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## A PARTNERSHIP WITH INSTITUTIONS & STRATÉGIES

Legacy Law Offices LLP is pleased to announce the formation of a strategic partnership with Institutions & Stratégies, a leading consulting firm specializing in public affairs and European and international financing engineering.

Having been established in 2010, Institutions & Stratégies is a major player in offering financial lobbying, assistance in obtaining European financing and the positioning of SMEs in the context of international public procurement.

Services offered by the Firm include Influence Strategy, Financial Strategy, & International Development Strategy.



*“To be the gateway to the world of tomorrow between institutional actors and economic operators from all continents for better strategic and economic partnerships in order to facilitate the implementation of development projects.”*

As part of this inclusive partnership, Legacy Law Offices LLP and Institutions & Stratégies will seek to explore the fields of PPP and alternate dispute resolutions, including international arbitration.

To fortify this unique combination of Firms, professionals from both firms shall be collaborating on various projects and assignments from time to time. We wish this collaboration a bright future.

Legacy Law Offices LLP a le plaisir d'annoncer la formation d'un partenariat stratégique avec Institutions & Stratégies, un cabinet de conseil de premier plan spécialisé dans les affaires publiques et l'ingénierie financière européenne et internationale.

Créé en 2010, Institutions & Stratégies est un acteur majeur du lobbying financier, de l'aide à l'obtention de financements européens et du positionnement des PME dans le cadre de la commande publique internationale.

Les services proposés par le cabinet comprennent la stratégie d'influence, la stratégie financière et la stratégie de développement international.



*“Etre la passerelle vers le monde de demain entre les acteurs institutionnels et les opérateurs économiques de tous les continents pour de meilleurs partenariats stratégiques et économiques afin de faciliter la mise en œuvre des projets de développement.”*

Dans le cadre de ce partenariat inclusif, Legacy Law Offices LLP et Institutions & Stratégies chercheront à explorer les domaines des PPP et des modes alternatifs de résolution des litiges, y compris l'arbitrage international.

Pour renforcer cette combinaison unique de cabinets, les professionnels des deux cabinets collaboreront de temps à autre sur divers projets et missions. Nous souhaitons à cette collaboration un bel avenir.



## THE TOWER OF BABEL AND THE PPP STORY OF KENYA\*

*The article was first published on Mondaq on December 5, 2024, and can be accessed [here](#).*

The story of the Tower of Babel inspires the present-day infrastructure industry in many ways. Where the biblical literature specifies that in order to deter the people from constructing a tower to heaven, God apparently caused confusion with respect to the languages of all the workers, thus rendering it impossible for them to understand one another, the ancient literature on the Tower of Babel offers an example into the modern-day project management failures on various levels.

For Kenya, however, the construction of the Bunge Tower reprised the incident of the Tower of Babel, where due to a multitude of reasons, which included cost overruns, time overruns, and insufficient accountability, the construction of the tower has continued from the year 2010 and is yet to be completed in its entirety, even today.

The history of public-private partnership (PPP) projects in Kenya has been through a number of ups and downs. While the country has borne witness to various successful infrastructure projects undertaken on PPP mode, a majority of the projects have faced a multitude of issues, many of which have caused great delays in completion, thus leading to enormous losses to the Kenyan administration.

With its Vision 2030 being in progress since 2008, these delays, failures, and losses, raise additional concerns with respect to the ability of the Kenyan administration, to achieve the milestones of becoming a middle-income country.

### Public-Private Partnership Projects and Failures – Meeting the Imaginations of the Administration

*"Megaprojects are imagined before they come into existence and in doing so, they create imagined failures." [1]*

The aforementioned statement has proven to be slightly true to the country of Kenya, where PPP projects have faced multi-faceted issues, primarily due to the inconsistencies between the expectations of the administration and the actual implementation of the projects.

