



### Order

This is an Appeal submitted to us under Bye Laws, Rules and Regulations of USE Ltd.

The Appellant Submitted brief fact of the matter as under:

1. The Respondent filed a claim for a sum of Rs.11,91,975.70/- against the Appellant stating that Respondent is a registered Corporate Trading Member of United Stock Exchange of India Ltd.(USE) and the Appellant is a Registered Corporate Trading cum Clearing Member of USE and is authorized to carry on the activities of clearing and settlement of deals/trades on behalf of the Trading Member. The Respondent in order to clear and settle its trades through Appellant entered into Clearing Member – Trading Member Agreement dt.16/08/2010. It was contended by the Respondent that the Respondent was initially clearing its trades in the Currency Derivatives Segment of NSEIL and MCX-SX through IL & /FS Securities Services Limited (ISSL) since year 2008 onwards and was top volume drivers in the Currency Derivatives Segment of NSEIL and MCX-SX and contributed significantly to growth of the Currency Derivatives Segments of the Exchanges.

2. According to the claim of Respondent the Respondent alleged that Appellant approached the Respondent in April 2010 and requested them to open an account with them and in turn Appellant would levy lower clearing/ transaction charges as compared to ISSL. The Respondent agreed on the rate of Rs.10 per crore on the traded value in futures and options subject to a maximum of Rs.50000/- per month per exchange in the Currency Derivatives Segment. It was also alleged that the appellant assured that no other charges viz the penalty charges, late pay-in-charges collateral charges for securities, etc. would be levied upon the Respondent. It was further alleged that Appellant did not offer any interest to be paid to the Respondent on the cash component of the margin money deposited by the Respondent. It was alleged that since it was beneficial to the Respondent and accordingly, the Respondent shifted its clearing from ISSL to the Appellant. It was alleged that the Respondent started its trading in the USE from the launch date of USE viz. 20/09/2010 onwards.

3. It was alleged that the Appellant never used to send any ledger of the Respondent and also never raised any bills regarding its clearing fees till December 2010 despite several request. It was alleged that the Respondent were shocked to know the quantum of exorbitant and unjustified charges levied by the Appellant which was contrary to the agreed terms between them. It was alleged that Appellant's back office inadvertently did not apply the agreed clearing tariff and the Appellant assured to reverse the said charges immediately. However the Appellant partly reversed the charges after repetitive follow-up. It was alleged that the Appellant also started levying late pay in charges which were contrary to agreed terms and being aggrieved by its illegal act of continuously and unilaterally charging of said charges, the Respondent decided to shift its clearing activities with Respondent's old clearing member step by step. It was alleged that no sooner the Appellant realized that the Respondent was trying to shift its entire clearing step by step, the Appellant again approached the Respondent requesting not to shift its existing clearing services from the Appellant and in addition on repetitive persuasion by the Appellant, the Respondent shifted its own clearing in the F&O Segment of NSEIL from Self-Clearing to the Appellant vide agreement dt.4/04/2011 with condition that the Respondent will immediately reverse the balance excess charges. It was alleged that after falling prey to the false promises of the Appellant, the Respondent decided to shift all its activities and running business with another clearing member but it was difficult to arrange the huge margin money required for shifting of business to other member. It was alleged that the Respondent terminated its clearing business with the Appellant in the NSEIL F&O Segment w.e.f.27/04/2012. However after termination of F&O Segment of NSEIL from the Appellant, the Appellant aggravated the Respondent by levying additional, unauthorized, unjustified and illegal charges and deliberately disabled the Respondent's terminal in NSEIL, MCX-SX and USE currency derivatives segment and thus, filed a claim of Rs.11,91,975.70 along with interest @ 18% p.a. compounded quarterly from 20/02/2013 till date of realization of the payment by the Appellant.

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4. The Appellant filed its statement of defense to the Statement of Claim thereby taking the following pleas:-

