

Q u a r t e r l y



Indian Council of Arbitration

Vol XLVII / July - September 2010

Transforming India into a Global Arbitration Venue

Statement of Purpose

The quarterly is published by Indian Council of Arbitration. The quarterly is distributed free of cost to its members. It is also available online at www.icaindia.co.in

Speeches, articles do not reflect the views of the members of the Editorial Board of ICA. The object of this quarterly is to provide perception on the practices directly or indirectly related to contemporary arbitration issues and in the same way to contribute to the development of these practices.

ICA welcomes the contribution on issues relevant to the commercial arbitration and other Alternative Dispute Resolution Mechanisms. The same shall be sent to:

The, Editor
Indian Council of Arbitration,
Federation house Tansen Marg, New Delhi
or can be sent by email:
ica@ficci.com, ica@airtelmail.in

Note: The submission of article by the publisher shall imply automatic transfer of all the copyrights of the author to the publisher of quarterly.

Editorial Board

Mr. N.G.Khaitan

Mr. P. C. Markanda

Mr. D. M. Popat

Mr. O. P. Goel

Dr. Kirti Dave

Mr. Yakesh Anand

Mr. Arun Chawla

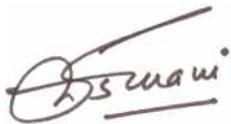
Editor

Ms. Shazia Usmani

From Editor's desk

One of the major changes which have come around 2010 is an age old dispute of countries like Slovakia and Croatia who have agreed to resolve their border dispute through arbitration. Since their independence from Former Yugoslavia in 1991, Slovakia and Croatia were in dispute over the ownership of the coastline of kilometers near Slovenia's Piran Bay port. Recently a referendum was moved by Slovenia to approve or reject the border arbitration agreement. Arbitration agreement was signed in November 2009 by Slovenian Prime Minister Borut Pahor and his Croatian Counterpart Jadranka Kosor to solve their border dispute through International arbitration. The Croatian Parliament adopted law to ratify the agreement, while Slovenia resorted to referendum. Although the final result of the referendum is officially not announced, but the preliminary result show that it is in favor of the said agreement. Slovenia hopes to win the disputed coastline through international arbitration and gain a narrow marine outfall. Through this it is clear that present day system cannot ignore the fact that proceedings and award of arbitration are not powerless and relief granted go further deep into the root. Border dispute with Slovenia was one of the main obstacles for Croatia's process of EU accession . Slovenia as an EU member announced it would no long hinder Croatia from joining EU only after the two countries reached the agreement on international arbitration.

The international law of arbitration still stands not only as alternative dispute mechanism but also paving way for international community to think that no area is untouched by arbitration. It is we who have to change the approach.



Ms. Shazia Usmani
Editor

Executive Summary

THE QUARTERLY AIMS AT EXPRESSING AND PROVIDING ITS READERS THE CRITICAL ISSUES IN COMMERCIAL ARBITRATION

The first article-A Round table Justice Through Lok Adalat (People's Court)- A Vibrant-ADR in India talks about the need of expeditious, inexpensive and lesser complex system of dispute resolution, which is the need of mankind in this hour. The author expresses that ADR is neatly worked out in concept of Lok Adalat, which is an essential tool in securing justice and equity. The author has given emphasis for promotion of ADR through state level, district level and Taluka legal agencies. The article is authored by Dr. Justice Jitendra N Bhatt, Chief Justice (Retd.).

The second article - Consultation on amending the Indian Arbitration Act. The author expresses his view that prior to proposing any amendment to the Arbitration Act, it is necessary to take into account what China and other fast developing countries have done to safeguard its citizens and Corporates. The article is authored by Mr. Ashok Sancheti, Senior solicitor.

Compensation for delay in work contract. The author Mr. P. C. Markanda, Senior Advocate, Punjab & Haryana High Court is distressed by the state of delays in the work contract. The author opines that in this globalized and modernized era of developments, delays in construction of projects, or contracts culminated into loss of time, wastage of resources and goes against national interest. The author has spelt out factors leading to delay on account of breaches of contract.

Scope of Judicial Intervention in Arbitration and Conciliation Act 1996- the author emphasis need of reducing and limiting the scope of judiciary in arbitration, keeping in mind that the Arbitration Act was formulated as a simple, less technical and more responsible method of dispute resolution. He further opines for minimization of judicial intervention to uphold the UNICTRAL model which aims at faster speedier resolution. The article is authored by Abhinay Kapoor, Student 3rd Year, Hidayatullah National Law University.

CONTENTS

Item	Page
A ROUND TABLE JUSTICE THROUGH LOK ADALAT (PEOPLE'S COURT) <i>Dr. Justice Jitendra N Bhatt</i>	2
CONSULTATION ON AMENDING THE INDIAN ARBITRATION ACT <i>Mr. Ashok Sancheti</i>	6
COMPENSATION FOR DELAY IN WORK CONTRACT <i>Mr. P.C. Markanda</i>	12
SCOPE OF JUDICIAL INTERVENTION IN ARBITRATION AND CONCILIATION ACT 1996 <i>Mr. Abhinay Kapoor</i>	24

A ROUND TABLE JUSTICE THROUGH LOK- ADALAT (PEOPLES' COURT) A VIBRANT-ADR-IN INDIA

*Dr. Justice Jitendra N. Bhatt**

The emergence of Alternative Dispute Resolution has been one of the most significant movements as a part of Conflict Management and judicial reform, and it has become a global necessity. Lawyers, law students, law makers and law interpreters have started viewing disputes resolution in a different and divergent environmental light and with many more alternatives to the litigation. While ADR, now, envisioned and ingrained in the conscience of the Bench and the Bar, is an integral segment of modern practice.

The Harvard Business School has also added Dispute Resolution as a New course a few years ago as a part of its curriculum. The American Bar Association has also created a Section of Dispute Resolution. In Justice Delivery System ADR is employed since the litigative journey in the court of law has become exorbitantly expensive, long time consuming, cumbersome, dilatory, complex and also stressful, on account of variety of reasons which may not be deeply probed in this subject at this stage.

Resolution of Disputes is an essential characteristic for societal peace, amity, comity and harmony and easy access to justice. It is evident from the history that the function of resolving dispute has fallen upon the shoulders of the powerful ones. With the evolution of modern States and sophisticated legal mechanisms, the Courts run on very formal processes and are presided over by trained adjudicators, entrusted with the responsibilities of resolution of dispute on the part of the State. The processual formalization of justice gave tremendous rise of consumption of time and high number of cases and resultant heavy amount of expenditure. Obviously, this led to a search for an alternative complementary and supplementary mechanism to the process of the Traditional Civil Court for inexpensive, expeditious and less cumbersome and also less stressful resolution of disputes.

As such ADR has been, a vital and vociferous, vocal and vibrant part of our historical past. Undoubtedly, Lok Adalat (People's Court) concept and philosophy is an innovative Indian contribution to the world Jurisprudence. It has very deep and long roots not only in the recorded history but even in pre-historical era. It has been proved to be very effective alternative to litigation. Lok Adalat is one of the fine and familiar fora, which has been playing an important role in settlement of disputes.

This movement will be further strengthened with more and more Government litigation and disputes by and against Government, going to Lok Adalat since the Government is the **LARGEST** litigant in this country. This olden but now legalized proven vetripotent and vital mechanism of ADR is covered by the statutory umbrella, the Legal Services Authorities Act,

**Chief Justice (Retd.), Chairman, Gujarat State Law Commission, Gandhinagar-382010*

1987, which has given it a legal sanction and made it more effective and enforceable in different States. Its process is voluntary and works on the principle that both parties to the disputes are willing to sort out their disputes by amicable solutions.

The national Legal Services Authorities constituted under the Legal Services Authorities Act, 1987, acts as the Apex and Nodal Agency for laying down policies and principles for making legal service available under the Act, the ground level operations of “**Lok Adalats**” are handled by State Level, District Level and Taluka Level agencies constituted in the respective States. Lok Adalat settlement is binding like an order, decree, judgments or award of a “Court”, It is executable and non-appealable. It brings an end only in one forum or stage and finality is achieved.

There is considerable evidence that ADR was widely used in ancient India, Rome and Egypt for the settlement of varied disputes. ADR's growth has long been an integral part of world's landscape, reflecting a sense that system of justice based on technical rules and procedures and formal processes was inefficient, insufficient and incomplete response to the needs and expectations of mankind. The institution of Lok Adalat in India as the very name suggests means People's Court.

In this respect, traditional system of justice is not enough for the larger societal interest and for the people committed to peace and inquisitive of expeditious, inexpensive and less complex settlement of their disputes. Therefore, even in the sacred texts of the major religious and also reflections of words of great Philosophers and Thinkers are pertinent and evident. Aristotle in “Rhetoric and on Poetics” said, “Arbitration was introduced to give equity its due weight”. Cicero has, also said that for a larger assessment of fairness processual justice many times would march over the substantive justice. He has also advocated the process of arbitration. Blackstone in his famous “Commentaries on the Law of English” has observed about the strict justice and formal rules on process and the requirement of adopting principles of process to deal with equities which matters in the controversy.

George Washington, the first President of the United States, borrowing from his experience as an arbitrator of private disputes in the 1770s, crafted it into his last will and testament:

“I hope and trust, that no disputes will arise concerning them; but if, contrary to expectations, of the usual technical terms, or because too much or too little has been said on any of the Devices to be consonant with law, My will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and understanding; two to be chosen by the disputants-each having a choice of one-and the third by those two. Which three men thus chosen, shall, unfettered by law or legal constructions; declare their Sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.”

Abraham Lincoln has observed:

“Discourage Litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often a real loser- in fees, expenses, and wastes of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Mahatma Gandhi, the father of Nation, has said:

“I had learnt the true practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven as under. The lesson was so indelibly burnt into me that the large part of my time, during the twenty years of my practice as a lawyer, was occupied in bringing about private compromises of hundreds of cases. I lost nothing, thereby not even money, certainly not my soul.”

The common man has started looking upon legal system as a foe and not as a friend. For him, law is always taking something away. When we go to Court, we know that we are going to win all or lose all. Whereas, when we go to any method of ADR or for informal settlement with different expectations, we know that we may not get all that we want, but we will not lose everything. In India, arbitration and domestic or in-house tribunals are alternatives to formal Courts. However, tribunalisation of justice has yet not, successfully, clicked to prove its true mettle. Many a times, experience has shown that the Tribunals often end up as a dead cycles of litigative voyage in the courts and resultant lengthening of the life of dispute resolution process.

