ICA Arbitration Quarterly

Vol. 199 | October-December, 2018

INDIAN COUNCIL OF ARBITRATION
Dedicated to Arbitration for Over Five Decades

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:

The Editor

ICA Arbitration Quarterly
Indian Council of Arbitration
Federation House,
Tansen Marg, New Delhi- 110001
Email: editor.ica@ficci.com; ica@ficci.com

Note:

Publisher:

Indian Council of Arbitration
Federation House, Tansen Marg,
New Delhi- 110001

CONTENTS

1. **FROM THE PRESIDENT'S DESK** 5

2. **ARTICLES**

The Amendments to the Indian Arbitration and Conciliation Act of 1996: A view from Abroad 7
By Joachim Knoll, *Partner, LALIVE*
Harshad Pathak, *Senior Associate, P&A Law Offices*

Enforcement of Domestic and Foreign Awards 19
By Naresh Kumar, *Advocate*

Latest Trend in Arbitrtion Law - A few Suggestions for "Additional Law Reforms" 29
By Justice D.R. Dhanuka, *Former Judge of High Court of Bombay*

Understanding 'Expert determination' 36
By R Venkataraghavan, *International Arbitrator, Trainer & Consultant*

Debating 'conciliation' as ADR in India 39
By Dr. Milind Hartalkar and Prof. Dr. Shashikala Gurpur
Symbiosis Law School Pune, Symbiosis International (Deemed University)

3. **ARBITRATION & ADR ROUNDUPS** 50

4. **REPORT ON – 3-Day Certified Training Course on: "DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION"** 60

5. **PHOTO GALLERY** 61

6. **CASE HIGHLIGHTS** 69

7. **RE-ACT** 77

8. **READERS' WRITE** 78

9. **MEMBERSHIP UPDATION FORM** 79

From the President's Desk

It is well established that dispute resolution process impacts economic development of any country and is vital for global perception on "doing business" in any economy. With growing economic activity, role of arbitration as dispute resolution mechanism is going to further expand in India.

To support the cause of dispute resolution and in recognition to the fact that "quality arbitration mechanism" is an integral component of ease of doing business, Government of India in 2015 had brought several amendments to the Arbitration and Conciliation Act, 1996 for making arbitration process cost effective, speedy, with minimum court intervention. Government has recently introduced the Arbitration and Conciliation (Amendment) Bill, 2018 in the Parliament to primarily promote institutional arbitration mandating Hon'ble Supreme Court and High Court to designate arbitral institution to appoint arbitrators and its adjudication under such institutions.

Aforesaid legislative amendments are in sync with Government's vision to attract maximum foreign investment by further improving "ease of doing business" in India and make India an arbitration friendly jurisdiction. Pro-arbitration judgments and orders passed by Hon'ble Supreme Court of India and High Courts has further added to growth of foreign investment and international trade.Though the impact from aforesaid efforts has been significant, there is always room for further improvement. Further, certain issues and concerns needs to be ironed out, as we move ahead.

This changing arbitration landscape in India and growth in commercial disputes presents opportunities for professionals working in the field of arbitration. In this regard, ICA continues to make endeavours for the professional development of its members. It recently organised 3-Day Certified Training Course on Domestic and International Commercial Arbitration in collaboration with Swiss Arbitration Academy which was very well received. I hope more and more members will take benefit of such training programs in future.

And with this brief, I wish all of you a very happy and prosperous 2019, a year of New Opportunities and Endless Possibilities!!!

Happy Reading!!

N G Khaitan

N G Khaitan

The Amendments to the Indian Arbitration and Conciliation Act of 1996: A view from Abroad

Joachim Knoll
Partner
LALIVE

Harshad Pathak*
Senior Associate
P&A Law Offices

1. Introduction

The Indian Arbitration and Conciliation Act 1996 ('Indian Arbitration Act'), originally enacted in 1996 based on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'), underwent a much-anticipated significant change in 2015. The Arbitration and Conciliation (Amendment) Ordinance, 2015 introduced a plethora of changes to the existing arbitration framework in India, which were enacted on 31 December 2015 by the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment Act'). The Amendment Act was deemed to have come into force on the date of the Ordinance, i.e. 23 October 2015.[1] Unless the parties agreed otherwise, the amendments were not to apply to arbitral proceedings that had been initiated[2] before the commencement of the Amendment Act,[3] but in relation to arbitral proceedings that had been initiated on or after the date of commencement of this Act. After years of uncertainty, the Supreme Court of India in March 2018 clarified that the amendments as a whole were prospective in nature.[4] However, it also observed that the amended Section 36, which no longer provides for an automatic stay of the enforcement of an arbitral award during annulment proceedings, will nonetheless apply to all annulment applications under Section 34 of the Indian Arbitration Act that are pending on the date of commencement of the Amendment Act.[5]

*The contents of this article reflect the personal views of the author alone, and not of P&A Law Offices. The author reserves his right to depart from these views in the future.

[1]*Amendment Act 2015, s 1(2).*

[2]*Indian Arbitration Act 1996, s 21.*

[3]*The term "commencement" is used here to mirror the language of Section 26 of the Amendment Act 2015, which pertains to the prospective/ retrospective application of the amendments. While the Amendment Act was enacted on 31 December 2015, its date of commencement is 23 October 2015.*

[4]*Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and etc., Civil Appeal Nos. 2879 – 2880 of 2018, para. 54.*

[5]*Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and etc., Civil Appeal Nos. 2879 – 2880 of 2018, para. 42.*

The Statement of Object and Reasons of The Arbitration and Conciliation (Amendment) Bill, 2015 reveals that these amendments were designed to make the arbitration process in India more user-friendly, cost effective and resulting in the expeditious disposal of cases, in line with India's commitment to improve its legal framework to obviate the delay in disposal of legal claims more generally.[6]

However, a more detailed analysis of the Amendment Act shows that consistent with the above broad objectives, these amendments are specifically intended to remove some of the hurdles created over time by the Indian judiciary through what was perceived as excessive intervention in the arbitral process.

While the impact of the changes introduced by the Amendment Act (hereinafter referred to as the "Amendments") can only be assessed once their judicial interpretation is ascertained, this paper seeks to assess how they are likely to be perceived by the international arbitration community and if they are in sync with their objective of remedying some of the vagaries of the Indian arbitration framework that render arbitrating in India less predictable and overall more complex than desired.

In the second part, we address the Amendments aimed at curtailing the opportunities for excessive judicial intervention by Indian courts in the arbitral process at the stage of the appointment of arbitrators. The third part addresses the Amendments motivated by an increasing judicial backlog in Indian courts, followed by the fourth part, which addresses the Amendments intended to promote efficiency in the conduct of arbitral proceedings. In the fifth part, we analyse whether and to what extent promoting institutional arbitration could serve to address some of the problems currently hampering the Indian arbitration framework. The sixth part concludes.

2. Minimizing Judicial Intervention in the Appointment of Arbitrators

One of the key objectives of the Indian Arbitration Act is to minimize the extent of judicial intervention in the arbitral process. Section 5 confirms that "[n]otwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.[7]

The deliberate use of the word 'judicial authority', as opposed to 'court' in Article 5 of the UNCITRAL Model Law[8], suggests that both courts and other quasi-judicial authorities in India, such as special tribunals, are expected to pay heed to this particular objective. The "purpose of Article 5 [of the Model Law] was to achieve certainty with respect to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the Law on international commercial arbitration all instances of court intervention."[9]

However, in the decade following the enactment of the Indian Arbitration Act, some Indian courts appeared not to have respected the text and spirit of Section 5. Through means of judicial interpretation, they expanded the scope of intervention at various stages of the arbitral process, particularly during the appointment of arbitrators. In many cases, this resulted in delay in the disposal of arbitration proceedings and in an increase in interference of the courts in arbitration matters, which defeated the object of the enactment.[10]

This being said, recent years have brought about a change in the attitude of Indian courts, which have adopted a cautious approach to not interfere in

[6] *The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 7.*

[7] *Indian Arbitration Act 1996, s 5.*

[8] *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (11 Dec. 1985), art 5 ('Model Law').*

[9] *Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 30.*

[10] *The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 2.*

international arbitration proceedings. The High Court of Delhi's refusal in 2018 to grant a permanent injunction against Vodafone Group PLC UK, prohibiting it from pursuing arbitration proceedings against India under the India-UK Bilateral Investment Treaty, is a prime example of this tendency.[11] However, such instances are few in between, and therefore, continue to remain an exception rather than the norm.

As acknowledged by the Law Commission of India in its 246th report, "the bar for judicial intervention (despite the existence of section 5 of the Act) has been consistently set at a low threshold by the Indian judiciary, which translates into many more admissions of cases in Court which arise out of or are related to the Act."[12] Commentators have therefore suggested that the biggest problem may not be with the text of the Indian Arbitration Act, but with its "disjunctive interpretation by Indian courts [and the] abuse of the arbitral process by litigants and lawyers alike"[13]. In other words, wherever the Indian Arbitration Act "bolted the front door and limited judicial intervention to a few strictly defined instances, the Indian Courts found means to break down the back door"[14]. Undoubtedly, this has contributed to India's reputation as an arbitration-unfriendly jurisdiction[15] and discouraged foreign parties from arbitrating in India.[16]

In this light, it is promising that the Amendments have sought to address some of the avenues for excessive judicial intervention by delineating the scope for intervention with the arbitral process at the initial stage of arbitral appointment.

Section 11 of the Indian Arbitration Act provides a framework for the appointment of arbitrators in case of any default by the parties. The provision originally empowered the Chief Justice, or any person designated by it, to appoint arbitrators under the circumstances specified therein. In the case of an international commercial arbitration[17], this power was exercisable by the Chief Justice of India, and in a domestic arbitration, by the Chief Justice of the High Court within whose local limits the court, as defined under Section 2(1)(e) of the Arbitration Act, was situated.

Yet, a seven-judge bench of the Supreme Court of India, by way of a majority judgment in *SBP & Co. v. Patel Engineering18*, had interpreted the un-amended Section 11 to hold that the power exercised by the Chief Justice of the High Court or the Chief Justice of India in the appointment of an arbitrator was a judicial and not an administrative power.[19] As a result, even at the initial stage of the appointment of arbitrator(s), the Chief Justice had the right to decide on preliminary aspects such as "existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for exercise of his power and on the qualifications of the arbitrator or arbitrators."[20] These avenues were then crystallized in a three-prong hierarchy in 2008 by another two-judge bench of the Supreme Court of India in *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.*[21] , which was confirmed by its subsequent benches.[22]

The Amendment Act has sought to address what was perceived as an overly broad interpretation of Section 11 by the judiciary, by adjusting the machinery for arbitral appointments under Section 11 in two principal ways:

(i) The power to appoint arbitrators has been transferred from the Chief Justice of India or that of any High Court, as the case may be, to the Supreme Court of India and such High Court itself, or any person or institution designated by such Court.[23] In international commercial arbitration, "the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."[24]

[11] *Union of India v. Vodafone Group PLC United Kingdom & Anr, CS (OS) 383/2017 & I.A. No. 9460/ 2017.*

[12] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 15 et seq, para. 22.*

[13] *Sumit Rai and Naresh Thacker, 'India', GAR (18 May 2015).*

[14] *Pramod Nair, 'Surveying a decade of the New law of arbitration in India', (2007) Arbitration International 23, 738.*

[15] *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 20.*

[16] *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.*

[17] *Indian Arbitration Act 1996, s 2(1)(f).*

[18] *SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618.*

[19] *SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618, para. 46(i).*

[20] *SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618, para. 46(iv).*

[21] *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267.*

[22] *Chloro Controls India Pvt. Ltd. v. Seven Trent Water Purification Inc, (2013) 1 SCC 641; Arasmeta Captive Power Co. Pvt. Ltd. v. Lafarge India Pvt. Ltd., AIR 2014 SC 525.*

[23] *Indian Arbitration Act 1996, s 11(4), (5) and (6).*

[24] *Indian Arbitration Act 1996, s 11(9).*

(ii) The newly introduced Section 11(6A) clarifies that the "Supreme Court or, as the case may be, the High Court, while considering any application [for arbitrator appointment] shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."[25]

The fact that the Indian legislature has clarified that these amendments shall apply "notwithstanding any judgment, decree or order of any Court" shows an intent to expressly address and adjust the interpretation given by the Supreme Court of India in *Patel Engineering*.[26] Under the Amendment Act, the grounds which the Supreme Court or a High Court, as the case may be, can examine prior to appointing an arbitrator are now expressly listed and thus limited.

The said amendments are undoubtedly more in line with the understanding of the mechanism for arbitral appointments under the Model Law, on which the Indian Arbitration Act is based. Article 11 of the Model law vests the power to appoint an arbitrator on a court, or 'other authority specified in Article 6' of the Model Law.[27] Article 6 then permits each country enacting the Model Law to specify the court(s), or another competent authority to appoint an arbitrator under Article 11.[28] The Court designated under Article 6 need not necessarily be a full court. "It may well be […] the president of a court or the presiding judge of a chamber for those functions, which are of a more administrative nature, and where speed and finality are particularly desirable"[29] and "a state may entrust these administrative functions even to a body outside its court system."[30] Thus, even under the Model Law, the function of appointing arbitrators was considered to be an administrative task, with minimal opportunity for intervention by a designated authority. As a result of the changes introduced by the Amendment Act, the Indian arbitration law now appears to be in sync with its goal.

There is however still room for further clarification. Particularly, while the new Section 11(6B) of the Act limits the issues that can be reviewed at the stage of arbitral appointments, the Act does not set a standard of review to be applied at this stage. The Supreme Court's finding in Patel Engineering that even at this stage, "[f]or the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded"[31] gives rise to some concern. It may seem desirable that the Act be further amended to clarify that even while deciding the issue of the existence of an arbitration agreement, the Supreme Court or the High Court adopt a prima facie, and not full and final review.[32] This was also the approach endorsed by Justice C K Thakker in his dissent in the Patel Engineering judgment, when he noted that:

"There is […] no doubt in my mind that at that stage, the satisfaction required is merely of prima facie nature and the Chief Justice does not decide lis nor contentious issues between the parties. Section 11 neither contemplates detailed inquiry, nor trial nor findings on controversial or contested matters."[33]

Incidentally, Justice Thakker's opinion resonates with the position under Swiss Law, where Article 179(3) of the Swiss Private International Law Act provides that "[i]f a judge has been designated as the authority for appointing an arbitrator, he shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties."[34]

---

[25] *Indian Arbitration Act 1996, s 11(6A).*

[26] *Armaan Patkar, 'Indian Arbitration Law: Legislating for Utopia', (2015) 4(2) Ind. J. Arb. L. 28, 30 ('The 2015 Act amends §11 to grant the power of appointment under §11 to the Supreme Court or the High Courts (or their designates) as the case may be, instead of their respective Chief Justices (or their designates). It has been clarified that designating a person or institution for the purposes of §11, is not a delegation of judicial power. This negates SBP & Co. where the Supreme Court inter alia held that the power under §11(6) is judicial.').*

[27] *Model Law, arts 11(3) and (4).*

[28] *Model Law, art 6.*

[29] *United Nations Commission on International Trade Law, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc.A/CN.9/264 20 (1985).*

[30] *United Nations Commission on International Trade Law, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc.A/CN.9/264 20 (1985).*

[31] *SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618, para. 38.*

[32] *See Pratyush Panjwani et al., 'Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?', (2013) 2(2) Ind. J. Arb. L. 24.*

[33] *SBP & Co. v. Patel Engineering Ltd. & Anr. (Dissenting Opinion of C K Thakker, J), (2005) 8 SCC 618, para. 13.*

[34] *Swiss Federal Statute on Private International Law, art 179(3). See also, French New Code of Civil Procedure, art 1455.*

The application of a prima facie review of the existence of an arbitration agreement in the context of the appointment of arbitrators is also squarely in line with amended Section 8 of the Indian Arbitration Act, which now mandates every judicial authority to refer a matter to arbitration in all circumstances "unless it finds that prima facie no valid arbitration agreement exists."[35] This is consistent with the observations of the Law Commission of India, suggesting that where a "judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal."[36]

3. Arbitration as a Means to Reduce the Judicial Backlog in India

There exists an important co-relation between the efficient conduct of arbitration and judicial assistance in support of the same. The Indian Arbitration Act gives ample opportunities to courts to assist arbitral tribunals, and thus the arbitration process in general. These may, for example, be in the form of granting interim measures[37], court assistance in the taking of evidence[38], or assistance in case of contempt to the arbitral tribunal during the conduct of arbitral proceedings.[39] Obviously, any delay by the court in the exercise of these functions will translate into delay in the arbitration proceedings the court is intended to support.

The judicial backlog in Indian courts is well documented. The Arbitration and Conciliation (Amendment) Bill, 2015 acknowledged that since India was ranked 178th out of 189 nations in the world in contract enforcement, it was time that urgent steps be taken to reduce the pendency of cases in courts and accelerate the process of dispute resolution through arbitration, so as to encourage investment and economic activity.[40] Similarly, the National Institution for Transforming India ('NITI Ayog'), which is the policy think tank of the Government of India, highlights that at the end of 2015, "there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending before the subordinate judiciary [out of which] 26% of cases, more than 8.5 million, [were] more than 5 years old."[41]. The Law Commission of India, in its 246th Report, also confirmed the general international perception that "in most Courts [in India], arbitration matters are kept pending for years altogether." The high pendency of litigation before Indian courts means that arbitration-related proceedings take a long time to be disposed, and for arbitral awards to become final.[43]

One of the factors that contributes to delay in addressing arbitration matters has been identified to be "the lack of dedicated benches looking at arbitration cases"[44], i.e. specialized benches for deciding the petitions or applications incidental to arbitration proceedings. To remedy this perception, various proposals have been made in the past few years. In its 246th Report, the Law Commission of India suggested that in "international commercial arbitrations, where there is a significant foreign element to the transaction and at least one of the parties is foreign, the relevant "Court" which is competent to entertain proceedings arising out of the arbitration agreement, should be the High Court [rather than the the principal Civil Court of original jurisdiction in a district] even where such High Court does not exercise ordinary original jurisdiction."[45] The Parliamentary Standing Committee in its Report on The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 further observed that "Government should establish

[35] *Indian Arbitration Act 1996, s 8(1).*

[36] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 20, para. 33.*

[37] *Indian Arbitration Act 1996, s 9(1).*

[38] *Indian Arbitration Act 1996, s 27(1), (3).*

[39] *Indian Arbitration Act 1996, s 27(5).*

[40] *The Arbitration and Conciliation (Amendment) Bill, 2015, Statement of Object and Reasons, para. 4.*

[41] *Bibek Debroy and Suparna Jain, 'Strengthening Arbitration and its Enforcement in India – Resolve in India', NITI Ayog, 1. Similar observations were made at the end of 2006 as well; see Pramod Nair, 'Surveying a Decade of the 'New' Law of Arbitration in India', (2007) 23(4) Arbitration International 699, 700.*

[42] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 16, para. 23.*

[43] *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.*

[44] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 16, para. 23.*

[45] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 17, para. 26.*

Commercial Courts/ Divisions on a pilot basis in some States where commercial disputes are large in number and thereafter, it be replicated in remaining States."[46] With such infrastructure, any application or appeal relating to international commercial arbitration would be heard and disposed of by the Commercial Appellate Division of the High Court.[47]

Following these recommendations, the Amendment Act altered the definition of 'court' in Section 2(1)(e) of the Indian Arbitration Act to reflect the Law Commission's suggestion. The amended Section 2(1)(e)(ii) now provides that the word "'Court' means in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court."[48]

Likewise, in Part II of the Indian Arbitration Act concerning the enforcement of New York Convention and Geneva Convention awards, two amendments are of significant import. The newly inserted Explanation to Section 47, dealing with New York Convention awards, clarifies that with respect to enforcement of a foreign award, the expression 'Court' "means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court."[49] An identical explanation is introduced in Section 56 with respect to Geneva Convention awards.[50]

The aforementioned amendments are supplemented by the enactment of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, section 10(1) of which provides special treatment to matters relating to international commercial arbitration. It states that where the subject-matter of an arbitration is a 'commercial dispute'[51] of a specified value, and if such arbitration is an international commercial arbitration, then all the applications or appeals arising out of such arbitration under the provisions of the Indian Arbitration Act that have been filed in a High Court, "shall be heard and disposed of by the Commercial Division where such Commercial Division has been constituted in such High Court."[52]

These amendments have been well received by the international community. The elimination of jurisdiction of principal civil courts in matters of international commercial arbitration, as well as creation of a commercial division in the High Courts to deal with arbitration applications is expected to calm some of the age-old apprehensions concerning the Indian litigation system and reduce the time spent litigating before Indian courts. Yet, considering the sheer magnitude of the problem at hand, as is evident from the figures cited above, more ambitious reforms in this regard may be required.

One major step in this direction would be to vest the Supreme Court of India with exclusive jurisdiction to hear the main applications filed under the Indian Arbitration Act relating to international arbitrations.[53] The Supreme Court is already the default appointing authority for international arbitrations , and its decision in this regard is final.[54] The yet more relevant step would be to designate the Supreme Court as the sole forum for deciding petitions for the setting aside of awards rendered in international arbitrations[55] and the enforcement of foreign awards under Part II of the Indian Arbitration Act.[56] The efficiency of such an approach is well-known to arbitration practitioners in Switzerland, where Article 191 of the Private International Law Act provides for the Swiss Federal Supreme Court as the exclusive jurisdiction to hear applications to set aside arbitral awards.[57] The absence of an appellate remedy against the Federal Supreme Court's decision in this respect, together with the quality of the decisions rendered by judges familiar with international

[46] *Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 78th Report – The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 (2015), 15, para. 27.*

[47] *Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, 78th Report – The Commercial Courts Commercial Division and Commercial Appellate Division of High Courts Bill, 2015 (2015), 10, para. 8.*

[48] *Indian Arbitration Act 1996, s 2(1)(e)(ii).*

[49] *Indian Arbitration Act 1996, s 47, Explanation.*

[50] *Indian Arbitration Act 1996, s 56, Explanation.*

[51] *The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, s 2(1)(c).*

[52] *The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, s 10(1).*

[53] *Indian Arbitration Act 1996, s 11(9).*

[54] *Indian Arbitration Act 1996, s 11(7).*

[55] *Indian Arbitration Act 1996, s 2(1)(f).*

[56] *Indian Arbitration Act 1996, s 48 and 57.*

[57] *Federal Statute on Private International Law, art 191 (Switzerland).*

arbitration ensures a particularly efficient approach. As a result, unless set aside, awards become final after some six months after being rendered. This guarantee has greatly contributed to Switzerland's popularity as a favoured seat of arbitration for international disputes.

Transposing the Swiss approach to India would of course present its very own challenges in light of the sheer size of the jurisdiction and the number of cases heard by the Indian Supreme Court. The proposal was nevertheless endorsed by Senior Advocate, Mr Fali S Nariman. In the first LCIA-India Arbitration Lecture in 2011, he discussed ten steps that ought to be adopted to salvage arbitration in India.[58] In his esteemed view, "the only way to inspire the confidence of the outside world in the Indian court system is to confer by law on the Supreme Court of India exclusive jurisdiction to decide all matters, with respect to foreign arbitrations and which pertain to enforcement of foreign awards."[59] And while Mr Nariman had lamented that no Chief Justice of India had taken his proposal seriously, the Indian Legislature may review this suggestion more carefully in the context of recent attempts at improving the Indian arbitration framework.

4. Repelling Guerrilla Tactics by Recalcitrant Parties

The above sections focussed on the interpretational discord and infrastructure limitations that contribute to delays in the arbitration process in India, and the amendments made to alleviate such concerns. However, this is not to suggest that these factors are the sole cause of delay. Indeed, arbitrations in India routinely take significant time to conclude even if there is minimum judicial intervention. "Delays on the part of the arbitrators and the counsel appearing in arbitrations"[60] are another common cause of delay. As acknowledged by the Law Commission of India in its 246th report, "[t]here is ingrained in the Indian system a culture of frequent adjournments where arbitration is treated as secondary by the lawyers."[61] And this is not a new concern.

Even in 2001, the Law Commission of India in its 176th report had noted:

"[I]n almost every arbitration in [India], at least one party is interested in delaying the conduct of arbitral proceedings and for that purpose, number of adjournments are sought at the stage of adducing evidence. It has been pointed out that parties and their counsel in India, still think that an arbitral tribunal is like court and raise all sorts of objections during the proceedings when oral evidence is being adduced."[62]

This tendency is particularly notable in India due to a preference for ad-hoc arbitration over institutional arbitration. This was most recently noted by the B N Srikrishna High Level Committee in 2017 ('HLC Report'), noting that ad hoc arbitrations tend to be protracted and costly in the absence of monitoring, and costs and delays in ad hoc also mount in case of frequent adjournments.[63]

The Amendment Act introduced two significant amendments to address these concerns; triggering contrasting reactions in the international community.

