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Resolving disputes the 'Ordinance' way

By **Barnik Ghosh**

Introduction

The Arbitration and Conciliation Act of 1996 ('the 1996 Act') was an improvement on the Arbitration Act 1940 but did not manage to put an end to the long & dreary litigation tunnels for the disputing parties with a little help from the highest court of our land. India has gone through major changes in business and investment environment over the last 10 years. In the past fifteen years, there have been major and disruptive changes in the manner of doing business and overseas investments in India have increased multi fold. The legislative intent behind the recently introduced the Arbitration and Conciliation (Amendment) Ordinance, 2015(the Ordinance) is to make the business environment simpler and easier to navigate by allowing a quick and transparent dispute resolution mechanism. This article discusses certain highlights of this Ordinance.

Interim Measures

The first aspect which the Ordinance addresses is the applicability of the 1996 Act. Section 2 of the Ordinance amends Section 2 (2) of the 1996 Act by extending the applicability of Sections 9, 27 and (37) (1) (a) & (3) contained in Part 1 of the 1996 Act to international commercial arbitrations. This Ordinance, thus removes the dilemma caused by the judgment of the Supreme Court in *Balco* v *Kaiser Aluminium*, (2012) 9 SCC 552. After the *Balco* judgment, parties were freeto choose between either offshore arbitration without interim measures in India or Indian arbitration without the neutrality of a foreign seat. However, with the 2015 Ordinance, the parties can now choose a foreign seat of arbitration and still have the liberty to apply for interim protection in India.

This amendment sets the ground for attracting business houses into India and also allowing companies to settle for more flexible arbitration clauses in the agreements. The Ordinance also states that an interim measure issued by an arbitral tribunal seated in India is enforceable in the same manner as a court order.

Commencement of proceedings

Section 5 of the Ordinance provides that if an Indian court grants interim measures before an arbitration has commenced, the arbitration must start within 90 days (or such further time as the court orders). This is an amendment to Section 9 of the 1996 Act and is a method to ensure that the arbitrator proceedings commence at the earliest. Moreover, the Act has been amended to restrain the Courts from entertaining any application for interim relief once arbitration has commenced. The Court is empowered to entertain such an application only if it is convinced that the arbitration tribunal will be unable to provide effective

relief. This amendment is a very stringent one and it is highly unlikely that any Court shall pass any order of interim relief once arbitration has commenced. Thus, this amendment may be seen in negative light by some Indian business houses who have until now effectively used the interim relief mechanism to delay arbitration proceedings.

Appointment of Arbitrator

The Ordinance provides that the Courts should complete the appointment of an arbitrator expeditiously, preferably within a period of sixty (60) days. Moreover, the scope of the Courts power under Section 11 of the 1996 Act has been duly restricted to examine the validity of the arbitration clause alone. This is made more stringent by making this irrespective of any decision of the Supreme Court or any other court. The very act of restricting the scope of the Courts is a bold step and will discourage litigants from arguing beyond the validity of the arbitration clause of an agreement.

Neutrality

The Ordinance has also addressed the neutrality aspect of the arbitrator by spelling out extremely rigorous grounds. This reminds us of the Companies Act 2013 which had set the benchmarks for an independent director. The Ordinance sets very high standards of neutrality for the arbitrators and the list of disclosures to be provided by the arbitrators have been set out in Section 8 of the Ordinance. In order to understand the far reaching impact of the neutrality drive of the Ordinance, it shall be pertinent to note that the arbitrators are to disclose in writing the *existence of any past or present relationship or interest in any of the parties or the subject matter of the dispute either direct or indirect.* This very section shall sound as a death knell for many potential arbitrators who have been appointed despite their close relationship with one of the disputing parties. In public sector companies, it is an officer of a department is appointed as arbitrator and this section will put an end to such appointments. The neutrality guidelines so set out in the Ordinance is radical and shall deter any company from entering into any such agreement. It perhaps may be better if a panel of independent arbitrators are notified such that appointment of arbitrators become easier. Further, the relationship of the arbitrator with the counsel has also been put under scanner in the new Ordinance. This will definitely be opposed in several quarters and may need to be relaxed accordingly. A similarity can be drawn between the Ordinance and the Companies Act 2013 in regard to the provisions of neutrality.

