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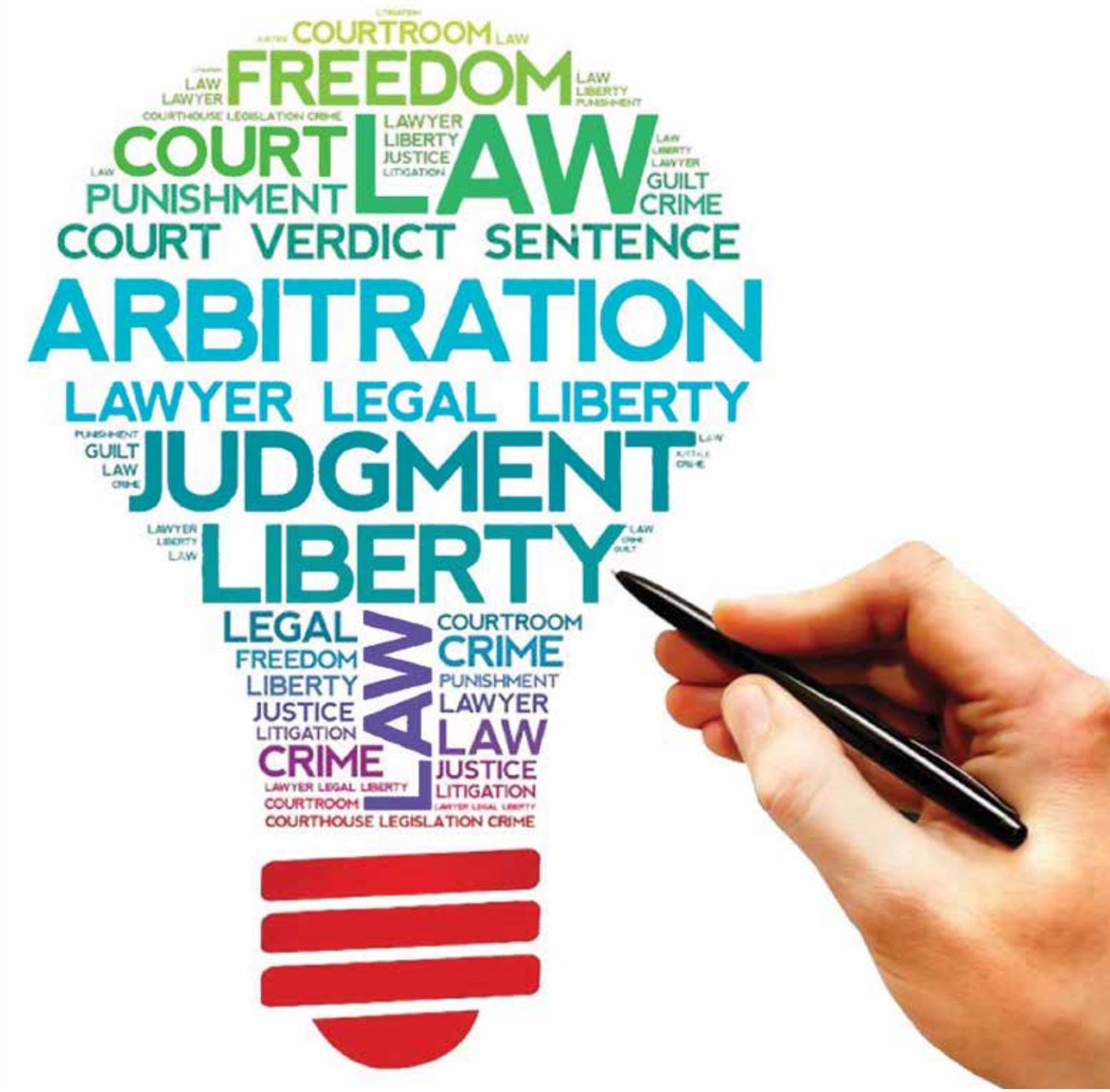

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Arbitration has been a dynamic field of dispute resolution since the enactment of the Arbitration (Amendment) Act on October 23, 2015. In the intervening 15 months, the legal fraternity and commercial world have witnessed a spurt of action and change both in the approach and interpretation of the law. The ball has been set rolling. However, are we on course to achieve what we set out for or is the target still out of sight?

The Amendment Act has introduced a multitude of provisions, some of which are as follows: flexibility to approach Indian courts for interim reliefs in aid of foreign-seated arbitrations, guidelines to determine ineligibility, independence, and impartiality of arbitrators, expeditious disposal with timelines for arbitration proceedings, judicial strength to interim orders passed by tribunals, costs-follow-event regime, narrow scope of review of awards and removal of an automatic stay on the execution of arbitral awards.

