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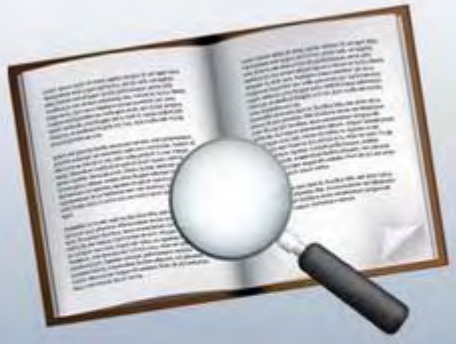

IN THIS ISSUE .....

EDITOR'S NOTE

Wishing you all a happy New Year! Really speaking New Year day is really just another day. Nothing changes really. Most will continue on the path that they are on. Many will make New Year's resolutions and the vast majority of them will be broken. If you are not where you think you should be, I would not suggest that you try to change things on the New Year day. Why...because that is what most other people will do and they do it simply because it's supposedly a special day. Your change of path will only come when either you make up your mind that you are going on a new path because you are determined to change or the pain becomes unbearable on the current path. The problem with the latter is that once the pain eases you often return to the old path.

The true New Year day is the day that you move from one path to another one (a better one) and stay on it. When that day comes mark it down on your calendar, for that day is really the special one.

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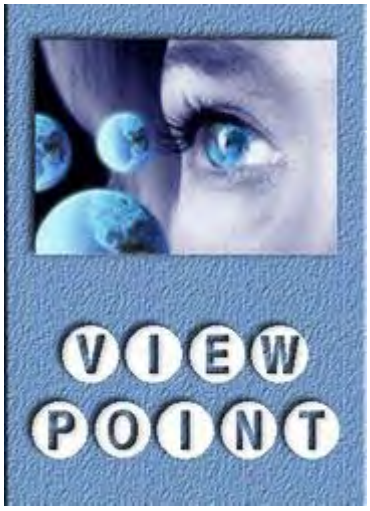

A MEDIATOR'S LETTER TO SANTA CLAUS

PROF. JOEL LEE

The Author as a Mediator writes a letter to Santa pointing out how mediation could work better in resolving disputes. A good reading during the season of Christmas and New Year.

This was originally published in the Kluwer Mediation Blog during December.

AUTHOR: MR. JOEL LEE IS THE ASSOCIATE PROFESSOR AT THE FACULTY OF LAW, NATIONAL UNIVERSITY OF SINGAPORE AND A MEDIATOR AT THE SINGAPORE MEDIATION CENTRE.

Dear Santa,

It's been a long time since I have written a letter to you and am a bit rusty. I hope you will forgive that.

How are you? I hope you are in good health despite what people have been saying about your weight gain and lack of exercise. I also hope that Mrs. Claus, the reindeers and the elves are doing well. Please give my warmest wishes to all of them.

I am writing to tell you of my Christmas wishes. My friends laughed at me when I told them I was going to write to you. They said I, as an adult, was too old! They even said that because I am a lawyer, I am on your naughty list.

Well, I am an adult but adults have dreams and wishes too and I hope that I am not disqualified from writing to you simply because I am a child stuck in an adult's body.

As for being naughty, I must admit that I am a lawyer and that during this past year, I haven't been all nice. But I have been more nice than naughty and I teach and help people to resolve conflicts amicably so I hope that counts for something.

When I was 8, I used to write to you to ask for presents I wanted for myself. I guess this letter is no different. I am asking to write for presents but this time not for myself.

In working with people in conflict, I can't help but notice that there are a number of things that make conflict worse and make it harder for parties to resolve their problems and to move on.

The first thing I notice is that parties often have a "I am right" attitude. Of course this must mean that the other person is wrong. One of the things that I have to do is to get them to realise that there are many truths, and that their

The first thing I notice is that parties often have a "I am right" attitude. Of course this must mean that the other person is wrong. One of the things that I have to do is to get them to realise that there are many truths, and that their truth is not the only one and not necessarily the "real" or "correct" one. It would really help if you could give the world the gift of perspective and understanding. Then, they will be better able to put themselves in the other party's shoes and see it from their point of view. And at least, even if they do not agree with the other party's point of view, they can understand and appreciate it.

