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MANOJ K. SINGH
Founder

Dear Friends,

Hope you all are keeping safe. We are pleased to present the September 2022 issue of our monthly newsletter 'Indian Legal Impetus'. In this issue, we have covered the latest developments, case laws, and issues related to the various disciplines of law in India. We sincerely hope that you will find this issue of Indian Legal Impetus informative and engaging.

The first article emphasizes on the standardization of Arbitrator's Fee as per Schedule IV of the Arbitration and Conciliation Act and analysed the judgment of the Hon'ble Supreme Court in the matter of ONGC vs. Afcons Gunanusa JV. The Second article focuses regarding the GST implication on secondment by overseas companies. The Supreme Court in the Northern Operating Systems case in a stark departure from the settled legal position and held that service tax in a secondment arrangement between an overseas group entity and an Indian group entity is payable, wherein the salary of the seconded employee is paid by the Overseas Company and the same is subsequently reimbursed by the Indian group company without mark up.

The third articles talk about the restrictions on courts from interfering with the Arbitrator's interpretation of contractual terms while deciding with a challenge under Section 34 of the Arbitration and Conciliation Act. It was emphasised that it is beyond the jurisdiction of the court to construe the terms of the contract as long as the arbitrator has taken a possible view and that the Arbitrator is the final arbiter of the disputes between the parties. It was also pointed out that it is not open to a party to challenge the Award on the ground that he has drawn his conclusions or has failed to appreciate certain facts. The fourth article is about the discretion of the Arbitral Tribunal to grant post award interest and focussed on the judgment of the Hon'ble Supreme Court in the matter of Morgan Securities and Credits Pvt Ltd v. Videocon Industries Ltd. The fifth article answers to the question regarding the pre-arbitral stage notification and as to whether the said is valid justification to reject the counter claim. It was highlighted that the Hon'ble Supreme Court has made it clear that counterclaims cannot be rejected just because their claims were not made known during the pre-arbitration phase. The purpose of Section 23(2A) of the Act is to protect the parties' interests if they later present a counterclaim. Additionally, it prevented the multiplicity of proceedings, which, if unchecked, can defeat the very purpose of the arbitration mechanism.

The sixth article deals talk about the extent of Judicial Intervention to determine the arbitrability of the dispute under Section 11 of the Arbitration and Conciliation Act. And the seventh article deals with the Application of the Rule of 'Contra Proferentem' in the interpretation of a Commercial Contract.

We hope that our esteemed readers find this information useful, and it also enables them to understand and interpret the recent legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. You can also send in your valuable insights and thoughts to newsletter@sandalawoffices.com.

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S&A Law Offices GURUGRAM

S&A Tower, Plot Number 5, 6 & 7
Udyog Vihar, Phase IV, Sector 18
Gurugram, Haryana- 122015, INDIA

NEW DELHI

E-337, East of Kailash
New Delhi - 110065, INDIA

MUMBAI

Unit No. 102, 10th Floor
Sakhar Bhavan Plot No. 230
Ramnath Goenka Marg Nariman Point
Mumbai - 400021, INDIA

BENGALURU

Awfis, S&A Law Offices
Renaissance Centra, 27 & 27/1
Mission Road, Rama Nagar
Bengaluru Karnataka-560027



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Managing Editor
Manoj K. Singh

Editor
Karan Kanwal

Published by
S&A Law Offices

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STANDARDIZATION OF ARBITRATOR'S FEE AS PER SCHEDULE IV: ANALYSING THE ONGC V. AFCONS GUNANUSA JV JUDGEMENT

- Devanshi Prasad and Shivam Gour

INTRODUCTION:

We are living in the modern era of upcoming legal jurisprudence and growing commercial disputes. 'Arbitration' is a form of Alternative Dispute Resolution that comes with any form of a commercial contract in this era. The increased penchant for arbitration has shored up the dubiety for the traditional method of litigation. One of the main aspects that attract parties towards the arbitration process is the cost advantage and the superiority of 'party autonomy'. Litigations and the entirety of the court administration are considered cumbersome and expensive for commercial contractors. On the other hand, arbitrations are believed to be more economical. Nonetheless, recent years have seen this notion to prove a modern myth rather than a conscious reality. One of the biggest contributors to the same appears to be focused on the Arbitrator's Fees.

The process of determining a dispute via arbitration involves submitting to an Arbitral Tribunal which constitutes a panel of arbitrators or a sole arbitrator. Such an arbitrator is freely appointed by the parties as an independent adjudicator.¹ It is stated that arbitration is governed by the principle of party autonomy – where the parties are free to exercise their choice and agree over the quintessential aspects of the application of laws, which decide their contractual relationship.

A concerning theme surrounding arbitrations in India and the following disrepute that goes with it relates to the high fees charged by arbitrators who are more often than not ex-Judges.

This article will shed light on the facets of Arbitrator's Fees as decided by the Apex Court in this case. The Supreme Court of India however has recently shed light on the matter in Oil and Natural Gas Corporation v. Afcons Guanasa JV.²

BRIEF FACTS OF THE CASE:

The disputes between the parties were referred to an Arbitral Tribunal of three arbitrators over a construction agreement in 2015. The agreement signed between the parties already provided for a stipulated fee schedule for the Arbitrators which was Rs. 10 Lakhs each where the claim and counterclaim amount in dispute was estimated over Rs. 10 Crores. The tribunal was of the opinion that the agreement between the parties provided for 'unrealistic' fee. Therefore, the parties agreed to revise the fee in alignment with the provisions of Schedule IV of the Arbitration and Conciliation Act, 1996 ("1996 Act"). However, when the tribunal in 2018 decided to revise its fee once again, citing the complexity of issues and large volume of documents attached with it, the ONGC refused to provide approval for the same.

¹Arbitration and Conciliation Act 1996, No. 26, Acts of Parliament, 1996 (India) §10.

²Oil and Natural Gas Corporation v. Afcons Guanasa JV, Petition for Arbitration (Civil) No.5/2022.

The tribunal temporarily exempted ONGC from submitting the revised fees which was followed by a Bombay High Court petition under Section 14 read with Section 15 of the 1996 Act filed by the Public Sector Undertaking. However, the petition was dismissed leading to the current case before the Apex Court.

POINTS OF DETERMINATION:

This article will discuss the following issues placed before the Bench:

1. Whether the arbitrator(s) are entitled to unilaterally determine their fees?
2. Whether the ceiling of Rs 30,00,000 in the entry at Serial No 6 of the Fourth Schedule of the Arbitration Act applies only to the variable amount of the fee or the entire fee amount; and
3. Whether the ceiling of Rs 30,00,000 applies as a cumulative fee payable to the arbitral tribunal or it represents the fee payable to each arbitrator?

EVOLUTION OF SCHEDULE IV:

Before analyzing the Court's guidelines, let us first look at the history of the Fourth Schedule, which was inserted into the 1996 Act via the 2015 Amendment. It was to provide a model for the fixation of fees of the arbitrator. Before the insertion, when the contract lacked such a stipulation, the Arbitral Tribunal itself could decide upon its fees.³

³Arbitration and Conciliation Act 1996, No. 26, Acts of Parliament, 1996 (India) § 31(8).

The problem with this earlier provision was that it restricted the autonomy of the parties. Even when the fee for the arbitrators is provided for in the agreement, due to a lapse of time between the reference and the date of the agreement, the fee that is provided in the agreement might become insufficient and unreasonably low for the arbitrators. Therefore, this system was problematic for both sides.

On another tangent, the tribunal was acting as a judge in its own cause while deciding its own fees. In the case of **Vijya Minerals v. Bikash Chandra Deb**,⁴ Calcutta High Court had observed that unilateral negotiation by arbitrator for fixation of his own fees goes against the principle of “*Nemo iudex in causa sua*.” Also any reference made to a Tribunal is a tripartite agreement between the arbitrator and the parties involved and hence they must have equal negotiating power while fixing the fees for the Tribunal.

