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STATEMENT OF PURPOSE

The ICA Arbitration Quarterly, published by the Indian Council of Arbitration, aims to be a scholarly journal to provide independent platform and ensure in-depth studies of the most important current issues in Domestic and International Arbitration, giving it even more urgency as a forum for original thinking, threadbare analysis and reporting on regional and global trends in order to contribute to the promotion and development of arbitration practices.

ICA, as such, welcomes the contribution from the intending writers on issues relating to domestic, maritime and international commercial arbitration. Intending writers are requested to read and understand "Guidelines for Authors" given on the inner side of the Back Cover of this Journal. The persons, intending to contribute in the Quarterly, may send article to:

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Contents

FROM THE PRESIDENT'S DESK

The COVID-19 pandemic with subsequent lockdowns and restrictions on physical meetings has created a situation where use of Information Technology has gradually over time gathered the momentum. The same is being used either partially or wholly in conducting virtual hearings both in the Domestic Courts and Arbitration. As a country we have moved ahead with a new normal of functioning with the help of information technology at all forums.

In Arbitration, especially involving parties from different states and jurisdiction, the various attributes like initiation of arbitration, filing of documents, case management at every stage and videoconferencing facility, advocates, arbitrators as well as arbitral institutes have started using such online software's and platform to facilitate arbitral proceedings with zero latency and easy to access platform for the users.

The frequent and sophisticated use of technology has made space and comfort towards delivery of justice. However, as the physical appearances are still difficult the burden on an already heavily-burdened judiciary has increased. Although courts are hearing urgent matters via video conferences, the proceedings in the less urgent matters remain in abeyance.

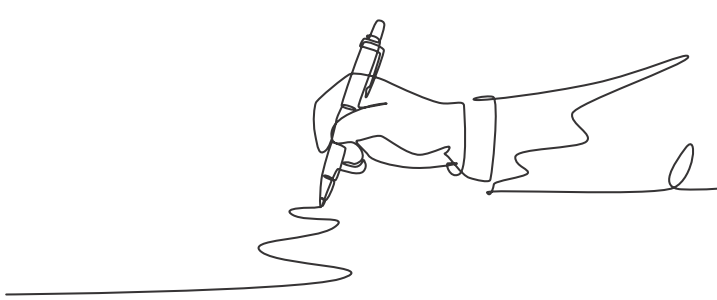
Arbitral institutes like ICA has been conducting arbitrations and have gone miles ahead to mitigate delays for all the matters, formulating guidelines for effective resolution in these times. The approach is towards acceptance of video-conferencing methods as the primary method of dispute resolution.

As normalcy shall take some time, the current situation should not deter us towards our aim of establishing an efficient and effective eco system for arbitration in India parallel to the ones across the globe. Our relentless efforts in doing the same along with your support and cooperation during this period shall help ICA go long way in achieving its mission!

I wish all the Readers an enriched Reading!

N G Khaitan

N. G. KHAITAN
President ICA



ANTI-ARBITRATION INJUNCTIONS: DELHI HIGH COURT SAYS NO WAY

Mr. Dheeraj Nair
Partner, J. Sagar

In a recent decision, ***Bina Modi and Ors. v. Lalit Modi and Ors., CS(OS) 84 and 85/2020***, a single judge of the Delhi High Court has cast doubt on the jurisdiction of Indian courts to grant injunctions restraining arbitral proceedings (popularly called anti-arbitration injunctions). While the grant of anti-arbitration injunctions by Indian courts has been discussed previously on this blog (here and here), the Delhi High Court's decision merits discussion as it poses a more fundamental question regarding the existence of a court's jurisdiction to grant anti-arbitration injunctions.

DELHI HIGH COURT'S DECISION IN BINA MODI

In Bina Modi, one of the trustees of a family trust had initiated arbitral proceedings against the other trustees for resolution of disputes arising under the trust deed. The other trustees filed two civil suits before the Delhi High Court, seeking inter alia an anti-arbitration injunction against such arbitral proceedings and a declaration that the arbitration agreement in the trust deed was null, void, inoperative and unenforceable. The Delhi High Court, while dealing with the suits, limited its adjudication to whether it has the power to injunct the arbitral proceedings "*notwithstanding the [purported] bar*" set out in a 2001 decision of a three-judge bench of the Supreme Court of India ("Supreme Court") in *Kvaerner Cementation India Limited v. Bajranglal Agarwal and Anr., (2012) 5 SCC 214.*

> The Delhi High Court ultimately relied on Kvaerner Cementation and concluded that a civil court did not have jurisdiction to entertain suits to declare invalidity of an arbitration agreement or injunct arbitral proceedings. In doing so, the

Delhi High Court noted that Kvaerner Cementation had recently been approved by the Supreme Court in A. Ayyasamy v. A. Paramasivam and Ors., (2016) 10 SCC 386 and National Aluminium Company Limited v. Subhash Infra Engineers Private Limited and Anr., 2019 SCC OnLine SC 1091.

Presently, an appeal against the decision in Bina Modi is pending before a division bench of the Delhi High Court. The division bench has in the interim restrained the respondents from pursuing proceedings before the emergency arbitrator till the disposal of the appeal.

However, in light of Bina Modi's reliance on Kvaerner Cementation, there is now some doubt as to whether suits seeking anti-arbitration injunctions are maintainable, notwithstanding case law, both of the Supreme Court and other Indian High Courts, affirming civil courts' jurisdiction to grant such injunctions.

KVAERNER CEMENTATION AND SUBSEQUENT DEVELOPMENTS

Kvaerner Cementation was an early decision of the Supreme Court (given in 2001, but reported in 2012) on the Arbitration and Conciliation Act, 1996 ("Act") which did not consider the interplay between the various provisions of the Act, or the scope of judicial intervention in relation to arbitration. It is a short order which did not consider or cite any precedent, nor did it elaborate on the facts of the dispute.

In Kvaerner Cementation, Kvaerner had sought the grant of an anti-arbitration injunction on the ground that there was no arbitration agreement between the parties, and as such the arbitration already initiated was without jurisdiction. The Supreme Court, on a bare reading of Section 16 of the Act (which enshrines the principle of kompetenz-kompetenz) and the object of the Act, held that a civil court did not have jurisdiction to determine any objection with respect to the existence or validity of the arbitration agreement.

Kvaerner Cementation appears to have read in a negative formulation of kompetenz -kompetenz, denuding civil courts of jurisdiction to rule on, inter alia, the existence and validity of an arbitration agreement. However, the argument that an arbitral tribunal has competence, to the complete exclusion of civil courts, to determine its jurisdiction was soundly rejected by a seven-judge bench of the Supreme Court in SBP & Co. v. Patel Engineering Limited, (2005) 8 SCC 618 and subsequent decisions. Under Indian law, the competence of the arbitral tribunal to rule on its own jurisdiction only means that when issues of jurisdiction are raised before the arbitral tribunal, it can decide them. Accordingly, in light of SBP & Co., it may be argued that Kvaerner Cementation has been implicitly overruled.

Kvaerner Cementation also did not consider earlier decisions of the Supreme Court where it had acknowledged civil courts' jurisdiction to grant injunctions in restraint of foreign arbitrations and foreign court proceedings where such proceedings were vexatious or oppressive.

A number of judgments of the Supreme Court subsequent to Kvaerner Cementation have also affirmed the jurisdiction of civil courts to grant anti-arbitration injunctions. In *Chatterjee Petrochem Company and Anr. v. Haldia Petrochemicals Limited and Ors., (2014) 14 SCC 574*, the Supreme Court affirmed civil courts' jurisdiction

to entertain suits seeking grant of anti-arbitration injunctions. While ultimately the Supreme Court declined the grant of an injunction restraining arbitral proceedings, such decision was based on the Supreme Court's finding that there was a valid arbitration agreement. Similarly, in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639* the Supreme Court unequivocally held that a civil court in India had inherent jurisdiction under Section 9 of the Code of Civil Procedure, 1908 to grant injunctions in restraint of arbitration. While these judgments did not consider Kvaerner Cementation, they incontrovertibly acknowledge the inherent jurisdiction of civil courts to grant anti-arbitration injunctions. From these judgments, it is also clear that the issue before courts is now limited to specifying the circumstances in which such injunctions can be granted.

While Kvaerner Cementation has subsequently been cited in two Supreme Court decisions, Ayyaswamy and National Aluminium, the following may be borne in mind.

The Supreme Court in Ayyaswamy makes a distinction between cases where the arbitral tribunal is constituted at one party's instance and the other party files a civil suit stating that the proceedings are not valid, and cases where a suit is filed by one party and the other party files an application under the Act seeking reference of the matter to arbitration. It observes that in the former case, Kvaerner Cementation applies to exclude the jurisdiction of civil courts whereas in the latter, courts have jurisdiction to examine questions of existence and validity of the arbitration agreement and arbitrability of the dispute.

However, Ayyaswamy did not appreciate that Kvaerner Cementation had been implicitly overruled by SBP & Co. and subsequent decisions which rejected the idea that an arbitral tribunal has the sole competence to decide such questions. Moreover, the distinction made in Ayyaswamy appears to be without any real difference as the question of civil courts' jurisdiction to examine the existence and validity of the arbitration agreement and arbitrability is equally at issue in both cases.

Similarly, in National Aluminium, the Supreme Court relied on Kvaerner Cementation and held that any objection with regard to the existence or validity of an arbitration agreement may be raised before the arbitrator. A civil suit cannot be maintained for determination of such objection. The Supreme Court simply applied Kvaerner Cementation without analysing that Kvaerner Cementation could no longer be considered good law in light of SBP & Co. Interestingly, the Supreme Court also appointed a new arbitrator, without examining the existence of a valid arbitration agreement. This goes against its previous decisions, including in *Duro Felguera S.A v. Gangavaram Port Limited, (2017) 9 SCC 729*, where the Supreme Court explicitly held that while considering the appointment of an arbitrator, it is well within the power of the Court to look into the existence of a valid arbitration agreement.

Additionally, both Ayyaswamy and National Aluminium did not consider the decisions in Chatterjee Petrochem and World Sport Group wherein the Supreme Court had affirmed the jurisdiction of civil courts to grant anti-arbitration injunctions. Therefore, the value of these decisions as binding precedent to negate civil courts' jurisdiction to grant such injunctions is doubtful at best.

