2023 INSC 976

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 43 OF 2022

LOMBARDI ENGINEERING LIMITED …PETITIONER(S)

VERSUS

UTTARAKHAND JAL VIDYUT NIGAM LIMITED …RESPONDENT(S)

J U D G M E N T

J. B. PARDIWALA, J.:

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Act 1996") filed at the instance of a company based in Switzerland and engaged in the business of design consultancy seeking appointment of an arbitrator for the adjudication of disputes and claims emanating from the Contract dated 25.10.2019 entered into between the petitioner and respondent i.e., Uttarakhand Vidyut Nigam Limited (a wholly owned corporation of the Government of Uttarakhand).

FACTUAL MATRIX

2. The petitioner is a design consultancy firm based in Switzerland, having its registered office at Via Del Tiglio 2, PO Box 934, CH 934, CH 6512, Bellinzona-Guibiasco, Switzerland and local Indian address at B3/61, 1st Floor, Safdarjung Enclave, Delhi – 110029.

3. The respondent is a wholly owned corporation of the Government of Uttarakhand having its registered office at Maharani Bagh, GMS Road, Dehradun, Uttarakhand, India and is engaged in the business of operating hydro power plants in the State of Uttarakhand.

4. The petitioner entered into a contract with the Uttarakhand Project Development and Construction Corporation Limited (hereinafter referred to as "UPDCC") for "Providing consultancy services and preparation of modified comprehensive and bankable Detailed Project Report of Arakot Tiuni Hydro Electric Project on river Pabar in district Uttarkashi of Uttarakhand" dated 25.10. 2019 (Tender Reference No. 01/DGM/UPDCC/2018-19) (hereinafter referred to as, 'the Contract' or 'the Project'). The Project was valued at Rs. 1,39,45,000/- (Rupees One Crore Thirty-Nine Lac Forty-Five Thousand only) (hereinafter referred to as the "Contract Value"). The petitioner was to commence work on the date of the execution of the Contract, i.e., 25.10.2019 and complete the work within 24 months, i.e., by 25.09.2021.

5. The Schedule A to Clause 5 of the Special Conditions of Contract (SCC) (hereinafter referred to as the "Schedule A") provided for the completion period of all works that the petitioner was required to carry out under the Project. Further, the Schedule B to Clause 5 of the SCC (hereinafter referred to as the "Schedule B") provided for the payment that was to be released to the petitioner upon the completion of each stage of work.

6. The respondent took over the said Project from the UPDCC pursuant to an order dated 08.05.2020, passed by the Government of Uttarakhand, which directed that the Project be transferred from UPDCC to the respondent. The takeover of the Project was done by virtue of a tripartite agreement dated 06.10.2020 (hereinafter referred to as the "Tripartite Agreement"), whereby the Contract was novated to the extent that the respondent stepped into the shoes of UPDCC and took over all the obligations under the Contract.

7. The Clause 53 read with Clause 55 of the General Conditions of Contract (hereinafter referred to as "GCC"), which forms part and parcel of the Contract between the petitioner and the respondent, set out the Arbitration Agreement. The said clauses are reproduced hereinbelow for reference:

> *"**CLAUSE-53: PROCEDURE FOR CLAIMS:***
>
> ***53.1** If a dispute of any kind, whatsoever, arises between the Employer and contractor in connection with or arising out of the contract for the execution of this works, whether during the execution of the works or after their completion and whether before or after repudiation or termination of the contract, including any disagreement by either party with any action,*

inaction, opinion, instruction determination, certificate or valuation of the Engineer, the matter in dispute shall, be referred to in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made the under and for the time being in force, shall apply to the arbitration proceedings.

53.2 The contractor shall submit the details of his claims in writing including:

(i) Particulars concerning the events on which the claim is based;
(ii) the legal basis for the claim, whether based on a term of the Contract or otherwise, and if based on a term of the Contract, clearly identifying the specific term;
vii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and
viii) details of the amount claimed and how it has been calculated.

Xxx xxx xxx

CLAUSE-55: ARBITRATION:

(a) All question and disputes relating to the meaning of the specification design, drawing and instructions herein and as to the quality of workmanship or materials used on the work or as to any other question claim, right, matter or thing, whatsoever in any way arising out of or relating to the contract, designs, drawings, specification, estimates instructions, orders or these condition or otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof, shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof and the rules made the under and for the time being in force, shall apply to the arbitration proceedings. <u>However, the Party initiating the arbitration claim shall have to deposit 7% of the arbitration claim in the shape of Fixed Deposit Receipt as security deposit.</u>

(b) <u>On submission of claims the Arbitrator shall be appointed as per the following procedure:</u>

I) For claim amount upto 10.00 Crores, the case shall be referred to Sole Arbitrator to be appointed by the Principal Secretary/Secretary (Irrigation), GoU,…"

(Emphasis supplied)

8. In the wake of various disputes that arose between the parties, the petitioner herein issued a notice of arbitration dated 06.05.2022, calling upon the respondent to appoint an arbitrator in terms of the arbitration clause contained in the GCC referred to above. The relevant part of the arbitration notice reads thus:

> *"26. The Respondent's failure to pay the Claimant's outstanding dues, therefore, entitles the Claimant to invoke the arbitration clause contained in 53 and 55 of the* ***GCC*** *for settlement of the Claimant's claims of a total of INR 1,04,32.664.86/- (Indian Rupees One Crore Four Lacs Thirty-two Thousand Six Hundred and Sixty-Four and Eighth-Six Paise only), i.e. INR 32,91,020/- (Indian Rupees Thirty Two Lakh Ninety One Thousand and Twenty only) towards Invoice dated 27 July 2020 and INR. 71,41,644.86/- (Indian Rupees Seventy-One Lacs Forty-One Thousand Six Hundred and Forty-Four and Eighty Six Paise only) for financial loss suffered by the Claimant on account of abandonment of the Contract by the Respondent. This Notice is without prejudice to the Claimant's rights to correct/amend/update/add any other additional figure/facts that may come to its notice in support of its claim, which rights are expressly reserved.*
>
> *27. Since the Claimant's claim is for an amount less than INR 10 Crores, under Clause 55(b)(I) of the GCC, a sole arbitrator is to be appointed by the Principal Secretary/ Secretary (Irrigation), Government of Uttarakhand. Notwithstanding the foregoing, the Claimant submits that in light of recent amendments to the Arbitration and Conciliation Act, 1996 and settled prevalent law laid down by the Hon'ble Supreme Court in the case of Perkins Eastman Architects DPC and Another v. HSCC (India) Limited [(2020) 20 SCC 760], the unilateral right of appointment given to the Respondent under the Contract, is not enforceable as on date. Therefore, the Claimant will propose the name of an arbitrator in this Notice, for*

consideration and appointment by the Respondent. The Claimant proposes the appointment of Mr. S.K. Sarvaria, District & Sessions Judge (Retired), Mobile No. 9910384642, as the Sole Arbitrator for the claims raised by the Claimant. The Respondent is requested to intimate its confirmation for the aforementioned nominee or provide an alternative name for appointment of the Ld. Sole Arbitrator, who shall be appointed only by mutual consent after the Claimant's written approval.

28. The Respondent is requested to intimate its approval to the nominee proposed by the Claimant, within 15 (fifteen) days of the receipt of this Notice, failing which the Claimant will exercise all rights under applicable law for the commencement of arbitration proceedings."

9. It is the case of the petitioner that instead of appropriately responding to the aforesaid notice of arbitration, the respondent issued a letter dated 09.05.2022, terminating the Contract alleging non-compliance of work and non-fulfilment of the contractual obligation.

10. In such circumstances referred to above, the petitioner has preferred the present application for appointment of an arbitrator invoking Section 11(6) of the Act 1996.

SUBMISSIONS ON BEHALF OF THE PETITIONER

11. Mr. Sidhant Goel, the learned counsel appearing for the petitioner submitted that the case on hand, is one of *"international commercial arbitration"* within the meaning of Section 2(f) of the Act 1996 as his client is incorporated outside India. He submitted that under Section 11(12)(a) of the Act 1996, this Court has the requisite jurisdiction to take necessary measures for the

constitution of an arbitral tribunal under Section 11(6) of the Act 1996 as the case is one of international commercial arbitration.

12. The learned counsel submitted that Clause 55.1(b)(I) of the Contract which provides for appointment of a sole arbitrator by the Principal Secretary/Secretary (Irrigation), Government of Uttarakhand is in teeth of the decision of this Court in ***Perkins Eastman Architects DPC and Another v. HSCC (India) Limited*** reported in (2020) 20 SCC 760. He submitted that the unilateral right of appointment of the arbitrator given to the respondent under the Contract is unenforceable as on date.

13. The learned counsel further submitted that the condition for pre-deposit of 7% of the claimed amount to initiate arbitration in accordance with Clause 55.1(b)(I) of the Contract is contrary to the decision of this Court in the case of ***ICOMM Tele Limited v. Punjab State Water Supply and Sewerage Board and Another*** reported in (2019) 4 SCC 401.

14. It was argued that such a clause could be termed as arbitrary being violative of Article 14 of the Constitution in the sense of being unfair and unjust. It was also argued that such clauses in the Contract do not have any nexus in preventing any frivolous or vexatious claims in determination to such claims.

15. In such circumstances referred to above, the learned counsel prayed that there being merit in this petition the same may be allowed and a sole arbitrator be appointed to resolve the disputes between the parties.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

16. Mr. Amit Anand Tiwari, the learned counsel appearing for the respondent vehemently submitted that the present petition deserves to be outright rejected as the petitioner has failed to comply with the two pre-conditions: (i) the pre-deposit of 7% of the claimed amount and (ii) failure on the part of the petitioner to approach the Principal Secretary/Secretary (Irrigation), Government of Uttarakhand for appointment of an arbitrator as provided under Clause 55 of the Contract.

17. In the aforesaid context, he strongly relied upon the decisions of this Court in the cases of ***Iron & Steel Co. Ltd. v. Tiwari Road Lines*** reported in (2007) 5 SCC 703, ***National Highways Authority of India and Another v. Bumihiway DDB Ltd. (JV) and Others*** reported in (2006) 10 SCC 763 and ***Yashwith Constructions (P)Ltd. v. Simplex Concrete Piles India Ltd. and Another*** reported in (2006) 6 SCC 204.

18. He submitted that the respondent cannot be said to have failed to act as required under the prescribed procedure. He invited the attention of a three-Judge Bench of this Court to a decision in the case of ***S.K. Jain v. State of Haryana and Another*** reported in (2009) 4 SCC 357, wherein a similar clause

requiring a security deposit of certain percentage of the claim amount was held to be valid. He argued that the reliance on the decision of this Court in the case of ***ICOMM Tele Limited*** (supra) by the petitioner is completely misconceived as the relevant arbitration clause therein was quite differently worded *vis-a-vis* the pre-deposit clause provided in the case of ***S.K. Jain*** (supra).

19. He submitted that in the absence of any clause to the contrary, the security deposit is refundable by virtue of being only a deposit for "security". The object of such a clause is to ensure that only valid and *bona fide* claims are made by the parties, and that the project is not hindered by frivolous and baseless claims. He submitted that a three-Judge Bench of this Court in ***S.K. Jain*** (supra) found the clause providing for pre-deposit to be logical and containing a balancing factor to prevent frivolous and inflated claims. The relevant clause in ***S.K. Jain*** (supra) provided that on the termination of arbitration proceedings, the sum would be adjusted against the costs awarded by the arbitrator and the balance amount would be refunded. In ***ICOMM Tele Limited*** (supra), the contract expressly provided for forfeiture of the security deposit, even in the event of the award going in favour of the party which made the deposit. In such circumstances, this Court held such a clause to be arbitrary being violative of Article 14 of the Constitution. In the present case, the Contract does not provide for any such forfeiture under Clause 55 and by virtue of the terminology used, the amount is to be deposited as a "security". It was submitted that the same should be

understood to be refundable upon completion of the proceedings between the parties. It was argued that in any case, Clause 4 of the GCC stipulates that the security deposit is to be refunded to the contractor on demand, after 14 days of expiry of Defects Liability Period. It does not exclude the security deposit made under Clause 55 from its purview.

20. He submitted that as such there is no challenge to the pre-deposit clause in the petition and the present petition under Section 11(6) of the Act 1996 is only for appointment of an arbitrator. The judgments in ***S.K. Jain*** (supra) and ***ICOMM Tele Limited*** (supra), relied upon on behalf of the petitioner were delivered in appeals arising out of writ petitions before the respective High Courts, where substantive challenges were made to the pre-deposit clause.

21. It was also argued that the petitioner having consented to the pre-deposit clause cannot be permitted to turn around and question its validity at the stage when a petition under Section 11(6) of the Act, 1996 is being considered, thereby circumventing the principle of "party autonomy".

22. In the last, it was argued that any order passed by this Court under Section 11(6) of the Act 1996 cannot be treated as a binding precedent in view of the decision of this Court in ***State of West Bengal and Others v. Associated Contractors*** reported in (2015) 1 SCC 32.

23. In such circumstances referred to above, the learned counsel appearing for the respondent prayed that there being no merit in the petition, the same be rejected.

ANAYLSIS

24. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following issues fall for the consideration of this Court:

(i) Whether the dictum as laid down in ***ICOMM Tele Limited*** (supra) can be made applicable to the case in hand more particularly when Clause 55 of the General Conditions of Contract provides for a pre-deposit of 7% of the total claim for the purpose of invoking the arbitration clause?

(ii) Whether there is any direct conflict between the decisions of this Court in ***S.K. Jain*** (supra) and ***ICOMM Tele Limited*** (supra)?

(iii) Whether this Court while deciding a petition filed under Section 11(6) of the Act 1996 for appointment of a sole arbitrator can hold that the condition of pre-deposit stipulated in the arbitration clause as provided in the Contract is violative of the Article 14 of the Constitution of India being manifestly arbitrary?