The Indian Arbitration Act already stated that unless otherwise agreed by the parties, it was for the arbitral tribunal to decide whether to hold oral hearings for the presentation of evidence or for oral argument, or conduct the proceedings simply on the basis of documents.[64] Under the recent Amendments, the tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, i.e. the arbitral tribunal shall sit continuously for the purposes of recording evidence and for arguments, with no interruptions on account of any adjournments.[65] Further, the tribunal shall

[58] *Fali Nariman, 'Ten steps to salvage Arbitration in India: The First LCIA-India Arbitration Lecture', (2011) 7(2) Arbitration International 115.*

[59] *Fali Nariman, 'Ten steps to salvage Arbitration in India: The First LCIA-India Arbitration Lecture', (2011) 7(2) Arbitration International 115, 119.*

[60] *Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 67.*

[61] *Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 12, para. 15.*

[62] *Law Commission of India, 176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001 (2001), 110.*

[63] *B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 16.*

[64] *Indian Arbitration Act 1996, s 24(1).*

[65] *Indian Arbitration Act 1996, s 24(1). See Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 13, para. 17 ('...the Commission has proposed addition of the second proviso to section 24 (1) to the Act, which is intended to discourage the practice of frequent and baseless adjournments, and to ensure continuous sittings of the arbitral tribunal for the purposes of recording evidence and for arguments.')*

not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any such cause.[66] This is significant since, while a single, continuous hearing on the merits, usually ranging from one day to some two weeks in duration, is the norm in the practice of international arbitration, the tradition in India was for arbitral tribunals to hold hearings in a disjunct manner, with numerous adjournments in between, which inevitably resulted in the hearings being spread across several months or years.

In a more prominent change, the newly inserted Section 29A now provides a statutory time limit for rendering an arbitral award. It first stipulates that the "award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference";[67] wherein "an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment."[68] The parties may, however, by consent, extend the initial twelve-month period by a further period not exceeding six months.[69] Interestingly, Section 29(4) provides that such time period may be then further

extended by the concerned Court on the application of any of the parties for sufficient cause and on such terms and conditions as may be imposed by the Court.[70] In the absence of such extension by the Court, if the award is not made within the initial twelve month period, or eighteen month period where the parties mutually extend the same, the mandate of the arbitrator(s) shall terminate.[71] Accordingly, beyond a permissible period of eighteen months, any further extension of the time period for rendering an award can only be granted by a Court.

The above provision is a throwback to the regime under The Arbitration Act, 1940 of India ('1940 Act'),[72] which ordinarily required the arbitrators to make their award within four months after entering on the reference.[73] However, the concerned Court had the authority to extend this time period.[74] Thus, an award passed after four months of entering upon reference did not *ipso facto become non-est*.[75]

Interestingly, no similar provision was included in the Indian Arbitration Act enacted in 1996, prior to the Amendment Act. This implied that Indian courts no longer had any power to extend the time for making an award, unlike under the old 1940 Act.[76] Consequently, "the condition precedent for enlargement of time would depend only on the consent of the parties, that

[66] *Indian Arbitration Act 1996, s 24(1).*

[67] *Indian Arbitration Act 1996, s 29A(1).*

[68] *Indian Arbitration Act 1996, s 29A(1), Explanation.*

[69] *Indian Arbitration Act 1996, s 29A(3).*

[70] *Indian Arbitration Act 1996, s 29A(5).*

[71] *Indian Arbitration Act 1996, s 29A(4).*

[72] *Manini Brar, 'Implications of the new Section 29A of the amended Indian Arbitration and Conciliation Act, 1996', (2017) 5(2) Ind. J. Arb. L. 113, 118.*

[73] *The 1940 Act, First Schedule, s 3.*

[74] *The Arbitration Act, 1940, s 28(1).*

[75] *See Jatinder Nath v. M/s Chopra Land Developers Pvt. Ltd. & Anr., AIR 2007 SC 1401.*

[76] *N.B.C.C. Ltd vs J. G. Engineering Pvt. Ltd, 2010) 2 SCC 385.*

is to say, that if the parties agree for enlargement of time."[77] And "the consequence of the arbitrator not concluding the proceedings and rendering the award within the period [that may be [prescribed under the arbitration agreement […] would unclothe the arbitrator of his legal authority to continue with the proceedings…"[78] That is no longer the case after the introduction of Section 29A. In fact, while Section 28 of the 1940 Act was subject to the parties' agreement to the contrary, and thus derogable[79], the present Section 29A is couched in mandatory terms.

The object behind Section 29A is clear, i.e. to avoid unnecessary delay in the completion of arbitral proceedings. Some perceive that such a provision could "do wonders for investor confidence."[80] However, the imposition of such a rigid time limit has not been welcomed internationally with enthusiasm for a variety of reasons.

Firstly, the imposition of a stringent time limit overlooks that the time taken to conclude an arbitration proceeding and render an award is not merely a matter of procedural efficiency but is intrinsically linked with factors such as the complexity of the dispute, the volume of evidence adduced, as well as the number of parties to the arbitration entitled to advance their submissions and rebut the submissions of the other parties. This aspect was highlighted by the HLC Report by reference to the Arbitration Ordinance 2011 in Hong Kong, stating that the timeline of an arbitration very much depends on the complexity of the issues in dispute[81], and hence, rigid timelines under Section 29A would not be practical.[82] Accordingly, while the imposition of time limits is generally accepted in international arbitration practice, the same is predominantly left to the mutual agreement of the parties, in consultation with the tribunal and any arbitral institution administering the arbitration.[83] While several institutional rules prescribe time limits, these are not absolute in nature, and extendable either by the institution, the arbitral tribunal, or by agreement of the parties.[84] After all, the purpose of arbitration, premised on the principle of party autonomy, is to allow the disputing parties flexibility to structure the procedure keeping in mind the nature and complexity of the dispute.[85]

Secondly, the fact that extensions beyond an eighteen-month period can be granted only by a Court is a double-edged sword. While on the one hand, it deters an arbitral tribunal to unnecessarily prolong the arbitral proceedings, the fact that after the expiry of such period, a party is constrained to appear before a court – the very forum it sought to avoid by means of an arbitration agreement – could result in further delays in the conclusion of the arbitration. Therefore, for the Amendment Act to provide yet another avenue for judicial intervention is widely perceived with suspicion. Despite the safeguards intended to ensure continuity of arbitration,[86] one fears that the very possibility of another judicial intervention after eighteen months of arbitration will cause even further delays in the resolution of the dispute.[87]

The fact that Section 29A(9) of the Indian Arbitration Act, which requires a Court to merely endeavour to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party[88], is not framed in mandatory terms fails to offer foreign parties and arbitration practitioners sufficient encouragement. Time and practice will tell how well the time limit in Section 29A(9) is respected by the courts, and how effective the rule really is.

---

[77] N.B.C.C. Ltd vs J. G. Engineering Pvt. Ltd, 2010) 2 SCC 385, para. 5; Bharat Oman Refineries Ltd. v. Mantech Consultants, 2012 SCC OnLineBom 669.

[78] Shyam Telecom Ltd. v. Arm Ltd., 2004 (3) Arb LR 146 (Delhi), para. 15.

[79] The Arbitration Act, 1940, s 3.

[80] Armaan Patkar, Indian Arbitration Law: Legislating for Utopia, (2015) 4(2) Ind. J. Arb. L. 28, 50.

[81] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 19.

[82] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 34.

[83] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 64.

[84] Andrew McDougall et al., 'Mandatory time limit for rendering awards under Indian Law: How good intentions can lead to bad outcomes', (2017) 5(2) Ind. J. Arb. L. 188, 189.

[85] Sanjeevi Seshadri, 'S29A of the New Indian Arbitration Act: An attempt at slaying Hydra', Kluwer Arbitration Blog (2 February 2016

[86] Indian Arbitration Act 1996, s 29A(6)-(7).

[87] Shreeja Sen, 'Arbitration provision prescribing time limit draws flak at NITI Aayog conference', Livemint (22 October 2016) ("The provision was also flagged by Alexis Mourre, President of the International Chamber of Commerce […] for an added scope for judicial intervention.")

[88] Indian Arbitration Act 1996, s 29A(9).

For the above reasons, it is important to pay heed to the recommendations of the HLC Report that Section 29A of the Indian Arbitration Act may still be amended in order to achieve effective incentives to carry out arbitration proceedings expeditiously, without the straight-jacket of an inflexible and somewhat unrealistic time limit.[89]

Adopting the aforementioned recommendations would be consistent with the suggestion of Justice R. C. Lahoti, a former Chief Justice of India, that "Section 29A […] is not going to work in India [since] six months are taken only in completing pleadings. The sensible provision would be to begin the limitation from the day the trial begins."[90]

It appears that the Indian legislature has already taken steps to give effect to the recommendations of the HLC Report. The Union Cabinet recently approved the Arbitration and Conciliation (Amendment) Bill, 2018 ('Amendment Bill 2018') for introduction in the Indian Parliament,[91] which was passed by the Lok Sabha, i.e. the lower house of India's bicameral Parliament, in August 2018.[92] Amongst other things, the Bill proposes " to amend [Section 29A(1)] by excluding

International Arbitration from the bounds of timeline and further to provide that the time limit for arbitral award in other [domestic] arbitrations shall be within 12 months from the completion of the pleadings of the parties."[93] This proposed amendment, if passed by the upper house of the Indian Parliament as well, will certainly be welcomed, for it alleviates the aforementioned fears of the international arbitral community.

5. The Dearth of Institutional Arbitration in India

In addition to the various Amendments made in 2015, several of the above concerns may be addressed to a large extent through institutional arbitration.[94] It is widely accepted that the lack of growth of institutional arbitration in India stemmed largely from the fact that the un-amended Indian Arbitration Act was, to borrow words from the Law Commission, "institutional arbitration agnostic – meaning thereby, it neither promote[d] nor discourage[d] parties to consider institutional arbitration."[95] The situation was aggravated by the additional hurdles posed by the Supreme Court of India that tended to prevent arbitration institutions from playing a prominent role in various stages of the arbitral process.

[89] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 4.

[90] Shreeja Sen, 'Arbitration provision prescribing time limit draws flak at NITI Aayog conference', Livemint (22 October 2016).

[91] Press Information Bureau, 'Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018', Government of India (7 March 2018).

[92] Express News Service, 'Lok Sabha passes Bill to help India become arbitration hub', The Indian Express (11 August 2018).

[93] Press Information Bureau, 'Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018', Government of India (7 March 2018); see The Arbitration and Conciliation (Amendment) Bill, 2018, s 6.

[94] Parliamentary Standing Committee Report on Personnel, Public Grievances, Law and Justice, 9th Report on The Arbitration and Conciliation (Amendment) Bill, 2003 (2005), in Ministry of Law and Justice, Proposed Amendments to the Arbitration and Conciliation Act 1996 – A Consultation Paper, 143, suggesting that institutionalised "arbitration in India can also ensure that parties to international arbitration opt for India as the [seat] for arbitration."

[95] Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 9, para. 6.

For instance, the majority judgment in Patel Engineering concluded that since the original Section 11 of the Indian Arbitration Act dealing with the appointment of arbitrators entailed the exercise of a judicial function, this power in its entirety, could be delegated by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.[96] Accordingly, it dismissed the suggestion that the un-amended Section 11 had theoretically allowed the Chief Justice of India or a High Court to delegate the function of arbitral appointments to any "person or institution."

Legislative measures were required to incentivise the use of institutional arbitration in India, some of which have already been implemented with the Amendment Act. The newly introduced Section 11(6B), for instance, clarifies that the "designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court."[97] The intention was to sway the discussion about the appointment mechanism in India away from the administrative-judicial debate, and focus on the precise scope of the tasks to be performed by the appointing authority.[98]

This has effectively paved the way for the Supreme Court or the High Court to appoint arbitration institutions as appointing authorities; something clearly envisaged by the text of the Indian Arbitration Act as well as the Model Law. This was also suggested by the Law Commission of India, when it noted in its 246th Report that:

"[D]elegation of the power of "appointment" […] shall not be regarded as a judicial act. This would rationalize the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialized, external persons or institutions."[99]

The initial effectiveness and success of the above amendment is confirmed by the fact that on 3 May 2017, the Supreme Court of India in Arbitration Case No. 33 of 2014, for the first time directed an arbitral institution, the Mumbai Centre for International Arbitration (MCIA), to appoint an arbitrator in a commercial dispute between Sun Pharmaceutical Industries Ltd. and Falma Organics Ltd. Nigeria.[100] This is certainly an encouraging sign from an international perspective as many Model Law jurisdictions stand by UNCITRAL's characterization of the appointment function as an administrative one.[101]

Nonetheless, the dearth of institutional arbitration in India appears to be as much a cultural issue as it is a legal one. Positive experiences with reliable arbitral institutions, as well as possible further legislative changes will be necessary to change existing conceptions.

The recommendations of the HLC Report, ranging from the establishment of an autonomous Arbitration Promotion Council of India ('APCI') to grade arbitral institutions in India[102] to designating private arbitral institutions as default appointing authorities for both international and domestic arbitration[103], provide an intriguing template for discussion. Notwithstanding the merits and demerits of some of the HLC recommendations, if the Indian Legislature reviews them with the same zeal and attention that it afforded the Law Commission of India's 246th Report, then the future looks promising.

[96] SBP & Co. v. Patel Engineering Ltd. & Anr., (2005) 8 SCC 618, para. 46(ii).

[97] Indian Arbitration Act 1996, s 11(6B).

[98] Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 18, para. 29.

[99] Law Commission of India, Report No. 246 – Amendments to the Arbitration and Conciliation Act 1996 (2014), 16, para. 24.

[100] Ayushi Singhal, 'Appointment of Arbitrators in India – Finally Courts Divest Some Power', Kluwer Arbitration Blog (5 Sep. 2017); Khushboo Narayan, 'SC tells MCIA to appoint arbitrator in global dispute', The Indian Express (30 July 2017).

[101] Fung Sang Trading Ltd. v. Kai Sun Sea Products & Food Co. Ltd., (1991) H.K.C.F.I. 190 (Hong Kong, 1991) ('Fung Sang'); Netherlands Code of Civil Procedure, art 1027(4).

[102] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 4, para. 1.

[103] B N Srikrishna High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (2017), 6.

The Amendment Bill 2018 already provides a slight glimpse of this future. On the one hand, the Bill proposes to amend Section 11 such that "parties may directly approach arbitral institutions designated by the Supreme Court for International Commercial arbitration and in other cases the concerned High Courts" for appointment of arbitrators,[104] with the applications for appointment to be "disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party".[105] On the other hand, it also seeks to create an independent body namely the Arbitration Council of India (ACI), which amongst other things "will grade arbitral institution and accredit arbitrators by laying down norms and take all such steps as may be necessary to promote and encourage arbitration."[106]

6. Concluding Remarks

After two decades since the enactment of the Indian Arbitration Act in 1996, based on the Model Law, the Amendment Act is perceived as a giant leap by Indian arbitration law in the right direction. One only hopes that it is the first of many. The approval of the Amendment Bill 2018 and its passage by the Lok Sabha is another positive indicator, which will bring the Indian Arbitration Act in further conformity with internationally accepted best arbitration practices. At present, it is sufficient to conclusively infer that the evolutionary journey that the Indian arbitration law has embarked upon is far from over. And the rest of the arbitration world is keenly watching!

***

[104] *Press Information Bureau, 'Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018', Government of India (7 March 2018); see The Arbitration and Conciliation (Amendment) Bill, 2018, s 3.*

[105] *The Arbitration and Conciliation (Amendment) Bill, 2018, s 3(13).*

[106] *Press Information Bureau, 'Cabinet approves the Arbitration and Conciliation (Amendment) Bill, 2018', Government of India (7 March 2018); see The Arbitration and Conciliation (Amendment) Bill, 2018, s 10.*

Enforcement of Domestic and Foreign Awards

Naresh Kumar
Advocate

INTRODUCTION

In India, obtaining judgment/decree/award is a race of obstacles, requiring time, money and valuable manpower. The claimant has a sigh of relief after receiving the arbitral award, but his relief turns into anxiety and worry when the opposite party do not abide by the arbitral award. In such a situation, the claimant has to prepare for another round of court battle for enforcing the award.

As far as domestic arbitral award is concerned, Section 36 of the Arbitration and Conciliation Act, 1996 (Act) provides that an arbitral award shall be enforced as a decree of the court under the Code of Civil Procedure, 1908 (CPC). However, for enforcement of foreign awards in India, Part II of the Act contains the provisions of the Geneva Convention and New York Convention. In this context, an attempt is made to discuss the legal and regulatory framework for enforcement of domestic and foreign arbitral awards in Indian courts, with reference to the 'convention countries award' and 'non-conventional awards'.

CHECKLIST FOR ENFORCEMENT OF ARBITRAL AWARDS IN INDIA

Part II of the CPC deals with the law relating to the execution of decree and order whereas Part XI, Order XXI contains the detailed procedure for execution of decrees and orders in India.

ENFORCEMENT OF DOMESTIC AWARDS

Following points deserve careful consideration for enforcement of arbitration award in India:

1. Only a valid award can be legally enforced. Ensure that the arbitral award is a valid award under section 31. Check the form and contents of arbitral award. It has to be in writing, signed by the Member of the Arbitral Tribunal (if there are more than one arbitrators, signature of the majority will be required with reason for the omitted signature). The award has to be a reasoned award, unless otherwise agreed by the parties. The award has to state the date and place and to be delivered to the parties.

2. In case the parties abide by the award (there is no application for challenging the award under section 34 of the Act), the arbitral award becomes final without the need for further enforcement proceedings.

3. The award becomes conclusive as to the issues with which it deals, unless there are a successful challenge on one or more grounds under section 34(2).

4. An execution petition for the arbitral award has to be filed within three months from the date of receipt of arbitration award under section 34(3) of the Act. The court may consider an additional period of 30 days under section 33 of the Act, if the Court is satisfied that the applicant was prevented sufficient cause from making the application within the aforesaid period of three months.

5. The successful claimant/decree holder can enforce an arbitral award in the same manner as if it is the decree of a court under the Civil Procedure Code (CPC). The decree holder has to resort to execution of the arbitral award under order 21 of the CPC against the judgment debtor for its enforcement.

6. The court which can entertain a suit with respect to the subject matter of dispute in arbitration alone can exercise power for execution of award under section 36 of the Act. This means that the court which can exercise the powers under Section 34 is the court to entertain the application for enforcement of the arbitral award.

7. An ex-party award and mutual settlement reached between the parties also fall under the scope of Section 36 of the Act and are enforceable as decree of the court under order 21 of the CPC.

Grounds of objection

The basic principle is that at the stage of execution of an arbitral award, there can be no challenge as to the validity of the arbitral award. The Supreme Court in case of *Vasudev Dhanjibhai Modi V. Rajabhai Abdul Rahman (1970) 1 SCC 670* held that the court executing the decree could not go beyond decree. It must take the decree according to its tenor. It could not entertain any objection that the decree was incorrect in law or in facts, until aside by appropriate proceedings in appeal or revision. The decree even if erroneous, would be still binding on the parties. The same principle was laid down in the case of *Bhawarlal Bhandari V. Universal Heavy Mechanical Lifting Enterprises (1999) 1 SCC 558* - unless there was an objection as to the jurisdiction of the arbitral tribunal, which goes to the very root of jurisdiction, there could not be any other ground of challenge at the execution stage of an arbitral award.

Execution petition in respect of execution of an award against the government body do not require service of notice to the Central/state government under section 80 of the CPC. The simple reason is that an execution application is different from institution of suit. The government, being a party of the arbitration proceedings, is already in possession of all the information.

ENFORCEMENT OF FOREIGN AWARDS TO THE GENEVA CONVENTION AND NEW YORK CONVENTION APPLY

In India, the Arbitration (Protocol and Convention) Act 1937, which came into force on 04.03.1937, provided for the enforcement of foreign arbitral awards to which the Geneva Convention of 1927 applied. Similarly, the Foreign Awards (Recognition and Enforcement) Act, 1961, which came into force on 30.11.1961, had been enacted pursuant to the New York Convention of 1958. Subsequently, the Geneva Convention ceased to apply to those awards to which the New York Convention applied.

Part II of the Act deals with enforcement of certain foreign award. According to section 44 of the Act `foreign award' means an arbitral award on differences between persons arising out of legal relationships, considered as commercial under the law in force in India, which is made on or after 11.10.1960 –

(a) in pursuance of a written agreement for arbitration to which the Convention applies; and

(b) in one of the territories of another contracting state notified in the Official Gazette by the Central Government to which the Convention applies.

The concept of commercial relationship under Section 2 the Foreign Awards (Recognition and Enforcement) Act, 1961, takes within its ambit all relationships, which arise out of or are ancillary and incidental to the international business and trade between the citizens

of different states. The underlying object is to facilitate and promote international business and trade, and, therefore, expressions occurring in such statues must receive liberal interpretation consistent with its literal and grammatical sense.

Foreign Award is final on merits

Section 46 provides that any enforceable foreign award shall be treated as binding for all purposes between the concerned parties to the agreement. As such, a foreign award being final, cannot be challenged on merits, and becomes conclusive, except for circumstances sated under section 48 of the Act for enforcement of foreign award.

The scope of the court's jurisdiction is restricted to decision on whether the award is enforceable - *Ludwig Wunscha & Co. v. Raunaq International, AIR 1983 Delhi 247*. Indian courts cannot call for the records of the arbitration and satisfy themselves about the genuineness and authenticity of the award, since that would obviate and vitiate a principal object of the Act, namely, to minimize intervention by the enforcing court- *Western Shipbreaking Corp. v. Clare Haren Ltd. 1998 (Supp.) Arb. KR 53 (Guj.)*

Procedure for Enforcement of Foreign Award

The procedure provided under section 47 of the Act, however, ensure that the court must be satisfied about the legality, validity and correctness of the award. Once the court is satisfied that the award if capable of being enforce, the award will be deemed to be a decree of the court – *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd. (AIR 2001 SC 2293)*. Section 47 of the Act provides that any person interested in enforcing a foreign award may apply to any court having jurisdiction over the subject matter of the award.

The party applying for the enforcement of a foreign award has to file the following documents:

(a) The original award which has been duly authenticated in the manner required by the law of the country in which it was made. If the award or the arbitration agreement is in a foreign language then a duly translated version in English certified as corrected by a diplomatic or consular agent of the country to which the parties belongs or certified as corrected in such other manner as may be sufficient according to the law in force.

(b) The original agreement for arbitration or a duly certified copy thereof.

(c) Evidence to prove that the award is a foreign award and has become final.

'Court' for enforcement of a foreign award means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction over the subject matter of the award in India.

The enforcement of foreign Awards under the New York convention, 1958 and Geneva Convention, 1927 has been incorporated into Chapters I & II of Part II of the Act. Chapters I & II contain the rules adopted by the major trading nations, which are signatories to the Conventions.

The party applying for the enforcement of a foreign award has to file the following documents:

- The original award which has been duly authenticated in the manner required by the law of the country in which it was made. If the award or the arbitration agreement is in a foreign language then a duly translated version in English certified as corrected by a diplomatic or consular agent of the country to which the parties belongs or certified as corrected in such other manner as may be sufficient according to the law in force.
- The original agreement for arbitration or a duly certified copy thereof.
- Evidence to prove that the award is a foreign award and has become final.

In case the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that Court.

Enforcement of a foreign award may be refused, at the request of the opposite party against, if the opposite party furnishes proof that –

(a) The parties to the agreement were under some incapacity, or the arbitration agreement was not valid under the law of the country where the award was made.

(b) The parties against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present their case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Enforcement of a foreign award may also be refused by a court on following grounds:

i. The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

ii. The enforcement of the award would be contrary to the public policy of India. Explanation 1 to section 34 of the Act clarifies that an award is in conflict with public policy of India, only if induced by fraud or corruption or breach of confidentially; or admissibility of evidence in other proceedings.

iii. The award has not become final in the country where it has been made.

An appeal shall lie from an order refusing enforcement of a foreign award under section 48 & 57 of the Act to the Court authorized by law to hear appeals from such order. No second appeal lie from an order passed in appeal under these sections, but nothing in this Act can take away any right to appeal to the Supreme Court.

Procedure for enforcement of awards

The procedure for enforcement of arbitral awards under the Geneva Convention and New York Convention and section 49 of the Act is almost the same. Section 49 states that where the Court is satisfied the foreign is enforceable; the award shall be deemed to be decreed of that Court.

