DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

Volume 3 Issue 2 May 2020

Message to the Readers

Nani Palkhivala Arbitration Centre, in collaboration with "Bar and Bench", periodically publishes articles relating to Arbitration law and practice. Many young and upcoming advocates associated with NPAC help us immensely in bringing out these articles.

The 4th May 2020 publication of Bar and Bench has brought out an interesting article by Mozzam Khan and Tanisha Khanna who are associated with NPAC, on the topic ***"Validity of unilateral appointment of arbitrators: Indian courts blow hot and cold".***

The article highlights the anomalies in some recent judgements of the Supreme Court on this issue. The concept of bias disqualifying persons from being appointed as arbitrators now finds statutory expression in Section 12(5)(1) and the seventh schedule to the Arbitration and Conciliation Act,1996 through the 2015 amendments. These provisions have rendered certain categories of people ineligible to be appointed as arbitrators.

However, a perusal of four important and recent judgments on this aspect by the Supreme Court yields a not so clear picture of how exactly these provisions are expected to work in practice.

In ***TRF Ltd Vs Energo Engineering Projects Ltd, (2017) 8 SCC 377,*** the Supreme Court applied the provisions of Section 12 (5) of the said Act read with the seventh schedule of the Act and held that once a person is statutorily ineligible to be appointed as an arbitrator, he then loses authority to even appoint an arbitrator, leave alone function as one.

In ***Perkins Eastman Architects DPC and another Vs HSCC India Ltd., (2019) SCC online SC 1517*** and in ***Bharat Broadband Network Ltd Vs United Telecoms Ltd,Civil Appeal No. 3972 of 2019,*** the Supreme Court followed the ratio of the judgment in ***TRF Ltd Vs Energo Engineering Projects Ltd., (2017)8 SCC 377*** and even went on to amplify the width of the proposition by holding that no person who had an interest in the outcome of an arbitral proceeding could participate even in appointing an arbitrator.

There is no doubt at all that if these principles had been applied consistently, the confidence in arbitration proceedings in India would have multiplied manifold.

However, in ***Central Organization for Railway Electrification Vs EVI-SPIC-SMO-Mcml (JV) Civil Appeal No.9486-9487of 2019,*** the above propositions laid down by the Supreme Court have gone into a bit of a tailspin. In that case, the Supreme Court has upheld the applicability of an arbitration clause allowing one party to nominate a panel of four arbitrators (all being its own employees) from which the counter party would choose two. Now, this puts the principle that no party who has an interest in the outcome of the arbitration proceedings could appoint an arbitrator in serious jeopardy. The interesting aspect is that in the ***Central Organization Railway*** case, the Supreme Court does not set aside the ratio of the judgment in ***Perkins Eastman***. Nor does it explain how the judgment in Eastman Perkins has been distinguished.

Such anomaly is likely to throw the appointment process of arbitration into unseemly conflict. The issue is now pending in court in the case of ***Bhayana Builders Pvt. Ltd. Vs Oriental Structural Engineers Pvt. Ltd***. One does hope that the Supreme Court resolves this anomaly at the earliest and in favour of the ratio of the judgment in ***Perkins Eastman***.

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- At the scheduled time, all stakeholders are to click on the link provided in the email and enter their name to begin the session. Each participant can then choose to control their audio and video through the controls provided.
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REPORT ON SPEECH BY JUSTICE INDU MALHOTRA

We bring you a brief report on the inaugural and keynote address by Hon'ble Ms. Justice Indu Malhotra, Judge, Supreme Court of India, delivered at the 12th Annual International Arbitration Conference hosted by the Nani Palkhivala Arbitration Centre on 16th February, 2020 at Delhi.

The 12th edition of the Annual International Arbitration Conference hosted by Nani Palkhivala Arbitration Centre which was attended by distinguished speakers and guests from around the world brought forth interesting ideas, viewpoints and suggestions in line with the theme of the Conference - *'Re-inventing Arbitration: Ways and Means'*.

Hon'ble Ms. Justice Indu Malhotra delivered the inaugural and keynote address where she focused her speech on the regime under the Arbitration and Conciliation Act, 1996 ("**1996 Act**") and the recent amendments, with emphasis on provisions pertaining to setting aside of awards, its scope and the way forward.