- 4.1. That the levying of transaction charges by the Appellant is by clause 2.3 of the Clearing Member – Trading Member agreement dt.16/08/2010. Since commencement of business, it was mutually agreed to levy Rs.20/- per crore without any maximum limit. However, in the last of week of October 2010 mutually decided that said charges would be Rs.20/- per crore subject to maximum Rs.50000/- per month and late payment charges on limit @12% p.a. and on request of the Respondent reversed the balance amount of the said month and imposed late payment charges on limit @12% p.a. on the limits.
- 4.2. That in the relation to NSE, the Respondent is liable to pay a sum of Rs.1,07,23,934.91 to the Appellant in respect of which the Appellant has already preferred a statement of claim before the Arbitral Tribunal under the Bye-Laws of the NSE.
- 4.3. That since the Appellant was neither privy to any dealing of Respondent with L&FS Securities Services Ltd. nor concerned with said dealing; Appellant denied all the averments made by Respondent in respect said dealing. It was also categorically denied that neither such charges levied by the said concern were discussed nor the Appellant had offered anything lower in relation to said charge.
- 4.4. That all the requisite documents in relation to settlement and margin obligations i.e. financial statements, open positions, margin statement, daily trade details etc. were provided to the Respondent on File Transfer Protocol (FTP) as well as the same were available on the web site of the Appellant i.e. [www.globecapital.com](http://www.globecapital.com). The Respondent had regularly logged on to aforesaid website and as such was duly aware of all the trading details on day to day basis. The copy of log generated from the computer system installed in the office of the Appellant showing access to the aforesaid web site by the Respondent is already annexed with Statement of defense as Annexure – R – 3. In addition, Respondent also has access to reports pertaining to its open position, margin statement and daily trade details etc. from the exchange as the Respondent is a registered trading member of the Exchange.
- 4.5. That the Appellant has not given any assurance of not levying late-pay-in-charges at any point of time.
- 4.6. That it was further denied that the Appellant had enjoyed any benefit of the bank guarantee furnished by the Respondent in relation to F&O Segment of NSEIL.
- 4.7. That no assurance was given by the Appellant to reverse Rs.11,91,533.32 on Respondent's shifting from self-clearing mode to clearing through Appellant.

5. The Respondent thereafter, submitted the Rejoinder to the Statement of defense dt.31/05/2013 along with documents thereby elaborating its contentions regarding statement of claim. The Appellant in response to said rejoinder filed its Sur-Rejoinder dt.25/06/2013 along with supporting documents. In response to Sur-Rejoinder dt.25/06/2013 the Respondent filed Sur-Sur-Rejoinder dt.15/07/2013. The Appellant thereafter filed a summarization of its contention/submission dt.29/07/2013 through Courier. The Appellant as per verbal directions of Ld. Arbitrator, provided the clarification regarding levy of late-pay-in charge in the account of the Respondent vide its submissions dt.08/08/2013. The said clarification was also in response to the Applicant's two statements tendered in 4<sup>th</sup> hearing held on 01/08/2013 showing the details of claim with respect to transaction charges contented by Appellant for Rs.20/- per crore subject to maximum of Rs.50000/- per month and Calculation of late pay in charges on debit balances in the Appellants account which was accepted, relied upon and taken on record.

6. That during the Arbitration proceedings held on 14/08/2013, the Ld. Arbitrator referred to SEBI circular dt.3/12/2009 vide their circular no.MIRSD/SE/Cir-12/2009 regarding imposition of penalty / delayed payment charges by either party, specifying rate and period (thus must not result in funding by the broker in contravention of the applicable law). The Appellant clarified in the said proceedings that the said circular is in relation to dealings between a client and stock broker (trading members included) and not relevant and applicable to present matter where the relationship of Clearing Member and Trading Member is involved. In any case the said circular simply provides that levy of penalty or delayed payment charges should not result in funding activities. However what are funding activities that have not been provided in the said circular. In support of its version, the Appellant placed on record the SEBI Circular No.SMD/Policy/Cir-6//97 dt.7/05/1997 which has clarified the fund based activities. The Appellant further placed on record circular dt.26/04/2012 (circular no.126/2012) wherein the Stock Exchange of India in NSE had intimated that the

(f) and Rule 8(3) of SCRR permits funding in connection with/ incidental to/ consequential upon the Securities Business.

7. That the Ld. Arbitrator passed the impugned Award dt.5/10/2013 of Rs.5,93,567.70 along with interest at the rate of 12% from 1/10/2011 in favour of the Respondent. According to the Appellant, the Ld. Arbitrator has ignored material facts placed on the record by the Appellant and awarded claim amount in favour of the Respondent leading to serious miscarriage of Justice to the Appellant without assigning any cogent reason and the award given by the Ld. Sole Arbitrator is liable to be set aside on the basis of facts stated above and grounds submitted herein below.

#### **8.Grounds on which the Appellant Challenged the Award:**

A. For that the Hon'ble Arbitrator failed to take into consideration the fact that the delay in filing the complaint and the allegations made against the Appellant was an afterthought. A prudent person like that of Respondent would always take appropriate steps at the earliest to protest regarding alleged wrongful levy of transaction charges as well as delayed payment charges which the Respondent had utterly failed to do at the relevant time. Specifically when the Respondent is a Trading Member and dealing with several clients trading under it and was required to act in accordance with Exchange Rule/Regulation, bye-law and Circular on the subject.

B. For that the Hon'ble Arbitrator failed to consider while delivering the award that the Statement of claim filed by the Respondent is an afterthought and counter blast to the Statement of claim of Rs.1,07,23,934.91 already preferred by the Appellant against the Respondent before the Arbitral Tribunal NSE, Mumbai.

