

RENDERING INDIA INTO AN ARBITRATION FRIENDLY JURISDICTION- ANALYSIS OF THE PROPOSED AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

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The Arbitration and Conciliation Act, 1996 was enacted by the Parliament with an objective to minimise intervention by courts in the process of arbitration. However, over a period of time the interpretation adopted by the higher judiciary to various provisions of the Act has been contrary to this objective. With a view to rectify this situation, the Ministry of Law and Justice released a Consultation Paper proposing amendments to the Arbitration and Conciliation Act, 1996. The present paper attempts to summarise and analyse the two most important amendments put forth by the Ministry, i.e. firstly, the application of Part I of the Act to international commercial arbitration, and secondly, appointment of arbitrators under §11 of the Act. It is argued by us that though the intention of the Ministry is to minimise judicial intervention and make arbitration an efficacious alternative remedy, the proposed amendments are not sufficient in rendering India an arbitration friendly jurisdiction. The paper also highlights a few other areas which need to be amended.

I. INTRODUCTION

The Arbitration and Conciliation Act, 1996¹ (1996 Act) was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.² The 1996 Act is enacted on the lines of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law³ (UNCITRAL Model Law) which was adopted in order to have a universally uniform

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¹ The Arbitration and Conciliation Act, 1996, Act No.26 of 1996 (August 16, 1996).

² Preamble to the Arbitration and Conciliation Act, 1996.

³ United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration*, 1985, UN Doc. A/40/17.

law for arbitral procedures. The underlying principle behind the 1996 Act was “to minimise the supervisory role of courts in the arbitral process”.⁴ This is evident from a plain reading of §5 of the 1996 Act which curtails the extent of judicial intervention to areas mentioned in the Act itself.⁵ However, with passage of time and with a certain degree of judicial legislation, the extent of judicial intervention has increased and the aforesaid objective seems to have been lost, as is evident from a plethora of decisions which have throttled the growth of arbitration into an efficacious alternative dispute resolution mechanism.⁶ Such an attitude of the judiciary and especially that of the higher judiciary, has led to a situation where an arbitral tribunal functions just like any other subordinate court whose decisions are regularly appealed against.

The Ministry of Law and Justice has proposed some significant changes in the 1996 Act with the intention of reinforcing the ‘minimal judicial intervention’ standard and to clear the confusion created by some innovative judicial interpretations of the 1996 Act and to some extent its poor drafting itself as set out in the Consultation Paper released on April 9, 2010 (Consultation Paper).⁷ The rationale for the proposed amendments has been summed up as follows:

“Further, in some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of such a legislation. Therefore, it becomes necessary to remove the difficulties and lacunas in the Act so that [the] ADR method may become more popular and object of enacting Arbitration law may be achieved.”⁸

The present article attempts to provide an overview of the amendments proposed by the Ministry of Law and Justice to rectify anomalies arising out of two very controversial decisions rendered by the Supreme Court regarding the application of Part I of the 1996 Act in *Bhatia International v. Bulk Trading S.A.*⁹

⁴ Statement of Objects and Reasons for the Arbitration and Conciliation Act, 1996. See also, G. Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act, 1996*, available at <http://www.ebc-india.com/lawyer/articles/633.htm> (Last visited on October 24, 2010).

⁵ Shafaq Uraizee Sapre, *et al.*, available at http://www.nishithdesai.com/Media_Article/2010/IndiaDR.pdf (Last visited on November 13, 2010).

⁶ *Id.*

⁷ See *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105, ¶35; *Venture Global Engineering v. Satyam Computers Services*, 2008 (1) SCALE 214, ¶10.

⁸ See G. Subba Rao, *Applicability of the Civil Procedure Code to Matters Before the Civil Courts Under the Arbitration and Conciliation Act, 1996*, available at <http://www.ebc-india.com/lawyer/articles/633.htm> (Last visited on October 24, 2010). See MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, *Proposed Amendments to the Arbitration Conciliation Act, 1996*, Consultation Paper, 1, (2010), available at lawmin.nic.in/la/consultation_paper.pdf (Last visited on October 24, 2010).

⁹ *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105.

