DIAC
Delhi International Arbitration Centre

NEWSLETTER

Delhi International Arbitration Centre

"Footprints towards excellence...."

MARCH, 2019 Issue-1

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Delhi International Arbitration Centre

NEWSLETTER
MARCH - 2019

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MESSAGE FROM THE PATRON-IN-CHIEF

JUSTICE RAJENDRA MENON
Chief Justice
High Court Of Delhi

Delhi International Arbitration Centre is a pioneer institution evolved from the roots of The Arbitration and Conciliation Act, 1996, based on the 1985 United Nations Commission on International Trade Law (UNCITRAL) providing a most favored platform for resolution of commercial disputes through Arbitration.

The well established and pre-determined arbitration procedure of the Institution saving the efforts of parties and their lawyers in determining the arbitration procedure and the adoption of updated rules taking into consideration the latest developments evolving in the arbitration practice have led to the tremendous growth of DIAC which is clearly visualized in terms of reference of cases to the centre, which has increased from 3 in the year 2009 to 2328 in the year 2018.

The vast databases of arbitrators having experience and specialization in areas like construction, maritime, contract, trade, commodities and other fields of science and technology is the key feature of the institution nurturing great faith of the litigants to approach the institution for speedy and cost effective resolution of their disputes.

The well-built infrastructure of the centre established in the premises of High Court of Delhi at the very heart of capital of country with 9 completely equipped hearing rooms with modern technologies such as projectors, consultation rooms with facility of video conferencing is providing speedy, risk-free, efficient and swift process of dispute redressal and the adoption of modern technologies has taken the dispute resolution process towards better form.

Being a part of this prestigious institution, I wish to extend my full support to the aims and objectives of the institution for providing an economic, flexible, commercial, viable and less formal than court mechanism for resolution of disputes of commercial nature between parties and hope that the institution may grow exponentially in the coming time to reach at its highest repute in the field of Arbitration.

(Rajendra Menon)

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MESSAGE FROM THE CHAIRPERSON

As we all know, the Delhi International Arbitration Centre (DIAC) made a small but a significant beginning in 2009 under the leadership of the then Chief Justice, Hon'ble Mr. Justice A.P Shah. DIAC was conceived and set up on the last day of his tenure. Since then DIAC has gone from strength to strength. It has today on its panel 411 expert Arbitrators, who bring to the table a huge amount of experience and expertise to resolve some of the most intractable disputes. Besides the human expertise that DIAC has managed to garner, it has in a short period of less than a decade, set up infrastructural and administrative facilities, which help in the quick, robust and inexpensive resolution of disputes. Notably, DIAC has a unique provision for *pro bono* adjudication as well.

Amongst several markers which measure efficiency of an Arbitration Centre, one such marker which shows that DIAC has made good progress is the consistent increase in the number of awards rendered by its panel of Arbitrators. The chart concerning disposal of cases shows that from 27 awards rendered in 2011, the number of awards pronounced by the end of 2018 increased to 303, which is nearly one-fourth of the total number of cases filed in that year.

It is to provide fillip to the DIAC that the Committee took a decision to bring out a newsletter. The intent was to provide updates not only on the activities of DIAC but also to disseminate information with regard to the most recent pronouncements on aspects relating to arbitration both by domestic Courts as well as Courts in other jurisdictions. Besides this, news items related to arbitration are also a feature of this newsletter. The idea being to provide to Judges of this Court a sort of a ready-reckoner on what is happening in the world of Arbitration. I hope that the persons and entities, who are associated with DIAC, will find this endeavour useful. DIAC would welcome any suggestions which would help in improving the content and presentation of newsletters which it hopes to bring out hereafter.

(Justice Rajiv Shakdher)
High Court of Delhi,
New Delhi

MESSAGE FROM THE VICE-CHAIRPERSON

The Delhi International Arbitration Center (DIAC) is a cost effective forum for alternate dispute resolution and has firmly established its relevance in India.

The publication of this newsletter is yet another step by the DIAC to apprise readers of the recent developments in the realm of arbitration. Apart from apprising the readers with regard to the events organized by the DIAC, an effort has also been made to give an overview regarding the recent judicial pronouncements relating to arbitration.

DIAC is the first Court annexed institution arbitration center and has now become the premier choice for parties to resolve even the most complex disputes. This is evident by the exponential rise in the number of disputes being resolved under the aegis of DIAC; from a mere three referrals in the year 2009, the number of referrals has increased to more than two thousand three hundred in the year 2018. This is also indicative of the Himalayan effort made by all those associated with the DIAC.

In order to harmonize itself with international practice, the DIAC has revised its rules and has framed the Delhi International Arbitration Centre (Arbitration Proceedings Rules), 2018 and the Delhi International Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules, 2018 which came into force on the 1st of July, 2018. The aforesaid Rules add clarity to the procedure and seek to address the need for an expeditious resolution of disputes. The Rules also incorporate a fast-track procedure to expedite the dispute resolution process.

Through this newsletter, the DIAC strives to not only refresh and update the reader *viz.* domestic advances in the field of arbitration, but even includes decisions of those jurisdictions, to which Indian law does not extend.

Since learning is a perennially evolving concept, the DIAC welcomes all comments and suggestions, which would act as catalysts in improving the content of this newsletter.

The DIAC has been responsive to the requirements of the parties in the past, it is expected that it would continue to evolve with the times.

I wish DIAC all the success!

(Justice Vibhu Bakhru)
High Court of Delhi,
New Delhi

Mr. Justice Rajendra Menon

Hon'ble The Chief Justice, High Court of Delhi
Patron-in-Chief, Delhi International Arbitration Centre

Members of the Arbitration Committee:

Mr. Justice Rajiv Shakdher
- Chairperson

•

Mr. Justice Vibhu Bakhru
- Vice Chairperson

•

Mr. Justice Yogesh Khanna
-Member

•

Mr. Justice Navin Chawla
-Member

•

Mr. Justice C. Hari Shankar
-Member

•

Ms. Maninder Acharya, Sr. Advocate
-Member
(ASG attached to the Delhi High Court)

•

Mr. Kirti Uppal, President, Delhi High Court Bar Association
-Member

•

Mr. A.K. Ganguli, Sr. Advocate
- Member

•

Mr. Rajiv Nayar, Sr. Advocate
-Member

•

Mr. Ciccu Mukhopadhaya, Sr. Advocate
-Member

•

Mr. Rajeeve Mehra, Sr. Advocate
- Member

•

Mr. Shashank Garg, Advocate
-Member

•

Mr. Nakul Dewan, Advocate
-Member

•

Ms. Kaveri Baweja, Co-ordinator
- Member (Ex-officio)

THE SECRETARIAT

Managed by Co-ordinator and three Additional Co-ordinators, assisted by ten Deputy Counsels, the Secretariat carries out the day to day functioning and general administration of the Centre.

ABOUT US

Delhi International Arbitration Centre, (DIAC) has the distinction of being the first ever High Court annexed Institutional Arbitration Centre. The Centre has made significant contribution to the growth of Arbitration as an effective catalyst to the dispute resolution mechanism, by providing state-of-the-art infrastructure, pre-established rules/procedures, organized structure, equitable fees and outstanding administrative as well as secretarial support for the conduct of Arbitration.

DIAC offers a panel of experienced Arbitrators comprising of eminent legal luminaries including Former Chief Justices of India, Former Supreme Court Judges, Former High Court Chief Justices and Judges, International Arbitrators, Former District and Session Judges, Senior Advocates, Advocates, Engineers, Architects, Chartered Accountants, Former Bureaucrats and other experts from various fields.

DIAC understands the need for consistent growth and has accordingly reframed its Rules, now called **Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018 and Delhi International Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules, 2018** which came into force from 1st July, 2018. As per the new Rules, a revised Fee Schedule for Domestic as well as International Commercial Arbitration has been adopted to suit the International parameters. A provision has been added wherein any party may challenge the Arbitrator on the grounds and as per the procedure laid down in Rule 10. Fast track Procedure to conclude the Arbitration Proceedings within 6 Months has also been incorporated in Rule 13. Interestingly, a provision for Scrutiny of Draft Award by a Committee, to suggest modifications to the Draft Award without interfering with the decision of the Tribunal has also been incorporated under Rule 32.

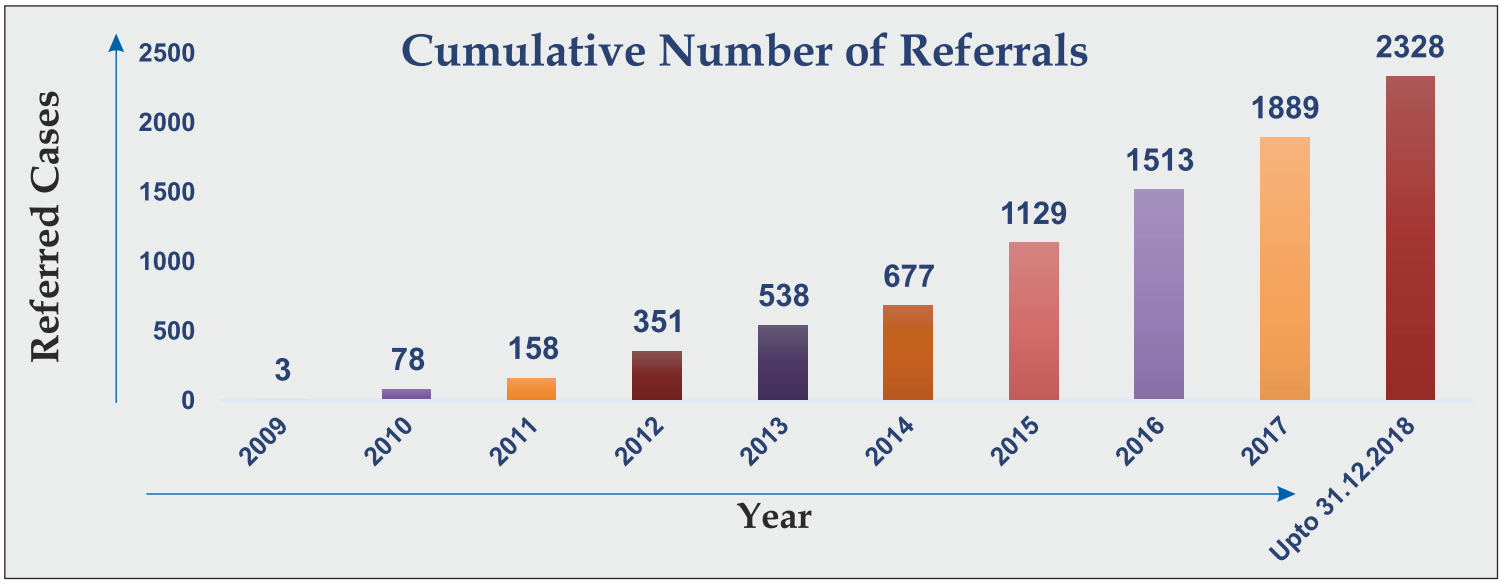
Located in the Delhi High Court premises, DIAC offers a highly developed infrastructure including 9 fully equipped hearing rooms with projectors, consultation rooms, and also facility for video conferencing.

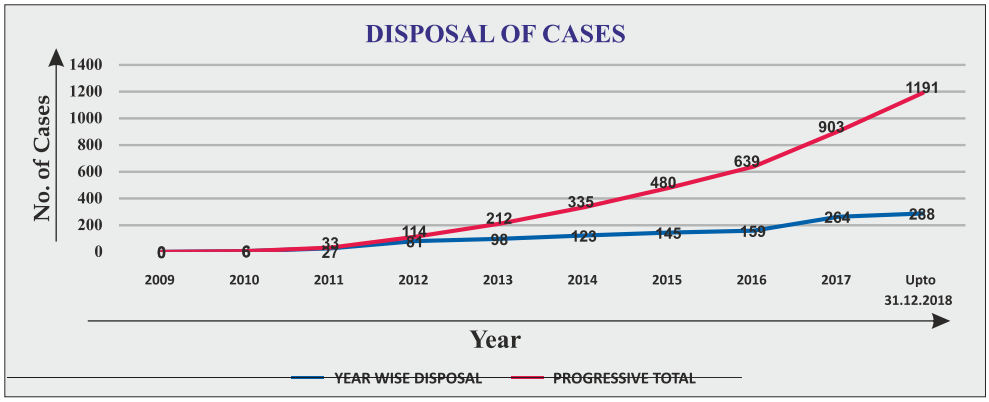
DIAC is now open on all days from 10 AM to 8 PM, including Second Saturdays and Sundays (except National Holidays/Gazetted Holidays).

