COMPOSITION OF AN ARBITRAL TRIBUNAL - RECONCILING THE JUDICIAL TURMOIL

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Abstract

The Indian Arbitration and Conciliation Act, 1996 with hallmarks of minimal court interference, quick dispute resolution and party autonomy allows parties to a dispute to choose any number of arbitrators in an arbitral tribunal under section 10, but with an embargo that such number *shall not* be even. The Supreme Court, however, in the case of *Narayan Prasad Lohia* has held that such a provision is derogable and deviated from the letter of the law. The present paper *firstly* attempts to ascertain the true nature of the provision of section 10 by using the tools of statutory interpretation, provisions in parallel international conventions and foreign laws and the case laws on the subject, and *secondly* examine the legal position subsequent to *Lohia* were several high courts have distinguished the application of the precedent to post- award disputes only. The paper seeks to study this attempt by the high courts to reconcile the law laid down in *Lohia* with the letter and spirit of section 10 and see if it sits well within the framework of the Act.

I Introduction

THE INDIAN Arbitration and Conciliation Act 1996 ("The Act 1996") strives to provide an alternative to the court as a method of dispute resolution while giving parties the autonomy in the method of resolving their disputes.[1] Party autonomy has been ensured to the parties on various aspects such as choosing the place of arbitration,[2] the procedure to be followed by the arbitral tribunal in conducting its proceedings,[3] language,[4] amongst others. Such autonomy has also been extended with respect to the composition of the arbitral tribunal, which is a departure from the repealed Indian Arbitration Act, 1940 ("the previous Act 1940")[5] and section 10 of the same provides:[6]

> Number of arbitrators
>
> (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

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1 Ministry of Law and Justice Government of India, "Proposed Amendments to the Arbitration and Conciliation Act 1996", A Consultation Paper at 124.

2 The Arbitration and Conciliation Act, 1996, s. 20 (1).

3 *Id*., s. 19 (2).

4 *Id*., s. 22 (1).

5 Indian Arbitration Act 1940, s. 6 states, 'Power of Court to appoint arbitrator or umpire (1) (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments.'

6 *Supra* note 2 , s. 10.

(2) Failing the determination referred to in sub-section (1) the arbitral tribunal shall consist of a sole arbitrator.

On the face of it, the provision under section 10(1) seems to be mandatory. The most common rule of interpretation is that any Act and its provisions should be read in its plain language. The same also requires giving effect to all the words used in a provision, since there is a presumption that the legislature inserted every part for a purpose and intended that every part of the statute should have effect.[7] It is in that light clear that holding section 10(1) non- mandatory would render the proviso otiose. Moreover, affirmative words stand at a weaker footing than the negative words while reading any provision as mandatory,[8] therefore, the use of phrase "shall not be an even number" in reference to determining the number of arbitrators, signifies the strict compliance mandated.

The paper deals with the interpretation of the Supreme Court of India in its decision in *Narayan Prasad Lohia* v. *Nikunj Kumar Lohia*,[9] (hereinafter "*Lohia*") wherein the court had digressed from the strict letter of the law and held that the proviso to section 10(1) is not strictly binding on the parties to arbitration. While there have been many criticisms leveled against the judgment,[10] the paper then attempts to examine the reasoning of the judgment, compare the provision of section 10 with the corresponding provisions in international conventions and foreign nations' municipal laws and attempt to assess how the ruling in *Lohia* case has been reconciled and applied by various high courts in India in light of the letter of section 10 of the Act 1996. It will be seen that how these subsequent decisions provide for a much required clarity on this point of law and correctly confines the law laid down in *Lohia* to a particular set of circumstances.

II Ruling in "*Lohia*" case and its analysis

The Act 1996 is enacted on the lines of UNICTRAL Model Law provides for various provisions seeking minimal court interference. For instance, section 4 provides that if any party knows that any provision of Part I of the Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with, yet proceeds with the arbitration without stating his/her objection, they would

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7 *J K Cotton Spinning and Weaving Mills Co Ltd* v. *State of UP*, AIR 1961 SC 1170 at 1174; *Mohommad Alikhan* v. *Commissioner of Wealth Tax*, AIR 1997 SC 1165 at 1167.

8 *Dharamdeo Rai* v. *Ram Nagina Rai*, AIR 1972 SC 928; G P Singh, *Principles of Statutory Interpretation* 405-406 (LexisNexis Butterworths Wadhwa Nagpur, 12th edn., 2010).

9 AIR 2002 SC 1139.

10 O P Malhotra and Indu Malhotra, *The Law and Practice of Arbitration and Conciliation* 471-2 (Lexis Nexis Butterworths 2nd edn, 2008); Badrinath Srinivasan, 'Arbitration and The Supreme Court: A Tale of Discordance Between the Text and Judicial Determination' 4 *NUJS L. Rev.* (2011) 639- 67; Rajinder Sachar, "Some Aspects on Arbitration Law" *PL WeBJoUR* 11(2003), *available at:* http://www.ebc-india.com/lawyer/articles/608.htm (last visited on June 25, 2015).

be deemed to have waived their right to object.[11] Also, if an action is brought before any judicial authority in a matter, which is the subject of an arbitration agreement, section 8 mandates that the authority shall refer the parties to arbitration.[12] In case the parties are unable to agree on a procedure for appointing the arbitrator or arbitrators, section 11 provides that any party can request the chief justice to appoint an arbitrator. Furthermore, section 16 encompasses the principle of "*kompetence- kompetence*", authorising an arbitral tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. However, any objection that the arbitral tribunal does not have jurisdiction, shall be raised not later than the submission of the statement of defence.

