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Report No. 246

Amendments to the Arbitration and Conciliation Act 1996

August, 2014

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D.O. No.6(3)238/2012-LC(LS) 5 August 2014

Dear Mr. Ravi Shankar Prasad ji,

I am enclosing herewith the 246th Report of the Commission on '***Amendment to the Arbitration and Conciliation Act, 1996***'. The Commission was entrusted with the task of reviewing the provisions of the Arbitration and Conciliation Act, 1996 ('the Act') in view of the several inadequacies observed in the functioning of the Act.

The Commission had earlier recommended various amendments to the Act under its 176th Report on the '*Arbitration and Conciliation (Amendment) Bill, 2001*'. After considering the recommendations of the 176th Report, the Government decided to accept almost all such recommendations and accordingly, introduced the '*Arbitration and Conciliation (Amendment) Bill, 2003*' in the Rajya Sabha on 22nd December, 2003. Subsequently, in the wake of the report of the *Justice Saraf Committee* the Bill was referred to the Department Related Standing Committee on Personnel, Public Grievances, Law and Justice for a further analysis.

The Departmental Related Standing Committee was eventually of the view that many provisions in the Bill were insufficient and contentious and, therefore, the Bill in its present form should be withdrawn and be reintroduced after considering its recommendations. Accordingly, the Bill was withdrawn from the Rajya Sabha.

In order to re-look into the provisions of the Act, the Ministry of Law and Justice issued a consultation paper on 08th April, 2010 inviting suggestions from eminent lawyers, judges, industry members, institutions and various other stakeholders. After receiving various responses to the Paper, the Ministry held several National Conferences across the country during July/August, 2010 inviting suggestions from lawyers, judges, industry, arbitration institutions and public at large. On the basis of such

comments and suggestions received at the National Conferences, the Ministry prepared draft proposals and a Draft Note was prepared for the Cabinet.

Thereafter, the Ministry asked the Commission to undertake a study of the amendments proposed to the Act in the '*Draft Note for the Cabinet*'. Accordingly, the Commission set up an expert Committee comprising of several eminent persons from the field of law to study the proposed amendments and make suggestions accordingly. Written responses were also received from various institutions like FICCI, CII and ASSOCHAM.

After extensive deliberations and study, the Commission has now prepared the present Report.

Chapter III of the present Report contains the proposed amendments. Also Annexure to the Report contains the proposed amendments in track changes made in the present Act along with notes.

With warm regards,

Yours sincerely,

[Ajit Prakash Shah]

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Amendments to the Arbitration and Conciliation Act, 1996

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Chapter I

BACKGROUND TO THE REPORT

1. The Arbitration and Conciliation Act, 1996 (hereinafter the "**1996 Act**"), is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, and to define the law relating to conciliation and for matters connected therewith or incidental thereto.

HISTORY OF ARBITRATION LAW IN INDIA

2. Regulation of the conduct of arbitration has a long history in India. The first direct law on the subject of arbitration was the Indian Arbitration Act, 1899; but, its application was limited to the Presidency towns of Calcutta, Bombay and Madras. This was followed by the Code of Civil Procedure, 1908 where the Second Schedule was completely devoted to arbitration.
3. The first major consolidated legislation to govern the conduct of arbitrations across the country was the Arbitration Act, 1940 which was based on the (English) Arbitration Act, 1934. The Act repealed the Arbitration Act, 1899 and the relevant provisions in the Code of Civil Procedure, 1908, including the Second Schedule thereof. The 1940 Act however, did not deal with enforcement of foreign awards, and for which purpose, the legislature had passed the Arbitration (Protocol and Convention) Act, 1937 to deal with Geneva Convention Awards and the Foreign Awards (Recognition and Enforcement) Act, 1961 to deal with New York Convention Awards. The working of the 1940 Act, which dealt with domestic arbitrations, was far from satisfactory. The arbitral regime at that point of time was premised largely on a mistrust of the arbitral process, and the same was the subject of much adverse comment by the courts.
4. The Supreme Court in *F.C.I. v. Joginderpal Mohinderpal*, (1989) 2 SCC 347, at para 7 observed –

> "We should make the law of arbitration simple, less technical and more responsible to the actual realities of the situation, but must be responsive to the canons of justice and fair play and make the arbitrator adhere to such process and norms which will create confidence, not only by doing justice between the parties, but by creating a sense that justice appears to have been done."

5. Several other cases adversely commented upon the working of the 1940 Act. The anguish of the Supreme Court is evident from the observations of D.A. Desai J. in *Guru Nanak Foundation v Rattan Singh*, (1981) 4 SCC 634:

> "Interminable, time consuming, complex and expensive Court procedures impelled jurists to search for an alternative Forum, less formal, more effective and speedy for resolution of disputes, avoiding procedural claptrap and this led them to Arbitration Act, 1940 ("Act" for short). However, the way in which the proceedings under the Act are conducted and without exception challenged in Courts, has made Lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under that Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal Forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Court been clothed with 'legalese' of unforeseeable complexity."

6. The working of the 1940 Act was also the subject of the 210th Report of the Public Accounts Committee of the Fifth Lok Sabha. The Law Commission of India also examined the working of the 1940 Act in its 76th Report.

7. The problem became more acute and pronounced after the liberalisation of the economy in 1991. Foreign investors required a stable business environment and a strong commitment to the rule of law, based on a predictable and efficient system of resolution of disputes. Thus, alternative systems like arbitration, were seen as a prerequisite to attract and sustain foreign investment.

8. In order to address these problems, the earlier regime was sought to be replaced by the Arbitration and Conciliation Bill, 1995 which was introduced in Parliament. Since the requisite legislative sanction could not be accorded to the 1995 Bill, the President of India promulgated the Arbitration and Conciliation Ordinance, 1996 on the same lines as the 1995 Bill. Interestingly, the Ordinance had to be promulgated twice because Parliament could not

enact the law in the required time period. Finally, Parliament passed the Bill in terms of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") which received the assent of the President of India on 16.08.1996 and came into force on 22.08.1996. However, it was made applicable to cases where the arbitral proceedings commenced as of 25.01.1996. The 1996 Act is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The 1996 Act repealed all three earlier laws (the 1937 Act, the 1940 Act and the 1967 Act as set out above) and applied to (i) domestic arbitrations; (ii) enforcement of foreign awards; and (iii) conciliations. Although the UNCITRAL Model Law was intended to provide a model law to deal with international commercial arbitrations; in the 1996 Act, the UNCITRAL Model Law provisions, with some minor modifications, are made applicable to both domestic and international commercial arbitrations.

9. The Act is based on the UNCITRAL Model Law (a set of 36 Articles) which was drafted to govern all international arbitrations by a working group of the United Nations and finally adopted by the U.N. Commission on International Trade Law (UNCITRAL) on June 21st, 1985. The Resolution of the UN General Assembly envisages that all countries should give due consideration to the Model Law, in view of the desirability of uniformity of the law on arbitral procedures and the specific needs of international commercial practice. This is also duly reflected in the Preamble of the Act of 1996 saying that: "*it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law*…".

SCHEME OF THE ARBITRATION AND CONCILIATION ACT, 1996

10. While drafting the 1996 Act, one of the major considerations was the need to curtail delays in the arbitral process. Another objective was to bring in its fold, international commercial arbitrations; in contrast the 1940 Act only dealt with domestic arbitrations. Some of these objectives are clearly reflected in the Objects and Reasons of the Arbitration and Conciliation Bill, 1995 as stated herein below:

(a) To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;

(b) To minimise the supervisory role of courts in the arbitral process;

(c) To provide that every final arbitral award is enforced in the same manner as if it was a decree of court.

11. The 1996 Act covers both international and domestic arbitration, i.e., where at least one party is not an Indian national and where both parties are Indian nationals respectively.

12. Part I of the 1996 Act titled 'Arbitration' is general in nature and contains ten chapters. Part II deals with 'Enforcement of Certain Foreign Awards'. Chapter I of Part II deals with New York Convention Awards and Chapter II deals with Geneva Convention Awards. Part III of the 1996 Act deals with Conciliation which does not have any bearing on the present Report. Part IV of the 1996 Act deals with supplementary provisions.

13. The 1996 Act also contains three Schedules. The First Schedule refers to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (also covered under Section 44 of the 1996 Act). The Second Schedule refers to Protocol on Arbitration Clauses (also covered under Section 53 of the 1996 Act). The Third Schedule refers to the Convention on the Execution of Foreign Arbitration Awards.

176TH REPORT OF THE LAW COMMISSION

14. In the year 2001, the Government made a reference to this Commission to undertake a comprehensive review of the Arbitration and Conciliation Act, 1996 in view of the various shortcomings observed in its working and also various representations received by the Government in this regard.

15. The Commission considered such representations which pointed out that the UNCITRAL Model (on the basis of which the Arbitration and Conciliation Act, 1996 was enacted) was mainly intended to enable various countries to have a common model for 'International Commercial Arbitration' but the 1996 Act had made provisions of such a Model Law applicable also to cases of purely

domestic arbitration between Indian nationals. Therefore, this was giving rise to some difficulties in the implementation of the Act.

16. In addition, there were also several conflicting judgments of various High Courts with regard to the interpretation of the provisions of the 1996 Act. Several other aspects about the difficulties in the working of the Act were also brought to the notice of the Commission.

17. After an in-depth study of the law on the subject, the Commission made its recommendations for bringing amendments in the Arbitration and Conciliation Act, 1996 in the form of its 176th Report.

JUSTICE B.P. SARAF COMMITTEE

18. The Government considered the recommendations of the 176th Report and after consulting the State Governments and various institutions, decided to accept almost all the recommendations. Accordingly, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on December 22, 2003.

19. Subsequently, on July 22, 2004, the Government constituted a Committee known as the "Justice Saraf Committee on Arbitration" under the Chairmanship of Dr. Justice B.P. Saraf to make an in-depth study of the analysis of the recommendations of the 176th Report of the Law Commission and all aspects of the Arbitration and Conciliation (Amendment) Bill, 2003. The Justice Saraf Committee thereafter gave a detailed report on January 29, 2005.