MILESTONES ACHIEVED BY THE CENTRE

The Centre has witnessed an exponential growth during its journey of almost a decade now. The statistics of recent past demonstrate both its success and future potentiality. DIAC had a humble beginning with only 3 cases referred to it in 2009, which scaled upto 2328 by the end of 2018. The numbers of listed hearings in 2018 were 5522 and the number of awards pronounced were 303.

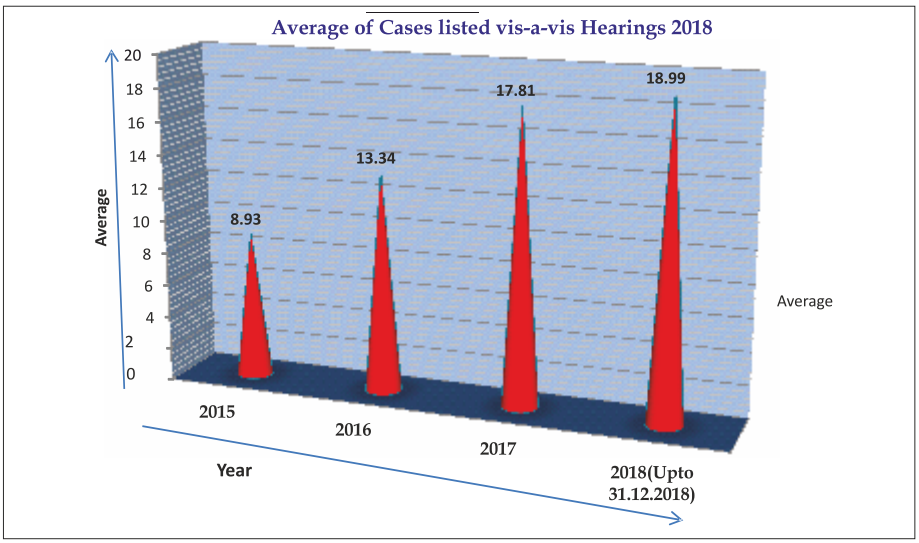
Graphical Representation of Achievements by the Centre:



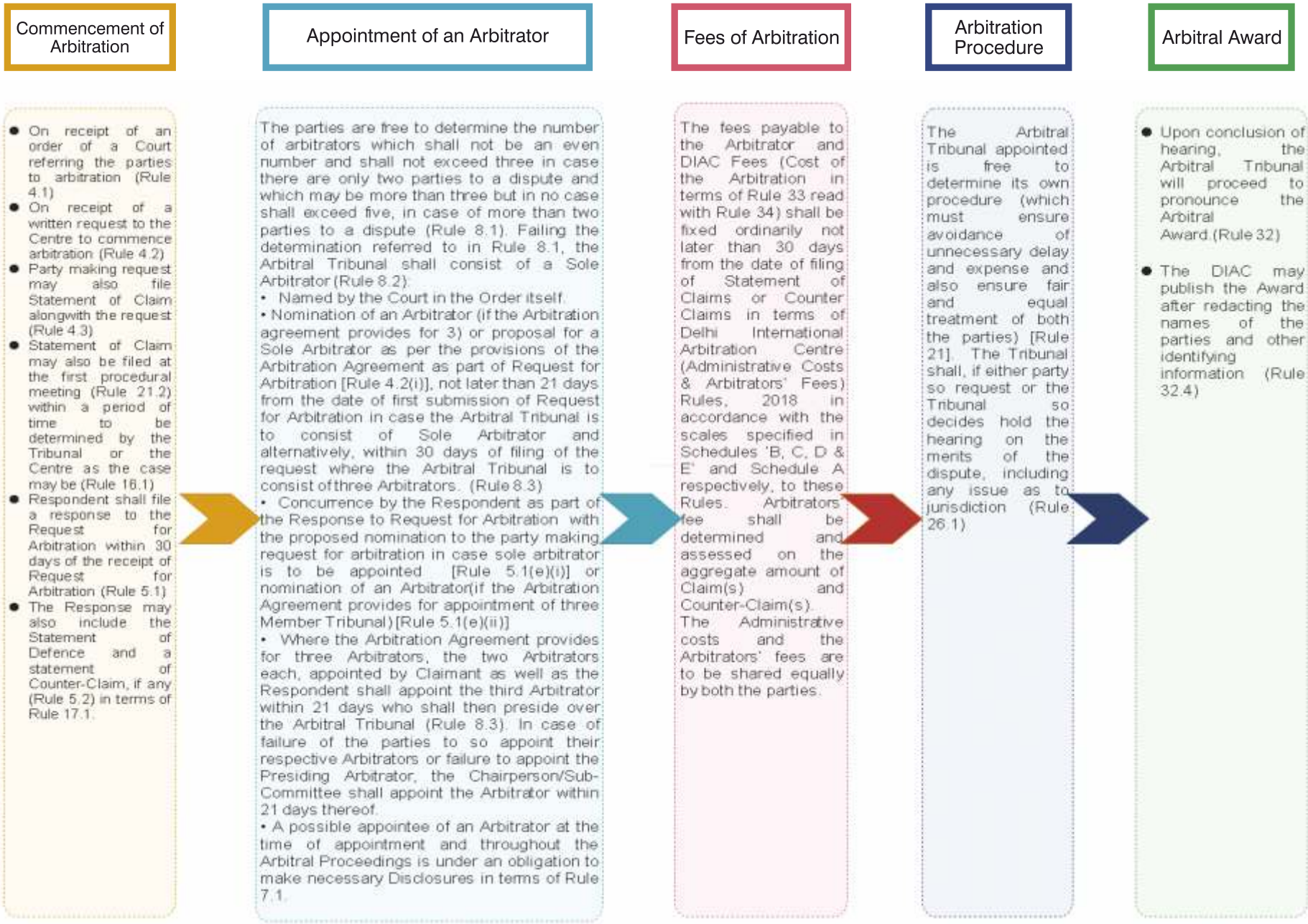


Details of Cases Listed vis-a-vis Hearings(DIAC)

Year	Listed	Hearings
2015	2533	2162
2016	3903	3335
2017	5228	4452
2018(Upto 31.12.2018)	5522	4823



STAGES OF ARBITRATION PROCEEDINGS (AS PER DIAC RULES)



RECENT JUDICIAL PRONOUNCEMENTS IN ARBITRATION

SUPREME COURT OF INDIA

Kandla Export Corporation and Anr. v. OCI Corporation and Anr.

[(2018) 14 SCC 715: 2018 SCC OnLine SC 170] Civil Appeals No. 1661-63 of 2018, decided on 07.02.2018

Foreign Awards cannot be challenged under Section 13(1) of the Commercial Courts Act, 2015

The question before the Supreme Court in this case was *"whether an appeal not maintainable under Section 50 of the Arbitration and Conciliation Act is nonetheless maintainable under Section 13(1) of the Commercial Courts, Commercial Division, Commercial Appellate Division of High Court Act, 2015."*

In the instant case, objections raised in Execution petition pursuant to an Award were rejected by the Commercial Division of the Gujarat High Court, against which order, an Appeal under Section 13(1) Commercial Courts Act was filed.

The matter came up before the Supreme Court, which, while relying on the principles laid down in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.[(2011) 8 SCC 333]*, discussing in detail the relevant sections of the Arbitration Act and Commercial Courts Act and further, emphasising on the objective of Amendment to the Arbitration Act, held that, '*Parliament is presumed to know when it enacted the Arbitration Amendment Act, 2015, and given the fact that no change was made in Section 50 of the Arbitration Act when the Commercial Courts Act was brought into force, it is clear that Section 50 is a provision contained in a self-contained code on matters pertaining to arbitration, and which is exhaustive in nature*'. It was very clearly stated that '*given the objects of both the enactments i.e., speedy resolution of disputes, if we were to provide an additional appeal, when Section 50 does away with an appeal so as to speedily enforce foreign awards, we would be turning the Arbitration Act and the Commercial Courts Act on their heads.*' It was, thus, concluded that Section 13(1) of Commercial Courts Act would not apply to cases covered by Section 50 of the Arbitration Act. It further means that if an appeal lies under Section 50 of the Arbitration Act then only Section 13(1) of the Commercial Courts Act can be looked into, for laying down the forum for hearing such an appeal. Providing an extra tier of appeal would further delay the enforcement of Foreign Award which, in turn, would be contrary to the object and purpose of the Arbitration and Conciliation Act.

Relied in: Precious Sapphire Ltd. v. Amira Foods Pvt. Ltd.; Delhi High Court [2018 SCC OnLine Del 12688]

Bar Council of India v. A.K. Balaji & Ors.

[(2018) 5 SCC 379 : 2018 SCC OnLine SC 214]

Civil Appeal Nos.7875-7879 of 2015; decided on 13.03.2018

Foreign lawyers and Law Firms permitted to conduct International Commercial Arbitrations in India

The Division Bench of the Supreme Court hearing a batch of Appeals against Judgments of the Bombay High Court and Madras High Court, framed five issues, out of which one was upon deliberation *"on bar to foreign law firms and lawyers from conducting Arbitration Proceedings and Disputes arising out of Contracts relating to International Commercial Arbitration."* The Supreme Court held that foreign lawyers do not have an absolute right in conducting International Commercial Arbitrations in India, however, this does not bar them in cases where the rules of Institutional Arbitration apply or the matter is covered by the provisions of the Arbitration Act in view of Section 32 and 33 of the Advocates Act, 1961. However, even in such cases, code of conduct applicable to legal profession in India, as per the Rules framed by Bar Council of India or Union of India, as the case maybe, has to be followed.

State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti [(2018) 9 SCC 472 ; 2018 SCC OnLine SC 966]

Civil Appeal No. 7314 of 2018; decided on 30.07.2018

Prior notice to the other party before filing of application to set aside an Arbitral Award under Sec. 34(5) of the Act, directory and not mandatory

The Supreme Court dealt with the issue as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996 which requires service of a prior notice of an application under Section 34 and an Affidavit endorsing compliance of such requirement to accompany the said application, is directory or mandatory. In the instant case, an application under Section 34 was filed before Patna High Court but without any prior notice or the affidavit.

The application was dismissed. The Supreme Court took note of several pronouncements of various High Courts drawing a contrast of Section 34(5) with Section 80 of the CPC, which makes it mandatory to serve a notice before institution of a suit against the Government or against a Public Officer and held that '*To construe such a provision as being mandatory would defeat the advancement of justice as it would provide the consequence of dismissing an application filed without adhering to the requirements of Section 34(5), thereby scuttling the process of justice by burying the element of fairness.*' It was also pointed out that the requirement in Section 34(1) was qua compliance with sub-sections (2) and (3) and not with sub-section (5). It further observed that no consequence is provided in case of elapse of time period to decide the application, which is in stark contrast to newly added Section 29A, which provides for termination of the mandate of the Arbitrator in case the time limit is not adhered to. The Court also underlined the endeavour on the part of Courts to stick to the time limit, nonetheless, to decide an application under Section 34 in one year either from the date of service of the notice to the opposite party by the applicant or from the date of filing of said application in the Court, as the case may be. With these observations, the instant application challenging an Arbitral Award was allowed.

K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd. [2018 SCC OnLine SC 1013]

Civil Appeal No 21825 of 2017; decided on 14.08.2018

Pending application challenging an Arbitral Award constitutes "pre-existing dispute" under Section 9 of the Insolvency and Bankruptcy Code, 2016 qua an operational debt.