C. For that the Hon'ble Arbitrator ignored the material fact that the Respondent had regularly logged on to the official website of the Appellant i.e. [www.globecapital.com](http://www.globecapital.com) and as such was fully aware of all the charges and penalties levied by the Appellant from time to time on day to day basis. The Appellant submitted a copy of log (Annexure-R-3) generated from the computer system installed in the office of the Appellant showing access to the aforesaid website by the Respondent. In addition to above the Respondent had also access to reports pertaining to its open position, margin statement, daily trade details etc. through the file called as Position file, margin file, trade file etc. from the Stock Exchange as the Appellant is a registered trading member of the Stock Exchange. Moreover, the Appellant has also provided the margin statement to Respondent on daily basis which depicts Respondents account details like balance available (segment wise and exchange wise) margin requirement on open position, collateral available in the form of shares, FDR, Bank Guarantee etc. Log for sending margin statement is already annexed as Annexure-R-9 along with Sur-Rejoinder. In absence of said details, it is impossible for the Respondent to maintain its book of account on regular basis. It is further pertinent to mention that the Appellant used to send details of pay in, pay out, shortage etc. over SMS to the Respondent on day to day basis.

D. For that the Ld. Arbitrator erred in holding that Transaction charges were to be collected @ Rs.10/- per crore subjects to maximum of Rs.50000/- in the month or part. The factual position is that initially in the month of September 2010, the transaction charges were agreed upon @ 20/- per crore on the trade value of the future contracts and accordingly the transaction charges were debited in the Respondent account. However during end of October 2010, it was mutually decided to keep maximum amount of Rs.50000/- per month for each exchange. Therefore the charges that were already debited in the Applicants account were reversed on 26/10/2010 and 29/10/2010 and from November 2010 in the system the levy of transaction charges was modified. From the perusal of E-mail dt.17/01/2011 sent by the Respondent himself, it can be revealed that the Respondent itself has sent a confirmation regarding levying of Rs.150000/- as transaction charges per month for all the three exchanges i.e.NSE. USE and MCX-SX from October 2010 onwards. This clearly established that there was a mutual understanding between both the parties regarding levying of transaction charges @ Rs.50000/- per month. The observation of the Ld. Arbitrator to the contrary were therefore de hors the record placed before him during the Arbitral Proceedings.

E. For that the Ld. Arbitrator ignored that during the 4<sup>th</sup> Arbitration Proceedings held on

charges and transaction charges (Annexure-A-8), the Ld. Arbitrator verbally directed the Appellant to provide its calculation of late pay in charges which the Respondent had duly complied with by filing the said calculation vide its letter dt.08/08/2013. To a great shock and surprise of the Appellant in the next very meeting held on 14/08/2013 the Ld. Arbitrator refused to take the said calculation on record for the reasons best known to him and permitted the Appellant only to address the said issue orally. The outcomes was therefore obvious in as much as when the impugned award was received it was found that the Ld. Arbitrator in para 26 A held that the Appellant has not provided the basis of calculation for margin money requirement not any debit made for short margin in the Respondent's Account. This clearly evince that the impugned award is totally perverse and is liable to be set aside by this Hon'ble Tribunal.

F. For that the Ld. Arbitrator ignored crucial evidence to decide the vital issue of the late payment charges agreed and confirmed in writing by the Respondent through its E-mail dt.17/01/2011(Annexure-R-8 annexed with Sur-Rejoinder dt.25/06/2013) wherein the Respondent has also agreed to pay late pay-in charges of Rs.8,39,506/- during the period from July 10 to December 2010 across all the exchanges. It is pertinent to mention here that the Appellant has charges an amount of Rs.7,92,272.11 as late pay in charges for the said period which is less than amount of Rs.8,39,506/- acknowledged by the Respondent in the said email. A comparison of charges as acknowledged by the Respondent and actually charges by the Appellant is hereunder:-

**Late pay in charges detail for all Exchanges.**

Date	Late pay in as agreed by Respondent's email dt.17/01/2011	Levied by Appellant
July 10	56712	
Aug. 10	123288	268183.4
Sep.10	166849	0
Oct.10	172602	250289.05
Nov.10	157315	19997.05
Dec.10	162740	253801.89
Total	839506	792272.11

In the email dt.17/01/2011 (Ref. Exh. E to Sur-Sur Rejoinder) the Respondent had perused the charges levied by the Appellant for the period up to December 2010 and acknowledged Rs.8,39,506/- as late pay in charges. In the said email at the end it is mentioned that Rs.253810/- is debited on 13/01/201. The break-up of the said debit is Rs.69496.29 for USE, Rs.121002.89 from MCX and Rs.63302.71 for NSE as can be seen from Exh-page no.26 for Sur-Sur Rejoinder filed by the Respondent. Thus late pay in charges agreed upon to by the Applicant pertain to USE, MCX-SX and NSE. It is not out of place to mentioned here that the late pay in charges was calculated @ 12% p.a. which is much less than 0.07% per day the Panel Interest on shortfall in margins/pay-ins, if any that are allegedly levied by other clearing member viz.ISSL as can be seen by referring to Exh-B and C of the Statement of claim filed by the Respondent. Further in the document relied upon by the Respondent, the charges allegedly levied by IL and FS also includes BG/FD charges which were never levied by the Appellant. The aforesaid aspect of the matter was clearly left out of consideration by the Ld. Arbitrator.

