISCIPLINING ARBITRATIONS

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Russell in the treatise "Russell on Arbitration", 23rd ed., para 4.131, page 168 has stated:

> "A Tribunal has the duty, in adopting suitable procedures, to avoid unnecessary delay or expense. The first part of this obligation is similar to the duty to 'use all reasonable dispatch' under the formal litigation and its breach is a ground for removal under the Arbitration Act, 1996. There is no precedent, however, for the obligation to avoid unnecessary expense. The duty might for example be discharged in part by using the power to limit reasonable costs. It is clearly very closely connected to the duty to adopt suitable procedure."

The duties of the tribunal in respect of proper conduct of the proceedings include disposal of the matter with reasonable dispatch, attending hearings and participating in deliberations following the agreed procedure and dealing with all the issues. (ibid, para 4.133, page 168)

In their treatise, Redfern and Martin have stated as follows:

> The Large American Law Firms continue to consider international arbitration as one kind of litigation amongst others. As a partner in a leading New York Firm observed: "Arbitration is considered by us to be an adjunct to 'litigation' – litigation in Courts. It is simply a different forum."

It is stated that the above statement squarely covers the manner in which arbitrations are conducted in India. The ills that have crept into the conduct of arbitration proceedings in India are set out hereunder.

Cry for expeditious disposal

There had been a cry for expeditious disposal of arbitration matters. Some worthwhile suggestions had been made by jurists and those practicing arbitration matters, but the resultant effect is almost NIL. It is felt that till such time legislature takes notice of such suggestions, nothing will move forward for the reasons which will be discussed hereunder.

Appointment of arbitrator through Court

To start with is the issue of appointment of arbitrator. If the arbitral tribunal cannot be constituted as per terms of the arbitration agreement, the only course available to the aggrieved party is to approach the Chief Justice of the High Court, in case of domestic arbitration, and the Chief Justice of India for international arbitrations. The legislature, while amending the 1996 Act, made a provision that "an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party". [Section 11(13)]

The aforesaid provision of sixty days, for appointment of arbitrator, has, as yet, not been adhered to by either by the High Courts or the Supreme Court because Section 11(13) is not a mandatory provision. All that the said Courts have to do is to make "an endeavour". "Endeavour" may or may not succeed. Often, knowing the system of working of Courts, it does not. Resultantly, delays occur at the initial stage itself. Such delays have a cascading effect on the conduct of proceedings and making of the arbitral award. It is suggested that the legislature may provide a period of 3 months within which it should be made mandatory for the Courts to make appointment of arbitrator. The word "endeavour" should be replaced by "shall".

Convening of preliminary hearing

In adhoc arbitrations, when an arbitral tribunal meets the parties for the first time by way of a preliminary meeting, a schedule for submission of pleadings is normally. However, it is only in very few cases that the parties stick to the schedule. Similarly, in case of institutional arbitrations, the situation is no different. Such institutions continue to remind the parties to stick to the time schedule but the parties do not attach any importance to submit the pleadings, more so in case where one of the parties is the Government or a semi-Government body or a PSU.

Completion of pleadings

When a party invokes arbitration clause, it is aware of its claims; it knows the nature of claims, amount of each individual claim and is possessed of all such documents which would be required to substantiate the claims. It is, therefore, not understandable as to why the claimant cannot start preparing the statement of claim from the time the arbitration clause is invoked. If the claimant submits the statement of claim at the time of preliminary hearing, it would save at least a period of one month. Now that there is a time limit of making the award within a period of 12 months from the date the arbitral tribunal enters upon the reference, all possible efforts have to be made to adhere to the same.

The period of 12 months is to be reckoned from the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment. The last date is when the Presiding Arbitrator receives notice of his appointment. The Presiding Arbitrator has to act swiftly on receiving notice of his appointment, inasmuch as he should consult his co-arbitrators for fixing a suitable date for convening a preliminary hearing.

It is commonly seen that most of the arbitrators have dozens of ongoing cases and, therefore, it is difficult to find a suitable short date when the preliminary meeting can be convened.

Generally speaking, the earliest available date with the arbitral tribunal is somewhere between 2 to 3 weeks from the date the Presiding Arbitrator receives notice of his appointment. If, for one reason or the other, the claimant has not been able to prepare statement of claim, it could very well do so when it gets the information of appointment of the Presiding Arbitrator.

There can be no plausible reason why the claimant should not submit the statement of claim on the very day when the preliminary meeting is convened.

Some seriousness has to be shown by the claimant to save on time. After all, it is his claims which have to be adjudicated. He should not expect the respondent to show due haste. If the claimant shows seriousness, there is every reason to believe that respondent may also reciprocate. At least, there will be an occasion for the arbitral tribunal to pressurize the respondent to show due haste and stick to the time schedule.

Likewise, the respondent is equally aware as to what its counter-claims are going to be. He can go ahead with the preparation of statement of counter claims. However, in some cases, some counter-claims may arise from the claims which the claimant may prefer. The respondent can, at least, keep the documents handy so that, if need be, the same could be relied upon rather than start locating the documents when the arbitral tribunal gives directions for submission of statement of counter claims. It is submitted that it is only in limited number of cases that the respondent may not be in a position to submit its statement of counter claims to the arbitral tribunal in the preliminary hearing itself.

Need to amend Act for expeditious disposal

In view of the foregoing, it is stated that the Act needs to be amended to the extent that the claim statement in respect of claims by the claimant, and in respect of counter claims by the respondent should be submitted to the arbitral tribunal at the preliminary meeting convened by the arbitral tribunal. It needs no emphasis to say that if this suggestion is accepted, a useful period of at least 2 months shall be saved.

It is a matter of common experience that the respondent, which is usually a government department, even after knowing well in advance the nature and amount of claims months before the arbitral tribunal convenes the preliminary hearing, seeks 8 to 12 weeks for submission of statement of defence. Such a request on the part of the respondent cannot be justified by any cannon of justice. Resultantly, delay caused by government departments particularly, is an avoidable one. Arbitral tribunals can certainly take exception to lame excuses put forth by the respondent for allowing 8 to 12 weeks for submission of defence statement, and make it clear to the Government and semi-Government organizations to submit defence statement within 2 weeks, failing which matter would be proceeded *ex parte.*

Government organizations generally seek a period 8 to 12 weeks for submission of the defence statement on the ground that the matter is old; those officials who were associated with the matter have since retired or transferred or for some other reason, not available. This is a usual plea which has no force in the eye of law. There would be no answer if the arbitral tribunal were to ask as to what they were doing from the stage the arbitration clause was invoked to the stage of appearance before the arbitral tribunal.

It is high time that the legislature amends Section 24 of the 1996 Act to the extent that it would be the statutory obligation of the claimant to submit its statement of claim in the very first meeting of the arbitral tribunal, and that the respondent shall submit the statement of defence within a period of 21 days from the date of preliminary hearing. Further submission of rejoinder shall not be a matter of right. It may be allowed in very rare cases and, if so allowed, the rejoinder shall be submitted within a period of 7 days. If the aforesaid suggestions are accepted, the total time which would be taken for completion of pleadings shall be 4 weeks and not 4 months (as normally experienced these days).

Allowing extension of time for completion of pleadings

Parties, whether Government/PSUs or private, take arbitral tribunals for granted. Even the arbitral tribunals show leniency towards Government/PSUs when it

comes to allowing time for submission of pleadings. Even in the matter of granting extension of time for submission of pleadings, the arbitral tribunals grant the same as a matter of routine. Granting of extension of time for completion of pleadings has, of late, become a norm – whether justified or unjustified.

Need to provide for ex parte hearing

The arbitral tribunals, generally, do not proceed ex parte against the erring party, for fear of award being set aside. Unless arbitral tribunals draw strength from the legislature, it is submitted, such a state of affairs shall continue. Obviously, delays would continue to occur in completion of pleadings. Once the legislature puts a time limit, in line with the foregoing suggestions, no party would take liberty or show casualness in completion of pleadings.

There may be cases where one party or the other or both, may have genuine problem for not sticking to the time schedule agreed to in the preliminary meeting. In such an event, arbitral tribunals should be vested with the power to extend the time, up to a maximum of 15 days, but not thereafter, subject to the condition that the defaulting party shows sufficient cause, within the meaning of Section 5 of the Limitation Act, for failing to adhere to the time schedule.

Extension of time in case of institutional arbitrations

In case of institutional arbitrations, the rules of arbitration should be modeled on the lines of Articles 4 and 5 of the Arbitration and ADR Rules of the International Chamber of Commerce, which provide for submission of "a description of the nature and circumstances of the dispute giving rise to the claim and of the basis upon which the claims are made". The Rules should further provide that the Reply or Answer to the said statement should be filed within 30 days, failing which the Secretariat may grant the respondent extension of time "provided the application to such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice.... the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules."

To discourage holding of three hearings in a day

It is customary on the part of the arbitrators, who have several ongoing arbitrations, to conduct as many as 2-3 arbitration matters a day. While it is commendable that they have the capacity to sit for long hours, the question is as to how much they understand. Generally speaking, the co-arbitrators are found napping, after enjoying a sumptuous lunch, whereas the Presiding Arbitrator has to be awake as he has to conduct the arbitration hearings. The level of understanding of each case by such arbitrators is too obvious to be stated here.

On the other hand, lawyers are equally to be blamed for vitiating the arbitration atmosphere. They invariably insist that arbitration hearings should be held on Court holidays or after 4 p.m. They take up arbitration matters just to supplement their income. They want to call it a day at 6 p.m. since they have to attend to their office as also to prepare for the cases which will be taken up by the Courts on the following day. Such an approach towards arbitrations is highly undesirable as it contributes to the delay in completing the proceedings and making of the award.

Need for fixation of hearing hours

It is suggested that the Act should provide for working hours for conduct of arbitration hearings, which maybe from 10 am to 4 pm with lunch break of 1 hour. Adherence to such time schedule is being followed, at few places, particularly in Mumbai. If each institution can fix its working hours, there is no reason why such a practice cannot be followed in case of arbitration hearings. Such a step would incidentally bring discipline to the conduct of arbitrations. The prevalent practice of some arbitrators conducting three matters a day will come to an end. Lawyers who are dedicated to arbitration will come forward to devote more time so as to help the arbitral tribunals to complete cases early.

Liberal grant of adjournment

Another factor which contributes towards delay in finalizing the arbitration matters is the liberal grant of adjournments. No doubt that situations can arise when need for seeking adjournment may be unavoidable. In India, we have to perform/attend to social and religious functions. Many marriages in own family or of a close relative are fixed. Nobody can afford to miss such a function. In case a close relative abstains from attending such a marriage, he will incur wrath of the family in which the marriage takes place. Another justifiable reason for seeking adjournment could be bereavement in the family or ailment. Other reasons may be avoidable. The arbitral tribunal should be vested with the power to grant adjournments only for totally unavoidable reasons. Though the power would be subjective in nature, but experienced arbitrators should be in a position to balance the situation.

Cap on number of cases which arbitrators may handle

With the Amendment Act, 2015, coming into force with effect from 23rd October, 2015, it is incumbent on the person who is approached in connection with his appointment as arbitrator to disclose in writing the number of arbitration matters he is handling. In addition, he is required to disclose "Circumstances which are likely to affect your ability to devote sufficient time to the arbitration and in particular your ability to finish the entire arbitration within twelve months". The idea is novel and is aimed at giving a fillip to expeditious disposal of arbitration matters.

The question is: How many persons have refused to accept the appointment to act as arbitrators? The answer would be: Very few. The purpose of stipulation of the Sixth Schedule is totally defeated. Undertaking is given by the arbitrators in a mechanical manner. Resultantly, awards cannot be made within the stipulated period of 12 months.

Solution to the problem lies in putting a cap to the number of cases which an arbitrator should be handling when offer is made for accepting the appointment, to a maximum of 5 cases. Even this figure which is quite high, but experienced arbitrators can manage. In case the legislature desires completion of arbitration matters within a period of 12 months, the solution lies in putting a cap on the number of cases which the arbitrator is handling at the time of his appointment. ICC Rules of Arbitration provide that while confirming the appointment of an arbitrator, the Court shall have due regard to "…. the prospective arbitrator's availability and ability to conduit the arbitration….". To achieve this objective, it is imperative that a cap needs to be put or the number of on-going arbitrations which the arbitrator may be handling while accepting appointment.

Imparting training to arbitrators

Making the law itself is not sufficient to achieve the purpose behind the enactment, that is, to get disputes resolved expeditiously. The men who are at the helm of affairs are important and their contribution to proper implementation of provisions of the Act with a purpose is essential. Therefore, practical training and knowledge of how to resolve the dispute; what techniques and methodologies are to be followed to resolve to disputes is the requirement of the day.

Conclusion

Though the provisions of the Amendment Act, 2015 are welcome, but in view of the experience gained in the practical implementation thereof, unless the legislature takes cognizance of the bottlenecks hindering the effective implementation of the Act, the avowed objective of the Amendments would be rendered otiose.

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CONSTRUCTION ARBITRATION: AN APPROACH FOR PREPARATION OF CLAIMS

Dr. Saraswat S.B.

Although there is no standard format or set formula for preparation of claims/counter-claims by the party(ies) in construction arbitration - as every project is unique and involves different variety of disputes but below mentioned steps and factors can be considered as a general guidance for preparation of claims / counter claims by the contractors as well as the employers.

A. Preparation of claims by the contractors:

I. Reasons for the claims in case of delay in completion of project –

I. Project was not delayed due to default committed by the claimant /contractor.

ii. Claimant/contractor has incurred more money than was paid in the project.

iii. Contractor deserves to get compensated for the delayed period for its investment of time and resources to complete the project even during the delayed period.

II. Steps for preparation of claims by the contractor for the delay caused by the employer in completion of the project -

i. Firstly it has to be ensured that there is delay caused in the completion of the Project and secondly it has to be ensured that delay was solely attributable to the employer.

ii. It has to be demonstrated that delay in completion of the Project has caused the contractor to incur extra costs.

iii. Contract is required to be reviewed for knowing the entitlement of compensation due to delay in completion of the Project.

iv. Complete details of all the delays attributable to employers and other agencies has to be evaluated thoroughly.

III. Possible heads of the claim in an EPC project by the contractor:

Again there is no standard formula to indicate the heads under which claim can be prepared. However following can work as an overall guide:

i. Complete cost incurred in organizing the project by the contractor during the entire duration of the delay in the project.

ii. Cost incurred for the extra engineering hours during the entire duration of the delay in the project.

iii. Cost incurred for the extra hours in procurement during the entire duration of the delay in the project.

iv. Cost incurred in supervision of site during the entire duration of the delay in the project.

v. Cost incurred with regard to additional insurance, premiums and maintaining/extension of the financial BG's and LCs for the delayed period of the project.

vi. Cost of the overhead of the contractor's company during the entire duration of the delay in the project.

vii. Cost of the price variation as per the price variation formula mentioned in the contract for labor, supplies and applicable items during the entire duration of the delay in the project.

viii. Cost relating to payment of extra taxes, duties and levies by contractor, if any for during the entire duration of the delay in the project.

ix. Cost with regard to extra resources for accelerating the project during delayed period.

x. Cost with regard to arears or pending amount/invoices/bills with the employer during the entire duration of the delay in the project.

xi. Interest on the payment not received, arrears, late payments with bank rate of cumulative interest.

xii. Payment of cost of items which were not originally in the scope of work of the contractor but were supplied as per requirement of the employer and were not paid.

xiii. Cost relating to extra scope of work which was not originally part of the contract but executed by contractors on the subsequent request of the employer.

xiv. Additional claims/prolongation claims based on specific criteria and conditions of contract of particular project executed by contractors.

xv. Prolongation cost incurred by contractor due to delay in completion of the project.

xvi. Overhead of the contractor's organization proportionate to the cost of the project is to be claimed which can be based on actual amount as per records. Otherwise it can be calculated based on some standard formula that has been accepted as one technique to determine overheads internationally.

xvii. Change orders which have not been paid by the employer will have to be evaluated.

xviii. Any exceptional claim which is unique to the project as per execution situations and contract conditions/breaches/violations will have to be considered.

While preparing the claim by contractors under various heads as above the accepted item rate / data either available in contract or available as per National / International standard norm of rates will be considered for computing the claims. Abnormally high rates, exaggerated values, unrealistic prices and item rates which cannot be justified, should not be used for computation of claim amounts. Basis and system of calculation of various claim amounts must be explained in justification notes to make the claims more scientific, realistic and logical.

B. Preparation of Counter-claim by the employer:

It may be pertinent to note that any consequential damages and claims due to delay in the project are normally not allowed and are not tenable in the construction/project contract except the Liquidated Damages (LD) for delay in the completion of the Project.

I. Reasons for counter-claim by the employer for delay in the completion of the project –

i. Completion of the project was not delayed by the employer and the employer had sufficient evidence in support of its statement.

ii. Employer has incurred loss of revenue due to delay in the completion of the project. It is called opportunity loss. In some projects there can be situation of consequential losses also.

iii. Employer deserves to get compensated against the aforesaid losses from the contractor for the delayed period if it is supported by contract.

II. Steps for preparation of counter-claims for delay in completion of the project by the contractor subject to provisions in the contract in this regard:

i. Firstly it is to be ensured that there is delay in completion of the Project and secondly it is to be ensured that delay is solely attributable to the contractor.

ii. It is to be determined and demonstrated that the delay has caused revenue loss to the employer.

iii. The contract is to be reviewed for knowing and confirming that employer is entitled to recover losses and damages by way of counter-claims from the contractor due to delay in completion of the Project.

iv. Complete details of all the delays attributable to contractors and other agencies has to be evaluated.

III. Possible heads of counter-claims by the employer:

The possible heads may vary from one contract to another depending on its conditions. The possible heads are as follows:

i. Recovery of the amount for opportunity loss for the delayed period, if allowed by the contract.

ii. Extra counter-claims based on specific criteria adopted by employer as per contract condition.

iii. Recovery of the LD amount from contractors by the employer for delayed period of the project.

iv. Recovery of the LD amount for failure in Performance Guarantee (PG) parameters as specified in the contract.

v. Recovery of the amount for items not supplied as per specification and scope in the contract in terms of quantity and quality.

vi. Recovery of the amount for the jobs which could not be completed as per scope of contract by contractors. These jobs may either still pending or may have been executed by employer at risk and cost of the contractor.

vii. Recovery of any consequential losses incurred by the employer due to any act of contractors as per specific provisions of contract.

viii. Cost for any item which is repeatedly failing and non-performing as per mentioned rating causing production loss and have not been replaced by the contractor in spite of at least three reminders during defect liability period can be claimed.

ix. Cost for items and erection work which were inferior in quality and needs replacement/substitution based on past performance records and which have not been remedied by the contractors can be claimed.