In **Union of India v. Singh Builders Syndicate**,⁵ the Supreme Court expressed its apprehension that refusal to pay an exorbitant fee by one of the parties might lead to prejudice against them. The court also made remarks regarding the absence of any ceiling for fixing the fee of arbitrators and exorbitant amounts charged by some ex-judges acting as arbitrators.

High fee charged by arbitrators who are mostly ex-judges has brought disrepute to the entire arbitration ecosystem in India and also led to the repulsion of arbitration in India to a more favorable jurisdiction. Thereby, the new schedule was inserted with the intention to rectify such issues as elaborated above.

⁴Vijya Minerals v. Bikash Chandra Deb, AIR 1996 Cal 67.

⁵Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523.

GUIDELINES LAID DOWN BY THE APEX COURT IN ONGC V. AFCONS GUANUSA JV:

In a welcome step, the Bench held that the fee for the arbitrators has to be decided mutually by all parties. It was held that “*arbitrator(s) do not possess an absolute or unilateral power to determine their own fees*”. Reference was made to the 246th Law Commission Report and the 2015 Amendment which inserted Schedule IV. The Bench reaffirmed that ‘*party autonomy is a cardinal principle of arbitrations*’.⁶

The parties are thus free to adhere to Schedule IV of the 1996 Act or decided among themselves what fee is to be paid. This is in line with the Delhi High Court ruling in *NHAI v. Gayatri Jhansi Roadways Limited*,⁷ where it was unequivocally held that Schedule IV is not mandatory in determining the fee structure where the fee structure has been agreed to in the agreement between the parties. However, if the parties have not been able to agree on a fee, the Fourth Schedule will function as a default option. This in turn ensures that Arbitrators do not take advantage of the oversight made during the drafting of the terms of a contract to benefit themselves by demanding exorbitant fees.

The parties can also agree to a fee according to Schedule IV initially subject to a revision of the fee after a fixed number of proceedings (Example – Schedule IV to be followed for 15 hearings after which a fee of 2 lakhs per hearing per arbitrator will be charged). Such revision in fee must be pre-decided and fixed in the preliminary hearing itself so as not to prejudice the parties at a later point in the proceedings.

⁶Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2016) 4 SCC 126; Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd (2017) 2 SCC 228.

⁷NHAI v. Gayatri Jhansi Roadways Limited, (2020) 17 SCC 626.

Once the terms of reference have been finalized and the fee schedule agreed upon in the preliminary hearing, the tribunal cannot tinker with the amount so fixed or the heads it would be charged under. The fee schedule is final for all purposes. This ensures the primacy of contractual relations which is one of the most attractive features of arbitrations for commercial entities.

Apart from these guidelines, the Supreme Court has instructed a periodic revision of Schedule IV of the Arbitration Act every 3 years so that the model fee reflects the changing needs of the arbitration ecosystem in India. The same, in our opinion, would be quintessential in ensuring that arbitrations remain cost-effective in the future by accommodating changing needs.

The Apex Court has also been conscious of not allowing for absurd conclusions from the reading of the Fourth Schedule. It is now settled that the ceiling of Rs 30,00,000 applies to the sum of the base and the variable amount. This gives way to the legislative intent of the lawmakers by not allowing excessive fees amounts in arbitrations. Furthermore, the Bench clarified that the ceiling of Rs 30,00,000 is for each Arbitrator of the Arbitral Tribunal and not just the entire Tribunal so that there isn't an abnormal profit in tribunals comprising Sole Arbitrators.

CONCLUSION:

The judgement goes a long way in making certain how the Arbitrators should proceed, however, the periodic revision that has been suggested by the Apex Court might die a slow death in the red tape laden Goliath of Indian Executive.

The Arbitration Council of India, which the policymakers thought would be a ground-breaking step to strengthen the Arbitration Ecosystem in India is yet to see the light of day. Non-revision of Schedule IV on regular basis would render it useless. It is thus suggested that the courts must lay down a formula (for example linking it to WPI) for regular revision of Schedule IV.

With the new guidelines in place, there is a lot more clarity on the matter of fixation of the Arbitrator's fee now. In addition, the Apex Court had given a lot of flexibility to both Arbitrators as well as the parties in dispute to fix the fee according to their convenience. A forced ceiling on the Arbitrator's fee would only be problematic for the budding ADR ecosystem of India. There is a possibility of disputes requiring an extended number of hearings to resolve the dispute wherein, the ceiling provided in Schedule IV would have dissuaded any qualified Arbitrator to take up the matter. The Supreme Court has granted more autonomy to parties, which is a positive step towards attracting more arbitration matters to India.

GST IMPLICATIONS ON SECONDMENT OF EMPLOYEES BY OVERSEAS COMPANIES

- *Smita Singh*

INTRODUCTION

The issue of taxability of secondment of employees was more or less settled in the erstwhile service tax regime. However, a disbalance in the position taken by the industry and experts on the secondment of employees by an Overseas Company to an Indian Company has crept in with the decision of the Supreme Court in Northern Operating Systems case¹. The Supreme Court decision has unsettled the still water on taxability on the secondment of employees by an Overseas Company to an Indian Company, where the salary is disbursed by the Overseas Company and the same is reimbursed by the Indian Company without any markup.

In the erstwhile regime, service tax authorities have always contended that this arrangement of secondment of employees to Indian entities from overseas group companies is nothing but receipt of manpower supply services and hence taxable under reverse charge in the hands of the recipient of such service i.e. the Indian host company. The authorities have argued that reimbursement of salaries of the seconded employees to the overseas group companies is the consideration for the provision of manpower services.

The CESTAT in many decisions² has held that in a secondment arrangement, there is an existence of an employer-employee relationship between the seconded employee and the Indian host entity, and hence there is no provision of manpower supply services.

However, the Supreme Court in the Northern Operating Systems case in a stark departure from this settled legal position and held that service tax in a secondment arrangement between an overseas group entity and an Indian group entity is payable, wherein the salary of the seconded employee is paid by the Overseas Company and the same is subsequently reimbursed by the Indian group company without mark up. The Supreme Court has further held the host Company located in India in such cases is providing Backoffice Support Services, to the Overseas Group Company.

The Court held that the crux of the issue is the taxability of the cross charge, which is primarily based on who should be reckoned as an employer of the secondee. The critical fact was that overseas group companies' business was to secure contracts, which can be performed by its highly trained and skilled personnel. Consequently, the overseas group company enters into contracts with host companies, for providing such services, by seconding its employees.

¹CC, CE & ST Vs Northern Operating Systems Private Limited [2022 (61) GSTL 129]

²Volkswagen India Pvt. Ltd Vs CCE [2014 (34) STR 135], Target Corporation India Private Limited Vs CCE [2021 (52) GSTL 164], Ivanhoe Cambridge Investment Advisory India (P) Limited Vs CST [2019 (21) GSTL 553], Airbus Group India Private Limited Vs CST [2016 (45) STR 120], Computer Sciences Corpn. India Private Limited Vs CST [2014 (35) STR 94]

The Court noted that the overseas employer deploys the employees to the host company on secondment, in relation to its own business. Further, overseas employer pays them their salaries. Their terms of employment – even during the secondment – are in accord with the policy of the overseas company, which is their employer. Upon the end of the period of secondment, they return to their original places, to await deployment or extension of secondment.

Considering the above arrangement, the Supreme Court held that quid pro quo is implicit, as both parties are deriving economic benefits from the arrangement. The Overseas Company gets the benefit of quality work from the Indian Company and the Indian Company is able to get business due to the presence of expert seconded employees. In this context, the Court held that the secondment of employees is a taxable service of 'manpower supply'. Our view on Implications under the GST regime.