DELHI HIGH COURT'S PRIOR DECISION IN MCDONALD'S

A division bench of the Delhi High Court had previously in *McDonald's India Private Limited v. Vikram Bakshi and Ors. 2016 (4) ARBLR 250 (Delhi)* dealt with the issue of civil courts' jurisdiction to grant anti-arbitration injunctions in arbitrations governed by the Act.

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The division bench in McDonald's held that civil courts had jurisdiction to grant anti-arbitration injunctions where it was proved that the arbitration agreement was null, void, inoperative or incapable of being performed. However, on facts, the court held that an anti-arbitration injunction could not be granted.

The Delhi High Court in Bina Modi considered McDonald's but held that it was per incuriam as it did not consider Kvaerner Cementation, which was decided by a larger bench of the Supreme Court. However, while McDonald's did not discuss Kvaerner Cementation, the reasoning therein is based on subsequent precedents of the Supreme Court including World Sport Group. It may also be argued that McDonald's did not have to consider Kvaerner Cementation as the hard-line interpretation of Kvaerner Cementation i.e. a complete bar on civil court's

jurisdiction is not applicable anymore owing to the decision in SBP & Co. The law laid down in McDonald's holds ground as a challenge to the decision in McDonald's before the Supreme Court was dismissed.

Does Section 41(h) of the SRA Bar the Grant of Anti-arbitration Injunctions?

A novel issue considered by the Delhi High Court in Bina Modi was the applicability of Section 41(h) of the Specific Relief Act, 1963 ("SRA") which bars the grant of injunctions when "equally efficacious relief can certainly be obtained by any other usual mode of proceeding". The Delhi High Court in Bina Modi decided that the Act provided an equally efficacious relief under Section 16, and therefore, injunctive relief could not be granted by a civil court. While this argument may seem attractive, it must also be taken into account that a procedurally inefficient remedy cannot be equally efficacious. If the issues go to the root of the arbitral proceedings, such as arbitrability and jurisdiction, such issues are bound to come back to the court in some manner or the other, which makes the whole process of referring the matter to an arbitral tribunal an exercise in superfluousness.

It remains to be seen whether the division bench hearing the appeal from Bina Modi would follow the single judge's approach and deny jurisdiction to grant anti-arbitration injunctions or instead follow the position in Chatterjee Petrochem and World Sports Group.

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THE MUDDY WATERS OF PRE-ARBITRATION PROCEDURES – ARE THEY ENFORCEABLE? ANSWERS FROM AN INDIAN PERSPECTIVE

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Modern day arbitration agreements usually contain provisions that require parties to take certain steps before the commencement of arbitration. Such clauses, often described as "multi-tiered" clauses, set out a sequence for invoking the arbitration agreement. Typically, pre-arbitration steps include procedures such as time-bound mediations, amicable settlements, cooling-off periods, and other forms of non-binding determinations.

Despite being a recurrent feature in dispute resolution clauses, the legal character of pre-arbitration procedures in India is unclear. An overview of the judgments shows that the courts have addressed this issue on numerous occasions, often rendering conflicting decisions. Broadly, the courts have taken two views. A majority of the courts have given effect to the plain meaning of the arbitration clause (on a case-by-case review) and have held that pre-arbitration procedures are mandatory and go to the jurisdiction of tribunals. Other courts (the minority view) have characterized (as a matter of general principle) pre-arbitration steps as optional and non-mandatory.

THE MAJORITY VIEW - MANDATORY AND JURISDICTIONAL NATURE OF PRE-ARBITRATION PROCEDURES BY SUPREME COURT

In M.K. Shah Engineers, the Supreme Court of India (SCI) considered whether an award could be set aside if certain "procedural pre-requisites" were not achieved. The arbitration clause in this case required the parties to initially submit their disputes to the "Superintending Engineer", and thereafter to arbitration in the event a party was dissatisfied with the decision of the Superintending Engineer. The SCI formulated the issue in the following terms: "[t]he principle issue for decision is what is the effect of absence of decision by the Superintending Engineer proceeding the demand for reference and commencement of the arbitration proceedings".

> Giving effect to the text of the clause, the SCI held that such conditions were "essential" and necessarily had to be observed. However, eventually it was found that the parties had, by conduct, waived this procedural pre-condition.

A similar view was taken by the SCI in S.K. Jain.1). In this case, the tribunal refused to assume jurisdiction on the basis that the appellant had not complied with certain "mandatory requirements". **The petition against the tribunal's decision was dismissed on the basis that the language of the arbitration clause required prior satisfaction of certain conditions.**

Recently, in *Oriental Insurance Company and in United India Insurance Co. Ltd*., the SCI took the view that arbitration clauses must be construed "strictly", therefore requiring completion of the "pre-conditions" to arbitration. In these cases, the disputes arose out of certain insurance claims. The arbitration clauses stipulated that disputes could not be referred to arbitration if the insurance company disputed its liability under the applicable policy. The SCI in United India Insurance Co. Ltd., found that the arbitration agreement was "hedged with a conditionality" and the non-fulfilment of the "pre-condition" rendered the dispute "non-arbitrable". However, even though the existence of an arbitration agreement was not disputed, the SCI found that the arbitration agreement could be "activated" or "kindled" upon the competition of the pre-conditions, and the same was "sine qua non for triggering the arbitration clause".

The appointing authority in *Demerara Distilleries* took a different approach. In this case, the language of the clause required parties to engage in mutual discussions, followed by mediation. In the absence of a resolution, the parties had the option of referring their disputes to arbitration. In the circumstances, the SCI found that objections relating to the appointment application being "pre-mature" did not merit "any serious consideration". It was held that various correspondence between the parties indicated that any mutual discussions or mediation would be an "empty formality".

It appears that in some situations (like in Demerara Distilleries), the SCI, other than being guided by the parties' intentions (i.e., by the language of the arbitration clause), may also consider the likelihood of success of pre-arbitration procedures. Interestingly, in disputes involving the Indian state or its entities, the courts may also test the constitutional validly of the prescribed pre-conditions. For instance, the SCI in Icomm Tele Ltd struck down a pre-condition requiring a deposit of 10% of the claimed amount as it found this obligation to be "arbitrary", making the process "ineffective" and "expensive".

BOMBAY HIGH COURT

A full bench of the Bombay High Court in *S Kumar Construction* had to decide whether prior compliance with pre-arbitration procedures was mandatory. After reviewing previous decisions on this issue, the Court answered this question in the negative. The Bombay High Court found that the cases which held such procedures to be compulsory were decided on the basis of a differently worded arbitration clause, and thus could be distinguished on facts. Importantly, the Bombay High Court did not pronounce that as a general rule all pre-arbitration procedures are optional. Instead, it was held that such procedures could be mandatory and go to the jurisdiction of the tribunal depending on the language of the arbitration clause. Similarly, the Bombay High Court in Atlanta Infrastructure declined to set aside an award on the ground of violations of pre-arbitral steps as it found that the satisfaction of such procedures was not mandatory under the dispute resolution clause.2)

THE OTHER VIEW - DELHI HIGH COURT

In contrast, the Delhi High Court has adopted a distinct position. In Ravindra Kumar Verma, the Court held that prior requirements before referring a dispute to arbitration are "only directory and not mandatory". The Ravindra Kumar Verma Court followed earlier decisions of the Delhi High Court in Sikand Construction and Saraswati Construction Company which held that "the procedure/pre-condition has to be only taken as a directory and not a mandatory requirement".

Following Ravindra Kumar Verma, the Delhi High Court in Baga Brothers, Siemens Limited, and Sarvesh Security Services has reaffirmed that pre-arbitration procedures are not mandatory.

COMMENT

In view of the above, it is difficult to ascertain with certainty whether pre-arbitration procedures are enforceable. However, a reasonable approach is to proceed on the basis (with the exception of the Delhi High Court decisions) that courts in India are likely to interpret arbitration clauses strictly and give effect to the language of clause. The courts however have not expressly examined this question (of pre-conditions to arbitration) as a matter of "admissibility" or "jurisdiction" or "procedure". The distinction between these concepts has been discussed in Professor Jan Paulsson's article here, and Professor Gary Born's article here.

The proper forum to determine if pre-arbitration steps have been satisfied and the consequences

It is also noteworthy that the 2015 Amendments have considerably limited the extent of court intervention whilst making arbitrator appointments. Previously, Indian courts exercised wide jurisdiction at the appointment stage and could decide on a host of issues at this juncture which lead to considerable delays. Accordingly, the amended arbitration act introduced a statutory limitation on the scope of a court's enquiry at the appointment stage to the "examination of the existence of an arbitration agreement". The legislative intent behind the amendments was to confine the court's jurisdiction, and to make the arbitral tribunal the appropriate forum for the determination of such controversies. Accordingly, the SCI in Duro Felguera, held that at the appointment stage, the courts can only "see whether an arbitration agreement exists - nothing more, nothing less". However, despite these legislative reforms, and the decision in Duro Felguera, a larger Bench of the SCI (three-judge bench in United India Insurance Co. Ltd.) went into the question of whether arbitration "pre-conditions" were met at the pre-constitution stage. With respect, this decision may be inconsistent with the recent legislative effort to designate the arbitral tribunal as the proper forum to determine such questions. Further, there is little clarity regarding the standard of judicial review to be applied whilst making these determinations.

Suggested approach

As a middle path, the Indian courts could consider adopting a similar approach taken by the Singapore Court of Appeal in *International Research Corp PLC v Lufthansa Systems* where the Court took the view that if the pre-conditions are defined with sufficient clarity and specificity, they are mandatory in nature whereas if they are vague and general in nature, they cannot be mandatorily enforced.

Further, the courts could offer clarity on the standard of compliance needed to satisfy the pre-arbitration conditions. Similar to the ruling in International Research Corp PLC, the Indian courts could also require "actual compliance" (or strict compliance) of the pre-conditions as opposed to "substantial compliance". These determinations could be made on a case-by-case basis and with an underlying objective to uphold the parties' intentions.

A clear statement of law would also enable parties to achieve a greater understanding on their pre-arbitration obligations and prompt them to make bona fide efforts to comply with the same. This could result in successful settlements in some cases and truly achieve the rationale behind pre-arbitration mechanisms, which is to save time and costs by voluntary settlement.

Finally, legal certainly would be particularly useful in the Indian context where the respondents routinely resist applications for the appointment of arbitrators and raise jurisdictional objections on the basis that certain "pre-conditions" (such as mediation) have not taken place. Clarity on this subject would discourage respondents from advancing unmeritorious objections thereby accelerating arbitrator appointments and the arbitration process as a whole.