C. Need of evidence in Construction Arbitration

Furnishing of complete details by the disputants & examination of evidence is one of the most important manadate which needs to be complied in arbitration for construction disputes as per section 23 and 24 of Arbitration and Conciliation (Amendment) Act, 2015.

The relevant part of the referred sections of the Act is reproduced here below to demonstrate that evidence of all the submitted delays and claims/counter-claims has to be presented to Arbitral Tribunal:

> ***"Section 23(2):*** *Parties may submit with the statements all documents they consider to be relevant or may be reference to the documents or other evidence they will submit"*
>
> ***"Section 24: Hearing and written proceedings:*** *(1)Unless otherwise agreed by the parties, arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument or whether the proceedings shall be constructed on the basis of documents and other materials"*

In view of the above, a contractor is required to furnish Delay Analysis Report (**DAR**) claiming that delay in the project is not attributable to it. It means that the contractor has to furnish all the documents / records evidencing that the delay mentioned in DAR relating to EPC and other activities is caused by the employer, therefore, contractor is eligible to get extension of time (EOT) without imposition of LD. Since contractor is eligible to get EOT of the contract as per its claim, therefore, it is entitled to get all potential extra claims including additional claims and prolongation cost claims, claims as per contract conditions etc. It is to be noted that contractor is required to submit all the details of evidences in form of documents and records which justify that delay mentioned in DAR is attributable to the employer. Claim made also should be supported by proper documents and records, correspondences, letters, communications, signed minutes of meetings, POs, acceptance letters, recorded site notes, communications made by contractors etc.

D. Recording evidence for delay caused in completion of the Project by the contractor

Erection of large EPC project is a very complex activity and is a very risky task for the contractor. Whenever there is delay in the project, it is easy for contractor to allege that delay has been caused due to the employer. It is also easy to prepare a huge claim against the employer. It is to be noted that on refusal of the claims by the employer, contractor can invoke the arbitration clause in the contract and start the arbitration with employer.

In the arbitration, contractor presents the claim by way of compensation for the delayed period, however, arbitrator generally analyses the basis of the claims of the contractor. For such claims contractor should be in position to present logical DAR which should become the basis of its claim. It is to be noted that DAR can be accepted by the Arbitral Tribunal only after furnishing evidences for its correctness and authenticity. From the above it emerges that for all the delays, contractor needs to collect all evidences during execution of the Project.

i. Contractor should employ highly experienced project executives who know and understand the complete contract, its terms & conditions, timeline of the activities, role of contractor and employer, etc.

ii. Contractor must monitor each and every activity strictly with respect to time. Whenever any delay has been observed in approval,

clearances by the employer, it should be communicated to employer and proper records of such communication should be kept.

iii. Whenever the employer is demanding anything beyond the scope of contract, same should be recorded in writing.

iv. Any hindrances created by the employer in execution of the project should be recorded in hindrance register and should be communicated to employer and such communication should be recorded.

v. Whenever any payment is not made or delayed, it should be put on record.

vi. Any force majeure activities faced in execution of the project should be put on record.

vii. Any activity of delay must be communicated from time to time.

It is to be noted that above is not a complete list. However, as described above, evidences for delay are accumulated and recorded by the contractor. Accordingly, DAR is prepared which is supported by evidences. Once the DAR is accepted by the Arbitral Tribunal, Contractor becomes entitled for extension of time for the contract. Therefore contractor is eligible to get extra claims for the delayed period. However, it is to be noted that evidences are required for confirming the values of claim.

It is to be noted that the documents which are presented as evidences should be reliable, authentic, and self-explanatory:

i. Claimant/Contractor shall submit to the Arbitrator and to the other party all the documents available with it, which are relied upon for delay claims.

ii. Claimant/Contractor must submit explanatory statements/notes as to how the submitted document are relevant for the delay claims.

iii. If any documents are not available /or not in custody of the contractor/claimant instead it is under the custody of other party then same should be declared and should be asked to be presented in arbitration proceeding during filing of statements.

iv. Wherever Court assistance is required to obtain the evidence, as provided in 27 of Arbitration and Conciliation Act 1996, needful should be done to make the evidences available to Arbitral Tribunal.

v. I is also possible that arbitrator may demand the production of additional documents which should be produced and presented by the concerned party.

vi. If the documents are in electronic form then file name and search criterion should be communicated.

vii. Documents should never be fabricated.

Just on similar lines as described above, employer also need to submit all the documents and records as evidence to support its counter - claim and to refute the DAR and claim submitted by the contractor. Such evidences by the employer may be in the form of various communications, letters, emails, MOM's, etc.

E. Consideration of following points by the Arbitral Tribunal for giving an arbitral award:

i. Arbitral Tribunal is required to go in details of DAR of the contractor and employer.

ii. It also needs on the type of delay and the party responsible for it based on the DAR and evidences submitted by the contractor and employer in support of/against it.

iii. Arbitral Tribunal can classify delays of the project in basic four categories. The four categories are as follows:

a. Critical delay:

There are delays on critical path and are excused by single party and are compensable. Such delays can be attributed

wholly to the employer or to the contractor. It is also possible that some part of such delays may be attributable to employer and some part to the contractor at different stages of critical path.

b. Concurrent delay:

These delays are caused by the contractor as well as by the employer and are excused by both the parties. Such delays are excusable but non-compensable.

c. Non-critical delays:

These delays do not delay the project and are non-excusable and non-compensable.

d. Force Majeure delays:

Such delays are nor attributable to contractor or to the employer as these happen due to reasons which are beyond their control.

After the Arbitral Tribunal classifies the delays and places them in a particular category, then the total picture of delay becomes very clear from the angle of how much delay is by employer, how much delay is by the contractor, how much is concurrent and how much is under force majeure category.

F. Categorization and eligibility of claims with reference to type of delay in the project:

i. Excusable compensable: Such delays are not due to the contractor and the contractor deserves compensation as well as time extension.

ii. Excusable non-compensable: In such delays, contractor is awarded time extension but not compensation.

iii. Excusable non-compensable (Concurrent): Such delays are due to contractor as well as due to the employer. Generally contractor is granted time extension but are not awarded compensation.

iv. No-Excusable non-compensable: In such delays contractor is individually responsible for delay and neither time extension nor compensation is granted.

v. Force majeure delay: Neither employer nor contractor are responsible for force majeure delays. Contractors is given time extension if the project is to be executed. As regards the compensation, it needs to be examined as to what claims can be accepted to compensate the contractor.

From the above, following conclusions can be drawn by the arbitral Tribunal:

i. Quantum of delay attributable to the employer;

ii. Quantum of delay attributable to the contractor;

iii. Quantum of extension of time a contractor is eligible along with eligibility of claims;

iv. Quantum of extension of time contractor is eligible without its eligibility of claims.

G. How much extension of time contractor is eligible with eligibility of claims?

Once the Arbitral Tribunal is clear as to how much extension a contractor is eligible against the delay then it becomes clear to determine as to what claims are to be awarded to contractor by employer and how much should be the amount of each claim as calculated based on the granted extension of the contract.

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TO EXTEND OR NOT TO EXTEND - THE NEW INDIAN APPROACH EXTENSION OF ARBITRATION AGREEMENTS TO NON-SIGNATORIES

Mr. Shaurya Upadhyay[1]

Introduction

With roughly 40% of international arbitration cases involving more than two parties,[2] we can observe the practice of courts and tribunals holding third-parties bound to arbitration agreements to which they are not signatories, based on various legal doctrines and principles.[3] This poses a challenge to the oft held notion of Arbitration being a 'bi-polar' dispute resolution system,[4] and brings forward several issues when dealing with such claims. India, as a jurisdiction, has faced the issue of 'extension' of arbitration agreements several times and has currently established the legal basis for 'extension to non-signatories' through the case of Chloro Controls (I) P. Ltd. Vs. Severn Trent Water Purification Inc. and Others.[5] However, given how each case brings forward its own complexity and typical circumstances, the regime under Chloro Controls has wavered at times in providing adequate guidance in several circumstances.[6]

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[2] Nathalie Voser, 'Multiparty Disputes and Joinder of Third Parties', in Albert Jan van den Berg (ed) 50 Years of the New York Convention: ICCA International Arbitration Conference (ICCA Congress Series, vol 14, Kluwer Law International 2009) 343.

[3] Nigel Blackaby and others, Redfern and Hunter on International Arbitration, (6th edn, Kluwer Law International and Oxford University Press 2015) para 2.42.

[4] Voser (n 2) 344.

[5] (2013) 1 SCC 641.

[6] See GMR Energy Ltd v Doosan Power Systems India Pvt Ltd, Civil Suit (Commercial) No 447 of 2017 in the High Court of Delhi; See also Shalaka Patil, Jeet Shroff, Delhi High Court's decision in GMR v. Doosan: Two steps forward, two steps back? <http://arbitrationblog.kluwerarbitration.com/2018/01/01/delhihigh-courts-gmr-v-doosan-two-steps-forward-two-stepsback/> accessed 1 August 2018.

This paper aims to analyse two closely linked doctrines used commonly in such extension claims against third-party non-signatories, i.e. the 'group of companies' doctrine and the principle of 'alter ego', as they have been used by the Indian Courts in their assessment of cases wherein the question of binding non-signatories to an arbitration agreement has been considered. It aims to conduct a systematic review of the international practice and usage of these principles through a study of international case law and academic opinions and provide analysis with respect to the problems and lacunae in the Indian jurisprudence on the topic.

With this aim, the paper shall first explore the definitional paradigm of the two key principles, i.e. 'Alter Ego' and the 'Group of Companies' **[I]** as used in this work. It shall then review the Indian approach to the aforementioned principles through certain very recent key judgments of the Indian Supreme Court and Delhi High Court **[II]**. The paper shall thirdly examine key 'obstacles' that are observed in the 'extension' of arbitration agreements to non-signatories, wherein primary focus will be given to the principles of 'consent' and 'party intention', with a secondary focus on confidentiality in arbitration, and its existence as a two-party bipolar setup. **[III]**, and finally conclude with a recommendation on certain 'best practices' that should be adopted by courts in similar situations more in line with international practices, and possibly project a normative future for the analysis undertaken during extension, as to ensure uniformity, ease of enforcement in the International context, and a reinforcement of the fundamental basis on which the legitimacy of arbitration rests **[IV]**.

However, the underlying conclusion that this paper aims to move towards is that both the possibility of extension and/or non-extension are both justifiable in almost all cases, i.e. very few cases contain a fact situation where extension is an impossibility. The final decision is one of being either pro-arbitration or pro-business as a jurisdiction, one where courts have gone from "competing with arbitration to competing for arbitration" While countries like France make the decision of being explicitly pro-arbitration to a point of supporting arbitration in the presence of clear cut commercial boundaries,[7] the English Law takes a more pro-business stance,[8] supporting the principles of privity of contract and freedom in commercial decision making. The Indian approach in recent years seems to surpass even France in being pro-arbitration (considering its recent 2017-18 judgments), with the Indian Supreme Court ruling in favour of extension in cases which seem to be a stretch even under the French normative and principled justifications. The core conceptual analysis underlying this paper is one which seeks to point out the jurisprudential lacunae in the justifications given while employing such an approach and seeks to strengthen the rigour with which such cases are dealt with.

This paper, as the title suggests, restricts itself to the analysis of the principles of 'alter ego' and 'group of companies' and does not enter the debate on other principles, although at times these said principles might be closely intertwined with the topic under discussion. This is done so keeping in mind the practical limitations of this project, and to avoid a superficial assessment of the subject.

Within this debate, the author understands that these principles have also been used in the assessment of 'extension' to the state through contracts with state owned entities.[9] This will not be the focus of the paper, although the analysis may contain some references to such matter for purely descriptive purposes. Care has been observed to ensure that investor-state arbitration principles are not confused with those of international commercial arbitration principles.

[7] Karim Abdul Youssef, 'The Present – Commercial Arbitration as a Transnational System of Justice: Universal Arbitration Between Freedom and Constraint: The Challenges of Jurisdiction in Multiparty, Multi-Contract Arbitration, in Albert Jan van den Berg (ed) Arbitration: The Next Fifty Years (ICCA Congress Series, vol 16, Kluwer Law International 2012) 112.

[8] See for example Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm).

[9] See for example Bridas S.A.P.I.C. et al v Government of Turmenistan and Turkmenneft, ICC Case No 9058/FMS/KGA, Second Partial Award dated 21 October 1999; Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.

I. The Definitional Paradigm

In this section, the paper attempts to address the definitional paradigms associated with the two terms being analysed from the perspective of International Arbitration, and in doing so this paper shall not only explore the various possible meanings and scopes of the terms in different jurisdictions but will also analyse the Indian approach taken to these principles and find possible common grounds which can be used to assess their usage in a more 'transnational'[10] context.

A) Alter Ego

The principle of Alter Ego does not have one uniform definition and is known by a variety of terms in different jurisdictions.[11] Legal conceptions of doctrines the same as or similar to 'alter ego' exist in the form of Durchgriff (Germany), levée du voile social (France), levantamiento del velo societario (Spain) and 'piercing/lifitng' the corporate veil in various jurisdictions closely following the English legal system.[12]

The exact dimension of this principle may be hard to determine, as there is no uniform theory of 'alter ego' or 'veil piercing',[13] however we shall attempt to understand a certain common underlying essence of the principle. When a court or tribunal deem an entity to be the 'alter ego' of another, they enter the question of whether the two corporations have a distinct corporate identity or not, however it is commonly understood that simply the existence of a corporate relationship would not lead to the blurring of corporate entities.[14]

> At this stage of enquiry, two distinct approaches can be observed. The first is one where courts/tribunals maintain that there exists a requirement of abuse of rights, fraud or malfeasance in order to 'pierce the corporate veil' or deem the company to be an 'alter ego' of another.[15] This approach is clearly preferred in Swiss, German, Canadian, and Hong Kong courts amongst others.[16] The second is where lack of distinct personality in itself would lead to the such veil piercing,[17] and is principally the more liberal approach towards 'alter ego'. In the latter approach the test would include instances where the "parent and subsidiary would 1) share common office and staff, 2) are run by common officers, 3) intermingle funds, 4) do not deal at arm's length with each other, and 5) are not treated as separate profit centres".[18]

One can however notice that the two approaches, while may appear distinct on the face of it (and as the latter has been adopted in countries like India for analysis on extension of agreements to non-signatories, as will be discussed later), they involve an underlying assumption of fraud or abuse of rights. The latter approach has been expanded in the Bridas S.A.P.I.C. case[19] by the U.S. Court of Appeals for the 5th Circuit, to show that the

[10] *Youssef, 'The Present – Commercial Arbitration as a Transnational System of Justice' (n 8) 103.*

[11] *Gary B. Born, International Commercial Arbitration (2nd edn, Kluwer Law International 2014) 1432.*

[12] *ibid 1432.*

[13] *Voser (n 2) 378.*

[14] *Tibor Varady, John J. Barcelo III, Arthur T. von Mehren, International Commercial Arbitration – A Transnational Perspective, (American Casebook Series, West Group 2012), 201-202.*

[15] *Jeffrey Waincymer, Procedure and Evidence in International Arbitration, (Kluwer Law International 2012) 528-529; See also Gary B. Born, International Arbitration: Law and Practice (2nd edn, Kluwer Law International 2015) 100-101; Voser (n 2) 383.*

[16] *Born, International Commercial Arbitration (n 11) 1435.*

[17] *See Varady and others (n 14) 202.*

[18] *ibid 202.*

[19] *Bridas S.A.P.I.C. et al. v. Government of Turkmenistan and Turkmenneft, Case No. 02-20929 U.S. Court of Appeals for the 5th Circuit, September 12, 2003, 19–22.*

intermingling of funds, blurring of corporate distinctiveness, and the dominance of the parent company over the subsidiary to a point where the subsidiary is treated as a unit within the parent company, its property treated by the parent company as its own property, and the lack of keeping the subsidiary at an arm's length are instances of fact that in and of themselves lead to the defrauding of the creditors due to lack of equitable dealing.[20]

It is therefore clear that an element of 'fraud' or 'breach of equity' is essential for the doctrine of 'alter ego' to apply in cases of international arbitration in almost all jurisdictions. The definition adopted in Indian jurisprudence however, may at times ignore the negative element of fraud, and has taken an extremely pro-arbitration stance by extending the arbitration agreements to non-signatory parent companies without even an investigation into the element of fraud or breach of equity.[21] There is also a significant overlap seen in the application of the 'group of companies' doctrine, the determination of implied consent, and questions of alter ego and veil piercing, which might blur the definitional paradigm for the doctrine of 'alter ego' to function independently in Indian jurisprudence, much like the French, who also agree to the extension without clearly distinguishing the doctrine[22]. However, it becomes important to note the distinction drawn by Gary Born between the two, wherein he observes that "The alter ego theory is a rule of law that is invoked to disregard or nullify the otherwise applicable effects of incorporation or separate legal personality. The outcome is that one entity is deemed ether non-existent or merely an unincorporated part of another entity. This result is often achieved without regard to parties' intentions at the time of the contracting, based on overriding considerations of equity and good faith".[23] This we shall observe next, is manifestly different from the 'group of companies' doctrine as adopted in the international arbitration context.

