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JANUARY 2018. Vol. XI, Issue I

# INDIAN LEGAL IMPETUS®

# EDITORIAL

***Manoj K. Singh***
***Founding Partner***

Dear Friends,

It is with extreme pleasure that we bring to you the January edition of the Indian Legal Impetus which is filled with enlightening articles dealing with a catena of legal subjects such as Arbitration, Contract Law, and Constitutional Law. We sincerely hope that you will find this issue of Indian Legal Impetus informative and helpful!

This edition has quite a few insightful articles on arbitration, First up we have the article which discusses the emerging judicial trends with regard to the enforcement of foreign arbitral award in the country, in the article the author discusses important case laws on the issue including the very recent judgment passed in the case of *Daiichi Sangkyo vs. Malvinder Mohan Singh*. Next is the article discussing the exceptions to law pertaining to the non-incorporation of the arbitration clause through general reference in a contract, wherein the authors have critically analyzed the judgment of *Inox Wind vs. Thermocables Ltd*. Next up is an article cum case law analysis which discusses the non arbitrability of landlord-tenant disputes wherein the author has analyzed the judgment in *Himangi Enterprises vs. Kamaljeet Singh Ahluwalia*. . Next is an article which discusses the issue that an arbitral award passed on the point of limitation is an interim award. Further we have an article which discusses an emerging topic in the field of international commercial arbitration pertaining to the proposal put forward by the Singapore International Arbitration Centre for the cross-institutional consolidation of international arbitration proceedings

This edition of the Indian Legal Impetus also looks at pertinent issues in Contract Law, the first article in this regard discusses the imposition of Liquidated Damages by the employer wherein the author has argued that such imposition is not the sole prerogative of the employer. The next article on the subject analyses the various legal ways by which a contract can be terminated legally without following the termination procedure as laid down in the contract.

On the issue of Constitutional Law, we have an article wherein the author has analyzed the case of Authorized officer, State Bank of Travancore vs. Matthew K.C to argue that the High Court should not entertain a writ petition under Article 226 of the Constitution if an alternative statutory remedy is available.

We also have an article which focuses on the recent regulatory stances pertaining to the regulation of cryptocurrencies. Lastly we have an article which looks at the Union Budget of 2018 which special focus on healthcare.

Please feel free to send your valuable inputs / comments at newsletter@singhassociates in

Thank you.

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# EMERGING JUDICIAL TRENDS IN THE ENFORCEABILITY OF INTERNATIONAL ARBITRAL AWARDS IN INDIA

SATWIK SINGH

**Abstract:** This research paper analyses the recent judicial trends pertaining to the enforceability of International Arbitral Awards in India.

## INTRODUCTION

With the advent of globalization, the commercial world has seen an exponential increase in cross border trade and commerce. However, at the same time this increase in the trade and commerce has been accompanied with the increase in the number of commercial disputes as well. Owing to the different jurisdictions and the various complexities arising therein, it comes as no surprise to see that the business world has always been reluctant to litigate in the courts for adjudicating their complex transactional disputes. It is due to this complexity, International arbitration has become the preferred remedy for adjudicating the disputes. Other factors that influence the success and the preference of arbitration over other methods of dispute adjudication are party autonomy and the Arbitral Tribunal's inherent power to determine the questions raised on jurisdiction. Excessive intervention by the national courts, generally defeats the aim of the arbitration procedure which is to provide speedy adjudication of the commercial disputes.

In India, the first law on Arbitration was enacted in 1940, however the Act suffered from many maladies such as a lot of court intervention in the arbitral proceedings apart from the fact that the erstwhile arbitration act of 1940 did not directly deal with the enforcement of foreign arbitral awards. As a consequence of the aforesaid, and with the view to bring the Indian arbitration regime in line with the international best practices and standards, and to consolidate the law pertaining to domestic arbitration, international arbitration and the enforcement of a foreign arbitral award, the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as, "**Arbitration Act**") was enacted which was based on the 1985 United Nations International Commission on International Trade Law model law and rules. The underlying principle behind the enactment of the Arbitration Act was to, "minimize the supervisory role of the courts[1] in the arbitral process[2]"

## ENFORCEABILITY OF FOREIGN ARBITRAL AWARD UNDER THE INDIAN REGIME

For a foreign arbitral award to be enforceable in the territory of India, it is required that the parties have received their binding awards from countries which are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as the "New York Convention" ) or the Execution of Foreign Arbitral Awards, 1927 ( hereinafter referred to as the "Geneva Convention") and the award is made in a country that has been notified as a convention country by India. India is a signatory to both the New York and Geneva Conventions. Under the Arbitration Act, the procedure for the enforcement of foreign arbitral awards to which both the New York and Geneva Convention applies is provided under Part II of the Act.

Part II of the Act pertains to the enforcement of 'certain' foreign awards, it has been divided in two chapters. Chapter 1 deals with New York Convention awards. Foreign award is defined under Section 44 of the Arbitration Act as, "*foreign award means an arbitral award on the differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India*". Section 46 of the Arbitration Act provides the conditions as to when a foreign arbitral award shall be held to be binding upon the parties. Section 48 of the Arbitration Act is very important as it states as to the conditions for enforcement of foreign awards, it is a negatively worded section wherein it gives out the conditions as to when

1 *in the case of international commercial arbitration, court means the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court*

2 *Statement of Objects and Reasons for the Arbitration and Conciliation Act, 1996.*

the enforcement of a foreign award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the court proof about the existence of any one or more grounds mentioned in clauses (a) to (e) of sub-section (1), further such enforcement can also be refused if the court finds any of the grounds mentioned in clauses (a) and (b) of sub-section (2) of section 48 of the Act. As per section 49, if the court is satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that court and the court has to proceed further to execute the foreign award.

The recent amendment made to the Arbitration Act in 2015 has also guided the courts to follow the minimum intervention doctrine very seriously and the as the next section of the paper clearly enunciates that the courts consistently have undertaken in various cases to not interfere with the arbitration process unnecessarily.

## RECENT JUDICIAL TRENDS

This section of the paper looks at how the Indian judiciary has looked at the enforcement of the foreign arbitral award in recent cases. World over in order to usher in a pro arbitration regime, the focus of the national courts across jurisdictions has been to uphold party autonomy and limiting the role of the courts in the arbitral process. The situation is same in India wherein the courts have constantly been upholding the doctrines of minimum interference and party autonomy in all stages of the arbitration. In India, the party can approach the court in all three stages of the arbitration. Indian courts have always made the parties arbitrate their disputes if the same had been envisaged in their agreement, rather than litigate the disputes in the national courts. The aforementioned assertion is made in the view of the fact that courts in the country have constantly refused anti arbitration injunctions and have also refused to interfere with the enforcement of the foreign arbitral awards as well.