While we encourage ADR mechanism, we must also, create a culture of settlement of disputes through such Mechanisms. Various methods have been experimented and accepted as viable methods in different situation in different environments in different countries. The ancient concept of settlement of dispute through mediation, negotiation or through arbitral process known as “ People's Court Verdict” or decision of “Nyaya-Panch” is conceptualized and institutionalized in the philosophy of Lok Adalat.

Some people equate Lok Adalat to conciliation or mediation, some treat it with negotiations and arbitration. Those who find it different from all these, call it “People's Court”. It involves people who are directly or indirectly affected by dispute resolution. It is rightly said participation, accommodation, fairness, expectation, voluntaries, neighbourliness, transparency, efficiency and lack of animosity are undoubtedly, all important characteristics of this unique Indian institution rooted in India's history and culture and environments.

The concept of Lok Adalat was pushed back in the oblivion in last few centuries before independence and particularly during British Regime. Now, this concept has, once again, been rejuvenated. It has, once again, become very popular and familiar amongst litigants. The Legal Services Authorities Act, 1987, pursuant to the Constitutional mandate in Article 39-A of the Constitution of India, contains various provisions for settlement of disputes through Lok Adalat. Thus, the ancient concept of Lok Adalat has now, statutory basis This is the system which has deep roots in Indian Legal History and its close alliance to the culture and perception of justice in Indian ethos.

The finest hour of justice is the hour of compromise when parties after burying their hatchet reunite by a reasonable and just compromise. This Indian- institutionalized, indigenised and now, legalized concept for settlement of dispute promotes the goals of our Constitution. Equal justice and free legal aid are hand in glove. It is rightly said, sine the Second World War, the greatest revolution in the law has been the mechanism of evolution of system of legal-aid which includes an ADRM. The statutory mechanism of Legal Services includes concept of Lok Adalat in Legal Services Authorities Act.

Indian socio-economic conditions warrant highly motivated and sensitized legal service programmes as large population of consumers of justice (Heart of the Judicial Anatomy) are either poor or ignorant or illiterate or backward and, as such, at a disadvantageous position. The State, therefore, has a duty to secure that the operation of legal system promotes justice on the basis of equal opportunity. Alternative Dispute Resolution is, neatly, worked out in the concept of Lok Adalat. It has provided an important juristic technology and vital tool for easy and early settlement of disputes.

The Gujarat State Legal Services Authority is on the forefront, in the whole of India, on the road-map of Legal Services and Lok Adalat, through this indigenous and hybrid mechanism and method, only in last eight years, more than 20,37,910 cases out of 22, 64,797 cases dealt with of different types have been amicably settled to the satisfaction of parties only in Gujarat (as on 01-04-2005).

Law and system of justice are not like antique to be taken down, dusted, admired and put back on the shelf, but it is rather like a vigorous tree which has its roots in history and takes on new graft, puts out new sprouts and occasionally drops dead wood. It is a dynamic instrument fashioned for the purpose of achieving ameliorative and harmonious adjustment, and settlement of disputes arising out of human relations by eliminating social tensions and conflicts and it must, therefore, change with changing socio-economic conditions.

The concept of Lok Adalat is no longer an experiment in India, but it is an effective and efficient, pioneering and palliative alternative mode of dispute settlement which is accepted as a viable, economic, efficient, informal, informal, expeditious form of resolution of disputes. It is a hybrid or admixture of mediation, negotiation, arbitration, conciliation and participation. The true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counselors and conciliators. It is a participative, promising and potential ADRM. It revolves around the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving at amicable, immediate consensual and peaceful settlement of the disputes.

We must be ever mindful that *“Yesterday is not ours to recover, but tomorrow is ours to win or lose.”* And, therefore, let us get together, stand united, and strengthen our Bench and Bar's irrevocable unique partnership and make collaborative, concerted, cooperative, creative, collective and cohesive endeavors in popularizing, proliferating and pioneering, concept and philosophy of important institution- Alternative Dispute Resolution Mechanism- so as to strengthen our pluralistic Democratic values, Rules of Law and thereby invigorate the commandment, *“Justice shall never be rationed”*.

CONSULTATION ON AMENDING THE INDIAN ARBITRATION ACT

Ashok Sancheti*

Prior to proposing any amendments to the Arbitration Act, the Law Ministry has initiated a consultative process and is seeking views of various stake holders such as judges, lawyers, arbitration institutions and the public at large. The idea behind the proposed amendments is to institutionalize the arbitration process in India.

It is widely assumed that many parties select arbitration to resolve their disputes at least in part because an arbitral award offers an effective and early end to the dispute in a way that a court judgment does not. Increased finality, so the argument goes, brings with it corresponding advantages in speed and cost savings.

However, speed and finality come at a price: "The sacrifice that arbitration entails in terms of legal precision is recognized . . ." As a result, however desirable it may seem at first, finality can be a universally positive quality in dispute resolution only if one of two basic assumptions is true. First, finality would always be an asset if arbitrators, unlike distinguished judges, never made mistakes. Even the most avid proponent of arbitration is unlikely to make such a claim.

The general preference for arbitration in *international* transactions has nothing to do with the advantages of speed and cost-saving, which are often emphasized at arbitration conferences. The main reason why we see arbitration clauses in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party's "home" court.³ In fact the costs are always higher and speed is seldom achieved.

The specificity of international transactions has led many countries to adopt separate statutes for international arbitration. Belgium, France, and Switzerland, as well as places that have adopted the UNCITRAL Model Arbitration Law such as Canada, Scotland and Hong Kong, all provide a more *laissez-faire* framework for international arbitration.

It would be helpful to study the amendments being proposed to the Federal Arbitration Act of the United States of America.

Proposed Amendments to the Federal Arbitration Act

Legislation is pending in the US Congress to amend the Federal Arbitration Act, While Congress's intent is to protect certain individuals with inferior bargaining power from being

* Senior Solicitor and Head of Practice, Morgan Walker Solicitors, London

¹ *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972).

² William H. Knull, III and Noah D. Rubins, "Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?" *American Review of International Arbitration*, 2000/Vol. 11 No. 4 p. 531,

³ Martin Hunter. "International Commercial Dispute Resolution: The Challenge of the Twenty first Century." 16 ARB. INT'L 379, 382 (2000)

coerced into arbitration, the proposed legislation could potentially undercut the desirability of arbitration as a preferred dispute resolution method between businesses.

On July 15 2008 a subcommittee of the US House of Representatives approved a draft bill, the Arbitration Fairness Act of 2007, to amend Section 2 the Federal Arbitration Act. Section 2 of the Federal Arbitration Act, currently provides that any "written provision" evidencing an intention to submit existing or future disputes to arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".

The bill would amend Section 2 of the Federal Arbitration Act in two significant respects. First, it would invalidate any pre-dispute arbitration agreement that required parties to arbitrate (i) employment, consumer or franchise disputes, or (ii) disputes arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. Second, the proposed legislation provides that "the validity or enforceability of an agreement to arbitration shall be determined by the court, rather than the arbitrator".

The bill also indicates that mandatory arbitration "*undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions*", and that mandatory arbitration is "*a poor system for protecting civil rights and consumer rights because it is not transparent*"? Ultimately, the bill's findings conclude that: "*while some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed federal policy favouring arbitration over the constitutional rights of individuals.* "

The following clause has been proposed as an amendment to the Federal Arbitration Act for setting aside as exclusive recourse against arbitral award (§534: Award Vacatur) -

"In any of the following cases, the United States court in the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

- i. A party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the applicable law; or*
- ii. 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*
- iii. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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 award which contains decisions on matters not submitted to arbitration may be set aside; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or*

⁴ HR 3010, 110th Congress Section 2(5), (6); S 1782, 110th Congress Section 2(5), (6).

- iv. *The award was procured by fraud, bias or corruption; or*
- v. *The award is in conflict with international public policy or the subject matter of the dispute is not capable of being submitted arbitration. "*

General and Institutional Bias in International Arbitration

In our experience, though not as a general rule, the arbitrators appointed by western institutions such as the ICC Paris, LCIA, LCAA, LME etc. are not necessarily free from bias and prejudice. Such bias is sometimes predominantly seen against parties from Asian and African countries. It is also reflected in the arbitral awards, though no statistics are available, Indian companies are seldom successful and normally face an award to pay at the end of long expensive exercise.

The cardinal principle in determining the tests of bias has been the oft quoted dictum of Lord Hewart in *R. v Sussex Justices Ex p. McCarthy*⁵ – "justice should not only be done but should manifestly and undoubtedly be seen to be done".

Prior to the landmark decision of the House of Lords in *R. v Gough*⁶ there was no judicial consensus over the test to be applied in cases of apparent bias. In *Gough*, Lord Goff reviewed the earlier cases and discerned two main tests that had commonly been applied by English courts- first, whether there was a real danger of bias and secondly, whether a reasonable person might reasonably suspect bias.

The real danger test was applied to arbitrators in *Laker Airways Inc v FLS Aerospace Ltd.*⁷ Here both the arbitrator appointed by the respondent and the barrister for the appellant came from the same barristers' chambers. The court held that the test of bias was not satisfied in this case given the peculiar functioning of barristers' chambers, where even though the barristers may share certain resources like libraries and staff, they are essentially self employed and work independently. The court relied on s.24 of the English Arbitration Act 1996 which, according to the court, reflected the real danger test. It merely required the arbitrator to be "impartial" and not necessarily independent, unless the lack of independence gives rise to justifiable doubts as to impartiality. The challenge had been made by an American party which was not accustomed to the English practices. The court viewed the matter from the perspective of a reasonable Englishman and not a reasonable American. It may be argued that from the perspective of the latter, an association with the same barristers' chambers may appear to give rise to a real possibility of bias.

The following cases are illustrations of bias in International Arbitrations:

1. In 1982, the American company Creighton Ltd was contracted by the state of Qatar to build a hospital in Doha, the Qatari capital. In 1986, the state expelled Creighton from the building site, alleging unsatisfactory performance. Creighton challenged its expulsion and claimed compensation. In June 1986, the parties agreed that the state of Qatar would appoint a consultant and a 'high authority' to deal with Creighton's

⁵ [1924] 1 K.B. 256

⁶ [1993] 2 All E.R. 724

⁷ [1999] 2 Lloyd's Rep. 45.

first two claims. However, the agreement did not provide a time limit for Qatar to make these appointments, nor whether it would be bound by the opinion of the appointees.