(iv) Whether the arbitration Clause No. 55 of the Contract empowering the Principal Secretary/Secretary (Irrigation), State of Uttarakhand to appoint an arbitrator of his choice is in conflict with the decision of this Court in the case of ***Perkins Eastman*** (supra)?

JURISDICTION OF THE COURT UNDER SECTION 11(6) OF THE ACT 1996

25. In the wake of a few decisions of this Court, the legislature thought fit to add sub section (6A) to Section 11 of the Act 1996 by way of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "Amendment 2015"). The same reads thus:

> *"(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subsection (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*
>
> (Emphasis supplied)

26. Taking cognizance of the legislative change, this Court in ***Duro Felguera, S.A. v. Gangavaram Port Limited*** reported in (2017) 9 SCC 729, noted that post the 2015 Amendment, the jurisdiction of the court under Section 11(6) of the Act, 1996 is limited to examining whether an arbitration agreement exists between the parties - "*nothing more, nothing less*".

27. The entire case law on the subject was considered by a three-judge bench of this Court in ***Vidya Drolia and Others v. Durga Trading Corporation*** reported in (2021) 2 SCC 1, and an overarching principle with respect to the pre-referral jurisdiction under Section 11(6) of the Act was laid down. The relevant portion of the judgment is as follows:

> *"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable*

case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. *v.* Patel Engg. Ltd., *(2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.*

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration

proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(Emphasis supplied)

28. The limited scope of judicial scrutiny at the pre-referral stage is navigated through the test of a *prima facie* review. This is explained as under:

"133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.

134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial…

xxx xxx xxx

138…On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective

disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes."

(Emphasis supplied)

29. Following the *general rule and the principle* laid down in ***Vidya Drolia*** (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-

arbitrability. In ***Pravin Electricals Private Limited v. Galaxy Infra and Engineering Private Limited*** reported in (2021) 5 SCC 671, ***Sanjiv Prakash v. Seema Kukreja and Others*** reported in (2021) 9 SCC 732 and ***Indian Oil Corporation Limited v. NCC Limited*** reported in (2023) 2 SCC 539, the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the *exception to the general principle* that the court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*** reported in (2021) 5 SCC 738, ***Secunderabad Cantonment Board* v. *B. Ramachandraiah and Sons*** reported in (2021) 5 SCC 705 and ***B and T AG v. Ministry of Defence*** reported in 2023 SCC OnLine SC 657, arbitration was refused as the claims of the parties were demonstrably time-barred.

30. In the case on hand, we are not concerned with the issue relating to the arbitrability of the dispute. It is not even the case of the respondent that the dispute is *ex facie* non-arbitrable. The case put up by the respondent is that there is definitely an arbitrable dispute and the same should be referred to the arbitral tribunal, however, the petitioner should abide by Clause 55 of the Contract.

31. In the case on hand, we are concerned first with the validity of the arbitration clause which provides for 7% pre-deposit of the total claim for the

purpose of invoking arbitration and secondly, the discretion vested with the Principal Secretary/Secretary (Irrigation) to appoint a sole arbitrator.

RE: ISSUE NOS. 1 AND 2

32. Before, we proceed to answer the issues framed by us, we must look into few decisions referred to by us as aforesaid.

S.K. JAIN V. STATE OF HARYANA

33. In ***S.K. Jain*** (supra), the challenge was to an order passed in a writ petition filed by the appellant, wherein it had prayed to quash a memo directing it to deposit 7% of the claimed amount before the arbitral tribunal. The civil appeal was dismissed by a three-Judge Bench of this Court and the memo was accordingly upheld.

34. In ***S.K. Jain*** (supra), the relevant arbitration clause reads as under:

> *"25-A. (7) It is also a term of this contract agreement that where the party invoking arbitration is the contractor, no reference for arbitration shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer in charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings be adjusted against the costs, if any, awarded by the arbitrator against the claimant party and the balance remaining after such adjustment in the absence of any such costs being awarded, the whole of the sum will be refunded to him within one month from the date of the award—*
>
> | *Amount of claim* | *Rate of security deposit* |
> |---|---|

1.	*For claims below Rs 10,000*	*2% of amount claimed*
2.	*For claims of Rs 10,000 and above and below Rs 1,00,000 and*	*5% of amount claimed*
3.	*For claims of Rs 1,00,000 and above*	*7% of amount claimed"*

(Emphasis supplied)

35. The relevant observations made by the Court in ***S.K. Jain*** (supra), more particularly, para 14 reads thus:

> *"14. It has been submitted by learned counsel for the appellant that there should be a cap in the quantum payable in terms of sub-clause (7) of Clause 25-A. This plea is clearly without substance. It is to be noted that it is structured on the basis of the quantum involved. Higher the claim, the higher is the amount of fee chargeable. There is a logic in it. It is the balancing factor to prevent frivolous and inflated claims. If the appellants' plea is accepted that there should be a cap in the figure, a claimant who is making higher claim stands on a better pedestal than one who makes a claim of a lesser amount."*

MUNICIPAL CORPN., JABALPUR AND OTHERS V. RAJESH CONSTRUCTION CO., (2007) 5 SCC 344

36. In the said case, the appellants had floated a notice inviting tender for construction of a road. Some portion of the work was awarded to the respondent therein by entering into a contract on the terms and conditions as contained in the tender. The tender contained various clauses; one amongst the same being clause 29 which pertained to arbitration in case any dispute arose between the parties and reads thus:

"29. Except as otherwise provided in this contract all questions and disputes relating to the meaning of the specifications, drawing and instructions hereinbefore mentioned and as to thing (sic anything) whatsoever, in any way arising out or relating to the contract, designs, drawings, specifications, estimates concerning the works or the execution or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the City Engineer in writing for his decision, within a period of 30 days of such occurrence. Thereupon the City Engineer shall give his written instructions and/or decisions within a period of 60 days of such request. This period can be extended by mutual consent of the parties.

Upon receipt of written instructions of decisions, the parties shall promptly proceed without delay to comply with such instructions or decisions. If the City Engineer fails to give his instructions or decisions in writing within a period of 60 days or mutually agreed time after being requested if the parties are aggrieved against the decision of the CE, the parties may within 30 days prefer an appeal of MPL Com who shall afford an opportunity to the parties of being heard and to offer evidence in support of his appeal. MPL Com will give his decision within 90 days. If any party is not satisfied with the decision of MPL Com, he can refer such disputes for arbitration to an Arbitration Board to be constituted by the Corporation, which shall consist of three members of whom one shall be chosen from among the officers belonging to the Urban Administration and Development Department not below the rank of BE, one retired Chief Engineer of any technical department and City Engineer, Nagar Nigam, Jabalpur.

The following are also the terms of this contract, namely:

(a) No person other than the aforesaid Arbitration Board constituted by the Corporation (to handle cases of all technical departments) shall act as arbitrator and if for any reason that is not possible the matter shall not be referred to arbitration at all.

(b) The Corporation may at any time effect any change in the personnel of the Board and the new members or members

appointed to the Arbitration Board shall be entitled to proceed with the reference from the stage it was left by his or their predecessors.

(c) The party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute(s).

(d) Where the party invoking arbitration is the contractor no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of a sum determined according to the table given below, and the sum so deposited shall on the determination of arbitration proceeding, be adjusted against the costs, if any awarded by the Board against the party and the balance remaining after such adjustment or in the absence of the such costs being awarded the whole of the sum shall be refunded to him within one month from the date of the award.

Amount of claim	*Rate of security deposits*
For claim below Rs 10,000	*5% of amount claimed*
For claim of Rs 10,000 and above but below Rs 1,00,000	*3% of amount claimed subject to minimum of Rs 500*
For claims of Rs 1,00,000 and above	*2% of the amount claimed subject to a minimum of Rs 3000"*

(Emphasis supplied)

37. The relevant findings recorded in ***Rajesh Constructions Co.*** (supra) are as under:

*"**20.** Clause 29 specifically stipulates, as indicated herein earlier, that if any dispute arises between the parties, the party seeking invocation of the arbitration clause, shall first approach the Chief Engineer and on his failure to arbitrate the dispute, the party aggrieved may file an appeal to MPL Com, failing which, the Corporation shall constitute an Arbitration Board to resolve the disputes in the manner indicated in clause 29. However,*

before doing so, the party invoking arbitration clause is required to furnish security of a sum to be determined by the Corporation.

21. *In this case, admittedly, the security has not been furnished by the respondent to the Corporation. We, in fact, asked Mr Sharma, appearing on behalf of the respondent to ascertain on the date of the hearing of the appeal, whether the security deposit was made or not. On instruction, Mr Sharma informed us that such security has not yet been deposited. Such being the position even today, we hold that the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in clause 29(d) of the contract. Therefore, we are of the opinion, that on account of non-furnishing of security by the respondent, the question of constituting an Arbitration Board by the Corporation could not arise at all. Accordingly, we hold that the High Court was not justified in appointing a retired Chief Justice of a High Court as arbitrator by the impugned order*.

22. *It is not disputed before us that the learned Arbitrator appointed by the High Court has already commenced the arbitration proceeding. Mr Mukherjee, appearing on behalf of the Corporation, on instruction, had submitted before us that they shall constitute an Arbitration Board as soon as the respondent furnishes security in terms of clause 29(d) of the contract and if any direction is given to the Arbitration Board to proceed from the stage the learned arbitrator had already reached, that would not be objected to. That is to say, Mr Mukherjee contended that the Arbitration Board may be directed to take over the arbitration proceedings from the stage the learned arbitrator had already reached.*

23. *Such being the stand taken by the Corporation, we direct the respondent to furnish the security of a sum to be determined by the Corporation within six weeks from this date and in the event security determined by the Corporation is furnished within the time mentioned herein earlier, the Corporation shall constitute an Arbitration Board in compliance with clause 29 of the contract. It is directed that the Arbitration Board shall proceed from the stage the learned arbitrator appointed by the High Court had already reached.*

> ***24.*** *That apart, it has to be kept in mind that it is always the duty of the court to construe the arbitration agreement in a manner so as to uphold the same. Therefore we must hold that the High Court ought not to have appointed an arbitrator in a manner, which was inconsistent with the arbitration agreement."*
>
> (Emphasis supplied)

ICOMM TELE LIMITED V. PUNJAB STATE WATER SUPPLY AND SEWERAGE BOARD

38. **Nature of the Clause:** Clause 25(viii) of Notice Inviting Tender provided that:

> *"viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at-call" for ten per cent of the amount claimed, on a schedule bank in the name of the arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with reference to the amount claimed and the balance, if any, shall be forfeited and paid to the other party."*
>
> (Emphasis supplied)

39. In 2008, the Punjab State Water Supply & Sewerage Board, Bhatinda issued notice inviting tender for extension and augmentation of water supply, sewerage scheme, pumping station and sewerage treatment plant for various towns mentioned therein on a turnkey basis. On 25.09.2008, the appellant company, which was involved in civil/electrical works in India, was awarded the said tender after having been found to be the best suited for the task. On

16.01.2009, a formal contract was entered into between the appellant and respondent No. 2 therein.

40. On 08.03.2017, the appellant approached the High Court of Punjab and Haryana challenging the validity of this part of the arbitration clause by filing Civil Writ Petition No. 4882 of 2017. The High Court merely followed its earlier judgment and dismissed the writ petition as well. The matter was carried to this Court.

41. The relevant observations made by this Court are as under:

> *"12. In S.K. Jain v. State of Haryana [(2009) 4 SCC 357 : (2009) 2 SCC (Civ) 163], this Court dealt with an arbitration clause in an agreement which read as follows:*
>
> *Xxx xxx xxx*
>
> *13. In upholding such a clause, this Court referred to the judgment in Central Inland Water Transport Corpn. [Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 : 1986 SCC (L&S) 429] and distinguished this judgment, stating that the concept of unequal bargaining power has no application in the case of commercial contracts. ...*
>
> *14. It will be noticed that in this judgment there was no plea that the aforesaid condition contained in an arbitration clause was violative of Article 14 of the Constitution of India as such clause is arbitrary. The only pleas taken were that the ratio of Central Inland Water Transport Corpn. [Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 : 1986 SCC (L&S) 429] would apply and that there should be a cap in the quantum payable by way of security deposit, both of which pleas were turned down by this Court. Also, the security deposit made would, on the termination of the arbitration proceedings, first be adjusted against costs if any awarded by the arbitrator against the claimant party, and the balance remaining after such adjustment then be refunded to the party making the deposit. This clause is materially different from Clause 25(viii), which, as we have seen,*

makes it clear that in all cases the deposit is to be 10 per cent of the amount claimed and that refund can only be in proportion to the amount awarded with respect to the amount claimed, the balance being forfeited and paid to the other party, even though that other party may have lost the case. This being so, this judgment is wholly distinguishable and does not apply at all to the facts of the present case.

xxx *xxx* *xxx*

20. The first important thing to notice is that the 10 per cent "deposit-at-call" of the amount claimed is in order to avoid frivolous claims by the party invoking arbitration. It is well settled that a frivolous claim can be dismissed with exemplary costs. ...