B) Group of Companies

A lot has been written about this "controversial"[24] and "so-called"[25] doctrine by scholars, following the case of Dow Chemicals[26] and its affirmation by the Paris Cour d'appel.[27] The Interim Award rendered in this case held that the group of companies are a part of "one and the same economic reality" and considered factors indicating that i) the companies in the group due to their role in the conclusion, performance and termination of the contracts containing the arbitration clause and ii) the common intention of the parties to include them as concerned parties to the contract, made the arbitration agreement binding on them by virtue of this existence as "a group of companies".[28]

The Dow Chemical case had a particular fact circumstance that is important to note. It was observed by the Tribunal that the parent company exercised "absolute control over its subsidiaries having either signed the relevant contracts or, like Dow Chemical France, effectively and individually participated in their conclusion, their performance, and their termination".[29]

This definition gives us a starting point into the investigation into the actual dynamic of what the often misunderstood 'group of companies' doctrine might contain. The 'group of companies' doctrine has specifically developed in the arbitral context and in the

[20] *ibid 19.*

[21] *See GMR Energy (n 6) paras 52, 64.*

[22] *Born, International Commercial Arbitration (n 11) 1435.*

[23] *ibid 1450.*

[24] *ibid 1445.*

[25] *Bernard Hanotiau, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions, (International Arbitration Law Library, vol 14, Kluwer Law International 2006) 49.*

[26] *Dow Chemicals v. Isover Saint Gobain, ICC Interim Award of 23 September 1982 in Case No. 4131, Published in 110 Journal du droit international (Clunet) 1983, 899-905. English translation available at <www.trans-lex.org/204131> accessed on 1 August 2018.*

[27] *Born, International Commercial Arbitration (n 11) 1446.*

[28] *Waincymer (n 15) 522; See also Voser (n 2) 379-380; Born, International Commercial Arbitration (n 11) 1446.*

[29] *Dow (n 26) 136.*

words of Jeffrey Waincymer, only those instances should reasonably invoke the doctrine where "related companies were sufficiently involved to be reasonably assumed by all to be subject to arbitral rights and obligations"[30]. Nathalie Voser is also of the opinion that the doctrine is perhaps a misnomer "since it is not sufficient for a third party to be part of the same group of companies in order to be bound by an arbitration agreement concluded by another member of the group".[31]

Gary Born in his assessment of the doctrine, gives a comprehensive assessment of the relevant case law, and while he does maintain that the Dow Chemical definition of the same would include the parties' intentions to bind and be bound, recent awards depart from this definitional paradigm, and holding the non-signatory parent company bound for reasons such as "unity of the group" and "the security of international commercial relations" which would be compromised if the economic reality of the situation is not taken into account.[32] This departure is one that raises several concerns, and as we see, a similar approach might have been taken by the Indian courts which have erroneously assumed the 'group of companies' doctrine to not only be part of the English legal system,[33] but also have departed from the 'intention to be bound' assessment and have resorted to a test which exclusively looks at the companies being part of the same group and having a dominant participation within the affairs of the subsidiary.[34]

At this stage, however, this paper would like to conclude that within the domain of International Arbitration the 'group of companies' doctrine, would include a two part assessment of i) whether the company belongs to a closely knit commercial group which almost functions as a single economic entity, and ii) whether both the parties intended the parent company to be bound by the arbitration, or created an impression of such intention. The reason for this restriction, as we see in the decision of the English courts in the Peterson Farms case,[35] is that simply 'extending' arbitration agreements, and therefore extending the rights and liabilities under those respective contracts, onto non-signatories goes against basic business planning and structuring and has the capability of going against party autonomy and consent which form the basis and perhaps core of international commercial arbitration.

II. The Indian Approach

Indian Courts at various stages have faced the question of 'extension' to non-signatories, and it is submitted that while case law is rich in this domain, the understanding projected by the Supreme Court of India of the international context, as has been interpreted and understood by the various High Courts and even later benches of the Indian Supreme Court, is muddled. This is because the jurisprudence does not draw a distinction between the various principles used in order to legitimise the extension but uses them in an overlapping manner. Due to the academic constraints of this project, this section has selected the four most pertinent cases in Indian jurisprudence, which include three recent landmark judgments from the Supreme Court of India, and one very recent case from the High Court of Delhi, all of which help substantiate what can be called the 'Indian approach' to extension of arbitration agreements to non-signatories, specifically in the use of alter ego and the 'group of companies' doctrine.

[30] *Waincymer (n 15) 523.*

[31] *Voser (n 2) 381.*

[32] *Award in ICC Case No. 5103, 115 J.D.I. (Clunet) 1206, 1207, 1212 (1988), as cited in Born, International Commercial Arbitration (n 11) 1447.*

[33] *Chloro Controls (n 5) para 66.*

[34] *GMR Energy (n 6) para 64.*

[35] *Peterson Farms (n 8) para 62.*

A) The Chloro Controls Regime

In what was perhaps the most important landmark judgment in Indian jurisprudence on the topic of 'extension to non-signatories'[36], a three-judge bench of the Supreme Court of India in 2012, held that the position under Indian Law incorporated and recognised the principles of 'alter ego'[37] and the 'group of companies' doctrine',[38] and held extension in certain circumstances to be a part of the Indian approach to dealing with non-signatories.

In this case, the question of 'whether non-signatories to an agreement containing the arbitration clause, could be bound by the arbitration agreement' was addressed on a legal basis (and not on its merits).[39] The court made observations relying on international scholastic opinion and legal precedence and approaches set by various courts, primarily English courts, given the common law background.

It is interesting to note that in 2012, the Supreme Court came to the conclusion that the 'group of companies' doctrine was in fact recognised in English legal precedence[40] when a completely opposite observation is drawn by Mr Gary Born in his work while assessing English case law. In Born's opinion "English courts have expressly rejected the doctrine as a matter of English law" and this conclusion relies on two cases, namely the 2004 case of Peterson Farms Inc. v C&M Farming Ltd,[41] and the year 2000 judgment in the Caparo Group Ltd. v Fagor Arrasate Sociedad Coop case.[42] Sadly for us, the Supreme Court of India does not specify which cases it relies on to conclude that the group of companies doctrine is a part of English Law, but does cite 'Russel on Arbitration' (Twenty Third Edition) as authority for the same.[43]

The court also recognised the "various legal basis" which can be used to bind a non-signatory to an arbitration, and divided the same into theories requiring "discernible intent" and reliance on the "good faith principle" (such as implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights), and those relying on the force of the applicable law instead (such as agent-principle relations, apparent authority, piercing of veil/alter ego, joint venture relations, succession and estoppel)[44].

They then separately observe that the 'group of companies' doctrine can also bind a non-signatory affiliate company to a contract entered into by another company within the group, and clearly states that it is only so when "circumstances demonstrate that the mutual intention of the parties was to bind both signatory as well as non-signatory parties.[45]

We can thus observe that the first exposition on this topic by Indian courts in 2012 leads to the following 'law' being set out. i) That in certain exceptional circumstances non-signatories can be bound by arbitration agreements. ii) That internationally accepted principles such as the group of companies doctrine and principles of veil piercing and alter ego form a part of the Indian jurisprudence and come under the scheme of the Indian Arbitration Act,[46] alongside other legal principles as enunciated above. iii) That the Indian Arbitration Act in general and specifically under Section 45 of the Act

[36] *Chloro Controls (n 5).*
[37] *ibid para 70, 100.*
[38] *ibid para 66, 102.*
[39] *ibid para 60-63.*
[40] *ibid para 66.*
[41] *Peterson Farms (n 8) para 93.*
[42] *[2000] Arb. & Disp. Res. L.J. 254 (QB).*
[43] *Chloro Controls (n 5) para 66.*
[44] *ibid para 100.*
[45] *ibid para 102.*
[46] *Indian Arbitration Act 1996.*

envisages a liberal interpretation keeping in mind India's "pro-arbitration" stance under the new regime, and that the "legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the UNCITRAL Model Rules, the New York Convention, and the Geneva Convention"[47].

It is with this legal basis that courts in India have proceeded on the topic.

The Chloro Controls case set out the principles as accepted in Indian jurisprudence, but no 'test' was set out under this regime explicitly. The various principles were applied generally to the fact situation and the parent company was held bound on several reasons in addition to just alter ego and the 'group of companies doctrine'.

However, what we shall see in the more recent case law, is that these principles, which to begin with based themselves on certain erroneous premises, were distorted beyond meaning into creating perhaps too strong a pro-arbitration bent, and tendency to extend the agreement to non-signatories.

B) Recent Case Law

In this section, we shall be observing the approach taken by the Indian Supreme Court and the High Court of Delhi in more recent cases. *The Chloro Controls regime*, even in the light of these recent judgments, remains good law and has not been revised by a larger bench of the Indian Supreme Court. The legal principles set out under the *Chloro Controls* regime have simply been distinguished and utilised in these later judgments.

In the case of *Cheran Properties Ltd v. Kasturi and Sons Ltd and Ors.*,[48] which is another three-judge bench judgment of the Supreme Court delivered on 24 April 2018, Justice Dr D Y Chandrachud writes perhaps one of the most detailed assessments of the *Chloro Controls* regime while hearing an appeal on a domestic arbitration case. In this case, the appellants contended that the *Chloro Controls* principle could only be attracted in the particular fact situation of a joint venture agreement and mother agreement containing arbitration clauses, and ancillary agreements not containing the same.[49] They also contended that the regime could only apply in International Arbitration cases and not domestic cases.[50]

Justice Chandrachud clarifies the position of the earlier judgment, stating that court through its extension regime has "recognised that modern business transactions are often effectuated through multiple layers and agreements"[51] and that "the circumstances in which they have entered into them may reflect an intention to bind both signatory and non-signatory entities within the same group".[52] The intention ascribed to this extension regime was the attribution of a meaning to the transaction which had consonance with the "business sense intended to be ascribed to them".[53] It is here that factors like i) the relationship between signatory and non-signatory elements; ii) commonality of the subject matter; and iii) composite nature of the transaction, are mentioned as considerations while determining cases on extension to non-signatories[54].

The judgment also (surprisingly?) brings forward the work of Gary B. Born in order to consecutively explain the extension through the use of the alter ego and the group of companies doctrine, and differentiates between the two, stating that "While the alter ego principle is a rule of law which disregards the effects of

[47] *Chloro Controls (n 5) para 88.*

[48] *Civil Appeal Nos. 10025 – 10026 of 2017, Supreme Court of India (Civil Appellate Jurisdiction).*

[49] *ibid para 10.*

[50] *ibid para 9.*

[51] *ibid para 17.*

[52] *ibid para 17.*

[53] *ibid para 17.*

[54] *ibid para 17.*

incorporation or separate legal personality, in contrast the group of companies doctrine is a means of identifying the intentions of the parties and does not disturb the legal personality of the entities in question"[55].

We therefore see a more nuanced approach towards the two principles emerging in the *Cheran Properties* judgment, however one must note that this case only clarifies the position of the *Chloro Controls* regime and does not address the concern as to whether this regime truly does benefit arbitration, and whether considerations of consent, confidentiality, fraud/malfeasance etc. are addressed under the law.

The second key recent judgment delivered by the Indian Supreme Court is used here to formulate a key problem which we shall address in the subsequent section. The case of *Ameet Lalchand Shah and Ors v. Rishabh Enterprises and Anr,*[56] a division (two-judge) bench judgment, was delivered by Justice R. Banumathi on 3 May 2018, dealing with the question of extension under the Indian Arbitration Act. This judgment too faced the question of whether an arbitration agreement under one contract could be extended to non-signatories. However, the fact situation was peculiar, and needs to be set out before the judgment can be assessed here.

In this case, there existed three contracts signed in 2012 by Rishabh Enterprises on one hand and different sellers and service providers on the other.[57] They arose out of a project concerning the installation of a Solar Power Plant in the state of Uttar Pradesh in India. The first, a two-part "Equipment and Material Supply Contract" as well as "Engineering, Installation and Commissioning Contract", was signed between Rishabh Enterprises and a M/s Juwi India. Both these agreements contained arbitration clauses. The second was a "Sale-Purchase Agreement" with a M/s Aston Renewables for purchasing certain equipment, and the agreement did not contain an arbitration clause. The third and final agreement was with M/s Dante Energy wherein Rishabh Enterprises would lease the equipment purchased from Aston onwards to Dante in return for monetary consideration. This agreement too contained an arbitration clause.[58] The agreement with Aston (without an arbitration clause) specified that the equipment purchased would be forwarded to Dante under another contract[59].

The question that arose was whether the arbitration agreement between Rishabh Enterprises and Dante Energy, could be 'extended' to Aston, even though the separate Sale-Purchase agreement signed by Aston Renewables did not contain any arbitration clause. It is important to note that in this case, the non-signatory was not in any group of companies, or in any way linked to the companies that were parties to the arbitration agreement, other than the commercial transaction it entered into with Rishab Enterprises.

The court in this case held that the arbitration agreement would still be extended to the non-signatory, since they were part of the same "single commercial project"[60] and therefore "even though the Sale and Purchase Agreement between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant"[61] and overturned the judgment of the High Court which had held the Sale-Purchase agreement to be the Main Agreement between the parties[62] and had rejected the extension of arbitration to Aston as bad in law.

[55] *ibid para 19.*

[56] *Civil Appeal No. 4690 of 2018, Supreme Court of India (Civil Appellate Jurisdiction).*

[57] *ibid para 5.*

[58] *ibid para 3-5.*

[59] *ibid para 16.*

[60] *ibid para 21.*

[61] *ibid para 21.*

[62] *ibid para 23.*

We can thus see that the court enters into the domain of extension, even without invoking questions of consent, and party intention and expectations, and extends arbitration agreements with justifications such as the inter-connectedness of the agreements implies "the dispute between the parties to various agreements could be resolved only by referring all four agreements and the parties thereon to arbitration".[63]

This judgment becomes important in understanding the extent of the pro-arbitration stance of the Indian Supreme Court while dealing with questions of reference to arbitration, and as a subset, questions on extension of arbitration agreements to non-signatories. It also becomes pertinent in our analysis of the importance of acknowledging commercial decisions and aspects of arbitration such as consent, which form the very basis of its legitimacy.

The last and final judgment, which we have already come across earlier, is the Delhi High Court Judgment of 14th November 2017, wherein the Justice Mukta Gupta assessed the question of extension in light of the Chloro Controls judgment. In the case of *GMR Energy Ltd. v. Doosan Power Systems India Pvt. Ltd.*,[64] the court held the arbitration agreement signed by a subsidiary company binding on its parent company, applying the 'alter ego' and 'group of companies' doctrines.

Again, we must look into the fact situation particular to the case, in order to better understand the court's position on the matter. GMR Group, a family run multinational business conglomerate through its various subsidiaries was dealing with Doosan Power, another multi-national conglomerate, through various supply and construction contracts.[65] As explained by the court, the various subsidiaries of the GMR Group, including GMR Infra, GCEL etc, were run at the helm by family members of the founder of the Group, GM Rao.[66] The various subsidiaries observed little or no corporate formality, and within the transaction, were often represented by other family members running different subsidiaries.[67] GCEL, which was a special purpose vehicle especially registered for this project,[68] was established by the GMR Group and was liable to pay a certain sum to Doosan India for work completed.

There were various agreements, and subsequent guarantees signed through a Memorandum of Understanding ("MOU").[69] The main agreement also contained a non-recourse obligation clause (Clause 23.12 of the agreement) which clearly stated that the agreement was entered into only on the parties behalf and that no recourse existed against shareholders, partners, directors, employees or agents of the parties, and explicitly excluded the use of principles such as piercing the corporate veil for this purpose.[70] Within these documents, while all other companies of the group had agreements with Doosan containing arbitration clauses, GMR Energy was one entity that had signed an MOU undertaking some liability of debt held by GCEL, however, without an arbitration clause.[71] It should be noted that there were other agreements and MOUs which did contain arbitration clauses, and the MOU with GMR Energy was the only one deviating from that practice. This MOU was subsequently terminated by GMR Energy and communicated to Doosan India. The case dealt with the question of whether this MOU was enough to make GMR Energy, a separate legal entity, however run under the same family group of companies, liable under the arbitration agreements in other contracts.[72]

[63] *ibid para 21.*
[64] *GMR Energy (n 6).*
[65] *ibid para 1.*
[66] *ibid para 21B.*
[67] *ibid paras 21D, 21J.*
[68] *ibid para 21D.*
[69] *ibid para 21.*
[70] *ibid para 62*
[71] *ibid para 47.*
[72] *ibid para 46.*

The respondents raised seven grounds before the for the extension of the arbitration agreement, which were i) free co-mingling of corporate funds, run by members of one family; ii) entities having common directors, using the same corporate signage and letterhead; iii) lack of corporate formality; iv) 100% ownership of shares; v) Indirect 93% stake of another company in the group which has also signed an arbitration agreement; vi) all companies part of a family run business; vii) acknowledgment of debt due by its subsidiary, and payment of part of the same[73].

The court held GMR Energy to be bound by the arbitration agreement signed by its subsidiary, on five grounds,[74] relying heavily on the Supreme Court's observations in the *Chloro Controls* regime.[75] However, we must note that the Delhi High Court was applying the observations on a different fact situation, and certain key differences existed in this case, that could have led to an opposite conclusion.

The High Court held that the fact that GCEL was a joint venture of the GMR Group, and a lack of corporate formality and co-mingling of corporate funds existed, contributed to their ruling.

They also relied on the MOUs entered into by GMR Energy and stated that their novation was a question of merit that could be decided within the arbitration. The existence of the MOUs undertaking liability of a contract that contained an arbitration clause, was held to be sufficient to extend the arbitration clause to the non-signatory using principles of alter ego, the group of companies doctrine, and the transferability of rights and liabilities including the right/liability to be subject to arbitration upon undertaking the guarantee under the MOU[76].

It must be noted however that two peculiar situations existed in this case, which the author shall argue, in the next section, could have been addressed through a more rigorous consent and party intention analysis but were ignored and summarily dealt with by the court. These are, the explicit intention expressed through the contractual non-recourse obligation clause and the aberrant exclusion of the arbitration agreement from the GMR Energy MOU. The argument made, should not be confused with one which states that the judgment would have been different if these factors were explicitly considered, but the reasoning provided would leave less room for arbitrary interpretation and creates a stronger more lucid extension regime.

III. Key Considerations

The extension regimes in the various countries make use of various contract law principles and other judicially evolved doctrines to enable courts and tribunals to make arbitration agreements binding on non-signatories.[77] The principles of 'alter ego' and the group of companies doctrine are two such principles.[78] However, at this stage, we must explore certain principle obstacles that are faced by courts and tribunals while considering questions of extension, that go to the very heart of the legitimacy and efficacy of International Arbitration. This section shall aim to analyse three primary sub-groups of these considerations, i.e. the issue of party autonomy (party intention and consent) **[A]**, the issue of confidentiality **[B]** and the issue of the two-party default arbitral setup **[C]**, and propose that at any point while applying the group of companies doctrine or the principle of alter ego, a judicial body must keep in mind these three sets of considerations and process individually each one before applying these legal principles to a particular fact situation.

