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CITIBANK, N.A.

v.

TLC MARKETING PLC AND ANR.

OCTOBER 5, 2007

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[LOKESHWAR SINGH PANTA, J.]

*Arbitration and Conciliation Act, 1996:*

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*ss. 2(f), 7, 11(5), 11(10) and 11(12) r/w ss. 10 and 21—‘International Commercial arbitration’—Application for appointment of sole arbitrator—A tripartite agreement amongst parties for “free return flight vouchers” to eligible credit card customers of applicant Bank—Violation of—Notice by applicant-Bank invoking arbitration clause of agreement and suggesting a name for appointment as sole arbitrator—Respondent repudiating claim and declining to accept the nomination suggested—Application by Bank u/ss. 11(5), 11(10) and 11(12) read with s. 10 of the Act for appointment of sole arbitrator in ‘international commercial arbitration’—Application resisted on grounds that notice was vague as no particular dispute was sought to be referred and terms of agreement were limited to obligations of parties arising prior to expiration of agreement—Alternative plea of appointment of arbitral tribunal comprising three arbitrators—HELD: Disputes arising out of the arbitration agreement between parties are covered under the definition of “international commercial arbitration” in terms of s. 2(f)—Parties entered into an arbitration agreement as provided u/s 7—The contract is a commercial document and must be interpreted in a manner to give efficacy to contract rather than to invalidate it—Narrow technical approach is not proper—On facts, existence of arbitration agreement was accepted and matter was suggested to be referred to an arbitral tribunal—Requirement of s. 10(2) is fully attracted, there being arbitration agreement deemed to be one providing for a sole arbitrator—A composition of arbitral tribunal comprising three arbitrators is not necessary or expedient nor can it*

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*be said to be fair and reasonable in larger interest of parties keeping in view the objectives of Act to make arbitral proceedings less expensive and more efficacious—In the circumstances, taking into consideration the fact that disputes and differences between parties emanating from the contract are required to be resolved through arbitration, sole arbitrator is appointed—Credit cards—Agreement for “free return flight vouchers” to cardholders—Violation of—Remedy—Deeds and Documents—Commercial documents—Interpretation of.*

*Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority, [1988] 2 SCC 338, held inapplicable.*

CIVIL ORIGINAL JURISDICTION : Arbitration Petition/  
Application No.1 of 2007.

(Under Section 10(2) read with Sections 2(f), 11(5), 11(10) and 11(12) of the Arbitration and Conciliation Act, 1996.

R.S. Suri for the Petitioner.

A.K. Ganguly, Soli J. Sorabjee, Nikhil Nayyar, Ankit Singha, TVSR Sreyas and N. Ganpathy for the Respondents.

The following Order of the Court was delivered

### ORDER

1. The applicant-Citibank, N.A. preferred this application under Sections 11(5), 11(10) and 11(12) read with Section 10 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as ‘the Act’] praying for appointment of sole Arbitrator in an ‘international commercial arbitration’ in terms of Section 2(f) of the Act, to adjudicate the dispute between the parties.

2. The applicant-Citibank, is a national banking association duly constituted, registered and in existence in accordance with the laws of the United State of America now in force and having its head office at 399 Park Avenue, Borough of Manhattan, City of New York and having an office in India among other places at Citigroup Centre, G. C-61, Bandra-Kurla Complex, Bandra (East), Mumbai. The applicant-Citibank,

A being engaged in banking business in India pursuant to licences and approvals from relevant authorities including Reserve Bank of India, *inter alia*, issues Credit and Debit Cards collectively [hereinafter referred to as 'Citibank Cards'].

B 3. The respondent No.1-TLC Marketing PLC (for short 'TLC'), is a company incorporated under the provisions of the laws in force in the United Kingdom having its registered office at 54, Banker Street, London W1U 7BU. TLC is a company engaged in the business of marketing and selling *inter alia* leisure, life-style and travel services.

C 4. The respondent No. 2-Wunderman India Pvt. Ltd. (for short 'WIPL') is an Indian company incorporated under the provisions of the Companies Act, 1956 and has its registered office at Kalpataru – Synergy, 2nd Floor, Opp. Grand Hyatt, Off Western Highway, Vakola, Santa Cruz (East), Mumbai. Respondent No. 2-WIPL is an exclusive marketing and fulfilling agent of respondent No.1-TLC for the Indian sub-continent.