21. It is therefore always open to the party who has succeeded before the arbitrator to invoke this principle and it is open to the arbitrator to dismiss a claim as frivolous on imposition of exemplary costs.

xxx *xxx* *xxx*

23. The important principle established by this case is that unless it is first found that the litigation that has been embarked upon is frivolous, exemplary costs or punitive damages do not follow. Clearly, therefore, a "deposit-at-call" of 10 per cent of the amount claimed, which can amount to large sums of money, is obviously without any direct nexus to the filing of frivolous claims, as it applies to all claims (frivolous or otherwise) made at the very threshold. A 10 per cent deposit has to be made before any determination that a claim made by the party invoking arbitration is frivolous. This is also one important aspect of the matter to be kept in mind in deciding that such a clause would be arbitrary in the sense of being something which would be unfair and unjust and which no reasonable man would agree to. Indeed, a claim may be dismissed but need not be frivolous, as is obvious from the fact that where three arbitrators are appointed, there have been known to be majority and minority awards, making it clear that there may be two possible or even plausible views which would indicate that the claim is dismissed or allowed on merits and not because it is frivolous. Further, even where a claim is found to be justified and correct, the amount that is deposited need not be refunded to the successful claimant. Take for example a claim based on a

termination of a contract being illegal and consequent damages thereto. If the claim succeeds and the termination is set aside as being illegal and a damages claim of Rupees One crore is finally granted by the learned arbitrator at only ten lakhs, only one-tenth of the deposit made will be liable to be returned to the successful party. The party who has lost in the arbitration proceedings will be entitled to forfeit nine-tenths of the deposit made despite the fact that the aforesaid party has an award against it. This would render the entire clause wholly arbitrary, being not only excessive or disproportionate but leading to the wholly unjust result of a party who has lost an arbitration being entitled to forfeit such part of the deposit as falls proportionately short of the amount awarded as compared to what is claimed.

xxx *xxx* *xxx*

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10 per cent would discourage arbitration, contrary to the object of de-clogging the court system, and would render the arbitral process ineffective and expensive.

28. For all these reasons, we strike down Clause 25(viii) of the notice inviting tender...”

(Emphasis supplied)

42. The principles of law discernible from the aforesaid observations made by this Court in ***ICOMM Tele Limited*** (supra) are as under:

(a) That the pre-deposit condition in an arbitration clause is violative of Article 14 of the Constitution of India being arbitrary.

(b) Unless it is first found or *prima facie* established that the litigation that has been embarked upon is frivolous, the exemplary costs or punitive damages cannot follow.

(c) Deterring a party to an arbitration from invoking the Alternative Dispute Resolution Process by pre-deposit of certain percentage would discourage

arbitration. This would run contrary to the object of de-clogging the court system and would render the arbitral process ineffective and expensive.

FEW DECISIONS OF THE HIGH COURTS ON THE SUBJECT

43. ***Lite Bite Foods Pvt. Ltd. v. Airports Authority of India*** reported in 2020 SCC OnLine Ker 4736,

Nature of the Clause:

> *"5.15.* ***Dispute Resolution***
> *....The Concessionaire by means of a written application can seek appointment of an Arbitrator and Authority would appoint such an Arbitrator within 30 days of receipt of the application, subject to fulfilling, the pre-requisites for appointment of the Arbitrator as laid hereunder:—*
>
> > *i. The case shall be referred to the Sole Arbitrator as per AA1 delegation of powers in vogue subject to the condition that the Concessionaire shall have to deposit the disputed amount with AA1 as condition precedent and the consent shall have to be obtained from the concessionaire for acceptance of the recommendations of Arbitrator before making reference to the Arbitrator for adjudication of dispute."*
>
> (Emphasis supplied)

44. The relevant extract from the Judgment reads thus:

> *"11...the conditions in clause 5.15 of the RFP, that require the petitioner to choose an Arbitrator from among a panel suggested by the respondent, as also the condition that requires the petitioner to make a pre-deposit of amounts as a condition for invoking the arbitration, would fall foul of the law declared by the Supreme court in the decisions reported as Perkins Eastman Architects DPC v. HSCC (India) Ltd. - [2019 SCC OnLine SC 1517] and ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board - [(2019) 4 SCC 401] respectively. I am not persuaded to accept the contention of the learned senior counsel for the respondent that it is only in the event of a challenge to*

clause 5.15 of the RFP on the ground that it is violative of the fundamental rights of the petitioner under Article 14 of the Constitution of India, that this Court can hold the said clause, in the RFP, as illegal. After the amendment of the 1996 Act in 2015, the law must be taken to be that any clause in an agreement, that requires one of the contracting parties to make a deposit of amount as a precondition for invoking the arbitration, has to be seen as rendering the entire clause arbitrary, being not only excessive or disproportionate but leading to a wholly unjust situation in arbitration proceedings, that are ordinarily to be encouraged on account of the high pendency of cases in courts and the ever-increasing cost of litigation. I am therefore of the opinion that even if the clause in the RFP is to be treated as supplementing Article 22 of the Concessionaire Agreement, the offending conditions in the RFP would have to be ignored in view of the declaration of law by the Supreme Court in the cases referred above."

(Emphasis supplied)

45. In the aforesaid decision of the Kerala High Court, the learned Single Judge after due consideration of the decisions of this Court in ***Perkins Eastman*** (supra) and ***ICOMM Tele Limited*** (supra), held that any clause in the agreement that requires one of the contracting parties to make a deposit of an amount as a pre-condition for invoking the arbitration should be seen as one rendering the entire clause arbitrary being not only excessive or disproportionate but something that may lead to a wholly unjust situation. Ultimately Article 22 of the concessionaire agreement therein was ignored while appointing an arbitrator in an application filed under Section 11(6) of the Act 1996.

46. ***The Assan Co-Op. L & C Society v. Haryana Vidyut Prasaran Nigam Ltd***., ARB-127-2019 (Section 11 Petition) and CWP-13539-2021 (Civil Writ Petition)

Date of Order: 03.112021

Forum: High Court of Punjab and Haryana (Single-Judge)

Nature of the Clause:

> *"Clause 25A of the Contract (Annexure P-1) reads as under:- "If any question, dispute, difference of opinions whatsoever arises in any way connected with or arising out of instrument for meaning or operation of any part thereof or the rights, duties or liabilities of either party, including the termination of the contract by either party and correctness thereof at any stage whatsoever it shall be referred to arbitration of MD/Chief Engineer of HVPNL or his nominee not below the rank of Superintending Engineer subject to the following conditions:-*
>
> *xxx xxx xxx*
>
> *7. In case the party invoking the arbitration is the contractor, the reference for arbitration shall be maintainable only after the contractor furnishes to the satisfaction of Engineering-In Charge a case security fee deposited @ 3% of the total amount claimed by him. The sum so deposited by the contractor shall on the termination of the arbitration proceedings be adjusted against the cost and any amount awarded against the contractor. The remaining amount shall be refunded to the contractor with-in one month from the date of the award."*
>
> (Emphasis supplied)

47. The relevant observations from the Judgment are as under:

> *"23. Resultantly, the issue of pre-deposit now arises. Counsel for the petitioner has heavily relied upon the judgment passed in M/s ICOMM Tele Ltd. (supra), which has been rightly distinguished by the learned counsel for the respondent ...*
>
> *24. Thereafter, in 'S.K. Jain Vs. State of Haryana and another', 2008 AIR (Punjab) 30 the challenge was to the clause of 7% of the total amount claimed. While placing reliance upon the judgment of the Apex Court in 'Municipal Corporation, Jabalpur & others Vs. M/s Rajesh Construction Co.', 2007 (5) SCC 344, the writ petition was dismissed. The said judgment was upheld by the Apex Court in 'S.K. Jain Vs. State of Haryana and another' 2009 (2)*

SCC (Civil) 163 by holding that there is logic in providing the said cap. …

25. In M/s ICOMM Tele Ltd. (supra) the objectionable clause 25 (viii) was struck down which was for 10% deposit. In the event of an award in favour of the claimant, the deposit was to be refunded to him in proportion to the amount awarded with regard to the amount claimed and the balance if any was to be forfeited and paid to the other party. Resultantly, the Apex Court came to the conclusion that nine times of the deposit could be forfeited by the parties who lost in the arbitration proceedings and despite the fact that the party has an award against it. Thus, the clause was held to be wholly arbitrary …

26. It was on such account the observations were made that the pre-deposit would discourage arbitration and the said clause as such was struck down by the distinguishing the judgment passed in S.K. Jain (supra). …"

(Emphasis supplied)

48. In the aforesaid decision, a learned Single Judge of the Punjab and Haryana High Court looked into both the decisions of this Court i.e., ***S.K. Jain*** (supra) and ***ICOMM Tele Limited*** (supra). The High Court went on to look into the relevant arbitration clause contained in both the decisions of this Court referred to above and thought fit to follow the dictum as laid in **S.K. Jain's** case being a decision rendered by a Bench of three Judges.

49. ***Garg and Company v. State of Haryana & Ors.,*** CWP Nos. 21840 of 2020, 21857 of 2020 and 21858 of 2020 (O&M) (Civil Writ Petitions)

Date of Order : 08.04.2022

Forum: High Court of Punjab and Haryana (Single-Judge Bench)

Nature of the Clause:

"33(7). It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor, no reference for Arbitrator shall be maintainable unless the contractor furnishes to the satisfaction of the Executive Engineer of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings, be adjusted against the cost, if any, awarded by the Arbitrator against the claimant party and the balance remaining after such adjustment, in the absence of any such cost being awarded the whole of the sum will be refunded to him within one month from the date of the award:

Sr. No.	*Amount Claims*	*Rate of Security Deposit*
i.	*For claims below Rs. 10,000/*	*2% of amount claimed*
ii.	*For claims of Rs. 10,000/- & above but below Rs. 1,00,000/-*	*5% of amount claimed*
iii.	*For claims of Rs. 1,00,000/- and above*	*7.5% of amount claimed"*

(Emphasis supplied)

50. The relevant observations from the Judgment are as under:

"All the questions and grounds sought to be raised by learned counsel for the petitioner are succinctly answered by the Hon'ble Supreme Court in M/s. ICOMM Tele Limited's case (supra) itself while discussing S.K. Jain's case (supra). It is obvious that a clear cut distinction has been made in respect to the type of pre-deposit clause. Discussion of the judgment of S.K. Jain's case (supra) makes it crystal clear that such like clauses, which provide for adjustment and refund to the party making the deposit after the passing of the award are materially different from the clause which was under challenge in M/s. ICOMM Tele Limited's case (supra). In case of M/s. ICOMM Tele Limited's case (Supra), the objectionable clause 25(viii) was struck down finding the same to be arbitrary…

It is in the said factual matrix that the observations regarding the clause of pre-deposit discouraging arbitration was made and the said clause was struck down while distinguishing the earlier judgment passed by the Hon'ble Supreme Court in S.K. Jain's case (supra).

Learned counsel for the petitioner is unable to deny that Clause 33(7) of the Agreement in the present writ petitions is identical to Clause 25(7) of the Agreement, which was under consideration in S.K. Jain's case (supra). Though learned senior counsel for the petitioner/s was at pains to submit that the ratio of M/s. ICOMM Tele Limited's case (supra) suggests that any kind of pre-deposit has to be set aside as it necessarily leads to deterring a party to an arbitration from invoking this alternate dispute resolution system and in-fact renders the entire arbitral process ineffective, however, keeping in view the specific discussion by the Hon'ble Supreme Court in its decision in M/s. ICOMM Tele Limited's case (supra) of S.K. Jain's case (supra), I do not find any merit in the argument raised by learned counsel for the petitioner. The same is accordingly rejected as it is clear that this Court is bound by the judgment of the Hon'ble Supreme Court in S.K. Jain's case (supra), which has not been overruled till date."

(Emphasis Supplied)

51. In the aforesaid decision of the Punjab and Haryana High Court, both the decisions of this Court i.e., ***ICOMM Tele Limited*** (supra) as well as ***S.K. Jain*** (supra) were looked into and the Court thought fit to follow the dictum as laid in ***S.K. Jain*** (supra).

52. ***Brij Gopal Construction Co. Pvt. Ltd. v. Haryana Shehri Vikas Pradhikaran,*** CWP-14587-2022 (O&M) (Civil Writ Petition)

Date of Order: 02.08.2022

Forum: High Court of Punjab and Haryana (Single-Judge)

Nature of the Clause:

"25(A)(vii) It is also a term of this arbitration agreement that where the party invoking arbitration is the contractor, no reference for Arbitrator shall be maintainable unless the contractor, furnishes to the satisfaction of the Engineer In charge of the work, a security deposit of a sum determined according to details given below and the sum so deposited shall, on the termination of the arbitration proceedings, be adjusted against the cost, if any, awarded by the Arbitrator against the claimant party and the balance remaining after such adjustment or whole sum in the absence of any such cost being awarded the whole of the sum will be refunded to him within one month from the date of the award.

AMOUNT OF CLAIMS	*RATE OF SECURITY DEPOSIT*
i) For claims below Rs. 10,000/-	*2% of amount claimed*
ii) For claims of Rs. 10,000/- & above & below Rs. 1,00,000/-	*5% of amount claimed*
iii) For claims of Rs. 1,00,000/-	*7.5 % of amount claimed and above"*

53. The relevant observations from the Judgment are as under:

"A similar controversy was sought to be raised in CWP-21840-2020 and other connected writ petitions, which have been dismissed on 08.04.2022. Question raised for adjudication in the said writ petitions was also whether the clause in question requiring a pre-deposit for invocation of Arbitration is unreasonable, unconscionable and liable to set aside. Clause in question in the abovesaid writ petitions was identical as clause 25(A)(vii) involved in the instant writ petition. Reliance had been placed on M/s ICOMM Tele Limited (supra) as is the case in the present writ petition. However, while dealing with the contentions as raised and dismissing the said writ petitions, judgment of the Three Judge Bench of the Hon'ble Supreme Court in S.K. Jain v. State of Haryana, (2009) 4 SCC 357 was duly considered. It was also noticed that Hon'ble Supreme Court itself in the case of M/s ICOMM Tele Limited (supra) referred to the case of S.K. Jain (supra) and infact upheld the clause regarding pre-deposit in S.K. Jain's case (supra)."

xxx *xxx* *xxx*

> *Similar view in regard to such a pre-deposit clause has also been taken by a Co-ordinate Bench in decision dated 03.11.2020 passed in ARB-127- 2019 and in CWP No. 13539 of 2021, titled as M/s The Assan Co-op L&C Society, Bahadurgarh, District Jhajjar Vs. Haryana Vidyut Prasaran Nigam Limited (HVPNL). Thus, in view of judgment of the Hon'ble Supreme Court in S.K. Jain vs. State of Haryana, 2009(2) RCR (Civil) 202 as discussed in M/s ICOMM Tele Limited(supra), order dated 15.01.2022 (Annexure P9) and dated 02.04.2022 (Annexure P11) have been correctly passed. This Court is clearly bound by the judgment of the Hon'ble Supreme in the case of S.K. Jain (supra) which has admittedly not been over ruled till date."*
>
> (Emphasis supplied)

54. In the aforesaid decision of the Punjab and Haryana High Court, both the decisions of this Court i.e., ***ICOMM Tele Limited*** (supra) and ***S.K. Jain*** (supra) were taken into consideration and ultimately, the Court followed the dictum as laid down in ***S.K. Jain*** (supra).