A glaring example of the aforementioned shortcomings may be evident through the Standard Gauge Railway (SGR) Project, which was the 'largest infrastructure project since the independence of Kenya' [2]. Being developed on PPP mode, the construction of SGR was undertaken by the China Harbour Engineering Company Limited (Contractor), after receiving funding from the Chinese Exim Bank. However, since the very beginning, project development faced a bundle of issues in terms of budgetary concerns, as well as the larger question relating to a lack of transparency in the unilateral appointment of the contractor sans a proper tendering process. Amidst such issues, while a phase of the SGR was completed and made operational in 2017, the awarding of the project in itself became a subject of a number of controversies, which ultimately led to the filing of a case before the Courts of Kenya.



Even though the judicial process ended in 2023 when the Supreme Court ruled in favour of the Government, the SGR continues to be 'under construction' costing the citizens of Kenya approximately Sh37.9 million [3] or even more on a daily basis.

Even though the SGR became a great lesson, its failure was followed by the unduly expectations attached to the development of the Lamu Port-South Sudan-Ethiopia Transport (LAPSSET) project. The ginormous project promised an apparent boon to Kenya's economy by offering the construction of multiple ports, roads, and airports connecting the port of Lamu with South Sudan and Ethiopia. The high expectations bore little to no fruit, however, due to an apparent failure on the part of the administration to account for various complications like massive destruction of the environment, including a UNESCO-declared cultural heritage site, which was well present within the project stretch. This miscalculation subjected the administration to grave criticism and hindrances during the construction process. Another complication arose due to the inability to account for the assailant-filled stretch of the project, which inevitably led to the demise of many construction workers at the hands of the assailants. [4]

#### **Vision 2030 and the Post – 2021 PPP Law Era**

*“The aim of Vision 2030 is the pursuit of global competitiveness and prosperity in order to offer Kenyans a high quality of life by 2030.” [5]*

The many failed PPP projects revealed a dark side to the project management capabilities of Kenya and provided an adverse inference to the internationally located private participants, which were the primary focus group for the Kenyan administration to attain its vision of development. That said, December 2021 was marked by a redeeming action on the part of the Government in the form of the Public Private Partnership Act 2021 (PPP Act 2021 or the Statute).

The statute offered a renewed perspective towards the execution of PPP projects in Kenya by providing for special provisions supported by established procedures to streamline the development of projects, thus, reducing the possibility of hinderances. Some of the key features exhibited by the PPP Act 2021, were the setting up of the PPP Committee, the Directorate of PPP, and the PPP Petition Committee.

As per the Statute, procurement methods were classified into direct procurement, privately initiated procurement, and competitive bidding, whereby the Government removed the ambiguities surrounding the unilateral appointment of contractors and further offered transparency in the provisions detailing the evaluation of bids and success fees in contracts.

The PPP Act 2021 was hailed to be a changemaker legislation and was supposed to be supported by the Draft PPP Regulations 2022, wherein the latter was the key to the necessary implementation of the Statute. Due to certain reasons best known to the administration, the Draft Regulations have yet to be enacted, thus having the inadvertent effect of rendering certain crucial provisions of the Statute toothless.



The resultant inadequate implementation of the Statute may be visible from the controversy surrounding the development of the Jomo Kenyatta International Airport, wherein while the awarding of the project to an Indian Conglomerate was in line with the provisions pertaining to privately initiated procurement, the signing of the contract itself faced intense protests due to an alleged lack of transparency, and the supposed one-sided agreement which allowed the Indian Conglomerate to operate the airport terminal for 30 years from the date of development at the cost of the Government.

That said, the PPP Act 2021 has been largely successful in bringing about a positive change in the infrastructural development of Kenya, wherein the country has been witness to various successful PPP projects, including the Nairobi Expressway Project. While having commenced prior to the implementation of the Statute, the expressway became the first largely successful PPP-DBFOT project to have been completed in 2022 and has since been operational. In addition to the expressway, the PPP Act 2021 has also seen great success in other road sector projects as well as the power sector projects, many of which have been operational and are on the verge of becoming a testament to the remarkable step that is the Statute.

### **Taking a Chit from the International Sphere – The Implementation of PPPs across the World**

It is an undoubted fact that PPPs carry with them a range of advantages which seem lucrative to governments across the world. This is one of the primary reasons why the method has been adopted by various developing and developed countries to bring about a positive transformation to their economies.