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INDIA: IMPACT OF COVID-19 ON ARBITRATION PROCEEDINGS IN INDIA

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The world is reeling under the impact of Covid-19, a global pandemic that has caused lockdowns in many countries. With the outbreak showing no signs of abating, the worldwide disruption in all facets of life seems set to continue. The legal system of India is no exception including the Alternate Dispute Resolution Mechanism, which has also been adversely affected.

> The Supreme Court of India, taking suo moto cognizance of the difficulties faced by litigants throughout the country, on account of the Covid-19 Virus with respect to the period of limitation under various laws passed an order dated March 23, 2020. It was held that the period of limitation in all proceedings before any Court or any Tribunal [whether under the general law or Special Laws] shall stand extended w.e.f. March 15, 2020, till further orders are passed.

THE CHALLENGE TO ARBITRAL PROCEEDINGS IN THE PRESENT SCENARIO AND THE IMPLICATIONS OF SECTION 29A

The situation of complete lockdown in the country prevents the physical conduct of arbitral proceedings. Non-conduction of proceedings gives rise to its own set of problems. Section 29A which was inserted by the Arbitration and Conciliation (Amendment) Act in the year 2015, fixes the time-period for passing the arbitral award within twelve months from the date of reference to the arbitral tribunal (i.e. when notice of appointment is received by the arbitrator) and is extendable by another six months with the consent of the parties. Any further extensions can only be granted by the concerned court, either prior to or after the expiry of the time period, failing which the mandate of the arbitral tribunal shall terminate. Hence, Section 29A, though enforcing a

strict timeline for the conclusion of arbitration proceedings, also provides a saving grace which may be resorted to in situations such as the present one.

In order to seek an extension of the statutory timeline for completion of arbitration proceedings, both the parties (jointly) or either of the parties individually can file an application before the concerned court within a reasonable period from either before or after the expiry of 12 months.

> The pending arbitration proceedings where the stipulated time period is expiring within the lockdown period as mandated by the Government of India may take recourse to Section29A for extension of time upon reopening of the courts of law.

Further, in line with the direction of the Hon'ble Supreme Court dated March 23, 2020, the statutory timelines for filing pleadings as well as conduction of all other proceedings stand extended and may be referred to in the application for an extension being filed. The order dated March 23, 2020, is all-encompassing and is applicable to all Courts and Tribunals which includes an Arbitral Tribunal as well.

LITIGATION PROCEEDINGS ARISING OUT OF THE ARBITRATION & CONCILIATION ACT

Statutory timelines enumerated under the Arbitration & Conciliation Act wherein a Court of law is mandated to be approached such as under Section 27, seeking Court assistance for evidence or under Section 34 for challenging an arbitral award, also stand affected in the present scenario. However, the order of the Hon'ble Supreme Court dated March 23, 2020, provides relief in extending the limitation period for all such stipulated timelines codified in the Act.

MODERNIZED PROCEDURES IN INTERNATIONAL COMMERCIAL ARBITRATION TO LEAD THE WAY

The Indian Council of Arbitration (ICA) is a leading arbitral institution in India administering the conduct of arbitration proceedings including international commercial arbitration. The ICA has been set up through the initiatives of the Government of India and handles a vast number of arbitration cases. The ICA has framed and adopted the International Commercial Arbitration Rules which govern international commercial arbitration carried out by the ICA and serve as a guideline to other arbitral institutions as well.

> The rules of the ICA mandate that the Arbitral Tribunal has the power to conduct arbitration proceedings by video conference, telephone or any such other means of communication as may be feasible and deemed fit. Since in international commercial arbitration, the parties are often residents of different countries, in order to enable the cost-effective arbitration proceedings and to meet the strict statutory timelines, the use of modern technology is a necessity more than a preference.

Since the virtual conduct of proceedings is already an established norm in international commercial arbitration, domestic arbitration proceedings will do well taking a leaf out of their book and applying it to today's tumultuous situation.

CONTINUITY OF ARBITRATION PROCEEDINGS IN THE TIME OF CORONA

Despite the increasing restrictions and complete lockdown in the country, some arbitral proceedings, which are of urgent nature, may be conducted virtually.

Section 19 of the Arbitration & Conciliation Act, 1996 states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 nor the Indian Evidence Act, 1872. The parties to the arbitration proceeding or the Arbitral Tribunal may decide on the procedure to be followed in the conduct of such arbitration proceedings.

While the Arbitration & Conciliation Act, 1996 is silent on the conduct of arbitration proceedings through video conferencing, Section 19 certainly empowers the Arbitral Tribunal to allow the same. The Arbitral Tribunal can direct the parties to the arbitration proceedings to file pleadings through electronic mail and conduct proceedings through the means of video conferences aiding social distancing with minimal loss of productivity.

In fact, Arbitral Tribunals in consonance with the changing technology and the strict statutory timelines enumerated in the Arbitration & Conciliation Act, 1996 may even resort to video conferencing in routine circumstances for convenience as well as cost-effectiveness even in domestic arbitration proceedings.

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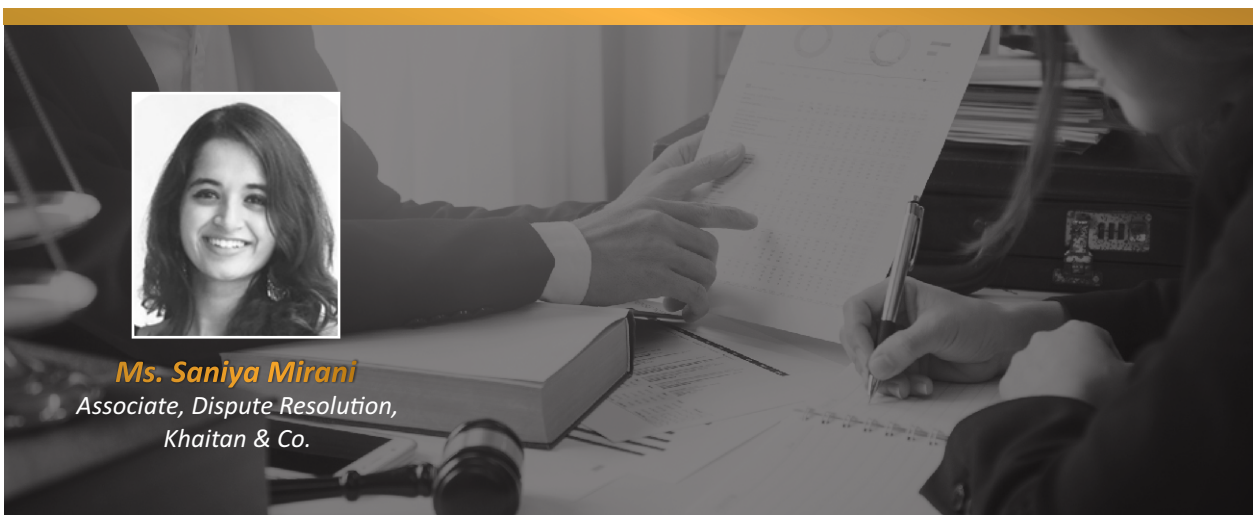
DUE PROCESS CONCERNS IN VIRTUAL WITNESS TESTIMONIES: AN INDIAN PERSPECTIVE



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Before the Covid-19 pandemic, virtual witness testimonies were prevalent in specific instances, such as when witnesses could not reach the venue because of illness. Article 8.1 of IBA Rules on Taking of Evidence in International Arbitration permits virtual testimony only at the discretion of the tribunal. The Commentary on the Rules establishes that the tribunal's decision to allow video-conference should depend upon the "sufficiency" of the reasons given.

The uncertainty of the return of normalcy has forced the parties to adapt to a new normal, by relying entirely on virtual hearings, including virtual witness testimonies. Arbitral institutions are organizing virtual hearings using various video-conferencing platforms. As parties get more comfortable with technology and realise the associated time/cost benefits, virtual witness testimonies are likely to become more prevalent.

Accordingly, there is a need to analyse the manner in which procedural safeguards such as, "due process", would play out in virtual witness testimonies, in order to enable a fair and proper hearings.

> The exact contours of "due process" vary amongst national laws, but certain broad principles, including, the right to be heard and equal treatment of parties are universally accepted. While the principle of the right to be heard entails that each party should have an opportunity to present its case and defend against opposition's case, the concept of equal opportunity entails that a party should not be less

UNDERSTANDING THE PREVALENT DUE-PROCESS CONCERNS

One prevalent due process concern is that witnesses may be coached using concealed means of communications during virtual witness testimony. Moreover, the credibility of virtual testimony, particularly in cross-examinations, has been questioned

as the practice involves analysing body language and non-verbal cues of the witness, such as eye gestures, gesticulation, and expressions, which becomes difficult during virtual hearings.

However, modern technology combined with logistical best practices has alleviated these concerns. Using HD video quality ensures that facial expressions and body gestures are clearly visible. As opposed to an in-person hearing, video-conferencing provides a closer-up view of the witness and allows for video replays (if recording permitted) for analysing body language. Through the installation of rotating or 360-degree view cameras, parties/tribunals may monitor the witness and ensure that he or she is not accessing other devices or persons for being coached. Separately, software applications/extensions may be used for blocking other web-pages for communication while the hearing is in progress.

These tech-solutions coupled with logistical best practices provided by the Seoul Protocol on Video Conferencing in International Arbitration, ("Protocol") address a majority of these concerns. The Protocol's requirements include: a reasonable part of the interior of the (witness's) room to be visible and giving testimony on an empty desk, which would further eliminate risks of witness coaching. The safeguard to opt-out of the video conference, if the tribunal deems it unfair to either party, ensures a safe back-up.

However, certain shortcomings of the virtual testimonies still need to be addressed. Virtual hearings may be more time-consuming in cases requiring bulky documents to conduct cross-examination. Moreover, there are issues of unreliability of technology. For instance, the right to be heard may be impacted when the connection is lost during a cross-examination leading to the loss of momentum and enabling the witness to re-evaluate their answers in the extra time. Virtual cross-examination may also not be helpful if there are audio/video distortions/ freezing of images/ time-lags. Further, concerns regarding equal treatment may arise where one party presents evidence and cross-examines in person, while the counter party is expected to take evidence by virtual hearing.[1])

A close-up view of the parties may also lead to over-interpretation of the visible gestures or actions. For instance, a miniscule-time lag in answering a question or visibility of sweat on the face may be over-interpreted.[2])

In my opinion, amidst these challenges, safeguarding the right of due process should be a dual responsibility of both the participants of the arbitral process (parties, arbitrators, institutions) and the courts enforcing the award. To minimize issues of unreliability/misuse of technology, parties (to the extent it can be afforded) should implement the logistical/technological best-practices, including installation of rotating cameras, communication blocking software, etc. Counsel should make a judgement call on whether to remotely take a clinching testimony, i.e., one which would affect the award. Tribunals may order to opt-out of videoconference where connectivity issues persist.