An Arbitral Award in favour of respondent formed the basis of notice under Section 8 of Insolvency and Bankruptcy Code (hereinafter called the "Code"), the reply thereto, raised a "pre-existing" dispute in terms of Section 9(5)(ii)(d) of the Code. It was held that the mandate of Section 9(5) of the Code must be followed to admit or reject the application made under the Code by the Adjudicating Authority. Reliance was placed on Para 34 and 38 of ***Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353*** and it was observed that the Code cannot be used by the Operational Creditors *"either pre-maturely or for extraneous considerations or as a substitute for debt enforcement procedures"* as the amount sought may not be finally payable on account of pendency of adjudication proceedings in an application under Section 34. The object of the Code was highlighted and it was held that the Insolvency Process can be invoked against a Corporate Debtor only *"in clear cases where a real dispute between the parties as to the debt does not exist."* It was, thus, held that *"filing of Section 34 application against an Arbitral Award shows that a pre-existing dispute continues even after the award, atleast till the final adjudicatory process under Section 34 and 38 has taken place"* and thus, the operational debt can be said to be still disputed in terms of Section 9(5) of the Code.

M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi [(2018) 9 SCC 49 : 2018 SCC OnLine SC 1019]

Civil Appeal No. 8367 of 2018; decided on 20.08.2018

The Arbitration Agreement between the parties, a registered broker of National Stock Exchange and its client, contained a clause conferring exclusive jurisdiction upon the Civil Courts in Mumbai. The proceedings were conducted in Delhi for convenience of the parties and an award was passed rejecting the Claim. Application under Section 34 was filed in Karkardooma District Courts in Delhi, however, the same was rejected on the basis of existence of *"exclusive jurisdiction clause"*. In an appeal thereof, the High Court referred the parties back to District & Session Judge, Karkardooma Courts for a fresh decision after framing specific issue of territorial jurisdiction and permitting parties to lead evidence upon same, which was then challenged before the Supreme Court.

The Supreme Court relied on its earlier judgment in *Indus Mobile Distribution (P) ltd. v. Datawind Innovations (P) Ltd.[(2017) 7 SCC 678]* and held that *"exclusive jurisdiction clause"* has its root in determination of *"juridical seat"* which can also be a *"neutral venue"* as per the agreement of the parties, in contra distinction to the concept of jurisdiction as per Code of Civil Procedure. It further noted that hearings conducted at some venue as per the convenience of the parties would not entail the place to be the seat of the arbitration, which in turn would determine the jurisdiction for post award proceedings. The Supreme Court took note of two judgments pronounced by High Court of Delhi in *Sandeep Kumar v. Ashok Hans [(2004) SCC Online Del. 106]* and *Sial Bio energie v. SBEC Systems [(2004) SCC Online Del. 863]* while deliberating upon the decision of High Court of Delhi referring the matter back to District judge for framing an issue with respect to the existence of territorial jurisdiction and permitting the parties to lead evidence. Observing that an application under Section 34 of the Act is a special remedy, to be dealt summarily, which requires expeditious disposal of the objections, it was thus, held that an application for setting aside an Arbitral Award would not ordinarily require anything beyond the record of the Arbitrator and if need be, affidavits of the parties may be filed before the Court and that cross-examination should not be allowed unless absolutely necessary. The judgment of High Court of Delhi with the direction for framing of issue and leading evidence qua territorial jurisdiction was accordingly set-aside.

Supreme Court sets up limit on fresh evidence for adjudicating challenge to Arbitral Award

Relied in: S. Balu v. ICDS Ltd. & Ors.; High Court of Kerala at Ernakulam [2019 SCC OnLine Ker 502]

United India Insurance Co. Ltd. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors. [2018 SCC OnLine SC 1045]

Civil Appeal No. 8146 of 2018; decided on 21.08.2018

Conditional Arbitration Clause of Insurance Policies should be read strictly

The order passed by the Madras High Court on a petition under Section 11(4) & 11(6) of the Arbitration and Conciliation Act, 1996, appointing an Arbitrator pursuant to a *"Conditional Arbitration Clause"* of 'Contractor All Risk Insurance Policy' taken by Respondent from the Appellant covering its entire project, has been set aside by the Supreme Court. The subject Clause 7 of the Insurance Policy expressing intent of parties to refer their differences to Arbitration also contained condition that only the accepted liability and undisputed claims of the policy shall be referable to Arbitration. The Ld. Single Judge of Madras High Court allowed the petition opining that the Arbitration Agreement existed between the parties in the form of Clause 7 of the Insurance Policy. The order was appealed against.

The Supreme Court, took note of its Three Judge Bench decision in *Oriental Insurance Co. Ltd. v. Narbheram Power and Steel Pvt. Ltd.[(2018) 6 SCC 534]*, following the exposition in *'Vulcan Insurance Co. Ltd. V. Marahaj Singh' [(1976) 1 SCC 943]* and held the instant dispute as non-arbitrable, observing that the admission of liability by the insurer is a pre-condition and thus, sine qua non for invocation of the Arbitration Clause.

It was concluded that "*an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the concerned policy*".

Relied in: Raj Dutta & Ors. v. Lambada Content India Pvt. Ltd.; Delhi High Court [2019 SCC OnLine 6906]

Union of India v. Hardy Exploration and Production India (INC) [(2018) 7 SCC 374 :2018 SCC OnLine SC 474]

Civil Appeal No. 4628 of 2018, decided on 25.09.2018

Supreme Court considers the issue of "seat" and "venue" of the Arbitration

The Three Judge Bench of Supreme Court, recently while passing an order, on a reference made to it by the Division Bench, considered the issue of *"seat"* or *"place"* of Arbitration as distinct from *"venue"* of Arbitration under International Commercial Arbitration matters. It was held that the *"seat"* of Arbitration or *"place"* of Arbitration has a different connotation than the *"venue"* of Arbitration and thus, cannot be used *"interchangeably"*. It was observed that the Arbitration Clause is reflective of the intent of the parties *qua* determination of a seat. It was pointed out that the International Conventions such as the New York Convention of 1958 and UNCITRAL Model Law of 1985 support the position that law of *"seat"* or *"place"* where the arbitration is held is normally the law to govern that Arbitration as well, even if not so specified since the law of that particular country will apply *ipso jure.* Article 20 of the UNCITRAL Model Law mandates the determination of place of Arbitration by the Arbitral Tribunal in case parties have not agreed to any such place, which determination shall form part of an Award as per Article31(3) of the Model Law. Article 20(2) grants liberty to the Arbitral Tribunal to select a *"venue"*, thus, the sittings at various places by the Arbitral Tribunal during the course of arbitration for hearings, inspections, for consultations are relatable to venue and cannot be equated with the *"place"* or *"seat"* of Arbitration. Agreement of the parties determines a *"place"* which becomes a *"juridical seat"* for the purpose of applicability of necessary jurisdiction. Similarly, if a condition is postulated attached to the term *"place"*, the same has to be satisfied to become *"juridical seat". It was held by the* Supreme *Court that, "a venue can become a seat if something else is added to it as a concomitant. But a place unlike seat, at least as is seen in the contract, can become a seat if one of the conditions precedent is satisfied. It does not ipso facto assume the status of seat."*

In the instant case, neither the "place" of arbitration was agreed by the parties nor was there any such positive determination by the Arbitral Tribunal. The fact that the Arbitrator held the meeting at Kuala Lumpur which was mentioned to be "venue" of the Arbitration as per the Articles of the Arbitration Agreement and that the Arbitrator signed the award there did not amount to positive determination by the Arbitrator about the "Juridical Seat" of the Arbitration. Intent of the parties was gathered from the other Articles of the Arbitration Agreement qua the applicability of Indian substantive law.

The Court ruled that Indian Courts had the jurisdiction to entertain the application under Section 34, challenging the legal propriety of the Award.

Relied in: Virgo Softech ltd. v. National Institute of Electronic and Information; Delhi High Court [2018 SCC OnLine Del 12722]

Shriram EPC Limited v. Rioglass Solar SA [2018 SCC OnLine SC 1471]

Civil Appeal No.9515 of 2018; decided on 13.09.2018

Non-Stamping of Foreign Award would not render it unenforceable under Section 49 of the Arbitration Act

The main issue deliberated upon was whether an Award which has not been stamped can still be enforced under the provisions of Section 48 and Section 49 of the Arbitration and Conciliation Act, 1996.

It was held that the term "Award" under Item 12 of Schedule I of the Indian Stamp Act, 1899 never included a Foreign Award from its very inception till date and thus, not liable for any Stamp duty. The position of Foreign Awards was considered under the Code of Civil Procedure, 1882 and Indian Stamps Act, 1899 wherein distinction was made between the Awards made in the Territory of British India and those in Princely States. The distinction continued in the Code of Civil Procedure, 1908 and the Arbitration (Protocol and Convention) Act, 1937. The present Arbitration and Conciliation Act, 1996 repealed the 1937 Act and placed Foreign Award relatable to New York Convention within Chapter I of Part II and those relatable to Geneva Convention within Chapter-II of Part-II. It was, thus, held that a Foreign Award which has not borne Stamp Duty under the Indian Stamp Act, 1899 would not render it unenforceable under Section 49 of the Arbitration and Conciliation Act, 1996.

P. Radha Bai v. P. Ashok Kumar *[2018 SCC OnLine SC 1670]*

Civil Appeal No. 77107713 OF 2013; decided on 26.09.2018

Section 34(3) of Arbitration Act tantamount to an "express exclusion" of Section 17 of Limitation Act

The Supreme Court considered the issue as to "*whether the text or the scheme and object of Arbitration Act excludes the application of Section 17 of Limitation Act while determining the limitation period.*" It is evident that an Arbitral Award can be challenged by way of an application under Section 34 of Arbitration and Conciliation Act within three months from the date when the party making an application receives the Award or the date of disposal of request for corrections or interpretation of the Award under Section 33. The time limit of three months is extendable only by thirty days as per Section 34(4). The phrase *"but not thereafter"* nails the legislative intent of giving "*finality*" to an Arbitral Award by fixing an "*outer boundary period"* for challenging an Award. Application of Section 17 of Limitation Act would alter the date of commencement of the limitation period specified clearly in Section 34(3) and thus, would be inconsistent to the principle of "*unbreakability*" which is an essential facet of the Arbitral Award. The provision to provide an outer limit for challenging an Award would also be rendered futile and would hit upon the "*certainty and expediency"* of the Arbitral Award. Further, an application under Section 34 is rather based on the Award and date of its receipt and not on the fraud and thus, any subsequent disability in terms of Section 17 of the Limitation Act would be immaterial in commencement of the limitation period.

P.E.C Limited v. Austbulk Shipping SDN BHD *[2018 SCC On Line SC 2549]*

Civil Appeal No.4834 of 2007; decided on 14.11.2018

The Supreme Court examined the issue as to whether an application under Section 47 of Act seeking enforcement of a Foreign Award is liable to be dismissed if it is not accompanied by an Arbitration Agreement. It was held that the word "shall" used in Section 47 of the Arbitration and Conciliation Act, 1996 enlisting the requirements for the parties applying for enforcement of the Foreign Award at the time of filing of an application be construed as "may", in tandem with the real intent of the legislature in construing the scope of the statute. This interpretation also draws support from relevant articles of New York Convention and the UNCITRAL Model Law on International Commercial Arbitration, 1985. Support is also drawn from Section 48 of the Arbitration and Conciliation Act, 1996 wherein any such condition of non-production of the Arbitration Agreement at the time of filing of the application seeking enforcement of Foreign Award has not been mentioned.

> The Arbitration Agreement need not be filed at the time of filing of an application seeking enforcement of a Foreign Award.

Radha Chemicals v. Union of India [MANU/SCOR/31276/2018]

Civil Appeal No. 10386 of 2018; decided on 10.10.2018

Remand of matter to the Arbitrator for fresh decision under Section 34 is beyond jurisdiction

In this case, the Supreme Court has set aside the judgment passed in a petition under Section 34 of the Arbitration and Conciliation Act, 1996 and appeal thereof, by both Learned Single Judge as well as Division Bench of the High Court, wherein the matter was remanded to the new Arbitrator for fresh decision on the point of limitation, as the whereabouts of the earlier Arbitrator were not known. The Supreme Court held that the Court while deciding a petition under Section 34 has no jurisdiction to remand the matter to the Arbitrator for a fresh decision.

The Supreme Court reaffirmed its stand taken in its series of judgments resulting in *Kinnari Mullick and Another v. Ghanshyam Das Damani, [(2018) 11 SCC 328]*, stating that the discretion of Court under Section 34(4) to defer the proceedings for specified purpose is limited and can be invoked only upon request by the party prior to setting aside of the award.