For an efficient implementation of the projects, governments across the world have worked in a collaborative manner with the project companies and have even established set policies and regulations which, while not completely fool-proof, have been mostly successful in facilitating an optimum realization of the benefits attached to the method of project development. The efforts put in during a number of such projects may, thus, act as examples for the Kenyan Administration for assessing the best international practices and inculcating the same within the country's regulations.

The Daang Hari-SLEX Link Road project in the developing country of the Philippines is one such example, where the government faced a bundle of issues which threatened incorrigible delays in project completion and financial closure. Through a collaborative effort and swift response, however, these issues were handled with care, thereby facilitating the initiation of the operational period in the year 2015. One such issue was faced by the Procuring Authority when, even though it had acquired a large portion of the land prior to the initiation of development, certain parcels remained to be acquired, which led to intense negotiations and diverse litigations during the project development phase. The complexities were dealt with by the Procuring Authority in a professional and swift manner, thus minimalizing the delay caused by the project. The Procuring Authority further proved its worth when, due to certain necessary and unanticipated design variations, a substantial increase in the project scope was caused.



For such an increase, the Authority reacted rapidly by sufficiently compensating the Project Company and, thereafter, making wise use of the lesson to work on assessing such design variations in other ongoing and future projects before the same could arise. Through the regular monitoring of the project by the Procuring Authority, and the collaborative approach adopted by both the parties, the project was completed without any severe delays. [6]

The developing country of Cameroon holds another example in the form of the Kribi Gas Fired Power Project, which was completed, albeit with minor delays, but through a comparatively efficient response of the Procuring Authority, alongwith the assistance of the World Bank. The Kribi Project was the first gas-to-power PPP being implemented in Cameroon and in the Central- African region, under a traditional project finance structure and it was anticipated that the success of the project would pave way for the country to make significant public investments as well as in mobilizing private sector investment [7]. During the execution phase, the project faced various operational challenges including the unavailability of local debt facilities for long tenures, which was vital for the project. With the assistance and advise of the International Financing Institution, and through a progressive approach of the Procuring Authority, the project attained due financing, and attained closure, with a minor delay of 6 months.

While there have been many other successful PPP projects undertaken by developing countries, which have surpassed the challenges through efficient collaborative approaches and expedited response time, the aforementioned cases provide ample insight

into the steps which may be necessary to be taken by both the procuring authorities and project companies, for deriving adequate benefits offered by the mode of development.

In this respect, it must also be emphasized that for a developing country like Kenya, it may be additionally beneficial if the numerous case studies and best international practices of the other developing countries are kept into consideration, in order to reduce any complications, which may otherwise, not be witnessed by developed or highly developed countries due to their ample accessibility to resources and income.

#### **Setting foot into an Affluent Future**

As may be observed from the execution of PPP projects across the world, many countries face a number of challenges during the project execution period, however, the key in these cases lie within the manner and the time of the responses of the Procuring Authorities and project companies, which may make or break the projects at hand.

For Kenya, while the key may also be derived from a change in the way the projects are designed and concession agreements are framed, viz. appropriate and efficient risk identification, risk allocation, and a balanced distribution of project obligations, another important factor, however, may lie in the swift and adequate implementation of the supporting PPP regulations to the PPP Act 2021. This implementation may bring about increased stringency, and compliance towards the Statute, which may be further strengthened through the added powers of various functionaries empowered under the PPP Act 2021.



Thus, while the Tower of Babel may or may not have been reprised in Kenya in the past, through an adequate management of the future PPP projects, combined with appropriately implemented regulations and policies, projects may see a better and brighter future in the country as time passes.