REPORT OF THE DEPARTMENTAL RELATED STANDING COMMITTEE ON PERSONNEL, PUBLIC GRIEVANCES, LAW AND JUSTICE

20. In light of the Justice Saraf Committee Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for study and analysis. Several eminent lawyers, representatives from the trade and industry, Public Sector Undertakings and representatives of the concerned Departments appeared before the said Committee and expressed

their views in detail. The Committee thereafter submitted its report to the Parliament on August 4, 2005.

21. The Committee was of the view that the provisions of the Bill gave room for substantial intervention by court in the arbitration process. The Committee stressed upon the need for popularizing institutional arbitration in India and called for establishment of an institution in our country in this regard which would be along international standards.

22. The Committee further expressed the view that many provisions were not only insufficient, but also contentious. Therefore, the said Bill ought to be withdrawn and a fresh Bill be brought after considering the recommendations of the Committee.

23. In view of the various amendments recommended by the Committee, the above Bill was withdrawn from the Rajya Sabha. At that time, it was decided that a new Bill must be introduced in the Parliament after undertaking an in-depth study of the various recommendations of the Committee.

THE PRESENT REPORT BY THE 20TH LAW COMMISSION

24. In order to undertake a study for suggesting amendments to the 1996 Act, the Ministry of Law and Justice also issued a Consultation Paper on April 08, 2010 inviting suggestions/comments from eminent lawyers, judges, industry members, institutions and various other sections of the government and other stakeholders.

25. Many written responses were received by the Ministry which were collated and studied in detail. The Ministry of Law and Justice thereafter held National Conferences in New Delhi, Mumbai and Bangalore during July/August 2010, inviting suggestions on the Consultation Paper from various significant quarters including lawyers, judges, industry, arbitration institutions and the public at large.

26. Taking into account the comments and suggestions received in writing and expressed orally in the National Conferences and discussions held thereafter, the Ministry prepared draft proposals. On the basis of the draft proposals, the Ministry prepared a 'Draft Note for the Cabinet'. Thereafter, vide F. No. A-60011/48/2010-Admn.III(LA), the Ministry of Law and Justice requested the

Law Commission to undertake a study of the amendment proposed to the Act in the 'Draft Note for the Cabinet'. Accordingly the present reference came to this Commission in the aforesaid terms.

27. Pursuant to this Reference, the Law Commission set up an expert committee to study the proposed amendments and make suggestions accordingly. The Committee comprised of several eminent persons from the legal field such as Justice Rohinton Nariman (then Senior Counsel), Mr. Arvind Datar, Mr. Shishir Dholakia, Mr. Darius Khambatta, Mr. Dushyant Dave, Mr. Ciccu Mukhopadhyay, Ms. Zia Mody, Mr. N.L. Rajah, Mr. Ajay Thomas, Mr. Suhaan Mukherjee, Mr. Anirudh Krishnan, Mr. Anirudh Wadhwa, Mr. Giriraj Subramanium and Mr. Ashutosh Ray.

28. Written notes and suggestions were thereafter circulated to the Commission by Justice Rohinton Nariman, Mr. Arvind Datar, Mr. Darius Khambatta, Mr. Shishir Dholakia, Mr. Dushyant Dave and Mr. N.L. Rajah. A written note was also given separately by Mr. Gourab Banerji (then Additional Solicitor General of India).

29. Written responses were also given by various institutions like FICCI, Assocham and CII. Mr. Lalit Bhasin, Sr. Advocate, Mrs. Pallavi Shroff and Mr. Tejas Karia, Advocates on behalf of CII, and Mr. D. Sengupta on behalf of FICCI made valuable suggestions.

30. The Commission also held various rounds of discussions with Justice Jagannath Rao, former Chairman of the Law Commission and author of the earlier Report (176th Report) on the subject. The Commission also considered the views of Justice V. Ramasubarmaniam of the Madras High Court.

31. The Commission also separately held a series of discussions with Mr. Anirudh Wadhwa and Mr. Anirudh Krishnan, whose inputs were incisive, vital and require special appreciation.

32. Thereafter, upon extensive deliberations, discussions and in-depth study, the Commission has given shape to the present Report.

CHAPTER II

INTRODUCTION TO THE PROPOSED AMENDMENTS

1. Litigating in courts in India is a time-consuming and expensive exercise, and justice usually eludes both parties to an action. The injustice is particularly egregious in commercial disputes, where cases remain pending for years. It is in this context that one must examine “arbitration” as a method of dispute resolution that aims to provide an effective and efficient alternative to traditional dispute resolution through Court.
2. In India, as in most developed legal systems, commercial contracts, whether with private persons or with the State, usually contain an arbitration clause where parties agree to settle any prospective dispute through arbitration instead of going to court. Arbitration has thus emerged as a commercially significant method of dispute resolution; and its importance has only grown since liberalisation in 1991.
3. The Arbitration and Conciliation Act, 1996 (hereinafter “the Act”) is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980. The Act has now been in force for almost two decades, and in this period of time, although arbitration has fast emerged as a frequently chosen alternative to litigation, it has come to be afflicted with various problems including those of high costs and delays, making it no better than either the earlier regime which it was intended to replace; or to litigation, to which it intends to provide an alternative. Delays are inherent in the arbitration process, and costs of arbitration can be tremendous. Even though courts play a pivotal role in giving finality to certain issues which arise before, after and even during an arbitration, there exists a serious threat of arbitration related litigation getting caught up in the huge list of pending cases before the courts. After the award, a challenge under section 34 makes the award inexecutable and such petitions remain pending for several years. The object of quick alternative disputes resolution frequently stands frustrated.
4. There is, therefore, an urgent need to revise certain provisions of the Act to deal with these problems that frequently arise in the arbitral process.The

purpose of this Chapter is to lay down the foundation for the changes suggested in the report of the Commission. The suggested amendments address a variety of issues that plague the present regime of arbitration in India and, therefore, before setting out the amendments, it would be useful to identify the problems that the suggested amendments are intended to remedy and the context in which the said problems arise and hence the context in which their solutions must be seen.

INSTITUTIONAL ARBITRATION IN INDIA

5. Arbitration may be conducted *ad hoc* or under institutional procedures and rules. When parties choose to proceed with *ad hoc* arbitration, the parties have the choice of drafting their own rules and procedures which fit the needs of their dispute. Institutional arbitration, on the other hand, is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of such institution. Essentially, the contours and the procedures of the arbitral proceedings are determined by the institution designated by the parties. Such institutions may also provide qualified arbitrators empanelled with the institution. Further, assistance is also usually available from the secretariat and professional staff of the institution. As a result of the structured procedure and administrative support provided by institutional arbitration, it provides distinct advantages, which are unavailable to parties opting for *ad hoc* arbitration.
6. The spread of institutional arbitration however, is minimal in India and has unfortunately not really kick-started. In this context, the Act is institutional arbitration agnostic – meaning thereby, it neither promotes nor discourages parties to consider institutional arbitration. The changes suggested by the Commission however, attempt to encourage the culture of institutional arbitration in India, which the Commission feels will go a long way to redress the institutional and systemic malaise that has seriously affected the growth of arbitration.
7. The Commission has, therefore, recommended the addition of Explanation 2 to section 11(6A) of the Act with the hope that High Courts and the Supreme

Court, while acting in the exercise of their jurisdiction under section 11 of the Act will take steps to encourage the parties to refer their disputes to institutionalised arbitration. Similarly, the Commission seeks to accord legislative sanction to rules of institutional arbitration which recognise the concept of an "emergency arbitrator" – and the same has been done by broadening the definition of an "arbitral tribunal" under section 2(d).

8. In this context, the Commission notes the establishment and working of the Delhi High Court International Arbitration Centre which started in 2009 and is now fairly established and is providing good service to its users. The Punjab & Haryana High Court has also started an Arbitration Centre in 2014 with its own set of rules. The Commission further notes the working of the Indian Council of Arbitration (ICA), which is associated with FICCI and which is one of the earliest arbitral institutions in the country. The Commission further commends the working of the Nani Palkhivala Arbitration Centre in Chennai which similarly has its own set rules, governing body and staff, and is well established in the southern India.
9. In order to further encourage and establish the culture of institutional arbitration in India, the Commission believes it is important for trade bodies and commerce chambers to start new arbitration centers with their own rules, which can be modeled on the rules of the more established centers. The Government can also help by providing land and funds for establishment of new arbitration centers. It is important to start a dialogue between the legal community which is involved in the practice of arbitration, and the business community which comprise of the users of arbitration, in order that institutional arbitration takes wing. The Government may also consider formation of a specialised body, like an Arbitral Commission of India, which has representation from all the stakeholders of arbitration and which could be entrusted with the task of, *inter alia,* encouraging the spread of institutional arbitration in the country.

FEES OF ARBITRATORS

10. One of the main complaints against arbitration in India, especially *ad hoc* arbitration, is the high costs associated with the same – including the

arbitrary, unilateral and disproportionate fixation of fees by several arbitrators. The Commission believes that if arbitration is really to become a cost effective solution for dispute resolution in the domestic context, there should be some mechanism to rationalise the fee structure for arbitrations. The subject of fees of arbitrators has been the subject of the lament of the Supreme Court in *Union of India v. Singh Builders Syndicate,* (2009) 4 SCC 523 where it was observed:

> "[T]he cost of arbitration can be high if the arbitral tribunal consists of retired Judges… There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee."

11. In order to provide a workable solution to this problem, the Commission has recommended a model schedule of fees and has empowered the High Court to frame appropriate rules for fixation of fees for arbitrators and for which purpose it may take the said model schedule of fees into account. The model schedule of fees are based on the fee schedule set by the Delhi High Court International Arbitration Centre, which are over 5 years old, and which have been suitably revised. The schedule of fees would require regular updating,

and must be reviewed every 3-4 years to ensure that they continue to stay realistic.

12. The Commission notes that International Commercial arbitrations involve foreign parties who might have different values and standards for fees for arbitrators; similarly, institutional rules might have their own schedule of fees; and in both cases greater deference must be accorded to party autonomy. The Commission has, therefore, expressly restricted its recommendations in the context of purely domestic, *ad hoc,* arbitrations.