The second thing I notice is that parties in conflict often feel isolated and separate from the other party. They only focus on the conflict and the bad feelings between them and the other party and cannot or will not see the commonalities that they share. I have to help them see that they are better off working with one another than to act separately. It would help if you could give them the gift of empathy and connection. Then they will be able to reconnect as human beings to solve their mutual problem.

The final thing I notice is that parties find it hard to accept solutions that are good for their future because they are constantly looking backwards. It is a bit like driving a car while only looking in the rearview mirror. I have to help them let go of the past so that they can move on with their lives. It would help if you could give them the gift of forgiveness and healing.

I know some of my friends will ask me why I don't just ask for world peace. I guess I could have, but I figure that if more people had the gifts above, we're one step closer to creating world peace for ourselves.

I know you have lots of letters to read and much work to do before Christmas so I'll end here.

Take care Santa and Merry Christmas!

Cheers
Joel

P.S. I'll be putting out some milk and cookies for you as usual. I bought some of those cookies you like so much.
P.P.S. Please give Rudolph a pat from me. He's my favourite!
P.P.P.S. I hope the elves aren't fighting. If you need a mediator, you know where to find me!

CHALLENGES TO THE JURISDICTION OF ARBITRAL TRIBUNAL - I

AMIT KUMAR PATHAK

Section 16(1) of the Arbitration & Conciliation Act dealing with the power of the Arbitral Tribunal in deciding its own jurisdiction integrates the doctrines of separability and kompetenz-2, which reinforce the autonomy of the arbitral process. The exercise of court-like powers by the arbitral tribunal discourages dilatory tactics. The author analyses the provision wherein the legislature has tried to protect and preserve the jurisdictional authority of tribunal and party autonomy. may also overweigh the losses of keeping mediators liable in civil suit.

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Introduction – Arbitral Tribunal's Jurisdiction

The Arbitration Act, 1940 had no provision analogous to this section. The law in India and England was on the same lines. The judicial and statutory development of law relating to arbitral tribunal's competence to rule on its own jurisdiction and the twin rule the autonomy of arbitration clause and doctrine of separability of the arbitration clause in the English law is remarkable. Before the enactment of the Arbitration Act of 1996, it was almost recognized practice for the arbitral tribunal to decide the objection taken to their jurisdiction. This was considered as an 'inherent' power of tribunal. However, the usual practice under modern international law and institutional rules of arbitration is to spell out in express terms, as it is often put, its competence to decide upon its own jurisdiction or, as is often put, its competence to decide upon its own competence.[1]

Article 16 of UNCITRAL Model Law is regarded as one of the 'pillars' of the Model Law. As a result of in-depth discussion at UNCITRAL, the scheme of this article has been described as 'an innovative and sensible compromise'. This article however, only regulates the arbitrator's decision that they do have jurisdiction. The eventuality that the arbitral tribunal rules that it has no jurisdiction, is not covered by the Model law[2].

At UNCITRAL it has been observed that the party 'is not precluded to obtain from the court a decision whether a valid arbitration agreement exists. However it was held that 'it is inoperative to compel arbitrators who had made such a ruling to continue the proceedings[3].

(Footnotes)

[1] OP Malhotra & Indu Malhotra, The law and Practices of Arbitration and Conciliation,2nd edition,lexis nexis butterworths,2006,p.no 622

[2] Supra note 1 at page no 226

[3] Ibid

Section 16(1) of this Act integrates the separability and kompetenz-2 doctrines, which reinforce the autonomy of the tribunal process. The exercise of court-like powers by the arbitral tribunal discourages dilatory tactics. The recognition of these doctrines reflects the efforts of the legislature to protect and preserve the jurisdictional authority of tribunal and party autonomy in the arbitral process. The section sets forth the twin principles of Kompetenz-2 and the doctrine of separability, both of which accord with modern international commercial arbitration practice, as confirmed by the high adoption rate of the provision.[4]

Powers of the Tribunal u/s 16 of 1996 Act

Arbitral Tribunal is now empowered under the new Act to rule on its own jurisdiction, including ruling on any objections with respect to existence or validity of Arbitration Agreements. The party can now contest that the Arbitral Tribunal is lacking powers necessary to adjudicate upon this reference. The Arbitration and Conciliation Act, 1996 mandates that prior to assumption of the jurisdiction, the plea u/s 16 shall be decided as it strikes at very authority.

