

# THE *Indian* Arbitrator

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## EDITOR'S NOTE

*We are happy to inform that IIAM has been approved by the International Mediation Institute (IMI) at the Hague, as a "Qualifying Assessment Programme". IIAM is the only institution in India to get the recognition. As we had mentioned in this column earlier, the requirement of training and certification of mediators is one of the most important steps to enhance the credibility and professionalism of mediation. From the perspective of a client, the profession of mediators should be properly governed by Code of conduct and ethical norms. Apart from the aspects of expertise and experience; these are concerns normally expressed by clients who take part in mediation. We hope the steps taken by IMI would enhance the credibility and popularity of mediation.*

*We look forward to your comments and suggestions to improve the quality of this news magazine.*



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# The View from an International Arbitration Customer: In Dire Need of Early Resolution (Part - II)

: MICHAEL MCILWRATH AND ROLAND SCHROEDER

## 5. THE MYTH THAT PARTIES ARE TO BLAME FOR DELAY IN THE PROCEEDINGS, OR THAT PARTIAL AWARDS CURRENTLY OFFER A VIABLE CURE

A common defence of arbitration is that, if there is delay, it is due to the parties wanting to make additional arguments or submissions, dragging their feet during the proceedings, or failing to identify and agree on issues that should be decided early. Although we do not deny some blame being properly allocated to parties for allowing their counsel to belt-and-suspender<sup>1</sup> every argument with still further arguments, we do not think the parties are the primary culprits responsible for the delays.

The view that the parties can impose greater efficiency rests on a faulty premise, which is that it is easily within their power to exercise more control over the procedure once a dispute arises, including by strictly enforcing time limits. This is not, in our submission, a valid premise in most disputes. It ignores that the parties are unlikely to be in good relations, at least with respect to the subject matter in dispute, and in some instances one of them (or their lawyers) may have an interest in delaying the determination of issues, not in expediting them – to delay payment of damages or to create financial pressure on the opposing party through delay and undue expense. Leaving the question of the timing of an arbitration to the parties inevitably puts at least one of them in the unenviable position of having to insist

on a shorter period of time than the tribunal would like to have.

Furthermore, parties invariably find they are forced to make belt-and-suspender type arguments, or at least arguments in the alternative, precisely because key issues have been left open. Without direction from the tribunal in the form of rulings on key issues or otherwise, the parties are left to guess what issues or evidence the tribunal will ultimately find useful or persuasive. While some amount of guessing as to what the decision-maker views as important will always take place, early resolution of key issues can and will lead to a streamlining of arguments and evidence. The parties themselves generally cannot arrange for the proceeding to be conducted this way because they, of course, have disagreements about the key issues and do not know how the tribunal

will come out on these issues – only the tribunal can answer those questions.

It is true that many arbitration rules and dispute resolution clauses will require the tribunal to issue the award within a certain time. It is equally true that it is not uncommon for tribunals to ask the parties or the institutions to extend that period. They unfailingly state more time as being necessary because of something the parties have done or in order to consider arguments they have made, or to allow them to make more arguments beyond the stated period. In reality, however, the parties (or at least one of them) will nearly always grant such a

*Without direction from the tribunal in the form of rulings on key issues or otherwise, the parties are left to guess what issues or evidence the tribunal will ultimately find useful or persuasive.*

### (Footnotes)

<sup>1</sup> “Belt and braces” in UK English. (Ed.)

request for fear of repercussion or lack of a thoughtful decision if they do not. From the party perspective, when a tribunal asks for more time, it is implicitly admitting that it has failed in its mission to discipline the process, even if the reason for the extension may be for legitimate concerns of which the parties may not be aware (such as the lack of consensus or availability of all members of the tribunal) and the arbitrators truly believe they have requested and obtained extensions only in the parties' interest and with their consent.

As for partial awards, our experience – shared by our colleagues – has been that tribunals are generally unwilling to determine critical issues in the early stages of proceedings when it would make most sense to dispense with them. In fact, we have seen arbitrations go on for years despite resting on a single issue – such as whether the contract existed or how a certain clause of the contract should be read – that was purely a legal question that the arbitrators probably could have decided on the basis of the initial pleadings and some early supplemental briefing.

At least one prominent institution discourages the granting of partial or interim awards on the traditional theory that it is the better practice for a tribunal to consider all issues and render a single final award. This no doubt explains the reluctance of some tribunals to do so. In our experience (and that of other in-house and external counsel with whom we routinely compare notes), this approach ignores the demand among the corporate community for efficient, effective and timely resolution of disputes.