CONDUCT OF ARBITRAL PROCEEDINGS

13. The Commission notes that there are numerous provisions in the Act which deal with the conduct of arbitral proceedings, and these are set out in Chapter V of the Act. However, despite existing provisions in the Act which are aimed at ensuring proper conduct of arbitral proceedings, the Commission found that the experience of arbitrating in India has been largely unsatisfactory for all stakeholders.
14. Proceedings in arbitrations are becoming a replica of court proceedings, despite the specific provisions in Chapter V of the Act which provide adequate powers to the arbitral tribunal. The Commission hopes that arbitral tribunals would use the existing provisions in the Act, in order to reduce delays.
15. In *ad hoc* arbitrations, fees are charged "per sitting" basis (with sometimes two/three sittings in a day in the same dispute and between the same parties), dates are usually spread out over a long period of time, and proceedings continue for years - which results in increase of costs, and denial of justice to the aggrieved party. There is ingrained in the Indian system a culture of frequent adjournments where arbitration is treated as secondary by the lawyers, with priority being given to court matters.
16. The Commission notes that this cultural revolution has to come from within the arbitration community. Arbitrators must eschew purely formal sittings, which are meant only for compliances. The Courts have already indicated that delay in passing an award can lead to such an award getting set aside [see for instance the decisions of the Delhi High Court in *Oil India Ltd v Essar Oil Ltd,* OMP No 416/2004 dt 17.8.2012 at paras 30-40; *UOI v Niko Resources*

Ltd, OMP No 192/2010 dt 2.7.2012 at paras 43-51; *Peak Chemical Corporation Inc v NALCO,* OMP 160/2005 No dt 7.2.2012 at para 29] – and the same should be a nudge to all arbitrators to hear and decide matters expeditiously, and within a reasonable period of time. Counsel for parties must similarly refrain from seeking frivolous adjournments or insisting upon frivolous hearings or leading long winded and irrelevant evidence. The Commission further notes that a conscious use of technology, like tele-conferencing, video-conferencing etc., should also be encouraged and the same can easily replace the need for purely formal sittings and thereby aid in a smoother and more efficient conduct of arbitral proceedings.

17. In this context, the Commission has proposed addition of the second proviso to section 24 (1) to the Act, which is intended to discourage the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments.
18. In order to further demonstrate and re-affirm the Act's focus on achieving the objectives of speed and economy in resolution of disputes, the Commission has also proposed an addition to the preamble of the Act. While this would not directly affect the defined substantive rights and liabilities of parties in terms of the Act, it would provide a basis for Arbitral Tribunals and Courts to interpret and work the provisions of the Act such that it ultimately achieves those objectives for the benefit of the ultimate users of arbitration.

JUDICIARY AND ARBITRATION

19. It is thought in some quarters that judicial intervention is anathema to arbitration, and this view is not alien to a section of the arbitration community even in India. The Commission however, does not subscribe to this view. The Commission recognizes that the judicial machinery provides essential support for the arbitral process. The paradox of arbitration, as noted by a leading academic on the subject, is that it seeks the co-operation of the very public authorities from which it wants to free itself.
20. The obvious starting point for any discussion on the role of the judiciary in arbitration is section 5 of the Act, which itself is derived from Art 5 of the Model Law, which brings reduced judicial involvement in the arbitral process

and a consequential increase in the powers of the arbitral tribunal. The position is all the more stark in India, given the changed regime from the 1940 Act which envisaged a much larger and more active role for the judiciary. However, notwithstanding the reduced role of the Courts and the enhanced powers accorded to the arbitral tribunal in the Act, it is necessary to carefully calibrate the balance between judicial intervention and judicial restraint. In this context, one may refer to the words of LORD MUSTILL in the foreword to the book O.P. MALHOTRA, *Law and Practice of Arbitration* (1st edn, 2002, LexisNexis) -

> "First, there is the central importance of a harmonious relation between the courts and the arbitral process. This has always involved a delicate balance, since the urge of any judge is to see justice done, and to put right injustice wherever he or she finds it; and if it is found in an arbitration, why then the judge feels the need to intervene. On the other side, those active in the world of arbitration stress its voluntary nature, and urge that it is wrong in principle for the courts to concern themselves with disputes which the parties have formally chosen to withdraw from them, quite apart from the waste of time and expense caused by gratuitous judicial interference. To a degree both views were right, and remain so; the problem has been to give proper weight to each of them. It was an unhappy feature of discourse on arbitration in the century just past that the legitimate arguments which could be advanced in favour of one or another came to be expressed, in some instances at least, with quite unnecessary vigour.
>
> Fortunately, in recent years wiser counsels have prevailed, and it has, I believe, generally come to be recognised on both sides of the procedural divide that the courts must be partners, not superiors or antagonists, in a process which is vital to commerce at home or abroad...
>
> Within a working lifetime, international arbitration has become a business, not a calling, often involving very large sums, and bringing in its train substantial monetary earnings for all concerned. Perhaps inevitably, there has been a concurrent decline in the standards of at least some – certainly not all – of those who take part. It is no good wringing hands about this, for it is a fact to be faced, and part of facing them is to recognise that now the influence of peer pressure and indeed of simple honour has waned and some other means must be found of protecting this voluntary process from those who will not act as they have agreed. In the end, like it or not, only the courts can furnish this protection, and even the most enthusiastic proponents of party autonomy are bound to recognise that they must rely on the judicial arm of the state to ensure that the agreement to arbitrate is given at least some degree of effect. It is no good complaining that judges should keep right out of arbitration, for arbitration cannot flourish

unless they are ready and waiting at the door, if only rarely allowed into the room.

It is however, equally important that the balance is maintained by a recognition by the courts that just as arbitration exists only to serve the interests of the community, so also their own powers are conferred only to support, not supplant, the extra-judicial process which the parties have chosen to adopt. Anyone who has been faced in a judicial capacity with a decision which seems wrong, can sympathise with the impulse to decide the issue again, this time correctly; yet in the field of arbitration it is an impulse which must, at all costs, be resisted, except in those circumstances where the legislature has explicitly created the right of appeal...

Precisely the same considerations apply to procedures in the arbitration. The parties have chosen to arbitrate, not litigate. By doing so they have selected the procedures laid down by the relevant legislation or institutional rules. If there are none, then they have deliberately entrusted the choice of procedures to the arbitrator himself. This is another choice which the court must respect. The Judge may think, and think rightly, that the choice is unwise, that a different procedure would better have suited the dispute in hand. Or he may believe, again rightly, that what the arbitrator did was inefficient or even in a degree unjust. But his or her task is not to re-try the case, but simply to ensure that the method of dispute resolution on which the parties agreed is what they have in the event received. Moreover, only where the departure from the agreed method is of a degree which involves real injustice, is the court entitled to intervene, and even then the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process."

21. In the course of the preparation of the Report, and as an underlying theme behind the proposed amendments, the Commission has strived to adopt a middle path to find an appropriate balance between judicial intervention and judicial restraint.

DELAYS IN COURTS, BEFORE THE TRIBUNAL AND INVESTMENT TREATY RISK

22. Judicial intervention in arbitration proceedings adds significantly to the delays in the arbitration process and ultimately negates the benefits of arbitration. Two reasons can be attributed to such delays. *First*, the judicial system is over-burdened with work and is not sufficiently efficient to dispose cases, especially commercial cases, with the speed and dispatch that is required. *Second*, the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary,

which translates into many more admissions of cases in Court which arise out of or are related to the Act.

23. Out of the two problems, the first is part of a wider and more pervasive problem that is endemic to the Indian judiciary, and the reforms for which form part of a separate study. However, a few suggestions may be noted. The Commission finds that in most Courts, arbitration matters are kept pending for years altogether, and one of the reasons is the lack of dedicated benches looking at arbitration cases. One may look to the experience in the Delhi High Court where there is a practice of having separate and dedicated benches for arbitration related cases. This has resulted not only in better and quicker decisions, but has also increased the confidence of the parties in choosing the jurisdiction of the Delhi High Court for dealing with arbitration related cases. The Government must consider this experience of the Delhi High Court, and request the Chief Justices to create specialised and dedicated arbitration benches. The Commission also believes that one of the methods to provide relief against frivolous and misconceived actions is to implement a regime for actual costs as is implemented in the UK and also other jurisdictions, and which finds its place in the proposed section 6A to the Act.

24. Two further sets of amendments have been proposed in this context. *First*, it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under section 11 are kept pending for many years. In this context, the Commission has proposed a few amendments. The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions. The Commission has further recommended an amendment to section 11 (7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been *appointed*, and as such are

non-appealable. The Commission further proposes the addition of section 11 (13) which requires the Court to make an endeavor to dispose of the matter within sixty days from the service of notice on the opposite party.

25. Similarly, the Commission has found that challenges to arbitration awards under sections 34 and 48 are similarly kept pending for many years. In this context, the Commission proposes the addition of sections 34 (5) and 48 (4) which would require that an application under those sections shall be disposed off expeditiously and in any event within a period of one year from the date of service of notice. In the case of applications under section 48 of the Act, the Commission has further provided a time limit under section 48 (3), which mirrors the time limits set out in section 34 (3), and is aimed at ensuring that parties take their remedies under this section seriously and approach a judicial forum expeditiously, and not by way of an afterthought. In addition, a new Explanation has been proposed to section 23 of the Act in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent, provided that the same falls within the scope of the arbitration agreement. The Commission has also recommended mandatory disclosures by the prospective arbitrators in relation to their ability to devote sufficient time to complete the arbitration and render the award expeditiously.

26. It is recommended that in the case of international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant “Court” which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court, even where such a High Court does not exercise ordinary original jurisdiction. It is expected that this would ensure that international commercial arbitrations, involving foreign parties, will be heard expeditiously and by commercially oriented judges at the High Court level. The amendments proposed to section 48 (as indicated above) are also intended to achieve the same object. This is important not just for providing confidence to foreign investors, but to mitigate the risk faced by the Government of India from claims by foreign investors under the relevant Investment Treaty negotiated by the Government of India with other countries. The award of the Arbitral

Tribunal in *White Industries Australia Ltd. v the Republic of India,* UNCITRAL, Final Award (November 30, 2011)**,** serves as a reminder to the Government to urgently implement reforms to the judicial system in order to avoid substantial potential liabilities that might accrue from the delays presently inherent in the system.

