

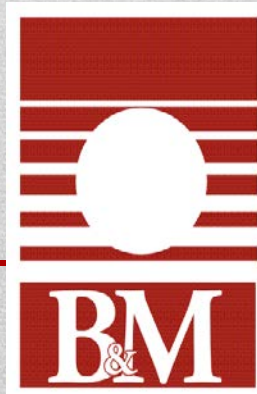
The New Arbitration and Commercial Court  
regime in India – *a plausible silver bullet  
cure the ills plaguing the commercial  
dispute resolution landscape in India!!*  
IML Seminar – 27 October 2016

**Bose & Mitra & Co.**

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# The Bloodbath in the Shipping industry !!!!

- Container and dry bulk commodity trade has been hit very hard by the slowdown in the Chinese economy and the world economy in general.
- The Baltic dry index plummeted from its peak of 11,793 points in May 2008 to 290 points in early 2016
- Shipping companies who once had a stellar reputation have gone into bankruptcy.



# Could India be knight in shining armour??

- India achieved a unique economic distinction in the year 2016 of becoming the fastest growing economy in the world of over 7% surpassing China and other big emerging economies.
- Population of 1.3 Billion – 18% of the worlds population



# Quenching India's thirst for energy - *Unlimited needs limited resources!*

- While it supports 18% of the world's population, it only has 0.6%, 0.4% and 7% of the world's oil, gas and coal reserves, respectively.
- India's energy consumption has doubled since 2000 and future potential for rapid increase in demand for energy enormous.
- An additional 315 million people almost the population of the United States today are expected to live in India's cities by 2040
- 35% of India's energy needs are met by Imports and is set to exceed 40% in the years to come.



- More than 66% of India's electricity generation comes from coal fired power plants. Indian imports of coal constitute 12% of the world coal imports. Second largest importer of coal after China and by 2020 would become the largest importer of coal in the world.
- India is the world's second largest importer, behind China and presently imports 70% of its domestic requirement of crude oil. This figure is said to rise to 90% by 2040. Taking advantage of the fall in global crude oil prices, the Indian government has embarked on a policy to fill up strategic petroleum reserves with cheap oil at a rock bottom price and this would further push demand for tankers calling to various Indian ports.

# Enforcing contracts against an Indian counterparty!



# The Protracted delays in the Indian Judicial System

- The World Bank in its Doing Business 2016 Index rates India as Rank No. 178 out of 189 countries in the ease in which contracts can be enforced
- Singapore has been ranked No. 1 in relation to the same. Interestingly China has been ranked at No. 7, Russia at rank No. 5, Brazil at rank No. 45
- **White Industries Bilateral Investment Treaty ICSID Arbitration Award**
  - The tribunal held that the inordinate delay of the Indian Judiciary in the enforcement of a foreign award tantamount to a breach of India's BIT obligation to provide an "effective means" of asserting claims and enforcing rights."



# Reasons for the bottlenecks

- Skewed ratio between the numbers of courts to the population in a given area
- Great number of interim and interlocutory procedures
- Fragmentation of the actual dispute into a large number of sub-disputes, which are often subject to their own appeals.







# The New Regime

- In an attempt to alter the poor impression created internationally about the Indian judiciary abroad to create an environment congenial for investment and commercial transactions the Indian legislature recently enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (“Commercial Courts Regime”) and the Arbitration and Conciliation (Amendment) Act, 2015 which made radical amendments to the Arbitration and Conciliation Act, 1996 (“New Arbitration Regime”)



# Time Bound Procedural Deadlines under the New Arbitration Regime

- 1 years time for the Tribunal to pass an award. This can be extended up to a maximum of 1 year, 6 months.
- In an event the Tribunal does not pass its award within 1 year and 6 months the mandate of the Tribunal shall stand automatically terminated. Thereafter, it would be incumbent to make an application to the Court seeking an extension of time to.
- In determining an application for extension of time the Court has the power to remove arbitrators from the Tribunal, order a reduction on the fees of the arbitrator and/or impose exemplary costs upon the parties for causing delays. This perhaps has the effect of naming and shaming various stakeholders in the new regime.
- An application for extension of time shall be disposed by the court within 2 months.
- An application for the appointment of an arbitrator shall be disposed by the Court within 2 months
- A substantial appeal against the award shall be disposed within 1 year