A) Party Autonomy – Consent and Party Intention

It is widely accepted that arbitration is a 'creature of consent' and grounds its legitimacy in the consent given

[73] *ibid para 52.*

[74] *ibid para 64.*

[75] *ibid para 53.*

[76] *ibid para 64.*

[77] *Born, International Arbitration: Law and Practice (n 15) 99-100.*

[78] *ibid 99-102; See also Waincymer (n 15) 518-526.*

by parties through the arbitration agreement, and that the same binds only the parties to the agreement.[79] In the context of multi-party arbitration and the admissibility of it thereof, Jeffrey Waincymer opines that "...inclusion of multiple persons and claims cannot occur without some legal basis for this. Ultimately it is a question of consent, either by reason of express agreements of the parties, or by some implied indication of intent and/or under the laws and rules made applicable by their arbitration agreement".80 He also states that "...any justifiable theory of the proper treatment of multi-party scenarios must be consistent with the evidence of consent" and that "mere efficiency is not enough, although efficiency may be factored in by some as an element of implied consent where parties have not clarified their attitude clearly".[81]

This consent/party intention requirement can be seen clearly imbued in Article II of the New York Convention, which clearly states that it is only parties to the agreement that are bound by the same, and requires courts to only refer the 'parties' to arbitration when seized with such a matter.[82] With this international context it is proposed that for the sake of international standardization of arbitral legitimacy and ease of enforcement, a consent analysis becomes an important prong at the stage of extension of arbitration agreements to non-signatories.

At this stage, a review of International case law on the topic shall shed light on how international practices treat consent and party intention as important while dealing with cases on extension. In the Dow Chemicals[83] case, the Paris Cour d'appel to begin with stresses repeatedly on the issue of "party intention".

It notes that the arbitrators for "good reason" considered the arbitration agreement to be binding on the non-signatory parent company "in accordance with the intention common to all parties involved", that extension was warranted in this case.[84] Again, while considering the issue of the "group of companies doctrine" the appellate court states in addition to the role of the parent company in the conclusion, performance and termination of the contract, "the mutual intention of all parties to the proceedings" rendered the parent company bound by the arbitration agreement, even though they themselves might not have been signatories.

The French courts do go a step further in later cases, and state that the presumption of the awareness of the arbitration clause would be enough to impute an acceptance of the same.[85] Perhaps another step down this path would be the Cotunav case, where the Paris Cour d'appel held that "by accepting to intervene in the performance of the contract as carrier appointed by one of the parties, in the framework of the contract, Cotunav necessarily assumed the obligations defined by the contract" which in turn included the arbitration agreement.[86] This in itself might be going beyond the consent/intention analysis, but the French approach is possibly the most liberal extension regime in Europe and most commentators still note that an indication of

[79] *N. Blackaby et al. (n 3) para 2.39; See also W. Michael Reisman and others, International Commercial Arbitration: Cases Materials and Notes on the Resolution of International Business Disputes, (The Foundation Press, New York 1997) 484; Gary B. Born, International Commercial Arbitration (n 11) 1409.*

[80] *Waincymer (n 15) 497-498.*

[81] *ibid 507-509.*

[82] *Article II, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958; See also, Born, International Commercial Arbitration (n 11) 1409.*

[83] *Dow Chemical (n 26).*

[84] *Ibid 132.*

[85] *Korsnas Marma v Durand-Auzias, Rev Arb 1989, 691; ABS v Amkor, Cour de Cassation, 27 March 2007, cited in Andrea Marco Steingruber, Consent in International Arbitration, (Oxford International Arbitration Series, Oxford University Press 2012), paras 9.38 – 9.40.*

[86] *Jean-Francois Poudret, Sebastien Besson, Comparative Law of International Arbitration, (2nd edn, Zurich, translated by Berti SV and Ponti A 2007) para 256, cf Rev Arb 1990 675 confirmed by the Cour de Cassation, Cass (1st Civ Ch), 11 June 1991, Rev Arb 1991 453, cited by Steingruber (n 85) paras 9.42 – 9.43.*

intention, that is determined in good faith and with sufficient objectivity, should be the relevant consideration while assessing questions of intention.[87] It is also the opinion of academics that under the French extension regime, mere existence of a group of companies (and therefore a presumption of awareness) is not sufficient to permit the extension to non-signatories.[88] We can however see the tendency of assuming distant and vague presumption of awareness achieved through reasoning such as '[companies were] working towards a common project, and therefore being aware of the arbitration agreement [entered into the contract]' as legitimate reasons for extension of the arbitration agreements within the reasoning present in the Rishabh Enterprises judgment of the Indian Supreme Court.[89]

This liberal approach that bypasses consent as a requirement (in all but name), has been analysed and critiqued by Karim Abou Youssef through two works published in 2010[90] and 2012[91] respectively, that talk about a "renaissance" in International Arbitration[92] and certain challenges that arise out of the changing scenario in the field. While considering questions of the exercise of jurisdiction, in cases of groups of companies, he states that courts in determining consent, consider the context within which the agreement exists. At times, in his opinion, the reach of these contextual circumstances goes beyond feeding into consent and feed directly into the decisions to extend/not extend the agreement to non-signatories as self-standing reasons.[93] Although he points out as problematic, the approach in cases such as in the ICC Case No. 9517, where the elements taken into consideration during the ruling on jurisdiction over non-signatories included consent/intention as only one of the many considerations and not a necessary one in and of itself, he argues that "[i]n some cases, contextual elements could even justify the exclusion of consent altogether; but context must be compelling to justify such an outcome".[94]

Youssef warns us that the upheaval of this necessary consent requirement, necessarily creates the need to rigorously reconsider and inquire into the limits of consent, as bypassing this requirement leads to several complications.[95] He argues that i) it interferes with the arbitrators' "basic duties to observe due process and to render a reasoned and enforceable award"[96], ii) it "challenges the ongoing relevance of international arbitration standards and distorts the operation of fundamental principles of arbitration law such as separability",[97] iii) the court "goes beyond the minimum standard of the New York Convention"[98] every time it deems a non-signatory bound by the arbitration agreement and "ignores basic requirements of national arbitration laws",[99] iv) it has "a distorting effect on the operation of other branches of law, such as the law of corporate groups"[100] and "limits on consent involve limits on the principle of the independence of legal entities"[101] and reduces the "effectiveness of corporate forms in terms of shielding from liability or jurisdiction and, in the group context, could even undermine the notion of corporate groups".[102]

English Law, as has been observed by the Peterson Farms case[103] explicitly rejected the group of companies doctrine explicitly from being a part of English law,[104]

[87] *Born, International Commercial Arbitration (n 11) 1448.*

[88] *Voser (n 2) 379; Hanotiau (n 25) para 107.*

[89] *Rishabh Enterprises (n 56).*

[90] *Karim Abou Youssef, 'The Limits of Consent: The Right or Obligation to Arbitrate of Non-Signatories in Groups of Companies' in Bernard Hanotiau and Eric A. Schwartz (eds), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, (vol 7, Kluwer Law International/International Chamber of Commerce 2010) 71-109.*

[91] *Youssef, The Present – Commercial Arbitration as a Transnational System of Justice (n 7) 103 – 132.*

[92] *ibid 104.*

[93] *ibid 106-107.*

[94] *ibid 107.*

[95] *Youssef, The Limits of Consent (n 90) 74 – 75.*

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

[103] *Peterson Farms (n 8).*

[104] *ibid para 62.*

however English courts use consent analysis, and conduct based implied consent as a valid reason for extension.[105] One of the reasons why a more rigorous assessment of the presence of consent is conducted within English law, is the importance given to privity of contract in its jurisprudence.[106]

Indian law must perhaps recognise this aspect of English law since the primary case setting up the extension regime in India, i.e. Chloro Controls case[107] assumes the group of companies doctrine to be a part of English Law, and therefore reduces the same to a cursory application of an accepted doctrine.[108] The stress on the aspect of common intention as was present in the Chloro Controls case, wherein the judges observe that "The court will have to examine such pleas with greater caution and by definite reference to the language of the contract and intention of the parties"[109] has diminished in some later judgments,[110] and has completely vanished in others.

One such instance is the observation of the Supreme Court of India wherein they hold that "though there are different agreements involving several parties,[...] it is a single commercial project"[111] on the basis of which an arbitration agreement has been extended to companies having no link to the signatory company, and not even part of the same contract, but generally working towards the same commercial project. Cases like these see a complete departure from consent and intention analysis and focus of efficiency as their justification for the extension.

At this stage it is important to note that several authors have opined the importance of consent analysis in considering the extension to non-signatories. Bernard Hanotiau, in explaining the true extent and scope of the 'group of companies' doctrine, opines that i) "the issue of consent to arbitration may take a special dimension when one (or more) company(ies) to a complex international transaction is (are) member(s) of a group of companies", ii) "consent to arbitrate may sometimes be implied from the conduct of a company of the group" and iii) "the sole fact that a non-signatory company is a part of a group of companies [...] is not per se a circumstance which is sufficient to permit the extension of the clause to the non-signatory". This shows a clear indication of the dependence of the group of companies doctrine on the aspect of consent.[112]

Similarly, in the context of the principle of "alter ego", Jeffrey Waincymer states that even while examining the factors present for piercing the corporate veil, "under a consent theory, there needs to be appropriate evidence that all parties intended to be bound. Yet if a party established a shell company to protect those with deeper pockets from recourse, its subjective intent is to the contrary and objective evidence points in the same direction. Hence, consent must arise by some deeming theory based on fraud, abuse of rights, misrepresentation or lack of good faith". Therefore, a clear reading of an analysis on the basis of implied or deemed consent has been included in the principle of piercing the corporate veil within the International Arbitration setup.

Within Indian jurisprudence, it is interesting to note that while the initial judgments did consider questions of implied consent and party intention, later decisions don't even mention the word consent or intention once

[105] *Steingruber (n 85) para 9.47.*

[106] *Voser (n 2) 380. See also Dimitar Kondev, Multiparty and Multicontract Arbitration in the Construction Industry, (John Wiley & Sons ltd, 2017) 23.*

[107] *Chloro Controls (n 5).*

[108] *ibid para 66.*

[109] *ibid para 71.*

[110] *GMR Energy (n 6) para 64.*

[111] *Rishabh Enterprises (n 56) para 21.*

[112] *Hanotiau (n 25) 51.*

in the entire judgment, let alone perform any form of consent or party intention analysis.[113] This is problematic in the larger scheme of things given the legitimacy of arbitration stemming from its reliance on party consent at the very core, and can be eliminated by the inclusion a rigorous case-wise consent/intention analysis while determining questions of extension to non-signatories. In the words of Waincymer again, "any justifiable theory of multi-party scenarios must be consistent with the evidence of consent in the instant case".[114]

India, as a jurisdiction, is still evolving its stance on arbitration, and has gone from a historically interfering legal system, to an overly hands-off one when it comes to questions of arbitrability.[115] As Yousef notes in a slightly different jurisdictional context, but is perhaps equally applicable in the Indian context, the national courts have gone from "competition with to competition for arbitration" and he observes that "the development of arbitration, […] created a spiral of accelerated expansion which fuelled even more liberal judicial attitudes. […] Instead of competing with arbitration to retain jurisdiction over international disputes, national courts started to compete among themselves to attract more arbitral business."[116] He explains this attitude in two parts of the process of relinquishment of control, stating that national courts exercise a "loose control" on the "gate to arbitration" (especially in the French context but again applicable in part to the Indian approach) and their approach has an element of "judicial self-negation" which is when "national courts compel (or accept compelling) arbitration beyond or absent the requirement of consent. They in fact, defer to arbitration beyond the logical and conceptual limit of the arbitration system". This extra-logical approach should, as is submitted later in this paper, be avoided and perhaps balanced with a sense of legal and more importantly logical control if arbitration is to sustain its own legitimacy in the long run.

B) Confidentiality

Nathalie Voser opines that confidentiality is one of the "obstacles" to multi-party arbitration, due to the fact that extension and joinder could lead to the disclosure of otherwise confidential information to third parties against the will of the parties (at least the one resisting the extension). She however does maintain that this issue must not be overemphasized as the third parties usually joined within the arbitration are in some way linked to the transaction and therefore are more often than not privy to the information in any event.[117] She also observes that confidentiality obligations can be extended to third-parties and therefore minimizes the harm caused by making an exception to the confidential nature of the arbitration.[118] The author disagrees with a universal application of these observations, especially keeping in mind the Indian approach.

Firstly, questions of extension don't necessarily always arise in cases where there are parties privy to the entire transaction on the other end, such as the Rishabh Enterprises case dealt with by the Indian Supreme Court.[119] Secondly, while confidentiality might be extended as an obligation to the third party, there might be instances where the company might not want the information disclosed to the non-signatory party as well, due to business considerations, and the same remains their right under the confidential structure they had intended to enter into. In fact, most national laws recognise this "party autonomy" to opt into confidentiality within arbitration proceedings, an aspect reinforced by the "UNCITRAL Model Law's general affirmation of the parties' procedural autonomy" and the "Model Law's drafting history [which] makes clear that the parties' agreements with regard to confidentiality will be given effect".[120]

Both these concerns, in the least warrant a confidentiality analysis attached to the party intention assessment performed by courts, simply because

[113] *Rishabh Enterprises (n 56).*

[114] *Waincymer (n 15) 533-534.*

[115] *Clyde & Co, Fifteen Years on from Bhatia: the Indian Government looks at how to institutionalise arbitration in the subcontinent (Commercial Litigation, 20 July 2017) <https://www.clydeco.com/uploads/Blogs/brexit/Article_-_Fifteen_years_on_from_Bhatia.pdf> accessed on 7 August 2018.*

[116] *Youssef, The Present – Commercial Arbitration as a Transnational System of Justice (n 6) 110.*

[117] *Voser (n 2) 352-353.*

[118] *Ibid.*

[119] *See section II B above, 12 – 13.*

[120] *Born, International Arbitration: Law and Practice (n 15) 203-204.*

confidentiality has been marketed as an essential benefit of arbitration[121] and parties entering arbitration agreement could have validly presumed that to be an essentially protected element of their preferred dispute resolution mechanism. As the White and Case – Queen Mary Survey Report states "87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature"[122] and it reports 36% of respondents choosing confidentiality and privacy as one of the three most valuable characteristics of international arbitration.[123] Authors such as Kondev have also stressed on the confidential nature of arbitration is one of its main advantages, while assessing the principle in the construction arbitration industry.[124] This simply goes on to show a clear assumption of confidentiality in the minds of parties when opting into arbitration.

C) Two-Party Setup

Arbitration is essentially envisaged as a bipolar two-party setup[125] where most legislations assume that there is Party A as a claimant and Party B as a Respondent,[126] and the consent-based mechanism, alongside several procedural aspects of arbitration rest on this bipolar setup of arbitration. One such example would be section 16 of the English Arbitration Act 1996, on appointments of arbitrators where the legislation assumes the term parties to mean only two parties, given 'each' party is allowed one arbitrator when making a two or three-member tribunal appointment.[127] Even if they envisage parties within the procedural rules to mean parties divided into Claimant Parties and Respondent Parties, in questions of multi-party setups especially concerning non-signatories, they might align with (n)either side, or both depending on the issue being discussed.[128]

These issues become heightened in cases of extension without understanding the party commercial setup, when extending the arbitration agreement to other subsidiary companies or directors. These entities might on the face of it look to be on one side of the dispute, but depending on which stage the case is, might actually change allegiances. Take for example a situation where the director of a company is deemed to be "an alter ego" of the company due to his wrongful exclusive participation on the companies behalf, however the company does have shareholders that might participate in the decision making process on a regular basis. If the tribunal wishes to hold the other party liable, both the individual director and the company decision making body would have an interest in pushing for this outcome, however at a stage where the tribunal inclines towards the liability of the company/director, their interests diverge, and the director and its company are turned opponents.

This therefore renders the arbitral procedure unfeasible in certain cases, and extension to non-signatories without these questions being addressed at the stage of extension tend to create several problems post facto. Such an instance can be seen in the Rishabh Enterprises case, which dealt with the extension to a party which was a non-signatory without a rigorous consent analysis and using an immensely vague version of the group of companies/alter ego doctrine.

[121] *ibid 201.*

[122] *White & Case – QMUL School of International Arbitration, 2018 International Arbitration Survey: The Evolution of International Arbitration 3 ,<www.arbitration.qmul.ac.uk /media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed on 2 August 2018.*

[123] *ibid 7.*

[124] *Kondev (n 106) 24.*

[125] *Voser (n 2) 352.*

[126] *ibid 351.*

[127] *English Arbitration Act 1996, s 16.*

[128] *Voser (n 2) 352.*

Since the party to which the agreement had not been extended was part of a supply chain, that party did not clearly fall within the fixed claimant-respondent categories because it was neither. The question within that case was whether this non-signatory party provided the machinery on time to the Respondents, so that the same could be leased to the claimant. In a situation where the tribunal holds this alleged fact to be true, both the claimant and respondent align against the non-signatory, making it the only "liable party" while not even having signed the arbitration agreement, or participated in appointment of arbitrators.

The effects on the legal rights of these non-signatories is immense, since without providing an alternative to the otherwise bipolar, agreed upon system, not only does the non-signatory at times not get say in the choice of tribunal, but may also create unforeseeable issues of conflicts of interest, and delays leading to increase in costs and delays. Therefore, the court/tribunal while considering issues of extension to non-signatories must do an assessment of the feasibility of the same against the procedural backdrop and ensure a reconciliation of the necessity to extend with the feasibility of the same.

IV. Conclusion: "To Extend or not to Extend"

This project started off with the aim of assessing the practice adopted by India in cases where questions of extension to non-signatories were dealt with by the Indian courts.

The author had noticed several discrepancies in the approach adopted, several terms which were used interchangeably and even mistakenly, and generally an overly liberal extension regime which to a large extent competed and even surpassed France in its application. The use of the group of companies doctrine and the principle of alter ego stood out as perhaps the most extensively used grounds when considering questions of extension within Indian jurisprudence.[129]

Exploring the field through this particular phenomenon of "extension" has taken us to the very core of arbitration as a field, and the legitimacy associated with it, and it is with this in mind that we must look at the normative structure that must be adopted by courts (in this case the Indian Supreme and High Courts), which must balance the necessity of making arbitration an efficient flexible mechanism, while at the same time ensuring its legitimacy remains uncompromised.

An assessment of Indian case law has highlighted four key challenges before the courts of the land. These are i) a confusing overlap of legal principles with a glaring lack of a rigorous consent analysis while considering cases of extension, ii) a lack of pragmatic solutions towards ensuring confidentiality and restructuring of the bipolar setup of arbitration, iii) a fundamental distaste for the preservation of entity law within the arbitral mechanism, and iv) an immensely pro-arbitration leaning of the court, perhaps to the detriment of the field of law itself.

It is with this in mind that the author proposes certain steps be taken to ensure that the extension regime in India is at par with International standards and practices, and that it remains a positive force within the Indian economic setup and doesn't deter businesses from opting into arbitration due to immense uncertainty of outcomes caused by arbitrary inclusion of non-signatory companies.