The Supreme Court in *Lohia* case was confronted with a situation where parties had already gone through the arbitration and none of the parties objected to the composition during the arbitral proceedings that culminated into an award being passed by a two - member arbitral tribunal. Subsequently, one of the parties assailed the award on the ground that the arbitral tribunal was constituted against the provisions of section 10 of the Act 1996.

The court in such a circumstance reasoned that to ascertain if section 10 is a mandatory provision, one is required to see if there is any right with a party to object to composition of an arbitral tribunal and at what stage. The court applying the above reasoning held that since section 16 allows a party to raise such a challenge to the jurisdiction of an arbitral tribunal before the arbitral tribunal itself, and since such a challenge is to be raised not later than the submission of a statement of defense before the arbitral tribunal, therefore there is a deemed waiver under section 4 if such challenge is not made within the specified time. Resultantly, the court held that a conjoint reading of section 10 with section 16 and 4 shows that section 10 is a derogable provision.

The court further added: [13]

> We are also unable to accept Mr. Venugopal's argument that, as a matter of public policy, Section 10 should be held to be non-derogable … even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings

11 *Supra* note 2, s. 4.

12 *Id.*, s. 8.

13 *Supra* note 9, para 18 (emphasis added).

> are not frustrated. But if the two Arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed. Thus, we do not see how there would be waste of time, money and expense if a party, with open eyes, agrees to go to Arbitration of two persons and then participates in the proceedings. On the contrary, there would be waste of time, money and energy if such a party is allowed to resile because the Award is not of his liking. Allowing such a party to resile would not be in furtherance of any public policy and would be most inequitable.

It is submitted that the judgment is problematic on following accounts:

Firstly it ignores the scenario where the agreement provides for an even number of arbitrators and a party approaches the chief justice under section 11 or a judicial authority under section 8 to have an arbitrator appointed or that the case be referred for arbitration. In such cases the chief justice or court is bound to see the validity of the arbitration agreement itself on its own.[14] So, even if the parties do not object, the chief justice or the court would still check the validity of arbitration agreement before referring the parties for arbitrator.[15] Therefore, the chief justice would not appoint a tribunal with even number of arbitrators since the same falls foul of the proviso to section 10(1)[16] and consequently section 10(2) becomes relevant which provides that in such an event a sole arbitrator has to be appointed. Resultantly, no question of raising any objection on the issue of violation of section 10 would arise before the tribunal under section 16. Therefore, it is submitted that predicating the interpretation of section 10 on section 16 hangs on a very flimsy thread by missing other scenarios.

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14 *P. Anand Gajapathi Raju* v. *P.V.G Raju* case [2000] 2 SCR 684 held that when judicial authority is bound to refer the matter for arbitration once the existence of a valid arbitration clause is established before it when parties approach the court under section 8 of the Act and similarly *Patel* case, AIR 2006 SC 450 in para 8, 15 holds that the chief justice has to decide on its whether the arbitrator to be appointed is a fit person or not, in terms of provision when the parties approach it under s. 11 of the Act.

15 For instance, see *Deepashree* v. *Sultan Chand*, AIR 2009 Delhi 85.

16 For instances, where the agreements provided for even number of arbitrators, but the Chief Justice or court have deemed that this is a failure to agree as per the provisions of s. 10(1), consequently s. 10(2) in invoked and thereby appointed a sole arbitrator, *See Wipro Finance Ltd* v. *Sandplast India Ltd*, 2006 (3) Raj 524 (High Court of Delhi); *Marine Container Services Pvt Ltd* v. *Atma Steels Ltd*, Manu/DE/1317/2000; *Deepashree* v. *Sultan Chand*, AIR 2009 Delhi 85; *Gunjan Sinha Jain* v. *Registrar General of High Court of Delhi* 188(2012) DLT 627; *Ashok Engineering Company, Engineers and Contractors* v. *General Manager South Central Railways* 2001 (2) ALT 449. (High Court of Andhra Pradesh); *North East Securities Ltd* v. *Sri Nageshwara Chemical and Drugs* 2000 (5) ALT 413.

(b) it is important to note the circumstance before the court in *Lohia*. In a post award scenario, section 34[17] of the Act 1996 comes into play which stipulates that an award can be set aside if:

> the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part.

The court interpreted this provision and held that section 34(2)(a)(v) of the Act 1996 comes into operation only when (a) it is established that the composition of the arbitral tribunal is not in accordance with the agreement of the parties and (b) such non – compliance of the agreement must be in conflict with a provision of Part I of the Act 1996 from which the parties cannot derogate.

