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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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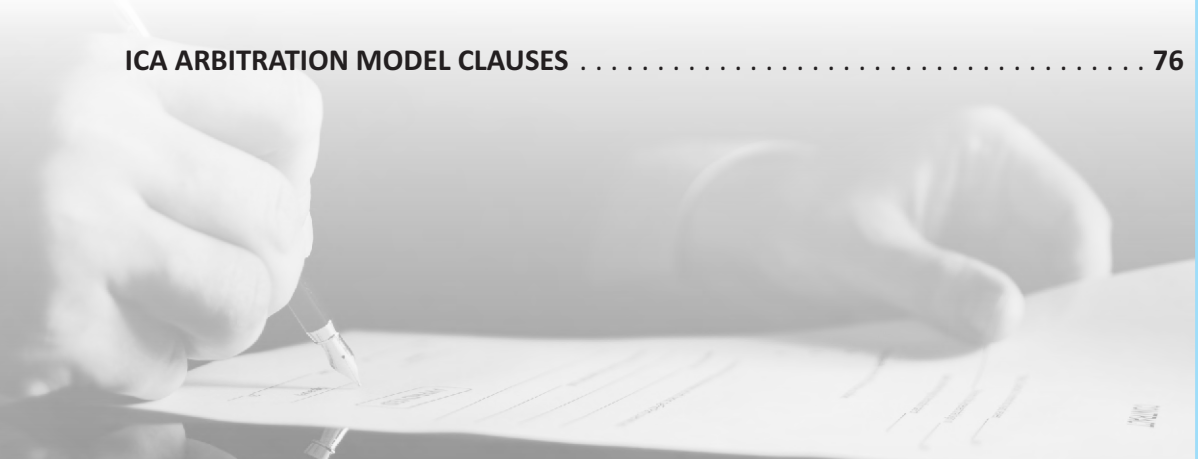


FROM THE PRESIDENT'S DESK

COVID-19, truly an unprecedented pandemic, is massively disrupting the global economy and is making more difficult to survive due to safety concerns. Several measures have been adopted by the Government including lockdown to limit the spread of disease. We at ICA know that this is a difficult time for our members and the arbitration community at large.

It is well established that availability of robust legal framework for alternate dispute resolution, particularly arbitration, is essential for efficient resolution of commercial disputes and is also an integral part of ease of doing business. However, in these turbulent times, due to safety concerns, most of the arbitration hearings have been adjourned and this has resulted in resolution of disputes being left in limbo. Courts & tribunals including Arbitral Tribunals have not been able to function due to restrictions on travel and movement imposed by the Government amidst the COVID-19 pandemic.

The current developments have forced Government, Courts, Regulators, etc. to think of new ways of doing things. I am of the firm belief that the future lies in rapidly adopting technology based solutions. Accordingly, in these difficult times, we at ICA have kept our spirits high and will continue to render services for arbitrations conducted under the aegis of ICA and increase our presence online through our virtual platforms and e-resources.

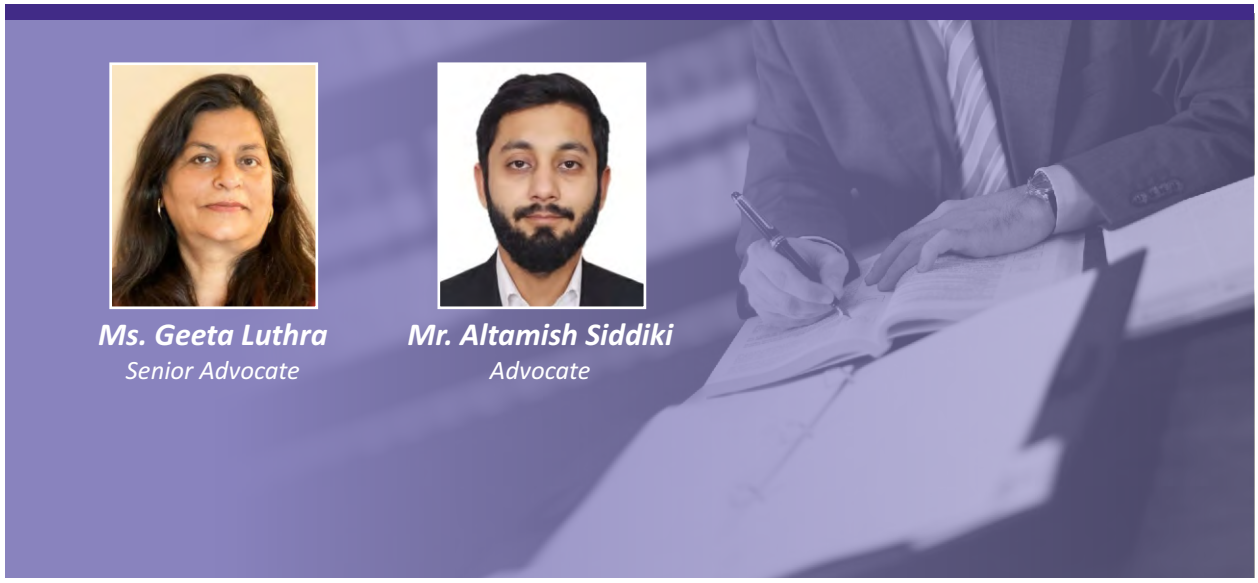
ICA is also committed to continue its endeavours for the professional development of its members by organising Webinars & Training Courses, among other initiatives. Recently, ICA with the support of FICCI organized the 3rd Edition of its International Conference on the theme ***"Arbitration in the Era of Globalisation"***, on 08th February 2020, at Federation House, Tansen Marg, New Delhi. Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice of India graced the Conference as the Chief Guest and delivered the Inaugural Address. Many of the sessions were chaired by the Hon'ble Judges of the Supreme Court. A galaxy of national and international speakers also addressed the participants. On 16th April 2020, ICA in collaboration with Khaitan & Co also organized a webinar titled ***"The New Normal-Impact of COVID-19 on Arbitration Landscape in India"***, which saw enthusiastic participation.

Members can be rest assured, that ICA is working tirelessly to meet the challenges thrown by the present circumstances and to offer reliable and effective dispute resolution services in new ways. Thank you for your cooperation and understanding during this period. The support of our esteemed members in our efforts would go a long way in achieving our mission!

N G Khaitan

N. G. KHAITAN

ARBITRABILITY OF DISPUTE WHILE ASSESING THE MATTER TO BE SENT FOR ARBITRATION BY THE COURTS



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INTRODUCTION

In the year 1985, the United Nations Commission on International Trade Law (UNCITRAL), a subsidiary body of the General Assembly brought in a model Arbitration law. The said law which is popularly known as UNCITRAL model law on International Commercial Arbitration helped many countries to improve their arbitration systems. Even though the objective of the said model law was to convince the member states to adopt a uniform International Arbitration law, which would help the international Trade and business in a big way, the model law also helped the member states to have a uniform domestic arbitration law. India, at the time, already had an existing law on the subject of Arbitration i.e. the Arbitration Act, 1940 which in itself was a big step forward in bringing a comprehensive law covering all important aspects of arbitration. However, due to certain inherent flaws in the said act and the resolution dated 11th December 1985 of the General Assembly which recommended that all states give due consideration to the model law on International commercial Arbitration, India swiftly responded to the recommendation of the United Nations and understood the importance of adopting the Model law to gain the confidence of foreign investors. Hence India enacted Arbitration and Conciliation Act 1996 in the lines of the above said UNCITRAL model law of Arbitration. The new act of 1996 was a huge move-away from the previous act since the new act reduced the interference of the courts to the minimum. The Supreme Court, while highlighting the need and shift from the previous act stated, "To attract the confidence of International Mercantile community and the growing volume of India's trade and commercial relationship with the rest of the world after the new liberalization policy of the Government, Indian Parliament was persuaded to enact the Arbitration & Conciliation Act of 1996 in UNCITRAL model and therefore in interpreting any provisions of the 1996 Act Courts must not ignore the objects and purpose of the enactment of 1996. A bare comparison of different provisions of the Arbitration Act of 1940 with the

provisions of Arbitration & Conciliation Act, 1996 would unequivocally indicate that 1996 Act limits intervention of Court with an arbitral process to the minimum."[1]

SECTION 8 OF THE ARBITRATION AND CONCILIATION ACT, 1996

Section 8 of the Arbitration and Conciliation Act, 1996, which is peremptory in nature, corresponded to Section 34 of the Arbitration Act, 1940 which provided that the judicial authority, on an application by a party, during the course of a legal proceeding pending before it, if satisfied that the applicant was, at the time when the proceedings were commenced, and still remained, ready and willing to do all things necessary for the proper conduct of the arbitration, had the discretion to stay the proceedings. The provision mainly dealt with the stay of legal proceedings where there was an arbitration agreement. And, when it was brought to the notice of the court that there was an arbitration clause in the contract, the court could pass an appropriate order to refer the matter to arbitration.[2]

Section 8 of the 1996 Act has a striking departure from the Section 34 of the 1940 Act. Exercise of judicial discretion which was the hallmark of Section 34 of the 1940 Act, has been taken away altogether under the Act of 1996. It provides that a judicial authority shall, on the basis of the arbitration agreement between the parties, direct the parties to go for arbitration. In case there is a valid arbitration clause, the courts now are obligated to refer the parties to arbitration in terms of their arbitration agreement.[3] Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute.[4] The present legislation on the subject embodies a conscious departure which is intended to strengthen the efficacy of arbitration.

Section 8 of the Act, by and large, is modeled on Article 8 of the UNCITRAL Model Law. However, it does not verbatim follow Article 8 of the Model Law. It makes some significant departures from the model law. The most significant departure is that the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" which are in Article 8 (1) of the Model Law, have not been adopted in Section 8(1) of the Act by the Parliament[5]. Article 8 of the UNCITRAL Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the Act of 1996 has made a departure which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8.[6]

Section 8 prior to the Arbitration and Conciliation (Amendment) Act, 2015 [No. 3 of 2016] read as under:

8. Power to refer parties to arbitration where there is an arbitration agreement.—

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1 *Konkan Railway Corporation v. Mehul Construction Co., (2000) 7 SCC 201.*

2 *Malhotra, O.P.; The Law & Practice of Arbitration and Conciliation; Third Edition (2014) at pg. 426*

3 *Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503.*

4 *Per Chandrachud, J. in his supplementing judgment in A. Ayyasamy vs A. Paramasivam & Ors, (2016) 10 SCC 386 at para.32*

5 *Malhotra, O.P.; The Law & Practice of Arbitration and Conciliation; Third Edition (2014) at pg. 429*

6 *Per Chandrachud, J. in his supplementing judgment in A. Ayyasamy vs A. Paramasivam & Ors, (2016) 10 SCC 386 at para.32*

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

However, after the **Arbitration and Conciliation (Amendment) Act, 2015 [No. 3 of 2016]** was brought into place, the Section 8 of the Act was also amended and now reads as under:

8. Power to refer parties to arbitration where there is an arbitration agreement.—1

[(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

2[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

A significant change after the amendment is the inclusion of the words "…notwithstanding any judgment, decree or order of the Supreme Court or any other court…" along with the proviso to the sub-section (2) of Section 8 of the Act.

Section 8 uses the expression 'judicial authority' and not 'Court'. Parliament has used three pertinent expressions in Section 8 i.e. 'judicial authority', 'action' and 'first statement on the substance of the dispute', in contradiction to the expression 'court', 'suit' and 'written statement' as used in the Code of Civil Procedure, 1908. Section 34 of the Act of 1940 used the terms 'judicial authority'. 'legal proceedings' and 'written statement'. All these expressions are wider in scope than the terms used in the Code of Civil Procedure, 1908, and the Act of 1940. The expressions 'action' and 'first statement on the substance of the dispute' have been borrowed from Article 8 of the Model Law.[7]

[7] *Malhotra, O.P.; The Law & Practice of Arbitration and Conciliation; Third Edition (2014) at pg. 431*

An analysis of Section 8 would show that once the pre-requisites of the section are fulfilled, the courts have no other option but to refer the matter to arbitration. The language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil -court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.[8]

However, before referring any dispute for the arbitration, the following conditions must be satisfied:

i. That there exists an arbitration agreement;

ii. That the action has been brought to the court by one party to the arbitration against the other party;

iii. That the subject matter of the suit is the same as the subject matter of the arbitration agreement;

iv. That the other party must move the court before he submits his first statement on the substance of the dispute, for reference to arbitration; and

v. The applicant moving an application, is required to produce the original arbitration agreement, or duly certified copy.

On fulfillment of the conditions of Section 8, no option is left to the court, but to refer the parties to arbitration.[9]

ARBITRABILITY OF DISPUTE: WHETHER THE DISPUTE IS ARBITRABLE OR NOT?

The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes – civil or commercial – from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute.[10]

When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non-obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Section 5 of the Act is reproduced hereinunder:

Section 5

5. Extent of judicial intervention.—*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the Court for an adjudication. Section 16 of the Act reads as under:

[8] *Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums [(2003) 6 SCC 503] at para. 14.*
[9] *Magma Leasing & Finance Ltd. v. Potluri Madhavilata & Anr. [2009 (4) Arb. L.J. 1 (SC); (2009) 10 SCC 103]*
[10] *Per Chandrachud, J. in his supplementing judgment in A. Ayyasamy vs A. Paramasivam & Ors, (2016) 10 SCC 386 at para.32*

Section 16

16. Competence of arbitral tribunal to rule on its jurisdiction.—

(1) *The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.*

(3) *A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.*

(4) *The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.*

(5) *The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.*

(6) *A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.*

Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the Court in proceedings under Section 34 of the Act while challenging the arbitral award.

The aforesaid scheme of the Act is succinctly brought out in the following discussion by the Supreme Court in **Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.**[11]

"3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act".

However, when a party questions the dispute raised as non-arbitrable, obviously, in such a case, the Court is to pronounce upon arbitrability or non-arbitrability of the

[11] *(2012) 5 SCC 214 at para. 3 and 4*

disputes. Notwithstanding, the fact that the Act does not make any provision excluding any category of dispute treating them as non-arbitrable, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The author feels that this interpretation will require re-examination in view of the non-obstante clause introduced by the 2015 amendment to Section 8 of the Act.

Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. However, in the year 2011, with the *Booz Ellen*[12] judgment, the Supreme Court has culled out certain specific categories of disputes which are non-aribtrable by stating that adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may, by necessary implication, stand excluded from the purview of private fora.[13] These are:

i. Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

ii. Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

iii. Matters of guardianship;

iv. Insolvency and winding up;

v. Testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

vi. Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.

The apex court went further to state this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in *personam* which is an interest protected against specified individuals. All disputes relating to rights in *personam* are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. It is the author's opinion that in view of the non-obstante clause in the amended Section 8 of the Act, this is no longer good law and will require fresh interpretation.

In **Vimal Kishore Shah v. Jayesh Dinesh Shah,**[14] the Supreme Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen[15], namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.

However, the Supreme Court with the decision in A. Ayyasamy[16] has further clarified the position on the objection as to arbitrability by stating that burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration.[17]

[12] *Booz-Allen and Hamilton Inc. v. SBI Home Finance Ltd [2011 (5) SCC 532]*
[13] *Id. at SCC pg. 546, para. 35*
[14] *2016 (8) SCC 788*
[15] *Booz-Allen and Hamilton Inc. v. SBI Home Finance Ltd. [2011 (5) SCC 532]*
[16] *A. Ayyasamy v. A. Paramasivam & Ors, (2016) 10 SCC 386*
[17] *Id. at para. 41*

As has been expressed earlier, with the Arbitration and Conciliation (Amendment) Act, 2015, amendment to Section 8 requires that the judicial authority compulsorily refer parties to arbitration irrespective of any decision by the Supreme Court or any other court, if the judicial authority finds that a valid arbitration clause prima-facie exists. The amendment essentially nullifies the judgment of the Supreme Court in *Booz Allen*[18], where it had ruled that serious allegations of fraud are not arbitrable.

Himangni Enterprises v. Kamaljeet Singh Ahluwalia judgment: An anomaly

In the year 2017, the Hon'ble Supreme Court in the ***Himagni Enterprises***[19], while deciding an issue on the arbitrability under S. 8 of the Act, and application of arbitration clauses in a land-lord tenant issue, held that the said issues are non-arbitrable. The Court reached the conclusion, in the respectful submission of the author, on wrong interpretation of one of the six categories of non-arbitrable issues as held in the *Booz Allen*[20] judgment, more specifically, eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[21] While the Supreme Court in the *Booz Allen* judgment specifically used the words tenancy matters governed by "special statutes", where "tenant enjoys statutory protection" and only "specified courts are conferred jurisdiction" thus taking away the applicability from the tenancy matters/ evictions under normal civil suits, the *Himangni* judgment, in the respectful submission of the author, was lost sight of, and therefore, the judgment in *Himangni Enterprises* (supra) was not a good law.

Recently, the Supreme Court bench of Rohington Nariman and Vineet Saran, J.J., in the case of ***Vidya Drolia and Others***[22] have referred the case of *Himangi Enterprises* (supra) to a larger bench. The bench stated, "We are, therefore, of the respectful view that the question involved in a Transfer of Property Act situation cannot possibly be said to have been answered by the two decisions of this Court, as has been stated in paragraph 18 of the said judgment" and therefore, held, "It is clear, therefore, that the judgment in Himangni Enterprises (supra) will require a relook by a Bench of three Hon'ble Judges of this Court."[23]

Other sections under the Act dealing with the issue of Arbitrability

Apart from section 8 of the Act that deals with the issue of arbitrability of a dispute are Section 34(2)(b) and Section 48(2) of the Act, inter alia, provide that an arbitral award may be set aside if the Court finds that the 'subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. While section 34 deals with challenge to an award under domestic arbitration, it being under Part-I of the Arbitration and Conciliation Act, 1996, section 48 deals with conditions of enforcement of foreign awards, it being under Part-II of the Arbitration and Conciliation Act, 1996.

