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FROM THE
PRESIDENT'S DESK

As India jumps 14 places to secure the 63rd position in World Bank's Ease of Doing Business 2020 report owing to its sustained business reforms, the quest for making India as the hub of International Arbitration and the creation of a vibrant ecosystem for institutional arbitration has stayed to be the foremost priority of our Government. However, the challenges brought by the Novel Coronavirus disease has indeed devastated human lives and livelihoods, posing an unclear picture of normalcy. In the midst of this health and economic crisis the pandemic has given rise to a new way of working! The Government of India including our Judicial System and other private agencies have been using different platforms offered by digital technology to support seamless functioning. The same has impelled us towards the path of achieving our goal to compete with other jurisdictions like London, Paris, Geneva, Singapore and New York as a global arbitration hub.

Indian Council of Arbitration has likewise adopted digital technology to empower its members with facility of video conferencing platforms like Microsoft Teams, Zoom, WebEx etc. to conduct the arbitration proceedings. In addition to this, the Council in its quest to provide continuous value to its stakeholders has also conducted a series of informative Webinars. These webinars were aimed to discuss the Arbitral Developments across the globe as well as the changing dynamics of India's International Arbitration regime. The panellists in these webinars shared unique insights and perspectives on strategies for effective conduct of arbitration proceedings and steps to make India as the preferred seat of arbitration.

The current situation being the new normal should not deter us towards our aim of establishing a vibrant eco system for arbitration in India. Our inexorable efforts in doing the same along with your support and cooperation during this period shall help ICA go long way in achieving its mission!

Have a delightful and an enriched Reading!

N G Khaitan

N. G. KHAITAN
President ICA

COULD AN ARBITRAL AWARD RENDERED BY AI SYSTEMS BE RECOGNIZED OR ENFORCED? ANALYSIS FROM THE PERSPECTIVE OF PUBLIC POLICY

Juan Jorge
Partner, Marval, O'Farrell & Mairal

QUESTIONING ABOUT THE (INEXORABLE?) FUTURE

Could artificial intelligence (AI) carry out decision-making? Is it just a matter of time? Will AI replace human arbitrators? Further, will emotional intelligence always trump AI, or will AI enhance the arbitral process?

Despite the topicality of the subject, the arbitration rules remain silent about AI. However, there is also no express provision regarding the human quality of arbitrators. Does this open the door to AI? In particular: should the recognition or enforcement of an award rendered by these systems be denied on the basis of public policy grounds contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)?

Public Policy under the New York Convention: Importance of Global Values

According to article 5 (2) b of the New York Convention, the competent authority in the country where recognition and enforcement is sought may refuse them, if the arbitral award is contrary to the public policy of his or her country.

To answer whether the use of AI for decision-making would imply a violation of such public policy, it is worth starting from the premise that public policy is a variable concept, which continuously evolves to meet the changing needs of political, social, cultural and economic contexts.

> The notion of public policy has been considered vague and hard to define. Despite that, to overcome this inconvenience we may resort to globalization, which first appeared as an

economic phenomenon, but has later been evidenced in numerous aspects, including political, cultural, legal and ideological concepts. Thus, we can speak of global values that prevail in a global society and that influence the evaluation of international public policy at the time of deciding on the recognition and enforcement of foreign arbitral awards. In fact, assuming that countries share some essential values, it seems difficult to imagine a successful defence based on public policy since there will be a coincidence between the prevailing conceptions in the country of the seat of the arbitration, the country whose law is applicable to the substance of the dispute and the country where the recognition and enforcement of the foreign arbitral award is intended.

Furthermore, the existence of global values may be one of the reasons for which there are relatively few decisions in which public policy is debated as grounds for refusing recognition or enforcement of foreign arbitral awards. In addition, we believe that the existence of global values recognized by most countries may explain why some awards set aside in the country of the seat of the arbitration were later enforced in other countries. When these global values are not respected by the judge of the seat of the arbitration, such as by annulling an award based on conceptions deviating from these values, then the "international community" allows its enforcement in other countries. Note that this case law arose only in the mid-1990s, precisely when globalization was at its peak. Interestingly, there is no record of judgments having enforced annulled awards during the first decades of application of the New York Convention.

Within these global values, party autonomy is of particular importance, as it is a cornerstone of arbitration. This is reflected in the need for relying on a valid arbitration agreement to get the parties to subject themselves to arbitration, and in the fact that party autonomy prevails over most arbitration rules, provided that the essential principles of due process are respected.

AI and Decision-Making in Arbitration

Remembering that the principles of public policy reflect the needs and values upheld by a society at a given time, it should be noted that AI applied to decision-making is still at an embryonic state, and therefore some obstacles may appear in the way of recognition or enforcement of an award rendered by those systems. In fact, arbitration practitioners could raise ethical reasons because of the absence of human qualities (e.g.: emotions) or due process defences based on the so-called "black box", which refers to the impossibility of directly explaining the results or predictions of the AI system.

Emotions such as empathy, or even anger, play an important role in legal decision-making. In addition, it seems that we assume that there is an intrinsic value in being heard by a human being, who is subject to duties of justice and respect. However, relativizes this point: it

is no less true that such emotions often lead to nonsense and resolutions contrary to the ideal of justice.

Despite a certain scepticism, some authors consider that if the applicable rules do not expressly prohibit AI systems to act as arbitrators, and there is an agreement of the parties regarding those, the public policy defence would not be successful in refusing recognition of an arbitral award. Others go further and relativize any prohibition that might exist in this sense: It has been said that if the parties trust AI, then who has authority to stop them from using it, particularly in arbitration where freedom of choice is paramount? Ultimately, all responses will depend on the reception of local courts to technology, and the importance attached to a global value such as party autonomy.

An interesting paper carried out on the basis of the Korean legal regime concluded that an arbitral award rendered by AI could face certain inconveniences (or at least queries) for reasons of public policy, given that the Korean Arbitration Act, subsection 36(2)2(b), states that the court may set aside an award that "is in conflict with the good morals or other public policy of the Republic of Korea."

Ways forward

As can be seen, to use AI systems as arbitrators, normative certainty is extremely important. For AI to be successfully integrated in the international arbitration system, its definition should be crystallized and thus be offered as an option devoid of practical and theoretical uncertainties.

As Kemelmajer de Carlucci points out, novelty and temporariness characterize an increasingly complex society to which, in order to be able to adapt, the Law must be more elastic and receptive to interference from different variables.

> At this point, we are faced with two possible paths: the creation of an avant-garde legal framework for arbitration and AI; or the modification of existing international treaties (in addition to national legislation and arbitration rules). It seems that this last option is not the most appropriate, especially with respect to the New York Convention.

Rightly, in 2006, the UNCITRAL Working Group II (Arbitration) warned that "formally amending or creating a protocol to the New York Convention was likely to exacerbate the existing lack of harmony in interpretation and that adoption of such a protocol or amendment by a number of States would take a significant number of years and, in the interim, create more uncertainty". Therefore, UNCITRAL prepared a recommendation concerning the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention. Here, the soft law technique triumphed over a hard law solution that probably would have not prospered.

Should an AI regulation follow the same path? Instead of modifying the New York Convention, some authors propose certain amendments to the UNCITRAL Secretariat Guide on the New York Convention, as "intends to be a more dynamic tool that allows for the adjustment of the provisions of the Convention, to the mutable necessities of the international arbitration system and its changing application by local courts".

Although the future is unknown, an unavoidable certainty appears to emerge: AI must be studied and regulated, and either admitted or prohibited (totally or partially), bearing in mind both justice and efficiency.

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ONLINE ALTERNATIVE DISPUTE RESOLUTION IN NEW NORMAL – AN AGE OF SETTLEMENT

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A major advantage of Alternative Dispute Resolution (ADR) is the ability to select your choice of "Judge." Both the parties can take full advantage of the same and select arbitrator, conciliator and mediator who has the expertise and would effectively resolve the dispute between the parties. The impact of Covid-19 thereby has caused an unending period of lockdown of all sectors which will definitely bring most of the parties to the settlement which may be best addressed by a skilled Mediator/Conciliator and an Arbitrator whom they trust and are comfortable working with. This is a crucial time for every Mediation/Conciliation and Arbitration where parties to the dispute should open /frank with the mediator/conciliator and the arbitrator, and communicate their goals and object to settle the case. The Mediator/Conciliator and the Arbitrator will make every attempt to reach the desired goal favourable to all. An advocate addressing the case for his client has to bring a definite solution within a limited time in order to successfully settle the case. The Mediator/Conciliator and the Arbitrator needs to be trustworthy enough to consider equitable settlement between the parties.

Selection of Mediator/Conciliator and the Arbitrator on case to case basis shall be done keeping in mind the expertise of the Mediator/Conciliator and the Arbitrator in a particular area. If you are not personally familiar with a suggested mediator/conciliator and the Arbitrator, research it with your colleagues as to whether the Mediator or the Arbitrator is effective? A Mediator/Conciliator as well as the Arbitrator should be a good listener, a representative of the parties, and use creativity when arriving at a settlement.

For mediations and conciliations, speak with a proposed Mediator/ Conciliator beforehand. Mediators / Conciliators welcome these conversations, since it allows you to select someone you are comfortable working with. Always submit a Pre- Mediation Brief to enable the mediator/Conciliator to learn the facts, disputed issues, and settlement posture.

For video mediations/conciliations, the Pre-Mediation brief can simply be e-mailed prior to the hearing date to the Mediator/Conciliator. The brief is even more important for mediations/conciliations over video conferencing, since exhibits and documents can be reviewed in advance, making the Mediator and the Conciliator updated with facts and circumstances of the case.

Good advocates are well prepared, and believe in their arguments. In mediation and conciliation, there is no judge or jury to impress. By keeping an open mind, the mediation/conciliation is an opportunity to learn about your case, both from your adversary/opponent side, and from the side of the Mediator/Conciliator. Successful Mediations and Conciliations make a more effective advocate for the clients and resolving disputes through this mechanism develop the personal and professional skills of and advocate to address complicated legal issues.

Mediations/conciliations and arbitration through video conferencing makes it easier for your clients to address their grievances. A client can join the meeting remotely, or go to their attorney's office to participate. Video technology allows an attorney and the client to be placed in virtual breakout rooms, where they can converse privately, while the Mediator/Conciliator and the Arbitrator communicates with the other attorney. The sphere of virtual mediations, conciliations and Arbitrators can continue even when physical mediations, conciliations and arbitration will resume saving the carrier significant travel expenses. Even if a case does not settle through online alternative dispute resolution, it is possible to learn the opponent's argument by recording the same, and get a simple evaluation of the strengths and weaknesses of the case. In the current lockdown situation, Law firms have mobilized their attorneys and staff to telecommute and conduct the business of the law remotely from their homes.