In the case of, "*Shri Lal Mahal Ltd. v. Progetto Grano Spa*"[3], the Hon'ble Supreme Court passed a landmark ruling on its own decision and significantly curtailed the scope of the expression, "public policy" as present under Section 48(2) (b) of the Arbitration Act and thereby limited the scope of the challenge to enforcement of the foreign arbitral awards in the country. It is important to note that previously the national courts were giving a very wide import to the word "public policy" to interfere with the foreign arbitral awards. The court had observed that Section 48 of the Arbitration Act does not in any way offer an opportunity to have a second look at the foreign award at the enforcement stage. The court affirmed that section 48 does not permit review of the award on merits and that the procedural defects in course of foreign arbitration do not necessarily imply that foreign award would be unenforceable.

Further in the case of, "*Cruz City 1 Mauritius Holdings v. Unitech Limited*[4]" the Delhi High Court refused to intervene in the award wherein one of the challenge to enforcement of foreign arbitral award was that the same is in violation of the foreign exchange laws of India, and it held that "*122. Even if it is accepted that the Keepwell Agreement was designed to induce Cruz City to make investments by offering assured returns, Unitech cannot escape its liability to Cruz City. Cruz City had invested in Kerrush on the assurances held out by Unitech and notwithstanding that Unitech may be liable to be proceeded against for violation of provisions of FEMA, the enforcement of the Award cannot be declined.*" "*123.... And thirdly, if Cruz City has been induced to make an investment on a false assurance of the Keepwell Agreement being legal and valid, Unitech must bear the consequences of violating the provisions of Law, but cannot be permitted to escape their liability under the Award*"

In another recent case of "*Zee Sports Ltd. v. Nimbus Media Pvt. Ltd*"[5]. the Bombay High Court refused to interfere with the arbitral award on merits and relied on the judgement in "*McDermott International Inc. v. Burn Standard Co. Ltd*[6]", where in the Supreme Court had observed that as under: "*52 The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to*

3 *Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012*

4 *] 2017 SCC OnLine Del 7810*

5 2017 SCC OnLine Bom 426

6 (2006) 11 SCC 181

*exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.".*

The Hon'ble Kerala High Court in the case of, "*Emmanuel Cashew Industries v. CHI Commodities Handlers Inc*[7]", while dealing with challenge to an arbitral award, observed that the mere filing of objections to the foreign award under Section 48 was not enough and the objector has to furnish "proof" of circumstances to satisfy any of the conditions mentioned in Section 48 of the Arbitration Act to refuse enforcement of the foreign award.

The Delhi High Court in the very recent judgment passed on 31 January 2018, in the case of *Daiichi Sankyo vs. Malvinder Mohan Singh* has refused to intervene in the foreign arbitral award passed in the favour of Daiichi Sankyo and it observed that under Section 48(2)(b) of the Act, the enforcement could be refused only if the award was contrary to the (i) fundamental policy of India (ii) interest of India and (iii) justice or morality. Further, the Delhi High Court affirmed that an award could not be said to be against the fundamental policy of Indian law in case there was violation of provisions of a statute but only if there was a breach of a substantial principle on which is Indian law is based upon.

Lastly in a very recent judgment, passed in the case of, "*Kandla Export vs. Oci Export Corporation*[8]" the Hon'ble Supreme Court had the opportunity to interpret the scope of Section 13 of the Commercial Courts Act and Section 50 of the Arbitration Act in light of the challenge to the execution of the foreign award under Section 13 of the Commercial Courts Act. The Hon'ble Supreme Court took a very pro-arbitration stand and refused to intervene by holding that appeals in respect of the arbitration proceedings are exclusively governed by the Arbitration Act and thereby the appeal provision of the Commercial Courts Act cannot be used be to circumvent the provisions of the Arbitration Act if no appeal is provided under the provisions of the Arbitration Act. In Line with the *Fuerst Lawson Ltd. vs Jindal Exports*[9] judgment, it was observed that the Arbitration Act was a self-contained code and thereby the amended Section 37 would hold precedence over the general provision contained in Section 13(1) of the Commercial Courts Act. The Hon'ble Supreme Court emphasized that interpretation given in the case was in consonance with the objective of the Arbitration Act, which is to ensure the speedy resolution of the disputes.

These judgments affirm the fact that the Indian courts have taken a very strict adherence to the principle of non-interference with foreign arbitral awards and have taken proactive steps to ensure their speedy execution, and thereby bolstering India's credentials as an arbitration friendly regime which is generally characterized by minimal intervention by the national courts and the speedy resolution of the arbitration proceedings.

7 MANU/KE/0329/2017

8 *CIVIL APPEAL NO. 1661-1663 OF 2018 @ SLP(CIVIL) No. 28582-28584 of 2017*

9 *(2011) 8 SCC 333*

# EXCEPTIONS TO THE LAW REGARDING NON-INCORPORATION OF ARBITRATION CLAUSE THROUGH GENERAL REFERENCE: WIDENING THE HORIZONS IN THE LIGHT OF INOX WIND LTD V. M/S THERMOCABLES LTD

*AKSHAT BAJPAI & ANMOL JASSAL*

## INTRODUCTION AND BRIEF FACTS

The Hon'ble Supreme Court, vide its judgment dated 05.01.2018 in the recent case of Inox Wind vs. Thermocables Ltd[10] has examined the scope of Section 7 (5) of the Arbitration and Conciliation Act, 1996 ("the Act"). In the process, the apex court judgment in the case of *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited* [11]("MR Engineers") was also distinguished. It also modified the settled position of law pertaining to the exception to the non-incorporation of arbitration clause contained in the general reference of a contract by holding that, "*a general reference to a standard form of contract of one party will be enough for the incorporation of the arbitration clause*".

The dispute in the instant case arose out of a contract pertaining to two purchase orders dated 13.12.2012 and 02.02.2013 for the supply of thermocables to Inox Wind (hereinafter to be referred as, "**the Appellant**" by Thermocables Ltd (hereinafter to be referred as "**the Respondent**".