Any person who wants enforce a foreign award in India has to apply in writing to any Indian court having jurisdiction over the subject matter of the award, enclosing the award and the agreement on which the award is based. The application is numbered and registered in the court and notice is issued to the effected parties.

In India foreign award can be sought for enforcement, although a foreign judgment was given in terms of the award. Merger of the award into the judgment in the country of origin does not have extra-territorial effect. As such, the award remains the cause of action for enforcement in other countries on the basis of the convention - *Northern Sales Company Limited v. Reliable Extraction Industries Pvt. Ltd., AIR 1985 Bom 332*. Meaning of the foreign award has to be interpreted in the light of the New York Convention and its implementing legislation in India – *Kochi Navigation Inc., v. Hindustan Petroleum Corporation Ltd., AIR 1889 SC 2198*. The Court in India, however, has power to modify the award on the ground of ambiguity.

Appealable orders

Section 59 (1) provides that an appeal shall lie from the order refusing to refer parties to arbitration under section 54 and to enforce a foreign award under section 57 of the Act to the court authorised by law to hear appeals from such order. Section 59(2) provides that no second appeal lie from an order passed in appeal under these sections, but nothing in this Act can take away any right to appeal to the Supreme Court.

The application will be numbered and registered in the court as a suit between the applicant as plaintiff and the other parties as defendants. The court will direct notice to be served upon the parties requiring them to show cause why the ward should not be enforced. The court, on being satisfied that the foreign award is enforceable under the Act, will pronounce judgment according to the award. Upon the judgment so pronounced, a decree will follow as in case of domestic awards. No appeal will lie from such a decree except in so far as the decree is in excess of or not in accordance with the award.

Execution of a foreign award against the government body does not require service of notice to the government under section 79 of the CPC.

The simple reason is that an execution application is different from institution of suit. The government, being a party of the arbitration proceedings, is already in possession of all the information.

Conditions for enforcement of award

Section 48(1) of the Act provides the following conditions under which enforcement of a foreign award may be refused at the request of the party against whom it is invoked, if the party furnishes the required proof:

(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party again whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Section 48 of the Act prescribes conditions for enforcement of New York Convention awards, which are foreign awards, including conditions for refusal to enforce `foreign award' in India. Section 48 is included in Chapter I of Part II of the Act.

Section 48 of the Act lists various grounds upon which the court in India may refuse to enforce an otherwise enforceable foreign arbitral award. Further, an Indian court may on its own motion, on either of the grounds of non-arbitrability of the dispute; and violation of public policy; decline to enforce a foreign arbitral award.

Section 48(2) of the Act provides that recognition and enforcement of an arbitral award may also be refused if the component authority in the country where recognition and enforcement is sought finds that--

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country. It is clarified that an award is in conflict with the public policy of India if it was induced or affected by fraud or corruption.

Section 48(3) provides that if an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) of section 48, the court may,

if it considers proper, may adjourn the decision on enforcement of the award and may order the party claiming enforcement or any other party to give suitable security.

Clause (e) of sub-section (1) of section 57 under Chapter II of Part II of the Act, on the other hand, refers to Geneva Contention Awards. It may be noted that the language used for enforcement of Geneva Convention Awards under the Act is different from the language used in clause (b) of sub-section (2) of section 48. As such, the enforcement of New York Convention award cannot be refused in India on the ground that it is opposed to law of India, if it is in conformity with the applicable provisions of foreign law governing the impugned Award and all the prescribed conditions under section 48 are complied with.

ENFORCEMENT OF FOREIGN AWARDS TO COUNTRIES TO WHICH THE CONVENTIONS DO NOT APPLY

There are many hurdles in enforcement of foreign awards made in countries, which are not parties to either the Geneva or the New York Conventions. Such foreign awards are, however, enforceable in India on the same grounds and in the same circumstances in which they are enforceable under the general law on grounds of justice, equity and good conscience.

Foreign awards can be enforced by following the procedure laid down in the Code of Civil Procedure in the court having jurisdiction. The important principles and conditions of enforcement of foreign awards by the Indian courts are as under:

- That there was a contract between the parties to refer disputes between them to an arbitral tribunal in a foreign country;
- That the award is in accordance with the terms of the agreement;
- That the award is not invalid according to the law governing arbitration proceedings obtaining in the country where the award was made;
- That it was a subsisting award at the date of suit; and
- That the enforcement of an award would be contrary to public policy or the laws in India.

The courts in India will not enforce a foreign award, if its enforcement would be contrary to public policy or the laws in India.

There are very few cases in which a foreign award has been denied recognition or enforcement on grounds of public policy or on the ground that it is against the laws of India. A foreign award will be deemed to be against the laws of India if it violates, for instance, provisions relating to exchange control, import-export policy or similar mandatory provisions.

1. Award made outside India under Indian procedural law

   Awards made outside India under the Indian procedural laws are enforceable in India under the Arbitration and Conciliation Act, 1996.

2. Award made in India under foreign procedural law

   Awards made in India under foreign procedural law are enforceable in India on general laws.

3. Award made outside India under foreign procedure law

   An award made outside India under foreign law is a foreign award. If it is one to which either of the Conventions applies, it has to be enforced under the Arbitration and Conciliation Act, 1966. In other cases its enforceability in India depends on the governing law and general principles.

Procedure for Enforcement of Foreign Award

The party applying for the enforcement of a foreign award has to file the following documents:

- The original award which has been duly authenticated in the manner required by the law of the country in which it was made. If the award or the arbitration agreement is in a foreign

language then a duly translated version in English certified as corrected by a diplomatic or consular agent of the country to which the parties belongs or certified as corrected in such other manner as may be sufficient according to the law in force.

- The original agreement for arbitration or a duly certified copy thereof.
- Evidence to prove that the award is a foreign award and has become final.

In case the court is satisfied that the foreign award is enforceable, the award shall be deemed to be a decree of that Court.

Enforcement of a foreign award may be refused, at the request of the opposite party against, if the opposite party furnishes proof that –

- The parties to the agreement were under some incapacity, or the arbitration agreement was not valid under the law of the county where the award was made.
- The parties against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present their case; or
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

  Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced; or
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Enforcement of a foreign award may also be refused by a court on following grounds:

- The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
- The enforcement of the award would be contrary to the public policy of India.
- The award has not become final in the country where it has been made.

An appeal shall lie from an order refusing enforcement of a foreign award under section 48 & 57 of the Act to the Court authorized by law to hear appeals from such order. No second appeal lie from an order passed in appeal under these sections, but nothing in this Act can take away any right to appeal to the Supreme Court.

COMMENTS

Arbitration is about the contract and a contract is rights and obligations between the parties to receive consideration for the promises made and performed. Any delay in enforcement of an arbitral award, which has achieved finality, defeats the very object of the contract as well as the New York convention, 1958 and Geneva Convention, 1927, to which India is a signatory. It is, therefore, suggested that the judiciary should dispose of the cases of enforcement of arbitration award most expeditiously in a summary manner.

In international private law, `the proper law of contract' is of decisive importance in dealing with any dispute that arises from it. Lord Denning in *Boissevain v. Weil (1949) All ER 146* stated: `the proper law of the contract depends not so much on the place where it is made,

nor even on the intention of the parties or on the place where it is to be performed, but on the place with which it has the most substantial connection.

Dicey and Morris in the Conflict of Laws (13th Edition Vol. II at page 1277) on public policy state that:

"It is a general principle of the conflict of laws that the courts of a country will not apply any foreign law if and in so far as its application would lead to results contrary to the fundamental principles of public policy of the lex fori (the law of the country in which an action is brought). The courts of all countries insist on applying to a case otherwise governed by foreign law, those principles of their own law which, in their own view, express basic ideas of public policy. But a mere difference between the lex fori and the foreign law which would otherwise be applicable, or a difference between the policy of the lex fori and the foreign law, is not sufficient to justify the exclusion of foreign law on grounds of public policy. It has already been seen that the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. As Judge Cardozo put it, the courts will not refuse to enforce or recognize a foreign right unless it would `violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the common weal."

As far as enforcement of arbitral awards are concerned, Article 1(e) of the Convention of the Execution of Foreign Arbitral Awards states: "that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."

In fact, delay in enforcement of an arbitral award, which has achieved finality, defeats the very object of the contract as well as the New York convention, 1958 and Geneva Convention, 1927. It is, therefore, suggested that the judiciary should dispose of the cases of enforcement of arbitration award most expeditiously in a summary manner.

RECENT JUDGMENTS

Recently the Supreme Court in the case of *Cruz City 1 Mouritius Holdings v. Unitech Limited (decided on 11.04.2017)* dealt with enforcement of foreign award on the ground of violations of Foreign Exchange Management Act (FEMA) and, thus, contrary to the public policy of India. The Apex Court after considering the facts of the case observed as under:

(a) The award of the London Court of International Arbitration (LCIL) directs Unitech to invest in the shares of Kerrush and therefore violates foreign Exchange Management (Transfer of issue of any Foreign Security) Regulations, 2004.

(b) The Respondent's obligation under the Agreement is in the nature of a guarantee by the Respondent on behalf of Burley and such guarantee violates the Foreign Exchange Management (Guarantees) Regulations, 2000,

(c) In terms of FEMA, the shares of Kerrush are required to be valued and purchase of those shares can only be made at the fair market value of those shares.

(d) Share Holding Agreement (SHA) contemplates an assured exit at a pre-determined rate to the Petitioner in respect of its investment in the project and this violates the mandatory circulars issued by the Reserve Bank of India.

(e) SHA is a device to circumvent the provisions of FEMA and the Regulations issued thereunder, which prescribe an assured exit from a foreign direct investment (FDI) at a pre-determined rate.

The Apex Court, after analyzing several cases, noted that the width of the public policy as a defense to resist enforcement of a foreign award was extremely narrow and could not be equated to offending any particular provisions or a statute. The court was of the view that the contravention of a provision of law was insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. However, it was noted that any remittance of money recovered from the Respondent in enforcement

of the award would necessarily require compliance of regulatory provisions and/or permissions from the concerned authorities.

The Court observed, "Unitech's contention that structure contemplated under the Keepwell Agreement read with SHA provided an assured return at a predetermined rate to Cruz City and this was a flagrant violation of FEMA and Regulations, made thereunder, is also bereft of merit. The Put Option provided to Cruz City under the Keepwell Agreement could be exercised only within a specified period. This was not an open ended assured exit option as it sought to be contended by Unitech. Cruz City had made its investment on a representation that the construction of the Santacruz Project would commence within a specified period. Plainly, if the construction of the Project commenced with the specified period, that is, by 17.07.2010, Cruz City would not be entitled to exercise the Put Option for exiting the investment. Further, the Put Option could only be exercised within a fixed time period of 180 days and the said option would be lost thereafter.

The Court further observed, "Even if it is accepted that the Keepwell Agreement was designated to induce Cruz City to make investments by offering assured returns, Unitech cannot escape its liability to Cruz City. Cruz City had invested in Kerrush on the assurances held by the Unitech and notwithstanding that Unitech may be liable to be proceeded against for violation of provisions of FEMA, the enforcement of the Award cannot be declined." The objections under section 48 of the Arbitration and Conciliation Act were rejected.

The Arbitration & Conciliation Act (as amended in 2016) has added an explanation in section 34(2) (b) (ii) to restrict the meaning of term `public' policy as a ground for challenging an arbitral. It provides that award shall be treated as in conflict with Public Policy, if it is induced by fraud or corruption or in violation of section 75 (confidentiality) or section 81 (admissibility of evidence in other proceedings), or if it is in contravention with the "fundamental policy of Indian Law" or is in conflict with the most basic notions of morality or justice. Further, Explanation 2 provides the test as to whether there is a contravention with fundamental policy of Indian law shall not entail a review on the merit of dispute.

The Supreme Court on 03.07.2013 in *Shri Lal Mahal v. Progetto Granto SPA (2013) 115 CLA 193(SC)* interpreted clause (b) of sub-section (2) of section 48 of the Act and ruled that foreign award, being an international award covered by the New York Convention, is enforceable in India under section 48 of the Act, overruling the earlier decision in case of *Phulchand Exports Ltd. v. OOO Patriot (2011)10 SCC 300*.

The High Court of Justice at London had already taken a particular view in respect of the legality of the award passed by arbitral Board of appeal and section 48 of the Act did not give an opportunity to have a second look at the foreign award in the award enforcement proceedings.

The Supreme Court held that while considering the enforceability of foreign award, the Indian court does not exercise appellate jurisdiction over foreign award. As such, the foreign award being an international award covered by the New York Convention was enforceable in India under section 48, notwithstanding the plea that it was opposed to public law.

The interpretation of section 48 in this landmark judgment provides for easy enforcement of foreign awards in India. In other words Indian courts would exercise retrain in setting aside foreign awards directly or indirectly on merits or on the ground of `patent illegality' if the submit matter were to be adjudicated under the Indian law.

The enforcement of foreign Awards under the New York convention, 1958 and Geneva Convention, 1927 has been incorporated into Chapters I & II of Part II of the Act. Chapters I & II contain the rules adopted by the major trading nations, which are signatories to the Conventions.

CONCLUSION

India aims to become a developed nation by 2020. To achieve the goal, a good legal and regulatory infrastructure is as important as physical and financial infrastructure. In fact, the International Court of Justice, Hague, and London Court of International Arbitration have set up their offices in India to provide arbitration services to international parties.

There is need for professionalizing, institutionalizing and globalizing the Indian arbitration system for speedy and effective dispute resolution to make India as one of the preferred hubs for attracting foreign direct investment and facilitate international trade and commerce. It is suggested that judiciary should maintain its proactive role in interpreting the Act so as to minimize challenges in enforcement of domestic and international arbitration award.

***

"The use of technology and strategies to reduce time and costs in arbitration have put it at the forefront of innovation for dispute resolution."

Marco Tulio Venegas
Head Partner of the Arbitration, Von Wobeser y Sierra

Latest Trend in Arbitrtion Law - A few Suggestions for "Additional Law Reforms"

Justice D.R. Dhanuka
Former Judge of High Court of Bombay

1. Notice of Arbitration :-

1.1. Section 21 of the Arbitration & Conciliation Act, 1996 reads as under :-

"21. Commencement of arbitral proceedings: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the Respondent"

Expression "unless otherwise agreed by the parties" may be deleted from the said Section. It should not be open to the parties to specify a different provision by an agreement regarding "notice of arbitration" as to when the arbitration shall be deemed to commence and stoppage of limitation in respect of the arbitral claim on receipt of notice of arbitration.

1.2. It is observed by some of us who are experienced Arbitrators that on several occasions, notice of arbitration issued under Section 21 of the Act does not specify "particular disputes" with particulars. It is observed that notice under Section 21 is kept vague and too general and parties go on adding claims and disputes as the case proceeds which is not fair. The parties must make up their mind to set out all the disputes with particulars and list of documents while issuing notice of arbitration. In order to avoid any ambiguity and in order to concentrate on the object of legislation to ensure speed and quality arbitration, after carefully study, I suggest that Notice of Arbitration and response thereto should comply Article 3 and Article 4 of UNCITRAL Arbitration Rules as revised in 2010 as indicated below. We should follow uniform and unified system in all the countries except in exception circumstances.

1.3. The notice of Arbitration must give all relevant particulars and disclose all the relevant documents to such an extent that later on it should be open to the Claimant to treat the Notice of Arbitration as a Statement of Claim subject to supplementation of pleading without adding new claims. If the notice is particularised as stated below and additional claims are not allowed to be incorporated in the

Statement of Claim, without leave of Arbitral Tribunal which may be rarely granted for sufficient cause, it shall be helpful in advancing the objective of Arbitration Law. According to sub-article 3 of Article 3 of UNCITRAL Arbitration Rules, Notice of Arbitration should include the following:

a) A demand that the dispute be referred to arbitration;

b) The names and details of all the parties to the arbitration ;

c) Identification of the arbitration agreement that is invoked;

d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;

e) A brief description of claim and an indication of the amount involved, if any; (As far as possible, the cause of action with 'particulars' be set out)

f) The relief or remedy sought

1.4. The Notice of Arbitration should also disclose the name of proposed Arbitrator coupled with a statutory declaration at least in 'Draft form' that the potential Arbitrator has sufficient time for completing the arbitral process with speed and quality within one year from the date of entering upon the Reference and the proposed Arbitrator is not related to parties or the relatives or the subject matter or Counsel as set out in 5th and 7th Schedules appended in the Arbitration & Conciliation Act, 1996. In other words, the proposed arbitrator must be experienced, independent and impartial and not overloaded and must ensure devotion of sufficient time so as to complete the arbitration latest within one year from the date of entering upon the reference.

Note: If the Arbitration clause provides for Institutional Arbitration, it should be specified that the name of proposed Arbitrator is selected from the Panel maintained by the Institution and notice is issued in compliance with the rules of the Institution.

1.5. By the said notice the Respondent should be called upon to respond to the said arbitration within 30 days of receipt of notice.

2. Response to the Notice of Arbitration:-

Within 30 days of receipt of Notice of Arbitration the Respondent shall communicate to the Claimant response to the Notice of Arbitration which shall include the following :-

a) Any plea that an Arbitral Tribunal to be constituted under the Rules lacks jurisdiction, if so, why, and on what ground? Particulars in respect of jurisdiction plea be summarized. The parties make reasonable disclosure in support of the plea. It must be clarified that as a matter of law the disputes must be such that the same are capable of being settled by arbitration. Non-Arbitral disputes or excepted matters should not be included in the notice of arbitration or response thereto.

b) A proposal for the appointment of Sole Arbitrator if the arbitration clause provides for appointment of Sole Arbitrator which can be done only by mutual consent. (in default an Application shall have to be made to the Hon'ble High Court or to the Hon'ble Supreme Court of India as the case may be in case of Domestic Arbitration and International Commercial Arbitration respectively as specified in Section 11). Note : Under ICC rule, the name of the proposed sole arbitrator must be confirmed by ICC court of arbitration.

c) Whether the Respondent has any claim of set off or Counter Claim arising out of the claim set out in the Notice of Arbitration, if so, the amount in respect thereof and the relief for remedies sought? Particulars in respect of set off and counter claim and list of documents relied upon.

d) List of document on which the Respondents relies upon.

Note: If response to Notice of Arbitration is not forwarded by the Respondent in time or otherwise, adverse inference may be drawn against the Respondent and the Respondent shall have to file Statement of Defence in response to the Statement of Claim expeditiously, giving an explanation for not responsing to the notice of arbitration.

II. As indicated in Article 20 of UNCITRAL Arbitration Rules, the Notice of Arbitration may be treated as statement of Claim coupled with additional particulars indicated below :-

a) The names and details of the parties

b) Statement of the Facts supporting the claim with necessary details so as to remove any ambiguity.

c) Points on issue

d) Relief and remedies sought, formulate of 'prayer clauses'.

e) List of all the documents relied upon by the Claimant along with copies of all the documents

f) Legal grounds in support of the claim.

Note: Statement of Claim should as far as possible, be accompanied by all the documents and other evidence including affidavits of all the Witnesses relied upon by the Claimant.

Note: Similarly the Statement of Defence should also be a detailed document and it should be open to the Respondent to rely on the response to the Notice of Arbitration as settlement of defence, to be supplemented by further settlement of facts, list of documents, affidavits of Witnesses, points at issue, relief for remedy sought including set off and Counter Claim and the legal grounds or argument supporting the defence plea and in particular detailed note regarding alleged lack of jurisdiction if any; excepted matters which cannot be arbitrated upon the dispute and claims which should not be and it cannot be arbitrated upon.

III. Section 29 of the Arbitration & Conciliation Act, 1996 provides that unless otherwise agreed by the parties, in arbitral proceedings with more than one Arbitrator, the decision of Arbitral Tribunal shall be made by a majority of all those members. It is possible that all the three arbitrators have different view and it is impossible to evolve "majority decision" concisely and precisely.

3.1. Section 29(2) of the Act provides that notwithstanding sub-section questions of procedures may be decide by the Presiding Arbitrator.

Note: It is reasonably possible to assume a situation where there is no majority decision at all and in case of three member Arbitral Tribunal, all the three members of Arbitral Tribunal have different views, in this situation, there should be appropriate remedy and the arbitration should not be wound up for want of a majority decision.

3.2. In the event of majority decision being not possible, the decision of the Presiding Arbitrator must prevail so that the Award can be made in terms of decision of the Presiding Arbitrator. It should be provided by amending section 29 of the Act. Copies of dissenting opinions of other Arbitrators may be annexed to the Award.

IV. It is noticed that sometime a party appointing Arbitrator prolongs the matter, deliberately remain absent and does not cooperate with speedy and quality disposal of Arbitral proceedings in time as contemplated. It is unfortunate In all such cases, there should be a specific provision to the effect that the remaining two Arbitrators may continue with the Arbitration and make even an award with the approval of the High Court which has jurisdiction to appoint an Arbitrator under Section 11 of the Act or in alternative by seeking quick appointment of substitute arbitrator directly by the High Court or the Supreme Court as the case may be after treating the mandate of defaulting arbitrator terminated.

4.1. Section 17 of Arbitration and Conciliation Act, 1996 as substituted by Act 3 of 2016 with effect from 23rd October 2015 confers detailed powers on the Arbitral Tribunal to grant interim measures of protection as set out therein. The Section 17(2) of the newly incorporated section also provides that subject to any orders passed in a Appeal under Section 37, any order issued by the Arbitral Tribunal under Section 17(1) shall be deemed to be an Order of the Court for all purposes and shall be enforceable under Code of Civil Procedure 1908 (5 of 1908) in the same manner as if it were an order of the Court.

In my opinion this is an useful provision but it all depends upon the experience and speed of the arbitrator/s with quick grasp.

Note: By this amendment, the orders passed by the Arbitral Tribunal in respect of interim measures of protection may be enforceable as if the same were Orders of the Court. This will reduce the load of the Court under Section 9 of the Act and it is an useful provision. Even in case of Model Law, the UN Model Law has been amended since December 2006 whereby the Foreign Seated Arbitrator in case of International Commercial Arbitration also can grant ad interim or even ad-interim reliefs which shall be enforceable at Law.

4.2. There is a small lacuna in Section 17(1) of the Act as pointed out below which should be removed as recommended by the high level committee presided by the Hon'ble Mr. Justice Shri B.N. Srikrishna. Section 17(1) of the Act reads as under:

"17(1) The party may, during the arbitral proceedings or at any time after making of the Arbitral Award but before it is enforced in accordance with Section 36, apply to the Arbitral Tribunal (i)....., (ii) ..... and Arbitral Tribunal shall have the same power for making orders as the court has for the purpose and in relation to, in proceeding before it. The Hon'ble High Level Committee has rightly recommended that "or at any time after making of the Arbitral Award but before it is enforced in accordance with Section" should be deleted from Section 17(1) of the Act since the Arbitral Tribunal becomes *functus officio* after the Award is made and it is inappropriate that the Arbitral Tribunal are continued to exercise all the powers to grant interim measures until the Award is enforced in accordance with Section 36. At the mist it can be provided that order of *status quo* or interim orders which are operative shall continue for some time.

4.3. Section 9 of the Act makes appropriate provisions in this behalf. i.e. for grant of post-Award interim relief till the award is enforced under section 36 of the Act.

V. There should be a specific sub-clause forming part of Section 17(1) of the Act providing that the Arbitral Tribunal shall have power to order either party to furnish security for costs. In my opinion there is a lacuna in the Act and this lacuna should be remedied. Sometime the cost may be very heavy and the same may not be recoverable at all. If Prima facie there is justification to pass such an Order, the party would be directed to furnish security if on the face of it may have a very very weak case or there are other reasons for doubting the solvency of a party. There should be an appropriate provision in this behalf.

VI. Immunity of Members of Arbitral Tribunal and Arbitral Institution:-

There should be a specific provision as provided in the English Arbitration Act to the effect that the members of the Arbitral Tribunal and Arbitral Institution act unless they act in bad faith, shall be entitled to enjoy immunity from facing any action for the act performed by the Arbitral Tribunal or the Arbitral Institution during the course of performance of their duty. This provision should be analogous to the provision made in Judicial offers protection act.