## **6. WHAT FAILING TO ADDRESS CORPORATE CONCERNS WILL MEAN FOR INTERNATIONAL ARBITRATION**

We believe our experiences are typical, as we have shared them with in-house counsel of other large companies, and we know we are not alone in our frustration. We see the result to be the following, not all of which are uniformly negative from a company perspective, but which may be disheartening for the international arbitration community:

### **Movement towards courts and away from international arbitration**

Although we do not doubt that international arbitration is here to stay, we believe that the lack of corporate satisfaction means it will not grow as much or as quickly as its potential would otherwise allow. We know from our interactions with in-house counsel at other companies that many have developed, or are developing, a real reluctance to resolve disputes through international arbitration where it can be avoided. At

least one Fortune 50 company has already banned international arbitration in its contracts. Some segments within GE likewise have begun to insist on dispute resolution before the courts wherever possible. While it is not always the timing of the arbitration process, but also other concerns which may sometimes favour litigation over arbitration – such as the ability to join third parties or to quickly seize or freeze assets in dispute – frustration with the length and expense of the arbitration process is increasingly cited as the rationale for favouring court resolution (or at least for no longer favouring arbitration).

### **Preference for Regional Arbitration Centres**

Where regional arbitral bodies have developed a strong reputation for rapid dispute resolution, parties will increasingly move their business there, instead of relying on the well-known international institutions. Many of these institutions are young, dynamic, and “get it” from the business perspective. They have access to reputable arbitrators and will actively move proceedings along.

### **UNCITRAL and other forms of ad hoc arbitration**

We believe that ad hoc arbitration has acquired a reputation in many places of being more efficient than institutional arbitration. This may be due to a misperception of the role or costs of institutions, or the inclination of some arbitrators to leverage the institution's role as a means to extend the time of the proceedings. Whatever the cause, the reputation of institutions for efficient conduct of disputes unfortunately will largely be determined by their most recent bad example. If it can take years to conclude an arbitration with only a single issue in dispute, parties will not see any value to the (usually minor) costs added by the institution. When litigation may not be an option for a particular contract, parties may be content with ad hoc arbitration.

### **Some silver linings in the search for alternative solutions: Increasing the use of mediation and reducing dependency on law firms**

The ability of the business world to engineer its own solutions to vexing problems cannot be underestimated. Just as parties to an arbitration may be more inclined to settle once they become steeped in a never-ending process, businesses that have been through an international arbitration may be generally more willing to accept mediation as an alternative form of resolving disputes. Mediation's benefits are widely known in some quarters, and concern about the cost and duration of arbitration may be helping extend its reach. Similarly, the slow pace of international arbitration can make it easier for companies to “in-source” arbitration work



instead of relying on international law firms, thereby mitigating the cost of the lengthy procedures.

## 7. IMPROVEMENTS THAT BUSINESSES WOULD LIKE TO SEE

Having discussed the issue with our GE litigation colleagues, we believe that rule and practice changes authorising and promoting the early disposition of key issues would be a highly positive step for international arbitration. Of course, arbitration institutions will have to do more than simply enact or modify their rules; they will have to ensure that the reform becomes effective by developing a culture that encourages key issues to be identified and addressed as early in the process as possible. Here are some ideas that we think would be helpful and appreciated by the business community:

1. **Arbitration Rules** (a) authorising and encouraging tribunals to identify at the outset of the proceedings any legal or factual issues amenable to early disposition that will narrow/focus the issues in dispute, and to establish procedures for resolving those issues; and (b) authorising and encouraging tribunals to stage cases to consider first those issues that may dispose of the need to consider later issues (i.e. phasing liability and damages).

*Arbitration institutions will have to do more than simply enact or modify their rules; they will have to ensure that the reform becomes effective by developing a culture that encourages key issues to be identified and addressed as early in the process as possible.*

2. **Arbitration Institutions** using their monitoring role and authority to ensure that tribunals are being proactive in managing the arbitration to make it faster and as reasonably streamlined as possible, including (a) considering the merits of the dispute at an early stage and directing the parties on the evidence that the arbitrators care about and feel they need to resolve the dispute; (b) actively pushing cases along toward resolution instead of allowing arbitrators to put parties in a difficult position by asking “is it OK for us to take more time”; and (c) actively discouraging arbitrators from all legal backgrounds (common law and civil law) from the view that they should let everything in and decide later what is important or relevant.