It is submitted that the facts and circumstances before the court could simply have been addressed on the ground that no application seeking the setting aside of the arbitral award can be entertained since the composition of the arbitral tribunal was in consonance with the agreement of the disputing parties and; (c) the above – quoted observations of the court show that the court has misconstrued the provision of section 10(1) and (2). The court went further to actively advocate the position that the parties may agree for constituting an arbitral tribunal with even number of arbitrators. It is submitted that this particular path sits in stark contradistinction to the letter and spirit of section 10 of the Act.

Reference can be made to the principles laid down in *Heydon's* case,[18] popularly known as 'Mischief Rule'. It was proposed that in order to interpret a statute one must find four things: (i) what was the common law before enacting a statute, (ii) the mischief or defect in it, (iii) how that defect was resolved by the Parliament by enacting the law, and (iv) then, keeping in mind the reason of remedy, the judges should always interpret the provision in order to suppress the mischief.

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17 The Act 1996, s. 34 (2) states:

(2) An arbitral award may be set aside by the court only if –

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that:

(i) – (iv)

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) ...

18 (1584) 3 Co Rep 7a.

Under the previous Act 1940, the mischief in law was that the parties had the option of appointing an arbitral tribunal consisting of even number of members.[19] Therefore, in cases where an arbitration agreement provided for the appointment of more than three arbitrators and if the arbitrators were equally divided in their opinions, the award of the umpire was to prevail under the repealed Act.[20] The legislature by enacting the new Act and providing for section 10 tried to settle the issue by restricting the autonomy of parties, which satisfies the rules of *Mischief Test* in reaching upon a decision to appoint an arbitral tribunal. In light of this change, it is submitted that this omission of provision for an umpire should not be dismissed as merely an accident.

Contextual interpretation

It is generally opined that the scope of a provision in a statute can be determined by taking into the account the language in which the provision is couched and construing it with the whole scheme of the statute.[21] Unlike the English Arbitration Act, 1996[22] and the Austrian Arbitration Act (Schiedsrechts Änderungsgesetz), 2006,[23] the Indian Act does not expressly classify between mandatory and non-mandatory provisions. Therefore, in order to ascertain whether a provision is mandatory or non-mandatory, one has to look at the phraseology of the provisions while reading the statute as a whole. While sections 3, 9, 11(2), 19(1) and (2), 20(1), 22(1), 24 (1), 25, 26 and 31(3)(a) use phrases "unless otherwise agreed by the parties" and "the parties are free to determine" and are not qualified by any proviso,[24] provisions which do not have such language and from which a party cannot derogate can be those that are provided in sections 4, 8, 10, 11(4), 11(6), 12, 13(4), 16 (2), (3) and (5), 24(2), 24(3), 27, 31(1), 34(2) and (4), 35, 36, 37, and 43(3).[25] In the latter, even if the parties contract otherwise to these provisions, they cannot oust the application of these provisions.

Purposive interpretation

Every statute and every provision in that statute is designed to achieve a purpose, which the enactors of that provision had in mind, which should be the concern of judges as aptly put by Lord Denning: [26]

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19 Indian Arbitration Act 1940, s. 6.

20 *Id.,* s. 8 (3) states: "Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail."

21 *Brown* v. *National Coal Board*, [1962] AC 574; *Reserve Bank of India* v. *Peerless General Finance and Investment Co Ltd*, (1987) 1 SCC 424.

22 *Supra* note 2, sch 1.

23 Austrian Arbitration Act 2006, s. 594.

24 *See also* AIR 2002 SC 1139, para 10, submissions of counsel Venugopal.

25 *Ibid.*

26 *Bulmer* v. *Bollinger*, [1974] Ch 401 at 426; the approach was also followed in *R* v. *Z*, [2005] UKHL 2005.

> no longer must they [the judges] examine the word in meticulous detail. No longer must they argue about the precise grammatical sense, they must look to purpose and intent.

While the legislature ensured party autonomy by giving freedom to parties to determine certain issues,[27] such freedom was also extended to determine the number of arbitrators.[28] The Act is also a mechanism for providing speedy remedy to parties by minimal wastage of resources in terms of time, money in resolving disputes between parties, which would be defeated if a deadlock between arbitrators arises in course of the proceedings of the tribunal.[29] Generally, the reason for mandating odd number of arbitrators in a tribunal is to prevent deadlocks and ensure the formation of a majority in decision-making.[30] While many commentators have opined in favour of strict compliance of section 10,[31] the commission to review the working of the Act also suggested an addition of explanation to section 10 clarifying that section 10 is not derogable.[32] The purpose of section 10(1) leads to a strong inference that the framers of the Act wanted section 10(1) to be mandatory and it is submitted that holding it as derogable would result into friction in the entire institution of arbitration as there will be great possibilities of deadlock and defeating the purpose of arbitration itself.

On the other hand, the purpose of the alternative dispute resolution as a mechanism for providing speedy remedy to parties by minimal wastage of resources in terms of time, money in resolving disputes between parties presents a counter argument as to what if the parties agree on the composition of two member arbitral tribunal, then, why would they waste money, time and resources in looking for a third arbitrator to fulfill the requirement of section 10(1). It is submitted that if parties do not want to

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27 *Supra* note 2, s. 2(6).