As per the purchase order, the supply was to be made according to the terms and conditions mentioned in the order and the Standard Terms & Conditions which also contained the dispute resolution clause and the same was not disputed by the Respondent. When the dispute arose, an application under Section 11 (6) of the Arbitration and Conciliation Act (hereinafter referred as, "the **Arbitration Act**") was filed before the Hon'ble Allahabad High Court wherein the Hon'ble High Court dismissed the application on the ground that the Appellant had failed to prove the existence of a valid Arbitration Agreement. It was under this circumstance that the present SLP arose before the Hon'ble Supreme Court, challenging the impugned judgment of the Hon'ble Allahabad High Court.

10 [Civil Appeal No. 19 of 2018]

11 (2009) 7 SCC 696

## WIDENING OF EXCEPTIONS

The Hon'ble High Court while dismissing the application under Section 11 of the Arbitration Act had relied upon the case of *M.R. Engineers and Contractors Private Limited* v. *Som Dutt Builders Limited*[12] wherein it had been held that an arbitration clause cannot be said to have been incorporated into the purchase order if there is no special reference to the arbitration clause in the standard terms and conditions. On a purposeful interpretation of Section 7(5) of the Arbitration Act, 1996, it was observed that a conscious acceptance of the arbitration clause in another document is required for incorporating it into the contract. In a nutshell, general words of reference or incorporation are not sufficient for referring the dispute to arbitration and a particular reference to arbitration clause is required.

Before arriving at its conclusion, the Hon'ble Supreme Court also traced the development of English law on the subject and appreciated the differences that exist in deciding whether a general reference is sufficient for incorporation in single contract cases as well as double contract cases. The Hon'ble Supreme Court then observed that in the case of *M.R. Engineers (supra)*, it was held that in single contract cases, general reference is enough for incorporation of an arbitration clause from a standard form of contract. In the same case, which has been discussed elaborately by the Supreme Court, it was held to be a rule that arbitration clause in an earlier contract cannot be incorporated by a general reference. The exception to the rule is a reference to a standard form of contract by a trade association or a professional institution. The Court finally held that although a general reference to an earlier contract is not sufficient for incorporation of arbitration clause, a general reference to a standard form would be enough for incorporation of the arbitration clause by relying upon the 24th Edition of Russell on Arbitration.

12 [(2009) 7 SCC 696

## CONCLUSION

Coming to the conclusion, it was observed by the bench that the Russell on Arbitration's 24th Edition (2015) had gone through changes and had departed from the position taken in 23rd edition (2007) of the book, which was the basis of the reasoning in the MR Engineers case. The bench elucidated that contrary to MR Engineers there is no distinction that is drawn between standard forms by recognized trade associations or professional institutions for incorporation of an arbitration clause by reference on the one hand and standard terms of one party on the other hand. The Court also examined the development of case laws in England by referring to the decision of the Queen's Bench in the case of *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL*[13]. Thus, in light of the development of law regarding incorporation after the judgment in M.R. Engineers, it was held that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, it was held that general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause.

13 [2010] EWHC 29 (Comm)

# ANALYSIS OF THE JUDGMENT *HIMANGNI ENTERPRISES V KAMALJEET SINGH AHULWALIA* (2017) 10 SCC 706 PASSED BY THE HON'BLE SUPREME COURT OF INDIA

*RUCHIKA DARIRA*

In a recent decision passed by the Hon'ble Supreme Court of India in the matter titled as "*Himangni Enterprises v Kamaljeet Singh Ahulwalia*", [14]the Hon'ble Supreme Court bench comprising of Hon'ble Justices R K Agarwal and Justice Abhay Manohar Sapre has reinforced the catena of decisions that bar the arbitrability of landlord- tenant disputes on the grounds of involvement of rights *in rem* and public policy.

In the present matter, the Appellant filed an appeal before the Hon'ble Supreme Court against the final judgment and order of the Hon'ble High Court of Delhi in F.A.O. No.344 of 2016 wherein the High Court upheld the decision of the District Court in rejecting the Appellants' application under Section 8 of the Arbitration and Conciliation Act, 1996 (*herein after refereed as* "Act"). The said application under Section 8 of the Act was filed by the appellant in the suit for eviction and permanent injunction filed by the Respondents against the Appellant.

## BRIEF FACTS:

In the instat case, the Respondents had entered and executed a lease deed dated 31st August, 2010 (*herein after referred as* "the said deed") with the Appellant. The said deed was for a period of 3 years with effect from 7th October, 2010. After the expiry of the said deed, no fresh deed was executed between the Respondents and the Appellant.

Subsequently, the Respondent filed a suit being C.S. No. 132/2016 against the appellant on 17.08.2015 in the Saket District Court inter- alia seeking the Appellant's eviction from the premises in question and claiming some unpaid arrears of rent and a grant of permanent injunction against the Appellant.

"The appellant, on being served with the notice of the civil suit, filed an application under Section 8 of the Act. According to the appellant, since the cause of action was based on the said deed, which contained an arbitration clause, the parties were bound by the same and the suit had to be referred to arbitration. The Appellant further argued that the Delhi Rent Act, 1995 was not applicable to the premises in question by virtue of Section 3(1)(c) of the same, and hence, the dispute was not solely within the purview of the civil court. The Respondents (being the Plaintiff in the C.S. No. 132/2016) vehemently opposed the said application on the ground that the said deed has come to an end by efflux of time and moreover the subject matter of the civil suit was incapable of being referred to arbitration. The District Court upheld the argument of the Respondents and dismissed the application of the Appellant.

Being aggrieved of the decision passed by the District Court, the Appellant filed an appeal before the Hon'ble Delhi High Court. The Hon'ble High Court upheld the decision District Court, giving rise to the present appeal before the Supreme Court.

## DECISION OF THE SUPREME COURT:

After hearing the arguments of the Appellant and the Respondent, the Court was of the view that question arising from the present appeal filed by the Appellant had been extensively discussed in various decisions passed by the Hon'ble Supreme Court in favour of the Respondents and against the Appellant.

The Court also placed reliance on *Natraj Studios (P) Limited v Navrang Studios* [15] and *Booz Allen & Hamilton Inc v SBI Home Finance Limited* [16]. In both the cases, the Supreme Court has held eviction and tenancy matters are governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

The court also rejected the argument of the Appellant with respect to that the Delhi Rent Act, 1995, was not

14 (2017) 10 SCC 706

15 1981 AIR 537

16 [(2011) 5 SCC 532]

applicable to the present dispute by virtue of Section 3(1)(c) of the said Act and dispute between the parties should have been referred to arbitration. The Supreme Court held that the mere preclusion of the Delhi Rent Act, 1995 from application did not mean that the Arbitration & Conciliation Act, 1996 would automatically apply to the present dispute. The court further held that in such a situation, the rights of the parties would be governed by the Transfer of Property Act, 1882. Therefore, the Supreme Court has again reinstated the bar on the arbitrability of landlord- tenant disputes on the grounds of involvement of rights *in rem* and public policy.