Towards this, she traced the evolution of the law of arbitration in India from the perspective of legislative policy and judicial decisions. She stated that arbitration has been viewed to be the most acceptable and viable mode for resolving commercial disputes due to an overburdened judiciary catering to a large population.

"India's ascent in the global economic ladder has put our arbitration regime in the spotlight", said Justice Indu Malhotra as she highlighted the tremendous growth in arbitration jurisprudence in India in the past decade, especially post the BALCO judgment. She stated that the two rounds of legislative amendments in 2015 and 2019 were introduced to bring the 1996 Act in consonance with contemporary international norms and practices. Coupled with these amendments, she stressed on the number of decisions of the Supreme Court in the recent past, which have helped effectuate such amendments brought about by the legislature.

The judge spoke about the 1940 Arbitration Act *(which governed domestic arbitrations)* and the Foreign Awards Recognition and Enforcement Act, 1961 and recalled how the proceedings were time consuming. *"Procedural claptrap of having the award made a rule of the court before it could become enforceable and going through the gamut of appeals made the entire system inefficacious"…"We had powers for the courts to modify/amend the award and wide grounds for setting aside awards"*, said the judge.

She then traced how India mirrored the UNCITRAL Model law after liberalization of the economy and enacted the 1996Act, with minor contextual variations to suit the local environment. She said that the 1996 Act has been framed as a comprehensive self-contained code for both domestic arbitrations and enforcement of foreign awards. However, she added that in her personal belief, these two (domestic arbitrations and enforcement of foreign awards) should have been governed by separate acts as they worked under two distinct regimes and sometimes interpretation of one part gets confused with the other when there is one common legislation. In this regard, she also referred to the judgments in the ***Bhatia*** and ***Venture Global*** cases which referred to Part 2 of the 1996 Act in the interpretation of domestic arbitrations.

She continued her speech to highlight the major shift in legislative policy with the enactment of the 1996 Act which contemplates minimal judicial intervention, reinforces the principle of 'kompetenz and kompetenz' and does away with the courts' power to modify/rectify errors in awards.

She then shifted focus to analyze the grounds for setting aside awards, as set out under Section 34 of the 1996 Act. She stated how the provision in the original Act restricted the grounds for setting aside awards to seven grounds, five of which were in line with the UNCITRAL model law. The additional grounds were when the court could exercise an ex officio power when it finds that (i) a dispute is unarbitrable, or (ii) the award is contrary to the public policy of India.

In addition to these, two other grounds that are available, though not explicitly stated under Section 34 are as follows:

(i) Under Section 13(5) of the 1996 Act where an objection of conflict of interest or apprehension on independence or impartiality of arbitrator is raised. Recourse for such a claim is only available at the post award stage under 1996 Act and is not provided for at intermediate stages of the proceedings as provided for under the UNCITRAL model law or English Arbitration Act. *While she believes that this could have been to expedite the arbitration process, her view is that such claims should be resolved first, rather than going through the entire proceedings before taking these objections up.*

(ii) Under Section 16(6) of the 1996 Act where a plea of lack of jurisdiction is raised. Here again, the remedy is provided only at the post award stage.

Justice Indu Malhotra then spoke about the amendments to the 1996Act in this connection. She stated that the Arbitration & Conciliation (Amendment) Act, 2015 ("**2015 Amendments**") have contributed significantly and have infact enhanced the position of India in the World Bank's rating of 'ease of doing business in the country'.

She delved into significant amendments under the 2015 Amendments, to Section 34. Two important clarificatory explanations were inserted through the 2015 Amendments on the following aspects:

(i) When is an award in conflict with public policy of India (a) if making of the award was induced or affected by fraud or corruption or in violation of Section 75 or 81 of the 1996 Act; (b) in contravention with fundamental policy of Indian law; (c) in conflict with the most basic notions of morality and justice;

(ii) What would be the test to check for contravention of fundamental policy of Indian law

Next, she addressed the ground of patent illegality which was introduced only with respect to domestic awards. This ground was first conceived of in the judgment of ***ONGC Vs Saw Pipes*** but was criticized as increasing the scope of judicial review. Thereafter, this ground has been given statutory recognition and has since been upheld.