27. Another problem that is sought to be addressed in the relevant amendments proposed to the Act, is to increase the threshold of judicial intervention at the various stages of the arbitral process – including the pre-arbitral (sections 8 and 11) and post-award stage (section 34). These have been discussed at the appropriate places.

SCOPE AND NATURE OF PRE-ARBITRAL JUDICIAL INTERVENTION

28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of Part I arbitrations and section 45 in the case of Part II arbitrations. sections 8, 45 and also section 11 relating to "reference to arbitration" and "appointment of the tribunal", directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.

29. The Supreme Court has had occasion to deliberate upon the *scope* and *nature* of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which obfuscates the real issue underlying such nomenclature/description as to –

    - the scope of such powers – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator

or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc; and which of these it should leave for decision of the arbitral tribunal.

- the nature of such intervention – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal

30. After a series of cases culminating in the decision in *SBP v Patel Engineering,* (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator under section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by RAVEENDRAN J in *National Insurance Co. Ltd. v Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267, where the Supreme Court laid down as follows –

"1. The issues (first category) which Chief Justice/his designate *will have to decide* are:

(a) Whether the party making the application has approached the appropriate High Court?

(b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement?

2. 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?

3. The issues (third category) which the Chief Justice/his designate *should leave exclusively to the arbitral tribunal* are:

(a) Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(b) Merits of any claim involved in the arbitration."

31. The Commission is of the view that, in this context, the same test regarding *scope* and *nature* of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd. v Aksh Optifibre*, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only *prima facie*.

33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The *scope* of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the *nature* of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is *prima facie* satisfied against the argument challenging the arbitration agreement, it *shall* appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only

in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.

SETTING ASIDE OF DOMESTIC AWARDS AND RECOGNITION/ENFORCEMENT OF FOREIGN AWARDS

34. Once an arbitral award is made, an aggrieved party may apply for the setting aside of such award. Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an international commercial arbitration whereas section 48 deals with conditions for enforcement of foreign awards. As the Act is currently drafted, the grounds for setting aside (under section 34) and conditions for refusal of enforcement (section 48) are in *pari materia*. The Act, as it is presently drafted, therefore, treats all three types of awards – purely domestic award (i.e. domestic award not resulting from an international commercial arbitration), domestic award in an international commercial arbitration and a foreign award – as the same. The Commission believes that this has caused some problems. The legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.
35. It is for this reason that the Commission has recommended the addition of section 34 (2A) to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed *proviso* to the proposed section 34 (2A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in *ONGC vs. Saw Pipes Ltd*, (2003) 5 SCC 705, which, although in the context of a purely domestic award, had the unfortunate effect

of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act. The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in *ONGC vs. Saw Pipes Ltd*, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not *ipso jure* result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is necessary to section 28 (1) given the express restriction of the public policy ground (as set out below).

36. Although the Supreme Court has held in *Shri Lal Mahal v Progetto Grano Spa*, (2014) 2 SCC 433, that the expansive construction accorded to the term "public policy" in *Saw Pipes* cannot apply to the use of the same term "public policy of India" in section 48(2)(b), the recommendations of the Commission go even further and are intended to ensure that the legitimacy of court intervention to address patent illegalities in purely domestic awards is directly recognised by the addition of section 34 (2A) and not indirectly by according an expansive definition to the phrase "public policy".

37. In this context, the Commission has further recommended the restriction of the scope of "public policy" in both sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in *Renusagar Power Plant Co Ltd v General Electric Co*, AIR 1994 SC 860 where the Supreme Court while construing the term "public policy" in section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". The formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds *only* if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice".

JUDICIAL INTERVENTIONS IN FOREIGN SEATED ARBITRATIONS

38. Section 2(2) of the Arbitration and Conciliation Act, 1996 (the "Act"), contained in Part I of the Act, states that "*This Part shall apply where the place of arbitration is in India.*" In comparison, Article 1(2) of the UNCITRAL Model Law provides: "*The provisions of this Law, **except articles 8, 9, 35 and 36**, apply **only** if the place of arbitration is in the territory of this State.*" The central issue, therefore, that was before the two judge Bench of the Supreme Court in *Bhatia International vs. Interbulk Trading SA,* (2002) 4 SCC 105, and before the five-judge Bench in *Bharat Aluminum and Co. vs. Kaiser Aluminium and Co.*, (2012) 9 SCC 552 (hereinafter called "BALCO") was whether the exclusion of the word "only" from the Indian statute gave rise to the implication that Part I of the Act would apply even in some situations where the arbitration was conducted outside India.
39. The Supreme Court in *Bhatia*, held that Part I mandatorily applied to all arbitrations held in India. In addition, Part I applied to arbitrations conducted outside India unless it was expressly or impliedly excluded. While *Bhatia* was a case arising out of section 9, the same principle was extended by the Supreme Court to sections 11 and 34 as well (in *Venture Global v Satyam Computer*, (2008) 4 SCC 190; *Indtel Technical Services v W.S. Atkins*, (2008) 10 SCC 308; *Citation Infowares Ltd v Equinox Corporation*, (2009) 7 SCC 220; *Dozco India v Doosan Infrastructure*, (2011) 6 SCC 179; *Videocon Industries v Union of India*, (2011) 6 SCC 161). As a result, Indian Courts were competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers existed unless Part I was expressly or impliedly excluded. Further, an implied exclusion was construed not on the basis of conflict of laws principles but in an ad hoc manner. This position now stands overruled following *BALCO*.
40. The Supreme Court in *BALCO* decided that Parts I and II of the Act are mutually exclusive of each other. The intention of Parliament that the Act is territorial in nature and sections 9 and 34 will apply only when the seat of arbitration is in India. The seat is the "centre of gravity" of arbitration, and even where two foreign parties arbitrate in India, Part I would apply and, by

virtue of section 2(7), the award would be a “domestic award”. The Supreme Court recognized the “seat” of arbitration to be the juridical seat; however, in line with international practice, it was observed that the arbitral hearings may take place at a location other than the seat of arbitration. The distinction between “seat” and “venue” was, therefore, recognized. In such a scenario, only if the seat is determined to be India, Part I would be applicable. If the seat was foreign, Part I would be inapplicable. Even if Part I was expressly included “it would only mean that the parties have contractually imported from the Arbitration Act, 1996, those provisions which are concerned with the internal conduct of their arbitration and which are not inconsistent with the mandatory provisions of the [foreign] Procedural Law/Curial Law.” The same cannot be used to confer jurisdiction on an Indian Court. However, the decision in *BALCO* was expressly given prospective effect and applied to arbitration agreements executed after the date of the judgment.

41. While the decision in *BALCO* is a step in the right direction and would drastically reduce judicial intervention in foreign arbitrations, the Commission feels that there are still a few areas that are likely to be problematic.

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a “judgment” or “decree” for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a

practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement executed pre-BALCO.

42. The above issues have been addressed by way of proposed Amendments to sections 2(2), 2(2A), 20, 28 and 31.

AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE

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

44. The Supreme Court, in *National Aluminium*, has criticized the present situation in the following words:

> "However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed under section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law."

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

POWERS OF TRIBUNAL TO ORDER INTERIM MEASURES

46. Under section 17, the arbitral tribunal has the power to order interim measures of protection, unless the parties have excluded such power by agreement. Section 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the arbitral tribunal rather than await orders from a Court. The efficacy of section 17 is however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal.
47. In *Sundaram Finance Ltd v. NEPC India Ltd.*, (1999) 2 SCC 479, the Supreme Court observed that though section 17 gives the arbitral tribunal the power to pass orders, the same cannot be enforced as orders of a court and it is for this reason only that section 9 gives the court power to pass interim orders during the arbitration proceedings. Subsequently, in *M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd.,* (2004) 9 SCC 619 the Court had held that under section 17 of the Act no power is conferred on the arbitral tribunal to enforce its order nor does it provide for judicial enforcement thereof.
48. In the face of such categorical judicial opinion, the Delhi High Court attempted to find a suitable legislative basis for enforcing the orders of the arbitral

tribunal under section 17 in the case of *Sri Krishan v. Anand*, (2009) 3 Arb LR 447 (Del) (followed in *Indiabulls Financial Services v. Jubilee Plots*, OMP Nos 452-453/2009 Order dated 18.08.2009). The Delhi High Court held that any person failing to comply with the order of the arbitral tribunal under section 17 would be deemed to be "making any other default" or "guilty of any contempt to the arbitral tribunal during the conduct of the proceedings" under section 27 (5) of Act. The remedy of the aggrieved party would then be to apply to the arbitral tribunal for making a representation to the Court to mete out appropriate punishment. Once such a representation is received by the Court from the arbitral tribunal, the Court would be competent to deal with such party in default as if it is in contempt of an order of the Court, i.e., either under the provisions of the Contempt of Courts Act or under the provisions of Order 39 Rule 2A Code of Civil Procedure, 1908.

49. The Commission believes that while it is important to provide teeth to the interim orders of the arbitral tribunal as well as to provide for their enforcement, the judgment of the Delhi High Court in *Sri Krishan v. Anand* is not a complete solution. The Commission has, therefore, recommended amendments to section 17 of the Act which would give teeth to the orders of the Arbitral Tribunal and the same would be statutorily enforceable in the same manner as the Orders of a Court. In this respect, the views of the Commission are consistent with (though do not go as far as) the 2006 amendments to Article 17 of the UNCITRAL Model Law.

ARBITRABILITY OF FRAUD AND COMPLICATED ISSUES OF FACT

50. The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in *Bharat Rasiklal v. Gautam Rasiklal,* (2012) 2 SCC 144 that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable. In this context, a 2 judge bench of the Supreme Court, while adjudicating on an application under section 8 of the Act, in *Radhakrishnan v. Maestro Engineers,* 2010 1 SCC 72 held that an issue of

fraud is not arbitrable. This decision was ostensibly based on the decision of the three judge bench of the Supreme Court in *Abdul Qadir v. Madhav Prabhakar,* AIR 1962 SC 406*.* However, the said 3 judge bench decision (which was based on the finding in *Russel v. Russel [1880 14 Ch. 'D. 471]*) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following *Radhakrishnan*, it appears that issues of fraud are not arbitrable.