Speedy Process

Section 29A has been inserted in the 1996 Act to address the issue of delay. As per this section, the arbitrators must issue an award within 12 months of their appointment. Further, the parties may agree to extend the period of passing of award by 6 months. However, sub-section (4) of Section 29A needs to be

perused in detail in this regard. The proviso to the said sub-section empowers the Court to reduce the mandate of the Arbitrator in the event Court finds that the proceedings have been delayed due to reasons attributable to the Arbitral Tribunal. This may have embarrassing consequences as the Arbitrators may be retired Supreme Court and High Court Judges who may not be comfortable with such provisions being enforced.

Section 29B has also been inserted to the 1996 Act vide Section 15 of the Ordinance. Section 29B provides for a fast track mode of arbitration procedure. As per Section 29B, parties may mutually decide to adopt the fast track mode of arbitration in which the Arbitrator has to decide and pass an award within six months of the date of reference. It shall be pertinent to note that only a Sole Arbitrator can be appointed in this case. Thus, if the parties intend to resort to the fast track method, the arbitration clause in the agreement has to be modified accordingly by specifically providing for a sole arbitrator to decide the dispute. The fast track arbitration proceedings shall be concluded and decided only on the basis of written pleadings and supporting documents. No oral hearing will be conducted unless requested by both parties. This may not be conducive as it is a long standing practice that oral arguments are necessary to determine a particular matter. The oratory skills of an advocate is being totally negated in this amendment and this may attract negative opinion from several sources.

Public Policy

"Public policy" is no more a wide ground to resist enforcement in India of an international commercial arbitration award or a foreign award. The scope of public policy has been limited to include fraud or corruption or cases of conflict with the fundamental policy of Indian law or basic notions of morality or justice. This amendment will nullify judgments such as *ONGC* v *Saw Pipes* (2003) 5 SCC 705 and *DDA* v *R.S. Sharma* (2008) 3 SCC 80, which had expanded the scope of Indian public policy under the 1996 Act. Similar amendments have also been introduced in Sections 48 and 57 making the test of public policy a uniform one for domestic and international awards.

Conclusion and Way Forward

Though the Ordinance has ushered a positive change, some gaps remain and in others the provisions are not far reaching in their scope as was initially recommended by the Law Commission. Moreover, in order to bring arbitration in India as the preferred mode of settling commercial disputes between companies, it is recommended that the process of mediation and arbitration be merged. For disputes having lower quantum of money involved, a timeline of 90 days may be provided to resolve the disputes and a lesser amount may be assigned as the costs to be incurred as expenses for conducting the arbitration. The necessity of having an Arbitration Agreement also needs to be dispensed with. This will ensure that even in

the absence of an arbitration agreement, the parties can approach the Arbitral Tribunal. The Ordinance also needs to pass the litmus test of practical implementation. It has an effect for a limited time period and it remains to be seen whether the Ordinance will go through as an Act of the Parliament in the days to come.

[The author is a Senior Associate, Corporate Practice, Lakshmikumaran & Sridharan, Kolkata]

Arbitration Ordinance, 2015 –'Public Policy' defined

By **Anup KoushikKaravadi**

In order to facilitate the ease of doing business, the Government of India ('Government') ,intends to overhaul the regulations governing business by abolishing many outdated laws and making extensive changes to the existing ones to allow companies to concentrate on their business and profits. The Government has introduced the Arbitration and Conciliation (Amendment) Ordinance, 2015, ('Ordinance') which was promulgated by the President of India on 23rd October, 2015 to remove the anomalies in the existing dispute resolution framework for expeditious resolution of commercial disputes.

The Ordinance introduces several changes to the Arbitration & Conciliation Act 1996 ('Arbitration Act') to increase fairness, make the process economically sound for the parties participating in resolution of disputes through arbitration; and most importantly, reduce extensive judicial intervention in arbitration matters.

Even though arbitration was proposed to be less complicated and faster than the primordial legal proceeding in Courts, judiciary played a very large role before the commencement or during and even after the completion of the arbitral proceedings.