E 5. The applicant-Citibank states that the respondents-TLC and WIPL are the *alter ego* of each other and their interests are identical, co-existent and co-terminus and for all practical purposes they are one party and their obligations are joint and several in respect of the subject-matter of the present application. It is the case of the applicant-Citibank that in September, 2005, both the respondents-TLC and WIPL had approached the Citibank and made a series of claims and representations about their expertise, background, financial wherewithal and intent to associate with the applicant-Citibank to implement a Scheme to reward and acknowledge the valued association of loyal customers of the applicant- Citibank. The respondents-TLC and WIPL represented to the applicant-Citibank that they were the promoters and incentive companies operating in various markets around the world and they could offer their clients fabulous consumer propositions and the corresponding service to support such promotions in order to help their clients to meet their objectives such as customer retention, loyalty, etc. etc. Respondent No.2-WIPL further represented to the applicant-Citibank that its proposition was designed to meet the expectations desired to be achieved by the

applicant-Citibank. It is pleaded by the applicant-Citibank that relying on the said claims, assurances and representations made by the respondents-TLC and WIPL, as regards their expertise in handling such arrangements, a tripartite agreement was entered into between the parties on 04.10.2005. The agreement became operational w.e.f. 01.10.2005 and was to be valid till 31.08.2006.

6. It is pleaded by the applicant-Citibank that under the Scheme it was agreed to by the parties to the agreement that the eligible credit card customers of the applicant-Citibank, having fulfilled certain specific criteria, were entitled to 'Free return flight vouchers' on air routes within India subject to the applicable terms and conditions. As and when, any of the customers of the applicant-Citibank qualified/fulfilled the eligibility criteria he/she would get a voucher from the applicant-Citibank. The customers, after the receipt of the vouchers, had the option to voluntarily complete the details required in the voucher including the choice of three destinations and three dates of travel but not earlier than 30 days from the date of signing the voucher and sending the same to the applicant-Citibank. The respondent No.2-WIPL was required to perform various tasks including, but not limited to contacting the customer, checking seat availability, confirming the booking request according to preferences and sending confirmation to customers of their preference of travel date/destination. The applicant-Citibank and the respondents - TLC and WIPL agreed to the Scheme called the "Fly for Sure" programme, which was envisaged by the applicant-Citibank to be effective from 01.10.2005 until 31.12.2005. The applicant-Citibank contracted for buying 1,00,000 return air-ticket vouchers from the respondents-TLC and WIPL in anticipation of the success of the Scheme for a consideration of Rs.432/- plus applicable taxes per voucher and, accordingly, had paid for the same in accordance with Appendix-II of the agreement. According to the applicant-Citibank, it was the responsibility of the respondents-TLC and WIPL to ensure fulfillment of the Scheme to the satisfaction of the customers. It is stated that under the Scheme, 35,000 card members of the applicant-Citibank were found to be eligible for availing of the 'free return air-ticket' to be provided by the respondents-TLC and WIPL. The applicant-Citibank forwarded the vouchers completed by the eligible and

- A interested card members to respondent No.2-WIPL in accordance with the procedure agreed to by the parties. The vouchers/requests forwarded by the applicant-Citibank were to be honoured by the respondents-TLC and WIPL by conducting themselves in a manner as stipulated under the agreement. It is further stated that the respondents-TLC and WIPL could
- B only have offered alternative dates or destinations to the customer(s) after having obtained the consent of the said customer(s) towards such alterations.

7. It is also stated that at the initial stage the operation and implementation of the Scheme progressed as per the agreement between the parties. However, since January, 2006 the applicant-Citibank started receiving complaints from its eligible customers indicating deficiencies on the part of the respondents-TLC and WIPL. Both the respondents seemed to have started indulging in a number of questionable practices, such as
- D deliberately not fulfilling/honouring their commitments which they had made to the eligible customers/card members in the 'booking confirmation' by calling them on the dates close to their travel dates and forcing them to postpone dates of travel and further pressurizing the customers/card members into opting for destinations and dates not preferred/requested
- E for and cancelling the original 'booking confirmations'. The applicant-Citibank through various communications has brought all the complaints to the notice of the respondents-TLC and WIPL and repeatedly requested both of them to discharge their commitments as contained in the agreement. It is stated that in spite of repeated communications being sent by the
- F representatives and officials of the applicant-Citibank to the respondents-TLC and WIPL, they merely gave assurances and no actual measures were undertaken by the respondents to solve such complaints of the customers. The applicant-Citibank indicated various instances of breaches of the terms of the agreement which were being repeatedly committed
- G by the respondents-TLC and WIPL that needed to be remedied, failing which the applicant-Citibank stood in a position of incurring irreparable losses, loss of goodwill and reputation along with the possibility of being subjected to various proceedings that were being threatened by the affected customers. The responses dated 30.04.2006 and 04.05.2006
- H received from the legal counsel of respondent No. 1-TLC indicated that

