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ARBITRATION

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EMERGENCY ARBITRATION: INDIAN PROSPECTS

SHASHANK CHADDHA*

1. CONCEPTUAL INTRODUCTION

Emergency Arbitration, as a mode of resolution of disputes that arise, has the same characteristics and procedures just like a normal arbitral proceeding. What is of pivotal difference here is that of finality, that is to say, in case of emergency arbitration, the relief given to a party is an interim relief to cater the needs of the moment and *may* not be final. This is under the genesis of this emerging mode of dispute resolution. The scope of the paper is to discuss this new concept and its prospects in India *vis-à-vis* the Arbitration Amendment Act of 2015.

An emergency arbitration provides a degree of enabling power to the parties in dispute to approach a neutral person much before an arbitral tribunal is formed according to the requirements of their contract.[1] This emergency relief so claimed

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[1] Guillaume Lemenez and Paul Quigley, The ICDR's Emergency Arbitrator Emergency Arbitrator Procedure in Action, ICDR, available at https://www.icdr.org/icdr/ShowPDF?doc=ADRSTG_004356 (last accessed, 02.12.2016).

effects a smooth transition of the business between the parties for the brief time period on the merits of the case. So how this process actually arises, may be a prospective question. There are situations in a business transactions, specially international sales transaction, whereby a party might want to hold on to the property in dispute or to apply for other ancillary interim reliefs such as injunctions, etc., the necessity of which is of prime importance at that moment. Where the official appointment of arbitrator, as according to the terms of the arbitration agreement or through the institutional rules, may take some time, an emergency arbitration fills such gap. Normally, if we rule out the existence of this mode then, the only remedy available would be to apply for interim relief to the Court under Section 9 of the Arbitration and Conciliation Act, 1996 ("1996 Act"). However, the omnipresent drawback with the application to Court is the time consuming mode and overdue-long process, which itself defeats the very purpose of having arbitration as the mode of dispute resolution.[2] Such an arrangement of interim resolution is likely to have been already agreed to by the parties to the contract.

[2] Madhu Sweta and Kanika Tandon, Emergency Arbitration In India: Concept And Beginning, Mondaq, available at http://www.mondaq.com/india/x/547970/trials+appeals+compensation/Emergency+Arbitration+In+India+Concept+And+Beginning (last accessed 02.12.2016).

The nature of this concept of dispute resolution lies in the stage of its implementation, that is, an emergency arbitration is a "pre-arbitration" resolution which is performed before the constitution of the designated arbitral tribunal or panel, as the case may be depending on the arbitration agreement.[3] Despite such pro-arbitration and private resolution mechanism, emergency arbitration does not find a "relevant" place in the Indian jurisdiction, despite the legislature's intent of glamorizing arbitration as the preferred mode of investment dispute resolution. However, this does not preclude the institutions of arbitration from incorporating such measure in their own rules. This shall be discussed in later sections of the paper. The aim of this paper is to delve into the conceptual understanding of this rising facet of arbitration and to look towards its prospects in Indian scenario given the recent Arbitration Amendment Act of 2015.

Although the benefits of an emergency arbitration may seem appalling, but regretfully, there are certain jurisdictions across the world which do not recognize the arbitrator's interim measures' power to cater the emergency needs of the parties making it difficult for the parties of that country to resort to

[3] Guillaume Lemenez and Paul Quigley, supra note 3.

international commercial arbitration.[4] This is, however, not to say that emergency arbitration is a new concept, the rules of which are emerging only now. There have been designated institutions such as the International Chamber of Commerce ("ICC") which has Pre-Arbitral Referee Procedure.

2. INSTITUTIONAL REFERENCES

As has already been discussed, there have been institutions which had already adopted or incorporated designated rules pertaining to emergency arbitration much before it came to be incorporated into the black letters. In the year 1990, the ICC has published its Pre-Arbitral Refree Procedure. A glance at the Article 6 of the ICC Rules of Arbitration, Appendix V, will provide an outline of emergency arbitration. The said article says:

"Article 6: Order

1) Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").

2) In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1)

[4] Lawrence W. Newman – Colin Ong (ed.), Interim Measures in International Arbitration, 2014, at 169, 215-216, 438, 447-450.

of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.

***

6) The Order shall cease to be binding on the parties upon:
a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;
b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.

*** "

The above-cited article establishes the nature of an emergency arbitration proceedings i.e., such proceedings' interim relief(s) is considered to be an Order for the purpose of the dispute and that, where the arbitral tribunal, when formed post emergency arbitration proceedings, thinks fit, *may* give finality to such interim order passed in the emergency arbitration.

Along the lines, the International Centre for Dispute Resolution ("ICDR") also provides, under its own rules, measures furthering emergency arbitration to cater immediate needs of the parties. Article 37 of the International Arbitration Rules

incorporates the principle of emergency arbitration. There is no requirement for a formal hearing and the arbitrator has the power to "order or award any interim or conservancy measure … including injunctive relief and measures for the protection or conservation of property."[5] Such interim or conservancy measure can range from interim awards or an order.[6]Apart from such interim measures, the Article also vests with the emergency arbitrator, powers to decide its own jurisdictional issues such as the one of arbitrability of the subject matter.[7]

Similarly, Singapore International Arbitration Centre ("SIAC") also gives the parties the availability of following an expedited relief mechanism. As the SIAC Rules *(updated from time to time)* state that, "an arbitral tribunal may, at the request of a party issue an order or an award granting an injunction or any other interim relief it deems appropriate".[8]It was in 2010 when SIAC also introduced similar provisions relating to emergency

[5] Article 37 of the International Arbitration Rules, 2006.

[6] Raja Bose and Ian Meredith, Emergency Arbitration Procedures: A Comparative Analysis, International Arbitration Law Review, [2012] Int.A.L.R., Issue 5, Page 191.

[7] Arbitrability of subject matter entails a phenomenon of "competence" of an arbitrator to be capable of resolving the disputes which are, by their very nature, can only be resolved by the state Courts. Such disputes may be range from banking matters to criminal cases, etc. Given their very nature, such cases are outside the competence of arbitration as a whole.

[8] Rule 26.1 of the SIAC Rules, 2013. Refer to http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience (last accessed, 04.12.2016).

arbitration. A SIAC emergency arbitrator enjoys the same powers as a normal arbitral tribunal, just like every other emergency arbitrator across other international institutions.[9] Unless parties agree, an emergency arbitrator cannot form part of the main tribunal. The order or award of an emergency arbitrator ceases to have effect if a tribunal is not constituted within 90 days.[10]

The presence of such provisions does not only exist outside India but also at the arbitral institutions in India. For instance, the Delhi High Court's Delhi International Arbitration Centre, New Delhi ("DAC"), also serves the needs of interim reliefs sought by the parties to an arbitration agreement. Part III-A i.e. Emergency Arbitration's sole section, Section 18A of the Arbitration Rules provides that every such emergency arbitration proceedings shall be completed within a period of seven days. This actually furthers the very purpose of having emergency arbitration in the first place.[11] As against the operative part of 90 days of the Order passed by an emergency

[9] Schedule 1 to SIAC Rules, 2013.

[10] *Supra note* 8. Also available at http://siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/338-the-siac-emergency-arbitrator-experience (last accessed, 04.12.2016).

[11] Section 18 A (6) of the Delhi International Arbitration Centre (Arbitration Proceedings) Rules ("DAC Rules") available at http://www.dacdelhi.org/topics.aspx?mid=55#19._Interim_measures_ordered_by_Arbitral_Tribunal (last accessed, 04.12.2016).

arbitrator in case of SIAC, the DAC Rules, on the other hand, provide that the Order/interim relief so passed by an emergency arbitrator will be operative for a period of two months.[12]The Rules also lay down that the Order of the arbitrator so passed will not bind the Arbitral Tribunal, thereby ruling out the opportunity of finality in any sense, as compared to what has been enshrined under the ICC Rules discussed in the second paragraph of this section.

The Mumbai Centre for International Arbitration ("MCIA") is also a viable option for the parties pursuing this mode of arbitration. According to the Rules of the MCIA, the matter sought before an arbitrator is to be decided within a period of 14 days which may be extended contingent upon agreement of all the parties involved.[13] Most importantly, according to Rule 14.7 of the MCIA Rules, "an order or an award of an Emergency Arbitrator shall comply with Rule 30.7 and, when made, shall take effect as an Award under Rule 30.12." This provision, as against the rules of other institutions providing emergency arbitration, escalates the interim order to the status of an Award when the conditions so specified by the other rules mentioned are complied with. As being one of the most liberal rules

[12] Section 18A(9) of the DAC Rules.

[13] Rule 14.6 of the MCIA Rules, 2016 available at http://mcia.org.in/mcia-rules/english-pdf/#mcia_rule14 (last accessed, 05.12.2016).

enhancing emergency arbitration, the Rules give enough power to the emergency arbitrator "to decide as to in what manner will these Rules apply as appropriate, and his decision in such matters *is* final and binding on the parties, subject to Rule 14.9."[14]

So far, we have discussed relevant rules encompassing emergency arbitration across five arbitral institutions. Among these, the MCIA Rules are the one which have given much power, not only to the parties, but also to the arbitrators carrying out the emergency arbitration proceedings.

As these rules do not have the force of a statute, it is, therefore, imperative that such furthering provisions be recognised by the legislature in the relevant statute of the country. What follows is the next section which discusses the status of emergency arbitration under the Indian law and compares it with the other jurisdictions which have incorporated this mode in their law.

3. STATUS UNDER THE INDIAN LAW

As has already been stated earlier, the Indian law does not expressly recognise the emergency arbitration under its Arbitration and Conciliation Act, 1996 ("1996 Act"). But before we delve into such lacuna, it is imperative that we look on the

[14] Rule 14.12 of the MCIA Rules, 2016.

nature of the award involved in emergency arbitration. Since the relief so claimed under an emergency arbitration is of interim nature, the 1996 Act's definition of 'arbitral award' extends to include interim relief award.[15] Also, at first, it may appear that the 1996 Act also recognises the emergency arbitration awards, however, it recognises the interim order making power of the 'Tribunal' and not the arbitrator who is appointed before the formation of the tribunal.[16] This means, where an interim measure of protection is ordered by the Arbitral Tribunal, it will be deemed as an award, under Section 2(1)(c) of the 1996 Act. However, such power of the Arbitral Tribunal will only be limited to the orders made *during or after* the formation of the Arbitral Tribunal.[17] This position has further been intensified by the Arbitration (Amendment) Act of 2015, which will be discussed in later paragraphs. Towards this reference, the Supreme Court of India in *Firm Ashok Traders v. Gurumukh Das Saluja*[18] had pointed out the fact that, "the arbitral tribunal is empowered by Section 17 of the 1996 Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that, Section 17 would operate only during the existence of the arbitral and when it is

[15] Section 2 (1) (c) of the 1996 Act.
[16] Section 17 of the 1996 Act.
[17] Section 10 of the Arbitration and Conciliation (Amendment) Act, 2015.
[18] Ashok Traders v. Gurumukh Das Saluja, (2004) 3 SCC 155 at ¶18.

being functional. During that period, the power conferred on the arbitral tribunal under Section 17 and the power conferred by the Court under Section 9 may overlap to some extent but so far as the period pre and post the arbitral proceedings is concerned the party requiring an interim measures of protection shall have to approach only the Court."

Going on the same lines, the Supreme Court had earlier also held that, "Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned Arbitrator, therefore, being *coram non judice* was wholly without jurisdiction and, thus, a nullity."[19] Such positions, as enumerated above by the two decisions by the Supreme Court of India clearly reflect that, under the Indian law, the position of interim award or interim order making power of an arbitrator/arbitral tribunal is restricted for "during the pendency" of the arbitration proceedings before the tribunal.

The position so shown in the last two paragraphs is limited to the extent of recognition of interim award or interim order making power of an arbitrator. It does not include the status of Indian law with regards to the recognition of emergency

[19] M.D., Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619.

arbitration proceedings resorted to by the parties. We, therefore, for a better understanding, move to the second part of this section, i.e. emergency arbitration proceedings' recognition by the judiciary of India.

Since the Indian law does not accommodate emergency arbitration's award, and since such position is not expressly stated by the Legislature, it is incumbent to refer to the decision of Indian courts to get a fairer picture. The Delhi High Court in a a very recent case, delivered on 07.10.2016, *Raffles Design International India Pvt. Ltd. and Anr. v. Educomp Professional Education Ltd. and Ors.,*[20]emerged as a saviour for the parties by recognising the award that was passed by the emergency arbitrator at SIAC. The dispute between the parties at the Court concerned with the maintainability of the petition filed by the petitioners, Raffles Design Pvt. Ltd. and Anr., under Section 9 of the 1996 Act. The respondents had contended the maintainability on the grounds, *inter alia,* that, the emergency arbitrator's award so passed will not be applicable in India and that, such measure would be to defeat the role of Section 9 of the 1996 Act. Both of these rested on the premise of applicability of Section 9 of the 1996 Act in a foreign seated arbitration, given

[20] Raffles Design International India Pvt. Ltd. and Anr. v. Educomp Professional Education Ltd. and Ors, O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016, IA Nos.25949/2015 & 2179/2016.

the tussle between the *Bharat Aluminium Co. v. Kaiser Aluminum Technical Services*[21]and the Amendment Act of 2015. The Court ultimately concluded with the applicability of the Amendment Act of 2015 and therefore, established the applicability of Section 9 of the 1996 Act to this case. However, the reference point for the purpose of this paper is of the enforcement of the 'interim award' passed by the emergency arbitrator at SIAC. We may refer to the quoted lines of the judgement below:

"95. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. .... Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief.

97. The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter, also obtained a judgment in terms of the interim order from the Singapore High Court.

[21] Bharat Aluminium Co v. Kaiser Aluminium Technical. Services Inc. (2012) 9 SCC 552.

98. It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However the Act does not contain any provision pari materia to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India.

99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. ... Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.

101. ... a Court while examining a similar relief under Section 9 of the Act would be unfettered by the findings or the view of the Arbitral Tribunal."

The Raffles case clearly solved the problem of the applicability of Section 9 of the 1996 Act, however, it does inexplicably

diminishes the opportunity of directly enforcing the interim award of the emergency arbitrator. For the purpose of enforcing the interim award of the emergency arbitrator, another suit is to be filed by the applicant so that the Court would pass interim relief along the same lines as those of arbitrator. It also may be that, the Court *might* not do so and may advance a differing interim award to that of what was passed by the emergency arbitrator. This interpretation follows directly from the paragraphs 100 and 101 of the above-referred judgement. Although there has been no concrete determination of this issue by the Indian judiciary, given the fact that the Supreme Court has not considered this point till now, nevertheless, reference could still be made to another celebrated judgement of the Bombay High Court, *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd &Ors.*,[22]in which, the High Court, considering the existence of an interim order passed by an emergency arbitrator, had passed its own order along the same lines.[23] In this case, the emergency arbitrator, appointed by SIAC, has passed an interim award freezing the assets of the respondents, i.e., Avitel Post Studios Ltd. and Ors., and they

[22] Arbitration Petition No. 1062/2012 (Bom).

[23] KC Lye and Samuel Leong, Emergency Arbitrators in Singapore, International Arbitration Report 2014, Issue 3, available at http://www.nortonrosefulbright.com/files/20141002-emergency-arbitrators-in-singapore-121534.pdf (last accessed, 07.12.2016).

were also not allowed to withdraw money from their bank accounts. As such, the contentions of the respondents rested on the maintainability and enforcement of the interim award passed by the emergency arbitrator. Towards the end, the High Court said that the petition was not for enforcement under Section 9 of the 1996 Act. For our purpose, the relevant paragraph of the judgement is:

"89. … in my view, since present application filed under section 9 of the Arbitration Act by the petitioner is not for enforcement of the interim award or jurisdictional award rendered by the arbitral tribunal but the petitioner seeks interim measures against the respondents, independently, parties by agreement having excluded the applicability of Part I of the Arbitration Act except section 9, the petitioner is thus entitled to invoke section 9 for interim measures. In my view petitioner has not bypassed any mandatory conditions of enforceability required by section 48 of the Act."

Through this case also, it is clear that the High Courts do recognise the interim award making power of the arbitrators located in different jurisdictions. However, the problem of independent action to be filed, besides already having pursued an emergency arbitration, accumulates the burden on the parties. This is because, from the reading of the Delhi High Court's judgement of *Raffles case*, andof the Bombay High Court's

judgement of *HSBC case*, there has to be an independent action which will have to be maintained at the national Courts. Here comes the stark difference of the benefits as to the recognition and enforcement of the emergency arbitration awards. This is what the following section discusses, i.e., the status of other jurisdictions and the approach their courts follow in reference to emergency arbitration.

4. STATUS UNDER OTHER JURISDICTIONS

After going through the two most important judgements of the High Courts in India, it is now appropriate that we look beyond the Indian jurisdiction so as to understand the gaps that the Indian law should cover for the purpose of developing a 'pro-arbitration' standard in India. In the first sub-part, we will look into the English law, thereafter, under the second part, Singapore's law, the country known as the arbitration-hub.

Under the United Kingdom's Arbitration Act of 1996[24] ("UK Arbitration Act"), the Courts have the power to enforce the peremptory order passed by the arbitral tribunal.[25]Under section 44 of the UK Arbitration Act, the Court further has the power to

[24] Arbitration Act, 1996 available at http://www.legislation.gov.uk/ukpga/1996/23/contents (last accessed, 09.12.2016).

[25] Section 42 of the UK Arbitration Act.

grant an urgent relief to the parties, as the case may arise. The relevant section is produced below:

"(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."[26]

The above-cited provision is limited by the next two sub-sections which are produced below:

"(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order."

Sub-section (5) provides powers of urgent relief making to the Court 'only' if the arbitral tribunal or any 'person' so conferred with such power is unable to deliver such urgent relief that is sought by the parties. This 'pro-arbitration' sub-section in ab

[26] Section 44(3) of the UK Arbitration Act.

Arbitration Act furthers the standards of the arbitration, because here, the Legislation itself puts an arbitral tribunal or any other person (for example, emergency arbitrator) at a superior level to that of the national Courts. Further, when we see sub-section (6) so produced above, the position described above of superiority is further enhanced.

Interpreting the above section, the High Court of England and Wales, in a very recent case of *Gerald Metals SA v. Timis*[27] the judgement of which was delivered in September, 2016, the High Court refused to interfere in the proceedings upon the application of the claimant herein, Gerald Metals SA. The Court held, inter alia, that:

"Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44."