55. ***Bathinda Railway Transhipment Cooperative L&C Society Ltd. v. Punjab Mandi Board & Ors.,*** Civil Writ Petition No. 28981 of 2019 (O&M)

Date of Order : 27.03.2023

Forum: High Court of Punjab and Haryana (Division Bench)

Nature of Clause:

> *"8. … 25(viii) It shall be an essential term of this contract that in order to avoid frivolous claims, the party invoking arbitration shall specify the disputes based upon facts and calculations stating the amount claimed under each claim and shall furnish a "deposit-at call" for ten percent of the amount claimed, on a scheduled bank in the name of the Arbitrator/Chairman of the Arbitral Tribunal, by his official designation who shall keep the*

amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded with respect to the amount claimed and the balance, if any, shall be forfeited and paid to the other party."

(Emphasis supplied)

56. The relevant observations from the Judgment are as under:

"10. From a perusal of the aforesaid two clauses (supra) i.e. one that has been assailed by the petitioner and the other that has been quashed by the Supreme Court in juxta position makes it absolutely clear that they are identical containing the same stipulations. The Supreme Court in the case of M/s Icomm Tele Ltd. (supra) after considering the validity of the said clause has held as under:-

> *"28. For all these reasons, we strike down clause 25(viii) of the notice inviting tender. This clause being severable from the rest of clause 25 will not affect the remaining parts of Clause 25. The judgment of the High Court is set aside and the appeal allowed."*

11. In the light of the aforesaid decision rendered by the Supreme Court in M/s Icomm Tele Ltd. (supra), which has considered absolutely an identical clause contained in the agreement between the parties and after doing so has struck down the said clause, it is not for this Court i.e. the High Court to consider the contention of the respondent and take a different view as that would be not just beyond the authority of this Court but would also be an act of impropriety. This Court being bound by the decision rendered by the Supreme Court in M/s Icomm Tele Ltd. (supra) allowed the present petition filed by the petitioner and declares the arbitration clause 25(viii) of the tender conditions, quoted above, as unconstitutional and passes the same orders in similar terms as were passed by the Supreme Court in paragraph-28 of the decision rendered in M/s Icomm Tele Ltd. (supra)."

(Emphasis supplied)

57. In the aforesaid decision of the Punjab and Haryana High Court, the decisions of this Court in the case of ***ICOMM Tele Limited*** (supra) as well as ***S.K. Jain*** (supra) were taken into consideration and ultimately, the Court followed the dictum as laid in ***ICOMM Tele Limited*** (supra), as the relevant arbitration clause in the said matter was almost identical to the one in ***ICOMM Tele Limited*** (supra).

58. ***Amazing India Contractors Pvt. Ltd. v. Airport Authority of India and Others*** reported in 2023 SCC OnLine Cal 1704, C.O. 66 of 2022 (Section 11 Petition)

High Court of Calcutta (Single Judge)

Nature of the Clause:

> *"33(iii). All disputes and differences arising out of or in any way touching or concerning this Agreement (except those the decision whereof is otherwise herein before expressly provided for or to which the public premises [Eviction of Unauthorized Occupants] Act and the rules framed there under which are now enforced or which may hereafter come into force are applicable), shall, in the first instance, be referred to a Dispute Resolution Committee (DRC) setup at the airports, for which a written application should be obtained from the party and the points clearly spelt out. In case the dispute is not resolved within 45 days of reference, then the case shall be referred to sole arbitration of a person to be appointed by the Chairman/Member of the Authority. The award of the arbitrator so appointed shall be final and binding on the parties. The Arbitration & Conciliation Act, 1996 shall be applicable. Once the arbitration clause has been invoked, the DRC process will cease to be operative. It will be no bar that the Arbitrator appointed as aforesaid is or has been an employee of the Authority and the appointment of the Arbitrator will not be*

challenged; or be open to Question in any Court of Law, on this account."

59. The relevant observations from the Judgment are as under:

> ***"25.*** *...*
>
> *That part of Clause 33 of the agreement between the parties providing for constitution of a Dispute Resolution Committee with a stipulation that before availing of dispute resolution, the disputed amount has to be deposited, is invalid and contrary to law for more than one reason. The first and foremost is that it fetters the right of the petitioner, a party to the arbitration agreement to avail of arbitration which is a statutory right. [ICOMM Tele Ltd. v. Punjab State Water Supply and Sewerage Board reported in (2019) 4 SCC 401]. Secondly, it is most ambiguous. If the petitioner is making a claim which is then and there disputed by the respondent, why should the petitioner, being the claimant be asked to deposit the disputed amount? When the petitioner is making a claim against the respondent, it is unable, at that point of time, to know whether the whole claim or part of it would be admitted, or the whole of it denied by the latter. Hence, it is unable to gauge the disputed amount. Even if it were possible for the respondent to notify the disputed amount immediately, the clause would only be operative if the respondent was simultaneously making a counter claim more than the petitioner's claim which was being denied by the petitioner, by seeking reference of the dispute to arbitration. If the respondent was first making the claim which was disputed by the petitioner, still the matter could not be referred to the Committee in as much as the clause suggests an application for dispute resolution by the petitioner only. For all these reasons, this clause itself is vague for uncertainty and invalid."*
>
> (Emphasis supplied)

60. In the aforesaid decision of the Calcutta High Court, ***ICOMM Tele Limited*** (supra) and ***Perkins Eastman*** (supra) were relied upon and ultimately, it was held that Clause 33 of the agreement therein between the parties providing for constitution of a *"Dispute Resolution Committee"* with a stipulation that

before availing of dispute resolution clause, the disputed amount has to be deposited, was held to be invalid and contrary to law.

61. We are of the view that as such there is no conflict between ***S.K. Jain*** (supra) and ***ICOMM Tele Limited*** (supra), as the relevant arbitration clauses that fell for the consideration of this Court in both the cases stood completely on a different footing. What is relevant to note are the points of law on which ***S.K. Jain*** (supra) was distinguished and explained in ***ICOMM Tele Limited*** (supra).

62. The Court while distinguishing ***S.K. Jain*** (supra) in ***ICOMM Tele Limited*** (supra) made some relevant observations in para 14 of the Judgment. Para 14 reads thus:

> *"**14.** It will be noticed that in this judgment there was no plea that the aforesaid condition contained in an arbitration clause was violative of Article 14 of the Constitution of India as such clause is arbitrary. The only pleas taken were that the ratio of Central Inland Water Transport Corpn. [Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156 : 1986 SCC (L&S) 429] would apply and that there should be a cap in the quantum payable by way of security deposit, both of which pleas were turned down by this Court. Also, the security deposit made would, on the termination of the arbitration proceedings, first be adjusted against costs if any awarded by the arbitrator against the claimant party, and the balance remaining after such adjustment then be refunded to the party making the deposit. This clause is materially different from Clause 25(viii), which, as we have seen, makes it clear that in all cases the deposit is to be 10 per cent of the amount claimed and that refund can only be in proportion to the amount awarded with respect to the amount claimed, the balance being forfeited and paid to the other party, even though that other party may have lost the case. This being so, this judgment is wholly distinguishable and does not apply at all to the facts of the present case."*

(Emphasis supplied)

63. In para 16 of ***ICOMM Tele Limited*** (supra), the court ultimately considered whether Clause 25(viii) could be said to be arbitrary and violative of Article 14 of the Constitution of India. Para 16 reads thus:

> *"16. Thus, it must be seen as to whether the aforesaid Clause 25(viii) can be said to be arbitrary or discriminatory and violative of Article 14 of the Constitution of India."*

64. Thereafter, the Court proceeded to observe that Clause 25(viii) therein could not be said to be discriminatory as the same applied equally to both the parties, however, arbitrariness could be said to be a separate and distinct facet of Article 14 of the Constitution. Saying so, the Court referred to and relied upon para 19 of this Court's decision in ***A.L. Kalra v. Project and Equipment Corporation of India Ltd.*** reported in (1984) 3 SCC 316. Para 19 reads thus:

> *"19. The scope and ambit of Article 14 have been the subject-matter of a catena of decisions. One facet of Article 14 which has been noticed in E.P. Royappa v. State of Tamil Nadu [(1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555 : (1974) 1 LLJ 172] deserves special mention because that effectively answers the contention of Mr Sinha. The Constitution Bench speaking through Bhagwati, J. in a concurring judgment in Royappa case [(1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : AIR 1974 SC 555 : (1974) 1 LLJ 172] observed as under: [SCC para 85, p. 38: SCC (L&S) p. 200]*
>
> > *"The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot*

countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

This view was approved by the Constitution Bench in Ajay Hasia case [(1981) 2 SCR 79 : (1981) 1 SCC 722 : 1981 SCC (L&S) 258 : AIR 1981 SC 487 : (1981) 1 LLJ 103]. It thus appears well-settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in Ajay Hasia case [(1981) 2 SCR 79 : (1981) 1 SCC 722 : 1981 SCC (L&S) 258 : AIR 1981 SC 487 : (1981) 1 LLJ 103] and put the matter beyond controversy when it said "wherever therefore, there is arbitrariness in State action whether it be of the Legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action". This view was further elaborated and affirmed in D.S. Nakara v. Union of India [(1983) 1 SCC 305 : 1983 SCC (L&S) 145 : (1983) UPSC 263 : AIR 1983 SC 130]. In Maneka Gandhi v. Union of India [(1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597] it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach

of Article 14. The contention as formulated by Mr Sinha must accordingly be negatived. "

(Emphasis supplied)

65. The Court thereafter, took notice of the fact that the 10 % "deposit-at-call" of the amount claimed therein was to avoid frivolous claims by the party invoking arbitration. This Court went on to say that a frivolous claim can always be dismissed with exemplary costs.

66. Keeping the aforesaid in mind, if we look into the 7% pre-deposit condition in the case on hand, as contained in Clause 55 of the GCC it is evident that nothing has been provided as to how this amount of 7% is to be ultimately adjusted at the end of the arbitral proceedings. With a view to salvage this situation, the learned counsel appearing for the respondent invited the attention of this Court to Clause 3 of the GCC, which relates to the security deposit for performance. Clause 3 reads thus:

*"**CLAUSE-3: SECURITY DEPOSIT FOR PERFORMANCE:***

3.1 The Security Deposit shall comprise of following:

(i) Performance Security Deposit/Performance Guarantee to be furnished by the Contractor at the time of Award of Work.

(ii) Retention Money/Security Deposit to be recovered from Interim bills of the Contractor.

3.2 The Contractor within 28 (Twenty Eight) days from the date of issue of Letter of Acceptance, shall furnish a Performance security deposit of 10% (Ten percent) of the Contract Price for due performance of contract, in any one of the following forms:

(a) Demand draft on any Nationalized/scheduled Bank of India in the name of Employer; or FDR/CDR in the manner as specified in Section-I.

(b) Bank Guarantee from an Indian Nationalized/Scheduled Bank of India or a foreign bank through its branch located in India acceptable to Employer in the prescribed proforma."

67. Thereafter our attention was drawn to Clause 4 which provides for refund of security deposit. Clause 4 reads thus:

*"**CLAUSE-4: REFUND OF SECURITY DEPOSIT**:*

The Security Deposit less any amount due shall, on demand, be returned to the contractor after 14 days of expiry of Defects Liability Period (referred in Clause 43 hereof). No interest on the amount of Security Deposit shall be paid to the Contractor at the time of release of Security Deposit as stated above."