Section 34 of the Act reads as under:

Section 34

34 Application for setting aside arbitral award. —

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application furnishes proof that—

i. a party was under some incapacity, or

[18] *Ibid. 16*
[19] *2017 (10) SCC 706*
[20] *Ibid. 19*
[21] *Ibid at para. 36.*
[22] *2019 SCC OnLine SC 358*
[23] *Ibid.*

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

ii. the arbitral award is in conflict with the public policy of India.

Explanation. —Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter...

On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

The first five grounds have been set forth in Section 34 (2) (a) and the remaining two grounds are contained in Section 34 (2) (b), which provides that an award may be set aside by the court on its own initiative if the subject-matter of the dispute is not arbitrable or the impugned award is in conflict with the public with the public policy of India. However, the courts have held that the above-mentioned grounds for setting aside an award must be construed narrowly. Further, in view of the permissive language of this Section, a court 'may', but is not obliged to set aside an award if one of the grounds is satisfied. Accordingly, even if one of the grounds which would justify setting aside an award is proved by the applicant, the court still has a residual discretion to save the rest of the award.

BURDEN OF PROOF UNDER SECTION 34 (2) (B)

The different semantics employed by the legislature in clause (a) and clause (b) of Section 34(2) are noticeable, and of relevance. A paramount duty is imposed upon the court to ensure that the award is not vitiated by either of the two grounds mentioned in clause (b) whereas the grounds under clause 2(a) are to be established by a person making the application to assail the arbitral award. The burden to plead and prove is lesser when it comes to a ground under clause (b).

Section 34(2)(b) empowers court *ex-officio*, to set aside an arbitral award, if the subject matter of the dispute is not arbitrable, or if the impugned award is in conflict with the public policy of India. The burden of proof to satisfy the court that the award is so vitiated, is on the party making the application.

Section 34(2)(b)(i): Subject matter of the dispute not capable of settlement by arbitration

There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, and therefore, the civil court cannot have jurisdiction to go into that question. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.[24]

An award where 'the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force' in India, will be a nullity. In principal, any dispute should be just as capable of being resolved by a private arbitral tribunal as by the judge of a traditional court. However, as arbitration is a private proceeding with public consequences, some types of disputes are reserved for the courts, whose proceedings are in the realm of a right in *rem*, or a public right. It is in this sense that they are not 'capable of settlement by arbitration'.

> In arbitrability is first of the two ex officio grounds for setting aside an arbitral award, where the court 'finds' that 'the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force'. It establishes as to which disputes can lawfully be referred to arbitration. A defined legal relationship whether contractual or non-contractual or a contract, may be perfectly legal and valid, still, a dispute with respect to such relationship may not be arbitrable on account of any other law for the time being in force, by virtue of which such dispute may not be referable to arbitration.

A common example of the same is the Special Rent Control Acts, where there is specific jurisdiction granted to Civil Courts and/ or Small Causes Court as the case may be, and arbitration is barred by specific provision of the said act. The Bombay Rents Hotel and Lodging House Rates Control Act 1947, for example has a specific provision, i.e. section 28 which gives specific jurisdiction to civil courts. The said act has been interpreted to have explicit bar to refer the matter to arbitration, even if there is a valid arbitration agreement, by a three-judge bench judgment of ***Natraj Studios (P) Ltd. vs. Navrang Studios & Anr.*** [25]

[24] *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr., 2004 (2) ARBLR 67 Bom*

[25] *1981(1) SCC 523*

Section 48 of the Act

Section 48(2) under part-II of the Act also deals with the non-arbitrability of a dispute, albeit only with regards to the foreign awards.

Section 48 of the Act reads as under:

48. Conditions for enforcement of foreign awards.—

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) the enforcement of the award would be contrary to the public policy of India. Explanation.—Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

The New York Convention, 1958[26] and the Model Law[27] authorize the relevant court to refuse recognition and enforcement of a foreign award ex officio where it finds that 'the subject matter of the difference is not capable of settlement through arbitration under the law of the country'.

Each state has its own peculiarities and predilections as to what disputes should be reserved for the courts of law, and what should be left for resolution by arbitration.

[26] *Article V (2) (a)*

[27] *Article 36(1) (b) (i)*

The provisions of Section 48(2) are identical to the provisions of Section 34 (2) (b). Whilst Section 34 (2) (b) is concerned with the setting aside of domestic awards, Section 48(2) (b) relates to refusal of enforcement of New York Convention awards, where the court finds that the subject matter of the dispute is not arbitrable under the law of India, or where the enforcement of the award would be contrary to the public policy of India.

CONCLUSION

To sum up the intention of the legislature while enacting and later amending the Section 8 of the Arbitration & Conciliation Act, 1996, it will be apt to quote Lord Hoffman speaking for the House of Lords in ***Premium Nafta Products***[28], stating it would be inconceivable that parties would have intended that some, amongst their disputes should first be resolved by a court before they proceed to arbitration:

> *"If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts...*
>
> *In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from arbitrator's jurisdiction."*

The same was referred to by the Supreme Court of India in the judgment of ***A. Ayyasamy***[29] by Justice D.Y. Chandrachud with the observation,

> *"The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle." He further went on to state, "A fresh line must be drawn to ensure the fulfillment of the intent of Parliament in enacting the Act of 1996 and towards supporting commercial understandings grounded in the faith in arbitration"*

The judgment in *Booz Allen* is no longer the last word on the subject. Various judgments of the different High Courts holding that agreements with arbitration clauses can be avoided on one interpretation or the other, have clearly lost sight of the principal enunciated in *Premium Nafta Product*[30]*s* of the House of Lords which should be equally kept in mind by the courts in India and have not given weight to the purport of the amended Section 8 of the Arbitration and Conciliation Act, 1996, as amended in 2015 where the words 'not withstanding any judgment, decree or order of the Supreme Court for any other court...' have been expressly added. Further, with the *Himangi Enterprises* (Supra) now referred to a larger bench, one can expect a more refined view on the interpretation of S.8 of the Act.

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[28] *2007 UKHL 40: 2007 Bus LR 1719 (HL)*

[29] *(2016) 10 SCC 386 at para. 53.*

[30] *Ibid 19*

OSSILATION OF JUDICIAL VIEW ON THE NATURE OF POWER OF THE COURT (CHIEF JUSTICE) UNDER SECTION 11(6) AND 11(6A) OF "THE ARBITRATION AND CONCILIATION ACT 1996"

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The Arbitration process under the Arbitration Act, 1940[1] (1940 Act), was a complete antithesis and a far cry from what it sought to achieve. The Arbitration process became protracted, time-consuming, expensive and complicated. The provisions of the 1940 Act, made "lawyers laugh and litigants weep" - leading to a call for making it more responsive to contemporary requirements. The arbitral regime at that point of time, premised largely on a mistrust of the arbitral process - exhorted the Supreme Court in ***F.C.I. v. Joginderpal Mohinderpal***[2], to urge and prod for a change. The Supreme Court observed - "We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done".[3]

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law in 1985 on International Commercial Arbitration.[4] The United Nations through the General Assembly advised the member nations to adopt the Model Law with such modifications, to have uniformity in arbitration procedure globally. At the national level, the liberalisation of the economy in 1991, required that India assure the foreign investors that it had a stable

1 *The Arbitration Act 1940. Act No. 10 of 1940, wef. 11.03.1940*
2 *(1989) 2 SCC 347*
3 *Ibid, para 7*
4 *UNCITRAL Model Law on International Commercial Arbitration 1985. (2008). United Nations. Vienna. Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf*

business environment and a strong commitment to the rule of law, which was based on a predictable and efficient system of resolution of disputes.

In order to assure the foreign investment and comply with its international obligations, the earlier arbitration regime was replaced by the Arbitration and Conciliation Act, 1996 (the Act). While drafting the 1996 Act, one of the major considerations was the need to curtail delays in the arbitral process. The Objects and Reasons of the Arbitration and Conciliation Bill, 1995 clearly outlined that the Act intended to "minimise the supervisory role of courts in the arbitral process".[5] Towards this, the Act specified several provisions, the most direct and notable was Section 5, which specifically sought to restrict judicial intervention. The said Section read - *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*[6]

Inspite of such language, the legislature conciously stated in Section 11(6) of the 1996 Act that - if a party fails to act as required under that procedure; or the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or a person, including an institution, fails to perform any function entrusted to him or it under that procedure - a party may request the Chief Justice of India or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. The Act, thus provided a mechanism to facilitate in providing for the appointment of arbitrators, by the special interference of the Chief Justice. This nature of the power that Chief Justice of India (in an international commercial arbitration) and Chief Justices of different High Courts (in a domestic arbitration) has been subjected to significant oscillating judicial and legislative scrutiny.

It was in the case of **Sundaram Finance Ltd. v. NEPC India Ltd.**[7] (Sundaram case) where for the first time a reference was made to the nature of the power of the Chief Justice under Section 11(6), albeit as a passing reference, in a case pertaining to interpretation of Section 9 of the Act. A two judge bench of the Apex court, held that the appointment of the arbitrator(s) must take place in compliance to Section 11 of the 1996 Act and that the power exercised by the Chief Justice under Section 11(6) was an administrative power and not a judicial one. The Court observed - "Under the 1996 Act appointment of arbitrator(s) is made as per the provision of Section 11 which does not require the Court to pass a judicial order appointing arbitrator(s). The High Court was, therefore, wrong in referring to these provisions of the 1940 Act while interpreting Section 9 of the new Act".[8]

The issue regarding interpretation of Section 11(6) was not directly an issue in the Sundaram case, but the Supreme Court had the occasion in ***Ador Samia (P) Ltd. v. Peekay Holdings Ltd***,[9] (Ador Samia case) when it dismissed a Special Leave Petition "in view of this settled legal position therefore, there is no escape from the conclusion that orders passed by the learned Chief Justice under Section 11(6) of the Act being of an administrative nature cannot be subjected to any challenge directly under Article 136 of the Constitution of India".[10]

In ***Wellington Associates Limited v. Kirit Mehta***[11], (Wellington case) a slight shift in the legal position was

[5] *Law Commission of India. (2014). Amendments to the Arbitration and Conciliation Act, 1996. Report No. 246. August. Page 3.*
[6] *The Arbitration and Conciliation Act 1996. Section 5*
[7] *(1999) 1 SCR 89, para 13*
[8] *Ibid, para 13*
[9] *(1999) 8 SCC 572*
[10] *Ibid, para 7*
[11] *(2000) 4 SCC 272*

observed wherein the Court accepted the legal position that the Chief Justice was an administrative authority but held that "when the said authority is approached seeking appointment of an arbitrator/ arbitrator tribunal under Section 11 and a question is raised that there is, to start with, no arbitration clause at all between the parties, the Chief Justice of India or his designate has to decide the said question".This led to constitution of a three judge bench in ***Konkan Railway Corporation Ltd. vs. Mehul Construction Co***.,[12] (Konkan Railway I).

In Konkan Railway I, the very first question framed was with regard to the power of the Chief Justice in exercise of his power under Section 11(6) of the 1996 Act. The Court answered the issue by holding that the Chief Justice of the High Court or his designate under Section 11(6) of 1996 Act, acts in purely an administrative capacity. The Court was of the opinion that only such a view would bring in speedy disposal of commercial disputes as only such an interpretation would facilitate the design and intent of the Act.

Towards this, the Court also pronounced that an order refusing to appoint an arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. This view was continued to be followed in several decisions including in ***Nimet Resources Inc v. Essar Steels Ltd***[13], untill it was doubted in ***Konkan Railway Corporation Ltd. vs. Rani Construction (P) Ltd***[14], leading to constitution of a five judge constitution bench in ***Konkan Railway Corporation Ltd. vs. Rani Construction (P) Ltd***[15] (Konkan Railway II). The call for reconsideration emanated out of the fact that the Act did not specifically take away the courts power to decide preliminary issues and that there were situations which called for such issues being dealt with by the Court rather than by the Arbitrator. Further, in certain jurisdictions where the UNCITRAL Model was being followed - the task of deciding the preliminary issue was with the Court rather than with the Arbitrator.

The Constitution Bench in Konkan Railway II, endorsed the view taken in Konkan Railway I and remarked that the default power of the Chief Justice or 'any person or institution' designated by him under Section 11 is not adjudicatory and the only function of the Chief Justice or his designate under Section 11 is to "fill the gap left" and appoint an arbitrator, so that the arbitral tribunal is expeditiously constituted and the arbitration proceedings are commenced. It also continuted with the view that the Chief Justice or his designate exercising the default power to appoint arbitrators is not a tribunal, therefore, such a decision cannot be made the subject of a petition for special leave to appeal under Article 136 of the Constitution.

The view endorsed in Konkan Railways I and Konkan Railways II, should have sealed the question as it accurately culled out the legislative intent. Yet unfortunately, the view prevailed for a while only, till a call for reconsideration of the said view was made and the issue was placed before a seven judge Bench in ***SBP & Co. vs. Patel Engineering Ltd***[16](SBP Case).

The seven judge bench by a split opinion of 6:1, completely turned the law around when it held that the power exercised by the Chief Justice was a judicial power and not an administrative one and hence proceeded to overrule Konkan Railway II. Penning the majority verdict, Justice P.K.

[12] *(2000) 7 SCC 201*
[13] *(2000) 7 SCC 497*
[14] *(2000) 8 SCC 159*
[15] *(2002) 2 SCC 388*
[16] *(2005) 6 SCC 288*

Balasubramanyan[17], also went on to dictate that the power conferred upon the Chief Justice under Section 11(6) permitted it to proceed only if it satisfies itself that all the conditions precedent to the initiation of arbitration proceedings exist. Consequently, the Chief Justice was to go into the question of the validity of the arbitration agreement, the existence or otherwise of a live claim and other jurisdictional matters. To rationalize this finding in the teeth of the rule of kompetenz-kompetenz laid out in Section 16, the Court interpreted that the rule of kompetenz-kompetenz will operate only in respect of those arbitrations, where an arbitrator has not been appointed by the Court. The legislative intent of the words, "any person or institution designated by him", in Section 11(6) allowing the Chief Justice to delegate to an "institution" was also strained with an interpretation that an "institution" can only mean a Judge of the Supreme Court or any High Court. The lone dissent was of Justice C.K. Thakker[18] who held that the function performed by the Chief Justice under 11(6) of the Act was purely and simply administrative, and was neither judicial nor quasi-judicial, which view was in harmony with the mandate of Konkan Railway II. On other issues, it diverged from Konkan Railway II, by holding that a writ petition under Article 226 as also a special leave petition under Article 136 was maintainable but cautioned the use of it with care, caution and circumspection.

The statement of objects and reasons of the Act clearly enunciated that the main object of the 1996 Act was to minimise the supervisory role of courts - it intended a role for the institutions. Konkan Railway II, had already formulated a platform which only needed to be re-inforced and toughened by plugging the loose ends with regard to interference of Courts under Article 226 and promotion of institutional arbitration. Instead, what actually emerged was a complete turnaround. The SBP case[19] was in that sense a death knell to the legislative intent. Not only did it almost sabotage, 'institutional arbitration' - instead of promoting it - by reading down the legislative intent to mean that the Chief Justice could only delegate to another judge and not to institutional body but it also opened floodgates of litigation at the preliminary stage itself defeating the very purpose of the legislation. SBP case ushered in a decade of excessive judicial involvement (till coming into force of the Arbitration and Concilliation (Amendment) Act, 2015[20]) and contributed materially in creating an arbitration unfriendly judicial era.

The mandate of the SBP case, found its echo in a series of judgements that followed. The first in the series was ***Ms. Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited***[21], wherein following the dictum in SBP case the apex court held that the function of the Chief Justice or his delegate is a judicial function. The scope of interference kept getting wider. The judgment in ***National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd***.[22], clarified the mandate in SBP case and stated that the Chief Justice may be required to decide - "(a) Whether the claim is a dead (long barred) claim or a live claim? (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation?" - and in doing so even take evidence, if deemed necessary. This over-enthusiastic expansion of the jurisdiction of the Chief Justice under Section 11, continued in several subsequent cases as in the case of ***Hindustan Copper Ltd. vs. Monarch Gold Mining Company Ltd.***[23]

[17] *Ibid, page 638, page 663, para 47*
[18] *Ibid, page 664 and page 669,, para 142*
[19] *(2005) 8 SCC 618*
[20] *Act 3 of 2016, wef. 23.10.2015*
[21] *(2006) 2 SCC 628*
[22] *(2009) 1 SCC 267*
[23] *(2012) 10 SCC 167*

In the meantime, in the legislative arena, there was a conscious move to simplify the Act in order to further the objects of the Act. Post Konkan Railway I, the Law Commission of India undertook a comprehensive review of the working of the said Act and recommended many amendments to the Act in its 176th Report. The Government of India after considering the recommendations of the Report and after consulting the State Governments and certain institutions, decided to accept almost all the recommendations. Accordingly, the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22 December, 2003. In July 2004, the Government of India constituted a Committee under the Chairmanship of Justice Dr. B.P. Saraf to make in-depth study of the implications of the recommendations of the Law Commission made in its 176th Report and all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003. The Committee was of the view that the provisions of the Bill gave room for substantial intervention by court in the arbitration process. The Committee stressed upon the need for popularizing institutional arbitration in India and called for establishment of an institution in the country in this regard along with international standards. The Committee further expressed the view that many provisions of the Bill were not only insufficient, but also contentious and therefore suggested withdrawl and introduction of a fresh Bill after considering the recommendations of the Committee. The Arbitration and Conciliation (Amendment) Bill 2003 was thus withdrawn to enable introduction of an amended Bill. Legislatively, this was made possible only in 2015 (it is lamentable that the Government of India took more than a decade to bring in the amendment after it was withdrawn) by the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment). The amendment was necessitiated not only due to the 'unfriendly judicial precedence' but also considering the fact that arbitration in India was becoming time-consuming and an expensive exercise. The most notable being :

"6. In section 11 of the principal Act,—

(i) in sub-sections (4), (5) and (6), for the words "the Chief Justice or any person or institution designated by him" wherever they occur, the words "the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court" shall be substituted;

(ii) after sub-section (6), the following sub-sections shall be inserted, namely:—

"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.";

(iii) in sub-section (7), for the words "the Chief Justice or the person or institution designated by him is final", the words "the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision" shall be substituted;"

The 2015 Amendment substantially corrected the shortcomings and the effect of the 'unfriendly judicial precedence' and provided for an environment of minimal judicial interference wherein the role of the Court (from that of the Chief Justice earlier) was restricted only to determining the existence of an arbitration agreement through introduction of Section 11(6A). In other words, it was the duty of the Court - only see whether an arbitration agreement existed and if so, then proceed administratively to appoint an Arbitrator, who then would decide all issues including its own jurisdiction.