But the question remains: "What is the legal community to do with the thousands of pending cases during the suspension of court appearances and the closure of the usual court houses during this unprecedented situation of lockdown due to covid-19 pandemic?" Cases ready for trial are in an indefinite state of suspension. The emergency e-filling of only most urgent cases do not consider the other cases both civil and criminal which are equally important from a client point of view. The entire socio-economic system will gradually collapse if Courts only give importance to most urgent cases to be listed and heard simultaneously by leaving aside other equally important cases in a situation where we do not know when ordinary functioning of the Courts shall resume in full force. Even listing of very few matters can only be done through virtual interface with limited number of Judges sitting and taking up those matters over online. Otherwise the entire current virtual interface will be disrupted and result to link failure. In India, due to this situation of continuous lockdown, it has been observed through online courts that it is not as such convincing approach to file matters through e-method system and conducting proceedings in High Court or other District Courts or Magistrate Courts or City Courts. In most of the cases, proceedings have faltered due to technical failure over the internet beyond the understanding of the Jury as well as the advocates due to lack of training in this regard. Suddenly adapting to an online system with no guidance beforehand and without skilled training to conduct E-Courts will result in a more insecure mode of dispute resolution system rather than having a positive approach. Our Information Technology and securing electronic records through E-Courts and E-filling of cases are neither secure nor safe for attribution,

acknowledgement and dispatch of electronic data through a secure interface. Even the Uniform Resource Locator of the E-Courts is not in a position to upload cases in bulk and start multitasking of conducting cases through online method of many numbers of Courts at one time. Thus, the e-filing system is practically in a state of suspense and will be understaffed as well.

In the current situation, the combination of ADR and technology can provide an efficient and cost-effective alternative to the inertia of inaction where settlement will play a major role. All we need to be proactive by thinking outside the box. The following suggestions may be accomplished by video conferences or telephonic hearings. Mediation and arbitration have long been recognized and utilized as an efficient and cost-effective means of resolving civil disputes in a non-emergent traditional ADR since ages based on Gandhian Principles in our Indian community in rural villages.

With continuous development of video conference technology and current situation of the closure of the courthouses, some directives through online alternative dispute resolution need to be incorporated for keeping the legal system awake. Of course, the parties can also agree to submit limited issues to an arbitrator and mediator/conciliator where there is a suitable chance of success through amicable settlement. The utility of online ADR shall also assist many advocates in these uncertain times to earn their livelihood and keep their hope in the Legal profession. Civil litigators cannot properly service their clients, nor can they make payroll, by merely pushing paper and waiting for the courthouse doors to reopen.

They need to take action to keep their cases moving and to push their cases toward resolution. Economic and social isolation is upon us. Video conference technology now allows participants in remote locations to simulate a secure virtual joint session hearing room where the attendance of all participants is known to each other. The technology also allows for the secure transmission of limited documents such PowerPoint presentations, cam-scanner documents, abode acrobat documents, word documents and photographs and the like. Submissions may be shared with, recorded and downloaded by, all participants by keeping confidentiality.

Needless to say, improvements in technology have made remote conferencing an option for attorneys and parties who cannot travel to the hearing site. Today secure video conferencing is no longer an option. It is a necessity. The transition from in-person hearings to "virtual" hearings can be seamless. As ordinarily trained in the technology, I look forward to being able to do my part in keeping the business of the law moving forward during this "new normal" with an approach of settlement through ADR in which we live. Indeed, the utilization of this technology during the coronavirus crisis may be the only option for the legal community to move ahead with the business at hand.

To support our system, our internet world is flooded with huge number of secure electronic applications suitable for scheduled video conferencing, web chatting, web hearing and e-learning such as Skype, Zoom, Hangout, Google Duo, Webinar and WhatsApp to name the few. So, let's welcome and start the new normal for a better tomorrow.

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HYBRID DISPUTE RESOLUTION MECHANISMS – SCOPE AND ADEPTNESS IN DIFFERENT JURISDICTIONS OF THE WORLD

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In today's era, the mechanisms of resolving disputes are tremendously growing aimed at maximizing satisfaction to the parties. With the increasing globalization and international commercial transactions, ensuring amicable relations between parties and resolution of disputes in the most efficacious manner is growing primary concerns for the disputants. Hence, it comes into prominence and great demand the farther end of the spectrum which is highly flexible and permits direct consultation between the parties to arrive at a collaborative settlement. Court litigation is at the other end of the spectrum and is the complete opposite. Between these two ends of the spectrum is a wide range of dispute resolution processes that are developing and are being adopted to deliver the most efficient manner of resolving disputes.

The rampant increase in international trade and commerce has attracted several legal disputes and this has led to the birth of a vast private framework of dispute resolution that is an alternative to the complex judicial systems. A highly successful illustration of such a conceptual scheme is the creation and harmonization of arbitration forums that have been widely recognized all over the globe. However, there is still a need for the development of mechanisms that take into consideration the possibility of disputes ranging in terms of complexity, duration, and other

parameters. Advancements in this regard have been ever-flowing. In the last decade, a variety of "mixed-mode scenarios"[1] have been adopted that are commonly termed as hybrid forms of dispute resolution. These modes combine adjudicative with non-adjudicative dispute resolution methods to tailor the most suitable procedure for certain disputes. They attempt to minimize the complexities and ease the process of dispute resolution.

This paper aims to highlight such hybrid mechanisms; more particularly, the framework of the two most dominant international commercial dispute resolution mechanisms – Arbitration and Mediation. Three hybrid forms of these two have seen development in the recent past. They are 'Arbitration – Mediation', 'Mediation – Arbitration', and 'Arbitration – Mediation – Arbitration'. They differ in the procedure that is to be enacted first.

Part I of the paper will emphasize what these processes entail and how they work. Part II of the paper aims to analyze the merits associated with each hybrid approach and will also focus on the preferred processes that should be adopted by parties among the various approaches. The author will thereafter in part III examine the risks associated with this hybrid model of dispute resolution that outweigh the short-term benefits attained by the parties in part II. Subsequently, in part IV, the author will keenly examine the scope and adeptness of these hybrid mechanisms in various jurisdictions around the world with special emphasis on India.

I. The interplay between Arbitration and Mediation as a viable option in Dispute Resolution

Preserving the relationship between the parties and maintaining confidentiality have become concerns of high priority for parties engaged in dispute resolution. Hybrid approaches to dispute resolution stem from a natural outgrowth to the existing modes of dispute resolution to cater to the needs and interests of the parties. To further understand the reasons that have led to the need to adopt hybrid approaches to mediation and arbitration, it is imperative to understand the nature of the two mechanisms. The only similarity that can be traced between the two modes is its private nature and confidentiality that is assured to the disputing parties.

Though arbitration is termed as a private mode of resolving disputes, it is essentially adjudicatory and is presided over by a neutral third party which gives the decision, the same being final and binding. It mirrors the litigation process to a certain extent in terms of procedure, especially when compared to mediation. Mediation on the other hand is a facilitated negotiation between the parties and has no adjudicatory element to it. A collaborative settlement is reached at by the parties themselves thus ensuring maximum satisfaction to them as their interests are best met. However, both these modes have shortcomings of their own and this is why hybrid processes come into the arena.

Hybrid dispute resolution is opted by parties where the application of either of these methods is unlikely to resolve all the issues of a particular dispute in finality.[2] There are several variations of the arbitration and mediation model in the domain of international dispute resolution thus ensuring the parties to tailor the mode of resolving disputes best suiting their needs. Some of such developed forms have been discussed as under:

[1] *Stipanowich, Fraser. The International Task force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases (2017)*

[2] *Blazo Nedic, "Med - Arb or Arb - Med? Exploring Arbitration - Mediation Interplay in Resolving Complex Disputes" (2017)*

Med – Arb

In the simplest terms, Med-Arb can be defined as an amalgamation of the processes of mediation and arbitration. Parties first undergo the mediation process, wherein an attempt to reach a collaborative settlement is made in the presence of a neutral mediator. If the mediation fails, the mediator takes upon the role of an arbitrator and the dispute enters the arbitration phase which ends with a 'final and binding' award passed by the arbitrator. Taking the dispute to arbitration is contingent solely on the success of the mediation. It is a blend of an informal collaborative approach while promising the structure and certainty of an arbitration proceeding to optimize the satisfaction of the parties yet it prevents complete chaos.

If the parties arrive at a settlement in the mediation phase, the mediator takes upon the role of an arbitrator and the agreement settlement arrived at by the parties takes the form of an arbitral award which is final and binding. Med- Arb is best understood as a 'mediation with a muscle'[3] concerning how certain shortcomings of the process of mediation are compensated by the strengths of the arbitration process. It has been observed that most Med – Arbs turn into a successful mediation itself without entering the arbitration phase since the parties fear the idea of a third party, who takes the position of an arbitrator, will be deciding the matter entirely, the decision being final and binding.[4] This motivates the parties to not only express their best suited interests but also take the onus of understanding the interests of the opposing party and arrive at a consensus during the mediation. Providing the greater decision control characteristic of mediation, this mode confers upon the parties the ability to have a larger say in the procedure of resolving the dispute,[5] which concludes with a final binding decision being passed. Thus, the crucial demerit in the mediation is of not arriving at a binding decision or leading to an impasse, are well taken care of, in this hybrid approach. Several pitfalls are associated with Med-Arb, which will be addressed in the latter part of the paper.

The Med-Arb framework is adopted and embraced by renowned institutions like the International Chamber of Commerce. To opt for this mechanism, it has to be expressly mentioned and opted for in the arbitration agreement. Model clause D of the ICC Mediation Rules, 2014 provides for this framework by specifically laying down 45 days to arrive at a settlement in mediation failing which the parties will have to finally submit their dispute to arbitration for resolution in consonance with the ICC rules on Arbitration.[6]

Arb-Med

The process of Arb-Med essentially involves two stages. Arbitration is initiated by the parties, during the pendency of which parties can refer the dispute to mediation to reach a collaborative settlement. There are various versions of Arb-Med that are practiced all over the world depending on the particularities of the dispute. One such variation is the 'Sealed Envelope' Arb-Med,[7] where firstly an arbitration proceeding is carried out and an arbitral award is passed by the arbitrator. The award remains sealed and is not revealed to the parties. The parties are allowed to reach a mediated settlement after having comprehended the interests of the opposing parties by way of pleadings submitted during the adjudicative process of arbitration.