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable (**See** *Ivory Properties and Hotels Private Ltd v. Nusli Neville Wadia*, 2011 (2) Arb LR 479 (Bom); *CS Ravishankar v. CK Ravishankar,* 2011 (6) Kar LJ 417). The Supreme Court in *Meguin GMBH v. Nandan Petrochem Ltd.*, 2007 (5) R.A.J 239 (SC), in the context of an application filed under section 11 has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in *Swiss Timing Ltd v Organising Committee*, Arb. Pet. No. 34/2013 dated 28.05.2014, in a similar case of exercising jurisdiction under section 11, held that the judgment in *Radhakrishnan* is *per incuriam* and, therefore, not good law.
52. The Commission believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to section 16.

NEUTRALITY OF ARBITRATORS

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz. their independence and impartiality, is critical to the entire process.
54. In the Act, the test for neutrality is set out in section 12(3) which provides –

"*An arbitrator may be challenged only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality…*"

55. The Act does not lay down any other conditions to identify the “circumstances” which give rise to “justifiable doubts”, and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any *actual* bias for that is setting the bar too high; but, whether the circumstances in question give rise to any *justifiable apprehensions* of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (**See** *Executive Engineer, Irrigation Division, Puri v. Gangaram Chhapolia,* 1984 (3) SCC 627; *Secretary to Government Transport Department, Madras v. Munusamy Mudaliar*, 1988 (Supp) SCC 651; *International Authority of India v. K.D.Bali and Anr*, 1988 (2) SCC 360; *S.Rajan v. State of Kerala*, 1992 (3) SCC 608; *M/s. Indian Drugs & Pharmaceuticals v. M/s. Indo-Swiss Synthetics Germ Manufacturing Co.Ltd.*, 1996 (1) SCC 54; *Union of India v. M.P.Gupta*, (2004) 10 SCC 504; *Ace Pipeline Contract Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*, 2007 (5) SCC 304) that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in *Indian Oil Corp. Ltd. v. Raja Transport (P) Ltd.,* 2009 8 SCC 520 carved out a minor exception in situations when the arbitrator “*was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject matter of the dispute*”, and this exception was used by the Supreme Court in *Denel Propreitory Ltd. v. Govt. of India, Ministry of Defence,* AIR 2012 SC 817 and *Bipromasz Bipron Trading SA v. Bharat Electronics Ltd.,* (2012) 6 SCC 384, to appoint an independent arbitrator under section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be

discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the *ex officio* member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the Red and Orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed section 12 (5) of the Act and the Fifth Schedule which incorporates the

categories from the Red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be *ineligible* to be so appointed, *notwithstanding any prior agreement* to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be *de jure* deemed to be unable to perform his functions, in terms of the proposed explanation to section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the Red and Orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent *de jure* inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the Red list of the IBA Guidelines).

60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to section 12 (5), where parties may, *subsequent to disputes having arisen between them,* waive the applicability of the proposed section 12 (5) by an express agreement in writing. In all other cases, the general rule in the proposed section 12 (5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of section 12 (1). and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator.

DEFINITION OF "PARTY"

61. Arbitration is a consensual form of dispute resolution, with the arbitral tribunal deriving powers and authority on the basis of the "contract" or the "agreement" between the parties. This agreement has far reaching consequences – it

takes away the right of the party to the arbitration agreement to avail its remedies in a court of law for resolution of the disputes covered by the terms of the arbitration agreement; and makes the consequent award binding, with a limited right of recourse in terms of section 34 of the Act. It would thus be incongruous and incompatible with this “consensual” and “agreement based” status of arbitration as a method of dispute resolution, to hold persons who are not “parties” to the arbitration agreement to be bound by the same.

62. However, a party does not necessarily mean only the “signatory” to the arbitration agreement. In appropriate contexts, a “party” means not just a signatory, but also persons “claiming through or under” such signatory – for instance, successors-of-interest of such parties, alter-ego’s of such parties etc. This is particularly true in the case of unincorporated entities, where the issue of “personality” is usually a difficult legal question and raises a host of other issues. This principle is recognized by the New York Convention, 1985 which in article II (1) recognizes an agreement between parties “in respect of a *defined legal relationship*, whether contractual or not.”

63. The Arbitration and Conciliation Act, 1996 under section 7 borrows the definition of the “arbitration agreement” from the corresponding provision at article 7 of the UNCITRAL Model Law which in turn borrows this from article II of the New York Convention. However, the definition of the word “party” in section 2(1)(h) refers to a “party” to mean “a party to an arbitration agreement.” This cannot be read restrictively to imply a mere “signatory” to an arbitration agreement, since there are many situations and contexts where even a “non-signatory” can be said to be a “party” to an arbitration agreement. This was recognized by the Hon’ble Supreme Court in *Chloro Controls v. Severn Trent Water Purification*, (2013) 1 SCC 641, where the Hon’ble Supreme Court was dealing with the scope and interpretation of section 45 of the Act and, in that context, discussed the scope of the relevant doctrines on the basis of which “non-signatories” could be said to be bound by the arbitration agreement, including in cases of inter-related contracts, group of companies doctrine etc.

64. This interpretation given by the Hon’ble Supreme Court follows from the wording of section 45 of the Act which recognizes the right of a “person

claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in section 54 of the Act. This language is however, absent in the corresponding provision of section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a "person claiming through or under such party". To cure this anomaly, the Commission proposes an amendment to the definition of "party" under section 2 (h) of the Act.

INTEREST ON SUMS AWARDED

65. The issue on whether future interest is payable not only on the principal sum but also on the interest accrued till the date of the award remains controversial notwithstanding the clear wording of section 31(7). Initially, the position under the 1940 Act was that there was an express bar on awarding compound interest. This was evident in reading section 3(3)(c) of the Interest Act, 1978, section 29 of the Arbitration Act, 1940 and section 34 of the CPC, 1908.
66. However, the Supreme Court in *Renusagar Power Co Ltd v. General Electric*, 1994 Supp (1) SCC 644, held that awarding compound interest was not a violation of public policy of India. It is pertinent to note that these observations were made in the context of a case where the arbitral tribunal had expressly pointed out that they were not concerned with a contract to pay compound interest but were awarding compound interest as a remedy for a breach of contract in order to put the injured party in the same economic position it would have been in if the contract had been duly performed. This award was held to be in consonance with the public policy of India. Furthermore, as set out above, it was explicitly stated that compound interest can be awarded when it is permissible to do so under the statute.
67. Under the 1996 Act, the words that have been used are of far wider import and the scheme of the relevant provisions indicates that award of interest on interest is not only permitted but also the norm. Yet, a two judge bench of the Supreme Court, in *State of Haryana v. L. Arora & Co.,* (2010) 3 SCC 690, held as follows "*section 31(7) makes no reference to payment of compound interest or payment of interest upon interest. Nor does it require the interest*

which accrues till the date of the award, to be treated as part of the principal from the date of award for calculating the post-award interest." Apart from being contrary to the statutory scheme of the Act, the decision in *Arora* is also against the decision of (co-ordinate) two judge benches of the Supreme Court in *ONGC v. M.C. Clelland Engineers S.A*, (1999) (4) SCC 327 and *UP Cooperative Federation Ltd v. Three Circles*, (2009) 10 SCC 374.

68. Recognising this conflict of judicial opinion, the Supreme Court, in *Hyder Consulting (U.K.) v. Governor of Orissa*, (2013) 2 SCC 719 has referred this issue for determination to a three judge bench.

69. It is in this context that the Commission has recommended amendments to section 31 to clarify the scope of powers of the arbitral tribunal to award compound interest, as well as to rationalize the rate at which default interest ought to be awarded and move away from the existing rate of 18% to a market based determination in line with commercial realities

COSTS

70. Arbitration, much like traditional adversarial dispute resolution, can be an expensive proposition. The savings of a party in avoiding payment of court fee, is usually offset by the other costs of arbitration – which include arbitrator's fees and expenses, institutional fees and expenses, fees and expenses in relation to lawyers, witnesses, venue, hearings etc. The potential for racking up significant costs justify a need for predictability and clarity in the rules relating to apportionment and recovery of such costs. The Commission believes that, as a rule, it is just to allocate costs in a manner which reflects the parties' relative success and failure in the arbitration, unless special circumstances warrant an exception or the parties otherwise agree (only after the dispute has arisen between them).

71. The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.

72. The Commission has, therefore, sought comprehensive reforms to the prevailing costs regime applicable both to arbitrations as well as related litigation in Court by proposing section 6-A to the Act, which expressly empowers arbitral tribunals and courts to award costs based on rational and realistic criterion. This provision furthers the spirit of the decision of the Supreme Court in *Salem Advocate Bar Association v Union of India*, AIR 2005 SC 3353, and it is hoped and expected that judges and arbitrators would take advantage of this robust provision, and explain the "rules of the game" to the parties early in the litigation so as to avoid frivolous and meritless litigation/arbitration.

OTHER AMENDMENTS

73. The Commission has also proposed some amendments in order to clarify certain other provisions in the Act. An amendment has been proposed to the definition of "international commercial arbitration", in section 2 (f)(iii) by removing the reference to a "company", which is already covered in section 2(f)(ii). The intention behind the proposal is that the test for determining the residence of a company must be based on its place of incorporation and not the place of central management/control. This adds greater certainty to the law, and re-enforces the "place of incorporation" principle laid down by the Supreme Court in *TDM Infrastructure Pvt Ltd v UE Development Pvt Ltd*, (2008) 14 SCC 271.
74. Two sets of amendments have also been proposed to section 7. It is clarified that an arbitration agreement must concern "subject matter capable of settlement by arbitration." This gives statutory recognition to the doctrine of arbitrability. The proposed sections 7(3A) and 7(3B) is intended to bring the Indian law in conformity with the UNCITRAL Model law and clarifies that an arbitration agreement can be concluded by way of electronic communication as well.
75. The Commission has also proposed an amendment to section 25 (b) to clarify that where, on the default on the Respondent in communicating his statement of defence, the arbitral tribunal shall also (in addition to having the

right to continue with the arbitration) have the discretion to treat the right of such Respondent to file a statement of defence as having been forfeited.