Section 34 of the Arbitration Act enables the parties to an arbitral award to file an application with the Courts seeking for setting aside the arbitral award after the same is passed by an arbitral tribunal. Section 34(2)(b)(ii) empowers the Courts to set aside the arbitral award if an award is in conflict with the 'public policy of India'. Additionally, the courts are empowered to refuse the enforcement of a foreign award at the request of a party against whom it is invoked on the ground that the arbitral award is contrary to the 'Public Policy of India' under Section 48(2)(b).

The ground that an arbitral award is in conflict with the public policy of India had turned out to be one of the best defense available for the losing party to challenge the arbitral award.

As the term 'Public Policy' is not defined, either in the Arbitration Act or in any other statute , the Supreme Court, in various cases has accepted that the term public policy is like an 'untrustworthy guide' or an 'unruly horse' but from time to time considerably extended the meaning of this term to permit judicial intervention on arbitration awards.

Interpretation of the term 'Public Policy'

The Supreme Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.* [(1994) SCC Supp. (1) 644] ('*Renusagar* Case') while dealing with the provisions of the Arbitration Act, 1940, had held that the enforcement of foreign award is to be refused on the ground if it is contrary to public policy and if its enforcement would be contrary to (i) fundamental policy of India; or (ii) the interests of India; or (iii) justice or morality.

Subsequent to the said interpretation which had a limited impact on the way the courts interfered with the arbitration proceedings, the division bench of the Supreme Court in *Oil and Natural Gas Corporation Limited* v. *Saw Pipes Ltd.* [(2003) 5 SCC 705] ('*Saw Pipes* Case') broadened the scope of the term 'public policy' to include 'patent Illegality' in addition to the attributes as mentioned by the Supreme Court in the *Renusagar* Case. Further, the Court had clarified that the illegality as referred to must go to the root of the matter and illegality trivial in nature cannot lead an award to be against public policy.

It is relevant to note that the Supreme Court in its decisions in *McDermott International Inc.* v. *Burn Standard Coal Company* [(2006) 11 SCC 181] *and Centrotrade Minerals & Metals Inc.* v. *Hindustan Copper Limited* [(2006) 11 SCC 245] had acknowledged the criticism against the interpretation provided in the *Saw Pipes* Case. However, they chose to abide by the said decision as the same was binding upon them.

Further, while dealing with the question of enforcing the foreign arbitral award, under Section 48 of the Arbitration Act, the Delhi High Court in *Glencore Grain Rotterdam B. V.* v. *Shivnath Rai Harnarain (India) Co.* [2008 (4) ARB LR 497 (Del)], followed *Renusagar* in tandem with the Explanation provided under Section 48(2) of the Arbitration Act. It was held that the scope and ambit of the expression 'public policy of India' must necessarily be construed narrowly to mean the fundamental policy of India and, as clarified by the Explanation to Section 48(2), conflict with the public policy must involve an element of fraud or corruption. Such a limitation in the interpretation of the term is required.

246th Law Commission Report

After considering the above provided interpretations of the Indian judiciary, the Law Commission of India in its 246th Report, proposed an amendment of Section 34 relating to grounds for challenge of an arbitral award, to restrict the interpretation of the term "Public Policy of India" by furnishing an explanation stating that only where making of award was induced or affected by fraud or corruption, or it is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice, the award shall be treated as one against the public policy of India.

However, the term 'fundamental policy of India' was constructed widely by a three-judge bench of Supreme Court in *ONGC Ltd.* v. *Western Geco International Ltd* [2014 (9)SCC 263]. The court referred to three distinct and fundamental juristic principles to be a part of fundamental policy of Indian law. It was held that firstly, adoption of a judicial approach, in a fair, reasonable and non-arbitrary manner in determination of rights is an essential part of fundamental policy of India. Secondly, determining the rights and obligations in accordance with principles of natural justice and by recording reasons for decision; and thirdly, decision should pass the test of *Wednesbury* principle of reasonableness, meaning, the decisions should not be so perverse or so irrational that no reasonable person would have arrived at the same.

It may be argued that such an extensive interpretation of the term 'fundamental policy of India' distorts the objective of the Arbitration Act and international practice. Further, such an interpretation may make the amendment suggested to Section 34 of the Arbitration Act by the Law Commission through its 246th Report non-effective. In light of these developments even though the Law Commission of India had given its recommendations for amending the Arbitration Act in the month of August, 2014, it rightly felt the necessity to give a supplementary to Report No. 246 exclusively on the concept and regime of 'Public Policy of India' and had further contained the said term by defining 'fundamental policy of India'.