The Arbitral Tribunal cannot acquire, possess and get seized of the jurisdiction when the claim has become time barred. The contention goes to the very root of the jurisdiction of the Arbitral Tribunal, when the Arbitral Tribunal suffers from inherent want of the jurisdiction because of time barred claim. Consequently, the jurisdiction is taken away. The party can advert the attention of the arbitrator to the foundation or substratum or bedrock or the jurisdictional facts necessary for conferring of or vesting in the jurisdiction to this Arbitral Tribunal by making an averment that a claim has to be within the framework of the Byelaws of the NSE. This is sine qua non for giving the jurisdiction to the Arbitral Tribunal in the reference. Apropos the ratio of judgments heavily relied upon by the party it should be noted that any judgments and orders of courts cannot be construed or interpreted like acts of parliament or as mathematical theorems. The concluding words alone cannot be blindly applied de hors the actual findings and directions contained in the judgments. On the other hand, the averments of the party are not sufficient to clothe the Arbitral Tribunal with the jurisdiction necessary to initiate this reference. Be that as it may, there ought to be merit in the contentions advanced by the party. It is a well-settled proposition that a proceeding is a nullity when the authority conducting it has no power to have seizin over the reference. The Arbitral Tribunal ought to be fortified by the arguments advanced and the plea raised by the party ought to be quite tenable and sustainable in the eyes of law. The Arbitral Tribunal must be persuaded to accede to the submissions and then only accordingly uphold the preliminary objection for interdiction at the very threshold. There must be a clear-cut case to prove that the reference is totally devoid of the jurisdiction, dominion and portal. The Limitation Act, 1963 applies to the Arbitration and Conciliation Act, 1996. The law does not help one who sleeps over his rights to the alleged claim. Delay defeats Justice and equity adds only promptitude and resultant consequences[5].

(Footnotes)

[4] Supra note 1 at p.no 628

[5] Competence of Arbitral Tribunal to rule on its own jurisdiction by Bhupendra shah available at http://www.icai.org/resource_file/10968dec04p744-748.pdf

No doubt, under Section 16(1) the Arbitral Tribunal may rule on its own jurisdiction including ruling on any objections with respect to the existence or validity of the arbitration agreement. Now under Section 16(1) the Arbitral Tribunal can examine the existence and validity of the arbitration agreement which it could not under the old Act where if the arbitration agreement was being challenged the matter had to be referred to the Court. But it is significant to note that it is an Arbitral Tribunal which alone can decide under Section 16(1) of the Act. The crucial point, therefore, is what is the Arbitral Tribunal which is mentioned in Section 16[6].

A plea that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the matter is raised during arbitral proceedings. A party aggrieved by an arbitral award may make an application for setting it aside[7].

Now Section 2(d) of the Act defines Arbitral Tribunal to mean a sole arbitrator or a panel of arbitrators. A reference to Section 10 provides that the parties are free to determine the number of arbitrators provided that such number shall not be an even number and sub-section (2) provides that failing the determination referred to in sub-section (1) the Arbitral Tribunal shall consist of a sole arbitrator. Thus it is mandatory under Section 10 of the Act that the Arbitral Tribunal cannot be of even number. In that context, Section 16(1) when it is talking of the power of the Arbitral Tribunal to rule on its own jurisdiction it is obviously contemplating an Arbitral Tribunal as provided by the Act which admittedly cannot be of two arbitrators[8].

This section corresponds to Art.16 of UNCITRAL Model Law and Art.21 of UNCITRAL Arbitration Rules. The section provides the competence of the Arbitral Tribunal to rule its own jurisdiction. The question is whether a particular dispute is referable to arbitration is to be decided by the arbitrator and by the court.[9]

The plea that the arbitral tribunal has no jurisdiction to proceed with arbitration could be raised before the tribunal itself which was under an obligation to decide such a plea[10]

A. Ruling on own Jurisdiction by Arbitrator:

Rajnigandha Co-operative Group Housing Society Ltd Vs Chand Construction Co[11]

The issue was whether the ruling on its own jurisdiction by the arbitrator is an interim award and appealable. The court deliberated on this matter in a very lucid and elaborate manner and clarified that the decision by the arbitral tribunal u/s 16(5) holding that it has jurisdiction to entertain the claim petition is not an interim award. It was categorically held that where the arbitral tribunal decides the question of jurisdiction u/s 16(5) and rules that disputes raised in the petition are arbitrable, the petition u/s 34 is not maintainable as no appeal is provided under the Act against such order and since the order is not an interim order, it is not challengeable u/s 34 either[12].