The impact of this decision is significant as it upsets the previous jurisprudence on the issue of taxability of reimbursements for seconded employees. The Supreme Court has treated secondment as a manpower supply service, only where the seconded employees are involved in the provision of a service by the host Indian company to the overseas company. While this ruling may not apply to all cases of secondment, it will open such transactions for scrutiny, having regard to the overall arrangement between the parties, especially as the authorities are likely to apply this ruling to current transactions under GST.

To determine their potential exposure to service tax, the overseas companies are required to re-evaluate secondment arrangements, especially in cases where the Indian host Company is providing a service to the overseas company under a separate inter-company agreement.

This decision of the Supreme Court has huge significance as it disturbs the earlier jurisprudence on this issue. The impact is not just limited to service tax implications but will have effects on the position under the GST regime as well. Resultantly, we have witnessed the revival of this issue leading to greater inquiries of all secondment arrangements in the ongoing GST audits. Further, the judgment is also likely to have an impact on issues arising out of these secondment arrangements from a direct tax perspective such as taxability of the amount cross charged to the Indian host company, creation of permanent establishment, etc.

RESTRICTION ON COURTS FROM INTERFERING WITH THE ARBITRATOR'S INTERPRETATION OF CONTRACTUAL TERMS WHILE DECIDING A CHALLENGE UNDER SECTION 34

- Priyanka Chemudupati

THE SCOPE OF CHALLENGE

Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) stipulates the grounds for the challenge of an arbitral award. The provision sets out that a party wanting to challenge an arbitral award has to do so within three months from the date of receipt of the arbitral award. However, when a sufficient cause has been shown by the party then the period of limitation is further extended by 30 days. When compared to, the Indian Arbitration Act, of 1940 which provided for three remedies against an award (rectification, remission, and setting aside under the 1940 Act) the scope of the challenge and setting aside in the 1996 Act is fairly narrow and restrictive.¹

The Act includes the challenge of an award on various grounds including incapacity of one part, invalid arbitration agreement, improper notice to the party, arbitrators dealing with issues not falling within the terms of submission to arbitration, the composition of arbitral tribunal not in accordance with agreement of parties, subject matter not capable of settlement through arbitration and awards that are in conflict with public policy, among others.

There were diverse opinions given by various courts on the scope of interference of a court while deciding a challenge under Section 34.

¹UHL Power Company Ltd. v. State of Himachal Pradesh, (2022) 4 SCC 116.

Various High Courts like Madras,² Telangana³, and Andhra Pradesh⁴ have stated that courts also have the power to amend/modify an arbitral award. On the other hand, High Courts like Bombay⁵ and Delhi⁶ were of the view that under Section 34 the courts can only quash an arbitral award, after which the parties would have to initiate fresh resolution proceedings. However, the Apex Court in its decision of **National Highways Authority of India v. M. Hakeem**⁷ laid down the law of scope of interpretation of Section 34 and the power of the courts to interfere with the award of an arbitrator, while holding that

“It can therefore be said that this question has now been settled finally by at least 3 decisions of this Court. Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act;

²Gayatri Balaswamy v. ISG Novasoft Technologies Ltd., 2014 SCC OnLine Mad 6568; ISG Novasoft Technologies Ltd. v. Gayatri Balasamy, 2019 SCC OnLine Mad 15819.

³Saptarishi Hotels (P) Ltd. v. National Institute of Tourism & Hospitality Management, 2019 SCC OnLine TS 1765.

⁴Kurra Venkateshwara Rao v. Competent Authority, 2020 SCC OnLine AP 146.

⁵Dirk India (P) Ltd. v. Maharashtra State Electricity Generation Co. Ltd., 2013 SCC OnLine Bom 481 ; Wind World (India) Ltd. v. Enercon GmbH, 2017 SCC OnLine Bom 1147.

⁶Nussli Switzerland Ltd. v. Organising Commonwealth Games, 2010, 2014 SCC OnLine Del 4834.

⁷2021 SCC OnLine SC 473.

as also to ignore the fact that the 1996 Act was enacted based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the “limited remedy” under Section 34 is coterminous with the “limited right”, namely, either to set aside an award or remand the matter under the circumstances mentioned in Section 34 of the Arbitration Act, 1996.”

Through this decision, the Supreme Court clarified that any competent court that is deciding on the challenge of an arbitral award under section 34 of the Act, cannot modify an award granted by the Arbitrator(s); it can only set aside the award granted.

INTERFERENCE WITH INTERPRETATION OF CONTRACTUAL TERMS

An arbitrator while deciding on a challenge under section 34 looks into the interpretation of the terms of the contract which binds the parties to the arbitration. In certain cases, parties have challenged the award on the ground that the arbitrator has not interpreted the contract accurately or has misinterpreted the contract. The question to be answered is if the clauses in the contract are open to two or more plausible interpretations and the arbitrator derives the conclusion based on one of the plausible interpretations, can that be a ground for challenging an award?

Another point of determination would be what would cause a misinterpretation by an arbitrator. It is pertinent to note that various decisions by the Supreme Court and the High Courts have laid down judicial precedents about this issue.⁸

In **Atlanta Limited v. Union of India**,⁹ a three-judge bench of the Apex court consisting of Hon'ble N.V. Ramana, former C.J.I., A.S. Bopanna J., and Hima Kohli J. limited the scope of interference of a court with the Arbitral Tribunals interpretation of the terms of the contract by stating that

“19. It is also a well-settled principle of law that challenge cannot be laid to the Award only on the ground that the Arbitrator has drawn his own conclusion or failed to appreciate the relevant facts. Nor can the Court substitute its own view on the conclusion of law or facts as against those drawn by the Arbitrator, as if it is sitting in appeal.

20. As long as the Arbitrator has taken a possible view, which may be a plausible view, simply because a different view from that taken in the Award, is possible based on the same evidence, would also not be a ground to interfere in the Award.”

The court concluded that it is beyond the jurisdiction of the court to construe the terms of the contract as long as the arbitrator has taken a possible view.

⁸State of Rajasthan v. Puri Construction Co. Ltd. And Another (1994) 6 SCC 485; Delhi Tourism and Transportation v. Gammon India Limited MANU/DE/2567/2018; McDermott International Inc. v. Burn Standard Co. Ltd. and Ors., (2006) 11 SCC 181.

⁹(2022) 3 SCC 739.

And reiterated that it is a settled legal position that the Arbitrator is the final arbiter of the disputes between the parties and it is not open to a party to challenge the Award on the ground that he has drawn his conclusions or has failed to appreciate certain facts.

While upholding the award and setting aside the High Court's decision the Supreme Court in **Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran**¹⁰ held that

“43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.”

The Supreme Court in **Indian Oil Corporation Ltd. v. Shree Ganesh Petroleum, Rajgurunagar**¹¹ very clearly held as to what sort of an interpretation would attract the grounds for challenge under section 34. It stated that:

“44. However, a distinction has to be drawn between failure to act in terms of a contract and an erroneous interpretation of the terms of a contract. An Arbitral Tribunal is entitled to interpret the terms and conditions of a contract, while adjudicating a dispute. An error in interpretation of a contract in a case where there is valid and lawful submission of arbitral disputes to an Arbitral Tribunal is an error within jurisdiction.”

¹⁰(2012) 5 SCC 306.