The Codification – Ordinance

It may be noted that the Ordinance had included the following Explanations in Section 34 to achieve the objective of the Arbitration Act:

'Explanation1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

- The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or
- It is in contravention with the fundamental policy of Indian law
- It is in conflict with the most basic notions of morality or justice

Explanation 2:- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.'

It is indeed a welcome move towards simplifying dispute resolution through arbitration and in the view of the said inclusion of the definitions to the terms 'Public Policy of India' and 'fundamental policy of India' it remains to be seen whether 'Public Policy' will be constructed narrowly, addressing the major concerns of investors by reducing judicial interference and improving the efficacy of dispute resolution.

[The author is a Principal Associate, Corporate Practice, Lakshmikumaran & Sridharan, Hyderabad]

Notifications & Circulars

Fraud reporting by auditors - Commencement of Sections 13 & 14 of the Companies (Amendment) Act, 2015: Provisions of Sections 14 and 15 the Companies (Amendment) Act, 2015 (21 of 2015), that amend Sections 143 and 177, respectively, of the Companies Act, have come into force from the 14-12-2015. MCA Notification S.O. 3388(E), dated December 14, 2015 has been issued in this regard.

Section 13 of the Amendment Act amends sub-section (12) of Section 143 which now provides that if the fraud being reported by the auditor involves amount less than the specified amount, the auditor is required to report the matter to the audit committee or to the Board. Further, it is provided that auditors, who have filed a report under this sub-section to the audit committee or the Board but not to the Central Government, shall disclose the details of the fraud in the Board's report. Sub-section (12) prior to this amendment provided for reporting only to the Central Government by the auditor if he in course of performing his duty, has reason to believe that there has been an act of fraud of such prescribed amounts committed by the Company or any of its employees. Section 14 of the Amendment Act provides an additional proviso to Section 177(4)(iv) stating that audit committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as may be prescribed. Sub-section 177(4) provides that every audit committee shall act in accordance with the terms of reference in writing of the Board. It includes subsequent modifications of transactions with related parties.

It may be noted that consequential amendments have also been made in Companies (Audit and Auditors) Rules, 2014 by Notification No. G.S.R. 972(E), dated 14-12-2015, and to the Companies (Meetings of Board and its Powers) Rules, 2014. Amendment to the Audit Rules, 2014 while revising Rule 13 also considerably reduces the time within which the matter has to be reported to the Central Government/ audit committee.

SEBI (LODR) Regulations, 2015 amended: The Securities Exchange Board of India has amended Regulation 34 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Regulation 34 requires all listed entities to submit annual reports to the stock exchange within 21 days of it being approved in the annual general meeting of the listed entity. Regulation 34(2)(f) as amended by Notification No. SEBI/LAD-NRO/GN/2015-16/27, dated December 22, 2015 (as effective from 1-4-2016) now mandates the top 500 listed entities, instead of the top 100 listed entities, based on market capitalization to include the business responsibility report, describing the initiatives taken by them from an environmental, social and governance perspective, in the format as

specified by SEBI. The listed entities other than top 500 listed companies and listed entities which have listed their specified securities on SME Exchange, may include these business responsibility reports on a voluntary basis in the format as specified.

Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000 amended: The Reserve Bank of India has made amendments to the Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000. According to RBI Notification FEMA. 357/2015-RB dated 7-12-2015, in Regulation 5, after sub-regulation (2)(b), sub-regulation (c) would be added in respect of manner of payment. Now any mode of payment that is in accordance with the directions issued by the Reserve Bank of India to authorized dealers from time to time has also been prescribed for payments for import into India.