The 2015 Amendment thus legislatively overruled the mandate of SBP case as also took care of the delay in the process of appointment by stating that no appeal shall lie from such a decision taken by the Court. It may be apposite to mention herein that even after the 2015 amendment, the Government took constructive steps towards betterment of the arbitration environment in India which culminated in the passing of the Arbitration and Conciliation (Amendment) Act, 2019[24] (2019 Act) which was pursuant to the 246th Report of the Law Commission of India based on the report of the High Level Committee to review the institutionalisation of arbitration mechanism of India headed by Justice B.N. Srikrishna[25] (High Level Committee Report).

The Supreme Court whose interpretation of Section 11(6) of the Act in SBP case and others, brought about and led to the 2015 amendment took upon itself to protect and preserve the legislative mandate and restrict judicial interference to the minimum. In ***Duro Felguera, S.A. v. Gangavaram Port Limited***[26] (Duro case), the Supreme Court maintained that the legislative intent of Section 11(6A) was explicit and distinct and that the Court's domain was limited to a narrow scrutiny as to whether there was an arbitration agreement. The Supreme Court then went on to consider "what are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple – it needs to be seen if the agreement contains alause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."[27] Thus, the Supreme Court clearly recognised that its role as the Court under Section 11(6) was slighest - that is to examine whether there was an arbitration clause and if the same existed then refer the same to arbitration. The Duro case[28] created the foundation of a new era of judicial precedence - which fostered and encouraged the legislative resolve that the function of the Court was administrative (rather almost mechanical) to see whether there existed an arbitration agreement between the parties and nothing more.

There were certain aberrations and variations which the Supreme Court was quick to dissipate and dispel. ***In United India Insurance Company Limited vs. Antique Art Exports Private Limited***[29] ***(United India case)***, referred to Duro case and observed that "the exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement". The Supreme Court concluded saying thus:

> *"In the facts and circumstances, this Court took note of subsection (6A) introduced by Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.[30]"(emphasis supplied)*

The two judge bench in United India case[31] contrary to the legislative mandate specified in Section 11(6A), took note of the view expressed in the Duro case and Section 11 (6A) but proceeded to observe that the appointment

[24] *Act 33 of 2019, wef. 9.08.2019*
[25] *Report dated 30.7.2017*
[26] *(2017) 9 SCC 729*
[27] *Ibid, para 3*
[28] *Ibid*
[29] *(2019) 5 SCC 362.*
[30] *Ibid, Para 20*
[31] *Ibid*

of arbitrator is a judicial power and not an administrative function and suprisingly also stated that the provisions even after the amendment left some degree of judicial intervention when examining the existence of an arbitration agreement. United India case, did not distinguish the Duro case rather it relied upon it – yet the view taken in the United India case, of the Court having some degree of scope for judicial invention, had the potential to take the clock back to the pre 2015 amendment era - although it seemed to have come to such a conclusion as it was a clear case where the arbitration agreement stood discharged by accord and satisfication and interference was justified to diffuse a protracted dispute.

Then in **Geo Miller and Co. Pvt. Ltd. vs Rajasthan Vidyut Utpadan Nigam,**[32] a three judge bench by an order dated September 3, 2019, proceeded to determine the sole issue as to whether the arbitration applications, on the facts of this case, were barred by limitation. The Court held in the facts of the case that invocation of arbitration was barred by limitation - no live claim persisted between the parties and declined to appoint an arbitrator as mandated in Section 11(6). Similarly, in **Union of India v. Parmar Construction Company**[33], one of the questions before the Court was whether the arbitration agreement stands discharged on acceptance of the amount and signing no claim/discharge certificate. The Court after going into the facts held "in our considered view, the arbitral dispute subsists and the contract has not been discharged as being claimed by the appellants employer(s) and all the contentions in this regard are open to be examined in the arbitral proceedings". Interestingly, these were cases where the invocation of arbitration took place much before the 2015 amendment. This case is thus clearly distinguishable and cannot be said to be contrary to the spirit of the legislative intent. So was the case of **ONGC Mangalore Petrochemicals Limited vs. ANS Constructions Limited**[34] - which arose before the insertion of Section 11(6A), which came to be dismissed by the Supreme Court in a Section 11 petition on the ground that accord and satisfaction had taken place.

However, in ***Oriental Insurance Company Limited v. Narbheram Power and Steel (P) Ltd***[35] (Oriental case), ***United India Insurance Co. Ltd. and Ors. v. Hyundai Engineering and Construction Co. Ltd.*** (Hyundai case)[36] ***and Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd*** (Garware case)[37] - the Supreme Court has taken a slightly contrarian view and inspite of the applicablity of Section 11(6A) of the Act proceeded to examine the arbitrablity of the dispute. In fact, in the Hyundai case, the Supreme Court (three judge bench) completely discarded the view in the Duro case - "Firstly, because it is a two-Judge Bench decision and also because the Court was not called upon to consider the question which arises in the present case, in reference to clause 7 of the subject Insurance Policy. The exposition in this decision is a general observation about

[32] *(2019) SCC Online SC 1137*
[33] *(2019) SCC Online SC 442*
[34] *(2018) 3 SCC 373*
[35] *(2018) 6 SCC 534*
[36] *(2018) SCC OnLine SC 1045*
[37] *(2019) SCC OnLine SC 515*

the effect of the amended provision and not specific to the issue under consideration. The issue under consideration has been directly dealt with by a three-Judge Bench of this Court in Oriental Insurance Company Limited (supra), following the exposition in ***Vulcan Insurance Co. Ltd. Vs. Maharaj Singh and Anr***, which, again, is a three-Judge Bench decision having construed clause similar to the subject clause 7 of the Insurance Policy".

The divergnece of prespective in the United India, Hyundai and Garware cases, came to rest with the 3 judge bench decision in the case of ***M/s Mayavati Trading Pvt. Ltd. vs. Pradyuat Deb Burman***[38] (Mayavati case), in which the Supreme Court considered all these decisions. The Supreme Court, quoted the report of the High Level Committee to review the institutionalisation of arbitration mechanism of India headed by Justice B.N. Srikrishna - which observed "A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in SBP & Co. (supra) and Boghara Polyfab (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator." - went on to hold as under :

> *"This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) - see paras 48 & 59.*
>
> *We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law ... "*

The sparks of a fresh round of ossilation of views were thus expediously doused with the overruling of the United India case by the Mayavati case. This was again underscored, and emphitically so, in **M/s. Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coal Field Limited**[39] (Uttarakhand case) where a two judge bench of the Supreme Court relying on the doctrine of kompetenz–kompetenz enshrined in Section 16 of the Arbitration & Conciliation Act, 1996 and the legislative intent to restrict judicial intervention at pre-reference stage, held that the issue of limitation would also have to be decided by an arbitrator. It also reaffirmed that the legislative intent of the Act is party autonomy and minimal judicial interference in the arbitration process.

It observed that the regime of the Arbitration Act outlines that once an arbitrator has been appointed, all objections and issues are to be decided by the arbitrator. The Supreme Court observed that the issue of limitation is a jurisdictional issue which should be decided by the arbitrator in terms of Section 16 of the Arbitration Act and not before the High Court at the pre-reference stage under Section 11 of the Arbitration Act. The Supreme Court observed that once the arbitration agreement is not in dispute, all issue including jurisdictional issues are to be decided by the arbitrator. The twin judgments of the Supreme Court in Mayavati case and Uttarakhand

[38] *(2019) 8 SCC 714*
[39] *2019 SCC Online SC 1518*

case, playing non-interventionist - pro arbitration role would go a long way in preventing endemic delays and ambiguities in judicial precedence. Care should be taken to see that the divergence of prespective in the Oriental and Hyundai cases on one hand and Mayavati case of the other, does not take a SBP case kind of a spin as both these set of decisions are of three judge benches.

The Government of India has taken considerable steps pre and post the Arbitration and Conciliation (Amendment) Act, 2019[40] based on the report of the High Level Committee[41]. Much still need to be done. The APCI which finds mention in the High Level Committee report need to be constituted immeidately and grading of arbitral institutions started. It is only then the Government will be able to notify the pending provisions including repeal of Section 11(6A) and achieve the object of the Arbitration and Conciliation (Amendment) Act, 2019. The risk of an aberration and ossilation of judicial view with regard to interference is otherwise high - as in the case of United India case or ***Deepdharshan Builders v. Saroj Sunderrao Trasikar***[42] wherein the Bombay High Court held as under :

> *"In so far as the judgment of the Hon'ble Supreme Court in the case of M/s.Duro Felgeura, SA (supra) relied upon by the learned senior counsel for the applicant in support of the submission that in view of Section 11 (6-A) of the Arbitration Act, the jurisdiction of this Court is confined only to the examination of existence of an arbitration agreement and thus issue as to whether this arbitration application is barred by law of limitation or not, cannot be decided by this Court is concerned, in my view, this submission is totally devoid of merit. The issue of existence of arbitration agreement which Court has to consider before appointing any arbitrator in an arbitration application filed under Section 11(6) itself is totally different than the issue as to whether the arbitration application filed under Section 11(6) is filed within the period of limitation or not. Though the powers of Court under Section 11(6) in view of Section 11(6-A) are confined to the examination of existence of the arbitration agreement, the issue as to whether the arbitration application filed under Section 11(6) is filed within the time prescribed under Article 137 of the Schedule to the Limitation Act, 1963 or not has to be decided by the Court itself while considering such application under Section 11(6) of the Arbitration Act and such issue cannot be left open to be decided by the arbitral tribunal".*

The Courts in India have always been dynamic and sprightly. Most of these intervensions have been out of good intensions but the reverberation of it has been ostracization of India as an Arbitration unfriendly jurisdiction. The Courts would have to tread with care, caution and circumspection and adopt a pro arbitration stance. It will have to resist the temptation and exercise self restraint. Judicial intervension and oscillation of judicial view, are prime contributors why India has not been able to achieve the potential that it merits as an Arbitration friendly regime - and other jurisdictions have gone past. No doubt there will be new and more challenging issues that the Courts face - these have to be dealt with keeping in mind the legislative intent - which clearly is minimalistic judicial interference. The decisions of the Supreme Court in Mayavati and Uttarakhand cases are steps in the right direction and the trend towards mimimalism should be welcomed and one hopes is the final imprimatur on the issue. Coupled with this the Courts have to be open to rely on encourage and push institutional arbitration. The Government of India should take immediate steps suggested in the High Level Committee and notify provisions which will act as energy boosters and make India a desired arbitration destination.

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[40] *Act 33 of 2019, wef. 9.08.2019*
[41] *Report dated 30.7.2017*
[42] *Commercial. Arbitration Application No. 107 of 2018 decided on 22.11.2018*

ARBITRATION & ADR ROUNDUPS

1. CHINA-HONG KONG ARBITRATION AGREEMENT COMES INTO FORCE

Interim measures in arbitration processes can now be enforced between China and Hong Kong after an agreement signed in April came into force on 1 October,2019. An arbitration expert has said that the agreement gives Hong Kong a unique advantage in arbitration.

The Supreme People's Court of China has published the agreement, called The Arrangement, between China and the Hong Kong Special Administrative Region (SAR) which says that companies involved in arbitration can apply for an interim measures order to a court in Hong Kong before or during the arbitration proceedings when the seat of arbitration is in mainland China.

This allows a court in one of the two territories to preserve evidence or freeze assets even if the arbitration is taking place in the other.

Arbitration expert Helena Chen from Pinsent Masons, the law firm behind Out-Law, said, "The Arrangement has placed Hong Kong in a unique position with regard to arbitration involving assets or evidence to be preserved or certain conduct to be ordered in the mainland China because Hong Kong is so far the only seat benefited from the Arrangement outside of mainland China."

"The implementation of the arrangement has been long-awaited after it was signed on 2 April 2019 and we expect the first application under it to be filed very soon," said Chen.

The Arrangement applies to Hong Kong based arbitrations operated by the Hong Kong International Arbitration Centre; the China International Economic and Trade Arbitration Commission Hong Kong Arbitration Center; the International Court of Arbitration of the International Chamber of Commerce - Asia Office; the Hong Kong Maritime Arbitration Group; the South China International Arbitration Center (HK), and the eBRAM International Online Dispute Resolution Centre.

The Arrangement applies to arbitrations administered by a mainland China arbitration institution, regardless of whether the seat of arbitration is in the mainland China.

The Arrangement said that parties to the arbitration proceedings administered by the mainland arbitration institutions may apply for interim measures from the High Court of the Hong Kong SAR in accordance with the High Court Regulations of the Arbitration Ordinance of the Hong Kong SAR before the arbitral award is made.

Source: As reported by OUT-LAW NEWS dated October 09, 2019 from website https://www.pinsentmasons.com/out-law/news/china-hong-kong-arbitration-agreement-comes-into-force

2. ARBITRATION ACT AND IBC CONFLICT: 2 COMPANIES MOVE SUPREME COURT

The companies have told the SC that Section 87 of the Arbitration and Conciliation Act 1996, as inserted by the 2019 Amendment Act, is in conflict with the Insolvency and Bankruptcy Code 2016 as the new provision destroys the level playing field.

Left with no effective remedy to initiate action against the government, PSUs and other statutory bodies for recovery of thousands of crores of rupees, Hindustan Construction Company (HCC) and Gammon Engineers & Contractors have approached the Supreme Court seeking to prevent their lenders from pushing them into insolvency.

While HCC is seeking to recover Rs 6,070 crore from the Central government and other PSUs including NHAI and NTPC, Gammon wants its dues of over Rs 837 crore that is stuck with the government and other PSUs like NHPC,

Gail and DMRC in terms of various arbitration awards. The companies have told the SC that Section 87 of the Arbitration and Conciliation Act 1996, as inserted by the 2019 Amendment Act, is in conflict with the Insolvency and Bankruptcy Code 2016 as the new provision destroys the level playing field. They said Section 87 provides that for all arbitral proceedings, which commenced prior to October 23, 2015, there shall be an automatic stay of the arbitral awards when challenged under Section 34 of the 1996 Act. This amendment, according to them, "clearly creates an imbalance between the consequences of the 1996 Act and the IBC.

They have challenged various provisions - Sections 3(10), 3(11), 3(12), 6, 7, 9, 31 and 238 of IBC as well as Section 87 of the Arbitration Act as being "arbitrary and discriminatory".

The Arbitration Act and IBC need to be harmoniously construed to protect the rights of a company which is facing the wrath of two mutually inconsistent enactments that is leading to divergent and devastating outcomes, Gammon said.

Expressing criticism about the newly inserted provision, the Judges told solicitor general Tushar Mehta that *"you (government) have put the clock back" as the provision had nullified the effect of its earlier judgment (BCCI vs Kochi Cricket) that decided the prospective application of automatic stay provision in the Arbitration Act. "We will start with presumption of unconstitutionality. You started this. World over this 2019 Act is being criticised. India cannot become a hub of arbitration if you go like this,"* Justice Nariman observed.

Source: As reported by Indu Bhan in Financial Express dated November 01, 2019 from website https://www.financialexpress.com/industry/arbitration-act-and-ibc-conflict-2-companies-move-supreme-court/1751393/

3. GERMANY: LUFTHANSA ARBITRATION WITH CABIN CREW UNION FALLS APART

Lufthansa and trade union UFO remain at odds over pay for some 21,000 workers, which led to a two-day strike earlier this month. The two sides had agreed to arbitration, but negotiations to that end have broken down.

Talks between Lufthansa and the cabin crew trade union UFO over entering comprehensive arbitration have fallen apart, both sides said in a statement this evening.

In November, Lufthansa and UFO agreed to enter arbitration to resolve ongoing wage disputes, though neither side had yet named their respective arbitrators. The two sides have been at odds over pay for some 21,000 staff members as well as the union's legal status.

However, Lufthansa withdrew its approval for arbitration because UFO did not agree to completely renounce strikes at four Lufthansa subsidiaries. Meanwhile, a UFO spokesman said Lufthansa was trying to "blackmail" the trade union.

Lufthansa insisted that it would continue to the arbitration process with the UFO, though the German airline said the sticking point was now the so-called small mediation, which concerns wage issues that spurred the union to call for its most recent work stoppage.

Wage dispute: Earlier, UFO had organized a 48-hour strike which impacted four Lufthansa subsidiaries - Germanwings, Eurowings Germany, Lufthansa City Line and SunExpress Germany. Lufthansa was forced to cancel 1,500 flights, which affected 200,000 passengers.

The collective bargaining issues that led to the UFO strike included more expenses and allowances for flight attendants as well as opportunities for seasonal workers to switch to regular employment.

Lufthansa CEO Carsten Spohr had tried to ban the strike in court, but did not succeed. On the first day of the strike, he offered negotiations for comprehensive arbitration.