G. For that the Ld. Arbitrator erred in holding that why the Appellant did not charge the delayed payment charges till 22/11/2010 and also it did not credit the Respondent with the same rate of interest on its credit balance from beginning. It is submitted that delayed payment charges on 22.11.2010 were for the month of Oct.2010. It is herein further submitted that there was no agreement by and between the parties wherein the Appellant was required to pay any interest on the credit balance existing in the account of the Respondent which even Respondent accepted in their written submission at para 16 of statement of case. That Appellant did not offer any interest to be paid to the Respondent on the cash component of the margin money deposited by the Respondent. Further the credit balance in the account of the Respondent at any point of time was not free in as much as the entire credit balance is taken into consideration by the Appellant in calculating the margin existing ay any point of time. Needless to mention that in F&O Segment there is stringent requirement of maintaining margin levels. The overall margin in calculated on the

basis of securities, Fixed Deposits and Credit balance made available by the Trading Member to its Clearing Member at a particular point of time. As such the Ld. Arbitrator held contrary to the terms of the agreement by and between the parties hereto. As such the award passed is not maintainable in the eyes of law being dehors the contract by and between the parties. Further the issue of payment interest on the credit balance of the Respondent was not raised by the Respondent in its pleading and the said issue was picked up by the Ld. Arbitrator of his own showing his biased attitude in favour of the Respondent. The Respondent being a Trading Member also pay margin to stock exchange and do not receive any interest from stock exchange. The Ld. Arbitrator ignored the material facts that the Respondent itself acknowledged in para 16 of its statement of claim as under:

“ The Applicant further states that unlike ISSL, the Respondent did not offer any interest to be paid to the Applicant on the cash component of the margin money deposited by the Applicant.”

H. For that the Ld. Arbitrator while allowing the alleged claim of the Respondent regarding late pay in charges, relied upon the SEBI circular dt.03.12.2009 between client and stock broker trading member included {circular no.MIRSD/SE/Cir.19/2009} which provides that “imposition of penalty/delayed payment charges by either party, specifying rate and the period (this must not result in funding by the broker in contravention of the applicable laws” This is mandatory document. In this regard, it is submitted that the said circular is in relation to dealing between a client and stock broker (Trading Members included) and not relevant and applicable to present matter where the relationship of Clearing Member and Trading Member is involved in any case the said circular simply provides that levy of penalty or delayed payment charges should not result in funding activities. However, what are funding activities that have not been provided in the said circular. SEBI has clarified the fund based activities vide Circular No.SMD/Policy/Cir-6//97 dt.07.05.1997 which provides as under:

“Based on the suggestions/representations received from various stock exchanges, SEBI has examined the applicability of Rule 8 (3) (f) of the Securities Contract (Regulations) Rule, 1957, relating to fund based activities of brokers. It has been opined that borrowing and landing of funds, by a Trading Member, in connection with or incidental to or consequential upon the securities business would not be disqualified under Rule 8 (1) (f) and 8 (3) (f)”

That part from this in consultation with SEBI, the stock exchange of India viz NSE had also clarified the funding in connection with/incidental to/ consequential upon the Securities Business vide its circular dt.26.04.2012{Circular no.136/2012} which provided in Annexure A as under:

“Rule 8 (1) (f) and Rule 8 (3) (f) of SCRR permits a trading member to fund in connection with or incidental to or consequential upon the securities business.”

“Debit Balance in client’s account:-

1(d) delayed payment charges or interest charged for the fund deployed by the member may be charged at the rate/s consented by the client.”

Thus the Arbitrator failed to take consideration the aforesaid circular in spirit which categorically provides that charging of interest or late payin charges are in connection with/incidental to/consequential upon securities business and broking activity and hence not a fund based activity. As such the impugned award is patently illegal and the same is liable to be set aside by the Tribunal.