3. **Parties, Counsel and Institutions** taking care that the arbitrators they name will genuinely have adequate time to devote to resolution of the arbitration over the next 6–12 months, and have a reputation for resolving disputes expeditiously.

## 8. WHAT'S GOOD FOR INTERNATIONAL BUSINESS IS GOOD FOR INTERNATIONAL ARBITRATION

Arbitration has slipped from its promise of a better, more efficient, dispute resolution process. As noted at the outset, businesses treat the ability to reach rapid and accurate decisions as a basic competency, and it is a competency we believe the international arbitration process is capable of delivering, but which needs to be implemented more often and more effectively.

Fortunately, there is nothing inconsistent between acting fairly, acting efficiently, and providing certainty of contract terms. If a balance of these values can be achieved, then business – our client and the arbitral institution’s customer – will have achieved its fundamental objectives.

No matter how good one becomes at any particular practice, there is always room for improvement, with rewards going to those who offer better products and services than their competitors. Given the competition among providers of

international dispute resolution services, we have little doubt that the first to improve the formula, by demonstrating a service that better meets the needs and objectives of the international business community, will also attract considerably more of that business. That is the way the business world works.

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*(Author: Michael McIlwrath is senior counsel for litigation for GE Oil & Gas, a division of the General Electric Company headquartered in Florence, Italy. Roland Schroeder is senior litigation counsel at the Corporate headquarters of the General Electric Company in Connecticut, United States. A draft of this article was initially presented at an IAI Paris conference on the early disposition of issues in international arbitration. Reprinted from (2008) 74 Arbitration 3–11)*

There is a big difference between people who want to say something and people who have something to say. Often, those with something to say don't talk much and those who want to say something won't be quiet.



# Effect of Arbitration Agreement on Third Parties: An analysis of the recent Supreme Court judgment - The Indowind Energy Case

: ANKUR KHANDELWAL

*A reading of the 1996 Act shows that speedy arbitration and least court intervention are its main objectives. This basic provision is found in the laws of all the countries which have adopted the UNCITRAL Model Law, which amply demonstrate that the objective is to see that the disputes are not unduly prolonged. The consequence of the Patel Engineering Case is that the judiciary is frequently adopting the law and reason laid down in it and concomitantly upsetting the process of arbitration.*

The Supreme Court of India recently in the case of Indowind Energy Ltd. v. Wescare (I) Ltd. and Anr<sup>1</sup>, laid down an arbitration agreement is not binding on the parties who have not signed the Arbitration Agreement. The decision of the Apex Court is on the reasoning of the Patel Engineering Case, i.e. the function of the Chief Justice under Section 11 is judicial in nature.

This decision is important for two reasons: it gives an understanding of balancing the intention of the parties with the freedom of the arbitral tribunal to rule on its own jurisdiction. The judgment was delivered by R. V. Raveendran, J. This Article seeks to analyse the judgment on the lines of the function of the Chief Justice under Section 11 of the Act and concludes that Patel Engineering Case has left its footprints for other

judgments to follow, denuding the arbitral tribunal of its jurisdiction under Section 16 of the Act.<sup>2</sup>

## BRIEF FACTS OF THE CASE:

The parties to the dispute are companies incorporated under the Companies Act, 1956. Wescare (I) Ltd., the respondent (hereinafter referred to as 'Wescare'), is in the business of setting up and operating/managing windfarms and generation of power from Wind Electric Generators. Subuthi Finance Ltd - second respondent (hereinafter referred to as 'Subuthi') is a promoter of the appellant company - Indowind Energy Ltd., (hereinafter referred to as 'Indowind'). An agreement of sale was entered into between Wescare and Subuthi. The agreement described "Wescare including its

### (Footnotes)

<sup>1</sup> Civil Appeal No. 3874 of 2010

<sup>2</sup> Section 16 of the Act provides for competence of arbitral tribunal to rule on its jurisdiction