Source: As reported in DW dated November 20, 2019 from website https://www.dw.com/en/germany-lufthansa-arbitration-with-cabin-crew-union-falls-apart/a-51325960

4. ARBITRATION RULINGS SHOULD NOT BE MUDDLED, SAYS SUPREME COURT

"They will result in wastage of time for the parties concerned"

The Supreme Court recently held that arbitration awards should be intelligible, reasoned and adequate, in order to avoid wastage of time for the parties concerned in the dispute.

"Muddled" awards would be detrimental to the very purpose of arbitration, which was speedy and amicable resolution of commercial disputes, Justice N.V. Ramana observed in a 21-page judgment.

Section 31(3) of the Arbitration Act specifically mandates arbitrators to give clear reasons for arriving at their conclusions.

The verdict is significant as the government has declared its thrust on putting India on the global map as an international hub for arbitration. Arbitration and conciliation are hailed as primary methods of amicably settling commercial disputes which may otherwise take decades to resolve in a court of law.

Award set aside

The judgment, by a Bench also comprising Justices Mohan M. Shantanagoudar and Ajay Rastogi, came on an appeal filed by Dyna Technologies against M/s Crompton Greaves in a 25-year-old dispute for payment of compensation for losses suffered due to unproductive use of certain machineries. A Madras High Court decision of April 2007, which set aside the Arbitral Tribunal's award, was under challenge in the appeal.

Holding that the arbitral award was given in a "muddled and confused form," the apex court set it aside as "unintelligible" and ordered payment of ?30 lakh as full and final settlement to Dyna within eight weeks.

Cautions courts

The judgment said interference by courts in arbitral awards was limited as per Section 34 of the Arbitration Act of 1996.

"We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award," Justice Ramana wrote.

The apex court warned courts against dismissing an arbitral award merely on the ground that its reasonings are inadequate. Courts should be careful about distinguishing between inadequate arbitral awards and unintelligible ones.

"Even if the court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, it needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal, so that awards with inadequate reasons are not set aside in casual and cavalier manner... On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award," the judgment said.

Source: As reported by Krishnadas Rajagopal dated December 19, 2019 from website https://www.thehindu.com/news/national/arbitration-rulings-should-not-be-muddled-says-supreme-court/article30342438.ece

5. RELIANCE INDUSTRIES TEARS INTO GOVERNMENT AFFIDAVIT, SAYS NO FINAL ARBITRATION AWARD DUE

Reliance Industries has mounted a strong counter to the government petition in the Delhi High Court seeking to block its USD 15 billion deal with Saudi Aramco, saying the petition is an abuse of process as no arbitration award has fixed any final liability of dues on the company.

In a counter affidavit, Reliance said it was a "falsehood" to say that the arbitration tribunal had passed an award requiring the company and its partners to pay USD 3.5 billion to the government. ?

It said the petition is an abuse of process as "it portrays that a sum of money is due and payable under the final award and purports to compute the money payable on a basis neither found in the arbitration award nor disclosed in the petition."

The government, it said, has calculated on its own volition the revised figure of its share of profit from oil and gas production allegedly due by extrapolating the purported finds.

The affidavit came in response to the government moving the Delhi High Court seeking to block Reliance selling 20 per cent stake in its oil and chemical business to Saudi Aramco for USD 15 billion, in view of pending dues of USD 3.5 billion in Panna-Mukta and Tapti oil and gas fields.

An international arbitration tribunal issued a partial award in October 2016 in the dispute between the Government of India (GoI), BG Exploration & Production India Limited (BG) and Reliance Industries Limited (RIL) regarding the Panna-Mukta and Tapti Production Sharing Contracts (PSC).

The tribunal in its 2016 award determined certain issues of principles. Pending determination of all issues before it, appropriately, it did not award any monetary sums. Quantification of amounts, if any, by the tribunal is to be done when all issues have been decided.

Certain parts of the 2016 award were challenged by BG/RIL before an English court wherein it decided some parts of challenge in favour of BG/RIL and directed the arbitration tribunal to reconsider those parts of the 2016 award. The tribunal, having reconsidered, issued another partial award in December 2018 which was in favour of BG/RIL.

While this challenge was pending in the English court, GoI unilaterally calculated certain amounts, based upon its interpretation of the 2016 award, which the government alleges are payable by Oil & Natural Gas Corporation (ONGC), BG and RIL.

Reliance said pursuant to the 2018 award, GoI's claim comes down very significantly -- a fact which the government has not taken cognisance of and approached the Delhi High Court prematurely for enforcement of its claim computed based on its interpretation of the 2016 award.

RIL maintained that except as quantified by the tribunal, no amount can be said to be payable at this stage.

GoI has challenged the 2018 award and the English court is yet to pronounce its judgment.

One of the most significant issues pending before the tribunal is an increase in the Cost Recovery Limit under the PSC. The arbitration tribunal is scheduled to hear BG/RIL's application for increase of PSC Cost Recovery Limit next year.

If the tribunal decides in favour of BG/RIL, then GoI's computation of sums allegedly payable by ONGC, BG and RIL is expected to further come down.

Final amounts payable, if any, by the parties (ONGC 40 per cent, BG 30 per cent and RIL 30 per cent) can only be determined by the arbitration tribunal in the quantification phase of the arbitration which will be scheduled after it has decided on all the issues before it, it said.

ONGC, who was directed by GoI in 2011 not to participate in the arbitration proceedings but be bound by the award, wrote to the stock exchanges in May 2018 that the government's demand is premature.

The 2016 award, in part superseded by the 2018 award, cannot be said to have attained finality and attempts to enforce the 2016 award are premature, RIL said.

Source: As reported in Business Line dated December 22, 2019 from the website https://www.thehindubusinessline.com/companies/reliance-industries-tears-into-government-affidavit-says-no-final-arbitration-award-due/article30372454.ece

6. RELIANCE INFRA SPURTS AFTER WINNING ARBITRATION AGAINST DVC

Reliance Infrastructure hit an upper-circuit limit of 5% at Rs 24.25 after the company said it won major arbitration

award of Rs 1,250 crore against Damodar Valley Corporation.

In an exchange filing, Reliance Infrastructure said it won a major arbitration award of Rs 1,250 crore against Damodar Valley Corporation (DVC), a Government of India undertaking.

A three-member Arbitration Tribunal unanimously gave the award in favour of Reliance Infrastructure on 21 December 2019. Reliance Infrastructure was the engineering & construction contractor for DVC's 2 x 600 MW Raghunathpur thermal power project in West Bengal commissioned in 2012.

The Arbitration Tribunal awarded the case in favor of Reliance Infrastructure and directed Damodar Valley Corporation to pay Rs 896 crore and return the bank guarantees of Rs 354 crore within four weeks or pay additional interest, at the rate of 15% per annum, for any delay in payment beyond four weeks. Pursuant to the recent Niti Aayog circular, Reliance Infrastructure will request DVC to pay 75% of the Arbitral Award against bank guarantee immediately. The proceeds will be used to pay lenders and reduce the debt of the company.

Reliance Infrastructure was the E&C contractor of Damodar Valley Corporation's 2 x 600 MW Raghunathpur Thermal Power Project in West Bengal with a contract value of Rs. 3,750 crore. After emerging the lowest bidder, Reliance Infrastructure was issued Letter of Acceptance on 11.12.2007 and unit 1 and unit 2 were to be commissioned in 35 and 38 months respectively.

During execution, Reliance Infrastructure faced various impediments such as non-availability of land, hindrances at project site on account of local agitations, unavailability of inputs from DVC viz. water and coal etc. The company commissioned the project. Unit 1 was commissioned on May 15, 2015 and Unit 2 was commissioned on February 23, 2016.

The company raised several claims on DVC in respect of delay and hindrances faced by it in execution of the project. However, DVC sought to levy liquidated damages upon the company for failure to adhere to the contractual schedule. DVC also filed a counter-claim and sought to levy liquidated damages, claims towards loss of generation, additional interest on loans and other claims.

The Arbitral Tribunal over 107 sittings dwelt on the rival claims of the parties and on 21 December 2019 pronounced its unanimous award in favour of Reliance Infrastructure.

Shares of Reliance Infrastructure jumped 10.22% in two trading sessions to its current market price of Rs 24.25 from its recent closing low of Rs 22 on 19 December 2019.

The Nifty 50 index fell 6.90 points or 0.06% at 12,264.90.

On the technical front, the stock's RSI (relative strength index) stood at 44.885. The RSI oscillates between zero and 100. Traditionally the RSI is considered overbought when above 70 and oversold when below 30.

The stock was trading below its 50-day moving average (DMA) placed at Rs 28.75 and 200-day moving average (DMA) placed at Rs 66.62. Both these levels would serve as resistance levels in the near term.

On a consolidated basis, Reliance Infrastructure net profit slumped 93.6% to Rs 280.35 crore on 1.7% increase in net sales to Rs 5,822.48 crore in Q2 September 2019 over Q2 September 2018.

Reliance Infrastructure is a utility company with presence across the chain of power businesses, such as generation, transmission, distribution and power trading.

Source: As reported on December 23, 2019 from the website https://www.business-standard.com/article/news-cm/reliance-infra-spurts-after-winning-arbitration-against-dvc-119122300293_1.html

7. RELIANCE INFRA GETS RS 94 CRORE FROM GOA GOVT AGAINST ARBITRATION AWARD OF RS 350 CRORE

The fund proceeds will be used to pay lenders and reduce the debt of company. Reliance Infrastructure

aims to be debt-free in 2020. Anil Ambani-led Reliance Infrastructure said that it has received Rs 94 crore from the Goa government against the arbitration award of Rs 350 crore. These funds will be used to pay lenders and reduce the debt of company. Reliance Infrastructure aims to be debt-free in 2020.

The company said that it will request the government of Goa to pay remaining 75 per cent of the arbitral award against bank guarantee immediately, the infrastructure major said in an exchange filing.

"As per the tribunal order, the government of Goa has deposited in Court, Rs 50 crore in November 2019 and Rs 44 crore on 20 December 2019," Reliance Infra said in a filing to the Bombay Stock Exchange.

The arbitration tribunal, on February 16, 2018, had ordered the Goa government to pay Rs 350 crore, including interest, in favour of Reliance Infrastructure. The tribunal has also directed that in the event government of Goa fails to comply with the award, interest at the rate of 15 per cent per annum will be payable in favour of the company.The matter went into arbitration when Goa state utility delayed payments to Reliance Infrastructure for power supplied from its 48 MW-Goa Power Plant in Sancoale.

The state government had entered into a power purchase agreement (PPA) with Reliance Infra on January 10, 1997, to commission and operate an open cycle electricity generation station of 39.8 MW at Sancoale, Goa. The station was to be operated by the company on Naphtha, subject to the parties consensually agreeing to the use of any alternate fuel.

During the term of the PPA, several disputes arose between the parties regarding the computation and payment of invoices raised by the company under the period utilising Naptha as well as the subsequent period in which there was a shift to Regasified Liquified Natural Gas. As a result, on July 31, 2014, Reliance Infrastructure invoked the dispute resolution provisions under the PPA and the matters were placed before a panel. The company also filed claims before the Joint Electricity Commission (JERC) in petition in 2015.

On 23rd December, the company had won Rs 1,250 crore arbitration award against government-owned Damodar Valley Corporation (DVC). The arbitration tribunal awarded the case in favour of Reliance Infrastructure and directed DVC to pay Rs 896 crore and return the bank guarantees of Rs 354 crore within four weeks or pay additional interest, at the rate of 15 per cent annually, for any delay in payment beyond four weeks.

Source: As reported by Chitranjan Kumar dated December 27, 2019 from website https://www.businesstoday.in/current/corporate/reliance-infra-gets-rs-94-crore-goa-govt-against-arbitration-award-rs-350-crore/story/392734.html

8. ET Q&A:' FOREIGN ARBITRATORS MUST BE ALLOWED TO BE STATIONED IN INDIA'

If India needs to become an international hub for arbitration, then the country needs to allow foreign arbitrators to represent matters related to foreign parties, senior counsel Arvind Datar tells Satish John & Maulik Vyas. International finance centres such as New York, London, Singapore and Dubai have a robust arbitration culture and India needs to learn from these places, he says. Edited Excerpts:

How do you view the latest amendments in the Arbitration Act?

First of all, we need to have clarity on international commercial arbitration. First, there has to be one party from the foreign side and the other one from India. There should be no embargo or bar on foreign arbitrators engaging their own foreign lawyer to practice in India for arbitration. Secondly, India should consider Singapore and the UK as role models to take lessons in order to make India one of the international arbitration hubs. No foreign lawyers should be given an option for fly in and fly out, rather should be allowed to be stationed in India for practising arbitration. Also, when they are practising in India, they are not following the rules of the Bar Council of India. The Balaji judgement suggests anybody who comes to India will have to be subjected to the Bar Council of India rules and that needs to be clarified.

What are the pitfalls you see in the current scheme of things?

The Arbitration Council of India (ACI) should avoid taking the bureaucratic route and ultimately should avoid becoming a bureaucratic committee. The ACI should not become a kind of a regulator of arbitration. The very idea of arbitration is autonomy. Another very important point is why an arbitrator should have knowledge of the Constitution of India. For example, the stock exchanges should get their own arbitrators who are members of the stock exchange. They will not be great lawyers or chartered accountants but they will be sector experts. Now take the example of shipping arbitrations; shipping arbitrators are former captains of the merchant navy. They are ideal for the shipping lines. They understand shipping law and damage to cargos and things related to shipping. They are not big lawyers.

Is there a need for minor tweaks in the existing law ?

What is important is not major changes but minor changes made consistently. Just like the case of foreign lawyers to come and go out, it will be a relief for foreign arbitrators. Under Section 11 of the Arbitration and Conciliation Act of 1996, if there is a dispute between an Indian and foreign party and they cannot agree on arbitrators, the Supreme Court has to appoint a person who's of a nationality that is not Indian and not from that (foreign party's) country so it makes it easy for foreign lawyers / judges / barristers to come to India for practising arbitration in India. Secondly, they can do a survey, and where a large number of arbitration cases are pending, there can be special judges who can dispose of these arbitrations. In short, they (foreign investors) want certainty. If an award is passed, within 15 months the appeal will be decided - that's what they want. It can't happen that in one state, it takes nine years and in another state, it takes six months.

In the last amendment, the timelines were ambitious in terms of completing arbitrations. What is your view?

Honestly, I feel that would work very well. If you put genuine timeline pressure on people to finish arbitration on specified time, that yields better outputs. I believe setting up timelines will be an effective measure.

Source: As Reported by Satish John, Maulik ,Vyas in The Economic Times dated January 01, 2020 from the website https://economictimes.indiatimes.com/opinion/interviews/et-qaforeign-arbitrators-must-be-allowed-to-be-stationed-in-india/articleshow/73055194.cms

9. ARBITRATION MUST BE AUTONOMOUS, FREE FROM GOVERNMENT CONTROL, SAYS SENIOR LAWYER

India has a long way to go to become a hub of arbitration and to do so it must be autonomous and free from government control, senior advocate Arvind Datar said.

The senior lawyer, who has appeared in various high-profile cases in the Supreme Court, including the SEBI-Sahara, NJAC and Aadhaar matters, said the present law makes arbitration subject to government regulations which is completely contrary to international practice.

Talking to PTI about the present status of arbitration in the country, he said the recent amendments made to the Arbitration and Constitution Act have helped in improving the efficiency of domestic arbitration, but a lot more needs to be done if India wants to compete with Singapore and London as a preferred destination for international arbitration.

"More proactive steps are necessary to make India the hub of international arbitration. Effort should be made to adopt and benchmark the steps taken by Singapore, London and Dubai to make arbitration completely autonomous and free from government control," Datar said.

He added that the enforcement mechanism for recovery after an award is passed has to be strengthened since there is still substantial delay in enforcing an award in the country.

"New amendments have come and they require an arbitration council, which is yet to be appointed. The Act has put various restrictions on who can be an arbitrator. If we want to be an international hub, we cannot operate with this mindset," Datar said.

On foreign lawyers coming to India for arbitration, he said there is a great deal of uncertainty due to the limitations in the current law.

"India urgently needs to make changes to the Advocate Act, and the most important step is to make institutional arbitration a reality, and public sector undertakings - who have a large number of arbitration - must set an example," he said

Source: As reported in Outlook dated January 06, 2020 from the website https://www.outlookindia.com/newsscroll/arbitration-must-be-autonomous-free-from-govt-control-says-senior-lawyer/1710139

10. WADA FILES OFFICIAL REQUEST WITH COURT OF ARBITRATION FOR SPORT TO RESOLVE RUSADA DISPUTE

The World Anti-Doping Agency (WADA) confirms, that it filed a formal request for arbitration with the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, to resolve the dispute related to the non-compliance case against the Russian Anti-Doping Agency (RUSADA).

This request for arbitration was filed in accordance with the process outlined in the International Standard for Code Compliance by Signatories (ISCCS, Article 10.4.1) and it will be resolved by the CAS Ordinary Arbitration Division. Under Article 23.5.7 of the World Anti-Doping Code (Code), third parties may apply to intervene within 10 days of the date of this press release.

The issue relates to the discovery by WADA of the manipulation of Moscow Laboratory data that were retrieved by WADA as part of post-reinstatement conditions imposed by WADA in September 2018 when RUSADA was reinstated as compliant. The WADA Executive Committee (ExCo) unanimously decided on 9 December 2019 to endorse a recommendation of the independent Compliance Review Committee to declare RUSADA as non-compliant for four years and impose a range of strong consequences, which include Russia's exclusion from participating in, bidding for or hosting major sporting events held in that time, including the Olympic and Paralympic Games and World Championships organized or sanctioned by Code Signatories. As part of these consequences, athletes from Russia may only participate in the covered events where they are able to demonstrate that they are not implicated by the situation in Russia.