Interest Equalisation Scheme on Pre and Post Shipment Export Credit: Reserve Bank of India has allowed exporters to avail the Interest Equalisation on Pre and Post Shipment Rupee Export Credit. The scheme is effective from April 1, 2015. For the period April 1, 2015 to November 30, 2015, banks are required to identify eligible exporters as per Government of India Scheme and credit their accounts with the required interest equalisation amount. From the month of December, 2015 onwards, banks are required to reduce the interest charged to eligible exporters on interest rates on advances by the rate of interest equalisation provided by the Government of India. Interest equalisation can be availed by eligible exporters only during the period of the scheme being in force. It can avail the benefit from the date of disbursement up to the date of repayment or up to the date beyond which the outstanding export credit becomes overdue. RBI Notification RBI/2015-16/259 DBR.Dir. BC.No.62/04.02.001/2015-16, dated 4-12-2015 issued in this regard also prescribes procedure for claiming reimbursement of interest equalisation benefit already passed on to eligible exporters.

Mobile Banking Transactions – Operative guidelines for banks – Customer Registration: Recognizing high density of population in India, RBI has instructed all banks to provide mobile channels to customers in order to widen the access to banking services. The National Payment Corporation of India has developed mobile banking services/ option for National Finance Switch (NFS). RBI Notification RBI/2015-16/269 DPSS. CO.PD.No./1265/02.23.001/2015-2016 dated 17 December 2015 isssued for the purpose instructs all banks that participate in NFS to carry out necessary changes in their respective ATM switches and provide customer registration for mobile banking at all their ATMs latest by 31st March, 2016. Further, Banks are required to spread awareness regarding mobile banking services and customer registration through multiple channels.

Ratio Decidendi

Takeover Regulations - Determination of Minimum Offer Price: The Supreme Court of India has in a dispute involving SEBI (Substantial Acquisition of Shares and Takeovers), 1997, decided on the question as to whether previous or contemporaneous acquisitions by the acquirers or persons acting in concert will be considered for computing the minimum offer price.

The appellant was desirous of acquiring 28.09% of shareholding in the target company which was set-up in collaboration with HSIDC. In terms of thejoint venture agreement, the appellant had an underlying obligation to buy back the shares of HSIDC in the target company. The aforesaid arrangement was also approved by HSIDC as a result of which the appellant was to assume the obligation to buy back the shares of HSIDC in the target company. However, according to a complaint filed with SEBI it was found that certain PACs of the appellant had bought shares belonging to HSIDC as part of the buyback obligation, at a much higher price.

With respect to whether the transaction involving the purchase of shares by the appellant from HSIDC was exempt from the mandatory offer requirements, the Apex Court held that that although Reg. 3(i) of the Takeover Regulations, 1997 exempted *"transfer of shares from state level financial institutions … to co-promoter(s) of the company pursuant to an agreement between such financial institution and such co-promoters"*, the aforesaid exemption operated only to the extent that the acquirer does not have to make a mandatory offer. It was held that even though the offer of buy-back by the PAC(s) of the appellant was exempted from mandatory offer requirements, the price of such offer shall still be taken into account for the purpose of determination of the minimum offer price.

Further the Court rejected the contention that since the transaction between the PAC(s) and HSIDC fell through due to financial difficulties on the part of the acquirers, the Regulations were not triggered. The contention that the purchase price for the acquisition of shares from HSIDC was to be paid in installments, and that the unpaid amounts were represented by post-dated cheques issued by the acquirers in favor of HSIDC which were dishonored on presentation was also rejected by the Apex Court. It opined that post-dated cheques amounted to a promise to pay and that promise would be fulfilled on the date mentioned on the cheque. Placing reliance on subsequent definition of 'acquisition' meaning directly or indirectly acquiring or agreeing to acquire shares or voting rights in, or control over, a target Company, it was observed that an acquisition takes place the moment the acquirer decides or agrees to acquire, irrespective of the time when the transfer stands completed in all respects. It was held

that the definition explicates that the actual transfer need not be contemporaneous with the intended transfer and can be in future. [*A.R Dahiya* v. *SEBI* – Civil Appeal No. 2727 of 2006 decided on 26-11-2015, Supreme Court]

Competition law – CCI to follow principles of natural justice: Competition Appellate Tribunal has held that Chairperson of the Competition Commission of India (CCI), who did not hear arguments of the learned counsel representing the appellants, cannot become a party to the final order passed under Section 27 of the Competition Act, 2002. The Tribunal hence set aside the Order passed by the CCI in 2012 imposing penalty of more than Rs. 6100 crore on various cement manufacturers. The CCI had found the specified cement manufacturers and Cement Manufacturers Association guilty of having acted in violation of Section 3(3)(a) and 3(3)(b) read with Section 3(1) of the Competition Act, 2005.