In 1987, as Qatar had failed to make any appointment, Creighton initiated proceedings before the ICC according to the arbitration clause in the contract. Because the contract did not specify a place of arbitration, the ICC decided to conduct the arbitration in Paris. The tribunal made three awards in 1989, 1991 and 1993 which ordered Qatar to make the appointments within 90 days and to pay Creighton damages, interest and attorney's fees totalling over \$8 million.

Qatar then filed an application before the French courts to set aside these awards. It argued that one of the arbitrators was biased as he had helped Creighton to find a lawyer in Qatar before the arbitration, and had been appointed as an arbitrator in another dispute involving Creighton and one of its subcontractors. In a judgement of March 16 1999, the French Supreme Court rejected Qatar's arguments and confirmed the enforceability of the awards.

2. *ASM Shipping Limited v Bruce Harris & ors* [2007] EWHC 1513 concerned an application under section 24 of the English Arbitration Act of 1996 for the removal of the two remaining arbitrators in circumstances where the third arbitrator stood down for apparent bias. The judge did not accept that there is an invariable rule that one member of a tribunal tainted with bias will affect the rest of the tribunal and dismissed the application.
3. The WTO rulings show how the WTO Agreement on subsidies and the WTO Dispute Settlement Processes can enable industrialized countries to get around rules and continue support to industry, while developing countries can't even "create a level playing field" for their enterprises who have to borrow (for export financing) in international markets which load on a heavy premium against them.

The Peoples Republic of China (PRC) does not wholly recognise arbitrations held under western institutions. Under the PRC's arbitration law, an arbitration agreement in the PRC is valid only if arbitration takes place under one of the PRC's arbitration commissions. (Most well known of these include The China International Economic and Trade Arbitration Commission (CIETAC) and the Shanghai Arbitration Commission.).

Any amendment to the Indian Arbitration Act should take into account what China as another fast developing country has took upon itself to safeguard its own citizens and corporates.

It is inevitable that particularly international arbitrators will have had contact with solicitors and counsel in other cases and may belong to the same law society, bar association or professional or academic institutions as them or even various witnesses. In England, the fact that an arbitrator has previously been instructed to act for or against either party, solicitor or counsel in the case before him will not normally suffice on its own to found a charge of bias.

Judicial Intervention in Arbitral Awards in India

In January 2008 the Supreme Court of India held in *Venture Global Engineering v Satyam Computer Services Limited*⁸ that an arbitration award rendered in London under LCIA rules could be challenged under the Act on the grounds of public policy. The Indian courts were held to be entitled to set aside foreign arbitral awards unless the parties had by express or implied agreement excluded Part 1 of the Act. The Supreme Court also held that if an "intimate and close nexus to India and its laws" is shown, then a party cannot be deprived of its right to challenge the award in India (even if the arbitration is held outside India).

In 2005, the Supreme Court defined the scope and limits of court intervention by clarifying sections 8, 11 and 45 of the Act. Although differences exist between sections 8 and 45, prima facie section 8 provides that, if a party begins court proceedings for breach of an arbitration agreement, the court shall (upon application of the other party) stay its own proceedings and refer the parties to arbitration. Section 45 provides that, in the same situation, the judicial authority shall refer the parties to arbitration. Section 11 provides that the chief justice of a high court or the Supreme Court shall appoint the arbitral tribunal if the parties have failed to agree on an appointment mechanism, or failed to perform it.

In *SBP and Co v Patel Engineering Ltd*⁹, it was held that appointments under section 11 are final and that the Chief Justice - or the designated judge - had authority to determine the validity of arbitration agreements. Therefore, the arbitration agreement could provide that litigating a matter covered by the arbitration agreement breaches that agreement; and could also - possibly - provide that the parties agree to challenge the validity of the agreement solely before the arbitral tribunal and not before a court. Specifying an appointing authority in their arbitration agreement also removes the opportunity for one party to ask the Indian courts to appoint the arbitrator when they really wish to contest the agreement's validity.

In the above referred case the Supreme Court of India (in a decision rendered by a Bench of seven Judges) held that the nature of power conferred on the Court under Section 11 of the Act is judicial (and not administrative) in nature. Accordingly, if parties approach the Court for appointment of arbitral tribunal (under Section 11) and the Chief Justice pronounces that he has jurisdiction to appoint an arbitrator or that there is an arbitration agreement between the parties or that there is a live and subsisting dispute to be referred to arbitration and the Court constitutes the Tribunal as envisaged, this would be binding and cannot be re-agitated by the parties before the arbitral tribunal.

In our view:

1. the authority and powers of the Indian Courts should not be curtailed particularly in respect of reviewing international arbitration awards where the rights of Indian companies may have been seriously prejudiced by a bad decision of a biased arbitrator and the company is left without recourse to appeal that decision. The misuse of court intervention post arbitral award can be curtailed by requiring the party challenging the award to deposit in court the total sum awarded. If the party

⁸ AIR 2008 SC 1061

⁹ (2005) 8 SCC 618

has financial difficulties, the court should have discretion to allow alternative security or not require security in the interest of justice. The challenge to international arbitral awards should be dealt by commercial courts in a strictly time bound manner.

2. The court should have power to rectify error of fact,
3. When the contract involving an Indian party does not clarify the seat of arbitration, the Act should provide that India should be the default seat.
4. When the contract involving an Indian party stipulates a floating arbitration, the Act should provide the seat of arbitration to be India.
5. The Act should provide the place in India where the international arbitration would be held. This could either be Delhi or Goa where the proposed international Arbitration centre is to be located.

Conclusion

In our view the government of India (Ministry of Law) should invite inputs from Indian corporate entities who have participated in International arbitrations, counsels and solicitors who have represented Indian parties in International arbitrations before concluding its consultation for the amendment of Indian arbitration act.

COMPENSATION FOR DELAY IN WORKS CONTRACTS

*P.C. Markanda**
Senior Advocate

Naresh Markanda
Senior Advocate

Rajesh Markanda
Advocate

In this fast developing era, thousands of works contracts are being awarded and executed in India at any given time. It is, however, noticeable that it is very rare that any of these projects is completed within the allotted time, more particularly when one of the parties is the Government or a PSU or a semi-Government undertaking or the like. This is despite the fact that it is well understood that it is neither in the interest of the Employer or the Contractor or the Nation that the works should be delayed. The reasons for delay are many and all of them are well-known and documented. Sometimes delay occurs on account of breaches committed by the Employer and at other times due to the Contractor. On occasions, delays occur for which neither party is responsible. Where the delay is due to the Contractor, the Employer normally provides an in-built mechanism in the contract for realization of damages¹ in the form of liquidated damages. Where delay is due to the Employer, a Contractor has to seek his remedy by seeking compensation or damages either in a court of law or before the Arbitral Tribunal, if the contract provides an arbitration clause.

Broadly speaking, factors leading to delay on account of breaches of contract committed by the Employer include: (a) Delay in handing over unhindered possession of site; (b) Delay in appointment of Engineer/Architect; (c) Delay in supplying instructions/drawings for carrying out works; (d) Delay in supplying stipulated materials; (e) Unnecessary interference in the working of the contractor; (f) insufficiency of funds etc. These factors are illustrative and not exhaustive.

Where prevention by the Employer is a default to do something which is a condition precedent to the Contractor's obligation to do the work, the Contractor may treat the prevention as repudiation of the contract, but in other cases where prevention is only partial, the contractor can complete the work and seek his remedy in damages.¹ In *G.M. Northern Rly. Vs. Sarvesh Chopra*,² it has been held as follows:

“In our country question of delay in performance of the contract is governed by Sections 55 and 56 of the Indian Contract Act, 1872. If there is an abnormal rise in prices of material and labour, it may frustrate the contract and then the innocent party need not perform the contract. So also, if time is of the essence of the contract, failure of the employer to perform a mutual obligation would enable the contractor to avoid the contract as the contract becomes voidable at his option. Where time is “of the essence” of an obligation, *Chitty on Contracts* (28th Edn., 1999, at p. 1106, para 22-015) states

* Senior Advocate, High Court, Punjab and Haryana

¹ *Holme v. Guppy*, (1838)3 M&W 387; *Mackintosh v. Midland Counties Rly. Co.*, (1845)14 M&W 548; *Lawson v. Wallasey Local Board*, (1883)48 LT 507; *Emden's Building Contracts & Practice*, 8th Ed., p. 243.

² (2002)4 SCC 45: AIR 2002 SC 1272

“a failure to perform by the stipulated time will entitle the innocent party to (a) terminate performance of the contract and thereby put an end to all the primary obligations of both parties remaining unperformed; and (b) claim damages from the contract-breaker on the basis that he has committed a fundamental breach of the contract ('a breach going to the root of the contract') depriving the innocent party of the benefit of the contract ('damages for loss of the whole transaction')”.

“If, instead of avoiding the contract, the contractor accepts the belated performance of reciprocal obligation on the part of the employer, the innocent party i.e. the contractor, cannot claim compensation for any loss occasioned by the non-performance of the reciprocal promise by the employer at the time agreed, “unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so”. Thus, it appears that under the Indian law, in spite of there being a contract between the parties whereunder the contractor has undertaken not to make any claim for delay in performance of the contract occasioned by an act of the employer, still a claim would be entertainable in one of the following situations: (i) if the contractor repudiates the contract exercising his right to do so under Section 55 of the Contract Act, (ii) the employer gives an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible, (iii) if the contractor makes it clear that escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance by the contractor in spite of delay and such notice by the contractor putting the employer on terms.”

Consequences of delays caused due to non handing over of site: While inviting tenders, the Employer invariably requires the Contractor to visit the site so as to acquaint himself about the state of the site and so as to acquire knowledge about availability of resources, materials etc. available at or near the site. This invitation to visit the site pre-supposes that the Employer is in possession of land for execution of the works. In actual practice, however, it is often observed, especially in Government contracts, that site is not made available to the Contractor at the start of the work or even within a reasonable time. In some cases, even the formalities for acquisition of land are not completed when contracts are awarded. Where land is available, it is often encumbered, either due to existence of utilities, temporary structures, religious structures, crops etc. In such circumstances, the Employer requires the Contractor to execute the works in bits and pieces and in an unplanned manner.