<sup>3</sup> Clause 10: Governing Law and Jurisdiction - This AGREEMENT shall be governed by and interpreted in accordance with the laws of India. The Parties submit to the exclusive jurisdiction of the court in the city of Chennai, Tamil Nadu. Any dispute, difference, claims or questions arising under this agreement or concerning any matter covered by this Agreement or touching upon this Agreement, the same shall be referred to arbitration before a sole arbitrator to be appointed by consent of Seller, Buyer/IW. The decision/award of the Sole Arbitrator shall be final and binding on all parties. The provisions of the arbitration and Conciliation Act, 1996 with such amendments there to as may be applicable, shall apply to the proceedings. The venue of the arbitration shall be Chennai and the language of the Arbitration shall be English.

subsidiary RCI Power Ltd” as the “Seller/Wescare”. Under the Agreement Subuthi Finance Ltd. and its nominee are “buyer” and as the “promoters of Indowind Energy Ltd.” Under this agreement, the seller agreed to transfer to the buyer certain business assets of the seller for a certain amount of consideration. Clause 10 of the agreement related to Arbitration.<sup>3</sup>

Owing to the arising disputes between Wescare on the one hand and Subuthi and Indowind on the other, in respect of the said agreement, Wescare filed three petitions under Section 9<sup>4</sup> of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as ‘the Act’) against Subuthi and Indowind seeking the following interim measures:

- (i) *OA No. 641/2007 to restrain Subuthi and Indowind from alienating, encumbering or otherwise disposing of the 31 WEGs and the land appurtenant thereto.*
- (ii) *OA No. 642/2007 to restrain Subuthi and Indowind from operating or running the WEGs pending completion of arbitration proceedings.*
- (iii) *OA No. 975/2007 to restrain Indowind from proceeding with the issue of initial public offer, proposed under the Red Herring Prospectus issued by it, pending final disposal of the arbitration proceedings.*

### DECISION OF THE HIGH COURT:

The said applications regarding interim measures were dismissed by a learned Single Judge of the Madras High Court on 21/08/2007, for the following reasons:

- (a) *As Indowind has not signed nor ratified the agreement dated 24/02/2006, the maintainability of*

*the applications under Section 9 of the Act was doubtful.*

- (b) *As the WEGs were purchased by Indowind after paying the entire sale consideration, Wescare was not entitled to an injunction restraining Indowind from alienating the WEGs.*

However, the order of the Single Judge categorically mentioned and clarified that whatever had been stated therein was in the context of disposal of the applications seeking interim measures under Section 9 of the Act and nothing contained therein should be construed as findings on merits and the Arbitrator should determine the issues raised before him uninfluenced by the observations made in the said order.

Further, Wescare filed a petition under Section 11(6)<sup>5</sup> of the Act against Subuthi and Indowind for appointment of a sole arbitrator to arbitrate upon the disputes between them in respect of agreement.

### CONTENTIONS OF THE PARTIES:

Subuthi argued and resisted the said petition alleging that as the agreement dated 24/02/2006 did not contemplate any transaction between Wescare and Subuthi and as no actual transaction took place between Wescare and Subuthi under the said agreement. Consequently, they stated that there was neither cause of action nor any arbitrable dispute between them.

Indowind resisted the petition on the ground that it was not a party to the agreement dated 24/02/2006 entered into between Wescare and Subuthi; that it had not ratified the agreement or acted upon it and since there was no arbitration agreement between Wescare and Indowind; the dispute was neither covered by nor in

#### (Footnotes)

<sup>4</sup> Section 9 provides for Interim Measures and reads as, “Interim measures etc. by Court.- A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

- (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure or protection in respect of any of the following matters, namely:-
  - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
  - (b) securing the amount in dispute in the arbitration;
  - (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;
  - (d) interim injunction or the appointment of a receiver;
  - (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

<sup>5</sup> Section 11(6) of the Act reads as follows, “Where, under an appointment procedure agreed upon by the parties,-

- (a) a party fails to act as required under that procedure; or
- (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
- (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.”

pursuance of the agreement and therefore the petition was not maintainable.

The decision of the Chief Justice of the Madras High Court was to allow the said application under Section 11 of the Act, and a sole arbitrator was appointed. The learned Chief Justice held that Indowind was prima facie a party to the arbitration agreement and was bound by it, even though it was not a signatory to the agreement dated 24/02/2006.