SP Singla Constructions Pvt. Ltd v. State of Himachal Pradesh & Anr. [2018 SCC OnLine SC 2673]

Civil Appeal Nos. 11824-11825 of 2018; decided on 4.12.2018

Appointment of an Arbitrator cannot be challenged under Section 11(6) of the Arbitration and Conciliation Act, 1996

The Supreme Court held that a challenge to the appointment of an Arbitrator as per the Arbitration Agreement between the parties cannot be made under Section 11(6) of the Arbitration and Conciliation Act, 1996. The Respondent and the Appellant had entered into a contract for construction works. The Appellant raised some disputes and requested for appointment of an Arbitrator, pursuant to which, the Chief Engineer, HPPWD appointed Superintendent Engineer, Arbitration Circle, HPPWD, Solan as the Arbitrator in terms of Clause 65 of the Agreement. The appointment was made under the provisions of Arbitration and Conciliation Act, 1996 prior to the Amendment Act, 2015. After the proceedings were terminated under Section 25(a) of the Arbitration and Conciliation Act, 1996 due to non-follow up by itself, the Appellant challenged the said appointment, by filing an application under Section 11(6) to the High Court praying for the appointment of an independent Arbitrator, which was dismissed. While relying on catena of judgments, it was held that the only remedy available with the party dissatisfied or aggrieved with the appointment of an Arbitrator is by challenging its appointment in terms of Section 13 of the Act which would be deliberated upon by the Arbitral Tribunal itself. It means that the Arbitral Tribunal shall continue with the proceedings and pronounce the award in case the challenge is unsuccessful and then the only option with the aggrieved party would be to challenge the Arbitral Award under Section 34 of the 1996 Act. It further clarified that the first instance of challenge of appointment of such an arbitrator must be before the tribunal itself.

In the instant case, as the Arbitrator had already entered reference, thus, Section 11 (6) of the Arbitration and Conciliation Act, 1996 cannot be invoked.

M/s Emaar MGF Land Limited v. Aftab Singh *[2018 SCC OnLine SC 2771]*

Review Petition (C) Nos. 2629-2630 of 2018
in Civil Appeal Nos. 23512-23513 of 2017, decided on 10.12.2018

An Arbitration Clause does not debar the consumers from availing a remedy under Consumer Protection Act

The Review Petition emanated from decisions of the National Consumer Disputes Redressal Commission (NCDRC) relating to a dispute between a Buyer and the Builder. The Builder filed an application under Section 8 of Arbitration and Conciliation Act, 1996 claiming that there was an Arbitration Agreement between the Builder and the Buyer. Supreme Court examined as to whether a remedy was available to the Buyer under Consumer Protection Act despite the existence of an Arbitration Agreement, in view of the Amendment made in Section 8 by the Arbitration and Conciliation (Amendment) Act, 2015 whereby the words *"notwithstanding any judgment, decree or order of the Supreme Court or any Court" were inserted.* Supreme Court took note of several pronouncements *viz. Fair Air Engineering (P) Ltd. & Anr. v.. N.K. Modi [(1996) 6 SCC 385], Skypak Couriers Ltd. v. Tata Chemicals [(2000) 5 SCC 294], National Seeds Corporations Ltd. v. M. Madhusudhan Reddy & Anr.[(2012) 2 SCC 506], Rosedale Developers (P) Ltd. v. Aghore Bhattacharaya & Ors.[(2018) 11 SCC 337,* wherein interface of provisions of Arbitration Act with Consumer Protection Act were dealt with. It was reiterated that the proceedings and remedies under the Consumer Protection Act are special in nature, considering the object and purpose of the Act and could be continued under the said Act despite there being an Arbitration Agreement. The Court noted that every Civil or Commercial dispute, whether contractual or non-contractual, is in principle capable of being adjudicated by Arbitration. However, there are certain categories of non-arbitrable disputes enlisted in judgments of the Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.[(2011) 5 SCC 532], A. Ayyasamy v. A. Paramasivam & Ors. [(2016) 10 SCC 386] and Vimal Kishor Shah & ors. v. Jayesh Dinesh Shah & ors. [(2016) 8 SCC 788]* which are: *(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences, (ii) matrimonial disputes, child custody (iii) matters of guardianship, (iv) insolvency and winding-up, (v) testamentary matters and (vi) eviction of tenancy matters (vii) disputes within the trust, trustees and beneficiaries.* Taking note of 246th Report of Law Commission considered by the Parliament while enacting the Amendment Act, 2015, the Court concluded that the Amendment under Section 8(1) has not negated large number of non-arbitrable categories of cases in the law laid down by this Court, in reference to Section 2(3) of the Act, as the statutes providing special remedy, was not in contemplation and the intent was only to minimize discretion of the judicial authority to refuse arbitration.

M/s. Simplex Infrastructure Ltd. v. Union of India
[(2019) 2 SCC 455 : 2018 SCC OnLine SC 2681]

Civil Appeal No.11866 of 2018 @ Special Leave Petition (C) No 17521 of 2017; decided on 5.12.2018

An application seeking condonation of delay of 514 days in filing another application under Section 34 of Arbitration and Conciliation Act, 1996 was allowed by the Single Judge of High Court of Calcutta, which formed the subject of present appeal. It was held that an application for setting aside the Arbitral Award may be made only in terms of Section 34(2) and Section 34(3). By use of words *"but not thereafter"* as part of Section 34(3), the legislature has made its intent clear that the statutory period of three months as mentioned in Section 34(3) is only extendable by 30 days as read with the proviso, upon sufficient cause shown by the party filing an application and not in any other circumstances for any further period whatsoever. The appeal, thus, in this case was allowed and the application seeking condonation of delay beyond the statutory period was rejected.

Statutory time limit to challenge an Arbitral Award has to be strictly adhered to

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Vidya Drolia & Ors. v. Durga Trading Corporation

Civil Appeal No. 2402 of 2018, decided on 28.02.2019

Issue of arbitrability of disputes under Transfer of Property Act and Specific Relief Act referred to Three Judge Bench

This Appeal was filed against the dismissal of a Review/Recall Application filed by the Appellants before the High Court of Calcutta in the light of judgment of the Supreme Court delivered in *Himangni Enterprises v. Kamaljeet Singh Ahluwalia, [(2017) 10 SCC 706]* wherein the disputes between landlord and tenant under the provision of Transfer of Property Act, 1882 were held to be non-arbitrable. Arbitration was invoked by the respondents in terms of a clause in the Tenancy Agreement, calling upon the appellants to deliver vacant and peaceful possession of the tenanted premises upon efflux of time. The judgment in *Himangni Enterprises (supra)* was pronounced by the Supreme Court during the pendency of the Arbitral Proceedings. The Supreme Court noted that the said decision in *Himangni Enterprises* was based on its earlier decisions in two cases of *Natraj Studios (P) Ltd. vs. Navrang Studios [(1981) 1 SCC 523] and Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. [(2011) 5 SCC 532],* any of which did not pertain to disputes between landlord and tenant under the provisions of Transfer of Property Act. The Court also observed that "*Transfer of Property Act is silent on arbitrability, and does not negate arbitrability"*. The Court also took note of its decision in *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan and Others [(1999) 5 SCC 651]* which held that there is no prohibition in the Specific Relief Act with respect to arbitrability of the issues relating to Specific Performance. The Court also considered the relevant provisions of Indian Trust Act, 1882, in the light of its earlier decision in *Vimal Kishor Shah and Others v. Jayesh Dinesh Shah and Others [(2016) 8 SCC 788]* with reference to *Dhulabhai v. State of M.P. [(1968) 3 SCR 662]* based on the principles laid down in *Wolverhampton New Waterworks Co. v. Hawkesford [141 ER 486]* to emphasize that *"the statute, considered as a whole, must lead necessarily to a conclusion that the disputes which arise under it cannot be the subject matter of arbitration"* and that the disputes arising thereunder are excluded to be referred to Arbitration by "*necessary implication"*. Noting that a similar "necessary implication" cannot be demonstrated for Transfer of Property Act or the Specific Relief Act, the case was referred to a Bench of Three Judges. It was held that the Award upon the culmination of arbitral proceedings in the matter would not be executed without applying to the Supreme Court.

Golden Chariot Recreations Pvt. Ltd. v. Mukesh Panika & Anr. [2018 SCC OnLine Del 10050]

ARB.P. 143/2018 & IA No.3336-3337/2018; decided on 23.07.2018

Issuance of notice of request under Section 11 is mandatory for filing an application therein.

In the instant case, a petition under Section 11 of the Arbitration and Conciliation Act, 1996 was filed seeking appointment of an Independent Arbitrator relying on an Arbitration Clause contained in the Supplementary Partnership Deed. Prior to the instant application, a petition under Section 9 was filed wherein the petitioner issued a notice invoking the Arbitration Clause which was responded to, and petition under Section 9 was accordingly disposed of. Subsequently, another notice invoking the Arbitration Clause was sent by the petitioner which also was responded to and the instant application was filed. The issue which arose qua the disposal of the present application is whether the said application is barred by limitation. It was noted that application under Section 9 of Arbitration and Conciliation Act was disposed of with the observation of the Court that the Arbitration Clause had already been invoked, however, no steps were taken for constitution of the Arbitral Tribunal. Subsequently, fresh notice was issued invoking the Arbitration Clause. It is noted by the Court that the party has to mandatorily follow the procedure laid down in Section 11, that is, to issue notice to the other party proposing the names of the Arbitrators and to approach the Court only on failure of consensus, within 30 days of such notice. Thus, the limitation for filing an application under Section 11 shall only accrue after 30 days of the receipt of request. It was accordingly, held that the limitation seeking appointment of an Arbitrator is distinct from period of limitation for making the claim and that in the instant case, limitation for filing the present application commenced from the expiry of 30 days of the prior notice, thus, the petitioner ought to have filed an application seeking appointment of Arbitrator at that stage when response was received from the respondent to the said request.

SLP (C) No.40627 of 2018 filed in the Supreme Court of India, against the said judgment was dismissed on 31.01.2019

Parsoli Motors Works (P). Ltd. v. BMW India P. Ltd. [2018 SCC OnLine Del 6556]

O.M.P(I)(COMM.) 559/2017; decided on 15.01.2018

Section 9 of Arbitration Act cannot bypass Section 41 of Specific Relief Act

The petitioner's car dealership agreement had a duration of one year with the right of renewal reserved at the sole discretion of the respondent manufacturer. When the targeted sales could not be achieved, admittedly for two years at a stretch, the respondent company refused to renew the dealership once it stood terminated at the end of the term. On the grounds of significant expenditure, time and energy invested by the petitioner in setting up the dealership, training the manpower and complying with the standards set by the respondents, the former prayed for a reasonable time of about 9 to 10 months to exit from its relationship with the respondent by moving an application for interim measures under Section 9 of the Arbitration and Conciliation Act, 1996.

High Court of Delhi analysed the scope of Section 9 of Arbitration and Conciliation Act and summed up the guiding principles regarding exercise of jurisdiction to grant interim relief. The Court relied upon various judgments of Supreme Court viz. *Adhunik Steel Ltd. v. Orissa Manganese & Minerals (P) Ltd. [(2007) 7 SCC 125], Arvind Constructions Ltd. v. Kalinga Mining Corporation [(2007) 6 SCC 798], Firm Ashok Traders v. Gurmukh Das Saluja [(2004) 3 SCC 155], Gujarat bottling Co v. Coca Cola [AIR 1995 SC 2327]* and also various decisions of Delhi High Court to conclude that the injunctions which cannot be granted under Section 41 of Specific Relief Act cannot be granted under Section 9 either, and that the three pre-requisites, of existence of prima facie case, balance of convenience and irreparable loss, have to be satisfied to further the basic intent behind the exercise of power to protect the subject matter of the Arbitration. The Court also pointed out that equitable jurisdiction to continue a contractual relationship, which is otherwise terminated/ terminable cannot be exercised within the scope of Section 9. The doctrine of legitimate expectation and the doctrine of promissory estoppels were discussed in detail to hold that any injunction which, in effect, amounts to specific enforcement of a contract, otherwise terminated/terminable, cannot be granted.