Arb – Med-Arb

Arb – Med-Arb, *(hereinafter referred to as "AMA")* just as the name suggests, is a mechanism where the disputants initially commence with an arbitration proceeding, followed by mediation. There is a temporal stay on the initial arbitral proceeding. Depending on the ability and willingness of the parties to reach a mediated settlement,

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[3] *"A different approach to conducting Med – Arb in complex commercial litigation matters" (2011) Alternatives, Vol. 29 no. 3*

[4] *Ross, William H., and Donald E. Conlon. "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration." The Academy of Management Review, vol. 25, no. 2, 2000, pp. 416–427. JSTOR, www.jstor.org/stable/259022.*

[5] *Deekshitha Srikant, Arka Saha, "Amalgamating the Conciliatory and the Adjudicative: Hybrid process and Asian Arbitral Institutions" (2014) Indian Journal of Arbitration Law (Vol. III, Issue 1), pg no 76.*

[6] *"Mediation Clauses - ICC - International Chamber of Commerce." ICC, iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/.*

[7] *Blazo Nedic, "Med - Arb or Arb - Med? Exploring Arbitration - Mediation Interplay in Resolving Complex Disputes" (2017)*

the next course of action follows. If no settlement is arrived at by mediation, the parties can continue with the arbitration. If the parties arrive at a negotiated settlement, the mediated settlement agreement is recorded as a consent award by the arbitrator. The consent award is generally enforceable in approximately 150 countries under the New York Convention, subject to local legislation.[8]

Singapore International Arbitration Centre *(hereinafter referred to as "SIAC")* and the Singapore International Mediation Centre *(hereinafter referred to as "SIMC")* in 2014, which are one of the few institutions that provide a specific Arb – Med-Arb Protocol *(hereinafter referred as "AMA Protocol")*. This protocol contains roughly 15 provisions concerning AMA proceedings.[9] This proves to be yet another manner in which the satisfaction of the parties can be maximized in resolving the dispute and is essentially time-efficient since parties do not delve in filing interlocutory applications that frequently arise in arbitrations and focus more on the crux of the merits pertaining to the matter. According to the 2018 Global Pound Conference Series report, combining an adjudicative procedure along with a non-adjudicative procedure finds itself to be in the top three ways in which international commercial disputes can resolve.[10]

II. Which one of these hybrid approaches is better?

It is a common question that is often brought up concerning whether there are any major differences in the processes of AMA and Med-Arb and why AMA should be opted as if the Med-Arb paradigm seems to be quicker, less financially draining and more efficient for the disputants. It is stated by several professional mediators with sufficient experience in mediation that parties shouldn't opt for mediation before arbitration. Commencing the dispute resolution procedure by arbitration helps the parties to attain a clear understanding of the opponent's case thus increasing the capacity and willingness to negotiate. The rationale supporting this is the need to submit arbitration pleadings before the case enters the mediation phase and hence the scope of the dispute is sufficiently outlined. This also prevents the mediation from being derailed and focuses on resolving the merits of the case effectively.

Another shortcoming that poses to be a criticism against AMA procedures is the lengthy nature of the dispute resolution mechanism that involves a case commencing with arbitration to hoping to mediation to potentially hopping back to arbitration. However, under the AMA protocol as provided by the SIAC and SIMC, the case files and documents are forwarded from the SIAC to the SIMC for mediation.[11] This helps minimize a lot of time and costs that would have been spent in reproducing the same materials.

The AMA protocol launched jointly by SIMC and the SIAC in 2014 is aimed to encourage parties to subject their disputes to a collective arbitration and mediation approach by having certain procedural guidelines.[12] These guidelines ensure that parties have sufficient protection against the defaults committed by opposing parties like non-payment of settled sum amounts. In a situation where one party does not adhere to the

[8] *Singapore International Arbitration Centre, available at: https://www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause*

[9] *Singapore International Mediation Centre, available at: http://simc.com.sg/siac-simc- arb-med-arb-protocol/.*

[10] *Iris Ng, The Singapore Mediation Convention: What does it mean for Arbitration and the future of Dispute Resolution ? KLUWER ARBITRATION BLOG (August, 2019) http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution/*

[11] *Singapore International Mediation Centre, available at: http://simc.com.sg/siac-simc- arb-med-arb-protocol/.*

[12] *Singapore International Mediation Centre, available at: http://simc.com.sg/siac-simc- arb-med-arb-protocol/.*

mediated settlement which takes the form of a consent award, the AMA Protocols save the parties from undergoing the commencement of litigation which would be the third mode of dispute resolution that the case is referred to. Moreover, the AMA Protocol proves to be the most suited guidelines that shall be adopted for hybrid approaches as it eradicates the fears of lack of neutrality and biases that creep in with the arbitrator and mediator being the same person. Hence, impartiality is taken care of in the provisions of the protocol as SIMC and SIAC appoint a mediator and an arbitrator to the same dispute, respectively.[13] This makes Arb – Med-Arb a mode of international dispute resolution which the parties can be confident and satisfied about.

In the case of Heartronics Corporation *v. EPI Life Ltd & others*,[14] the Singapore High Court had to consider an application involving a Med-Arb clause. The aforementioned case involves a License Agreement and Distribution Agreement concerning the sale of certain medical instruments. The parties had a dispute resolution clause in the agreement, however, the plaintiff and the defendants had discrepancies and non-cooperation with each other on grounds of whether the parties were bound by mediation as inferred from the clause in the agreement. To this effect, one of the parties sought to commence court proceedings instead. The implication of this case is such that if the clause had been an AMA clause in the agreement instead of a Med-Arb clause, the dispute would commence with an arbitration proceeding. The reason why this is better for the smooth functioning of the proceeding is that arbitration does not necessitate any form of cooperation between the parties unlike mediation, which is an inherently voluntary exercise. Therefore, after examining the implications of this case, an AMA clause gives the claimant a better control throughout proceedings and prevents unnecessary delay in situations where co-operation lacks.

Considering the intricacies of these hybrid approaches, a noteworthy observation that has been arrived at after witnessing the practical implications of the modes is that in a lot of situations, Arb-Med is preferred to Med-Arb because of the reason that parties are more likely to reveal confidential information during the mediation in the former as the stakes and wish to emerge successful in the arbitration process is faded..[15] This is because the arbitral award is already passed by the arbitrator, sealed and kept away from the knowledge of the parties. Thus, parties carry out the mediation in the most honest element with no fear of bias that could potentially reach the arbitrator/ mediator as the information revealed in the mediation can have no implications on the arbitral award that has already been passed.

III. Reasons for the infrequent use and suggestions

Though these processes seem to have a great impetus in the modes of international dispute resolution in light of being theoretically efficient for parties, a huge chunk of its discourse revolves around how it fails to meet the Principles of Natural Justice. A dogmatic view has been expressed by renowned mediators and arbitrators around the globe voicing their concerns regarding the problematic hybrid approach. Mediation, as a collaborative procedure is infinitely flexible[16] than the adjudicatory process of Arbitration bound by rules and regulations. The

[13] *Singapore International Mediation Centre, available at: http://simc.com.sg/siac-simc- arb-med-arb-protocol/.*

[14] *Heartronics Corporation v. EPI Life Ltd & others [2017] SGHCR 17*

[15] *Deekshitha Srikant, Arka Saha, "Amalgamating the Conciliatory and the Adjudicative: Hybrid process and Asian Arbitral Institutions" (2014) Indian Journal of Arbitration Law (Volume III, Issue 1), pg no 76*

[16] *John Sturrock, Keep Mediation and Arbitration Separate? KLUWER ARBITRATION BLOG (August, 2015) http://mediationblog.kluwerarbitration.com/2015/08/29/keep-mediation-and-arbitration-separate/*

amalgamation of these differences limits the effective combination of the two processes. The difficulties leading to the infrequent use have been discussed henceforth:

The first issue primarily revolves around the idea that in case of a failed mediation in the case of a Med-Arb, or in case of an Arb-Med, the person serving as the mediator in the case assumes the role of the arbitrator as well..[17] An approach of this kind compromises the essence of the processes involved since it requires a mediator to take up an adjudicatory role even though they are usually conditioned to act as a mere facilitator of the communication between the parties.[18] It creates a lack of confidentiality which is an essence of both mediation and arbitration. Although it is considered that this is not a practical issue because of the neutral's dedication to objectivity, structural limitations imposed in the Med-Arb agreement, or a combination of both. However, the bias remains to be potential if not certain.

It creates a three-fold issue - Firstly, the parties resist in sharing confidential information with the mediator knowing that he may turn into an arbitrator and the confidential information might provide a sense of bias in the final order.[19] During the mediation process, it is the reliance on such information with which the mediator facilitates the process, thereby resulting in a settlement; Secondly, the parties may take undue advantage of the mediation session to gain the sympathy of the facilitator who acts in the capacity of the arbitrator and lays a binding agreement;[20] Thirdly, the parties not being privy to other's confidential information are not allowed to rebut the other's claims made during private communication in the mediation. These above-mentioned issues are a direct stroke to the principles of natural justice.

There is also a possibility of a circumstance where the authority is unaware of their own bias, as that is not supported by their conscious decisions. But many scholars are opinionated to the contrary. One such opinion states that it is possible to make the transition from a mediator to an arbitrator, considering that adjudication is necessarily an evidentiary assessment and considering that lawyers are already adept at distinguishing between conversation at mediation and admissible evidence presented at arbitration.[21] Another says that parties to a Med-Arb can overcome informational bias by crafting the Med-Arb agreement in a way that engages pre-agreed limits for the neutral to see privileged and non-privileged information..[22] In *Bowden v. Weickert*[23], it was held that when the case was referred back to arbitration after the parties attempted to settle through mediation, failed, the arbitrator had a duty to remain impartial, and to protect the confidentiality of all mediation communications.

It is due to the risks associated with this lack of confidentiality, that there is infrequent use of this facility in Hong Kong. Parties are not being able to give

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[17] *Deekshitha Srikant, Arka Saha, "Amalgamating the Conciliatory and the Adjudicative: Hybrid process and Asian Arbitral Institutions" (2014) Indian Journal of Arbitration Law (Volume III, Issue 1), pg no 76*

[18] *John Sturrock, Keep Mediation and Arbitration Separate ? KLUWER ARBITRATION BLOG (August, 2015) http://mediationblog.kluwerarbitration.com/2015/08/29/keep-mediation-and-arbitration-separate/*

[19] *https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/*

[20] *https://onlinelibrary.wiley.com/doi/full/10.1111/fcre.12454*

[21] *Leslie Dizgun, "Med-Arb: Crossing the Line" in A Practitioner's Guide to Commercial Arbitration, ed by Marvin J. Huberman (Toronto: Irwin Law, 2017).*

[22] *Lee Akazaki, "Overcoming Bias: Mediation-Arbitration in Canadian Civil Litigation" (2015) at 18, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653461>.*

[23] *2003 Ohio 3223*

their full participation in the mediation phase because that could be potentially used against them in the arbitration. Hence, the lack of transparency in the conduct of the parties is concerning since mediation runs on this principle of maximizing party involvement and satisfaction. Many mechanisms can remedy this situation; like '*overlapping neutrals*' involving different individuals acting in different capacities. The arbitrator is engaged in the mediation process to save the private meeting. It saves time as well as confidentiality. On the other hand, '*plenary med-arb*' is another mechanism that engages a single neutral in both procedures while prohibiting the neutral from engaging in private communication thereby making the neutral rely exclusively on plenary/formal communication and document exchange. This puts ex parte communications outside the scope of the process. Though this has an adverse effect on mediation, however, effectively eliminates the concerns of award contamination.