28 *Id.*, s. 10(1).

29 Law Commission of India, 176th Report on "The Arbitration And Conciliation (Amendment) Bill 2001", 239- 240 (2001); See ,O P Malhotra and Indu Malhotra, *supra* note 10 at 462.

30 Alan Uzelac,'Number of Arbitrators and Decisions of Arbitral Tribunals', Arbitration International (United Kingdom), 23 (4) 2007; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* 185-86 (OUP 4th edn., 2003) para 4-19; O P Malhotra and Indu Malhotra *supra* note 10. *Supra* note 29; Justice BP Saraf and Justice SM Jhunjhunwala, *Law of Arbitration and Conciliation* 204 (3rd edn., 2001).

31 *Supra* note 1 at 117-8.

32 *Supra* note 2, s. 11(5) reads:

Appointment of arbitrators:

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

waste money on a third arbitrator, then would it not be preferable to provide for the appointment of a sole arbitrator and in such a scenario the Supreme Court or the high court can be approached to exercise power under section 11(5).[33]

III Counterpart provision to section 10 in international conventions, foreign laws and Indian laws

Since any departure from the letter of the provisions of law on that very same subject followed in other jurisdiction is an important tool in gathering intention of the legislature,[34] it would be useful to refer to the provisions regarding 'number of arbitrators' provided in various international conventions, foreign jurisdictions and Indian laws. In fact, whenever the Act departs from UNCITRAL Model Law, such departure has been given tremendous weight by the Supreme Court.[35]

International conventions

The Act is hugely influenced from the UNCITRAL Model Law,[36] which extends its most important feature of party autonomy over all the aspects of arbitration,[37] to decide any number of arbitrators.[38] Whereas, the European Convention providing a uniform law on arbitration states that an arbitral tribunal *shall* be composed of an odd number of arbitrators,[39] in case there is an agreement providing for an even number of arbitrators, an additional arbitrator *shall* be appointed[40] and in case of an unsettled

33 G P Singh, *Principles of Statutory Interpretation* 302 (LexisNexis Butterworths Wadhwa Nagpur 12th edn, 2010).

34 For instance, one of the landmark cases on Indian Arbitration Law Jurisprudence *Bharat Aluminium Company* v. *Kaiser Aluminium* (2012) 9 SCC 552 ['*BALCO*' case] para 68 where the court overruled a precedent in the case of *Bhatia International* v. *Bulk Trading SA*, AIR 2002 SC 1432, para 27. The issue was whether in cases where place of arbitration is outside India, can Part I of the Act apply to those proceedings includes the provisions of interim measures by courts or parties approaching chief justice of high courts *etc*. In both the cases the court referred to art. 1 (2) of UNCITRAL law that stated provisions of Model Law shall apply *only* if place of arbitration is in territory of state and on comparison with Indian Act's corresponding provision which stated that Part I shall apply *if* place of arbitration is in India. The omission of word 'only' in the Act led the court in *Bhatia* case to conclude that Part I applies to arbitrations outside India, whereas, the court in *BALCO* used the same provision of Model Law and explained as to why the word 'only' was used in the Model Laws by referring to 330th meeting of Travaux Preparatoires of UNCITRAL and why it was not necessary to be used in Indian corresponding provision to hold that Part I only applies to arbitrations that take place in India.

35 *Supra* note 2, Preamble.

36 Robert Merkin, *Arbitration Law* 1.12 (4th edn., 2008).

37 UNCITRAL Model Law, art. 10(1).

38 Annex, European Convention providing a Uniform Law on Arbitration, Strasbourg, 20.1.1966, art 5(1).

39 *Supra* note 38, art. 5(2).

40 *Supra* note 38, art. 5(3).

agreement, the tribunal shall consist of three arbitrators.[41]The Washington Convention also mandates the uneven number requirement.[42]

Counterpart in foreign jurisdictions

The English Arbitration Act, 1996 provides that the parties are free to agree on the number of arbitrators to form the tribunal and whether there is to be a chairman or umpire.[43] It further provides that an agreement providing for even number of arbitrators shall be understood to have required appointment of an additional arbitrator as chairman of the tribunal, unless otherwise agreed upon by the parties.[44] However, this Act provides that the mandatory provisions listed in Schedule I shall have effect notwithstanding any agreement to the contrary,[45] where the schedule does not contain any provision for composition of tribunal as mandatory. However, this is distinguished from its corresponding Indian provision that explicitly restricts the party autonomy in choosing only an odd number of arbitrators to comprise an arbitral tribunal and grants no discretion in that respect.

The Dutch Code of Civil Procedure[46] relating to Dutch Arbitration states that the arbitral tribunal *shall* consist of uneven number of arbitrators and in case parties agree to even number then, the arbitrators *shall* appoint an additional arbitrator who shall act as chairman. The NAI (Netherlands Arbitration Institute) Rules,[47] it is provided that in case an agreement provides for an even number of arbitrators, it shall be deemed to have required an appointment of one additional arbitrator.[48]

Similarly, to overcome the difficulties arising from even number of arbitrators in a tribunal, the Switzerland Code of Civil Procedure[49] provides that where the parties have agreed on an even number, they have deemed to have intended that 'an additional person shall be designated as chairperson.'[50] Similar is the provision in Austria where the parties are free to agree on the number of arbitrators, but if agree on an even

41 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) 1965, art 37(1).