The first proposal is that the legislature must consider revising the Indian Arbitration Act[130] so as to answer within the law, questions of applicability of the group of companies doctrine and the principle of alter ego (among other grounds) within Indian arbitration law. This would involve setting out an exhaustive step-wise procedure which can be used by courts to answer questions of extension with legal certainty. It would also

[129] *See Section II above.*

[130] *Indian Arbitration Act (n 45).*

entail ensuring that the scopes of legal principles are defined clearly, ensuring, for example, that the application of the principle of alter ego always results in the assessment of the presence of fraud/ malfeasance,[131] or that the group of companies doctrine takes party intention into account.[132] It is not the authors suggestion that the legislature provides an all-encompassing solution, since it is nearly impossible to provide a one-size-fits-all solution for extension, but the minimum standard for interpretation and application of these doctrines/principles in terms of a necessary consent, intention, confidentiality and procedural feasibility analysis for all cases could be provided for within the law, perhaps enunciating the various grounds already provided for within Indian case law.[133]

The second proposal, which deals with the leanings of the court, is a reconsideration of entity law itself, within the Indian business law setup. Entity law, which is where concepts of privity of different legal entities, and the subsequent rights and liabilities of companies stem from, has been oftentimes ignored due to the sometimes questionable but legally sound business decisions made to maximise profits. This is done to go in favour of the "economic reality" rather than "legal reality" and has a ripple effect on corporate governance, business strategizing and planning, and general commercial decision making. It takes away from the legal certainty of limited liability as is ensured by entity law, and if a jurisdiction must truly disregard such entity law during consideration of liabilities of non-signatories, it should then ensure that their company laws reflect this shift, so as to ensure legitimacy of the process, and ensure forewarning to businesses.

Finally, the fundamental premise of this paper, i.e. consent, should not be compromised, as it perhaps will remain the foundational principle on which arbitration grounds its legitimacy, and this foundation cannot be weakened for a superficial pro-arbitration leaning. It remains the case that sometimes the law will provide explicitly for cases where arbitration agreements bind non-signatories even in the absence of consent, i.e. in cases of succession, agency, assignment etc., however these work on well-established principles of contract law and therefore are exempt from such consent-based analysis. The group of companies doctrine, however, and the principle of alter ego, are based in more equitable considerations and therefore must treat the foundational principles of arbitration as equally valuable if not more. The reason for this, as we have seen before, is that ignoring these fundamental core principles of arbitration leads to the questioning of its legitimacy and go beyond legal acceptability.

In conclusion, the question we must ask ourselves at this juncture is whether countries like India should reinvent their approach to the extension regime at all or go down the French path. The answer to this lies eventually in what one is striving to achieve. There is definitely an argument to be made that arbitral business is valuable, and attracting it is perhaps the stance developing countries like India should/could take. However, as long as the decisions are made with full cognizance of their legitimacy and impact they have on the reality of arbitral business, our work as legal academics is complete.

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[131] *See Section I A above.*

[132] *See Section I B above.*

[133] *See generally Chloro Controls (n 4).*

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ARBITRATION & ADR ROUNDUPS

(Jan-March,2019)

1. No interim order to stop Agusta from going on with arbitration against govt: Delhi HC

The Delhi High Court on January 09, 2019 refrained from issuing any interim order restraining AgustaWestland from continuing with arbitration proceedings against the Union government for cancelling the scam-tainted helicopter deal.

A bench of Justice Pratibha M Singh, however, agreed to examine whether arbitral proceedings in the case ought to be terminated, owing to the nature of allegations raised, including corruption and fraud.

The court will also examine whether time limits prescribed under Section 29A of Arbitration and Conciliation Act will apply to pending proceedings where arbitral proceedings have already begun.

Directing that a copy of the order be placed before the Arbitration Tribunal, Justice Singh noted, "This court agrees with the view of Madhya Pradesh High Court that Section 29A of the Act does not apply to arbitral proceedings commenced prior to the coming into force of the Amendment Act of 2015. Thus, the mandate of the Arbitral Tribunal, constituted under the Agreement dated 8th February, 2010, in the present case, does not stand terminated".

The court said the arbitral record should be placed before it on the next date of hearing - February 28. The court also sought within three weeks reply from Agusta Westland International Limited (AWIL), which had initiated proceedings before the Arbitration Tribunal in October 2013.

The court was hearing the government's plea, praying for a permanent injunction order to restrain AWIL from continuing with the arbitration process due to the ongoing criminal cases before the trial court. AWIL contends that the Ministry of Defence (MoD) cannot unilaterally freeze payments in the Rs 3,600-crore deal.

The government had initially refused to be drawn into the arbitration process but decided to participate in it in January 2014.Appearing for MoD, Additional Solicitor General (ASG) Pinky Anand and advocate Rajesh Ranjan sought permanent injunction restraining AWIL from continuing with the arbitration proceedings, as the mandate of Arbitral Tribunal has been terminated in terms of Section 29A of Arbitration and Conciliation Act, 1996.

After the amendment in October 2015, Section 29A makes it mandatory to complete arbitration proceedings within 12 months - an additional six months, in some circumstances - from the date arbitral tribunal enters upon the reference.

Questioning the tribunal's jurisdiction, the government argued that it cannot go into various allegations raised regarding the transaction, as also allegations of corruption, fraud, and bribery. Thus, the government submitted, the arbitral proceedings deserve to be stayed since the disputes are not arbitrable.

Appearing for AWIL, senior advocate Arun Kathpalia submitted that this case is not governed by the provisions of Section 29A, as arbitral proceedings had begun much before the 2015 Amendment Act came into force. The court noted: "...as to whether the contract, which includes arbitration agreement, is vitiated by fraud, as also allegations of bribery and corruption are concerned, in order for this court to decide the said question, the nature of the claims raised by the defendant (AWIL) and the nature of objections and allegations raised by the plaintiff (MoD) need to be considered."

"The arbitral record is not before the court and the defendant has also not yet been given an opportunity to respond to the case set out by the plaintiff..."

Source: As reported by Pritam Pal Singh in The Indian Express dated 10th January, 2019 from website: https://indianexpress.com/article/india/no-interim-order-to-stop-agusta-from-going-on-with-arbitration-against-govt-delhi-high-court-5531157/

2. ONGC unit wins arbitration against Daelim Industrial Company.

ONGC Petro Additions Ltd. (OPAL), a petrochemical company owned by Oil & Natural Gas Corp., won a major international arbitration case against South Korea's Daelim Industrial Company Ltd. for abandoning a high-stakes project. An international arbitral tribunal in Singapore, ruling in favour of OPAL, said Daelim had breached its contractual obligations by withdrawing from the project and must compensate OPAL.

The compensation amount will be determined at the next hearing in the case, tentatively set for April 4 & 5, said lawyer R Sasiprabhu of RS Prabhu & Co, who appeared for OPAL. Drew & Napier of Singapore represented Daelim. OPAL, based in Dahej in Gujarat, will claim compensation for loss of net present value with interest thereon. The compensation in the agreement was capped at 20% of the contract cost of Rs 1,500 crore.

The contract had been awarded to Daelim on condition that "until the final contract documents are prepared and executed, the bidding documents... and your written acceptance shall constitute a binding contract between us..."

However, after attending the kick-off meeting and providing the performance bank guarantee, Daelim refused to sign the final contract on the ground that it had unresolved issues with Chevron, which was to provide the technology licence needed to manufacture product and sell them. OPAL cancelled the contract with Daelim on April 28, 2011, and awarded it to the next lowest bidder, Samsung. It also initiated arbitration proceedings in Singapore demanding compensation for loss or damage sustained due to non-fulfilment of the contract.

Daelim first resisted the arbitration proceedings on the ground that the arbitral tribunal had no jurisdiction and there was no concluded contract. Later, it claimed that although there was a binding contract, it had been rendered void. The South Korean company argued that it had been discharged from performance of such contract because it was awarded subject to "conditions subsequent," which could not be fulfilled as a result of Chevron backing out of the venture.

Source: As reported by Samanwaya Rautray in The Economic Times dated 10th January, 2019 from website: https://economictimes.indiatimes.com/industry/energy/oil-gas/ongc-unit-wins-arbitration-against-daelim-industrial-company/articleshow/67477790.cms

3. Niko serves arbitration notice on Reliance, BP

Niko Resources has served a notice of arbitration on Reliance Industries NSE -1.96 % and BP Plc after they asked the Canadian oil and natural gas NSE 1.56 % company to exit the KG-D6 block because it had defaulted on cash calls, RIL said in its earnings statement.

Niko owns 10% participating interest in the KG-D6 block off the eastern coast that has a bunch of depleting fields as well as some promising ones being currently developed. RIL owns 60% interest in the block while BP holds 30%.

During the October-December quarter, M/s Niko (NECO) Ltd defaulted on cash calls, which triggered a default notice, RIL said. "Since Niko did not cure the default within the default period, RIL and BP issued notice to Niko for withdrawal from production sharing contract (PSC) and joint operating agreement (JOA) and assign the participating interest to RIL and BP," the company said. Niko responded by serving a notice of arbitration.

In an update on its website, Niko said that under the terms of the JOA, if the defaulting party does not cure a default within sixty days of the default notice, the non-defaulting parties have the option to require the defaulting party to withdraw from the KG-D6 contract

and JOA. This notice from RIL and BP "will have a material adverse impact" on Niko's stakeholders, particularly its shareholders, the company said. Niko has been going through financial difficulty for years and has tried unsuccessfully to sell its interest in the KG-D6 block. It hasn't been able to secure financing to fund its share of the RCluster, Satellite Cluster and MJ development projects in the block, leading to a default.

Source: As reported in The Economic Times dated 18th January, 2019 from website: //economictimes.indiatimes.com/articleshow/67581416.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

4. CBS Chief Fired in Sex Scandal Fights For $120 Million Severance

CBS's former CEO Leslie Moonves, fired over sexual abuse allegations, is taking the television network to arbitration to try to get $120 million in severance it refused to pay him. CBS and Moonves had agreed in September when he was fired that he had the option to go to arbitration to settle any differences over his severance, according to a Securities and Exchange Commission filing.

Following an independent investigation, CBS's board of directors said in December they had "determined that there are grounds to terminate (Moonves) for cause."

The board cited Moonves's "willful and material misfeasance," "breach of his employment contract" and "willful failure to cooperate fully" with the investigation, meaning he would "not receive any severance payment" from CBS. Under his contract, Moonves was entitled to a $120 million severance package unless he was terminated for cause.

He was accused by 12 women of sexual harassment and assault in two New Yorker magazine articles published in July and September.

Since joining CBS in 1995, Moonves transformed the corporation into the most-watched television network in the country and one of the media industry's best-performing businesses.

A one-time actor, he was promoted to president and CEO of CBS Television in 1998 and became chairman in 2003.

Source: As reported in NDTV dated 18th January, 2019 from website: https://www.ndtv.com/world-news/cbs-chief-leslie-moonves-fired-in-sex-scandal-fights-for-120-million-severance-1979410

5. Cairn says final drafting of arbitration award against retro tax in process

In an operational update, Cairn said it is seeking monetary compensation of USD 1.4 billion from the Indian government in the arbitration proceedings.

British oil firm Cairn on January 22 said that an international arbitration tribunal is in the process of drafting a final award in its challenge to the Indian government using retrospective legislation to seek Rs 10,247 crore in taxes. It, however, did not say when the award was expected. In an operational update, Cairn said it is seeking monetary compensation of USD 1.4 billion from the Indian government in the arbitration proceedings. Cairn Energy's 4.95 per cent stake in mining major Vedanta NSE 0.48 % were attached by the Income Tax Department shortly after issuing Rs 10,247 crore tax demand in January 2014 on alleged capital gains the British firm made on a decade-old reorganisation of its India business.

The Income Tax Department, beginning May 2018, has sold most of the Cairn shares to recover tax dues. The share sale happened during the pendency of the challenge Cairn had mounted against the retrospective tax demand with a three-member arbitration tribunal. One member of the panel has been named by the government of India.

"All submissions and procedural steps for the international arbitration under the UK-India Bilateral Investment Treaty are now complete," Cairn said in the update. "Drafting of the final award by the tribunal is ongoing."

The company said it is seeking under the treaty a monetary compensation of USD 1.4 billion -- the sum required to reinstate the company to the position it

would have been in, but for the actions of the Income Tax Department since January 2014. "Cairn continues to have a high-level of confidence in the merits of its claims in the arbitration," it added.

In January 2014, Cairn received notice from the Income Tax Department of India, requesting information relating to the group reorganisation in 2006. The Income Tax Department attached the 10 per cent shareholding in Cairn India, which was subsequently merged with its parent Vedanta. Cairn Energy held 4.95 per cent stake in Vedanta post that move. Cairn Energy received a draft assessment order from the Indian Income Tax Department in March 2015 and subsequently filed a notice of dispute under the UK-India Investment Treaty in order to protect its "legal position and shareholder interests."

"We strongly contest the basis of the tax assessment order, supported by detailed legal advice on the strength of the legal protections available under international law. As such, the company has a high level of confidence in its case under the UK-India Investment Treaty which seeks the restitution of the full value of our assets," it says. The final arbitration hearings were held in August 2018 in The Hague. The Arbitral Tribunal will issue a binding and internationally-enforceable award.

Source: As reported in The Economic Times dated 22nd January, 2019 from website:https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-says-final-drafting-of-arbitration-award-against-retro-tax-in-process/articleshow/67639109.cms

6. Brazil Federal Union and CODESP win Libra arbitration on the Brazilian Port of Santos

On January 7,2019, it became public the award of the arbitral proceeding between, on one hand, Libra Terminais S.A. and Libra Terminais Santos S.A. ("Libra"), two concessionaires of cargo terminals T-35 and T-37 at the Port of Santos, the busiest in Brazil, and, on the other hand, CODESP (the state-owned operator the port of Santos) and the Federal Union, on the lease of such terminals. Libra was sentenced to pay at least R$2,8 Billion (circa US$750 M), mainly for unpaid port fees and dismissed Libra's claim of over US$2 Billion for review of the lease fees and damages. The arbitral proceeding was managed by the CAM-CCBC (Arbitration Center of the Chamber of Commerce Brazil-Canada) and the arbitrators were Cristiano Zanetti, Lauro Gama and Rodrigo Fonseca (president). This is a very rumorous arbitration not only due to the amounts at stake, but also for the political implications.

Libra won the concession of T-35 in 1998. Since the beginning Libra has tried to reduce the fees, claiming that CODESP failed to implement the required port infrastructure. The dispute went to the judicial courts. In 2015, under Michel Temer's presidency, the concession of both terminals was extended until 2035 and the parties decided to submit their respective claims to arbitration. A presidential decree was issued to regulate arbitral proceeding involving port concessions. The extension of such leases was controversial as Libra was supposedly in default and his owner was one of the main President Temer's donators during his political career. In 2018 the Federal Accounts Tribunal (TCU) annulled the extension of the term of the lease of terminals. The outcome of this arbitration was very positive to the institute in Brazil, for several reason. First, the decision demonstrates that seasoned Brazilian arbitrators are able to deal quite well with complex and sensitive disputes involving the public administration. Moreover, it shows that there is no such thing as a bias favourable to the private party in arbitrations involving state entities, thereby setting a precedent for the government to submit more disputes to arbitral venues.

Source: As reported by Joaquim de Paiva Muniz in Global Arbitration news dates 29th January, 2019 from website :https://globalarbitrationnews.com/brazil-federal-union-and-codesp-win-libra-arbitration-on-the-brazilian-port-of-santos/

7. Russian athletics federation withdraws appeal against doping ban

The federation had filed an appeal against at the Court of Arbitration for Sport (CAS) in September against IAAF's decision to extend the ban, imposed in November 2015.

Russia's athletics federation said on January 25 that it would withdraw its appeal against the decision by the global athletics governing body IAAF to prolong its suspension over evidence of state-sponsored doping. The federation had filed an appeal against at the Court of Arbitration for Sport (CAS) in September against IAAF's decision to extend the ban, imposed in November 2015.

The federation said its withdrawal of the appeal was linked to the World Anti-Doping Agency (WADA) decision this week not to suspend RUSADA, Russia's anti-doping agency, despite Moscow missing a deadline to hand over laboratory data.

For the Russian athletics federation to be reinstated, the Athletics Integrity Unit must confirm it has been given access to data and samples from the former Moscow anti-doping laboratory. WADA said this month it had retrieved the laboratory data.

The federation must also cover legal costs and the cost of IAAF investigations before the ban can be lifted. "I'm convinced that at this time we must concentrate our efforts on negotiations and communication with IAAF regarding the reinstatement of the Russian athletics federation, and not waste time and effort on judicial processes," federation president Dmitry Shlyakhtin said in a statement The Court of Arbitration for Sport told Reuters on Friday it had not been notified that the federation wanted to withdraw its appeal. The IAAF did not immediately reply to a request for comment.

Although the federation remains suspended, several Russian athletes, including 2015 world champion hurdler Sergey Shubenkov, have been cleared to compete internationally as neutrals after demonstrating they are training in doping-free environments.

The IAAF's next Council meeting is set to take place March 10-11 in Doha.