If, however, participants fail to remedy due process breaches internally, courts must ensure that grounds to

challenge or resist enforcement dynamically interpreted in order to address due process violations owing to unreliability and misuse of technology.

WITNESS EXAMINATION BY VIDEO IN INDIA

While the legislation is silent on video-conferencing, the recording of witness testimony through video-conferencing has been permitted by the Indian Supreme Court, where the presence of witness is required, but the witness cannot appear without an unreasonable amount of delay, expense or inconvenience. *(State of Maharashtra v. Dr. Praful Desai, (2003) 4 SCC 601.)*

Accordingly, in cases where witnesses have had poor health conditions, financial burden, were aged or resided abroad, testimonies have been taken through videoconferences. *(See The State of Maharashtra v. Chandrabhan Sudam Sanap, 2018 SCC OnLine Bom 6576; Zaishu Xie & Another v. The Oriental Insurance Company Ltd. & Others, 2014 (207) DLT 289; Amitabh Bagchi v. Ena Bagchi, 2004 SCC OnLine Cal 93.)*

At the same time, the courts have given directions for conducting a videoconferencing examination including, (i) proper identification of witnesses; (ii) the appointment of a technical coordinator; (iii) ensuring access of documents to witnesses; and (iv) presence of an officer to ensure witness is not coached. The Court has further caveated that the cross-examinations should be finished in one-go, without granting adjournments. Although, High Courts have also noted the unsuitability of virtual cross-examination where there are voluminous documents. (R Shridharan v. R Sukanya, 2011 (2) MWN (Civil) 324.)

Likewise, the courts have been largely positive towards video testimonies in arbitrations. The Calcutta High Court directed a witness present in Russia to present himself for a cross-examination through videoconference. *(Saraf Agencies Private Limited v. Federal Agencies for State Property Management, 2018 SCC OnLine Cal 5958.)* The Madras High Court went one-step further and encouraged parties from different parts of the country to conduct entire arbitration via videoconference. *(Axis Bank v. M/s Nicco UCO Alliance Credit Limited, 2017 SCC OnLine Mad 33928.)* More recently, the Delhi High Court, in the case of *Rategain Travel Technologies Private Limited v. Ujjwal Suri, recognizing the possibility of conducting virtual arbitral proceedings, stated, "the arbitral tribunal may consider conducting the hearings and recording of evidence by video-conferencing, if considered feasible". (Rategain Travel Technologies Private Limited v. Ujjwal Suri, High Court Of Delhi, O.M.P (MISC) 14/2020, May 11, 2020.)*

In light of these judicial precedents, it may be reasonable to conclude that the Indian courts may continue taking a positive view towards video testimonies in arbitration. Taking inspiration from above-cited decisions, in order to further eliminate risks of witness coaching, either the representative of an institution or the counterparty may be present in the same room as witness. Moreover, parties should be encouraged to keep the virtual cross-examinations brief and conduct them in one session.

ENFORCEMENT OF AWARDS IN INDIA

For due process purposes, a party may challenge or resist the enforcement of an award on grounds of, inability to present one's case or the tribunal's lack of compliance with the procedure contemplated in the agreement.

A common instance where an award may be successfully challenged or resisted on the ground of inability to present one's case, is where no opportunity was given to a party to deal with an argument which goes to the root of the case. *(Vijay Karia and Others v.*

Parysmian Cavi E Sistemi SRL and Others ("Vijay Karia"), 2020, SCC OnLine SC 177; Ssangyong Engineering and Construction Company Limited v. NHAI ("Ssangyong"), 2019 SCC OnLine SC 677.) In Vijay Karia case, the Supreme Court propounded that the test to determine if a party has been unable to present its case is - *"whether factors outside the party's control have combined to deny the party a fair hearing."*

> Further, the ground of violation of "public policy" may also be invoked by courts sua sponte to set aside or resist enforcement. However, the Indian Judiciary has been taking a pro-enforcement approach by narrowly interpreting the ground of public policy.

Given the pro-enforcement approach of the Indian judiciary, the courts are unlikely to set-aside/resist enforcement of domestic/foreign awards, unless there has been an "apparent" due process violation during virtual testimony. Accordingly, enforcement challenge to an award based on virtual witness testimonies would be successful when fairness has been visibly impacted, and not when grounds made out are hyper-technical. In my opinion, such a standard, although high, aims to strike a balance between fairness and ensuring that parties do not indulge in speculative litigation. The standard would also assist in reducing due process paranoia, i.e., "a perceived reluctance by arbitral tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully".

CONCLUSION

The due process concerns in virtual testimonies are yet to be fully resolved. In my opinion, until such resolution, the decision to take virtual testimonies should be taken carefully - technological capabilities of participants, importance of witness, are relevant considerations in such decision-making. Furthermore, in my opinion, where virtual testimonies are taken, implementation of technological/logistical solutions coupled with vigilance of courts is necessary to avoid due process concerns.

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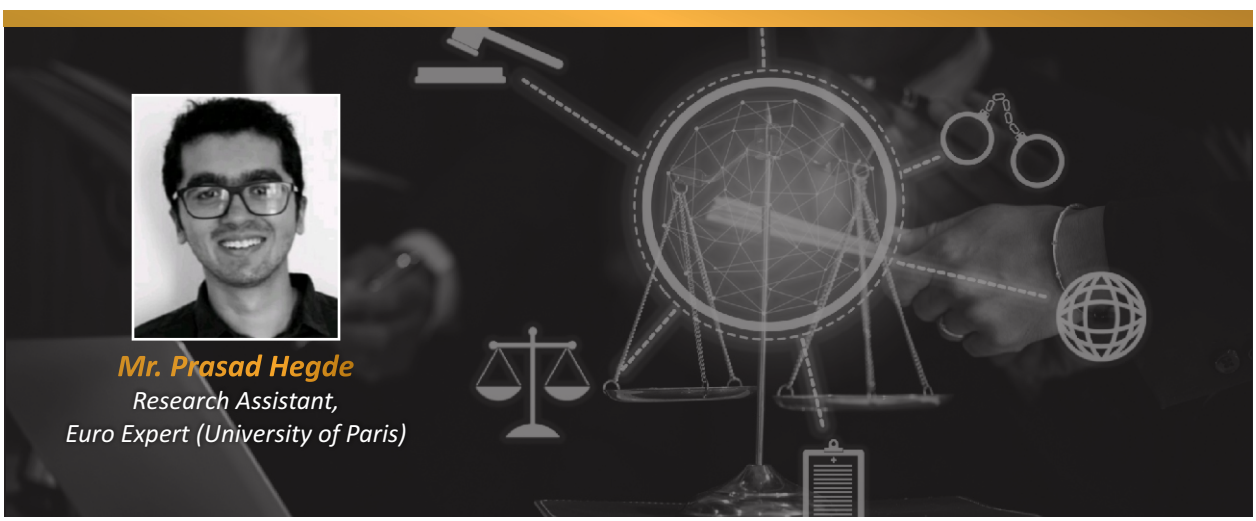
BALASORE V. MEDIMA: PROVIDING CLARITY OR CREATING A MIST AROUND THE GRANT OF INJUNCTIONS IN FOREIGN SEATED ARBITRATIONS?



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A single-judge bench of the Calcutta High Court (Calcutta HC) recently delivered a judgement in Balasore Alloys Ltd. v. Medima LLC which revived the debate regarding whether a 'civil court has jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations?' This decision requires a careful examination because of its impact on 1) the arbitration-friendly reputation that India has slowly gained and, 2) the larger and important question of whether civil courts have the jurisdiction to grant an anti-arbitration injunction in foreign seated arbitrations.

BACKGROUND OF THE DISPUTE

The case before the Calcutta HC concerned agreements between India-based Balasore Alloys Ltd. (Balasore) and US-based Medima LLC (Medima). The Agreement entered into in 2018 provided for an International Chamber of Commerce (ICC) Arbitration in London. Further, the purchase orders that were issued regularly provided for the application of the Arbitration and Conciliation Act, 1996 (the Act), and for the venue of arbitration to be Kolkata, India.

A dispute arose between the two entities, and Medima commenced arbitration under the ICC rules in London. At the same time, Balasore also initiated arbitral proceedings under the Act in Kolkata. In Medima's arbitration, Balasore raised objections regarding the validity of the arbitration agreement and urged the ICC Court to decide the matter as a preliminary issue before the constitution of the tribunal. In turn, the ICC Court confirmed that a 3-member tribunal would be constituted, and it would decide all objections. Hence, Balasore approached the Calcutta HC to grant an anti-arbitration injunction against the ICC Arbitration. The primary question before the Calcutta HC was whether a civil court has the jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations?

THE DECISION OF THE COURT

The Calcutta HC, while ruling that a civil court has the power to grant an anti-arbitration injunction in

a foreign seated arbitration, held that this power has to be exercised sparingly and only under the circumstances listed in paragraph 24 of the Supreme Court's (SC) judgement in Modi Entertainment Network v. WSG Cricket PTE Ltd. Further, the Calcutta HC while rendering this decision, rejected the Delhi High Court's decision in Bina Modi & Ors. v. Lalit Modi & Ors which had held that a civil court lacks the power to grant anti-arbitration injunctions.

On facts, it held that Balasore is not entitled to an anti-arbitration injunction since it has failed to display how their case falls under any of the categories provided in para 24 of the judgment in *Modi Entertainment Network.* Therefore, the Calcutta HC ruled that there is no reason which merits the grant of an injunction against the ICC arbitration seated in London.

APPLICABILITY OF PRINCIPLES GOVERNING ANTI-SUIT INJUNCTIONS TO ANTI-ARBITRATION INJUNCTION

Although on facts, the Calcutta HC held that Balasore was not entitled to an anti-arbitration injunction, the basis on which it was decided that a civil court in India has the power to grant an anti-arbitration injunction in foreign seated arbitrations merits discussion. As mentioned above, the Calcutta HC while arriving at this conclusion, relied on the principles provided in para 24 of the SC judgment in Modi Entertainment which govern the grant of anti-suit injunctions.