# THE AWARD PASSED ON THE POINT OF LIMITATION IS AN INTERIM AWARD

*SWATI SINHA*

In a recent judgment delivered on 23rd January 2018, in the matter of **M/s Indian Farmers Fertilizer Co-Operative Limited vs. M/s Bhadra Products** the Hon'ble supreme Court of India dealt with the ticklish issue of limitation and if an award passed on the basis of limitation would come under the purview of an "Interim Award" as defined under Section 2 (C) of the Arbitration and Conciliation Act 1996 "hereinafter referred to as the **ACT** ''and how an interim award passed can be challenged separately and independently under Section 34 of the Act.

The Interim Award is contemplated under **Section 31(6)** of the Act as:-

"*The Arbitral Tribunal may, at any time during the Arbitral proceedings, make an interim award on any matter with respect to which it may make a final arbitral award*"

## THE FACTUAL MATRIX OF THE PRESENT CASE

The Appellant issued a tender enquiry to 19 parties, including the Respondent, for supply of Defoamers. The Respondent submitted its bid, pursuant to which a Letter of Intent dated 2nd November, 2006 was issued to the Respondent for supply of 800 Metric Tonnes of Defoamers to be used for production of 3,08,880 Metric Tonnes of P2O5. By 11th April, 2007, the Respondent had supplied 800 Metric Tonnes of Defoamers, however, they could not achieve the targeted production by the end of 1st November, 2007, which was the validity of the supply period. After considerable delay, on 6 th June, 2011, the Respondent issued a legal notice demanding payment of Rs.6,35,74,245/- on 27th September, 2012. The Appellant made it clear that there was nothing due and payable to the respondent. Since disputes arose between the parties, on 1st October, 2014 the Respondent invoked arbitration, and on 25th January, 2015, Justice Deepak Verma, a retired Judge of the Supreme Court, was appointed as the sole arbitrator. On 3rd March, 2015, issues were framed. On 23rd July, 2015, the learned Arbitrator thought it fit to take up the issue of limitation first, inasmuch as the counsel appearing for both the parties submitted that this issue could be decided on the basis of documentary evidence alone. This issue was then decided in favor of the claimant stating that their claims had not become time barred. A petition filed under Section 34 of the Act challenged the aforesaid award, styling it as the 'First Partial Award'. On 8th October, 2015, the District Judge, Jagatsinghpur, dismissed the Section 34 Petition stating that the aforesaid award could not be said to be an interim award and that, therefore, the Court lacked jurisdiction to proceed further under Section 34 of the Act. The appeal to the High Court of Orissa was dismissed by the impugned order dated 30th June, 2017, reiterating the reasoning of the learned District Judge.

## PERTINENT ISSUES THAT EMERGED FOR CONSIDERATION IN THE PRESENT JUDGMENT

(a) Whether an award on the issue of limitation can first be said to be an interim award ;

(b) (b) Whether a decision on a point of limitation would go to jurisdiction and, therefore, be covered by **Section 16** of the Act;

## CONCLUSION

The Hon'ble Supreme Court of India held as under:-

" *We are of the view that such an award, which does not relate to the arbitral tribunal's own jurisdiction under Section 16, does not have to follow the drill of Section 16(5)* and (6) of the Act. Having said this, we are of the view that Parliament may consider amending *Section 34* of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34 can be made after the delivery of the final arbitral award .Piecemeal challenges like piecemeal awards lead to unnecessary delay and additional expense."

It is therefore safely culled out form the judgment that while deciding the matter, the Hon'ble Supreme Court of India took a view that the issue of limitation is an

independent matter that strikes at the very root of the ongoing arbitration between the parties that needs to be decided forthwith, hence it was held that the said award has colors of an interim award and the said award decided the issue of limitation with absolute finality and it therefore comes under the ambit of an "interim award" which can be challenged separately and independently under Section 34 of the Act . However a concern was raised on the additional expenses borne by the parties on the decision of issues in a piecemeal manner while passing of interim awards and the same needs to be consolidated under one umbrella of "Final Award".

# SIAC PROPOSAL FOR CROSS-INSTITUTIONAL CONSOLIDATION OF INTERNATIONAL ARBITRATION PROCEEDINGS

*RUPESH GUPTA*

## INTRODUCTION

Recent times have seen rapid developments in the field of arbitration not just in India but world-over. An overall pro-arbitration view has been adopted with passage of time and almost every institution and legislature has been deliberating on making the arbitration process more effective, efficient and authoritative. An apt example of this is the passing of Arbitration and Conciliation (Amendment) Act, 2015 in India with salient features and changes to achieve the preamble of the arbitration statute in India. Recognizing certain shortfall in the present system relating to international arbitration proceedings, the Singapore International Arbitration Centre (**"SIAC"**) has recently proposed cross-institutional consolidation of international arbitration proceedings. This Article seeks to analyze the need for such consolidation of cases and the challenges that may be faced if such a proposal is accepted and sought to be implemented.

## NEED OF THE HOUR

At present, the general rule is that related disputes can be consolidated and adjudicated together. This ensures that there is a single decision that covers all matters of issue between the parties and there are no contrary decisions arising out of the same factual matrix. A problem arises when there are multiple agreements between the same parties or related parties and each of these agreements are subject to a different set of institutional arbitration rules. Now, under the present regime, arbitrations conducted by the same institution can be consolidated however, no such consolidation can take place when parties have subjected themselves to different institutional arbitrations under their agreements.[17] This means that there will be concurrent proceedings on similar matters between the same parties giving rise to multiple decisions that may be contrary to each other and hence pose a problem at the time of enforcement of award. The proposal by SIAC aims to eliminate multiplicity of decisions in connected matters thereby also reducing inconsistency in decisions. It seeks to provide a one-stop solution for inter-related matters and provides cost-effective solution as now, a single arbitration will effectively deal with all issues arising between the parties thus also allowing a comprehensive solution to the matter.