Source : As reported in The Indian Express dated 25th January, 2019 from website: https://indianexpress.com/article/sports/sport-others/russian-athletics-federation-withdraws-appeal-against-doping-ban-5555537/

8. Regional Developments: The key developments in Arbitration across the regions

a) First year of Trans-Pacific Partnership

Australia has ratified the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, along with Canada, Japan, Mexico, New Zealand and Singapore. The CPTPP came into force on 30 December 2018. The agreement contains an investor-state dispute settlement mechanism (using arbitration) for breaches of certain investment protections under the treaty.

b) Hong Kong- Third party funding in arbitration to be permitted

Amendments to the Arbitration Ordinance expressly permitting third party funding for arbitration, and introducing related measures, will come came into effect on 1 February 2019. An advisory body will monitor compliance by funders with a Code of Practice. The Code will cover the funding agreement, capital adequacy requirements for funders, conflicts of interest, confidentiality and privilege, degree of control by funders over proceedings, disclosure, liability for adverse costs, and grounds for termination.

c) Japan - Legislature considers fewer restrictions on representation by foreign lawyers

In 2018, an amendment to the Act on Special Measures Concerning the Handling of Legal Services by Foreign Lawyers was proposed. This would relax certain restrictions for foreign lawyers to represent clients in international arbitration cases and ADR. The matter may be voted on by Japan's legislature in 2019 and, if passed, could lead to an increase in the number of international arbitration and ADR cases that take place in Japan.

d) Thailand- Amendments expected to Arbitration Act

The legislature is considering a draft bill to amend the Thai Arbitration Act. Thai law currently precludes foreign counsel from acting in many arbitrations conducted in Thailand, and foreign arbitrators must go through the inconvenient process of obtaining a work permit. The proposed changes are designed to address these issues. The amendments are expected to come into effect sometime in 2019, although the actual date and final form of amendments are not yet certain.

e) Czech Republic- New civil law-based rules on taking of evidence in international arbitration

The "Prague Rules" on the taking of evidence in international arbitration were launched in Prague in December 2018. The rules were conceived as an alternative to the widely-used IBA Rules, which have been criticised in some quarters as cumbersome and slow, increasing the time and cost of proceedings. The Prague Rules are more akin to the procedures used in civil law jurisdictions and give the arbitration panel a more inquisitorial role. The success of the new rules will be closely monitored in 2019.

f) Sweden - Swedish Arbitration Act to be modernized

Significant amendments to the Swedish Arbitration Act will enter into force on 1 March 2019. The key changes aim to avoid parallel proceedings, accommodate multi-party arbitrations, clarify how substantive law should be determined, shorten the window for commencing challenge proceedings, and allow the use of English in witness testimonies without the need for simultaneous translation in challenge proceedings. It is intended that the changes will assist in attracting more international arbitration proceedings to Sweden.

g) United Arab Emirates- New arbitration laws to be put to the test

In 2018, the UAE enacted new arbitration law, based on the UNCITRAL Model Arbitration Law. It adopts a modern and favourable approach to arbitration and addresses problematic procedural issues that arose under the previous regime. It is anticipated that 2019 will see a number of new court decisions on critical issues such as enforcement and interim powers, which will be key in measuring the impact of the new law and its interpretation by the courts.

h) Canada- Updates to arbitration legislation expected

In 2018, the provinces of Ontario and British Columbia adopted the current UNCITRAL Model Law on International Commercial Arbitration. It is expected that more of the 10 Canadian Provinces will follow their lead in 2019 by updating and modernizing both their international and domestic commercial arbitration legislation. This modernization, along with a deepening of arbitration jurisprudence, will continue to position Canada as a desirable seat of arbitration.

i) Venezuela- Arbitration centre set to increase transparency

The Arbitration Centre of the Caracas Chamber is currently revising its rules. Planned changes include greater transparency in the appointment of arbitrators. The Caracas Chamber and the CEDCA Arbitration Centre, the two main Arbitration Centres of Venezuela, have recently adopted measures that allow them to act as seats in international arbitration cases, administer arbitration in a foreign currency and set fees and arbitration costs in a foreign currency.

j) United States- NAFTA replacement will alter mechanisms for investor-state disputes

The US- Mexico- Canada Agreement was signed in November 2018. The Agreement, which replaces NAFTA, requires ratification by all three countries before it takes effect. The USMCA contains several different mechanisms for investor-state disputes. It is anticipated that investor-state arbitration will be phased out for the US and Canada (although the claims will be able to be brought in domestic courts), whereas US investors will still be able to bring arbitration claims in many circumstances against Mexico, if the cases meet the required conditions.

Source: As reported by Benjamin Roe, Steven Adams and Nestor Gadrinab in Global Arbitration News dated January 31st, 2019 from website: https://globalarbitrationnews.com/the-year-ahead-regional-developments-what-are-the-key-developments-across-the-regions/

9. Bayer's Monsanto wins arbitration ruling over royalties from Indian seed company.

Monsanto had insisted it has patent protection in India and it therefore could collect royalties through bilateral contracts with the Indian seed companies. German drug maker Bayer AG's Monsanto unit has won proceedings against Indian seed maker Nuziveedu Seeds Ltd (NSL) in a royalty dispute, lawyers familiar with the matter said. The lawyers, who did not wish to be named as the decision was not public, did not disclose the terms of the arbitration ruling.

Mahyco Monsanto Biotech (India) (MMB), a joint venture between Missouri-based Monsanto and India's Maharashtra Hybrid Seeds Co (Mahyco), "has received a favourable award from the arbitration panel in the proceedings against NSL and Prabhat", a Bayer spokesman said in an e-mailed statement when asked about the ruling. He declined to say how much NSL and one of its affiliates, Prabhat Agri Biotech Ltd, had been told to pay MMB. By Monsanto's calculations, NSL and its two affiliates owed about $22.82 million to MMB.

"The award is confidential, and we will not be able to share any further details at this stage," said the Bayer spokesman.

NSL said that the arbitration tribunal had directed both parties to maintain the confidentiality of proceedings and they were not allowed to make public statements. NSL has the right to appeal the arbitration ruling in a court, the lawyers said.

MMB sells genetically modified (GM) cotton seeds under licence to nearly 40 Indian seed companies, which in turn sell the products to retailers. NSL and two of its affiliates were among the 40.

But NSL and its affiliates decided to stop paying royalties, or trait fees, to MMB in 2015, arguing that Indian law did not provide Monsanto with patent protection on its GM cotton seeds, and if there were to be payments they should be set by the Indian government.

A spokesman for Mahyco said it was referring all questions on the matter to Bayer. The tribunal consisted of three retired judges, according to the lawyers, though their identities have not been disclosed.

Last month India's Supreme Court set aside an order by the Delhi High Court, which in April 2018 said that Monsanto could not claim patents on its GM cotton seeds.

Hindu nationalist groups close to Prime Minister Narendra Modi's ruling Bharatiya Janata Party have opposed both Monsanto and GM technology in India's agriculture, Reuters revealed in a special report in 2017.

India's farm ministry has twice slashed royalties that local seed companies pay to Monsanto. The ministry has also cut cotton seed prices. After a spate of unfavourable government orders and a tussle over royalty payments, Monsanto in 2016 withdrew an application seeking approval for its next generation of GM cotton seeds in India.

Source: As reported in The Indian Express dated 12th February, 2019 from website: https://indianexpress.com/article/business/companies

/bayers-monsanto-wins-arbitration-ruling-over-royalties-from-indian-seed-company-5580004/

10. Bombay High Court Overturns 2017 Arbitration Award to HPCL for $113 Million

The Bombay High Court has set aside an arbitration award of more than Rs. 800 crores owed to Hindustan Petroleum Corp by Malaysia's M3nergy.

In 2017, state-run HPCL was awarded the amount after an arbitration board found that M3nergy had delayed the finalising of a consortium agreement which led to the termination of an exploration contract with India's Oil and Natural Gas Corp, the Economic Times newspaper reported at the time. However, the Bombay High Court ruled on January 10 to set aside the award saying the tribunal which ruled in favour of HPCL had no jurisdiction to do so, according to court documents uploaded to the court's public information system on February 11 and reviewed by Reuters.

Rishab Gupta, a partner at the Indian law firm Shardul Amarchand Mangaldas that represents M3nergy, confirmed on January 10 that ruling was for the original Rs.800 crore amount given in 2017.A company spokesman for HPCL was not immediately available to make a comment when contacted by Reuters.

Source : As reported by Thomson Reuters in NDTV dated 13th February, 2019 from website: https://www.ndtv.com/business/bombay-high-court-overturns-2017-arbitration-award-to-hpcl-for-113-million-1993031

11. Petroceltic threatens International arbitration against EGPC to settle $30m arrears

Petroceltic International, the UK based energy company, announced on February 17, its intention to commence arbitration proceedings in the World Bank-managed International Centre for Settlement of Investment Disputes against the Egyptian General Petroleum Corporation (EGPC), for the breach by the EGPC of its obligations under multiple gas sales agreements, and the EGPC's inability to pay its debts as they fall due for payment.

Petroceltic's Chairperson, Angelo Moskov, told Daily News Egypt that the total arrears account for $30m.

"We do not threaten international arbitration lightly, but we are at the end of our patience with the EGPC: the current situation is totally unacceptable. I would strongly urge the EGPC to rectify its current default without further delay to restore cordial relationships between our two respective companies and to send a positive message to the international investment community," Moskov added.

On the other hand, the EGPC responded that Petroceltic abides by its exploration and production concession in accordance with the agreement, and that the authority sent a letter to the company on 7 February 2019 assuring the EGPC's absolute commitment to all the contracts concluded. The EGPC added that this is evident by the authority's payment of $6m worth of arrears in December 2018 to Petroceltic for the company to fulfil its obligations under the agreements, and to provide the necessary funds to finance the operations until the completion of the abdication process.

"We call on Petrolectic to overcome this dispute by fulfilling the mutual obligations of all parties," the statement concluded.

Source: As reported by Mohamad Adel in Daily News, Egypt dated 22nd February, 2019 from website: https://dailynewsegypt.com/2019/02/18/petroceltic-threatens-international-arbitration-against-egpc-to-settle-30m-arrears/

12. Google to End Forced Arbitration for All Worker Disputes

Google on February 22, 2019 said it will no longer require that its workers settle disputes with the company through arbitration, responding to months of pressure from employees. The change will take effect from March 21st and will apply to current and future

employees. Employees that have settled past disputes won't be able to re-open their cases.

Google said last year it would end forced arbitration for sexual harassment and assault cases, and on February 21, expanded that practice to all worker disputes. Google's parent company, Mountain View, California-based Alphabet, has its nearly 100,000 employees. The updated practices only apply to Google employees, and employees of Google projects such as Deep Mind and Access. Other Alphabet subsidiaries, such as Waymo, are not included. Mandatory arbitration requires employees to settle their disputes with the company privately and outside of court. The practice, widespread in US employment contracts, can lend itself to secrecy and has faced criticism recently. Google workers who staged a walkout late last year have continued to press the tech giant to drop forced arbitration requirements. Protest organisers commended Google for its announcement but wrote in a Medium post that they would not officially celebrate until the changes went live in employee agreements.

Google won't make all employees re-sign their work contracts, it said, but will post the policy change internally and update its contracts for new employees. The company also said it would extend the change to its agreements with contract workers. But it will not require vendors to change their own contracts, meaning some workers could still be held to the previous standard. Other tech companies including Facebook, Uber,and Microsoft have recently ended forced arbitration for sexual assault and harassment claims.

Google Walkout organisers who are focused on forced arbitration issues said they would continue working on ending the practice at other companies. Members of the group plan to meet with lawmakers in Washington, DC, next week to advocate for a federal law against forced arbitration.

Source: As reported in Gadgets 360, NDTV dated 22nd February, 2019 from website: https://gadgets.ndtv.com/others/news/google-to-end-forced-arbitration-for-all-worker-disputes-1997532

13. Arbitration Charge: NTPC to explore 'statutory remedies'

Energy major NTPCNSE -0.91 % has decided to explore "statutory remedies" relating to a Rs 2,015-crore arbitration charge slapped on it in a fuel-supply dispute against Jindal ITF (JITF). The charge, believed to be one of the largest-ever infrastructure arbitration awards, pertains to a dispute over transhipment of coal from the high seas for NTPC's Farakka power plant.

"We are exploring the statutory remedies available to NTPC," an official spokesperson said.

The final award was announced by a three-member Arbitral Tribunal, consisting of Justice Vikramajit Sen (Retd), Justice B P Singh (Retd) and Justice Anil Kumar (Retd) on January 27, 2019.

NTPC had earlier signed a contract with Inland Water Authority of India (IWAI) and JITF for transportation of coal to its 2,100-MW power plant located at Farakka, West Bengal.

The project, introduced for the first time in India, involved the movement of coal in deep draft locations like Sandheads and Kanika Sands from ocean going vessels to barges and transportation of such unloaded coal via National Waterway No.1 to Farakka.

The Arbitral Tribunal after hearing both sides and reviewing documents and evidence, held that NTPC has contributed majorly toward the delay in the construction of Phase I and Phase II of the project. NTPC had allegedly failed to provide the required land for setting up the coal handling system. Due to the delay, JITF could not complete the Phase I and Phase II on time and, therefore, was found liable to compensate JITF.

The tribunal awarded the minimum guaranteed amount for the entire period of the agreement, amounting to Rs 2,015 crore plus interest and applicable taxes.

JITF is a subsidiary of Jindal SAW, part of the Prithvi Raj Jindal group.

JITF's legal advisory team was represented by Singh & Associates' Manoj K Singh, founding partner, Gunita

Pahwa, joint managing partner, Nilava Bandyopadhyay, senior partner, and Rajdutt Shekhar Singh, partner.

While arbitral proceedings were in place, Singh & Associates (on behalf of JITF) filed two interim applications seeking payment of the minimum guarantee quota or MGQ amount of Rs 158.5 crore and Rs 197.81 crore for the first and second year of the operations period, arguing that NTPC had failed to provide the minimum guaranteed coal to JITF at transfer points (deep draft locations in mid-sea). The Arbitral Tribunal also allowed interim applications filed by JITF and directed NTPC to pay the to pay the MGQ amount, said Pahwa.

Source: As reported by Debjoy Sengupta, Rakhi Majumdar in The Economic Times dated 6th March, 2019 from website: https://economictimes.indiatimes.com/markets/stocks/news/arbitration-charge-ntpc-to-explore-statutory-remedies/articleshow/68280115.cms

14. Jindal Rail Infra poised to get Rs 18.35 crore in an arbitration case

Jindal Rail Infrastructure Limited is poised to get Rs 18.35 crore in an arbitration case against the ministry of railways in dispute regarding supply of wagons.

A Tribunal comprising of Justice A. K. Patnaik (Former Judge of Supreme Court) appointed by the Delhi High Court under section 11 of the Arbitration and Conciliation Act, 1996, decided the dispute which arose between Jindal Rail Infrastructure NSE 1.18 % Limited and Indian Railways. The final award came on March 1, 2019.

Jindal Rail Infrastructure, which is promoted by Jindal SAW, was represented by Singh & Associates' legal team led by Manoj K Singh, founding partner, and Nilava Bandyopadhyay, senior partner in the arbitration.

Indian Railways purchases wagons in bulk quantities and a prospective wagon manufacturer has to be certified by the Research Design and Standards Organizations (RDSO). Jindal Rail is certified by the RDSO and it became a regular supplier manufacturing and supplying various types of wagons to Indian Railways. It participated in the Railways' tender process and became L1 and was awarded the contract.

The entire tender quantity of wagons was to be distributed to the eligible tenderer based on their past performances and also as per L1, L2 and L3. However, as per the law, rules and prevalent practices of the Indian Railways, all the other eligible tenders were to match the L1 price while getting their respective quantities. The Contract also provides for the exercise of 30% Option clause in favour of Indian Railways, by which it can increase or decrease the awarded quantity of wagons.

Jindal Rail raised a dispute with Indian Railways, aggrieved mainly by two of its acts, i.e., awarding a tender to L2 bidders at L2 rate, which was much higher than the L1 rate and the illegal exercise of 30% Option clause by the Indian Railways.

The Tribunal arrived at the conclusion that the Indian Railways have committed a breach of the contract by purchasing 496 wagons BOXNHL wagons from Jindal Rail at a lower price than the market price. Thus, the Railways' is liable to compensate Jindal Rail for the loss or damage caused for such breach under Section 73 of the Indian Contract Act 1872.

"This is an unprecedented case, where Indian Railways, in a tender for manufacturing and supply of wagons, adopted dual pricing. Even after discovering price in the next tender, the Indian Railways compelled the manufacturer to supply wagon at the rate discovered in the earlier tender," Manoj K Singh, Founding Partner, Singh & Associates said. Now, as the Hon'ble Tribunal has found the act of Indian Railways to compel the manufacturer to supply wagons at the earlier discovered rate as breach of contract on the part of Indian Railways and Indian Railways is liable to compensate the manufacturer, it will have a great impact on the wagon industry, he added.

Source: As reported by Rakhi Majumdar in The Economic Times dated 8th March, 2019 from website: https://economictimes.indiatimes.com/industry/transportation/railways/jindal-rail-infra-poised-to-get-rs-18-

35-crore-in-an-arbitration-case/articleshow/68322945.cms

15. Delhi: Centre's plan to take over arbitration facility stayed.

The Union government's move to take over the International Arbitration Centre in Delhi was blocked by Delhi high court on 7th March 2019, which said it will "stay the Ordinance" that enabled the transfer of assets and control. A bench of Chief Justice Rajendra Menon and Justice V K Rao stayed the New Delhi International Arbitration Centre Ordinance 2019, which was approved by the Union cabinet on February 28, to allow it to take over the place, which has been functioning since 1995.

Yes, we are staying it. You can use the facility but can't take over everything from the society. We will issue a formal order, wait for it," the bench remarked when Additional Solicitor General Maninder Acharya urged the court not to stay a Presidential promulgation.

The court's observations came on a plea filed by the Centre for Alternative Dispute Resolution in Vasant Kunj, challenging the take-over. Appearing for the society that that runs the centre, senior advocate Dushyant Dave informed the bench that the government has already asked it to hand over the assets and properties, including books of account, registers and other documents relating to the organisation. In its plea, the Union government said the centre came into being in 1995 with the aim of promoting alternate dispute reducing the burden of arrears in courts.

Having several legal luminaries and experts as part of the governing counsel of the society, the organisation said introduction of the ordinance "is a fatal blow on the working of the autonomous society.' An ordinance was passed on the ground that the Centre has not been able to actively engage developments in arbitration ecosystem. A bill to this effect was passed by Lok Sabha in January but could not be not be passed in the Rajya Sabha.

Source: As reported by Abhinav Garg in The Times of India dated 8th March, 2019 from website: http://timesofindia.indiatimes.com/articleshow/68310285.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

16. Punj Lloyd gets favourable arbitration award for Heera Redevelopment Project

Punj Lloyd announced that the Arbitration Tribunal in the matter of Punj Lloyd & Anr. v/s Oil & Natural Gas Corporation in respect of Heera Redevelopment Project, has given an award in favour of Punj Lloyd for an amount of USD 4,985,866.37 with interest @ 9%p.a. from due date till the date of payment / realization along with a further amount of USD 17,500.00 and USD 7,919,661.00.

The amount of USD 7,919,661.00 has to be paid within four months from the award otherwise interest @ 12% p.a. will be payable till the payment or realization thereof.

Source: As reported in Business Standard dated 13th March, 2019 from website: https://www.business-standard.com/article/news-cm/punj-lloyd-gets-favourable-arbitration-award-for-heera-redevelopment-project-119031301115_1.html

17. Pulwama: Whistleblower bureaucrat leaves arbitration fee to welfare fund for bereaved families

Whistleblower bureaucrat Sanjiv Chaturvedi has refused to accept around Rs 2.5 lakh arbitration fee in a case and instead asked the parties concerned to deposit it in the Centre-run fund for the welfare of the families bereaved in the Pulwama terror attack.