TRANSITORY PROVISION

76. The Commission has proposed to insert the new section 85-A to the Act, to clarify the scope of operation of each of the amendments with respect to pending arbitrations/proceedings. As a general rule, the amendments will operate prospectively, except in certain cases as set out in section 85-A or otherwise set out in the amendment itself.

Chapter III

PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

Amendment to the Preamble

After the words aforesaid “Model Law and Rules” the following be inserted:

And WHEREAS it is further required to improve the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation, in order to provide a fair, expeditious and cost-effective means of dispute resolution;

[**NOTE**: This amendment is proposed in order to further demonstrate and re-affirm the Act’s focus on achieving the objectives of fairness, speed and economy in resolution of disputes through arbitration.]

Amendment of Section 2

1. In section 2 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act),-

(i) In sub-section (1), clause (d), after the words “…panel of arbitrators” add “and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;”

[**NOTE**: This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules which provide for an emergency arbitrator are given statutory recognition in India.]

(ii) In sub-section (1), clause (e), after the words “Court means –” add sub-section (i) beginning with the words “in the case of an arbitration other than international commercial arbitration,” before the words “the principal Civil Court of original jurisdiction”

In sub-section (1), clause (e) replace sub-clause (ii) by following:

"(ii) in the case of an international commercial arbitration, the High Court exercising jurisdiction over the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Court of a grade inferior to such High Court, or in cases involving grant of interim measures in respect of arbitrations outside India, the High Court exercising jurisdiction over the court having jurisdiction to grant such measures as per the laws of India, and includes the High Court in exercise of its ordinary original civil jurisdiction."

[NOTE: This is to solve the problem of conflict of jurisdiction that would arise in cases where interim measures are sought in India in case of arbitrations seated outside India. This also ensures that in International Commercial Arbitrations, jurisdiction is exercised by the High Court, even if such High Court does not exercise ordinary original civil jurisdiction.]

(iii) In sub-section (1), clause (f), sub-clause (iii), delete the words "a company or" before the words "an association or a body of individuals

[NOTE: The reference to "a company" In sub-section (iii) has been removed since the same is already covered under sub-section (ii). The intention is to determine the residence of a company based on its place of incorporation and not the place of central management/control. This further re-enforces the "place of incorporation" principle laid down by the Supreme Court in *TDM Infrastructure Private Limited v. UE Development India Private Limited,* (2008) 14 SCC 271, and adds greater certainty in case of companies having a different place of incorporation and place of exercise of central management and control]

(iv) In sub-section (1), clause (h), add the words "or any person claiming through or under such party" after the words "party to an arbitration agreement"

[NOTE: This is just to clarify that a "party" also includes a person who derives his interest from such party, and further re-enforces the decision of the Supreme Court in *Chloro Controls (I) P. Ltd.v. Severn Trent Water Purification Inc. and Ors.,* (2013) 1 SCC 641]

(v) In sub-section (1), after clause (h), insert clause "(hh) "seat of the arbitration" means the juridical seat of the arbitration"

[NOTE: This definition of "seat of arbitration" is incorporated so as to make it clear that "seat of arbitration" is different from the venue of arbitration. Section 20 has also been appropriately modified.]

(vi) In sub-section (2), add the word "only" after the words "shall apply" and delete the word "place" and insert the word "seat" in its place.

[NOTE: This amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rules *Bhatia International v. Bulk Trading S.A. and Anr.*,(2002) 4 SCC 105, and re-enforces the "seat centricity" principle of *Bharat Aluminium Company and Ors. etc. v. Kaiser Aluminium Technical Service, Inc. and Ors. etc*., (2012) 9 SCC 552]

Also insert the following proviso "*Provided that*, subject to an express agreement to the contrary, the provisions of sections 9, 27, 37 (1)(a) and 37 (3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act."

[NOTE: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.]

(vii) After the proviso in sub-section (2), insert sub-section "(2A) Notwithstanding any judgment/ decree to the contrary, the amendment to this sub-section (2) shall not apply to applications which are pending before any judicial authority on the date of such amendment, and which have arisen in relation to arbitrations where the date of the arbitration agreement is prior to 06.09.2012."

[**NOTE**: This proviso is needed, since the proposed amendment to S 2 (2) does away with the prospective over-ruling of *Bhatia International v. Bulk Trading S.A. and Anr.*, (2002) 4 SCC 105 in *Bharat Aluminium Company and Ors. etc. v. Kaiser Aluminium Technical Service, Inc. and Ors. etc*., (2012) 9

SCC 552. However, applications that are already pending in an Indian court and which have been filed on the basis of the *Bhatia* rule, should be protected.]

Insertion of Section 6A

3. After section 6 of the Act, add section "6A. **Regime for costs-** (1) In relation to any arbitration proceeding or any proceeding under any of the provisions of this Act pertaining to such an arbitration, the court/ arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908, has the discretion to determine:

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

Explanation.—For the purpose of clause (*a*), "costs" means reasonable costs relating to—

(*i*) the fees and expenses of the arbitrators/ courts and witnesses;

(*ii*) legal fees and expenses;

(*iii*) any administration fees of the institution supervising the arbitration; and

(*iv*) any other expenses incurred in connection with the arbitral/ court proceedings and the arbitral award.

(2) If the court/ arbitral tribunal decides to make an order in payment of costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court/ arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In deciding what order, if any, to make about costs, the court/ arbitral tribunal will have regard to all the circumstances, including–

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle was made by a party and unreasonably refused by the other party.

(4) The orders which the court/ arbitral tribunal may make under this provision include an order that a party must pay:

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."

[**NOTE:** The above principle ensures that the "costs follow the event" regime governs all arbitrations/ arbitration related court litigation. Such a regime would disincentivize frivolous proceedings and inequitable conduct. The basis of the above provisions is Rule 44 of the Civil Procedure Rules of England.

The Explanation to sub-section (1) reflects the wording of the Explanation to section 31(8) of the Arbitration and Conciliation Act, 1996 (which has now been deleted in the present draft).

The main objective of including the "costs follow the event" regime is to disincentivize the filing of frivolous claims/ applications. These provisions also further the spirit of the ruling of the Supreme Court in *Salem Advocate Bar Association v Union of India,* AIR 2005 SC 3353].

Amendment of Section 7

4. In section 7 of the Act,

(i) In sub-section (1), after the words “contractual or not” add “, concerning a subject matter capable of settlement by arbitration.”

[**NOTE**: This amendment makes it abundantly clear that a dispute must be arbitrable in the first place.]

(ii) after sub-section (3) and before sub-section (4), insert sub-sections

“(3A) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(3B) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

Explanation: For the purpose of this Act, "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex and telecopy.”

[**NOTE:** This amendment brings Indian law in conformity with the UNCITRAL Model Law on International Commercial Arbitration and clarifies that an arbitration agreement can be concluded by way of electronic communication as well.]

Amendment of Section 8

5. In section 8 of the Act,

(i) In sub-section (1), after the words “substance of the dispute, refer” add “to arbitration, such of” and after the words “the parties to” add “the action who are parties to the” and after the word “arbitration” add the word “agreement”.

(ii) after sub-section (1), add "*Provided* that no such reference shall be made only in cases where –

(i) the parties to the action who are not parties to the arbitration agreement, are necessary parties to the action;

(ii) the judicial authority finds that the arbitration agreement does not exist or is null and void.

Explanation 1: If the judicial authority is *prima facie* satisfied about the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall decide the same as a preliminary issue;

Explanation 2: Any pleading filed in relation to any interim application which has been filed before the judicial authority shall not be treated to be a statement on the substance of the dispute for the purpose of this section."

[**NOTE:** The words "such of the parties… to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, (2003) 5 SCC 531, – in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are *necessary* parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be

final and not *prima facie.* The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.]"

(iii) In sub-section (2), after the words "duly certified copy thereof" add "or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified copy thereof in a circumstance where the original arbitration agreement or duly certified copy is retained only by the other party."

[**NOTE:** In many transactions involving Government bodies and smaller market players, the original/ duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same.]

<u>Amendment of Section 9</u>

6. In section 9,

(i) before the words "A party may, before" add sub-section "(1)"

(ii) after the words "any proceedings before it" add sub-section "(2) Where, before the arbitral proceedings, a Court grants any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within 60 days from the date of such grant or within such shorter or further time as indicated by the Court, failing which the interim measure of protection shall cease to operate.

[**NOTE**: This amendment is to ensure the timely initiation of arbitration proceedings by a party who is granted an interim measure of protection.]

(iii) Add sub-section "(3) Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious."

[**NOTE:** This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all

interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.

Accordingly, section 17 has been amended to provide the Arbitral Tribunal the same powers as a Court would have under section 9]

Amendment of Section 11

7. In section 11,

(i) In sub-section (4), sub-clause (b), after the words “by the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(ii) In sub-section (5), after the words “by the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(iii) In sub-section (6), sub-clause (c), after the words “may request the” delete “Chief Justice” and add words “High Court” and after the words “designated by” delete the word “him” and add the word “it”.

(iv) after sub-section (6), insert sub-section “(6A) An appointment by the High Court or the person or institution designated by it under sub-section (4) or sub-section (5) or sub-section (6) shall not be made only if the High Court finds that the arbitration agreement does not exist or is null and void,

Explanation 1: If the High Court is *prima facie* satisfied regarding the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall decide the same as a preliminary issue.

Explanation 2: For the removal of any doubt, it is clarified that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power.

Explanation 3: The High Court may take steps to encourage the parties to refer the disputes to institutionalised arbitration by a professional Indian or International Arbitral Institute.

[**NOTE**: The proposed section 11 (6A) envisages the same process of determination as is reflected in the proposed amendment to section 8. Explanation 2 envisages that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power. Explanation 3 has been inserted with the hope and expectation that High Courts would encourage the parties to refer the disputes to institutionalize arbitration by a professional Indian or international arbitral institute.]

(v) In sub-section (7), after the words “or sub-section (6)” add the words “or sub-section (6A)” and after the words “to the” delete the words “Chief Justice or the” and add the words “High Court is final where an arbitral tribunal has been appointed or a” and after the words “person or institution” add the words “has been” and after the words “designated by” delete the words “him is final” and insert the words “the High Court, and no appeal, including letters patent appeal, shall lie against such order.”