There is an implied undertaking on the part of the building owner that he will hand over the land for the purpose of allowing the Contractor to do that which he has bound himself to do.³ If the Employer does not hand over the site at the time fixed by the contract, or immediately if no time is so fixed or if he excludes the Contractor from the site, the Contractor is entitled to throw up the work and bring an action for damages,⁴ or he may after he obtains the site continue with the work and bring an action for damages for breach of contract later.⁵ In the

³*Freeman v. Hensler*, (1900)64 JP 260.

⁴*Roberts v. Bury Commissioners*, (1870) LR 5 CP 310.

⁵*Ibid*; *Miller v. London County Council*, [1934] All E.R. Rep 657; *Cowell v. Rosehill Racecourse Co. Ltd.*, (1937)56 CLR 605 at p. 621; *Uttar Pradesh State Electricity Board v. Om Metals & Minerals Ltd.*, 2000(3) RAJ 32 (SC).

case of partial prevention, i.e. where the breach by the Employer is not fundamental and does not entitle the builder to cease work, or, being fundamental, is not treated as a repudiation by the builder, the measure of the damage is the loss of profit arising from the reduced profitability or added expense of the work carried out and completed by the builder. It is, of course, quite possible for a continuing fundamental breach by the employer first to affect the profitability of work carried out, since the builder may not immediately elect to treat the contract as at an end, and then to give rise to a claim for loss of profit on the uncompleted work when he does so.⁶

If the contract is delayed due to breaches on the part of the Employer, the Contractor would be entitled to recover compensation for loss of opportunity to earn profit elsewhere – the reason being that, but for the delay, the Contractor would have received back his key men, plant, equipment and working capital which collectively form the contract organization, ready for employment elsewhere. It is convenient for this purpose to envisage the contract organization as a profit-earning machine. The claim will be governed by time corresponding to the delay caused by the breach and by the potential daily, weekly or monthly profit-earning capacity of the particular contract organization.⁷

A Contractor is entitled to claim extra expenditure incurred on establishment, overhead charges, machinery, T&P, shuttering and scaffolding if the period of contract is prolonged due to breaches of contract on the part of the Employer.⁸ A Contractor can also be compensated in the form of revision of rates for works executed after the stipulated date of completion of the work.⁹ An arbitrator is entitled to award damages on account of increase in the cost of construction material or extra expenditure on overheads and establishment charges because these are damages which a Contractor suffers due to lengthening of the period of performance beyond the time originally fixed in the contract.¹⁰ A contractor can also make a claim for under-utilization of his machinery, equipment etc. during the stipulated period of contract in the event of breach committed by the Employer.¹¹

A Contractor is entitled to escalation during the extended period of contract, especially if he is not responsible for delay in execution of works.¹² If there is an escalation clause in the contract, it would equally apply for the period during the extended period of contract as it did during the stipulated period.¹³ An arbitrator would, however, not be entitled to adopt an escalation formula different from that set out in the agreement for purposes of compensating the Contractor for delay in execution of contract.¹⁴

⁶ *Hudson's Building and Engineering Contracts*, 10th Ed., p. 596.

⁷ *Construction Contracts : Principles and Policies in Tort and Contract*, by I.N. Duncan Wallace, p. 116; *P.C. Sharma v. D.D.A.*, 2006(1) RAJ 521 (Del).

⁸ *Kishan Chand v. Union of India*, 1999(1) RAJ 510 (Del).

⁹ *Municipal Corp. of Greater Mumbai v. Jyoti Const. Co.*, 2003(3) Arb LR 489 : 2004(1) RAJ 165 (Bom); *Alkaram v. Delhi Development Authority*, AIR 1980 NOC 47 (Delhi); *State of Karnataka v. R.N. Shetty & co.*, AIR 1991 Kant 96: 1991(1) Arb LR 334 (DB); *P.M. Paul v. Union of India*, AIR 1989 SC 1034: 1989(2) Arb LR 215; *R.P. Builders v. Union of India*, 1992(1) Arb LR 391 (Del).

¹⁰ *Rawla Construction Co. v. Union of India*, ILR (1982) Delhi 44; *Puranchand Nangia v. Delhi Development Authority*, 2006(2) Arb LR 456 (Del).

¹¹ *Krishna Bhagya Jala Nigam Ltd. v. G. Harishchandra Reddy and another*, (2007)2 SCC 720: AIR 2007 SC 817

¹² *NPCC vs Rajdhani Builders*, 2006(3) RAJ 214: 2006(2) Arb LR 219 (Del); *State of Goa v. Jyoti Ltd.*, 1996(1) Arb LR 476 (DB); *Delhi Development Authority v. Wee Aar Constructive Builders*, AIR 2005 Del 140 (DB).

¹³ *State of Goa v. Jyoti Ltd.*, 1996(1) Arb LR 476 (Bom)(DB).

¹⁴ *Delhi Development Authority v. U. Kashyap*, 1999(1) Arb LR 88: 1999(2) RAJ 91 (Del)(DB).

The Employer cannot be allowed to take advantage of such wrongs which result into prolongation of contract. The party committing breach of contract cannot demand performance thereof by the other party and consequently cannot retain or forfeit the security money deposited for performance of the contract if there is delay in execution of works.¹⁵

Delay due to issue of drawings: It is the duty of the Employer to furnish to the Contractor the necessary drawings within a reasonable time.¹⁶ When a Contractor engages labour for levelling and dressing of the site of construction and the Employer commits breach of the contract by not making available drawings on time, it cannot safely be said that the Contractor was prevented from performing his part of the contract within the stipulated time. Under such circumstances, the Contractor would be entitled to award of charges incurred on idle labour.¹⁷ If the machinery, tools, plants and establishment of the Contractor remains idle on account of non-supply of drawings and designs, an award on this account was held to be fair and equitable.¹⁸ Where in the course of execution of a contract, drawings and designs are changed as a result of which there is an abnormal increase in the quantity of work, the contractor would be entitled to claim higher rate for extra works required to be executed.¹⁹

Law and order: In a contract awarded by the State Government, if a Contractor is prevented from completing the work due to failure of the Government to maintain law and order, he would be entitled to compensation for increased cost of execution.²⁰

Delay in supply of stipulated materials: In case of delay in supply of materials contracted for, the damages are to be assessed with reference to the date fixed for delivery and the Court must estimate the rate as best as it can. If it is proved that after rescission of the contract the claimant acting reasonably and as prudent man, he might have made a contract at better rates that could be considered a ground for abatement of damages and if after the breach of the contract, fresh contract is entered which is at the risk of the party other than the party claiming damages for he cannot make use of such a purchase for the purpose of enhancing his damages. The mere fact that it is somewhat difficult to accept the damages with certainty and precision does not relieve the defendant of his liability to pay the damages to the plaintiff to compensate for the loss. The plaintiff would be entitled to the benefit of every reasonable presumptions as to the loss suffered.²¹

Delay in making payments: If the Employer fails in the discharge of his primary duty to ensure regular and timely payments for work done, the Contractor deserves to be compensated in the form of damages for overstay at the site. In *Hyderabad Municipal Corporation Vs M. Krishnaswami Mudaliar*, AIR 1985 SC 607: (1985)2 SCC 9, it has been held as under:

“Where under the terms of the contract the work was to be completed by the contractor within a period of one year but due to financial difficulties – less budget having been provided for in the said year the contractor was requested by the authorities to spread

¹⁵ *Vakil Chand Bindal v. Delhi Development Authority*, 1999(2) Arb LR 553: 1999(3) RAJ 566 (Del).

¹⁶ *Kingdom v. Cox*, (1848) 5 C.B. 522.

¹⁷ *Ibid*; *C. Srinivasa Rao v. P. Ramakutty*, AIR 1999 Mad 317: 2000(1) RAJ 473.

¹⁸ *Krishna Bhagya Jala Nigam Ltd. vs G. Harishchandra Reddy*, (2007)2 SCC 720: AIR 2007 SC 817.

¹⁹ *State of U.P. v. Ram Nath International Const. Pvt. Ltd.*, AIR 1996 SC 782: (1996)1 SCC 18.

²⁰ *K.N. Sathyapalan vs State of Kerala*, (2007)13 SCC 43:2006(4) Arb LR 275: 2007(1) RAJ 211

²¹ *Union of India v. Indian Proofing & General Industries*, 1998 (Supp) Arb LR 181: 1998(3) RAJ 281 (Del).

over the work for two years more, i.e. to complete the same in three years but the contractor was agreeable to spread over the work for two years more as suggested on condition that extra payment will have to be made to him in view of increased rates of either material or wages and the Government did not intimate to the contractor that no extra payment on account of increased rates would be paid to him or that he will have to complete the work on the basis of original rates, and only when after completion of work the contractor submitted his final bill claiming 20 per cent extra over and above the rates originally agreed upon between the parties the Government stated that he was not entitled to increased rates, it was held that both in equity and in law the contractor was entitled to receive extra payment.”

Extension of time: Where the cause of delay is due to breach of contract by the Employer, and there is also an applicable power to extend the time, the exercise of that power will not, in the absence of the clearest possible language, deprive the Contractor of his right to claim damages for the breach.²² There can be no substance in the argument that the act of granting extension of time eliminates any right claim of damages due to prolongation of work, as the organization granting extension cannot be a judge of its own cause.²³

Computation of damages: In a very recent decision in *McDermott International Inc v. Burn Standard Co. Ltd.*,²⁴ the Supreme Court has held as under:

“Sections 55 and 73 of the Indian Contract Act do not lay down the mode and manner as to how and in what manner the computation of damages or compensation has to be made. There is nothing in Indian law to show that any of the formulae adopted in other countries is prohibited in law or the same would be inconsistent with the law prevailing in India.

“As computation depends on circumstances and methods to compute damages, how the quantum thereof should be determined is a matter which would fall for the decision of the arbitrator. We, however, see no reason to interfere with that part of the award in view of the fact that the aforementioned formula evolved over the years, is accepted internationally and, therefore, cannot be said to be wholly contrary to the provisions of the Indian law.

“A court of law or an arbitrator may insist on some proof of actual damages, and may not allow the parties to take recourse to one formula or the other. In a given case, the court of law or an arbitrator may even prefer one formula as against another. But, only because the learned arbitrator in the facts and circumstances of the case has allowed MII to prove its claim relying on or on the basis of Emden Formula, the same by itself, in our opinion, would not lead to the conclusion that it was in breach of Section 55 or Section 73 of the Indian Contract Act.”