Furthermore, this points to another demerit - the promotion of 'hiding your agenda'. The lawyers being practitioners fathom the inevitable arbitration should the mediation fail. They apply shrewd gimmicks to the extent that they are not certainly keen on sharing the confidential information and reveal their agenda behind the dispute.

This issue of confidentiality can be resolved if the parties choose to be governed by the Med-Arb opt-out clause wherein the mediation is carried out by a mediator, but when the dispute enters the phase of arbitration in case the mediation fails, the arbitration will be presided over by a new arbitrator, who will have no prior affiliations with the dispute. The key benefit is that parties are assured better neutrality and confidentiality, however, the downfall being that the process turns out to be much more time consuming and expensive since the arbitrator would be a completely new person with no knowledge of the merits of the dispute.

Another demerit of Arb-Med is the weariness. The parties have a 'let's get it over with' attitude after the exhaustive process of arbitration at the first stance and hence the transition from arbitration to mediation is not smooth. The parties are already privy of every fact and circumstance and find it worthless indulging in the same process all over again. Furthermore, a scenario that needs to be thrown light at is one where the parties enter into mediation even after the arbitral award has been pronounced. It is usually when the award is languishing and the winner has difficulty in executing it. The parties traverse through the judicial rung in the hope of having the award considered as bad in law.

This further points towards the demerits of the procedure, the risk of potential bias or potential bias in situations where the arbitrator and mediator is the same person, has generated great discussions in-depth in Hong Kong because of the decision passed in the case of *Gao Hai Yan & Anor v Keeneye Holdings Ltd & Others*[24] (hereinafter referred to as the **Keeneye case**). Commonly referred to as the "wining and dining" mediation case, it scrutinizes whether the process of Arb-Med was in contrast to the principles of fairness in an arbitration proceeding. The court was of the viewpoint that the mediator taking upon the role of an arbitrator in the same case does put a threat to the neutrality of the decision in rendering the award.[25] The rules and enactments of Australia, Brazil, China, Singapore, Hong Kong, India, and the rules of the World Intellectual Property Organisation (WIPO) provide for mediation by arbitrators on the consent of the parties.

[24] *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others, 2011 WL 5506418 (CA), [2012] 1 HKLRD 627, [2011] HKEC 1626[2011] HKEC 1626*

[25] *Claire Wilson, The Arb-Med hybrid in Hong Kong – Much ado about nothing? KLUWER ARBITRATION BLOG (Jan 24, 2014) http://kluwermediationblog.com/2012/02/01/the- arb-med-hybrid-in-hong-kong-much-ado-about-nothing/*

It is also pertinent to note that the parties have an agreement specifically mentioning the adoption of a hybrid form of dispute resolution mechanism. It specifies that the parties have given consent and acts as a defense to the issue of confidentiality. In *Bowden's case (Supra)* the court of appeal of Ohio sixth appellate district Sandusky country, while discussing the innovative and creative ways to further the purpose of alternative dispute resolution through hybrid med-arb mechanisms held that it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process, by allowing a court-appointed arbitrator to function as the mediator of their dispute. The record must also contain - (1) evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails; (2) a written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails; and (3) evidence of whether the parties agree to waive the confidentiality requirements imposed on the mediation process if their disputes are later arbitrated. Furthermore, This agreement of consent must be in plain language and must specify the procedures to be employed. If the parties have not entered into any specific agreement dictating the use of confidential information, the award given by the arbitrator can be termed to be arbitrary and capricious. In *Cellular Operators Association of India and Ors. vs. Department of Telecommunication and Ors.*.[26] it was held that The TRAI has no statutory power of mediation. The TRAI did not say that the parties had agreed for a hybrid alternative disputes redressal mechanism known as MED-ARB or MEDOLA. When such an alternative disputes redressal mechanism is resorted to and a party not only submits itself to its jurisdiction without any demur whatsoever but also seeks to implement a part of the determination immediately, which is in its favor and does not complain thereabout, in our opinion, should not be permitted to question the jurisdiction of this Tribunal at a later stage.

IV. The adeptness of Hybrid mechanism in various jurisdictions:

> Jurisdictions around the world have developed the mechanisms of hybrid dispute resolution. However, to some jurisdictions, this concept is still afresh. In Hong Kong, the culture of mediation is novel.[27] Recently, there has been a boom in the development of mediation, comparatively, due to the Civil Justice Reform (CJR) that mandates civil disputes to be mediation before litigation.[28] Sections 32 and 33 of the Hong Kong Arbitration Ordinance which were made effective in 2011[29] deal with mediation and the appointment of mediators in an arbitral setting if no settlement is arrived at during the mediation phase.

Despite these provisions, it is not a widely-adopted facility and thus calls for active steps to be undertaken to ensure that the fears of bias and confidentiality that are associated are eradicated.

However, the scenario in China is different; with the unprecedented boom in the Chinese economy, evolving modes of dispute resolution are most

[26] *MANU/TD/0148/2011*

[27] *Claire Wilson, The Arb-Med hybrid in Hong Kong – Much ado about nothing?KLUWER ARBITRATION BLOG (Jan 24, 2014) http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/*

[28] *Claire Wilson, The Arb-Med hybrid in Hong Kong – Much ado about nothing? KLUWER ARBITRATION BLOG (Jan 24, 2014) http://kluwermediationblog.com/2012/02/01/the-arb-med-hybrid-in-hong-kong-much-ado-about-nothing/*

[29] *Hong Kong Arbitration Ordinance Cap. 609 (2011)*

welcome to increase efficiency and to ensure that they continue to remain favored business hubs. The arbitral institutions in China have provisions for Med-Arb and remain the only Asian country to continue to use this hybrid mode effectively without many hindrances.[30] The China International Economic and Trade Arbitration Commission[31] is the only arbitral institution that has rules or statutory backing that allow for the arbitral tribunal to carry out the mediation between the parties after receiving the consent of the parties. It is evident from the civil procedure of the Chinese law that mediation has deep roots in the culture of dispute resolution in China. The legal framework of Med-Arb can be found in the Arbitration Law of the People's Republic of China. Article 51 of the Arbitration law confers upon the arbitrators the power to engage in mediation that follows.[32] Further, apart from China, Singapore is one of the most favored hubs of international arbitration. India, on the other hand, is one of the fastest-growing economies and has to take active steps to facilitate the use and adoption of hybrid dispute resolution modes.

As compared to Asia, the growth of Arb-Med in Europe is relatively slow tracked. The Mediation-Arbitration process has been supported well in Asian countries like Singapore, China, and Japan but not greatly adopted in Europe.[33] The reasons for this can be traced back to the framework of the judiciary, attitude of the legal system towards judicial mediation, and various other inferences. Although these hybrid approaches have gained popularity in countries like Switzerland, France, and Germany, the civil procedure legislation is such that it addresses meditation along with litigation as compared to Arb-Med.[34] For instance, the French Code of Civil Procedure, mentions mediation during litigation and does not combine the same with arbitration. Likewise, it is the case with the Swiss Federal Civil Procedure Code.[35] However, the Code of Civil Procedure in Germany does acknowledge Arb-Med. If the parties agree upon a settlement in mediation during arbitration, the proceedings end there and then in Germany. Similar to the AMA Protocol as launched by SIAC and SIMC, depending on the choice of the parties, the arbitral tribunal is asked to record the settlement agreement in the form of an arbitral award.[36] An empirical study by a German scholar proves that owing to the reason that judges in Germany often play the roles of being a judge as well as a mediator, to “switch hats”[37] is not uncommon and is not a threat to the fairness of the proceedings if the arbitrator and the mediator is the same person in the Arb-Med process. This is due to the rampant practice of mediation along with litigation in Germany, which is an interesting perspective to view the debate surrounding bias in the hybrid approaches.

The situation in India is very different as compared to other jurisdictions. Being a common-law jurisdiction, it strikes completely in contrast with the judicial

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[30] Deekshitha Sriskant, Arka Saha, "Amalgamating the Conciliatory and the Adjudicative: Hybrid process and Asian Arbitral Institutions" (2014) Indian Journal of Arbitration Law (Volume III, Issue 1), pg no 76

[31] The CIETAC is the oldest and largest arbitration institution in China

[32] Ali, Shahla F., The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities (October 18, 2016). Dispute Resolution International, DRI 119. PP. 119-132, 2016. Available at SSRN: https://ssrn.com/abstract=3216252

[33] Christophe Imhoos, Mediation and other combined ADR clauses: Still a long way towards true recognition and enforcement by Swiss Courts? KLUWER ARBITRATION BLOG (September, 2011) http://mediationblog.kluwerarbitration.com/2011/09/07/mediation-and-other-combined-adr-clauses-still-a-long-way-towards-true-recognition-and-enfoncement-by-swiss-courts/

[34] Weixia Gu, "Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications", (2019), Wash. L. Rev., (Volume 29), pg no 117

[35] Weixia Gu, "Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications", (2019), Wash. L. Rev., (Volume 29), pg no 117

[36] Singapore International Mediation Centre, available at: http://simc.com.sg/siac-simc- arb-med-arb-protocol/.

[37] Weixia Gu, “Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications”, (2019), Wash. L. Rev., (Volume 29), pg no 117

framework than that of Germany. A procedure similar to the German procedure would be regarded as 'highly inappropriate'[38] in India and hence the adoption of this approach in India needs certain active steps to be taken than a mere open mind of the judiciary. It is not the scenario where India has not delved into the discourse on whether Med-Arb and other hybrid approaches shall be adopted. India has a long history attached to these processes.

India's Panchayat Raj system depicts the essence of Med-Arb proceedings, where the disputes were brought before the Panch (the council of five elder members headed by the Sarpanch). In the first attempt to resolve the disputes, the disputants were required to come to a consensus, failing of which, the Panch gives an order that is binding. These orders were backed by social sanctions like ex-communication.