It was further observed that from the scheme of the Act, it is apparent that the legislature did not provide appeal against the order u/s 16(5) where the arbitral tribunal takes a decision rejecting the plea that the arbitral tribunal has no jurisdiction. The intention appears to be that in such a case, the arbitral tribunal shall continue with the proceedings and make an award without delay and without the arbitral process being interfered with at that stage by the Court in their supervisory role[13].

(Footnotes)

[6] Some Aspects on Arbitration Lawby Rajinder Sachar, Cite as : (2003) PL WebJour 11 available at http://www.ebc-india.com/lawyer/articles/608.htm
[7] Supra note 5
[8] Supra note 6
[9] Harika Rice Mills v.State of Punjab 1998)1 RAJ 223(P&H)
[10] Union of India v Chief Just ice of HC,Allahabad 2001)3 RAJ 521(All)
[11] 2002(1) RAJ 212 (Del)
[12] Ibid
[13] Ibid

B. Power in respect to the Existence or Validity of the Arbitration Agreement:

Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan[14]

The apex court considered a question where there existed different arbitral clauses in the connecting agreements. Speaking for the Bench, Jagannadha Rao, J held: "It will be noticed that under the Act of 1996 the arbitral tribunal is now invested with power under Sub-section (1) of Section 16 to rule on its own jurisdiction including ruling on any objection with respect to the existence or validity of the arbitration agreement and for that purpose, the arbitration clause which forms part of the contract shall be treated as an agreement independent of the other terms of the contract and any decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure affect the validity of the arbitration clause. This is clear from Clause (b) of Section 16(1) which states that a decision by the arbitral tribunal that the main contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

In the present context Sub-sections (2) and (3) of Section 16 are relevant. They refer to two types of pleas and the stages at which they can be raised. Under Sub-section (2) a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submissions of the statement of defence; however, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator. Under subsection (3) a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. These limitations in Sub-sections (2) and (3) are subject to the power given to the arbitrator under Sub-section (4) of Section 16 that the tribunal may, in either of the cases referred to in Sub-section (2) or Sub-section (3), admit a later plea if it considered the delay justified. Sub-section (5) requires the arbitral tribunal to decide on the pleas referred to in Sub-section (2) or Sub-section (3) at that stage itself. It is further provided that if either of the pleas is rejected and the arbitral tribunal holds in favour of its own jurisdiction, the tribunal will continue with the arbitral proceedings and proceed to make the arbitral award. Then comes sub-section (6) which states that the party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

(Footnotes)

[14] 1999)5 SCC 651 ,652

IN A HOLE?

We have often heard people saying, "I feel like I have dug myself in a hole."

Well, the truth of the matter is that everything is a matter of perception. Your outlook determines your outcome! It's better to be in a hole than in a rut. A rut is simply a grave with both ends kicked out! The hole could be for laying a foundation.

This is a process of life. You lose before you gain. You give before you get. You follow before you lead. You establish a solid foundation before you build. Before a farmer sows his fields, he first digs holes. Every beautiful flower starts out as a seed in a hole. Every fruit-bearing tree gets its start in a hole.

While digging a hole is dirty work and frustrating at times, it is necessary. Thomas Edison aptly stated, "Restlessness and discontent are the first necessities of progress."

So although being in a hole is confining and irritating, just hang on and learn to bloom where you are planted! A pearl is formed in an oyster because of an irritant that enters. So, while you are irritated, realize that a valuable pearl is being formed deep within you.

Just keep your mouth closed, and bloom where you are planted!

C. Jurisdiction of Tribunal:

Konkan Railway Corp Ltd. V. Rani Construction Pvt Ltd[15]

A constitutional Bench of Supreme Court observed: "S16 provides for this. It state that the tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement shows that the arbitral tribunals authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned council for the appellant, but goes to very root of its jurisdiction [16].