The Court, while interpreting the London Court of International Arbitration Rules ("LCIA Rules"), highlighted the limited role of the Courts in an arbitration proceedings, whatever the stage they might be at. This decision is significant in the light of the limited role that the Court plays in granting urgent reliefs too.

[27] [2016] EWHC 2327 (Ch).

This reflects that, parties, by appointing emergency arbitrator, may escape the rigours of the Court practices.[28] For this purpose, the relevant paragraph from the judgement is produced below:

"It is common ground that the test of urgency under subsection (3) is to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale: see Starlight Shipping v. Tai Ping Insurance [2008] 1 Lloyd's Rep 230, paras 22, 24, 27."[29]

Therefore, after seeing just a part of the law of arbitration and the approach followed by the Courts there, pursuant to the UK Arbitration Act, it definitely creates a gap of party's autonomy in our country by not recognizing the provision of emergency arbitration and by not minimizing, legislatively, the role of the Courts in arbitration proceedings, including emergency arbitration. To fill this gap, and to provide to the parties sufficient flexibility, the arbitral institutions providing arbitral

[28] Chris Parker and Aaron McDonald, English High Court has no power to grant urgent relief under Arbitration Act where urgent relief could be granted by expedited tribunal or emergency arbitrator under LCIA Rules, Herbert Smith Freehills Arbitration Notes available at http://hsfnotes.com/arbitration/2016/10/07/english-high-court-has-no-power-to-grant-urgent-relief-under-arbitration-act-where-urgent-relief-could-be-granted-by-expedited-tribunal-or-emergency-arbitrator-under-lcia-rules/ (last accessed, 09.12.2016).

[29] Gerald Metals SA v. Timis at page 15.

proceedings' services have enacted their own rules in such a manner, so as to cover what the Indian law does not cover.

To look towards other jurisdictions will be to further this assertion of gap that has been so described. New Zealand has, recently, carried out an amendment in its Arbitration Act of 1996.[30] The Amendment Act received the assent on the 17th of October this year which enlarges the scope of the arbitral tribunal so as to include the provision of 'emergency arbitrator' under its purview. This amendment has been done to clarify the position of the enforceability of emergency arbitration's award or order, and to put it at par with the final award which are passed by a constituted arbitral tribunal. As Timothy Lindsay puts it,

"Confirming the status of emergency arbitral tribunal awards as being on the same level as traditional arbitral awards reinforces arbitration as the "one stop shop" parties intend it to be."[31]

[30] For reference, please visit, http://www.legislation.govt.nz/act/public/2016/0053/latest/096be8ed813ff6f2.pdf (last accessed, 09.12.2016).

[31] Timothy Lindsay and Edith Offner, Important amendments to Arbitration Act 1996 (New Zealand), Lowndes Jordan, available at http://www.lojo.co.nz/updates-article/important-amendments-to-arbitration-act-1996-new-zealand-confirms-decisions-made-by-emergency-arbitrators-are-enforceable-as-arbitral-awards (last accessed, 09.12.2016).

Therefore, all what has been cited above, whether it in reference to common law countries carrying out a pro-arbitration step, is for the purpose of highlighting the lacunas that are present in the Indian Arbitration Act and which need to be covered by the Legislature. The next section i.e. the conclusion, talks about this, in reference to the Arbitration Amendment Act of 2015 passed by the Parliament and what the Parliament could have done, and thereafter, the section concludes the whole paper.

5. CONCLUSION

Throughout this paper, we have seen the position of arbitration in India and the analysis of the rules of different arbitral institutions which provide the parties to an arbitration agreement, flexibility and provision to claim urgent relief in case of emergency situations. However, as already stated in the last section, these institutional rules do what the 1996 Act fails to do. The Parliament of India had enacted an amendment Act in December, 2015 amending the 1996 Act. Before such amendment, the Law Commission, in its 246th Report[32], had recommended the recognition and enforcement of emergency

[32]Law Commission of India, Government of India, 246th Report – 'Amendments to the Arbitration and Conciliation Act 1996, August, 2014' available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (last accessed, 09.12.2016).

arbitration award and orders. In its report, the Commission had stated:

"Amendment to Section 2 of the Principal Act:

In sub-section (1), clause (d), after the words "...panel of arbitrators" add "and, in the case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator;"

[NOTE: This amendment is to ensure that institutional rules such as the SIAC Arbitration Rules which provide for an emergency arbitrator are given statutory recognition in India.]"[33]

However, despite these suggestions by the Law Commission of India, the Amendment Act of 2015 failed to address the rising need of recognition of emergency arbitration. Had the Amendment Act recognised it, the role of the Courts would have much more minimized and would have been limited to the extent to providing the reliefs which an emergency arbitrator could notprovide, and of course, the enforcement.

For the purpose of garnering more investment in the country, one of the main concerns of the parties is the dispute resolution. Therefore, the government should endeavour to recognise such

[33] *Id*. at p. 37.

type of arbitration proceedings so as to give the parties enough flexibility to follow their own private process of dispute resolution. Although the Parliament has failed to address the issue of emergency arbitration, this still could be looked after if the Courts are proactive to follow the legacy of international courts, such as, the English High Court, as discussed above, and take a step towards recognising that, at last, arbitration is a private process. If a party is required to approach the Court, then, there is no need of having an arbitration agreement in the very first place.

RELEGATION OF APPLICATION FOR INTERIM MEASURES BY COURT TO TRIBUNAL UNDER THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

Prakhar Deep[1] & Nandita Chauhan[2]

1. BACKGROUND

The Arbitration & Conciliation Amendment Act, 2015 ("Amendment Act") came into force to rectify the infirmities of the Arbitration & Conciliation Act, 1996 ("1996 Act") discovered in the due course of time. The legislative intent was to makearbitration more effective, time-bound and reduce the intervention of the Courts. Introduction of time-bound proceedings, limiting the interpretation of 'public policy' in S. 34 of the 1996 Act,removal of automatic stay on operation of award after challenging the award under S. 34 are some of the major highlights in this regard. Another crucial advancement in the law of Arbitration was giving the Arbitral Tribunal equal powers to that of the Court while deciding the application of

[1] Advocate, Delhi High Court, B.A. LL.B. (Hons.), Rajiv Gandhi National University of Law, Patiala, 2014.

[2] Associate, Shardul Amarchand & Mangaldas, B.A. LL.B. (Hons.), Army Institute of Law, Mohali, 2014.

interim measures. The Parliament in this regard amended S. 9 & S. 17. Under the 1996 Act, the Arbitral Tribunal's order under S. 17 was not enforceable and hence, unlike the order for interim relief by a Court, the orders by the Tribunal were virtually 'toothless'. It was perhaps realized by the Legislature that parties resorted to Courts for interim relief even after the constitution of Arbitral Tribunal since the powers of the Arbitral Tribunal were limited and not enforceable.

The impuissant nature of the Arbitral Tribunal not only reduced the ambit of powers given to the Arbitral Tribunal but sparked another debate with respect to extent Court's intervention under S. 9 in interim applications. Since the Arbitral Tribunal is always seized with the dispute and can ultimately decide the matter, the Courts while deciding the S. 9 interim measures application had to act cautiously and only take a *prima facie* view. However, on some occasions the Courts have often decided the whole dispute under S. 9 and even passed orders under S. 9 during the pendency of S. 17 Application as scope of S. 9 was wider than that of S. 17 under the 1996 Act.[3]

The Legislature has now amended S. 17 and brought it at par with S. 9. Under the Amendment Act, once the Tribunal is

[3] Benara Bearing and Pistons Ltd. v. Mahle Engine Components Private Ltd., FAO 66/2016; National Highways Authority of India v. China Coal Construction Group, (2006) 1 ArbLR 265.

constituted, all the applications for interim measures are to be decided by the Arbitral Tribunal only, unless Court is of the opinion that an efficacious remedy is not available. There has been a considerable addition to S. 9 of the 1996 Act to effectuate the S. 17 amendment. S. 9(2) &S. 9(3) have been added. Whereas S. 9(2) mandates the commencement of Arbitral proceedings within 90 days from passing of order under S. 9, S. 9(3) bars the Court from entertaining the interim measures application once the Arbitral Tribunal is constituted. Only if Court is of opinion that an efficacious remedy may not be available with the Arbitral Tribunal, it can entertain the interim measures application.

The moot question which arises is whether the Court,during the pendency of the S. 9(1),can relegate the interim measures application to be decided by the Tribunal. Since the powers under S. 17 are now same as that under S. 9, the Tribunal is now vested with powers to adjudicate all such applications. Since the Amendment Act does not contain any express provision permitting the transfer or relegation of the cases, an exhaustive interpretation of S. 9(3), considering the Legislature's intent,must be looked into. At present, the Delhi and Calcutta High Courts are of divergent views. A Division Bench of the Calcutta High Court, in the case of Tufan Chatterjee v. Rangan

Dhir,[4] has held that an interim measures application under S. 9(1) can be transferred to the Arbitral Tribunal and be decided under S. 17. Even Delhi High Court, in case of Aquatech Systems (Asia) Pvt. Ltd. v. SKS Power Generation,[5]has also transferred the Application under S. 17. However, recently, a Division Bench of the Delhi High Court, in case of Benara Bearings & Pistons Ltd. v. Mahle Engine Components India Pvt. Ltd.,[6] held that a pending application under S. 9 cannot be transferred to the Arbitral Tribunal under S. 17. The Court, after interpreting the word "entertain" used in S. 9(3), held that the pending Applications cannot be transferred to the Tribunal since the Court has already been conferred jurisdiction to adjudicate a S. 9(1) Application. In order to ascertain the true intent of the Legislature, it is imperative to analyse the intent of the 1996 Act and the Amendment Act with the judicial precedents setting out the scope of S. 9.

[4] FMAT No. 47 of 2016 and CAN 308 of 2016, ¶¶ 43-45 ("Tufan Chatterjee").
[5] O.M.P. No. (I) No. 446/2015 (An appeal was filed before the Division Bench but eventually the Petitioner had withdrawn the S. 9 Petition).
[6] *Supra* note 3.

2. WHETHER A PENDING APPLICATION UNDER S. 9 CAN BE TRANSFERRED TO THE TRIBUNAL TO BE CONSIDERED AS S. 17 AS PER THE AMENDMENT ACT

S. 9(3) refrains the Court from entertaining an interim measures application under S. 9(1) once the Tribunal is constituted. It is not out of place to point out that the provision uses the word "entertain" which has been widely interpreted in law. The interpretation of the word "entertain" came up before a full bench headed by Hidayatullah, J. of the Supreme Court in the case of Lakhmiratan Engineering Works v. Assistant Commissioner (Judicial) I, Sales Tax.[7]The Supreme Court, after relying on the decisions of theAllahbad High Court,[8] held that the expression 'entertain' does not mean the same thing as the filing of the application or admission of the application by the Court. The word 'entertain', in its application, bears the meaning 'admitted to consideration'. The Supreme Court affirmed the view of the Allahabad High Court in Haji Rahim Bux& Sons v. Firm Samiullah & Sons wherein it was observed that word "entertain" meant not "receive" or "accept" but "proceed to consider on merits" or "adjudicate upon". The aforesaid

[7] (1968) 1 SCR 505, ¶¶ 7-9.

[8] Kundal Lal v. Jagannath Sharma, AIR 1962 All 547; Dhoomchand Jain v. Chamanlal Gupta, AIR 1963 All 443; Bawan Ram v. Kunj Beharilal, AIR 1961 All 42; Haji Rahim Bux & Sons v. Firm Samiullah & Sons, AIR 1963 All 326.

observation of the Supreme Court has been affirmed in State of Haryana v. Maruti Udyong & Ors.,[9] Martin & Harris Ltd v. 6th Additional District Judge and Ors.[10]and Hindustan Commercial Bank v. Punnu Sahu[11].

The Calcutta High Court in Tufan Chatterjee, while allowing a transfer of S. 9 application to the Tribunal under S. 17, relied upon the case of Martin & Harris.[12] The Court accepted the submission of the Appellant distinguishing the term "institute" and "entertain" and extended the applicability of S. 9(3) to such applications which are already pending before the Court by terming them "entertained" application eligible to be transferred to the Tribunal. The Court observed:

> *"35. However, as rightly argued by Mr. Bhattacharya, there is difference between the expressions 'institute' and the expression 'entertain'. The expression 'institute' is not synonymous with the expression 'entertain'. In Martin & Harris Ltd. v. 6th Additional District Judge and Ors. reported in (1998) 1 SCC 732 cited by Mr. Bhattacharya, the Supreme Court interpreted the expression 'entertain' in Clause 21(1)(a) of the U.P. Urban Buildings*

[9] 2007 (7) SCC 248, ¶ 8.
[10] 1998 (1) SCC 732, ¶¶ 8-10 ("Martin & Harris").
[11] 1971 (3) SCC 124, ¶ 4.
[12] *Supra* note 2.

> *(Regulation of Letting, Rent and Eviction) Act, 1972 to mean entertaining the ground for consideration for the purpose of adjudication on merits and not any stage prior thereto. Unlike the Limitation Act, which bars the institution of a suit after expiry of the period of limitation, Section 26 prohibits the Court from entertaining an application under Section 9, except in circumstances specified in Section 9(3), which necessarily means considering application on merits, even at the final stage."*

The aforesaid interpretation of the word "entertain" may suggest the interpretation of S. 9(3) that a pending application which is already admitted by the Court but not decided may fall into the category of matter as contained in S 9(3) therefore since the Court has not decided the matter on merits it is refrained from further adjudicating the matter and the only option left with the Court is to either justify that "efficacious remedy" is not available with the Tribunal so to continue adjudicating the matter or transfer it to the Arbitral Tribunal by effect of bar under S. 9(3). This interpretation was followed in Tufan Chatterjee as well.

However, none of the aforesaid cases deal with a situation wherein the word "entertain" is to be interpreted in light of the pending applications after enactment of a new legislation as is

the case in S. 9(1) after introduction of S. 9(3). A similar situation had arisen before the full Judge bench of the Supreme Court headed by Justice S.M. Sikri in case of in Dewaji v. Ganpati.[13]The Apex Court held that if the term "entertain" is used in the statute then it has no effect on the pending suit/application (similar to section 9(3) of the Amendment Act) as entertain means a bar on entertaining new applications only. The Court observed that had the legislature used the term "entertain or try any suit" then the bar could have been on the pending applications as well. Thus, the use of "entertain" shall have only prospective effect. Therefore, if the provisions of S. 9(3) are strictly interpreted then pending applications under the S. 9(1) cannot be transferred to the Arbitral Tribunal. The Division Bench of the Delhi High Court in Benara has drawn the same conclusion but didn't place reliance on the Dewaji v. Ganpati case.

Another source to interpret the meaning of term 'entertain' is the Legal Glossary published by the Government of India. Legal Glossary is used by draftsmen while preparing a Bill. As per the glossary, "entertain" means "to admit in order to deal with".[14] Therefore, the interpretation by the full bench of the Supreme

[13] (1969) 1 SCR 573, ¶ 12.
[14] GOVERNMENT OF INDIA, LEGAL GLOSSARY (Mar. 15, 2017, 10:00 PM), http://lawmin.nic.in/olwing/legal%20glossary/D%20to%20G.pdf.

Court in Dewaji case and definition as provided in Legal Glossary which is relied upon by the Delhi High Court in Benara does suggest that if the Court has already seized the interim measures application then it cannot transfer the same to the Arbitral Tribunal and S. 9(3) would only operate on a fresh application filed after the constitution of Arbitral Tribunal. However, the Delhi High Court has not recorded the legal glossary meaning in the judgment on *Benara*.

3. NEED FOR HARMONIOUS INTERPRETATION OF 9(3) AND ITS DISTINCTION FROM A USUAL OUSTING JURISDICTION CLAUSE

The aforesaid interpretation of the word "entertain" used in S. 9(3), if accepted and enforced, would turn out be a conundrum for Judiciary and Legislature. This is because in usual practice, the parties often only apply for interim measures at a primitive stage of the dispute and before the constitution of the Arbitral Tribunal and thus, merely accepting this interpretation, which may be a mere draftsmen's error, would not reduce the Court's burden or compliment the amendment to S. 17.

If the strict interpretation is given to S. 9(3), prohibiting the transfer of pending application to the Arbitral Tribunal, the whole object of bringing the Arbitral Tribunal's powers at par with the Court would become impuissant. Opinions favouring strict interpretation of S. 9(3) often assert that S. 9(3) is not an

Ouster Jurisdiction clause and has no express provision for transfer of cases. Several legislations[15] are also in support of this contention wherein a provision to ouster the jurisdiction of court/authority is followed by a provision enabling transfer of pending cases. However, it is pertinent to note that S. 9(3) is not an Ousting Jurisdiction clause but in fact gives the Court a discretion and provides a supervisory jurisdiction over the matter. The wording of S. 9(3) is:

> *"Once the arbitral tribunal is constituted, the Court shall not entertain"*

and NOT:

i. "*No civil court shall have jurisdiction to entertain any suit or proceeding"*; or

ii. *"With effect from the date of establishment of the Tribunal under this Act, no civil court shall have jurisdiction to entertain any appeal in respect of any matter, which the Tribunal is empowered to determine under its appellate jurisdiction".*

[15] The Electricity Act, 2003 (See S. 145, ousting the jurisdiction of civil courts and S. 122, which allows the transfer of pending cases); The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (See S. 34, ousting the jurisdiction of civil court and S. 5A, which allows the transfer of pending cases); The Armed Forces Tribunal Act, 2007 (See S. 33, ousting the jurisdiction of civil court and S. 34, which allows the transfer of pending cases).

It is pertinent to note that if the intention of the Legislature was to completely ouster the jurisdiction of the Court then S. 9 would have been constructed as:

> "*Once the arbitral tribunal is constituted, the Court shall not have jurisdiction to entertain"*

Therefore, rather than comprehending S. 9(3) as an ousting clause to reduce judicial interference, the provision must be interpreted to reduce the burden of the Courts. The Hon'ble Chief Justice of India, Mr. T.S Thakur, in his address at the Arbitration Conference expressed his concerns over the avalanche of cases Judiciary is handling,[16] often for interim measures. If such cases are conveniently routed to the Arbitral Tribunal, which has been conferred jurisdiction for dealing with the dispute, then it would certainly compliment the Act and vision of the CJI. Further, not only on the Amended Act but on several earlier occasions, the Indian judiciary has supported the view that its role in the arbitration process be minimal and only of a supervisory nature. Below is a brief analysis of judicial viewpoint of the 1996 Act and legislative intent inferred from the Assembly debates while enacting the 2015 Amendment Act.