# Time Bound Procedural Deadlines under the Commercial Courts Regime

- The Commercial Courts Regime envisages a full fledged suit along with an appeal against a decree to be completed within 2 years
- Full and frank disclosure of all documents whilst filing the Statement of Claim/ Plaintiff. An undertaking that all documents in the possession of the Plaintiff have been placed on record.
- 30 days time to file a Defense/Written Statement to the Statement of Claim (which can after paying costs be extended to 90 days) An undertaking that all documents in the possession of the Defendant have been placed on record.
- 30 days time to inspect original documents after Defense
- 15 days time to file an affidavit of admission and denial of documents



- 1 months time for filing Admission and Denial of Documents the First Case Management Conference/ Hearing
- 6 months after First Case Management Conference/ Hearing, Commercial Court to complete the trial and the final hearing is to take place
- 3 months after the final hearing, the judge of the Commercial Court to pass a Decree
- 2 month time limit to appeal against the Decree passed by the Court of First Instance
- 6 months time for the Appeal Court to decide the appeal against the Decree passed by the Court of First Instance

# Legal Costs under the New Arbitration Regime and the Commercial Courts Regime

- Whilst legal costs are not recoverable on an indemnity basis Courts and Tribunals have been given sweeping powers to impose exemplary legal costs taking into account an entire gamut of factors.
- The Plaintiff, in his suit, seeks a liquidated amount payable under a contract and damages for breach of the contract. The Court holds that the Plaintiff is entitled to the claim for liquidated damages but also comes to a finding that the claim for damages is frivolous and vexatious.
- In such circumstances the Court may impose costs on the Plaintiff, despite the Plaintiff being the successful party, for having raised frivolous claims for damages.



# Factors to be taken into account by the Court/ Tribunal in awarding costs

Pursuant to the new regime the Arbitral Tribunal whilst awarding legal costs ought to take into account the entire gamut of factors including but not limited to the following:

- The conduct of all the parties.
- Whether a party has been awarded only a part of its claim.
- Whether the party has made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings
- Whether any reasonable offer to settle the dispute is made by a party and refused by the other party
- Whether the party had made a frivolous claim and instituted a vexatious proceedings wasting the time of the Court.

# Key ramifications of the New Arbitration Regime in the international shipping industry

- High Courts to now oversee all arbitrations taking place out of India
- Final nail on the coffin relating to the law laid down in *Venture Global Engineering v. Satyam Computer Services Ltd* 2008 (4) SCC 190 – a losing party in a foreign arbitration can no longer file a substantive appeal in relation to the underlying merits of the case in India which has even prior to the enactment of the new Act been overruled by *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc*
- Interim measures of security allowed under section 9 in support of arbitrations taking place out of India





# Interim Measures

- Section 9 – Indian Courts have power to pass *inter alia* interim order in aid of arbitral proceedings :-
    1. Order security.
    2. Preservation of evidence
    3. Appointment of receiver to take custody of the property.
  - In so far as domestic arbitrations goes once the tribunal is formed, the Court generally do not entertain a section 9 application for interim measures and a corresponding application would have to be made before the Tribunal. A party is likely to be in contempt of court if they do not comply with interim measures passed by the Tribunal in a domestic arbitration.
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# Interim measures – Obtaining contemporaneous evidence

Cargo claim / charterparty dispute – an application for interim measures can be made to the Indian High Court under section 9 to direct appoint a commissioner to go on board the vessel take photographs of cargo the vessel as well as obtain copies of log books, collect samples of cargo etc which would serve as contemporaneous evidence during the foreign arbitration proceedings .