(*Bhatia International*) and a host of decisions upholding the law laid down therein, and the appointment of arbitrators under §11 of the 1996 Act as interpreted in *SBP & Co. v. Patel Engineering*¹⁰ (*Patel Engineering*). The present article is divided into two broad parts. Part II examines two of the most important amendments proposed by the Ministry of Law and Justice, namely, changes with respect to the application of Part I of the 1996 Act to international commercial arbitrations held outside India and changes in §11 of the 1996 Act regarding the constitution of the arbitral tribunal.¹¹ Part III examines certain areas of the 1996 Act which still need to be addressed. It is stated that although these areas might not raise significant questions of law, they are, nevertheless, important aspects of arbitration which need to be taken note of and unless they are reconciled, the present amendments might just not be enough to make India an arbitration-friendly jurisdiction. Finally, Part IV concludes that the proposed scheme of appointment of arbitrators is also insufficient to provide for an effective and a speedy resolution of disputes. This part provides for an alternative method of appointing arbitrators in order to meet the underlying objectives of the 1996 Act.

II. PROPOSED AMENDMENTS

A. APPLICATION OF PART I – BHATIA INTERNATIONAL AND VENTURE GLOBAL

Part I of the 1996 Act is entitled ‘Arbitration’ and lays down the law governing domestic arbitrations, whereas Part II entitled ‘Enforcement of Foreign Awards’ relates to enforcement of foreign awards in international commercial arbitrations under the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) and Convention on the Execution of Foreign Arbitral Awards, 1928 (Geneva Convention). §2(2) of the 1996 Act provides that Part I of the 1996 Act applies “where the place of arbitration is in India”. The primary area of judicial uncertainty relates to the application of Part I of the 1996 Act to international commercial arbitrations held outside India. After a host of conflicting high court decisions,¹² the Supreme Court finally settled the controversy in *Bhatia International* wherein it was held that Part I of the 1996 Act would be applicable even to arbitrations held outside India unless the parties to such arbitration, expressly or impliedly exclude the application of the provisions of Part I. The Supreme Court concluded as follows:

¹⁰ *S.B.P. & Co. v. Patel Engineering*, (2005) 8 SCC 618.

¹¹ Other Amendments include amendments to §§ 12, 28, 31(7)(b), 34, 36 and insertion of a new §34A.

¹² See *Dominant Offset Pvt. Ltd. v. Adamuske Strojirny AS*, (1997) 68 DLT 157; *Olex Focas Pvt. Ltd. v. Skodaexport Company Ltd.*, AIR 2000 Del 161; *East Coast Shipping v. MJ Scrap*, (1997) 1 Cal HN 444; *Marriott International Inc. v. Ansal Hotels Ltd.*, AIR 2000 Del 377 (DB); *Kitechnology N.V. v. Union Gmbh Plastmacshinen*, (1998) 47 Del RJ 397.

“To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.”¹³

The primary reason for the Supreme Court to come to the said conclusion was that in the event that Part I of the 1996 Act was not made applicable to international commercial arbitrations held outside India, it would potentially render such arbitrations meaningless due to the absence of provisions of interim/conservative reliefs available to the parties; a party having assets in India could easily dispose of same during the course of the arbitration.¹⁴ However, the decision rendered in *Bhatia International* was not confined to §9 applications and a host of subsequent decisions which cite *Bhatia International* with approval have extended the application of other provisions of Part I of the 1996 Act to cases where it might not be appropriate to interfere with foreign arbitral proceedings.¹⁵ For instance, in *Citation Infowares Ltd v. Equinox Corp*,¹⁶ the disputed question before the Supreme Court was with respect to the appointment of arbitrators in terms of §11 of the 1996 Act. The substantive law governing the contract was the law of California, United States. The question with respect to Indian courts assuming jurisdiction was contested on the claim of an express choice of governing law. However, following *Bhatia International*, the jurisdiction was upheld on the ground that Part I of the 1996 Act was not excluded.¹⁷

However, scope for intervention by Indian courts was further increased by the decision of the Supreme Court in *Venture Global Engineering v. Satyam Computers Services (Venture Global)*,¹⁸ where the Court whilst interpreting the decision in *Bhatia International* held that even §34 of the 1996 Act would be applicable to international commercial arbitrations held outside India, unless the same has been expressly or impliedly excluded by the parties to the dispute. In

¹³ *Supra* note 9, ¶32.

¹⁴ *Id.*, ¶14.

¹⁵ V. Niranjan, *Greater Role for Judicial Intervention in Foreign Arbitration*, July 19, 2009, available at <http://indiacorplaw.blogspot.com/2009/07/greater-role-for-judicial-intervention.html> (Last visited on October 25, 2010).