[16] Closing Address of the erstwhile Chief Justice of India, Hon'ble Mr. T.S Thakur at the Arbitration Conference organized by Neeti Ayog.

4. AIMS AND OBJECTIVE OF S. 9 OF THE 1996 ACT

The 1996 Act was a step to comply the Indian Arbitration law to the UNCITRAL Model Law. Some of these objectives are clearly reflected in the Objects and Reasons of the Arbitration and Conciliation Bill, 1995, as stated herein:

a) To comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
b) To minimise the supervisory role of courts in the arbitral process;
c) To provide that every final arbitral award is enforced in the same manner as if it was a decree of court.

S. 9 of the 1996 Act was based on the Art. 9 of the Model Law but the Legislature decided to take it further. The Legislature empowered the Indian Courts under S. 9 to go beyond what Art. 9 does. The Model Law enabled a party to approach a court for an interim measure of protection before or during the arbitral proceedings. The Legislature, while enacting the 1996 Act, enabled a party to approach the Court before, during or even after the arbitral award is delivered (but before its enforcement by Court). As the law progressed, the judiciary, on several occasions, had to decide the scope of S. 9. The Supreme Court

of India, in Sundaram Finance Ltd. v. NEPC India Ltd.,[17] held that the Court, while passing any order under S. 9, must be satisfied that the applicant will take effective steps for commencing arbitral proceedings.[18] Essentially, interim measures are grants of temporary relief aimed at protecting the parties' rights pending the final resolution of a dispute. The efficacy of the arbitration primarily depends upon the interim measures that may prevent adverse parties from destroying or removing assets so as to render the final arbitral award meaningless.[19]This is also the view of Prof. Russel, a leading authority on Commercial Arbitration, who says:[20]

> *"The whole purpose of giving the court power to make such orders is to assist the Arbitral Tribunal in cases of urgency or before there is an arbitration on foot. Otherwise, it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertaking from the claimant, that the*

[17] Sundaram Finance Ltd. v. NEPC India Ltd., 1999 (2) SCC 479, ¶ 19.
[18] 1999 (2) SCC 479, ¶ 19.
[19] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105, ¶ 31.
[20] DAVID ST. JOHN SUTTON & JUDITH GILL, RUSSEL ON ARBITRATION306-307 (22nd Edition, Sweet &Maxwell Limited, 2003).

substantive questions are reserved for the arbitrator or arbitrator."

The Court, under S. 9, can, only on the basis of a *prima facie* view, grant interim relief and not decide the merits of the matter. S. 9 does not extend to the situation wherein the Court decides the whole dispute, leaving the arbitration proceedings infructuous as nothing would be left for the Arbitrator to decide.[21]The Delhi High Court, in Softline Media Ltd. and Shalimar Advertisers v. Delhi Transport Corporation,[22] held that the Court must refrain from making observations on merits and the Arbitrator must take a fresh look into the matter on the basis of pleadings, documents and other materials placed before him without, in any way, being influenced by the observations made by the Court. The Court ordered the status quo to be maintained for 2 months and directed the parties to seek further necessary orders from the Tribunal under S. 17 if required.

An instance of the Court relegating the interim measures application to the Arbitral Tribunal even under the old Act goes way back to 2002 when the Delhi High Court, in the case of Associates India Financial Services Pvt. Ltd v. Jairaj Shetty,

[21] Trehan Promoters and Builders Pvt. Ltd. v. Welldone Technology Parks Development Pvt. Ltd., O.M.P 507/2009, ¶ 6; Deepak Mitra v. District Judge Allahabad, AIR 2000 All 9, ¶ 13; Nepa Limited v. Manoj Kumar Agrawal, AIR 1999 MP 57, ¶ 17.

[22] 2002 Supp ArbLR 632, ¶¶ 15, 22.

exercised its discretionary power and transferred the S. 9 Petition to the Arbitral Tribunal to be considered as S. 17. A similar view has been taken by Justice Manmohan Singh in Aquatech Systems (Asia) Pvt. Ltd. v. SKS Power Generation O.M.P. No. (I) No. 446/2015. However, the case of Aquatech (supra) does not hold binding value since the appeal was filed before the same Bench where case of Benara (supra) was pending and subsequently, it was also withdrawn. The intention in referring to the aforesaid cases is that the Court, in the past, has taken such steps to relegate such applications to the Arbitral Tribunal. Following are the relevant observations of Justice Dr. Mukundakam Sharma, then Ld. Single Judge:

> *"I appoint ……. as the Court Receiver who shall take possession of the two excavators and keep the same in safe custody without putting the same for any kind of use until further orders to be passed on this petition under section 9 of the Act which is pending and is now converted to a petition under section 17 of the Arbitration and Conciliation Act. All further questions and issues with regard to the custody and preservation of the two excavators shall henceforth be dealt with by the learned Arbitrator in accordance with law by exercising his powers under section 17 of the Act."*

5. SCOPE OF S. 9 (3) AND S. 17 POST THE ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2015

Whereas the 1996 Act was based on the 1985 UNCITRAL Model Law wherein the Tribunal had limited powers but then, the UNICITRAL Model Law was amended in 2006. Art. 17 under the 1985 Model Law seemed a half-hearted attempt, as it neither contained an enforcement mechanism nor were any adverse effects sanctioned in the event of non-compliance. Art. 17 in 1985 Model Law was essentially premised on voluntary compliance and therefore (not unsurprisingly), was rarely resorted to.[23] The extensive revision of Art. 17 on interim measures was considered necessary, considering the facts that such measures were increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.[24]

The 2006 amendment of the UNCITRAL Model Law marked the occasion to revisit the 1996 Act and align it as per the

[23] Sumeet Kachwaha, *"Interim Relief": Comments on the UNCITRAL Amendments and the Indian Perspective* (Feb. 28, 2017, 12:15 P.M.), http://www.kaplegal.com/upload/pdf/Transnational_Dispute_Management.pdf.

[24] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, ¶ 4.

amended Model Law. The 20th Law Commission of India headed by Justice A.P Shah constituted a committee consisting of several eminent persons from the legal field and conducted several discussions before making its recommendations in the 246th Report of the Law Commission of India. In Chapter 1,i.e Introduction to the proposed amendments, the Law Commission of India made its stand clear that its primary intent is to reduce the judicial intervention in the pre-arbitral process. The Commission had put a strong emphasis that the Court must adopt a *prima facie* approach during the pre-arbitration institution stage. The Law Commission reasoned its recommendation to S. 17 amendments by stating that S. 17 is an important provision, which is crucial to the working of the arbitration system, since it ensures that even for the purposes of interim measures, the parties can approach the Arbitral Tribunal rather than await orders from a Court. The Law Commission also admitted that the efficacy of S. 17 is, however, seriously compromised given the lack of any suitable statutory mechanism for the enforcement of such interim orders of the arbitral tribunal.[25] The Law Commission acknowledged the efforts of the judiciary in providing suitable legal basis for enforcing the orders of

[25] LAW COMMISSION OF INDIA, 246TH LAW COMMISSION REPORT, Chapter 2, *Powers of Tribunal to Order Interim Measures*.

Tribunal under S. 17 in the case of Sri Krishan v. Anand [26]but observed that it is important to provide teeth to the interim orders of the Arbitral Tribunal as well as to provide for their enforcement.[27] The Law Commission did not provide any detailed explanation to the proposed amendments to S. 9 but observed that S. 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as the other provisions.

6. THE LAW COMMISSION'S VIEW AND THE LEGISLATIVE INTENT IN S. 9 AMENDMENT

The Law Commission proposed that *firstly*, the S. 9 interim protection order would cease to operate after 60 days or time specified by the Court to ensure that the parties timely initiate the arbitration proceedings. *Secondly*, the Law Commission proposed to add S. 9(3) which said, "*Once the Arbitral Tribunal has been constituted, the Court shall, ordinarily, not entertain an Application under this provision unless circumstances exist owing to which the remedy under section 17 is not efficacious.*" The Law Commission added an explanatory note stating:

[26] (2009) 3 ArbLR 447 (Del).
[27] *Supra* note 23.

> "*This amendment seeks to reduce the role of the Court in relation to grant of interim measures once the Arbitral Tribunal has been constituted. After all, once the Tribunal is seized of the matter it is most appropriate for the Tribunal to hear all interim applications. This also appears to be the spirit of the UNCITRAL Model Law as amended in 2006.*"

The aforesaid proposals found their place in the Amendment Act but with slight modifications. The 2015 Arbitration & Conciliation (Amendment) Bill introduced in the Parliament, which was later ratified to be enacted, departed slightly from the Law Commission's Recommendations. S. 9 in the Amendment Act has extended the duration of the Court's interim measure order to 90 days and does not expressly state if the Order would cease to exist upon the expiry of the term. With regards to S. 9(3), the Legislature has omitted the term "ordinarily" and therefore intention of the Legislature is to reduce any ambiguity which may arise where parties end up interpreting the term "ordinarily". This step is taken to reduce the scope of giving a second interpretation to S. 9(3) and provide Court's intervention only in such cases wherein efficacious remedy is not available with the Arbitral Tribunal.

6.1. Law Commission's view and Legislative intent in S. 17 Amendment

Further, with regards to the substitution of S. 17 of the 1996 with a new provision, the Law Commission's rationale at Pg. 51 of its Report was:

> *[NOTE: This is to provide the arbitral tribunal the same powers as a civil court in relation to grant of interim measures. When this provision is read in conjunction with section 9(2), parties will by default be forced to approach the Arbitral Tribunal for interim relief once the Tribunal has been constituted. The Arbitral Tribunal would continue to have powers to grant interim relief post-award. This regime would decrease the burden on Courts. Further, this would also be in tune with the spirit of the UNCITRAL Model Law as amended in 2006.]*

In fact, a perusal of the legislative debates in the Lok Sabha on 17.12.2015[28] shows that there is no dispute that the spirit of the amendment is to reduce judicial intervention in arbitral proceedings. In particular, at Page 153, the Hon'ble Member of Parliament (Joyce George) has stated:

[28] Pg. 153 and 194 of Assembly debates.

> *"Sir, in this Bill, we are trying to reduce the involvement of the court in an arbitration proceeding. For that, we have imposed certain provisions to restrict the courts from passing interim orders after constitution of an Arbitration Tribunal."*

Another Hon'ble Member of Parliament observed the intervention of Courts in the Arbitration process and stated as under*:*

> *"The delay of time in arbitral proceedings was not the only malady plaguing arbitration of India, another equally daunting challenge was courts' interference in arbitration under Section 9 and awards being set aside by courts."*

Minister of Law & Justice Shri Sadanand Gawda, while presenting the Bill in the Parliament, observed that[29]:

> *"One is inordinate delay in disposing of the cases. Second is the too much interference by the courts. The court itself used to take years together. The persons who went for arbitration could not settle the matter".*

A perusal of the aforesaid discussions with regards to the amended Act clearly evidences that the legislative intent was to

[29] *Id*. at 194.

reduce the judicial intervention but still provide the full judicial support. A bare perusal of the other important amendments such as S. 8 (reducing judicial intervention by mandating a *prima facie* approach to be taken by the Court), S. 34 (wherein limitations are added to interpret the term "Public Policy") and removal of automatic stay of the arbitral award by merely filing an Application under S. 34 clearly show that the Legislature intended to give more autonomy to the Arbitral Tribunal and reduce the burden of the Courts. These amendments must be read in spirit to aid the burdened judiciary and not curtail its power.

7. A PRAGMATIC VIEW TOWARDS S. 9(3)

Considering the aforesaid discussions, it may be suggested that relegating the interim measures applications to the Arbitral Tribunal does not seem to be an absurd thought. This gives rise to another question i.e. *Whether the interim protection order of the Court stays or gets vacated?*

In any dispute involving an arbitration, the parties often approach the Court before invoking the Arbitration clause and the whole process of getting an interim protection is so swiftly done, the other side is often not required to be served with the S. 9 Petition if no caveat is filed or arbitration is not invoked. It is a common practice to secure an *ex parte* ad interim protection of

the matter before invocation of the Arbitration clause. If the interpretation that upon the constitution of Arbitral Tribunal, the petition is to be transferred from the Court is accepted then it would limit the Court's role to a body that only provides interim protection at the first instance. The situation would be similar to admission of a PIL or an SLP wherein the Court has to act with due care. This should not be construed as taking away the power of the Court as even then, discretionary power is given to the Court to grant interim measures if it is of the opinion that an efficacious remedy may not be available with the Arbitral Tribunal.

If the protection order of the Court is not stayed till the disposal of interim measures application by the Tribunal once its relegated by the Court, it would defeat the whole purpose of the relegation. The following is a brief illustration in this regard.

7.1. Brief Illustration

Brief Illustration to substantiate the legislative intent and harmonious construction of S. 9(2), (3) and S. 17 of the amended Arbitration Act, 2015.

A and B have a business relationship. The Parties have a dispute. A is aggrieved by the fact that B may dispose off the assets. The arrangement provides that all issues are to be decided by Tribunal. However, since the Tribunal is not

constituted, A, due to urgency, approached the Court under S. 9. The Court issues notice and before the next date of hearing, the Tribunal is constituted. B approaches the Court, stating that the Court has no jurisdiction since Tribunal is constituted.

Three scenarios:

1. *Court finds that efficacious remedy is not available with Tribunal, and thus invokes its discretionary power and decided the matter under Section 9. (**Note**- Court must provide reasoning as to why it efficacious remedy not available with Tribunal.)*

2. *The Court finds that there is an efficacious remedy available under Section 17 and therefore it relegates the matter to the Tribunal. However, the Court does not grant any interim relief. (**Note-**In this case since A has no interim protection, and its remedy under Section 17 before the Tribunal would become infructuous and grave prejudice be caused.)*

3. *The Court finds that there is an efficacious remedy available under Section 17 and therefore, it relegates the matter to Tribunal. The Court makes no observation as to merits of the matter and only takes a prima facie view and grants interim measures which are to be looked into by the Tribunal on merits under Section 17. (No*

*prejudice is caused to either party.)(**Note-**This illustration shows the harmonious interpretation of Section 9(3), 9(2) and Section 17 of the amended Act.)*

8. CONCLUDING THOUGHTS AND PRACTICAL GUIDANCE

In my opinion, while interpreting any provision of a statute, it is imperative to first analyse the object and intent of the statute and then interpret the statute using principles rather than just a precedent. Interpretation of the word "entertain" through the prism of precedents will not fulfil the primary aim and objectives of the 1996 Act, which is to minimise judicial intervention of Courts.

It is true that arbitration in India today is plagued by misconduct and riddled with procedural disputes which are disrupting the ethos of commercial jurisprudence. The Legislature is putting in efforts to remove infirmities and improve the Arbitration law in India. Therefore, even now, the Courts are still proceeding with caution and are not too comfortable giving complete autonomy to the Arbitral Tribunal.

Although a Division Bench of the Delhi High Court has thoughtfully observed in *Benara* (Supra) at para 24 of the judgement that:

> *"We may also note that if the argument of the appellant were to be accepted that the moment an Arbitral Tribunal is constituted, the Court which is seized of a Section 9 application, becomes coram non judice, would create a serious vacuum as there is no provision for dealing with pending matters."*

However, a blanket ban on the relegation of the pending interim measures to the Tribunal may be not a fruitful solution. The aforesaid issue needs to be addressed with aim to further interpret the term "efficacious" as stated in section 9(3). It will be interesting to witness the decisions to come when the Courts will give meaning to "efficacious remedy" and set parameters and thresholds on issues which can be dealt by the Arbitral Tribunal.

COMPETITION

LAWS

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CASE COMMENT: ESS CEE SECURITIES PVT. LTD. & ANR. V. M/S DLF UNIVERSAL LIMITED & ANR.

Maalvinder Singh*

1. INTRODUCTION

In the landmark case of Competition Commission of India v Steel Authority of India1 ('SAIL's case'), the Supreme Court's interpretation of various provisions of the Competition Act, 2002 ('Act'), particularly the interpretation given to Ss. 26(1), 26(2), 53A(1)(a) and 53B(1) of the Act, has come to be considered as a touchstone against which the metes and bounds of the appellate jurisdiction of Competition Appellate Authority ('COMPAT') is to be decided. Nonetheless, this settled position has once again become unsettled. Recently, the scope of COMPAT's appellate jurisdiction vis-à-vis the extent of its power to pass orders under S. 53B(3) of the Act, was brought into question before the apex court in the ongoing proceedings

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[1] Competition Commission of India v Steel Authority of India, (2010) 10 SCC 744.

of *Uber India Systems Pvt. Ltd. v. Competition Commission of India &Ors.*[2]

It had been observed in a number of recent cases, that the Tribunal has passed certain orders and directions under S. 53B (3) of the Act, which are *ultra vires* to both the written word and the intent behind the said provision. However, the Tribunal in its latest judgment in *Ess Cee Securities Pvt. Ltd. & Anr. v. M/s DLF Universal Limited &Anr.*,[3] might have tacitly shifted the prevailing trend towards the right direction by applying a restrictive approach while deciding its jurisdiction in this case. In this comment, this restrictive approach taken by the Tribunal in the present case would be analyzed from the standpoint of interpretation and contemporary judicial trend.

2. FACTS

2.1. Preliminary facts

In this case, the petitioners were two associated companies ('informants'), who had booked apartments in the respondent's project called 'DLF Capital Greens Phase-III'. Immediately after the bookings were made, the respondents started harassing

[2] Uber India Systems Pvt. Ltd. v Competition Commission of India & Ors., C.A. no. 641/2017.

[3] Ess Cee Securities Pvt. Ltd. &Anr. vM/s DLF Universal Limited & Anr., Appeal No. 02/2016 [Decided on 09.02.2016].

the informants with frequent demand notices for payments, which were sent on monthly basis, and hefty fines, which were imposed on the informant for even minor delay in payment. The informants tolerated this behavior for nearly 30 months as the had their money tied up with the respondents.

However, three months prior to the stipulated date of delivery, the respondents conveyed their inability to deliver the project within the stipulated time due to delay in procurement of requisite approvals. They further offered the informants a meager compensation at Rs.10/- per square feet per month.