I. That the Ld. Arbitrator ignored that no person of ordinary prudence will further switch over its clearing operation in the F&O segment of NSEIL at the mutually agreed rate of Rs.40/- per crores in futures traded value and Rs.1250 per crores of the option premium traded value w.e.f.05.05.2011 when it was not satisfied with the services of the Appellant and had such issued pending as alleged in the present Arbitration. It all goes to prove that the Respondent was having no issue pending prior to this period and being satisfied with the services and the charges as debited in its account by the Appellant agreed to switch over in the NSE F&O Segment. Further the Respondent continued to make payments and took pay-outs during the period of 2010-11 and 2011-12 in USE Segment without any demur or protest as detailed under Para 13 on page no.9 of the Sur Rejoinder.

J. For that the Ld. Arbitrator acted in a biased manner which is evident to the very fact that the Ld. Arbitrator made a copy-paste from the Award dt.10.08.2013 passed by Ld. Arbitrator Shri. Narendra J. Mehta in an Arbitration matter filed by Respondent against Appellant in MCX-SX. From the perusal of para 46 of said Award, it can be revealed that para 46 of said Award is copied and pasted in the impugned Award at para 26 F. Thus the Ld. Arbitrator did not apply its own mind in impartial manner and misdirected himself which resulted in

passing of an illegal and arbitrary award. The said paragraph is reproduced herein as under:-

"As far as delayed charges are concern the same is not trade on the exchange, the same is not an instruction to buy or sell security-option-derivatives nor does it mean that constituent has paid money or given security. These are normally charged by broker to the constituent for providing the finance during the period of operation. However the SEBI as per their circular dt.03.12.2009 vide their circular no. MIRSD/SE/Cir-19/2009 stated that "Imposition of penalty/delayed payment charges by either party, specifying rate and period (this must not result in funding by the broker in contravention of the applicable laws") this mandatory document.

The Respondent and the Applicant have agreed on the ledger account submitted by the Applicant. It was confirmed by the Respondent that the delayed payment charges was charged for the first time on 22.11.2010 and till such time Respondent did not charge the delayed payment charges in spite of the debit balance in the account of the Applicant. In fact the Respondent did not reply to the question asked to them. "why they did not charge the delayed payment charges to Applicant till 22.11.2010" and also "why they did not credit the Applicant with the same rate of interest on their credit balance from beginning." Thus means that the delayed payment amount charged by the Respondent is not correct and the same is an afterthought. The same is required to be awarded to the Applicant in full considering the above. This also means that the Applicant is also not entitled to any interest on their credit balance with the Respondent during the while period except the reversal of delayed payment charges by the Respondent amounting to Rs.544377.42. I would have permitted the delayed payment charges to the Respondent to claim to the extent there was debit balance in the account of the Applicant minus Credit balance in the account of the members but there is no counter claim by the Respondent nor the Respondent have given particulars, hence am unable to decide the same."

K. For that the Ld. Arbitrator awarded an interest beyond the period as claimed by the Respondent in its Statement of Claim. From the perusal of para V (1) Statement of Claim at page no.23, it can be seen that the Respondent prayed for interest from 20.02.2013, whereas the Ld. Arbitrator awarded the interest amount on Award amount w.e.f. 01.10.2011 and thus showing biased attitude in favour of the Respondent.

L. As such awarding of claim raised by the Respondent by the Ld. Arbitrator is perverse being without any basis and /or evidence on record. The Ld. Arbitrator had not given any reasons in support of his aforesaid findings. The impugned award is therefore liable to be set aside.

In view of the facts and circumstances of the present case and submissions made above the Appellant has prayed that the impugned award dt.05.09.2013 passed by the Hon'ble Sole Arbitrator in A.M. No. USE/ARB/01/2013 be set aside, further award the cost of the present proceedings in favour of the Appellant and against the Respondent and Pass such other and further order(s)/direction(s) which this Hon'ble Appellant Tribunal may deem fit and proper, under the facts and circumstance of the case.

9. The Respondent (Original Applicant) filed their reply to the Appeal and denied contentions made by the Appellant in appeal for setting aside the original award and further submitted as under.

A) The Respondent submitted that the Appellant in its Statement of Appeal at Page no.360-367 has provided purported calculations of the alleged late pay in charges which were debited by the Appellant in the Respondent's account in the month of Oct.2010 to Feb.2011 and May 2011 to Aug. 2011. On perusal of the alleged calculations it clearly reflects that the calculations provided by the Appellant are self made calculations and manufactured only for the present appeal matters in order to try and justify its illegal acts of levying late pay in charges without any basis and without any agreement between parties. In this context the Respondent sought the attention of the Ld. Appellant Tribunal to the following.

B) Though the Appellant has alleged huge shortfalls, the same do not tally with the Respondent's ledger balances annexed at Page Nos.63-88 of the Appellant's appeal memo except for a few instances in the month of November 2010. Further, on the days when there were alleged shortfalls for which the Appellant has illegally and unilaterally levied late pay in

charges, on the very same date, the Appellant has also unilaterally transferred funds from the Respondent's account in USE Segment to Respondent's account in other exchanges ( which implies that there was no shortfalls in USE CDS Segment as falsely alleged by the Appellant) and has also released huge collateral including bank guarantees, securities and cheque to the Respondent on the very same date.