6.1. There is still a controversy regarding jurisdiction of the Court entitled to execute the Award as if it were a decree of the Court. Several High Courts have taken different views. A question has been posed for consideration as to whether an application for execution or enforcement of a Domestic Award must necessarily be made only before the District Court to which First Application was made which had jurisdiction to entertain the first application having regard to Section 42 of the Arbitration and Conciliation Act,1996. The Hon'ble High Court of Madhya Pradesh, the Hon'ble High Court of Delhi, the Hon'ble High Court of Kerala and the Hon'ble High Court of Rajasthan and Haryana appear to have taken the view that an Application for execution of the Award as if it was a decree would also be governed by Section 42 of the Act and should be filed only before the Courts as specified in Section 2(1)(e) of the Act It appears that the Hon'ble High Court of Kolkata in the case of *HDFC Bank Ltd., Vs Sima Mondal* has taken the view that execution proceeding in respect of Award as if it were a decree can be taken before any court having pecuniary and territorial jurisdiction and the Award – Decree can even be transferred to another court where the assets of Judgement Debtor are situate having regard to provision of Code of Civil Procedure. In other words according to this view the execution proceeding need not necessarily be taken before the District Court or the Court having jurisdiction to which alone subsequent application can be made having regard to Section 42 of the Act.

6.2. In my opinion this lacuna should be removed by appropriate amendment in the law.

6.3. Section 2(1)(h) of the Arbitration and Conciliation Act define the expression "party" as under. The Party means to an Arbitration Agreement. There is a lacuna in this definition. Section 35 of the said Act specifically provides that the Award shall be binding on the parties and person claiming under them respectively. It is rightly recommended by the Hon'ble High Power Committee that in all relevant sections of the Act that the definition of the expression 'party' should be amended so as to include all persons claiming through or under them there would be no anomaly.

VII. Clarificatory note on decision making by the courts or other judicial authorities on jurisdictional dispute so as to bar the jurisdiction of Arbitral Tribunal under Section16 of the Act :-

Keeping applying the bar of resjudicata or issue stopped to the decision already made by a court of law or other jurisdictional authority under section 8 or 9 of the act. As regard decision issue of existence of a arbitration agreement which is also a jurisdictional issue, the decision the High Court or supreme court under section 11 of the act is final and conclusive and cannot be reopened under section 16 of the Act.

7.1. Prior to the Judgement of 7 Judges Bench of the Hon'ble Supreme Court of India in the case of *S.B.P. & Co., Vs Patel Engineering Ltd., - (2005) 8 SCC 618*, it was held by five Judges Bench of the Hon'ble Supreme Court of India although erroneously in the case of *Konkan Railway Corporation Ltd., Vs Rani Construction (P) Ltd., - (2002) 2 SCC 388* that the Hon'ble Chief Justice of the Hon'ble High Court or of the Hon'ble Supreme Court while exercising power of appointment under Section 11 of the Act exercised an administrative power and not a judicial part which appointing an arbitrator to

appoint and the decision made by the Hon'ble Chief Justice of the Hon'ble High Court under Section 11 of the Act could be challenged by a Writ Petition or could be re-opened under Section 16 of the Act. It is now authoritatively held by 7 Judges Bench of the Hon'ble Supreme Court of India in the case of *S.B.P. & Co., Vs Patel Engineering Ltd.*, that the Hon'ble Chief Justice exercises judicial power and in view of Section 11(7) of the Act the decision made by the Hon'ble Chief Justice of the Hon'ble High Court or the Hon'ble Supreme Court on jurisdictional issue is final and conclusive and cannot be reopened under section 16 of the Act. In this case a reference was specifically made to Section 11(7) of the Arbitration & Conciliation Act, 1966 providing finality of the decision of jurisdictional issues decided by the Hon'ble Chief Justice or the Hon'ble Designated Judge under Section 11 of the Act. It means that this the jurisdictional issue could not be reopened or reconsidered under Section 16 of the Act by the Arbitral Tribunal once the issue was finally decided under section 11 of the Act. In the Judgement of Seven Judges Bench of the Hon'ble Supreme Court in the case of Patel Engineering Ltd., identical observations were made in respect of decision making by the courts on "Jurisdictional issue" i.e. as for example existence of arbitration agreement under Section 9 of the Act as well as by a judicial authorities which may be even other than a court under Section 8 of the Act, shall also be treated as 'final' and binding and could not be re-opened under section 16 of the Act. It has been observed and rightly so in same of the standard commentaries that observations of the Hon'ble Supreme Court of India in the case of Patel Engineering Ltd., on effect and decision on jurisdiction issue under Section 8 and Section 9 of the Act should not be treated as final just as decision given by the Hon'ble Chief Justice under Section 11 of the Act in view of Section 11(7) of the Act. In other words the decision made by the judicial authority under Section 8 of the Act will have to be considered "prima facie view only and not a final view". It has been so stated now in the amended Section 8 of the Act. Similarly by majority judgement of the Hon'ble Supreme Court in the case of *SHIN-ETSU Mechanical Co., Ltd., Vs Aksa Optifibre Ltd., (2005)7 SCC 234*, according to the majority view, the court could decide the jurisdictional issue while considering application under Section 45 of the Act only on a prima facie examination of the issue of jurisdiction. In other words, the Arbitral Tribunal or the Foreign Court as and when the issue arises may take even a different view on the jurisdictional issue since the view taken by the Hon'ble 7 Judges while deciding application under Section 45 of the Act is merely a prima facie and does not operate as Resjudicata. Sabharwal J. while delivering minority judgement took a different view. There is no provision similar to Section 11(7) of the Act anywhere else i.e. nothing of sub-section forming part of Sections 8 and 9 or Section 45 of the Act. Even while deciding jurisdictional issue under Section 9 of the Act the Hon'ble Mr. Justice Rebello took the view that the decision of the court deciding application under Section 9 of the Act on jurisdictional issue if raised will operate as "issue estoppels" and the Arbitral Tribunal shall not be entitled to reopen the issue under section 16 of the Act. In other words the Arbitral Tribunal could consider jurisdictional issues under Section 16 of the Act only when the reference was made without the intervention of the Court and perhaps these is no contrary decision of any court or judicial authority on this aspect. These are all complex matter and it is better if a final view is taken by the Apex Court at the earliest.

7.2. The newly substituted Section 36 (2) of the Act provides that pendency of a Petition challenging the Award filed under Section 34 of the Act shall not operate as automatic stay of enforcement of Award. In other words the parties filing petition under Section 34 of the Act after 23rd October 2015 shall have to make an Application for stay of execution of enforcement of an Award and in case the Award is a money Award the Court shall

have to consider the provision re : deposit or furnishing of security as contemplated under Order 41 Rule 5 of Code of Civil Procedure and require the Judgement Debtor the Petitioner who has challenged the Award to deposit required amount or furnish security or bank guarantee or refuse to grant stay except on terms to be imposed.

Thus the law on the subject has completely undergone change. On this aspect different High Courts have taken different views and the matter is still pending before the Hon'ble Supreme Court of India. The members of legal paternity are awaking the judgement of the Hon'ble Supreme Court of India so that there is no more uncertainty on this vital issue. In my humble opinion is that earlier Judgement of the Hon'ble Supreme Court of India providing for automatic stay of enforcement of Award during the pendency of Petition under Section 4 of the Act itself was erroneous His Lordship the Hon'ble Mr. Justice Santosh Hegde had left it to Parliament to amend the law and the parliament has done it now after several decades with effect from 23rd October 2015.

7.3. In the case of Bhatia International, provisions of Part I of the Act it was held by three Judges Bench that Part I of the Act would be applicable even where the Arbitration was held outside India unless applicability of Part I was excluded expressly or by necessary implications. The ratio of this judgement as prospectively overruled by Judgement of larger bench of the Hon'ble Supreme Court of India in the case of Balco i.e. prospective overruled with effect from 6th September 2012. Now the law is amended with effect from 23rd October 2015. A proviso has been added to Section 2(2) of the Act and considering that even where there is Foreign Seated Arbitration and Arbitration is held out of India, Section 9, Section 27 and relevant part of Section 37 shall be applicable at the instance of the party having legitimate grievance. Thus as a matter of fact originally when the Judgement of three Judges bench in case of Bhatia International was delivered, the emphasis was on application or grant of interim relief under Section 9. Since the assets of the party may be in India, even though the arbitration is a Foreign Seated Arbitration and the innocent party must have an easy remedy available. To this extent from commercial point of view this was a correct decision. However, it was later on held in the case of Venture Global that even Foreign Seated International Arbitration Award could be challenged before the Indian Court under Section 34 of the Act. This line of decision was erroneous and it was rightly held by the Judgement of larger bench in Balco case that no petition under Section 34 of the Act could be filed challenging Foreign Award and the Judgement in the case of Bhatia International was overruled prospectively with effect from 6th September 2012. Once again the law is changed by adding a proviso to Section 2(2) of the Act, only Section 9 and Section 27 and relevant part of Section 37 are made applicable even when the Arbitration is held outside India but not Section 34 of the Act and rightly so. It means that in case of Foreign Seated Arbitration, Part I and Part II both apply to the extent set out in the relevant provisions. For the time being, I say no more.

***

Understanding 'Expert determination'

R Venkataraghavan
International Arbitrator, Trainer & Consultant

Since the type of disputes vary from case to case, the mechanism to resolve such disputes have to be appropriate and most importantly cost effective. As the old adage goes, "One size doesn't fit all' (at-least in dispute resolution). Traditionally the disputes were settled in the courts through litigation process but over the time, both the litigants and the courts understood that litigation is not the best form of dispute resolution when the disputes are of technical nature (for example a dispute on ground conditions or on a software license) and hence the system of 'Alternative Dispute resolution' (ADR) was born.

Among the various ADR processes, there is so much of choice and again one need to choose the appropriate mechanism to address a particular dispute. Expert determination is one of the ADR process and in this brief article let us try to understand the nuances of expert determination and its applicability in the spectrum of ADR.

Various types of ADR process

Broadly speaking, any dispute resolution mechanism other than litigation could be included within the definition of ADR, although in recent times, dispute resolution professionals are trying to exclude even arbitration from the ADR, since the arbitration process is becoming highly expensive and slow similar to litigation. Anyway this argument is for another day and for the time being let us stick to the old definition of ADR which includes mediation, negotiation, adjudication, arbitration and expert determination to name a few.

For the sake of convenience and easy understanding, the ADR can be grouped under three families. (Readers are advised to refer to the author's previous article titled 'Dispute Resolution in construction contracts: Practical considerations' in the Indian Council of Arbitration Quarterly magazine July - September 2017)

1. Negotiation family including negotiation and early neutral evaluation
2. Mediation family including mediation, conciliation
3. Adjudication family including adjudication, dispute boards, arbitration and expert determination

The first group of dispute resolution does not involve a third party as the dispute is negotiated amicably between the Parties in dispute. In the mediation process, although there is an involvement of third

party, called mediator his role is only persuasive and he has no power to impose a decision or outcome to the dispute. The third, adjudication family involves the appointment a third party who has been empowered by the Parties to deliver a decision or award which will be binding on them. It is obvious that in terms of costs, the negotiation is the cheapest ADR mechanism and the cost gradually increases when the second and third tier processes are applied.

Definition of Expert, Expert witness and Expert determination

The law dictionary defines an expert as 'A person that had knowledge and skills learned over years of experience in a subject. Their opinion can be helpful in problem solving'. Any professional can be an expert in his field which includes doctors, engineers and quantity surveyors and in technical disputes their role is almost inevitable.

Most of you may be familiar with the concept of expert witness and a word of caution here. Expert witness should not be confused with expert determination although both processes involve appointment of experts.

Expert witness has been defined as 'a person who is a specialist in a subject, often technical, who may present his/her expert opinion without having been a (an eye) witness to any occurrence relating to the lawsuit or criminal case'.

It is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/her expertise, training and special knowledge. Expert witnesses are common in arbitration proceedings involving disputes for extension of time, quality of work, nature of defects and even quantum of compensation claimed by the Claimant. Engineers, quantity surveyors and event auditors are called upon to assist the tribunals in resolving complex technical disputes.

Expert determination is a dispute resolution process under which the parties agree to refer the dispute to an independent third party, who is knowledgeable in the subject matter of the dispute and in whom the parties have confidence acting as an expert, to make a determination which is binding on the parties. The readers can quickly notice the difference between expert witness and expert determination. In the former, the expert only provides his expert opinion which assists the arbitration tribunal to deciding the dispute. In case of expert determination, the expert assumes the role of an arbitrator, so to say, to decide the dispute by himself based on his expert knowledge.

Expert determination and arbitration

Since the expert determines the dispute in the expert determination process, it could be easily compared to arbitration. There are several similarities between the both processes but also there are differences between them. Both arbitration and expert determination are final determination procedures in the sense that the decision arrived by the expert/tribunal is final and binding on both parties. (Readers note that adjudication is only a temporary binding process and a decision in adjudication can later be challenged in arbitration) Also both these processes are purely contractual in nature and unless the parties agree to refer their disputes for expert determination or arbitration, there is no legal mechanism to impose these procedures.

However expert determination differs from arbitration as there is no statutory framework governing expert determination in most of the common law jurisdictions[107]. It is worth noting that, unless the contract so provides, an expert is not bound by the rules of natural justice. Once the expert has rendered his decision, there are very few grounds on which it can be appealed, even if he gets it wrong[108]. The court will only interfere if the expert acted outside his terms of reference or there is a fraud[109]. In MacDonald Estates[110] case, the court has commented that, "expert determination is not a judicial process and he is entitled

[107] *This article has been written based on common law principles of United Kingdom.*

[108] *Owen Pell Ltd v Bindi (London) Ltd (TCC) EWHC 1420*

[109] *Jones v Sherwood Computer Services plc 1992 1 WLR 277*

[110] *MacDonald Estates Plc v National Car Parks Ltd 2010 S.C 250*

to carry out his own investigations and he is not restricted to the submissions by the parties in order to make a determination. On the contrary, the arbitration is a *quasi-judicial* process[111], where the arbitrator determines the dispute based on the submissions by the parties". In Bernhard[112] case, Mr. Justice Cooke has observed that there is no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be binding.

The other contrasting difference between expert determination and arbitration is that in case of arbitration the arbitrator or the tribunal can't be sued by either party even if he is negligent. The only remedy available for the parties is to appeal to the competent courts to set aside the award and then only if it comes within the accepted grounds for setting it aside, the courts will agree to do so. In other words, the arbitrator himself is not liable to be sued as commented by Lord Denning in the Campbell's case.

A particular advantage of expert determination when compared with arbitration is that it is normally a speedier process and may be conducted in a way that best promotes the parties confidentiality thereby ensuring the protection of any commercially sensitive information and in general the process is less adversarial than arbitration or, for that matter, litigation.

Expert determination and statutory adjudication

In many common law jurisdictions, adjudication is a statutory requirement following the implementation of the Housing Grants Act in UK. Commentators say that the statutory adjudication is having the shades of expert determination although by and large the adjudication resembles arbitration process albeit the former is considered to be 'rough and ready' process while the arbitration is considered to be a final determination.

The adjudicator is not liable for anything done or omitted in the discharge of his function unless he has acted in bad faith and this feature is similar to quasi-judicial role of arbitration[113].

However, Section 108 (2) (f) of the 1996 Housing Grants Act states that the adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, which is a unique characteristic of expert determination, whereas arbitrators are not expected to conduct their own investigation. This particular requirement of the Act rebalances the adjudication towards the expert determination.

Hence adjudication can be seen as a compromise process and a kind of hybrid which incorporates the elements of both arbitration and expert determination, however without the finality.

Limitation of expert determination

One fundamental disadvantage of expert determination is the risk to one of the parties of an unfavourable outcome. Agreements for expert determination typically provide for the decision of the expert to be final and binding with no appeal as to the merits of the expert's decision[114] save for the case of fraud[115] or collusion.

Conclusion:

Expert determination is a form of dispute resolution with many potential advantages over the more conventional forms of ADR like adjudication and arbitration. It may be of particular value in the context of technical disputes in construction contracts in that, if the parties are able to identify an expert with suitable expertise and in whom they have confidence, it can provide a satisfactory resolution which is both quicker and cheaper. International Chamber of Commerce provides the appointment and administration of expert proceedings. One word of caution though, this form of ADR is suitable only for pure technical disputes where no legal interpretation is required.

***

[111] *Lord Denning in Campbell v Edwards 1976 1 WLR 403*

[112] *Bernhard Schulte GmbH v. Nile Holdings Ltd [2004] Lloyd's Rep. 352*

[113] *Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd;*

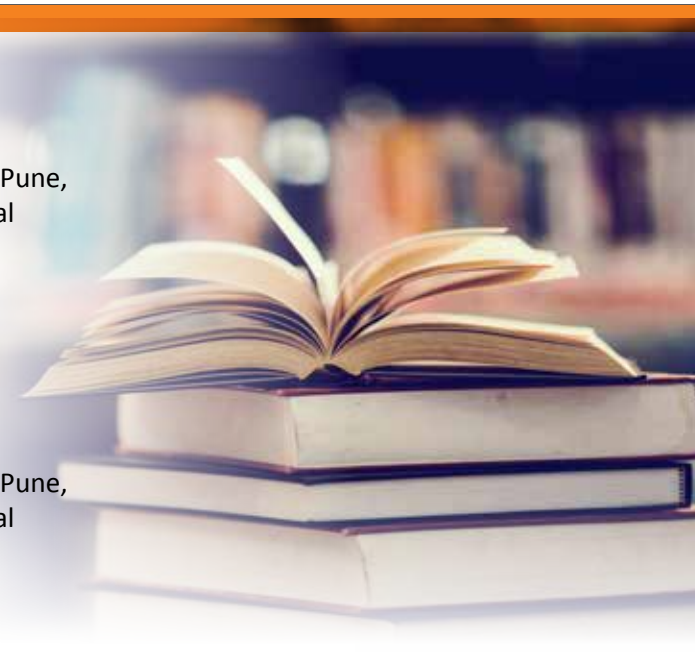
[114] *Evergreat Construction Co Pte Ltd v. Presscrete Engineering Pte Ltd [2006] 1 SLR 634*

[115] *Jones v. Sherwood Computer Services Plc [1992] 1 WLR 277*

Debating 'conciliation' as ADR in India

Dr. Milind Hartalkar
Symbiosis Law School Pune,
Symbiosis International
(Deemed University)

Prof. Dr. Shashikala Gurpur
Symbiosis Law School Pune,
Symbiosis International
(Deemed University)



Conflict is one of the fundamental conditions of the human existence and an inevitable and necessary fact of all social interaction.[116] Conflicts have existed in all cultures, religions and societies since time immemorial as long as humans have walked the earth. In fact, they also exist in animal kingdom, philosophies and procedures for dealing with conflicts have been part of the human heritage, differing between cultures and societies.[117] The notion of conflict has to do with subjective perception.[118] It suffices for a conflict to exist that one party has a certain perception of the other side's behavior, immaterial of whether that other side is aware that a conflict or the potential for one exist or knows of these concerns, and immaterial of how that side reacts.[119]

Disputes usually begin as conflicts, i.e. as grievances. Grievances set out the ground work for disputes. Disputes are conflicts, i.e. grievances, escalated by confrontation because the other side will not give in.[120] Conflict becomes a legal dispute if one party asserts a claim which is not accepted or satisfied by the other. The assertion of rights is often perceived as a hostile act and can lead to an escalation of the conflict.

The reference of conflicts of human being can be traced back in the records of religious books and historical documents. The reference is found in the Bible, Mahabharata and similar religious and historical documents that the conflicts were resolved or tried to be resolved by various processes, including negotiation, mediation, arbitration and adjudication.

Because the conflicts are an integral part of human interaction, one must learn to manage them to deal with them in a way that will prevent escalation and destruction and come up with innovative and creative ideas to resolve them.[121] One potential reason for the

[116] *CHRISTIAN BUHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 132 (2nd ed, Kluwer Law International, 2006). 132.*

[117] *Yona Shamir, Alternative dispute Resolution Approaches and their Application, PCCP, publication 2001-2003, as a contribution from UNESCO's International Hydrological Programme to the World Water Assessment Programme (Jan. 13, 2017, o5:15PM) http//unesdoc.unesco.org/images/0013/001332/133287e.pdf*

[118] *KLAUSE PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS NEGOTIATION, MEDIATION, ARBITRATION, 19, (Volume II, Second edition, Wolterkluwer, Kluwer law International, 2009).*

[119] *Ibid.*

[120] *Supra Note 118, at 21.*

[121] *Supra Note 118, at 25.*

escalation of disputes is 'zero-sum thinking', i.e. the perception of one or both sides that each party can only win at the expense of the other.[122] Litigation is classical example of "fixed sum" or "zero–sum" or "win-lose" situations, where a gain to one party inevitably correlates with loss to the other.[123]

In the backdrop of the above insights, the author will elaborate the trajectory of the concept of ADR as a method of dispute resolution and list the types of ADR. Every adjudication basically involves determination of rights. On domestic field adjudication through the courts is most favoured process of dispute resolution.

Since the Second World War arbitration has proved an extremely popular method of resolving disputes apart from court litigation. The arbitration was thought as an alternative to the traditional litigation.

The emergence of ADR is one of the most significant movements as a part of conflict management and judicial reform. In recent years, in countries the world over, courts have shown an increasing willingness to encourage parties to explore mediation and other ADR techniques before or even after going to trial. All such devices just stop short of compelling parties to mediate, cost sanctions against parties who refused to mediate and even a stay of proceedings to enforce compliance with a mediation clause in an agreement. In England, parties are encouraged 'to use an alternative dispute resolution procedure'.[124]

Alternative Dispute Resolution i.e the ADR normally would comprehend any method of dispute resolution other than adjudication as part of justice established and administrated by the state. From this point of view even arbitration will fall with the scope of ADR since it is major alternative to court litigation. In domestic setting, arbitration may be considered as a method of ADR, but in international context as arbitration is generally accepted procedure in commercial transaction, arbitration is not considered as ADR to procedures which is different from conventional or generally accepted form of arbitration.

Modern ADR is a voluntary system, according to which the parties enter a structured negotiation or refer their disputes to a third party for evaluation and/or facilitation of resolution.[125] ADR is a generic term. It denotes range of private dispute resolution processes that have been developed as alternative to litigation before domestic courts. ADR is a form of facilitated settlement, which is confidential and without prejudice.[126] Alternative Dispute Resolution (ADR, sometimes also called as "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non confrontational way.[127] It covers broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end where an external party imposes a solution.[128]

In its philosophical perception, ADR process is considered to be the mode in which the dispute resolution process is qualitatively distinct from the judicial process.[129] It is a process where disputes are settled with the assistance of a neutral third person generally of parties own choice; where the neutral is generally familiar with the nature of the dispute and the context in which such disputes normally arise; where the proceedings are informal, devoid of procedural technicalities and are conducted, by and large, in the manner agreed by the parties; where the dispute is resolved expeditiously and with less expenses; where the confidentiality of the subject-matter of the dispute is maintained to a great extent; where decision making process aims at substantial justice, keeping in view the interests involved and the contextual realities.[130] In substance, the ADR process aims at rendering justice in the form and content which not only resolves

[122] Supra Note 116, at 134.

[123] Ibid.

[124] O.P. Malhotra & Indu Malhotra, the Law and Practice of Arbitration And Conciliation 1497 (2nd ed, 2006).

[125] Dr. Loukas A. Mistelis, ADR in England and Wales, 12 AM. REV. INT'L ARB.167, 170 2001.

[126] SIMON DAVIS, ADR: What Is It And What Aare The Pros And Cons? In Adr & Commercial Disputes, in ADR AND COMMERCIAL DISPUTES 1 (Russell Caller ed., Sweet & Maxwell, 2002).

[127] Yona Shamir, Alternative dispute Resolution Approaches and their Application, PCCP, publication 2001-2003, as a contribution from UNESCO's International Hydrological Programme to the World Water Assessment Programme (Jan. 13, 2017, o5:15PM) http//unesdoc.unesco.org/images/0013/001332/133287e.pdf

[128] Ibid.

[129] Sarvesh Chandra, ADR: Is Conciliation the Best Choice?, in ALTERNATIVE DISPUTE RESOLUTION 82 (P.C.RAO, WILLIAM SHEFFIELD et al eds., 1997 ed., Universal Law Publishing Co. Pvt. Ltd., Reprint 2007).

[130] Ibid.

the dispute but tends to resolve the conflict in the relationship of the parties which has given rise to that dispute.[131]

Alternative methods for resolving legal disputes are related to elements of the legal system which are minimally connected with and impacted by common law. Conflicts between people arise irrespective of the legal system existing in their country. Efforts to find ways out of conflicts are natural for all people. Their desire to settle a dispute ought to be supported by any law–abiding country by establishing simple, lawful and clear procedures. Hence, alternative dispute resolution is not only legal construction; it is also a certain type of thinking and a philosophy leading to compromise, agreement, and peaceful resolution. The psychological boon of the ADR concept consists of a shift from the stereotype of litigation to an opportunity for using less stressful and time-consuming, more flexible and informal dispute resolution methods.[132]

The goals pursued by ADR go beyond legal considerations. Their overriding priority is to prevent difficulties, ensure continued performance of the contract, maintain the contractual relationship and make their joint project a success.[133] The mediator is in a position to provide solutions which are beyond the powers of the court to provide.[134]

In ADR the importance is not to form or procedure but the intention of the parties to settle the dispute amicably with the help of third neutral party on the basis of the procedure agreed between themselves. The only condition being the third neutral party has no right to adjudicate the matter or impose his decision on the parties.