68. We are of the view that Clauses 3 and 4 respectively as above relating to security deposit for performance and refund of the same has no nexus at all with the pre-deposit amount of 7% as stipulated in Clause 55 of the GCC. Such vague and ambiguous condition of 7% pre-deposit of the total claim makes the same more vulnerable to arbitrariness thereby violating Article 14 of the Constitution. Even otherwise, as explained in ***ICOMM Tele Limited*** (supra) if the claim of the petitioner herein is ultimately found to be frivolous the arbitral tribunal can always award costs in accordance with Section 31A of the Act 1996, which reads thus:

***"31A. Regime for costs**.— (1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine—*

(a) whether costs are payable by one party to another;
(b) the amount of such costs; and
(c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, "costs" means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;
(ii) legal fees and expenses;
(iii) any administration fees of the institution supervising the arbitration; and
(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,-

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or
(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including-

(a) the conduct of all the parties;
(b) whether a party has succeeded partly in the case;
(c) whether the party had made a frivolous counterclaim leading to delay in the disposal of the arbitral proceedings; and
(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay-

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

69. In the aforesaid context, we may refer to and rely upon a nine-Judge Bench decision of the Supreme Court of Canada in the case of ***Uber Technologies Inc., Uber Canada, Inc., Uber B.V. and Rasier Operations B.V. v. David Heller*** reported in 2020 SCC OnLine Can SC 13**.** We quote the relevant observations as under:

*"**42.** In our view, there are ways to mitigate this concern that make the overall calculus favour departing from the general rule of referring the matter to the arbitrator in these situations. Courts have many ways of preventing the misuse of court processes for improper ends. Proceedings that appear vexatious can be handled by requiring security for costs and by suitable awards of costs. In England, courts have awarded full indemnity costs where a party improperly ignored arbitral jurisdiction (Hugh Beale, ed., Chitty on Contracts (33rd ed. 2018), vol. II, Specific Contracts, at para. 32-065; A. v. B. (No. 2), [2007] EWHC 54 (Comm.) : [2007] 1 All ER 633 (Comm.), at para. 15; Kyrgyz Mobil Tel Limited v. Fellowes International Holdings Limited, [2005] EWHC 1329 : 2005 WL 6514129 (Q.B.), at paras. 43-44). Further, if the party who successfully enforced an arbitration agreement were to bring an action, depending on the circumstances they might be able to recover damages for breach of contract, that contract being the agreement to arbitrate (Beale, at para. 32-052; West Tankers Inc. v. Allianz SpA, [2012] EWHC 854 (Comm.) : [2012] 2 All ER 395 (Comm.), at para. 77)."*

(Emphasis supplied)

RE: ISSUE NO. 3

WHETHER THE VALIDITY OF THE PRE-DEPOSIT CONDITION AS CONTAINED IN CLAUSE 55 OF THE AGREEMENT CAN BE

LOOKED INTO AND DECIDED ON THE ANVIL OF ARTICLE 14 OF THE CONSTITUTION IN A PETITION UNDER SECTION 11(6) OF THE ACT 1996?

70. The vociferous submission on the part of the learned counsel appearing for the respondent, that this Court while considering an application under Section 11(6) of the Act 1996 for the appointment of arbitrator should not test the validity or reasonableness of the conditions stipulated in the arbitration clause on the touchstone or anvil of Article 14 of the Constitution, is without any merit or substance.

71. It would be too much for the respondent to say that it is only the writ court in a petition under Article 226 of the Constitution that can consider whether a particular condition in the arbitration clause is arbitrary.

72. It is not for the first time that this Court is looking into the arbitration clause falling foul of Article 14 of the Constitution while deciding Section 11(6) application.

73. In the case of ***TRF Limited v. Energo Engineering Projects Limited*** reported in (2017) 8 SCC 377, this Court observed as under: -

> "*In this batch of appeals, by special leave, the seminal issues that emanate for consideration are; whether the High Court [TRF Ltd. v. Energo Engg. Projects Ltd., 2016 SCC OnLine Del 2532] , while dealing with the applications under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for brevity, "the Act"), is justified to repel the submissions of the appellants that once the*

*person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by **operation of law**, he would not be eligible to nominate a person as an arbitrator, and second, a plea that pertains to statutory disqualification of the nominated arbitrator can be raised before the court in application preferred under Section 11(6) of the Act, for such an application is not incompetent. For the sake of clarity, convenience and apposite appreciation, we shall state the facts from Civil Appeal No. 5306 of 2017."*

xxx *xxx* *xxx*

54. *In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator**.** The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so**."***

(Emphasis supplied)

74. In ***Perkins Eastman*** (supra), this Court held as under:

"This application under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act, 1996 ("the Act") and under the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996 ("the Scheme") prays for the following principal relief:

"(a) appoint a sole arbitrator, in accordance with Clause 24 of the contract dated 22-5-2017 executed between the parties and the sole arbitrator so appointed may adjudicate the disputes and differences between the parties arising from the said contract."

xxx xxx xxx

21. *But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue,* ***"whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator.*** *The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]"*

(Emphasis supplied)

75. In ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited*** reported in (2017) 4 SCC 665, this Court held as under:

> ***"28.*** *Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.****"***
>
> (Emphasis supplied)

76. What is relevant to note in all the above referred decisions of this Court is the phrase "operation of law". This phrase is of wider connotation and covers the Act 1996 as well as the Constitution of India and any other Central or State Law.

77. In the aforesaid context, we should look into and discuss the Kelson's Pure Theory of Law on the basic norm that he called "Grundnorm".

78. Kelson's pure theory of law has its pyramidical structure of hierarchy based on the basic norm of Grundnorm. The word 'Grundnorm' is a German word meaning fundamental norm. He has defined it as '*the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity*'. It is the Grundnorm which determines the content and validates the other norms derived from it. But from where it derives its validity, was a question which Kelson did not answer, stating it to be a meta-physical question. Grundnorm is a fiction, rather than a hypothesis as proposed by the jurist. The Grundnorm is the starting point in a legal system and from this base; a legal system broadens down in gradation becoming more and more detailed and specific as it progresses. This is a dynamic process. At the top of the pyramid is the Grundnorm, which is independent. The subordinate norms are controlled by norms superior to them in hierarchical order. The system of norms proceeds from downwards to upwards and finally closes at Grundnorm. (Reference: Application of Grundnorm in India, Zainab Arif Khan, Aligarh Muslim University)

79. Our Constitution is the paramount source of law in our country. All other laws assume validity because they are in conformity with the Constitution. The Constitution itself contain provisions that clearly provide that any law which is

in violation of its provisions is unlawful and is liable to be struck down. As contained in ***Article 13,*** which provides that all laws which were made either before the commencement of the Constitution, or are made after it, by any competent authority, which are inconsistent with the fundamental rights enshrined in the Constitution, are, to the extent of inconsistency, void. This again unveils the principle of Grundnorm which says there has to be a basic rule. The Constitution is the basic and the ultimate source of law.

80. In the aforesaid context, we must look into view decisions of the High Courts explaining the theory of Grundnorm.

(i) In the case of ***Squadron Leader H. S. Kulshrestha v Union of India*** reported in 1999 SCC OnLine All 270, the court held that '*According to the theory of the eminent jurist Kelson, in every country there is a hierarchy of laws, and the highest law is known as the* ***grundnorm*** *of law. In our country the grundnorm is the Constitution.*'

(ii) In another case of ***Abdur Sukur & Another v State of West Bengal & others*** reported in 2019 SCC Online Cal 5455, the court held that '*...enshrined in the Constitution of India, which is the grundnorm of all Indian statutes.*'

(iii) In another case of ***Om Prakash Gupta v Hindustan Petroleum Corporation Ltd. & Anr.*** reported in 2009 SCC OnLine Raj 1381, it was again

held that '*Since the limits have been defined by the Constitution, they are, in jurisprudential term, 'the grundnorm'.*'

(iv) In another case of ***Sunil v State of M. P. & Another*** reported in 2016 SCC OnLine MP 8551, it was again mentioned that, '*The Constitution of India is the grundnorm – the paramount law of the country. All other laws derive their origin and are supplementary and incidental to the principles laid down in the Constitution.*'

(v) In the case of ***Government of Andhra Pradesh & Ors vs Smt. P. Laxmi Devi*** reported in (2008) 4 SCC 720, this Court observed, '*According to Kelson, in every country there is a hierarchy of legal norms, headed by what he calls as the 'grundnorm'. If a legal norm in a higher layer of this hierarchy conflicts with a legal norm in a lower layer the former will prevail. In India the Grundnorm is the Indian Constitution*.'

81. Thus, in the context of the Arbitration Agreement, the layers of the Grundnorm as per Kelsen's theory would be in the following hierarchy:

(i) Constitution of India, 1950;
(ii) Arbitration and Conciliation Act, 1996 & any other Central/State Law;
(iii) Arbitration Agreement entered into by the parties in light of s. 7 of the Arbitration and Conciliation Act, 1996.

82. Thus, the Arbitration Agreement, has to comply with the requirements of the following and cannot fall foul of:

(i) Section 7 of the Arbitration and Conciliation Act;
(ii) any other provisions of the Arbitration and Conciliation Act, 1996 & Central/State Law;
(iii) Constitution of India, 1950.

83. The observations of this Court in para 236 of ***Vidya Drolia*** (supra) should clinch the issue. Para 236 reads thus:

> *"**236.** Having established the threshold standard for the court to examine the extent of validity of the arbitration agreement, as a starting point, it is necessary to go back to Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], which laid down : (SCC p. 759, para 48)*
>
> > *"48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."*
>
> *At first blush, the Court seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. <u>However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. This view is confirmed by Duro Felguera case [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], wherein the reference to the contractual aspect of arbitration agreement is ingrained under Section 7 analysis. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc.</u>"*

(Emphasis supplied)

84. The concept of "party autonomy" as pressed into service by the respondent cannot be stretched to an extent where it violates the fundamental rights under the Constitution. For an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm i.e. the Constitution. It is the rule of law which is supreme and forms parts of the basic structure. The argument canvassed on behalf of the respondent that the petitioner having consented to the pre-deposit clause at the time of execution of the agreement, cannot turn around and tell the court in a Section 11(6) petition that the same is arbitrary and falling foul of Article 14 of the Constitution is without any merit.

85. It is a settled position of law that there can be no consent against the law and there can be no waiver of fundamental rights. The Constitution Bench of this Court speaking through Chief Justice Y.V. Chandrachud (as His Lordship then was) in ***Olga Tellis and Others v. Bombay Municipal Corporation and Others*** reported in (1985) 3 SCC 545 observed something very illuminating on the said aspect:

> ***"28.*** *It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance*

of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the

existence and scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

29. *The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In Basheshar Nath v. CIT [1959 Supp 1 SCR 528 : AIR 1959 SC 149 : (1959) 35 ITR 190], a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy."*

(Emphasis supplied)

Issue No. IV

86. The issue as regards, the validity of arbitration clause empowering the Principal Secretary/Secretary (Irrigation), Government of Uttarakhand to appoint an arbitrator of his choice is concerned, the same could be said to be covered by the decision of this Court in ***Perkins Eastman*** (supra):

87. If circumstances exist giving rise to justifiable doubts as to the independence and impartiality of the person nominated or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded

ignore the designated arbitrator and appoint someone else. [See: ***IOC v. Raja Transport Pvt. Ltd***, (2009) 8 SCC 520]

88. In the aforesaid context, we must look into the amended Section 12 of the 1996 Act. Section 12 reads thus:

> *"12.* **Grounds for challenge.**
> *(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—*
>
> *(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and*
> *(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.*
>
> *Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.*
>
> *Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]*
>
> *(3) An arbitrator may be challenged only if—*
>
> *(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or*
> *(b) he does not possess the qualifications agreed to by the parties.*
>
> *(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.*

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

89. The Amendment 2015 is also based on the recommendation of the Law Commission which specifically dealt with the issue of "*Neutrality of Arbitrators*" and a discussion in this behalf is contained in paras 53 to 60 of the Law Commission's Report No. 246 published in the August 2004. We reproduce the entire discussion hereinbelow:

*"**NEUTRALITY OF ARBITRATORS***

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

*'**12. (3)** An arbitrator may be challenged only if—*

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality.…'

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any actual bias for that is setting the bar too high; but, whether

the circumstances in question give rise to any justifiable apprehensions of bias.

56. The limits of this provision has been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court (see Executive Engineer, Irrigation Division v. Gangaram Chhapolia [Executive Engineer, Irrigation Division v. Gangaram Chhapolia, (1984) 3 SCC 627] , Transport Deptt. v. Munuswamy Mudaliar [Transport Deptt. v. Munuswamy Mudaliar, 1988 Supp SCC 651] , International Airports Authority v. K.D. Bali [International Airports Authority v. K.D. Bali, (1988) 2 SCC 360] , S. Rajan v. State of Kerala [S. Rajan v. State of Kerala, (1992) 3 SCC 608] , Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd. [Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd., (1996) 1 SCC 54] , Union of India v. M.P. Gupta [Union of India v. M.P. Gupta, (2004) 10 SCC 504] and ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd., (2007) 5 SCC 304] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. [Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd., (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] , carved out a minor exception in situations when the arbitrator

'was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute' (SCC p. 533, para 34)

and this exception was used by the Supreme Court in Denel (Proprietary) Ltd. v. Ministry of Defence [Denel (Proprietary) Ltd. v. Ministry of Defence, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37 : AIR 2012 SC 817] and Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd. [Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd., (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702] , to appoint an independent arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the

Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed Section 12(5) of the Act and the Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."

(Emphasis supplied)

90. Although, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", yet the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In the international sphere, the "appearance of neutrality" is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term "neutrality" used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term "neutrality of arbitrators" is commonly used in this context as well. (See: ***Voestalpine Schienen GMBH*** (supra))

91. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond

pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of the non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement. (See: ***Voestalpine Schienen GMBH*** (supra))

92. There are a plethora of judgments of this Court even prior to the amendment of Section 12, where courts have appointed the arbitrators, giving a go-by to the agreed arbitration clause in certain contingencies and situations, having regard to the provisions of unamended Section 11(8) of the Act which, *inter alia*, provided that while appointing the arbitrator, Chief Justice, or the person or the institution designated by him, shall have regard to the other conditions as are likely to secure the appointment of an independent and impartial arbitrator. See ***Datar Switchgears Ltd. v. Tata Finance Ltd*** reported in (2000) 8 SCC 151, ***Punj Lloyd Ltd. v. Petronet MHB Ltd.*** reported in (2006) 2 SCC 638, ***Union of India v. Bharat Battery Mfg. Co. (P) Ltd.*** reported in (2007) 7 SCC 684, ***Deep Trading Co. v. Indian Oil Corpn.*** reported in (2013) 4 SCC 35, ***Union of India* v. *Singh Builders Syndicate*** reported in (2009) 4 SCC 523 and ***North Eastern Railway v. Tripple Engg. Works*** reported in (2014) 9 SCC 288.