On 27 December 2019, RUSADA formally disputed the ExCo decision. As per the special provisions applicable to the Ordinary Arbitration Procedure contained within section R38 of the CAS Code of Sports-Related Arbitration, WADA has filed for arbitration as the claimant. Within that application, WADA has included the name of the respondent (RUSADA) and a brief statement of the facts of the case. WADA is represented in these proceedings by Ross Wenzel and Nicolas Zbinden of Swiss law firm Kellerhals Carrard, both of whom have extensive experience in successfully litigating doping cases, including against Russian athletes. Once the panel is nominated and the panel issues timelines, WADA will file a full brief with CAS.

In accordance with Article 23.5.9 of the Code, any CAS decision in relation to the non-compliance, the proposed consequences and/or the proposed reinstatement conditions will be binding and must be recognized and enforced by all Code Signatories.

Source: As reported in World Anti-Doping Agency dated January 09, 2020 from website https://www.wada-ama.org/en/media/news/2020-01/wada-files-official-request-with-court-of-arbitration-for-sport-to-resolve-rusada

11. GOVERNMENT PLANS NEW LAW TO PROTECT FOREIGN INVESTMENT

India is planning a new law to safeguard foreign investment by speeding up dispute resolution, aiming to attract more capital from overseas to boost stuttering domestic growth, two officials with direct knowledge of the matter told Reuters.

In a 40-page initial draft, India's finance ministry has proposed appointing a mediator and setting up fast-track courts to settle disputes between investors and the government, one of the sources said.

"The idea is to attract and promote foreign investment, but a major issue for investors is enforcement of contracts and speedy dispute resolution," said the official.

The draft proposal is aimed at diffusing investor mistrust around the sanctity of agreements, which has worsened recently after some state governments decided to review approved projects, or threatened to cancel contracts.

Both officials declined to be named as the proposal is not public, and is still being assessed by different ministries and regulators.

A spokesman for the finance ministry did not respond to a request for comment.

Foreign investors have highlighted the enforcement of contracts as one of their biggest concerns, said the second official, adding that improving on this front would also reduce litigation for the government.

While investors can still rely on the existing legal system to settle disputes, it often takes several years for cases to be decided or settled.

Investors previously had an option to take India to international arbitration courts under bilateral investment treaties (BITs) the government had agreed with dozens of nations. But, after suffering setbacks in overseas arbitration matters, India has allowed most of its treaties to lapse, giving investors little to fall back on in case of major disputes.

BITs are agreements between two countries that give foreign investors protections, and among other things, legal recourse via international arbitration in disputes with a government.

India is entangled in more than 20 such overseas arbitration cases - the most against any country - brought by companies including Vodafone, Deutsche Telekom and Nissan Motor Co for disputes over retrospective tax claims and breach of contracts.

If India loses these cases, brought before most of its BITs lapsed, it could end up paying billions of dollars in damages.

The government's thinking is that India may not need to sign investment treaties with other nations if the new law, which is modelled on a BIT, can give confidence to investors, said the first source.

A domestic law, however, cannot be a substitute for a BIT as its scope cannot allow investors to take their case to international arbitration, the sources said.

Source: As reported by Aditi Shah , Aftab Ahmed , Reuters dated January 15, 2020 from the website https://www.livemint.com/news/india/government-plans-new-law-to-protect-foreign-investment-11579084078405.html

12. NHAI KICKS OFF ARBITRATION CLAIM SETTLEMENT VIA RECONCILIATION PROCESS

The National Highways Authority of India (NHAI) has settled an arbitration claim worth about Rs 650 crore with Infrastructure Leasing & Financial Services (IL&FS) for nearly Rs 200 crore through a conciliation process.

The NHAI decided to settle the claim for less than 70 per cent of the Rs 800-crore demanded by the company through an arbitration process, said an official. The NHAI had, in turn, asked for Rs 150 crore from the company, which worked out to a net outgo of Rs 650 crore.

This comes amid reports of the NHAI deciding to settle stuck projects through conciliation instead of taking the long road of arbitration. This would reduce the agency's debt burden, which may reach Rs 2.5 trillion by the end of the financial year.

The settlement with IL&FS for four laning of Jorabat-Shillong (Barapani) section of NH-40 in Assam and Meghalaya on the design, build, operate and transfer (DBFOT) pattern under BOT (Annuity) was awarded to the concessionaire, IL&FS Transportation Networks.

The project commenced on January 12, 2011, with the scheduled completion date of January 10, 2014. Owing to various reasons, work was delayed and a final commercial operational date was issued on January 30, 2019, the official said.

The agency had gone for arbitration before the arbitral tribunal in respect of certain disputes related to this project, such as loss on account of interest during construction, additional costs toward maintenance, loss of escalation, loss of revenue/annuities on account of

delayed commercial operation, and certain additional work executed on ground to the tune of Rs 803.23 crore.

The NHAI also raised claims of Rs 145.33 crore, excluding interest, against the concessionaire on account of delays and other issues.

"Now the NHAI and the concessionaire through conciliation agreed to settle all the claims for an amount of Rs 197.62 crore," the official added.

There would be an interest payment to the tune of Rs 54.53 crore equivalent for the settlement, which will take the final amount to Rs 252.13 crore payment to the concessionaire.

The conciliation exercise is being conducted by the NHAI to deleverage its balance sheet.

There are three committees on reconciliation set up by the NHAI to look into these claims. These comprise retired judges.

The road ministry issued a set of guidelines in March for reviving stuck national highway projects. According to the guidelines, a mutually agreed and executed agreement between the parties for projects awarded under the engineering, procurement, construction (EPC) mode that qualify as stuck could be reached in order to foreclose the disputes.

The NHAI has lined up a portfolio of projects worth Rs 18,000 crore to be bid out in the next few months, which includes five hybrid-annuity packages on the Vadodara-Mumbai Expressway, four EPC packages on the Delhi-Vadodara expressway, and projects in Uttar Pradesh and Bihar.

For the current financial year, the NHAI has the approval to raise Rs 75,000 crore in borrowings during the current year, while the government support is Rs 36,691 crore. In 2018-19 (FY19), a mix of debt raised from banks, toll revenue, and a road monetisation scheme was to yield Rs 62,000 crore to the NHAI. This financial year, allocation has been made to the NHAI for major works under the Bharatmala Pariyojana.

The money will come from the Central Road Infrastructure Fund, the Permanent Bridges Fee Fund, and Monetisation of National Highways Fund.

The Bharatmala programme envisages construction of 20,000 km of roads at an estimated investment of Rs 7 trillion.

While the overall allocation for NHAI has seen a rise in the past couple of years, the authority's Internal and Extra Budgetary Resources (IEBR) has increased.

In 2017-18, the NHAI's IEBR was Rs 50,532.41 crore. It went up to Rs 62,000 crore in FY19 and further to Rs 75,000 crore in 2019-20.

The highways ministry is hopeful of receiving close to Rs 47,000 crore budgetary support in the upcoming Budget. This would be Rs 10,000 crore higher than the Rs 37,000 crore support that the ministry received last year. Besides the fiscal support, the NHAI has the mandate to raise Rs 75,000 crore during the current financial year.

Source: As reported by Megha Manchanda in Business Standard dated January 16, 2020 from website https://www.business-standard.com/article/economy-policy/nhai-kicks-off-arbitration-claim-settlement-via-reconciliation-process-120011600075_1.html

13. BATTLE FOR MIAL: ARBITRATION TRIBUNAL RESTRAINS ADANIS FROM BUYING BIDVEST STAKE; GVK ASKED TO COMPENSATE SOUTH AFRICAN PARTNER

In a major setback to the Adani Group's bid to get a hold on Mumbai airport, an arbitration tribunal has restrained it from going ahead with buying out the 13.5 percent stake of South African partner Bidvest Services in the country's the second largest airport.

The tribunal has also asked Bidvest to maintain status quo on its stake but asked GVK, which owns 50.5 percent in the airport, to compensate it for the delay by way of paying interest on the agreed share purchase agreement (Rs 1,248 crore) till the pendency of the case.

"It is directed that pending the final disposal of the arbitration proceedings, Bid Services or anyone acting for and on behalf of it is restrained from alienating in any

manner its 16.20 crore (13.5 percent) equity shares in Mumbai international airport and that the escrow documents submitted to the tribunal by GVK to show its compliance of the 15 September 2019 order will not be altered till the end of the arbitral proceedings," the tribunal said in a 55-page order dated 19 January.

The case was sent for arbitration on 2 July 2019 by the Delhi High Court.

The tribunal comprising retired justices KPS Radhakrishnan, AK Patanaik and Madan B Lokur, also asked GVK to pay interest to Bidvest Services on the agreed share purchase amount till the pendency of the issue.

The tribunal has based its order on the fact that GVK has been able to satisfy all the parameters required for granting the interim order even though it could not deposit on its own the purchase amount into the escrow account because GVK made the fund transfer by two companies-Green Rock B 2015 of Jersey and Indo-Infra Inc of Canada.

The Bombay High Court had late October asked GVK to close the deal by 7 November 2019 in the third extension to arrange the Rs 1,248-crore or Rs 77 a share for the deal, valuing MIAL at Rs 9,500 crore.

The Adanis', which already has won the bids to run six Airport Authority-built non-metro airports in Lucknow, Jaipur, Guwahati, Ahmedabad, Thiruvananthapuram and Mangalore, bid to enter the country's second busiest airport by buying out Bid Services Division Mauritius (Bidvest) from MIAL was stalled after GVK chose to exercise its first right of refusal, and matched the Rs 1,248-crore offer that the Adanis made to the Bidvest in March.

The GVK Group exercised its right under clause 3.7 of the shareholders agreement (rights of first refusal) to purchase the shares. But the group failed to purchase the same within the time prescribed in the agreement, the plea said.

According to the agreement, the date to make the payment and to transfer the shares was September 30 which was later extended by consent twice to 7 November.

On 15 September, an arbitral tribunal, which heard the case between GVK and Bidvest, gave GVK time till 31 October to deposit the money. According to the arbitral order, if GVK failed to deposit the money, Bidvest was free to sell its stake to anyone else.

On 5 March 2019, Bidvest had entered into an agreement with the Adanis to sell its entire 13.5 percent stake in the airport for a consideration of Rs 1,248 crore. But later GVK made the counter offer, forcing the Adanis to move the Bombay High Court on 4 September claiming that the March pact with Bidvest was valid, subsisting and binding.

According to the petition, GVK had exercised its right of first refusal before the 30-day mandated time frame on 4 April.

MIAL is 50.5 percent owned by GVK Group, 26 percent by the national airports operator AAI, 13.5 percent by Bidevest and remaining 10 percent by ACSA Global (Airports Company of South Africa).

In the meanwhile, late June GVK had also moved the Delhi High Court seeking an injunction against Bidvest from offering or selling its shares to any person other than GVK, the Adanis said in their suit.

Though the Delhi HC had on 2 July dismissed the petition noting that the company had not shown its willingness to complete the deal, a division bench later sent the dispute for arbitration.

In the run-up to the 7 November deadline, the debt-laden GVK Group had on 28 October entered into an agreement to sell 79 percent of its stake in GVK Airport Holdings for Rs 7,614 crore to the Abu Dhabi Investment Authority, PSP Investments of Canada, and the state-owned National Investment and Infrastructure Fund.

The move was aimed at preventing the Adanis, who have taken over five AAI-run airports earlier this year.

The GVK Group also owns the upcoming Navi Mumbai international airport and a stake in MIAL will give an equal stake in the new airport as well. Adanis are also ready to buy out ACSA's 10 percent but is stuck on valuation.

Source: As reported in Firstpost dated January 21, 2020

from website https://www.firstpost.com/business/battle-for-mial-arbitration-tribunal-restrains-adanis-from-buying-bidvest-stake-gvk-asked-to-compensate-south-african-partner-7934641.html

14. TRADE: EU AND 16 WTO MEMBERS AGREE TO WORK TOGETHER ON AN INTERIM APPEAL ARBITRATION ARRANGEMENT

On 24th January 2020, in Davos Switzerland, the EU and Ministers from 16 Members of the World Trade Organization (WTO) have agreed to develop a multi-party interim appeal arrangement that will allow the participating WTO members to preserve a functioning and two-step dispute settlement system at the WTO in disputes among them. This initiative was launched in mid-December 2019 by the EU and a number of other WTO members following the effective paralysis of the WTO Appellate Body, due to the blockage of any new appointments since 2017.

Commissioner for Trade Phil Hogan said: *"This statement testifies to the high importance that the EU and the participating WTO members attach to retaining a two-step dispute settlement process in WTO trade matters. The multiparty appeal arbitration arrangement will guarantee that the participating WTO members continue to have access to a binding, impartial and high-quality dispute settlement system among them. Let me underline again that this remains a contingency measure needed because of the paralysis of the WTO Appellate Body. We will continue our efforts to seek a lasting solution to the Appellate Body impasse, including through necessary reforms and improvements."*

The multi-party interim arrangement will be based on Article 25 of the WTO Dispute Settlement Understanding (DSU). It will secure the participating WTO members (Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, and Uruguay) an effective and binding dispute settlement process for potential trade disputes among them.

The arrangement is a contingency measure and it will only apply until the WTO Appellate Body becomes operational again. The EU believes that an independent and impartial appeal stage, giving the necessary guarantees of rulings of the highest quality, must continue to be one of the essential features of the WTO dispute settlement system.

Source: As reported in European Commission dated January 24, 2020 from website https://ec.europa.eu/commission/presscorner/detail/en/IP_20_113

15. TIME IS RIPE FOR LEGISLATION CONTAINING COMPULSORY 'PRE-LITIGATION MEDIATION': CJI

Chief Justice of India S A Bobde said that the time is ripe to devise a comprehensive legislation which contains "compulsory pre-litigation mediation" that would ensure efficiency and reduce the time of pendency for parties as well as courts.

Speaking at the 3rd edition of an international conference on 'Arbitration in the Era of Globalisation', Justice Bobde said a robust "arbitration bar" is critical to the development of institutional arbitration in India as it would ensure availability and accessibility of practitioners with knowledge and experience.

Justice Bobde said that today arbitration plays an essential role in the global infrastructure of international trade, commerce and investment and as an integral member of the global community and a trading and investment giant, how India engages with international arbitration has important ramifications on international trans-boundary flows of trade, commerce and investments as a whole.

"The pre-institution mediation and settlement as mentioned in the Commercial Courts Act would pave the way for many more institutions to emphasize on the need of pre-litigation mediation considering its very many benefits.

"I think the time is ripe to devise a comprehensive legislation which contains compulsory pre-litigation mediation and a remedy for the biggest drawback in a

mediation agreement that is to say the unenforceability of an agreement arrived at a mediation would ensure efficiency and also reduce the time pendency for parties as well as the courts," he said.

While talking about India's role in international arbitration, Justice Bobde said, "In recent times, globalisation has led to the dramatic growth in cross-border transactions involving India, which has led to an increasing demand for cross-border arbitration. This has resulted in establishment of transnational practices to deal with growing quantum and complexity of matters."

He added that arbitration was not meant to mirror litigation. "The time-consuming methods of long oral arguments, long written submissions and a reference to precedence are bound to bring about the same effect in arbitration as it is done in litigation," he said.

Justice Bobde said that in the 21st century, the "global and economic integration, filled by technological innovations, enhanced communication and affordable transportation" have sharply reduced the relevance of national border for trade commerce and economic activities.

"I do agree that the globalisation seems to stay. Exponential growth of trans-boundary interactions necessitates formation of complex regulatory frameworks, including provision of effective and efficient methods of dispute resolution.

"Yet attempts to resolve international commercial or investment disputes in jurisdiction-tethered-state-forums have met with little success. This void has been successfully plugged by various alternate methods of dispute resolution, in particular international arbitration.

"It would not be wrong to suggest that today arbitration is the most preferred mode of privately resolving a varied range of disputes, however it must be kept in mind that the same is at the cost of mediation and conciliation which is much faster and less expensive than arbitration," he said, at the programme was organised by Indian Council of Arbitration and Federation of Indian Chambers of Commerce and Industry.

He further said that one must also be cognizant of the synergistic opportunities available for international arbitration through utilisation of disruptive technologies.

"Both 'IA' (International Arbitration) and 'AI' (Artificial Intelligence) are leading alternatives to status quo: IA to traditional methods of dispute resolution, AI to traditional methods of performance," he said.

He said that the judges' aim is to resolve a dispute, but the dissatisfaction in the outcome results in the hierarchy of the appeals which cannot be avoided.

"Judging can be a difficult task and judges do what everybody avoids doing, i.e., take decisions. Popularity is a mirage for judges. No judge worth a salt aims at popularity. The idea is to resolve a dispute. But there is a dissatisfaction in the outcome which results in the hierarchy of the appeals which cannot be avoided.

"And therefore the utmost importance of alternative dispute resolution and that is something over the judiciary has no control except that it should not interfere with awards," he said.

He further added, "I don't think it was intended that the arbitrators should look at pleadings, look at evidence, analyse pleadings, look at precedents and then deliver the award which must be like a judgement. And once you deliver an award which reads like a judgment, the interference is also like that of towards a judgment."

“I think arbitrator was intended to be somebody who knows the subject, who knows the people who have appointed him, who have broad idea of the dispute and is simply looks at the evidence and says this should be the result. This was meant to be a simple process," he said.

Source: As reported in The Economic Times dated February 08, 2020 from the website https://economictimes.indiatimes.com/news/politics-and-nation/time-is-ripe-for-legislation-containing-compulsory-pre-litigation-mediation-cji/articleshow/74026498.cms

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Report on International Conference

ARBITRATION IN THE ERA OF GLOBALIZATION: 3rd Edition

08th February 2020, New Delhi

Indian Council of Arbitration (ICA) with support of FICCI organised the First Edition of it's International Conference on Arbitration in the Era of Globalisation in December 2015 and the Second Edition of the said International Conference was organised in December 2017. In both the editions, the then Chief Justice of India inaugurated the conference as the Chief Guest, and the technical sessions were chaired by several illustrious sitting Supreme Court judges. A galaxy of foreign speakers and large participation was a common factor in both the editions.