## THE ROAD AHEAD

SIAC has addressed various issues that will come up once such a proposal is accepted. The major issues involved in implementing this proposal are:

1. **Governing rules**- The first issue will be the decision as to whether matters should be consolidated and if yes, which institutional rules will govern the arbitration. SIAC proposes two alternatives for this problem. The fist alternative is setting up of a joint committee which will decide applications for consolidation and the institutional rules that will govern the proceedings. The other alternative suggested is to appoint one institution that will decide these applications and the criteria for consolidation.

2. **Uniformity of rules among institutions-** The effective implementation of this proposal requires that all institutions have a uniform set of rules with respect to criteria for deciding consolidation applications as well as the procedure to be followed once an application is approved. The criteria for consolidation should be clearly set out and the reasons for allowing an application for consolidation should also be given in each decision in order to ensure transparency. Setting out reasons will also ensure that a judicial review is readily possible when required.

3. **Party Autonomy-** The proposal envisages that once the parties have expressly selected the institutional rules, they are deemed to have ac-

*17 SIAC, "Memorandum Regarding Proposal on Cross-institution Consolidation Protocol". Available at: http://www.siac.org.sg/images/stories/press_release/2017/Memorandum%20on%20Cross-Institutional%20Consolidation%20(with%20%20annexes).pdf*

cepted the provisions for consolidation. Now, there might be situations where parties do not wish to consolidate matters and such automatic approval to consolidation undermines party autonomy. The rules should provide for a mechanism whereby parties may opt-out of such consolidation and are free to take up their disputes before different institutions.

4. **Partial Consolidation**- There will be situations wherein consolidation of all related disputes will not be possible. The final set of rules need to address the issue of partial consolidation of cases in such a situation.

5. **Enforcement-** Another issue that may arise is the enforcement and validity of an award passed pursuant to the consolidation. On a challenge to such an award, the concerned court of a country may come to a finding that the award is not enforceable as the consolidation was improper or unwarranted. In such situations, the very purpose of this provision will be lost as instead of increasing efficiency and ease it will result in creating additional hurdles for the winning party.

## CONCLUSION

The idea of consolidating proceedings across institutions sounds very convenient in theory. However, its implementation poses many challenges, some of which will only come to the fore when this proposal is finally implemented. The adoption of this practice would undoubtedly require streamlined and uniform rules across institutions. The cross-institution consolidation proposal is designed to facilitate the efficient and enforceable resolution of international commercial disputes, which is expected to provide significant gains for parties. The proposal is indeed a welcome step as it will save substantial costs, time and will enable the matters to be decided via one institution. However, a question arises as to how consolidation of cases pending before different institutions is beneficial for the institutions as well. The stance of other leading institutions on this matter is yet to be seen. We look forward to further updates and deliberation on this subject as arbitration is the prevalent alternate dispute resolution mechanism in present and for the future.

# IMPOSITION OF LIQUIDATED DAMAGES IS NOT THE PREROGATIVE OF THE EMPLOYER

*RAHUL PANDEY*

"Damages" for breach of contract refers to the compensation for any damage or injury or inconvenience suffered by the other party as a consequence of the breach. Aggrieved party can claim damages as a matter of right but the court has the discretion in determining the 'quantum' of damages. Common law principles governing the grant of damages are codified in Section 73-75 of the Indian Contract Act, 1872 [hereinafter referred as "**The Act**"].

Employers generally have the Liquidated Damages [hereinafter referred as '**LD'**] clause in contracts. Such clauses provide that in case of breach, say on the account of delay in completion of work, LD will be levied or imposed as a consequence thereof. Such stipulations are covered under Section 74 of the Act. The court is not bound to award the amount mentioned in contract as damages but can award a reasonable compensation not exceeding the amount mentioned.

The moot questions being explored by this article are: i) when the employer can impose 'LD'? ii) Whether the employer is entitled to realise the LD so imposed? This article aims at understanding court's approach in levying and realizing LD in the case of works/ construction/building contracts.

## 1. Employer's right to impose Liquidated Damages or Penalty

As explained in the above paragraphs, LD is essentially damages predetermined by the parties at the time of making of contract irrespective of whatever actual damages may be. These damages may be for breach of entire contract or breach of a particular term in the contract.[18] Parties can have different amount for the breach of different terms of the contract. In *J G Engineers Pvt. Ltd* v. *Union of India*[19] the Hon'ble Supreme Court held that a party can impose LD only if the other party has committed the breach and that must have been adjudicated by the court or arbitrator.

It is pertinent to note here that the employer cannot unilaterally determine the breach and impose LD. There has to be an adjudicatory process provided in the contract, the courts in absence of such process have refused to enforce the clauses authorizing the employer from quantifying the damages on its own.[20] Thus, before the breach is adjudicated by court or arbitrator the employer cannot impose any LD on the contractor. If he does so, the same will be illegal or perverse.[21]

Also, the employer cannot impose the LD without giving the defaulting party a reasonable notice to remedy the 'delay' or 'breach'.[22] The requirement of giving notice is not a mere formality. The employer is obligated to give a detail notice stating clearly the breach complained of, time to remedy such breach and consequences in case the breach is not remedied within the specified period.

## 2. Liquidated Damages or Reasonable Compensation

As noted earlier that section 74 provides that on the account of breach the party is entitled to either the fixed sum or penalty or the reasonable compensation not exceeding the amount of sum agreed or penalty stipulated in the contract. The Hon'ble Apex Court in *Kailash Nath* v. *Delhi Development Authority*[23] laid down the guidelines for determining whether parties are entitled to 'liquidated damages or reasonable compensation'. For the sake of brevity the basic principles are summarised below:

a) Sum named in the contract is payable as the liquidated damages only if it is 'genuine pre-estimate of damages' otherwise the parties is entitled to only reasonable compensation not exceeding the fixed sum mentioned in the contract;

18 *Engineering Projects (India) Ltd v. B K Constructions, AIR 2012 Kant 35 (DB).*

19 *J G Engineers Pvt. Ltd v. Union of India, AIR 2011 SC 2477.*

20 *Bharat Sanchar Nigam Ltd v. Motorola India Pvt. Limited, (2009) 2 SCC 337.*

21 *Indian Oil Corporation v. Lloyds Steel Industries, (2007) 4 ArbLR 84 (Del).*

22 *Kailash Nath Associates v. Delhi Development Authority, (2015) 4 SCC 136.*

23 *Id.*

b) If any penalty is stipulated in the contract then only reasonable compensation is awarded not exceeding the amount so fixed for the penalty;

c) In case the court decides to award reasonable compensation, the basic principles of section 73 shall apply in assessment of compensation;

d) Proof of damage or loss is a *sine qua non* for grant of reasonable compensation under Section 74 and such proof is dispensed only if damages are difficult or impossible to prove and liquidated damages are genuine pre-estimate of damages.