C) Further, even when there were no alleged shortfalls in the Respondent's account in USE CDS Segment, still the Appellant has unilaterally levied late pay in charges without any basis. On the days even when there were alleged shortfalls in margins as per the Appellant's own submission, the Appellant has also allowed the Respondent to increase the positions, again establishing the fact that there was no margin shortfalls in USE CDS Segment as falsely alleged by the Appellant. Respondent provided the chart reflecting the purported calculations of late pay in charges debited by the Appellant, the details of the funds unilaterally transferred by the Appellant from Respondent's USE CDS Segment to Respondent's account in other Exchanges and the collateral released by the Appellant across all segments/exchanges.

D) The Respondent provided following chart, which reflects the details of the alleged late pay in charges, which according to Respondent illegally debited by the Appellant in the Respondent's account across various segments/ exchanges.

Month	USE CDS	MCXSX CDS	NSE CDS	NSE FNO
July 2010	-	-		
Aug. 2010	-	-	2,68,183.40	
Sept.2010	-	-	-	-
Oct. 2010	77,662.84	1,06,616.52	66,010.41	
Nov.2010	4,095.34	15,901.71	-	
Dec.2010	69,496.29	1,21,002.89	63,302.71	
Jan.2011	1,55,156.27	1,07,660.11	62,402.34	
Feb.2011	1,65,350.86	59,845.95	62,434.37	
Mar.2011	-	48,451.55	54,093.95	
April.2011	-	-	-	
May 2011	23,720.97	14,117.36	35,826.78	
June2011	43,550.16	8,881.47	93,259.45	
July 2011				
Aug.2011	5,344.69			
Sept.2011				39,693.46
Oct.2011				5,993.44
Nov.2011				33,819.83
Dec.2011				56,751.40
Jan.2012				24,045.73
Feb.2012				18,392.19
Mar.2012				34,701.26
April 2012				-
May 2012				-
Total	5,44,377.42	4,82,477.56	7,05,513.41	2,13,397.31

E) The Respondent submitted that from the above chart it can be clearly observed that the Appellant has not levied late pay in charges in USE CDS Segment in the months of September 2010, March 2011, April 2011 and September 2011 though as per the Appellant's own ledgers there were purported debit balances in the Respondent's account in USE CDS Segment in the aforesaid months. It can therefore be clearly observed and concluded from the chart that there is no consistency followed even by the Appellant in the



unilateral and illegal levy of the late pay in charges and this clearly establishes the fact that there was no agreement between the parties to levy late pay in charges.

According to the Respondent further from the Appellant's own alleged calculations in the Statement of Appeal at Page Nos.360-367, the alleged self made manufactured calculation reflects that the late pay in charges for the month of May 2011 was a sum of Rs.50,506/- but the Appellant has illegally debited a sum of Rs.23,720.97 in the Respondent's ledger account in USE CDS Segment for the same month. This supports the contentions of the Respondent that the Appellant was playing with the account of the Respondent at its own whims and fancies and this needs serious deliberation of the Ld. Appellant Tribunal. According to the Respondent the Appellant has failed to clarify/ justify the apparent discrepancies observed even in its own calculations and has also desperately failed neglected and omitted to clarify and substantiate its self made alleged calculations for late pay in charges, despite various opportunities provided by the Lower Arbitral Tribunal.

F) The Respondent therefore humbly requested the Ld. Appellant Tribunal to direct the Appellant to substantiate its purported calculations at page no.360-367 of its Statement of Appeal with basis, logic and formulate for each month along with documentary evidence thereof.

G) The Respondent further submitted that the transaction charges agreed since inception was Rs.10/- per crore subject to a maximum of Rs.50000/- per month per exchange in CDS Segment. Since the Respondent was already having a huge turnover across both the Exchanges (NSE and MCX SX) in CDS segment and was enjoying a flat sum of Rs.50000/- per month from ISSL, it made no commercial sense to shift its business with the Appellant. The Appellant has however alleged that a sum of Rs.20/- per crore was agreed to be the transaction charges without any maximum limit and from October 2010 it was agreed that a ceiling of Rs.50000/- per month would be applicable. In this context the Respondent seeks the attention of the Ld. Appellant Tribunal to the following.