The Third Edition of the Conference organised on 08th February 2020 at New Delhi aimed to highlight the increasing relevance and impact of arbitration, particularly with regard to international commercial arbitration and India's stake in global landscape of dispute resolution.

The Third Edition of the conference was organised into five extremely informative technical sessions viz. Arbitration: India and the Global Contours; Expedited /Summary Procedures & Emergency Arbitrator; Efficacy of Investment Treaty Arbitrations; Recognition and Enforcement of Arbitral Awards: Global Scenario; Holistic Dispute Resolution: Med-Arb or Arb-Med-Arb?.

Conference was inaugurated by the Chief Guest, Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India who delivered the inaugural address. Hon'ble Mr. Justice Sanjay Kishan Kaul, Hon'ble Ms. Justice Indu Malhotra, Hon'ble Mr. Justice S. Ravindra Bhat, Hon'ble Mr. Justice Mukesh R Shah, Judges, Hon'ble Supreme Court of India chaired their respective technical session of the Conference. Technical session on holistic dispute resolution was chaired by Ld. Senior Advocate & Mediator, Mr. Sriram Panchu. Galaxy of arbitration experts from across the globe shared their experience on various aspects of arbitration.

Amongst others, legal practitioners, in-house counsels, corporate representatives, arbitrators, chartered accountants, company secretaries and legal academia attended the conference. The third edition was resounding success with massive turnout.

INAUGURAL SESSION:

Hon'ble Mr. Justice Sharad Arvind Bobde, ***Chief Justice of India*** while inaugurating the Conference stated that arbitration is the most preferred mode of resolving a varied range of disputes. He highlighted the fact that catena of decisions and host of amendments, including fast track arbitration and establishment of specialized commercial courts, have attempted to transform India into a robust centre for international and domestic arbitration. He noted that "A robust arbitration bar is critical to the development of institutional arbitration in India as it would ensure availability and accessibility of practitioners with knowledge and experience in the field of arbitration". He also stressed that mediation and conciliation is much faster dispute resolution mechanism and less expensive than arbitration. He emphasized that mediation solves a problem quickly, efficiently and there is no appeal unlike in an arbitration. He suggested two steps that are necessary, one is compulsory pre-litigation mediation and second, a provision in the law that the mediation agreement will result in a decree which can be enforced by a court. Speaking on institutional arbitration, he observed that it has had limited success in India and in order to remedy this concerted support from all stakeholders is required. He concluded by stating that if ADR methods remain secondary to litigation, they are likely to remain ineffective.

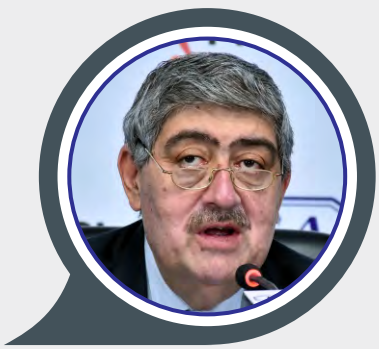
Ms. Sangita Reddy, ***President, FICCI***, felicitating Hon'ble Chief Justice of India highlighted that delay in dispute resolution is arguably one of the biggest hurdles to the ease of doing business in India. She stated that Indian courts are considerably bogged down by the pendency of cases, and it is only natural that business must resort to some other alternative means of dispute resolution, and institutional arbitration seems to be the best possible way. She suggested that the disposal of arbitration related cases in the Courts should be prioritized and the arbitration practice in India should be made more contemporary in line with international standards.

Mr. N. G. Khaitan, ***President, ICA*** in his welcome address noted that there is a marked improvement in the arbitration culture in India and that further steps needed to be taken. He remarked that this is a transformational time for India, and arbitration as a mechanism of dispute resolution cannot be ignored for a growing economy like India. He suggested that it is time for the judiciary and the legislature as well as the legal fraternity to support and promote arbitration. He opined that in order to become one of the largest economies in the world, it is very much necessary that commercial disputes are resolved in a timely manner and to have a robust mechanism for enforcement of arbitral awards.

Mr. Arun Chawla, ***Deputy Secretary General, FICCI & Advisor, ICA*** in his opening remarks, stated that the Conference had brought together a multitude of stakeholders including jurists, lawyers, business leaders and arbitrators from across the world. He said that the Conference was a great occasion and an amazing opportunity for the participants to understand various aspects of arbitration from the experiences of national and international arbitration experts; present their thoughts; and also seek responses from the Chief Justice of India, Hon'ble Mr. Justice S. A. Bobde, who presides over the largest judicial system of the world. He also mentioned that ICA as an institution is committed to make the arbitral process as simple as possible and to promote mediation as a parallel tool to resolve disputes.

TECHNICAL SESSION 1: ARBITRATION: INDIA AND THE GLOBAL CONTOURS

Hon'ble Mr. Justice Sanjay Kishan Kaul, ***Judge, Supreme Court of India*** chairing the first technical session emphasized that the quick adjudication of disputes is important for commerce. He stated that courts are over burdened and accordingly there is a need to look towards alternative dispute resolution to resolve disputes. Stating that he was a votary of the mediation process, Justice Kaul highlighted that the process was admirable because the solutions are more myriad and it is geared towards what the parties want. He further said that the Med-Arb process was possibly the best and expressed his belief that this will facilitate a lot of settlements. Justice Kaul drew attention to the fact that business people want solutions and are not concerned about legal intricacies. He concluded by saying that though endeavours have been made, a lot more needs to be done.



Mr. James P Duffy IV, ***Partner, Reed Smith LLP, New York*** addressed two very pertinent points viz. the rise of institutional arbitration and the creation of a specialized international arbitration bar and the role that it plays. Stating that the trend is towards institutional arbitration, he discussed the many advantages it had, such as more predictability, faster resolution of disputes and increased enforceability of awards. He also noted that over the last five years, there has been a rise in arbitral institutions in India and this could help make India a global hub for arbitration in the next decade. Coming to his second point, he stated that the creation of a dedicated international arbitration bar would give rise to a common set of understanding between arbitrators, which in turn would result in disputes getting resolved more efficiently and with better results.

Mr. David Kavanagh QC, ***Partner & European Co-Head of Skadden's International Litigation and Arbitration Group, London*** gave an overview of his experience regarding India's attitude to international arbitration. He gave examples to demonstrate that positive cases can be favourable for the impression India gives to the international community. He stated that the careful and efficient manner in which judges in India have dealt with challenges to awards inspires confidence in practitioners. At the same time, he stated that India needs to protect and guard it's fragile position carefully.

Ms. Pallavi Shroff, ***Managing Partner & National Practice Head, Dispute Resolution, Shardul Amarchand Mangaldas & Co Advocates & Solicitors, Delhi*** emphasised that in a global economy, dispute resolution is very important. She noted that substantial strides have been made viz. both the substantive and the procedural laws have been amended with an aim to bring down judicial interventions and fill in gaps that existed with regard to enforcement of arbitral awards. She stressed on the importance of institutional arbitration for India and stated that it was far more effective than ad hoc arbitration and provides more predictability and certainty and adds to the credibility of an award. According to her, in India we do not have institutions that can lead large and complex arbitrations. She endorsed the need for institutions to have modern rules. She concluded by saying that mediation can go a long way in resolving commercial disputes but awareness and training are necessary for that to happen.

Mr. Nakul Dewan, ***Senior Advocate, Supreme Court of India*** stated that presently India is overburdened with excessive arbitrations by few people and is not well placed to join the leagues of London and Singapore as a neutral seat of arbitration. He stated that our lawyers are not trained well enough to be able to conduct these cases and, therefore, the work circulates among very few people. He, therefore, proposed that we must first train our legal force and build their capacities. He concluded by saying that for the next ten years, it should be India's aim to imbibe best practices since that is the only way it would become a great place to arbitrate.

TECHNICAL SESSION 2:
EXPEDITED / SUMMARY PROCEDURES & EMERGENCY ARBITRATOR

The second technical session was chaired by **Hon'ble Ms. Justice Indu Malhotra,** ***Judge, Supreme Court of India.*** Justice Malhotra began her keynote remarks by dispelling certain doubts about the 2019 amendments to the Arbitration and Conciliation Act, 1996. At the outset, she clarified that the qualifications prescribed in the 2019 amendments are meant for domestic arbitrators and not for international arbitrators. Secondly, she pointed out that the objective of the establishment of Arbitration Council for India was to promote the growth of arbitration in India and it had no regulatory role, whatsoever. Speaking on the issue of summary procedures, she stated that summary procedures have been incorporated by the 2015 Amendment Act. She also noted that even though statutory provision is in place with regard to fast-track arbitrations, it has not gained currency in India. She concluded by stating that so far as emergency arbitrations are concerned, they haven't been given statutory recognition but the judiciary has enforced awards passed by them.

Ms. Rebecca Sabben-Clare, QC, ***7 King's Bench Walk Temple, London*** in her presentation talked about summary procedures and remarked that although in courts around the world, it was a routine practice, arbitration has traditionally been different. Nevertheless, she noted, the view is changing and rules on summary procedures are being included by institutions. She said that there has been a change post 2016 and tribunals do have the power to follow a summary procedure. She cautioned that summary procedures may not always yield a desirable result though she felt that it was helpful that arbitrators had such a power.

Mr. Duncan Speller, ***Partner, WilmerHale, London & Barrister*** addressing the issue of expedited procedures briefly touched upon following issues, i.e. the meaning of expedited/fast track arbitration, some of the recent trends and how they relate to India, and what can be done better to ensure that arbitration is expeditious. He highlighted an important point that fast track procedures supplement and are not a substitute for the tribunal's general duty with respect to case management. With regard to recent trends, he highlighted that post 2016 there has been a profusion of fast track procedures, largely as a response to the needs of commercial users. He concluded by saying that the tools are in place and all that needs to be done is to implement them in practice.

Mr. Ganesh Chandru, ***Partner, Dua Associates, New Delhi*** gave a bird's eye view of emergency arbitrator and gave the example of Singapore International Arbitration Centre (SIAC) which has been very successful in this regard. He noted that in India, despite the recommendations of the Law Commission and the Sri Krishna Committee, the arbitral tribunal's definition does not include an emergency arbitrator if appointed under institutional rules. He then discussed a couple of cases in which Indian Courts have endorsed the SIAC-emergency arbitrator provisions. He emphasized how in the Indian context it has been very popular and when emergency arbitrator provisions were introduced, Indian parties were quick to use it. He concluded by referring to the ICA Rules which make provision for emergency arbitrator.

Mr. Charles Bear QC, ***Fountain Court Chambers, London*** discussed the options within the framework of ICA so as to deal with extra-ordinary claims brought by the category of persons he calls 'unaccountable disputants', who are not restrained by corporate or political structures. He stated that in order to ensure that a legitimate claim doesn't get affected, it is justified to truncate the ordinary model. This is where summary procedures come in, he said. He also said that a tribunal can decide even without hearing witnesses, when on its face the case that has been raised is not credible. He expressed the belief that this would be a truly summary procedure and is also consistent with the underlying principle of the New York Convention. However, he stated that these options are rarely taken up and concluded by suggesting that even though not very efficient it is a prudent course at present.

TECHNICAL SESSION 3: EFFICACY OF INVESTMENT TREATY ARBITRATIONS

Third technical session was chaired by **Hon'ble Mr. Justice S. Ravindra Bhat,** ***Judge, Supreme Court of India***. Justice Bhat drew attention to the fact that the Investor State Dispute Settlement (ISDS) framework has been extremely controversial and threatens to jeopardize several trade agreements. He noted that investment treaties necessarily influence policy decisions and have a social and economic effect, and substantiated this by reference to cases. He suggested that tribunals must be composed in a way to include arbitrators from developing countries and persons with experience in domestic legal systems which would help increase confidence in the dispute settlement mechanisms and ensure that arbitrators are cognizant of the constraints upon government to take policy decisions in public interest. He concluded by saying that it is time that wider consensus is reached on basic concepts such as expropriation and to possibly move towards a common Convention on some of these concepts.

Mr. Jonathan Wood, ***Head of International Arbitration, RPC Law Firm, London and Singapore & Chair, Board of Trustees, Chartered Institute of Arbitrators (CIArb), London*** threw light on the fact that investment treaty arbitrations are costly, complex and lengthy. The biggest issue according to him was that sovereign States fail to pay up once an award has been granted and as a result investors have to wait for years to be compensated. He then discussed the ways in which this can be dealt with. He suggested that export credit agencies and the private insurance market, which provides political risk insurance and which will pay upon a default by a sovereign State, can play a significant role in this respect. He also advocated that the World Bank should be more dynamic in exercising its powers and withhold loans to recalcitrant States. He concluded by saying that investors must beware before they invest in a particular State.

Mr. Francis Xavier, SC, PBM, ***President – Chartered Institute of Arbitrators (CIArb), Singapore & Regional Head, Disputes Practices, Rajah & Tann LLP, Singapore*** began his presentation by stating that there is universal consensus today that the investor-State dispute resolution system is not working and even countries which traditionally used to support it are no longer keen on doing so and organizations which had supported it today agree that the system needs to be comprehensively overhauled. He discussed the prevailing criticisms of the Investor State Dispute Settlement (ISDS) system and whether those were valid. He made it clear that the solution was not to get rid of the ISDS system but to fix the problems it had. He highlighted that entire States are at the mercy of ad hoc tribunals which are deciphering vague treaty provisions, not guided by precedent, and, therefore, proposals for an international investment court must be considered.

Ms. Chiann Bao, ***Vice President, ICC International Court of Arbitration & Former Secretary General, Hong Kong International Arbitration Centre, Hong Kong*** proposition was procedural and simple in nature and related to counter-claims and their ability to enhance the efficacy of investor-State arbitration. She made the observation that Bilateral Investment Treaties (BITs) have an inherent asymmetry that is involved to attract foreign investment to a State, and this has prompted some of the backlash against the Investor State Dispute Settlement (ISDS) system. One of the remedies has been the increased popularity of the use of counter-claims by host states in the course of arbitration. She stated her belief that despite complicated challenges to counter-claims and even though they largely fail except for in a few cases, the existence of counter-claims can serve other purposes such as encouraging ADR mechanisms and discouraging investors from bringing claims.

Dr. Prabhash Ranjan, ***Professor, South Asian University & Expert on International Investment Law, New Delhi*** elucidated India's backlash against Bilateral Investment Treaties (BITs) and Investor State Dispute Settlement (ISDS) and how this cannot be divorced from the backlash that we are witnessing against globalization in general. He shed light on how because of the ISDS claims brought against India, the Government decided to unilaterally terminate investment treaties, came up with a Model BIT and tried to convince its treaty partner countries to sign joint interpretative statements which can act as subsequent agreements for interpreting these treaties. He made the argument that while India was right in pointing out the problems with the BITs and the ISDS system, its solution to the problem was not quite right. The solution cannot be to walk out of the system but to work and build a system which tries to balance the interests of both the investor and the State. He concluded by saying that India must, therefore, recalibrate her strategy.

TECHNICAL SESSION 4: RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS: GLOBAL SCENARIO

The keynote speaker for the session was **Hon'ble Mr. Justice M. R. Shah,** ***Judge Supreme Court of India***. Justice Shah gave a comprehensive presentation on the enforcement of awards in India and also discussed the statutory provisions governing recognition and enforcement of awards under the Arbitration and Conciliation Act, 1996. He remarked that getting a favourable award from an arbitral tribunal was only a battle half won as enforcement of award remains a major challenge. Despite this, he stated that India would readily pass as a pro-arbitration jurisdiction. He suggested that if India was to remain an equal partner in the international community, commercially speaking, then the enforcement of foreign awards must take place as soon as possible. He noted that there has been a positive developments and decisions of the Hon'ble Supreme Court point towards less interference by courts and on limited grounds only.

Ms. Karishma Vora, ***Barrister (England & Wales) & Advocate (India)*** stated that the important thing to be borne in mind was that under the New York Convention, interim awards or provisional awards are not enforceable. She also clarified a common misconception that awards passed in any of the New York Convention countries can be easily enforced in another signatory State. She then discussed the position under English law with respect to defences to enforcement such as incapacity, public policy and so on.

Ms. Niuscha Bassiri, ***Partner, Hanotiau & van den Berg, Brussels, Belgium*** spoke about enforcement proceedings in Belgium. She remarked that Belgium has adopted an ultra-modern pro-arbitration approach to enforcement and one of the modern aspects was that it does not differentiate between awards rendered in Belgium and those rendered elsewhere i.e. the enforcement proceedings are alike regardless of where the award is from. She highlighted that enforcement in Belgium may not be easy because of language barriers. She further shared that in order to facilitate enforcement, the Belgium law has clarified that the courts in which one can start the enforcement proceedings and has limited it to certain courts.

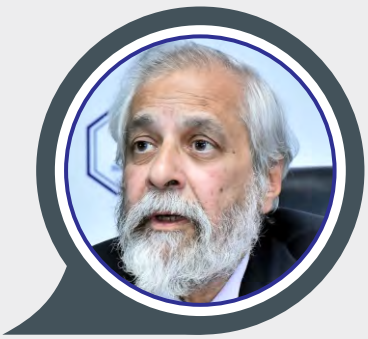
Ms. Sapna Jhangiani, ***Partner, Clyde & Co Clasis Singapore Pte. Ltd. Singapore*** discussed the issue of recognition and enforcement of arbitral awads in few asian jurisdictions such as China, Vietnam and Myanmar. She encouraged business users to ask their counsel about enforcement at a very early stage to avoid any surprises later including questions such as whether interim orders can be enforced and whether it is easy to enforce the interim order or award in a particular jurisdiction. Secondly, she highlighted that there can be a big difference between enforcement and execution of judgment against the assets of the counter party. She concluded by advising that a party must think very carefully about recognition and enforcement and think even more carefully about execution against assets and any remedies at their disposal in the jurisdiction they are looking at.