Aggrieved by these actions of the respondents, informants approached the CCI under S. 19(1)(a) of the Act seeking compensation for abuse of dominant position by the respondents. Till the date of information, both the companies had already paid a total of Rs. 3,86,54,205/- and Rs. 3,40,39,756.72/- respectively, to the respondents.

In their information to CCI, the informants stated that they were particularly looking for a 'luxury apartment' and the distinct facilities offered by respondents in their project that highly appealed to them and became the primary reason for their choice. They further averred that after doing the due diligence, they found that DLF ('respondents') had the largest market share

in 'luxury residential apartments' market in Delhi and no other project offered similar facilities as the respondents.

2.2. CCI's order

Upon considering the information submitted by the informants, the Commission first ventured to determine the relevant market in the present case. It was found that, in this case the relevant product market would be '*provision of services relating to development and sale of residential apartments*' as 'no other product(s), such as services relating to development and sale of commercial/ industrial properties and residential plots may be considered as substitutable/ interchangeable with provision of services relating to development and sale of residential apartment.'[4] Whereas Delhi was held to be the relevant geographical market in the present case.[5]

After ascertaining the relevant market, the Commission held that there were other real estate developers like Delhi Development Authority, Ansal API, CGHS Group, Parsvnath, etc. in Delhi, who posed competitive constraints to the respondents in the relevant market. It was deduced further that due to this position of respondents, the informants were not dependent upon them

[4] *Supra* note 3 at ¶ 11.
[5] *Ibid.*

for purchasing residential apartment.[6] Therefore, the Commission could not make out any *prima facie* case of dominant position against the respondents and consequently matter was closed under the provisions of S. 26(2) of the Act.[7]

2.3. COMPAT's Judgement

The informants appealed against the above order before the Competition Appellate Tribunal ('Tribunal') under S. 53A(1)(a) of the Act. Upon analyzing the facts of the case and the order passed by the Commission, the Tribunal framed a singular issue that is 'whether the Commission was right in closing the matter and not ordering an investigation by the Director General'.[8]

After considering the material on record, the Tribunal held that the Commission had failed to properly appreciate the information submitted by the informants. Further, the Tribunal found that the Commission's order was inconsistent with its previous ruling in *Belaire* case[9] where it had specifically explained the characteristics of 'high end' residential apartments and held them to be a separate product than 'regular' or 'economic' apartments. Finally, the Tribunal held that the

[6] *Id.* at ¶ 12.
[7] *Supra* note 3 at ¶ 13.
[8] *Id.*at ¶ 4.
[9] Belaire Owner's Association v DLF Limited &Ors., Case No. 19/2010 dated 12 August 2011.

Commission had erred in determining the relevant market and it narrowed the scope of relevant market in this case to '*provision of services relating to development and sale of high-end luxury residential apartments in Delhi*'.[10] The case was then remitted back to Commission for deciding 'whether the respondents are in a dominant position in the relevant market as determined above, and whether they have abused their dominance and thereby acted in contravention of S. 4(2) of the Act.'[11]

3. ANALYSIS

The most noteworthy aspect of this judgement is the approach taken by the Tribunal while determining the extent of its jurisdiction under S. 53A (1) (a) vis-à-vis its power to issue orders under S. 53B (3) in the present case. From a contrast analysis of the restrict approach taken by the Tribunal in the present case vis-à-vis the approach taken by it in its previous judgements, substantial implications could be drawn as to the overall scope of the jurisdiction of the Tribunal under the Act.

[10] *Supra* note 3 at ¶ 18.
[11] *Id.* at ¶ 19.

S. 53A(1)(a) of the Act provides for establishment of the Tribunal, and also provides for matters against which the Tribunal may hear and dispose of appeals. It reads as under:

***"53A**. (1) The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal –*

> *(a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub-sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45 or section 46 of the Act;"*

S. 53B(3) of the Act, provides for orders which the Tribunal may pass after hearing the as per the procedure laid down under S. 53B and it reads as under:

*"**53B.**(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against."*

3.1. Interpretation

As far as interpretation of these provisions is concerned, it may be seen that while S. 53A(1)(a) dictates as to against what matters an appeal shall lie before the Tribunal, it is S. 53B(3) ('impugned provision') which provides for orders which the Tribunal may pass while exercising its appellate jurisdiction under S. 53A(1)(a). It shall be noted that the latter states that the Tribunal may 'pass any such order as it may deem fit' but it continues further to specifically restrict the scope of 'such order' to precisely 'confirming', 'modifying' or 'setting aside' 'the direction, decision or order appealed against'.

In order to better understand this point, the above underlined portion of the impugned provision may be divided into two parts- (i) 'pass such orders thereon as it thinks fit', which is of very broad scope, and (ii) 'confirming, modifying or setting aside the direction, decision or order appealed against', the construction of which could either restrict the scope of the first part or deemed as merely illustrating its scope inconclusively, depending upon the meaning of ',' ('comma') placed between both the parts.

According to Crabbe (1993), punctuation forms part of the legislation.[12]A comma may be used: 'for the purpose of facilitating the construction of a sentence, and the comprehension of the sentence'; 'where the information conveyed is necessary to the main thought'; or 'where the information conveyed is parenthetical'.[13]Hence, a comma may be placed where some supplementary information needs to be conveyed, it could be an addition to the preceding text or an exception to it, and its implication has to be deduced by its application.

By applying this logic to the impugned provision, we may find that, due to the use of multiple commas in the said provision, the context indicates that legislator's intended for the whole provision to be construed in continuation. Also, as there is lack of any word like 'includes' or 'etcetera' at the beginning or end of the phrase 'confirming, modifying or setting aside…', the most suitable inference from this is that this second part of the impugned provision was added by the draftsmen so as to set out certain qualifications for the first parti.e. 'pass such orders thereon as it thinks fit'.

[12]Vcrac Crabbe, *Legislative Drafting* 91, (1st Ed. 1993).
[13]*Id.*at 95-97.

3.2. **Judicial Trend**

Nevertheless, *au contraire* to these technical deductions, the apex court is seen to have taken a different view in the *SAIL*'s case,[14] where the jurisdiction of the Commission and the Tribunal were discussed at considerable length. In its *Obiter*, the Court explained the impugned provision as:

"*…S. 53B(3) further requires that the Tribunal, after giving the parties to appeal an opportunity of being heard, to pass such orders, as it thinks fit, and send a copy of such order to the Commission and the parties to the appeal."*[15]

It is evident from the above excerpt that the Court did not mention or recognize any qualification as suggested earlier. Nonetheless, it is submitted that the provisions under the spotlight in this case were S. 53A(1)(a) and S. 53B(1) with the special focus on whether an order made by the Commission under S. 26(1) could be appealed before the Tribunal under the aforementioned provisions. This question was answered in negative by the Court, however, no part of the judgment discussed in particular the scope of Tribunal's appellate jurisdiction with regard to orders made under S. 26(2), appeal against which lies directly under S. 53A(1)(a). The above quoted

[14] *Supra* note 1.
[15] *Id.* at ¶ 63.

description of the impugned provision was given only in a passing to explain the procedure laid down under S. 53B.

Howbeit, whatever the case maybe, it would be pertinent to see how the Tribunal had itself interpreted the impugned provision and passed orders thereunder.

In *North East Petroleum Dealers Association v. Competition Commission of India and Ors.*,[16] where the appellants had alleged abuse of dominance by certain major Public Sector Undertakings (PSUs) involved in the business of sale of petrol, diesel and other allied petroleum products. Upon considering the material on record, the Commission found no weight in the allegations made by the appellant and passed an order u/s 26(2) to close the matter. However, on appeal against the said order, Tribunal found that there was a prime facie case arising out of the material placed on record and consequently, it ordered the setting aside of the Commission's order.

Interestingly, the Tribunal not only set aside the Commission's order but also gave its opinion as to the existence of *prima facie* case and further remanded the case back to the Commission, to comply with the procedural formality of passing directions to Director General to initiate the investigation. It is ironic that in

[16]North East Petroleum Dealers Association v Competition Commission of India and Ors., Appeal No. 51 of 2014 [decided on 26.11.2015].

the entire judgment the Tribunal dictates the reservations which must be observed by the Commission while forming an opinion regarding the existence of *prima facie* case, meanwhile it itself takes over the functions of the Commission as expressly prescribed by the Act and reduces the Commission's quasi-judicial role to a merely executive one.

Relevant excerpt from the judgment read as follows:

"11. We have refrained from examining the pleadings filed by the parties in this appeal and the documents produced by them in detail because then the Tribunal would be repeating the mistake committed by the Commission to go into the merits of the allegations. However, we have no hesitation to hold that a prima facie case is disclosed from the allegations made by the informant and the Commission committed an error by refusing to order an investigation under S. 26(1).

12. In the result, the appeal is allowed. The impugned order is set aside and the matter is remanded to the Commission for issue of a direction to the Director General under Section 26(1) for conducting an investigation…"

Nevertheless, it shall be noted that the Tribunal at least remanded the case back to the CCI for compliance with express procedure laid down under the Act. Compared to this, the other more recent decisions of the Tribunal could be deemed as far

more bold and straightforward and less considerate of the mandate of the statute.

In *Gujarat Industries Power Company Limited v. Competition Commission of India and Ors.,*[17]where the appellant, a public limited company, filed an appeal against the Commission's order under S. 26(2). Tribunal, after appreciating the material on record, found that there existed a *prima facie* case against the respondent and further ordered directly for Director General to initiate the investigation. Unlike the *North East Petroleum Dealers* case, Tribunal, not only executed the quasi-judicial function of the Commission by itself, but also did not consider it necessary to even comply with the due procedure of the statute by indirectly ordering such investigation through the Commission. Relevant excerpt from the judgment reads as follows:

"27. In the result, the appeal is allowed. The impugned order is set aside and it is held that the appellant has succeeded in making out a prima facie case of violation of Section 4 of the Act which needs to be investigated. Therefore, the DG is directed to conduct an investigation into the allegations contained in the information filed by the appellant and submit a report to the

[17]Gujarat Industries Power Company Limited v Competition Commission of India and Ors., Appeal no. 3 of 2016 [decided on 28.11.2016].

Commission under Section 26(3) of the Act read with Regulation 20(4) of the Regulations within a period of sixty days from the date of receipt of this order…"

In *Meru Travels Solutions Private Limited. Competition Commission of India and Ors.*[18],which immediately preceded the present judgment, the Tribunal passed a similar order to the Director General to initiate the investigation.[19]This case was appealed against before the apex court and, interestingly, during the course of proceedings of this appeal, the renowned counsel for the respondents, Mr. Harish Salve, raised this same issue which has been discussed so far i.e. the Tribunal exceeded its power to pass orders under the impugned provision in its judgment.

When the bench asserted that it was within the appellate powers of the Tribunal to do so, and in turn questioned his premise for the said contention, the learned counsel replied during his submissions that:

"the power will depend on the nature of the statute. COMPAT can confirm or set aside CCI's order and it can even modify it

[18]Meru Travels Solutions Private Limited v. Competition Commission of India and Ors., Appeal No. 31/2016 [decided on 07.12.2016].
[19]*Supra* note 18 at ¶ 19, 20 & 21.

but COMPAT cannot say that the director general should investigate. This matter will have an impact on various cases."[20]

Therefore, from the discussion hitherto, it may be concluded that stand taken by the Tribunal may indicate a future paradigm shift, where the ambiguity in the impugned provision maybe dealt in the righteous manner by the Tribunal by self-limiting the exercise of its appellate jurisdiction to only conflicts of law or patent procedural errors viz. non-observance of principles of natural justice etc. However, whether the contention raised by the respondent in *Meru* case stands or if the Hon'ble Court gives any other interpretation to the impugned provision, would prove to be a major decisive factor on this issue.

4. CONCLUSION

In this comment, a significant aspect of the judgment at hand was analyzed i.e. the approach taken by the Tribunal to determine the extent of its power to pass orders while exercising its appellate jurisdiction under S. 53A(1)(a) as regards to appeals against orders passed under S. 26(2) of the Act. Upon considering the matter from point of views of interpretation and from the study of various relevant case laws, it was found that

[20]Press Trust of India (PTI), *Uber says Supreme Court, COMPAT order suffers from jurisdictional flaw*, FINANCIAL EXPRESS, (Mar. 1, 2017, 8:24 PM) http://www.financialexpress.com/industry/uber-says-supreme-court-compat-order-suffers-from-jurisdictional-flaw/571590/.

the restrictive approach taken by the Tribunal in the present judgment was a plausible step towards rightful application of the impugned provision. However, as mentioned during the discussion, this issue being recently raised before the apex court in a high-profile case, it is highly probable that the Court's interpretation of the impugned provision would prove as a major decisive factor in determining the very scope of the jurisdiction conferred upon the Tribunal under the Act.

CORPORATE LAWS

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CRITICAL ANALYSIS OF THE TRANSFORMATION OF THE COMPANY LAW BOARD INTO THE NATIONAL COMPANY LAW TRIBUNAL IN THE LIGHT OF VARIOUS COMMITTEE REPORTS

Vikalp*

1. INTRODUCTION

Companies Act, 1913 was in force in India before the Companies Act, 1956.The 1913 Act was founded on English Companies (Consolidated) Act of 1908. The Company Law Amendment Committee headed by Lord Justice Lionel Cohen, at the time of the end of 2nd World War, put forward its report after doing an extensive enquiry for a period of 2 years. The committee recommended extensive changes in the English Companies Act, 1929. It is on the recommendation of the Cohen Committee that the English Companies Act, 1948 was enacted. Taking inspiration from such changes, the Government of India also thought of reviewing the Indian Companies Act, 1913.[1]

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[1] GOVERNMENT OF INDIA, REPORT: BHABHA COMMITTEE REPORT (Department of Company Affairs, 1952), at 17.

The radical changes made in the 1948 Act encouraged Indian government to review the archaic 1913 Act. Thus, the Government constituted a committee headed by C.H. Bhabha (a Parsi businessman who took charge of the Commerce portfolio in the India from 15th August, 1947), which, after doing exhaustive research by interviewing various corporate law experts, submitted its report of 477 pages to the Indian Government in 1952.[2] By accepting most of the recommendations of the committee, the Parliament enacted the Companies Act, 1956. The Companies Act 1956 was to a large extent inspired by the English Companies Act, 1948, not only adopting many of the important provisions of the1948 Act but also redrafting various contentious sections.[3]

Under the 1956 Act, the power to undertake inquiry and investigation was vested with the Central Government and the CLB. Similarly, under the Companies Act 2013, which replaced the 1956 Act, that power is with the NCLT and the Central Government. But back in 1950, there was no authority which could investigate and inquire into the affairs of the company; so,

[2] The 477 pages Report by the Bhabha Committee ("Bhabha") was submitted to the Government of India in March 1952. The Government accepted most of the recommendations of the Bhabha Committee, thereby enacting the Companies Act, 1956.

[3] Bhabha, at 7.

the Bhabha Committee recommended establishing a statutory authority for undertaking this task. The Committee observed:-

The powers of inspection and investigation into the affairs of a company, which the Companies Acts of most countries confer on the Government or a quasi-independent authority, are intended primarily as a check on the activities of such people. We recognize that, in some cases, the use of the powers of inspection and investigation may initially tend to shake the credit of a company and thereby adversely affect its competitive position, although the allegations against the company may in the end be found to have been largely unfounded. It is, therefore, necessary that the investigation provisions of the Act should be so conceived as to reduce this threat to the credit of companies to a minimum. This risk should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company, where such investigation is prima facie called for. On the contrary, we consider it to be in the long-term interest of the trade and industry of this country that such powers should be vested in a competent authority and exercised energetically, albeit with due caution and fairness in all cases which require investigation.[4]

[4] *Id.* at 133.

The Committee recommended establishing a central authority in line with the Board of Trade (BOT) of England under the English Companies Act 1948 which can initiate investigation into the affairs of the company *suo moto* but the business community was suspicious of this move and feared that it will lead to unnecessary interference in their internal autonomy and harassment to honest and bona fide businessmen. However, the Committee was positive that if a central authority like the BOT is established on the basis of their recommendations, it will be able to deal effectively with all the issues of corporate world and the Committee went a step further and recommended adopting the provisions regarding the BOT under the Companies Act, 1948 in *toto*.

The power to prevent minority shareholders from oppression and mismanagement was given to the CLB under the 1956 Act and has been given to the NCLT under the 2013 Act. But when the CLB was constituted in 1964, it was just another department of the corporate Ministry and the Ministry used to look into such matters. The Bhabha Committee strongly advocated for a central authority like BOT of England to ensure corporate governance in India, which never came into being, but laid the foundation of the CLB as a forum for corporate disputes because after the 1956Act was passed on the recommendations of the Committee, a need was felt for such an authority.

2. THE VARIOUS COMMITTEE REPORTS AFTER THE COMPANIES ACT 1956 UPON WHOSE RECOMMENDATIONS THE COMPANY LAW BOARD WAS RECONSTITUTED INTO THE NATIONAL COMPANY LAW TRIBUNAL AND THE REASONS FOR SUCH TRANSFORMATION

2.1. Sachar Committee

The object for which the Committee was constituted is as follows:-

to consider and report on what changes are necessary in the Companies Act 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956, and the Monopolies and Restrictive Trade Practices Act, 1969, so as to simplify them and to make them more effective whenever necessary.[5]

The CLB was established in the year 1963 by the Companies (Amendment) Act, 1963 as it was considered desirable for the better and convenient administration of the Companies Act, 1956 to set up a Board to which most of the powers and functions of the Central Government under the Companies Act or other

[5] GOVERNMENT OF INDIA, REPORT: COMMITTEE ON COMPANIES AND MRTP ACT (Department of Company Affairs, 1978), at 9.

laws could be entrusted. At that time, it was known as Board of Company Law Administration (now known as the Company Law Board). Together with it, a Tribunal was also set up to look into the matters of fraud, misfeasance and other malpractices of the companies and report the matter to the Central Government to take appropriate actions and the Tribunal was also empowered to hear cases relating to oppression and mismanagement. The provisions relating to the Companies Tribunal were, however, subsequently repealed by the Companies (Tribunal Abolition) Act, 1967 (No. 17 of 1967), but the provisions relating to the Company Law Board have remained in the statute and were subsequently strengthened by the Amendment Act of 1974 (Act No. 41 of 1974). The Companies Act, 1956, since its inception, has been amended 24 times and it was finally replaced by Companies Act, 2013, consolidating all the amendments that had been made in the 1956 Act so as to make it simpler and more streamlined.