42 *Supra* note 2, s. 15(1).

43 *Id*., s. 15(2).

44 The Arbitration Act 1996, s. 4(1).

45 Dutch Code of Civil Procedure, Dutch Arbitration Act, 1986, art. 1026(1) and (3).

46 NAI Arbitration Rules, art. 12(3).

47 Bommel van der Bend, Marnix Leijten and Marc Ynzonides, *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law* 91 (1st edn., 2007).

48 Code of Civil Procedure 1908, s. 360(2).

49 2 Bernhard Berger and Franz Kllerhals, *International and Domestic Arbitration in Switzerland* (2nd edn., 2010).

50 Austrian Arbitration Act (*SchiedsrechtsÄnderungsgesetz*), 2006 in Austrian Code of Civil Procedure (*Zivilprozessordnung*) 1983, s. 586 (1).

number, require the arbitrators to appoint an additional arbitrator as chair.[51] While the German ZPO (Zivilprozessordnung) changed the earlier provision of § 1028 of ZPO that provided for cases in which parties fail to determine number of arbitrators, the number shall be two and amended it that in such a case a three- member tribunal will be helpful in avoiding a dead-lock which is often encountered by a two- member arbitral tribunal,[52] the arbitration law in the former Yugoslavia states that the number of arbitrators must be odd,[53] which the commentators considered it to be mandatory.[54] The Egyptian Arbitration law, 1994 in fact, declares the agreement void if it contemplates an even number of arbitrators.[55]

Indian laws

The previous Act did not make any differentiation between even number and odd number, and gave full discretion to the parties to choose whatever way they want to appoint the arbitrators and how many they wanted to appoint.

The Industrial Disputes Act, 1947 introduced arbitration as a method of labour dispute resolution by an amendment in 1964 and adding section 10A. It provided that where an arbitration agreement provides for a reference of the dispute to an even number of arbitrators, the agreement shall provide for the appointment of another person as umpire who shall enter upon the reference, if arbitrators are equally divided.[56]

IV Judicial discourse on the subject

Decisions complying with the letter of section 10

In *Vinay Babua* v. *Yogesh Mehta*,[57] it was held by the High Court of Bombay that section 10 is non- derogable on the ground that the Act makes it clear that parties can derogate from the provisions of the Act, "when it is so provided". The Supreme of India in the case of *Groupe Chimique Tunisien Sa* v. *Southern Petrochemicals Industries Corpn Ltd*, appointed three arbitrators having regard to section 10, despite the arbitration agreement providing for two arbitrators.[58] Similar stance was taken in the case of *B Patil Belgaum* v. *Konkan Railway Construction Ltd*,[59] where it was held that a clause in the arbitration agreement

51 Karl- Heinz Bockstiegel, Stefan Michael Kroll and Patricia Nacimiento, *Arbitration in Germany, The Model Law in Practice* 39 (2nd edn., 2007).

52 See art. 472/2 of the Code of Civil Procedure of former Yugoslavia (CCP-SFRY).

53 See Jankoviæ *et al.,* Commentary CCP 491(Belgrade, 1990), *quoted* in Alan Uzelac,'Number of Arbitrators and Decisions of Arbitral Tribunals', 23 (4) Arbitration International (United Kingdom) (2007).

54 The Egyptian Arbitration Law, art. 15 (2).

55 Industrial Disputes Act 1947, s. 10A (1A).

56 1998 (4) Bom CR 849.

57 (2006) 5 SCC 275.

58 1998 (1) Mah LJ 502 (Bom.)

59 2006 (3) Raj 524. (High Court of Delhi)

providing for appointment of two arbitrators is not consistent with the provision of section 10 and consequently appointed the third arbitrators with consent of parties, whereas, in the cases of *Wipro Finance Ltd.,* v. *Sandplast India Ltd*,[60] and *Marine Container Services Pvt Ltd* v. *Atma Steels Ltd*,[61] the agreement was for appointment of two Arbitrators, but the court placing reliance on section 10, appointed a sole arbitrator.

V Reconciling *Lohia* ruling – Pre award *vis-à-vis* post award scenario

Application of *Lohia* in pre – award stage

The decision of the Supreme Court in *Lohia* has been differentiated by several high courts on the ground that the court in *Lohia* was dealing in a scenario where parties to the dispute had willingly participated in an arbitration by an even member arbitral tribunal and it was only after the award was passed that a belated objection was raised with respect to the constitution of the arbitral tribunal.

