Chandigarh
24th March 2014

Dear Mr. Chawla,

This has reference to your letter dated 21st March 2014. On going through the proposed amendments to Arbitration and Conciliation Act, 1996 by the Law Commission of India, I offer my comments as follows:

1. Section 2(1)(h): Definition of 'party' as contained in section 2(1)(h) is proposed to be changed by adding the words "or any person claiming through or under him". The proposed change is likely to cause unnecessary and uncalled for complications. It is very much possible that abuse of the process of law shall be resorted to by unscrupulous litigants. Back-dated agreements between the 'party' and 'person claiming through or under him' are likely to come up. There is no requirement that such agreements between the 'party' and 'person claiming through or under him' must be registered.

2. Section 11(6): Under sub-sections (a) & (b) of section 11(4) and section 11(5), a period of 30 days has been provided. No such provision exists in section 11(6). It is by judicial precedent that a period of thirty days has come to be recognized, which, at times, is not followed by the High Courts. It is imperative to incorporate the said amendment otherwise Courts are likely to take the view that since the Legislature has not provided for the period of 30 days even after amendment of the Act, no end date can be fixed for the appointing authority to make the appointment of arbitrator. In that event, unending delay is likely to take place in the constitution of the arbitral tribunal.

3. Proposed sub-section 11(14): Simply saying 'endeavour' shall be made by the court to dispose off the matter within 60 days, shall not serve the purpose. Because of huge backlog of cases, the High Courts, as well as the Supreme Court, are unlikely to make the appointment of arbitrator or dispose of the matter within 60 days. It is suggested that a period of 90 days may be incorporated for final disposal of the matter, otherwise it can be said with certainty that no major change in disposal of section 11 applications shall take place.

4. Proposed section 21(A): The word 'any' needs to be incorporated between the words 'shall not, in' and 'manner' in the Explanation. This Explanation may be re-worded accordingly.

5. Proposed section (21A)(1): The period of 24 months needs to be reduced to 18 months (subject to an extension of time up to a maximum period of 6 months on account of sufficient cause being shown), which

will be in tune with the time taken in international arbitrations. From practical angle, it is stated that the arbitrators who are handling large number of cases are not in a position to give short dates, which obviously leads to delay the adjudication process. It is, therefore, imperative that, in order to overcome this problem, a provision needs to be made that no person shall accept any invitation to act as arbitrator if he has more than 6 cases in hand. An Explanation needs to be added that a case shall be deemed to be pending till such time an award is made. It should also be provided in the Act that at the time of taking up the appointment, the arbitrator shall disclose the number of pending arbitrations at that point of time.

6. Fee structure of arbitral tribunal: Arbitration is taken recourse to by the parties for its expeditiousness and economy. Insofar as 'expeditiousness' is concerned, this has been taken care of by the proposed amendment by fixing time ceiling for making the award, but insofar as 'economy' part is concerned, the Bill should contain a provision for fixation of fee of arbitrators in accordance with some rational fee structure. So far there is none. However, ICA and ICADR have their own fee structure and so is the case with Delhi High Court as well as Punjab and Haryana High Court. Till such time there is a statutorily recognized fee structure, based on the claims and counter claims, arbitrators will continue to fix fees at their whims and fancies. These days, fee of arbitrators generally range from Rs. 50,000/- to Rs. 5,00,000/- per day/session, in addition to reading fee and award-writing fee which is nearly equivalent to fee of 4 hearings. In fact, there should be no such extra charge over and above daily fees. It needs to be clarified in the proposed amendment that 'day' shall mean from 10.30 am to 4.00 pm (with lunch break of 1 hour), otherwise the arbitrators will continue to have 3 hearings every day as now prevalent. Moreover, there should be a cap on the number of hearings for claiming daily fee. This would result in early completion of cases.

7. Holding hearings in evenings and on holidays: Lawyers have made arbitration matters as a source of supplementing income. They do not agree to attend hearings, if the same are fixed before 4 p.m. on any working day on the plea that they have to attend to the court work. By this time of the day, anybody would feel exhausted. They invariably insist on holding hearings on weekends or on holidays when the courts are closed. This practice needs to be stopped forthwith since it pollutes the arbitration culture. In fact, there should, preferably, be no arbitral hearings on Sundays and holidays. Some provision can be made in the proposed Act to this effect.

8. Time limit for submission of pleadings: Time for submission of pleadings needs to be fixed by the statute otherwise it would be a good ground for the arbitral tribunal for seeking extension of time from the court for

making the award. It is suggested that a maximum period of 2 weeks be allowed to the claimant to file its claim statement (since he has sufficient time to prepare the claim statement before invoking the arbitration clause) and a maximum period of 4 weeks to the respondent to file its defence statement. The claimant may be allowed to file its Rejoinder, if any, within the next 2 weeks. Thus, total time for completion of pleadings should be restricted to nearly 2 months, which is quite reasonable. The proposed Bill needs to make it clear that no extension of time for filing pleadings shall be allowed, except on sufficient cause being shown for any likely delay. In that view of the matter, section 23 needs to be amended accordingly.