the respondents have found the Scheme to be 'over sold' and allegedly to be commercially unviable to honour the commitments and there was a clear indication in the said responses of abdication on the part of the respondents-TLC and WIPL of their responsibilities and obligations under the agreement inasmuch as new conditions to perform the obligations were set out which suggested payment of further amount which was de hors the terms of the agreement itself. It is also submitted that in the circumstances created by the respondents-TLC and WIPL, the applicant-Citibank vide its letter dated 10.05.2006 informed the respondents-TLC and WIPL of the termination of their involvement under the agreement w.e.f. 10.05.2006 which was necessitated due to the acts of omission and commission on their part and continued loss of goodwill and reputation of the applicant-Citibank. The applicant-Citibank, subsequent to the termination of the involvement of the respondents-TLC and WIPL under the agreement, was compelled to take the remedial action of providing return air-tickets to its eligible customers/card holders. In view of the failure of the respondents-TLC and WIPL to perform their respective obligations in terms of the agreement and in order to resolve the disputes, the applicant-Citibank issued a legal notice dated 15.07.2006 through its counsel to the respondents-TLC and WIPL, thereby invoking the provisions of Clause 10 of the agreement dealing with the resolution of disputes which have arisen between the parties. The applicant-Citibank in the said notice suggested the name of Hon'ble Mr. Justice S. P. Bharucha, Former Chief Justice of India, to act as the sole Arbitrator.

8. In response to the legal notice dated 15.07.2006 of the applicant-Citibank, respondent No. 1-TLC vide its communication dated 14.08.2006 and respondent No. 2-WIPL vide its communication dated 11.08.2006 not only repudiated the claim of the applicant-Citibank, but also declined to accept the nomination of Hon'ble Mr. Justice S. P. Bharucha, Former Chief Justice of India, as the sole Arbitrator. They recommended the disputes to be referred to arbitration comprising of three arbitrators, one nominated by each of the three parties to the agreement. They proposed the name of Hon'ble Mr. Justice M. H. Kania, Former Chief Justice of India, to be appointed as an Arbitrator.

9. In the above stated premises, the applicant-Citibank has now filed

A the present application praying for the appointment of sole Arbitrator in terms of the agreement and the law.

10. In response to the application, respondent No. 1-TLC submitted that the Scheme offered by the applicant-Citibank to its qualified card members was not the Scheme contracted for in the agreement and, therefore, in any event there could be no liability on respondent No.1-TLC for any alleged loss or damage under the agreement. It is stated that the application is not maintainable inasmuch as no valid notice invoking arbitration under Section 21 of the Act has at all been issued and notice dated 15.07.2006 does not even state as to what are the losses alleged to have been suffered which the applicant-Citibank seeks to claim in the arbitration proceedings. The said notice is very vague as no particular dispute or claim is sought to be referred to and it does not state what, if any, losses were caused to the applicant as a result of the alleged breach of the agreement. It is also submitted that the terms of the agreement are limited to the provisions of warranties, confidentiality, indemnification, governing law and obligations of parties arising prior to the expiration or termination. There is no valid or binding arbitration clause in existence on and with effect from 10.05.2006, i.e. the date of wrongful repudiation of contract by the applicant-Citibank, which was accepted by the respondents, therefore, there exists no dispute that needs reference to the arbitration. It is contended that the respondents-TLC and WIPL are separate and different companies incorporated in different jurisdictions, with different ownership and control and under no circumstances can they be treated as one party. It is clarified that the applicant-Citibank did not strictly incorporate the terms of Appendix-V to the agreement in its offer to its card members, but offered a Scheme in material variation without the consent of respondent No. 1-TLC, a fact which came to its knowledge only after the offer was sent out by the applicant-Citibank. Further, it is stated that the conditions required for satisfaction of Sections 11(5), 11(10) and 11(12) of the Act are not satisfied by the applicant-Citibank and, therefore, on the above-stated premises, the application is liable to be dismissed.