¹⁶ *Citation Infowares Ltd. v. Equinox Corp*, (2009) 7 SCC 220.

¹⁷ *INDTEL Technical Services v. W.S. Atkins Plc*, (2008) 10 SCC 308; *National Agricultural Co-op Marketing Federation India Ltd v. Gains Trading Ltd.*, (2007) 5 SCC 692.

¹⁸ *Venture Global Engineering v. Satyam Computers Services*, 2008 (1) SCALE 214.

other words, Indian courts would even have jurisdiction to set aside an award rendered outside India under §34. In what came to be one of the most criticised decisions of the Supreme Court in recent times, the decision in *Venture Global*, on what some say is a misinterpretation of *Bhatia International*, paved the way for much increased judicial interference by Indian courts.¹⁹ It is stated that *Bhatia International* was clear as to when Part I would be made applicable to international commercial arbitrations held outside India even when not excluded by the parties. The Supreme Court had categorically observed that when there were specific provisions available in Part II of the 1996 Act, the same would override the similar provisions contained in Part I and hence, for the said issues, Part I would not be applicable. Relevant extract of the decision of the Supreme Court in *Bhatia International* is reproduced below:

“...Part II then contains provisions for enforcement of ‘foreign awards’ which necessarily would be different. For that reason special provisions for enforcement of foreign awards are made in Part II. *To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards.*”²⁰ [Emphasis supplied].

From the above it is amply clear that since Part II expressly provides for a mechanism to enforce a foreign award under §48 of the 1996 Act, which also provides for the grounds on which such enforcement may be refused, it was incorrect for the Supreme Court in *Venture Global* to hold that §34 would also be made available to a party which seeks to assail an award rendered in an international commercial arbitration outside India. The Supreme Court in *Venture Global* observed as follows:

“That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to hold that where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate to the extent permitted by the provisions of Part I. It is also clear that even in the case of international commercial arbitration held out of India provisions of Part I would apply unless the

¹⁹ Neerav Merchant, *Making Arbitration Work in India*, February 14, 2010, available at <http://www.mydigitalfc.com/opinion/making-arbitration-work-india-786> (Last visited on November 13, 2010); Dipen Sabharwal, *Another Setback for Indian Arbitration (and Foreign Investors)*, available at http://www.whitecase.com/idq/spring_2008_4/ (Last visited on November 13, 2010); Prabhash Dutta, *Consultation Paper Released on Amendment to Arbitration Act*, April 9, 2010, available at <http://www.lawetelnews.com/NewsDetail.asp?newsid=891> (Last visited on November 13, 2010).

²⁰ *Supra* note 9, ¶26.

parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act and there is no lacuna as such.”²¹

Thus, it is clear that after the decision of *Venture Global*, the distinction recognised in *Bhatia International* has been blurred, if not completely lost and has resulted in a situation where the Indian courts have a significant say in international commercial arbitrations held outside India.

Therefore, to cure of these defects, the Ministry of Law and Justice has proposed to amend the 1996 Act to reinforce the ‘minimal judicial standard’. The Law Ministry has proposed to amend §2(2) of the 1996 Act as follows:

“(2) This part shall apply only where the place of arbitration is in India.
Provided that provisions of §§9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognised under Part II of this Act.”²²

From a plain read of the above, it is clear that the concerns regarding a foreign award being rendered meaningless in the event interim/conservative reliefs are not provided, are taken care of, by the proposed amendment.²³ It is also pertinent to note that whilst taking into account the said concerns, the amendment also renders the decision in *Venture Global* ineffective insofar as the said decision provides that even §34 of the 1996 Act would be made available to parties to an international commercial arbitration held outside India.

Further, the Supreme Court in *Bhatia International* and other decisions has held that Part I mandatorily applies “when the arbitration is held in India” without having defined the scope of the term. The phrase corresponding to this is ‘where the place of arbitration is in India’ as used in §2(2) of the 1996 Act.²⁴ It is

²¹ *Supra* note 18, ¶17.

²² MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, *Proposed Amendments to the Arbitration Conciliation Act, 1996*, Consultation Paper, 14-15, (2010).

²³ Anirudh Krishnan, *Proposed Amendments to the Arbitration and Conciliation Act, 1996*, August 20, 2010, available at <http://www.criticaltwenties.in/lawthejudiciary/proposed-amendments-to-the-arbitration-and-conciliation-act-1996> (Last visited on October 25, 2010).