Mani Kumar Subba & Anr. v. Future Gaming & Hotel Services Private Ltd. *[2018 SCC OnLine Del 12973]*

CS (COMM) 1250/2018; decided on 06.12.2018

Three Member Tribunal constituted to avoid conflicting Awards

In rather peculiar facts of this matter, two separate Arbitrators entered reference under two Arbitration Agreements, first dated 24.12.2013 and the other dated 02.04.2015. The suit was filed seeking a restraint on the Arbitral proceedings arising out of an Agreement dated 24.12.2013 on the ground that the same stands superseded by a later Agreement. It be noted that plaintiff no.2 was only a confirming party qua the Agreement dated 2.4.2015. The Court examined various clauses of the Arbitration Agreement to identify the role of plaintiff no.2 in the entire transaction, holding that facts of the matter are such that it cannot be said that the defendant cannot maintain any claim against plaintiff no.2. The Court relied upon the settled position qua substitution and supersession in a judgment of "*Citi Bank N.A. v. Standard Chartered Bank [(2004) 1 SCC 12]*" to underline that agreement of both the parties to a Contract is imperative for substitution/alteration of a Contract. It was further noted that there is no question of any supersession of the contract as plaintiff no.2 was not a party to the second agreement, further taking support from the point that the Arbitration Agreement is quite distinct from the main Contract. Under the unique circumstances as detailed above, the Court rather interestingly suggested that a Three Member Tribunal be constituted citing the possibility of conflicting Awards being rendered in respect of two Agreements. The arrangement was also not objected to by either party. Keeping the two Arbitrators already appointed, a third Member of the Tribunal was appointed to act as the Chairman of the Tribunal.

Ram Abhoshan v. PEC [2018 SCC OnLine Del 12352]

FAO(OS) 154/2018; decided on 14.11.2018

Change in Policy does not constitute Force Majeure.

An Arbitral Award was challenged before Single Judge of High Court of Delhi who concurred with the majority view of the Arbitral Tribunal, which was then challenged before the Division Bench of High Court of Delhi. The primary issue raised was that the profit margins of the petitioner substantially reduced due to liberalization of RBI Policy with respect to import of gold in India and claimed frustration of the contract asserting *Force Majeure* by invoking Clause 7 of the Tender of import of gold, as also under Section 56 of the Indian Contract Act, 1872. The contention was rejected and it was held that the *Force Majeure* is not applicable to the facts of the case as change in policy was not something which prevented, wholly or partially, the petitioner from carrying out its contractual obligations, also noting that the respondent had no role to play in the issuance of the policy. It was concluded that the contentions raised were without any merits as there were no changed circumstances which made the performance of the contractual obligations impossible.

M/s Chandok Machineries v. M/s S.N. Sunderson & Co. [2018 SCC OnLine Del 12782]

FAO(OS)(COMM) 268/2018; decided on 10.12.2018

Delhi High Court clarifies 'making of the award', in case of procedural irregularity

Division Bench of High Court of Delhi upheld the decision of Single Judge in an appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 whereby the challenged Arbitral Award was held to be valid. The Award was passed by the Three Member Arbitral Tribunal, bearing signatures of two of the three Arbitrators, just one day prior to the date on which the mandate of the Tribunal would have terminated, that is, on 13.06.2017. The Award was signed by the third Arbitrator on 28.06.2017. The reasons for delay in signing the Award were set out in an order on an Application under Section 33(1)(a) filed by the respondent. The challenge under Section 34 Petition was raised *inter alia* on the ground that the mandate of the Arbitral Tribunal had terminated prior to signing of Award by the third Arbitrator. Reaffirming the stand of the Single Judge, it was held that the purpose of Section 29(1) read with Section 31(2) is to avoid fresh round of litigation and hence, the presence of majority of the tribunal was regarded as sufficient. The Court observed that, '*a procedural irregularity of this nature ought not to vitiate the entire decision-making process particularly when it is capable of being subsequently cured*'. In the instant case, the compliance of Section 31(2) was done when the lacuna of the award was cured by stating reasons of the belated signing in the order on an application under Section 33.

Union of India v. Reliance Ltd. & ors. [2018 SCC On Line Del 13018]
ARB. A. (COMM.) 57/2018; decided on 18.12.2018

A three member Arbitral Tribunal passed a Procedural Order directing disclosure of documents by the Union of India (UOI). Aggrieved by the same, the present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 was filed, against Reliance India Ltd. (RIL) and NIKO (NECO) Resources Limited (NIKO) and B.P. Exploration (Alpha) Limited ("BP"). Dispute arose between the parties on account of violation of Production Sharing Contract ("PSC") in relation to exploration, extraction, evacuation and sale of Natural Gas from particular gas fields. The Arbitral Tribunal dismissed the objections raised on behalf of UOI. The Court observed that the power of an Arbitral Tribunal to order discovery was not contained in Section 17(1)(ii)(c) of Chapter IV of the 1996 Act rather it can be understood to be sourced in Section 19(4) read with Section 27 of the 1996 Act. The Arbitral Tribunal, being not bound by the provisions of Code of Civil Procedure and Evidence Act, are free to agree upon a procedure to be followed in conduct of Arbitral Proceedings which includes the power to gather evidence as well. Further, drawing parallels with the provisions of Order XI of Code of Civil Procedure which vests power in the Civil Courts to order Discovery or Inspection, against which no appeal (except under Rule 21 of Order XI) is provided, the legislature never intended to make an order directing discovery/disclosure of documents by Arbitral Tribunal as appealable under Section 37(2)(b). The appeal was accordingly dismissed concluding that it was not maintainable against a Procedural Order seeking disclosure/discovery of documents passed by the Arbitral Tribunal.

An order directing disclosure of documents not appealable under Section 37(2)(b) of the Arbitration Act

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Republic of India v. Augusta Westland International Ltd. [2019 SCC OnLine Del 6419]
CS (COMM) 9/2019; decided on 09.01.2019

A Suit was filed for Declaration that the mandate of the Arbitral Tribunal be terminated in terms of Section 29A of the Arbitration and Conciliation Act, 1996. The issue considered was whether Amendment Act of 2015 would apply to pending arbitral proceedings.

It was held that the language of Section 26 of the Amendment Act clearly specifies that it does not apply *"to the arbitral proceedings commenced in accordance with provisions of Section 21 of the Principal Act"*. Thus, if arbitral proceedings have commenced under Section 21 of the Act, prior to coming into force of the 2015 Amendment Act, then Section 29A of the Act would not be applicable.

Section 29A of the Arbitration and Conciliation Act, 1996 is not applicable to proceedings already initiated in terms of Section 21 of the Act.

The Explanation in Section 29A(1) uses the terminology *"deemed to have entered upon reference"*. This language is clearly distinct from *"commencement of arbitral proceedings used in Section 21 of the Act"*. While the time period prescribed in Section 29A Act would apply from the date when the Tribunal enters upon reference, the commencement of arbitral proceedings does not take place when the Tribunal enters reference.

Arbitral proceedings are deemed to have commenced as per the provisions of Section 21 of the Act and not as per the Explanation to Section 29A(1) of the Act.

The legislative intent was obviously not to make the provisions of Section 29A of the Act retrospective in nature. Section 26 of the Amendment Act is clear that the amendments apply prospectively, in so far as arbitral proceedings are concerned.

R.V. Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors. *[2019 SCC OnLine Del 6531]*

CS(COMM) 745/2017; decided on 15.01.2019

Non-signatory could be subjected to Arbitration without consent in exceptional circumstances

An application under Section 8 of Arbitration and Conciliation Act, 1996 having been filed by/on behalf of the defendants in a suit filed by the plaintiff was opposed on the premise that defendant no.5 is a Company which is a foreign entity with which there is no agreement or collaboration. High Court of Delhi deliberated upon the issue, placing reliance on the principles laid down in recent pronouncements of the Supreme Court in *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc & Ors.[(2013) 1 SCC 641]*, *Cheran Properties Limited v. Kasturi & Sons Limited & Ors.[(2018) 16 SCC 413],* and noted that a non-signatory or third party could be subjected to Arbitration without his consent, only in exceptional cases, where either there is direct relationship to the signatory party of the Arbitration Agreement or there exists commonality of the subject matter or there are composite transactions in the agreement between the parties.

C & C Maritime Pte. Ltd. v. Advance Surfactants India Ltd. *[2019 SCC OnLine Del 6789]*

EX. P. 311/2014, decided on 24.01.2019

Respondent cannot allege violation of Principle of natural Justice for its own failure to file defence.

Petition was filed under Section 49 of the Arbitration and Conciliation Act, 1996 for enforcement of the Arbitral Awards. Respondent submitted that the Arbitral Tribunal was neither properly constituted nor was any opportunity of defending the Claim was given.

It was held that if the respondent, despite sufficient efforts & opportunities by the Arbitral Tribunal to serve it, maintains silence then Respondent cannot be heard to complain about non-grant of opportunity to file its defense or claim violation of the Principles of Natural Justice.

NCC Limited v. Indian Oil Corporation Limited *[2019 SCC OnLine Del 6964]*

Arb. P. 115/2018; decided on 08.02.2019

Scope of Section 11 narrowed down by the Amendment Act, 2015

It is a petition filed by NCC limited (Petitioner) seeking direction for appointment of a Sole Arbitrator under Section 11(6) read with Section 11(8)(b) opposed by Indian Oil Corporation Ltd. (Respondent) on the premise that the claims sought to be arbitrated are not *"Notified Claims"* as per relevant clauses of General Conditions of Contract and the jurisdiction to decide as to whether the claims are *"Notified Claims"* or not, vest with the General Manager of Respondent. Only "*Notified Claims*" (decision already taken by General Manger), also included in the final bill can be referred for Arbitration. The Court noted that the insertion of Section 11(6A) by the Amendment Act, 2015 has considerably narrowed down the scope of examination by the Court qua a petition under Section 11 as in confined only to existence of an Arbitration Agreement, relatable to the dispute at hand. The Court relied on doctrine of "*kompetnz kompetenz" to* conclude that a petition under Section 11 seeking appointment of an Arbitrator may be dismissed in case the disputes between the parties, on a mere bare perusal of the Arbitration Agreement, can be held outside its ambit/not relatable to the Arbitration Agreement, however, where the facts require further enquiry or leading of evidence or there is a contest between the parties about the relatability of the dispute to the Arbitration Agreement or even with regard to objections on the validity or existence of the Arbitration Agreement, the decision ought to be left to the Arbitral Tribunal.

Rakna Arakshaka Lanka Ltd.v. Avant Garde Maritime Services (P) Ltd. [2018] SGHC 78 The High Court of Republic of Singapore; Decided on 02.04.2018

Ruling on jurisdiction as a preliminary question to be challenged within 30 days as per UNCITRAL Model Law, 1985

RAKNA ARAKSHAKA LANKA LTD., the Plaintiff was engaged with AVANT GARDE MARITIME SERVICES (PRIVATE) LIMITED, the defendant in relation to projects involving Maritime Security Services under the arrangement of an Umbrella Master Agreement. Alleging the breach of the clause of Master Agreement, defendant commenced Arbitral Proceedings against the Plaintiff under the aegis of Singapore International Arbitration Centre (SIAC) as per rules. During arbitral proceedings, Plaintiff did not participate in the arbitration process except for the two letters written to SIAC – one pointing that the "disputes contemplated falls or contain matters beyond the scope of submission of arbitration and that the arbitral proceedings are in conflict with the Public Policy of Republic of Sri Lanka", the other informing SIAC that it had settled the matter with defendant and so no longer required to proceed with the Arbitration without annexing a copy of MOU. Both the submissions did not find favour with the Ld. Arbitral Tribunal. A Final Award was passed in favour of defendant. Plaintiff then challenged the Final Award before the Singapore High Court invoking s 24 of the International Arbitration Act and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration Act on three main grounds:-

a) Under Article 34(2)(a)(iii) of the Model Law on the basis that MOU terminated the reference the reference to arbitration (the jurisdiction issue).
b) Under Article 34(2)(a)(ii) of the Model Law and/or s 24 (b) of the International Arbitration Act stating certain pieces of correspondence were not copied to RAKNA ARAKSHAKA LANKA LTD. (the Natural Justice issue).
c) Under Article 34(2)(b)(ii) of the Model Law or s 24 (a) of the International Arbitration Act (IAA) on the basis that the Master Agreement upon which Arbitral Proceedings were brought was tainted with bribery and corruption in Sri Lanka (Public Policy issue).