Thus, the employer is entitled to claim LD only if the court/arbitrator finds that these are genuine pre-estimate of damages otherwise he will be entitled only for reasonable compensation assessed according to the well settled principles of Section 73.

2.1. *Whether the sum claimed is a Penalty or Liquidated damages?*

Penalty in a contract is a payment stipulated as *in terrorem* or as a punishment. The purpose of penalty is not compensating the other party but to ensure the performance of contract. It is necessary to determine whether the fixed amount payable on breach is 'penalty' or 'LD' because in case it is a penalty the employer will be entitled only to a reasonable compensation otherwise it is entitled to LD if that is a genuine pre-estimate of damages.[24]

**3. No Damages payable when liquidated damages awarded**

Where the parties to a contract have included a specified sum of money to awarded as damages in case of breach of contract, and then it must be taken to exclude the right to claim an unascertained sum of damages. The right to claim LD is enforceable under section 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises.[25]

The effect of Section 74 is that a party to the contract is not entitled to the full amount specified under the contract unless the employer proves that it has really suffered damages to the extent of full amount or where the Court considers that the full amount is reasonable compensation that may be awarded in the circumstances of the case.

**4. Forfeiture of employer's right to impose LD**

The employer's right to realize LD is forfeited in certain circumstances such as:

a) Waiver: When there is a breach of contract, the employer can either elect to affirm the breach and claim LD or ignore the same and grant continuation of the contract. In case he chooses not to elect the breach as repudiatory breach, he is disentitled to claim LD. He would have said to waive off his right to claim LD and the right to claim the same will be forfeited.[26]

b) Employer himself is at fault: Where a clause in the contract stipulated levy of LD if the work is not done with due diligence and the delay occurred due to failure on part of the employer to supply materials in the required time. It was held that imposition of damages by the employer could not be justified.[27]

## CONCLUSION:

LD is consequential of breach of contract. It is imperative for the employer to first establish the breach and then impose LD. As discussed earlier, party alleging the breach cannot determine the breach on his own and stipulations in the contract providing for imposition of LD without an adjudicatory process are void in terms of Section 28 and Section 74 of the Act. Thus, a unilateral imposition of LD without adjudication of the breach is not only legally tenable but also commercially unsound. The imposition and realization of LD due to delay in completion of a part of contract financially overburden the constructor and in due course results in non-completion of whole contract. Hence, employer prerogative to impose LD is not unfettered but restrictive.

24 *Belco Enterprises v. DTC, OMP No. 498/ 2007, Delhi High Court decided on 21 January 2010.*

25 *Sir Chunilal V. Mehta and Sons Ltd. vs. Century Spinning and Manufacturing Co. Ltd., 1962 Supp. (3) SCR 549*

26 *J G Engineers Pvt. Ltd v. Union of India, AIR 2011 SC 2477, in this case there was delay in completion of work and respondent granted the extension without levying LD.*

27 *Oil and Natural Gas Commission v. Shyam Sunder Agarwalla and Co., AIR 1984 Gau 11.*

# INTRICACIES INVOLVING TERMINATION OF A CONTRACT WITHOUT ADHERING WITH THE DUE PROCEDURE

*SURBHI DARAD*

Termination of contract is considered to be lawful when a legitimate reason exists to end the contract before performance has been completed. Termination of a contract is a basic means to end the contract. Under the Indian Contract Act, 1872 (hereinafter to be referred as "the **Contract Act**"), on one hand, a contract can be validly terminated by giving legitimate reasons. For example, by frustration, breach or prior agreement. Whereas, on the other hand, a termination can in itself become a breach of contract if it can be classified as wrongful termination.

Repudiatory breach is one of the underlining principles to terminate a contract validly. It simply means a contravention of a stipulated situation which goes so much into the root of the contract that it makes further commercial performance of a contract impossible"[28]. A Repudiatory Breach can occur if the party does not intend to perform its part of under the contract any further or does acts which are inconsistent with the terms of the contract. Such an act ultimately affects the rights of the other party. Consequently, in case of such breach the option available to the other party is either to terminate the contract or to continue the contract by repairing the breach. If the party chooses the former one, then it generally, must be done in fair and reasonable manner as the termination is also subjected to principles of natural justice[29]. However, in some exceptional circumstances, a termination following repudiatory breach of contract can be justified even if principles of natural justice or the procedure given in the agreement is not followed.

In the case of *Air India Ltd. vs. GATI Ltd.,* 2015 it was held that "in case of repudiatory breach of contract by one party, termination of the contract by the other party is justified even if the procedure is not followed". Inaction or delay on the part of the one party can make the procedure given for termination superfluous as non-adherence of the procedure may not suffer the party which committed breach due to their inactions.[30] In another case of *Deva Builders through M.R. Rattan vs. Nathpa Jhakri Joint Venture,* 2002 the Hon'ble Court held that "although the Defendant has not given the requisite notice terminating the contract but it was the Plaintiff who had committed breach of the contract by not executing the work in accordance with the terms and conditions of the agreement."

Therefore, it can well be stated that non-adherence with the termination procedure can, sometimes, be accepted on the basis of compelling circumstances of the case. However, it is also admitted that non-compliance of the procedure may lead to damages being imposed for wrongful termination of contract[31]. The claim of damages and their quantification would depend upon (i) the nature of injury; (ii) the injured party's responsibility therefore and the extent thereof; and (iii) the nature and extent of injuries caused to the parties on each other.[32]

Other than repudiatory breach, a contract can also be terminated in order to mitigate losses. In support of this proposition, authority of *Bharat Petroleum Corporation Limited & Anr. Vs. M/s Jethanand Thakordas Karachiwala & others,* 1998 can be cited wherein due to loss suffered by the Appellant, there was no alternative before them other than to terminate the contract. The court, in the instant case held that "The contract could not be specifically enforceable and Defendant Company could not be compelled to continue the distributorship of the agent who has duped not only the defendants but even the customers." This conclusion is also in consistence with the judgement *Strategic Outsourcing, Inc. vs. Continental Casualty Company,* 2008. In this case, the Court of Appeal for the Fourth Circuit stated that when a party loses a substantial amount of money under the contract and the negotiation is impossible, then a motive to terminate the contract is neither wrongful nor unconscionable. It further specifically

28 *VIACOM 18 Media Pvt. Ltd. vs. MSM Discovery Pvt. Ltd., 2011, para 112-113.*

29 *Hindustan Petroleum Corp. Ltd. vs. Super Highway Services and Anr. 2010.*

30 *D.L.F. Universal Ltd. vs. Atul Limited, 2009.*

31 *State of Madhya Pradesh and others vs. Respondent: M/s. Recondo Limited, Bhopal, 1989.*

32 *Supra note. 1, para 160.*

held that "a party's desire to avoid financial losses constitutes reasonable grounds for declining to perform otherwise applicable contractual obligations."