Chaturvedi, a 2002 batch Indian Forest Service officer of Uttarakhand cadre, was appointed as arbitrator by the Chandigarh Housing Board in January 2018 in a dispute

between the board and a construction company, official records say the arbitration proceedings were held during February and April 2018 and in January 2019.

Finally, the award resolving dispute was issued on February 23, 2019. The contract value of the project was around Rs 6 crore and the dispute regarding claims and counter claims by the parties involved around Rs 60 lakh, the records say.

As per the fourth Schedule of Arbitration and Conciliation (Amendment) Act, 2015, the arbitration fee was to be around Rs 2.2 lakh besides administrative charges on travel, lodging and others. he total amount of fee to be paid to Chaturvedi was supposed to be around Rs 2.5 lakh.

While finalising the dispute, Chaturvedi determined his fee as Rs 0 and asked the concerned parties to deposit the fee and charges on an equal basis into the account opened by the Ministry of Home Affairs for welfare of families of CRPF soldiers killed in the Pulwama attack, according to an official order.

Chaturvedi, who had exposed various corruption cases during his stint as Chief Chief Vigilance Officer in Delhi's All India Institute of Medical Sciences (AIIMS), had also donated Magsaysay award money to the Prime Minister's Relief Fund.

He had won the prestigious award in 2015 in recognition of his exemplary integrity, courage and tenacity, inter alia, in uncompromisingly exposing and painstakingly investigating corruption in public office.

Chaturvedi had donated Rs 14.23 lakh to the PM's relief fund after the AIIMS refused to accept his donation of of the award money for free treatment of underprivileged patients.

Source: As reported in The Economic Times, dated 17th March, 2019 from website: https://economictimes.indiatimes.com/news/defence/pulwama-whistleblower-bureaucrat-leaves-arbitration-fee-to-welfare-fund-for-bereaved-families/articleshow/68448665.cms

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53rd ANNUAL GENERAL MEETING

Photo Gallery

53rd Annual General Meeting of the Indian Council of Arbitration (ICA) is chaired by Mr. N.G. Khaitan, President, ICA. The others present on the Dias are Ms. Geeta Luthra, Vice President, ICA; Mr. Dilip Chenoy, Director General, ICA; Mr. Arun Chawla, Advisor, ICA and Mr. Vinay Kumar Sanduja, Registrar, ICA.

Mr. Vinay Kumar Sanduja, Registrar, ICA briefing Members about certain significant events conducted by ICA during the year.

A section of Members during Annual General Meeting, ICA.

Group Photograph at the end of 53rd Annual General Meeting, ICA
(L to R): Mr. Vinay Kumar Sanduja, Registrar, ICA; Mr. Arun Chawla, Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Ms. Geeta Luthra, Vice President, ICA and Mr. Dilip Chenoy, Director General, ICA.

Conference on

"STRENGTHENING ARBITRATION IN INDIA: THE WAY FORWARD"

2nd February 2019, New Delhi

BRIEF REPORT

On occasion of it's 53rd Annual General Meeting, Indian Council of Arbitration (ICA), organised a Conference on **"Strengthening Arbitration in India: The Way Forward"** on 02nd February 2019 at New Delhi.

Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court of India, was the Chief Guest at the Conference and delivered the Inaugural Address. Justice Gupta highlighted the fact that India is one of the fastest growing economies in the world and there is tremendous scope for arbitration to become full time profession. Justice Deepak Gupta, in this regard, also suggested that there is a need for dedicated specialised professionals to work in this area of arbitration on full time basis.

Recognising the need for specialised arbitrators, Justice Gupta further suggested that quality of arbitrators needs to be improved and emphasised the role of arbitral institutions to empanel the arbitrators from different specialised fields such as engineers, amongst others. Justice Gupta also emphasised on the use of technological advancements such as video conferencing, e-mails etc. for speedy disposal of arbitration cases.

On the way forward, Justice Gupta was of the firm belief that institutional arbitration is the need of the hour. Describing the important aspects of the institutional arbitration viz. institutional rules governing arbitration proceedings, administrative and infrastructure facilities, specialised panel of arbitrators, fixed fees etc., Justice Gupta pointed out that institutional arbitration provides quick and cost effective resolution of disputes as compared to litigation which is time consuming.

Earlier, at the Inaugural Session of the Conference, Mr. Arun Chawla, Advisor, ICA being the session moderator delivered opening remarks. Mr. N.G. Khaitan, President, ICA and Senior Partner, Khaitan & Co. delivered welcome address at the Conference. Inaugural Session concluded with vote of thanks by Ms. Geeta Luthra, Senior Advocate and Vice President, ICA.

Inaugural Session was followed by a Panel Discussion which was chaired by Hon'ble Ms. Justice Hima Kohli, Judge Delhi High Court. Amongst other things, Hon'ble Justice Kohli delved into the present state of arbitration landscape in India and pro-arbitration judgments and orders passed by Hon'ble Supreme Court of India and High Courts.

Eminent speakers in the field of arbitration were invited by the ICA at the said panel discussion, namely, ***Mr. Ashok Sharma**, Director, Chartered Institute of Arbitrators, Advocate and Member, Governing Body ICA; **Mr. Sanjeev Kapoor**, Partner, Khaitan & Co; **Mr. Tejas Karia**, Partner and Head-Arbitration, Shardul Amarchand Mangaldas; **Mr. Ganesh Chandru**, Execurive Partner, Lakshmikumaran & Sridharan and **Ms. Neeti Sachdeva**, Registrar & Secretary General, Mumbai Centre for International Arbitration.* Eminent Panellists shared their views on different aspects of arbitration law and procedure and also shared their insights based on their practical experiences.

Mr. Ashok Sharma, Director, Chartered Institute of Arbitrators, Advocate and Member, Governing Body ICA shared industry perspective with regard to utility of arbitration for industry users in India and discussed benefits and drawbacks of arbitration for industry users, in light of factors such as costs and expenses.

Mr. Sanjeev Kapoor, Partner, Khaitan & Co. deliberated on change in judicial approach including recent pro-arbitration attitude of Indian courts and developments such as minimal judicial intervention, upholding the validity of arbitration agreements etc. with reference to recent cases in the field of arbitration.

Mr. Tejas Karia, Partner and Head-Arbitration, Shardul Amarchand Mangaldas discussed the effectiveness of proposed amendments to Arbitration Act, 1996 and in particular the need for developing an arbitration bar and enforcement of foreign interim arbitral awards in India.

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan shared the international perspective in the field of arbitration and in particular highlighted the best practices prevalent in other jurisdictions such as Singapore which may be adopted by India to become arbitration friendly jurisdiction.

Ms. Neeti Sachdeva, Registrar & Secretary General, Mumbai Centre for International Arbitration deliberated on issue of Institutionalisation of Arbitration in India including the need for promotion of institutional arbitration in India keeping in mind the benefits of institutional arbitration for parties in terms of time, costs, facilities and infrastructure.

Panel discussion was followed by Q&A session wherein participants directed thought provoking questions to the panellists and also few questions were addressed to the Chair of the Panel Discussion, Hon'ble Ms. Justice Hima Kohli which were aptly replied.

Thereafter, the Conference concluded with Lunch.

Conference on
"STRENGTHENING ARBITRATION IN INDIA: THE WAY FORWARD"
2nd February 2019, New Delhi

Photo Gallery

Participants at Registration Desk.

Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court and Chief Guest for the Conference is escorted to the Auditorium.

Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court of India delivers Inaugural Address.

Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court of India is presented with Green Certificate by Mr. N.G. Khaitan, President, ICA.

Mr. N.G. Khaitan, President, ICA delivers Welcome Address.

Mr. Arun Chawla, Advisor, ICA delivers Opening Remarks.

Mr. N. G. Khaitan, President, ICA, addressing the audience.

Vote of Thanks by Ms. Geeta Luthra, Vice President, ICA.

Huge gathering at the Conference.

End of Inaugural Session (L to R): Mr. Arun Chawla, Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Hon'ble Mr. Justice Deepak Gupta, Judge, Supreme Court of India; Ms. Geeta Luthra, Vice President, ICA; Mr. Dilip Chenoy, Director General, ICA.

Hon'ble Ms. Justice Hima Kohli, Judge, Delhi High Court is escorted to the Auditorium.

Hon'ble Ms. Justice Hima Kohli, Judge, Delhi High Court is presented with Green Certificate by Mr. N.G. Khaitan, President, ICA.

Hon'ble Ms. Justice Hima Kohli, Judge, Delhi High Court addressing the audience during the Panel Discussion.

A section of Audience during Panel Discussion.

Hon'ble Ms. Justice Hima Kohli addressing the Audience during the Panel Discussion.

Mr. N. G. Khaitan, President, ICA, addresses the participants.

Mr. Ashok Sharma, Director, Chartered Institute of Arbitrators; Advocate; and Member, Governing Body, ICA addresses the participants during the Panel Discussion.

Mr. Sanjeev Kapoor, Partner, Khaitan & Co. addresses the participants during the Panel Discussion.

Mr. Tejas Karia, Partner and Head-Arbitration, Shardul Amarchand Mangaldas makes remarks during the Panel Discussion.

Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA makes remarks at the close of the Conference.

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan shares his views with the participants.

Ms. Neeti Sachdeva, Registrar & Secretary General, Mumbai Centre for International Arbitration shares her views.

Hon'ble Ms. Justice Hima Kohli replying to a query during Q&A Session.

Distinguished guests seated in the front row of the Auditoriun.

Group Photograph at the end of Conference (L to R): Mr. Arun Chawla, Advisor, ICA; Mr. Tejas Karia, Partner and Head-Arbitration, Shardul Amarchand Mangaldas; Mr. Ashok Sharma, Director, Chartered Institute of Arbitrators and Member, Governing Body, ICA; Mr. N.G. Khaitan, President, ICA; Hon'ble Ms. Justice Hima Kohli, Judge, Delhi High Court; Mr. Sanjeev Kapoor, Partner, Khaitan & Co; Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan; Ms. Neeti Sachdeva, Registrar & Secretary General, Mumbai Centre for International Arbitration; Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA.

Seminar on
"INSTITUTIONAL ARBITRATION IN INDIA: THE WAY FORWARD"
&
Inauguration of ICA Service Centre at Merchants Chamber of Uttar Pradesh, Kanpur 16th March 2019

BRIEF REPORT

Indian Council of Arbitration (ICA) inaugurated it's **11th Service Centre at Merchants Chamber of Uttar Pradesh (MCUP), Kanpur on 16th March 2019** to further promote the use of Arbitration in commercial disputes for expedited dispute resolution and for conducting arbitration under the ICA Rules of Arbitration.

After the inauguration of ICA Service Centre, a Seminar on **"Institutional Arbitration in India: The Way Forward"** was organized by ICA in association with Federation of Indian Chambers of Commerce and Industry (FICCI) and MCUP.

Hon'ble Mr. Justice Govind Mathur, Chief Justice, Allahabad High Court graced the occasion as a Chief Guest and delivered Key Note address. Hon'ble Mr. Justice Pankaj Mithal and *Hon'ble Mr. Justice Shabihul Hasnain, Judges, Allahabad High Court* graced the occasion as Guests of Honor and also addressed the participants.

Mr. Justice Govind Mathur in his key note address recognized the efforts of the ICA in the sphere of institutional arbitration and also lauded the efforts of ICA for opening its Arbitration Centre at Kanpur- the major industrial and commercial city of the country. Hon'ble Justice Mathur during his key note address emphasized that arbitration should be recognized as prime and foremost apparatus to resolve commercial disputes and not the alternate mode of dispute resolution. However, Justice Mathur showed cause of concern in relation to frequent challenge of awards particularly by the Government, being the largest litigator.

While taking note of advantages of institutional arbitration over ad-hoc arbitration in terms of qualified empanelled arbitrators, administering dispute resolution process at minimum cost etc., Justice Mathur laid special emphasis on the importance of institutional arbitration for resolving commercial disputes.

Hon'ble Mr. Justice Pankaj Mithal and Hon'ble Mr. Justice Shabihul Hasnain, in their special address also recognized the advantages of arbitration as alternate mode of dispute resolution. Also, in their special address, issues and concerns such as frequent challenge of arbitral award before the Courts, sensitization of arbitration as preferred mode of dispute resolution to business community etc. were pointed out and which needs to be ironed out.

Earlier, Mr. Arun Chawla, Advisor, ICA delivered the opening remarks and moderated the Inaugural Session of the Seminar. Mr. Beni Madhav Garg, President, MCUP delivered Introductory Address and Mr. N.G. Khaitan, President, ICA delivered Welcome Address at the Seminar. Inaugural Session concluded with vote of thanks by Dr. Dharmesh Awasthi, Member, Governing Body, ICA.

Feedback provided by the participants showed that the Seminar was helpful as it made Industry and Professionals understand the need for adopting Institutional Arbitration as preferred mode of dispute resolution in commercial matters owing to its numerous advantages over court proceedings and ad-hoc arbitration in terms of time, cost and infrastructure facilities etc.

The Seminar was attended by sitting and retired Judges; Arbitrators; Senior Officials from public and private sector; Senior members of the legal fraternity including Advocates etc.

The Seminar concluded with Lunch.

Inauguration of ICA Service Centre & Seminar on

INSTITUTIONAL ARBITRATION IN INDIA: THE WAY FORWARD"

at Merchants Chamber of Uttar Pradesh

16th March 2019, Kanpur

Photo Gallery

Inauguration of ICA Service Centre

Inauguration of ICA Arbitration Service Centre by Hon'ble Mr. Justice Govind Mathur, Chief Justice, Allahabad High Court.

Group photograph at the launch of ICA Arbitration Service Centre.

Lighting of Lamp

Lighting of Lamp at the Seminar on "Institutional Arbitration in India: The Way Forward" by Hon'ble Mr. Justice Govind Mathur, Chief Justice, Allahabad High Court.

Felicitation of Chief Guest and Guests of Honour

Felicitation of Chief Guest, Hon'ble Mr. Justice Govind Mathur, Chief Justice, Allahabad High Court by Mr. N. G. Khaitan, President, ICA.

Felicitation of Guest of Honour, Hon'ble Mr. Justice Pankaj Mithal, Judge, Allahabad High Court by Mr. Beni Madhav Garg, President, MCUP.

Felicitation of Guest of Honour, Hon'ble Mr. Justice Shabihul Hasnain, Judge, Allahabad High Court by Dr. Dharmesh Awasthi, Member, Governing Body, ICA.

Mr. N.G. Khaitan, President, ICA delivers Welcome Address.

Mr. Arun Chawla, Advisor, ICA delivers Opening Remarks.

Introductory Address by Mr. Beni Madhav Garg
President, MCUP.

Special Address by Hon'ble Mr. Justice Shabihul Hasnain
Judge, Allahabad High Court.

Special Address by Hon'ble Mr. Justice Pankaj Mithal
Judge, Allahabad High Court.

Key note address by Hon'ble Mr. Justice Govind Mathur
Chief Justice, Allahabad High Court.

Mr. N.G. Khaitan, President, ICA addressing the audience.

A section of Audience.

Presentation of Memento to Hon'ble Mr. Justice Govind Mathur Chief Justice, Allahabad High Court.

Presentation of Memento to Hon'ble Mr. Justice Pankaj Mithal Judge, Allahabad High Court.

Presentation of Memento to Hon'ble Mr. Justice Shabihul Hasnain Judge, Allahabad High Court.

Vote of thanks by Dr. Dharmesh Awasthi Member, Governing Body, ICA.

CASE HIGHLIGHTS

Giriraj Garg, Appellant Vs. Coal India Ltd. and Ors., Respondent

In this case, Giriraj Garg (Appellant), challenged the order of Hon'ble High Court of Jharkhand rejecting the application under section 11(6) of the Arbitration and Conciliation Act, 1996 (the Act) for appointment of independent arbitrator on account of failure by Coal India Ltd. (Respondent) to appoint arbitrator when dispute arose between the parties under the Sale Orders. The said Sale Orders were issued under the 2007 Scheme of the Respondent which incorporated the arbitration clause.

Hon'ble High Court of Jharkhand rejected the application filed by the Appellant under section 11(6) of the Act on the ground that the disputes related to different transactions entered into between the parties, under the 2007 Scheme. Hon'ble High Court while dismissing the said petition of the Appellant observed that the sale orders did not contain an arbitration clause, hence, arbitration could not be invoked by the Appellant even though the 2007 Scheme contained an arbitration clause. Hon'ble High Court further noted that arbitration clause contained under Scheme 2007 could not be incorporated by reference in the sale orders since none of the individual sale orders made reference to the applicability of terms and conditions of the 2007 Scheme to the sale orders. The arbitration clause in the 2007 Scheme read as follows:

"All disputes arising out of this scheme or in relation thereto in any form whatsoever shall be dealt exclusively by way of arbitration in terms of the Arbitration and Conciliation Act, 1996." (Emphasis supplied)

In this regard, it is pertinent to note that sale order issued by Respondent contained Standard Terms and Conditions at the end. Clause 7 of the said terms and conditions stated that the sale orders would be governed by the Guidelines, Circulars, Notices, and Instructions issued by Coal India Ltd., Bharat Coking Coal Ltd. etc. Clause 7 reads as follows:

7. The sale order will be governed by guidelines - circulars - office orders - notices - instructions, relevant law etc. issued from time to time by Coal India Ltd., Bharat Coking Coal Ltd., State Govts., Central Govt. and other statutory bodies. This is also subject to any future escalation in prices and or levies/or duties-taxes etc. which may be imposed from time to time. (Emphasis supplied)

The issue that arose before Hon'ble Supreme Court was whether the arbitration clause contained in the 2007 Scheme, would stand incorporated by reference in each of the sale orders in terms of Clause 7 incorporated in the sales orders.

For the purposes of deciding the aforesaid issue, Hon'ble Supreme Court noticed Section 7(5) of the Act which states that *"the reference in a contract to a document containing an arbitration clause, constitutes a valid arbitration agreement, if the contract is in writing, and the reference is specifically made to incorporate the arbitration Clause as a part of the contract."*. Hon'ble Supreme Court noted that the principle of incorporation by reference of an arbitration clause, from another document or contract was a well-established principle in arbitration jurisprudence and the same was contained in section 7 (5) of the Act.

In the aforesaid context, Hon'ble Supreme Court observed that *"The arbitration agreement need not necessarily be in the form of a Clause in the substantive contract itself. It could be an independent agreement; or it could be incorporated by reference either from a parent agreement, or by reference to a standard form contract."*

Hon'ble Supreme Court also delved into section 6 (2) of the English Arbitration Act which is pari materia to

section 7 (5) of the Act and other relevant judgments and commentaries on the subject and observed that in the instant case Hon'ble High Court had taken erroneous view that an arbitration clause would not stand incorporated in the individual sale orders entered into by the Respondent and the Appellant.