Mr. Sanjeev Kapoor, ***Partner, Dispute Resolution, Khaitan & Co., New Delhi*** spoke on a very specific issue, that is, the impact of the 2015 Amendment on the enforcement of awards in India. He remarked that the realization that the world community was not happy with India's track record in the enforcement of arbitration awards, was taken stock of by the legislature and the 2015 Amendments were introduced. He stated his belief that the amendments have made arbitration work in India by reigning in the definition of public policy and introducing conditions for the stay of an award. He also stated that enforcements of awards are now taking place at a much faster rate and with lesser judicial intervention and hence the desired objective has been achieved by the 2015 Amendments, and enforcement in India has become much easier than before.

TECHNICAL SESSION 5:
HOLISTIC DISPUTE RESOLUTION: Med-Arb or Arb-Med-Arb?

The session was chaired by **Mr. Sriram Panchu,** ***Senior Advocate & Mediator,*** who began the conversation with the point that arbitration and mediation are two completely different processes, like two opposite poles. However, today there are views that these two opposites could be harmonious partners and it was, therefore, important to look at the processes of Med-Arb or Arb-Med-Arb.

Hon'ble Mr. Justice Madan B. Lokur, ***Former Judge, Supreme Court of India & International Judge, Supreme Court of Fiji*** stated that Med-Arb is definitely an experiment that is worth trying considering its success. However, he cautioned against the danger of the same person acting as both arbitrator and mediator in a particular dispute. This is because as a mediator he/she would be privy to confidential information and one of the parties may object to this. He also felt that it would be an interesting idea to carry out a parallel procedure where the arbitration goes on and the parties simultaneously carry out mediation proceedings with another person. He concluded by saying that there are many benefits of Med-Arb as it is cost-effective and the time taken is considerably less and all in all Med-Arb as a substitute is definitely worth being tried.



Mr. Andrew Miller, QC, ***Barrister, Arbitrator and Mediator, London*** explained the processes of Med-Arb and Arb-Med-Arb. He highlighted that the real stumbling block has been whether the same person can be the arbitrator and also the mediator. He noted that there can be circumstances where clients on both the sides agree that they don't mind the same neutral switching from arbitration to mediation and vice versa. He felt that that this needs careful consideration and structuring, but there are ways to do it. He noted that arbitration had not been quick, efficient and cheap and user satisfaction had been low. Therefore, as service providers, arbitrators must consider the options that can be offered to clients.

Hon'ble Mr. Justice Arjan Kumar Sikri, ***Former Judge, Supreme Court of India & International Judge, Singapore International Commercial Court ("SICC")*** discussed Arbitration and Conciliation Act, 1996 and noted that normally the arbitrator will not act as mediator unless the parties consent. He observed that whether the same person can act as both arbitrator and mediator would also depend on the expertise of the person concerned. He felt that when parties agree that the same person can act as mediator, some things are taken care of, for instance that there would not be any requirement of separate session, i.e. any caucus, so that no confidential information can be used by the mediator when he acts as an arbitrator.

Mr. George Lim, ***Chairman, Singapore International Mediation Centre, Singapore & Mediator*** began his presentation by observing that the trend in the world is to adopt hybrid process for dispute resolution and people are no longer thinking of mediation alone or arbitration alone but as a combination to resolve their commercial disputes. Mr. Lim highlighted the fact that what best fits the case or what's best for the client is adopted for the purposes of dispute resolution. These hybrid processes such as Med-Arb or Arb-Med-Arb are creative and flexible. He also noted that as the next big thing, mediation cannot be ignored by India and concluded with the hope that India would ratify the Singapore Convention soon.

International Conference

ARBITRATION IN THE ERA OF GLOBALIZATION: 3rd Edition

08th February 2020, New Delhi

Photo Gallery

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India welcomed by Ms. Sangita Reddy, President, FICCI

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India welcomed by Mr. N.G. Khaitan, President , ICA

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India is presented with Akshaya Patra Certificate by Ms. Sangita Reddy, President, FICCI

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India is presented with Green Certificate by Mr. N.G. Khaitan, President, ICA

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India is presented with FICCI study on Judicial Reforms The Way Forward by Ms. Sangita Reddy, President, FICCI

Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India delivers the Inaugural Address

Huge gathering of stakeholders during the Inaugural Session

Ms. Sangita Reddy, President, FICCI delivers the Felicitation Address

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

Mr. Arun Chawla, Deputy Secretary General , FICCI & Advisor, ICA delivers the Opening Remarks

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

A section of distinguished invitees and speakers from India and Abroad

End of Inaugural Session (L to R): Mr. Arun Chawla, Deputy Secretary General , FICCI & Advisor, ICA; Mr. N.G. Khaitan, President, ICA; Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India; Ms. Sangita Reddy, President, FICCI; Ms. Geeta Luthra, Vice President, ICA

FICCI and ICA Senior Office Bearers with Hon'ble Mr. Justice Sharad Arvind Bobde, Chief Justice, Supreme Court of India

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

Hon'ble Mr. Justice Sanjay Kishan Kaul, Judge, Supreme Court of India makes keynote remarks during the Technical Session

Hon'ble Mr. Justice Sanjay Kishan Kaul, Judge, Supreme Court of India is flanked by (L to R): Mr. Nakul Dewan, Senior Advocate, Supreme Court of India; Mr. James P Duffy IV, Partner, Reed Smith LLP, New York; Ms. Pallavi Shroff, Managing Partner & National Practice Head, Dispute Resolution, Shardul Amarchand Mangaldas & Co. Advocates & Solicitors, New Delhi; Mr. David Kavanagh QC, Partner & European Co-Head of Skadden's International Litigation and Arbitration Group, London

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

Hon'ble Ms. Justice Indu Malhotra, Judge, Supreme Court of India makes keynote remarks during the Technical Session

Hon'ble Ms. Justice Indu Malhotra, Judge, Supreme Court of India is flanked by (L to R): Mr. Charles Bear QC, Fountain Court Chambers, London; Ms. Rebecca Sabben-Clare QC, 7 King's Bench Walk Temple, London; Mr. Ganesh Chandru, Partner, Dua Associates, New Delhi; Mr. Duncan Speller, Partner, WilmerHale, London & Barrister

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

Hon'ble Mr. Justice S. Ravindra Bhat, Judge, Supreme Court of India makes keynote remarks during the Technical Session

Hon'ble Mr. Justice S. Ravindra Bhat, Judge, Supreme Court of India is flanked by (L to R): Ms. Chiann Bao, Vice President, ICC International Court of Arbitration & Former Secretary General, Hong Kong International Arbitration Centre, Hong Kong; Dr. Prabhash Ranjan, Professor, South Asian University & Expert on International Investment Law, New Delhi; Mr Francis Xavier SC, PBM, President – Chartered Institute of Arbitrators (CIArb), Singapore & Regional Head, Disputes Practices, Rajah & Tann LLP, Singapore; Mr. Jonathan Wood, Head of International Arbitration, RPC Law Firm, London and Singapore,& Chair, Board of Trustees, Chartered Institute of Arbitrators (CIArb), London

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

Hon'ble Mr. Justice M. R. Shah, Judge Supreme Court of India makes keynote remarks during the Technical Session

Hon'ble Mr. Justice M. R. Shah, Judge, Supreme Court of India, New Delhi is flanked by (L to R): Ms. Karishma Vora, Barrister (England & Wales) & Advocate (India); Mr. Sanjeev Kapoor, Partner, Dispute Resolution, Khaitan & Co., New Delhi; Ms. Niuscha Bassiri, Partner, Hanotiau & van den Berg, Brussels, Belgium; Ms. Sapna Jhangiani, Partner, Clyde & Co, Clasis Singapore Pte. Ltd., Singapore

Mr. Sriram Panchu, Senior Advocate & Mediator makes remarks during the Technical Session

Hon'ble Mr. Justice Madan B. Lokur, Former Judge, Supreme Court of India & International Judge, Supreme Court of Fiji makes remarks during the Technical Session

Hon'ble Mr. Justice Arjan Kumar Sikri, Former Judge, Supreme Court of India & International Judge, Singapore International Commercial Court ("SICC") makes remarks during the Technical Session

From (L to R): Mr. George Lim, Mediator & Chairman Singapore International Mediation Centre, Singapore; Mr. Sriram Panchu, Senior Advocate & Mediator; Hon'ble Mr. Justice Arjan Kumar Sikri, Former Judge, Supreme Court of India & International Judge, Singapore International Commercial Court ("SICC"); Mr. Andrew Miller QC, Barrister, Arbitrator and Mediator, London

Mr. Vinay Kumar Sanduja, Joint Director & Registrar, ICA interacting with Foreign Arbitrator and Speaker Ms. Niuscha Bassiri, Partner, Hanotiau & van den Berg, Brussels, Belgium

Networking Cocktails & Dinner

Networking Cocktails & Dinner

ICA Conference Secretariat

CASE HIGHLIGHTS

BGS SGS Soma JV v. NHPC Ltd.

Briefly stated, dispute arose between the parties in relation to contract given by Respondent (NHPC) to the Petitioner (BGS SGS Soma JV) for construction of Diversion Tunnels, Coffer Dams, Concrete Gravity Dams, Plunge Pools and Cutoff Walls of Subansri Lower Hydroelectric Project on river Subansri, with an installed capacity of 2000 MW at the project site located in the lower Subansri districts in the States of Assam and Arunachal Pradesh.

As disputes and differences arose between the parties in terms of the contract, Petitioner invoked the dispute resolution mechanism as contained in Clause 67.3 of the agreement between the parties. Petitioner invoked the said dispute resolution clause with regard to payment of compensation for losses suffered by Petitioner due to hindrances caused by the Respondent. The said clause reads as follows:

"Any dispute in respect of which the Employer and the Contractor have failed to reach at an amicable settlement pursuant to Sub-Clause 67.1, shall be finally settled by arbitration as set forth below. The Arbitral Tribunal shall have full power to open up, review and revise any decision, opinion, instruction, determination, certificate or valuation of the Engineer.

(i) A dispute with an Indian Contractor shall be finally settled in accordance with the Indian Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrator appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of this Sub-clause, the term "Indian Contractor" means a contractor who is registered in India and is a juridic person created under Indian law as well as a joint venture between such a contractor and a Foreign Contractor.

(ii) In the case of a dispute with a Foreign Contractor, the dispute shall be finally settled in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and read with UNCITRAL Arbitration Rules. The arbitral tribunal shall consist of three Arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Presiding arbitrator. In case of failure of the two arbitrators appointed by the parties to reach a consensus within a period of 30 days from their appointment on the Presiding Arbitrator to be appointed subsequently, the Presiding arbitrator shall be appointed by the President of the Institution of Engineers (India). For the purposes of this Clause 67, the term "Foreign Contractor" means a contractor who is not registered in India and is not a juridic person created under Indian Law. In case of any contradiction between Indian Arbitration and Conciliation Act, 1996 and UNCITRAL Arbitration Rules, the provisions in the Indian Arbitration and Conciliation Act, 1996 shall prevail.

(iii) Arbitration may be commenced prior to or after completion of the Works, provided that the obligations of the Employers, the Engineer, and the Contractor shall not be altered by reason of the arbitration being conducted during the progress of the Works.

xxx xxx xxx

(v) If one of the parties fail to appoint its arbitrator in pursuance of Sub-clause (i) and (ii) above, within 30

days after receipt of the notice of the appointment of its arbitrator by the other party, then the President of the Institution of Engineers (India), both in cases of foreign contractors as well as Indian Contractors, shall appoint the arbitrator. A certified copy of the order of the President of Institution of Engineers (India), making such an appointment shall be furnished to each of the parties.

(vi) *Arbitration Proceedings shall be held at New Delhi/Faridabad, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*

vii) *The decision of the majority of arbitrators shall be final and binding upon both parties. The cost and expenses of Arbitration shall be borne in such a manner as determined by the arbitral tribunal. However, the expenses incurred by each party in connection with the preparation, presentation etc. of its proceedings as also the fees and expenses paid to the arbitrator appointed by such party on its behalf shall be borne by each party itself."*

Pursuant to request of the Petitioner, a three-member Arbitral Tribunal was constituted as per Clause 67.3 of the agreement and in accordance with the Arbitration and Conciliation Act, 1996 (Act). Seventy-one sittings of the Arbitral Tribunal took place at New Delhi and award was passed at New Delhi, by which the claims of the Petitioner were allowed, together with simple interest at 14% per annum till the date of actual payment.

After the award was passed, Respondent filed an application under Section 34 of the Act for setting aside the award before the Court of the District and Sessions Judge, Faridabad, Haryana. In response, the Petitioner filed an application under Section 151 read with Order VII Rule 10 of the Code of Civil Procedure, 1908 and Section 2(1)(e)(i) of the Act, seeking a return of the petition filed under Section 34 for presentation before the appropriate Court at New Delhi and/or the District Judge at Dhemaji, Assam. In November, 2017, after constitution of Special Commercial Court at Gurugram, the Section 34 petition filed at Faridabad was transferred to the said Gurugram Commercial Court which allowed the application of the Petitioner, and returned the Section 34 petition for presentation to the proper court having jurisdiction in New Delhi.

Aggrieved by the order of the Gurugram Commercial Court, the Respondent filed an appeal under Section 37 of the Act read with Section 13 (1) of the Commercial Courts Act, 2015 before the Hon'ble High Court of Punjab and Haryana at Chandigarh. Allowing the appeal and setting aside the judgment of the Special Commercial Court, Gurugram, Hon'ble Punjab & Haryana High Court held that the appeal filed under Section 37 of the Act was maintainable, and that Delhi being only a convenient venue where arbitral proceedings were held and not the seat of the arbitration proceedings, Faridabad would have jurisdiction on the basis of the cause of action having arisen in part in Faridabad.

Accordingly, appeal by way of special leave petition was filed before Hon'ble Supreme Court of India to decide the issues relating to maintainability of appeals under Section 37 of the Act, and filing of petition under section 34 of the Act on the basis of seat of arbitration.

With regard to maintainability of appeals under Section 37 of the Act, Hon'ble Supreme Court observed that an appeal can lie only from the orders specified in clauses (a), (b) or (c) of section 37 (1) of the Act.

On facts, Hon'ble Supreme Court rejected the contention that the appeal fell within Section 37(1) (c) of the Act and related to an order "setting aside" or "refusing to set aside" an arbitral award under Section 34 on the ground that neither the arbitral award was set aside nor the court had refused to set aside the said arbitral award under Section 34 of the Act. Supreme Court observed that *"…distinction is made between judgments which either set aside, or refuse to set aside, an arbitral award after the court applies its mind to Section 34 of the Arbitration Act, 1996, as against preliminary orders of condonation of delay, which do not in any way impact the arbitral award that has been assailed."* Accordingly, Hon'ble Supreme Court came to the conclusion that appeal filed in the present case before Hon'ble Punjab & Haryana High Court was not within the purview of section 37 of the Act and was not maintainable.

As regards filing of petition under section 34 of the Act, Hon'ble Supreme Court noted that the same was dependent on where the "seat" of arbitration of the arbitral proceedings between the parties is located.

Before deciding the said issue, Hon'ble Supreme Court noted the judgment of Hon'ble Punjab & Haryana High Court passed in the present case and looked into the following conclusions of the High Court *"....that the arbitration Clause in the present case does not refer to the "seat" of arbitration, but only refers to the "venue" of arbitration. Consequently, the impugned judgment holds that since a part of the cause of action had arisen in Faridabad, and the Faridabad Commercial Court was approached first, the Faridabad Court alone would have jurisdiction over the arbitral proceedings, and the courts at New Delhi would have no such jurisdiction."*

Thereafter, Hon'ble Supreme Court laid down the law as to what constitutes the "juridical seat" of arbitral proceedings in the following words. *".....whenever there is the designation of a place of arbitration in an arbitration Clause as being the "venue" of the arbitration proceedings, the expression "arbitration proceedings" would make it clear that the "venue" is really the "seat" of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as "tribunals are to meet or have witnesses, experts or the parties" where only hearings are to take place in the "venue", which may lead to the conclusion, other things being equal, that the venue so stated is not the "seat" of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings "shall be held" at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a "venue" and not the "seat" of the arbitral proceedings, would then conclusively show that such a Clause designates a "seat" of the arbitral proceedings. In an International context, if a supranational body of Rules is to govern the arbitration, this would further be an indicia that "the venue", so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the "stated venue", which then becomes the "seat" for the purposes of arbitration."*

Hon'ble Supreme Court also looked at the correctness of it's earlier judgment in the case of Hardy Exploration and Production (India) Ltd. and observed that the three judge bench in Hardy Exploration Case failed to apply the Shashoua principle to the arbitration clause in question and had not followed the law as to determination of a "juridical seat", laid down by a five judge bench of Supreme Court in BALCO case. Accordingly, Hon'ble Supreme Court declared that the judgment in Hardy Exploration case, being contrary to the five judge bench in BALCO case cannot be considered to be good law.