The Hon'ble judge also discussed her experience as part of the High Level Committee which looked into the High Courts' decision-making under Section 34 of the Arbitration Act and clarified the role of courts when setting aside an award. Pursuant to the suggestion from this Committee, the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendments**") was enacted.

One such change was with respect to the original provision under the 1996 Act which provided that a person objecting to an award must provide proof for any of the grounds under Section 34. She stated how some High Courts and District Courts were being misled and were treating the Section 34 as an appeal, by framing issues and allowing evidence. The High Level Committee therefore recommended substituting it with the words *'established on the basis of record of the arbitral tribunal'*, which was accepted. This was to clarify that no fresh material can be provided for setting aside the award.

With respect to nature of power, there has been a long line of decisions by the Supreme Court to give clarity on this. She referred to one such judgment where it was clarified that 'it is not an appellate power and was merely in the nature of supervisory jurisdiction'.

She stated that scope of enquiry of the Courts is restricted to a consideration of whether any of the grounds under 34(2), 13(5) or 16(6) of the 1996 Act were made out for setting aside the award. Subsequently, in the ***Fiza Developers case***, a two judge bench allowed cross examining of witnesses, etc. Thereafter, Justice Nariman and Justice Indu Malhotra diluted this in the case of ***MK Global Services*** and clarified that no fresh material could be recorded. She also highlighted that a three judge bench has since overruled the ***Fiza Developers case*** as well.

Justice Indu Malhotra reiterated that re-appreciation of evidence or probing into mental processes or intent of the arbitrator was not allowed under Section 34. *"The arbitrator is a master of evidence and so the court cannot sit in appeal over the same."... "If an arbitrator has taken a plausible view, the Courts should not interfere and should not relook at the substantive reasoning and merits of the dispute",* she said. *"However, the arbitrator cannot decide contrary to the terms of the contract or rewrite the contract under the guise of interpretation",* she added.

The judge expressed how, in the last 5 years, the Indian Courts have certainly revealed a pro-arbitration approach and very few awards have been set aside.

However, she cautioned that the process should be neutral, fair and transparent. An arbitrator should not be conflicted. If a sole arbitrator is unilaterally appointed and is interested in the outcome of the dispute, it is a clear conflict of interest. In this regard, she recalled the ***Eastman Perkins case*** and stated that unilateral appointment of a sole arbitrator is an "*anathema to principle of neutrality and conceptuality with are the underpinnings of a good and robust arbitration system and are therefore unsustainable and liable to be set aside".*

Only in extreme cases have the courts struck down awards for grounds listed above, she added. "*The public policy issue has been whittled down in many cases. Public policy is basically disregarding orders of superior courts, lack of judicial approach, lack of application of principles of natural justice or perversity no reasonable person would have arrived at the same conclusion."* Further, she stated that 'patent illegality' is also a ground which is used for setting aside domestic awards and has been defined in the case of ***Associate Builders*** by the Supreme Court as 'contravening the substantive law of India and such contravention not being trivial but going to the root of the matter and contravening provisions of the 1996 Act, like an unreasoned award which is not in accordance with terms of the contract and is in violation of Section 28(3) of the 1996 Act'.

These are broadly the contours of the powers of the court to review awards passed in domestic arbitrations, said the judge.

Section 34 The Way Forward

Justice Indu Malhotra concluded her speech by expressing her opinion on the way forward with respect to grounds for setting aside awards. She said that she doesn't believe Section 34 of the 1996 Act requires any further tweaking. *"Arbitration is as good as the Arbitrator who conducts the arbitration. Therefore, it is necessary to appoint trained arbitrators with domain knowledge of the subject they are dealing with and persons of integrity, rather than widen the scope of judicial review",* said the judge. *"In fact, widening the scope of judicial review is contrary to the entire spirit of the arbitration Act which restricts judicial intervention",* added the judge.

The judge opined that a second look at the award is preferable through internal review processes rather than moving towards the courts. *"To effectuate a two tier arbitration process, the way forward is to move away from the era of ad hoc arbitrations and bring about institutionalization of arbitrations"*, she concluded.