Thereby depicting the essence of Med-Arb. The same is still practiced in rural areas of India. Though India follows the UNCITRAL Model Law which recognizes settlement in arbitration; also, the Arbitration and the Conciliation Act of 1996 recognizes the same in its Section 30 by encouraging the parties for a settlement and termination of arbitral proceedings upon such settlement, yet, more formal recognition is required in India which advocates for different kinds of hybrid dispute resolution mechanisms. Even after amendments to the Act of 1996 making the process speedier and more transparent, mediation has not been formally introduced.

Taking into account the pendency of cases in the Indian Judicial system, from the apex Supreme Court to the trial courts, India must try to adapt to more effective and efficient means of dispute resolution. Concerning the settlement as per section 30 of the act, the Hon'ble SC in **VISA International Ltd. vs. Continental Resources (USA) Ltd.**[39] held that the settlement agreement shall have the same effect as the arbitral award on agreed terms on the substance of the dispute rendered by the arbitral tribunal under Section 30.

The Indian judiciary has, at more than one occasion, expressed their intention of the same in certain cases and acknowledged the effectiveness of the hybrid Med-Arb process..[40] in the recent case of **Cellular Operators Association of India and Ors. vs. Department of Telecommunication and Ors**[41] it was held that the Indian judiciary is intending towards a drastic growth in the domain of dispute resolutions by way of embracing the hybrid approaches. The adoption of such procedures is a must for India, it is advocated that the same is highly beneficial and facilitates a process of ease and comfort.

[38] *Weixia Gu, "Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and Its Global Implications", (2019), Wash. L. Rev., (Volume 29), pg no 117*

[39] *MANU/SC/8347/2008*

[40] *Dr. Priyadarshi Nagda, "Adeptness of MED - ARB in Dispute Resolution" International Journal of Advance Research and Development, (2017) (Volume 2, Issue 3), pg no 51*

[41] *Cellular Operators Association of India and Ors. vs. Department of Telecommunication and Ors (2011)3CompLJ452(TelecomDSAT).*

A certain form of recognition of these processes can be seen by the judicial decision given by the Delhi High Court in 2012 in *Halidram Manufacturing Company Pvt. Ltd. vs. DLF Commercial Complexes Limited*,[42] there was a clause in the agreement between the parties according to which on the event of a dispute, the parties shall settle amicably by mutual discussion failing which the same shall be settled through arbitration. The defendant did not abide by such a clause and moved to the civil court. It was held that the arbitration clause under consideration has another dimension. It would be manifest on perusal of the above arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, it was observed that such a clause should be honored.

It is apparent that the 'mutual discussion' clause represents a form of Med-Arb and the same was upheld by the court. However, later in 2014, the Delhi High Court reversed its view in the case of *Ravindra Kumar Verma vs. BPTP Ltd.*[43] Held, the fact that in the arbitration clause, there was prior requirement to be complied with before invoking arbitration and seeking reference of disputes to arbitration was only directory and not mandatory. If the arbitration clause was treated in a mandatory manner, then the same can result in serious and grave prejudice to the party who seeks to invoke arbitration. because the time consumed in conciliation proceedings before seeking the invocation of arbitration is not exempted from limitation under any of the provisions of the Limitation Act, 1963. The existence of conciliation or mutual discussion should not be a bar in seeking to file proceedings for reference of the matter to arbitration. Section 77 of the act was also relied on - "Section 77. Resort to arbitral or judicial proceedings.- The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."

This approach of the India courts was taken while giving regard to conciliation and not mediation. The statue does not recognize mediation, let alone hybrid forms of dispute resolution mechanisms. India has always advocated for the 'right to speedy trial' as being implicit in Article 21 of the Constitution of India *(Hussainara Khatoon v. State of Bihar[44])* and giving regard to the same has developed the mechanisms like Arbitration, Conciliation, Mediation, and Lok Adalats to strengthen both fair administration of justice and smooth judicial system. However, the parliament of India is yet to pay heed to formally adopting the hybrid mechanism. As has already been discussed in the former parts of this paper that the mixing of mechanisms is not a new process, India's Panchayati Raj has been doing the same. Moreover, the court wile referring the parties for mediation undergoes a form of hybrid structure of litigation and mediation. However, to be a part of the global community and for betterment and development, the legislature needs to formally recognize the hybrid dispute resolution mechanism.

[42] *MANU/DE/1742/2012*

[43] *MANU/DE/3028/2014.*

[44] *MANU/SC/0119/1979 : AIR 1979 SC 1360*

Hence, the burden falls on the legislature to recognize the same. In this respect, it has to be noted that recently via the 2019 amendment to the act, part IA (Section 43A to Section 43M) to the Act which brought **the introduction of ACI for promotion of arbitration, mediation, conciliation, and other alternative dispute redressal mechanisms, was added; also**, takes the international commercial arbitration out of the time limitations provided under Section 29A(1). These amendments, along with many others, put India on the world map in arbitration proceedings - It aims to make India an international arbitration hub by providing facilities for the settlement of commercial disputes. However, it lacks the adoption of more convenient mechanisms.

The question that arises is how can this mechanism be implemented in India with the prevalent cultural and legal differences. It has to be observed that India being a common law country is suspicious of such hybrid structure. The reasons for the same have already been discussed in the *Keeneye case(Supra)*. Hence, it is certainly not an easy task to adopt a mechanism in a common law legislature which is essentially followed in civil law countries like Switzerland or Germany. The adoption of the hybrid dispute resolution mechanisms in India can be understood by referring to certain common law countries that have already established the same - In Canada, the Med-Arb process was advocated by some arbitrators as far back as the 1940s and has been considered a popular and effective method for the settlement of labor disputes. It is used by several dispute resolution organizations and has legislative backing in many provinces..[45] These include the Canada Industrial Relations Board (CIRB), Ontario Grievance Settlement Board (GSB), British Columbia Labour Relations Code,[46] all of which provide for the Med-Arb process in the resolution of labor disputes. The process was formally adopted in the United States in the 1970s with the State of Wisconsin becoming the first state to formally adopt the process on 1st January 1978.. [47]

Hence, the adoption of hybrid dispute mechanisms can also be made in India. It can be ascertained that adopting hybrid mechanisms will not diverge India from common law. An example in this respect is HongKong which is a common law country yet has similar provisions to that of a civil law country - Hong Kong Arbitration Ordinance and the China International Economic and Trade Commission (CIETAC), as well as the Arbitration Law of the Peoples Republic of China, have similar provisions. India, while adopting such mechanisms should use it's cultural, legal, and traditional peculiarity as an asset to solve the problems of neutrality and contest to the award.

CONCLUSION

The hybrid dispute resolution mechanisms have gained wide popularity in International Commercial Arbitration. The mechanisms like Med-Arb, Arb-Med, and ARb-Med-Arb are certain novelistic approaches that work towards the betterment of the global dispute resolution society. Though it is clear that the risks in the practical implications of the approach are essentially serious as they can lead to the removal of the arbitrator or invalidity of the arbitral award on grounds of lack of neutrality. The potential bias and the perception of bias are what has triggered the discourse against these

[45] *Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca*

[46] *British Columbia Labour Relations Code, 2003*

[47] *Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative" available at www.irc.queensu.ca*

hybrid approaches. The pitfalls of adopting the hybrid approach tend to have a much more detrimental impact than the short-term benefits that the parties gain from it. Nonetheless, these shortcomings can be tackled by ratifying certain steps to best meet the intent they were introduced for. Thus, for reasons discussed above, circumventing bias is an issue that calls for the most attention.

> An intelligible differentia can be drawn in the Med-Arb provisions between it being a pure provision and there being an option to opt-out. Other mechanisms like overlapping neutrals and Plenary Med-Arb can also be paid consideration. Parties can choose the provision that best meets their interests and concerns in resolving their disputes.

This concept is fairly more popular in civil law jurisdictions and is being gradually recognized in common law jurisdiction, even though a tint of suspicion remains. Countries like China, Hong Kong, Australia, Canada have widely accepted. International institutions like SIAM- SIMC, ICC, and HKIAC along with certain national authorities like CIETAC, CRB, GSB, etc have adopted the model clauses. In the 21st century, India is running a race towards globalization. India ranks fourth in the Asia Power Index yet where Asia sees high popularity in implementation of the hybrid procedure, India lags. The distinct cultural, traditional, and legal background of India should be seen as an opportunity to further the growth of such mechanisms. With the implementation of ACI by the 2019 amendment to the Act, it is certainly easier to recognize the hybrid mechanisms. With specific guidelines laid in this respect, India could also become a part of the global hybrid dispute resolution mechanisms.

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ICA INDIAN COUNCIL OF ARBITRATION

ARBITRATION & ADR ROUNDUPS

1. ENFORCEMENT OF A 20-YEAR-OLD ICC AWARD GRANTED

On 2 June 2020, the Indian Supreme Court rejected the appeal filed by Hindustan Copper Limited (HCL), a state entity of India, against the enforcement of an ICC award in favor of a US metals trader named Centrotrade, and granted enforcement of the award.

The dispute arose from the payments under an agreement concluded between HCL and Centrotrade for the sale of copper concentrate to the former for its plant in Khetri, Rajasthan. Unusually the agreement included a two-tier arbitration clause stipulating that in case either party was dissatisfied with a prior India-seated arbitration at the first stage, London-seated ICC arbitration can be adopted then. In 1999, after the issuance of award for no damages ruled by an arbitrator appointed by the Indian Council of Arbitration, Centrotrade commenced ICC arbitration. The ICC tribunal found in favour of Centrotrade and ordered HCL to pay over US$ 550,000 plus interest in 2001.

Centrotrade applied to enforce the ICC award before the Calcutta High Court, but the Court declined its application. Centrotrade appealed to the Indian Supreme Court. HCL argued that it failed to sufficiently present its case since the sole arbitrator in the ICC tribunal had refused to extend the filing deadline. However, the Court found that the sole arbitrator had extended the deadline for HCL's submissions twice and he had fully considered the case HCL submitted even though it had been submitted out of time. The Court held that failure for submission by HCL was not due to external circumstances as required under case law and the award was "extremely fair" to HCL.

Source: As reported in International Arbitration Newsletter - June 2020 | Regional Overview: Asia Pacific dated June 24, 2020 from website https://www.garrigues.com/en_GB/new/international-arbitration-newsletter-june-2020-regional-overview-asia-pacific

2. HURDLES IN LAND ACQUISITION PROCESS? NHAI TO SCRAP PART OF CONTRACT

NHAI Chairman Sukhbir Singh Sandhu said the matter of land acquisition should not be left pending as it leads to litigation cases in the future.