²²*Hudson'S Building and Engineering Contracts*, 10th Ed, p. 647; *Metro Electric Co. v. Delhi Development Authority*, AIR 1980 Del 266 (DB); *Rawla Construction Co. v. Union of India*, ILR (1982) Delhi 44; *Emden and Watson'S Building Contracts*, 7th Ed., p. 272; *State of Karnataka v. R. N. Shetty & Co.*, AIR 1991 Kant 96 : 1991(1) Arb LR 334 (DB).

²³*N.D.R. Israni v. Delhi Development Authority*, 1989(2) Arb LR 349 (Del).

²⁴(2006)11 SCC 181: 2006 (2) Arb LR 498

The Madras High Court, has however, held that evidence must be led to prove losses instead of exclusively relying on any formula. The High Court did not agree with the arbitrators that *Hudson's* formula could be relied upon in the absence of evidence of loss of profit, depreciation and maintenance. It further held that the Supreme Court in the above-said case had required the arbitrator to consider strict legal obligations and not expectations of a Contractor, however, reasonable.²⁵

In awarding compensation for prolongation of contract period, some amount of guess work is inevitable and it cannot be contended that reasoning given is not proper.²⁶ The fact that damages are difficult to estimate, or could not be assessed with certainty or precision, cannot relieve the wrong-doer of the necessity of paying the damages for breach. Lack of evidence in such matters would not be a sufficient ground for awarding only nominal damages.²⁷

Hudson in his treatise has summed up the law on the subject in the following manner:

“At this point it may assist if an indication is given of the types of consequential damage which contractors are likely to or may suffer when a contract is monetarily affected by an employer's breach, the heads of damage (apart from the direct damage immediately suffered on some individual work process, which will obviously vary from case to case) are likely to be as follows:

- (a) When delay in completion of the whole project results, a contractor will usually suffer:
 - (i) a loss owing to the fact that his off-site overheads, which will partly be independent of the actual site expenditure or even the period the contract takes to complete (such as head-office rents) and partly may be dependent (such as additional administrative expenditure in relation to a dislocated and longer contract) will have either increased in the latter case, or need to be recovered from a smaller annual turnover than that budgeted for in the former case;
 - (ii) a loss of the profit earning capacity of the particular contract organisation affected, due to its being retained longer on the contract in question without any corresponding increase in the monetary benefit earned and without being free to move elsewhere to earn the profit which it otherwise might do;
 - (iii) an increase of cost in his running on-site overheads, that is to say those elements of cost directly attributable to the contract which are governed by time and which are independent of the amount of work carried out, for instance supervisory costs, costs of permanent plant such as site huts, and certain special plant needed throughout the work;
 - (iv) in a contract without an applicable fluctuations clause, the inflationary or other increases in the cost of labour or materials (less any decreases) which he would not have incurred but for the delay.

²⁵*Ennore Port Ltd. vs Skanska Cementation India Ltd., 2008(2) Arb LR 598 (Mad).*

²⁶*A.S. Sachdeva & Sons v. Delhi Development Authority, 1996(1) Arb LR 148 (Del).*

²⁷*Pani Bai v. Sire Kanwar, AIR 1981 Raj 184.a*

- (b) Whether or not delay in completion results, the disturbance of a contractor's progress or planning may also result in lower productivity from the contractor's plant or labour.

All these heads of damage can be conveniently discussed under the following four paragraphs (a) to (d):

(a) "Head Office Overheads" and profit

Off-site overheads are usually known in the industry as "Head Office Overheads". It is convenient to deal with these together with profit, because it is the practice of most contractors of any substance in major contracts, after making their best estimate of the prime cost of the whole project, to add a single percentage thereto for both the above items. In bill contracts, the total sum calculated from prime cost may be distributed across the bill rates, or the contractors may have built up the tender sum by estimating bill rates for particular processes, adding the same percentage to cost when calculating each rate, and in really important contracts two teams of estimators may each estimate separately by the two methods as a cross-check before finally producing the tender sum. Other things being equal, the contractor's loss from an extended contract period must bear proportionate extension of this percentage of his contract sum, and the loss calculated in this way is a real loss (provided the true percentage used can be determined) and is quite independent of the extent to which his contract prices may have been profitable or unprofitable, which depends on the accuracy of his estimates of cost on that particular contract and not on the profit percentage (this is not, of course, the case where an extended contract period is not involved, and the contractor sues for loss of profit on work which he has not done, as where the contract has been wrongly terminated by the employer. there he must prove that he would have made a profit in fact -i.e. that his contract prices were an accurate estimate, or an over-estimate, of cost.) The percentage used in the United Kingdom in pricing for head-office overheads and profit obviously varies from contractor to contractor, and is usually a closely guarded secret, but evidence given in litigation on many occasions suggests that it is usually, in a major contract subject to competitive tender on a national basis, between 3 per cent and 7 per cent, of the total prime cost, including P.C. and provisional sum figures for nominated sub-contractors. It should be remembered that these percentages which may seem small in relation to turnover, in fact represent a return on capital employed of several times that percentage per annum (it is, in effect, this very high "gearing" element in the pricing of building and engineering contracts, due to the very high ratio between turnover and capital employed, that means that a very small difference in pricing or estimating may produce very heavy losses or very large profits). Some contractors do consciously apply a breakdown of the percentage as between head office and profit, but for the purpose of assessing the loss due to delay in completion, the division is not theoretically important. The formula usually used is as follows:-

$$\frac{\text{H.O./Profit Percentage}}{100} \times \frac{\text{Contract Sum}}{\text{Contract Period}} \times \text{Period of delay (in weeks)}$$

(e.g. in weeks)

A caveat should, however, be entered in regard to the profit element in the above formula. The formula assumes that the profit budgeted for by the contractor in his prices was in fact capable of being earned by him elsewhere had the contractor been free to leave the delayed contract at the proper time. This itself involves two further assumptions, namely that on average the contractor did not habitually underestimate his costs when pricing, so that the profit percentage was a realistic one at that time, and secondly that there was thereafter no change in the market, so that work of at least the same general level of profitability would have been available to him at the end of the contract period. There is no doubt that satisfactory evidence on these matters is necessary, and the case of *Sunley Vs Cunard White Star (1940)*, and a number of cases involving the wrongful detention of ships, and consequential loss of charter-party profits, indicate that in the absence of such evidence a contractor who has been delayed will only be entitled to interest on capital employed, and not to loss of profit."

The following interesting case, it is respectfully submitted, approaches the question of overheads correctly from the point of view of principle, though the method of calculation is not entirely clear and it does not follow the same formula.

ILLUSTRATION

A master, in a case where work had been delayed for $4\frac{3}{4}$ months and where the contractor's average percentage of overheads to total turnover over the last two years had been 4.99 percent, allowed the contractor (a) \$3,600, being 4.99 per cent of the additional direct cost of a particular breach causing delay and (b) \$2,802 for overheads during the period of delay. The Court of Appeal of Ontario disallowed (b). *Held*, by the Supreme Court of Canada, during the $4\frac{3}{4}$ month period overheads were continuing to run, but the contractor was obtaining no revenue from which to defray the overheads and the contractor was entitled to (b); *Shore V. Horwits (1964) S.C.R. 589 (Canada)*

(b) Site Overheads

These will include items like supervision (including, perhaps, part of the time of a contracts manager as well as a full-time site agent or general foreman), hutting, permanent gantries or hoists, certain types of pumping or dewatering in engineering contracts, and standing time of plant required to be retained on the site. Some of these will not necessarily be present for the whole period of delay. The "standing time" of unproductive plant, is frequently claimed by contractors on the basis of hire-rates, which may result in the capital value of a new piece of plant being claimed over a relatively short period of time. Hire-rates may sometimes be adopted by Courts, where satisfied that a loss of profit has occurred, and where evidence of that particular loss exists, but in the absence of evidence of profit opportunity, only depreciation and maintenance may be allowed.

ILLUSTRATION

An excavating machine costing Pounds 4,500 when new, and with a life of three years, was delayed by one week under a contract for its transport from Doncaster to Guernsey.

While still at Doncaster during the delay, it worked for one day and earned Pound 16. There was very little other evidence before the court. The plaintiffs had originally claimed Pound 577. *Held*, by the Court of Appeal, in the absence of evidence as to actual loss of profit, the damage was depreciation during the period, interest on the money invested, some maintenance and some wages thrown away. Average depreciation when working would be Pound 29 per week. As the machine was idle, Pound 20 per week would be allowed and Pound 10 for interest, maintenance and wages, making Pound 30, less the Pound 16 receipts, for which credit must be given. *Sunley Vs Cunard White Star [1940]* 1 K.B. 740

(c) Rises in cost of materials and labour

These call for little comment, except that it may be very difficult exercise, for which careful examination of the contractor's likely programme will be required, to decide when materials would have been ordered, or labour engaged, but for the delay.

(d) Loss of Productivity

As stated, this may not necessarily be associated with any overall delay. This damage is usually very hard to assess. In many cases where there has been delay, a delaying factor may cause little or no loss under this head, because if the extent and duration of the delay can be forecast with reasonable notice, the contractor can postpone engaging, or reduce, his plant and labour force during the period when the delaying factor is operating, so that they bear a similar ratio to output to that during periods when progress is more rapid. In other cases, he may not be able to do this, and in inflationary times, a contractor will have good reason not to disperse his labour force once he has organised it, for fear that he will not be able to get it back later. Bonus schemes can also be seriously upset, whether or not there is overall delay. In assessing claims for loss of productivity of plant, such plant, if hired, will be paid for by the contractor at "standing" rates. Plant not in this category should be valued on a depreciation basis and loss of profit should not be allowed upon it in the absence of evidence of an available profitable use elsewhere -See the *Sunley* case. It is not unusual, in the absence of any more precise method, to claim this type of loss as an arbitrary percentage on total labour or plant expenditure during the period of dislocation.

(e) General Considerations

In cases where the work is partly carried out and the contract is repudiated, a contractor should consider his position carefully before deciding to sue for damages for breach of contract, since it has been held that in such a case, he may elect not to sue for damages but instead bring an action in *quantum meruit* for the work done by him. In a case where the contractor's rates are highly profitable, it is obviously likely to be the best course to sue for loss of profit. If, on the other hand, the contract rates or price are low or uneconomic, it may well be that a reasonable price for the work done will be more advantageous to him, particularly if a substantial amount of work has been done prior to the employer's repudiation.