In *Deepashree*,[62] the agreement[63] between the parties provided for even number of arbitrators. The High Court of Delhi took notice of the precedents in *Wipro Finance*,[64] *Marine Container,*[65] and *Ashok Engineering*,[66] wherein arbitration agreements stipulating for the appointment of two Arbitrators was construed to be an agreement for the appointment of a sole arbitrator. The court distinguished the ruling in *Lohia* on the ground that therein the apex court was concerned with a post – award stage, whereas in the present case, the issue was with respect to section 10(2) and an appointment by a chief justice in terms of section 11 of the Act 1996. Resultantly, the arbitration agreement between the parties was held to be an agreement for a sole arbitrator in terms of section 10(2) of the Act 1996 and lone member arbitration was appointed by the high court under section 11(6).

The distinction between pre – award stage and post – award stage was reiterated by the High Court of Delhi in *Gunjan Sinha.*[67] The case did not involve any arbitration dispute, but rather was a case where a judicial services examination had a multiple choice question asking:

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60 86(2000) DLT 45.

61 *Supra note* 16.

62 *Id*., para 1 reproduces the arbitration clause:

If and when any dispute arises between the parties as to the meaning, interpretation or on implementation of these terms, such dispute shall be referred to the arbitration of two Arbitrators, one to be appointed by the publishers and the other by the author/s.

63 *Supra* note 60.

64 *Marine Container Services Pvt. Ltd., Supra* note 16.

65 *Ashok Engineering Company, Engineers & Contractors* v. *General Manager, South Central Railways*, 2001 (2) ALD 208.

66 *Gunjan Sinha Jain, Supra* note 16.

67 *Ibid.*

> *Question No. 170.*
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> An arbitration agreement providing for arbitration of four arbitrators is, under the Arbitration & Conciliation Act, 1996, to be construed as an agreement for arbitration by:
>
> (1) Sole arbitrator. (2) Five arbitrators. (3) Three arbitrators. (4) Four arbitrators only.

Some of the candidates relying on the ruling in *Lohia* had opted for option (4), whereas the answer key showed option (1) as the correct answer. The High Court of Delhi placed reliance on the decision in *Deepashree*[68] and the distinction made therein and rejected the contention. It was held consequently held option (1) was the correct answer.

The High Court of Madhya Pradesh in *National Council of YMC of India*,[69] was faced with similar circumstances. The court referred to a ruling passed by the Andhra Pradesh High Court in *Sri Venkateshwara*,[70] where it was held that if even number of arbitrators are appointed, the arbitration in such cases would be by a sole arbitrator in view of section 10(2) of the Act 1996 and for taking further action in the matter, the procedure contemplated under section 11 will have to be followed. Then it placed reliance on the ruling in *Lohia*. Resultantly, the High Court of Madhya Pradesh *firstly* cleared the air on the validity of the arbitration agreement holding that the arbitration agreement in the present case contemplating appointment of an even in number arbitrators is a valid agreement. On the *second* issue regarding the procedure to give effect to such an arbitration agreement, the court held in such a circumstance section 10(2) comes into play and a sole arbitrator is to be appointed in accordance with the procedure contemplated under section 11(6) because the "*appointment in accordance to the procedure agreed to between the parties is not permissible*".

The ruling in *National Council of YMC of India* was then followed by the High Court of Delhi in *Orient Bell*,[71] wherein the arbitration agreement[72] providing for a four – member

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68 *Supra* note 15.

69 *National Council of Y.M.C. of India* v. *Sudhir Chandra Datt* 2013 (2) MPL J 684.

70 *Sri Venkateshwara Construction Co.* v. *Union of India*, MANU/AP/0914/2001, AIR 2001 AP 284.

71 *Orient Bell Ltd.* v. *Kaneria Granito Ltd.*, Arb. P. 477/2014 and IA No. 6086/2016, MANU/DE/3376/2017.

72 *Id.,* para 5 reproduces the arbitration clause:

> 11. Arbitration and Governing Law:-
>
> a. …
>
> b. If for any reason such disputes cannot be resolved amicably by the parties, the same shall be referred to and settled by the arbitration by 4 persons from the tile industry, two appointed by KG and 2 by OCIL and generally abide by their unanimous decision and to take their views into account and attempt to solve their disputes. The arbitration proceedings shall be held at a place convenient to both parties and in accordance with the Arbitration and Conciliation Act, 1996, or any subsequent enactment or amendment thereto (the "Arbitration Act").

arbitral tribunal was held to be impermissible in terms of section 10 of the Act 1996. The High Court of Delhi distinguished the *Lohia* ruling on the same ground (as it did in *Deepashree*[73]) that *Lohia* was a post - award decision. The court here had categorically held that where the arbitral tribunal is yet to be constituted, and the parties had not agreed on an odd number of arbitrators, then in term of section 10(2), there has to be an arbitration by a sole arbitrator.

Operating in a pre – award stage, the High Court of Calcutta in *Sunil Kumar Agarwal*,[74] was adjudicating on an application under section 11(6) of the Arbitration and Conciliation Act, 1996 was filed by the petitioner praying for the appointment of an arbitrator in place of one of the joint arbitrators of the arbitral tribunal named by the parties. It was also prayed that the court might appoint a third arbitrator to constitute the arbitral tribunal. The court had framed two issues, namely whether (a) any dispute exists between the parties, which are covered by any arbitration agreement and (b) the said arbitration agreement providing for the arbitral tribunal comprising, only two members, is valid, and enforceable. Finding that in the facts and circumstances of the case, there does not exist any dispute which can be referred to arbitration, the court did not dwell into the second issue. However it still added that *prima facie* the arbitration agreement does not seem to be valid.