Thus the ADR is a non adjudicatory process whereby the parties to the dispute try to settle their dispute with the help of third neutral person or persons engaged

by them with the method or process determined by the parties themselves and the neutral person cannot compel the parties to his/her terms. The parties have total autonomy to accept the terms of settlement or refuse the same. The parties also have the autonomy to resile from the process at any moment. The best part is that unless the parties mutually agree, the third neutral person cannot thrust his/her decision on dispute upon the parties.

Next the researcher proposes to discuss the various types of ADR techniques.

Types of ADR Techniques

Having considered the concept of Alternate Dispute Resolution techniques, let us discuss various types of ADR methods.

A non binding type of ADR that has caused stir on the domestic and international commercial scene is mediation or conciliation as a mode of dispute resolution. At international level both these words are used interchangeably. Other well known types of ADR are Negotiations, Early Neutral Evaluation (ENE) or Mini - Trial (or executive tribunal) and Med-Arb,' Arb-Med etc. The ADR may be without intervention of court or Court annexed. Negotiation is not a type of ADR as it does not involve third neutral party.

A non binding type of ADR that has caused stir on the domestic and international commercial scene is mediation or conciliation as a mode of dispute resolution. At international level both these words are

[131] *Ibid.*

[132] *Elena Nosyreva, Alternative Dispute Resolution in the United States and Russia: A Comptive Evaluation, 7 ANN. SURV. INT'L & COMP. L., 7, 12(2001).*

[133] *Jean Francois Guillemin, Reasons For Choosing Alternative Dispute Resolution, in ADR In Business Practice and Issues Across Countries and Cultures 14 (Arnold Ingen-Housz ed., Vol II, Wolters Kluwer, Kluwer Law International, 2011).*

[134] *Dunnett v. Railtarck, [2002] 2 All.E.R. 850.*

used interchangeably. Other well known types of ADR are Negotiations, Early Neutral Evaluation (ENE) or Mini - Trial (or executive tribunal) and Med-Arb,' Arb-Med etc. The ADR may be without intervention of court or Court annexed. Dr. A.S. Anand, a former Chief Justice of India, has wished that the next century would not be a century of litigation, but century of negotiation, conciliation, and arbitration.[135]

Negotiations differ from other dispute resolution procedures in as much as it does not involve a third party to facilitate or promote the settlement while all other procedures essentially involve a third party.

Early Neutral Evaluation (ENE) is also termed as Mini trial, the parties present their cases in adversarial manner which is evaluated by neutral third party, and the parties negotiate on the basis of this evaluation.

A mini-trial consists of a structured information exchange in which representatives from both sides make brief presentations of their case to a panel of executives from all parties.[136]

Mini trial is conducted with panel comprising of a third neutral party and a senior executive from each side with no connection to the dispute. After hearing the submissions, the senior executives negotiate for a settlement. If no settlement is reached, the neutral is usually invited to become a mediator and give his opinion. However the third neutral party is not required to give his decision.

Mediation and Conciliation - A conflict, however, can paradoxically become an opportunity to strengthen ties and generate new business relationships depending on the process chosen for resolving the dispute. One such example is mediation, in which principals with authority can meet and can transform a dispute into a new business deal.[137] Mediation is one of the world's ancient modes of dispute resolution and is believed to be as old as human society itself. Today, although mediation is gaining popularity in many parts of the world, for instance in United States, mediation is but one-albeit claimed by some as the most important of a number of methods of alternate dispute resolution ("ADR"). The phrase "Let's talk" captures mediation's approach to dispute resolution and deal making.

Mediation is considered a consensual dispute resolution practice in which a third-party with some claim to neutrality facilitates the negotiation, and perhaps resolution, of an issue between two or more parties.

Conciliation is negotiation facilitated by an independent and impartial third party. It is a process, whereby a dispute is referred to a third person, who hears the parties on questions of fact and law and forms his opinion and attempts to persuade the parties to accept it. The third party is not empowered to impose a decision on the parties,[138] and unless parties agree on a settlement, the ADR process will not reach any binding agreement resolving the dispute.

Though terms 'mediation and conciliation' are used interchangeably, in mediation the third neutral party plays an evaluative role, i.e. by expressing his opinion, whereas in conciliation the role is facilitative one that is third neutral party does advise parties of his/her own opinion.

Multi tier Agreement - Sequential processes are very commonly used and are often drafted into contracts as escalation clauses. It is not uncommon that in the arbitration agreement parties include clauses that they should first try to settle the dispute by negotiations. In case the negotiations fail the dispute must be referred to conciliation or other alternative dispute resolution procedures reference to arbitration should be made only when these steps fail. It is well settled principle that agreement to negotiate is not of binding nature.

MED - ARB is the most common type of combined process used. Mediation followed by arbitration. The mediator becomes an arbitrator and renders an enforceable decision following mediation processes on all issues where the parties fail to reach an agreement. Parties start with mediation to try to find a mutually acceptable solution. In the event of failure, the mediator takes on the guise of arbitrator to issue a binding decision. However this process may pose many problems including challenge to its validity. Also

[135] Law Commission of India, 'Need For Justice-Dispensation Through Adr Etc.', Report No.222, 2010(4)Arb.L.R. 17, 19 (Journal Section).

[136] Supra Note 116, at 195.

[137] Jereme Lack, Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available To The Parties, in ADR in Business Practice and issues across Countries and Cultures 345 (Arnold Ingen-Housz ed., Vol. II, Kluwer International, 2011).

[138] Haresh Dayaram Thakur v. State of Maharashtra, AIR 2000 SC 2281.

it has several pitfalls as the party may have disclosed confidential information to the mediator in a private caucuses, who himself/herself acts as an arbitrator, if the mediation fails.

The disadvantage in the procedure is the parties may have divulged the secrets, which may make the mediator biased. It is doubted whether same person should act mediator and then as an arbitrator. So many suggest Med-Arb (dif) or Med–Arb-opt-out opposed to Med- Arb (same).

In Med-Arb (diff) or Med-Arb-opt-out once the mediation part is completed and before the arbitration part commences, each party is entitled to independently appoint a different person as an arbitrator for the arbitration. There are many international rules that suggest combinations of mediation followed by arbitration e.g. World Intellectual Property Organization (WIPO), International Chamber of Commerce (ICC), Chartered Institute of Arbitrators (CIArb), American Arbitration Association (AAA).

Arb-Med - The Med-Arb process could be reversed. The Arb-Med could commence with an ordinary arbitration procedure. The parties first conduct a 'rough and quick' arbitration, appointing a neutral to give a short ruling as to the amount to be paid by one party to the other. The award is sealed in an envelope and marked "confidential" and leaves it on the table without disclosing its contents. The parties then commence mediation proceedings having agreed in advance to open the envelope and accept it as binding ruling if they have not reached an agreement using mediation or conciliation by a specified time. If the parties settle the envelop is torn up and its contents remain unknown to the parties.

MEDALOA is an abbreviation of the hybrid process of Mediation and 'Last Offer Arbitration' (MEDALOA). In fact it is just a modification of the Med-Arb process. If the parties do not settle through agreement, each party then submits a final binding offer to the Med-Arbitrator, and the later chooses between one of the two final offers, which then becomes a binding arbitration award.[139] Having considered the basic tenets of the ADR, its types in the next part let us examine the position of ADR in India.

PART- II

International Legal Framework of ADR

The United Nations Commission on International Trade Law (UNCITRAL) has earlier framed UNCITRAL Conciliation Rules, 1980. The world wide increased use of conciliation as well as the need for harmonized solutions made the UNCITRAL to frame Model Law on International Commercial Conciliation in the year 2002. Article 1 (3) of the Model Law defines "Conciliation" to mean a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute.

The UNCITRAL has not used word 'Alternate Dispute Resolution'. Under Article 1(3) , 'conciliation' is defined in wider sense to include within its meaning all forms of processes used to resolve the disputes between the parties with the help of third neutral person but who cannot impose his/her decision upon the parties. The broad nature of the definition indicates that there is no intention to distinguish among the procedural styles or approaches to mediation. The word "conciliation" would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person or persons. Different styles and techniques might be used to in practice to achieve settlement of a dispute, and different expressions might be used to those styles and techniques. The methods may differ as regards the technique, the degree to which third parties are involved in the process and the kind of involvement whether as a facilitator or making substantive proposals as to possible settlement.[140]

The definition of 'Conciliation' in Paragraph (3) of Article 1 sets out the elements for the definition of 'conciliation'. The definition takes into account the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an independent and impartial third person or persons that assists the parties in an attempt to reach an

[139] James T. Peter, Note & Comment: Med-Arb in International Arbitration, 8 AM. REV. INT'L ARB. 83, 85 (1997).

[140] Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation 2002.

amicable settlement. The intention is to distinguish conciliation, on the one hand, from binding arbitration and, on the other hand, from mere negotiations between the parties or their representatives.[141]

The words "and does not have authority to impose upon the parties a solution to the dispute" are intended to further clarify and emphasize the main distinction between conciliation and a process such as arbitration.[142]

The attitude of the courts towards Alternate Dispute Resolution or ADR is changing. Formerly the courts claimed for themselves exclusive expertise in the resolution of disputes and doubted the accuracy and efficacy of methods of dispute resolution other than their own; they have become increasingly willing to defer to those other methods.[143]

In the United States the courts both federal and state, became not merely participants, but advocates of, the "Alternative Dispute Resolution" or "ADR" revolution that is currently transforming the landscape of civil litigation. Specifically, by not only deferring to, but encouraging, the most commonly used methods of court-annexed ADR (i.e. mediation, case evaluation, mini trial, and summary jury trial), which are all aimed at fostering settlements, the courts have moved to thrust back upon the parties to dispute the very choice, i.e. how to resolve the matter, that one party at least, by instituting litigation, apparently wished a court (or jury) to make. Yet the fundamental impetus underlying the shift with respect to court –annexed ADR and arbitration is the same in both cases the courts have moved to limit the scope of their direct involvement in dispute resolution.

In UK the courts have supported the movement of ADR. Following the two Woolf reports and the Civil Procedure Act 1997, most recommendations were effected from April 26, 1999 through Civil Procedure Rules 1998. The civil justice reform had four main objectives:

- Simplification of procedure (including expediency and cost reduction through an underlying principle of proportionality)
- Judicial case management (requiring judges to actively manage the resolution process by watering down the adversarial system)
- Pre-action protocols (aiming at encouraging contact between parties and better exchange of information; hoping that a settlement may be facilitated); and
- Alternatives to court procedure.[144]

There are three different ways, in which the Woolf Reports and the Civil Procedure Rules attempt to promote ADR:

The payment system has been changed so as to enable claimants and defendants alike to make offers relating to the allocation of costs;

The settlement at the earliest possible stage is encouraged by pre-action protocols and an active case management;

Official encouragement is given to the avoidance of litigation through recourse to alternative dispute resolution.[145]

Parties are encouraged to make offers to settle at pre-litigation or early stage. Cost consequences follow for unreasonable refusal. Similar consequences follow where there is insufficient compliance with the court mandate to undertake mediation efforts.[146]

In United States the movement supporting ADR has resulted in the 1990s in court rules and legislation which formally incorporate ADR into the litigation system : so called "court -annexed ADR" as distinguished from ADR engaged in by parties prior to or without the initiation of a lawsuit.[147] The ADR programs have been implemented into public justice system, in addition to

[141] *ibid*

[142] *Ibid.*

[143] *Martin J. Newhouse, Some Reflections on ADR And The Changing Role of the Courts, 39 B.B.J.15, 16 (1995).*

[144] *Dr. Loukas A. Mistelis, ADR in England and Wales, 12 AM. REV. INT'L ARB.167, 2001.at 179.*

[145] *Ibid, at 180.*

[146] *Ibid.*

[147] *Martin J. Newhouse, Some Reflections on ADR And The Changing Role of the Courts, 39 B.B.J.15 (1995) at 16, 17*

the private sector. The Civil Justice Reform Act of 1990 was created as a pilot program to develop cost and delay reduction in the federal district courts.[148] This provided that United States District Court shall consider principles and guidelines of litigation management and cost and delay reduction. It allowed program including mediation. Pursuant to procedural changes enacted by Congress, many federal courts developed ADR programs in the early 1990s, and federal courts are now mandated by statute to provide these offerings.[149] In parallel development, law schools made special ADR courses available as part of their procedural offerings.[150]

Thus both in UK and USA the change in the attitude and sincere efforts by the courts to promote ADR has helped to develop the movement of ADR

The Supreme Court of India has advocated for resolution of disputes with the help of alternate dispute resolution techniques. In Afcons Infrastructure Ltd. & Anr v/s Cherian Varkey Construction Co. (P) Ltd. & Ors[151] it is stated that "Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts." Thus ADRs are accepted in India as a better choice, but not as mandatory.

PART - III

ADR in India Without Intervention of Court under Arbitration and Conciliation Act, 1996

Access to the justice, as a fundamental and human right should be within reach of the disputants. It cannot become mirage[152]. Now days the courts are encouraging the parties to settle the disputes through negotiations, mediation or conciliation. The provisions of Code of Civil Procedure[153], Section 23 of Hindu Marriage Act, 1955, Industrial Disputes Act, Family Courts Act, Lok Adalats are based on the concept of ADR. The use of Ombudsmen is other type of alternative dispute resolution (ADR). The concept of conciliation is also introduced by Arbitration and Conciliation Act, 1996.

In India, the origin of the Alternate Dispute Resolution (ADR) could be traced to the origin of political institutions on one hand and trade and commerce on the other. Dr. Priyanath Sen in his book "The general principles of Hindu jurisprudence" has given an exposition of the dispute resolution institutions prevalent during the period of Dharmashastras. He refers to the resolution of the disputes between members of a particular clan or occupation or between members of a particular locality, by Kulas (assembly of the members of a clan), Srenis (guild of a particular occupation) and Pugas (neighborhood assemblies)."[154]

Earlier in India, disputes were settled by a council of village elders, known as a Panchayat. This was an accepted method of conflict resolution.

If the dispute is settled without intervention of the Court, such settlement agreement of its own force will not be executable directly. If a party to the settlement agreement does not act in pursuance thereto aggrieved party will have to knock the doors of the court to have such an agreement enforced specifically. It is therefore

[148] *Elena Nosyreva, Alternative Dispute Resolution in the United States and Russia: A Comptive Evaluation, 7 ANN. SURV. INT'L & COMP. L., 7, (2001) at 9.*

[149] *Ellen E. Deason, Competing and Complementary Rule Systems:Civil Procedure And ADR: procedural Rules For Complementary Systems Of Litigation And Mediation-Worldwide, 80, NOTRE DAME L. REV. 553, 560 (2005).*

[150] *Ibid.*

[151] *2010(8) SCC 24*

[152] *Justice S.B. Sinha, Mediation: Constituents, Process and Merit, Souvenir, National Conference on mediation -2012, Mediation and Conciliation Project Commmittee, Supreme court of India, 7.*

[153] *Section 89 , O.XXXII-A*

[154] *Sarvesh Chandra, ADR : Is Conciliation the Best Method, 'Alternative Dispute Resolution', Reprint 2007, Universal law Publishing Co. Pvt. Ltd, 82*

necessary that such settlement agreements should be recognized and enforced without again requiring the parties to knock the doors of the court. Such settlement agreements should get statutory recognition.

For the first time in India, the concept of conciliation without intervention of the court is incorporated under Arbitration and Conciliation Act, 1996 (the said Act of 1996).

The Part III of the said Act of 1996 is applicable to conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. The conciliation is not applicable to certain disputes where by virtue of law for time being in force such disputes cannot be submitted to conciliation[155]. Thus the dispute regarding divorce or disputes relating to eviction of tenants governed under Rent Control Act cannot be settled through conciliation.

Sections 61 to 81 of the said Act of 1996 provide the procedure for the settlement of the disputes by conciliation. The said Act of 1996 does not define 'conciliation'. However section 67 (1) of the said Act of 1996 impliedly defines it as the assistance given to the parties in an impartial manner in their attempt to reach an amicable settlement of their dispute[156].

The participation in the conciliation is voluntary. It is for the party to the dispute to decide whether he wishes to settle the dispute through conciliation. From bare reading of section 62 of the said Act of 1996 it is clear that, unlike arbitration, conciliation does not require any written agreement between parties.

Sections 65 to 75 of the said Act of 1996 deal with the manner to conduct the conciliation proceedings and its nature. The conciliator is to assist the parties in an independent and impartial manner and shall be guided by the principles of objectivity, fairness and justice[157]. The conciliator at any stage of the proceedings may make a proposal for settlement of the dispute. Such proposal need not be in writing and need not be supported by reasons[158].

Section 73 of the said Act of 1996 provides that when it appears to the conciliator that there exists an element of settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties the conciliator may draw up, or assist the parties in drawing up, the settlement agreement. When parties sign the settlement agreement, it is final and binding on the parties and persons claiming under them respectively. The conciliator shall authenticate the settlement agreement.

The said Act of 1996 does not mention 'mediation' separately. Looking at the function of the conciliation his job is not only to bring the parties to the table of settlement but also to actively participate in the proceedings and suggest the terms of settlement. Thus it appears that legislatures have not made any distinction between conciliation and mediation, under the said Act of 1996.

At this juncture it is desirable to discuss approach of the Supreme Court on conciliation.

In ***Haresh Dayaram Thakur v State of Maharashtra***[159], the issue before Apex Court was whether the agreement drawn by the conciliator himself and not signed by the parties can be final and binding on the parties. The Apex Court held that a conciliator is a person who is to assist the parties to settle the disputes between them amicably. When the parties are able to resolve the dispute, between them by mutual agreement and it

[155] Sub Section (2) of Section 61 of the Arbitration and Conciliation Act,1996.

[156] Justice R.V. Raveendran, Mediation- Its Importance and Relevance, Souvenir, National conference on Mediation-2012, Mediation and Conciliation Project Committee Supreme Court of India, Delhi, 17, 20

[157] Section 67 of the Arbitration and Conciliation Act, 1996.

[158] Section 67 (4) of the Arbitration and Conciliation Act, 1996.

[159] 2000 DGLS (Soft.) 925 = AIR 2000 SC 2281= 2000(6) SCC 179

appears to the conciliator that there exists an element of settlement which may be acceptable to the parties he is to proceed in accordance with the procedure laid down in section 73, formulate the terms of a settlement and make it over to the parties for their observations; and the ultimate step to be taken by a conciliator is to draw up a settlement in the light of the observations made by the parties to the terms formulated by him. The settlement takes shape only when the parties draw up the settlement agreement or request the conciliator to prepare the same and affix their signatures to it.

In ***Mysore Cements Limited v Svedala Barmac Limited***,[160] the Supreme Court has to deal with the enforcement of the Letter of Comfort furnished on the same day of a settlement arrived at during conciliation signed by both the parties and authenticated by the Conciliator. The Supreme Court refused to enforce the said settlement on the ground that there is no any formulation and reformulation by the Conciliator as provided in section 73 of the said Act of 1996i.e procedure contemplated under the said Act of 1996 is not followed strictly. The Apex Court has held that it is not every agreement or arrangement between the parties to the disputes, arrived at in whatever manner or form, during the pendency of conciliation proceedings that automatically acquires the status of a 'settlement agreement' within the meaning of section 73 of the Act so as to have the same status and effect as if it is an arbitral award, for being enforced as if it were a decree of the court. It is only that agreement which has been arrived at in conformity with the manner stipulated and form envisaged and got duly authenticated with section 73 of the Act, alone can be assigned the status of a settlement agreement, within the meaning of and for effective purpose of the Act, and not otherwise.

In the humble opinion of the author basically ADR is a process to resolve the dispute amicably with the help of third neutral party. The techniques/ procedure/ form used to settle the disputes may vary depending upon the nature of the dispute. As long as the parties voluntarily agree to settle the dispute with the intervention of third neutral party and settles the dispute by entering settlement agreement, such an agreement should be recognized and enforced. A broader view is required to be adopted. There may not be a procedure laid down by the legislature. Considering the fact that party may choose their own procedure to settle the dispute by ADR. It may be a combination of one or more techniques which may not be found in statute books. The parties may have their own procedure to settle the dispute. The Arbitration and Conciliation Act, 1996 in Part III has provided the procedure only for 'Conciliation'. The said Act of 1996 has made the 'settlement agreement' arrived at between the parties to be enforceable as a decree of the Court.[161] The Supreme Court in Mysore Cement's[162] case has stated very categorically that it is only that agreement which has arrived with conformity of the manner stipulated and form envisaged and got duly authenticated with section 73 of the Act, alone can be assigned the status of the' settlement agreement'.

There will be no scope for the other types of ADR than conciliation as their procedure of settlement differs from conciliation. The narrower interpretation by the Supreme Court in above cited case may pose problems for settlement agreements arrived by adopting different procedure than laid down in the said Act of 1996.

PART - IV

ADR IN INDIA WITH INTERVENTION OF THE COURT.

Apart from conciliation without intervention of court, a Court annexed alternative disputes resolution techniques are also evolved in recent times. Section 89 was inserted in the Code of Civil procedure, 1908 by section 7 of the Code of Civil procedure (Amendment) Act, 1999. The objects and reasons for the said amendment is stated to be "With a view to implement the 129th Report of the Law Commission of India and to make the conciliation scheme effective, it is proposed to make it obligatory for the court to refer the dispute after the issues are framed for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the Court in which it was filed."

[160] *2003 DGLS(Soft.) 320= AIR 2003 SC 3493= 2003 (10) SCC 375*

[161] *Section 74 of Arbitration and Conciliation Act, 1996.*

[162] *2003 DGLS(Soft.) 320= AIR 2003 SC 3493= 2003 (10) SCC 375*

The Supreme Court in Afkon's case[163] opined that having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed under section 89 of the Code. Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process under section 89 of the Code, is mandatory.

The cases of public interest, election to public offices , suits for probate or letters of administration, cases involving prosecution for criminal offenses, etc. are normally considered to be not suitable for ADR process having regard to their nature.[164]

However the Supreme Court has clarified that the categorization as 'suitable' and 'unsuitable' is not exhaustive or rigid and is illustrative.[165]

Fali S. Nariman opined that the decision of the Apex Court in Afkon's[166] case is set back to the movement of ADR through assistance of the courts. A strained construction has been placed on a most important and salutary provision in the code.[167] The Apex Court should have used the opportunity to take the movement of ADR further. The Apex court , in the humble opinion of the author, has unnecessarily restricted powers of court to exercise jurisdiction to refer the parties to arbitration or conciliation only if parties consent thus efficacy of the said section is reduced.

Lord Woolf M.R. has in Cowl v Plymouth City Council[168] stated that the courts should make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts.

Loknyayalaya or Lokadalat

Another effort made by the legislator in furtherance of ADR is establishment of the Lok Adalats, Nyaya Panchayats under The Legal services Authorities, 1987 Act (Act of 1987), as a part of the campaign to take justice to the people and ensure that all people have equal access to justice in spite of various barriers, like social and economic backwardness[169]. The philosophy behind setting up of permanent and continuous Lok Adalats is that in our country, the litigant public has not so far been provided any statutory forum for counseling and as such, these Lok Adalats may take upon themselves the role of counselors as well as conciliators.[170]

The Lok Adalat has jurisdiction to determine and to arrive at compromise or settlement between the parties to a dispute in respect of (i) any case pending before; or (ii) any matter which is falling within the jurisdiction of, and is not brought before, any Court for which the Lok Adalat is organized[171]. However the Lok Adalat has no jurisdiction in respect of an offence which is not compoundable[172]. The Lok Adalat shall take the

[163] *Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors, 2010(8) SCC 24*

[164] *Ibid*

[165] *Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors, 2010(8) SCC 24*

[166] *Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors, 2010(8) SCC 24*

[167] *Forward by Fali S. Nariman, Mediation , Practice and Law the Path to Sucessful Dispute Resolution, Sriram Panchu, Lexis Nexis Butterworths Wadhwa, Nagpur,2011 pg xxvii*

[168] *[2002] 1 W.L.R. 207.*

[169] *Law commission of India, report no.222, 'Need for Justice-dispensation through ADR etc.' 2010(4) Arb.L.R. 17(Journal section),at p. 19.*

[170] *Law commission of India, report no.222, 'Need for Justice-dispensation through ADR etc.' 2010(4) Arb.L.R. 17 (Journal section), at p. 20.*

[171] *Sub section (5) of Section 19 of Legal Services Authorities Act, 1987*

[172] *Proviso section 19 of legal services Authorities Act,1987.*

cognizance of the cases referred to it when the parties agree or if one of the parties make an application to the Court for referring the case to Lok Adalat or that the Court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat.[173] Where the matter is settled or compromised before Lok Adalat an award shall be drawn by the Lok Adalat, and it shall be deemed to be the decree of a civil court[174]. But in view of the decision of Afkon's case the approval of the court would be necessary[175].