The first recommendation that the Sachar Committee made regarding the CLB was restructuring the CLB on the lines of Income Tax Appellate Tribunal, which is an independent and quasi-judicial body. They commented:-

In the field of governmental control, however, we have recommended the restructuring of the Company Law Board on the model of the Income Tax Appellate Tribunal, which would

exercise independent and quasi-judicial functions in respect of several matters provided for in the Act, with a view to facilitating a better and quicker administration of the provisions of the law. At the same time, we have also suggested that a greater measure of self-discipline be imposed on company managements if they wish to be spared of the frequent need to obtain approval of governmental agencies on each and every matter, which may sometimes be regarded as falling within the realm of internal management of a company.[6]

The Committee recommended that the CLB be made an independent, quasi-judicial body like the Income Tax Tribunal with permanent benches in different regions of the country. It also recommended that matters of purely administrative nature should remain with the Central Government and other matters which require exercise of quasi-judicial powers, with the CLB, which must be reconstituted and function independently of the Central Government and not as one of the departments of the Government, ensuring speed and efficiency in discharge of these functions. The CLB must also be given the power to impose its order by prescribing penalty in case of default. The Committee also recommended that the members of the CLB be appointed on the lines of Chairman and Members of the Income Tax

[6] *Id.* at 7.

Tribunal by a Selection Board constituted under Rules framed for that purpose under Article 309 of the Constitution of India. The Central Government is empowered under Section 10E to prescribe necessary qualification and experience needed to be the Chairman or Member of the CLB. Accordingly, the Central Government made the Company Law Board (Qualification and Experience and Other Conditions of Service of Members) Rules, 1993, which prescribes the necessary qualification and experience needed to be appointed as a Member of the CLB.

The Committee wanted the Members to be appointed like the Members of the Public Service Commission, so as to give them more security and independence in making decisions, but this was not done. This should have been done to make the CLB more efficient and independent.

Then, the Sachar Committee spoke about the delegation of legislative powers with respect to the CLB and it was of the opinion that:-

except for the purpose of exercising powers under a few sections of the Act which it has to exercise by means of sittings of the Bench, operates virtually as the Central Government under a different name.[7]

[7] *Id.* at 10.

Before the 1988 amendment, the CLB was acting as just another department of the Government, which is why it was suggested that it be made an independent and quasi-judicial body.

Again, the Sachar Committee pointed out that there are several powers which were exercised by the Central Government, which must be transferred to the CLB and similarly, there were many matters of company law which were dealt with by the civil courts, but must be dealt with by the CLB, because it is a specialized body which can deal with such matters in a better way and it would also take the extra work off the shoulders of the courts. Thus, Sections 391 to 407 had been amended accordingly, giving some of the powers of the civil courts in company matters exclusively to the CLB or sharing it with the CLB.

Thus, the Committee observed:-

While making the suggestion for the constitution of an independent Company Law Board to whom we have assigned some of the functions presently exercised both by the Central Government and the courts, we have been guided by the consideration that the Act should be administered not only in a manner which gives the affected party a right to be heard, but that it also ensures speed, administrative efficiency and

application of judicial mind uninfluenced by 'executive considerations'.[8]

Again, the Committee made suggestions regarding changes to be made in Section 2(11) of the 1956 Act (dealing with the definition of the court under the Act) such that CLB maybe clothed with power to penalise for not following the provisions of the Act. Such an amendment has been made byAmendmentAct of1988by adding clause 4(D) under Section 10E and Section 634A.Thus, the orders of the CLB are to be enforced as if it is a decree of the civil court. So, these Sections have given teeth to the orders of the CLB to ensure that they are enforced.

However, an important suggestion that had been made by the Committee was that the rule-making power under the Act should remain with the Central Government and not with the CLB because of economic and public interest involved and in case of need, reference can be made to the CLB by the Central Government, as a result of which Section 642, which empowers the Central Government to make rules on important matters or to carry out the purposes of the Act, had been retained.

[8] *Id.*

The Committee further recommended that the Act of 1956 must be repealed and a new Act must be passed in light of the recommendations of the Committee and a saving clause must be placed therein so that any order passed or decision made by the Government or the CLB or by the Registrar before passing of the new Act remains unaffected, for avoiding any difficulty or confusion. Now, the Companies Act, 2013 has been passed replacing the 1956 Act, the need for had been felt since 1988;but due to several reasons, it never saw the light of day until 2013.

Another important amendment was by way of inserting Section 10F by the Amendment Act, 1988 which provided that the orders of the CLB are appealable before the concerned High Court, only on the question of law which was not there before the 1988 amendment. But as the NCLT has been constituted,appeals against the orders of the NCLT lies before the NCLAT not only on questions of law but also on questions of fact, which was not there before, thereby providing finality to the orders of the CLB to a great extent, which is not there in case of the NCLT.

The Committee recommended certain changes in the existing CLB like, the power to constitute the CLB should remain with the Central Government but the power to constitute the regional benches must be with the CLB, which was done under Section 10E(4B).The Committee also recommended that the Members

of the CLB must possess the necessary qualification to hold the post of judicial and technical members. Thus, the Company Law Board (Qualification and Experience and other conditions of services of members) Rules, 1993 provided for two categories of members to be appointed under the CLB, i.e. technical members and judicial members, following these recommendations. However, the Committee provided no recommendations regarding qualifications of the technical members who were required to deal with cases involving IPR or other technical matters.

Sachar Committee further recommended the compounding of corporate offences which was inserted in the 1956 Act by way of the Companies Amendment Act, 1988, which was later amended by the Companies (Amendment) Act, 2000. The Committee observed that a lot of default in compliance to the provisions of the Act happen due to ignorance and because of the complex nature of such provision and mostly, offences are of technical nature. That is why the Committee advocated the compounding of such offences.[9]

Consequently, the Companies (Amendment) Act was passed in 1988 encompassing all such recommendations and bringing

[9] CS Divesh Goyal, *Compounding under Companies Act - 2013*, TAXGURU (Mar. 2, 2017, 1:01 P.M.), http://taxguru.in/company-law/compounding-companies-act-2013.html#_ftnref2.

important changes in the CLB, making it a quasi-judicial, independent body under Section 10E and 10F of the 1956Act, accordingly having the power to regulate its own procedure.

2.2. Eradi Committee

The next Committee to be discussed is the Eradi Committee under the chairmanship of Justice V. Balakrishna Eradi. The Committee was constituted on 22.10.99 by the then Prime Minister, Shri Atal Bihari Vajpayee. It was a high-level Committee on law relating to the insolvency and winding up of companies. The Committee's main object was to study the prevailing law relating to the winding up of the companies and revamp it in accordance with the contemporary law on the subject and to advice improvements in the procedure at various levels of the insolvency proceedings of the companies so as to ensure the speedy disposal of such cases, in line with the international practices.[10]

The Committee presented its report to the Government on 31st August and advocated for establishing a national tribunal having the powers and jurisdiction of the CLB. The powers presently exercised by the BIFR (Board for Industrial and Financial

[10] PIB, *Justice Eradi Committee on Law Relating to Insolvency of Companies* (Mar. 5, 2017, 11:00 A.M.), http://pib.nic.in/focus/foyr2000/foaug2000/eradi2000.html.

Reconstruction) or the Appellate Authority for Industrial and Financial Reconstruction (AAIFR) under the Sick Industrial Companies Act, 1985 (SICA) regarding rehabilitation and revival of sick companies and by the respective High Courts' regarding the winding up of companies and powers of the CLB must be transferred to the tribunal. For that, the Committee recommended amending Article323B of the Constitution so that powers of the respective High Courts could be transferred to the tribunal. Also, the Committee recommended that the tribunal should have the power to prescribe the time for every step to be taken by the Liquidator, within which winding up has to be done, to speed up the process.[11]

The Eradi Committee observed that there were multiple agencies like the CLB, the respective High Courts and the BIFR dealing with various subject matters of company law. The Committee stated:-

The High Courts are not able to devote exclusive attention to winding up cases which is essential to conclude the winding up of companies quickly. The experiment with BIFR for speedy revival of companies has also not been encouraging.[12]

[11] J. Venkatesan, *Eradi panel recommends repeal of SICA*, THE HINDU (Feb. 12, 2017, 10:07 A.M.), http://www.thehindu.com/2000/09/03/stories/0203000g.htm.

[12] GOVERNMENT OF INDIA, REPORT: *COMMITTEE ON LAW RELATING TO*

The Committee basically emphasized that the multiplicity of forums has led to conflicts of decisions, chaos and confusion, and delayed the justice delivery system. So, it suggested that there must be one national tribunal having the power of the High Courts as well as of the CLB and the BIFR, as it observed that because of a huge backlog of cases, the High Courts are not able to give the much-needed attention and priority to the winding up cases, delaying the matter at hand. Also, the BIFR, which was constituted to rehabilitate and recover sick companies, had not been able to do its job very well since its establishment in the year 1987. Thus, there must be a national tribunal which will deal with all the cases earlier dealt with by the CLB, the High Courts and the BIFR/AAFIR and all the pending cases must be transferred to the tribunal after its establishment, so that there is a single forum dealing with all the matters of company law, removing all the confusion and chaos caused by these multiple forums.

Therefore, the Committee recommended that the Sick Industrial Companies (Special Provisions) Act, 1985 be repealed and Article 323B of the Constitution be amended to set up a national tribunal, and Section 10E relating to the CLB also be repealed.

INSOLVENCY AND WINDING UP OF COMPANIES (Ministry of Law, Justice and Company Affairs, 2000), Preface.

The reason forwarded for the establishment of a tribunal having the power of all the three authorities by the Committee was:-

The above recommendation has been prompted by a desire to avoid multiplicity of authorities.

The multiplicity of forums had led to chaos and confusion and delays in the justice delivery system. One institution for all corporate issues would speed up the justice delivery system and provide the much-needed relief to the litigants who earlier had to run from one forum to another for resolving their corporate disputes.

It had been recommended to the Committee that the power of the courts must be statutorily conferred on the CLB but the Committee observed that:-

jurisdiction of the Courts be statutorily conferred on the Company Law Board did not find favor at this stage when the CLB does not have adequate Members, Benches at all the seats of the High Courts, and infrastructure to deal with multiplicity of proceedings involved in matters relating to winding up.[13]

So, at the time when the Committee was constituted in 1999, the CLB neither had sufficient Members nor enough benches at different locations to take care of the cases that were going on in

[13] *Id.* at 18.

the different civil courts. That is why the Committee recommended that that was not the time forth CLB, having a paucity of members, to be burdened with more cases of the courts by transferring the powers of the courts to the CLB. Ultimately, the Committee thought that instead of transferring the power to the CLB, it would be better to have a single body to deal with all the cases of company law, i.e. a national tribunal having more members and more benches to deal with wide variety of corporate cases.

Thus, based on the recommendations of the EradiCommittee report, the Company Law (Second Amendment) Act, 2002 was passed which made some fundamental changes in the Companies Act, 1956.It introduced Section 10FA, which provided for the dissolution of the CLB and Part 1B and 1C, which provided for NCLT and NCLAT. Part 1B provided for the constitution, composition, powers etc. for the NCLT and likewise, Part 1C dealt with the NCLAT, to hear appeals against the orders of the NCLT. The Tribunal encompasses the powers of the concerned High Courts and the CLB and the BIFR, after the repeal of the SICA, 1985.On the recommendation of the Eradi Committee, the law of "Insolvency in Companies" was introduced.

The Committee recommended that the winding up proceedings relating to unlisted companies be dealt with by the CLB and the

CLB be strengthened by appointing adequate number of members and increasing the Benches of the CLB to deal with those additional number of cases until the NCLT is constituted, but the recommendation was not followed and the winding up cases of all companies, listed or unlisted, were dealt with by the High Courts themselves. Also, the condition of the CLB remained the same, facing the paucity of Members and benches until it was replaced.

The next recommendations were regarding Section 435, which provided that the winding up cases can be transferred to the district courts from the High Courts, but the Committee observed that this Section was rarely used. If it would have been used, it would surely ease the burden of the respective High Courts. Thus, the Committee recommended that there was no point in keeping such a Section and recommended for its repeal which was actually done and advocated for setting up of a tribunal in its place.

2.3. **J.J. Irani Committee**

The committee was constituted on 2nd December, 2004, under the chairmanship of Jamshed Jiji Irani, an Indian businessman who, before joining Tata Steel, was working for the British Iron and Steel Research Association and retired from the post of Director of Tata Steel in the year 2007.

The object for constituting Irani Committee was mentioned in the press note dated03/2005:-

Government had undertaken an exercise to comprehensively revise the Companies Act, 1956, to enable a simplified compact law to replace the existing Act, that would address the changes taking place in the national and global economic scenario, enable adoption of internationally best practices as well as provide adequate flexibility for timely evolution of new arrangements to meet the requirements of the corporate sector in India.[14]

So the main purpose of the J.J. Irani Committee was to revamp the Companies Act, 1956 and replace it with a new one keeping in view the changes that have taken place in our economy due to liberalization and globalization. There has been a consistent demand from the corporate sector for the simplification of the applicable laws and procedures because the Companies Act, 1956 was overtly complex, haphazard and very bulky. So, we needed a new legislation which was simple and compact by reducing the size of the Act and removing redundant provisions.

[14] Government of India, Ministry of Company Affairs, *Presentation of the Report of the Expert Committee on Company Law by Dr. J.J. Irani, Chairman of the Expert Committee* (Mar. 4, 2017, 12:05 P.M.), http://mca.gov.in/Ministry/pdf/press_release/Press_032005.html.

The urgent need for a new legislation was explained by the Committee stating that the present law is so complex that everybody needed an advocate and experts like Chartered Accountants to understand it. The Committee observed:-

We should have simplicity in laws and it should be contemporary in nature, so that we don't need anybody to interpret. The UK government has updated their laws in 2006 and in thus, it was immediately after the Enron reaction.[15]

Thus, we also needed a new law in tune with the present times. This was thankfully done by the UPA government by enacting the Companies Act, 2013.

Next, the Irani Committee observed

Since the Indian Companies Act is a central legislation, it should appropriately remain so. The "sovereign vacuum" created by withdrawal of the Central Government from any area of corporate operation and entrustment of the same entirely to a regulator may generate demands in the Indian Federal system for State legislations on the subject, which we feel could lead to duplication and confusion. Further, regulatory urge to control

[15] *Dr J.J. Irani holds forth on corporate governance*, THE INDIAN EXPRESS (Feb. 15, 2017, 3 P.M.), http://archive.indianexpress.com/news/dr-j-j-irani-holds-forth-on-corporate-governance/469028.

corporate governance often becomes intrusive, posing serious regulatory risks in addition to inhibiting the freedom for decision making necessary for corporate functioning.[16]

Thus, the Irani Committee pleaded for the control of the Central Government under the new Act, as it had been under the 1956 Act. Otherwise, several state legislations would create chaos and confusion which would not be good for the economy. Thus, the Companies Act, 2013 is a central legislation under the supervision of the Central Government.

After that, the Irani Committee talks about how voluminous the Companies Act, 1956 is, also containing provisions which are procedural in nature. The law of the old Act was very rigid and any changes in it required parliamentary amendment. Therefore, the Companies Act, 1956 failed to adapt itself to the changes that have happened in the national as well as in the international scenarioand was regarded as being outdated. On the other hand, the Act of 1956 contained certain fundamental provisions which needed to be retained. So, the Irani Committee gave a solution -

Therefore, we recommend that the Company Law may be so drafted that while essential principles are retained in the substantive law, procedural and quantitative aspects are shifted

[16] GOVERNMENT OF INDIA, REPORT: EXPERT COMMITTEE ON COMPANY LAW (Ministry of Corporate Affairs, 2005), at 5.

to the rules. This would enable the law to remain dynamic and to adapt to the changes in business environment.

The procedural part has been separated from the substantive part in the 2013 Act on the basis of this recommendation, thus providing greater flexibility in rule-making so as to adapt the law in accordance with the varying technological and economic scenario. Procedural aspects of the act have thus been notified separately by the Government after carefully framing it in line with the modern times.[17]

Next, the Irani Committee talks about speedier disposal of corporate disputes. They observed that the time taken by the existing framework is longer than usual.Further, rehabilitation, liquidation, winding up, mergers and amalgamations required speedier disposal. Thus, the Committee welcomed the 2002 Amendment which provided for establishing NCLT and NCLAT.The Committee observed, *"It is time for the forum with specialization to deal with corporate issues, bringing together expertise from various disciplines".* Therefore, a single unified

[17] *Companies Act, 2013: Fresh thinking for a new start*, DELOITTE (Mar. 23, 2017, 3 P.M.), https://www2.deloitte.com/content/dam/Deloitte/in/Documents/tax/thoughtpapers/in-tax-companies-act-2013-fresh-thinking-for-a-new-start-noexp.pdf.

forum will ensure speedier disposal of justice than multiple forums causing chaos and confusion.

Next, the Committee talks about offences and penalties, recommending that the matters of procedural nature which do not irretrievably affects the shareholder's rights need to be treated differently. The Committee observed:-

At present, the process of prosecution for offences faces many delays. Under the present law, all lapses, howsoever trivial, are required to be tried by the Trial Court as criminal offences. Delays are also attributable to the procedural aspects required to be followed to bring the offender to book them under Companies Act, 1956. Most violations are of procedural nature. However, there is no structure for dealing with such offences speedily. The delayed processing of complaints leads to enormous administrative burden and high cost to the economy. The process of prosecution gets prolonged and the deterrent effects of the penal provisions get diluted.

Therefore, the Government took heed of the Committee's recommendation and under the Companies Act, 2013, the procedural aspects have been separated from the main Act and are notified separately. Further, they have been simplified contrary to the old Act and several rules and procedures have

been prescribed by the Government for speedy disposal of corporate cases.

Next, the Committee recommended that for speedy disposal of corporate criminal cases involving penalties, the proposed NCLT should have special benches having criminal jurisdiction, whose orders must be appealable only before NCLAT. In the1956 Act, there were no such provisions but if we see the 2013 Act, it provides for Special Courts under Section 435, presided by a Single Judge appointed by the respective High Courts, who must be holding the position of Sessions Judge or Additional Sessions Judge, having criminal jurisdiction in respect of offenses under the Act.

The Central Government, by notification, informed that these Special Courts will deal with cases which are punishable by imprisonment of 2 years or more.[18] These courts are established, as pointed out by the Committee, for the speedy disposal of corporate criminal cases.