11. Shri T. R. Ramachandran, Business Manager-Credit Cards of the applicant-Citibank in rejoinder affidavit has reiterated and reasserted

the averments made in the arbitration application and repudiated the defence pleaded by respondent No. 1-TLC in its counter affidavit. It is submitted that notwithstanding the obligations of the respondents-TLC and WIPL as provided for in the agreement, they had repeatedly refused to take action to correct the breaches of the agreement as intimated by the applicant-Citibank. Further, in the e-mail dated 21.04.2006 sent by Mr. Sean Langley (Operations Director), followed by communication dated 04.05.2006 sent through counsel, respondent No. 1-TLC had offered two "options" for proceeding, each of which would have modified substantially the prior agreement without addressing or correcting the breaches cited by the applicant-Citibank, i.e. failing to rectify their failure to provide return tickets to the eligible customers/card members as envisaged under the agreement and as such the offer in question per se tantamounts to a fundamental breach of the agreement on the part of the respondents-TLC and WIPL. It is also stated that irrespective of the number of the customers who would have redeemed their vouchers, in terms of Clause 7 and, in particular, Appendix-I to the agreement, it was clearly the responsibility of the respondents-TLC and WIPL to ensure fulfillment of the Scheme to the satisfaction of the customers.

12. No counter has been filed by respondent No.2-WIPL.

13. I have heard learned counsel for the parties and perused the record.

14. Mr. R. S. Suri, learned counsel appearing for the applicant contended that Citibank had received various complaints from thousands of its eligible customers indicating series of deficiencies on the part of the respondents-TLC and WIPL in implementation of the Scheme offering 'Free return flight voucher' and 'World for free destinations' to such Citibank card- members, who have fulfilled certain specified criteria on selective domestic air routes in India and the applicant-Citibank taking serious note of the said complaints, sent various communications and repeatedly requested the respondents-TLC and WIPL to comply with the terms of the agreement, but both the respondents have failed to settle the dispute amicably. He submitted that in order to save its goodwill, reputation and high standards of service and to mitigate the damages



A directly resulting from the breach of the terms of the agreement, the applicant-Citibank was compelled to take the remedial action of providing return air tickets to its eligible customers/card members, the expenses of which were, of course, to be borne by both the respondents as provided in the agreement and the circumstances created by the respondents-TLC  
B and WIPL manifestly provided grounds for termination of the agreement under Clause 23 and having invoked the arbitration Clause 10, the applicant-Citibank had issued notices under Clause 24 to both the respondents requesting them to resolve the disputes/differences under the Act through a sole Arbitrator in terms of Section 10(2) of the Act.

C 15. Mr. A. K. Ganguli, learned Senior Advocate appearing on behalf of respondent No.1-TLC, resisted the aforesaid submissions of Mr. R. S. Suri. According to Mr. Ganguli, the applicant-Citibank has made vague assertion of existence of dispute and has not identified or pointed out as to what exactly is the dispute or precise claim, which has arisen for invoking  
D the arbitration clause, but despite the communications and representations made by respondent No.1-TLC to the applicant-Citibank to spell out the disputes which are referable to arbitration, no valid notice invoking arbitration clause has at all been issued to the respondent. He submitted that notice dated 15.07.2006 issued by the applicant-Citibank is vague  
E as it does not state as to what are the obligations which were breached and what, if any, loss was caused as a result of such alleged breaches to the applicant-Citibank. He next contended that the respondents-TLC and WIPL are separate and different companies incorporated in different  
F jurisdictions, with different ownership and control and under no circumstances can they be treated as one party as contended by the applicant-Citibank. He finally prays for the dismissal of the application. In support of the submission that there must be a precise dispute raised by the parties, reliance is placed in the case of *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority* [1988] 2 SCC 338. I have the  
G advantage of going through the said judgment in which it is held by this Court that the existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Arbitration Act, 1940. There can be a dispute only when a claim is asserted by one party and denied by other on whatever grounds. Mere  
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failure or inaction to pay does not lead to the inference of the existence of dispute. Further, it is observed that whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case. The proposition of law is well known and well-settled in the cited case but the said decision does not fully advance the case of the respondents-TLC and WIPL, in any manner, in the facts and circumstances of the present case.