In *Hira Steel*,[75] an application under section 11(6) of the Act 1996 was filed before the High Court of Bombay seeking appointment of a sole arbitrator. The respondent opposed the same arguing that the arbitral tribunal has to be constituted only as per the agreement[76] between the parties which in the present case provides for the appointment of two arbitrators, one to be appointed by each of the parties. The court still opined that there was a failure to determine the number of arbitrators to constitute an arbitral tribunal under section 10(1) of the Act 1996 and directed that the arbitral tribunal is to comprise of a sole arbitrator in view of section 10(2) of the Act 1996. The precedent in *Lohia* was again distinguished on the ground that the same was a post – award ruling.

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73 *Supra* note 15.

74 *Sunil Kumar Agarwal* v. *Govind Ram Agarwal* (2019) 2 CAL LT 502 (HC).

75 *Hira Steel Limited* v. *Prasanna V. Ghotage* 2014 (1) ABR 806.

76 *Id.,* para 7 reproduces the arbitration clause:

Clause 14 of the Memorandum of Understanding.

It is further agreed that any controversy, claims or dispute arising out to and/or relating to any part of the whole of this agreement or breach thereof any which is not settled between the signatories, themselves, shall be settled and binding by and through arbitration in accordance with the rules and by appointing two arbitrators individually by the parties, any decision and/or award made by the arbitrator shall be final, conclusive and binding on the parties and enforceable in the Court of law in India.

From the above it is clear that there is catena of cases distinguishing *Lohia* on the ground that the latter was in respect of a post award stage, the precedent in *Perin Hoshang*[77] provides for an instance where *Lohia* was interpreted even in a pre – award stage. In *Perin Hoshang*, the arbitration clause[78] stipulated that arbitrators were to be appointed "one by each party to the difference". Therefore, there would have been a minimum of two parties to any difference or dispute. In other words, the arbitration clause had contemplated at least two or more arbitrators depending upon how many specific differences and disputes each party may have.

The applicants approached the High Court of Bombay under section 11(6) of the Act 1996 seeking appointment of a sole arbitrator. In the event of even number of arbitrators getting appointed, the high court placed reliance on the following observations in *Lohia*.[79]

> Similarly, even if parties provide for appointment of only two arbitrators, that does not mean that the agreement becomes invalid. Under Section 11(3) the two arbitrators should then appoint a third arbitrator who shall act as the presiding arbitrator. Such an appointment should preferably be made at the beginning. However, we see no reason, why the two arbitrators cannot appoint a third arbitrator at a later stage i.e. if and when they differ. This would ensure that on a difference of opinion the arbitration proceedings are not frustrated. But if the two arbitrators agree and give a common award there is no frustration of the proceedings. In such a case their common opinion would have prevailed, even if the third arbitrator, presuming there was one, had differed.

Resultantly the high court held that constitution of an arbitral tribunal with even number of arbitrators is valid.

It is submitted that this particular reliance on the observations of the apex court made in *Lohia* were neither the subject matter of dispute nor constitute the operative part of the decision. The decisions of various high courts where application of *Lohia*

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77 *Perin Hoshang Davierwalla* v. *Kobad Dorabji Davierwalla*, Arbitration Application No. 178 of 2013, 2014 (6) Bom CR 700.

78 *Id*., para 1 reproduces the arbitration clause:

> All disputed and differences whatsoever which shall either during the partnership or after the termination thereof arise, between the partners or their representative or between any partner and the legal heirs/representatives of the other partner touching these presents or the construction or application thereof, or any clause or thing herein contained, or any account, division, valuation debts or liabilities to be made hereunder or as to any other matter in or the rights, duties or liabilities of any persons under these presents shall be referred to arbitrators one to be appointed by each party to the difference in accordance with and subject to the provisions of the Indian Arbitration Act, 1940…

79 *Supra* note 9, para 18.

is restricted to a post - award scenario strikes the perfect balance between the language of section 10 along with its sub clauses (which is categorical in mandating an arbitral tribunal of odd number of arbitrators) and the operation of section 4 read with section 16 in constituting deemed waiver (whereby parties with open eyes took part in the arbitration and then in the event of loss, went back and questioned the constitution of the arbitral tribunal).

Application of *Lohia* in post – Award stage

In the post – award stage, the application of *Lohia* ruling can be seen in the ruling of the High Court of Himachal Pradesh in *Inderjeet Singh Avtar*.[80] The issue before the court was regarding the effect of the Act 1996 on the validity of an arbitration agreement entered prior to the commencement of the Act 1996 and consequently the validity of an arbitral tribunal constituted under it. The arbitration agreement[81] provided for the disputes to be referred to two arbitrators, and in case of difference of opinion between the two arbitrators, reference to an Umpire appointed by the two arbitrators was envisaged. The court acknowledged this fact that the reference to the third umpire/ arbitrator was only in case of difference of opinion between the two arbitrators that were to be appointed earlier. However, referring to section 10(1) of the Act 1996, it opined that the parties are free to determine the number of arbitrators but such number shall not be an even number. Consequently it opined that the appointment of an umpire in effect meant that there was to be a third arbitrator appointed, the court

80 *State of H.P.* v. *Inderjeet Singh Avtar Singh*, O.M.P. (M) No. 94 of 2001, 2004 (1) Shim LC 105, MANU/HP/0203/2003.

