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Arbitration News

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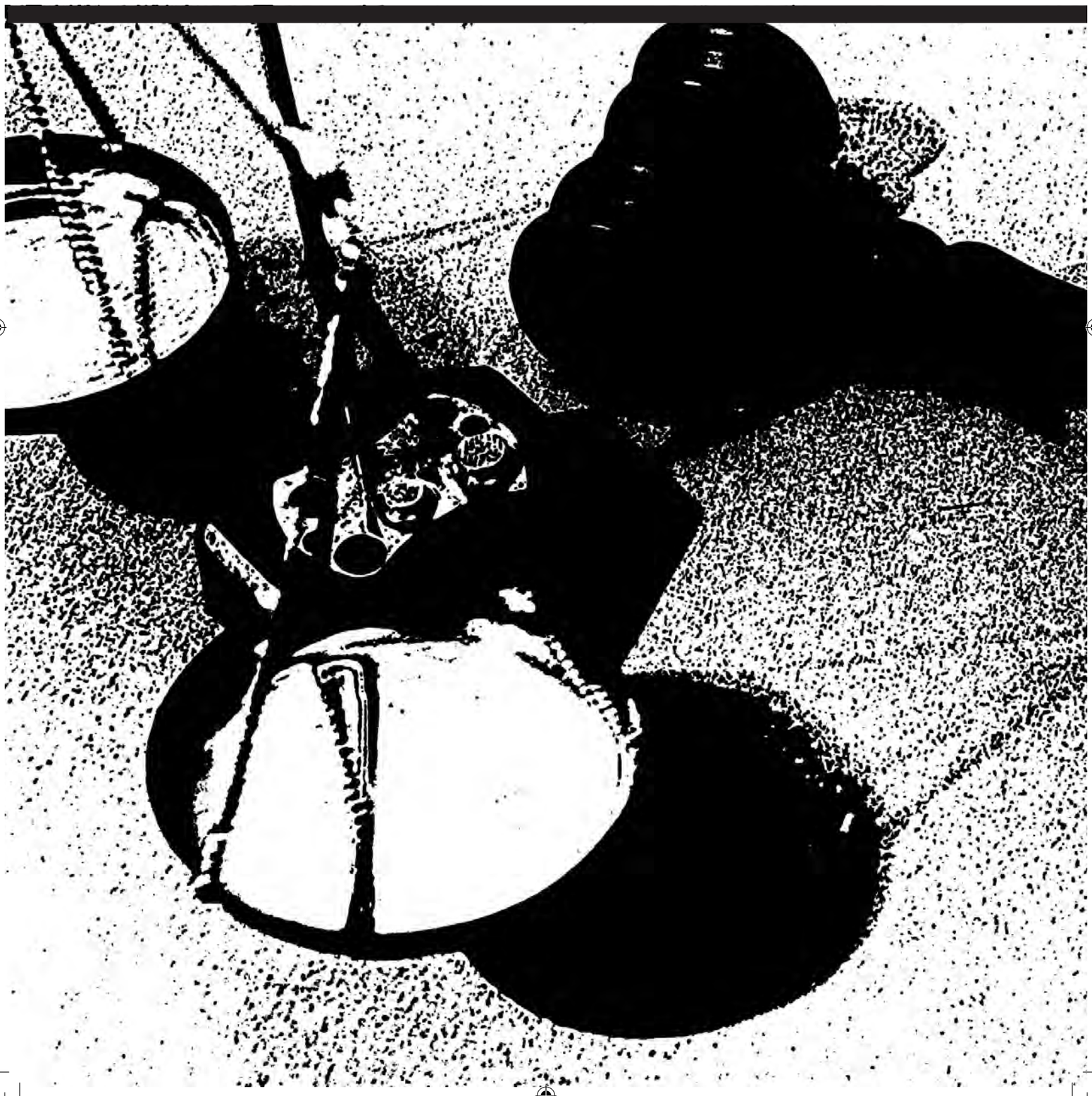

India

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Appointment of an arbitrator – a dispute in itself!

Contractual relationships are much like marriages. In good times, anything goes, but in bad times, there is no issue small enough not to fight over. It is probably for this reason that something as simple as the law surrounding the appointment of an arbitrator has developed in the manner it has.

Earlier, the appointment of an arbitrator in India was less complicated, where both parties would agree to listen to the decision of a respected elder, whom both trusted implicitly. Today, the law surrounding this seemingly innocuous aspect of an agreement has developed tremendously and parties argue vociferously to insert their choice of details including forum and arbitrator into the dispute resolution clause of a contract.