¹¹(2022) 4 SCC 463

45. *The Court does not sit in appeal over the award made by an Arbitral Tribunal. The Court does not ordinarily interfere with interpretation made by the Arbitral Tribunal of a contractual provision, unless such interpretation is patently unreasonable or perverse. Where a contractual provision is ambiguous or is capable of being interpreted in more ways than one, the Court cannot interfere with the arbitral award, only because the Court is of the opinion that another possible interpretation would have been a better one.*”

Various other decisions by the courts like **Food Corporation of India v. Joginderpal Mohinderpal & Another**,¹² **Puri Construction Pvt. Ltd v. Union of India**¹³ and **Hind Builders v. Union of India**¹⁴ have substantiated that, while exercising appellate power, the courts should not substitute their opinion with that of the arbitrator. If an arbitrator construes a term of the contract reasonably, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.¹⁵

CONCLUSION

The legislature aimed to reduce the intervention of courts and provide a speedy justice delivery system. Judgments like these have limited the powers of the court to interfere with the holdings of an arbitral tribunal.

¹²AIR 1989 SC 1263.

¹³AIR 1989 SC 777.

¹⁴AIR 1990 SC 1340.

¹⁵Associate Builders v. Delhi Development Authority, (2015) 3 SCC 49.

It is also pertinent to note that with the pro-enforcement view that the Indian courts have started adopting, decisions limiting the scope of judicial interference would encourage arbitration as a dispute resolution process. However, one must keep in mind that even though the Arbitration and Conciliation Act, 1996 provides an alternative to the litigation system, it is not a complete departure from it. It is rather a system that co-exists with the court system, and therefore interference of courts in matters, where grounds under Section 34 are justified, would be inevitable.

DISCRETION TO GRANT POST-AWARD INTEREST: ANALYSIS OF MORGAN SECURITIES AND CREDITS PVT LTD V. VIDEOCON INDUSTRIES LTD

- Sidhant Kaushik and Ankur Mishra

INTRODUCTION

Hon'ble Supreme Court of India (“**Court**”) had in the case of **Morgan Securities and Credits Pvt Ltd v. Videocon Industries Ltd**,¹ (“**Morgan Securities**”) clarified the issue of whether the Arbitral Tribunal has the discretion to grant post-award interest on any part or whole of the 'sum' as provided in Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 (“**Act**”). In **Morgan Securities**, the Court had ruled that the Arbitral Tribunal has the discretion to award post-award interest on any part or the whole of the 'sum' as interpreted in **Hyder Consulting (UK) Limited v. Governor, State of Orrisa**² (“**Hyder Consulting**”) under Section 31(7)(b) of the Act.

BACKGROUND

On 27.01.2003, the Appellant (**Morgan Securities and Credit Pvt Ltd**) and the Respondent (**Videocon Industries**) entered into an agreement under which the Respondent availed of bill discounting facilities from the Appellant. The Appellant disbursed Rs 5,00,32,656 pursuant to the said agreement. However, the said dues remained unpaid. The Appellant issued a notice on 31.01.2006 invoking the arbitration clause of the agreement.

Pursuant to the invocation of arbitration clause, the Sole Arbitrator rendered an arbitral award in favor of the Appellant on 01.03.2013 and decreed the claim of the Appellant to the tune of Rs. 5,00,32,656. In the said award, the Sole Arbitrator had also awarded interest on the decreed amount in the following manner:

1. Interest at the rate of 21% P.A from the date of default to the date of the demand notice
2. Interest at the rate of 36% P.A. from the date of demand notice to the date of the award.
3. Interest at the rate of 18% P.A. on the principal amount of Rs 5,00,32,656 from the date of award to the date of payment.

The aforesaid award was challenged under Section 34³ of the Act before the Hon'ble Delhi High Court wherein the Appellant had urged that the post-award interest of 18% per annum should be granted on the total sum awarded i.e. sum being inclusive of principal and the pre-award interest. The Hon'ble Delhi High Court dismissed the petition vide judgment dated 07.02.2019 holding that the Ld. The Arbitrator had in his discretion restricted the post-award interest to the principal amount and that the Court would not interfere with the exercise of this discretion by the Ld. Sole Arbitrator under Section 34 of the Act.

¹Morgan Securities and Credits Pvt. Ltd. v. Videocon Industries Ltd, Civil Appeal No. 5437 of 2022.

²Hyder Consulting (UK) Limited v. Governor, State of Orrisa, (2015) 2 SCC 189.

³Morgan Securities & Credits Pvt Ltd v. BPL Display Devices Ltd and Anr, O.M.P No. 972 of 2013 & Videocon Industries Ltd. v. Morgan Securities & Credits Pvt Ltd and Anr, O.M.P No. 665 of 2013.

The Appellant challenged the judgment dated 07.02.2019 under an appeal filed u/s 37 of the Act and the same was also dismissed by the Division Bench by a judgment dated 26.02.2020. The Division Bench of the High Court observed that the judgment in Hyder Consulting clarifies that when the arbitral award is silent on post-award interest, it would be payable on the 'sum' awarded, which would include both the principal and the pre-award interest. The Appellant being aggrieved by the Judgment of the Division Bench of the Delhi High Court instituted proceedings under Article 136 of the Constitution whereupon notice was issued by Apex Court was confined to the issue of post-award interest on 16.07.2021.

ISSUES DISCUSSED IN MORGAN SECURITIES AND CREDITS PVT LTD V. VIDEOCON INDUSTRIES LTD (CIVIL APPEAL NO. 5437 OF 2022)

a. Grant of Post-Award Interest under Section 31(7)(b) of the Act

Section 31(7) of the Act contemplates the grant of interest by the Arbitral Tribunal for two different scenarios: Section 31(7)(a) of the Act provides for the grant of pre-award interest i.e. interest for the period between the date on which cause of action arose and the date on which the award is made by the Arbitral Tribunal, and Section 31(7)(b) of the Act provides for post-award interest i.e. interest for the period between the date of award to the date of payment.

Unlike Section 31(7)(a) of the Act, Section 31(7)(b) of the Act provides that a sum directed to be paid under an arbitral award shall carry interest from the date of award to the date of payment, the use of the term 'shall' may be taken to mean that Arbitral Tribunal has no discretion under Section 31(7)(b) of the Act other than specifying through the direction in the award about the rate of interest.

b. Ruling of Hyder Consulting and discretion to grant interest under Section 31(7)(b) of the Act

In Morgan Securities, the Apex Court ruled that the decision in Hyder Consulting was on the limited issue of whether post-award interest could be granted on the aggregate of the principal and the pre-award interest. The Apex Court observed that issue of whether the Arbitral Tribunal could award post-award interest on a part of the aggregate sum was not conclusively decided in the opinions forming part of the majority in Hyder Consulting.

In Hyder Consulting, Sapre J in Para 10 had observed that what carried under Section 31(7)(b) of the Act is the “sum directed to be paid by an arbitral award” and not any other amount much less by or under the name “interest”. Accordingly, Sapre J held that the interest under sub-clause (b) is granted on the “sum” directed to be paid by an arbitral award wherein the “sum” is nothing more than what is arrived at under Section 31(7)(a) of the Act. Sapre J. noted that while the grant of pre-award interest is at the discretion of the Arbitral Tribunal; post-award interest is mandated by the statute where the Arbitral Tribunal only has the discretion to decide the rate of interest.