81 *Id.*, *para* 1 reproduces the arbitration clause:

16. Arbitration :

Any dispute or difference of question which may at any time arise between the parties herein, touching or arising out or in respect of the contract, including the scope of the arbitration and jurisdiction of arbitrator/empires to decide the dispute/difference question referred to him/ them and all question matters points referred issued in respect of which decision of any part in this contract is stated to be final shall be referred to two arbitrators, one to be appointed by each party and in case of difference of opinion between the arbitrator appointed by them before entering on the reference and the decision of such arbitrators/umpire(s) as the case may be shall be final and binding on the parties. The arbitration shall be governed by the Indian Arbitration Act, 1940 and as amended from time to time with the over-riding provision that the arbitrator shall have the un-reserved right to enlarge the period for publishing the award as they deem fit. In all cases where the amount of the claim is Rs. 50,000 and above, the arbitrator/umpire will give the reason for the award." [Emphasis Added]

concluded that in such circumstance section 11(3)[82] comes into play and thereby the arbitration agreement was valid in terms of the Act 1996. The court on the facts and circumstances of the case further noted that both the parties had participated in the arbitration proceedings till its conclusion and did not raise any objection as to the validity of the constitution of the arbitral tribunal. The court, referring to *Lohia*, held that there was a deemed waiver in terms of section 4 of the Act 1996. The only reason court had set aside the award was on the ground that the 3rd arbitrator had not participated in the proceedings under the impression that the proceedings were null and void.

The High Court of Delhi in *Anita Garg*[83] reasoned on similar lines that an arbitral tribunal comprising of even number of arbitrators does not fall foul of section 10 of the Act 1996 and an award by such a tribunal can be set aside neither under section 34 nor under section 48 of the Act 1996.

Same view had been earlier taken by the High Court of Delhi in *Sara International*.[84]

The High Court of Calcutta in *Sifandros Carrier*[85] was confronted with a similar issue where challenge was mounted to the enforceability of a foreign award under section

82 *Supra* note 2, s. 11 stipulates:

Section 11 - Appointment of arbitrators.

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) – (5)

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) - (14)."

83 *Anita Garg* v. *Glencore Grain Rotterdam B.V.*, (2011) 4 Arb LR 59.

84 *Sara International Ltd.* v. *Arab Shipping Co. (P) Ltd.*, 2009 (3) ARB LR 81 (Delhi).

85 *Sifandros Carrier Ltd.* v. *LMJ International Ltd.*, G.A. No. 514 of 2017 and E.C. No. 975 of 2015, MANU/WB/1053/2018.

48[86] of the Act 1996 passed in an arbitration held in London. One of the grounds to challenge the award was that the arbitral tribunal had comprised of two arbitrators and the same was violative of section 48(2)(b), *i.e.,* the public policy of India. The court, relying on *Lohia* as well as the ruling of the High Court in Delhi in *Anita Garg*,[87] repelled the same holding that under Indian law once an award is passed, there is a deemed waiver on whether the arbitral tribunal comprising of even number of arbitrators was validly constituted or not.

VI Conclusion

The court was presented in *Lohia* case with circumstances where a party was trying to avoid an award by arguing a technicality of law when the party itself had acquiesced in its violation. It is submitted that nevertheless, the court should not have opted for a radical interpretation of a provision that is couched in such clear and unambiguous terms. The approach erroneously applies the principles of statutory interpretation, disregards the deviations from the UNCITRAL Model Law and previous Act, 1940 and ignores the counterpart provisions in various laws. The reasoning itself, in my view, suffers from flaws due to misconstruction with other provisions of the Act. While the doctrine of judicial precedent binds the lower courts with this judgment, the high courts have been distinguishing this precedent to be limited to only post-award decisions. Therefore the only logical legal position that comes out is that in case of awards passed by arbitral tribunals comprising of even number of arbitrators, courts should hold that such awards do not violate section 34(2)(v) since parties had agreed to take part in such proceedings before an arbitral tribunal comprising of even number of arbitrators. On the other hand, in cases of pre - award scenarios, the approach opted by the Madhya Pradesh High Court in *National Council of YMC of India*[88] and the High Court of Delhi in *Deepashree*[89] provides for a succinct and logical framework towards the interpretation of section 10 and lays down a correct course forward.

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86 *Supra* note 2, s. 48(2) stipulates:
Section 48 - Conditions for enforcement of foreign awards.
(1) …
(2) Enforcement of an arbitral award may also be refused if the Court finds that-
(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
(b) the enforcement of the award would be contrary to the public policy of India.
(3) ...

87 *Supra* note 83.

88 *National Council of Y.M.C. of India* v. *Sudhir Chandra Datt*, 2013 (2) MPL J 684.

89 *Supra* note 15.