The plea of the plaintiff was rejected on all the above three grounds. As regards the first objection of jurisdiction issue, it was observed that the plaintiff failed to fulfil its obligation under MOU which was neither filed before the Arbitral Tribunal nor was the same defended when called upon to do so. Thus, the decision by Tribunal that matter in the Arbitration was still alive and accordingly deliberated upon, was accepted by the Singapore High Court. Further, as the Arbitral Tribunal already ruled on jurisdiction as a preliminary question, the same should have been challenged within 30 days of receipt of notice of the ruling as per the mandate of s 10 (3) of the International Arbitration Act coupled with Article 16 (2) and Article 16 (3) of the Model Law, which gives discretion to the Arbitral Tribunal whether to rule on jurisdiction as a preliminary question or as an Award on merits and that if the Arbitral Tribunal rules on the same as a preliminary question, it is imperative for the aggrieved to challenge the same within 30 days after the receipt of the notice of ruling upon preliminary issue. It was also underlined that the plaintiff, nonetheless, has not lost its passive right of resisting recommendation and enforcement of Arbitral Award on the plea of jurisdiction.

The ground of violation of Natural Justice also did not find favour with the High Court on the premise that the Plaintiff, all the while, despite receipt of important communications at various stages had chosen not to participate or respond or tender any submission to the ongoing proceedings, thus, unable to fulfil the requirements of Article 34 (2) (a) (ii) or s 24 of International Arbitration Act.

On the third ground, of public policy, it was specified that s 24 (a) of the International Arbitration Act contemplated a situation where the Award itself is tainted or induced by fraud/corruption which is not the situation here. Further, plaintiff continues to be engaged in the project under the umbrella of the same Master Agreement which has been scrutinized and held not to be contrary to Public Policy. Thus, all the three grounds taken by Plaintiff were rejected and the Award of Arbitral Tribunal was upheld.

Astro Nusantara International B.V. & Ors. v. PT First Media TBK [2018] HKCFA 12; FACV 14/2017
Hong Kong Court of Final Appeal; Decided on 11/04/2018

Time barred application for resisting enforcement of Award allowed

The main issue deliberated in this case was qua "the principles applicable when a party seeks leave to resist enforcement of a New York Convention Arbitration Award out of time." The dispute between the parites dates back to the year 2008 when the Arbitration was commenced between 'Astro' (Respondent), a group of eight Malaysian Media Companies and 'First Media' (Appellant), a part of Indonesian conglomerate 'Lippo', listed on Indonesian Stock exchange, pursuant to an Arbitration Agreement in Subscription and Shareholding Agreement providing Arbitration through Singapore International Arbitration Centre (SIAC) applying Singapore law. Some Additional Parties which were providing substantial funds and services for the Joint Venture project of Astro and First Media were sought to be joined in the proceedings by Astro relying upon Rule 24(b) of SIAC Rules. Request was allowed by way of an Award on preliminary issues, however, no appeal was filed against the order by the Respondent. The Arbitration was concluded on merits by way of Final Award dated 16.02.2010 in favor of Petitioner and Additional parties.

'Astro' filed for Enforcement of Award in Singapore as well as Hong Kong. In Singapore, 'Astro' was initially granted leave for Enforcement of Award, however, the appeal of the Respondent was allowed by the Singapore Court of Appeal, setting aside the Enforcement Orders. It based the decision on lack of jurisdiction of the Arbitrator to join the Additional Parties. It was also observed that there was no valid Arbitration Agreement between the First Media and the Additional Parties.

Whereas, in Hong Kong, the leave for Enforcement of Award was granted, pursuant to Section 2GG[5] of the Arbitration Ordinance. Lippo had 14 days to apply for setting aside of the order of Hong Kong Court, however, the same was not done believing that since Lippo had no assets in Hong Kong, Astro would not be able to get the Award enforced. However, Petitioner managed to get some orders favouring it from various Courts which compelled the Respondent, after a delay of 14 months to file for extension of time to apply for setting aside of the Hong Kong enforcement orders and judgment.

The Court of First Instance refused to entertain the Appeal on the premise that the Singapore Court of Appeal, a Court of competent jurisdiction had determined an identical issue that the Arbitral Tribunal had no power to join additional parties to the Arbitration and thus, there was no valid Arbitration Agreement on which to base the Award. Further, it reasoned the refusal of leave for extension of time, the enforcement being governed by Hong Kong law, on two grounds (i) that the Respondent was in breach of duty in good faith as in it chose not to challenge the ruling of the Tribunal on the jurisdictional issue in the Court of Appeal, rather used the same only at the stage of enforcement, to suit its interest and (ii) that it was a deliberate decision to not challenge the order within the given time limit, coupled with the length of delay and the fact that Award was not set aside at the seat of Arbitration.

The Court of Appeal overturned the decision of Court of First Instance based on principle of good faith that sufficient note of the fundamental defect in jurisdiction was not taken however, endorsed the factors on which it based its decision on exercise of discretionary powers.

The decision was further challenged in the Court of Final Appeal which basically answered two questions of law: (i) test to determine whether an extension of time on an application seeking to resist enforcement of Arbitral Award under the New York Convention should be granted; (ii) whether the fact that the Award was not set aside by the Courts of the seat of Arbitration is a relevant factor in such determination.

It was noted that the jurisdiction to extend time is broad but must be used to enable justice to be done to the parties. The Court discarded the view taken by the lower Courts, in placing reliance on the factor/principles to exercise discretion as laid down in *Terna Bahrain Holding Company WLL v. AI Shamsi [(2013) 1 Lloyd's Rep 86],* rather found the approach laid down in the *Decurion* much more applicable in the set of circumstances under examination which holds that it is important to consider all the relevant factors with the objective of *"overall justice"* in a case rather than a mechanical approach. Other authorities applied by the lower Courts were also found not applicable because the question of existence of a valid Arbitration Agreement was not there in those cases. It was further held that the decision taken by the Appellant in not filing the setting aside application within 14 days time limit, when it considered that there were no assets available in Hong Kong for the purpose of enforcement, was entirely reasonable, particularly when the jurisdiction of the Tribunal was already in challenge, thus, it was open for the appellant to have reserved this remedy for an enforcement stage. It was further held that denying appellant an extension of time could cost him a hearing when his application was meritorious and entail a consequence which would rather outweigh the resultant accrual of benefit of enforceability of the Award in question. The appellant was, thus, granted the extension of time to apply to set aside the orders granting leave to apply seeking enforcement of Arbitral Award.

Paloma Company Limited v. Capxon Electronic Industrial Company Limited [2018] HKCFI 1147 High Court of the Hong Kong Special Administrative Region Court of First Instance; Decided on 25.05.2018

The Applicant (Paloma Company Ltd., a Japanese Company) and the Respondent (Capxon Electronic Industrial Company Ltd., a company registered in Taiwan) were engaged in the sale and purchase of electrolytic capacitors. The dispute pertains to certain defective capacitors supplied by the Respondent. Pursuant to the Arbitration Agreement, the disputes were referred to a Three-Member Arbitral Tribunal and the proceedings were commenced at Japan Commercial Arbitration Association by the Applicant against the Respondent. The Tribunal passed an Award in favour of the Applicant to the tune of JPY 2,427,186,647 plus interest and costs. The Respondent sought to have the same set aside in a number of proceedings in Tokyo District Court, Tokyo High Court, Japan Supreme Court and also Taiwan Shilin District Court. The leave to enforce the Award in Hong Kong was granted to the Applicant and the Charging Order *Nisi,* in respect of 85,137,200 shares in Lancom Limited held by the Respondent, was passed in favour of the Applicant. Thereafter, the Respondent filed evidence to challenge the Charging Order *Nisi* on the grounds that, the service of the order was ineffective and illegal and the respondent was under the process of being dissolved. In March 2018, the Respondent took out the *"Setting Aside Summons"*

Scope of Court in exercising power to set aside Arbitral Award is limited

for setting aside the Arbitral Award on the ground that it was in conflict with the Public policy on account of an unfair presumption formed by the Tribunal about contamination of the capacitors by chlorine as a result of bare hand operations by respondent's workers on the basis of certain reports prepared by respondent in response to queries of the applicant. The presumption in turn reversed the burden of proof to the prejudice of the Respondent.

While deciding the setting aside summons, the Court relied on the Judgement of *KB v. S & Ors. [2015] HKCFI 1787; [2016] 2 HKC 325* which states that *"(i) the primary aim of the Court is to facilitate the arbitral process and to assist with enforcement of the Awards, (ii) the Courts should interfere in the Arbitration of disputes only on the grounds expressly provided under the Ordinance, (iii) Enforcement of Arbitral Award should be 'almost a matter of administrative procedure' and Court should be 'as mechanistic as possible', (iv) the party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way, (v) in enforcement of award the Court does not look into the merits or at the underlying transaction, (vi) even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the Court has a residual discretion and may nevertheless enforce the award despite the proven existence of valid ground."* The Court also relied on the judgement of *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd. [1999] HKCFA 40; [1999] 2 HKCFAR 111* which held *".... that courts should recognise the validity of decisions of an arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice."*

After considering the evidence and submissions made by the counsels, the Court observed that there has not been any impermissible reversal of Burden of Proof or the reasoning of the Arbitral Award shows any actual bias against the Respondent. In view of the above Judgement of *KB v. S & Ors.*, the Court refused to look further into the merits of the Award or the reasoning of the Arbitral Tribunal. The Court also accepted the submission advanced by the Applicant that *"the inescapable conclusion is that Capxon is inviting the Court to review errors or explode the reasoning of a tribunal. This is not permissible"*. The *"Setting Aside Summons"* for setting aside the Arbitral Award were accordingly dismissed.

Outokumpu Stainless USA, LLC v. Converteam SAS [2018 WL 4122807] Eleventh Circuit Bench, In the United States Court of Appeals; Decided on 30.08.2018

Signing of Arbitration Agreement is a condition precedent for invoking arbitration under New York Convention

The Plaintiff (Outokumpu Stainless USA) and a Company named "Fives" entered into three Contracts for sale and purchase of three "Cold Running Mills" (CRMs). The Plaintiff was the Buyer and the Company "Fives" was the Seller under the Contract. All the three Contracts also contained Arbitration Agreements. The Arbitration Clause required the arbitration to take place in Germany in accordance with the Rules of International Chamber of Commerce and the forum to apply substantive law of Germany. The Contract also provided that the term "Seller" as mentioned shall also include Sub-Contractors. Subsequently, Fives entered into a Sub-Contract with GE Energy Power Conversion France SAS (GE Energy) for the supply of nine motors for CRMs under the Contract. Subsequently, even after the inspections and emergency repairs, motors supplied by GE Energy of all the three CRMs failed. The Plaintiff, thereafter, discovered that GE Energy, Fives and a third Company DMS SA, had entered into a Sub-contractor agreement called *"Agreement for Consortial Cooperation"*. This led to disputes between the parties to the contracts. The Plaintiff filed a suit before Circuit Court of Alabama. The Court of Alabama held that (i) as to the motion to remand, the Contract falls under the New York Convention, (ii) as to the motion to compel arbitration, the four jurisdictional pre-requisites *Bautista Judgment (discussed below)* were met (iii) there was an agreement between plaintiff and GE Energy, a sub-contractor (iv) arbitration agreement arose out of legal commercial relationship between plaintiff and Fives, accordingly the District Court granted the motion to compel and dismissed the action. The said decision of the Court of Alabama was challenged before the Eleventh Circuit Bench, United States of America.