Whereas, the opinion of Bobde J. did not rule on whether the Arbitral Tribunal had the discretion to order post-award interest on a part of the 'sum' that was arrived under Section 31(7)(a). Thus, in Morgan Securities, the ruling of Hyder Consulting was not interpreted as having placed fetters on the discretion of the Arbitral Tribunal in the grant of post-award interest under Section 31(7)(b) of the Act.

c. Discretion of Arbitral Tribunal to grant post-award interest under Section 31(7)(b) of the Act

Once the ruling of Hyder Consulting is placed in context, it becomes apparent that the foundation for the power of the Arbitral Tribunal to award post-award interest on part of 'sum' has to be identified within the wordings of Section 31(7)(b) of the Act. An important aspect in this regard is the use of the phrase '*unless the award otherwise directs*' in Section 31(7)(b) of the Act. Section 31(7)(b) of the Act simply provides that the sum directed to be paid by an arbitral award shall carry interest at a specified rate from the date of award to the date of payment unless the award otherwise directs. Interestingly, the Court, in Morgan Securities, has interpreted '*unless the award otherwise directs*' as qualifying only the rate of post-award interest. In Morgan Securities, the Court contrasted the qualifier in Section 31(7)(b) with Section 31(7)(a) of the Act wherein "unless otherwise agreed by the parties" occurs at the beginning of the clause and thus qualifying the entire provision. Whereas "unless the award otherwise directs" appears in Section 31(7)(b) of the Act after the words '*a sum directed to be paid by an arbitral award shall*' and before the

words '*carry interest at the rate of eighteen per cent*' and thus qualifies only the rate of interest.

Ratio of the Judgment in Morgan Securities

The ruling of the Court in Morgan Securities is significant as it discussed the limitation and restriction on the exercise of discretion in grant of interest by the Arbitral Tribunal. The Court had by its judgment, strengthened a more flexible approach in determination of interest especially at the post-award stage by the Arbitral Tribunal. The Court compared the discretion available to Arbitral Tribunal in grant of interest at pre-award and post-award stage under the Act. Under Section 31(7)(a) of the Act, a wider discretion is conferred on the Arbitral Tribunal in regard to determine the reasonable rate of interest, the sum on which the interest is to be paid and the period for which payment of interest is to be made. On the other hand, Section 31(7)(b) of the Act only contemplates a situation where the arbitration award is silent on post-award interest, in which event the award-holder is entitled to a post-award interest of eighteen percent. The Court held that the discretion of the Arbitral Tribunal can only be restricted by an express provision to that effect and there is nothing in Section 31(7)(b) of the Act which restricts the discretion of the Arbitral Tribunal for the grant of post-award interest. In Morgan Securities, Court has interpreted Section 31(7)(b) to hold that the Arbitral Tribunal has the discretion to grant post-award interest and that clause (b) of Section 31(7) of the Act does not fetter the discretion of the Arbitral Tribunal to grant post-award interest on the 'sum' as interpreted in Hyder Consulting or any part thereof.

Finally, the Court ruled that the Arbitral Tribunal must exercise the discretion in good faith, must take into account relevant considerations and must rationally taking cognizance of the surrounding circumstances.

CONCLUSION

The ruling of Morgan Securities is a welcome development as much as it lays down the ambit of discretion available in the grant of post-award interest by the Arbitral Tribunal. The Court has emphasized that Arbitral Tribunal takes note of various factors such as the financial standing of the award-debtor and the circumstances of the parties in dispute before awarding interest. The ruling of Morgan Securities clearly holds that the exercise of discretion in terms of whether interest is levied on principal or 'sum' as interpreted in Hyder Consulting stands clear from the perversity in terms of Section 34 of the Act.

THE PRE-ARBITRAL STAGE NOTIFICATION: IS IT A VALID JUSTIFICATION TO REJECT THE COUNTER-CLAIM?

- Nishant Tiwari and Shilpi

INTERPLAY BETWEEN CPC AND ARBITRATION

In India, arbitration proceedings are governed by the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the Act”)¹. Arbitration hearings are presided over by neutral arbitrators, who attempt to settle the dispute after hearing the parties in dispute. In addition to being enforceable under the Act, the decision made by the arbitrators may also be regarded as being at par with the ruling of a civil court.

The defendant in a civil suit has the right to bring a claim for relief and a defense against the plaintiff. As per Order VIII Rule 6A of the Code of Civil Procedure (hereinafter referred to as “CPC”), before the Respondent offers the defense, he gets a period for filing the counterclaim.² As per Section 19 of the Act, the arbitral tribunal shall not be bound by the provisions of CPC.³ However, an arbitration proceeding must be conducted following the fundamental principles of a fair trial and natural justice.

These principles cannot be disregarded in an arbitration proceeding because they are also the cornerstones of the CPC and the Law of Evidence.

¹The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

²The Code of Civil Procedure, 1908, Order VIII Rule 6A, No. 5, Acts of Parliament, 1908 (India).

³The Arbitration and Conciliation Act, 1996, § 19, No. 26, Acts of Parliament, 1996 (India).

The Hon'ble Supreme Court in the case of *Ashok Kalra v. Wing Commander Surendra Agnihotri*,⁴ held that the counterclaim, if any, that the Respondent is required to file must be made before formulation of the issues and not after.

THE EXCEPTION OF NATIONAL HIGHWAY AUTHORITY OF INDIA V. TRANSSTROY (INDIA) LIMITED

In a recent decision issued by the Division Bench of M.R. Shah and Sanjiv Khanna, JJ. in the case of *National Highway Authority of India v. Transstroy (India) Ltd.*⁵ decided on 11th July 2022, the Supreme Court permitted the Appellant to file a counterclaim to prevent the initiation of the multiplicity of proceedings.

• Factual Analysis and Ruling by the Arbitral Tribunal and the High Court-

Under the National Highways Development Project (NHDP) PHASE-III, National Highway 210 was to be improved and expanded with two lanes and paved shoulders. NHA and the contractor (Respondent) entered into an Engineering Procurement and Construction Agreement (hereinafter referred to as “the Contract”).

⁴*Ashok Kalra v. Wing Commander Surendra Agnihotri* 2020 (2) SCC 394.

⁵*National Highway Authority of India v. Transstroy (India) Limited*, 2022 SCC OnLine SC 832.

According to NHAI, the Contractor had repeatedly failed to uphold certain contractual requirements, and as a result, a notice of cure period was sent, requiring the Contractor to correct the defaults within 60 days. A notice of intention to terminate the contract was sent when the Contractor failed to remedy the identified deficiencies. After finding the reply of the contractor unsatisfactory, NHAI gave notice of termination to the contractor per clause 23.1.2 of the Contract. As per the claim of NHAI, NHAI specifically mentioned in the termination notice that “the same is without prejudice to the Authority's right to claim damages for the Contractor's failure to comply with the unambiguous obligations casted upon it under the Contract and/or to realize any dues, losses and damages whatsoever under the Contract or under applicable laws, as the case may be”.

After the termination of the Contract, the Contractor invoked the arbitration clause under the Contract, to settle certain disputes. The Contractor filed the statement of claim and NHAI filed its Statement of Defence. NHAI contended before the Apex Court that both in the termination notice as well as in the Statement of Defence, NHAI had reserved its right to claim damages and stated that it would file its counterclaim separately. After two days of filing the Statement of Defence, NHAI sent a letter to the Arbitral Tribunal requesting an extension of time for filing the counterclaim. The Tribunal denied the request, primarily on the grounds that NHAI had not followed the procedure outlined in Clauses 26.1 and 26.2 of the Contract and that, as a result, the counterclaim was outside the purview of the arbitration agreement and the resolution of

the underlying dispute lay outside the jurisdiction of the tribunal. In particular, the Tribunal decided that the counterclaim was a dispute that had to be settled amicably through conciliation as required by Clause 26 of the Contract before bringing it to arbitration.

NHAI filed an appeal with the Delhi High Court according to Section 34 of the Act to contest the aforementioned ruling. The High Court rejected the appeal and upheld the decision of the Arbitral Tribunal. NHAI chose to pursue this appeal since it was aggrieved and unsatisfied by the High Court's judgment and order.

- **Contentions of the Parties -**

According to NHAI, both in the termination notice as well as in its Statement of Defence, it had specified that it reserved its right to sue for damages and will present its counterclaim separately. Therefore, the contention on behalf of the Contractor that the counterclaim was by surprise or by way of counterblast was stated to be rejected. Furthermore, the counterclaim was a “claim” rather than a separate “dispute”, and Clause 26 does not allow for the repeated employment of the same method in the case of an overlapping cause of action.