Wrongful termination of contract: Where the Employer has wrongfully terminated the contract, or has committed a fundamental breach justifying the Contractor to treat the contract as at an end, the measure of damages will be the loss of profit which he would otherwise have earned. If the work is partly carried out at the time when the contract is repudiated, the Contractor will normally be entitled to the value of the work done assessed at the contract rates, plus his profit on the remaining work. The measure of profit was assessed at 15% of the value of the remaining part of the work.²⁸ In a similar case, where the Government wrongfully cancelled a contract, the Kerala High Court held that the measure of damages is the amount of profit lost to the contractor by the breach.²⁹ For estimating the amount of damages, the Court should make a broad evaluation instead of going into minute details.³⁰ The view taken by Delhi High Court in *R.K. Aneja v. Delhi Development Authority*³¹ goes a step further when it says that the Contractor would be entitled to 10% loss of profit on the balance amount of work left undone even without proof of loss of profit which he expected to earn by executing the balance work.

Prohibition on award of damages: If the arbitrator awards compensation, when there is a specific prohibition in the contract then the arbitrator would be said to have travelled beyond the terms of the contract.³² In MES contracts, clause 11 of the agreement prescribes a prohibition for award of damages. In *Ramnath International Construction (P) Ltd. vs Union of India*,³³ the Supreme Court held as under:

“..... clause 11(C) of the General Conditions of Contract is a clear bar to any claim for compensation for delays, in respect of which extensions have been sought and obtained. Clause 11(C) amounts to a specific consent by the contractor to accept extension of time alone in satisfaction of his claims for delay and not claim any compensation. In view of the clear bar against award of damages on account of delay, the arbitrator clearly exceeded his jurisdiction, in awarding damages, ignoring clause 11(C).”

However, in *Asian Techs Ltd. vs Union of India*,³⁴ the Supreme Court held as under:

“Apart from the above, it has been held by this Court in *Port of Calcutta v. Engineers-De-Space-Age, (1996)1 SCC 516*, that a clause like Clause 11 only prohibits the *Department* from entertaining the claim, but it did not prohibit the *arbitrator* from entertaining it. This view has been followed by another Bench of this Court in *Bharat Drilling & Treatment (P) Ltd. v. State of Jharkhand, (2009)16 SCC 705*.”

However, it must be added here that *Ramnath's* case was not considered in *Asian Techs* case. Be that as it may, what we are now faced with are two judgments of the Apex Court, which run contrary to each other. How to resolve the dilemma? In a recent unreported judgment of the Delhi High Court titled *Simplex Concrete Piles (I) Ltd. vs Union of India*, Suit No. 614A/2002 decided on 23.2.2010, both the aforesaid judgments were cited. By relying upon settled

²⁸A.T. Brij Paul Singh & Bros v. State of Gujrat, AIR 1984 SC 1703:(1984)4 SCC 59; Mohd. Salamatullah v. Govt. of A.P., AIR 1977 SC 1481; B.S.N.L. v. Narasinghal Aggrawal, AIR 2006 Ori 148: 2006 (4) Arb LR 93; Devendra Kumar Sharma v. Airport Authority of India, 2008(3) Arb LR 87 (Del); BSNL vs BWL Ltd., 2006(3) RAJ 239: 2006(2) Arb LR 212 (Del).

²⁹State of Kerala v. K. Bhaskaran, AIR 1985 Ker 49 (DB); Subhash & Company vs DDA, 2006(3) RAJ 618: 2006(4) Arb LR 506 (Del).

³⁰Dwaraka Das v. State of MP, (1999)3 SCC 500: AIR 1999 SC 1031.

³¹1998(2) Arb LR 341: 1999(1) RAJ 344 (Del).

³²State of Kerala v. N.E. Abraham, AIR 1998 Ker 314: 1998(2) Arb LR 369: 1998(2) RAJ 523 (DB).

³³(2007)2 SCC 453: AIR 2007 SC 509: 2006(4) Arb LR 385.

³⁴(2009)10 SCC 354.

precedents, the Delhi High Court held that when there are conflicting judgments of Supreme Court of co-equal Benches, then, the High Court ought to follow the judgment which lays down the law more correctly. The Delhi High Court also relied upon a judgment of the Supreme Court reported as *M.G. Brothers Lorry Service Vs. M/s. Prasad Textiles*, (1983)3 SCC 61: AIR 1984 SC 15 wherein it was held that a contractual clause which is in the teeth of a provision which furthers the intendment of a statute, has to give way and such a clause becomes void and inoperative by virtue of Section 23 of the Contract Act. The High Court summed up the position as follows:

“Provisions of the contract which will set at naught the legislative intendment of the Contract Act, I would hold the same to be void being against public interest and public policy. Such clauses are also void because it would defeat the provisions of law which is surely not in public interest to ensure smooth operation of commercial relations. I therefore hold that the contractual clauses such as Clauses 11A to 11C, on their interpretation to disentitle the aggrieved party to the benefits of Sections 55 and 73, would be void being violative of Section 23 of the Contract Act.”

Clause 59 of the A.P. Standing Specifications provides that no claim for compensation on account of any delay or hindrance to the work from any cause whatsoever shall lie, has been subjected to close judicial scrutiny. A single Judge of the A.P. High Court³⁵ held that the clause was totally inequitable and unreasonable. This judgment was confirmed by a Division Bench of the High Court,³⁶ but was reversed by the Supreme Court³⁷ and the matter was sent back to the high Court for final consideration. The A.P. High Court has thereafter consistently held that clause 59 is a complete bar on claim for escalation and compensation.³⁸ The Supreme Court, while upholding the validity of clause 59 of the A.P. Standing Specification, has held that any award of escalation beyond the contractual period was barred.³⁹ However, if the State itself waives off the benefit of clause 59 and enters into an agreement to pay extra rates for one year when the work was extended, it cannot deny the same benefit to the Contractor for the next year when the work was delayed due to its own fault.⁴⁰

Where the terms of the contract specifically prohibited revision of rates due to change in scope of work or specifications, an award rendered by an arbitrator awarding the said sum is liable to be set aside.⁴¹ A clause in a contract debarring the contractor from claiming escalation in rates was construed to be limited to the stipulated period of contract and not beyond.⁴²

Damages not payable where no loss suffered: Every case of compensation for breach of contract has to be dealt with on the basis of Section 73 of the Contract Act. In a case where the

³⁵*V.Raghunadha Rao v. State of AP*, (1988)1 Andh LT 461.

³⁶*State of A.P. v. Raghunadha Rao*, (1988)1 Andh LT 242 (DB).

³⁷CA. No. 530/1994.

³⁸*State of Andhra Pradesh v. Associated Engg. Enterprises Ltd.*, AIR 1990 AP 294: 1990(2) Arb LR 375: (1989)2 ALT 372 (DB).

³⁹*Ramalinga Reddy v. Superintending Engineer*, 1994(5) SCALE 67

⁴⁰*Government of Andhra Pradesh v. Satyam Rao*, AIR 1996 AP 288: 1996(2) Arb LR 453 (DB).

⁴¹*Hindustan Construction Company Limited v. Tamil Nadu Electricity Board*, 2005(1) Arb LR 41 (Mad) (DB); *R.B. Jodhamal v. State*, 2005(1) Arb LR 534 (J&K).

⁴²*Anurodh Constructions v. DDA*, 2005(3) RAJ 252 (Del).

party complaining of breach of contract had not suffered legal injury in the sense of sustaining loss or damage, there is nothing to compensate him, for; there is nothing to recompense, satisfy or make amends and, therefore, he would not be entitled to compensation.⁴³

Recommendation: The law of compensation for delay in completion of works contracts is fairly well developed in India and judgments such as those rendered in the cases of *G.M. Northern Rly. v. Sarvesh Chopra* and *McDermott International Inc v. Burn Standard Co. Ltd.* have furthered elucidated and clarified the law on the subject. Employers should be wary of delays caused in execution of works and ought to plan the works in such a manner that such delays are avoided. Prevention is better than cure.

⁴³*Indian Oil Corporation vs Llyod Steel Industries Ltd., 2007(4) Arb LR 84; 2008(1) Arb LR 170 (Del).*

SCOPE OF JUDICIAL INTERVENTION IN ARBITRATION AND CONCILIATION ACT, 1996

*Abhinay Kapoor*¹

I. Introduction

“The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of Judges in numbers never before contemplated. The notion of that ordinary people want black robed judges, well-dressed lawyers, fine panelled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible”.²

By- Justice Warren Burger, the former CJI of American Supreme Court

This was the belief when arbitration was instituted as an alternative dispute resolution system. Arbitration as an alternative dispute resolution system is not new to our country and it preexisted in the form of panchayat where disputes were decided by the 'panches'³ and people voluntarily submitted themselves before them.⁴ The law governing arbitration in a formal sense was first introduced during the British rule with the creation of the Bengal Regulations in 1772. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.⁵ Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) Arbitration (Protocol and Convention) Act, 1937 (ii) Indian Arbitration Act 1940, and (iii) Foreign Awards (Recognition and Enforcement) Act, 1961.⁶

The aforesaid Acts were not able to fill up the vacuum created by the modern day arbitration and in this background the government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an endeavour to modernize the outdated 1940 Act. This Act repealed the three Acts mentioned above.⁷ But again this Act also came with certain downside; Section 5 of the Act which deals with the judicial intervention in case of Arbitral proceedings allowed judicial intervention in certain cases; this provision was used by the judiciary as an apparatus to intrude the proceedings. How far the judiciary has utilised this provision as a device and to what extent for pleasing its ego is a topic of discussion of this paper and the author has also tried to throw some light on the response of global commune on this judicial pandemonium.

¹ Author is a Student, Third Year, Hidayatullah National Law University, Raipur, (C.G.).

² Hon'ble Justice S.B.Sinha, Judge Supreme Court of India, “*ADR and Access to Justice: Issues and Perspectives*”.

³ 'Panches' were the wise men of the community, whose decisions were binding on the parties.

⁴ See, S.K. Dholakia, “ANALYTICAL APPRAISAL OF THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2003”, Indian Council of Arb. Q., Jan.-Mar. 2005, at 3, available at www.ficci.com/icanet.