DELETION OF SECTION 11(6A): WHO WILL IMPOUND THE INSUFFICIENTLY STAMPED INSTRUMENTS?

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This article attempts to study the impact of the deletion of Section 11(6A) brought out by the Arbitration and Conciliation (Amendment) Act, 2019 (hereinafter referred to as the "**2019 Amendment**") on the documents which are insufficiently stamped.

It is trite to note that a document does not "exist in law" if it is not stamped properly. Prior to the 2019 Amendment to the Arbitration and Conciliation Act, 1996, (hereinafter referred to as the **"1996 Act"**) the Courts were responsible for deciding the "existence" of arbitration agreements under the aforementioned clause. The Apex Court in a landmark judgment[1] has settled the law that insufficiently stamped documents cannot be acted upon unless the deficit duty and penalty is paid. The Courts were required to impound the unstamped documents under the regime that existed before the 2019 Amendment was brought about.

However, with the 2019 Amendment providing for the omission of Section 11(6A), the question that remains is as to who will have the authority to decide the issues (primarily, existence) attached to an arbitration agreement.

Before addressing this, it is important to understand the march of law on the captioned subject vis-à-vis introduction of Section 11(6A) via Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the **"2015 Act"**) and unenforceability of unstamped documents.

Introduction of Section 11(6A)

Arbitration can be simply distinguished from litigation on one aspect Time. It is a known fact that arbitration was brought in to mitigate the hardships faced by the parties due to eternal litigation. That being said, the law on arbitration in all jurisdictions is designed keeping in mind the principle of minimum judicial interference. Judicial interference exists in the form of referring the parties to arbitration, appointing the arbitrators, granting interim reliefs, assisting during the arbitral proceedings- collecting evidence, etc.

A question whether the power of appointing the arbitrators conferred to the Courts (Chief Justice, then) was administrative or judicial, arose in 2000.[2] The Hon'ble Court held the same to be administrative in nature. However, this decision was overruled in 2005,[3] by a seven judge bench, holding the same to be judicial. A plain import of this decision will be that Courts while performing their judicial function can deal with the preliminary issues attached to the arbitration agreement, like "existence", "arbitrability of dispute", etc.

Notably, the Apex Court in 2011,[4] while demarcating the difference between the scope of interference under Sections 8 and 11 of the 1996 Act, clearly laid down that Courts cannot decide upon the arbitrability component. A Court, while appointing arbitrators, must confine itself only to the existence of arbitration agreement and not enter the sphere of Arbitral Tribunals.

Evidently, these decisions perplexed arbitration practitioners and various stakeholders. To resolve the quandary, the legislature, by way of 2015 Amendment to the Act, introduced sub- clause 6A to Section 11, which reads as follows:

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[1] SMS Tea Estates Private Limited v. Chandmari Tea Company Private Limited., (2011) 14 SCC 66

[2] Konkan Railways v. Rani Construction (P) Ltd., (2002) 2 SCC 388

[3] SBP v. Patel Engineering Ltd. ("Patel Engineering"), (2005) 8 SCC 618

[4] Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd.,(2011) 5 SCC 532

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

2015 Amendment in essence, narrowed the scope of judicial interference by restricting it to decide only one aspect existence of an arbitration agreement. Therefore, whether a dispute is arbitral or not, is a matter which falls in the Arbitral Tribunal's sphere. Moreover, the function performed by the courts while examining the existence of an arbitration agreement was concluded to be "administrative" in nature.

Enforceability of arbitration clauses contained in inadequately stamped documents

The enforceability of an arbitration clause contained in an unstamped document was dealt by the Supreme Court in the case of ***SMS Tea Estates Private Limited Vs Chandmari Tea Company Private Limited.***[5]

Briefly, the Hon'ble Court discussed the proviso to Section 49 of the Registration Act, 1908, Section 16 of the 1996 Act and Section 35 of the Stamp Act, 1899. The Apex Court held that a conjoint reading of proviso to Section 49 and Section 16(1)(a) clearly leads to the conclusion that an arbitration agreement contained in an unregistered instrument (which is, compulsorily registrable) can be acted upon i.e. enforced. However, an arbitration agreement contained in an unstamped document cannot be acted upon. To be enforceable, such document needs to be impounded under the Stamp Act, 1899. The Hon'ble Supreme Court, recently, in the case of ***M/s. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram & Other Charities &Ors. Vs M/S Bhaskar Raju & Brothers & Ors***[6] reiterated the same position.