93. Taking note of the aforesaid judgments, this Court in ***Union of India and Others v. Uttar Pradesh State Bridge Corporation Limited*** reported in (2015) 2 SCC 52 summed up the position in the following manner:

"13. No doubt, ordinarily that would be the position. The moot question, however, is as to whether such a course of action has to be necessarily adopted by the High Court in all cases, while dealing with an application under Section 11 of the Act or is there room for play in the joints and the High Court is not divested of exercising discretion under some circumstances? If yes, what are those circumstances? It is this very aspect which was specifically dealt with by this Court in Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 : (2014) 5 SCC (Civ) 30]. Taking note of various judgments, the Court pointed out that the notion that the High Court was bound to appoint the arbitrator as per the contract between the parties has seen a significant erosion in recent past. In paras 6 and 7 of the said decision, those judgments wherein departure from the aforesaid "classical notion" has been made are taken note of. It would, therefore, be useful to reproduce the said paragraph along with paras 8 and 9 hereinbelow: (SCC pp. 291-93)

> *"6. The 'classical notion' that the High Court while exercising its power under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd. [(2007) 5 SCC 304], wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in Union of India v. Bharat Battery Mfg. Co. (P) Ltd. [(2007) 7 SCC 684] wherein following a three-Judge Bench decision in Punj Lloyd Ltd. v. Petronet MHB Ltd. [(2006) 2 SCC 638], it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious.*
>
> *7. The apparent dichotomy in ACE Pipeline [(2007) 5 SCC 304]and Bharat Battery Mfg. Co. (P) Ltd. [(2007) 7 SCC 684] was reconciled by a three-Judge Bench of this Court*

in Northern Railway Admn., Ministry of Railway v. Patel Engg. Co. Ltd. [(2008) 10 SCC 240], wherein the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasised by taking into account the expression 'to take the necessary measure' appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read along with the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460]. Para 48 of the Report wherein the scope of Section 11 of the Act was summarised may be quoted by reproducing sub-paras (vi) and (vii) hereinbelow: (Indian Oil case [(2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460], SCC p. 537)

> *'48.(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.*
>
> *(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded, ignore the designated arbitrator and appoint someone else."*

8. The above discussion will not be complete without reference to the view of this Court expressed in Union of India v. Singh Builders Syndicate [(2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246], wherein the appointment of a retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in para 25 of the Report in Singh Builders Syndicate [(2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246] this Court had suggested that the Government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

9. A pronouncement of late in Deep Trading Co. v. Indian Oil Corpn. [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] followed the legal position laid down in Punj Lloyd Ltd. [Punj Lloyd Ltd. v. Petronet MHB Ltd., (2006) 2 SCC 638] which in turn had followed a two-Judge Bench decision in Datar Switchgears Ltd. v. Tata Finance Ltd. [(2000) 8 SCC 151]. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in Deep Trading Co. [(2013) 4 SCC 35 : (2013) 2 SCC (Civ) 449] subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in Northern Railway Admn. [(2008) 10 SCC 240] not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act."

(emphasis in original)

14. Speedy conclusion of arbitration proceedings hardly needs to be emphasised. It would be of some interest to note that in England also, Modern Arbitration Law on the lines of UNCITRAL Model Law, came to be enacted in the same year as the Indian law which is known as the English Arbitration Act, 1996 and it became effective from 31-1-1997. It is treated as the most extensive statutory reform of the English arbitration law. Commenting upon the structure of this Act, Mustill and Boyd in their Commercial Arbitration, 2001 companion volume to the 2nd Edn., have commented that this Act is founded on four pillars. These pillars are described as:

(a) The first pillar: Three general principles.

(b) The second pillar: The general duty of the Tribunal.

(c) The third pillar: The general duty of the parties.

(d) The fourth pillar: Mandatory and semi-mandatory provisions.

Insofar as the first pillar is concerned, it contains three general principles on which the entire edifice of the said Act is structured. These principles are mentioned by an English Court in its judgment in Deptt. of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co. [2005 QB 207 : (2004) 3 WLR 533 : (2004) 4 All ER 746 : 2004 EWCA Civ 314]. In that case, Mance, L.J. succinctly summed up the objective of this Act in the following words: (QB p. 228, para 31)

> *"31. ... Parliament has set out, in the Arbitration Act, 1996, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court involvement where necessary in the interests of the public and of basic fairness."*

Section 1 of the Act sets forth the three main principles of arbitration law viz. (i) speedy, inexpensive and fair trial by an impartial tribunal; (ii) party autonomy; and (iii) minimum court intervention. This provision has to be applied purposively. In case of doubt as to the meaning of any provision of this Act, regard should be had to these principles.

15. In the book O.P. Malhotra on the Law and Practice of Arbitration and Conciliation (3rd Edn. revised by Ms Indu Malhotra), it is rightly observed that the Indian Arbitration Act is also based on the aforesaid four foundational pillars.

16. First and paramount principle of the first pillar is "fair, speedy and inexpensive trial by an Arbitral Tribunal". Unnecessary delay or expense would frustrate the very purpose of arbitration. Interestingly, the second principle which is recognised in the Act is the party autonomy in the choice of procedure. This means that if a particular procedure is prescribed in the arbitration agreement which the parties have agreed to, that has to be generally resorted to. It is because of this reason, as a normal practice, the court will insist the parties to adhere to the procedure to which they have agreed upon. This would apply even while making the appointment of substitute arbitrator and the general rule is that such an appointment of a substitute arbitrator should also be done in accordance with the provisions of the original agreement applicable to the appointment of the arbitrator at the initial stage. [See Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. [(2006) 6 SCC 204]. However, this principle of party autonomy in the choice of procedure has been deviated from in those cases where one of the parties have committed default by not acting in accordance with the procedure prescribed. Many such instances where this course of action is taken and the Court appoint the arbitrator when the persona designata has failed to act, are taken note of in paras 6 and 7 of Tripple Engg. Works [North Eastern Railway v. Tripple Engg. Works, (2014) 9 SCC 288 : (2014) 5

SCC (Civ) 30]. We are conscious of the fact that these were the cases where appointment of the independent arbitrator made by the Court in exercise of powers under Section 11 of account of "default procedure". We are, in the present case, concerned with the constitution of substitute Arbitral Tribunal where earlier Arbitral Tribunal has failed to perform. However, the above principle of default procedure is extended by this Court in such cases as well as is clear from the judgment in Singh Builders Syndicate [Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246].

17. In the case of contracts between government corporations/State-owned companies with private parties/contractors, the terms of the agreement are usually drawn by the government company or public sector undertakings. Government contracts have broadly two kinds of arbitration clauses, first where a named officer is to act as sole arbitrator; and second, where a senior officer like a Managing Director, nominates a designated officer to act as the sole arbitrator. No doubt, such clauses which give the Government a dominant position to constitute the Arbitral Tribunal are held to be valid. At the same time, it also casts an onerous and responsible duty upon the persona designata to appoint such persons/officers as the arbitrators who are not only able to function independently and impartially, but are in a position to devote adequate time in conducting the arbitration. If the Government has nominated those officers as arbitrators who are not able to devote time to the arbitration proceedings or become incapable of acting as arbitrators because of frequent transfers, etc., then the principle of "default procedure" at least in the cases where Government has assumed the role of appointment of arbitrators to itself, has to be applied in the case of substitute arbitrators as well and the Court will step in to appoint the arbitrator by keeping aside the procedure which is agreed to between the parties. However, it will depend upon the facts of a particular case as to whether such a course of action should be taken or not. What we emphasise is that Court is not powerless in this regard."

(Emphasis supplied)

94. In the context of independence and impartiality of the arbitrator more particularly keeping in mind the amended Section 12 of the Act 1996, we must refer to and rely upon the observations made by this Court in paras 20 to 25 of the decision in the case of ***Voestalpine Schienen*** (supra):

> ***"20.*** *Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj [(2011) 1 WLR 1872 : 2011 UKSC 40] in the following words: (WLR p. 1889, para 45)*
>
> > *"45. ... the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."*
>
> ***21.*** *Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury [Fouchard, Gaillard, Goldman on International Commercial Arbitration 562 (Emmanuel Gaillard & John Savage eds., 1999) {quoting Cour*

de cassation [Cass.] [Supreme Court for judicial matters] Consorts Ury v. S.A. des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France)}.] , underlined that:

"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power may be, and it is one of the essential qualities of an arbitrator."

22. *Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.*

23. *It also cannot be denied that the Seventh Schedule is based on IBA guidelines which are clearly regarded as a representation of international based practices and are based on statutes, case law and juristic opinion from a cross-section on jurisdiction. It is so mentioned in the guidelines itself.*

24. *Keeping in view the aforesaid parameters, we advert to the facts of this case. Various contingencies mentioned in the Seventh Schedule render a person ineligible to act as an arbitrator. Entry 1 is highlighted by the learned counsel for the petitioner which provides that where the arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party, would not act as an arbitrator. What was argued by the learned Senior Counsel for the petitioner was that the panel of arbitrators drawn by the respondent consists of those persons who are government employees or ex-government employees. However, that by itself may not make such persons ineligible as the panel indicates that these are the persons who have worked in the Railways under the Central Government or the Central Public Works Department or public sector undertakings. They cannot be treated as employee or consultant or advisor of the respondent DMRC. If this contention of the petitioner is accepted, then no person who had earlier worked in any capacity with the Central Government or other autonomous or public sector*

undertakings, would be eligible to act as an arbitrator even when he is not even remotely connected with the party in question, like DMRC in this case. The amended provision puts an embargo on a person to act as an arbitrator, who is the employee of the party to the dispute. It also deprives a person to act as an arbitrator if he had been the consultant or the advisor or had any past or present business relationship with DMRC. No such case is made out by the petitioner.

25. *Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the "circumstances" which give rise to "justifiable doubts" about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list."*

(Emphasis supplied)

FEW FOREIGN COURT JUDGMENTS ON THE SUBJECT

95. We also looked into a very lucid and erudite judgement on the issue of unconscionable pre-condition in the arbitration agreement delivered by a 9 Judge

Bench of the Supreme Court of Canada in the case of ***Uber Technologies v. Heller*** (supra).

96. In the aforesaid case, Mr. Heller (driver) was required to accept the terms of Uber's standard form service agreement, which stipulated that to resolve any dispute through arbitration or mediation with Uber, the claimant would have to pay an up-front administrative and filing fee of USD 14,500.

97. The Supreme Court of Canada held the aforesaid pre-condition to be unconscionable and unenforceable by a majority of 8:1. The majority speaking through Abella and Rowe JJ., while explaining the doctrine of unconscionability held as under:

> *"**53.** We agree with Mr. Heller that the arbitration agreement is unconscionable. The parties and interveners focused their submissions on unconscionability in accordance with this Court's direction in TELUS Communications Inc. v. Wellman, [2019] 2 SCR 144, at para. 85, that "arguments over any potential unfairness resulting from the enforcement of arbitration clauses contained in standard form contracts are better dealt with directly through the doctrine of unconscionability".*
>
> ***54.** Unconscionability is an equitable doctrine that is used to set aside "unfair agreements [that] resulted from an inequality of bargaining power" (John D. McCamus, The Law of Contracts (2nd ed. 2012), at p. 424). Initially applied to protect young heirs and the "poor and ignorant" from one-sided agreements, unconscionability evolved to cover any contract with the combination of inequality of bargaining power and improvidence (Mitchell McInnes, The Canadian Law of Unjust Enrichment and Restitution (2014), at p. 521; see also pp. 520-24; Bradley E. Crawford, "Restitution — Unconscionable Transaction — Undue Advantage Taken of Inequality Between Parties" (1966) 44 Can. Bar Rev. 142, at p. 143). This development has been described as "one of the signal*

accomplishments of modern contract law, representing a renaissance in the doctrinal treatment of contractual fairness" (Peter Benson, Justice in Transactions : A Theory of Contract Law (2019), at p. 165; see also Angela Swan, Jakub Adamski and Annie Y. Na, Canadian Contract Law (4th ed. 2018), at p. 925).

55. *Unconscionability is widely accepted in Canadian contract law, but some questions remain about the content of the doctrine, and it has been applied inconsistently by the lower courts (see, among others, Morrison v. Coast Finance Ltd., (1965) 55 DLR 710 (2d) (B.C.C.A.); Harry v. Kreutziger, (1978) 9 B.C.L.R. 166 (C.A.), at p. 177, per Lambert J.A.; Downer v. Pitcher, 2017 NLCA 13 : 409 DLR 542 (4th), at para. 20; Input Capital Corp. v. Gustafson, 2019 SKCA 78 : 438 DLR 387 (4th); Cain v. Clarica Life Insurance Co., 2005 ABCA 437 : 263 DLR 368 (4th); Titus v. William F. Cooke Enterprises Inc., 2007 ONCA 573 : 284 DLR 734 (4th); Birch v. Union of Taxation Employees, Local 70030, 2008 ONCA 809 : 305 DLR 64 (4th); see also Swan, Adamski and Na, at p. 982; McInnes, at pp. 518-19). These questions require examining underlying contractual theory (Rick Bigwood, "Antipodean Reflections on the Canadian Unconscionability Doctrine" (2005) 84 Can. Bar Rev. 171, at p. 173).*

56. *The classic paradigm underlying freedom of contract is the "freely negotiated bargain or exchange" between "autonomous and self-interested parties" (McCamus, at p. 24; see also Swan, Adamski and Na, at pp. 922-23; P.S. Atiyah, Essays on Contract (1986), at p. 140). At the heart of this theory is the belief that contracting parties are best-placed to judge and protect their interests in the bargaining process (Atiyah, at pp. 146-48; Bigwood, at pp. 199-200; Alan Brudner, "Reconstructing contracts" (1993) 43 U.T.L.J. 1, at pp. 2-3). It also presumes equality between the contracting parties and that "the contract is negotiated, freely agreed, and therefore fair" (Mindy Chen-Wishart, Contract Law (6th ed. 2018), at p. 12) (emphasis in original).*

57. *In cases where these assumptions align with reality, the arguments for enforcing contracts carry their greatest weight (Melvin Aron Eisenberg, "The Bargain Principle and Its Limits" (1982) 95 Harv. L. Rev. 741, at pp. 746-48). But these*

arguments "may speak more or less forcefully depending on the context" (Wellman, at para. 53; see also B.J. Reiter, "Unconscionability : Is There a Choice? A Reply to Professor Hasson" (1980) 4 Can. Bus. L.J. 403, at pp. 405-6). As Professor Atiyah has noted:

The proposition that a person is always the best judge of his own interests is a good starting-point for laws and institutional arrangements, but as an infallible empirical proposition it is an outrage to human experience. The parallel moral argument, that to prevent a person, even in his own interests, from binding himself is to show disrespect for his moral autonomy, can ring very hollow when used to defend a grossly unfair contract secured at the expense of a person of little understanding or bargaining skill.