16. Mr. Soli J. Sorabjee, learned senior counsel appearing on behalf of respondent No.2-WIPL, has sought to support the arguments of Mr. Ganguli. He made an alternative argument that if this Court is inclined to accept the prayer of the applicant-Citibank, then the dispute, if any, arising out of the agreement dated 04.10.2005 may be referred to an arbitral tribunal comprising of three arbitrators and selection/appointment of the third arbitrator may be left to the choice of the two named arbitrators already nominated by the applicant-Citibank and the respondents-TLC and WIPL jointly. I am afraid to accept this submission. A composition of the arbitral tribunal comprising of three arbitrators, in my considered opinion, is not necessary or expedient nor it can be said to be fair and reasonable in the larger interests of the parties because such an order may lead to burdening the parties to bear extra amounts of money in prosecuting the arbitral proceedings which as per the objectives of the Act are less expensive and more efficacious remedy to the parties to settle their disputes.

17. In the backdrop of the above narrated factual situation and respective contentions of the parties, the question that arises for consideration of this Court is whether in view of the various communications followed by reminders and legal notices sent by the applicant-Citibank to the respondents-TLC and WIPL whereby certain serious instances of complaints having been received from the eligible customers/card members regarding deficiencies in services rendered to them and other disputes/differences as set out in Appendix-II of the agreement and also having failed to provide 'Free return flight voucher' in relation to "Fly for Sure" programme in accordance with the provisions of Appendix-I to the agreement, an arbitration clause contained in the

A agreement could be invoked.

B 18. The tripartite agreement made by and entered into between the parties on 04.10.2005 is not in dispute. The agreement came into force w.e.f. 01.10.2005 and was valid till 31.08.2006, which could be extended by mutual consent on such terms as parties mutually agree in writing as per Clause 3.1 of the agreement. It appears from the record that respondent No.2-WIPL approached the applicant-Citibank and expressed its keen desire to be appointed as the Fulfillment Agency for implementation of 'Free return flight voucher' and 'World for Free destinations' Scheme of the applicant-Citibank and providing related services to the customers in terms of Clause 4 of the agreement. Respondent No. 1-TLC had agreed to ensure the performance by WIPL of its obligations under Clause 6 of the agreement. In terms of Clause 8, on representation having been made by the respondents to the applicant-Citibank, the parties had entered into the agreement on exclusive basis on the terms and conditions contained in the Appendix(s) and Enclosures attached and incorporated by reference as an integral part of the agreement. In order to appreciate the controversy in this matter, it is, therefore, necessary to refer to the relevant clauses of the arbitration agreement in relation to the dispute or controversies arising out of the said agreement. Clause 2.2 deals with "Services" and Clause E 2.3 defines "Free return flight voucher", whereas "World for Free destinations" is defined in Clause 2.4.

19. Clause 4 of the agreement dealing with "Services" reads as under:-

F "4. WIPL shall be liable and responsible to provide services to the Citibank and its customers in accordance with the provisions of Appendix-I hereto.

G TLC shall be liable and responsible for ensuring that WIPL provides the services to Citibank and its customers in accordance with the provisions of this Agreement including Appendix-I hereto."

20. Clause 7 of the Agreement envisages General obligation of WIPL and TLC.

H 21. Clauses 7.1, 7.2 and 7.2.2 read as under:-

“7.1 WIPL shall be solely responsible to provide services to Citibank and its customers in accordance with the provisions of Appendix-I. WIPL shall provide the effective services as per the Appendix-I to the customers of Citibank and act in the interest of both Citibank and its customers. WIPL hereby indemnifies Citibank and shall keep Citibank safe, harmless and indemnified from time to time and at all times hereafter, from and against (i) all loss, harm and injury suffered or incurred by Citibank, (ii) all claims, demands, customer complaints, suits, actions and/or proceedings either civil or criminal in nature, made or adopted against Citibank and (iii) all costs, charges and expenses suffered or incurred by Citibank directly or indirectly on account of or as a consequence of WIPL failing to fulfill any of its obligations under this Agreement and/or failing to fulfill all or any of its responsibilities and obligations under this Agreement and Appendix-I hereto.

7.2 WIPL and TLC hereby undertake to be solely liable and responsible, to the exclusion of Citibank, for all claims, demands, disputes, suits, actions and/or proceedings either civil or criminal in nature arising out of non-fulfillment of any of their obligations or responsibilities arising under this Agreement and the Appendix-I hereto.

7.2.2 .....