The Tribunal in this regard held that mere fact that by virtue of substituted Section 22, the business of the Commission is required to be transacted in its meetings, it cannot lead to an inference that while deciding the allegations contained in the information filed and passing orders, the Commission exercises purely administrative power or discharges administrative functions. It was held that that while passing orders under the specified provision of the Competition Act, the CCI is required to act as per the accepted standard of fairness and render just decision after complying with the principles of natural justice. It was observed that procedure required to be followed by the Director General for conducting investigation and by the Commission for passing of orders/issue directions under Section 27 and/or the various provisions is akin to the procedure required to be followed by the Civil Court.

The COMPAT also observed that signing of each page of the Orders by the Chairperson strongly indicated the fact that those were authored by him and not by any of the other six Members, who had heard the arguments. The Tribunal though noted that while discharging adjudicatory functions of the Commission, all Members enjoy coordinate position vis-à-vis Chairperson, but held that influence of the Chairman, who is over-all in-charge of the Commission and plays a pivotal role in the functioning of the body, on the decision-making process cannot be subtle.

Remanding the matter to the CCI for passing fresh orders after hearing the parties, the Tribunal stated that time has come for the Commission to evolve a comprehensive protocol and lay down guidelines for conducting investigation/inquiry in consonance with the rules of natural justice. [*Lafarge India Limited and Ors* v. *Competition Commission of India* - Appeal No. 105, 103, 104, 106, 107, 108, 109, 110, 111, 112, 113, 122, 123, 124, 125, 126, 127, 128, 129, 132, 133, and 134 of 2012, decided on 11-12-2015, COMPAT]

NEW DELHI
5 Link Road,
Jangpura Extension,
Opp. Jangpura Metro Station,
New Delhi 110014

B-6/10, Safdarjung Enclave
New Delhi - 110 029
Phone : +91-11-4129 9811
E-mail : lsdel@lakshmisri.com

MUMBAI
2nd floor, B&C Wing,
Cnergy IT Park,
Appa Saheb Marathe Marg,
(Near Century Bazar)Prabhadevi,
Mumbai - 400025.
Phone : +91-22-24392500
E-mail : lsbom@lakshmisri.com

CHENNAI
2, Wallace Garden,
2nd Street
Chennai - 600 006
Phone : +91-44-2833 4700
E-mail : lsmds@lakshmisri.com

BENGALURU
4th floor, World Trade Center
Brigade Gateway Campus
26/1, Dr. Rajkumar Road,
Malleswaram West, Bangalore-560 055.
Ph: +91(80) 49331800
Fax:+91(80) 49331899
E-mail : lsblr@lakshmisri.com

HYDERABAD
'Hastigiri', 5-9-163, Chapel Road
Opp. Methodist Church, Nampally
Hyderabad - 500 001
Phone : +91-40-2323 4924
E-mail : lshyd@lakshmisri.com

AHMEDABAD
B-334, SAKAR-VII,
Nehru Bridge Corner, Ashram Road,
Ahmedabad - 380 009
Phone : +91-79-4001 4500
E-mail : lsahd@lakshmisri.com

PUNE
607-609, Nucleus, 1 Church Road,
Camp, Pune – 411 001. Maharashtra
Phone : +91-20-6680 1900
E-mail : lspune@lakshmisri.com

KOLKATA
2nd Floor, Kanak Building
41, Chowringhee Road, Kolkatta-700071
Phone : +91-33-4005 5570
E-mail : lskolkata@lakshmisri.com

CHANDIGARH
1st Floor, SCO No. 59, Sector 26,
Chandigarh - 160026
Phone : +91-172-4921700
E-mail : lschd@lakshmisri.com

GURGAON
OS2 & OS3, 5th floor,
Corporate Office Tower,
AMBIENCE Island, Sector 25-A,
Gurgaon- 122001
Phone: +91- 0124 – 477 1300
Email: lsgurgaon@lakshmisri.com

EUROPE
Lakshmikumaran & Sridharan SARL
35-37, Avenue Giuseppe Motta, 1202 Geneva
Phone : +41-22-919-04-30
Fax: +41-22-919-04-31
E-mail : lsgeneva@lakshmisri.com