**End Notes:**

1. Detlef Müller-Mahn et. all, Megaprojects – mega failures? The Politics of aspiration and the transformation of rural Kenya, EJDR 1069, 1073 (2021).
2. Oscar Otele, China's Approach to Development in Africa: A Case Study of Kenya's Standard Gauge Railway, Council on Foreign Relations 1, 4, [https://www.cfr.org/sites/default/files/pdf/Otele\\_A%20Case%20Study%20of%20Kenya%E2%80%99s%20Standard%20Gauge%20Railway.pdf](https://www.cfr.org/sites/default/files/pdf/Otele_A%20Case%20Study%20of%20Kenya%E2%80%99s%20Standard%20Gauge%20Railway.pdf).
3. Business and Human Rights Resource Centre, <https://www.business-humanrights.org/en/latest-news/kenya-high-cost-of-stalled-railway-project-demonstrate-how-land-disputes-with-locals-could-impact-infrastructural-projects/> (last visited Oct. 25, 2024).
4. Nation, <https://nation.africa/kenya/news/al-shabaab-ghosts-haunt-sh17-9bn-lapsset-project-4528782#story> (last visited Oct. 25, 2024).
5. Vision 2030, <https://vision2030.go.ke/about-vision-2030/> (last visited Oct. 25, 2024).
6. PPIAF, <https://managingppp.gihub.org/case-studies/daang-hari-slex-link-road/> (last visited Oct. 25, 2024).
7. World Bank, <https://ppp.worldbank.org/public-private-partnership/library/cameroon-kribi-power-plant> (last visited Oct. 25, 2024).

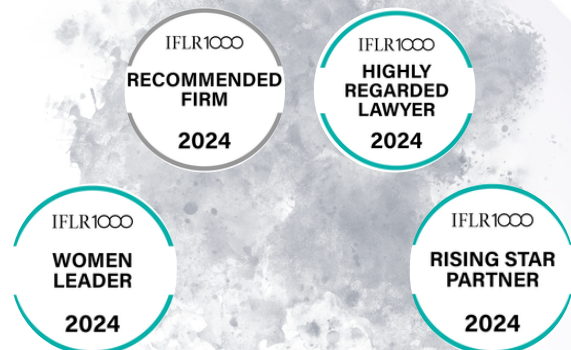


**SNIPPETS: LEGACY RECAP**

In November 2024, **Mr Gagan Anand** was appointed as the Special Senior Standing Counsel for the State of Himachal Pradesh. In this capacity, he will be responsible for representing the State of Himachal Pradesh and its associate bodies before different Courts & Tribunals in matters relating to arbitration and corporate/commercial disputes. We congratulate Mr Anand for this incredible feat!



The 2024 edition of IFLR1000 Asia-Pacific Rankings recognized Legacy Law Offices LLP as a **'Recommended Firm'** in the areas of Project Development: Infrastructure, Energy, & Transport, as well as in the practice area of Capital Markets. **Mr Gagan Anand** and **Ms Shalini Munjal** were recognized as **'Highly Regarded Lawyers'**, whereas Ms Munjal was also included in the list of **Women Leaders** for the second consecutive year. Ms Eshjyot Walia was also recognized as a **Rising Star**. These rankings are a testament to the continuing progress in the quality legal services offered by the Law Firm.







## PARTY AUTONOMY AND THE ARBITRATION ACT

The principle of party autonomy has been at the heart of every arbitration proceeding. Arbitration as an alternative dispute resolution mechanism was introduced with the intention of lowering the burden of the judiciary and promoting the resolution of disputes at the will and circumstances of the parties. Setting up an out-of-court dispute resolution mechanism has helped resolve multifold issues with the concurrent dispute resolution mechanism. However, the evolving practice of arbitration falls short of the aspirations with which it was introduced.

The Indian Judiciary has made continuous and repeated efforts to make arbitration a lucrative practice in India. These efforts have been made on the judicial and legislative ends of the concurrent legal framework governing the practice in India. However, one of the most debated topics for consideration within India's arbitration practice was whether the arbitration agreement could bind the non-signatories/third parties, and if yes, what are the grounds for impleading these parties to an arbitration proceeding? Contrasting opinions and judgments ensued debate in regard to their engagement and rights in an arbitration proceeding. However, with progressive developments and decisions, the Judiciary provided various grounds for legally impleading a non-signatory party to arbitration.

In 2013, the Hon'ble Supreme Court's decision in Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 dealt with the impleading of non-signatories.

It provided a list of factors to be taken into consideration before referring non-signatory parties to an arbitration proceeding. The Court held that non-signatory parties could be impleaded in arbitration proceedings based on different grounds, including the relationship of the non-signatory party with the signatory parties, their involvement or contribution in the subject matter of the arbitration proceedings and/or based on a composite transaction. However, further analysis of this judgment reflected that despite providing grounds for impleading of non-signatories to arbitration, the following judgment also provided very limited instances wherein the non-signatory party must have intended to be a part of the proceedings.