As per the above decision, an anti-suit injunction can be granted if: (i) the proceedings are oppressive, vexatious or in a forum non-conveniens; (ii) in case the proceedings are to be allowed, then the ends of justice would be defeated; (iii) the proceedings in the foreign court (decided by the parties based on an exclusive-jurisdiction clause) would result in injustice to the parties. Therefore, looking at the decision rendered in Balasore a question arises that whether the principles governing an anti-suit injunction can also govern the grant of an anti-arbitration injunction.

A two-judge bench of the Delhi HC in *Mcdonald's India Pvt. Ltd. v. Vikram Bakshi & Ors.* has considered this question before, where it held that in a case involving an anti-arbitration injunction, the governing principles could not be the same as that of an anti-suit injunction. The reason being that the Act being a complete code in itself, empowers an arbitral tribunal itself to rule on its own jurisdiction. Further, it held that the governing principles of a civil suit and that of arbitration are different. Therefore, the principles applicable to govern an anti-suit injunction could not be applied to a suit concerning anti-arbitration injunctions.

Even recently in the *Bina Modi* judgement, the Delhi HC held that principles of anti-suit injunction cannot be used in a dispute concerning an anti-arbitration injunction, the reason being, under the Act, arbitrations are based on the principles of party autonomy and Kompetenz-Kompetenz. A tribunal has sufficient power to rule on its own jurisdiction, and the courts should sparingly interfere when the parties have displayed a strong intention to refer their disputes to arbitration.

THE LEGAL POSITION FOR GRANT OF ANTI-ARBITRATION INJUNCTIONS IN FOREIGN SEATED ARBITRATIONS

A two-judge bench of the SC in Chatterjee Petrochem v Haldia Petrochemicals held that civil courts in India have the power to grant anti-arbitration injunctions in foreign seated arbitrations. The SC held that the grant of such injunctions should be based on the parameters mentioned in Section 45 of the Act i.e. if the arbitration agreement is "null and void, inoperative, or incapable of being performed".

In World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd, a two-judge bench of the SC upheld Chatterjee Petrochem. The SC relied on Redfern and Hunter to explain that an arbitration clause is "inoperative" and "incapable of being performed" when "it has ceased to have effect as a result, for example, of a failure of the parties to comply with a time-limit, or where the parties by their conduct impliedly revoked the arbitration agreement".

Kvaerner Cementation v. SBP

A three-judge bench of the SC in *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.* held that by virtue of Section 16 of the Act, a civil court lacks the power to look into matters related to the existence or validity of an arbitration clause (jurisdictional issues). However, the Calcutta HC made an interesting observation by noting that Kvaerner stood implicitly overruled by a seven-judge bench decision of the SC in SBP & Co. v. Patel Engineering Ltd. & Ors. The reason behind this was that the majority opinion of the SC in SBP had conclusively rejected the argument that an arbitral tribunal solely has competence, to the complete exclusion of civil courts, to determine its own jurisdiction. Therefore, the Court held that in light of the majority opinion in SBP, it may be interpreted that the dictum in Kvaerner stood implicitly overruled. However, a careful analysis of both Kvaerner and SBP reveals that both these judgements operate in totally different planes.

The main issue referred to a seven-judge bench in SBP was to decide whether the power exercised by a Chief Justice or his/her designate under Section 11 of the Act was an administrative function or a judicial function. With a majority of 6-1, the SC decided this function to be a judicial function. Further, the SC ruled that a civil court has the power to rule on a tribunal's jurisdictional issues. However, this power of a civil court was decided only in relation to Section 11 of the Act.

The SC in SBP dealt with the powers of a civil court to rule on the tribunal's jurisdiction. No where did the SC in SBP deal with the issue regarding the exclusion of powers of a civil court to grant an anti-arbitration injunction by virtue of Section 16. However, this was exactly the question that the SC was concerned about in Kvaerner i.e., exclusion of powers of a civil court. Therefore, both these judgments apply to whole together different aspects, and there cannot be any kind of overlap between them. Hence, Kvaerner very well stands firm and cannot be rejected on the ground that it stands implicitly overruled by virtue of SBP.

APPLICABILITY OF KVAERNER TO FOREIGN SEATED ARBITRATIONS

The Calcutta HC in Balasore rejected Kvaerner by giving an invalid reason as explained above. However, the HC was right in rejecting Kvaerner but should have done so with a different reason i.e., by holding that Kvaerner applies to domestic arbitrations and not to foreign seated arbitrations.

Kvaerner reached the SC through Article 136 of the Constitution. It was an appeal against an order of the Bombay HC wherein the Bombay HC had upheld the district court's decision which rejected Kvaerner's plea to grant an anti-arbitration injunction. Hence, it can be seen that Kvaerner was a case that dealt with anti-

arbitration injunctions in a domestic seated arbitration because it is only in cases of domestic arbitrations that a district court has the power to entertain a suit for grant of anti-arbitration injunctions. If it were to be a foreign seated arbitration then the jurisdiction would lie with an appropriate high court.

Kvaerner's decision in holding that civil courts lack the power to grant such injunctions still holds ground, but this is only in context to domestic arbitrations. Therefore, the Delhi HC in Bina Modi erred in holding that a civil court lacks the power to grant an anti-arbitration injunction in a foreign seated arbitration, by relying on Kvaerner. Instead, it should have upheld the power of civil courts to grant such injunctions by relying on Section 45 of the Act and Chatterjee Petrochem. Further, while the Calcutta HC was right in rejecting Kvaerner, its reasoning behind the same seems to be flawed (as explained above).

CONCLUSION

The single-judge bench decision in *Balasore* has been appealed to a division bench. However, the division bench is yet to re-examine the question as to whether civil courts have the jurisdiction to grant anti-arbitration injunctions in foreign seated arbitrations. Therefore, the Calcutta HC still has an opportunity to rectify the errors committed by the single-judge bench. Hence, it is high time the HC 1) clarifies the applicability of Kvaerner to foreign seated arbitrations, lay to rest the apparent conflict between Kvaerner & SBP and, 2) firmly establishes the grounds on which an injunction can be granted against a foreign seated arbitration.

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1. Vodafone wins International Arbitration against India in ₹ 20,000 crore Tax Dispute Case

Vodafone Group Plc said that it had won an international arbitration case against the Indian government, ending one of the most high-profile disputes in the country involving a Rs 20,000 crore in tax claim.

An international arbitration tribunal in The Hague ruled that India's imposition of tax liability on Vodafone, as well as interest and penalties, were in a breach of an investment treaty agreement between India and the Netherlands, two sources with direct knowledge of the matter said.

India had claimed a total of Rs 279 billion, including about $2 billion in tax, as well as interest and penalties, one of the sources said.

The tribunal, in its ruling, said the government's demand is in breach of "fair and equitable treatment" and it must cease seeking the dues from Vodafone. It also directed India to pay 4.3 million pounds to the company as compensation for its legal costs, one of the sources added.

Vodafone said in a statement the amount of the award was confidential. Shares in the company's India unit, Vodafone Idea ended 13 per cent higher than before.

"The tribunal held that any attempt by India to enforce the tax demand would be a violation of India's international law obligations," Vodafone said in its statement.

The Finance Ministry said it will carefully study the award, together with its lawyers. "After such consultations, the government will consider all options and take a decision on further course of action including legal remedies," the ministry said in a statement.

"Vodafone has finally got justice first from the Supreme Court and now from an international arbitral tribunal," said Anuradha Dutt, the lawyer representing the company.

The ruling brings an end to one of the most controversial disputes in India under international treaty agreements that it enters into with countries to protect foreign investments.

Vodafone's tax dispute stems from its $11 billion deal to buy the Indian mobile assets from Hutchison Whampoa in 2007. The government said Vodafone was liable to pay taxes on the acquisition, which the company contested.

In 2012, the Supreme Court ruled in favour of the telecom provider but the government changed the rules to enable it to tax deals that had already been concluded.

In 2014, Vodafone initiated arbitration proceedings against India.

Source: As reported in India Today by Thompson Reuters dated 25th September, 2020 from website https://www.indiatoday.in/business/story/vodafone-wins-international-arbitration-against-india-in-2-billion-tax-dispute-case-1725394-2020-09-25

2. Singapore, India Bourses to End Arbitration, Push Trading Link

Singapore Exchange Ltd. and the National Stock Exchange of India Ltd. are formally ending a years-long disagreement related to derivatives trading, with the two exchanges set to launch a cross-border trading link.

Both exchanges will withdraw arbitration proceedings that began after a dispute erupted in 2018 regarding the trading of Indian stock-based derivatives in Singapore, according to a statement from the Singapore exchange.

The exchanges have received another round of regulatory approvals on implementing a connect that will allow market participants to trade NSE Nifty 50 Index futures and options contracts from India's Gujarat International Finance Tec-City.

This is "definitely a positive outcome for SGX as it allows a bigger pool of clients" even though the Nifty products will cease to trade in Singapore once the platform is operational, said Joel Ng, an analyst at KGI Securities (Singapore) Pte.

The dispute between Singapore and India's exchanges came to the fore in February 2018, when NSE together with other Indian markets said they would end all licensing agreements with foreign bourses to discourage offshore trading. The two revived talks in July that year, which resulted in the proposal of a cross-border trading link for Nifty 50 index derivatives.

The exchanges received a set of approved regulatory dispensations from their statutory regulators for the connect last year. The related contracts are currently traded on the Singapore bourse. The launch date for the new NSE IFSC-SGX Connect has not been decided yet.

"SGX will work with NSE and stakeholders to develop a connectivity infrastructure," the exchange's Chief Executive Officer Loh Boon Chye said in the statement.

"The connect will broaden the international and domestic participant base and further strengthen the capital market ecosystem in GIFT city resulting in more broad based development across asset classes and capital raising activity," added Vikram Limaye, NSE's chief executive officer.

Source: As reported by Ishika Mookerjee at Bloomberquint on 22nd September, 2020 from website https://www.bloombergquint.com/global-economics/singapore-india-bourses-to-end-arbitration-push-trading-link

3. Supreme Court Grants Relief To Vedanta, Videocon In Ravva Oil Field Case

The top court upheld Delhi High Court's order which refused to interfere with the arbitral award in production sharing contract for Ravva oil fields.