The appeal required the Court to examine two questions: *(1) whether an action between the buyer and a sub-contractor of the seller relates to Arbitration Agreement signed by the buyer and the seller, and (2) whether a non-signatory sub-contractor may compel arbitration against the buyer under the agreement.* Noting that the Federal Policy favours Arbitral Dispute Resolution, the interpretation of the expression "*relates to*" as used in Section 205 of United Nations Convention on the Recognition and Enforcement of Arbitral Awards, incorporated in Federal Arbitration Act was couched in broad terms as in *"the Arbitration Agreement need only be sufficiently related to the dispute such that it conceivably affect the outcome of the case"* and there was need for further examination *"whether Arbitration Agreement binds the parties before it."* For the purpose of removal, only pre-requisite was an Arbitration Agreement that may *"fall under the Convention"* qua which the four pronged test as employed in *Bautista vs. Star Cruises, [396 F.3d 1289, 124 n.7 (11th Cir. 2005)]* need to be applied as in;

"*(a) there is an agreement in writing, signed by the parties or contained in an exchange of letters or telegrams; (b) the agreements provides for arbitration in the territory of a signatory of the Convention; (c) the agreement arises out of legal relationship, contractual of otherwise, which is considered confidential; and (d) a party to the Agreement is not an American Citizen, of the commercial relationship has some reasonable relation with one or more foreign states."*

It was, thus, concluded that the analysis has to be carried out only on the face of pleadings, employing the four factors laid above qua an Arbitration Agreement and further the determination that the "lawsuit" sufficiently relates to the "Arbitration Agreement", so as to affect its outcome. It was also held that signing of the Arbitration Agreement by the parties is imperative under the Convention to compel Arbitration and cannot be done away with, being an important principle of United States and International Arbitration Law. Thus, in this case, non-signatory GE Energy was not allowed to compel Arbitration against Appellant, citing a third party beneficiary theory. The order of the District Court denying Motion to Remand was accordingly affirmed but the order to compel Arbitration was reversed.

Company A and Others v. Company D and Others *[2018] HKCFI 2240*

High Court of Hong Kong Special Administrative Region, Court of First Instance; Decided on 3.10.2018

Role of Court "ancillary" to arbitral proceedings in grant of interim measure

The case at hand deals with an application seeking appointment of a receiver qua shares in a company registered in the name of a third party (3rd Defendant), as an interim measure under Section 45 of Arbitration Ordinance in aid of the Arbitration seated in Singapore between the plaintiffs and two defendants whereas the third defendant is neither a party to Arbitration Agreement nor to the Arbitration Proceedings. It was noted that Section 45 of the Ordinance does not exclude the power of the Court to grant an interim measure, when otherwise agreed by the parties and place Court on an independent pedestal irrespective of the power exercised by the Tribunal under Section 45. The Court also noted two restrictions on the powers of the Court in relation to granting orders for interim measures qua Arbitral Proceedings outside Hong Kong. It was held, taking note of Article 9 of the Model Law which postulates that approaching Court with a request to grant interim measure of protection is not incompatible with the Arbitration Agreement, also underlining the object of the Ordinance for "fair and speedy resolution of disputes by Arbitration", that the role of the Court, for the purpose of grant of interim measure, was "ancillary" to arbitral proceedings. The Court has to apply the same general principles which govern the grant of interim injunction in the legal proceedings to any request made before and during the arbitral proceedings, as in, each case has to be considered on its own merits to establish whether the grounds for interim measures are established, which would "facilitate or aid or support" the purpose of arbitral proceedings. It was concluded that the jurisdiction to grant any interim measure against a third party to an Arbitration must be sparingly exercised, and if so necessary, only upon establishment of clear evidence and on strong grounds considering that a non party has no right of appeal against any such Order. The application of appointment of receiver against a third party was accordingly dismissed.

RJ and another v. HB – *[2018] EWHC 2833 (Comm.)*

High Court of Justice, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court; Decided on 26.10.2018

Non-disclosure of a new point central to Award would constitute "serious irregularity" within the meaning of Section 68 of the Arbitration Act, 1996

It is about a Final Award in an ICC Arbitration. The Arbitration was the result of certain commercial transactions entered into between HB (the defendant herein who was claimant in the arbitration) and RJ (the claimant herein who was respondent in the arbitration) wherein RJ, as a potential investor, agreed to provide HB an amount of US $75 Million in cash to enable HB to acquire controlling interest in Bank II, upon merger of Bank I and Bank II while HB already owned a controlling interest in Bank I, to ultimately receive minority interest in Bank II as well, however, acquisition finally could not be funded by borrowing in cash on account of certain "regulatory compliance reasons" and thus, the agreement in principle could not be implemented by RJ. HB alleged that RJ was in breach of an obligation to obtain necessary authorization and thus, invoked Arbitration against it. The Award was passed wherein RJ was declared to be in breach of the *"Merger Phase Agreement"* and apart from other reliefs, RJ was declared to be the beneficial owner of the shares in Bank II purchased for US $ 75 Million. This part of Award (Award#3) was claimed to be affected by *"serious irregularity"* within the meaning and scope of Section 68 of Arbitration Act, 1996 by RJ who approached the Court to set it aside and to remit to the Arbitrator for reconsideration.

It was alleged by RJ that the relief granted was never sought by HB and beyond the contentions raised by the parties to the dispute and thus, deprived the parties of any opportunity to address any such issue as the parties were not put to notice at all by the Arbitrator. It was noted that there were three brief exchanges during oral closing of submissions, to be throwing a hint into what was going in the Arbitrator's mind. However, those were concluded not enough to put the parties on notice about any such contemplation by the Arbitrator. It was held that the Arbitrator, as required under Section 33 of the Arbitration Act, 1996, has a general duty of fairness towards the parties i.e. if the Arbitrator contemplated determination of a dispute between the parties on a new or different basis, than the arguments already raised by the parties or the nature of relief sought, the parties have to be given *"notice and a proper opportunity to consider and respond to the new point"* as any such determination, would cause substantial injustice to parties. The declaration that RJ is the beneficial owner in Bank II held by HB was neither sought as relief by HB nor so suggested by RJ nor at any point of time raised by the Arbitrator during the Arbitration proceedings. Section 68 entails consideration of the propriety of relief granted, on the touchstone of *"procedural irregularity"* which would cause *"substantial injustice"*. The Award was held to be affected by *"serious irregularity"* within the meaning of Section 68 of 1996 Act. Considering the extent of its impact, the entire Award#3 was ordered to be set aside. However, removal of the Arbitrator as a proposition was rejected and the matter was remitted for a fresh consideration by the Arbitrator.

[JKX Oil & Gas PLC and another V. Ukraine [Case No.757/5777/15] – Ukrainian Supreme Court][1]

Enforcement of Emergency Arbitral Award not barred in Principle in the State of Ukraine

Aggrieved by the increase in Royalties by the Ukrainian Parliament, on extraction of natural gas for industrial users from 28% to 55% depending upon the extraction depth, an English Company **JKX Oil & Gas PLC (JKX)** notified the State of Ukraine about the existence of *Bilateral Investment Treaty* (BIT) in mid-November, 2014. Notice of dispute was sent to the Administration of the President of Ukraine. As the measures of increase in royalties was extended for the year 2015, JKX initiated Emergency Arbitration proceedings under The Stockholm Chamber of Commerce (SCC) Rules to obtain an order restraining Ukraine from imposing royalties exceeding 28%. An Emergency Award was rendered abstaining the State of Ukraine from increase in the royalties. The Recognition and Enforcement of Emergency Award was granted by the Court of First instance which was reversed by the Court of Appeals and was eventually confirmed by the High Specialized Court on Civil and Criminal matters. The Court held that the power to alter the Royalty Rates vest with the Ukrainian Parliament and that the Courts or Arbitral Tribunals cannot be provided with competence to vary those taxes in contravention of the Tax Code of Ukraine which, in turn, would puncture the basic foundation of taxation, which was what the Emergency Award sought to do, by unilaterally, in effect, altering the tax slab rates. The Emergency Award was, thus, held to be violative of Article V.2(b) of the New York Convention, being not in conformity with the Public Policy of Ukraine. The Court also held that it is mandatory to comply with the cooling off period of three months to amicably settle the disputes by both the parties before resorting to Arbitral Proceedings. The Court noted that the notice of claim was ought to be sent to Ministry of Justice of Ukraine, which is the authority responsible for protections of rights and interest of Ukraine, in disputes with Foreign investors and thus, the Proceedings of Emergency Arbitration were held to be in breach of the Arbitration Agreement and violative of Article V.2(b) of the New York Convention. It is important to note that this judgment, although refused enforcement of Emergency Arbitral Award in this matter on account of violations of certain Articles of New York Convention, however, does not deny in principle, the recognition and enforcement of Emergency Arbitral award in the State of Ukraine.

Bridgestone Licensing Services, Inc. And Bridgestone Americas, Inc. v. Republic of Panama *(ICSID Case No. ARB/16/34)*; order dated 13.12.2018

Standards of impartiality diluted for expert witness of a party

An application was filed by Claimant before an Arbitral Tribunal, during proceedings in the International Centre for Settlement of Investment Disputes, seeking removal of an Expert Witness for the Respondent in respect of Panamanian Law and to file an Expert Report from a Replacement Independent Expert in Panamanian Law on the premise that the respondent has divulged "confidential and privileged information" to the Expert Mr. Lee during discussions with him, qua his engagement, which raised serious doubts on the truthfulness of the Certification regarding the Elements of Independence specified under "*International Bar Association Rules on the Taking of Evidence in International Arbitration" ("IBA Rules")* on the ground that he failed to disclose his prior relationship with the counsel of the Claimant which reflect a "*substantial conflict of interest"* with Mr. Lee. The Tribunal ruled on its own jurisdiction to examine the application and to disqualify an Expert Witness or not to admit his evidence. Further, a distinction was drawn between an Arbitrator or an Expert appointed by the Arbitrator, having personal or professional connection with one of the parties or their respective lawyers and a party appointed Expert Witness who has been paid to give evidence in support of that party, as a party would bring in an Expert Witness only if his testimony supports its case. It was further pointed out that Rule 9 of ICSID Arbitration Rules dealing with disqualification of Arbitrators cannot be applied to party appointed Expert Witness. This is also the case with the "*IBA Guidelines on Conflict of interest"* applicable to Arbitrators. The requirement under Article 5.2(c) of the IBA Rules was underlined wherein an Expert Report of the party appointed expert must contain a Statement of Independence from the parties, lawyers and the Tribunal. It was one of the contentions of the Claimant that the Expert Witness failed to disclose any such relationship with the legal representatives of the respondent and thus, his report stands in clear conflict with Article 5.2(c). It was held that it is imperative to disclose the case details to the expert so that he can understand the relevant issue before seeking to engage him as an Expert Witness and that any potential expert witness cannot be impressed with the *"duty of confidence"*. The application seeking removal of party appointed Expert Witness was accordingly dismissed.

[1] ***Source:*** *Article published on 13/11/2018 by LexisNexis on their Official Website as the judgment is available only in Ukrainian*

David Heller v. Uber Technologies Inc. *[2019 ONCA 1]*
3JB, Court of Appeal for Ontario; Decided on 02.01.2019

The purpose of a benevolent legislation cannot be defeated by invocation of Arbitration

An order of the Motion Judge of the Superior Court of Justice which stayed the plaintiff's action in favour of Arbitration was challenged before Court of Appeal for Ontario. The appellant in this case was a resident of Ontario and had the license to use the Uber Driver App. He commenced a proposed class action "*on behalf of any person since the year 2012 who worked or continues to work for Uber in Ontario providing food delivery services and/or personal transportational services using various Uber apps*" wherein he sought a Declaration that *"these drivers in Ontario be declared Employees of Uber and governed by the provisions of Employment Standards Act, 2000, S.O. 2000, c.41 (the ESA)"*. A further Declaration was sought that "*Uber has violated the provisions of ESA and that the Arbitration provisions of the Service Agreement between the parties are void and unenforceable"*.