Subsequently, a landmark judgment of the Hon'ble Supreme Court in Cox & Kings v. SAP India Pvt. Ltd. provided clarity on the circumstances under which non-signatories can be impleaded or referred to arbitration proceedings. Besides upholding the reference of non-signatories to an arbitration agreement based on their intention and engagement in the subject matter, the Hon'ble Court established that non-signatories could be bound by an arbitration agreement if their intent to be bound is evident through conduct, participation in the underlying transaction, or commercial gains of the case.

The judgment emphasized that the mere existence of a legal or commercial relationship with a signatory is insufficient.



Henceforth, there must be clear evidence of an intent to create legal obligations under the arbitration agreement. The landmark judgment also highlighted that referring non-signatories to arbitration requires clear evidence of their intention to undertake obligations under the arbitration agreement beyond mere association or affiliation with the signatory party.

Recently, in response to a Section 11 petition, the Hon'ble High Court of New Delhi in *Suresh Kumar Kakkar & Anr. v. M/s Ansal Properties and Infrastructure Limited & Anr.* decided upon the maintainability of the Section 11 petition and petition for impleading third-party to an arbitration. In doing so, the Hon'ble Court held that the impleading of non-signatory parties cannot be decided by the Courts at the stage of admission of Section 8 or Section 11 petition.

The Hon'ble Court must only decide upon the prima facie issue of the existence of a valid arbitration clause/agreement and must leave the issue of valid reference of non-signatories to arbitration proceedings onto the Arbitral Tribunal.

The Hon'ble Court also reflected upon the limited powers of the referral court to delve into the intricacies of the reference of third parties to an arbitration agreement and specifically grant the power to the Arbitral Tribunal to ensure the validity of the reference of non-signatories parties. The Arbitral Tribunal will have complete power to ascertain the impleading of third parties to arbitration proceedings after reassuring their implied consent, interest or involvement in the subject matter of the primary arbitration proceeding.

India is looking towards a portrayal as a feasible and convenient arbitration seat for people around the world with the intention of making India an arbitration hub. In doing so, people are relying on the judiciary as well as the legislature to make necessary revisions and amendments to ease India's dispute resolution regime with one such initiative, the establishment of the Arbitration Bar.

Foreign arbitration proceedings in India not only promote legal development but also attract foreign direct investment in the nation, which further helps the country's economic development. The recent attempts towards alignment of the Indian framework with foreign practices concerning the reference of third parties to arbitration proceedings will further promote India as a lucrative arbitration seat for both domestic and foreign arbitrations.

Additionally, this development will also ensure that arbitration remains a consensual process, upholding the principle of party autonomy while addressing the practicalities of resolving disputes within complex corporate structures in the present pretext.



*Image source: JAMS website, available [here](#).*



## SNIPPETS: LEGACY RECAP

**Mr Gagan Anand** and **Ms Vandana Randhawa** attended the FIDIC Asia Pacific Conference 2024, organized by the Society of Consulting Architectural and Engineering Firms in Kathmandu in Nepal, Kathmandu.

The conference saw **Mr Anand** as a Speaker of an esteemed panel undertaking a discussion on the 'Translation of Good Governance to Practical Reality, Acts, Regulations, Charter for Climate Shocks, and the Role of FIDIC, FIDIC Asia-Pacific'.

**Legacy Law Offices LLP** acted as one of the proud sponsors of the Conference.



**Mr Ishan Khanna** and **Ms Eshjyot Walia** attended the 4th Construction Claims and Dispute Management Summit 2024, organized in New Delhi by the Inventicon Business Intelligence Pvt. Ltd. The Partners actively participated in the roundtable discussions concerning the development and role of dispute resolution mechanisms in the efficient and effective resolution of construction claims.

In November 2024, the team of Legacy Law Offices LLP, comprising **Ms Sadiqua Fatma**, **Mr Ishan Khanna**, **Ms Tanvi Kakar**, and **Mr Tenzen Tashi Negi**, were invited to attend the 19th Foundation Day of Dedicated Freight Corridor Corporation of India Limited.