WIPL shall be solely and absolutely responsible for providing the Services and for issuing the free return flight vouchers in accordance with the provisions of Appendix-I, to the customers of Citibank as also for ensuring that the carriers with which it has entered into any arrangements in pursuance of this Agreement, strictly comply with their obligations and accept the honour of all return free flight vouchers issued to the customers of Citibank in pursuance of this Agreement.”

22. Clause 10 of the agreement is the arbitration clause, which is to the following effect:-

“10. The parties hereby agree that any controversy, claim or dispute

- A arising out of the interpretation, application or in connection with this Agreement which cannot be resolved amicably, shall be conclusively resolved by arbitration under Indian Arbitration and Conciliation Act, 1996 and any amendments made thereto. The place of arbitration shall be Mumbai and the arbitration shall be conducted in English language only.
- B This Agreement shall be governed by Indian Laws and shall be amenable to the exclusive jurisdiction of courts in Mumbai only.”

23. Clause 23 deals with “Termination of the Agreement” and reads as under:-

- C “23. Termination – Citibank may terminate this Agreement upon 30 days’ prior notice to WIPL and TLC in this behalf.

- D In the event that either Citibank on the one part and WIPL and TLC on the other part shall, at any time during the term of this Agreement, commit any material breach of any requirement, obligation and covenant and warranty herein contained, and shall fail to remedy such breach within 7 (seven) days after written notice thereof, the other party(ies) may at its/their discretion, and in addition to any other remedy that might be available in law or equity, terminate this Agreement by written notice to such effect.....”
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24. Clause 24 of the agreement prescribes giving of notice by either party.

- F 25. The obligations and responsibilities on the part of the parties to the agreement are incorporated in Appendix-I, which *inter alia* envisaged that respondent No. 2-WIPL shall be liable and responsible for ensuring that it would provide the required services to the applicant-Citibank and its eligible customers/card members in accordance with the terms of the agreement. The satisfactory service to be rendered by the respondents-TLC and WIPL was the material obligation on their part as per the terms of the agreement and it was a pre-requisite condition that the applicant-Citibank would pay a commission of cost of tickets in terms of Appendix-II to the agreement. Further, the respondents-TLC and WIPL jointly and severally undertook to indemnify the applicant-Citibank from and against
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all costs, charges and expenses suffered or incurred by the applicant- Citibank, directly or indirectly, on account of or as a consequence of the respondents-TLC and WIPL failing to fulfill any of their responsibilities and obligations under the agreement read with Appendix-I thereto. Under the "Fly for Sure" programme envisaged in the agreement, 35,000 card members of the applicant-Citibank were found to be eligible to avail the opportunity of the 'Free return flight voucher' to be provided by respondents-TLC and WIPL. The applicant-Citibank forwarded the vouchers completed by the eligible and interested card members to respondent No. 2-WIPL in accordance with the procedure as agreed by the parties. The vouchers/requests forwarded by the applicant-Citibank were to be honoured by the respondents jointly by conducting themselves in a manner as stipulated under the agreement, including issuing 'return air-tickets' towards any one of the three dates, for any one of the three destinations, as indicated by the customers. The respondents-TLC and WIPL could only have offered further or other alternative dates or destinations to the customers and 35,000 card members after having obtained their consent towards such alterations. The material documents placed on record would show that the applicant-Citibank requested the respondents-TLC and WIPL to comply with the terms of the agreement in regard to the complaints of eligible customers indicating series of deficiencies in services on the part of the respondents-TLC and WIPL. However, in spite of repeated communications being sent by the representatives and officials of the applicant-Citibank to the respondents-TLC and WIPL, they merely made assurances and no actual measures were undertaken by them to rectify their acts of omission and commission. The applicant-Citibank in various communications (copies whereof are placed on record of these proceedings) including courier – e-mail notice dated 10.05.2006 (Annexure A-8) has given specific instances of disputes and differences that have arisen between the applicant-Citibank on the one hand and the respondents-TLC and WIPL on the other hand which are to be resolved by the arbitral tribunal in terms of the arbitration Clause 10 of the agreement. Legal notice dated 15.07.2006 (copy Annexure A-9) as envisaged under the agreement and the provisions of the Act has been issued by the legal firm of the applicant-Citibank to the respondents-TLC and WIPL suggesting the name of Hon'ble Mr. Justice S. P.