The two main bastions of the tribunal jurisdiction under this section are – (1) Competence of the arbitral tribunal to make a binding decision on its own jurisdiction, including the decision ruling on any objection with respect to the existence or validity of arbitration agreement –competence-2, and for that purpose (2) to treat, an arbitration clause which forms part of the substantive contract, as an agreement independent of the other terms of that contract and the decision by the arbitral tribunal that the contract null and void will not ipso jure invalidate the arbitration clause – 'autonomy of the arbitration clause' or 'doctrine of seperability' and survival of the arbitration clause.[17]

The Supreme Court of India by a 7 Judge Bench decision in S.B.P & Co. v. Patel Engineering[18], overruled its earlier 5 Judge Bench decision in the case of Konkan Railway Corporation v. Rani Construction Pvt. Ltd., (2002) 2 SCC 388. Section 11 of the Arbitration Act, 1996 provides for appointment of an arbitrator by the Chief Justice of India, in the case of international arbitration and by the Chief Justice of the High Court, in the case of domestic arbitrations (in the event the parties' envisaged mechanism for constituting the tribunal breaks down). This simple provision has engrossed the mind of the judiciary for quite sometime. The earlier view, taken in the Konkan Railway case was that the power to make an appointment is administrative in nature and to be exercised expeditiously, with minimum judicial procedure. All contentious issues would be left open to be determined by the arbitral tribunal, as it is empowered to under Section 16 of the Act. However, this view now stands overruled by S.B.P & Co. v. Patel Engineering. The Court would now assume a far more interventionist approach. Since the power now would be judicial (and not administrative) the court would decide contentious issues pertaining to validity of the arbitration agreement.

This is how the Supreme Court decision puts it: "It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the arbitral tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11 (6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary."

This decision impacts certain fundamental tenets of the arbitration laws of India. The jurisdiction of arbitrators to rule on their own jurisdiction (Competence-Competence principle) conferred by Section 16 of the Act stands curtailed.

(Footnotes)

[15] MANU/SC/0053/2002

[16] 2002)1 Arb LR 326

[17] Olympus superstructures Pvt.Ltd. v Meena Vijay Khetan (1999)5 SCC 651 ,652

[18] 2005 (9) SCALE 1

Now the tribunal cannot rule on its own jurisdiction in cases where the same is challenged before the Court in a Section 11 proceeding, and the court makes a finding thereon. In such cases, the Court would have jurisdiction and their decision shall be final.

Further, by an obiter the Supreme Court has held that where a court action is brought in a matter which is the subject of an arbitration agreement, the Court would not simply refer the matter to the arbitral tribunal (as it would have earlier). It would examine whether there is in existence a valid arbitration clause (thereby entering into contentious issues). The earlier interpretation of Section 8 of the Act was that the Court would not entertain contentious issues, but would merely refer the parties to arbitration and leave it to the arbitral tribunal to determine these (Hindustan Petroleum Corporation v. Pink City Midway Petroleum, (2003) 6 SCC 503).

D. Scope of Jurisdiction of Civil Court:

Pappu Rice Mills Vs Punjab State Cooperative Supply and Marketing Federation Ltd[19]

This case reiterated the point that courts will have no jurisdiction where remedy is provided under the Act. Briefly stating the fact, the plaintiff had filed a petition under Order 39 Rules 1 & 2 r/w Section 151 of CPC for ad interim injunction in spite of the fact that the defendant had already appointed an arbitrator in respect of the dispute and that arbitrator had already issued notice to the parties in the arbitral proceedings pending before him[20].

It was held that the arbitral tribunal is competent to decide the questions of its own jurisdiction and where it rejects the plea of the objector regarding jurisdiction, the arbitral tribunal would be competent to proceed with the arbitration and to give its award. The aggrieved party is entitled to challenge the same under Section 34. Thus, the remedy being available to the plaintiff, the civil court would not be competent to restrain the arbitrator from proceeding with arbitration, in view of Section 5[21].

This being the case, the court is justified in refusing to grant ad interim injunction in favour of the plaintiff.

To be continued...