The Arbitration and Conciliation Act, 1996

The law of arbitration in India is governed by the provisions of the Arbitration and Conciliation Act, 1996, ('the Act'). The Act leaves parties free to decide on whether they wish to go in for institutional arbitration or ad hoc arbitration. In India, institutional arbitration had, initially, failed to take off as expected and most parties preferred to go in for ad hoc arbitration. This was possibly due to the lack of enough institutional arbitration facilities. However, it must be said that in the light of the rapid development of the Indian industry and

the creation of efficient facilities for institutional arbitration, both in India and globally, settlement of disputes by arbitral institutions is fast gaining popularity.

The Act provides for domestic arbitration as well as international commercial arbitration. Under section 10 of the Act, parties are free to determine the number of arbitrators they wish to appoint to resolve a dispute subject to the fact that such number is not an even number. Where an arbitration agreement is silent about the number of arbitrators, the Act provides that the arbitral tribunal would consist of a sole arbitrator. A 'no-brainer' provision as simple as this has been tested and interpreted by the courts in several cases.

In *MMTC Ltd v Sterlite Industries (India) Ltd*,[1] the said provision was tested where it was unsuccessfully argued that where each party thereto had agreed to appoint an arbitrator, and the two arbitrators so appointed were to jointly appoint a third arbitrator, the said arbitration agreement was invalid since technically the parties have appointed an even number of arbitrators, irrespective of the fact that the same agreement contemplates that the two arbitrators will appoint a third arbitrator. The Honourable Supreme Court ('Supreme Court/Court') also held that the validity of an arbitration agreement did not depend on the number of arbitrators specified in such agreement. In fact, in *Narayan Prasad Lohia v Nikunj Kumar Lohia & Ors*,[2] the Court upheld an arbitral award issued by an arbitral tribunal consisting of two arbitrators on the ground that when a party had an opportunity to object to the composition of the arbitral tribunal under the Act and did not object, and instead participated in such proceedings, it would be deemed that such party would have waived their right to object to the composition of the arbitral tribunal.

More importantly, in *Great Offshore Limited v Iranian Offshore Engineering & Construction Company*,[3] the Court has held that technical irregularities in an arbitration agreement per se will not make it invalid. The intention of the parties to arbitrate is of utmost importance in deciding on the validity of an arbitration agreement. The judgment also lays down that the courts, while deciding on an application for appointment of an arbitrator, should not go into technicalities of the agreement in question. The technicalities such as stamping, seals, signatures or production of original agreement have been described by the Court as 'red tape that has to be removed before the parties can get what they really want – an efficient and potentially cheap resolution of their dispute' and these technical issues are to be considered as mere indicators of intent and should not be insisted upon if parties are able to show intent (to arbitrate) in other ways.

Section 11 of the Act

Let us now look at section 11 of the Act which deals with the appointment of arbitrators. When parties are unable to mutually agree on an arbitral tribunal, depending on whether the arbitration is a domestic arbitration or an international commercial arbitration, either party can make an application to the High Court or the Supreme Court for appointment of an arbitrator. It can be seen on a bare reading of the provisions of the Act that the parties are given as much freedom as they wish in the appointment of the arbitral tribunal.

In hearing applications under section 11 of the Act, the courts have, in a number of decisions, always given the widest possible interpretation to the terms of the agreement between the parties in order to give meaning thereto rather than invalidate it by giving it a narrow interpretation. The Court has also time and again insisted, as was in the case of *Northern Railway Administration, Ministry of Railway, New Delhi v Patel Engineering Company Ltd*[4] that the parties must follow the procedure agreed in the arbitration agreement and exhaust the remedies provided therein before approaching the courts for the appointment of the arbitral tribunal. The reason for this is to minimise the supervisory role of the courts in the arbitration process, as is envisaged in the statement of objects and reasons of the Act. This has posed a challenging situation for the courts in view of the fact that while the Act envisages minimising the role of the courts in the process of arbitration, litigants are increasingly involving the courts in issues that require the courts to delve deeper into the crux of the arbitration agreement resulting in the courts setting precedents in the process.