In the present case, Hon'ble Supreme Court noted that clause 67.3 (vi) of the agreement provided that arbitration proceedings shall be held at New Delhi/Faridabad, India. Accordingly, Hon'ble Supreme Court observed that either of the places viz. Delhi/Faridabad can be designated as the "seat" of arbitration. In this regard, following para of the Hon'ble Supreme Court may be noted *"..There being no other contra indication in such a situation, either New Delhi or Faridabad, India is the designated "seat" under the agreement, and it is thereafter for the parties to choose as to in which of the two places the arbitration is finally to be held."*

Thereafter, Hon'ble Supreme Court looked into the facts of the present case and came to the conclusion that *"..proceedings were finally held at New Delhi, and the awards were signed in New Delhi, and not at Faridabad, would lead to the conclusion that both parties have chosen New Delhi as the "seat" of arbitration Under Section 20(1) of the Arbitration Act, 1996. This being the case, both parties have, therefore, chosen that the Courts at New Delhi alone would have exclusive jurisdiction over the arbitral proceedings. Therefore, the fact that a part of the cause of action may have arisen at Faridabad would not be relevant once the "seat" has been chosen, which would then amount to an exclusive jurisdiction Clause so far as Courts of the "seat" are concerned."*

Accordingly, Hon'ble Supreme Court set aside the impugned judgment of Hon'ble Punjab and Haryana High Court. Hon'ble Supreme Court held that given the arbitration clause in these proceedings, Courts in New Delhi had jurisdiction to entertain Section 34 petition as held by Special Commercial Court at Gurugram.

Canara Nidhi Limited Vs. M. Shashikala and Ors.

In this case, issue before Hon'ble Supreme Court of India was whether the parties can adduce evidence to prove the specified grounds contained in Section 34 (2) of the Arbitration and Conciliation Act, 1996 (Act), in an application under Section 34 of the Act seeking to set aside the award.

The Appellant (Canara Nidhi Limited) filed the appeal before Hon'ble Supreme Court aggrieved by the judgment passed by the Hon'ble High Court of Karnataka wherein order passed by the District Judge was set aside and directions were given to the District Judge to "recast the issues". Further, Hon'ble High Court of Karnataka permitted Respondent Nos. 1 and 2 (M. Shashikala and Ors) to file affidavits of their witnesses and cross-examination of the witnesses with regard to proceedings under section 34 for setting aside the award.

Earlier by an order, Ld. District Judge had dismissed the application filed by Respondents under section 151 of the Code of Civil Procedure to adduce evidence to prove the specified grounds in Section 34 (2) of the Act. Ld. District Judge observed that there was no necessity of adducing fresh evidence in the application filed under Section 34 of the Act as *"... the grounds urged in the application can very well be met with by the records of the arbitration proceedings and by perusing the arbitral award..."*.

Main contention of the Appellant in the present case before Hon'ble Supreme Court was that section 34 proceedings were summary in nature and the scope of such proceedings was limited. It was submitted by Appellant that the validity of the award has to be decided on the basis of the materials produced before the arbitrator and there is no scope for adducing fresh evidence before the court in the proceedings under Section 34 of the Act. Further, it was contended by Appellant that Ld. District Judge rightly rejected the application filed by Respondent Nos. 1 and 2 for permission to lead evidence since Respondent Nos. 1 and 2 did not make out any exceptional grounds for permission to lead fresh evidence in the proceedings under Section 34 of the Act.

Main contention of the Respondents in the present case before Hon'ble Supreme Court was that additional evidence was necessary to prove the grounds stated in the application filed under Section 34 of the Act. Further, it was contended that the grounds for setting aside the award being specific, Respondent Nos. 1 and 2 were rightly given an opportunity by the Hon'ble High Court to adduce evidence in the proceedings under Section 34 of the Act.

Before deciding the issue in hand, Hon'ble Supreme Court first took note of it's earlier decision in Fiza Developers case wherein it was observed that *"Applications Under Section 34 of the Act are summary proceedings with provision for objections by the Respondent-Defendant, followed by an opportunity to the applicant to "prove" the existence of any ground Under Section 34(2). The applicant is permitted to file affidavits of his witnesses in proof. A corresponding opportunity is given to the Respondent-Defendant to place his evidence by affidavit. Where the case so warrants, the court permits cross-examination of the persons swearing to the affidavit. Thereafter, the court hears arguments and/or receives written submissions and decides the matter. This is of course the routine procedure. The court may vary the said procedure, depending upon the facts of any particular case or the local rules. What is however clear is that framing of issues as contemplated Under Rule 1 of Order 14 of the Code is not an integral part of the process of a proceedings Under Section 34 of the Act."*

Thereafter, for the purposes of deciding the issue in the present case, Hon'ble Supreme Court, also referred Justice B.N. Srikrishna Committee's report and looked into it's earlier decision in *Emkay Global Financial Services Limited v. Girdhar Sondhi.* Hon'ble Supreme Court in Emkay Global Financial Services Limited case

observed that the decision in Fiza Developers case must be read in the light of the amendment made in Section 34(5) and Section 34(6) of the Act and clarified the legal position by stating that *".....an application for setting aside an arbitral award will not ordinarily require anything beyond the record that was before the arbitrator. However, if there are matters not contained in such record, and are relevant to the determination of issues arising Under Section 34(2)(a), they may be brought to the notice of the Court by way of affidavits filed by both parties. Cross-examination of persons swearing to the affidavits should not be allowed unless absolutely necessary, as the truth will emerge on a reading of the affidavits filed by both parties."*

On the basis of aforesaid, Hon'ble Supreme Court clarified the position and observed that Section 34 application will not ordinarily require anything beyond the record that was before the arbitrator and that cross-examination of persons swearing in to the affidavits should not be allowed unless absolutely necessary.

On facts of the case, Hon'ble Supreme Court observed that no ground was made out in the application filed by Respondent Nos. 1 and 2 seeking permission to adduce evidence (in the proceedings under Section 34 of the Act) as to the necessity of adducing evidence and what was the nature and relevance of the evidence sought to be led by Respondents. Further, Hon'ble Supreme Court noted that there was no disclosure as to specific documents or evidence required to be produced except statement that the Respondent intends to adduce additional evidence or otherwise the Respondent will be subjected to hardship under Section 34 of the Act.

Accordingly, allowing the appeal, Hon'ble Supreme Court set aside the judgment passed by Hon'ble Karnataka High Court wherein the application to adduce the evidence to prove the specified grounds contained in Section 34 (2) of the Act was allowed.

Mayavti Trading Pvt. Ltd. Vs. Pradyuat Deb Burman

On facts, Hon'ble Supreme Court of India refrained from exercising its extraordinary jurisdiction under Article 136 of the Constitution of India. However, during the course of arguments, a recent decision of Hon'ble Supreme Court namely, *United India Insurance Company Limited v. Antique Art Exports Private Limited was pointed out, wherein it was held that "...appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted."*

Hon'ble Supreme Court looked into United India Insurance Company Limited case wherein it was stated as follows: *"In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the Respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication."*

Accordingly, in the aforesaid context, Hon'ble Supreme Court of India dealt with the issue relating to power of the Supreme Court and High Court under section 11 of the Arbitration and Conciliation Act, 1996 (Act) relating to appointment of arbitrator.

Hon'ble Supreme Court analyzed the case law under Section 11(6) of the Act, prior to the Amendment Act, 2015 and noted that the law relating to appointment of arbitrator prior to the 2015 Amendment included going beyond the existence of arbitration agreement.

Before deciding the issue relating to power of the Supreme Court and High Court under section 11 of the Act, Hon'ble Supreme Court looked into Section 11(6A) as inserted by the Amendment Act of 2015, which reads as follows *"11. (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under Sub-section (4) or Sub-section (5) or*

Sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

Accordingly, in the light of section 11 (6A) of the Act, Hon'ble Supreme Court overruled it's decision in *United India Insurance Company Limited* case as not having laid down the correct law. Hon'ble Supreme Court held that power of the Court to appoint arbitrator as contained under Section 11(6A) of the Act is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment of the Hon'ble Supreme Court in it's earlier decision of *Duro Felguera, S.A. v. Gangavaram Port Limited wherein it was held that " From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect-the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple-it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."*

Hindustan Construction Company Limited and Ors. Vs Union of India (UOI) and Ors.

In this landmark case, Hon'ble Supreme Court of India dealt with set of writ petitions wherein constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (the Act) and repeal of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment Act) with effect from 23.10.2015 was challenged. Challenge was also made to various provisions of the Insolvency and Bankruptcy Code, 2016 (IBC).

It was contended that the insertion of section 87 and repeal of section 26 as per the Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment Act) resulted in discriminatory treatment being meted out to Petitioner (Hindustan Construction Company Limited and Ors).

Before discussing the issues involved, 2019 Amendment Act which introduced Section 87 in the Act and omitted Section 26 of the 2015 Amendment Act may be noted. Relevant provisions under consideration reads as follows:

"87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall-

(a) not apply to-

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings."

"Section 26 of the 2015 Amendment Act reads as follows:

26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

Briefly stated, Petitioner being an infrastructure construction company was involved in construction of public-utilities and projects like roads, bridges, hydropower and nuclear plants, tunnels and rail facilities as a contractor for government bodies such as the National Highways Authority of India (Respondent No. 5), NHPC Ltd. (Respondent No. 6), NTPC Ltd. (Respondent No. 8), IRCON International Ltd. (Respondent No. 7) and the Public Works Department. It was contended by Petitioner that cost overrun by the aforesaid Government organizations resulted in huge delays. Accordingly, recovery of the legitimate dues of

the Petitioners was invoked through civil proceedings or through arbitrations.

Petitioner contended that, in many cases, the arbitration awards passed in it's favour got challenged under Sections 34 and 37 of the Act, particularly in view of the fact that the moment a challenge was made under Section 34, there was an 'automatic-stay' of such awards under the Act as amended by the 2015 Amendment Act read with 2019 Amendment Act.

Petitioner also contended that Government bodies other than Government companies owe huge sums of money to the Petitioners. However, since they were exempt from IBC owing to the status of statutory authorities or government departments, no action could be initiated against them. In any case, the moment application was filed to challenge an award under Section 34 and/or Section 37 of the Act, such debt became a 'disputed debt' and proceedings were in any case not maintainable under IBC. On the other hand, it was also contended by the Petitioner that demand notices under the IBC were being issued against Petitioner for non payment of it's dues in relation to aforesaid projects for supplying men, machinery and material for the projects.

For the purposes of deciding the writ petition, Hon'ble Supreme Court of India took note of it's earlier judgments including *BCCI v Kochi Cricket Pvt. Ltd. (2018) 6 SCC 287,* Justice Srikrishna Committee Report and Statement of Objects and Reasons to the Arbitration and Conciliation (Amendment) Act of 2015 and 2019.

Firstly, Hon'ble Supreme Court considered the issue whether filing up of an application under section 34 of the Act (i.e. challenge of award) leads to automatic suspension of the award under section 36 of the Act.

In this regard, Hon'ble Supreme Court of India looked into it's earlier decision of *National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr. (NALCO)* wherein it was observed that an award cannot be executed when challenged under Section 34. Hon'ble Supreme Court also looked into it's earlier decision in *Fiza Developers and Inter-trade Pvt. Ltd. v. AMCI (India) Pvt. Ltd. and Anr.(Fiza Developers)* wherein it was observed that filing of the application under section 34 of the Act itself lead to stay of the enforcement of the award.

After analyzing the aforesaid decisions of NALCO and Fiza Developers, Hon'ble Supreme Court in the present case observed that *"To state that an award when challenged Under Section 34 becomes unexecutable merely by virtue of such challenge being made because of the language of Section 36 is plainly incorrect. ….. When read with Section 35, all that Section 36 states is that enforcement of a final award will be under the Code of Civil Procedure, and in the same manner as if it were a decree of the Court."*

Hon'ble Supreme Court in the present case also observed that *"To read Section 36 as inferring something negative, namely, that where the time for making an application Under Section 34 has not expired and therefore, on such application being made within time, an automatic-stay ensues, is to read something into Section 36 which is not there at all. Also, this construction omits to consider the rest of Section 36, which deals with applications Under Section 34 that have been dismissed, which leads to an award being final and binding (when read with Section 35 of the Arbitration Act, 1996) which then becomes enforceable under the Code of Civil Procedure, the award being treated as a decree for this purpose."*

Accordingly, Hon'ble Supreme Court observed that there cannot be automatic stay of an award on filing of application under section 34 and the law as laid down by it's earlier decisions of NALCO and Fiza Developers was incorrect. Hon'ble Supreme Court noted that correct position of law is that Section 36 even as originally enacted when read with Section 35 of the Act, leads to treating the award as if it were a decree of the court under the Code of Civil Procedure.

Thereafter, Hon'ble Supreme Court noted that the above position has already been stated by the Hon'ble Supreme Court in it's earlier decision in the *BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287* (BCCI) and accordingly observed that the law laid down in it's earlier BCCI judgment was correct law. Hon'ble Supreme Court looked into the following relevant portions of the BCCI judgment to delineate the correct position of the law relating to applicability of 2015 Amendment Act with

reference to proceedings under section 34 read with section 36 of the Act.

Hon'ble Supreme Court looked into the 246th Law Commission Report wherein it had proposed replacing section 36 of the Act and also noted the following relevant paras of 246th Law Commission Report as considered in the BCCI case:

"43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition Under Section 34 has expired or after the Section 34 petition has been dismissed. In other words, the pendency of a Section 34 petition renders an arbitral award unenforceable. The Supreme Court, in National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. [National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., MANU/SC/1082/2003 : (2004) 1 SCC 540] held that by virtue of Section 36, it was impermissible to pass an order directing the losing party to deposit any part of the award into Court. While this decision was in relation to the powers of the Supreme Court to pass such an order Under Section 42, the Bombay High Court in Afcons Infrastructure Ltd. v. Port of Mumbai [Afcons Infrastructure Ltd. v. Port of Mumbai, MANU/MH/1398/2013 : (2014) 1 Arb LR 512 (Bom)] applied the same principle to the powers of a court Under Section 9 of the Act as well. Admission of a Section 34 petition, therefore, virtually paralyses the process for the winning party/award creditor."

"45. In order to rectify this mischief, certain amendments have been suggested by the Commission to Section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application Under Section 34."

Hon'ble Supreme Court also noted that as per decision in BCCI case, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the 2015 Amendment Act. On the basis of aforesaid reasoning and discussions, Hon'ble Supreme Court observed that the amended Section 36, being clarificatory in nature, merely restates the position that *"the unamended Section 36 does not stand in the way of the law as to grant of stay of a money decree under the provisions of the Code of Civil Procedure".*

Thereafter, Hon'ble Supreme Court looked into the issue as to whether the 2019 Amendment Act removes the basis of the BCCI judgment.

In this regard, Hon'ble Supreme Court took note of it's earlier decision of BCCI case wherein it was stated that *"The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons.*

Hon'ble Supreme Court in BCCI case also stated that *"It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."*

Given the BCCI judgment and aforesaid discussions, Hon'ble Supreme Court observed that 2019 Amendment Act removes the basis of BCCI judgment by retrospectively omitting Section 26 altogether from the very day when it came into force.

Thereafter, Hon'ble Supreme Court examined the constitutional validity of the introduction of Section 87 into the Act, and deletion of Section 26 of the 2015 Amendment Act by the 2019 Amendment Act in the light of Articles 14, 19(1)(g), 21 and Article 300-A of the Constitution of India.

For the purposes of deciding the constitutional validity of section 87 into the Act, Hon'ble Supreme Court took note of series of events which led to the 2019 Amendment Act particularly the Justice Srikrishna Committee Report which recommended the introduction of Section 87 owing to the fact that there were conflicting High Court judgments on the scope of the 2015 Amendment Act.

In this regard, Hon'ble Supreme Court in the present case observed that the Justice Srikrishna Committee Report was dated 30.07.2017, i.e. long before BCCI decision came and observed that *"Whatever uncertainty there may have been because of the interpretation by different High Courts has disappeared as a result of the BCCI judgment (supra), the law on Section 26 of the 2015 Amendment Act being laid down with great clarity. To thereafter delete this salutary provision and introduce Section 87 in its place, would be wholly without justification and contrary to the object sought to be achieved by the 2015 Amendment Act, which was enacted pursuant to a detailed Law Commission report which found various infirmities in the working of the original 1996 statute. Also, it is not understood as to how "uncertainty and prejudice would be caused, as they may have to be heard again", resulting in an 'inconsistent position'. The amended law would be applied to pending court proceedings, which would then have to be disposed of in accordance therewith, resulting in the benefits of the 2015 Amendment Act now being applied. To refer to the Srikrishna Committee Report (without at all referring to this Court's judgment) even after the judgment has pointed out the pitfalls of following such provision, would render Section 87 and the deletion of Section 26 of the 2015 Amendment Act manifestly arbitrary, having been enacted unreasonably, without adequate determining principle, and contrary to the public interest sought to be subserved by the Arbitration Act, 1996 and the 2015 Amendment Act. This is for the reason that a key finding of the BCCI judgment (supra) is that the introduction of Section 87 would result in a delay of disposal of arbitration proceedings, and an increase in the interference of courts in arbitration matters, which defeats the very object of the Arbitration Act, 1996, which was strengthened by the 2015 Amendment Act."*

Based on aforesaid reasons, Hon'ble Supreme Court of India in the instant case held that the deletion of Section 26 of the 2015 Amendment Act, together with the insertion of Section 87 into the Act by the 2019 Amendment Act, is struck down as being manifestly arbitrary under Article 14 of the Constitution of India. Hon'ble Supreme Court further held that the BCCI judgment will therefore continue to apply so as to make applicable the salutary amendments made by the 2015 Amendment Act to all court proceedings initiated after 23.10.2015.

As regards, constitutional challenge to the IBC, Hon'ble Supreme Court of India noted that *"NHAI is a statutory body which functions as an extended limb of the Central Government, and performs governmental functions which obviously cannot be taken over by a resolution professional under the Insolvency Code, or by any other corporate body. Nor can such Authority ultimately be wound-up under the Insolvency Code."* Accordingly, Hon'ble Supreme Court observed that the definition of "corporate person" in Section 3(7) of the IBC cannot be read in a manner to include NHAI and other similar entities as statutory bodies functioning under the limb of Central Government.

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