Setting aside the order of Hon'ble High Court, the Hon'ble Supreme Court observed that *"The individual sale orders emanate out of the 2007 Scheme. The sale orders specifically state that they would be governed by the guidelines, circulars, office orders, notices, instructions, relevant law etc. issued from time to time by Coal India Limited or Bharat Coking Coal Limited etc. As a consequence, the arbitration Clause (i.e. Clause 11.12) in the 2007 Scheme would stand incorporated in the sale orders issued thereunder."*

Allowing the appeal, Hon'ble Supreme Court observed that clause 7 in the sale orders falls under the 'single contract case' where the arbitration clause is contained in a standard form document i.e. the 2007 Scheme, to which there is a reference in the individual sale orders issued by Respondent.

ICOMM Tele Ltd., Appellant Vs.Punjab State Water Supply and Sewerage Board and Ors, Respondents.

In this case, Hon'ble Supreme Court of India struck down a pre-arbitral deposit clause contained in notice inviting tender for extension and augmentation of water supply, sewerage scheme and sewerage treatment plant for various towns on turnkey basis, issued by the Punjab State Water Supply and Sewerage Board (Respondent).

The said Notice inviting tender was part and parcel of the contract entered into between Respondent No. 2 and ICOMM Tele Ltd. (Appellant). The Appellant had also entered into similar contracts with Respondent No. 2 which contained the same arbitration clause. The Clause 25(viii) of the notice inviting tender relating to pre-arbitral deposit read as follows:

"viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten percent of the amount claimed, on a Schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t. the amount claimed and the balance, if any, shall be forfeited and paid to the other party."

When the dispute arose in terms of the contract, the Appellant sought for waiving of 10% deposit fee for the purposes of invoking arbitration in terms of aforesaid Clause 25 (viii) of the notice inviting tender. Since there was no response, Appellant filed writ petition which was dismissed by High Court stating that such tender condition can in no way be said to be arbitrary or unreasonable. Thereafter, the Appellant filed a writ petition challenging the validity of arbitration clause which was also dismissed. Thereafter, Appellant approached Hon'ble Supreme Court for the relief on ground that clause 25(viii) was arbitrary and hence violated Article 14 of the Constitution of India.

Before determining the constitutional validity of clause 25 (viii), Hon'ble Court had to decide the issue of maintainability of the writ petition. In this regard, Hon'ble Supreme Court, observed that *"It is well settled that the terms of an invitation to tender are not open to judicial scrutiny, as they are in the realm of contract, unless they are arbitrary, discriminatory, or actuated by malice."* However, Hon'ble Supreme Court also noted that power of judicial review can be exercised under it's writ jurisdiction and observed *"It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters."*

Hon'ble Supreme Court noted the legal principles of maintainability of writ petition and stated that in an appropriate case, a writ petition as against a State or an

instrumentality of a State arising out of a contractual obligation is maintainable.

In its judgment, on the issue of maintainability of writ petition, Hon'ble Supreme Court also laid down that *"when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution...."*

After discussing the position with regard to maintainability of writ petition against State or an instrumentality of the State, Hon'ble Supreme Court looked at aforesaid Clause 25(viii) to determine whether the same was arbitrary or discriminatory and violative of Article 14 of the Constitution of India.

While determining the constitutional validity of clause 25 (viii), Hon'ble Supreme Court observed the following:

- 10% "deposit-at-call" of the amount claimed was inserted in notice inviting tender in order to avoid frivolous claims by the party invoking arbitration. However, Court noticed the well settled position that a frivolous claim can be dismissed with exemplary costs.
- "Deposit-at-call" of 10% of the amount claimed, for the purposes of invoking arbitration was without any direct nexus to the filing of frivolous claims, particularly in view of the fact that clause 25 (viii) applies to all claims (frivolous or otherwise) made at the very threshold.
- 10% deposit was to be made before any determination that a claim made by the party invoking arbitration was frivolous. Court noted that a Claim may be dismissed but need not be frivolous.
- Hon'ble Court noted that the Clause25 (viii) would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. While elaborating further, Hon'ble Court noticed the fact that in the present case 3 arbitrators were to be appointed for the purposes of arbitration, hence there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous.
- Clause 25 (viii) was arbitrary in view of the fact that even where a claim was found to be justified and correct, the amount that was deposited as per clause 25 need not be refunded to the successful claimant. For the purposes of understanding, Hon'ble Court gave the following example: *"A claim based on a termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of one crore is finally granted by the learned arbitrator at only ten lakhs, only one tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire Clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed."*

Allowing the Appeal on the basis of aforesaid observations, Hon'ble Supreme Court struck down Clause 25(viii) of the notice inviting tender as arbitrary and violative of Article 14 of the Constitution. Hon'ble Supreme Court noted the deterrent and discouraging effect of clause 25 (viii) on arbitration in the following words: *"Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive."*

Hon'ble Supreme Court also noticed that the clause 25(viii) was against the very fact of arbitration to be adopted as alternate dispute resolution process. Hon'ble Court noted the well settled law and stated *"arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation."*

Jaiprakash Associates Ltd., Appellant Vs.Tehri Hydro Development Corporation India Ltd., Respondent

In this case, Hon'ble Supreme Court of India has laid down the powers of an Arbitral Tribunal to grant interest pendente lite i.e. between the date cause of action arose and the date on which award is made under the Arbitration and Conciliation Act, 1996 (the Act).

Briefly stated, Jaiprakash Associates Ltd. (Appellant) was awarded the contract by the Tehri Hydro Development Corporation India Ltd. (Respondent) to execute certain Works. Owing to some disputes, arbitration was invoked by Appellant and Arbitral Tribunal comprising of three arbitrators was constituted. After hearing the parties, the Arbitral Tribunal by majority award allowed claims to certain extent and also granted interest at the rate of 10% per annum from the date when the arbitration was invoked till 60 days after the award. The Arbitral Tribunal also awarded future interest at the rate of 18% per annum till the date of payment.

In the aforesaid context, following relevant portion of the Award, may be noted:

"As seen from above, Clause 50.0 and 51.0 of the Contract deny interest on the Claimant's dues by the Respondent due to dispute etc. However as per above quoted judgment of Hon'ble Supreme Court of India, the claim for interest can be considered by the Arbitration Tribunal."

It is pertinent to note that the learned Arbitrators granted the interest by relying upon the law declared by the Hon'ble Supreme Court in *Board of Trustees for the Port of Calcutta v. Engineers-De-Space-Age MANU/SC/0735/1996 : (1996) 1 SCC 516* and in this regard following observations from the said judgment were noted by the Hon'ble Court:

...In other words, according to their Lordships the arbitrator is expected to act and make his award in accordance with general law of the land but subject to an agreement, provided, the agreement is valid and legal. Lastly, it was pointed out that interest pendent like is not a matter of substantive law, interest for the period anterior to reference. Their Lordship concluded that when the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute is referred to the arbitrator, he will have the power to award interest pendente lite for the simple reason that in such a case it is presumed that interest was implied term of the agreement between the parties; it is then a matter of exercise of discretion by the arbitrator. The position of law, has, therefore, been clearly stated in the aforesaid decision of the Constitution Bench.

Strictly construed the term of the contract merely prohibits the Commissioner from paying interest to the contractor for delayed payment but once the matter goes to the arbitration the discretion of the Arbitrator is not, in any manner, stifled by this term of the contract and the Arbitrator would be entitled to consider the question of grant of interest pendent lite and award interest if he finds the claim to be justified. We are, therefore, of the opinion that under the Clause of the contract the Arbitrator was in no manner prohibited from awarding interest pendente lite.

Aggrieved by the award passed by the Arbitral Tribunal, the Respondent challenged the award before the Hon'ble High Court of Delhi on limited ground of pendente lite interest awarded by the Arbitral Tribunal. Quashing the award on the limited point of interest granted, Hon'ble Delhi High Court held that if interest is prohibited as per the expressed terms of the contract between the parties, the Arbitrator does not get jurisdiction to award interest. Insofar as interpretation to the Clause 50 and 51 of the General Conditions of Contract (GCC) was concerned, Hon'ble High Court noticed that these Clauses were on the same terms as Clause 1.2.14 and 1.2.15 of the contract which were subject matter of construction in *Tehri Hydro Development Corporation (THDC) Limited and Anr. v. Jai Prakash Associates Limited MANU/SC/0806/2012 : (2012) 12 SCC 10.* In the said judgment, Hon'ble Supreme Court had categorically held that no interest

was payable on claim for delayed payment due to the contractor in terms of clauses contained in the contract.

Thereafter, the Appellant aggrieved by the order of the Hon'ble High Court, preferred intra-court appeal which was dismissed by the Division Bench of the Hon'ble Delhi High Court to the effect that no interest was payable as per Clauses 50 and 51 of GCC. The view taken by the Hon'ble Delhi High Court was that Clause 50 and 51 of the GCC categorically provided that no interest would be payable to the contractor on the money due to him.

Appellant finally approached the Hon'ble Supreme Court and the issue before the Supreme Court was whether any interest could be awarded by the Arbitrators in view of Clauses 50 and 51 of the GCC which governed the terms between the parties. Clause 50 and 51 of the GCC read as under:

Clause 50.0 Interest on money due to the contractor

No omission on the part of the Engineer in charge to pay the amount due upon measurement or otherwise shall vitiate or make void the contract, nor shall the contractor be entitled to interest upon any guarantee or payments in arrears nor upon any balance which may on the final settlement of his account, be due to him.

Clause 51.0 No claim for delayed payment due to dispute etc.

No claim for interest or damage will be entertained or be payable by the corporation in respect of any amount or balance which may be lying with the corporation owing to nay dispute, different or misunderstanding between the parties or in respect of any delay or omission on the part of he Engineer in charge in making intermediate or final payments on in any other respect whatsoever.

After hearing the submissions of the parties, Hon'ble Supreme Court noted that the present case was to be decided as per the 1996 Act. Thereafter, it noted that in the present case, clauses 50 and 51 of GCC put a bar on the Arbitral Tribunal to award interest and hence the Arbitral Tribunal lacked jurisdiction to award interest. Hon'ble Supreme Court also noted that right from the stage of arbitration proceedings till the High Court, aforesaid clauses were interpreted to hold that they put a bar on the Arbitral Tribunal. In this regard, Hon'ble Court noted that *"Even the majority award of the arbitral tribunal recognised this. Notwithstanding the same, it awarded the interest by relying upon Board of Trustees for the Port of Calcutta case. The High Court, both Single Bench as well as Division Bench, rightly noted that the aforesaid judgment was under the 1940 Act and the legal position in this behalf have taken a paradigm shift which position is clarified in Sayeed Ahmed and Company case. This rationale given by the High Court is in tune with the legal position which stands crystallised by catena of judgments as noted above."*

For the purposes of deciding the issue, Hon'ble Supreme Court looked into section 31 (7) of the 1996 Act and held that the position under 1996 Act, was wholly different as compared to 1940 Act, as the 1996 Act sanctifies agreements between the parties and states that the moment the agreement says otherwise, no interest becomes payable from the date of the cause of action until award is delivered.

For providing further clarity on the issue, Hon'ble Supreme Court considered its earlier judgments viz. *"State of Uttar Pradesh v. Harish Chandra and Company (2012) 12 SCC 10" and "Sayeed Ahmed and Company v. State of Uttar Pradesh & Ors (2009) 12 SCC 26"* and held that the view taken by Hon'ble Delhi High Court was correct to the extent that the legal position with respect to interest in an arbitral award under 1940 Act has taken a paradigm shift. Considering the present legal position and taking into consideration the judgment in Sayeed Ahmed (supra), the Supreme Court found that Clauses 50 and 51 of the GCC put a bar on the Arbitral Tribunal to award interest and therefore, the Arbitral Tribunal did not have any jurisdiction to do so.

Emaar MGF Land Limited, Appellant Vs. Aftab Singh, Respondent

In this case, Hon'ble Supreme Court of India, decided the important issue of arbitrability of consumer disputes.

Briefly stated, the Respondent (Aftab Singh) entered into a Buyer's Agreement with the Emaar MGF Land Limited (Appellant) in furtherance to allotment of a Villa by the appellant under it's real estate project of building an integrated township. When, certain disputes arose between the parties with regard to delivery of possession of the villa by the Appellant and payment etc., the Respondent filed consumer complaint before National Consumer Dispute Redressal Commission (NCDRC) for deficiency of service by the Appellant and payment of compensation. Appellant objected to the filing of consumer complaint before NCDRC and also filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 (the Act) for referring matter to arbitration in view of Clause 43 of Buyer's agreement which provided for settlement of disputes between the parties through arbitration under the Act.

Ld. Single Member, NCDRC while hearing the consumer complaint case of Respondent along with several other similarly situated applications and other similarly situated applications filed under Section 8 for referring parties to arbitration, took the view that considering the vital importance and far reaching consequence of legal issue involved in these applications, it would only be appropriate that said applications were considered and decided by a Larger Bench, consisting of at least Three Members.

Thereafter, the Three Member Bench of NCDRC considered the submissions of the parties and in Paragraph Nos. 55 and 56 of its judgment came to following conclusion, which reads as under:

*"**55**. In view of the afore-going discussion, we arrive at the following conclusions: (i) the disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable; (ii) there are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution; (iii) the subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court; (iv) Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make disputes non-arbitrable and (iv) in light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended Sub-section (1) of Section 8 cannot be construed as a mandate to the Consumer Forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.*

***56**. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

Thereafter, on the basis of the decision given by Three Member Bench of NCDRC, Ld. Single Member rejected the applications filed by the Appellant under Section 8 of the Act. Aggrieved by the order passed by the Larger Bench NCDRC holding consumer disputes to be non-arbitrable, Appellant filed Civil Appeal to the Hon'ble Supreme Court challenging the order passed by the Larger Bench, NCDRC and prayer was also made to set aside subsequent order passed by Single Member, NCDRC dismissing application filed by the Appellant under Section 8 of the Act. It is pertinent to note that the Hon'ble Supreme Court of India dismissed civil appeal as it found no grounds to interfere with order of NCDRC. Appellant thereafter filed a review petition to review the judgment of the Supreme Court.

Main contentions of the Appellant before the Hon'ble Supreme Court were that after amendment of Section 8 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015, the Parliament had added the words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" in Section 8 of the Act w.e.f. 23.10.2015, and the Parliamentary intendment was clear that after the said amendment, the judicial authority was mandated to refer a dispute for arbitration if there was a valid arbitration agreement.

As regards Respondent is concerned, it's main contentions before the Hon'ble Supreme Court were

that the Consumer Protection Act, 1986 provided for an additional and beneficial remedy to the consumer to avail of the speedy, expeditious disposal of his or her dispute. Respondent also contended that the Consumer Protection Act, 1986 being a beneficial legislation enacted to give an additional remedy for the settlement of disputes, the same cannot be taken away by Section 8 of the Act.

Respondent also relied upon Section 2(3) of the Act which expressly states that Part I of the Act "shall not affect any other law for the time being in force by virtue of which certain disputes may not be referred to arbitration".

One of the principal issue before the Hon'ble Supreme Court in this case was whether by the insertion of words "notwithstanding any judgment, decree or order of the Supreme Court or any Court" under Section 8(1) by the (Amendment) Act, 2015, legislature intended to do away with the decision of judgments of Supreme Court laying down that Consumer Protection Act being special remedy can be initiated and continued despite there being any arbitration agreement between the parties?"

For deciding the issue, the Hon'ble Supreme Court considered its earlier judgments prior to 2015 Amendment in relation to section 8 of the Act viz. Fair Air Engineering Pvt. Ltd & Anr v N K Modi ((1996) 6 SCC 385), National Seeds Corporation Limited v Madhusudhan Reddy & Anr ((2012) 2 SCC 506) and Rosedale Developers Private Limited v Aghore Bhattacharya & Ors ((2018) 11 SCC 337), and noted that *"This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services."*

Hon'ble Supreme Court also noted that *"Not only the proceedings of Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can neither stop or stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. For example, there may be a commercial agreement between two parties that all issues pertaining to transaction are to be decided by arbitration as per arbitration Clause in the agreement. In case where a cheque is dishonoured by one party in transaction, despite the arbitration agreement party aggrieved has to approach the criminal court. Similarly, there are several issues which are non-arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement. This Court had occasion to consider the above aspect and has noticed various disputes which are non-arbitrable, reference is made to the judgment of this Court in Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors. MANU/SC/0533/2011 : (2011) 5 SCC 532."*

Hon'ble Supreme Court thereafter on the issue regarding arbitrability of consumer dispute post 2015 Amendments to the 1996 Act observed as follows *".....Can it be said that after amendment under Section 8(1), the law laid down by this Court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has been reversed or set at naught. Neither any such Legislature intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed."*

To further elaborate the position on arbitrability of consumer dispute particularly in context of section 8 (1) of the Act as amended by the Amendment Act of 2015, Hon'ble Supreme Court stated that *"While carrying out amendment under Section 8(1) of Act, 1996, the statutes providing additional remedies/special remedies were not in contemplation."* Thereafter, Hon'ble Supreme

Court clarified the position of section 8 of the Act as amended by the Amendment Act of 2015 in the following words *"notwithstanding any judgment, decree or order of the Supreme Court or any Court" were meant only to those precedents where it was laid down that the judicial authority while making reference Under Section 8 shall entitle to look into various facets of the arbitration agreement, subject matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning."*

Hon'ble Supreme Court while deciding the review petition took note of it's earlier decision in *Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors. MANU/SC/0913/2016 : (2016) 8 SCC 788* wherein Court had occasion to consider the provisions of Section 8 of the Act in reference to special remedy provided under the Trusts Act, 1882. In the said case, Hon'ble Supreme Court held that disputes within the trust, trustees and beneficiaries are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. In the aforesaid case, Hon'ble Supreme Court held that the remedy provided under the Act for deciding such disputes is barred by implication.

Hon'ble Supreme Court relying on the ratio laid down in the aforesaid case titled *Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors*. observed that no error was committed by the NCDRC in rejecting the application filed by the Appellant under Section 8 of the Act.

At the end of the judgment, Hon'ble Supreme Court also laid down the important position with regard to availing of special remedy provided under the statute vis-à-vis arbitration agreement of the parties to resolve their disputes in following words *"....that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration."*

***

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CA Anshul Gupta
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