H) The Respondent submitted that a soon as the Respondent would cross a turnover of Rs.2500/- crores per month per exchange, the ceiling of Rs.50000/- per month at Rs.20/- per crore would be hit and there would be no benefit to the Respondent in shifting the business since the Respondent's combined turnover across both the Exchanges was at a monthly average of Rs.17,913.67 crores (based on F.Y.2009 – 2010) Therefore in order to have the benefit, it was agreed between the parties that the transactions charges are Rs.10/- per crore subject to maximum of Rs.50000/- per month since the Respondent would be benefited only if the Respondent was not able to breach the turnover of Rs.5000/- crores in some months on some exchanges, as the Respondent would then have to pay a lower amount as transaction charges.

### **Findings & Conclusion**

We have carefully gone through the arguments of the Appellant and the Respondent.

We have examined the case of Appellant and perused the award dt.5<sup>th</sup> September 2013 passed by Hon'ble Sole Arbitrator. The Appellant has challenged the said award on ground that Hon'ble Arbitrator failed to take into consideration the fact that the delay in filing the complaint and the allegations made against the Appellant was an afterthought. Hon'ble Arbitrator failed to consider while delivering the award that the Statement of claim filed by the Respondent is an afterthought and counter blast to the Statement of claim of Rs.1,07,23,934.91 already preferred by the Appellant against the Respondent before the Arbitral Tribunal NSE, Mumbai. We do not find the above grounds as just and proper for setting aside said award.

The Hon'ble Arbitrator in his Award dt.5<sup>th</sup> September 2013 awarded Rs.5,93,567.70 together with simple interest @ 12% p.a. from 1<sup>st</sup> October 2011 to the Respondent. While awarding the said amount, the Hon'ble Arbitrator has awarded Rs. 78,096.70 towards the levy of transaction charges and Rs.5,15,474/- towards the levy of late pay in charges. The Appellant contended that said amounts were charged to the Respondent as per the agreed terms of contract between the parties. The Appellant has produced the documents in support of his said contentions. However after perusing the record of the proceedings and after going through the contentions of the Appellant and Respondent, we find that the Appellant has failed to justify its claim for setting aside the Award dt.5<sup>th</sup> September 2013 passed by the Hon'ble Arbitrator.

We find that there are discrepancies in the charges levied by the Appellant to the Respondent in the matter of levy of the transaction charges and late pay in charges.

In the matter of transaction charges it is observed that the Appellant claimed that since commencement of business, it was mutually agreed that the transaction charges were levied at Rs.20/- per crore without any maximum limit, however, in the last of week of October 2010 mutually decided that said charges would be Rs.20/- per crore subject to maximum Rs.50000/- per month. The documents filed by the Appellant speak otherwise and do not support the said contention of the Appellant. We find in the said matter that there were inconsistencies, while charging the transaction charges. The record maintain by the Appellant does not support the charges levied in the said matter. On the other hand we find that the arguments advanced by the Respondent in this matter are more acceptable. The Respondent while substantiating its arguments stated that the transaction charges agreed since inception was Rs.10/- per crore subject to a maximum of Rs.50000/- per month per exchange in CDS Segment. Since the Respondent was already having a huge turnover across both the Exchanges (NSE and MCX SX) in CDS segment and was enjoying a flat sum of Rs.50000/- per month from ISSL, it made no commercial sense to shift its business with the Appellant. The Appellant has however alleged that a sum of Rs.20/- per crore was agreed to be the transaction charges without any maximum limit and from October 2010 it was agreed that a ceiling of Rs.50000/- per month would be applicable. The Respondent submitted that as soon as the Respondent would cross a turnover of Rs.2500/- crores per month per exchange, the ceiling of Rs.50000/- per month at Rs.20/- per crore would be hit and there would be no benefit to the Respondent in shifting the business since the Respondent's combined turnover across both the Exchanges was at a monthly average of Rs.17,913.67 crores (based on F.Y.2009 – 2010) Therefore in order to have the benefit, it was agreed between the parties that the transactions charges are Rs.10/- per crore subject to maximum of Rs.50000/- per month since the Respondent would be benefited only if the Respondent was not able to breach the turnover of Rs.5000/- crores in some months on some exchanges, as the Respondent would then have to pay a lower amount as transaction charges.

We find the above arguments of the Respondent more acceptable and therefore we do not find any perversity in the original award while upholding the claim of the Respondent (Original Applicant) in the matter of transaction charges.