[Emphasis added; p. 148]

58. *Courts have never been required to take the ideal assumptions of contract theory as "infallible empirical proposition[s]". Equitable doctrines have long allowed judges to "respond to the individual requirements of particular circumstances .... humaniz[ing] and contextualiz[ing] the law's otherwise antiseptic nature" (Leonard I. Rotman, "The 'Fusion' of Law and Equity? : A Canadian Perspective on the Substantive, Jurisdictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2 C.J.C.C.L. 497, at pp. 503-4). Courts, as a result, do not ignore serious flaws in the contracting process that challenge the traditional paradigms of the common law of contract, such as faith in the capacity of the contracting parties to protect their own interests. The elderly person with cognitive impairment who sells assets for a fraction of their value (Ayres v. Hazelgrove, Q.B. England, February 9, 1984); the ship captain stranded at sea who pays an extortionate price for rescue (The Mark Lane, [L.R.] 15 P.D. 135); the vulnerable couple who signs an improvident mortgage with no understanding of its terms or financial implications (Commercial Bank of Australia Ltd. v. Amadio, [1983] HCA 14 : 151 CLR 447) — these and similar scenarios bear little resemblance to the operative assumptions on which the classic contract model is constructed.*

59. *In these kinds of circumstances, where the traditional assumptions underlying contract enforcement lose their*

justificatory authority, the doctrine of unconscionability provides relief from improvident contracts. When unfair bargains cannot be linked to fair bargaining — when they cannot be attributed to one party's "donative intent or assumed risk", as Professor Benson puts it — courts can avoid the inequitable effects of enforcement without endangering the core values on which freedom of contract is based (p. 182; see also Eisenberg, at pp. 799-801; S.M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 J.C.L. 55, at p. 60). This explains how unconscionability lines up with traditional accounts of contract theory while recognizing the doctrine's historical roots in equity, which has long operated as a "corrective to the harshness of the common law" (McCamus, at p. 10; see also Rotman, at pp. 503-4).

60. *This Court has often described the purpose of unconscionability as the protection of vulnerable persons in transactions with others (Hodgkinson v. Simms, [1994] 3 SCR 377, at pp. 405 and 412; Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 SCR 426, at p. 462, per Dickson C.J., and p. 516, per Wilson J.; Norberg v. Wynrib, [1992] 2 SCR 226, at p. 247; see also Bhasin v. Hrynew, [2014] 3 SCR 494, at para. 43). We agree. Unconscionability, in our view, is meant to protect those who are vulnerable in the contracting process from loss or improvidence to that party in the bargain that was made (see Mindy Chen-Wishart, Unconscionable Bargains (1989), at p. 109; see also James Gordley, "Equality in Exchange" (1981) 69 Cal. L. Rev. 1587, at pp. 1629-34; Birch, at para. 44). Although other doctrines can provide relief from specific types of oppressive contractual terms, unconscionability allows courts to fill in gaps between the existing "islands of intervention" so that the "clause that is not quite a penalty clause or not quite an exemption clause or just outside the provisions of a statutory power to relieve will fall under the general power, and anomalous distinctions ... will disappear" (S.M. Waddams, The Law of Contracts (7th ed. 2017), at p. 378).*

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70. *The classic example of a "necessity" case is a rescue at sea scenario (see The Medina, [L.R.] 1 P.D. 272). The circumstances under which such agreements are made indicate*

the weaker party did not freely enter into the contract, as it was the product of his "extreme need ... to relieve the straits in which he finds himself" (Bundy, at p. 339). Other situations of dependence also fit this mould, including those where a party is vulnerable due to financial desperation, or where there is "a special relationship in which trust and confidence has been reposed in the other party" (Norberg, at p. 250, quoting Christine Boyle and David R. Percy, Contracts : Cases and Commentaries (4th ed. 1989), at pp. 637-38). Unequal bargaining power can be established in these scenarios even if duress and undue influence have not been demonstrated (see Norberg, at pp. 247-48; see also McInnes, at p. 543).

71. *The second common example of an inequality of bargaining power is where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms, creating a type of "cognitive asymmetry" (see Smith, at pp. 343-44). This may occur because of personal vulnerability or because of disadvantages specific to the contracting process, such as the presence of dense or difficult to understand terms in the parties' agreement. In these cases, the law's assumption about self-interested bargaining loses much of its force. Unequal bargaining power can be established in these scenarios even if the legal requirements of contract formation have otherwise been met (see Sebastien Grammond, "The Regulation of Abusive or Unconscionable Clauses from a Comparative Law Perspective" (2010) 49 Can. Bus. L.J. 345, at pp. 353-54).*

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84. *Unconscionability, moreover, can be established without proof that the stronger party knowingly took advantage of the weaker. Such a requirement is closely associated with theories of unconscionability that focus on wrongdoing by the defendant (see Boustany, at p. 6). But unconscionability can be triggered without wrongdoing. As Professor Waddams compellingly argues:*

> *The phrases 'unconscionable conduct', 'unconscionable behaviour' and 'unconscionable dealing' lack clarity, are unhistorical insofar as they imply the need for proof of wrongdoing, and have been unduly restrictive.*

(Waddams (2019), at pp. 118-19; see also Benson, at p. 188; Smith, at pp. 360-62.)

85. *We agree. One party knowingly or deliberately taking advantage of another's vulnerability may provide strong evidence of inequality of bargaining power, but it is not essential for a finding of unconscionability. Such a requirement improperly emphasizes the state of mind of the stronger party, rather than the protection of the more vulnerable. This Court's decisions leave no doubt that unconscionability focuses on the latter purpose. Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation. A rigid requirement based on the stronger party's state of mind would also erode the modern relevance of the unconscionability doctrine, effectively shielding from its reach improvident contracts of adhesion where the parties did not interact or negotiate.*

86. *In our view, the requirements of inequality and improvidence, properly applied, strike the proper balance between fairness and commercial certainty. Freedom of contract remains the general rule. It is precisely because the law's ordinary assumptions about the bargaining process do not apply that relief against an improvident bargain is justified.*

87. *Respecting the doctrine of unconscionability has implications for boiler plate or standard form contracts. As Karl N. Llewellyn, the primary drafter of the Uniform Commercial Code, explained:*

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which

constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

There has been an arm's-length deal, with dickered terms. There has been accompanying that basic deal another which ... at least involves a plain expression of confidence, asked and accepted, with a corresponding limit on the powers granted : the boiler-plate is assented to en bloc, "unsight, unseen," on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.

(The Common Law Tradition : Deciding Appeals (1960), pp. 370-71)

88. *We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power (Waddams (2017), at p. 240). Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects (Benson, at p. 234).*

89. *Our point is simply that unconscionability has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract. The many ways in which standard form contracts can impair a party's ability to protect their interests in the contracting process and make them more vulnerable, are well-documented. For example, they are drafted by one party without input from the other and they may contain provisions that are difficult to read or understand (see Margaret Jane Radin, "Access to Justice and Abuses of Contract" (2016) 33 Windsor Y.B. Access Just. 177, at p. 179; Stephen Waddams, "Review Essay : The Problem of Standard Form Contracts : A Retreat to Formalism" (2013) 53 Can. Bus. L.J. 475, at pp. 475-476; Thal, at pp. 27-28; William J. Woodward, Jr., "Finding the Contract in Contracts for Law, Forum and Arbitration" (2006) 2 Hastings Bus. L.J. 1, at p. 46). The potential for such contracts*

to create an inequality of bargaining power is clear. So too is their potential to enhance the advantage of the stronger party at the expense of the more vulnerable one, particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies. This is precisely the kind of situation in which the unconscionability doctrine is meant to apply.

90. *This development of the law of unconscionability in connection with standard form contracts is not radical. On the contrary, it is a modern application of the doctrine to situations where "the normative rationale for contract enforcement ... [is] stretched beyond the breaking point" (Radin, at p. 179). The link between standard form contracts and unconscionability has been suggested in judicial decisions, textbooks, and academic articles for years (see, e.g., Douez, at para. 114; Davidson v. Three Spruces Realty Ltd., (1977) 79 DLR 481 (3d) (B.C.S.C.); Hunter, at p. 513; Swan, Adamski and Na, at pp. 992-93; McCamus, at p. 444; Jean Braucher, "Unconscionability in the Age of Sophisticated Mass-Market Framing Strategies and the Modern Administrative State" (2007) 45 Can. Bus. L.J. 382, at p. 396). It has also been present in the American jurisprudence for more than half a century (see Williams v. Walker-Thomas Furniture Company, 350 F.2d 445 (1965), at pp. 449-50).*

91. *Applying the unconscionability doctrine to standard form contracts also encourages those drafting such contracts to make them more accessible to the other party or to ensure that they are not so lop-sided as to be improvident, or both. The virtues of fair dealing were explained by Jean Braucher as follows:*
Businesses are driven to behave competitively in their framing of market situations or otherwise they lose to those who do. Only if there are meaningful checks on what might be considered immoral behavior will persons in business have the freedom to act on their moral impulses. An implication of this point is that, absent regulation, business culture will become ever more ruthless, so that the distinctions between "reputable businesses" and fringe marketers gradually wither away…. [p. 390]

92. *This brings us to the appeal before us and whether Mr. Heller's arbitration clause with Uber is unconscionable.*

93. *There was clearly inequality of bargaining power between Uber and Mr. Heller. The arbitration agreement was part of a standard form contract. Mr. Heller was powerless to negotiate any of its terms. His only contractual option was to accept or reject it. There was a significant gulf in sophistication between Mr. Heller, a food deliveryman in Toronto, and Uber, a large multinational corporation. The arbitration agreement, moreover, contains no information about the costs of mediation and arbitration in the Netherlands. A person in Mr. Heller's position could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law. Even assuming that Mr. Heller was the rare fellow who would have read through the contract in its entirety before signing it, he would have had no reason to suspect that behind an innocuous reference to mandatory mediation "under the International Chamber of Commerce Mediation Rules" that could be followed by "arbitration under the Rules of Arbitration of the International Chamber of Commerce", there lay a US$14,500 hurdle to relief. Exacerbating this situation is that these Rules were not attached to the contract, and so Mr. Heller would have had to search them out himself.*

94. *The improvidence of the arbitration clause is also clear. The mediation and arbitration processes require US$14,500 in up-front administrative fees. This amount is close to Mr. Heller's annual income and does not include the potential costs of travel, accommodation, legal representation or lost wages. The costs are disproportionate to the size of an arbitration award that could reasonably have been foreseen when the contract was entered into. The arbitration agreement also designates the law of the Netherlands as the governing law and Amsterdam as the "place" of the arbitration. This gives Mr. Heller and other Uber drivers in Ontario the clear impression that they have little choice but to travel at their own expense to the Netherlands to individually pursue claims against Uber through mandatory mediation and arbitration in Uber's home jurisdiction. Any representations to the arbitrator, including about the location of the hearing, can only be made after the fees have been paid.*

> ***95.*** *The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent precondition that he travel to Amsterdam,[7] initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.*
>
> ***96.*** *We add that the unconscionability of the arbitration clause can be considered separately from that of the contract as a whole. As explained in Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd., [1981] A.C. 909 (H.L.), an arbitration agreement "constitutes a self-contained contract collateral or ancillary to the [main] agreement" (p. 980; see also p. 998, per Lord Scarman). Further support comes from the severability clause of the Uber Rasier and Uber Portier agreements, and s. 17(2) of the AA."*
>
> (Emphasis supplied)

98. Brown J. in his separate but concurring opinion held that such a pre-condition as mentioned in the agreement was opposed to public policy as it impeded the claimant from resolving his dispute effectively. The relevant observations are as under:

> *"**110.** The ground upon which I proceed is that which precludes an ouster of court jurisdiction or, more broadly, which protects the integrity of the justice system. As Lord Atkin stated in Fender v. St. John-Mildmay, [1938] A.C. 1 (H.L.), at p. 12, ousting the jurisdiction of the courts is harmful in itself and "injurious to public interests" (see also Kain and Yoshida, at pp. 20-23). A provision that penalizes or prohibits one party from enforcing the terms of their agreement directly undermines the administration of justice. There is nothing novel about the proposition that contracting parties, as a matter of public policy,*

cannot oust the court's supervisory jurisdiction to resolve contractual disputes (see e.g. Kill v. Hollister, (1746) 1 Wils. K.B. 129 : 95 E.R. 532; Scott v. Avery, (1856) 5 H.L.C. 811 : 10 E.R. 1121; Deuterium of Canada Ltd. v. Burns & Roe Inc., [1975] 2 SCR 124). Indeed, irrespective of the value placed on freedom of contract, courts have consistently held that a contracting party's right to legal recourse is "a right inalienable even by the concurrent will of the parties" (Scott, at p. 1133).