To reduce build-up of arbitration cases, the National Highways Authority of India (NHAI) has asked its project managers to cancel portions of the proposed contracts in case of hurdles in the land acquisition process.

NHAI Chairman Sukhbir Singh Sandhu, in a letter to the authority's regional offices and project director, has said the matter of land acquisition should not be left pending as it leads to litigation cases in the future.

"In future, the stipulated land would be acquired and handed over encumbrance free to the contractor in time or that part of the project will be cancelled if the land is not handed over," Sandhu wrote in the letter, a copy of which is with *Business Standard*.

Such disputes mostly land in arbitration, for which contracts have provision. It is not just the projects that get delayed but also the invested money - either of the government or the private party - gets stuck in the dispute. It is learnt that not just for future projects, the NHAI has done the same for some project stretches in the past. "The idea is to stay away from any future litigation and arbitration, because then questions are raised as to why NHAI did not address the issue if the land was not fully," said an official.

Sandhu has asked his regional offices for a stricter maintenance of land acquisition progression data. NHAI's concern for the arbitration matters and its related claims can be gauged from the fact that at the start of 2020, the authority had set a target of settling arbitration claims worth Rs 70,000 crore through the reconciliation method in January 2020.

The process began with NHAI settling an arbitration claim worth about Rs 650 crore with Infrastructure Leasing & Financial Services (IL&FS) for nearly Rs 200 crore through a conciliation process.

The NHAI decided to settle the claim for less than 70 per cent of Rs 800 crore demanded by the company through an arbitration process. The NHAI had, in turn, asked for Rs 150 crore from the company, which worked out to a net outgo of Rs 650 crore.

The conciliation exercise is being conducted by the NHAI to deleverage its balance sheet. There are three committees on reconciliation set up by the NHAI to look into these claims. These comprise retired judges.

Source: As reported by Megha Manchanda in Business Standard on May 27, 2020 from website https://www.business-standard.com/article/economy-policy/land-trouble-scrap-contract-nhai-tells-branches-to-cut-arbitration-cases-120052601643_1.html

3. RELIANCE POWER WINS LAWSUIT CHALLENGING VALIDITY OF ARBITRATION AWARD

The total dues payable by Kokos Jiang and Prestige Capital Holdings stands at 68 million dollars as on the day of judgement.

Reliance Power Netherlands BV, a wholly-owned subsidiary of Anil Ambani-owned Reliance Power Ltd, has won a lawsuit in the Central Jakarta district court of Indonesia challenging the validity of Singapore arbitration award favouring Reliance Power.

Kokos Jiang and Prestige Capital Holdings, who were respondents in the arbitration, had filed a lawsuit in Jakarta court requesting nullification of the entire arbitration award.

As per the Singapore arbitration award, arbitrators had ordered Kokos Jiang (earlier known as Kokos Leo Lim) and Prestige Capital Holdings Ltd in Seychelles to pay Reliance Power Netherlands BV a sum of 43.2 million dollars along with default interest.

The total dues payable by Kokos Jiang and Prestige Capital Holdings stands at 68 million dollars as on the day of judgement. With this judgement, the Indonesian court has further reinforced the ongoing award execution process.

"Reliance Power is on track to execute the award for a sum of 68 million dollars (Rs 510 crore) during FY 2020-21," as said in regulatory filings at Indian stock exchanges.

Reliance Power Ltd, a part of the Reliance Group, is a leading private sector power generation and coal resources company. It has one of the largest portfolios of power projects based on coal, gas, hydro and renewable energy with an operating portfolio of 5,945 megawatts.

Source : As reported in Business Standard on May 26, 2020 from website https://www.business-standard.com/article/companies/reliance-power-wins-lawsuit-challenging-validity-of-arbitration-award-120052601519_1.html

4. INVESTOR-BROKER HAVE FILED SUIT-COUNTERSUIT IN BOMBAY HC IN OIL FUTURE CONTRACT DISPUTE

MUMBAI: Dhanera Diamond has taken Motilal Oswal Financial Services (MOFSL), Multi Commodity Exchange (MCXNSE -1.46 %) and its clearing corporation to court demanding Rs 56.11 crore with interest. While in countersuit MOFSL is claiming to secure Rs 80.74 crore from the trading firm during the pendency of the dispute before an arbitrator.

Dhanera Diamond has argued in its petition that the MCX does not permit negative trading for the said contract and hence there is no question of settling those contracts in the negative value and demanding payment from Dhanera.

“MCX's risk assessment software (SPAN) also does not contemplate trading of crude oil contracts at negative values," argued Dhanera Diamond in its plea, a copy of which was reviewed by ET, "This is apparent as even currently, for crude oil Futures contracts expiring in May 2020, MCX does not permit trading at negative values."

Countering this, MOFSL has approached the court against Dhanera Diamonds under Section 9 of the Arbitration and Conciliation Act. MOFSL sought the court's intervention to secure the amount from the trader until the final order from the arbitration tribunal regarding settlement obligations for the trades in crude oil contracts that expired on April 20.

On May 8, after hearing both the sides, Justice RI Chagla posted the matter for further hearing on May 15.

Birendra Saraf, a senior counsel, who appeared for the MOFSL, argued that the stock exchange and its clearinghouse had issued a circular on April 21 ascribing negative due date rate (DDR) of Rs 2,884 and settled crude oil contracts traded on MCX on the NYMEX Crude Oil.

"Since the prices of crude oil futures traded on NYMEX that was due to expire on April 21, 2020 falling into negative territory, the debit balance exceeded the margins obtained by the petitioner (MOFSL) as a broker from its client respondent no 1(Dhanera Diamond)," MOFSL argued in the court.

While, Venkatesh Dhond, senior counsel, who appeared for the trader, argued that the brokerage house deliberately withheld certain documents in its arbitration petition

"Respondents (Dhanera Diamonds) have filed a suit against the petitioner (MOFSL) regarding this transaction and declaration of price and the suit had been served on the respondents herein on May 6," the counsel for Dhanera Diamond said, adding that it is only thereafter and as a counter that the present arbitration petition was filed.

Chandubhai Mehta, managing partner of law firm Dhruve Liladhar & Co is representing Dhanera Diamond in the case. While MOFSL is being represented by Ravichandra Hegde, partner of Parinam Law Associates. When contacted, MCX officials declined to comment as the matter is sub judice.

Source: As reported by Maulik Vyas in ET Bureau on May 18, 2020, from website https://economictimes.indiatimes.com/markets/stocks/news/dhanera-counters-mofsls-suit-in-high-court/articleshow/75749829.cms

5. DONALD TRUMP OFFERS TO 'MEDIATE OR ARBITRATE' BETWEEN INDIA AND CHINA

In a surprise move, US President Donald Trump on Wednesday offered to "mediate or arbitrate" the raging border dispute between India and China, saying he was "ready, willing and able" to ease the tensions, amid the continuing standoff between the armies of the two Asian giants.

Trump previously offered to mediate between India and Pakistan on the Kashmir issue, a proposal rejected by New Delhi which maintains that there is no role for any third party in bilateral issues.

"We have informed both India and China that the United States is ready, willing and able to mediate or arbitrate their now raging border dispute. Thank you!" Trump said in a predawn tweet.

Trump's unexpected offer came a week after a senior US diplomat accused China of engaging in border clashes with India in an attempt to shift the status quo.

Alice Wells, the top US diplomat for South Asia, had also encouraged India to resist China's aggressive behaviour.

"If you look to the South China Sea, there's a method here to Chinese operations, and it is that constant aggression, the constant attempt to shift the norms, to shift what is the status quo. "It has to be resisted," said Wells, on May 20 at the Atlantic Council here, days before she retired.

China dismissed the statement of Wells as "nonsense" the next day. A Chinese Foreign Ministry spokesman also said that consultations were going on through diplomatic channels between Beijing and New Delhi, and Washington has "nothing to do" with it.

The nearly 3,500-km-long Line of Actual Control (LAC) is the de-facto border between India and China.

Several areas along the LAC in Ladakh and North Sikkim have witnessed major military build-up by both the Indian and Chinese armies recently, in a clear signal of escalating tension and hardening of respective positions by the two sides even two weeks after they were engaged in two separate face-offs.

But on Wednesday, China took an apparently conciliatory tone by saying that the situation at the border with India is "overall stable and controllable," and both the countries have proper mechanisms and communication channels to resolve the issues through a dialogue and consultation.

India has said the Chinese military was hindering normal patrolling by its troops along the LAC in Ladakh and Sikkim and strongly refuted Beijing's contention that the escalating tension between the two armies was triggered by trespassing of Indian forces across the Chinese side.

The Ministry of External Affairs said all Indian activities were carried out on its side of the border, asserting that India has always taken a very responsible approach towards border management. At the same time, it said, India was deeply committed to protect its sovereignty and security.

"Any suggestion that Indian troops had undertaken activity across the LAC in the Western sector or the Sikkim sector is not accurate. Indian troops are fully familiar with the alignment of the Line of Actual Control in the India-China border areas and abide by it scrupulously," MEA Spokesperson Anurag Srivastava said at an online media briefing last week.

Source: As reported in Economic Times on May 27, 2020 from website https://economictimes.indiatimes.com/news/politics-and-nation/donald-trump-offers-to-mediate-or-arbitrate-between-india-and-china/articleshow/76037847.cms

6. GOVERNMENT SEEKS USD 520 MILLION FROM CAIRN OIL & GAS; COMPANY SLAPS ARBITRATION NOTICE

The government has slapped a USD 520 million (around Rs 3,941 crore) demand notice on billionaire Anil Agarwal's oil and gas unit Cairn after an audit found alleged discrepancies in cost recovery in the Rajasthan oil and gas fields operated by the company, sources said adding the firm has disputed the demand and initiated arbitration proceedings.

The Directorate General of Hydrocarbons (DGH), the upstream technical arm of the Ministry of Petroleum and Natural Gas, sought USD 520 million in additional profit petroleum for the government after an audit of capital and operating expenses incurred on the Mangala and other oilfields in the Rajasthan block RJ-ON-90/1, sources with direct knowledge of the development said.

The audit alleged discrepancies in the way capital expenses made on setting up the infrastructure to produce oil were booked.

The law provides for operators recovering all the capital and operating cost from revenues earned from the sale of oil and gas before sharing a fixed percentage of profit with the government. Booking a higher expenditure curtails government's profit share.

Cairn Oil and Gas, a vertical of Agarwal-controlled Vedanta Ltd, earlier this month sent an arbitration notice, disputing the demand, they said.

A company spokesperson declined to comment.

Cairn is the operator of Rajasthan block with 70 per cent interest while the balance is held by state-owned Oil and Natural Gas Corp (ONGCNSE 5.52 %).