The Committee also recommended that there should be a limitation period provided for prosecution of offenses under the

[18] *Now, 8 special courts for speedy trials under companies law*, THE ECONOMIC TIMES (Mar. 25, 2017, 6P.M.), http://economictimes.indiatimes.com/news/economy/policy/now-8-special-courts-for-speedy-trials-under-companies-law/articleshow/52385959.cms.

Companies Act to ensure speedy disposal of corporate cases and also to avoid multiplicity of proceedings. Under Section 422 of the 2013 Act, the Tribunals have been asked to dispose of the cases within 3 months though it is discretionary, not mandatory. Also, appeal to the NCLATwill have to be made within 45 days and to the Supreme Court within 60 days only through SLP, thus giving finality to the orders of the tribunal. However, the Courts have been given the discretion to extend the period in case of exigencies. Thus, contrary to the 1956 Act,(which, by way of 2002 Amendment Act, inserted Section 10GE which provided for limitation period but as the NCLT was not constituted until 2013,it was never implemented). The 2013 Act provided for limitation period under Section 433, implementing the 2002 Amendment. Thus, the cases have to be disposed of within this limited time period, ensuring the speedy disposal of corporate cases.

The Committee also recommends that certain offences must be made compoundable to save the Courts' time and to ensure the speedy disposal of cases. Under the 2013 Act, Section 441 provides for compounding of offences, providing for penalty up to 5 lakh rupees. The 1956 Act also provides for compounding of offences under Section 621A, as amended bythe 2002 Amendment Act, providing that offences with fine not exceeding Rs 50,000 can be compounded by the Regional

Director and those offences with fine exceeding Rs 50,000can be compounded by the CLB.Under new Act, offences of up to 5 lakh rupees can be compounded by NCLT.

The Committee also recommended that in case of prosecution for offences under the Act, imprisonment or penalty with imprisonment must be imposed only with prior approval of the Central Government, after investigation is done under the supervision of the Governmentto filter out false or vexatious claims against the company.

Also, the Committee recommended that cases involving substantial public interest and multi-disciplinary ramification must be handled by the SFIO (Serious Fraud Investigation Office) established under the new Act. The SFIO will contain members from all fields so that it can deal with all sorts of matters effectively. The Committee observed:-

The Central Government may refer complex cases involving substantial public interest or multi-disciplinary ramifications to the officers of the SFIO. The Committee feels that setting up of such an organization is essential to unravel the complex corporate processes that may hide fraudulent behaviour. The SFIO should be strengthened further and its multi-disciplinary character retained.

So if we see the current act of 2013, it provides for Serious Fraud Investigation Office under Section211. It is headed by a Director and experts from the fields of:-

i. Banking;
ii. Corporate affairs;
iii. Taxation;
iv. Forensic audit;
v. Capital market;
vi. Information technology;
vii. Law; or
viii. Such other fields as may be prescribed.

Thus, we can say that the recommendations of the Committee have been followed here. Under Section 212, if the Central Government receives a report from the Registrar or by special resolution of the company or in public interest or from any department of the Central Government or state government, the matter can be referred to the Director of the SFIO and he can designate as many inspectors among the experts as required for investigation into the affairs of the company. It is a specialized, multi-disciplinary organization established to investigate frauds of complex and serious nature and it has been strengthened with wide discretionary powers. I think it is a very good step by the Government which will protect the interests of not only the

shareholders but also of the company and would prevent the happening of another Satyam type scam.

3. **CERTAIN FUNDAMENTAL CHANGES HAVE ALSO BEEN BROUGHT IN THE FUNCTIONING OF THE NCLT, UNLIKE THE CLB, WHICH WAS INDEPENDENT OF THE IRANI COMMITTEE RECOMMENDATIONS**

At the time of registration, if there are any procedural errors, it can now be questioned at any time. The Tribunal can take various deterrent measures under the Act like dissolving the company as well as cancellation of registration. If the registration of a company is obtained wrongfully or illegally, then Section 7(7) provides for de-registration of companies in appropriate cases. The remedy of de-registration is different from winding up and striking off.[19]

The 2013 Act retains the remedy provided to the minority shareholders from oppression and mismanagement. However, certain changes have been introduced in the new Act like the bar for mismanagement has been set little higher and for oppression it has been set little lower. Thus, in case of mismanagement, the test of "winding up on just and equitable grounds" has been

[19] Prachi Manekar-Wazalwar, *NCLT – Powers & Functions under Companies Act, 2013,* LAWSTREETINDIA (Mar. 28, 2017, 11:00 A.M.), http://lawstreetindia.com/experts/column?sid=164.

extended even to mismanagement matters, whereas in the 1956 Act, it was available only under oppression. Also, the minimum eligibility criteria for applying to the Tribunal in the case of oppression and mismanagement has been relaxed. Thus, even members who do not fulfil the eligibility criteria can apply to the Tribunal. [20]

The remedy for refusal by the companies to register transfer of shares and securities as well as rectification of register of members is given under Section 58 and 59 of the 2013Act, while under the 1956 Act, it was given under Section 111 and 111A.This power has been transferred to the Tribunal from the CLB. But in the new Act, certain improvements have been made. Now, this remedy is available in case of all kinds of securities whereas earlier, it was only available for shares and debentures.[21]

Chapter XIV deals with the powers of the NCLT regarding investigation. Certain changes have been made under the new Act. Earlier, the order foran investigation into the affairs of the company could be made only on the application of at least 200 members. Now, it has been reduced to only 100 members. Also, under the new Act, the investigation into the affairs of the

[20] *Id.* at 2.
[21] *Id.*

company will be ordered only if the applicant is able to satisfy the Tribunal that such circumstances exist where it is imperative to do an investigation. The investigation can be ordered overseas also. Also, there are provisions which empower the Government to provide assistance to Courts and investigative agencies of other countries conducting an investigation in our country. Earlier, during an investigation, restrictions could be imposed on dealings with any type of shares. Now, such power has been extended to securities as well. Thus, the Tribunal can impose restrictions on securities too. Now, the Tribunal has also been given the power to freeze the assets of the company during the investigation, which cannot be used during such period. Such a proceeding can be initiated at the instance ofa wide variety of persons in certain situations.[22]

One very positive change that has been brought by the 2013 Act is that the number of benches of the Tribunal has been increased to 11.Earlier, the CLB used to have only 5 benches for the entire country due to which there was a huge backlog of cases, which has been remedied by the new Act.

Another major problem that has been addressed by the new Act is that earlier, there was no express provision in the 1956 Act which specifically excluded the jurisdiction of the civil courts.

[22] *Id.* at 3.

Thus, there were multiplicity of proceedings and conflicting judgements all the time. Also, matters used to get delayed due to the technicalities of the procedural law. Putting an end to this mess, Section 430 of the 2013 Act expressly excludes the jurisdiction of the Civil Courts in company matters, which I think will be a big relief to the litigants.[23]

4. CONCLUSION

We must not forget that the main purpose for which tribunals were created was speedy disposal of cases and simplification of procedure, because strict adherence to the Civil Procedure Code delayed the matter to a great extent. Thus, the Tribunals are governed by the principle of natural justice but under the 1956 Act, technicalities were pleaded by the parties very often. Also, the procedures followed under the old Act were very complex and there was difficulty in execution of such orders. But I hope that the new Companies Act will not face such challenges after taking lessons from the old Act.

It was the Eradi Committee which came up with the idea of the NCLT to replace the erstwhile CLB through Companies (Amendment Act), 2002, but the provisions were never notified

[23] Varun Marwah, *10 features that distinguish the NCLT from the CLB*, BAR&BENCH (Mar. 30, 2017, 11:10 A.M.), http://barandbench.com/10-features-distinguish-nclt-clb/.

and the CLB continue to function as the vires of the NCLT were challenged before the Madras High Court and later on, before the S.C. Ultimately, in the case of *Union of India v. R. Gandhi, President, Madras Bar Association [(2010) 11 SCC 1]* ,the Supreme Court gave the green signal to the constitution of the NCLT, subject to certain changes that has to be made by the Government in the constitution and selection process, which was found by the court to be faulty.[24]

On 1st June 2016, the provisions for the constitution of NCLT/NCLAT were notified. The transfer of power from various forums to the Tribunals will happen in 2 phases. In the first phase, the powers of the CLB will be transferred to the NCLT and in second phase, the powers of the respective High Courts and the BIFR will be transferred to the Tribunals. Also, the NCLT has been equipped with several new powers and functions, some of which I have already discussed.[25] So, the constitution of the NCLT will usher in a new era of corporate dispute resolution, making the Tribunals far more potent and dynamic than its predecessor, taking note from the various Committee Reports and the working of the CLB under the old Act. But the condition of Tribunals in India has never been very

[24] *Supra* note 19, at 1.
[25] *Id.*

good as they face a lot of challenges and step-motherly treatment by the Government. Though they are created with lots of enthusiasm but that enthusiasm fizzes out over a period of time, as had happened with the CLB, which never had full strength, had been reeling under the pressure of backlog of cases, had inadequate infrastructure, etc. I hope that the NCLT/NCLAT will not meet the same fate and would perform much better than its predecessor.

LEGALITY OF PUT AND CALL OPTIONS: ENDURING MURKINESS AND ISSUES FOR NON-RESIDENT INVESTORS

Rohit Beerapalli*

1. INTRODUCTION

One of the most widely-accepted principles of modern economic theory is that influxes of investment are required for the economy to grow at a reasonable pace. This is especially true in light of the so called *'multiplier principle'*.[1] Simplistically, it means that an investment of a certain amount of money leads to an increase in national income that may be several times the value of the original investment.[2] The investment acts as a catalyst, leading to augmentation in consumption and production.[3]

As a result, it would stand to reason that the prudent course of action for a government interested in ensuring sustained growth

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[1] SAMPAT MUKHERJEE, MODERN ECONOMIC THEORY (2002), at 673-690.

[2] Masaichi Mizuno, *Funds, Investment and Multiplier*, 88 WELTWIRTSCHAFTLICHES ARCHIV 259–286 (1962), at 280.

[3] Edward G. Bennion, *The Multiplier, The Acceleration Principle, and Fluctuating Autonomous Investment*, 27 THE REVIEW OF ECONOMICS AND STATISTICS 85–92 (1945), at 85.

would be to encourage investment to the greatest extent reasonably possible. It is essential that there be freedom of investment to prevent recessions and economic slow-downs.[4]

In India, one of the major concerns regarding investment, especially investment from abroad, are the questions of legality arising with respect to Call and Put Options. Exit options such as this are absolutely essential, because investors would be reluctant to make investments when there is a chance that such investment may end up transforming into a sinkhole from which the investor cannot escape.Regulatory authorities seem to be taking more objective and realistic approaches to the legality of such instruments. However, up until very recently, there were some lacunae in the law regarding the legality of the exit options. Even after such issues were addressed, there are some persisting issues, especially regarding exit valuations of non-resident investors.Over the course of this paper, various issues that have been raised regarding the valuation of Call and Put Options have been analysed, and an attempt has been made to offer solutions to them.

[4] KEVIN A. HASSETT, INVESTMENT, THE CONCISE ENCYCLOPAEDIA OF ECONOMICS (2nd ed. 2008).

2. POPULAR OPTIONS FOR EXITING INVESTMENTS

Private equity investors usually have a plan of exit in mind at the time they make their investment. For a long period of time, the primary exit option for investors in India has been an Initial Public Offer (IPO).[5]There are several upsides and disadvantages to this exit strategy.[6] On the one hand, it leads to a higher valuation in a buoyant market, and is usually preferred by the management of the company, as well as the investor in caseswhere along-term shareholding may bedesired. Further, there are regulatory benefits for Foreign Venture Capital Investors and Venture Capital Funds, as the lock-in period for non-promoter investors does not apply to them, and also pricing norms do not apply on both entry and exit.[7]On the other hand, the value of the investment is at the mercy of market conditions, which can be turbulent and unpredictable. There are also considerable transaction costs involved in the process, and the process itself may take a long time to be completed, during the

[5] *Exit Options for Private Equity Investors*, The Practical Lawyer, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=19310).

[6] *Ibid*.

[7] Nishith Desai Associates, *Indian Private Equity: 'Venturing' into India*, 1 INDIAN VENTURE CAPITAL JOURNAL 34-38 (2005), at 36.

pendency of which the value of the investment is at constant risk of deterioration.[8]

Alternatively, there is the option of entering into agreements to buy-back shares. Under such agreements, there is usually a pre-determined rate of return for the investment. Although it may seem like an easy and safe investment, any buy-back agreement would have to comply with the strict provisions of the Companies Act, 2013.[9] It would also have to comply with the Share Capital and Debenture Rules,[10]or the Buy-Back Regulations issued bythe Securities and Exchange Board of India,[11] for unlisted and listed companies respectively.Due to the requirement of explicit provisions allowing such agreements in theArticles of the company,[12] as well as the severity of the restrictions imposed by regulations, it may not always be the best option investors looking for a good exit strategy.

Due to the problems associated with IPOs and Buy-back agreements, investors sometimes prefer to use exit instruments

[8] Monitoring & Exiting Private Equity Investments | Street Of Walls, http://www.streetofwalls.com/finance-training-courses/private-equity-training/monitoring-exiting-private-equity-investments/ (last visited Feb 7, 2017).

[9] *See* Sections 68,69,70, Companies Act, 2013.

[10] Companies (Share Capital and Debentures) Rules, 2014.

[11] Securities and Exchange Board of India (Buy Back of Securities) Regulations, 1998.

[12] Section 68, Companies Act, 2013.

such as Put and Call options to as part of their exit strategy in order to have more confidence in their ability to exit on terms that may be palatable to them, as well as ensuring that they get returns that are at least equivalent to that of the other investors.

3. PUT AND CALL OPTIONS

An option is essentially an entitlement to buy or sell an asset in the future at a price that may be predetermined.[13] "Put and Call Options" shall hereinafter be referred to as "Options" for the sake of brevity. In the current context, such assets are shares. As the title of this chapter indicates, they are two types in the instant context:

3.1. Put Options –

They are the right of a shareholder to sell the shares to another shareholder at a price that may be specified in the agreement, or which may be determined as per the agreement, exercisable at the time the shareholder may want to exit its investment. The other shareholder has an obligation to purchase the shares at such determined price.

[13] Stephan Abraham, *The History of Options Contracts*, INVESTOPEDIA (2010), http://www.investopedia.com/articles/optioninvestor/10/history-options-futures.asp (last accessed 8th February, 2017).

3.2. **Call Options –**

They are basically the opposite of put options, where the shareholder has the right to acquire the shares of another existing shareholder, at price that may be determined in a manner that is identical to the put options.

Currently, there are two issues that necessitate discussion:

a. *Whether options contracts are permitted by the Securities Contracts (Regulation) Act, 1956, especially prior to the notification on October 3rd, 2013.*

b. *Whether non-residents are allowed to freely enter into Options under the applicable Foreign Direct Investment Regulations*

4. VALIDITY UNDER SCRA

Prior to October 3rd, 2013, any agreement which had any clause with Options would have been invalid. This is because SEBI only allowed spot delivery contracts, and contracts of any other kind for the delivery of securities was void.[14] Spot delivery contracts have been defined as *"actual delivery of securities and payment of a price therefore either on the same day as the date*

[14] Notification No. 184(E), dated 1-3-2000, SECURITIES AND EXCHANGE BOARD OF INDIA.

of the contract or on the next day, the actual period taken for the despatch of the securities or remittance of money therefore through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality".[15]

Articles published by *Nishith Desai*[16] and *Samvad Partners*[17], two well-known law firms, have explored the interpretation of the above-mentioned regulations by SEBI. It would appear that the Options are not in the nature of a spot-delivery contract, and would therefore be void. Both the articles refer to the case of *Niskalp Investments v. Hinduja TMT*,[18] wherein the Court found that the Options are illegal under SCRA as they are not spot-delivery contracts.

However, attention may also be drawn to the *MCX* judgement,[19] where the Court made a distinction between the option to decide unilaterally, and a contract of sale and purchase which involves

[15] Section 2(i), Securities Contracts (Regulation) Act, 1956.

[16] Archana Rajaram, *Escape Legally*, ASIA LAW, http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Escape_Legally.pdf (last accessed 7-2-2017).

[17] Options Contracts in India, SAMVAD PARTNERS, http://www.samvadpartners.com/wp-content/uploads/2014/04/Option-Contracts-in-India_April-2014.pdf (last accessed 7-2-2017).

[18] *Niskalp Investments and Trading Co. Ltd. v. Hinduja TMT Ltd.*, [2007] 79 SCL 368 (Bom.).

[19] *MCX Stock Exchange Limited v. Securities & Exchange Board of India & Ors.*, 2012 (114) BomLR 1002.

reciprocal obligations. Since the Options would not amount to a contract of sale and delivery of securities, they may be deemed to be valid. It would appear that most experts in the fieldagreed with the fact that this judgement could set a positive precedent for the enforcement of Options clauses, but in the consent terms entered into between the parties before the Supreme Court there existed pre-condition that the MCX findings would not be binding on SEBI. Hence, it was a good-judgement on paper, but hardly the ground-breaking legalization that was called for.

5. LEGALITY AFTER THE COMPANIES ACT, 2013 AND THE OCTOBER 3RD NOTIFICATION

Matters are further complicated by Section 58(2) of the then new Companies Act, which stated that *'any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract'*.[20]This is fundamentally incompatible with the regulation discussed earlier. The contradictions and incompatibility of all the regulations, laws, and cases on point contributed to a state of confusion regarding the enforceability of Options.

The October 3rd Notification explicitly authorized any Shareholders Agreements and Articles containing clauses that

[20] Section 58(2), Companies Act, 2013.

allowed for Options.[21] However, even after this notification, more confusion was added to an already chaotic situation as the notification only validated such clauses prospectively, and invalided all such clauses that were in existence before the notification, bringing up the question of why it was not having a retrospective effect.

6. WHY NOT RETROSPECTIVELY VALIDATE OPTIONS?

This precise issue is discussed in an interesting episode of *The Firm*.[22] Two opposing views are taken by the host and the guests. One view is that the validation should have been retrospective as there was nothing illegal about the clauses in the first place. I would say that there is some merit in this argument, given the judgement in *MCX*. While issuing the notification stating that all such options are valid would have been justified, invalidating all other existing clauses was uncalled for, as there was a lacuna in the law, and nothing explicitly invalidating such options.

[21] *Notification under section 16 and 28 of Securities Contracts (Regulation) Act, 1956*, Notification No. LAD-NRO/GN/2013-14/26/6667, dated 3-10-2013.