In opposition to NHAI's position, the contractor argued that merely reserving rights would not provide any party the authority to evade the contractually mandated process under Clause 26. Since the Contract does not allow for parties to assert claims by turning solely to arbitration without first following the procedures outlined in Clause 26.

The Contractor submitted that it is only on the failure to resolve the dispute amicably that the dispute will be submitted for arbitration.

- **Points for Determination-**

The issue at hand was whether or not, given the facts and circumstances of the case, the High Court and the Arbitral Tribunal erred in denying NHAI's application for an order under Section 23(2A) of the Arbitration Act, 1996⁶ preventing NHAI from recording the counterclaim.

In the present case, the cause for the dispute between the parties was the termination of the contract by NHAI. The Court observed that “It may be true that in a given case, the “Dispute” may include the claims and/or counter-claims, but, at the same time, the main dispute can be said to be termination of the contract, which as observed hereinabove was required to be resolved through conciliation after following the procedure as above.”

Therefore, in accordance with Clause 26 of the Contract, the issue over termination had to be settled through conciliation. According to the Supreme Court, neither the arbitral panel nor the High Court understood the distinction between the terms “claim”, which can be made by either side, and “dispute”, which by definition has two sides. The Court concluded by saying that NHAI's request to bring a counterclaim was a “claim” and not a “dispute”.

The Court further noted that NHAI had reserved its right to sue from the beginning and that even in its Statement of Defence, it had asserted such a set-off of Rs. 1.23 crores and stated expressly that it reserved its right to bring a counterclaim.

⁶The Arbitration and Conciliation Act, 1996, § 23(2A), No. 26, Acts of Parliament, 1996 (India).

Furthermore, NHAI did not wait at all to make the application under Section 23(2A) of the Act, which would have allowed it to record the counterclaim, despite first requesting an extension of time to file the counterclaim.

The Court found that there was no obligation to follow the procedure outlined in Clause 26 of the Contract, much less a question to avoid the procedure after it was proven that the counterclaim was a “claim” and not a “dispute”. The Court stated, “Once any dispute, difference, or controversy is reported pursuant to Clause 26.1, the entire subject matter, including counterclaim/setoff, shall constitute subject matter of arbitration as ‘any issue which is not resolved under Clauses 26.1 and 26.2.’”

Therefore, the Court consequently found that denying NHAI's request to file a counterclaim would be contrary to Section 23(2A) of the 1996 Arbitration Act, which allows for the filing of counterclaims and setoffs.⁷

- **Findings of the Supreme Court -**

The Supreme Court ruled that the High Court erred by rejecting the application under Sections 34⁸ and 37⁹ of the Act and upholding the Tribunal's order preventing NHAI from filing a counterclaim because it did not consider the aforementioned factors and applied a limited interpretation of Clause 26 of the Contract.

⁷*Id.*

⁸The Arbitration and Conciliation Act, 1996, § 34, No. 26, Acts of Parliament, 1996 (India).

⁹The Arbitration and Conciliation Act, 1996, § 37, No. 26, Acts of Parliament, 1996 (India).

The High Court ought to have recognized that permitting NHAI to file the counterclaim would have prevented the need for several actions.

The judgment made by the Arbitral Tribunal as well as the challenged judgment and order made by the High Court were subsequently revoked by the Supreme Court. NHAI was permitted by the court to submit the counterclaim. The Court further ordered that when calculating the duration for passing of awards as required by Section 29A of the Act¹⁰, the time spent in litigation be deducted.

CONCLUSION

The Supreme Court's decision stated above made it clear that counterclaims cannot be rejected just because their claims were not made known during the pre-arbitration phase. The purpose of Section 23(2A) of the Act is to protect the parties' interests if they later present a counterclaim. Additionally, it prevented the multiplicity of proceedings, which, if unchecked, can defeat the very purpose of the arbitration mechanism.

¹⁰ The Arbitration and Conciliation Act, 1996, § 29A, No. 26, Acts of Parliament, 1996 (India).

EXTENT OF JUDICIAL INTERVENTION TO DETERMINE THE ARBITRABILITY OF THE DISPUTE UNDER SECTION 11 OF THE A&C ACT, 1996

- Ajay & Sahil Kumar Purvey

INTRODUCTION

'The Arbitration and Conciliation Act, 1996', (hereinafter, 'the Act'), is the cardinal law for Indian arbitration. Indian arbitration law has been evolving due to economic volatility, dynamic contractual terms, and trans-border dealings. Interpretation of various provisions of the Act has been subjected to judicial scrutiny and statutory amendments. The scope of judicial inquiry under Section 11 of the Act, is one of these existing quandaries. Section 11 of the Act deals with the appointment of the arbitrator. As the essence of 'party autonomy' has been integrated throughout the Act, Section 11 also gives liberty to parties to agree on procedures for the appointment of the arbitrator.¹ Post 2019 Amendment, failing to agree on the appointment of the arbitrator, any of the parties can approach arbitral institutions designated by the Supreme Court/High Courts for the appointment of the arbitrator². However, the newly amended statute does not define the 'scope of intervention' by arbitral institutions while appointing an arbitrator. Recently, on 20th July 2022, the apex Court in the **Indian Oil Corporation Limited vs. NCC Limited**³ dealt with the same quandary and reiterated that the court may interfere at the stage of Section 11 to determine the arbitrability of the dispute.

Therefore, this Article analyzes the legislative intents, legislative amendments, and judicial precedents to understand the scope of judicial inquiry to determine the arbitrability of dispute under Section 11 of the Act.

LEGISLATIVE INTENT

Indian Law Commission's 176th report recommended that while dealing with Section 11 application, the courts should not delve into the preliminary issues of the dispute. If the court finds that there exists an arbitration agreement and proceeds with the arbitrator's appointment, then that would align with the legislative intent of Section 11 of the Act. Accordingly, Section 11 was amended by the 2015 amendment, and Sub-section (6A) was incorporated, which limits the scope of judicial intervention to the examination of the existence of an arbitration agreement. However, due to the various inconsistent judicial precedents, Sub-section (6A) was omitted by the 2019 amendment. Section 11 has been subjected to various amendments as well as judicial interpretations. Therefore, the next part of this article analyses the effect of various amendments to Section 11.

¹Section 11(2), The Arbitration and Conciliation Act, 1996.

²Section 11(4) & Section 11(6), The Arbitration and Conciliation Act, 1996.

³Indian Oil Corporation Limited v. NCC Limited, Civil Appeal No. 341 of 2022.

AMENDMENTS TO SECTION 11

• Interpretation of Section 11 before the 2015 Amendment

The Apex Court in **National Insurance Co. Ltd. v. Boghara Polyfab**⁴ determined the issues which may be decided by the court other than examining the existence of an arbitration agreement while determining the application under Section 11. The Court observed that *“The issues (second category) which the Chief Justice/his designate may choose to decide are: (a) whether the claim is a dead (long barred) claim or a live claim? (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?”* The Court expanded the scope of Section 11, which was against the legislative intent and object of the Act as it also grant the court power to decide the preliminary issues. Reading the court's observation along with the Section 11(7) would make the decision of the court on preliminary issues final. It leaves no scope for the arbitral tribunal to determine the preliminary issues and goes against Section 16 of the Act which recognizes the *Kompetenz-Kompetenz* principle. Determination of preliminary issues by the court also slowed down the disposal of the case. Subsequently, the 2015 Amendment was brought to expedite the disposal of matter and reinstate the soul of the *Kompetenz-Kompetenz* principle.

⁴ *National Insurance Co. Ltd. v. Boghara Polyfab*, (2009) 1 SCC 267.