[**NOTE**: This amendment ensures that

a) an affirmative judicial finding regarding the existence of the arbitration agreement; and (b) the administrative act of appointing the arbitrator are final and non-appealabe.]

(vi) In sub-section (8), delete the words “The Chief Justice or the person or institution designated by him, in appointing an arbitrator,” and add the words “The High Court or the person or institution designated by it, in appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of section 12 sub-section (1) and ”

(vii) In sub-section (8), sub-clause (b), add the words “the contents of the disclosure and”

(viii) In sub-section (9), delete the words “Chief Justice” and add the words “Supreme Court” before the words “of India” and after the words “designated by” delete the word “him” and add the word “it”.

(ix) In sub-section (10), after the word “The” delete the words “Chief Justice” and add the words “High Court” and after the words “scheme as” delete the

word “he” and add the word “it” and after the words “sub-section (6) to” delete the word “him” and add the word “it”.

(x) In sub-section (11), after the words “sub-section (6) to” delete the words “the Chief Justices of” and after the words “High Courts or” delete the word “their” and add the word “its” and after the words “designates, the”, delete the words “Chief Justice” and add words “High Court” and after the word “or” delete the word “his” and the word “its”.

(xi) In sub-section (12), sub-clause (a) after the words “reference to” delete the words “”Chief Justice”” and add the words “”High Court”” and after the words “reference to” delete the words “”Chief Justice” and add the words “”Supreme Court”.

(xii) In sub-section (12), sub-clause (b) after the words “reference to” delete the words “Chief Justice” and add the words “High Court” and after the words “construed as a reference to, ” delete the words “the Chief Justice of” and after the words “in that clause, to” delete the words “the Chief Justice of”.

(xiii) after sub-section (12), add sub-section “(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or their designate as the case may be, as expeditiously as possible and an endeavor shall be made to dispose of the matter within 60 days from the date of service of notice on the opposite party.”

[**NOTE**: This amendment is to ensure speedy disposal of S 11 applications.]

(xiv) after sub-section (13), add sub-section “ (14) In determining the fees of the arbitral tribunal in the case of arbitrations other than international commercial arbitrations and the schedule for its payment to the arbitral tribunal, the High Court is empowered to frame necessary rules, and for which purpose the High Court may look to the Sixth Schedule of the Act.

Explanation: For the removal of doubt, it is hereby clarified that this sub-section (14) of section 11 shall not apply in case where parties have agreed for determination of fees as per the rules of an arbitral institution.”

[**NOTE:** There have been instances where arbitrators are known to charge excessive fees. An indicative fee schedule is therefore provided in the 6th Schedule. The High Courts are given liberty to frame their own rules in this regard.]

Amendment of Section 12

8. In section 12,

(i) In sub-section (1), after the words “writing any circumstances” add “-” and delete the words “likely to give rise to justifiable doubts as to his independence or impartiality”and insert sub-clause “ (*a*) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and”

(ii) In sub-section (1), after sub-clause (a), insert sub-clause “(*b*) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to finish the entire arbitration within 24 months and render an award within 3 months from such date;”

(iii) In sub-section (1), after sub-clause (b), add “*Explanation 1*: The contents of the Fourth Schedule shall be treated as a guide in relation to determining whether circumstances exists which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2: The disclosure shall be made by such person in the form set out in the Seventh Schedule of the Act.”

[**NOTE**: This amendment is intended to further goals of independence and impartiality in arbitrations, and only gives legislative colour to the phrase “independence or impartiality” as it is used in the Act. The contents of the Fourth Schedule incorporate the Red and Orange lists of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. While Mr. Malhotra was of the view that the said provisions should not apply to the public sector, excluding the public sector will

render the provision susceptible to a challenge under article 19 of the Constitution of India.]

(iv) after sub-section (4), insert sub-section "(5) Notwithstanding any prior agreement to the contrary, any person whose relationship with the parties, Counsel or the subject matter of the dispute falls under one of the categories set out in the Fifth Schedule shall be ineligible to be appointed as an arbitrator."

(v) after sub-section, insert "*Provided* that parties may, subsequent to disputes having arisen between them, waive the applicability of this provision by an express agreement in writing;"

(vi) After the first proviso, add the second proviso as follows:

"Provided further that the instant sub-section shall not apply to cases where an arbitrator has already been appointed prior to the effective date of the instant amendment;"

[**NOTE**: This amendment is in consonance with the principles of natural justice, that an interested person cannot be an adjudicator. The Fifth Schedule incorporates the provisions of the Waivable and Non-waivable Red List of the IBA Guidelines on Conflict of Interest. However, given that this clause would be applicable to arbitrations in all contexts (including in family settings), it is advisable to make this provision waivable, provided that parties specifically agree to do so *after* the disputes have arisen between them.]

<u>Amendment of Section 14</u>

9. In section 14,

(i) In sub-section (1) after the word "terminate" delete the word "if" and add the words "and he shall be substituted by another arbitrator if"

(ii) In sub-section (1), after sub-clause (b), add "Explanation: Where an arbitrator whose relationship with the parties, Counsel or the subject matter of the dispute falls under one of the categories set out in the Fifth

Schedule, such an arbitrator shall be deemed to be "*de jure* unable to perform his functions"."

[**NOTE:** this is in furtherance to the amendment to S 12]

Amendment of Section 16

10. In section 16,

After sub-section (6), insert sub-section "(7) The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc."

[**NOTE**: This amendment is proposed in the light of the Supreme Court decisions (e.g. *N. Radhakrishnan v.Maestro Engineers,* (2010) 1 SCC 72) which appear to denude an arbitral tribunal of the power to decide on issues of fraud etc.]

Amendment of Section 17

11. In section 17

(i) In sub-section (1), delete the words "Unless otherwise agreed by the parties," and add words "A party may, during", after the words "the arbitral" delete the words "tribunal may," add the words "proceedings or", after the word "at" delete the words "the request of a party, order a party to take", and after the word "any" add words "time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal for an" and after the words "interim measure of protection" delete the words "as the arbitral tribunal may consider necessary" and after the words "in respect of" add the words "any of the following matters, namely:—"

(ii) In sub-section (1), insert sub-clause "(a)the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;"

(iii) In sub-section (1), after sub-clause "(a)", insert sub-clause "(b)securing the amount in dispute in the arbitration;"

(iv) In sub-section (1), after sub-clause “(b)”, insert sub-clause “(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;”

(v) In sub-section (1), after sub-clause “(c)”, insert sub-clause “(d) interim injunction or the appointment of a receiver;”

(vi) In sub-section (1), after sub-clause “(d)”, insert sub-clause “(e) such other interim measure of protection as may appear to the Arbitral Tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders as the Court has for the purpose of, and in relation to, any proceedings before it. ”

[**NOTE**: This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006.]

(vii) delete words In sub-section (2) and add the words “(2) Subject to any orders passed in appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an Order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 in the same manner as if it were an Order of the Court.”

[**NOTE**: This is to ensure the effective enforcement of interim measures that may be ordered by an arbitral tribunal.]

Amendment of Section 20

12. In section 20, delete the word “Place” and add the words “Seat and Venue” before the words “of arbitration”.

(i) In sub-section (1), after the words ”agree on the” delete the word “place” and add words “seat and venue”

(ii) In sub-section (3), after the words “meet at any” delete the word “place” and add word “venue”.

[NOTE: The departure from the existing phrase “place” of arbitration is proposed to make the wording of the Act consistent with the international usage of the concept of a “seat” of arbitration, to denote the legal home of the arbitration. The amendment further legislatively distinguishes between the “[legal] seat” from a “[mere] venue” of arbitration.]

Amendment of Section 23

13. In section 23, after sub-section (1) and before sub-section (2), add the words “*Explanation*: In his defence the respondent may also submit a counter claim or plead a set off, which shall be treated as being within the scope of reference and be adjudicated upon by the arbitral tribunal notwithstanding that it may not fall within the scope of the initial reference to arbitration, but provided it falls within the scope of the arbitration agreement.”

[**NOTE**: This explanation is in order to ensure that counter claims and set off can be adjudicated upon by an arbitrator without seeking a separate/new reference by the respondent so long as it falls within the scope of the arbitration agreement, in order to ensure final settlement of disputes between parties and prevent multiplicity of litigation.]

Amendment of Section 24

14. After the proviso, add words “*Provided* further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on continuous days, and not grant any adjournments unless sufficient cause is made out and may impose costs, including exemplary costs, on the party seeking the adjournment.”

[**NOTE**: This amendment is to ensure expeditious hearings in the arbitration and to avoid unnecessary adjournments.]

Amendment of Section 25

15. In section 25, sub-clause (b), after the words “by the claimant” add the words “and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited;”

Amendment of Section 28

16. In section 28,

(i) In sub-section (1), after the words “Where the”, delete the word “place” and add the word “seat” and after the words “of arbitration is” delete the word “ situate”

[**NOTE**: This amendment is only clarificatory, and follows on from the amendment to S 20.]

(ii) In sub-section (3), after the words “tribunal shall decide” delete the words “in accordance with” and add the words “having regard to”

[Note: This amendment is intended to overrule the effect of *ONGC Ltd. v. Saw Pipes Ltd.,* (2003) 5 SCC 705, where the Hon’ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]

Amendment of Section 31

17. In section 31

(i) In sub-section (4), after the words “its date and the” delete the word “place” and add the word “seat”

(ii) In sub-section (7),In sub-clause (b), after the words “carry interest at” add the words “2% per annum more than” and before the words “rate of” add the word “current” and after the words “rate of” delete the words “eighteen per centum per annum” and add the word “interest”.

(iii) In sub-section (7), after sub-clause (b), add the words “*Explanation 1*: The expression “current rate of interest” shall have the same meaning as assigned to it under Clause (b) section 2 of the Interest Act, 1978.

Explanation 2: The expression "sum directed to be paid by an arbitral award" includes the interest awarded in accordance with section 31(7)(a)."

[**NOTE**: Explanation 1 ensures that the default rate of interest is in line with prevailing commercial realities and not an arbitrary figure of 18%.