[22] *ROFR, Tag, Drag, Call, Put: Valid!*, THE FIRM, http://thefirm.moneycontrol.com/news_details.php?autono=964230 (last accessed 7th February, 2017).

The alternative point of view seems to be that the parties can enter into new agreements or renegotiate existing agreements to make Options enforceable. However, given the time and resources required to make such changes, it would be highly improbable that the parties would be willing to renegotiate their agreements in all cases. An argument is raised that SEBI *could not* have retrospectively validated the agreements as they had prohibited them in the past, but that is not true for the same reason that is mentioned above, there was no explicit restriction of such contracts, so there was no reason to invalidate all existing contracts. Perhaps SEBI wanted to maintain consistency by not contradicting its earlier stance, but that is not reason enough to invalidate existing agreements, especially in the light of the *MCX* judgement.

7. FOREIGN DIRECT INVESTMENT AND OPTIONS

The options discussed earlier allow the investor to minimize risk and get some sort of assured return. It was the belief of regulators that foreign investors were not taking enough of a risk in Indian markets, since they were looking to assure an exit at assure prices before entering into an agreement.[23] As explained

[23] *See Press Release on FDI Policy* (Circular 2 of 2011), dated 31-10-2011, MINISTRY OF COMMERCE AND INDUSTRY; *Foreign Direct Investment – Pricing Guidelines for FDI instruments with optionality clauses*, AP (DIR Series) Circular No. 86, dated 9-1-2014, RESERVE BANK OF INDIA.

by Sandeep Parekh in an article,[24] the Reserve Bank of India allows for investment through two routes, equity and debt.[25]The debt route is heavily regulated, whereas the equity route is less so, this is due to the fact that the RBI is interested in boosting investment into the country, as opposed to guaranteeing outflow from the economy. The essential argument of the RBI is that when there is a guaranteed return, the investment is in the nature of debt and must consequently be subjected to the more stringent regulations that would be applicable.[26]

8. THE TATA-DOCOMO DISPUTE

For the corporate juggernaut that is the Tata Group, the DoCoMo dispute is the gift that keeps on giving. While the clash of the titans might be intriguing to watch, it draws attention to an important issue that affects investor confidence in India.In fact, most of the literature on the point FDI and Options seem to be regarding the Tata-DoCoMo dispute that is currently on going. DoCoMo had invested in Tata Telecommunications with the understanding that if certain milestones were not met within

[24] Sandeep Parekh, *Courts might hold guaranteed return of capital clause invalid – Business Standard*, INITIAL PRIVATE OPINION, http://spparekh.blogspot.in/2016/08/courts-might-hold-guaranteed-return-of.html (last accessed 7th February, 2017).

[25] *Consolidated FDI Policy*, dated 7-6-2016, MINISTRY OF COMMERCE AND INDUSTRY, at 3.4.

[26] *Master Circular on Foreign Investment in India*, Master Circular No. 15/2013-14, RESERVE BANK OF INDIA.

a period of five months, Tata would find a buyer at fair market value, or pay half of the original value of the investment, whichever was higher at the time of the exit.[27] Since a buyer could not be found, Tata agreed to pay half the amount of the original investment. This payment however, was blocked by the RBI as being in violation of the above-mentioned regulations, since it above the value that could be reached by accepted valuation methods and amounted to guaranteed returns.

Even a *prima facie* analysis indicates that these regulations, at least in the manner that they have been implemented, seem to do more harm than good.[28] The DoCoMo case highlights this well, as the company was willing to take a loss of 50% on its initial investment, which in no way could be considered to be a guaranteed return. This raises an interesting conundrum, should the impugned regulations be as strict as they are now, or should there be more room to interpret the provisions according to the situation at-hand?

[27] Deepali Gupta et al., TATA VS DOCOMO: TWO WARRING PARTNERS AND ONE BIG MESSTHE ECONOMIC TIMES, http://economictimes.indiatimes.com/news/company/corporate-trends/tata-vs-docomo-two-warring-partners-and-one-big-mess/articleshow/53748101.cms (last visited Feb 7, 2017).

[28] Bhargavi Zaveri and Radhika Pandey, *Tata-Docomo: What went wrong, and what we need to do different*, AJAY SHAH'S BLOG, https://ajayshahblog.blogspot.in/2016/07/tata-docomo-what-went-wrong-and-what-we.html (last accessed 7th February, 2017).

8.1. Problems of an excessively strict regulation

The assumption that having any sort of guaranteed return is equivalent to debt masquerading as equity is a highly problematic one. In the DoCoMo case for instance, the investor was willing to exit at 50% of its investment value, or sell the shares at the fair market value, and therefore, the original agreement did not in any way violate the impugned regulations. If DoCoMo had agreed to terms that stated that the valuation at the time of exit would be greater than the fair value, then such terms could be questioned.

If the objective was to prevent debt masquerading as equity, the current state of regulations makes no sense whatsoever. If the RBI imposes restricts on agreements that grant a guaranteed return that is more than the fair valuation at the time of exit, that would presumably have an effect on such colourable investments. However, imposing restrictions on *any* guarantees, even if the amount guaranteed is a fraction of the original investment, it would appear that the regulations are overbearing, since such an agreement can in no way be said to be guaranteeing returns on investment. Even the RBI itself has notified the Finance Ministry that the regulations may be inappropriate in certain cases. However, the Finance Ministry stubbornly refuses to budge from the *status quo*, seemingly

backing the point of view that an investor willing to take a haircut after a risky investment is somehow investing through the debt route[29].

Perhaps the understanding of the term 'returns' to the RBI indicates to them '*any amount*', as opposed to '*any amount relative to the initial investment*'. That would certain explain their stance in this matter. However, the latter is considered the more appropriate understanding in the context of investments.[30] Further, only this understanding would have some sort of nexus to their intentions behind the regulations, since it affects any sort of guaranteed gains, as opposed to any sort of guarantee. Considering any amount beyond fair market value to be returns, notwithstanding the amount of the initial investment, is manifestly absurd. It would be appropriate in light of this discussion to state that the position taken by the RBI on this matter is incorrect.

[29] PTI, *India bound to enforce London court's decision on Tata: DoCoMo*, LIVE MINTHTTP://WWW.LIVEMINT.COM/ (2016), http://www.livemint.com/Companies/j8qlizNz25PvGfycVUexJK/India-bound-to-enforce-London-courts-decision-on-Tata-DoCo.html (last visited Feb 7, 2017).

[30] *Return*, INVESTOPEDIA, http://www.investopedia.com/terms/r/return.asp (last visited Feb 7, 2017).

8.2. The Delhi High Court on the DoCoMo Dispute

The recent decision of the Delhi High Court in this matter has had no substantial alteration or clarifying effect on the law discussed above.[31] The Court held that the RBI had no right to intervene because it was merely an enforcement of an arbitral award, and not a transfer of shares as such. The returning of share scrips to Tata was only incidental, and could be seen as a voluntary return of the scrips, since Docomo had no use for them.[32] The Court has essentially maintained the position that the applicable regulations would apply in the case of transfer of shares.[33] As such, even after the conclusion of the case, the fact remains that the transfer pricing norms are still applicable, and there is no change in the position of law, except the enforceability of Arbitral Awards in cases like this has been upheld.

9. CONCLUSION

I had raised two primary areas of inquiry for this paper, using the sources mentioned above, I believe it would be save to arrive at the following conclusions:

[31] *NTT Docomo Inc. v. Tata Sons Limited*, OMP (EFA) (COMM.) 7/2016 & IAs 14897/2016, 2585, 2017 (*hereinafter* 'NTT Docomo').
[32] NTT Docomo, at ¶50.
[33] NTT Docomo, at ¶54.

The Options clauses entered into prior to October 3rd, 2013 are invalid, but any such clauses inserted into an agreement after the date shall be enforceable. The power to exercise the option can be derived from the articles or a shareholders' agreement. The reasoning behind the decision to not give the notification a retrospective effect is dubious at best.

Options are permitted in the case of foreign direct investment, but only insofar as they do not guarantee a return, where a return is understood to mean any amount of money above fair value, and not relative to the initial investment. The manner in which this regulation has been utilized means that regardless of the terms of the agreement, the amount paid must not be more than the value arrived at through the prescribed methods. This would, in effect, neuter the purpose of Options clauses in the first place, as the DoCoMo case clearly shows, agreements guaranteeing even a fraction of the initial investment, let alone any profits, will be hit by the regulations.

9.1. **The need for more liberal regulations**

I started this paper with an explanation of why investments are considered to be important for the growth of an economy, this is especially true in the case of a country such as India, where sustained periods of growth are essential for the purpose of development. It would be in the best interest of the economy to

regulate only to the extent that is necessary. There regulations with respect to Put and Call Options have undergone a lot of flip-flops in the past, and continue to be the subject of confusion.

In order to rectify this situation, the following steps must be taken to ensure that excessive regulation does not scare away investors:

a. *Allow Foreign Investors to enter into agreements that at least allow the investor to safeguard at least a fraction of the initial investment, regardless of the valuation of shares, and have a more liberal interpretation of the relevant regulations, since any amount guaranteed that is less than the initial quantum of investment cannot be said to be debt masquerading as equity.*
b. *Frame appropriate guidelines for Options, including values such as maximum amount that can be guaranteed (compared to the initial investment), and terms that must be included or excluded in the agreements (such as prohibition of sale to foreign investors). This would give investors more clarity as to what they can expect at the time of exit, instead of being blindsided by flip-flopping interpretations and regulations.*

INTERNATIONAL TRADE LAWS

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AN OUTSTRIP VIEW ON FINANCIAL CRISIS 2007 & BASEL ACCORD I, II & III

Sibadutta Dash*

1. INTRODUCTION

A worldwide budgetary emergency happened in 2007 which is still with us and we are living with its delayed consequences and paying a ton to leave this problem.[1] By experiencing this emergency and attempting to settle duty on the components which brought on the monetary emergency, it will be found that before this emergency a critical number of business analysts, approach creators and market administrators had begun faulting the lawful structure of Basel II in regards to the capital ampleness which influenced subprime advances at first in the U.S then spread at the worldwide level.[2] Many investigators trust that the emergency was happened in view of the absence of transparency.[3]

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[1] http://yaleglobal.yale.edu/content/global-economic-crisis.

[2] *Ibid.*

[3] http://www.positivemoney.org/issues/recessions-crisis/.

In U.S, subprime home loans are the fundamental variable behind the money related emergency alongside some administrative disappointments, for example, the revoking of the glass-segeal Act.[4] However, in UK the monetary debacle occurred because of the administrative disappointments of FSD (Financial budgetary system[5]) and there were no fitting laws of bankruptcy for the banks. Some trust that capital prerequisite for bank was additionally a reason of the crisis.[6]

There were directions on global level Basel I and Basel II. In spite of the fact that they were not executed appropriately but rather astounding imperfections were available there in directions. The Basel administration is a global framework for banks. In this paper the reasons for the disappointments of Basel I and Basel II and how the disappointments of these accords have influenced the monetary framework will be talked about. Basel I was not ready to shield the world from the money related emergency. In spite of the fact that, Basel II came only couple of months before the emergency however it was additionally neglected to keep the world from money related emergency. Basel II has two noteworthy provisos that it permitted the banks

[4] *Ibid.*

[5] Francesco Cannata and Mario Quagliariello, "*The role of Basel II in the subprime financial crisis: guilty or not guilty?*" (2009) n 3/09 carefin working paper.

[6] http://www.investopedia.com/terms/t/tangible-common-equity.asp.

to exaggerate the genuine measure of their capital and it likewise permitted the banks to downplay the hazard which was connected with their business which makes a non-straightforward framework. Taking after are the principle disappointments of Basel accord which drove the world towards budgetary emergency. Stability Board which is a universal body that screens and makes suggestion for the worldwide.

a) Tangible Common Equity (TCE) is the finest approach to decide the bank's presentation to hazard which incorporates advances, securities and structures which are possessed by the bank. These benefits can be sold on account of fall to pay its commitments yet tragically this strategy was not embraced in Basel II.[7]

b) Basel II did not characterize an impeccable approach to quantify chance weighted resources and permitted the banks to downplay the hazard on their benefits.

c) The capital prerequisite for banks was too low in regards to the hazard weighted resources. Banks were playing with the framework they could undermine the proportion of hazard on their resources and capital prerequisite was too low that it turned

[7] Capital Standards for Banks: The Evolving Basel Accord.

into a noteworthy cause in the disappointment of Basel accords which created money related crisis.[8]

Banter on the purposes for the money related emergency will be proceeded however there is most likely this emergency has more than one reason which is interlinked moreover. A commission was made by the US Congress to distinguish the purposes for the emergencies. The commission in its report inferred that the emergency was avoidable however it happened in view of the disappointments of money related directions, over the top obtaining, and arrangement producers who were not set up to confront the emergency.

After the money related emergency, many changes have been made on universal and additionally on residential level. Basel III which is not actualized yet but rather has many changes and attempted to limit the danger of any further emergency. In Basel III the capital necessity for banks are expanded and the proportion of hazard weighted resources are characterized. This paper will fundamentally assess the new changes of Basel III.

[8] Capital Accord to Incorporate Market Risks, Basle Committee on Banking Supervision, (January 1996).

1.1. An Overview of Financial Crisis

Monetary emergency which had happened in 2007 has influenced the world severely. This emergency was not a cataclysmic event, it happened on account of wasteful laws and the abuse of flexibility which Basel accord had given to the banks to exaggerate the genuine estimation of their advantages and downplay the hazard on their benefits. In this piece of the paper there would be brief talk on the disappointments also, defects in Basel I and Basel II which has brought about worldwide money related emergency. Taking after are the defects in Basel concurs which turned into the reasons for money related emergency.

a) Deferred assess resources were not deducted from capital. It decided future benefit which was not precise that brought about monetary emergency.

b) Amendment in Basel I made in 1997 which is known as the market chance alteration and Basel II upgraded the vagueness of the capital framework.[9] In Basel I and Basel II the capital necessity was too low that is the reason to trust on a bank was

[9] Simon Ashby, "The Future of UK Banking Following the Financial Crisis" A Response from the Financial Services Research Forum to the Independent Commission on Banking September 2010 Issues Paper

not good.[10] Banks exploited from it which had driven us to the emergency.

c) Basel II permitted the directors to set extra necessity on particular firm as indicated by the way of its business and in the wake of deciding the hazard appended to the business of that firm that was a decent approach since capital prerequisite under Basel I and Basel II was low yet lamentably this approach was utilized once in a while.

After the emergency, the significant banks of UK had a capital prerequisite of 10% in 2008. Be that as it may, if the money related emergency will be investigated in the light of those variables which brought on this emergency, it will be reasonable reality that despite the fact that there were huge escape clauses in the directions yet in the meantime those controls were not actualized in the genuine sense and this thing was likewise underlying driver of the emergency. There was not appropriate keep an eye on monetary exercises. Numerous financial experts had anticipated about this emergency yet no consideration was paid to their worries. More than administrative disappointments, carelessness has assumed an essential part in this emergency.

[10] Hui Tong, Shang-jin Wei, "Real Effects of the 2007-08 Financial Crisis Around the World" (March 18.2014)

2. CONSEQUENCES OF FINANCIAL CAUSES

Outcomes of money related emergency are extremely unfortunate and it has influenced the world seriously. The primary fundamental issue which was made by this emergency was unemployment.[11] This emergency influenced entire of the general public and costs of products turned out to be high. All the market resources were caved in because of the liquidation problems.[12] A critical fall in the costs of houses was measured which seriously influenced the home loan business on the planet and particularly in US.

Value cost of the greater part of the organizations declined that influenced the general public severely in light of the fact that individuals lost their money.[13]GDP rate went ahead a low level which straightforwardly influenced government treasury. In the budgetary emergency legislature of each state confronted difficult issues since they needed to save the falling firms and furthermore the administrations were not able gather charges which are the main asset to profit for the government.[14] That was more awful for the legislature since when they had need of more

[11] *Ibid*
[12] Brian J. Boltan, "*The U.S Financial Crisis: A summary of causes and Crisis*", (Oct. 21, 2009)
[13] *Ibid.*
[14] *Ibid.*

cash they got less. So, the money related emergency pulverized the world monetary system.[15]

3. GOVERNMENT ROLE IN FINANCIAL CRISIS

On the part of government, distinctive business analysts have their diverse perspective. Some recommend that administration ought not to venture into protect the organizations since government has the cash which has a place with the general population of that state and government ought to need to utilize that cash for the welfare of the people.[16] On the other hand some market analyst have an inverse view point, as per the government ought to need to safeguard the organizations and they have a solid contention in the support of their point that organizations in a state have a place with the general population and many individuals have their work in those firms.[17]

Subsequently, if the administration won't safeguard the organizations, the general public will confront its consequences.[18]They contended that to save a firm is really to protect the general public. There are points of reference for both

[15] Carmen M. Reinhart, "*The Economic and Fiscal Consequences of Financial Crisis, North and South*", (Dec 2009)
[16] ElchinSuleymanov, Elvin Alirzayev, "*Government Role During the Global Financial Crisis*", (Oct 21, 2013).
[17] *Ibid.*
[18] *Ibid.*

sides on the grounds that there is no law which precludes the legislature to protect a budgetary institution.[19] Similarly, there is no law which makes it compulsory on the administration to save them. It is an optional energy of the administration. On account of Lehman Brothers government chose not to protect them.[20] However, on account of HSBC the administration chose to venture in and safeguarded the bank.[21] Greece is additionally saved by the European Bank.[22]

Moreover, every one of the financial analysts have a consistent view that legislature ought not sit tight for emergency they ought to need to assume their part to keep away from such emergency and make directions in like manner.