• The Amendment of 2015

Indian Law Commission's 246th report recommended introducing Section 11(6-A). Accordingly, Section 11(6-A) confined the Court's role under Section 11 *“to the examination of the existence of an arbitration agreement”*. The amended provision didn't allow the Court to examine the validity of the arbitration agreement, which was in contrast to the Law Commission's recommendation that *“once the prima facie conclusion is that the agreement does not exist or if it is determined that agreement is null and void, such determination is conclusive”*.⁵ This led to various conflicting opinions of the court.

• Interpretation of Section 11 after the 2015 Amendment

The apex court has provided a literal interpretation of Section 11(6A) of the Act in **Duro Felguera, S.A. v. Gangavaram Port Limited**,⁶ stating that the jurisdiction of courts while dealing with the application under Section 11 is restricted to examining whether there exists an arbitration agreement or not. The Hon'ble Supreme Court has observed that: *“From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only into one aspect – the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question.*

⁵ Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August, 2014).

⁶ *Duro Felguera, S.A. v. Gangavaram Port Limited*, (2017) 9 SCC 729.

The resolution to that is simple – it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”⁷

In **United India Insurance v. Hyundai Engg. & Construction Co. Ltd.**,⁸ the apex court adopted a broader interpretation and reached a different conclusion and observed as follows: “Suffice it to say that appointment of arbitrator is a judicial power and is not merely an administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a *prima facie* arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.”⁹

However, in **Mayavati Trading v. Pradyut Deb Burman**,¹⁰ the court overruled this decision and reiterated the earlier position of law i.e. “Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment of *Duro Felguera*.”¹¹ Any other preliminary objection cannot be raised at the stage of section 11 and rather, should be dealt with by the tribunal at a later stage.

⁷ Ibid.

⁸ **United India Insurance v. Hyundai Engg. & Construction Co. Ltd.**, (2018) 17 SCC 607

⁹ Ibid.

¹⁰ **Mayavati Trading v. Pradyut Deb Burman**, (2019) 8 SCC

¹¹ Ibid.

In **Jindal Stainless Ltd. v. Damco India Pvt. Ltd.**¹² and **Ritika Diwan v. Supertech Ltd.**,¹³ the Delhi High Court has followed the apex court's opinion that the Court has to restrict itself to the ascertainment of the existence of arbitration agreement while dealing with the application under Section 11. Thereafter, Delhi High Court diverged from this opinion and laid down the popular test known as the '**Dual Test**'. In **Unique Reality Pvt. Ltd. v. RC Infra Developers**,¹⁴ **Pave Infrastructure Pvt. Ltd. v. WAPCOS Ltd.**,¹⁵ and **Devi Fatehpuria v. Jugal Kishore Shyam Prakash and Co.**,¹⁶ the court while deciding the petition under Section 11(6), held that the Court should examine the 'existence' as well as the 'validity' of the arbitration agreement.

Thereafter, the apex court also diverged from its earlier opinion and even exceeded the threshold of the dual test laid down by the Delhi High Court. In **Oriental Insurance Company Ltd. v. Narbheram Power and Steel Private Ltd.**,¹⁷ the apex court while deciding the petition under Section 11(6), went on to examine whether the conditions of the contract out of which the dispute arose, have been met or not by the parties involved.

¹² **Jindal Stainless Ltd. v. Damco India Pvt. Ltd.**, 2016 SCC Online Delhi 6368

¹³ **Ritika Diwan v. Supertech Ltd.**, 2019 SCC Online Delhi 11255

¹⁴ **Unique Reality Pvt. Ltd. v. RC Infra Developers**, Arb. Petition No. 432 of 2019

¹⁵ **Pave Infrastructure Pvt. Ltd. v. WAPCOS Ltd.**, Arb. Petition No. 574 of 2019

¹⁶ **Devi Fatehpuria v. Jugal Kishore Shyam Prakash and Co.**, Arb. Petition No. 339 of 2019

¹⁷ **Oriental Insurance Company Ltd. v. Narbheram Power and Steel Private Ltd.**, (2018) 6 SCC 534

Similarly, in the case of **Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.**,¹⁸ the apex court has held that the application under Section 11 can only be decided if the contract in which that particular arbitration agreement is contained is properly stamped. This judicial approach transgressed the provision of Section 11(6A). Inconsistent interpretations of Section 11, and the increased intervention of the court have certainly undermined the power of the tribunal to rule on its own jurisdiction. Therefore, the 2015 amendment undoubtedly failed to achieve its objective of ensuring minimal judicial intervention in accordance with the *Kompetenz Kompetenz* principle.

- **The Amendment of 2019 and Subsequent Development**

The 'Ministry of Law and Justice' constituted the 'High-Level Committee' under the chairmanship of Justice B.N. Srikrishna to formulate the quintessential policies for making India a favorable destination for international and domestic arbitration. Based on the committee's recommendations, the amendment was made to Section 11, and sub-section (6A) and (7) were repealed. Although the 2019 amendment increased the efficiency of the adjudication process in India, it still failed to resolve the looming issue that what would be the extent of interference of the court while dealing with the question of appointment of arbitration under Section 11.

¹⁸Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209

Repeal of Sub-section (6A) has left courts without any guidelines on this issue. Alternatively, it could be inferred that position prior to 2015 is restored. Recently, the apex court in **Indian Oil Corporation Limited v. NCC Limited**,¹⁹ reiterated that the arbitral tribunal has the power to adjudicate on the question of jurisdiction as well as arbitrability of the dispute arising out of the arbitration agreement if the court is of the opinion that the facts are such that such interference is indispensable.

CONCLUSION

The core idea of arbitration rests on the principle of party autonomy and judicial non-interference to ensure the speedy resolution of disputes between parties. The 1996 Act was also brought with the motive of ensuring speedy as well as effective resolution of disputes. How far it has been achieved is a larger question that needs examination on various fronts. Section 11 is one such area that opens the possibility of judicial intervention and the recent judgment of the apex court in **Indian Oil Corporation Limited v. NCC Limited**²⁰, enhances the scope of examination by the courts. It will adversely impact the arbitration procedure by increasing the cost as well as the time period of adjudication for the parties involved.

¹⁹Indian Oil Corporation Limited v. NCC Limited, Civil Appeal No. 341 of 2022

²⁰Ibid.

APPLICATION OF THE RULE OF 'CONTRA PROFERENTEM' IN THE INTERPRETATION OF A COMMERCIAL CONTRACT: A CRITICAL ANALYSIS

- Ms. Jewel Bhateja and Ms. Eshita Jain

BACKGROUND:

A contract acts as a vital tool in building an effective business relationship. It not only represents a common consensus between the parties but is also aimed at preventing disputes by mutually agreeing on a set of clauses. It encourages a collaborative relationship between the parties by minimizing future contractual disagreements. A contract with mutual agreement leaves little scope for future disagreements. Dispute mitigation is a core component of any contract, however, not every contract entered with mutual agreement serves the equal interests of both parties.

A contractual relationship facilitates an equal opportunity for the parties to collaborate and discuss terms and conditions favorable to each party. Given the benefit of mutual agreement, parties must review and revise contractual clauses to prevent any latent ambiguity and make it mutually beneficial to avoid any possibility of future probable disputes.

As a universal rule, contracts are interpreted in accordance with the plain meaning of the terms in which they are expressed. The objective of interpretation is to gauge the intention of the parties underlying the express terms at the stage of the formation of a contract. However, if the analysis of the words leads to more than one plausible construction, argued differently by each party, the court becomes inclined to invoke the rule of Contra Proferentem.