### QUESTIONS BEFORE THE SUPREME COURT:

The two important questions before the Apex Court in this case were as follows:

- (i) *Whether an arbitration clause found in a document (agreement) between two parties, could be considered as a binding arbitration agreement on a person who is not a signatory to the agreement?*
- (ii) *Whether a company could be said to be a party to a contract containing an arbitration agreement, even though it did not sign the agreement containing an arbitration clause, with reference to its subsequent conduct?*

Decision of the Court:

The Court relied on Section 7 of the Act<sup>6</sup> and stated that for a provision to constitute arbitration agreement for the purpose of Section 7 should satisfy the following two conditions<sup>7</sup>:

- (i) it should be between the parties to the dispute; and
- (ii) it should relate to or be applicable to the dispute.

The Court stated that Wescare did not enter into any agreement with Indowind, with the intention of making such arbitration agreement, a part of their agreement. Nor did Wescare state that there was any exchange of statements of claim and defence in which it had alleged

the existence of an arbitration agreement and the same had been accepted and not denied by Indowind in the defence statement. The Court further mentioned that in absence of there being any exchange of letters, telex, telegrams or other means of telecommunication referred to and provided a record of any arbitration agreement between the parties, Sub-section (5) nor Clauses (b) and (c) of Sub-section (4) of Section 7 applied.

The Agreement in question was held to be signed by and valid between Wescare and Subuthi and not by Indowind and thus there could be appointment of an arbitrator if there was any dispute between Wescare and Subuthi. However, the Court added that since Indowind was not a signatory to the agreement it could not be considered to be a 'party' to the arbitration agreement, specially in the absence of any document signed by the parties as contemplated under Clause (a) of Sub-section (4) of Section 7, and in the absence of existence of an arbitration agreement as contemplated in Clauses (b) or (c) of Sub-section (4) of Section 7 and in the absence of a contract which incorporates the arbitration agreement by reference as contemplated under Sub-section (5) of Section 7.

### ANALYSIS OF THE DECISION:

Section 2(h)<sup>8</sup> of the Act defines the term 'party' as referring to a party to an arbitration agreement and Section 2(b)<sup>9</sup> defines the term 'arbitration agreement' as an agreement referred to in Section 7. Reading Section 7, analyzing Sub-sections (2), (3) and (4) of it, it becomes clear that an arbitration agreement will be considered to be in writing if it is contained in the following:

- (a) a document signed by the parties; or
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other, or

#### (Footnotes)

<sup>6</sup> Section 7 lays down the requirements of an Arbitration Agreement and reads as, "Arbitration agreement.- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

<sup>7</sup> Yogi Agrawal v. Inspiration Clothes & U and Ors. MANU/SC/8443/2008 : 2009 (1) SCC 372.

<sup>8</sup> Section 2(h) of the Act reads as, "'party' means a party to an arbitration agreement."

<sup>9</sup> Section 2(b) of the Act reads as, "'arbitration agreement' means an agreement referred to in section 7"



- (d) a contract between the parties making a reference to another document containing an arbitration clause indicating a mutual intention to incorporate the arbitration clause from such other document into the contract.

In this context, it is important to note that though a contract can be entered into even orally and can be spelt out from correspondence or conduct, an arbitration agreement is different from a contract. An arbitration agreement can come into existence only in the manner contemplated under Section 7 and thus the requirement of an arbitration agreement being in writing is mandatory.

In this context, it would be important to note the following observation of the Supreme Court regarding the rules of examination of a document, in the Economic Transport Organisation Case<sup>10</sup>:

*“.....The nature of examination of a document may differ with reference to the context in which it is examined. If a document is examined to find out whether adequate stamp duty has been paid under the Stamp Act, it will not be necessary to examine whether it is validly executed or whether it is fraudulent or forged. On the other hand, if a document is being examined in a criminal case in the context of whether an offence of forgery has been committed, the question for examination will be whether it is forged or fraudulent, and the issue of stamp duty or registration will be irrelevant. But if the document is sought to be produced and relied upon in a civil suit, in addition to the question whether it is genuine, or forged, the question whether it is compulsorily registrable or not, and the question whether it bears the proper stamp duty, will become relevant. If the document is examined in the context of a dispute between the parties to the document, the nature of examination will be to find out that rights and obligation of one party vis-à-vis the other party. If in a summary proceedings by a consumer against a service provider, the insurer is added as a co-complainant or if the insurer represents the consumer as a power of attorney, there is no need to examine the nature of rights inter-se between the consumer and his insurer.”*

The question of examining an arbitration agreement also raises another question of judicial intervention in arbitration. The scope of examination of the agreement by the learned Chief Justice or his Designate under

Section 11(6) is necessarily to be restricted to the question whether there is an arbitration agreement between the parties. The examination cannot extend to examining the agreement to ascertain the rights and obligations regarding performance of such contract between the parties.