The event commemorated the various milestones achieved by the Authority in transforming the Indian Railways Freight Network.



To mark a perfect end to the year 2024, Legacy Law Offices was proud to report that **Ms Vandana Randhawa** became the First Female FIDIC Certified Procurement Specialist after taking an exam held by FIDIC Credentialing Limited. This achievement is a testament to the 2 decades' worth of expertise held by her in handling procurement-related tasks for national and international projects.





## EXAMINING UNILATERAL APPOINTMENT OF ARBITRATORS IN LIGHT OF THE RECENT SUPREME COURT JUDGMENT

*“The defining characteristic of arbitration law (particularly ad hoc arbitration) is that it allows freedom to the parties to select their arbitrators. This is unlike domestic courts or tribunals where the parties have to litigate their claims before a pre-selected and randomly allocated Bench of judges.” [1]*

In November 2024, the Hon’ble Supreme Court of India was confronted with an integral arbitration-related question. Whether the lists of arbitrators used by various Government Departments and Public Sector Organizations for referring cases to arbitrations amount to the defeating of the basic objective of arbitration vis-à-vis the equality clause provided under Section 18 of the Arbitration and Conciliation Act, 1996?

In response, the Hon’ble Court carried out a detailed study of the principles governing the law, whereafter an answer was given in the affirmative.

While observing that “the possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators”, the Hon’ble Supreme Court held that,

*Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties.*

*It also violates the nemo judex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act.” [2]*

The aforementioned judgment raised a relevant question concerning the preset lists, not only by the government institutions but also by various private parties, for arbitrators adjudicating their company cases while simultaneously bringing the method of arbitrator appointment under the limelight.

### **Circumstances Preceding the Judgment**

In August 2014, the Law Commission of India published its 246th Report, recommending certain amendments to the Arbitration and Conciliation Act, 1996. Amongst the various issues pointed out by the Commission, the Report specified that ‘A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.’ [3] In pursuance, to deal with the issue, a recommendation was made to ‘automatically disqualify those persons whose relationship with the parties fell within the purview of the categories specified by law’.



While placing reliance on the report, parties approached the Hon'ble Supreme Court in the case of **Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company**, [4] ('present case'), praying for the invalidation of procedures allowing the dominance of a single party on the appointment of arbitrators.

### Issues Preceding the Report

In its bid to become a five trillion-dollar economy, India has been investing deeply in developing the infrastructure sector. In furtherance, the Government is focussing on the promotion of the public-private partnership (PPP) model for project development. With this motive, a number of lucrative options are being offered to national and international private participants in exchange for their investments and support.

However, being a developing country, absolutely escaping the possibility of contractual disputes in all projects may not be achievable for India. Thus, while the government's new goal to transform the country into an arbitration hub lines well with the ambition of infrastructural growth, the inclusion of truly impartial and unbiased arbitration procedures is vital.

### Defining Independence and Impartiality

The terms 'independence' and 'impartiality' emerge from Section 12 of the Arbitration and Conciliation Act, 1996, in accordance with which a person who has been approached to act as an arbitrator has been mandated to disclose any indirect or direct circumstances which give rise to justifiable doubts regarding their independence and impartiality.

Even in the case of **VoestalpineSchienen GmbH v. Delhi Metro Rail Corporation Ltd** [5], the Hon'ble Supreme Court has held that

*"Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which is (sic) applied to all judicial and quasi-judicial proceedings."*

Prior to the case at hand, questions regarding the independence and impartiality of the arbitrators have always been answered in the negative, wherein the Hon'ble Courts have expressed the opinion that the mere inclusion of a person in the list of arbitrators of a government authority cannot ipso facto mean that there is an existing bias or even a real likelihood of bias.

However, in the present case, while holding that the judgment be held to have a prospective effect, the Hon'ble Bench disagreed with the VoestalpineSchienen judgment, and held that,

*"In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators."* [6]

### Examining the Effects of the Judgment on SAROD

The Society for Affordable Redressal of Disputes (SAROD) Rules have been the subject of a number of grievances on part of the contracts concerning road & highway construction projects.