CONTRA PROFERENTEM: AN EFFECTIVE TOOL IN RESOLVING AMBIGUITY

The rule of Contra Proferentem traces its origin from English Common Law Jurisprudence and it is explained as – *Ambiguities in the language of a written contract should be construed against the drafter of the unclear term*¹. It imposes liability on the party who drafts the contract in unclear terms with an aim to exclude or limit the drafter's liability.

The uncertainty underlying the ambiguous clause arises mainly due to the lack of constructive discussions on the clause. The rule of Contra Proferentem is one of the principles of interpretation of a contract which acquires significance in resolving disputes underlying the interpretation of a vague clause. A contract is generally an output of long-standing negotiation between the parties which allows the parties to protect their best interests by inserting clauses favorable to both. But there exist contracts where not both parties share equal bargaining power, hence resulting in one-party dominance. Such are the contracts of insurance, where there is unilateral dictation of clauses by one party, and the other party being a mere signatory is left with no authority in the stipulation of clauses. This has been discussed by the Supreme Court in the case of *Bank of India v. K Mohandas*²,

¹Philippe Fouchard & Berthold Goldman, Fouchard, Gaillard, *Goldman on International Commercial Arbitration* 827 (Kluwer Law International 1999).

²*Bank of India v. K Mohandas*, (2009) 5 SCC 313.

wherein the Court observed as *“In India, this principle has been exhaustively applied in the insurance cases in favour of the insured since the agreement is wholly drafted by the insurance company giving no opportunity to the other party to negotiate”*³.

In such a case, if the clause lacks precision and clarity, and its interpretation results in more than one reasonable construction, the court resolves such ambiguity by adopting construction favorable to the party who has not written the contract. The objective underlying such principle is to discourage an attempt on the parties to carelessly draft a contract, since there is always a party who is in a better position to avoid the vagueness in a contractual clause, hence imposing liability on such a party seems justified. But, it is a travesty of justice that even after the courts have applied the rule of Contra Proferentem majorly in insurance contracts, the insurance contracts have not modified their language to suit the clearer and unambiguous terms since their interpretation of the insurance coverage is still a subject of judicial scrutiny.

JUDICIOUS APPLICATION OF THE RULE OF CONTRA PROFERENTEM

However, the rule of Contra Proferentem must be used with caution since it acquires significance only in cases of ambiguous language of the clause, leading to various plausible interpretations. If the clause bears clear language capable of a specific meaningful interpretation, the rule finds no application.

³ *LIC of India v. Insure Policy Plus Services Pvt. Ltd. and Ors.*, AIR 2016 SC 182.

Therefore, before invoking the rule, it becomes imperative to identify the party at fault at whose instance the ambiguity was inserted. Such an approach by the judicial system points out that the application of the rule of Contra Proferentem is to be neither too literal, nor too rigid but must be used with caution considering the facts and circumstances of each case.

The Supreme Court has been mindful of the fact that though the application of the rule is limited as a measure of last resort when used, it must advance the purpose of meaningful interpretation. This has been illustrated in *Colinvaux's Law of Insurance* as:

“Quite apart from contradictory clauses in policies, ambiguities are common in them and it is often very uncertain what the parties to them mean. In such cases, the rule is that the policy, being drafted in the language chosen by the insurers, must be taken most strongly against them. It is construed contra preferentes, against those who offer it. In a doubtful case, the turn of scale ought to be given against the speaker, because he has not clearly and fully expressed himself. Nothing is easier than for the insurers to express themselves in plain terms. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in the sense in which he might reasonably have understood it. If the insurers wish to escape liability under the given circumstances, they must use words admitting no possible doubt.

But a clause is only to be contra preferentes in case of real ambiguity. One must not use the rule to create ambiguity. One must find ambiguity first. Even where a clause by itself is ambiguous if, by looking at the whole policy, its meaning becomes clear, there is no room for the application of the doctrine.

So also where if one meaning is given to a clause, the rest of the policy becomes clear, the policy should be construed accordingly.”⁴

In this regard, the Supreme Court has further observed in *Export Credit Guarantee Corporation of India Ltd. v. Garg Sons International*⁵ that “...it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes with the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement”.⁶

LIMITED SCOPE OF CONTRA PROFERENTEM IN COMMERCIAL CONTRACT

It is worth noting that in view of the pattern of the Indian judicial system, this doctrine finds little scope in case of commercial contracts. The Supreme Court in the case of *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran* observed that “In a commercial contract which is a bilateral document mutually agreed upon, there is no scope for applying *Contra Proferentem*”⁷.

⁴ Robert and Merkin (Eds.), *Colinvaux's Law of Insurance* (6th Edn., 1990) at p. 42.

⁵ *Export Credit Guarantee Corporation of India Ltd. v. Garg Sons International*, (2014) 1 SCC (Civ) 648

⁶ *Ibid.*

⁷ *Rashtriya Ispat Nigam Limited v. Dewan Chand Ram Saran*, (2012) 5 SCC 306 : AIR 2012 SC 2829.

To further elucidate the purpose of such doctrine, the Bombay High Court in *Oil and Natural Gas Corporation Ltd. v. Interocean Shipping (India) Pvt. Ltd.* To further elucidate the purpose of such doctrine, the Bombay High Court in *Oil and Natural Gas Corporation Ltd. v. Interocean Shipping (India) Pvt. Ltd.* observed that “A contract executed by and between parties “with open eyes” cannot attract the *Contra Proferentem* Rule even if an ambiguity arises; if a party does not challenge the terms of a contract during the contract's execution or during the execution of the work, nor does it clarify its questions or doubts regarding the contract with the other party, then such a party must not be allowed to take advantage of there being an ambiguity in the contract terms. It had every opportunity to rectify such an ambiguity earlier, which it did not utilize”.

Further, the Supreme Court has noted that essentially there is no difference between insurance contracts and any other form of contract except for the fact that the former is a contract of *uberrima fides*, i.e., good faith on the part of the assured. It is for this reason that insurance contracts are more inclined towards being interpreted as *Contra Proferentem* in case of ambiguity or doubt.⁸ The Court has further observed that “(I)n interpreting documents relating to a contract of insurance, the duty of the court is to interpret the words in which the contract is expressed by the parties because it is not for the court to make a new contract, however reasonable, if the parties have not made it themselves”.¹⁰

⁸ *Oil and Natural Gas Corporation Ltd. v. Interocean Shipping (India) Pvt. Ltd.*, (2017) 5 Bom CR 8.

⁹ *General Assurance Society Ltd. v. Chandumull Jain*, (1966) 3 SCR 500

¹⁰ *Ibid.*

CONCLUSION:

While the doctrine of *Contra Proferentum* does seem to draw a level-playing ground for parties with unequal bargaining powers, it is needless to mention that it has been used sparingly by the Indian judiciary owing to its own set of issues. At the same time, this doctrine may be needed in the current scenario more than ever wherein standard forms of contract are very frequently used, subsisting on unequal bargaining power. Consequently, the need to apply this doctrine to commercial contracts has increased, and how and when the said doctrine may be applied to commercial contracts in the Indian Legal system is awaited.



CONTACT US

GURUGRAM

Plot Number 5, 6, 7, Udyog Vihar
Phase IV, Sector 18
Gurugram, Haryana- 122015, INDIA
Phone: 91-124-4666400
Fax: 91-124-4666401

BANGALORE

Awfis, S&A Law Offices
Renaissance Centra, 27 & 27/1
Mission Road, Rama Nagar
Bengaluru, Karnataka-560027

NEW DELHI

E-337, East of Kailash
New Delhi 110065 INDIA
Phone: 91-11-46667000
Fax: 91-11-46667001

MUMBAI

Unit No-101, 10th Floor
Sakhar Bhawan, Plot No.230
Ram Nath Goenka Marg, Nariman Point
Mumbai-400021 INDIA
Phone: 91-22-66025000
Fax: 91-22-66025001