²⁴ The ‘*situs*’ or seat of arbitration is the legal place of arbitration agreed upon by the parties to conduct arbitral proceedings. The choice of seat of arbitration is crucial as, among other things, the mandatory norms of the procedural law of the seat of arbitration are applicable to the arbitration proceedings. Once the seat is chosen it is treated as the legal place of arbitration even if proceedings are, for convenience, held elsewhere. Therefore a distinction can be made between the seat of arbitration and the place where arbitration proceedings may be held. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION- COMMENTARY AND MATERIALS*, 573-575 (2001).

submitted that in absence of a clear definition for the term there exists uncertainty regarding whether ‘place of arbitration’ will be in India if merely a few hearings of arbitration are held in India, or if there is a necessary requirement of all the hearings to be held in India. This uncertainty can be done away with if the term is defined analogous to the concept of ‘seat of arbitration’ which has been clearly defined in the English Arbitration Act, 1996 and which has sufficient common law jurisprudence relating to it.²⁵

B. APPOINTMENT OF ARBITRATORS - PATEL ENGINEERING

In an effort to promote institutionalised arbitration, the Ministry of Law and Justice has proposed to amend §11 of the 1996 Act which provides for the appointment of arbitrators.²⁶ Presently, sub-sections (4) to (11) of §11 of the 1996 Act provide that in case the parties fail to mutually appoint an arbitrator or in case of arbitration by a three-member tribunal where the two appointed arbitrators fail to appoint the third arbitrator within the stipulated time, the appointment is to be made by the Chief Justice or any person or institution designated by him/her.

The Supreme Court has consistently held that the orders of the Chief Justice or his/her designate are administrative in nature and hence they are not assailable under Article 136 of the Constitution of India. In *Adur Samia (P) Ltd v. Peekay Holdings Ltd.*²⁷ (*Peekay Holdings*), a two-judge bench of the Supreme Court held that “there is no escape from the conclusion that orders passed by the learned Chief Justice under §11(6) of the Act being of an administrative nature cannot be subjected to any challenge directly under Article 136 of the Constitution of India.”²⁸ This stand was further substantiated in the three-judge bench decision of the Supreme Court in *Konkan Railway Corp. Ltd. v. Mehul Construction Co.*²⁹ that held as follows:

“...The nature of the function performed by the Chief Justice being essentially to aid the constitution of the arbitration tribunal immediately and the Legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order...”³⁰

A Constitution Bench of the Supreme Court in *Konkan Railway Corp. Ltd. v. Rani Construction (P) Ltd.*³¹ (*Konkan Railway*) further affirmed the position

²⁵ BORN, *supra* note 24

²⁶ MINISTRY OF LAW AND JUSTICE, *supra* note 22, 15.

²⁷ *Adur Samia (P) Ltd v. Peekay Holdings Ltd.*, (1999) 8 SCC 572.

²⁸ *Id.*, ¶7.

²⁹ *Konkan Railway Corp. Ltd. v. Mehul Construction Co.*, (2000) 7 SCC 201.

³⁰ *Id.*, ¶6.

³¹ *Konkan Railway Corp. Ltd. v. Rani Construction (P) Ltd.*, (2002) 2 SCC 388.

that the orders under §11 of the 1996 Act were administrative in character and held as follows:

“In conclusion, we hold that the order of the Chief Justice or his designate under §11 nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a tribunal. Such an order cannot properly be made the subject of a petition for special leave to appeal under Article 136.”³²

However, departing from this settled position of law regarding the nature of orders under §11 of the Act, the Supreme Court reversed its decision in *Konkan Railway* in the seven-judge bench decision in *Patel Engineering*, wherein it held that the decision of Chief Justice or his/her designate is a judicial decision and hence in the event the said decision has been rendered by a High Court Chief Justice or his/her designate, the same is open to challenge under Article 136 of the Constitution of India.³³ However, in cases where the Chief Justice of India or his/her designate exercises the power under §11, the same cannot be appealed and is final and binding upon parties.³⁴ The Supreme Court further ruled that the Chief Justice or the designated Judge would have the right to decide preliminary issues with respect to his/her own jurisdiction to entertain the request, the existence of a valid arbitral agreement, the existence or otherwise of a live claim, the existence of the conditions for the exercise of the power and on the qualifications of the arbitrator.³⁵ Further, although the Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator, the order appointing an arbitrator could be passed only by the Chief Justice or the designated Judge.³⁶