In a major setback for the government, the Supreme Court upheld a foreign arbitration award in favour of Vadanta and Videocon for the development of the Ravva oil and gas fields off the coast of Andhra Pradesh between 2000 and 2007. The ruling allowed the companies to recover $499 million for the project, an amount that was capped at $198 million by the centre, dismissing the government's appeal against the foreign arbitration award.

The Supreme Court said the Malaysian court rightly examined the Ravva arbitration award, which doesn't offend public policy of India, as it is a subsequent event. The enforcement court cannot reassess evidence available, it said.

The top court upheld an order by the Delhi High Court, which refused to interfere with the arbitral award in the production-sharing contract (PSC) for Ravva oil fields in the Krishna Godavari basin. Cairn India (now Vedanta) and Videocon were allowed to recover $198 million as per the contract.

In July 2014, the Malaysian Court of Appeals had upheld the arbitral award allowing additional recoveries to Vedanta.

The dispute centres around the production-sharing contract between the companies and the government over exploration of the Ravva oil fields between 2000 and 2007.

The Petroleum Ministry moved the top court in June this year, after the Delhi High Court refused to interfere with the arbitral award in favour of Vedanta.

Source: As reported by Reported by A Vaidyanathan and Abhishek Vasudeon in NDTV Profit dated 16th September, 2020 from website https://www.ndtv.com/business/supreme-court-grants-relief-to-vedanta-videocon-in-ravva-oil-field-case-2296165

4. Harvey Weinstein seeks to pursue arbitration over firing from Weinstein Co.

DOVER, Del. (AP) - Disgraced Hollywood film mogul and convicted rapist Harvey Weinstein is asking a bankruptcy judge in Delaware to allow him to pursue arbitration in New York over what he claims is his wrongful termination from the company he co-founded.

An attorney for Weinstein submitted a court filing this week asking the judge who is presiding over The Weinstein Co. bankruptcy to lift the automatic stay that halts outside legal proceedings involving Chapter 11 debtors so he can pursue the arbitration case he filed in 2017.

"Newly discovered information and facts, gleaned during the course of investigation and discovery in collateral matters, have yielded evidence that corroborates the wrongful termination claim that is subject of the arbitration," Weinstein attorney Julia Klein wrote.

Klein also said there has been no willful delay in seeking to lift the bankruptcy stay in order to proceed with the arbitration.

"Movant has been involved in one of the most publicized criminal proceedings in recent history, after which he was convicted and sentenced to a term of incarceration of 23 years, and is also defending against numerous civil claims, while facing additional prosecution in California," she noted. "All while movant has suffered from increasing ill health and medical issues."

The Weinstein Co. sought bankruptcy protection in March 2018 amid a sexual misconduct scandal that brought down Weinstein and triggered a nationwide movement to address predatory sexual behavior and harassment in the workplace. Weinstein was sentenced to 23 years in prison earlier this year after being convicted in New York of rape and sexual assault.

Prosecutors in Los Angeles are seeking his extradition to California to face charges of raping a woman and sexually assaulting another in 2013.

According to court filing, Weinstein in 2015 entered into an employment agreement with The Weinstein Co. that includes a provision requiring binding arbitration in New York for any dispute between the parties, including claims for discrimination and for violation of any federal, state or local law.

The company fired Weinstein in October 2017 just days after The New York Times published a story detailing decades of sexual harassment allegations made against him by actresses and employees. Weinstein filed an arbitration demand two weeks later, asserting violations of the employment agreement and related state law claims.

The future of the bankruptcy case remains up in the air following a decision by a federal judge in New York last month to reject a proposed $19 million settlement between Weinstein and some of his accusers. Lawyers for several other alleged victims had opposed the deal, which also would have required approval by the bankruptcy court.

The proposed settlement amount was included in a plan proposed in the bankruptcy case to create a $46.8 million fund to settle claims against Weinstein and other company officials and to cover their defense costs.

Attorneys for two women who have filed lawsuits alleging they were sexually assaulted by Weinstein have asked the bankruptcy judge to convert the Chapter 11 case to a Chapter 7 liquidation. Doing so would reduce the amount of money going to professionals and allow a trustee to pursue civil claims on behalf of the bankruptcy estate against Weinstein and other company officials, they argue.

Attorneys for the company and the official committee of unsecured creditors have asked the judge to give them until Aug. 31 to try to negotiate a revised plan that would eliminate class action treatment of sexual misconduct claims and would be overseen exclusively

by the bankruptcy court, with no involvement by the New York district court.

Attorneys for the two women contend that any revised bankruptcy plan would still be dictated and funded by self-interested insurance companies who are not fiduciaries of the bankruptcy estate and not working in the best interests of Weinstein's victims.

"A threshold issue, therefore, is whether the insurance companies will be permitted to rent this court, with the debtors and committee acting as their proxies, and have this court invoke its most robust powers and jurisdiction, to silence forever victims of rape, sexual assault and sexual harassment," they wrote in a recent court filing.

A hearing in the case is scheduled for Sept. 2.

Source: As reported by Associated Press on 21st August, 2020 from website https://pagesix.com/2020/08/21/harvey-weinstein-seeks-to-pursue-arbitration-over-firing/

5. Jammu and Kashmir HC sets up Arbitration Centres at Srinagar and Jammu- The centres will be called "The Jammu and Kashmir International Arbitration Centre (JKIAC)".

The Jammu and Kashmir High Court accorded approval to setting up of its annexed Arbitration Centers at Srinagar and Jammu in order to provide an institutionalized framework for speedy and expeditious resolution of disputes through alternate dispute resolution mechanism.

Called as "The Jammu and Kashmir International Arbitration Centre (JKIAC)", the Chief Justice of the High Court of Jammu & Kashmir shall be its Patron-in-Chief , an official spokesperson said. He said to ensure that the constitution of such Centres is smooth and effective, the High Court has also framed "The Jammu and Kashmir International Arbitration Centre (JKIAC) (International Management Rules, 2020)".

"For securing fair, speedy and inexpensive Justice to the litigants and being sensitive to the fact that the object of the Section 89, in absence of detailed modalities, has remained somewhat dormant in Jammu and Kashmir, High Court has set up these Arbitration Centers," the official spokesperson said.

He said to monitor and oversee the Centres, an Arbitration Committee consisting of three Judges of the High Court, Advocate General, Assistant Solicitor General attached to the High Court and three members to be nominated by the Chief Justice of the Common High Court of Jammu & Kashmir and Ladakh out of whom at least one shall be designated Senior Advocate, while the others may be any arbitration expert, in India or abroad has to be established.

"To supervise and manage the JKIAC, a secretariat consisting of Coordinator who shall be member of Higher Judicial Service and two additional coordinators who shall be Members of Judicial Service , have to be appointed by the Chief Justice.

The rules further envisage appointment of Chief Counsel and Deputy Counsel amongst Advocates having experience in the field of arbitration," he added.

As per the Rules, the official spokesperson said that the JKIAC has to prepare and maintain a Panel of Arbitrators as approved by the Arbitration Committee from time to time from amongst persons who are suitable and willing to serve as arbitrators provided that their suitability shall be determined by the Arbitration Committee.

He said that the empanelment of the Arbitrators shall consist of Former Judges, Former Judicial Officers, Chartered Accountants, Bureaucrats, Engineers, Architects, Professors etc.

"Similarly for dealing with the arbitration proceedings in such Centres, "Jammu and Kashmir International Arbitration Centre (Arbitration Proceedings) Rules, 2020" have also been framed by the High Court," the official spokesperson said.

He said for regulating administrative fee of the Centre and Arbitrator's fee, JKIAC (Administration Pass and Arbitrator's Fee) Rules, 2020" have been framed by the High Court.

"The setting up of Jammu and Kashmir International Arbitration Centre shall go a long way in achieving the object behind enactment of Section 89 Civil Procedure Code and at the same time shall ensure that arbitration proceedings remain inexpensive and are carried out within shortest possible time," the official spokesperson.

He said courts annexed Arbitration Centres are successfully functioning at Delhi, Chandigarh, Bangalore, Chennai (Madras) and Cuttack (Orrisa).

Source: as reported by All Indian Press Trust of India on 20th September, 2020 from website https://www.ndtv.com/india-news/j-k-high-court-arbitration-centres-to-be-set-up-in-srinagar-jammu-2298224

6. Justice Nariman To Launch Asia Pacific Centre for Arbitration & Mediation On August 6

Ten arbitration and mediation centers from Asia Pacific countries have come together to launch a one of its kind Asia Pacific Centre for Arbitration & Mediation (APCAM).

This is a historic step towards collaborating dispute resolution in the Asia Pacific region into an innovative and unique model.

The official Launch of the international ADR centre is scheduled for 4.00 PM IST on August 6, 2020, and will be streamed Live via Zoom Session.

The APCAM will be inaugurated by Justice RF Nariman, Judge, Supreme Court. Other dignitaries who shall launch APCAM Rules, Website, etc. include Justice Neil McKerracher, Jude, Federal Court of Australia; Prof. Justice Chang-fa Lo, Former Judge, Constitutional Court of Taiwan; Mr. Nopporn Podhirangsiyakorn, Vice President of the Supreme Court of Thailand; Justice AR Sharma, Chairperson, NHRC, Nepal; and Prof. Wisit Wisitsorat, Permanent Secretary of Ministry of Justice, Thailand.

Source: As reported in Live Law on 2nd August, 2020 from https://www.livelaw.in/events-corner/justice-nariman-to-launch-of-asia-pacific-centre-for-arbitration-mediation-on-august-6-160884

7. Manchester City Ignored UEFA Investigation, But Did Not Breach FFP: Sports Court

Earlier this month, the Court of Arbitration for Sport overturned a two-year ban from European competitions imposed on Manchester City by UEFA and reduced a fine of 30 million euros to 10 million euros.

- CAS released a full reasoned judgement about Manchester City's fine
- It said fine was because of City's unwillingness to cooperate with UEFA
- The club was accused of inflating their value of income from sponsors

Manchester City showed a "blatant disregard" for UEFA's investigation into alleged Financial Fair Play (FFP) breaches, according to the Court of Arbitration for Sport (CAS), but European football's governing body failed to prove City had disguised funding from the club's owners as sponsorship income. Earlier this month, CAS overturned a two-year ban from European competitions imposed on City by UEFA and reduced a fine of 30 million euros (27 million pounds, $35 million) to 10 million euros.

The full reasoned judgement by CAS showed that the fine was to reflect "a severe breach" in City's unwillingness to cooperate with UEFA's investigation.