The question raises the Patel Engineering - Konkan Railway Dispute, i.e. whether the power of the Chief Justice is judicial or administrative. It is settled that when an application is filed under Section 11, the Chief Justice or his Designate is required to decide only two issues, that is whether the party making the application has approached the appropriate court and whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such agreement. Therefore, the Chief Justice exercising jurisdiction under Section 11 of the Act has to only consider whether there is an arbitration agreement between the petitioner and the respondent/s in the application under Section 11 of the Act.<sup>11</sup> Any wider examination in such a summary proceeding will not be warranted.

In so far as the issue of existence of arbitration agreement between the parties, the learned Chief Justice or his Designate is required to decide the issue finally and it is not permissible in a proceeding under Section 11 to merely hold that a party is prima facie a party to the arbitration agreement and that a party is prima facie bound by it. It is not as if the Chief Justice or his Designate will subsequently be passing any other final decision as to who are the parties to the arbitration agreement. Once a decision is rendered by the Chief Justice or his Designate under Section 11 of the Act, holding that there is an arbitration agreement between the parties, it will not be permissible for the arbitrator to consider or examine the same issue and record a finding contrary to the finding recorded by the court. This is categorically laid down by the Constitution Bench in SBP. Therefore the prima facie finding by the learned Chief Justice that Indowind is a party to the arbitration agreement is not what is contemplated by the Act.

On the contrary there is also the view that a person to be bound by an arbitration agreement need not personally sign the written arbitration agreement.<sup>12</sup> However the Apex Court held that such view is of no assistance as they do not relate to a provision similar to Section 7 of the Indian Act.

## CONCLUSION:

### (Footnotes)

<sup>10</sup> Economic Transport Organisation v. Charan Spinning Mills (P) Ltd. MANU/SC/0113/2010 : 2010 (2) SCALE 427

<sup>11</sup> SBP & Co. v. Patel Engineering Limited 2005 (8) SCC 618 and in National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd. 2009 (1) SCC 267

<sup>12</sup> FISSER v. International Bank 282 F.2d 231 (1960) and J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile S.A. 863 F.2d 315



In effect, the Court in this case followed the SBP Patel Engineering Case. The consequence of the Patel Engineering Case is that the judiciary is frequently adopting the law and reason laid down in it and concomitantly upsetting the process of arbitration. In Ludhiana Improvement Trust & Anr v Today Homes and Infrastructure (Pvt) Ltd<sup>13</sup> 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.

It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration, but at the same time, it has made some departures from the Model Law. Section 11 is in the place of Article 11 of the Model Law.<sup>14</sup> The fact that instead of the 'Court', the powers are conferred on the Chief Justice, has to be appreciated in the context of the

statute.<sup>15</sup> Consequently, it can be said that the power to appoint arbitrators was laid in the hands of the Chief Justice not in their judicial capacity.

A reading of the 1996 Act shows that speedy arbitration and least court intervention are its main objectives. The limitation on the intervention by the courts is clearly enunciated in Section 5 of the Act.<sup>16</sup> This basic provision is found in the laws of all the countries which have adopted the UNCITRAL Model Law. The provisions as to waiving objections etc. contained in Sections 4, 12, 14(4), 16(5), 19(1) and 25 amply demonstrate that the objective is to see that the disputes are not unduly prolonged. In fact, the UNICTRAL Model Law, wherever it permitted intervention by court, by way of appeal, before the passing of the award, left it to the arbitrator, to proceed or not to proceed further pending the appeal. This was intended to see that the appeal proceedings are not allowed to be unreasonably delayed.<sup>17</sup>

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#### (Footnotes)

<sup>13</sup> Civil Appeal No 6104 of 2008 (Arising out of Special Leave Petition (Civil) No 10550 of 2008.

<sup>14</sup> Rodemadan India Limited v. International Trade Expo Center Limited, AIR 2006 SC 3456

<sup>15</sup> Article 11 of the UNCITRAL Model Law confers the duty to appoint the arbitrators upon the Court and to restrict judicial intervention, the Act confers such duty on the Chief Justice or his designate.

<sup>16</sup> Section 5 declares: "Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part."