By amendment in the year 2002 to Legal Services Authorities Act, 1987 chapter VI-A, containing section 22–A to 22-E, is introduced. By the said amendment the Permanent Lok Adalats in respect of one or more public utility services is established.

Basically this amendment introduces the court annexed settlement of disputes before it reach the court.

The Permanent Lok Adalat shall assist the parties in their attempt to reach amicable settlement of the dispute in an impartial and independent manner. Where the Permanent Lok Adalat is of the opinion that there exist elements of settlement in such proceedings which may be acceptable by both the parties, it may formulate the terms of a possible settlement of dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof. Sub section (8) of the section 22–C provides that where the parties fail to reach at an agreement under sub section (7) of section 22–C the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute. It is pertinent to note as per section 22-E every award of the Permanent Lok Adalat shall be deemed to be a decree of a Civil Court. Every award made by the Permanent Lok Adalat shall be final and not called in question in any original suit, application, or execution proceeding[176].

In the humble opinion of the author the provisions of sub section (8) of section 22-C and section 22-E of the Act of 1987 are contrary to the basic philosophy of the alternative disputes resolution techniques.

PART- V

CONCLUSION

It appears that in the absence of the definition of 'Conciliation' coupled with the procedure of Conciliation only laid down in Part III of the Arbitration and Conciliation Act, 1996 and importantly the view taken by the Apex Court the concept of ADR, without intervention of the court, in India is restricted only to one type of ADR i.e 'Conciliation'. It is necessary that the terms 'Conciliation' in the Arbitration and Conciliation, 1996 be given wider meaning and by legislative amendment it should be made at par with the definition of 'Conciliation' given in UNCITRAL Model Law on International Commercial Conciliation, 2002.

More participation and encouragement by the courts to participate or resolve the dispute through ADR is necessary. The procedural law regarding the same need to be amended to make the referring the parties for settlement by one or the other mode of ADR compulsory and equally making mandatory for the parties to participate in ADR.

***

[173] *Section 20 (1) of Legal Services Authorities Act, 1987*

[174] *Sub section (1) of Section 21 of Legal Services Authorities Act, 1987*

[175] *Afcons Infrastructure Ltd. & Anr v Cherian Varkey Construction Co. (P) Ltd & Ors, 2010 DGLS(Soft.) 756 =2010(8) SCC 24, para 28.*

[176] *Section 22-E of Legal Services Authorities Act, 1987*

ARBITRATION & ADR ROUNDUPS

1. Reliance Infra awarded Rs 200 crore arbitration against NHAI: Company

Reliance Infrastructure on Monday said it has won a Rs 200 crore arbitration award against National Highway Authority of India (NHAI).

"A three-member Arbitration Tribunal in its unanimous award on August 31, 2018, has asked NHAI to pay Rs 150 crore by November 29, 2018, to Reliance Infrastructure. NHAI will have to pay interest at the rate of 12 per cent per annum on the amount if they do not pay Rs 150 crore by the deadline," the company said in a BSE filing.

The tribunal has also awarded Reliance Infrastructure compensation at the rate of 13.5 per cent of actual revenue for the loss of revenue suffered due to change in location of toll plaza, it added.

Reliance Infrastructure said this is payable from March 2017 till the end of concession on January 14, 2038. Net present value of this future cash-flow is estimated at over Rs 50 crore.

Reliance Infrastructure said the need for arbitration arose due to prolonged delay in providing land by the NHAI to TD Toll Road Pvt Ltd (TD Toll Road), a wholly-owned subsidiary of Reliance Infrastructure, resulting in cost over-run during construction and change in location of toll plaza.

The contention of TD Toll Road that the project was delayed resulting in cost over-run during construction and location of toll plaza resulting in loss of revenue was upheld by the tribunal.

TD Toll Road has designed, built and are operating 87 km long 4-lane National Highway (NH45) road connecting Trichy and Dindigul in Tamil Nadu.

Source: As reported in The Times of India dated 3rd September 2018, Website: https://timesofindia.indiatimes.com/business/india-business/reliance-infra-wins-rs-200-crore-arbitration-against-nhai-company/articleshow/65655095.cms

2. India wins arbitration against French co LDA

India has won an international arbitration involving French company Louis Dreyfus Armateurs (LDA). The Permanent Court of Arbitration has also awarded India over $7 million (Rs. 50 crore) as compensation towards legal expenses.

The Haldia Dock Complex of the Kolkata Port Trust had awarded a supply, maintenance and operation contract for Berths 2 and 8 to ABG Infralogistics and ABG Kolkata Container Terminal in April 2009. Later, LDA was inducted as a partner in this joint venture, Haldia Bulk Terminals Pvt Ltd (HBT).

Problems started in 2012 when HBT terminated the contract citing mounting losses, non-allocation of cargo to Berths 2 and 8 and other factors like declining law and order issues. Multiple litigations followed.

In the meantime, LDA served an arbitration notice against the India government, taking the matter up before the Permanent Court of Arbitration. It claimed that India failed to protect is investment made in the project and filed for claims amounting to $36.15 million (Rs. 260 crore).

According to a KoPT release, the Shipping Ministry and the port trust took up the matter and the arbitration court dismissed "LDA's claim in their entirety". The Tribunal held that LDA's investment is "not entitled to protections" under the Reciprocal Promotion & Protection Investment 1997 Treaty (signed between India and France) as it does not have "minimum 51 per cent" in the project.

Source: As reported in The Hindu Business Line dated 11th September 2018, Website: https://www.thehindubusinessline.com/companies/india-wins-arbitration-against-french-co-lda/article24928835.ece

3. Qatar's BeIN Seeks $1 Billion From Saudi Arabia Over Piracy

Qatar's BeIN Sports network began legal actions against Saudi Arabia on 1st October, 2018, seeking $1

billion in damages over pirated sports broadcasts, the latest escalation in a spat that has seen the Gulf Arab neighbours sever diplomatic and trade ties.

The tussle over television rights escalated before this year's soccer World Cup began in Russia, as the two sides accused each other of bad faith over a deal covering a large chunk of the tournament's matches.

BeIN Sports said in a statement it had lodged an international investment arbitration case against Saudi Arabia, contending that it has been "unlawfully driven out of the Saudi market." The state of Qatar also filed a separate case on 1st October, 2018 with the World Trade Organization in Geneva claiming that Saudi Arabia had violated the organization's intellectual property rights agreement.

The Saudi government's Center for International Communication did not immediately respond to a request for comment. Saudi officials have previously denied any link to a sports service broadcasting pirated content.

The two countries have been locked in a broader political standoff for more than a year. Saudi Arabia and three of its allies severed diplomatic, trade and transport links with Qatar in June 2017, accusing the gas-rich peninsula of sponsoring terrorism and meddling in their internal affairs. Qatar, which is set to host soccer's World Cup in 2022, has denied those allegations and says the boycott is an attempt to subvert its sovereignty.

The spat spilled into sports broadcasting rights with the mysterious emergence of a pirated channel called beoutQ.

BeoutQ appeared after the devices used to broadcast beIN Sports were banned from import to Saudi Arabia. It broadcasts the same games and commentary as beIN Sports, complete with a faint beIN logo that floats across the screen. Promotional materials for BeoutQ say it's backed by Colombian, Cuban and Middle Eastern investors.

Qatar alleges that Saudi Arabia is behind the pirated broadcasts, which are interspersed on beoutQ with anti-Qatar content. Saudi Arabia has denied that it has anything to do with the channel and said it's been fighting beoutQ by confiscating thousands of devices used to stream it.

If Qatar and Saudi Arabia can't resolve the matter after 60 days, Qatar may then ask a WTO dispute settlement panel to investigate the matter and issue a ruling.

BeoutQ devices were widely available in Saudi Arabia in the months leading up to the World Cup, and it's common to find the channel broadcasting sports in restaurants and cafes across Riyadh. Saudi officials said the devices were also available in other countries.

World soccer governing body FIFA said in July that it would take legal action in Saudi Arabia, though it didn't say who it planned to sue.

In the arbitration case, beIN Sports alleges that Saudi Arabia "initiated a series of abusive measures specifically targeting" the company in order to force it out of the Saudi market, revoking beIN's legal right to operate, banning the import of beIN set-top boxes, suspending all monetary transactions with beIN and blocking its website.

"BeIN has suffered damages in excess of $1 billion, which continue to increase with each passing day," the company said in the statement.

Meanwhile, beoutQ has "created a plague of piracy," Sophie Jordan, beIN Media Group's general counsel, said in the statement. "Unless the whole sports, entertainment and broadcast industry takes a stand, its impact will be devastating and irreversible."

Source: As reported by Vivian Nereim in Bloomberg dated 01st October 2018 and updated on 02nd October 2018, Website: https://www.bloomberg.com/news/articles/2018-10-01/qatar-s-bein-sports-seeks-1-billion-damages-from-saudi-arabia.

4. First Emergency Arbitrator Proceedings in China and Enforcement in Hong Kong

In August 2018, the Beijing Arbitration Commission ("BAC") closed its first arbitration case involving emergency arbitration procedures in China ("GKML Case"). This case, with the claimants represented by Baker McKenzie Fenxun, is significant in that it not only featured the first emergency arbitrator proceeding ("EA proceedings") in China but also the enforcement of the emergency arbitrator order ("EA Order") in Hong Kong,

and therefore has set a precedent and example for future practices of similar proceedings.

Articles 62 and 63 of the BAC Arbitration Rules 2015 Edition ("BAC Rules") provide for EA proceedings to parties who want to apply for interim measures prior to the constitution of the tribunal. There are similar provisions in the rules of many Chinese arbitration institutions. However, until the GKML Case, there had never been an emergency arbitrator case in China. As such, BAC had to build its practice from scratch starting from this case.

Source: As reported by Haifeng Li in Global Arbitration News dated 9th October 2018, Website: https://globalarbitrationnews.com/first-emergency-arbitrator-proceedings-in-china-and-enforcement-in-hong-kong/

5. India should create conducive environment for international arbitration: Justice Arjan Kumar Sikri

Early and cost-effective resolution of commercial disputes is important, and India should create an environment conducive for international arbitration, said Supreme Court of India Judge Arjan Kumar Sikri.

Justice Sikri, while addressing a 'training-cum-brainstorming workshop on best practices in international arbitration' further said, the government should also widen the panel of arbitrators.

"The government has a supervisory and regulatory role to ensure smooth operation of international collaborative efforts. Any disputes have to be quickly and effectively settled in an amicable way so as to not sever the relationship," he said.

Noting that in the last four-five years, the government had brought many amendments to the Arbitration and Conciliation Act, Justice Sikri said, "India should become an arbitration hub."

"Currently India has ad-hoc arbitration; let us hope that institutional arbitration takes shape in India," he said.

Justice Sikri also stressed on the need of changing mind-set of government officials as some knowingly delay arbitration proceedings.

Speaking at the same event, Minister of State for Law and Justice P P Chaudhary said that arbitration ensures timely and effective enforcement of contracts.

"It (arbitration) should become the de-facto mode of commercial dispute resolution for the majority. The govt is focusing on building resources and institutions towards this," Chaudhary said.

Under the arbitration process, disputes are resolved in shortest possible time, he added.

Niti Aayog CEO Amitabh Kant said arbitration was important to improve ease of doing business in India.

Use of arbitration for dispute resolution will greatly reduce pendency of cases and boost investor confidence in India, Kant added.

Source: As reported in The Economic Times dated 10th October, 2018, Website: https://economictimes.indiatimes.com/news/politics-and-nation/india-should-create-conductive-environment-for-international-arbitration-justice-arjan-kumar-sikri/articleshow/66145938.cms

6. England and Wales: Application to correct an award does not always extend the time limit for challenging the award

The English High Court has confirmed in *Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Equinox Ltd & Anor* [2018] EWHC 538 (Comm) that the 28 day time limit for challenging or appealing an arbitral award under the English Arbitration Act 1996 (the "Act") commences on the date the award is made and is not necessarily deferred pending any application to the tribunal to correct the award. This follows an earlier case confirming that the time limit for any challenge or appeal runs from the date the award is made and not the date it is received by the parties.

Parties wishing to challenge an award should not wait until any correction of the award is considered if the proposed correction of the award is not material to the challenge of the award. If the outcome of any application to correct the award is material to the potential basis for challenging the award, this case suggests the time limit for challenging the award commences from the date of the corrected award rather than the date it was originally made. However, where there is an outstanding application for the correction of an award the appropriate action in some cases, to avoid the risk of any challenge becoming time-barred, will be to seek

an extension of time for challenging the award before the expiry of the 28 day time limit based on the date of the original award.

Source: As reported by Tom Yates and Lauren Owide in Global Arbitration News dated 17th October 2018, Website: https://globalarbitrationnews.com/england-and-wales-application-to-correct-an-award-does-not-always-extend-the-time-limit-for-challenging-the-award/

7. Opinion | Doing business: Aim must be to scale top 25 by '22

The immediate target is to ensure India reaches top 50 in 2020 Doing Business report

Given the government's focus on running businesses easy and simple, India has jumped 65 positions in the World Bank's ease of doing business rankings. Placed at 77th in the world now, India is within touching distance of being in the top 50. By being among the top 10 gainers for two years in a row, India has shown not just the willingness to reform, but the initiatives over the past four years are ensuring exponential growth, beyond merely the 65-place improvement in rankings since 2014. This is just the beginning. The best is yet to come.

The immediate target is to ensure India reaches the top 50 in the Doing Business 2020 report and, for that, many of the aspects are already in place. The 2019 report mentioned India's improved rank on six out of the 10 parameters pertaining to commencing and doing business within its borders. One of the main catalysts for this improvement was the rollout and streamlining of the goods and services tax (GST). GST has been an unqualified success, with a faster registration process than its predecessor, and making tax payment easier. With GST implementation issues having been addressed, one can expect this unprecedented reform to showcase efficiency across the country. India has also made paying taxes less costly by both reducing corporate income tax rate as well as the employees' provident fund scheme rate. These reforms will push India's ranking up in this indicator in time for the next report.

Laudable work has been done over the past four years to bring India to its current position. Now, in the remaining indicators, we must improve like we did this past year in "trading across borders", where we improved from 146 to 80, and "dealing with construction permits", where we improved from 181 in the 2018 report to 52. The enforcement of contracts and concerns with pendency is one area that continues to be a concern.

One aspect that could help alleviate concerns with commercial contracts, as well as help reduce the burden on the courts and consequently pendency, is through the Alternative Dispute Resolution (ADR). Institutional arbitration, for example, could greatly help in loosening the stranglehold that pendency has on enforcement of contracts and other legal delays. The government of India has made major strides in greater efficiency and efficacy in resolving commercial disputes, including major legislative measures on promoting ADR.

With top class arbitration as an alternative, many of the concerns regarding enforcement and delays in the courts could dissipate. In addition to this, the broad use and implementation of the Insolvency and Bankruptcy Code (IBC), will help greatly in resolving insolvency.

Another concern remains in registering property, an indicator where India's position needs to improve. Some state governments, such as Maharashtra, have invested heavily in digitizing land records and building online solutions for registration and mutation. But these are just the first steps.

It takes several weeks to conduct title search on property and to mutate the property in the name of the new owner. The time taken to complete these formalities must be reduced, and technology can play a critical and significant role in reducing the time requirement—digitizing land records can help improve public access, but they are not effective in isolation. A land buyer must seek information that is held in different agencies, at differing stages of digitizing. This data must instead be integrated into a useable, searchable format that allows users to quickly and effectively identify encumbrances through a single interface. Reducing the search time will require massive digitization at various offices and linking records together using a unique ID.

Another focus area where we need to improve is in starting businesses. Despite important reforms in starting a business, India needs to improve its position since other countries appear to have also reformed rapidly.

In India, transformative change has been made possible. Not only have we escalated our ranking by 65 positions, but have also fostered a competitive spirit

among states by ranking them. The journey to the top 50 has already begun. All systems are firing, and the transformation is there for the world to see. India's ambition to become the easiest and simplest place for investors to do business in is 65 places closer to where it aims to be. Once we reach the top 50 next year, we can target the ultimate goal for 2022—to focus on reaching the top 25. Given the political commitment and administrative will, this is both doable and feasible.

Source: As reported by Amitabh Kant in Live Mint dated 19th November 2018, Website: https://www.livemint.com/Opinion/P51ltM1d9kjDHUs9iD6z8K/Opinion--Doing-business-Aim-must-be-to-scale-top-25-by-22.html?utm_source=scroll&utm_medium=referral&utm_campaign=scroll

8. SPML Infra wins arbitration award against Jharkhand Urja Utpadan Nigam

SPML Infra has won Rs. 47.5 crore Arbitration Award Against Jharkhand Urja Utpadan Nigam. The Arbitration order was passed by Sole Arbitrator, Hon'ble Justice D. G.R. Patnaik (Retd. Judge, Jharkhand High Court), and Jharkhand Urja Utpadan Nigam was asked to pay it immediately. Jharkhand Urja Utpadan Nigam will have to pay interest @18% on the amount if it is not paid immediately as per award.

The need for the arbitration arose due to cost over-run during construction, delayed payment, and additional expenses incurred due to delay and claims of the company were upheld by the Arbitrator. The proceedings of the arbitration were held for five years starting 2013 and all pleadings and arguments by both the parties were completed in 36 sittings.

Source: As reported in Business Standard dated 19th November 2018, Website: https://www.business-standard.com/article/news-cm/spml-infra-wins-arbitration-award-against-jharkhand-urja-utpadan-nigam-118111900138_1.html

9. Top court dismisses appeal on arbitration award

Singapore's top court has ruled in favour of Lesotho against a South African diamond mining company seeking to restore an arbitration award on its mine leases expropriated by the kingdom.

The Court of Appeal, in the first application in Singapore involving an investor-state arbitral award dispute from Africa, dismissed the appeal against a Singapore High Court decision to set aside the award.

The appeal, heard by a five-judge court presided over by Chief Justice Sundaresh Menon, underscores Singapore's growing profile as a seat for arbitrations in general, and for investment arbitrations in particular, lawyers told The Straits Times.

Investment arbitrations are a form of arbitration directed against states, and usually brought under a foreign investment treaty or a free trade agreement.

The case is also significant as the parties chose Singapore for their arbitration although it did not concern Singapore or Singapore law. But the appeal enabled the courts here to address important issues of international law.

In the case, Swissbourgh Diamond Mines and other investors claimed their mining leases in Lesotho had been unlawfully expropriated and sought redress. Lesotho is one of 15 member states of the Southern African Development Community (SADC) which set up a regional tribunal to hear investment claims.

An SADC tribunal approached by the investors in 2009 was dissolved by its member states before the claim could be heard.

In 2012, Swissbourgh took the case to the Permanent Court of Arbitration (PCA), which ordered a new tribunal be formed to hear the expropriation claims.

But last year, Lesotho successfully applied to the Singapore High Court to set aside the PCA's award.

Swissbourgh and the South African investors appealed in May this year to the top court, comprising CJ Menon and Judges of Appeal Andrew Phang, Judith Prakash, Tay Yong Kwang and Steven Chong.

Representing them was Queen's Counsel Stephen Jagusch as briefed by a WongPartnership team led by Senior Counsel Alvin Yeo. Lesotho was defended by QC Samuel Words-worth as briefed by a Rajah & Tann team led by Mr Paul Tan Beng Hwee.

The court also appointed Queen's Counsel J. Christopher Thomas and Professor N. Jansen Calamita from the National University of Singapore to help the court as amici curiae, which means friends of the court.

The appeals court, in its 160-page judgment, made clear it had the jurisdiction to set aside the award based on the cited provisions in UNCITRAL Model Law, which is a regime prepared by the United Nations Commission on International Trade Law that countries can use as part of their domestic legislation on arbitration. The court said, among other things, that the PCA tribunal had no jurisdiction to determine the claim of Swissbourgh and the investors.

"We find that there are no relevant disputes that concern any obligation that was owed by the kingdom in relation to the admitted investment. Finally, we also take the view that (Swissbourgh) may not have exhausted their local remedies," wrote CJ Menon in judgment grounds issued on Tuesday.

The court also called Swissbourgh's claim of "a lack of judicial independence in the kingdom's courts spurious", given that the courts had not hesitated to be "critical and dismissive of the actions of (their) own government".

Source: As reported in The Straits Times dated 30th November 2018, Website: https://www.straitstimes.com/singapore/courts-crime/top-court-dismisses-appeal-on-arbitration-award

10. Arbitrator is only entitled to his fees, not the costs imposed on parties, Bombay High Court

The Bombay High Court has held that costs imposed on parties to an arbitration cannot be covered in the term "fees" fixed for an arbitrator. An arbitrator, therefore, cannot direct any party to an arbitration proceeding to pay such costs to him.

The order was passed by a Single Judge Bench of **Justice SJ Kathawalla** in a petition under **Section 15** of the Arbitration and Conciliation Act, 1996, seeking termination of the mandate of the Arbitral Tribunal constituted to resolve the dispute between the Petitioner, Modi Dairy and Respondent, Alfa Laval (India) Ltd.

The Petition also sought to appoint a fit and proper person as an Arbitrator in substitution of the earlier Arbitral Tribunal.

In his guidelines set out for filing Statement of Claim, Written Statement and Statement of Counter Claim, the Arbitrator to the proceedings had informed the parties that no extensions/adjournments would be granted except in the gravest of circumstances and subject to payment of costs of a minimum of Rs. 20,000.

Pursuant to this direction, a cost of Rs. 50,000 was imposed on the Respondent for seeking time to file the Statement of Claim. Although the Arbitrator recorded that no specific ground was mentioned for the same, the deadline for filing the Statement of Claim was extended.

Soon after, the Petitioner sought extension of time to file the Statement of Defence on two occasions. On both the occasions, time was granted by the Learned Arbitrator subject to costs of Rs. 50,000 for each extension.

Subsequently, the Arbitrator directed the Petitioner to deposit total costs of Rs. 1,00,000 within a stipulated date with him by cheque or by NEFT transfer.

Aggrieved by the direction to pay the costs imposed to the Arbitrator himself, the Petitioner moved the High Court to terminate the mandate of the Arbitrator.

It was the Petitioner's case that the practice of imposing costs that is to be paid to the Arbitrator is against the provisions of law and also against the Arbitration Agreement between the Parties concerned.

Before the High Court, the Respondents also agreed to terminate the mandate of the Arbitrator.

The Court held that the Arbitrator is only entitled to receive his fee for the days on which the meetings are fixed by him, and not the costs that he imposes on parties. If a contrary procedure is followed by the Arbitrator, the Court observed, his mandate can be terminated on this ground.

"The Learned Arbitrator is certainly entitled to his fees. Even if a party/parties seek/s and obtains adjournment/s on the days fixed for hearing, the Arbitrator/s may still insist that his/their fees or part thereof be paid. However, the Arbitrator/s, apart from charging his / their fees, cannot direct any party to pay costs to him / them on any ground, including the ground that the pleadings are not filed on time by the parties, or for granting extension/s to file pleadings."

The Court further observed that if the Arbitrator is of the view that the party is seeking time without showing any grave circumstance, he has the power to reject the

Application seeking extension. He, however, cannot direct the party to pay costs to him.

Such costs are always payable to the other side and certainly not to the Arbitrator, the Court clarified.

Since both the Parties had agreed to terminate the mandate of the Arbitrator and appoint Advocate Salil Shah as the Sole Arbitrator to decide all the disputes between them, the mandate of the earlier Arbitrator was terminated automatically under **Section 15(1)(b)**, and no order of termination was required to be passed, the Court recorded.

The Petitioner was represented by Advocate **Rashid Khan** who was instructed Advocate Suvarna Joshi. The Respondents were represented by Advocates **Alpana Ghone** with **Chirag Dave** and **Dnyaneshwar Jadhav**. The Counsel were instructed by **Legasis Partners**.

Source: As reported by Aditi Singh in Bar & Bench dated 1st December 2018, Website: https://barandbench.com/arbitrator-entitled-fees-not-costs-bombay-high-court/

11. State courts' decisions on appointments and removals of arbitrators are not subject to extraordinary appeal

Article 111(7) of the Italian Constitution grants parties with the right to file an extraordinary appeal with the Supreme Court on grounds of error in law against any state court final decision regarding personal freedom. The reference to personal freedom would seem to limit the scope of the remedy to criminal actions. However, already in 1948, the Supreme Court of Cassation extended the availability of the appeal to civil proceedings and, in particular, infringement of subjective rights or a status by state courts' decisions.