But that the charges of alleged concealment of equity funding were more significant violations and that "based on the evidence the panel cannot reach the conclusion that disguised funding was paid to City."

City's fortunes on the field have been transformed since a takeover from Shiekh Mansour, a member of the Abu Dhabi royal family, in 2008.

The club were accused of deliberately inflating the value of income from Emirati sponsors Etisalat and Etihad Airways to meet UEFA's FFP regulations, which limits the

losses clubs can make to spend on player transfer fees and wages.

UEFA launched an investigation after German magazine Der Spiegel published a series of leaked emails relating to City's finances in 2018.

CAS indicated that witness statements from senior City executives as well as a letter from Sheikh Mansour - all provided to CAS but not to UEFA during the first process - could have swung the original verdict in City's favour.

"The appealed decision is therefore not per se wrong but, at least to a certain extent, is a consequence of MCFC's decision to produce the most relevant evidence at its disposal only in the present appeal proceedings before CAS," said the court.

The judgement also found that UEFA's case was hamstrung by the necessity to finalise the appeal before the start of the 2020/2021 Champions League as it relinquished a request for more evidence to be provided from City's emails.

"UEFA's approach in this regard is understood, because it was faced with a dilemma between trying to obtain additional evidence and having an award issued before the start of the 2020/2021 UEFA club competitions season," added the CAS panel.

Nine Premier League clubs -- Arsenal, Burnley, Chelsea, Leicester, Liverpool, Man United, Newcastle, Tottenham and Wolves -- filed an application to UEFA for City not to be allowed to compete in European competition if a verdict was not reached before the start of the 2020/21 season.

Source: As reported in NDTV Sports on 29th July, 2020 from https://sports.ndtv.com/football/manchester-city-ignored-uefa-investigation-but-did-not-breach-ffp-sports-court-2270574

8. India Entitled For Compensation But Can't Prosecute Italian Marines": World Court

In February 2012, India accused two Italian marines of killing two Indian fishermen who were on a fishing vessel off Kerala coast in India's Exclusive Economic Zone.

The Permanent Court of Arbitration in the Hague has upheld the conduct of the Indian authorities in the Enrica Lexie case in which two Italian marines were accused of killing two Indian fishermen in 2012, and said New Delhi is entitled to get compensation in the case but can't prosecute the marines due to official immunity enjoyed by them.

The international tribunal also held that the two marines violated the international law, and as a result Italy breached India's freedom of navigation under the United Nations Convention on the Law of the Sea (UNCLOS), External Affaires Ministry Spokesperson Anurag Srivastava said.

In February 2012, India accused two Italian marines, Salvatore Girone and Massimiliano Latorre, on board the MV Enrica Lexie --an Italian flagged oil tanker-- of killing two Indian fishermen who were on a fishing vessel off Kerala coast in India's Exclusive Economic Zone (EEZ).

The issue of jurisdiction over the case became a big argument between the two countries. While India maintained that the incident happened in Indian waters and also the fishermen killed were Indian, and hence the case must be tried as per its laws, Italy claimed that the shooting took place outside Indian territorial waters and its marines were on-board the ship with the Italian flag.

India had detained the two marines after the shooting incident but later allowed them to return to Italy on specific conditions following separate orders by the Supreme Court.

Mr Srivastava said the tribunal decided that India is entitled to payment of compensation in connection with "loss of life, physical harm, material damage to property and moral harm suffered by the captain and other crew members of St. Antony".

"The Tribunal upheld the conduct of the Indian authorities with respect to the incident under the provisions of the UNCLOS. It held that the actions of the Italian military officers and, consequently, Italy

breached India's freedom of navigation under UNCLOS Article 87(1)(a) and 90," he said.

The MEA spokesperson also said the tribunal observed that India and Italy had "concurrent jurisdiction" over the incident and a valid legal basis to institute criminal proceedings against the Marines.

Mr Srivastava said the tribunal rejected Italy's claim to compensation for the detention of the Marines.

"However, it found that the immunities enjoyed by the marines as state officials operate as an exception to the jurisdiction of the Indian courts and, hence, preclude them to judge the Marines," he added.

The tribunal said it "decides by three votes to two, in respect of Italy's Submission...that the marines are entitled to immunity in relation to the acts that they committed during the incident of 15 February 2012, and that India is precluded from exercising its jurisdiction over the marines.

While Judge Vladimir Golitsyn (President), Judge Jin-Hyun Paik and Professor Francesco Francioni voted in favour of Italy, Judge Patrick Robinson and Dr Pemmaraju Sreenivasa Rao voted for India in the five-member tribunal.

Italy had maintained that the two marines aboard the tanker mistook the ''St Antony'' for a pirate vessel.

"The tribunal took note of the commitment expressed by Italy to resume its criminal investigation into the events of February 15, 2012," he added.

Meanwhile, the Italian foreign ministry, in a statement, said the two marines are entitled to immunity from the jurisdiction of Indian courts.

"India is therefore precluded from exercising its jurisdiction over the Marines. The Arbitral Tribunal has therefore agreed on the Italian position that the Marines, being members of the Italian armed forces in the official exercise of their duties, cannot be tried by Indian courts," it said.

It said Italy has to resume its criminal investigation into the Enrica Lexie incident, taking note of the commitment expressed during the proceedings in the tribunal.

On the verdict that India is entitled to payment of compensation in connection with loss of life, physical harm and material damage to suffered by the captain and other crew members of the Indian fishing boat, the Italian foreign ministry said the the "tribunal invites the two parties to consult with a view to reaching agreement on the amount of compensation due."

Italy stands ready to fulfill the decision taken by the Arbitral Tribunal, in a spirit of cooperation," it said.

Mr Srivastava said the tribunal also decided that it shall retain jurisdiction should either party or both parties wish to apply for a ruling from it in respect of the quantification of compensation due to India.

Source: As reported in NDTV by All Press Trust of India on 3rd July, 2020 from https://www.ndtv.com/india-news/india-entitled-for-compensation-but-cant-prosecute-italian-marines-world-court-2256595

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Report on the webinar titled

Arbitration in India - The Way Forward, Perils & Precautions in Complex Disputes: Navigating Multiple Contracts, Multiple Pares and Multiple Proceedings"

in association with SIAC on 25th September, 2020

Mr Ritin Rai
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Mr Tejas Karia
Member, SIAC Court of Arbitration; Partner & Head-Arbitration, Shardul Amarchand Mangaldas & Co.

Mr Sanjeev Kapoor
Partner, Khaitan & Co.

Mr Nand Gopal Khaitan
President, ICA; Senior Partner, Khaitan & Co.

Mr Kabir Singh
Partner, Clifford Chance Asia

Mr Thio Shen Yi, SC
Joint Managing Partner, TSMP Law Corporation

In this era of globalization today, we see complex, multi-faceted transactions where multiple parties enter into having distinct yet a connected and dependant agreements so as to achieve a common commercial goal. To understand the significance of a well drafted arbitration agreement and the need to promote Institutional Arbitration, ICA in collaboration with SIAC held webinar on Friday, 25th September, 2020 titled ***"Arbitration in India - The Way Forward, Perils and Precautions in Complex Disputes: Navigating Multiple Contracts, Multiple Parties and Multiple Proceedings"***

Mr. Ritin Rai, Senior Advocate, Supreme Court of India; Tenant 7 King's Bench Walk, invited the participants to SIAC-Indian Council of Arbitration Webinar - Part 2 and also welcomed the diverse panel who would help understand the divergent perspective on the concept of the multiple proceedings across nations. While introducing the topic he asserted the need of the parties to contemplate the root cause which can lead to such complexities and compilations at the later stage of the contract execution? Whether the parties and their lawyers thinking through while drafting of the agreement?

Mr. Nand Gopal Khaitan, President ICA; Senior Partner, Khaitan & Co., stated that when he was new to the legal profession, arbitration law in India was not robust and Institutional Arbitration was not known. While citing an example, of a case instituted under the aegis of ICA where 384 cases were instituted together, having arbitration clause referring to different mode of appointment which conflicted with the mode of appointment provided under the Rules of ICA. Until consent from both side are taken to abide by ICA Rules, the case was an example of sheer disorder and confusion. It led to Supreme court directing ICA to appoint Sole arbitrator in all 384 as they couldn't get clubbed in. Therefore, as a lesson, the parties while entering into multi-party contract should at the beginning itself draft a robust clause, in such a way that it allows for clubbing of the cases, so as to reduce the complexity and the cost.

Mr. Kabir Singh, Partner, Clifford Chance Asia, stated that it may be difficult to predict what types of dispute are more likely to arise under a contract, when drafting a dispute resolution clause, it can be useful to consider the most appropriate dispute resolution mechanism for achieving a timely and cost-efficient resolution of a dispute particularly where multiple parties or multiple contracts are likely to be involved. There are several ways to tackle the said issue and the easiest way is to

have one arbitration agreement or identical clause to remove uncertainity or to have cross referred arbitration agreement.

The clauses are drafted depending on the complexity of the contract, the jurisdiction, intention of the parties to joinder, compatible agreement with similar rules etc. An Umbrella Agreement which sets out general principles that will apply to more specific give-and-take contracts in the future is a good way out. Provisions for consolidation, choosing Institutional Arbitration which clearly has rules on consolidation/ joinder criteria is an adopted approach these days.

Mr. Tejas Karia, Member, SIAC Court of Arbitration; Partner & Head- Arbitration, Shardul Amarchand & Co.; emphasised that if the parties need to carry all the Permutation & Combination at the very foundation, as more issues would rise even before actual litigation starts. A robust dispute resolution Clause is the way to deal with situations having multiple parties. If not though through, at times consolidations are not always the solution. The main idea of consolidation is to avoid multiplicity of cost and multiplicity of award. Mr. Karia stated that, if parties did not contemplate a robust clause at the time of drafting, parties can later do so before the dispute arises, through a proper amendment. Also in cases where the PSU's act as a middle men between government and the contractors having separate dispute resolution clauses, the Court has granted consolidation where the subject matter is same and parties are having a single economic interest.

In Cheran Properties Limited v. Kasturi and Sons Limited & Ors. (Civil Appeal No 10025-10026 of 2017) the Court has held that an award can be enforced even against a non-signatory to the arbitration proceeding.

Though the main intention of the Institutional Rules on consolidation is to avoid multiplicity, but if the parties do not have well drafted dispute resolution clauses, consolidation gets challenging, even if is intended !