However, while the arbitration arena looks up to the silver lining, it continues to be marked with shadows of the old regime and a band of grey areas. Assorted interpretations of amendments by Indian high courts has brought to light an array of issues that necessitates clarity and purposive interpretation. The following content seeks to highlight certain issues. We expect that the Hon'ble Supreme Court will bring in greater clarity and certainty in arbitration law and resolve a majority of issues in 2017.

> When a majority of the amendments have been drafted with clinical precision and judicious foresight, it is up to the judiciary to eliminate shadows of the old Act and reinstate the laudable intention of legislators in fortifying the arbitration regime in the country

I. Retrospective or Retroactive: A question of construal or a matter of perspective?

Waves created over retrospective or retroactive provisions by Vodafone in 2014, albeit on the shores of tax, seem to have rolled onto the field of arbitration. Applicability of the Amendment Act under Section 26[1] remains the most significant and controversial provision so far.

View from the East; opposing the West and within:

In *Electro Steel Casting Limited v. Reacon (India) Pvt. Ltd.*,[2] the Calcutta High Court held that the Amendment Act would not apply to arbitration proceedings commenced prior to an amendment and to court proceedings arising thereto. Hence, the filing of a challenge post-amendment against an award passed prior to amendment would operate as an automatic stay on enforcement of the award. Conflicting within the court on a slightly different issue on pending court proceedings in *Tufan Chatterjee vs. Sri Rangan Dhar*,[3] a division bench held that the amendments would apply to court

[1] Section 26: Act not to apply to pending arbitral proceedings: - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act. [2] Application No.1710/2015, January 2016. [3] 2016 SCC Online Cal 483. [4] Arbitration Petition 868/2012, December 2016. [5] Chamber Summons No. 1530 of 2015. [6] Application No. 7674/2015 in O.P. 931/ 2015.

proceedings pending under Section 9 on the date of the amendment. Needless to say that the Amendment Act would necessarily apply to court proceedings instituted after the amendment.

In Board of Trustees of the Port of Mumbai vs. Afcons Infrastructure Ltd.,[4] the Bombay High Court held that the amendment would not apply to pending court proceedings under Section 34. A divergent ruling was rendered in Rendezvous Sports World vs. the Board of Control for Cricket in India.[5]

The South and North – poles apart?

In New Tirupur Area Development Corporation Ltd. vs. M/s Hindustan Construction Co. Ltd.,[6] the Madras High Court detected a distinction between the language of S. 85(2) in the Arbitration & Conciliation Act, 1940 and the amended Section 26, suggesting "intended" deletion of the words "in relation to" arbitration proceedings in the Amendment Act. It held that the Amendment Act would apply to court proceedings initiated after amendment, irrespective of emanating from an award made prior to amendment.

In a diametrically opposite ruling in Ardee Infrastructure Pvt. Ltd. vs. Anuradha Bhatia,[7] the Delhi High Court recently held that the term "to arbitral proceedings" should be given the same expansive meaning as "in relation to arbitral proceedings." This implies that the old Act would apply to arbitral proceedings commenced prior to the amendment, including court proceedings emanating from such arbitral proceedings, whether initiated before or after amendment. The court categorized cases into three buckets. The first bucket envisaged an award made and court proceedings initiated after amendment. The second dealt with an award passed prior to amendment and court proceedings initiated after amendment. The third bucket considered an award passed and proceedings initiated prior to amendment but pending at the time of amendment. The court held that if the term "arbitral proceedings" is construed to exclude court proceedings, *"then the first part of Section 26 would only deal with the first category. There would be nothing in Section 26 which pertained to the second and third categories of cases."*

Perhaps, party autonomy, which is the epicenter of arbitration, could save parties from the judicial pandemonium where arbitration proceedings were pending on October 23, 2015. Arbitration clauses stating that arbitration proceedings are to be governed by the A&C Act and any amendment or re-enactment thereof will bring pending arbitration proceedings within the purview of the Amendment Act. This was recognized by the Delhi High Court in Madhava Hytech-Rani vs. Ircon International.[8] This would automatically bring pending and future court proceedings within the ambit of the Amendment Act. Nevertheless, it is clear by now that the Supreme Court alone can take central charge of ropes in this judicial tug of war on retrospective and retroactive application of the amended law.

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> "The motley of conflicting decisions can only be straightened by the Supreme Court. For the business and legal community, it is time to tailor and uphold party autonomy in a manner that will sufficiently guard the parties from the spells of varying interpretation, and infuse a contractual framework conducive to effective dispute resolution

II. Role in Arbitrator Appointment: Administrative or Judicial?

Following SBP & Co. vs. Patel Engineering,[9] the Supreme Court offered an all-encompassing role to courts while examining an application under Section 11 in National

[7] 2017 SCC Online Del 6402. [8] Arbitration Petition 159/2016, December 2016. [9] (2005) 8 SCC 618. [10] Arbitration Petition 347/2016. [11] Arbitration Petition 635/2016. [12] Arbitration Petition 677/2015. [13] Hindustan Construction Co. Ltd. vs. IRCON International Ltd.[Arbitration Petition 596/2016]. [14] Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited & Ors. [O.P. No. 466/2016]. [15] Request Case No. 14 of 2016. [16] Arbitration Case 166/2016. [17] (2003) 5 SCC 705. [18] IX AD(Delhi) 617. [19] O.M.P.(I) (COMM.) 23/2015 & CCP (O) 59/2016, IA Nos. 25949/2015 & 2179/2016.

Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.[10] Courts could examine whether a petitioner had approached the appropriate high court or whether a claim is a dead (long barred) or live claim, amongst other issues.

The Amendment Act sought to cut the judicial cord and handle the same in an administrative manner. Upholding this new relationship in *Picasso Digital Media Pvt. Ltd. vs. Pick-A-Cent Consultancy Service Pvt. Ltd.*,[11] the Delhi High Court held that the scope of examination by courts under Section 11 was confined to the existence of a valid arbitration agreement. Issues relating to jurisdiction or arbitrability of the dispute would be left for the arbitrator. Respecting the separation of scope of examination between the court and arbitral tribunal will set the trail for a harmonious relationship between the two forums.

III. Employee or Not – Is it the spirit or the letter of law?

The amended Section 12 along with Schedules V and VII introduced rigorous provisions for disclosure and appointment of independent and impartial arbitrators. The most significant overhaul was proposed to be made with respect to the appointment of employees as arbitrators. High Courts have differed, again. In *Assignia-Vil JV vs. Rail Vikas Nigam Ltd.*,[12] the Delhi High Court held that existing employees of public sector undertakings could not be appointed as arbitrators, irrespective of a contract to the contrary. Delhi[13] and Madras[14] High Courts followed suit. In Dream Valley *Farms Pvt. Ltd. & Anr. vs. Religare Finvest Ltd. & Ors.*, the Punjab & Haryana High Court held that disclosure is mandatory and not left to the discretion of the arbitrator for circumstances under the Fifth Schedule. In SDB-SPS (JV) vs. Bihar Rajya Pul Nirmaan Nigam,[15] the Patna High Court was the first to hold that the provisions of the Amendment Act prevailed over the Bihar Public Works Contracts Disputes Arbitration Tribunal Act, 2008 wherein employees could be appointed as arbitrators.

However, on the appointment of former employees as arbitrators, the Punjab & Haryana High Court held in Reliance Infrastructure Ltd. vs. Haryana Power Generation Corporation Ltd.[16] that a conflict of interest arose only if the arbitrator is currently an employee. The only past relationships covered are "any other business relationships." Further, it was sufficient to make disclosure to the nominating party and not to all parties. This distinction between existing and former employees, coupled with disclosure nuances, provides a ripe ground for parties to stall arbitrations by way of challenge proceedings, both under Section 13 and Section 34. We are now faced with the question: did the spirit to rule out conflict create a conflict between the letter and the spirit?

IV. Patent Illegality: Myth or reality?

Pursuant to the ruling on ONGC vs. Saw Pipes,[17] domestic awards can be set aside if vitiated by patent illegality. This opens a pandora's box for domestic arbitrations. It is essential for courts to confine to instances where illegality appears on the face and not when dived deeper into the award. Caveats such as courts shall not set aside awards for erroneous application of law or re-appreciation of evidence, ought to be made sacrosanct. Fortunately, patent illegality is not available as a ground for challenging awards under international commercial arbitrations seated in India. The Delhi High Court acknowledged the importance of this provision in Xstrata Coal Marketing AG vs. Dalmia Bharat Cement Ltd.[18]

V. Access to Indian Courts for Foreign Seated Arbitrations

Some welcome changes have been made for international arbitrations. Section 2(2) of the Amendment Act makes Sections 9, 27, and 37(1) and (3) applicable to foreign seated arbitrations, unless an agreement exists to the contrary. In an interesting decision in *Raffles Design International India Pvt. Ltd. vs. Educomp Professional Education Ltd.*,[19] the Delhi High Court held that Section 9 was available to parties in a foreign seated arbitration, even if the arbitration commenced prior to the Amendment Act. This stands as a stark example of purposive interpretation adopted by the court.

The aforesaid overview sheds light on the diversity of interpretations arising out of the amendments and the strengths and weaknesses to be remedied thereunder. The motley of conflicting decisions can only be straightened by the Supreme Court. For the business and legal community, it is time to tailor and uphold party autonomy in a manner that will sufficiently guard the parties from the spells of varying interpretation, and infuse a contractual framework conducive to effective dispute resolution.

However, one cannot countenance the fact that several recommendations under the 265th Law Commission Report have been incorporated to ensure speedy and efficacious dispensation of justice. It would be safe to state that a majority of the amendments have been drafted with clinical precision and judicious foresight. The vital task now rests with the judiciary to eliminate shadows of the old Act, direct the course of law going forward, and re-instate the laudable intention of the legislators in fortifying the arbitration regime in India.