From the aforementioned judgments, it can be concluded that termination of contract is generally subjected to the principles of natural justice but repudiatory breach or non-performance or delay caused by one party may entitle the other party to terminate the contract even without following the procedure stated in the agreement. The underlying reasoning that appears to be behind this is the fact that if one of the parties has already manifested its intention not to bound by contract, the other party cannot be put under unnecessary compulsion of complying with the technical procedure as given in the contract.

# CAN THE HIGH COURT ENTERTAIN A WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION IF AN ALTERNATIVE STATUTORY REMEDY IS AVAILABLE?

*PRANNOY RAIKHY*

The Hon'ble Supreme Court in the case of "***Authorized Officer, State Bank of Travancore and Ors. Vs. Mathew K.C.", MANU/SC/0054/2018,*** whereby, the Appellant / Bank assailed an interim order dated 24.04.2015 passed in a writ petition Under Article 226 of the Constitution, staying further proceedings at the stage of Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as the 'SARFAESI Act'), held that the Hon'ble High Court ought not to entertain a writ petition Under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person.

## BRIEF FACTS:

The loan account of the Respondent / borrower was declared a Non-Performing Asset (NPA) on 28.12.2014. Despite repeated notices, the Respondent failed and neglected to pay the dues. Statutory notice Under Section 13(2) of the SARFAESI Act was issued to the Respondent on 21.01.2015. The objections Under Section 13(3A) were considered, and rejection was communicated by the Appellant on 31.3.2015. Possession notice was then issued Under Section 13(4) of the Act read with Rule 8 of The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules') on 21.04.2015. Aggrieved against the order passed Under Section 13(3A) of the SARFAESI Act, the Respondent / borrower filed a writ petition Under Article 226 of the Constitution, staying further proceedings at the stage of Section 13(4) of the SARFAESI Act. The outstanding dues of the Respondent on the date of the institution of the writ petition was Rs. 41,82,560/-.

## LEGAL ISSUE:

Whether a High Court can entertain a writ petition under article 226 of the constitution if an alternative statutory remedy is available?

## SUBMISSION BY THE APPELLANT:

The Appellant / Bank submitted that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved Under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India v. Satyawati Tandon and Ors., 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. v. Ikbal and Ors., 2013 (10) SCC 83. The writ petition ought to be dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same.

## SUBMISSION BY THE RESPONDENT:

It was contended by the Respondent / borrower that it was desirous to repay the loan, and merely sought regularization of the loan account. The inability to service the loan was genuine, occasioned due to market fluctuations causing huge loss in business, beyond the control of the Respondent. The failure of the Bank to consider the request for regularization of the loan account, the absence of a right to appeal Under Section 17 against the order passed Under Section 13(3A), the Respondent was left with no option but to prefer the writ application as the Respondent genuinely desired to discharge the loans.

## DECISION:

The Hon'ble Supreme Court after considering the submissions on behalf of the parties observed that the discretionary jurisdiction Under Article 226 of the Constitution is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal Rule is that a writ petition Under

Article 226 ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in *Commissioner of Income Tax and Ors*[33]., It was held that the pleadings in the writ petition are very bald and contain no statement that the grievances fell within any of the well defined exceptions. The allegation for violation of principles of natural justice is rhetorical, without any details and the prejudice caused thereby. It harps only on a desire for regularization of the loan account, even while the Respondent acknowledges its own inability to service the loan account for reasons attributable to it alone.

The writ petition was clearly not instituted bonafide but patently to stall further action for recovery, as the fact that the Section 13(4) notice was issued on 21.04.2015 and the remedy u/s 17 of the SARFAESI Act was available was not placed before the Court when the impugned interim order came to be passed on 24.04.2015. Also, it is nowhere pleaded why the remedy available Under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing it.

,Lastly, the Hon'ble Supreme Court observed that it is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same.

The Hon'ble Supreme Court observed that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. As such, the impugned order is contrary to law laid down by this court and is unsustainable.

*33 2014 (1) SCC 603*

# BITCOIN (CRYPTO CURRENCY): RECENT REGULATORY STANCES

*RAJDUTT S SINGH*

Bitcoin is a digital currency that allows people to buy goods and services and exchange money without involving banks, credit card issuers or other third parties. On 24 December 2013, the Reserve Bank of India ("***RBI***") issued a press release and cautioned users, holders and traders of virtual currencies ("***VCs***"), including Bitcoins, about the potential financial, operational, legal, customer protection and security related risks.

RBI clarified vide the aforesaid Press release that the creation, trading or usage of VCs including Bitcoins, as a medium for payment are not authorized by any central bank or monetary authority. Further, the said RBI press release claimed that no regulatory approvals, registration or authorization have been obtained by the entities concerned for carrying on such activities. RBI stated that such VCs may pose certain risks which include *inter alia*:

(i) VCs are prone to losses arising out of hacking, loss of password, compromise of access credentials, malware attack etc.

(ii) There is no underlying or backing of any asset for VCs. As such, their value seems to be a matter of speculation.

(iii) VCs, such as Bitcoins, are being traded on exchange platforms set up in various jurisdictions whose legal status is also unclear. Hence, the traders of VCs on such platforms are exposed to legal as well as financial risks.

In the wake of significant spurt in the valuation of many VCs and rapid growth in Initial Coin Offerings (ICOs) and keeping in view rampant increase in the trading of VCs including bitcoin, the RBI vide press release dated 1 February 2017 and 5 December 2017 advised that RBI has not given any licence / authorisation to any entity / company to operate such schemes or deal with Bitcoin or any virtual currency. As such, any user, holder, investor, trader, etc. dealing with Virtual Currencies will be doing so at their own risk.