Under clause 11.6 of the SAROD Rules, an arbitrator with more than 3 cases at hand has been prohibited from undertaking any more cases, whereas from the list of 68 arbitrators, the website of the Body shows that more than 30 have their hands 'full'. This fact is a prima facie concern towards the very foundation of the principles of party autonomy, wherein the choices of the members to appoint arbitrators have been restricted.

An additional restraint arises from clauses 4.3 and 4.4 of the Rules, in accordance with which a party has been obligated to pay a filing fee of INR 25,000 plus GST at the time of filing of the Notice of Arbitration and to further become a member of SAROD, which amounts to approximately INR 2 Lakhs.

Needless to mention, since the establishment of the Body, arbitration clauses concerning the procedures to be before SAROD have become adhesive for roads and highway construction projects.

A compulsion pertaining to the payment of a membership fee, as well as the filing fee, is rather conflicting with the basic principles governing arbitrations and fairness.

This observation has also been adopted by the Hon'ble High Court of Delhi in the case of **Rani Construction Pvt Ltd vs Union of India** [7], where the Court held that,

*Insistence on the part of the SAROD that the parties must take membership of SAROD as a pre-condition for taking necessary steps to constitute an arbitral tribunal as per its rules, impinges on the validity of the appointment procedure; amounts to failure to perform the function entrusted to the concerned institute under the procedure agreed to by the parties, and consequently attracts Section 11 (6) (c) of the A&C Act, 1996 and making it incumbent*

*on this Court to take requisite steps to constitute the arbitral tribunal."*

Not only this, but SAROD rules have been called out for a number of other complicated issues, which put the very principles of fairness, impartiality, and independence into question.

The judgments of the Hon'ble Supreme Court, read in consonance with the impact of the SAROD Rules, however, raise new hopes. By expressing a disagreement towards unilateral arbitrator appointment clauses in government contracts, the Hon'ble Court has opened a new window for the aggrieved contractors engaged in highways and road contracts.

#### **Transforming India into an Arbitration Hub**

*Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country.* [8]

As aforementioned, India has been striving to attain the tag of an 'arbitration hub'. In pursuance, other than the need to include provisions for welcoming international arbitrations, actions at a domestic level also become vital.

For two-fold progress in attaining the aforementioned goal with the projected infrastructural growth, it is essential that government contracts be amended to include clauses that do not offer an adverse presumption to private contractors regarding the resolution of disputes.

In light of this, it may be specified that the judgment of the Hon'ble Supreme Court in the present case is an undoubted step in the right way.



End Notes:

1. Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company, Civil Appeal Nos. 9486-9487 of 2019 before the Supreme Court of India.
2. *Id.*
3. 246th Report of the Law Commission of India.
4. *Supra* note 1.
5. VoestalpineSchienen GmbH v. Delhi Metro Rail Corporation Ltd., [2017] 1 SCR 798.
6. *Id.*
7. Rani Construction Pvt Ltd vs Union of India, ARB.P. 1011/2023.
8. *Supra* note 5 at 34.

## SNIPPETS: LEGACY RECAP

The year 2024 ends on a highly celebratory note for Legacy Law Offices LLP, as **Mr Gagan Anand** has been appointed as the **Vice Chair of the FIDIC Contracts Committee**. Having been appointed as a Member of the Committee only in March 2024, the present elevation speaks manifold on the great milestone held by Mr Anand.



In December 2024, **Mr Gagan Anand** acted as a Panelist for the FIDIC International Contract Users' Conference 2024 and undertook a discussion on FIDIC's Approach to PPP Contracts alongside other highly qualified experts in their fields.

## SEASONS' GREETINGS



Legacy Law Offices LLP extends its warm yet snowy greetings for Christmas. May all your wishes come true and the world becomes a better and greener place!



Legacy Law Offices LLP wishes everyone a very Happy and Prosperous New Year. May the year 2025 bring with it, loads of happiness and wealth in the lives of all.



**SAVE TREES! REDUCE  
POLLUTION! RECYCLE!  
GO GREEN!**



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Specialist advice must be sought about specific circumstances.

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