A Bharucha, Former Chief Justice of India, to be appointed as the sole Arbitrator. In response thereto, respondent No.2-WIPL vide registered A.D. – fax - e-mail - courier dated 11.08.2006 denied all the allegations of the applicant-Citibank averred in the said communications and notice dated 15.07.2006. Respondent No.2-WIPL also stated that all the alleged  
B allegations made in the notice or made by way of any prior correspondence shall be dealt with by it by way of a comprehensive reply or by way of a counter claim, if any arbitration proceedings are likely to be initiated by the applicant-Citibank. Respondent No.2-WIPL, however, recommended that the disputes be referred to an arbitral tribunal comprising of three  
C arbitrators to be nominated by all the three parties to the agreement, namely, the applicant-Citibank and the respondents-TLC and WIPL respectively. Respondent No.2-WIPL, however, nominated Hon'ble Mr. Justice M. H. Kania, Former Chief Justice of India, as its nominee.

D 26. Respondent No. 1-TLC in its reply dated 14.08.2006 to the notice dated 15.07.2006 sent by the Solicitors on behalf of the applicant-Citibank, denied the unsubstantiated allegations of non-fulfillment or breach of any obligation by it under the agreement dated 04.10.2005 entered into between the parties. In reply, respondent No. 1-TLC states that notice invoking an arbitration is not valid as the same does not comply with the  
E requirement of Section 21 of the Act applicable in India as it is completely unclear from the contents of the notice as to what disputes the applicant-Citibank has sought to be referred to the arbitration and the applicant-Citibank first should provide quantification of its alleged claims and disputes. However, respondent No.1- TLC agrees to the suggestion of  
F respondent No.2-WIPL for appointment of arbitral tribunal comprising of three members, one each to be appointed by the parties to the agreement.

G 27. As noticed above, the disputes arising out of the arbitration agreement between the parties are covered under the definition of “international commercial arbitration” in terms of Section 2(f) of the Act. The parties have entered into an arbitration agreement as provided under Section 7 of the Act. Section 10(1) of the Act provides that the parties are at liberty to determine the number of arbitrators provided such number  
H shall not be an even number. In default of determination referred to in

sub-section (1), the arbitral tribunal shall consist of a sole arbitrator in terms of Section 10(2) of the Act. Section 21 of the Act lays down that unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute would commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. A

28. The contract is a commercial document and must be interpreted in a manner to give efficacy to the contract rather than to invalidate it. Narrow technical approach is not proper. The above-extracted Clause 10 of the arbitration imports in itself all disputes and the arbitration agreement cannot be said to be as vague or uncertain as to be unenforceable. In Clause 10 of the agreement, the words "any controversy, claim or dispute arising out of the interpretation, application or in connection with this agreement which cannot be resolved amicably" could embrace within its fold all matter which can legitimately arise in connection with the agreement. The arbitration clause does not put any cap on the powers of the arbitrator to decide any particular claim or counter claim, the details of which shall be submitted by the parties in their pleadings before the arbitrator. The words contained in Clause 10 are wide enough and as the question turned upon the true interpretation of the contract and the parties have to take recourse to the contract to establish their claim and counter claim, if any, having regard to the fact that the existence of an agreement is not denied and that there has been an assertion of claim by the applicant-Citibank in the forms of letters and notices issued to the respondents and responses of TLC and WIPL thereto, the matter would be arbitrable. The conduct of the respondents-TLC and WIPL would show that on receipt of the communications and notices of the applicant-Citibank, the same were not rejected outright by them. The existence of arbitration agreement was accepted and the matter, if any, was suggested to be referred to an arbitral tribunal of three members, one to be appointed by each party. B C D E F

29. In view of the instances of breaches of the terms and conditions of the relevant clauses of the agreement coupled with the breaches of specific obligations and responsibilities contained in the Appendix(s) and Enclosures attached and incorporated by reference as an integral part of the agreement and having regard to the words used in Clause 10 of the G H



A agreement and having regard to the fact that the parties have failed to determine an even number of arbitrators as per the provisions of Section 10(1) of the Act, the requirement of Section 10(2) of the Act is fully attracted in the present proceedings, in other words, the arbitration agreement deemed to be one providing for a sole arbitrator.

B 30. In the above-said circumstances, taking into consideration the fact that the disputes and differences between the parties emanating from the contract are required to be resolved through arbitration, Hon'ble Mrs. Justice Sujata V. Manohar, retired Judge of this Court, is hereby appointed to act as a sole Arbitrator.

C 31. The Arbitration Application, accordingly, stands disposed of. There will be no order as to costs.

R.P.

Arbitration Application disposed of.