# Interim measures – receiver taking custody of the cargo

Shipowner can move the Indian court and appoint a receiver to take custody of the cargo by agreeing to pay warehousing charges during the pendency of a dispute between rival cargo interests



# Interim measures – Securing a claim prior to the passing of an award

- The party seeking security would have to make out a case dissipation of assets
- A security application cannot not be used to give the status of secured creditor to an unsecured creditor



# Fast Track Arbitration

- Tribunal to consist of a sole arbitrator
- The award would be passed merely by reviewing documents and there would be no oral hearing
- The arbitrator is under an obligation to pass an award within 6 months of initiating the reference



# No automatic Stay on the award merely by filing an appeal

- The New Legislation does not grant an automatic stay on the enforcement and execution of the award merely because an appeal against the award is pending.
- As award is given the status of a decree passed by the Court and there would be a stay on the same only upon the party seeking a stay on the enforcement and execution of the award furnishing security for the same.



# Disclosure Requirements of an Arbitrator

6<sup>th</sup> and 7<sup>th</sup> Schedule to the New Regime

*“16. The arbitrator has previous involvement in the case”*

*Shakti Bhog Foods Ltd. vs Kola Shipping Ltd.* – Delhi High Court held that arbitrator appointed in a reference between Disponent Owners and Sub Charterers had an obligation to disclose that he had also been appointed an arbitrator in a dispute between Head Owners and Disponent Owners.

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# Can two Indian parties arbitrate abroad????

- Bombay High Court says NO – *M/s Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Private Ltd*
- Madhya Pradesh High Court says Yes!!!! - *Sasan Power Ltd. v. North American Coal Corporation India Private Limited (“Sasan”)*
- Supreme Court did not deal with the issue in determining the appeal in *Sasan* but recognized that two Indian parties can arbitrate out of India if the underlying contract had been assigned by a foreign party to an Indian party





# Initiating substantial proceedings in India relating to a contract containing a foreign arbitration clause

- When an Indian Court is dealing with an application to refer the parties to arbitration out of India under section 45 of the Act and one of the parties challenges the existence of the arbitration agreement, the Indian Court would have to proceed to make a final determination on the existence and enforceability of the arbitration agreement prior to referring the parties to arbitration. Parties are free to lead evidence at this stage of enquiry before referring the parties to arbitration per *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc* (2013) 1 SCC 641
- The new arbitration regime is a lost opportunity to overturn the *Chloro* judgment and give effect to the *Kompetenz-kompetenz* principle.
- This is however different from the position under domestic arbitrations in that the Court will only have to make a prima facie determination on the existence of the arbitration agreement before referring the parties to arbitration under section 8 of the Act.



# Arbitration clause in a Charter Party Agreement was incorporated into the Bill of Lading

- An arbitration clause contained in a charterparty can be incorporated into the Bill of Lading insofar as it does not lead to any inconsistency *per M V Baltic Confidence v. State of Trading Corporation of India Ltd* (2001) 7 SCC 473
- The terms of a charterparty can be incorporated into a bill of lading contract even if the consignee has no knowledge of the terms of the charterparty *per British India Steam Navigation Co Ltd v. Shanmughavilas Cashew Industries* (1990) 3 SCC 48



# Admiralty Court arresting a vessel for the enforcement of a foreign arbitral award in India

- The Gujarat High Court in *MV Cape Climber* allowed a Claimant invoke its admiralty jurisdiction to arrest a vessel to enforce a London arbitral award subsequently converted into a judgment of the English High Court.
  - Indian Court refused to apply the English precedent of the *The Bumbesti* [1999] 2 Lloyd's Rep 481 but rather chose to follow the reasoning of the Hong Kong Court in *The Alas* [2014] 4 HKLRD 160
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## Enforcing the award/ judgment against cargoes being