Interpreting §11 of the Act in such a way has proved to be problematic and the Ministry of Law and Justice in its Consultation Paper has recognised the same.³⁷ Firstly, since an order made by the Chief Justice of India or his/her designate is not appealable, it curtails the power of judicial review which is a basic structure of the Constitution. In other words, an order made by a single judge of the Supreme Court cannot be assailed before any forum, which clearly curtails the power of judicial review. Secondly, as a consequence of the level of scrutiny permitted by the decision in *Patel Engineering* at the constitution stage itself, there is a delay in the constitution of the arbitral tribunal; the court is also required to look into elaborate evidence (in case the need arises) to adjudicate the plea/defenses raised

³² *Supra* note 31, ¶23.

³³ *Supra* note 9, ¶44.

³⁴ *Id.*

³⁵ *Id.*, ¶47.

³⁶ *Id.*

³⁷ See Niranjan V., *Recent Developments on the Scope of S.11 Jurisdiction*, July 2, 2010, available at <http://lexarbitri.blogspot.com/2010/07/recent-developments-on-scope-of-s-11.html> (Last visited on October 26, 2010).

by those who are contesting the reference to arbitration. Thirdly, due to the level of scrutiny permitted by the Court in *Patel Engineering*, any comment made by the Chief Justice or his/her designate could adversely impact the process before the arbitral tribunal as the tribunal might be influenced by such observations. Fourthly, since a remedy is available under Article 136 of the Constitution in case the order under §11 has been made by a Chief Justice of a High Court or his designate, a party seeking to delay the process would invariably appeal before the Supreme Court thereby further delaying the process of constitution.

The Consultation Paper recognises the problems created by the Supreme Court's decision in *Patel Engineering* and seeks to cure the same. The Ministry, with the objective to reduce court interference at the constitution stage, has proposed to amend §11 of the 1996 Act in the following manner:³⁸

1. The phrase 'Chief Justice or his/her designate' as appearing in §11 of the 1996 Act is to be replaced by 'High Court or any person or institution designated by it' or 'Supreme Court or any person or institution designated by it' as the case maybe.
2. The decision rendered under sub-sections (4), (5) and (6) of §11 to be made non-appealable by replacing sub-section (7).
3. To make it mandatory for the Supreme Court or the High Court as the case may be in cases of commercial disputes of a specified value to delegate the appointment procedure to an arbitral institution by adding sub-section (13).
4. Provides for a prescriptive timeline of 60 days for the applications under §11 to be disposed of under sub-section (14).

C. IMPLIED ARBITRATION CLAUSE

As noted above, the Ministry of Law and Justice has recognised the problems created by the Supreme Court decision in *Patel Engineering* wherein the Supreme Court held that a Chief Justice or his/her designate would consider the validity or otherwise of an arbitration agreement whilst considering an application under §11 of the 1996 Act.³⁹ Thus, to avoid this issue being raised at the stage of constitution of the arbitral tribunal in cases which concern commercial transactions of high value, the Law Ministry has proposed to include a clause in the 1996 Act which would provide for a deemed arbitration clause unless expressly excluded by the parties in writing. The said clause would read as follows:

“Unless parties expressly and in writing agree otherwise, every commercial contract with a consideration of specified value (Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.”⁴⁰

³⁸ MINISTRY OF LAW AND JUSTICE, *supra* note 22, 20-22.

³⁹ *Id.*, 36.

⁴⁰ *Id.*

Laudable as the objective of the Ministry of Law and Justice might be, such a proposal defeats the very purpose of arbitration being an alternate method of dispute settlement. Arbitration is admittedly an alternative provided to contracting parties to ensure that their disputes get settled in a speedy manner and by personnel who are familiar with the subject matter of the dispute. However, it still remains an alternate. This amendment changes the very nature of that alternative by making it the main stream methodology of dispute settlement and gives the parties an alternative to opt for the conventional mode of dispute settlement.

Further, inclusion of such a deemed arbitration clause also runs counter to the principle of party autonomy. In other words, unless the parties specifically choose in writing to opt for arbitration, the courts cannot force the parties to arbitrate their disputes. This principle has also been recognised, albeit in a slightly different context, by the Supreme Court in *M/s. Afcons Infra. Ltd. Anr. v. M/s. Cherian Varkey Construction*,⁴¹ wherein the Supreme Court recognised and upheld the principle that arbitration being an adjudicatory process, the courts cannot force parties to arbitrate unless there is an express agreement between the parties to do so. It is stated that the said principle squarely applies in the present situation and hence the Ministry should consider dropping the inclusion of the said provision.