4. BACKGROUND OF BASEL ACCORD

Basel board of trustees on managing an account supervisory has its cause in 1973. In Germany and New York, the banks of BankhausHerstatt and the Long Island's Franklin National Bank separately bore overwhelming misfortunes. Eight banks in United States were broke down from 1965 to 1981.[23] To

[19] *Ibid.*
[20] Jeffery A. Frankle, "*Responding to the Financial Crisis*", (Feb 2007).
[21] Investopedia staff, "*Case Study: The Collapse of Lehman Brothers*".
[22] NikoletaKalmouki, "*Renzi: EU Saved Greece to Rescue Banks*", (July 24, 2014) Accessed: 2nd, December 2014.
[23] <http://www.ukeconomyexplained.hsbc.co.uk/Contents.01_Financial_Crisis.14_The_Financial_Crisis.

maintain a strategic distance from such sort of misfortunes the national bank governors of G10 nations made prompt strides and built up a council on keeping money directions (Basel Committee on Banking Supervision) [24] which improved its participation in 2009 and as of late in 2014 and now 28 nations are individual from this committee.[25] The central point behind the foundation of this advisory group was to upgrade budgetary soundness. To accomplish its objective the advisory group figured a few suggestions.

a) Minimum guidelines for the directions were prescribed.

b) Sharing of supervisory issues, methods for how to advance basic comprehension.

c) The board accentuation to enhance cross-fringe participation.

d) Exchange of data with respect to the improvements in managing an account segment and budgetary markets to discover present and coming issues for the worldwide monetary system.[26]

Nations are spoken to by the national bank of the nation in this panel and this board of trustees gives rules. In any case, the choices of the board of trustees are not authoritative on any

[24] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1327252.
[25] FadiZaher, "*How Basel I Affected Banks".*
[26] <http://www.bis.org/bcbs/.

nation. Singular national experts actualize its discoveries as per their national interest.[27]

4.1. Basel I

The principle point behind the formation of Basel I was to

a) Make the International managing an account framework more grounded.

b) Create an imperfection less universal managing an account system.[28]

An obligation emergency of Latin America in 1980 encouraged the Basel board of trustees to consider the capital proportion in fundamental worldwide banks. The board chose to decide the hazard and proposed a capital proportion for banks. Therefore, in 1988 Basel capital accord was affirmed by G10 Governors.[29]

- To set a base capital proportion on the bank capital a complete meaning of bank capital was required and lamentably there was no meaning of bank capital. In Basel I the meaning of bank capital has been defined.[30]

[27] Bank for International Settlement: Basel Committee on Banking Supervision, A Brief History of the Basel Committee
[28] Bank for International Settlement: Basel Committee on Banking Supervision, A Brief History of the Basel Committee
[29] FadiZaher, "How Basel I Affected Banks"
[30] *Ibid.*

- Minimum capital proportion to hazard weighted resources was announced 8% of the capital in Basel I.31
- This new exertion was warmly welcome by the part states as well as a few states which have universal banks.
- In September 1993 the Basel board of trustees issued a report and clarified that banks in G10 nations are meeting the base capital necessity which was proposed in Basel accord.32

4.2. **Basel II**

Basel II was executed in 2007 only couple of months before the budgetary emergency. Basel II is really another adaptation of Basel I with specific changes. Basel II was built up to address the present issues and to cover those escape clauses which were available there in Basel I. Basel II presented three "Column" which covers the principle guns of Basel II. As indicated by Basel I there was just a single technique to figure administrative capital for hazard credit. Be that as it may, Basel II presented three techniques (The Standardized approach, Foundation Internal rating approach, progressed Internal rating approach)

[31] Bank for International Settlement: Basel Committee on Banking Supervision, A Brief History of the Basel Committee.
[32] *Ibid.*

also and left it on the tact of the moneylenders to pick which they think fit.[33]

5. CAPITAL NECESSITY (TIER 1)

It builds up various approaches to ascertain least administrative capital for credit hazard. Basel I had offered just a single route for the computation of administrative capital which was identified with credit hazard. Be that as it may, Basel II has given another charge to operational risk.[34] To decide the credit hazard taking after are the routes gave under Basel II.

5.1. Standardized Approach

This is not another way which Basel II has presented it was likewise said in Basel I. In any case, certain progressions have been made in it. In this strategy, Basel II connected a settle rate of hazard on various things. For instance credits for private property have 35% hazard which was half in Basel I.[35]

5.2. Foundation Internal Rating Based Approach

This is another approach to appraise the administrative capital for hazard capital. After the money related emergency, Basel II is condemned by numerous business analyst in light of this

[33] *Ibid.*
[34] http://www.cml.org.uk/cml/policy/issues/748>.
[35] *Ibid.*

approach. In this strategy loan specialists have the opportunity to utilize their own specific manner to look at their administrative capital necessity.

Moneylender is the person who can judge the likelihood of default identified with any credit that is the reason Basel II gives this flexibility to the bank that he can decide the prerequisite of administrative capital.[36]

5.3. Advanced Internal Rating Approach

This technique is like the establishment inward evaluating approach. In this strategy the loan specialists need to decide just after things

i) Probability of default.

ii) Loss given default.

iii) Exposure at default.

In this extremely propelled time this technique gives a quick approach to decide the necessity of administrative capital.[37]

6. OPERATIONAL RISK

In Basel I there is nothing in regards to operational hazard except for Basel II has tended to it. Operational hazard is a harm which

[36] *Ibid.*
[37] *Ibid.*

happened because of the disappointment of interior and outer problems.[38]

7. **SUPERVISORY REVIEW (TIER 2)**

This technique has perceived the hazard components which are not tended to in level 1 and has given the guidelines to conform capital prerequisite. This strategy has taking after outcomes;

i) Increase the capital necessity at times.

ii) Requires the bank to consider the full scope of hazard which they may face.[39]

8. **SHOWCASE DISCIPLINE (TIER 3)**

This is exceptionally critical piece of Basel II three level methodologies. The main reason behind this technique is to enhance the straightforwardness. Banks are required to give an entire detail of their hazard administration. They are required to give the data through monetary statements.[40]

Obstructions in the Implementations of Basel Accord

Basel II is another type of Basel I; be that as it may, the standards which are depicted in these Basel Accords are questionable. The

[38] Operational Risk: Basel Committee on Banking Supervision, Consultative document, (Jan 2010), Accessed.
[39] http://www.cml.org.uk/cml/policy/issues/748.
[40] *Ibid.*

Basel Accord has announced equivalent capital necessity for all the budgetary establishments which is unrealistic to receive in each monetary framework. There are commitments on the states to authorize worldwide controls however for Baselconcurs there are no such obligations.[41] These are the primary defects in Basel I and Basel II which brought on money related emergency.

a) Standardized Approach, Foundation Internal Rating Based Approach and Advanced Internal Rating Approach were utilized to decide the capital necessity for hazard weighted resources are extremely equivocal, that is the reason it is embraced by couple of bigger banks in United States.[42]

b) Many nations were not able actualize Basel II due to its multifaceted nature and inadequate resources.[43]

c) There was nothing in Basel Accord which could address the complex corporate framework in Asia.[44]

[41] Kyoto Protocol to The United Nations Framework Convention on Climate Change, United Nations (1998),
Accessed
[42] http://www.cml.org.uk/cml/policy/issues/748.
[43] *Ibid.*
[44] This is not to suggest that there would be no consequences to a state or its financial institutions if Basel II were repudiated.

d) Terms of Basel Accord were not official on any state, they have the decision to embrace it somewhat or even they may overlook it fully.[45]

e) The capital prerequisite which was proposed in Basel accord was too low and not able to spare the banks from monetary crisis.[46]

f) In every one of the locales the execution of Basel Accord was not straightforward and consistent.[47]

g) High quality information is required to actualize the Basel Accord yet to gather that information, banks should bear cost. This turned into an obstacle to actualize Basel Accord.[48]

h) The crucial point behind the Basel Accord was to make concordance amongst expansive and little banks at International level yet it had neglected to do so.[49]

There is nothing in the Basel accord for little monetary establishments in light of the fact that the guidelines which are proposed by the Basel accord are tranquil hard to embrace for little banks.

[45] "Capital Standards for Banks: The Evolving Basel Accord".
[46] http://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe.
[47] *Ibid.*
[48] *Ibid.*
[49] Imas A Moosa, "*Basel II as Casuality of the Global Financial Crisis*".

9. POINTS OF BASEL III

In spite of the fact that Basel II had come only couple of months before the budgetary emergency yet at the same time it was not able address every one of the issues confronted by the money related markets. There are numerous escape clauses which are highlighted by the business analysts in Basel II and they trust that Basel II has neglected to keep us from the budgetary crisis.[50] The crumple of Lehman siblings in September 2008 made it clear to everybody that Basel II needs real changes and to determine these issues Basel Committee had proposed a few standards for liquidity hazard administration and issued a paper to enhance the structure of Basel II.[51]

In September 2010, new capital necessities for business banks were made. This new capital prerequisite turned into a piece of Basel III. Basel III is made to keep the world from any further emergency. In Basel III the Committee attempted to address every one of those issues which created money related crisis.[52] 27 states were consented to actualize Basel III from first January 2013 as indicated by their national interest.[53] One thing was

[50] *Ibid.*
[51] Bank for International Settlement: Basel Committee on Banking Supervision, A Brief History of the Basel Committee (Oct 2014).
[52] *Ibid.*
[53] http://www.bis.org/press/p100912b.pdf.

clear for monetary administrative specialists after the budgetary emergency that many changes are required at household and worldwide level.[54]

10. BASEL III

Basel III has improved the three columns which were built up in Basel II. Taking after are the significant changes

i) The base prerequisite for normal value is improved up to 3.5% which was 2% in Basel II.

ii) Minimum prerequisite for level 1 is expanded from 4% to 4.5%.

iii) The term Bank has been characterized in Basel III.[55]

iv)To enhance the quality and straightforwardness, Basel III has set a higher capital requirement.[56]

[5454] Douglas W. Arner, "*Adaptation and Resilience in Global Financial Regulation*", 89 NORTH CAROLINA LAW REVIEW1579, 1626 (2011).

[55] http://www.bis.org/publ/bcbs164.htm.

[56] http://www.moodysanalytics.com/~/media/Insight/Regulatory/Basel-III/Thought-Leadership/2012/201219-01-MA-Basel-III-FAQs.ashx

v) Minimum capital prerequisite is announced 8% for all hazard weighted assets.[57]

vi) Another term Capital support is characterized which is

Accessible capital - Risk Capital = Capital Buffer.[58]

11. DIAGRAM ON NEW CHANGES OF BASEL III

The budgetary emergency of 2007-2008 uncovered every one of the blemishes in universal monetary framework. Global strategy creators attempted to perceive those defects and tended to them yet at the same time there are tremendous civil arguments on this point whether these new changes can shield the world from any monetary emergency or not. The progressions which have been made are adequate and able or more changes are still needed.[59] Some investigators have found the new changes are definitely not qualified to address money related emergency and assert that the new changes will improve the cost of banks because of high capital ratio.[60] However, a few examiners have considered that

[57] Adrian Blundell-Wignall& Paul Atkinson, "*Thinking Beyond Basel III: Necessary Solutions for Capital and Liquidity*", (2010).
[58] Peter Miu, "*Can Basel III work? Examining the New Capital Stability Rules by Basel Committee: A Theoretical and Empirical Study of Capital Buffers*".
[59] *Ibid.*
[60] Brian Perry, "*Understanding the Basel III International Regulation".*

these changes will be extremely reasonable in future to maintain a strategic distance from any budgetary crisis.[61] How and when these new changes will be executed is additionally addressed by numerous approach creators. They have appended the material hazard with the execution of new regulations.[62]

> They accentuate on the element that capital necessity is high and if banks in little economies will neglect to satisfy this prerequisite it will hurt the financial system.[63] It will require long investment to keep up the base capital necessity. If there should arise an occurrence of emergency the qualified resources will have the capacity to meet the liquidity prerequisites. This term "qualified resources" should be returned to in light of the fact that those benefits which are to be incorporated into qualified resources are not adequate to satisfy liquidity needs.[64] To limit the

[61] Peter Miu, "*Can Basel III work? Examining the New Capital Stability Rules by Basel Committee: A Theoretical and Empirical Study of Capital Buffers".*

[62] *Ibid.*

[63] *Ibid.*

[64] http://0login.westlaw.co.uk.brum.beds.ac.uk/maf/wluk/app/document?&srguid=i0ad82d0800000149f401.9a80c5622d61&docguid=IB51A9AD02CD611E3B51FCF4E007350B7&hitguid=IB51A9AD02CD611E3B51F

danger of being defaulter, the banks require an extra capital alongside least capital prerequisite required under Basel III.[65] Basel III has attempted to enhance the correspondence between banks which are chipping away at worldwide level and it likewise has attempted to make the framework more straightforward.

In any case, the past emergency resembled a bad dream that is the reason numerous fast changes have been made in the past control. Albeit numerous surprisingly great changes have been made yet at the same time the peril of any emergency still exists there. There are a few issues which still should be tended to properly.[66] capital alongside least capital prerequisite required under Basel III.[67] Basel III has attempted to enhance the correspondence between banks which are taking a shot at

CF4E007350B7&rank=4&spos=4&epos=4&td=336&crumb-action=append&context=29&resolvein=true

[65] *Ibid.*

[66] Basel Committee on Banking Supervision: Progress report on implementation of the Basel regulatory framework.

[67] Michael Pykhtin, Dan Rosen, "*Pricing Counterparty Risk at the Trade Level and Credit Valuation.*
Adjustment Allocations", 6THE JOURNAL OF CREDIT RISK (3-38) , (2010/11)

universal level and it likewise has attempted to make the framework more straightforward.

Notwithstanding, the past emergency resembled a bad dream that is the reason numerous fast changes have been made in the past direction. Albeit numerous surprisingly great changes have been made yet at the same time the threat of any emergency still exists there. There are a few issues which still should be tended to properly.[68]

12. USAGE OF BASEL III

Twenty seven purviews consented to execute Basel III from first January 2013 yet the Basel board's report which was distributed in April 2013 revealed that exclusive eleven states have done it.[69] Canada has passed last guidelines for the credit valuation change in the light of Basel accord's structure on tenth December 2012 however it didn't implement it until January 2014. Essentially, China has made principles named as 'focal counter

[68] http://www.shearman.com/~/media/Files/NewsInsights/Publications/2013/09/Basel-III-FrameworkUSEU-Comparison/Files/View-full-memo-Basel-III-Framework-USEU.

[69] *Ibid*

gathering clearing houses' are not the piece of their household law till the date.[70]

Additionally, an alternate technique is received to actualize Basel III. In United States, capital system of Basel III is embraced at household level by means of Dodd Frank Wall Street changes and Consumer Protection Act. Last US rules have re-examined numerous things under the light of Basel III structure.

a) Regulatory capital has been reconsidered

b) Method to decide chance weighted resources has been changed

c) Capital necessity is set which is proposed in Basel III[71]

In Europe, the Basel III is actualized by two mandates, the Capital Requirement Control (CRR) and Capital Requirement Directive (CRD) which were issued on 27th June 2013. Capital Requirement Directive expelled the past system and actualized Basel III. The CRR is currently the piece of residential law in all part states. For the usage of Basel III the European Banking Authority will assume its part. Basel III will cover all the money

[70] Jeffery Atik, "*EU Implementation of Basel III in the Shadow of Euro Crisis*",LOYOLA (2014).
[71] *Ibid.*

related organization in EU.[72] Through these Directives, many changes have been done and new capital and liquidity necessities have been forced on budgetary establishments in EU. Basel II had neglected to illuminate the budgetary emergency that is the reason Basel III is made.European Commission and European Central Bank have assumed a noteworthy part really taking shape of Basel III.[73]

Through the Directives least guidelines for capital prerequisite it is proposed for the part conditions of Europe. Be that as it may, states have carefulness to set a higher standard for their Banks for instance Banks in Switzerland needs more capital requirement.[74] The reason behind the higher capital prerequisite is to limit the peril of bankruptcy of the banks. It is a direct result of the contention that distinctive least capital necessity for banks in EU states will make an obstacle to satisfy the fantasy of brought together European Banking market.[75] On the measures of capital prerequisite there is a distinction of assessment. Joined Kingdom and Sweden have their assessment that the matter of capital necessity ought to have a place with the caution of the

[72] *Ibid.*
[73] *Ibid.*
[74] Shaukat Zaman, "*Implementation of Basel III Capital Instructions"*
[75] *Ibid.*

State. Nonetheless, Germany and France have the conclusion that the base capital necessity ought to be same in all EU states.[76]

13. PAKISTAN HAS PASSED A ROUND (BPRD CIRCULAR NO. 06 2013) TO EXECUTE BASEL III.

As indicated by this round, a back rub has been sent to every one of the banks and monetary foundation of Pakistan that they ought to need to meet the capital necessity as specified in Basel III. This roundabout especially addresses the qualified capital, capital proportion and use proportion and it is unmistakably expressed that different changes which have been made in Basel III will be tended to independently. A time period is set by the State Bank of Pakistan that Basel III will be completely actualized by 31st December 2019.77 Basel accord has blended audits by the experts. Some discovered it as great improvement and said its positive focuses to fortify their contention. They contended that the Basel accord has presented the controls for the banks on International level. Capital prerequisite for banks is settled and recipes to check the hazard weighted resources are introduced.[78] However, there are countless who contended that

[76] Laurent Balthazar, *"From Basel 1 to Basel 3: The Integration of State-of-the-Art Risk Modeling in Banking Regulation"* Palgrave Macmillan, New York (2006).
[77] *Ibid.*
[78] *Ibid.*

the Basel accord is the main source behind the money related emergency. Defects of these Basel agrees have been utilized to fortify their contention. Capital prerequisite for banks was too low and they have the opportunity under Basel II to judge their hazard weighted resources. Yet, these opportunities have been abused by the Authorities which cause monetary crisis.[79]

14. CONCLUSION

The money related emergency, which began from the United States and influenced the entire world, occurred because of the administrative disappointments. There were many blemishes in the controls and they were not executed completely. This monetary emergency is not overcome yet and its outcomes are as yet present in the general public. Society is influenced severely in light of the fact that it has brought on unemployment and higher costs of things. Government needs to save the organizations however tragically it was not able do as such due to less accumulation of expenses. It was contended that the money related emergency happened because of the carelessness of those foundations that is the reason government ought not venture into protect them. On universal level, there is Basel accord to control the money related foundations.

[79] *Ibid.*

In spite of the fact that these Basel accord's base capital necessity for banks is pronounced. The capital necessity which is proposed in Basel I is surveyed in Basel II and afterward again checked on in Basel III. Company between the monetary outskirts is proposed in Basel accord and a straightforward money related framework is imagined through this. To diminish the peril of emergency least capital proportion is pronounced by the hazard weighted resources. Distinctive techniques are acquainted with decide the hazard weighted resources. Every one of the imperfections which were said in Basel I and Basel II are currently attempted to keep away from in Basel III. The field is open for entire of the world to actualize Basel III with a uniform money related framework. Joined States, Europe and numerous different purviews are changing their local laws as per Basel III and it is confident stride towards money related emergency to be overcome.