### imported/ exported into India

- Enforcement proceedings with respect to a foreign arbitral award can be initiated High Court in the state wherein the Award Debtor has its assets.
- The Award Debtor can thereafter resist the enforcement of the Award by raising objections enumerated under the New York Convention. In an event the Indian Court dismisses these objections of the Award Debtor under the New York Convention the Foreign Award is deemed to be a decree of an Indian Court
- Thereafter the High Court can issue a precept to the local court within whose jurisdiction the port is located. An application should be made to the local court to attach the cargo.
- ~~It may in certain circumstances, be possible to move the admiralty court to obtain an order of arrest against the cargo.~~

# Attaching cargo imported by entities which *alter egos* of the Judgment Debtor

- Indian Courts would not ordinarily disregard the corporate and juridical personality of a company unless a clear case of “fraud” is made out.
  - In an event the Award Holder has obtained tangible evidence to demonstrate that the Award Debtor has fraudulently hived of its assets to entities wholly owned and controlled by the management of the Award Holder it may be possible to attach the cargoes being shipped by these entities.
  - However, it is incumbent that sufficient notice ought to be provided to the other entity whose assets have been sought to be attached.
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# Institutional arbitration in India

- Indian Council of Arbitration (“ICA”) – Most Indian Government shipping contract tenders provide for arbitration to be administered by the ICA which has a special maritime arbitration rules
- Mumbai Center for International Arbitration – Recently established earlier this month – Rules seek to adopt the best practices in international arbitration which *inter alia* include emergency arbitration where the Registrar appoints an interim arbitrator, scrutiny of awards, publication of awards with names of parties and sensitive information, consolidation of arbitrations

# The establishment of Commercial Courts in India

- With a view to promote trade and ease of doing business in India the Government of India has sought to radically overhaul the Judicial system by creating specially constituted “Commercial Courts” which are on the lines of the Commercial Courts in England
- Only claims above INR 10 Million/ USD 160 Thousand approximately can be moved before these Courts



# What Is A Commercial Dispute?

- Export or Import of Merchandise
- Issues relating to Admiralty Law
- Carriage of Goods
- Agreement for the Sale of Goods
- Exploration of Oil and Gas Reserves and Natural Resources
- Insurance



# Summary Judgment

- Under the erstwhile regime it was possible to obtain a Summary Judgment only on a written confirmation of a debt and/or an agreement to pay a liquidated amount on or before a definitive date.
- However, in the present case the Commercial Courts Act provides for summary Judgments either in favor of the Plaintiff or the Defendant, if a party can show to the court that there is no real prospect of the other party succeeding in its claim or defense, as the case may be and there is no other prospect why the claim should not be disposed of before recording oral evidence.
- The Court can take into account documentary evidence whilst passing a summary judgment.



# E- Discovery

- There has been a growing trend in litigations for parties to concoct and fabricate electronic records to synthesize evidence to suit their convenience such as emails, swift remittance, bank advises, by merely producing printouts of the same
- In order to deal with these unscrupulous practice the Commercial Courts Act allows the Commercial Court to call upon parties to the litigation to produce metadata or logs of the electronic records.
- Metadata has often been described as the "foot print" of a document.



# Cost Budgeting

- For the first time in India litigants have an option to file and exchange a cost budget.
- This seeks to limit the financial liability of losing parties to a predetermined sum and also potentially deter a litigant by introducing expensive and time consuming procedures.
- Costs budgets provide the Court with the inputs from the parties, to actively control the costs of cases before it. Effective costs management has the potential to lead to the saving of costs (and time) in litigation.
- It would assist parties to take an informed decision on whether to settle the case when they have a rough ballpark of the future legal costs prior to the commencement of a trial.



# Plausible Drawbacks of the Commercial Courts and New Arbitration Regime

- Unrealistic Timelines
- Prospective or retrospective applicability?????
- kompetenz kompetenz principle
- India is a signatory to the ("Hague Service Convention"). Unfortunately, there has been an absence of soft infrastructure facilities in India for the service of foreign judicial documents.
- Furthermore, it is impossible to enforce worldwide freezing orders passed by foreign courts in India.





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