In the event the Ministry does decide to proceed with the said section, it would also have to correspondingly amend §7 of the 1996 Act to provide for statutory arbitrations since at present §7 requires that parties should have an arbitration agreement in writing. Therefore, since the inclusion of this provision would amount to a statutory arbitration, §7 would also have to be amended to recognise the same.

III. OTHER ASPECTS OF THE 1996 ACT REQUIRING CHANGE

Although the Ministry of Law and Justice has proposed certain important changes to the 1996 Act, there are still areas which remain problematic. The present section explores such areas which could be changed in order to make arbitration a more viable option for dispute resolution.

A. COSTS

Since arbitration is a mechanism in which parties replicate a judicial system for themselves, which otherwise is provided by the State, it certainly has considerable costs associated with it. However, with the current system prevalent

⁴¹ *M/s. Afcons Infra. Ltd. & Anr. v. M/s. Cherian Varkey Construction*, Civil Appeal No. 6000 of 2010. Decided on July 26, 2010.

in India, under §31(8) of the 1996 Act, each party generally bears its own costs for the proceedings. It is stated that the apportionment of costs between the parties should be legislatively done in a manner which dissuades the dishonest/frivolous party from contesting frivolous claims before the tribunal. One method may be by suitably amending §31(8) of the 1996 Act to include that, in the event that the tribunal is of the view that a party was involved in agitating frivolous claims before the tribunal, it shall bear the entire costs for the proceedings. Since the costs associated with an arbitration proceeding are considerably higher when compared to a proceeding before any other conventional court, such a provision would certainly deter a dishonest party from unnecessarily agitating.

B. TIMELINE ADHERENCE BY PARTIES

At present the 1996 Act does not provide any timeframe within which an arbitral proceeding is to be concluded resulting in considerable delays. It is stated that §24 of the 1996 Act needs to be amended to provide a timeframe within which the proceedings need to be concluded and in the event that such proceedings are not concluded within such time due to the fault of any of the contesting parties, the said party should at least bear the costs for such delay. This would ensure that the parties do not engage in tactical delays during the arbitral proceedings.

C. FOREIGN AND DOMESTIC AWARDS VIS-À-VIS STAMPING OF AWARDS

In *M/s. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*,⁴² the Supreme Court held that a foreign award is deemed to be already stamped as a decree of a court. However, with respect to a domestic award, there is no such presumption. In other words when a domestic award is sought to be enforced, it needs to be filed in a court and execution proceedings under Code of Civil Procedure need to be commenced. However, for such execution proceedings to commence, the award in question needs to be stamped depending upon the stamp duty applicable in the state in which the award is being enforced. On the other hand, in case of a foreign award, it is deemed to be stamped and hence, there are no stamping requirements for such an award. Therefore, there are clear financial implications which follow with the stamping of a domestic award as against the non-stamping of a foreign award. This creates an unwarranted distinction which needs to be done away with.

D. INTRA COURT APPEALS

§37 of the 1996 Act provides for appeal against orders as specified in the said section. Moreover, such appeals are before courts authorised by law to

⁴² *M/s. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*, (2001) 6 SCC 356.

hear such appeals. It is stated that at present different high court charters provide for different situations under which an intra-court appeal is permitted, some of which might cover situations under §37 and some might not. Therefore, to bring out consistency in such situations, it is desirable to provide for a specified appellate procedure in the 1996 Act, which at present largely depends upon the High Court concerned.

These are few instances, which might not be significant questions of law *per se*, but nevertheless do raise practical issues which need to be redressed.

IV. CONCLUSION

The Consultation Paper released by the Ministry of Law and Justice is a laudable step towards resolving the anomalies present in the working of the 1996 Act. However, as discussed above not all proposals may be sufficient to resolve the challenges faced in the field of Indian arbitration and achieve the primary objective of the 1996 Act to create a pro-arbitration legal regime with minimal judicial intervention.