ONGC is not a part of the arbitration but will have to abide by whatever award of the dispute resolution proceeding comes out, sources said adding the company will have to pay 30 per cent of the USD 520 million demand in case the arbitration panel upholds the DGH demand.

Source: As reported in Economic Times on May 28, 2020 from website https://economictimes.indiatimes.com/industry/energy/oil-gas/government-seeks-usd-520-million-from-cairn-oil-gas-company-slaps-arbitration-notice/articleshow/76067829.cms

7. Such An Award Shocks The Conscience Of The Court"; Bombay HC Sets Aside Sole Arbitrator's Award Against Jackie Shroff

The Bombay High Court last week set aside an award passed by a sole arbitrator against actor Jackie Shroff and noted that conclusions arrived at by the arbitrator are not just wrong, but "exhibit an unmitigated perversity and is shocking to the conscience of the court."

Justice SC Gupte heard an arbitration petition filed by Shroff challenging the said award in a matter between him and respondent Ratnam Sudesh Iyer. Both Shroff and Iyer were shareholders in a company called Atlas Equipfin Pvt Ltd.

On December 31, 1994 the petitioner and respondent entered into a joint venture and shareholder's agreement to carry on business of an investment holding company through Atlas to collaborate with Sony for production, acquisition and export of television software, in which Atlas would own 25% equity. The petitioner claimed to have subscribed to 10% shares.

Thereafter, in 1995, Atlas entered into a joint venture with Sony group for setting up Sony TV channel in India. The joint venture company was named Sony Entertainment Television India Pvt.Ltd. (SET India), later renamed as Multi Screen Media Pvt. Ltd. (MSM).

Sometime in 2002, the shareholders of Atlas decided to sell the shares held by Atlas in MSM. However, around 2005, request was made by the respondent over telephone to the petitioner for signing a document giving mandate to Standard Chartered Bank for sale of shares of MSM held by Atlas along with an authority to apply such sale proceeds for repayment of a loan of USD 93 million taken by a company called Grandway Global Holdings Limited.

The petitioner refused to sign the document even though he received several phone calls from the respondent, as he did not have direct or indirect interest in Grandway Global Holdings. Then, the petitioner filed a petition under Sections 397 and 398 of the Companies Act, 1956 against the respondent. But the said petition was withdrawn after other shareholders in Atlas assured Jackie Shroff that his interests would be protected.

Finally, in April 2005, the petitioner received a notice with an attachment of placement instruction dated November 15, 2005. The placement instruction referred to the Bridge Facility Agreement executed between Grandway and SCB dated June 10, 2005. The said placement instruction purported to bear the petitioner's signature even though the petitioner claimed he never signed it.

Few days later, the petitioner filed a complaint with the Economic Offences Wing against the respondent and others complaining about forgery and requesting for an investigation into the matter. Subsequently, the respondent approached the petitioner's chartered accountant with a proposal to settle the disputes. On January 3, 2011, a deed of settlement was drawn and executed between the parties. The deed provided for keeping a sum of USD 1.5 million in escrow so as to be released to the petitioner upon withdrawal of the EOW

complaint. Moreover, an additional sum of USD 2 million to be held in escrow and to be released in favour of the petitioner within seven days of receipt of sale proceeds by Grandway or Atlas in respect of sale of their shares in MSM.

EOW informed the petitioner in January 2011 that the enquiry against him had been closed. Upon receipt of EOW letter dated January 13, 2011, the escrow agent released unto the petitioner the first escrow cheque held by him in the sum of USD 1.5 million. The escrow agent continued to hold the other undated cheque in the sum of USD 2 million pending sale of shares of MSM by Atlas.

By their letter dated June 30, 2011, the petitioner's advocates called upon the respondent to complete the sale of shares of MSM. By his letter dated July 8, 2011, the respondent claimed that the petitioner had committed a breach of the deed of settlement by sending an email on June 15, 2011. The said email was sent by Jackie's wife Ayesha who had referred to the respondent as a 'forger'.

In May 2012, the petitioner personally signed the said agreement, by which Atlas sold its shareholding in MSM to Sony in terms of the deed of settlement.

While the petitioner was awaiting release of the second escrow cheque of USD 2 million, the respondent filed an arbitration petition against him u/Section 9 of the Arbitration and Conciliation Act, 1996. The Respondent prayed for an interim injunction against release of the undated escrow cheque of USD 2,000,000 by the escrow agent. The matter was referred to a sole arbitrator former Supreme Court Judge SN Variava who passed the impugned award on November 10, 2014.

The arbitrator held that the petitioner had committed breach of the deed of settlement as his wife had referred to the respondent as a forger in an email. Also, the deed of settlement was not terminated and continued to be valid and subsisting between the parties,yet the arbitrator awarded damages of USD 3.5 million to the respondent.

After going through the arbitrator's order, Court observed-

"Each of the above conclusions is not just plainly wrong, but exhibits an unmitigated perversity and is shocking to the conscience of the court, to say the least, as I shall presently explain”

Thereafter, Court went on to explain that two emails were written by Jackie's wife Ayesha Shroff, one on June 9, 2011 and the second one on June 15, 2011.

"These two emails, in the first place, were addressed to the respondent. If the respondent was the only addressee and recipient of the emails, there is no way the emails could be considered as a breach of the relevant clause. "Any person or entity" referred to therein as a prohibited recipient could never include the respondent himself."

Court reasoned that the email of June 9 complains about non-mentioning of the deal term sheet signed between one Providence and SCB; the allegation is that the respondent was not being straightforward in his conduct. The second email complains about the same event, only it states- "I have no wish to continue to fraternize with a forger".

Finally, setting aside the award and allowing the petition, Justice Gupte observed-

"Can such an award be ever sustained as something a fair and judiciously minded person could have made. In my humble opinion, it is the very opposite of justice; it would be a travesty of justice to uphold such an award.

The impugned award, thus, does not measure up to the minimal judicial scrutiny even within the parameters of Section 34 of the Act. It is completely unreasonable, impossible, and I dare say, perverse. It is partly based on no evidence, partly on non-application of mind, and partly, by a wholesale misapplication of law resulting into miscarriage of justice. All in all, it shocks the conscience of the court."

Source: As reported by Nitish Kashyap in Live Law dated May 26, 2020 from website https://www.livelaw.in/news-updates/bombay-hc-sets-aside-sole-arbitrators-award-against-jackie-shroff-157304

8. HIT BY LOCKDOWN, CONSTRUCTION INDUSTRY SEEKS IMMEDIATE RELEASE OF PENDING DUES FROM GOVT AGENCIES

Finance minister Nirmala Sitharaman recently announced a stimulus package of Rs 20 lakh crore, or 10 per cent of the GDP, in five tranches to give a boost to the economy which will be in the negative territory for the current fiscal.

As the ongoing lockdown has severely impacted infrastructure activities across the country, liquidity starved engineering and construction industry is seeking immediate release of long pending dues from the central and state government agencies.

According to industry players, release of these dues, most of which are stuck in arbitration and run into thousands of crores of rupees, would bring in immediate liquidity in the current COVID crisis scenario, rather than the Rs 20 lakh crore economic stimulus package announced recently.

Finance minister Nirmala Sitharaman recently announced a stimulus package of Rs 20 lakh crore, or 10 per cent of the GDP, in five tranches to give a boost to the economy which will be in the negative territory for the current fiscal.

"Funding of construction projects will be instrumental in helping revive the economy as infrastructure investment has the highest GDP multiplier factor, almost 2.0x, and our industry is among the largest employment generators impacting seven crore households. Risk aversion by financial institutions to infrastructure was prevalent pre-COVID, and has now worsened," HCC Director and Group CEO Arjun Dhawan told PTI.

He further said that contract enforcement and timely dispute resolution is the bedrock of free enterprise and while we all hope for swifter conciliation or court proceedings, an immediate solution is the unqualified payment of arbitration dues without repeated challenge in courts or the onerous requirement of bank guarantees.

"This immediate liquidity will repay lenders, unlock supply chains, protect thousands of MSMEs including migrant labour while restarting the profit cycle that will trigger our economic revival," he added.

National Highways Authority of India (NHAI) alone has at least 180 cases in arbitration involving a sum of about Rs 80,000 crore. The agency has been holding dialogues (with contractors and industry players) to find resolution to disputes through reconciliation.

Meanwhile, the Reserve Bank of India has also slashed the repo rate by 40 basis points in eighth straight cut and also allowed lenders to extend an ongoing moratorium on loan repayment, which was due to end on May 31, by another three months till August 31, a move intended at easing liquidity pressure.

"These initiatives will boost liquidity subsequently as the clients or customers can avail credit, but eventually it would be spent on project execution. The policy announced relaxation in time limits for infra projects, but is silent on who would bear the cost implications of lockdown. Once lockdown ends, we expect more clarity and that would put to rest this debate," Tata Projects Chief Strategy Officer Himanshu Chaturvedi said.

Echoing similar views, global professional services firm Alvarez & Marsal Managing Director Venkataraman Renganathan opined that the stimulus package is a step in the right direction and is intended to infuse liquidity into the system, however, it is a credit line.

"In a way, the stimulus package will get in the liquidity for projects which have been stranded for money. However, we need to understand that this is a credit line and not a bailout package. So, the contractors will have to repay the money.

"The issue of non-settlement of dues by the authorities has been there in the pre-COVID period. However, in the current scenario, the money which they owe to the contractors, if paid, will provide the much needed liquidity to them," he added.

Another industry expert, who did not wish to be named said, "while lending, banks will lend only to those players whose credit scores are good. However, companies which are already under stress due to various reasons, will not get the credit. Many of these players have thousands of crores of rupees pending under arbitration with the government agencies or yet to be paid".

Source : As reported in Financial Express on May 24, 2020 from website https://www.financialexpress.com /industry/construction-industry-seeks-immediate-release-of-pending-dues-from-govt-agencies/1969157/

9. AN ALTERNATIVE TO THE ELECTRICITY CONTRACT ENFORCEMENT AUTHORITY

Mandating commissions to refer contractual disputes for arbitration can overcome states' opposition to the Electricity Contract Enforcement Authority.

The Draft Electricity (Amendment) Bill 2020 has fuelled controversies among all stakeholders in the power sector. Reportedly, the Telangana state cabinet termed it draconian and decided to strongly oppose it in Parliament. The bill abolishes the state selection committee for appointment of members to the state electricity regulatory commission and proposes their selection by a central government committee. The objection of the state governments is understandable.

Equally controversial is the creation of a new Electricity Contract Enforcement Authority (ECEA) to deal with contractual disputes between the state distribution companies and suppliers of electricity-generators and transmission entities. We propose to address this issue here.