In *SBP & Co v Patel Engineering Ltd*[5], questions were raised regarding the powers of the courts in appointment of the arbitral tribunal and if the courts could even go into any other issues, such as the validity of the arbitration agreement. In the matter, a seven

judge bench of the Court overruled the decision of a five judge bench of the Court in the *Konkan Railway Corporation*[6] case and held inter alia that the power exercised by the Chief Justice (of either the High Court or the Supreme Court, as the case may be) is not merely an administrative power but was, in fact, a judicial power. Holding such power to be a judicial power and not a mere administrative power, therefore, requires the Chief Justice to see whether there is an arbitration agreement between the parties and an arbitrable dispute there under.

In *Ludhiana Improvement Trust & Anr v Today Homes and Infrastucture (Pvt) Ltd*[7] it was contended and upheld that since an arbitration agreement obtained fraudulently would be void and unenforceable, it would be necessary for the court to exercise its judicial power under section 11 of the Act, as held in *SBP & Co v Patel Engineering Ltd*, and decide on the existence of an arbitration agreement prior to the appointment of the arbitral tribunal.

Furthering the complications and in addition to the various contentions put forth before the courts for appointment of the arbitral tribunal, in *TDM Infrastructure Pvt Ltd v UE Development India Pvt Ltd*[8] it was argued that even though both the appellant and the respondent were companies incorporated in India, as the directors and shareholders were based in Malaysia, it would bring the proposed arbitration within the definition of 'international commercial arbitration', as defined under section 2(f) of the Act and an application under section 11 of the Act would lie before the Supreme Court. The Supreme Court rejected this contention.

Appointments made by institutions

A possible alternative to ad hoc arbitration and the complicated process of appointment of an arbitrator (and the ever increasing issues surrounding the same) is for parties to opt for institutional arbitration which is conducted as per the rules and procedure of a mutually acceptable arbitral institution. Though institutional arbitration has its own set of problems such as high costs and possible delays, it is the preferred option with foreign companies who enter into any agreement with Indian counterparts and who are well aware of the infamous delays prevalent in the Indian judicial system. Institutional arbitration proceedings offer strict timelines and fixed costs and thus are an attractive alternate option. This has however not stopped parties from litigating on the issue of appointment of an arbitrator as has been seen in *Standard Corrosion Controls Pvt Ltd v Sarku Engineering Services SDN BHD*[9] where, in spite of the parties having agreed to refer disputes to arbitration applying the rules of the International Chamber of Commerce to be held at Mumbai, an application was first made to the Court to appoint an arbitrator. The said application was dismissed as non-maintainable and the Court once again held that parties must first approach the nominated authority.

Similarly, in *Shivnath Rai Harnarain (India) Ltd v Abdul Ghaffar Abdul Rehman*[10] the Court held that where the parties had agreed to refer disputes for arbitration in Singapore before a certain agreed arbitrator, it was not open to them to ask the Court to appoint an arbitrator.

However, care must be taken to ensure that the costs of such institutional arbitration, which often appear higher than ad hoc arbitration, are made clear upfront. Significantly, in light of the restrictions placed by India on the enforcement of arbitral awards not made in India, care must also be taken when choosing the seat of the arbitration proceedings. To get a quick arbitral award passed by an efficient arbitral institution in a country which is not recognised as a reciprocating country may defeat the entire purpose of approaching such institutions.

It should be remembered that an arbitration agreement is merely an agreement between contracting parties to refer certain disputes between them for adjudication before an arbitral tribunal, which may be nominated in advance. Where parties are at logger heads there is a possibility that they will evade such previously agreed terms, however neutral and reasonable they may be. It is, therefore, important that where parties have entered into an arbitration agreement out of their own volition, the courts let such arbitration agreement and procedure run its full course before intervening in any manner whatsoever. Where parties seek to avoid complying with previously agreed terms, such application for appointment ought to be dismissed forthwith at the threshold and without any delay whatsoever.

Whatever the choice between the parties, one can clearly say that in today's highly competitive, sophisticated and ever-changing commercial relationships, appointment of

an arbitrator to resolve a dispute has, in fact, turned out to be one of the major disputes between the parties.

Notes

1 AIR 1997 SC 605.
2 (2002) 3 SCC 572.
3 Arbitration Petition No 10 of 2006.
4 Judgment of the Supreme Court dated 18 August 2008, in Civil Appeal No 5067 of 2008 arising out of SLP (C) No 16196 of 2006.
5 (2005) 8 SCC 618.
6 (2002) 2 SCC 388.
7 Civil Appeal No 6104 of 2008 (Arising out of Special Leave Petition (Civil) No 10550 of 2008.
8 Arbitration Application No 2 of 2008.
9 Arbitration Application No 6 of 2008.
10 (2008) 5 SCC 135.