It is settled case-law of the Supreme Court that a court judgement, even if issued in the form of an order *(ordinanza)* or ex parte decision (decreto), can be subject to an Article 111 appeal if the judgement (i) affects subjective rights or a status, and (ii) has res judicata effects (i.e. when there is no judicial remedy and the judgement is not modifiable or revocable by the court who issued it).

With regard to the state courts' power to intervene in arbitral proceedings, the Supreme Court confirmed with two recent rulings (summarized below) its position that state courts' decisions on both appointments and removals, despite having final character, do not fulfill the requirements of the Article 111(7) appeal.

The Italian legal framework mirrors thus the principle applicable in other civil law jurisdictions. In France, for instance, the orders of the juge d'appuì are not appealable (Article 1460 of the French Code of Civil Procedure). Similarly, under Swiss law governing international arbitrations, there is no remedy available against the arbitrator's appointment by the state court under Article 179(3) PILA, whereas Article 180(3) PILA explicitly provides that the state court decides "in a final manner" on challenges of arbitrators. Vice versa, common law jurisdictions generally provide for a remedy against state court decisions regarding appointments and challenges (e.g., Sections 17(4) and 24(6) of the English Arbitration Act).

Appointment of arbitrators (Supreme Court decision No. 9767/2018, dated 19 April 2018)

In this case, the president of an Sicilian state court, declared inadmissible a party's application for the appointment of two arbitrators at the discretion of the court[1]. The applicant appealed the President's order arguing that the decision prevented the establishment of the arbitral tribunal and thus radically deprived the parties of the right to obtain recognition and protection of their subjective legal positions arising from the arbitration agreement.

The Supreme Court rejected the appeal, ruling that a state court's order regarding the appointment of an arbitral tribunal's member is issued due to a disagreement of the parties with regard to the mere appointment of arbitrators. With its order, the state court does not resolve a dispute between two or more parties in the sense of establishing a controversial right or attributing a disputed good. The state court's intervention simply replaces the missing outcome of the parties' negotiation on the arbitral tribunal's composition and remains completely alien to the actual dispute. The state court's order can thus not be regarded as decision under Article 111(7) of the Italian Constitution[2].

As concerns the finality of the order, the Supreme Court clarified that, in case the state court appoints a member

of the arbitral tribunal, the latter can subsequently assess the legitimacy of its appointment. Otherwise, in case the state court rejects the application, the potential prejudice to the parties must be attributed to the unsuccessful negotiations on the appointment between the parties and not to the state court's intervention.

In the decision No. 18004/2018, dated 9 July 2018, the Supreme Court extended the above principle to state courts' orders regarding the replacement of arbitrators. The Court held that state court decisions on the appointment and replacement are not appealable under Article 111(7) of the Italian Constitution because they do not produce any substantial or procedural effects of a *res judicata* decision.

Removal of arbitrators (Supreme Court decision No. 20615/2017, dated 31 August 2017[3])

This cases stems from an arbitration in which the President of the Court of Milan – competent to decide on challenges of arbitrators in this specific case under Article 815(3)[4] of the Code of Civil Procedure – removed an arbitrator for "serious divergence of opinions" with a party. The removed arbitrator lodged an Article 111(7) appeal with the Supreme Court.

The Supreme Court held, first of all, that Article 815(3) of the Code of Civil Procedure expressly declares a state court's order on the removal of an arbitrator not subject to appeal and thus final. Moreover, the Court ruled that the removal of an arbitrator cannot be appealed under Article 111 of the Constitution since the state court's order is of an essentially administrative nature and constitutes a merely functional and instrumental measure regarding the conduct of the procedure itself. The removal order does not affect the arbitral tribunal as such or the criteria for its establishment, nor does it jeopardize the right of the party to the appointment of its own arbitrator. The right to challenge an arbitrator rather protects the correct composition of the arbitral tribunal and the general interest in its impartiality and impartiality[5].

[1] According to Article 810(2) Code of Civil Procedure, if the respondent does not appoint its arbitrator, the claimant may, by way of appeal, *"request that the appointment be made by the President of the court in whose jurisdiction the seat of arbitration is situated. If the parties have not yet determined the place of arbitration, the application shall be submitted to the President of the court of the place where the arbitration agreement was entered into or, if that place is abroad, to the President of the court of Rome".*

[2] Similar conclusions were drawn by the Supreme Court, *inter alia*, in the decisions No. 11665/2007 and 3129/2002.

[3] Similar conclusions were drawn by the Supreme Court, *inter alia*, in the decisions No. 10359/2012 and 8472/2002.

[4] Article 815(3) Code of Civil Procedure: *"A challenge shall be lodged by means of an appeal to the President of the Court [in whose district the arbitration is seated] within ten days from notification of the appointment or the knowledge of the grounds for challenge. The President shall issue an order not subject to appeal, after having heard the challenged arbitrator and the parties and, if necessary, having considered summary information".*

[5] This principle has also been reflected in the above commented decision No. 9767/2018.

Source: As reported by Lukas Innerebner in Global Arbitration News dated 20th November 2018, Website:https://globalarbitrationnews.com/italy-state-courts-decisions-on-appointments-and-removals-of-arbitrators-are-final-and-not-subject-to-extraordinary-appeal/

12. STC allowed Rs. 600 crore as interest by Supreme Court in settlement of dispute with Global Steel

The Supreme Court ordered Global Steel Holding Limited (GSHL) and Global Steel Philippines Inc. (GSPI) to pay Rs. 600 crore as interest to State Trading Corporation (STC/ appellant) for the settlement of a dispute.

The order was passed by a Bench of Justices **AM Sapre** and **Indu Malhotra** in an appeal filed by STC against an order of the Delhi High Court.

By way of background, a tripartite agreement was entered into between STC and the respondents, GSHL and GSPI in 2005, for purchase and sale of commodities known as HR Coils and CR Coils.

In the performance of the agreement, disputes arose between the parties, particularly with respect to the non-payment of outstanding dues to the appellant STC. The parties, therefore, decided to settle their disputes by means of conciliation proceedings with the assistance of two Conciliators.

The parties entered into a Settlement Agreement under Section 73 of the *Arbitration and Conciliation Act, 1996*. In terms of the Settlement Agreement, the GSHL and GSPI agreed to pay a total amount of US$ 355,818,019.29 with interest @ 13.25 percent per annum to STC. However, they committed default in the payment of the amount.

The parties, therefore, entered into another Settlement Agreement dated May 17, 2012 through the intervention of the Conciliators.

As per the second Settlement Agreement, GSHL and GSPI agreed to pay a total amount of US $ 347,737,209.68 inclusive of interest at the rate of 13.50 % p.a. (Rs.1605 crores in Indian currency) by November 10, 2010.

Both the Settlement Agreements were executed by Pramod Mittal as Chairman of GSHL and GSPI.

As per the second settlement agreement, Pramod Mittal furnished a personal guarantee by which he assured payment of the outstanding amount payable by GSHL and GSPI to the appellant, STC.

However, GSHL and GSPI defaulted again, whereupon STC filed an execution petition in the Delhi High Court. The Delhi High Court, however, dismissed the same on March 9, 2015 on the ground that none of the judgment debtors was located within the jurisdiction of the Court. This led to the appeal in Supreme Court.

During the hearing of the case, Senior Advocate **Kapil Sibal** appearing for GSHL and GSPI, submitted that an amount of Rs. 810 crore was paid towards the outstanding liability under the two Settlement Agreements.

Further, when the matter was taken up for final hearing, the respondents offered to deposit Rs. 800 crore, without prejudice to their right to prosecute the case, within four weeks, to show their bona fidesto the Court. The Court recorded the said submission in its order passed on October 31.

On November 29, the Senior Counsel brought demand drafts for Rs.810 crore in favour of the decree holder – STC. When the matter was taken up for hearing on December 4, the demand drafts for Rs. 800 crores were directed to be handed over to the Court Master in a sealed envelope.

The Court noted these factual aspects in its judgment passed on 6th December, 2018 and observed that the entire liability of the respondents till November 10, 2012 stands discharged.

It proceeded to order that the demand drafts for Rs. 800 crore furnished by the respondents be handed over to STC. Importantly, it directed that interest at the rate of 8% per annum be paid on the principal sum of Rs. 1610 crore starting from November 10, 2012. Thus, an amount of Rs. 600 crore was directed to be paid by the respondents to STC.

"Lumpsum amount of Rs.600 crores (Rupees Six Hundred Crores) worked out on the basis of 8% S.I. per annum (rounded off) be paid by the respondents to the appellant towards full and final satisfaction of the amounts due under the Settlement Agreement dated 15.11.2010, and Further Settlement Agreement dated 17.05.2012."

The interest has to be paid within twelve weeks.

The Court also made it clear that if the amount of Rs. 600 crore is not paid on or before February 28, 2019, it would amount to contempt of the order passed by the Supreme Court. It would then be open to the appellant to take appropriate action against the respondents in accordance with law for non-compliance.

Since the parties agreed to the termination of the proceedings by virtue of the above settlement arrived at by way of Court's directions, the Court found it fit not to decide the legal issues involved in the case.

"Having heard the learned senior counsel for the parties, and on perusal of the record, we are of the considered opinion that it is not necessary to decide the various legal issues arising in the case."

Senior Advocate **Dushyant Dave** along with advocate Uday Gupta appeared for STC. The respondents were represented by Senior Advocate **Kapil Sibal** along with advocate Gautam Mitra. The Court recorded its appreciation for the two Senior Counsel for their efforts in enabling the parties to resolve the dispute.

"At this juncture, we consider it appropriate to place on record our appreciation of the valuable assistance provided by both the senior counsel, Mr. DA Dave and Mr. Kapil Sibal in enabling the parties to resolve the disputes. The senior counsel addressed the myriad legal issues which arose in the case with clarity, persuasiveness, lucidity and industry."

Source: As reported by Murali Krishnan in Bar & Bench dated 8th December 2018, Website: https://barandbench.com/stc-600-crore-interest-supreme-court-settlement-dispute-pramod-mittal-global-steel/?_branch_match_id=581097722205150016

13. AAI wins arbitration case after Judge rejects plea by Consortium:

Airports Authority of India (AAI) won a Rs 3,000-crore arbitration case after Justice SS Nijjar found no merit in a consortium's claim that the airport regulator deliberately breached ground handling rules.

The agreement between the consortium — Bhadra International India and Novia International Consulting APS — and AAI does not give exclusive rights to the two entities to provide ground-handling services, Justice Nijjar said, adding that rules do not limit the number of ground-handling services providers at the airports.

The consortium had filed two separate arbitrations for Chennai and Kolkata airports and a few airports in south India, claiming a collective amount of more than Rs 3,000 crore after accusing AAI of not complying with Ground Handling Regulations, 2007.

According to the two arbitral awards accessed by CNBC-TV18, the consortium claimed an amount of Rs1,882.29 crore plus 18 percent interest for Chennai and Kolkata and Rs 1,260.67 crore plus 18 percent interest for the remaining airports in the south.

The consortium had alleged that airlines operating at these airports were outsourcing the ground-handling services. This was in contravention of its exclusive rights on ground-handling services across seven airports — Chennai, Kolkata, Thiruvananthapuram, Kozhikode, Coimbatore, Mangalore and Trichy.

Ground-handling services include aircraft cleaning, servicing, loading and unloading of food and beverages, cargo and luggage handling.

The consortium was awarded the licence to operate ground-handling services at the seven airports in 2010.

Source: As reported by Ashpreet Sethi in CNBC-TV18 dated 6th August 2018, Website: https://www.cnbctv18.com/aviation/aai-wins-arbitration-case-after-judge-rejects-plea-by-consortium-443061.htm

***

3-day Certified Training Course on

DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION

22nd to 24th November 2018
New Delhi

26th to 28th November 2018
Mumbai

BRIEF REPORT

Indian Council of Arbitration, a leading arbitral institution in India, and one of the most important arbitration centres in Asia Pacific, in collaboration with Swiss Arbitration Academy organized 3-day Certified Training Course on *"Domestic and International Commercial Arbitration"* from 22nd to 24th November 2018 at New Delhi and from 26th to 28th November 2018 at Mumbai.

Training was imparted by prominent arbitration experts from India and Abroad on different aspects of domestic and international commercial arbitration including international best practices in the field of arbitration. Foreign faculty members with extensive experience in international arbitration included Dr. Urs Weber Stecher, Partner and Head-Arbitration Team, Wenger & Vieli AG, Attorneys-at-Law (Switzerland); Mr. Joachim Knoll, Partner, LALIVE, Law firm (Switzerland); Dr. Nikolaus Vavrovsky, Partner, Vavrovsky Heine Marth Rechtsanwalte (Austria) and Mr. Florian Stefan, Senior Associate, Vavrovsky Heine Marth Rechtsanwalte (Austria). Indian faculty comprised of Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan (New Delhi), Mr. Tejas Karia, Partner and Head-Arbitration, Shradul Amarchand Mangaldas & Co. (New Delhi) and Mr. Raj Panchmatia, Partner, Khaitan & Co (Mumbai).

Training Course was tailored to provide practical training on various aspects of domestic and international arbitration. Topics such as initiating an arbitration proceeding; constitution of Arbitral Tribunal; practical problems/issues relating to claim, defence statement, counter claim; taking of evidence in international arbitration etc. were part of curriculum. On Day 2 and Day 3 of the Training Course, half day Mock Session involving Role Play by participants as Claimants, Respondents, Arbitrator was also conducted. Detailed course material was provided to participants in advance for the purposes of mock case session.

Feedback provided by the participants showed that the Training Course spanning over three (3) days was intellectually engaging and participants had stimulating time.

3-day Certified Training Course on

DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION

22nd to 24th November 2018 | New Delhi

PHOTO GALLERY

Mr. Arun Chawla, Advisor, Indian Council of Arbitration delivers Opening Address

Welcome and Introduction in progress during the Training Course

End of Welcome and Introductory Session during the Training Course

Overview of gathering during the Training Course

A section of participants

Another overview of gathering during the Training Course

Dr. Urs Weber Stetcher, Partner and Head -Arbitration Team, Wenger & Veili AG, Attorneys-at-Law (Switzerland), addresses participants

Mr. Joachim Knoll, Partner, LALIVE, Law Firm (Switzerland) shares his views with participants

Mr. Nikolaus Vavrovsky, Partner Vavrovsky Heine Marth Rechtsanwalte (Austria) shares his views with participants

Mr. Tejas Karia, Partner and Head-Arbitration, Shardul Amarchand Mangaldas & Co, presents his views on various aspects of Commercial Arbitration from Indian perspective

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan addresses participants on different aspects of Domestic and International Commercial Arbitration

Participants preparing within their teams for mock exercises on Days 2 and 3

Another view of Participants preparing within their teams for mock exercises on Days 2 and 3

Discussions and preparations amongst Participants for mock exercises on Days 2 and 3

ROLE PLAY- Mock Case session attended by participants in Group I

ROLE PLAY- Mock Case session attended by participants in Group II

Another view of ROLE PLAY- Mock Case attended by participants in Group I

Another view of ROLE PLAY- Mock Case session attended by participants in Group II

Question and Answer during the Training Course

End of Final Session and Day 3 of the Training Course

Concluding Remarks by Mr. Arun Chawla, Advisor, Indian Council of Arbitration

Thanksgiving to Faculty by Mr. Vinay Kr. Sanduja, Joint Director, Indian Council of Arbitration

Group Photograph at the end of Training Course

3-day Certified Training Course on

DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION

26th to 28th November 2018 | Mumbai

PHOTO GALLERY

Mr. Vinay Kr. Sanduja, Joint Director, Indian Council of Arbitration makes opening remarks at the commencement of the Training Course

A view of Faculty addressing the participants of the Training Course

Overview of gathering during the Training Course

A section of participants

Another overview of gathering during the Training Course

A view of section of participants

Dr. Urs Weber Stetcher, Partner and Head -Arbitration Team, Wenger & Veili AG, Attorneys-at-Law(Switzerland), shares his experience with the participants during the Training Course

Mr. Joachim Knoll, Partner, LALIVE, Law Firm (Switzerland) shares his views with participants

Mr. Florian Stefan, Senior Associate, Vavrovsky Heine Marth Rechtsanwalte shares his views during the Training Course

Mr. Tejas Karia, Partner and Head-Arbitration, Shardul Amarchand Mangaldas & Co, makes presentation at the Training Course

Mr. Ganesh Chandru, Executive Partner, Lakshmikumaran & Sridharan addresses participants during the Training Course

Mr. Raj Panchmatia, Partner, Khaitan & Co shares his thoughts with participants during the Training Coursse

Participants prepare within their teams for mock exercises on Day 2 and 3

Participants preparing within their teams for mock exercises on Days 2 and 3

Faculty helping participants during preparation within their teams for mock exercises on Day 2 and 3

ROLE PLAY- mock Case attended by participants in Group I

ROLE PLAY- Mock Case attended by participants in Group II

Another view of ROLE PLAY- Mock Case attended by participants in Group I

Another view of ROLE PLAY- mock Case attended by participants in Group II

Participants presenting their case during Mock Case Session

Remarks by Mr. Vinay Kumar Sanduja, Joint Director, Indian Council of Arbitration

End of Final Session and Day 3 of the Training Course

Group Photograph at the end of Training Course

CASE HIGHLIGHTS

INDIAN CASES

Caraval Shipping Services Pvt. Ltd. Vs. Premier Sea Foods Exim Pvt. Ltd.

In this case, Hon'ble Supreme Court of India, clarified the scope of arbitration agreement for the purposes of arbitration under the Arbitration and Conciliation Act, 1996 (the Act).

In this matter, dispute arose out of Multimodal Transport Document/Bill of Lading which stated that Merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the Bill of Lading whether typed, printed or otherwise.

Briefly stated, Premier Sea Foods Exim Pvt. Ltd., Merchant had earlier filed a Suit to recover a sum of Rs. 26,53,593/- in which the Bill of Lading was expressly stated to be cause of action. However, soon after the institution of the Suit, Caraval Shipping Services Pvt. Ltd. filed application under section 8 of the Act pointing out that the arbitration clause was included in the printed terms annexed to the Bill of Lading and hence the dispute needs to be resolved through arbitration. After the dismissal of section 8 application by the Courts below, Caraval Shipping Services Pvt. Ltd. filed Civil Appeal before the Hon'ble Supreme Court of India.

The issue before Hon'ble Supreme Court of India was whether arbitration clause in the printed terms annexed to the Bill of Lading constituted a valid arbitration clause.

Main contention of Appellant, Caraval Shipping Services Pvt. Ltd. before Hon'ble Supreme Court was that printed conditions of the Bill of Lading were expressly referred to in the Bill of Lading and both parties were stated to be bound by the same. Appellant submitted that in accordance with Section 7(5) of the Act read with Supreme Court judgment in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*, there was a reference in the contract to the arbitration clause, which was in writing and the reference was such that the arbitration clause formed part of the contract.

Whereas Respondent, Premier Sea Foods Exim Pvt. Ltd., contended before the Supreme Court that as per Section 7(4)(a) of the Act, an arbitration agreement needs to be in a document that is signed by the parties. Since the Bill of Lading was not signed by Respondent therefore, it was not bound by the arbitration clause contained in that document.

Hon'ble Supreme Court after hearing the contentions of both Appellant and Respondent and on perusal of the arbitration clause, contained in Clause 25 observed that clause 25 being a printed condition and annexed to the Bill of Lading shows that the Respondent had expressly agreed to be bound by the arbitration clause despite the fact that it is a printed condition annexed to the Bill of Lading. Hon'ble Supreme Court also noted that the Respondent had itself relied upon the Bill of Lading as part of its cause of action to recover the sum of Rs. 26,53,593/- in the suit filed by it.

Based on aforesaid, Hon'ble Supreme Court observed that the Respondent cannot argue that for the purpose of its suit, it will rely upon the Bill of Lading (though unsigned) but for the purpose of arbitration, take the stand that arbitration clause should be signed.

Relying on its earlier judgment in *Jugal Kishore Rameshwardas v. Mrs. Goolbai Hormusji* wherein it was held that an arbitration agreement needs to be in writing though it need not be signed, Hon'ble Supreme Court observed that in all cases an arbitration agreement need not be signed and as per Section 7(3) of the Act, the only prerequisite is that arbitration agreement must be in writing. Further, Hon'ble Supreme Court observed that in the present case, Section 7 (5) of the Act read with abovesaid Supreme Court judgment in Jugal Kishore Rameshwardas , makes it clear that the reference in the Bill of Lading was such to make the arbitration clause part of the contract between the parties.

Shriram EPC Limited Vs. Rioglass Solar SA

The case involved an interesting question dealing with enforcement of foreign award under section 48 and 49 of the Arbitration and Conciliation Act, 1996, where the

award had not been stamped. Hon'ble Supreme Court of India noted that main contention in the Appeal related to interpretation of the expression "award" and whether the said expression would include foreign award.

For deciding the issue *"whether stamp duty is payable on foreign award"*, the Hon'ble Supreme Court of India looked into the Indian Stamp Act 1899 (prior to amendment by Act 43 of 1955 and post amendment 1955) and came to conclusion that "award" under Item 12 of Schedule I to the Indian Stamp Act, 1899 had remained unchanged till date. Hon'ble Supreme Court observed that the expression "award" never included a foreign award from the very inception till date. Consequently, a foreign award not being includible in Schedule I of the Indian Stamp Act, 1899, was not liable for stamp duty.

Hon'ble Supreme Court relying on the judgment passed by Madhya Pradesh High Court in Narayan Trading Co. v. Abcom Trading Pvt. Ltd. dismissed the appeal. Relevant para of the aforesaid judgment passed by Hon'ble Madhya Pradesh High Court which was approved by Hon'ble Supreme Court of India while dismissing the Appeal read as follows: *"…While Arbitration and Conciliation Act, 1996 was enforced, no amendment was made in the definition of award given in the Indian Stamp Act. Similarly, the Schedule which lays down the stamp duty payable on award was not amended by including the foreign award. It appears that law makers while enforcing the Arbitration and Conciliation Act, 1996 was of the view that foreign award shall be enforceable as if it were a decree of the Court, no amendment was brought either in the definition of award or in the Schedule relating to payment of stamp duty on award. Since the definition of award given at Entry No. 11 of the Schedule of the Indian Stamp Act does not cover the foreign award and one of the objects to enforce the new Act was to enforce final award as if it was a decree.."* In view of aforesaid, Hon'ble Supreme Court of India held that the fact that a foreign award has not borne stamp duty under the Indian Stamp Act, 1899 would not render it unenforceable.

South Delhi Municipal Corporation Vs. SMS AAMW Tollways Private Ltd.

In this case, Appellant, South Delhi Municipal Corporation (SDMC) challenged the order of Hon'ble High Court of Delhi allowing the Arbitration Petition under section 11 (6) of the Arbitration and Conciliation Act, 1996 (the Act) filed by Respondent, SMS AAMW Tollways Private Ltd. (SMS AAMW Tollways). In the said petition, SMS AAMW Tollways had relied on Clause 16 of the Bilateral Agreement relating to resolution of the dispute with the Appellant, SDMC.

The issue that arose before Hon'ble Supreme Court in the instant case was whether Clause 16.3 of the Bilateral Agreement entered into by parties for the purpose of collection of tax from all border entry points within the NCT of Delhi, was departmental appeal or arbitration.

In this regard, it is pertinent to note the relevant Clause 16 as contained in the Bilateral Agreement, and the same is reproduced as under:

16.1 *Except where otherwise provided in the Agreement, all questions and disputes in any way arising out of or relating to the Agreement shall be dealt with as mentioned below.*

16.2 *In the event the Contractor considers any work demanded of it as being outside the requirements of the Agreement, or disputes any record or decision given in writing by the Competent Officer in any matter in connection with or arising out of the Agreement, to be unacceptable, it shall promptly within [15] days request the Competent Officer in writing to give his instructions or decision in respect of the same. Thereupon, the Competent Officer shall give his written instructions or decision within a period of [30] days from the receipt of the Contractor's letter.*

16.3 *If the Competent Officer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Competent Officer, the Contractor may, within [15] days of receipt of the Competent Officer's instructions or decision, appeal to the Commissioner who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of its appeal. The Commissioner shall give his decision in writing within [30] days of receipt of Contractor's appeal which shall be acceptable to the Contractor.*

For the purposes of deciding the issue whether clause 16.3 provided for arbitration or a departmental appeal, Hon'ble Supreme Court noticed that Clause 16.2 of the Bilateral Agreement provided resolution of disputes by the Competent Officer of the SDMC whereas Clause 16.3 gave power to Commissioner of the Municipal

Corporation to resolve the disputes. Thereafter, Supreme Court came to conclusion that clause 16.3 under which an application to appoint an Arbitrator under Section 11(6) of the Act was made by the Respondent, SMS AAMW Tollways was in the nature of departmental appeal and not arbitration on the basis of settled principle of interpretation that unless the word raises an ambiguity it is not necessary to consider another meaning.