⁵ See generally, K Ravi Kumar, 'ALTERNATIVE DISPUTE RESOLUTION IN CONSTRUCTION INDUSTRY', *International Council of Consultants (ICC) papers*, www.iccindia.org. at p 2.

⁶ See generally, K Ravi Kumar, 'ALTERNATIVE DISPUTE RESOLUTION IN CONSTRUCTION INDUSTRY', *International Council of Consultants (ICC) papers*, www.iccindia.org. at p 2.

⁷ Section 85, The Arbitration and Conciliation Act, 1996.

II. Legislative Intent

It will be apt to refer to the observation made by Redfern and Hunter which is as follows.

“Amongst states which have a developed arbitration law, it is generally recognized that more freedom may be allowed in an international arbitration than is commonly allowed in a domestic arbitration. The reason is evident. Domestic arbitration usually takes place between the citizens or residents of the same state, as an alternative to proceedings before the courts of law of that state.....it is natural that a State should wish (and even need) to exercise firmer control over such arbitrations, involving its own residents or citizens than it would wish (or need) to exercise in relation to international arbitrations which may only take place within the state's territory because of geographical convenience.”⁸

This is contrary to the legislation in India. Post the Arbitration and Conciliation Act, 1996 which, by adding Section 5 to the Act (which primarily implemented the UNCITRAL Model Law on International Commercial Arbitration but with some important deviations.⁹), aimed at minimal Judicial control over arbitration, to narrow the basis of challenges of the awards, decrease judicial supervision, ensure finality of awards, and expedite the arbitration process as appeal which went to courts challenging the award used to unnecessary delay the decision which was both pricey and dreadful to the litigants. The main objectives set out in the Statement of Objects and Reasons of the 1996 Act are “to minimise the supervisory role of courts in the arbitral process” and “to provide that every final arbitral award is enforced in the same manner as if it were a decree of the Court”.¹¹

Some of these objectives are well served, in that there was a marked difference in the processes initiated under the new Act but a relative minefield of interpretation was opened up within the new 1996 Act. It has also been under fire, more recently in the last two to three years in India, especially since the arbitrations invoked under the new Act reached fruition and interpretative problems arose.¹²

Judicial intervention which promotes the aim to ensure arbitral autonomy coupled with neutrality or impartiality in the arbitral process with equality between the parties and full opportunity to them to present their case is needed for a just decision. Minimum judicial intervention to achieve this object is the proper limit. A law providing for judicial intervention within these limits is the Model Law. The New Act enforced in India from January 25, 1996, is an attempt in that direction.¹³ But the Judges face a particular challenge in implementing this Act. They seek a delicate balance between ensuring justice by correcting any injustice, resolving arbitration disputes efficiently and granting parties' autonomy.¹⁴

⁸ Refer, Redfern and Hunter, “LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION”, Sweet and Maxwell, London, (4th Edition, pp. 14 - 15)

⁹ See, United Nations Commission on International Trade Law (UNCITRAL), G.A. Res. 31/98 (Dec. 15 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>. (arbitration rules were adopted by the general assembly in 1976 to harmonize arbitration laws and provide countries with a model template).

¹⁰ See, Promod Nair, “SURVEYING A DECADE OF THE 'NEW' LAW OF ARBITRATION IN INDIA”, 23 Arb. Int'l., 699, 701(2007).

¹¹ Refer, Para 4 (v) and (vii), “the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996”.

¹² See, Paul Whitley, “Arbitration in India”, Talk to the European Branch of the C.I.Arb. at Salice D'Ulacio, Italy, 9th / 10th April 2005.

¹³ See, Honorable Justice Jagdish Sharan Verma Chief Justice of India, Supreme Court of India (New Delhi, India), “DEFINING THE PROPER LIMITS OF JUDICIAL INTERVENTION IN AND ASSISTANCE FOR THE ARBITRAL PROCESS: HOW A-NATIONAL CAN AN INTERNATIONAL ARBITRATION BE?”, Biennial IFCIA Conference October 24, 1997, Geneva, Switzerland.

¹⁴ See, Harpreet Kaur, “THE 1996 ARBITRATION AND CONCILIATION ACT: A STEP TOWARD IMPROVING ARBITRATION IN INDIA”, 6 Hastings Bus. L.J. 261

The relationship between court and arbitral tribunals swings between forced cohabitation and true partnership. In spite of protestations of “party autonomy”, arbitration is wholly dependent on the underlying support of the courts that alone have the power to rescue the system when one party seeks to sabotage it.¹⁵ Thus, even though the legislative intent behind the Arbitration and Conciliation Act, 1996 was minimising the role of judiciary, it can be very finely pointed out that arbitration rests on the shoulder of Judiciary which has been the fate of almost all the Arbitration proceeding as one or the other party is dissatisfied with the award and also for execution of the arbitral award the aggrieved party has to take recourse to the judiciary.

Though the statement of Objects and Reasons of the 1996 Act points out that its object is to reduce judicial intervention in arbitration proceedings, it will not be erroneous to say that the Act has not been able to achieve its prime objective since the judiciary has been constantly striding the arbitral periphery. Jurists and experts have opined that unless the courts themselves decide not to interfere, the Arbitration and Conciliation Act, 1996, would meet the same fate as the 1940 Act.¹⁶ But this is not possible as mentioned earlier that almost all the Arbitration proceedings are challenged in the Court of law the requirement of judicial intervention is not from the side of the courts but is also from the side of the parties who constantly knock the doors of judiciary. A provision has been made under the 1996 Act to stop this intervention in Part I; What is needed more is a better mechanism for the execution of arbitral award. As a former senior English judge has stated:

“There is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced the ideas of transnationalism leans against the involvement of mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering.”¹⁷

II. Extent of Judicial Intervention

Though the legislature has truly tried to limit the intervention power of judiciary in arbitration proceedings, judicial intervention in arbitration proceedings in India is mainly due to the interpretation of the Arbitration and Conciliation Act, 1996. Section 5 of the 1996 Act is as follows:

“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.”¹⁸

This Section is parallel to Article 5 of the UNCITRAL which reads as:

“In matters governed by the law, no court shall intervene except where so provided in this law”.¹⁹

¹⁵ See, Redfern and Hunter, “Law and Practice of International Commercial Arbitration”, Sweet and Maxwell, London, (4th Edition, p. 388)

¹⁶ Refer, Inaugural address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration's National Conference on 'Arbitrating Commercial and Construction Contracts' held at Hotel Inter Continental, New Delhi, December 6, 2003.

¹⁷ See, Lord Mustill in *Coppee Levalin NV v. Ken-Ren Fertilisers and Chemicals* (1994) 2 Lloyd's Rep. 109 at 116.

¹⁸ Section 5, The Arbitration and Conciliation Act, 1996.

¹⁹ Article 5, United Nations Commission on International Trade Law (UNCITRAL), G.A. Res. 31/98 (Dec. 15 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>.

The important purpose of Article 5, according to the UN Commission, was “not to negate court intervention altogether or cut down the proper role of courts but to list out, in the national law, all the situations which permit court intervention and exclude any plea based on a remedy outside the Act or based on a residual power of the national courts.”²⁰

The purpose is to keep court intervention restricted to the situations expressly indicated in the Act and to exclude all other remedies. The remedies excluded are not only till the stage arbitrators are appointed rather than that, the exclusion are also applicable during the pendency of the arbitration proceedings. Not only this, the remedies excluded are also at a time when the arbitration has not started in the form of interim measures in Section 9.²¹ Of course, it is obvious that Section 5 will not come in the way of the exercise of powers under Article 227 of the Constitution of India by the High Court or under Article 136 by the Supreme Court of India inasmuch as these are constitutional provisions.²²

The 1996 Act specifically provided for limited instances in domestic arbitration when a court can intervene prior to the making of an award by the arbitral tribunal. The Court can intervene only in the following ways: to stay legal proceedings and refer parties to arbitration;²³ to grant interim measures;²⁴ to appoint arbitrators in cases of conflict;²⁵ to terminate the mandate of arbitrators in a limited set of circumstances;²⁶ and assist in taking evidence.²⁷ A court is also limited in its ability to stay a proceeding.²⁸ The Court has dealt with plethora of case under these sections and in less than 14 years of passing of the 1996 Act the Court is flooded with cases under the provisions aforesaid.

IV. Stride of Judiciary in Arbitral Periphery

The Indian judicial system vis-a-vis arbitration was and is proactive which is least desirable for promoting international trade and commerce. There has been a growth of judicial law making by the Courts in the last more than fourteen years of the working of the Indian Arbitration and Conciliation Act, 1996. A perusal of some of the recent judgments of the courts seem to have played a negative role in taking the law backward thus preventing the growth of international trade and commerce. It seems that just as politicians and bureaucrats do not give up power, judges are no exception.²⁹ A relative minefield of interpretation was opened up within the new 1996 Act. It has also been under fire, more recently in the last few years in India, especially since the arbitrations invoked under the New Act reached fruition and interpretative problems arose. On a number of occasions the judiciary has stridden in the arbitral periphery, some of these have been discussed below.

²⁰ See, UN Commission's Report (1985) on the Adaptation of Model Law, paras 62 and 63.

²¹ The Arbitration and Conciliation Act, 1996.

²² U.N. Commission Report, para. 62.

²³ Section 8

²⁴ Section 9

²⁵ Section 11

²⁶ Section 14(2)

²⁷ Section 27

²⁸ Secur Industries Ltd. v. Godrei & Boyce Mfe. Co. Ltd., A.I.R. (2004) 2 S.C.R. 705.

²⁹ Refer, D.S.Chopra, “SUPREME COURT'S ROLE VIS A VIS INDIAN ARBITRATION AND CONCILIATION ACT, 1996”.