9. Time limit for recording of oral evidence: Retired Judges, in particular, generally, do not favour deciding the matter on the basis of documentary evidence. There is hardly any case disposed of by them without recording oral evidence of both the parties. This may be taken as a ground for seeking extension of time beyond the period allowed under the statute. In order to obviate such a ground, the proposed Bill needs to incorporate a maximum period of 3 weeks for recording of oral evidence of both the parties since hearings can be held on day-to-day basis.

10. Venue of hearings: The practice of holding hearings in 5-Star Hotels needs to be curbed straightaway. Instead, hearings need to be held at such places where it would be economical to do so. For example, in major cities there are Arbitration Centres where arbitral hearings could be held. It could also be in the Conference Rooms of the parties, by rotation. This will help reduce infructuous expenditure.

11. Proposed Section 21A(2)(a): The words ‘and extraordinary’ need to be inserted after the words ‘upon sufficient’. The words ‘sufficient cause’ have received liberal approach from the courts. The addition of the words ‘and extraordinary’ would not be amenable to be construed in a light manner.

12. Section 34: The Bill needs to incorporate a provision that no award shall be entertained by the Court if the same had not been made within the period allowed under the provisions of the Bill or within the time extended by the court, if any.

13. Section 2(1)(e): The definition of section 2(1)(e) needs to be confined to High Courts and not the principal court of original jurisdiction in the District. For quick disposal of arbitration matters, it is imperative that objections against the award are heard by a single judge of the High Court with a right of appeal to the Division Bench of the High Court.

14. Time limit for disposing appeals: A period of one year has been fixed for disposal of objections under section 34 of the Act. Surprisingly, no time

limit has been fixed for disposal of appeal under section 37. It is suggested that the Law Commission may fix a maximum period of 6 months for disposal of appeal.

15. Deposit of decreetal amount in Court: It has been experienced over the years that even after exhausting all remedies under the Act, the judgment-debtor does not pay the decreetal amount to the decree-holder. Resultantly, the decree-holder has to undergo another round of litigation in the form of execution proceedings. The Law Commission may consider incorporating a provision for deposit of at least 50% of the decreetal amount in the Court alongwith the application under section 34 of the Act. This may, incidentally, lead to reduction in filing of frivolous objection petitions. In fact, in one of the earlier proposed amendments, the provision for deposit of amount alongwith the objection petition had been made, but the same is not present in the now proposed amendments. It is suggested that this provision may be incorporated.

16. Section 38: Proviso to section 38 authorizes payment of extra fees to the arbitral tribunal in case counter claims are filed. This provision has been misused by arbitral tribunals, inasmuch as for every hearing, daily fee is separately claimed for claims and counter claims. This does not make any logical sense since at any given time both claims and counter claims cannot be heard simultaneously. In fact, the parties are charged double the amount of daily fee, which causes financial hardship. The Law Commission may consider deletion of provision for separate fee for claims and counter claims.

17. The Fourth Schedule: It is suggested that wherever the word ‘arbitrator’ appears in the Fourth Schedule, the words ‘and/or close family member’ need to be incorporated. This will further enhance the chances of fair and impartial adjudication.

18. Serial Nos. 22 & 38: At S. No. 22 on page 40, it has been provided that “The arbitrator has within the past three years been appointed as arbitrator on two or more occasions acted or one of the parties or an affiliate of one of the parties”. At S. No. 38 on page 41, a provision has been made that “If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties”. If a survey of the on-going arbitrations in India is conducted, it will be noticed that the number of cases is so large that it may not be possible for the parties to find capable and competent arbitrators. This may lead to appointment of not-so-capable persons as arbitrators. It is thus, suggested that the period of 3 years may be reduced to 2 years.

Further, the genesis behind the proposed amendments under S. Nos. 22 and 38 is not understood. In a way, it casts doubts on the integrity and impartiality of those who act as arbitrators. In any case, is the stipulation

applicable to Presiding Arbitrators also? Furthermore, are the amendments applicable to cases where there is a sole arbitrator? It is necessary to have some clarity in the proposed amendments. Moreover, what is 'significant' also needs to be clarified to remove chances of confusion at a later date.

19. Serial No. 33: The expression 'A close personal friendship exists' is too vague. Unnecessary and uncalled for litigation will ensue. Instead, it is proposed that a provision may be made that 'the arbitrator or his close family friend and a counsel for his close family friend are often seen in family get-togethers". On page 42, the Explanation defines 'close family member' as 'a spouse, sibling, child, parent or life partner'. It is stated that 'spouse' and 'life partner' seem to be the same. If not, the expression 'life partner' needs to be suitably defined.

I hope the observations made above shall be brought to the notice of the concerned persons for the needful.

With best wishes

Yours sincerely,

(P.C. MARKANDA)

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