After perusing clause 16 of Bilateral Agreement between the parties, Hon'ble Supreme Court remarked that *"the language of Clause 16.3 does not lend itself to any other construction other than that it provides for an appeal against the decision of a Competent Officer rendered under Clause 16.2"*. In this regard, Hon'ble Court also noted that Clause 16.3 of the Bilateral Agreement was an appeal since only the Contractor was entitled to take recourse to appeal, if the Contractor was dissatisfied with the decision of the Competent Officer including a possible failure to decide within the prescribed period i.e. within 30 days. The other side, i.e. a Competent Officer who had raised a demand which the Contractor had not complied with could not file such an appeal. In these circumstances, Hon'ble Supreme Court observed that Clause 16.3 of the Bilateral Agreement provided for an appeal against the decision of a Competent Officer rendered under Clause 16.2.

While deciding the aforesaid issue, Hon'ble Supreme Court also discussed attributes which must be present for an agreement to be considered as an arbitration agreement, and the same are reproduced as under:

"(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,

(2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,

(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,

(4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,

(5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,

(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

Hon'ble Supreme Court also discussed other relevant factors which shall be taken into account for the purposes of determining whether an agreement was in the nature of arbitration agreement i.e. *"whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."*

Allowing the appeal, Hon'ble Supreme Court held that Clause 16 and in particular Clause 16.3 did not provide for the reference of any dispute that may arise between the parties to an Arbitrator and the intention was not to provide for a forum for resolving disputes and order of Hon'ble High court of Delhi appointing the Arbitrator under section 11 (6) of the Act was set aside. Thus, in the present case, clause 16.3 of the Bilateral Agreement was held to be in the nature of Departmental Appeal and not Arbitration by the Hon'ble Supreme Court.

Vedanta Ltd. v/s Shenzen Shandong Nuclear Power Construction Co

In this case, Hon'ble Supreme Court of India has laid down guidelines to determine the interest payable on arbitral award by arbitrators in relation to International Commercial Arbitration.

Briefly stated, in this matter, dispute arose between parties in relation to four inter related contracts (EPC contracts) for construction of Co-Generation Power Plant which resulted in termination of the EPC contracts. Consequent thereto Respondent- Claimant invoked arbitration clause and dispute was referred to Arbitral Tribunal. Arbitral Tribunal while passing the Arbitral Award also awarded certain amount of interest in favour of Respondent-Claimant. Aggrieved by the said award, Appellant filed objections under section 34 petition before Delhi High Court which was rejected.

Further appeal under section 37 of the Arbitration and Conciliation Act, 1996 (the Act) was filed before Division Bench and the same was also dismissed. Aggrieved by the judgment of Division Bench, the Appellant, Vedanta Ltd. preferred Special Leave Petition before Hon'ble Supreme Court and at the time of arguments restricted the challenge to the rate of interest awarded by Arbitral Tribunal.

Supreme Court considered the challenge on the interest awarded by the Arbitral Tribunal and noted that in an international commercial arbitration, in the absence of an agreement between the parties on Interest, the rate of Interest awarded would be governed by the law of the Seat of arbitration. Hon'ble Supreme Court while looking into the aspects of interest in an international commercial arbitration also noted that the rate of interest awarded must correspond to the currency in which the award is given, and must be in conformity with the laws in force in the lex fori. Since, the present case related to international commercial arbitration with seat in India, Hon'ble Supreme Court observed that the rate of interest to be awarded must be in accordance with the Act.

Hon'ble Supreme Court of India also laid down following guidelines to be followed by arbitrators while exercising discretion reasonably in awarding interest. Hon'ble Supreme Court laid down factors (below mentioned) which must be taken into account by the Arbitral Tribunal while making an award for Interest.

(i) the 'loss of use' of the principal sum;

(ii) the types of sums to which the Interest must apply;

(iii) the time period over which interest should be awarded;

(iv) the internationally prevailing rates of interest;

(v) whether simple or compound rate of interest is to be applied;

(vi) whether the rate of interest awarded is commercially prudent from an economic stand-point;

(vii) the rates of inflation;

(viii) proportionality of the count awarded as Interest to the principal sums awarded.

Apart from above, Hon'ble Supreme Court also observed that the rate of Interest must be compensatory as it is a form of reparation granted to the award-holder; and must not be punitive, unconscionable or usurious in nature. Further, it was observed that the Courts may reduce the Interest rate awarded by an arbitral tribunal where such Interest rate does not reflect the prevailing economic conditions or where it is nor found reasonable, or does not promotes the interests of justice.

On facts, Hon'ble Supreme Court observed that, in the present case, dual rate of Interest adopted by the Arbitral Tribunal was unjustified (i.e. payment of Interest @ 9% for 120 days post award and if the amount awarded is not paid within 120 days', the rate of Interest would be up to 15% on the sum awarded). Hon'ble Supreme Court also observed that the award of higher rate of Interest after 120 days' was arbitrary, particularly in view of the fact that if the award-debtor is made liable to pay a higher rate of Interest after 120 days, it would foreclose or seriously affect his statutory right to challenge the Award by filing objections Under Section 34 of the Act.

Hon'ble Supreme Court went on to state that imposition of a high rate of interest @ 15% post-120 days was exorbitant, from an economic standpoint, and had no co-relation with the prevailing contemporary international rates of Interest. Hon'ble Court also observed that the Award-debtor cannot be subjected to a penal rate of interest, either during the period when he is entitled to exercise the statutory right to challenge the Award, before a Court of law, or later. Furthermore, Hon'ble Court noted that in the present case, the arbitral tribunal had also not given any reason for imposing a 15% rate of Interest post 120-days.

Thereafter, Hon'ble Supreme Court of India observed that the award of Interest @ 9% on the Euro component of the Claim was unjustified and unwarranted particularly in view of the fact that such high rate of Interest on a claim made in a foreign currency, would result in the Claimant being awarded compensation, contrary to the conditions stipulated in the Contract. Noticing that the Award granted a uniform rate of 9% on both the INR and the EUR component, Hon'ble Court observed that when the parties do not operate in the same currency, complications caused by differential interest rates must be taken into account. Further, the Court noted that, in the present case, it was necessary for the arbitral tribunal to co-ordinate the choice of

currency with the interest rate (since the Interest rates differ depending upon the currency) and hence, a uniform rate of Interest for INR and EUR was not justified.

Disposing of the appeal, Hon'ble Supreme Court modified the Interest awarded by the arbitral tribunal as follows: (i) The Interest rate of 15% post 120 days granted on the entire sum awarded was deleted. A uniform rate of Interest @ 9% was held to be applicable for the INR component in entirety till the date of realization. (ii) The Interest payable on the EUR component of the Award was held to be payable as per LIBOR + 3 percentage points on the date of Award, till the date of realization.

FOREIGN CASES

1. Consolidated Contractors Group SAL (CCG) vs. Ambatovy Minerals SA: decided by Ontario Court of Appeal

The arbitration arose from a $258 million mining project for the construction of a pipeline to carry nickel ore slurry from Ambatovy Minerals SA's open pit mine in the Madagascar Mountains to the coast. The contract in question contained a tiered dispute resolution clause consisting of three stages whereby disputes would:

- first be referred to Ambatovy's supervising engineer;
- if unresolved, proceed to adjudication; and
- if either party was dissatisfied with the adjudicator's decision, the case would go to arbitration under the International Chamber of Commerce (ICC) Rules, seated in Toronto and subject to the substantive law of Ontario.

The dispute resulted in a unanimous final award issued in September 2015, which awarded CCG $7 million of its $91 million claim and Ambatovy $25 million for its counterclaims. The tribunal ordered CCG to pay Ambatovy $9.8 million in costs.

The Ontario Superior Court dismissed CCG's application to set aside the award, rejecting CCG's arguments and upholding the narrow circumstances under which a court can refuse to enforce an international award. The court of appeal dismissed the appeal.

CCG's first ground for the setting aside and refusal to enforce the award was that the arbitral tribunal had acted without jurisdiction. The Ontario Superior Court rejected CCG's argument that the tribunal had erred in finding that it had jurisdiction to hear Ambatovy's counterclaims. CCG argued that the tribunal had no jurisdiction to hear the counterclaims because it had not been through the tiered phases of the dispute resolution clause, which it argued were precedential to arbitration. The superior court rejected this argument, deferring to the tribunal's decision regarding procedural issues relating to the conduct of the arbitration.

The tribunal had found that the parties' agreement which stipulated that CCG's main claims could go directly to arbitration, bypassing the adjudication stage of the dispute resolution process, reflected the intention that any disputes between the parties be resolved efficiently. As such, the tribunal concluded that there was a common intention that disputes would be dealt with at the same time and by the same tribunal when there was sufficient connection between the disputes. The tribunal determined that there was indeed a sufficient connection between the counterclaims and the main claims, and therefore heard them together.

On appeal, CCG argued that the tribunal's jurisdiction was purely consensual and, since there was no agreement regarding the issue of arbitrating the counterclaims, the tribunal had exceeded its jurisdiction. Following its earlier decision in United Mexican States v Cargill Inc, the court of appeal held that the question was to be reviewed on the standard of correctness and that a reviewing court should interfere only where there was a true error of jurisdiction (eg, where a tribunal has decided a matter outside its geographic or temporal jurisdiction). Considering the terms of reference, the contractual terms relating to arbitration, the parties' submissions and the arbitral award, the court of appeal found that the tribunal had jurisdiction to determine the issues and rule on the parties' requests for relief. Therefore, CCG had not raised a true question of jurisdiction and the tribunal's decision could not be reviewed under Article 34 of the International Commercial Arbitration Act.

The court was careful to note that not every dispute submitted to arbitration will necessarily draw in any counterclaims between the parties, emphasizing that it will depend on the contractual intention of the parties in each case. The court also cautioned that parties should not ignore pre-arbitration dispute resolution requirements.

The court of appeal agreed with the lower court in rejecting CCG's argument that it had been denied procedural fairness. Although CCG had received proper notice of the proceedings and participated in the arbitration from the start, CCG argued that it had been denied procedural fairness and was unable to present its case because:

- the tribunal had developed its own novel theory;
- the tribunal had relied on an argument raised by Ambatovy for the first time in reply; and
- the costs award deprived it of a fair opportunity to present its case.

The court of appeal found that CCG was attempting to reargue the merits of its case and its arguments did not meet the high bar required to constitute a denial of procedural fairness. On the issue of costs, the court noted that the tribunal had discretion over costs under the ICC Rules and was entitled to consider which party was the winner. CCG did not demonstrate that it had been prevented from presenting its case on costs or that the decision was the result of an error in principle.

CCG argued that the tribunal's award had resulted in Ambatovy being granted double recovery, which constituted an unfair penalty contrary to Ontario public policy. The tribunal ruled that CCG had forfeited certain tranche payments owed by Ambatovy if CCG met certain milestones, while also awarding Ambatovy liquidated damages due to delays in project completion. The application judge rejected CCG's argument that the tribunal had compensated Ambatovy twice for delays in the project. The court agreed that the characterisation of the tranche payments as bonuses (which were forfeited when the project milestones were not reached) was appropriate and that there had been no double recovery. The court held that the tribunal's award did not violate public policy, nor did it offend local principles of justice and fairness in a fundamental way.

2. Lin Tiger Plastering Pty Ltd vs. Platinum Construction (Vic) Pty Ltd: decided by Supreme Court of Victoria, Australia

Lin Tiger Plastering Pty Ltd **(Lin Tiger)**, a plastering and framing supplier, entered into a sub-contract with Platinum Construction (Vic) Pty Ltd **(Platinum Construction)**, a commercial builder, to perform works on two Melbourne properties.

The terms of the sub-contract contained a layered dispute resolution clause. One clause contemplated that disputes between the head-contractor and sub-contractor would be deemed to be a 'domestic building dispute' and determined by VCAT, while another provided if disputes between the builder and sub-contractor would be determined by a single arbitrator. It is important to note that s 14 of the *Domestic Building Contracts Act 1995* (Vic) (the **DBCA**) provides that any term in a domestic building contract or other agreement requiring a dispute under the contract to be determined by arbitration is void.

A dispute arose between the parties under the sub-contract. Platinum Construction proceeded by commencing arbitral proceedings. An arbitral tribunal was constituted by a single arbitrator. The tribunal ruled that it had jurisdiction to determine the dispute, and the arbitration agreement in the sub-contract was valid and unaffected by the operation of the DBCA.

Lin Tiger filed an application in the Supreme Court of Victoria under s 16(9) of the *Commercial Arbitration Act 2011* (Vic) (the **CAA**) seeking a determination that the arbitral tribunal did not have jurisdiction to determine a sub-contracting dispute. This provision provides that if the arbitral tribunal rules (as a preliminary question) that it has jurisdiction, any party 'may request, within 30 days after having received notice of that ruling, the Court to decide the matter'.

The primary issue in the case was whether Lin Tiger undertook 'domestic building work' within the meaning of the DBCA. If it undertook domestic building work, the dispute in relation to the work would fall within the definition of a 'domestic building dispute' under the DBCA (as s 54 of the DBCA provided that a domestic building dispute can include a dispute between a builder and a sub-contractor). Relevantly, the *Domestic Building Contracts Regulations 2017* (Vic) (**Regulations**) excluded insulating and plastering as 'building work' for the purposes of the DBCA. Lin Tiger asserted that the work under the sub-contract extended beyond plastering and insulation work and satisfied the definition of 'domestic building work' (meaning that the dispute could not be determined by arbitration). Platinum Constructions on the other hand asserted that the work was only insulating and plastering work, and therefore work excluded by the operation of the DBCA – meaning the dispute under the sub-contract could be determined by arbitration.

In order to consider the application brought by Lin Tiger, the Court had to first determine whether the application under s 16(9) of the CAA (being the 'request…[for] the Court to decide the matter') was a hearing de novo, or a review of the ruling of the arbitral tribunal on jurisdiction.

The Court started by observing the now well-established principle (derived from recent authorities) that the legislative regime under the various arbitration legislation in Australia (including under the *International Arbitration Act 1974* (Cth), and the Commercial Arbitration Acts within the States and Territories in Australia), is for 'minimum curial interference' with arbitral proceedings – and to provide maximum court support and assistance for arbitral processes. In this context, the Court considered that a de novo standard of review under s 16(9) of the CAA would contemplate a complete rehearing which, at first sight, seems to run contrary to the policy of minimal curial interference.

In the absence of any Victorian or Australian authority directly on point, the Court examined relevant jurisprudence from other countries (which has interpreted the equivalent of s 16(9) of the CAA on the basis that it is a Model Law provision). Having examined authorities from Hong Kong, Singapore, New Zealand and England, and learned authors, Croft J held (at [40]) that a hearing de novo is the correct standard of review to be applied under s 16(9) of the CAA when an application is made by a party seeking a review of an arbitral tribunal's decision to rule on its own jurisdiction.

Having determined the applicable standard of review, the Court proceeded to consider (by way of rehearing, on the evidence put before the tribunal) whether Lin Tiger undertook 'building works' within the meaning of the DBCA. The Court held that on the evidence before it, the totality of the works undertaken by Lin Tiger was properly regarded as plastering works only. As this work was excluded from the definition of building works under the DBCA, the Court held that the DBCA did not apply, and the dispute was to be determined by arbitration.

3. Broken Hill City Council v Unique Urban Built Pty Ltd: decided by Supreme Court of New South Wales

A dispute arose between the Broken Hill City Council (the Council) and Unique Urban Built Pty Ltd (Urban) in relation to a contract to upgrade the Broken Hill Civic Centre (the Contract). The Contract was based on a standard form contract published by Standards Australia.

The Council alleged that Urban had variously breached the Contract, including failing to complete the works with due diligence and within the stipulated time frame, failing to carry out the works to the required standard and failing to rectify defects and deficiencies in the works.

The Contract contained a dispute resolution clause which provided for any disputes between the parties in connection with the subject matter of the Contract to be finally resolved through arbitration (the Arbitration Agreement). The Contract also provided that, failing agreement by the parties, the arbitrator shall be appointed by the President of the "Australasian Dispute Centre" (which is a non-existent organisation) and for the arbitration to be conducted under the Rules of the Institute of Arbitrators, Australia (now known as the "Institute of Arbitrators & Mediators Australia").

The Council commenced Court proceedings against Urban in relation to its dispute. Urban sought an order under section 8(1) of the Act (which is modelled on Article 8(1) of the Model Law) for the Court to refer the parties to arbitration in accordance with the Arbitration Agreement.

In response, the Council argued that the Court should not make such an order on the basis that the Arbitration Agreement was inoperative, as it was dependent upon the mechanism for the appointment of an arbitrator and that there could be no agreement to arbitrate if the mechanism "misfires".

Urban argued that the Arbitration Agreement could stand in its own right and that if the mechanism for the appointment of an arbitrator fails, then the Court is empowered to appoint an arbitrator under section 11(3)(b) of the Act (which is modelled on Article 11 of the Model Law).

The issue before the Court was whether the Arbitration Agreement was inoperative such that the Court should not make an order under section 8 of the Act and refer the parties to arbitration.

Justice Hammerschlag held that the Arbitration Agreement was not "inoperative", notwithstanding that there was a defective mechanism for the appointment of an arbitrator.

His Honour emphasised that the Act distinguishes between an arbitration agreement within the meaning of the Act and an agreement on arbitral procedures.

If an arbitration agreement is inoperative, null and void or incapable of being performed, then the Court cannot refer the parties to arbitration pursuant to section 8(1) of the Act. However, the same cannot be said for a defective agreement on arbitral procedures, such as, in this case, a defective mechanism for the appointment of an arbitrator.

Here, the clause at issue was an agreement on an arbitral procedure rather than the arbitration agreement itself.

His Honour determined that section 11 of the Act clearly empowered the Court to appoint an arbitrator in the absence of agreement by the parties or where the procedure for the appointment of an arbitrator fails. However, while the Act steps in to provide a procedure for appointing an arbitrator or remedying a defective procedure, it will not step in to remedy a defective arbitration agreement.

His Honour also noted that the parties did not place importance upon any characteristics of an arbitrator appointed by the President of the Australasian Dispute Centre. This could be contrasted with Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd [2008] SGHC 229, where the Court, in that decision, ascribed some importance to the fact the arbitrator was to be, or appointed by, a specific person or specialist.

Finally, His Honour indicated that he failed to see how reasonable persons in the respective positions of the Council and Urban intended that their agreement would fail because of the non-existence of the appointing authority.

Ultimately, the Court referred the parties to arbitration pursuant to section 8(1) of the Act.

***

"The theory of economics basically says there has to be economic growth because of trust. But despite the trust, disputes arise and it is through institutional arbitration that disputes can be solved."

Dr. Amartya Sen,
Nobel Prize Winner

RE⇨⇦ACT

3 - Day Certified Training Course

on

"DOMESTIC AND INTERNATIONAL COMMERCIAL ARBITRATION"

NEW DELHI - 22nd to 24th November, 2018
MUMBAI - 26th to 28th November, 2018

THANK YOU FOR YOUR FEEDBACK!

Very good performance and faculty members. Explained the concepts very well.

PARTICIPANT: Mr. Rajani Kanth

I really love to participate in the Seminars, Conferences organised by ICA as they are really helpful, contemporary and oxygenated.

PARTICIPANT: Ms. Arti Singh

I have attended ICA Seminars earlier. This year's Certified Training Course was most perfectly planned and diligently conducted. I am most grateful to ICA for conducting this Training Course.

PARTICIPANT: Mr. Mohan S Panse

It was a great learning experience. Hope to attend more of such training programs to update my knowledge.

PARTICIPANT: Mr. N M Chandani

5 stars for this training course, 100% satisfied. Best on arbitration so far.

PARTICIPANT: Mr. Bhaven Shah

In all it was very good. The best of the Training Course organised by ICA

PARTICIPANT: Mr. Mahendra S Uttarrwar

Very well organised and arranged program. Training material supplied is excellent.

PARTICIPANT: Mr. Mangesh S Gangalwar

Administration was very good as was the management of the Training course.

PARTICIPANT: Dr. Swaraj Puri

A very well organised event. My compliments to the staff of ICA. The reception, seating arrangements, scheduling of events, materials provided, breaks and refreshments were all of a very high quality. Each aspect seems to have gone into detail. My compliments.

PARTICIPANT: Brig. Neeraj Parashar

It was nicely organised program by ICA. The hospitality was outstanding. Lunch and refreshments served were very delicious. I want to convey my sincere thanks to organisers for the program. Heartiest congratulations for nicely organising and conducting the training course. All the best.

PARTICIPANT: Mr. Ram Lakhan Singh

READERS' WRITE

In pursuance of its constant endeavour to disseminate information on arbitration matters, Indian Council of Arbitration (ICA) intends to facilitate responses to the queries of its members/readers pertaining to arbitration process, laws, rules etc. Accordingly, members/readers may send their queries to the Editor, ICA Arbitration Quarterly at **editor.ica@ficci.com** Dr. P.C. Markanda, Member of Editorial Board, ICA has kindly agreed to respond to such queries as received by the Editor, ICA Arbitration Quarterly only, which would then be uploaded on the ICA's website **www.icaindia.co.in**

Note: *Indian Council of Arbitration/Editor of the ICA Arbitration Quarterly Journal has the sole discretion to accept/reject the queries received or publish it with modification and editing, as it considers appropriate.*

MEMBERSHIP DATABASE UPDATION FORM

(Your membership no.....)

PLEASE FILL THE FORM IN BLOCK LETTERS

Full Name: Dr./Mr./Ms/ .....

.....

.....

Address:.....

.....

.....

.....Pin .....

Occupation .....

*Phone/s: (Office) .....(Residence) .....

Mobile: .....

Email:*.....

***Mandatory under the Rules**

Kindly fill the ICA Membership Database Updation Form and send the same at **membership.ica@ficci.com** or to the **Joint Director, Indian Council of Arbitration**, Federation House, Tansen Marg, New Delhi 110001

NOTES

NOTES

NOTES

Articles Invited for

ICA ARBITRATION QUARTERLY JOURNAL

Guidelines for Authors

1. Articles on the issues and areas of concern in the field of arbitration, including issues relating to domestic, maritime and international commercial arbitration are published in the ICA Arbitration Quarterly Journal (Journal).
2. The article must be original contribution of the author.
3. The article must be an exclusive contribution for the Journal.
4. The article must not have been published elsewhere, and must not have been or must not be sent elsewhere for publication, in the same or substantially the same form.
5. The copyright of the articles, if published in the Journal, shall vest with the Indian Council of Arbitration.
6. Articles go through a review process and Indian Council of Arbitration/the Editor of the Journal has the sole discretion to accept/reject an article for publication in the Journal or to publish it with modification and editing, as it considers appropriate.
7. The article shall be sent to the Editor, ICA Arbitration Quarterly Journal, Indian Council of Arbitration, Federation House, Tansen Marg, New Delhi-10001 and mailed to editor.ica@ficci.com
8. The article shall be accompanied by a 'Declaration-cum-Undertaking' from the author(s) as under:

Declaration-cum-Undertaking

1. I, Mr./Ms./Dr./Prof....., declare that I have read and understood the Guidelines for Authors.
2. I affirm that:
   a. the article titled "....." is my original contribution and no portion of it has been adopted from any other source;
   b. this article is an exclusive contribution for ICA Arbitration Quarterly Journal and has not been / nor would be sent elsewhere for publication;
   c. the copyright in respect of this article, if published in ICA Arbitration Quarterly Journal, shall vest with the Indian Council of Arbitration;
   d. the views expressed in this article are not necessarily those of the Indian Council of Arbitration or the Editor of the Journal.
3. I undertake that I:
   a. comply with the guidelines for authors;
   b. shall abide by the decision of the Indian Council of Arbitration, i.e., whether this article will be published and / or will be published with modification / editing;
   c. shall be liable for any breach of this 'Declaration-cum-Undertaking'.

(Signature)

ISSN: *2456-9801*

Indian Council of Arbitration

Federation House, Tansen Marg, New Delhi – 110 001
Ph.: 91-11-23738760-70, 23319849, 23319760, Fax: 23320714, 23721504
E: ica@ficci.com, W: www.icaindia.co.in