Explanation 2 intends to legislatively overrule the decision of the Supreme Court in *State of Haryana v. S.L. Arora,* (2010) 3 SCC 690, the correctness of which has now been referred to a larger bench by virtue of the decision of the Supreme Court in *Hyder Consulting (U.K.) v. Governor of Orissa*, (2013) 2 SCC 719.]

(iv) In sub-section (8), after the words "by the parties" delete ",—" and delete the provision for sub-clause (a) before the words "the costs of" and after the words "fixed by the arbitral tribunal" delete ";" and add the words "in accordance with section 6A of this Act."

(v) Rest of the sub-section 8 be deleted.

Amendment of Section 34

18. In section 34,

(i) In sub-section (1), after the words "sub-section (2)" add the words ", sub-section (2A)".

(ii) In sub-section (2), after the word "*Explanation.—"* delete the words "Without prejudice to the generality of sub-clause (*ii*), it is hereby declared, for" and add the word "For" and after the words "the avoidance of any doubt," add the words "it is clarified" and after the words "public policy of India" add the word "only" and after the word "if" delete the word "-" and add the word ":" and add the sub-clause "(a)" before the words "the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81" and add the word "; or" after the words "violation of section 75 or section 81" and add sub-clause "(b) it is in contravention with the fundamental policy of Indian law; or" and add

sub-clause “(c) it is in conflict with the most basic notions of morality or justice."

[**NOTE**: The proposed Explanation II is required to bring the standard for setting aside an award in conformity with the decision of the Supreme Court in *Renusagar Power Co. Ltd.v. General Electric Co.*, 1994 Supp (1) SCC 644 *and Shri LalMahal Ltd. v. ProgettoGrano Spa,*(2014) 2 SCC 433,for awards in both domestic as well as international commercial arbitrations. Ground (c) reflects an internationally recognized formulation. Such a formulation further tightens the *Renusagar* test and ensures that “morality or justice”- terms used in *Renusagar*- cannot be used to widen the test.]

(iii) After the *Explanation* in sub-section (2), insert sub-section “(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.”

[**NOTE**: The proposed S 34(2A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.,* (2003) 5 SCC 705. The proviso creates exceptions for erroneous application of the law and re-appreciation of evidence, which cannot be the basis for setting aside awards.]

(iv) In sub-section (3), after the words “An application” delete the word “for setting aside” and add the word “under the above sub-sections”

(v) re-number sub-section (4) to read as sub-section (6) and insert sub-section “(4) An Application under this section shall be filed by a party only after issuing a prior Notice to the other party and such an Application shall be accompanied by an affidavit from the Applicant endorsing compliance with this requirement.” and sub-section “(5) An Application under this

section shall be disposed off expeditiously and in any event within a period of one year from the date on which the notice under Sub-section (4) is served.".

Amendment of Section 36

19. In section 36,

(i) add numbering as sub-section (1) before the words "Where the time" and after the words "Section 34 has expired," delete the words "or such application having been made, it has been refused" and add the words "then subject to the provision of sub-section (2) hereof,"

(ii) insert sub-section "(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3) hereof;"

(iii) insert sub-section "(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing."

(iv) insert proviso "*Provided* that the Court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908."

[**NOTE**: This amendment is to ensure that the mere filing of an application under section 34 does not operate as an automatic stay on the enforcement of the award. The Supreme Court in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr,* (2004) 1 SCC 540, recommends that such an amendment is the need of the hour.]

Amendment of Section 37

20. In section 37,

(i) In sub-section (1), renumber sub-clause “(a)” as sub-clause “(b)” and insert sub-clause “(a)refusing to refer the parties to arbitration under section 8;”

(ii) In sub-section (1), renumber sub-clause “(b)” as sub-clause “(d)” and insert sub-clause “(c) refusing to appoint an arbitrator or refusing to refer such appointment to a person or institution designated by it under section 11, in the case of an arbitration other than an international commercial arbitration”.

[**NOTE**: Sub-sections (a) and (c) have been added to provide for appeal in cases of orders refusing to refer parties to arbitration under section 8 (mirroring the existing provision in section 50) and to provide an appeal where the High Court refuses to appoint an arbitrator respectively.]

(iii) In sub-section (3), after the words “No second appeal” add the words “, including letters patent appeal,”

[**NOTE**: This amendment is clarificatory and reduces the scope of the party to file an LPA.]

Amendment of Section 47

21. In section 47, in the “*Explanation*” after sub-section (2), after the words “ “Court” means the” add the words “High Court exercising jurisdiction over the” and after the words “including any” delete the words “civil court” and add the word “Court” and after the words “inferior to such” delete the words “principal Civil Court, or any Court of Small Causes” and add the words “High Court.”

[**NOTE**: See the Note to section 2(e)]

Amendment of Section 48

22. In section 48,

(i) In sub-section (2), in the “*Explanation.—*”, delete the words “Without prejudice to the generality of clause (*b*), it is hereby declared, for” and add the word “For” and after the words “avoidance of any doubt,” add the words “it is clarified” and after the words “the public policy of India” add the word “only” and after the word “if” delete “-” and “;” and insert sub-clause

"(a)" before the words "the making of the award" and delete "." And add ";" after the words "by fraud or corruption" and add sub-clauses "(b)it is in contravention with the fundamental policy of Indian law; (c) it is in conflict with India's most basic notions of morality or justice."

(ii) Re-number sub-section "(3)" as sub-section "(5)" and add sub-section "(3) An objection under the above sub-sections shall not be made after three months have elapsed from the date on which the party making such objections has received notice of the application under section 47 of the Act:

Provided that if the Court is satisfied that the party raising the objection was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(iii) insert sub-section "(4) An objection under this section shall be disposed off expeditiously and in any event within a period of one year from the date on which the notice issued pursuant to an application under section 47 is served."

[**NOTE:** The above provisions have been incorporated to set a time frame for hearing an objection under section 48. The above time frame is in tune with the time frame set for hearing an application under section 34]

(iv) insert sub-section "(6) The costs regime set out in section 6A of the Act shall apply to a proceeding in relation to sections 47 and 48 of the Act."

[NOTE: This provision has been included to ensure that the "costs follow the event" regime also applies to proceeding under sections 47 and 48]

<u>Insertion of Section 85A</u>

A new section section85A on transitory provisions has been incorporated.

Transitory provisions .—(1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended)

shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations -

(*a*) the provisions of section 6-A shall apply to all pending proceedings and arbitrations.

Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.

(*b*) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.

(*c*) the provisions of second *proviso* to section 24 shall apply to all pending arbitrations.

(2) For the purposes of the instant section,—

(*a*) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

(*b*) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

[NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]

<u>Amendment to the Schedules</u>

After The Third Schedule, add the **"THE FOURTH SCHEDULE**

(See section 12)

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators :

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Previous services for one of the parties or other involvement in the case

20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

Relationship between an arbitrator and another arbitrator or counsel.

25. The arbitrator and another arbitrator are lawyers in the same law firm.

26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Relationship between arbitrator and party and others involved in the arbitration

30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Other circumstances

32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

Explanation: (1)The term 'close family member' refers to a spouse, sibling, child, parent or life partner.

(2) The term 'affiliate' encompasses all companies in one group of companies including the parent company.

(3) It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."

[**NOTE**: The above rules are taken and adapted from the Orange list of the International Bar Associations Guidelines on Conflicts of Interest in International Arbitration.]

After The Fourth Schedule, add the **"THE FIFTH SCHEDULE**

(See section 12)

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation: (1)The term 'close family member' refers to a spouse, sibling, child, parent or life partner.

(2) The term 'affiliate' encompasses all companies in one group of companies including the parent company.

(3) It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

[**NOTE**: The above rules are taken and adapted from the Red list of the International Bar Associations Guidelines on Conflicts of Interest in International Arbitration.]"

After The Fifth Schedule, add the **"THE SIXTH SCHEDULE**

(See section 11 (14))

Sum in Dispute (Rs.)	**Model Fees (Indicative)**
Upto Rs. 5,00,000/-	Rs. 45,000/-
Above Rs. 5,00,000/- and upto Rs. 20,00,000/-	Rs. 45,000/- + 3.5% of the claim amount over and above Rs. 5,00,000/-
Above Rs. 20,00,000/- and upto Rs. 1,00,00,000/-	Rs. 97,500/- + 3% of the claim amount over and above Rs. 20,00,000/-
Above Rs. 1,00,00,000/- and upto Rs. 10,00,00,000/-	Rs. 3,37,500/- + 1% of the claim amount over and above Rs. 1,00,00,000/-
Above Rs. 10,00,00,000/- and upto Rs. 20,00,00,000/-	Rs. 12,37,500/- + 0.75% of the claim amount over and above Rs. 1,00,00,000/-
Above Rs. 20,00,00,000/-	Rs. 19,87,500/- + 0. 5% of the claim amount over and above Rs. 20,00,00,000/- with a ceiling of Rs. 30,00,000/-

* In the event, the arbitrator to be appointed is a Sole Arbitrator, he shall be entitled to an additional amount of 25% on the fee payable as per the table set out above.

After The Sixth Schedule, add the **"THE SEVENTH SCHEDULE**

(See section 12 (1)(b) Explanation 2)

NAME:

CONTACT DETAILS:

PRIOR EXPERIENCE (INCLUDING EXPERIENCE WITH ARBITRATIONS):

NUMBER OF ON-GOING ARBITRATIONS:

CIRCUMSTANCES DISCLOSING ANY PAST OR PRESENT RELATIONSHIP WITH OR INTEREST IN ANY OF THE PARTIES OR IN RELATION TO THE SUBJECT MATTER IN DISPUTE, WHETHER FI-NANCIAL, BUSINESS, PROFESSIONAL OR OTHER KIND, WHICH IS LIKELY TO GIVE RISE TO

JUSTIFIABLE DOUBTS AS TO YOUR INDEPENDENCE OR IMPARTIALITY (LIST OUT):

CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN 24 MONTHS AND RENDER AN AWARD WITHIN 3 MONTHS (LIST OUT):"

(Justice A.P. Shah)
Chairman

(Justice S.N. Kapoor)
Member

(Prof. (Dr.) Moolchand Sharma)
Member

(Justice Usha Mehra)
Member

(N.L. Meena)
Member-Secretary

(P.K. Malhotra)
Ex-officio Member