An enquiry into whether an arbitration agreement exists is subjective and therefore leads to contradictory notions. Subsequently, the debatable question that arose was what all would fall under the ambit of "existence of arbitration agreement" as mentioned in Section 11(6A). Whether just the fact that an agreement containing an arbitration clause could be located (physical form) would lead to the conclusion that it exists, was debated. Two schools of thought prevailed in this regard.

In ***United India Insurance Company Limited & Ors. Vs Hyundai Engineering and Construction Company Limited &Ors.***[7] ***("Hyundai Case"),*** the Hon'ble Court enunciated that whether an arbitration agreement exists can be determined only by enquiring into the fact that the agreement in which the arbitration clause is contained exists in law. A similar view was adopted by the Apex Court in the case of ***United India Insurance Vs Antique Art Exports***[8] ***("Antique Case"),*** wherein it held that it is important to consider other factors too while determining the existence of an arbitration agreement and reliance must not be placed on mere existence.

The impact of Section 11(6A) on SMS Tea was discussed in the case of ***Garware Wall Ropes Limited Vs Coastal Marine Constructions and Engineering Limited***[9] in which the Court clearly stated that an enquiry into whether a document is adequately stamped does not imply that the Courts are going beyond the scope provided under Section 11(6A), which is confined to examination of existence of an arbitration agreement. It held that such an enquiry falls under the ambit of "existence of an arbitration agreement" as the very purpose is to check whether such document "exists in the eyes of law" (unstamped document does not).

Therefore, the term "existence" as envisaged in Section 11(6A) does not imply mere existence but legal existence. An unstamped document does not exist in law, therefore an arbitration clause contained in such a document cannot be enforced and the Courts are required to impound the same.

However, the Courts are no longer required to do so after the 2019 Amendment leaving the question on who is the relevant authority for impounding such unstamped documents.

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[5](2011) 14 SCC 66

[6]Civil Appeal No. 1599 of 2020

[7](2018) 17 SCC 607

[8](2019) 9 SCC 209

[9](2019) 9 SCC 209

Appointment of Arbitrators by Arbitral Institutions: 2019 Amendment

The 2019 Amendment empowers the Supreme Court (in cases of international commercial arbitrations) and High Court (in cases other than international commercial arbitration) to designate arbitral institutions for the appointment of arbitrators. Earlier, these appointments were made by the Courts.

A probable implication is that arbitral institutions will now be responsible for impounding insufficiently stamped documents. However, due to lack of sufficient guidelines and the concern on whether arbitral institution can be regarded as an authority under the Stamp Act, 1899, this question remains.

Deletion of sub-clause 6A: Are we resuscitating the regime that existed before the 2015 Amendment?

The omission of Section 11(6A) by the 2019 Amednment leads to a very presumable question on whether are we going back to the regime that existed before the 2015 Amendment, This was answered in the negative by the Hon'ble Supreme Court in the case of ***Mayavti Trading Vs Pradyuat Deb Burman (2019) 8 SCC 714***, *wherein it held that the motive behind the aforesaid deletion is to encourage institutional arbitration and reduce judicial interference. It clearly stated that deletion of sub- clause 6A is not done to bring back the old regime but to bring about a speedy dispute resolution system. While dealing with Section 11(6A), it also held that the Courts are confined to examine only the "existence" of an arbitration agreement hence overruling the Antique Case.*

Comment

In the opinion of the author, the deletion of Section 11(6A) is a step forward as it aims at making India an arbitration friendly jurisdiction. However, following issues still remain unanswered: (i) Who will impound the insufficiently stamped instruments containing arbitration clause? (ii) What will be the scope of examination after the deletion of Section 11(6A)?

***It is important to note that Section 11(6A) has not yet been notified*

***It is important to note that provisions in relation to Arbitral Institutions have not yet been notified*

***Disclaimer**: Views expressed are personal.*

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