In the matter of late pay in charges, it is the contention of the Appellant that Ld. Arbitrator erred in holding that why the Appellant did not charge the delayed payment charges till 22/11/2010 and also it did not credit the Respondent with the same rate of interest on its credit balance from beginning. According to Appellant the delayed payment charges on 22.11.2010 were for the month of Oct.2010. There was no agreement by and between the parties wherein the Appellant was required to pay any interest on the credit balance existing in the account of the Respondent which even Respondent accepted in their written submission at para 16 of statement of case. That Appellant did not offer any interest to be paid to the Respondent on the cash component of the margin money deposited by the Respondent. Further the credit balance in the account of the Respondent at any point of time was not free in as much as the entire credit balance is taken into consideration by the Appellant in calculating the margin existing ay any point of time. In F&O Segment there is stringent requirement of maintaining margin levels. The overall margin in calculated on the basis of securities, Fixed Deposits and Credit balance made available by the Trading Member to its Clearing Member at a particular point of time. As such the Ld. Arbitrator held contrary to the terms of the agreement by and between the parties hereto. As such the award passed is not maintainable in the eyes of law being dehors the contract by and

between the parties. Further the issue of payment interest on the credit balance of the Respondent was not raised by the Respondent in its pleading and the said issue was picked up by the Ld. Arbitrator of his own showing his biased attitude in favour of the Respondent. The Respondent being a Trading Member also pay margin to stock exchange and do not receive any interest from stock exchange.

On the other hand the Respondent advanced his arguments stating that the Appellant in its Statement of Appeal at Page no.360-367 has provided purported calculations of the alleged late pay in charges which were debited by the Appellant in the Respondent's account in the month of Oct.2010 to Feb.2011 and May 2011 to Aug. 2011. On perusal of the alleged calculations it clearly reflects that the calculations provided by the Appellant are self made calculations and manufactured only for the present appeal matters in order to try and justify its illegal acts of levying late pay in charges without any basis and without any agreement between parties. In this context the Respondent sought the attention of the Ld. Appellant Tribunal that though the Appellant has alleged huge shortfalls, the same do not tally with the Respondent's ledger balances annexed at Page Nos.63-88 of the Appellant's appeal memo except for a few instances in the month of November 2010. Further, on the days when there were alleged shortfalls for which the Appellant has illegally and unilaterally levied late pay in charges, on the very same date, the Appellant has also unilaterally transferred funds from the Respondent's account in USE Segment to Respondent's account in other exchanges and has also released huge collateral including bank guarantees, securities and cheque to the Respondent on the very same date.

Further the Respondent submitted that the Appellant has not levied late pay in charges in USE CDS Segment in the months of September 2010, March 2011, April 2011 and September 2011 though as per the Appellant's own ledgers there were purported debit balances in the Respondent's account in USE CDS Segment in the aforesaid months. It can therefore be clearly observed and concluded from the chart that there is no consistency followed even by the Appellant in the unilateral and illegal levy of the late pay in charges and this clearly establishes the fact that there was no agreement between the parties to levy late pay in charges. According to the Respondent further from the Appellant's own alleged calculations in the Statement of Appeal at Page Nos.360-367, the alleged self made manufactured calculation reflects that the late pay in charges for the month of May 2011 was a sum of Rs.50,506/- but the Appellant has illegally debited a sum of Rs.23,720.97 in the Respondent's ledger account in USE CDS Segment for the same month. This supports the contentions of the Respondent that the Appellant was playing with the account of the Respondent at its own whims and fancies and this needs serious deliberation of the Ld. Appellant Tribunal. According to the Respondent the Appellant has failed to clarify/ justify the apparent discrepancies observed even in its own calculations and has also desperately failed neglected and omitted to clarify and substantiate its self made alleged calculations for late pay in charges, despite various opportunities provided by the Lower Arbitral Tribunal.

After perusing the documents submitted by the Appellant we find that there is substance in the Arguments of Respondent to the extent that there is inconsistency in the calculation presented by the Appellant. The calculation presented at page no.360-367 of the Appeal did not tally with the statements submitted by the Appellant.

For the reasons stated above we do not find any reason to interfere in the original award in the matter of awarding Rs. 78,096.70 towards the levy of transaction charges and Rs.5,15,474/- towards the levy of late pay in charges to the Respondent. However we find that the Ld. Arbitrator awarded an interest beyond the period as claimed by the Respondent in its Statement of Claim. We have therefore decided to modify the said Award only in respect of the interest part granted by the Ld. Arbitrator. We therefore pass following order,

11/04/11  
 2/1

**Appeal Award**

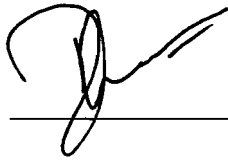
- A) The Appellant is directed to pay Rs. 593567.70 together with simple interest @ 12% p.a. from 20.02.2013.
- B) No order as to costs.

**Mr. G. K. Sharma**  
(Co- Arbitrator)



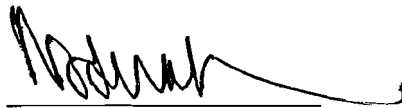
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**Mr. Rajan Chavan**  
(Presiding Arbitrator)



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**Mr. Naresh B. Shah**  
(Co- Arbitrator)



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Place: Mumbai

Dated this 25<sup>th</sup> day of February, 2014