## SUPREME COURT ON BITCOIN

Recently, in November 2017, a Public Interest Litigation ("***PIL***") was filed before the Hon'ble Supreme Court of India for seeking issuance of directions *inter alia* to regulate the flow of Bitcoin (crypto money). As per the said PIL, no regulator be it, SEBI, authorities under FEMA or money laundering Act or even the income tax officials have got no power to track, monitor and regulate crypto money account to crypto money account transfers. The said PIL further stated that Bitcoin (crypto money) is neither falling under the definition of money/currency nor share/debenture/ commodity but is an entity with financial value and hence liable to be made subject to statutory regulation of some kind.

The Hon'ble Supreme Court of India was pleased to issue notice to the ministries of Finance, Law and Justice, Information Technology, market regulator SEBI and the RBI and sought their response to the PIL.

## VCS UNDER REGULATORS' SCANNER

Recently, the Income Tax (I-T) Department conducted survey operations at major Bitcoin exchanges across the country including in Delhi, Bengaluru, Hyderabad, Kochi and Gurugram, on suspicion of alleged tax evasion. The survey, under section 133A of the Income Tax Act, was conducted for gathering evidence for establishing the identity of investors and traders, transaction undertaken by them, identifying counterparties, related bank accounts used, etc.[34]

## CONCLUSION

Since 2013, the RBI has released on three occasions (two of them were issued in 2017) cautionary notifications on cryptocurrencies relating to potential economic, financial, operational, legal, customer protection and security related risks associated in dealing with such virtual currencies including bitcoins. However, there has been no regulatory action as it is a grey area and there exists uncertainty to determine

34 *http://www.moneycontrol.com/news/india/bitcoin-now-under-ed-scanner-what-various-regulatory-authorities-in-india-have-to-say-about-the-cryptocurrency-2466083.html*

who regulates the new technology of virtual currencies. Hopefully, the Government of India would undertake pragmatic approach to regulate this arena at the instance of the Apex Court.

# UNION BUDGET 2018: BUDGET FOCUSES ON HEALTHCARE

*VIJAYLAXMI RATHORE*

The Union Budget 2018 was presented by Finance Minister (FM) Arun Jaitey on February 01, 2018. The major announcements of Union Budget 2018 related to Health sector are being discussed in this article, the Schematic outlays of health sector budget allocation is also being described in the tables below :-

## SCHEMATIC OUTLAY OF HEALTH SECTOR BUDGET ALLOCATION:

| Ministry/Department/ Scheme Name | FY 2017-18 | FY 2018-19 |
|---|---|---|
| **Health & Family Welfare** | **47,353** (crore) | **52,800** (crore) |
| Pradhan Mantri Swasthya Suraksha Yojna (PMSSY) | 3,975 | 3,825 |
| National AIDS and STD Control programmme | 2,000 | 2,100 |
| National Rural Health Mission | 21,189 | 24,280 |
| National Urban Health Mission | 752 | 875 |
| Human Resoruces for Health & Medical Education | 4,025 | 4,225 |
| Tertiary care programme | 725 | 750 |
| Rashtriya Swasthya Bima Yojana (RSBY) | 1,000 | 2,000 |
| | | |
| **AYUSH** | 1,429 | 1,626 |
| National Ayush Mission (NAM) | 441 | 504 |
| | | |
| **Health Research** | 1,500 | 1,800 |

- ***Healthcare gets a big boost with announcement of National Health Protection Scheme*** – The finance minister has announced that the government will provide health insurance worth Rs 5 lakh to 10 crore poor families across India. This will be the world's largest government funded health care programme.

- Primary, Secondary and Tertiary healthcare: 1.5 lakes health and wellness centres for primary, secondary and tertiary healthcare would provide comprehensive healthcare with free diagnostics treatment. This has been given a provision of Rs 1200 crore in the budget.

- Tuberculosis (TB) Patients: The Government has, decided to allocate additional `600 crore to provide nutritional support to all TB patients at the rate of `500 per month for the duration of their treatment.

- Setting up 24 new Government Medical Colleges and Hospitals: By upgrading existing district hospitals in the country. This would ensure that there is at least 1 Medical College for every 3 Parliamentary Constituencies and at least 1 Government Medical College in each State of the country.

- Health and Education Cess increased by 1%: The existing three per cent education cess will be replaced by a four per cent "Health and Education Cess" to be levied on the tax payable. This will enable government to collect an estimated additional amount of `11,000 crores.

- Proposals to modify custom Duty rates: under indirect tax regime the changes in custom duty to address the problem of duty inversion in medical device sector, further to provide adequate protection to domestic Perfumes and toiletry industry as described below-

| Items | Description | Rate of Duty | |
|---|---|---|---|
| | | From | To |
| Medical Devices | Raw materials, parts or accessories for the manufacture of Cochlear Implants | 2.5% | nil |
| Perfumes and toiletry preparations | Preparations for oral or dental hygiene, including denture fixative pastes and powders; yarn used to clean between the teeth (dental floss), in individual retail packages | 10% | 20% |

- **Amendments in Import duty – First Schedule to the Customs Tariff Act, 1975:**

The tariff rate of customs duty for the specified medical devices is being increased from 7.5% to 10%. The effective rate of import duty on such medical devices will, however, remain unchanged.

- Health insurance limit increased for senior citizen and salaried taxpayer:
  - Raising the limit of deduction for health insurance premium and/ or medical expenditure from 30,000/- to 50,000/-, under section 80D. All senior citizens will now be able to claim benefit of deduction up to `50,000/- per annum in respect of any health insurance premium and/or any general medical expenditure incurred.
  - Raising the limit of deduction for medical expenditure in respect of certain critical illness from, 60,000/- in case of senior citizens and from 80,000/- in case of very senior citizens, to 1 lakh in respect of all senior citizens, under section 80DDB.
  - In order to provide relief to salaried taxpayers, a standard deduction of 40,000/- in lieu of the present exemption in respect of transport allowance and reimbursement of miscellaneous medical expenses.
- **Promote cultivation of medicinal/ aromatic plants:** Indian ecology supports cultivation of highly specialized medicinal and aromatic plants. India is also home to a large number of small and cottage industries that manufacture perfumes, essential oils and other associated products. To support organized cultivation and associated industry the allocation of a sum of 200 crore is purposed.

## CONCLUSION:

The Union Budget 2018 has taken a step big leap towards achieving universal health coverage by making health care more accessible with the flagship National Health Protection Scheme initiative which should expand access to quality healthcare to the poor and under-privileged. The increase in health insurance limit should also lead to substantial boost in the healthcare insurance sector, Hospital sector should also make gains from this budget.

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