111. *This head of public policy serves to uphold the rule of law, which, at a minimum, guarantees Canadian citizens and residents "a stable, predictable and ordered society in which to conduct their affairs" (Reference re Secession of Quebec, [1998] 2 SCR 217, at para. 70). Such a guarantee is meaningless without access to an independent judiciary that can vindicate legal rights. The rule of law, accordingly, requires that citizens have access to a venue where they can hold one another to account (Jonsson v. Lymer, 2020 ABCA 167, at para. 10 (CanLII)). Indeed, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 SCR 214, at p. 230). Unless private parties can enforce their legal rights and publicly adjudicate their disputes, "the rule of law is threatened and the development of the common law undermined" (Hryniak v. Mauldin, 2014 SCC 7 : [2014] 1 SCR 87, at para. 26). Access to civil justice is paramount to the public legitimacy of the law and the legitimacy of the judiciary as the institution of the state that expounds and applies the law.*

112. *Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty. That such an agreement is contrary to public policy is not a manifestation of judicial idiosyncrasies, but rather an instance of the self-evident proposition that there is no value in a contract that cannot be enforced. Thus, the harm to the public that would result from holding contracting parties to a bargain they cannot enforce is "substantially incontestable" (Millar Estate, at p. 7, quoting Fender, at p. 12). It really is this simple : unless everyone has reasonable access to the law and its*

processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak. Or, as Frederick Wilmot-Smith puts it, "[l]egal structures that make enforcement of the law practically impossible will leave weaker members of society open to exploitation at the hands of, for example, unscrupulous employers or spouses." (Equal Justice : Fair Legal Systems in an Unfair World (2019), at pp. 1-2).

113. *The reference to making enforcement of the law practically impossible leads to a further, related point : there is no good reason to distinguish between a clause that expressly blocks access to a legally determined resolution and one that has the ultimate effect of doing so. That this is so is illustrated by the judgment of Drummond J. in Novamaze Pty Ltd. v. Cut Price Deli Pty Ltd., (1995) 128 ALR 540 (F.C.A.). In Novamaze, the terms of a franchise agreement permitted the franchisor to take control of the franchisee's business if either party threatened to commence, or commenced, legal proceedings against the other. This clause, Drummond J. explained, was "capable of operating as a powerful disincentive to the franchisee to take proceedings of any kind against [the franchisor], no matter how strong a case the franchisee may have that it has suffered wrong" (p. 548). Summarizing the relevant principle, Drummond J. continued:*

> *... the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that "inalienable right" contravenes this public policy and is void. A disincentive to a person to exercise this right of recourse to the court can, depending upon how powerfully it operates to discourage litigation, amount to a denial of this right just as complete as an express contractual prohibition against litigation. [pp. 548-49]*
>
> *xxx xxx xxx*

117. *Uber's position requires this Court to accept that the change in judicial posture following the enactment of modern arbitration legislation leaves no room for the operation of public policy. But curial respect for arbitration, and for parties' choices to refer disputes to arbitration, is premised upon two considerations.*

First, the purpose of arbitration is to ensure that contracting parties have access to "a 'good and accessible method of seeking resolution for many kinds of disputes' that 'can be more expedient and less costly than going to court'" (Wellman, at para. 83, quoting Legislative Assembly of Ontario, March 27, 1991, at p. 245). Second, courts have accepted arbitration as an acceptable alternative to civil litigation because it can provide a resolution according to law. As this Court observed in Sport Maska Inc. v. Zittrer, [1988] 1 SCR 564, at p. 581:

> *The legislator left ... various procedures for settling disputes to be resolved freely by litigants when recourse to the courts was still possible. If judicial intervention was ruled out, however, the legislator had to ensure that the process would guarantee litigants the same measure of justice as that provided by the courts, and for this reason, rules of procedure were developed to ensure that the arbitrator is impartial and that the rules of fundamental justice ... are observed. The arbitrator will make an award which becomes executory by homologation. This indicates the similarity between the arbitrator's real function and that of a judge who has to decide a case.*
>
> *[Emphasis added.]*

In other words, any means of dispute resolution that serves as a final resort for contracting parties must be just. This is important because, unlike the submission of existing disputes to arbitration, and contrary to my colleague Côté J.'s assertion, an agreement to submit all future unknown disputes to arbitration is not simply a substitute for the parties' negotiations (para. 250). Rather, it serves as a transfer of dispute resolution authority away from public adjudicators (W.G. Horton, "A Brief History of Arbitration" (2017) 47 Adv. Q. 12, at p. 14; Sport Maska, at p. 581; Wellman, at para. 48; Desputeaux, [2003] 1 SCR 178, at para. 40). The legitimacy of such a transfer rests upon whether it can provide a comparable measure of justice.

xxx *xxx* *xxx*

121. *In sum, applying public policy to determine whether an arbitration agreement prohibits access to justice is neither stating a "new common law rule" as my colleague Côté J. characterizes it, nor an expansion of the grounds for judicial*

> *intervention in arbitration proceedings (paras. 307, 312 and 316). Common law courts have long recognized the right to resolve disputes according to law. The law has simply evolved to embrace arbitration as means of achieving that resolution. Contractual stipulations that prohibit such resolution altogether, whether by express prohibition or simply by effect, continue to be unenforceable as a matter of public policy."*
>
> (Emphasis supplied)

99. The Majority ultimately concluded observing the following in paragraphs 97 and 98 respectively of the judgement as under:

> *"**97.** Respect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all. As our colleague Justice Brown notes, under the arbitration clause, "Mr. Heller, and only Mr. Heller, would experience undue hardship in attempting to advance a claim against Uber, regardless of the claim's legal merit" (para. 136). The arbitration clause is the only way Mr. Heller can vindicate his rights under the contract, but arbitration is out of reach for him and other drivers in his position. His contractual rights are, as a result, illusory.*
>
> ***98.** Based on both the disadvantages faced by Mr. Heller in his ability to protect his bargaining interests and on the unfair terms that resulted, the arbitration clause is unconscionable and therefore invalid."*
>
> (Emphasis supplied)

100. The courts in the United States of America have also deliberated upon the doctrine of unconscionability on numerous occasions. The Court of Appeal of California in the case of ***Patterson v. ITT Consumer Financial Corporation*** reported in 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993), had the occasion to consider whether the requirement for the claimants to pay a filing fee along with hearing fees for the purpose of resolving the matter could be said to be

unconscionable. The Court of Appeals held that such a condition was "incomprehensible" and discouraged the borrowers from pursuing their claims. The relevant observations are as under:

> *"B. Unconscionability*
>
> *2. Two alternative analyses exist under California law for determining whether a contractual provision will be unenforceable because it is unconscionable. (Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 925, fn. [216 Cal. Rptr. 345, 702 P.2d 503] ["Both analytical pathways should lead to the same result."].) The first model set out in Graham v. Scissor-Tail, Inc. (1981) 28 Cal.3d 807 [171 Cal.Rptr. 604, 623 P.2d 165] asks initially whether the contract is one of adhesion. (Id. at p. 819.) Since a contract of adhesion is still fully enforceable, the inquiry then turns to whether enforcement should be denied. First, enforcement will be denied if the contract or provision falls outside the reasonable expectations of the weaker party. (Id. at p. 820.) Second, enforcement will be denied even if it does fall within the reasonable expectations of the parties, but it is unduly oppressive or unconscionable. (Ibid.)*
>
> *The alternative analytical model was set out in A M Produce Co. v. FMC Corp., supra, 135 Cal.App.3d 473. It sought to define what rendered a contract or a contractual provision unconscionable and hence unenforceable under Civil Code section 1670.5 (135 Cal.App.3d at p. 485.) A M concluded that unconscionability has a procedural and a substantive component. (Id. at p. 486.) The procedural component focuses on the factors of oppression and surprise. (Ibid.) Oppression results where there is no real negotiation of contract terms because of unequal bargaining power. (Ibid.) "`Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms." (Ibid.) The substantive component of unconscionability looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner. (Id. at p. 487.) To be unenforceable there must be both substantive and procedural unconscionability, though there may be an inverse relation between the two elements. (Ibid.)*

3. A contract of adhesion is "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." (Neal v. State Farm Ins. Cos. (1961) 188 Cal.App.2d 690, 694 [10 Cal.Rptr. 781].)

4. The record before us indicates that plaintiffs are individuals of modest means, some self-employed or temporarily jobless, who borrowed relatively small amounts of money, often in response to advertising promising "guaranteed loans." The loan agreement which they signed included a preprinted form containing an arbitration clause either as the final paragraph on a page entitled "Agreement for Dispute Resolution" or at midpage on a sheet of text, but set apart by the use of boldface type. On both versions of the form the provision was clearly titled "Arbitration." None of the preprinted clauses had been modified in any manner, which suggests that they were nonnegotiable. Several of the borrowers stated that they believed they would not have been able to obtain a bank loan. In these circumstances we think it indisputable that the contract was one of adhesion.

ITT argues that arbitration has become such a common means of dispute resolution that it must be considered within the reasonable expectation of the borrowers. While arbitration per se may be within the reasonable expectation of most consumers, it is much more difficult to believe that arbitration in Minnesota would be within the reasonable expectation of California consumers. The arbitration clause says only that the dispute will be "resolved by binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota."

xxx *xxx* *xxx*

In order to obtain a participatory hearing, however, the responding party must make a prompt demand for one and accompany it with prepayment of fees. Prepayment of hearing fees can be waived for individuals, but only after filing an affidavit of indigency. However, the rule explaining the fee waiver process is, as the trial court aptly noted, "incomprehensible," since it requires compliance with rules concerning involuntary dismissals.

The likely effect of these procedures is to deny a borrower against whom a claim has been brought any opportunity to a hearing, much less a hearing held where the contract was signed, unless the borrower has considerable legal expertise or the money to hire a lawyer and/or prepay substantial hearing fees. The latter is especially unlikely given the small dollar amounts at issue. In a dispute over a loan of $2,000 it would scarcely make sense to spend a minimum of $850 just to obtain a participatory hearing. In short the procedure seems designed to discourage borrowers from responding at all. In the event that they do not respond, an award may be entered against them if the documents submitted by ITT support its claim."

(Emphasis supplied)

101. Similarly, the United States District Court, W.D. Michigan in the case of ***Vegter v. Forecast Financial Corporation*** reported in 2007 WL 4178947, while discussing the principle of procedural and substantive unconscionability in arbitration agreements, held as under:

*"**B. Unconscionability***

Generally applicable contract defenses, such as unconscionability, can invalidate an arbitration agreement consistent with the FAA. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996). Whether an arbitration clause is unconscionable is governed by state law. Stutler v. T.K. Constructors, Inc., 448 F.3d 343, 345 (6th Cir. 2006). Under Michigan law, in order to invalidate a contract provision for unconscionability, the Court must find the provision is both procedurally and substantively unconscionable. Pichey v. Ameritech Interactive Media Servs., Inc., 421 F. Supp. 2d 1038, 1044-45 (W.D. Mich. 2006) (Bell, C.J.). The inquiries for finding procedural and substantive unconscionability have been phrased as: "(1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable?" Id. at 1045 (quoting Allen v. Mich. Bell. Tel. Co., 18 Mich. App. 632, 637, 171 N.W.2d 689 (1969)).

As to procedural unconscionability, the Court finds that this was a contract of adhesion. The terms of the contract were not negotiated and Plaintiff had relatively little economic strength in the transaction.

As to substantive unconscionability, the arbitration clause is unreasonable insofar as it requires Plaintiff to travel to Okaloosa County, Florida for the arbitration. In many circumstances requiring a consumer to travel a substantial distance to arbitrate a claim has been found to be unreasonable. DeOrnellas v. Aspen Square Mgmt., Inc., 295 F. Supp. 2d 753, 765-66 (E.D. Mich. 2003); Garrett v. Hooters-Toledo, 295 F. Supp. 2d 774, 783 (N.D. Ohio 2003); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1176-77 (N.D. Cal. 2002). In determining whether requiring the arbitration to be held in Florida is unreasonable, the Court must ask whether the "provision would deter a substantial number of similarly situated potential litigants. . . ."Morrison, 317 F.3d at 663. See Stutler, 448 F.3d at 346 (indicating that the test from Morrison is applicable "to the question of whether an arbitration clause is enforceable where federal statutorily provided rights are affected."). Requiring a consumer who is experiencing financial distress to travel to Florida would effectively deter such a consumer from pursuing arbitration. At the time the contract was signed Defendants knew that Plaintiff was experiencing financial difficulty and presumably knew that it would be difficult for Plaintiff to arbitrate in Florida. Given those circumstances, the Court finds that requiring Plaintiff to arbitrate in Florida would effectively bar Plaintiff from brining a claim and is substantively unreasonable.

The Court finds that the provision in the arbitration clause that designates Okaloosa County, Florida as the site of the arbitration is both procedurally and substantively unconscionable under Michigan law. Therefore, the Court severs and declares unenforceable the provision in the arbitration clause that designates Okaloosa, Florida as the site of the arbitration."

102. In view of the aforesaid discussion, we have reached to the conclusion that we should ignore the two conditions contained in Clause 55 of the GCC, one

relating to 7% deposit of the total amount claimed and the second one relating to the stipulation empowering the Principal Secretary (Irrigation) Government of Uttarakhand to appoint a sole arbitrator and proceed to appoint an independent arbitrator.

103. In the result, this application stands allowed.

104. We appoint Mr. V.K. Bist, the Former Chief Justice of the High Court of Sikkim to act as the sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

…..……..…….……CJI.
(Dr. Dhananjaya Y. Chandrachud)

……..……..……J.
(J.B. Pardiwala)

……...…...…….J.
(Manoj Misra)

New Delhi;
November 6, 2023.