Any driver who accessed the Uber App was required to enter into a Driver Services Agreement or an UberEATS Services Agreement, each of which agreement contained an Arbitration Clause. The object and scope of ESA was discussed, taking note of various beneficial provisions qua the rights of employees. *ESA* mandates an employer to comply with specific requirements or the prohibitions, as the case may be, for the benefit of employee and also empowers an employee to make a complaint to the Ministry of Labour in case of contravention of any provision of ESA by the employer which would then undertake the investigative process against the employer. It was, thus, concluded that the Arbitration Clause rather constitutes *"contracting out of ESA"*, depriving the Uber drivers of certain statutory benefits they are entitled to, being the residents of Ontario and thus being offensive to Section 5(1) of ESA, is invalid. It is also because the Arbitration Clause requires Laws of Netherland to apply to the Arbitration and the driver is bereft of any knowledge of those laws as to whether those would offer greater or lesser benefits, however, the said driver is entitled to certain minimum benefits and protections under the laws of Ontario. It was further held, applying the four elements test laid down in *Titus v. William F. Cooke Enterprises Inc., 2007 ONCA 573, 284 D.L.R. (4th) 734*, at para 38, affirmed in *Pheonix Interactive Design Inc V. Alterinvest II Fund L.P., 2018 ONCA 98, 420 D.L.R. (4th) 335*, that the contractual provision, the Arbitration Clause in this case, is invalid on the basis of unconscionability. The four elements test applied is as under-

(i) a grossly unfair and improvident transaction;
(ii) a victim's lack of independent legal advice or other suitable advice;
(iii) an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
(iv) the other party's knowledge taking advantage of this vulnerability.

It was held that all the four elements of the test for unconscionability are present in this case. The Arbitration Clause was, accordingly, held to be invalid under Section 7(2) of the Arbitration Act, 1991 for the reason that it amounts to illegal contracting out of Employment Standards Act, 2000 eliminating certain basic rights and protections statutorily granted to residents of Ontario, unreasonably and unconscionably favouring the respondent.

Henry Schein Inc., ET AL. v. Archer & White Sales, INC. –
Supreme Court of United States – No. 17-1272.
Argued on October 29, 2018; Decided on 08.01.2019

"Wholly Groundless" exception inconsistent with the Arbitral Clause

Archer and White Sales, INC (the Respondent herein) alleged violations of Federal and State Anti-trust Law and filed a suit seeking money damages and injunctive relief against Henry Schein (the Petitioner herein). Federal Arbitration Act was invoked by the petitioner, urging the District Court to refer the dispute to Arbitration in accordance with the American Arbitration Association Rules (AAA). The rules provide that the Arbitrators have the power to resolve all the questions relating to arbitrability. This rule became the contention of the parties qua the facts of this case, as the Court itself may resolve the question of arbitrability if argued to be *"wholly groundless"*.

It was held that Arbitration is a contract which must be enforced as per the terms agreed to, by the parties and, thus, if the parties decide as per the terms of the contract that even the arbitrability questions should be decided through Arbitration then the Court cannot exercise any power to preside on that issue even if it considers the arbitrability of a particular nature of dispute to be "wholly groundless". It is not up to the Court to discern those which are meritorious and which are not and then refer only the meritorious ones to the arbitration, rather all the grievances as per the Arbitration Clause, whether arbitrable or not, ought to be referred to Arbitration.

ASIA'S FIRST INTERNATIONAL ARBITRATION BODY SPECIALISED IN INTELLECTUAL PROPERTY DISPUTES

The International Arbitration Centre in Tokyo (IACT) started its operations as the first Asian International Arbitration Centre specialised in Intellectual Property Disputes aiming at expeditious resolution of growing number of Patent Infringement Disputes. It is noteworthy that the decisions given by Arbitrators upon disagreements between Japanese or even non-Japanese parties, shall be binding across the 150 plus signatories to a United Nation Agreement on Arbitral Awards.

SWEDEN SET TO ADOPT A NEW ARBITRATION ACT

The Swedish Parliament adopted some revisions to the Swedish Arbitration Act, to enter into force on 1st March, 2019. The revised Act provides for appointment of Arbitrators in multi-party arbitrations by the Court if the parties are unable to agree on the appointment of the Arbitrator and release any Arbitrator so previously appointed. The revised act also contains provision for consolidation of two or more arbitrations into single arbitration proceeding on fulfilment of certain conditions.

The new Act gives arbitrators explicit mandate to determine the applicable substantive law in the absence of party agreement. The act also sets out a shorter timeline for setting aside of an award from 3 months to 2 months from the date when the party received the award. The act also emphasises on independence of arbitrators. It provides that the arbitrator shall not only be impartial but also independent. The Act introduces a provision for leave to appeal, which enables the Supreme Court to limit its examination to issue(s) of precedential value. Significantly, it changes the way jurisdictions were challenged by the parties as in actions can now be brought only prior to the commencement to the Arbitration unless there is no objection from the opposite party, with only 30 days to appeal with the Forum of Court of Appeal.

JAPAN AND HONG KONG TO STRENGTHEN COLLABORATION ON INTERNATIONAL ARBITRATION AND MEDIATION

A Memorandum of Cooperation (MoC) has been signed between Hong Kong's Department of Justice and Japan's Ministry of Justice with the aim to strengthen Cooperation on International Arbitration and Mediation, which reflects the increase in focus by the respective governments qua development of Arbitral Institutions in both the Countries. It entails training in the key areas for individuals and Institutions, information exchange programmes and organisation of seminars on International Arbitration.

THE ICC ARBITRATION CLAUSE FOR TRUST DISPUTES

ICC introduced a new Arbitration Clause for Trust Disputes and its Explanatory note, 10 years after the first clause was issued. The Clause is formulated as an agreement which is binding on the original parties to the trust by virtue of their executing the trust instrument, and on all others by virtue of their having acted under, or claimed or accepted benefits under, the trust. The note also provides that an Award will be binding on unborn or minors or other unascertained beneficiaries lacking capacity only if they are represented.

HONG KONG INTERNATIONAL ARBITRATION CENTRE (HKIAC) : NEW RULES COME INTO FORCE

The newly amended HKIAC Rules came into force on 1st November, 2018 with provisions for Emergency Arbitration, use of new technologies, transparency of third party funding, single arbitration for multiple contracts, concurrent or sequential conduct of multiple arbitrations and delivery of Award not later than three months after the proceedings have been closed.

UAE: ARBITRATORS NO LONGER TO FACE CRIMINAL LIABILITY

UAE has amended its Article 257 of the Penal Code to remove Arbitrators from potential criminal liability. Earlier Article 257 imposed criminal liability on Arbitrators who failed in their duty of impartiality to bring the Arbitration practices in UAE at par with the international position.

VICTORY OF ONGC IN DAELIM INDUSTRIAL COMPANY DISPUTE

An International Arbitral Tribunal in Singapore ruled in favour ONGC Petro Additions Ltd. (OPAL) against the South Korea's Daelim Industrial Company Ltd. for breach of contractual obligations qua construction of high density polyethylene plant at a cost of Rs.20,000 crores ($2.8 billion) which escalated to Rs.35,000 Crores on account of breach which led to its cancellation by OPAL.

NEW SET OF RULES FOR JAPAN COMMERCIAL ARBITRATION ASSOCIATION (JCAA) COME INTO FORCE

JCAA amended its Administrative Rules for UNCITRAL Arbitration, Commercial Arbitration Rules and also enacted 'Interactive Arbitration Rules' with effect from 1st January, 2019 with the purpose to offer a unique and attractive Arbitration Model for the expeditious and effective resolution of International disputes.

ABU DHABI GLOBAL MARKET (ADGM) ARBITRATION CENTRE BEGINS ITS OPERATIONS

The Abu Dhabi Global Market Arbitration Centre was officially opened on October 17, 2018, to provide a venue for resolution of disputes through Arbitration. The contracting parties may choose the Abu Dhabi Global Market, a financial freezone, as a seat of Arbitration and select an Arbitral Institution of their choice.

HONG KONG CODE OF PRACTICE FOR THIRD PARTY FUNDING OF ARBITRATION

The Hong Kong Code of Practice for Third Party Funding in Arbitration came into effect from February 1, 2019 which allows third party funding by providing financial assistance in relation to cost of arbitration reducing the financial risks of the claimant. It is significant that a restrictive definition of “third party

funder" has not been adopted and also does not includes any regulations for them, thus, Hong Kong can now establish funding arms.

PROMULGATION OF NEW DELHI INTERNATIONAL ARBITRATION CENTRE ORDINANCE

The Union Cabinet has approved promulgation of an Ordinance namely, "The New Delhi International Arbitration Centre Ordinance, 2019" to establish New Delhi International Arbitration Centre as a flagship autonomous Institution for conducting domestic and International Arbitrations with an objective to facilitate India to become a hub for Institutional Arbitration. It will be headed by a Chairperson who has been a Judge of the Supreme Court or a Judge of a High Court or an eminent person having special knowledge and experience in the field of Arbitration.

ARBITRAL AWARD TO THE TUNE OF RS. 2782.33 CRORES SET ASIDE BY DELHI HIGH COURT

Division Bench of Delhi High Court has set aside an Arbitration Award (except on the question of waiver) directing Delhi Metro Rail Corporation to pay Rs.2782.33 Crores to the Reliance Infrastructure Subsidiary, the Delhi Airport Metro Express Pvt. Ltd. as termination payment, setting aside a Single Judge order of Delhi High Court upholding the Award. The Court has instead given liberty to both the parties to invoke an Arbitration Clause for fresh adjudication on the Claims and Counter Claims.

FACING EMPLOYEES AGITATION, GOOGLE ENDS MANDATORY ARBITRATION CLAUSE

The US giant sets to end the mandatory Arbitration Clause in their Employees Contract with effect from March 21, 2019. The Mandatory Arbitration Agreement prevented the employees to seek legal remedies before the Courts of Justice. Also the Mandatory Agreements like this are generally designed to favour the employers. The change however, shall not affect the disputes already pending for adjudication or settled claims.

FINAL DRAFT OF PRAGUE RULES

A Working Group of civil law practitioners mainly from Eastern European Countries conducted a survey and subsequently drafted the *"Prague Rules on the Efficient Conduct of International Arbitration"*. The Rules were approved and were made available for signing on 14th December, 2018 in Prague. These Rules are intended to provide possible alternative/ supplementary framework to standardized practices in International Arbitration with the aim to increase the efficiency and cost-effectiveness of the Arbitral Proceedings.

EVENTS AT DIAC

DIAC, on 1st September, 2018 organised a Seminar on *"Ethics in Arbitration"* at India International Centre, New Delhi which was attended by Judges of High Court of Delhi, Members of the Arbitration Committee, District and Session Judges, Members of Delhi High Court Bar Association, Panel Arbitrators, Senior Advocates, Partners of Law Firms and other eminent personalities. DIAC had the honour of having Mr. Fali S. Nariman, Sr. Advocate as the keynote Speaker and Mr. Justice Sanjiv Khanna (presently Judge of Supreme Court of India) as the Chief Guest of the Seminar. The Sessions included topics of *"Conflict of Interest in the appointment of Arbitrators"* chaired by Mr. Justice A.P. Shah, Former Chief Justice of Delhi High Court, *"Challenges to Arbitrators"* chaired by Mr. Justice S.J. Vazifdar, Former Chief Justice of Punjab & Haryana High Court, "*Fees of Arbitrators"* and "*Timelines for Award"* chaired by Mr. Justice Mukul Mudgal, Former Chief Justice of Punjab & Haryana High Court. Other notable Speakers included Mr. Gopal Subramanium (Senior Advocate), Mr. Hiroo Advani (Senior Partner, Advani & Co.), Mr. Gourab Banerji (Senior Advocate), Ms. Zia Mody (Managing Partner, AZB & Partners), Ms. Meenakshi Arora (Senior Advocate), Mr. K.V. Vishwanathan (Senior Advocate), Mr. Akhil Sibal (Senior Advocate) and Mr. Akshay Bhan (Senior Advocate).

The Patron-in-Chief Mr. Justice Rajendra Menon, Chief Justice of High Court of Delhi visited on 16.08.2018

Mr. Gary Born visited on 13.10.2017

Visit of delegates from England on 10.11.2017

Mr. Justice M.R. Shah, the then Judge of High Court of Gujarat (presently Judge of Supreme Court of India) visited on 14.5.2018

Visit of Judges from North-East on 25.5.2018

Mr. Justice Vikram Nath, Judge of High Court of Allahabad visited on 30.7.2018

Alexender G. Fessas – Secretary General of ICC Court and Director of ICC Dispute Resolution visited on 11.12.2018

Japanese Delegation headed by Mr. Takashi Yamashita, Minister of Justice, Japan visited on 14.01.2019

Delegation from 27 countries visited on 24.01.2019

Law students of Symbiosis Law School, Noida visited on 08.02.2019

Glimpses of Seminar on Ethics in Arbitration, held by DIAC on 1st September, 2018

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