The proposal of the Ministry of Law and Justice to amend §2(2) of the 1996 Act effectively cures the ambiguity in the applicability of Part I of the 1996 Act to international commercial arbitrations, created by the decision of the Supreme Court in *Bhatia International* and its misinterpretation in *Venture Global*. The concerns raised regarding a foreign award being rendered meaningless in case interim/conservative reliefs are not provided are taken care of by the proposed proviso to §2(2). Therefore, the proposed amendment would go on to render the impact of the decision in *Venture Global* ineffective, and rightly restrict excessive intervention by the courts in international commercial arbitrations held outside India. However, to completely ensure that the decision in *Venture Global* is rendered ineffective, it is submitted that a proviso be added to §34 restraining the courts from entertaining any petition under §34 which seeks to assail an award rendered in an international commercial arbitration held outside India.

With respect to the amendments proposed to §11 of the 1996 Act, it is submitted that they may not effectively remove the problems currently faced in the appointment procedure. The amendment seeks to move away from the decision of the Supreme Court in *Patel Engineering* and emphasises the importance of promoting institutional arbitration in India. However, it is submitted that this approach is also not free from problems and will not achieve the desired effects. The proposed amendments are silent on the whether the nature of the order made under §11 is judicial or administrative, which has been the mainstay of the problems created by decision in *Patel Engineering*. Therefore, *Patel Engineering* continues to hold as good law and an appeal under Article 136 of the Constitution would still lie thereby delaying the constitution of the tribunal. Further, the proposal is also silent on the level of scrutiny permitted under a §11 proceeding, which has not only been the cause of considerable delay in the constitution of the tribunal but also has the potential of adversely affecting the merits of the dispute before the

arbitral tribunal. Moreover, the proposal creates further problems by providing for a mandatory authorisation to arbitral institutions in cases of only high value contracts. This would create a dual system of appointment and may lead to development of parallel jurisprudence qua appointment of arbitrators. Also, the said provision makes a reference to the Commercial Division of High Courts Bill, 2009 which might not even be passed by the Parliament, failing which the recommendations of the said proposal would be problematic.

It is submitted that an institutionalised arbitration mechanism is capable of providing the much needed expertise to the resolution of disputes, and can also effectively avoid unnecessary delays in a § 11 application. Therefore, in order to fully capture the benefits of institutionalised arbitrations, § 11 must be amended to refer all matters to a recognised arbitral institution for the appointment of arbitrators, not limiting the referral in cases involving matters of high commercial worth. Therefore, a party seeking appointment should make an application before the concerned court, which in turn would merely direct the parties to approach a recognised arbitral institution. In other words, the appropriate court would merely act to supervise which arbitral institution the parties should approach for appointment of the tribunal.

The mechanical exercise of merely referring the matter to an arbitral institution would require considerably less time in court (possibly only a single day) and would also reduce the unnecessary pleadings which a § 11 application currently requires. It would also ensure that a specialised arbitral institution, dealing with such matters on a regular basis, would appoint the right people to the right dispute such as appointing a tribunal consisting of both technical and legal personnel who are better qualified to resolve the dispute accurately. Further, since the order made by the courts directing which institution to approach would be purely administrative in nature, Article 136 of the Constitution would not be attracted and hence there would be no time lost in frivolous appeals. It must be noted that even if the said order is administrative in nature, a writ remedy is technically not excluded. However, a writ court is not very likely to entertain a writ petition on the ground that there exists an efficacious alternate remedy available in terms of § 16 of the 1996 Act. In case a party is not satisfied with the appointment process, it could raise its concerns before the tribunal so constituted under § 16 in consonance with the principle of *kompetenz kompetenz*.⁴³ In such a scenario, the arbitral tribunal ought to decide the issues concerning its jurisdiction/constitution as preliminary issue. Such an order passed by the tribunal is an appealable order as per § 37 of the Act.

Therefore, delegation of the appointment procedure to specialised agencies would not only reduce the delay caused by conventional court process but would also not leave a party remediless.

⁴³ *Kompetenz kompetenz* is the power of an arbitral tribunal to decide upon its own jurisdiction that is, the competence of the arbitral tribunal to decide upon its own competence.

Thus, the consultative process initiated by the Ministry of Law and Justice seeking the views of various stake holders prior to amending the 1996 Act seems to have been a constructive exercise. The Consultation Paper released by the Ministry is a big step towards minimising court intervention in arbitral proceedings brought about by interpretations awarded to various provisions of the 1996 Act by the Courts and addressing the lacunae in the existing 1996 Act as highlighted by the Supreme Court in its various judgments.