<sup>17</sup> For more information on the UNCITRAL Model Law, see <http://www.uncitral.org/uncitral/en/index.html> (last visited May 30, 2010)



### The Lighter Side

Emily, a self-appointed monitor of the church's morals, kept sticking her nose into other people's business. Several members did not approve of her extracurricular activities, but feared her enough to maintain their silence.

She made a mistake, however, when she accused Frank, a new member, of being an alcoholic after she saw his old pickup parked in front of the town's only bar one afternoon.

She emphatically told Frank (and several others) that every one seeing it there WOULD KNOW WHAT HE WAS DOING!

Frank, a man of few words, stared at her for a moment and just turned and walked away. He didn't explain, defend, or deny. He said nothing.

Later that evening, Frank quietly parked his pickup in front of Emily's house... walked home... and left it there all night.



## IIAM gets approval of IMI Qualifying Assessment Programme

Indian Institute of Arbitration & Mediation has become the first institution in India to be approved as a “Qualifying Assessment Programme” (QAP) for IMI Certification. Certain top professional, provider and training organizations who have developed programs to qualify mediators as IMI Certified have been approved by the Independent Standards Commission of IMI. These are programs whose mediator training and assessment assertedly provides assurance of mediation experience and expertise worthy of IMI certification. The other institutions approved so far by IMI for QAP are AAA-ICDR and the Denmark Mediation Center.

International Mediation Institute (IMI) at The Hague, Netherlands, is formed for the purpose of certifying international standards for mediators and for implementing the Global Mediator Competency Certification. On 1 January 2009, the International Mediation Institute (IMI) has launched its global mediator competency certification scheme. This is an online scheme for enabling businesses and their advisers to find the world’s most competent mediators (including IIAM Mediators) by using an advanced search engine on the IMI web portal.

## IBA announces approval of revised evidence rules

The International Bar Association adopted the new IBA Rules on the Taking of Evidence in International Arbitration. Arbitration Committee Co-Chairs Guido Tawil and Judith Gill QC had submitted the draft to the IBA Council for approval after a two-year review process that included public consultation. The revised version of the IBA Rules of Evidence was developed by the members of IBA Rules of Evidence Review Subcommittee, which was created by then Co-Chairs of the Arbitration Committee Sally Harpole and Pierre Bienvenu. The Subcommittee was advised by members of the 1999 Working Party responsible for the drafting of the 1999 IBA Rules as well as by representatives of leading arbitral institutions. The 2010 IBA Rules on the Taking of Evidence in International Arbitration can be accessed at: <http://tinyurl.com/IBA-Arbitration-Guidelines>.

### *Interested to contribute Articles?*

*We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or [editor@arbitrationindia.com](mailto:editor@arbitrationindia.com).*

*Publication of the Article will be the discretion of IIAM and submissions made indicates that the author consents, in the event of publication, to automatically transfer this one time use to publish the copyrighted material to the publisher of the IIAM Journal.*

## Research shows global upturn in commercial disputes

The number of global arbitrations rose 16 per cent last year suggesting that the number of commercial disputes resulting in legal proceedings is increasing in the wake of the economic downturn. Research from Hogan Lovells showed that London had seen an almost 30 per cent increase in disputes between 2008 and 2009. The firm says the statistics are evidence that businesses and governmental entities are increasingly turning to alternative means of dispute resolution, as well as traditional litigation, to resolve contentious matters.

## Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to [training@arbitrationindia.com](mailto:training@arbitrationindia.com)



### Think ... Are you...?

This is an eyewitness account that happened in the City of New York, on a cold day in December some time ago...

A little boy about 10 years old was standing before a shoe store on Broadway, barefooted, peering through the window, and shivering with cold.

A lady approached the boy and said, "My little fellow, why are you looking so earnestly in that window?"

"I was asking God to give me a pair of shoes", was the boys reply.

The lady took him by the hand and went into the store, and asked the clerk to get half a dozen pairs of socks for the boy. She then asked if he could give her a basin of water and a towel, and he replied: "Certainly", and quickly brought them to her.

She took the little fellow to the back part of the store and, removing her gloves, knelt down, washed his little feet and dried them with a towel.

By this time the clerk had returned with the socks. Placing a pair upon the boy's feet, she purchased him a pair of shoes, and tying up the remaining pairs of socks, gave them to him.

She patted him on the head and said, "No doubt, my little fellow, you feel more comfortable now?"

As she turned to go, the astonished lad caught her by the hand, and looking up in her face, with tears in his eyes, answered the question with these words,

"Are you God's Wife?"