Mr. Thio Sen YI SC, Joint Managing Partner, TSMP Law Corporation, highlighted that SIAC has a robust and detailed set of rules for consolidation and joinder under multiple contracts (with possible multiple parties) in a single arbitration. The following set of rules under the SIAC Rules are referred, ie. Rules 6 on Multiple Contracts; Rule 7 on Joinder of Additional Parties; and Rule 8 on Consolidation. Prior to the full constitution of the tribunal (Rule 8.1), the SIAC Court may, upon application by a party, consolidate two or more arbitrations pending under the Rules into a single

Arbitration after fulfilling few conditions. Mr. Thio stated that the courts at several occasion have also denied to enforce the awards where proper parties are not added and there is lack of fundamental issue with the jurisdiction.

Mr. Sanjeev Kapoor, Partner, Khaitan & Co., stated that most of the law on consolidation and joinder in India is a judge made law which depends on facts and circumstances of the case and perception of the judges. As there is no provision in Arbitration & Conciliation Act, 1996 (the Act) the judges interpret other expressions of Act like "*a person claiming through or under him*", or Section 35 and then decide on joinder depending upon facts and circumstances of each case. *Ameet Lalchand Shah v. Rishabh Enterprises*, the Hon'ble Supreme Court the opportunity to interpret Section 82 of the Act while applying the principles laid down in *Chloro Controls India Private Ltd. vs. Severn Trent Water Purification Inc. [(2013) 1 SCC 641]* in relation to domestic arbitration and elucidate what person claiming through or under means. The Hon'ble Court ruled that in cases where the agreements are inter-connected and several parties are involved in a single commercial project executed through several agreements, all the parties can be made amenable to arbitration provided they fulfil certain criteria and strict prerequisites.

Thus, the webinar concluded with the concept that the intention of the parties are the foremost essential component in making an arbitration successful. Parties may be referred to arbitration even if only the principal agreement contained an arbitration clause and ancillary agreements did not. If the parties' intention is to not resolve disputes through arbitration, then it may be advisable for the parties to exclude arbitral clauses from all agreements forming part of the same transaction.

The session concluded with Few questions and answers.

CASE HIGHLIGHTS

Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties & Ors

It is a settled precedent that all disputes relating or arising out of Rights in Personam are arbitrable whereas, the rights relating to Right in Rem shall fall under the jurisdiction of the Courts leaving few exceptions. Right in Personam refers to an action against an individual person whereas Right in rem is an action against the public at large.

In this case the Hon'ble Supreme Court stated that an action instituted under Section 31 of the Specific Relief Act, 1963 is not an action in rem, but an action Personam and therefore is arbitrable. The Hon'ble Court while deciding the above issue also revisited its earlier judgement in Booz Allen & Hamilton vs SBI Home Finance Ltd., to analyse and carve out further exceptions into the category of non-arbitrable cases.

In brief, the Deccan Paper Mills Co. Ltd. (hereinafter the "*Appellant*") were owners of approx. 80,200 square meters land, and had entered into an agreement dated 22.07.2004 with the M/s. Ashray Premises Pvt. Ltd. (hereinafter the "*Respondent 2*") for developing certain portion of the land. The agreement entered between the parties had a clause whereby owner was stated to have no objection if at any stage during the continuance of this agreement the Developer assigns, delegates the rights, under this agreement or the Power of Attorney/writings executed in furtherance hereof to any other person, firm or party without violating or disturbing any of the terms and conditions of this agreement. There was no arbitration clause in the agreement. However, Clause 2(m) in the agreement permitted the right of assignment, by which Respondent No. 2 entered into an agreement with Regency Mahavir Properties (hereinafter the *"Respondent No.1"*) and assigned the execution of the agreement dated 22.07.2004. The agreement entered between the Respondents carried an arbitration clause which stated that *"in case of any dispute, parties can appoint one common arbitrator or two separate arbitrators to settle the dispute subject to Arbitration and Conciliation Act, 1996". Through a deed of confirmation dated 13.07.2006 the arbitration clause was made a part of the agreement and assignment to Respondent No. 1 was reaffirmed.*

Whilst entering into the contract, Appellant was made to believe by one of the leading partners of the *"Respondent No.1",* that the work shall be executed at the earliest. The Appellant was also under a bonafide belief that Mr. Atul Chordia (ex-partner of Regency) would be responsible for the development of the said property. It was later known to the Appellant when there was an apparent delay in the completion of the work that Mr. Chordia had chosen to retire in 2006 itself and alleged that the contract was entered with fraud and deceit. Hence the contract is void ab initio and is not binding on them, and prayed for cancelation of the agreement.

The Appellant prayed for cancellation of the agreement and deed before the Ld. Civil Judge as all the agreements were obtained by fraud. Later, the Respondent No. 1 filed an application under section 8 of the Arbitration and Conciliation Act, 1996 to refer the parties to arbitration. The Plaintiff however resisted the validity of the agreement on the ground that there exists no arbitration agreement. The Ld. Court allowed the application and referred the matter to arbitration.

The Court stated that if the other conditions of Section 8 are met, then the Court has to refer the parties to arbitration unless it finds that prima facie, no valid arbitration agreement exist. In the present case, the finding that is returned is correct-a valid arbitration agreement certainly exists as the agreements that are sought to be cancelled are not stated not to have ever been entered into.

Further, the Appellant referred an appeal before Hon'ble Supreme Court, and prayed for the cancellation of all the agreements and proceedings u/s.31 of Specific Relief Act, 1963 is a proceeding in rem and thus comes within the exceptions within the Booz Allen Case.

Referring to Section 31, a Division Bench of the High Court in Aliens Developers (supra) held that

> *"a right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals and actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas, actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property." In the said judgment, it is clearly held that if the adjudicatory effect of the Court is a judgment in rem, only public fora i.e. Courts and Tribunals have to adjudicate such disputes, but not the Arbitral Tribunals as agreed by the parties. As much as the Development Agreement-cum-Irrevocable Power of Attorney is a registered one and is relating to title of the property, any cancellation will affect the removal of rights accrued to the parties, such cancellation is to be communicated to the officer who has registered the document, in view of the provision Under Section 31(2) of the Specific Relief Act. Therefore, we are of the considered view that such adjudicatory function in cases like this will operate in rem. In any event, having regard to the power conferred on Courts by virtue of the provision Under Section 31(2) of the Specific Relief Act, only a competent Court is empowered to send the cancellation decree, to the officer concerned, to effect such cancellation and note in his books to that effect. When such Statutory power is conferred on Courts, such power cannot be exercised by the Arbitrator, in spite of the fact that there is an arbitration Clause in the agreement entered between the parties...*

In response to the explanation by the Hon'ble Court under Section 31 of the SRA, 1963, Respondent No. 1 asserted that the said provisions gives the power of discretion to the Court to rule for the benefit of the party interested in setting aside a written instruments, therefore, proceedings would be in Personam. It was also contended by the Respondent that in light of the recent amendments to the Act, only thing necessary to be seen while deciding an application under Section 8 of the Act is existence of a valid arbitration agreement.

On the issue of arbitrability of dispute in face of allegations of fraud, the Hon'ble Supreme Court referred the case in *Avitel Post Studioz Limited and Ors. v. HSBC PI Holding (Mauritius) Ltd.*,, laid down the law on invocation of the **"fraud exception"**. If the subject matter of an agreement between parties falls within Section 17 of the Indian Contract Act, 1872, or involves fraud in the performance of the contract, as has been held in the aforesaid judgment, which would amount to deceit, being a civil wrong, the subject matter of such agreement would certainly be arbitrable. Further, it was also held that merely because a particular transaction may have criminal overtones as well, does not mean that its subject matter becomes non-arbitrable.

> *"We have no doubt that Shri Navre is right in his submission that there is no averment that the agreement dated 20.05.2006 and the deed of confirmation dated 13.07.2006 were not entered into at all, as a result of which the arbitration Clause would be non-existent. Further, it is equally clear that the suit is one that is inter parties with no "public overtones", as has been understood in paragraph 14 of Avitel (supra), as a result of which this exception would clearly not apply to the facts of this case."*

When it comes to Section 31(1), the important expression used by the legislature is ***"any person against whom a written instrument is void or voidable..."*** in the case of Muppudathi Pillai v. Krishnaswami Pillai stated that,

> *"The principle behind the section is to protect a party or a person having a derivative title to property from such party from a prospective misuse of an instrument against him. A reading of section 31(1) then shows that when a written instrument is adjudged void or*

voidable, the Court may then order it to be delivered up to the plaintiff and cancelled – in exactly the same way as a suit for rescission of a contract under section 29. Thus far, it is clear that the action under section 31(1) is strictly an action inter parties or by persons who obtained derivative title from the parties, and is thus in personam. "

The provisions of Section 39 make it clear that three conditions are requisite for the exercise of the jurisdiction to cancel an instrument: (1) the instrument is void or voidable against the Plaintiff; (2) Plaintiff may reasonably apprehend serious injury by the instrument being left outstanding; (3) in the circumstances of the case the court considers it proper to grant this relief of preventive justice. On the third aspect of the question the English and American authorities hold that where the document is void on its face the court would not exercise its jurisdiction while it would if it were not so apparent. In India it is a matter entirely for the discretion of the court.

Overruling Alien Developers, the bench dismissed the appeals and further observed:

"The proceeding under section 31 is with reference to specific persons and not with reference to all who may be concerned with the property underlying the instrument, or "all the world". Clearly, the cancellation of the instrument under section 31 is as between the parties to the action and their privies and not against all persons generally, as the instrument that is cancelled is to be delivered to the plaintiff in the cancellation suit. A judgment delivered under section 31 does not bind all persons claiming an interest in the property inconsistent with the judgment, even though pronounced in their absence"

"..The reasoning in the aforesaid judgment would again expose the incongruous result of section 31 of the Specific Relief Act being held to be an in rem provision. When it comes to cancellation of a deed by an executant to the document, such person can approach the Court under section 31, but when it comes to cancellation of a deed by a non-executant, the non-executant must approach the Court under section 34 of the Specific Relief Act, 1963. Cancellation of the very same deed, therefore, by a non-executant would be an action in personam since *a suit has to be filed under section 34. However, cancellation of the same deed by an executant of the deed, being under section 31, would somehow convert the suit into a suit being in rem. All these anomalies only highlight the impossibility of holding that an action instituted under section 31 of the Specific Relief Act, 1963 is an action in rem."*

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