(Footnotes)

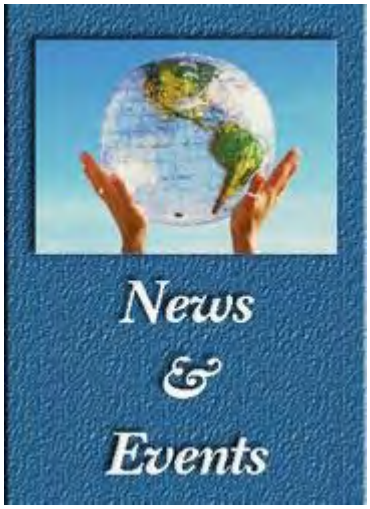
[19] 2000 AIR (P&H) 276
[20] Supra not 18
[21] Ibid

So the Lutheran minister is driving down to New York to see the radio show and he's stopped in Connecticut for speeding and the state trooper smells alcohol on his breath and then he sees an empty wine bottle on the floor, and he says,

"Sir, have you been drinking?" And the minister says, "No, just water."

The sheriff says, "Then why do I smell wine?" And the minister looks down at the bottle and says, "Good Lord, He's done it again!"

NEWS & EVENTS



IIAM FORMING INTERNATIONAL NEUTRAL PANEL FOR TRANSNATIONAL DEALS & DISPUTES

With the increase in the volume of transnational trade, investment and business between India and countries in the Asia Pacific and other region and consequential rise in the volume of business disputes, dispute resolutions and enforcement, IIAM is intending to provide international mediation and arbitration service for business groups from India doing trade, business or investment abroad or multinational business groups doing trade, business or investment in India, by creating a panel of professional mediators and arbitrators representing various countries with respective language and cultural background. IIAM International Mediation Services include deal mediations for making efficient business deals and dispute management systems or dispute mediations for amicable and effective dispute resolutions.

With ASEAN extending the free trade pact to include services and investment and the recent inclusion of China and Hong Kong in the list of countries under the New York Convention, it is expected that the use of mediation and arbitration will increase in transnational business.

For more details and empanelment contact dir@arbitrationindia.com

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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.

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AMA ACCREDITATION COMMITTEE RECONSTITUTED

The Asian Mediation Committee (AMA) Accreditation Sub Committee has been reconstituted. Mr. Anil Xavier, President IIAM takes over as Chairman of the Sub Committee from Winston Sui of Hong Kong Mediation Centre at the AGM of the Asian Mediation Association held on 15/12/2012 at Malaysia. The members of the Sub Committee are Sabiha Shiraz of Singapore Mediation Centre and Peter Ho of HKMC.

LITIGATION IN ROMANIA - NEW RULES ON CONSIDERING MEDIATION

From early January 2013 parties to all current or future litigation before Romanian courts must prove they attended a mediation meeting before an authorized mediator to be informed about the advantages of settling a dispute via mediation. The law requires attending the meeting, even if no actual mediation commences and no agreement is reached.

ARBITRATORS MUST DECIDE WHETHER NON-COMPETES ARE ENFORCEABLE - US SUPREME COURT

The United States Supreme Court held that the enforceability of a non-compete agreement containing a valid arbitration clause must be determined by an arbitrator in the first instance, not by a federal or state court. The US Supreme Court unanimously chastised the Supreme Court of Oklahoma for ignoring the federal policy in favor of arbitration under the Federal Arbitration Act (FAA) on disputes involving non-compete agreements. The interplay of arbitration and court proceedings has always played an integral role in non-compete disputes. This decision will significantly impact the strategy and tactics used in non-compete disputes going forward.

HONG KONG MEDIATION ORDINANCE TO COME INTO EFFECT IN JANUARY 2013

The Hong Kong Government Gazette has announced that the Mediation Ordinance passed on June 22nd 2012 will come into effect on January 1, 2013. The Mediation Ordinance provides a regulatory framework to remove impediments to the development of mediation - among other things to give statutory effect to the confidential nature of "any mediation communication" made before, during or after mediation. The Ordinance applies to mediations conducted wholly or partly in Hong Kong or where the agreement to mediate is governed by Hong Kong law. The Ordinance also applies to the Hong Kong Government and its statutory bodies.