One such example is in case of the nature of the appointment of the arbitrator. The Supreme Court in this case by its series of decisions created another ground for challenging the arbitral process. The matter to be decided in these cases was whether appointment of arbitrator by the court is administrative or judicial function, thus the nature of appointment of arbitrator was to be determined by the court. The first case which came before the court was *Konkan Railway Corporation v. Mehul Construction Co.*³⁰ where a three judge bench decided that when an arbitrator is appointed under Section 11³¹ by the Chief Justice of the Supreme Court or a High Court it does so under the administrative function of the Chief Justice. This position was reiterated by a five judge bench in *Konkan Railway v. Rani Construction Pvt Ltd.* This happened in the year 2002. Three years later in 2005, a seven judge bench decide the same question in the case of *SBP & Co. v. Patel Engineering Ltd.*³³ and by a majority of six to one held that the power to appoint an arbitrator under Section 11 is judicial in nature. This thread bare surgery on this point of law became important as under the Constitutional scheme of things in India if the exercise of power of appointment of arbitrator is administrative no further judicial challenge is possible whereas if it is judicial the same can be challenged either under Article 226, 227 of the Constitution or under Article 136 of the Constitution as the case may be.³⁴

Therefore, by deciding that nature of appointment of arbitrator under Section 11 is judicial in nature contrary to its own previous decisions the Supreme Court opened another window of litigation for challenging arbitration process. Another example of such intervention is in case of *Bhatia International v. Bulk Trading S.A.*³⁵ where the question which came before the court was, whether the ICC Rules applying to the concerned arbitration proceedings excluded the application of section 9³⁶ of Part I of the Indian 1996 Act. Supreme Court in the case decided that:

“To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such Arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial Arbitrations held out of India provisions of Part I would apply unless the parties by Agreement express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision in Part I which is contrary to or excluded by that law or rules will not apply.”³⁷

The decision in *the instant case* gave some chance to the arbitrating parties to approach the Indian courts for some protective measures before it sticks its neck out in the foreign arbitral jurisdiction. Section 34 also adds to this list and judicial interpretation of the word 'public policy' in this section has been highly criticised by one and all. Rule 34 of the UNCITRAL Model Rules provides grounds for setting aside an arbitral award and one of the grounds is that

³⁰ (2000) 7 SCC 201

³¹ The Arbitration and Conciliation Act, 1996.

³² (2002) 2 SCC 388

³³ (2005) 8 SCC 618

³⁴ See, Aniruddha Sen, 'THE ROLE OF THE COURT IN APPOINTMENT OF ARBITRATORS - AN ANALYSIS WITH REFERENCE TO THE SUPREME COURT OF INDIA'S DECISION IN SBP V. PATEL ENGINEERING', 10 VJ (Vindobona Journal of International Commercial Law and Arbitration 2006, p.45

³⁵ (2002)4 SCC 105.

³⁶ Section 9, The Arbitration and Conciliation Act, 1996 allows a party to seek interim injunctive relief even before the Arbitration had commenced.

³⁷ *Bhatia International v. Bulk Trading S.A.* 2002(4) SCC 105, para. 32.

where the award is in conflict with the public policy of the state.³⁸ The word 'Public Policy' was interpreted by the court in case of *Oil & Natural Gas Corporation v SAW Pipes*³⁹, *The term has been opened up to a wide interpretation by the Supreme Court of India. Here, the Court expanded it to instances of the award's findings being opposed to substantive provisions of Indian law, to the Act or to the terms of the contract.*

The courts must take the law forward based on trust and confidence in the arbitral system.⁴⁰ Encouraging Arbitration is quite an important ingredient for any developed economy. It is useful in attracting business houses all over the world to invest in India and it gives them a feeling of security as extensive court proceedings are undesired by everyone. In this process judges and Judiciary will have to put a self check on their supremacy so that they do not stride the arbitral periphery. Such a propensity to exercise their authority to intervene may be attributable to their skepticism that arbitration is not effective at resolving disputes or the judges' vested concern that their jurisdiction will be adversely eroded.⁴¹

V. Concern of the Global Arbitral Commune

The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, and procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.⁴² Also, globalization of the Indian economy in the early nineties and the consequent economic reforms necessitated the existence of effective dispute resolution mechanisms to quickly settle commercial disputes.⁴³ In the last decade most of the international organisations, multinational companies, etc. have started exercising this as their first option which is contrary to their previous inclination of approaching to the judiciary as they have learnt from their error. It is nowhere close to ideal, but it is generally better than the alternatives.⁴⁴ Nowadays international community has developed arbitration as the most viable option in case of a disagreement and they go to a neutral country, or an organisation to arbitrate between them.

If judiciary will move forward with this attitude of extensive intervention in arbitral proceedings, sooner or later India will become the last destination to carry out arbitration proceedings as judiciary, it seems, is not ready to let go its power. Courts cannot be leaned upon to salvage the perceived inadequacies of the arbitral system through their greater intervention. Rather, the courts must take the law forward based on trust and confidence in the arbitral system.⁴⁵

³⁸ Rule 34(2)(b)(ii) of UNCITRAL

³⁹ (2003) 5 SCC 705

⁴⁰ *Refer*, Kachwaha, Sumeet, 'THE INDIAN ARBITRATION LAW : TOWARDS A NEW JURISPRUDENCE', Int. A.L.R. 2007, 10(1), 13-17

⁴¹ *See*, Pramod Nair, 'QUO VADIS ARBITRATION IN INDIA?' *Business Line*, October 19, 2006. Pramod Nair is a Visiting Fellow at the Lauterpatch Research Centre for International Law, University of Cambridge.

⁴² *See*, Hon'ble Justice S.B. Sinha, Judge Supreme Court of India, "ADR and Access to Justice: Issues and Perspectives".

⁴³ *See*, Krishna Sarma, Momota Oinam, Angshuman Kaushik, "*Development and Practice of Arbitration in India – as it Evolved as an Effective Legal Institution*", *Center on Democracy, Development, and The Rule of Law, Freeman Spogli Institute for International Studies*, No. 13, October, 2009.

⁴⁴ *Supra* nt. 7.

⁴⁵ *Supra* nt. 39.

The time has come when judiciary needs to give effect to the legislative intent. It is high time that courts stop intervening beyond the power given by the Act otherwise the whole purpose of the 1996 Act will be defeated and the provisions “to minimise the supervisory role of courts in the arbitral process in section 5 will be rendered otiose.”⁴⁶

VI. Conclusion

Responding to claims of inefficiency and unpredictability, the Indian Government enacted the 1996 Arbitration and Conciliation Act. Parliament's goal was to increase party autonomy and efficiency while minimizing judicial intervention in the arbitration process.⁴⁷ By this 1996 Act, the legislature brought in drastic changes due to which the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous.⁴⁸ These changes were brought to achieve an objective. The question which the judiciary has to really respond to is that whether the judiciary has been able interpret the provisions of the 1996 Act with an approach to accomplish the objective which were behind legislating this Act. It is beyond any doubt that the ultimate aim of the Act was to diminish judicial intervention which was based on the UNCITRAL model but to what extent this was achieved is something to ponder on. Notwithstanding the interventionist instincts and expanded judicial review, Indian courts do restrain themselves from interfering with arbitral awards.⁴⁹

The Supreme Court in *Food Corporation of India Vs. Joginderpal* observed that the law of arbitration must be 'simple, less technical and more responsive to the actual reality of the situations', 'responsive to the canons of justice and fair play'.⁵⁰ However, there are still inherent problems that hindered in the working of successful arbitration in India which are multifold starting from requirement for amendment of certain provision of law to changing the mindset of the stakeholders who are judges, arbitrators, lawyers and parties involved.⁵¹ Primary aspiration to realize in order to make arbitration a successful exercise is to break away from all these blockades and make arbitration a separate dispute resolution mechanism and to liberate it from all hindrance.

⁴⁶ Para 4 (v) and (vii) of the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.

⁴⁷ *Supra* at note 13.

⁴⁸ (1999) 2 SCC 479 (Sundaram Finance vs. NEPC Ltd.). The Supreme Court held at p 484 thus: 'The provisions of this Act (the 1996 Act) have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction.'

⁴⁹ *McDermott International Inc. vs. Burn Standard Co. Ltd*, 2006(11) SCC 181 at pp. 81-82.

⁵⁰ AIR 1981 SC 2075 at pp. 2076-77

⁵¹ *Supra* note 42.

INDIAN COUNCIL OF ARBITRATION

The members are requested to kindly fill-in the database updation form in case of any change in residence/telephone or in the status quo for upgradation of our database:

DATABASE UPDATION FORM

Full Name: Mr./Ms/
(in Block letters)

Address:
.....
.....
..... Pin

Occupation:

Phone/s: (Office)..... (Resi.) Mobile:.....

Email: Fax:

Date of Birth: Age: Nationality:

Are you Member of ICA Panel of Arbitrators, If yes give your amended particulars if any.....
.....
.....
.....
.....

Kindly mail the updated changes at ica@ficci.com or send it to Indian Council of Arbitration Federation House, Tansen Marg, New Delhi 110001.

Forthcoming Conferences

INTERNATIONAL CONFERENCES

1. Resolution Business Disputes in Today'S China

Date : 8TH NOVEMBER 2010

Place : STOCKHOLM, SWEDEN

This conference will focus on the prons and cons of resolving disputes in china by means of arbitration or in the domestic courts, and the alternatives.

For details see: www.sccinstitute.com

2. International Arbitration: is India Different?

Date : 2 DECEMBER 2010

Place : MUMBAI, INDIA

Association Internation des Jennes advocate holding 2 days Arbitration/ Business law conference in Business capital of India. Conference will include presentation held and panels chaired by leading Indian Arbitration practitioners and in house counsels.

For further details see: www.aija.org

ICA CONFERENCES

1. Conference on dispute resolution vis A Vis Arbitration

Date: 13TH NOVEMBER 2010

Place: COCHIN, KERALA

For many companies, arbitration has become an essential business asset as well as a means of creating value. It is being exploited on an increasingly international level in various forums. As a consequence parties are looking for dispute resolution mechanisms that match their business requirements private procedures which would provide efficient, flexible and less costly means of settling disputes without disrupting commercial relationships. This is what is the aim of this one day conference.

The conference will be chaired by many esteemed speakers from various countries.

For more details see: icaindia.co.in

2. Conference on Present Arbitration Regime: A LEGAL PERSPECTIVE.

Date: 4TH DECEMBER 2010

Place: LUDHIANA PUNJAB

The purpose of this one day conference is to provide intensive knowledge of arbitration to the party representative, insertion of the clauses of arbitration in the initial contract agreement. After completion of the conference the participants will have a better understanding of the substantive components of commercial arbitration, the benefits and limitations of the arbitration.



Indian Council of Arbitration

Federation House, Tansen Marg, New Delhi - 110 001

Ph. : 91-11-23738760-70, 23719103, 23319849, 23319760, Fax : 23320714, 23721504

E-mail : ica@ficci.com / ica@airtelmail.in

Website : www.icaindia.co.in