This bill, inter alia, divests the electricity regulatory commissions (ERCs) of their dispute resolution function. The Authority would act as a central body, with exclusive powers and jurisdiction to adjudicate on the performance of obligations under all contracts relating to sale, purchase, or transmission of electricity. ECEA will not have any jurisdiction over any matters related to regulation or determination of tariff, or disputes involving tariff. It will have at least five members of judicial and technical background, appointed by the central government. All orders of the Authority will be executable as a decree of the civil court.

Appeal from its order will lie before the 'restructured' Appellate Tribunal for Electricity (APTEL) and, thereafter, a second appeal before the Supreme Court.

One argument in favour of the Authority could be that tariff fixation, a prime function of commissions, is akin to legislative function as has been held by the Supreme Court in a catena of judgments. Commissions also make delegated legislation in the form of regulations on a variety of matters. The basic structure doctrine of our Constitution requires separation of powers. From this angle, the power to legislate and the power to adjudicate on disputes should not be vested in the ERCs as is the case today.

Moreover, it is the perception of private investors in generation and transmission that in adjudication, there is a tendency on the part of state regulators to take a pro-revenue approach when state utilities and state institutions are involved in a contractual dispute. With the combined functions of making legislation and adjudicating disputes, ERCs may assume the role of a judge in their cause. Technically, ERCs can make regulations directly nullifying a decision rendered in a specific dispute. A regulation may also overturn a decision by APTEL. Hence, ERCs can remove the basis of a decision in adjudication by simply making legislation, by altering the general rights of a class. It can be argued that the object of ECEA is, in effect, to prevent abuse of power.

However, dispute on the jurisdiction of the ECEA or an ERC cannot be ruled out. Decisions involving a contractual dispute will receive finality only before the Supreme Court, entailing several years.

As per the Constitution of India, electricity is a subject found as Item 38 on List III of the Seventh Schedule, whereby both the central and state governments have the power to make laws on it. No doubt, the state governments shall view the proposed amendment as violative of the "basic structure" of the Constitution.

What is the way out of this impasse? Whereas the Electricity Act, 2003, itself entitles the commission to either arbitrate itself or refer disputes to arbitration, if it is made mandatory for commissions to refer contractual disputes for arbitration, the objectives of setting up ECEA could be achieved.

The grounds for challenging an arbitral award have been significantly narrowed down in the 2005 Amendment to the Arbitration and Conciliation Act, 1996, and do not entail a review of the merits of the dispute. The mandate of the Supreme Court that there must be a judicial member in the adjudication of disputes can be easily complied with by having a person of legal background or a retired judge in the arbitral panel. The Arbitration Act mandates the passing of the final award within 12 months. The disputing parties are entitled to appoint their nominee, who, in turn, will appoint the presiding arbitrator.

Commissions will also benefit as they will have much more quality time to address the various nuances and obligations of tariff determination, critical questions of cross-subsidy, agricultural metering, and promote the development of a market for ensuring cheaper electricity for consumers. All in all, referral of matters to arbitration will be a win-win situation for all stakeholders in the power sector. This will, no doubt, meet the central government's principal objective of protecting the interests of generators and transmission providers-payment security.

Source: As reported by Pramod Deo & Arijit Maitra dated May 15, 2020 from websitehttps://www.financialexpress.com/opinion/an-alternative-to-the-electricity-contract-enforcement-authority/1959464/

10. NEW SIGNATORIES TO THE NEW YORK CONVENTION

On 3 February 2020, the Seychelles became the 162nd State party to accede to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). The Convention entered into force for the Seychelles on 3 May 2020. Shortly thereafter on 31 March 2020, Palau, an island nation located in the Western Pacific Ocean, became the 163rd State party to accede to the Convention. The Convention will enter into force for Palau on 29 June 2020.

In order for a State party to become a party to the Convention, it has to first express its consent to be bound by the Convention by depositing an instrument of accession with the Secretary General of the United Nations. This is provided in Article IX (2) of the Convention. An instrument of accession must include certain information, including an unambiguous expression of the intent of the Government, on behalf of the State, to consider itself bound by the treaty and to undertake faithfully to observe and implement its provisions. The Convention then enters into force for a State party on the ninetieth day after deposit of the instrument of accession.

In addition to the Seychelles and Palau, it is reported that Ethiopia's parliament approved ratification of the Convention on 13 February 2020. However, as per information available on UNCITRAL's official website regarding the status of signatories to the Convention, Ethiopia is not a party to the Convention.

It is likely that while its parliament has approved its accession to the Convention, thereby signifying Ethiopia's intention to be bound by the treaty and its provisions, the State has not yet formally deposited its instrument of accession with the Secretary General of

the United Nations. Once Ethiopia deposits its instrument of ratification with the UN Secretary General, the total number of Contracting State parties to the Convention will then go up to 164, and the Convention will enter into force for Ethiopia on the ninetieth day after deposit of its instrument of accession.

Source: As reported by Brigitta John in Global Arbitration News on May 06, 2020 from website https://globalarbitrationnews.com/new-signatories-to-the-new-york-convention/

11. SC EXTENDS LIMITATION UNDER ARBITRATION ACT & SEC 138 OF NEGOTIABLE INSTRUMENTS ACT WITH EFFECT FROM MARCH 15

The Supreme Court has extended the limitation period for statutory provisions under Section 138 of the Negotiable Instruments Act & the Arbitration & Concilliation Act with effect from March 15 until further orders.

Taking note of the fact the SC had passed an order on March 23 to extend the limitation for filings in Courts/Tribunals in the wake of COVID-19 situation, the bench ordered :

"it is hereby ordered that all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 and under section 138 of the Negotiable Instruments Act 1881 shall be extended with effect from 15.03.2020 till further orders to be passed by this Court in the present proceedings".

"In case the limitation has expired after 15.03.2020 then the period from 15.03.2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown", added the bench comprising CJI S A Bobde, Justice Deepak Gupta and Justice Hrishikesh Roy.

The order was passed in an application seeking extension of limitation under Section 29A of the Arbitration and Conciliation Act and Section 138 of the Negotiable Instruments Act.

Senior Advocate Dushyant Dave (Appointed Amicus Curiae) submitted that the March 23 order should be extended to all "statutory proceedings".

Senior Advocate Meenakshi Arora referred to an application moved for purposes of extending limitation in terms of statutory requirements under Section 29A of the Arbitration Act, i.e. the statutory period within which an arbitral award has to be passed.

Advocate Mayank Kshirsagar appear for Applicant-Advocate Sahil Mongia and sought extension of limitation period of 30 days w.r.t Service of Legal/Demand Notice in terms of Section 138(b) of the Negotiable Instruments Act.

The bench also directed Attorney General KK Venugoal to file a response to all applications pertaining to the issue of ambit of laws in which extension of limitation of time line prescribed is required to be extended.

Earlier, on March 23, when the lockdown had first been announced by Prime Minister Narendra Modi, a CJI led bench had passed a *general order* extending Limitation with effect from March 15, invoking special powers under Article 142 of the Constitution of India.

The March 23 order had been passed with the objective of reducing physical filings in courts and tribunals across the countries during the COVID-19 pandemic.

The Supreme Court had ordered,

"To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f.15th March 2020 till further order/s to be passed by this Court in present proceedings"

The bench had further stated that the same shall be binding on all courts/tribunals as per Article 141,

"We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities.

Source: As reported by Sanya Talwar in Live Law on May 06, 2020 from website https://www.livelaw.in/top-stories/sc-extends-limitation-under-arbitration-act-s-138-of-negotiable-instruments-act-with-effect-from-march-15-156309

12. INVESTMENT TREATY UPDATES

India considers new foreign investment law

According to reports, India's Ministry of Finance is considering a proposal for a new law to safeguard foreign investment by providing fast and effective dispute resolution processes in an aim to attract more overseas capital. The draft proposal includes a plan to set up an investment tribunal in state high courts that will fast-track disputes between investors and the government, and to appoint mediators for disputes with foreign investors.

India prevails in UNCITRAL BIT case brought by Russian/Cypriot investors

We understand that a tribunal constituted under the Russia-India BIT and the India-Cyprus BIT has dismissed claims filed against India by Tenoch Holdings Limited (Cyprus), Maxim Naumchenko and Andrey Poluektov in relation to India's cancellation of letters of intent for the issuance of telecommunication licenses. India had reportedly cancelled the telecommunication licenses for on the grounds of preservation of its essential security interests. The tribunal upheld all of India's contentions.

Jurisdiction award in Nissan BIT claim sets out India's grounds for objecting jurisdiction

The tribunal in the Nissan BIT claim under the Japan-India Comprehensive Economic Partnership Agreement ("CEPA") had dismissed India's objections to jurisdiction. The award) of the tribunal dismissing India's objections to Nissan's claim under the CEPA has now become public.

India argued that the tribunal was not constituted properly as (i) the tribunal chair had to be appointed by agreement between the parties as per the CEPA; and (ii) India had failed to appoint its nominee by the 60-day period, and the CEPA did not provide for the subsequent actions of the PCA. The PCA granted India and extension to appoint its nominee, and simultaneously appointed a tribunal chair following a list procedure. The tribunal ruled that the CEPA applied to both the nominee and the tribunal chair. Therefore, once it was clear that the parties had failed to appoint the chair within 60 days' from the date of the notice, it was logical for the PCA to commence with its list procedure.

India also relied on a fork-in-the-road provision in the CEPA arguing that Nissan was precluded from pursuing the claim before the tribunal as its corporate affiliate in India had commenced proceedings before the Madras High Court. The tribunal held that there is no duplicity of claims as the proceedings before the Madras High Court were not "investment disputes" and those disputes had only been brought before the tribunal.

India also tried to argue that the umbrella clause in the CEPA was undercut by the exclusive forum selection clause in the 2008 Memorandum of Understanding wherein the government had promised various incentives and tax concessions. The tribunal noted that the umbrella clause was drafted broadly requiring India to observe "any obligations", which would include contractual obligations. In rejecting any limitation on the umbrella clause that was not expressly present, the tribunal noted that India must be aware of several MoUs that contain exclusive forum selection clauses and must have intended for them to be caught by the umbrella clause.

The tribunal also ruled against India's objection that Nissan was precluded from bringing its claims by a three 3 year time limited in the CEPA as Nissan had

knowledge of the losses incurred as early as February 2014. The tribunal held that Nissan was only claiming for the incentives that became payable after that date (February 2014) and therefore the date from which the limitation period would begin was February 23, 2014.

Finally, India argued that the CEPA excluded claims arising out of taxation measures. The tribunal rejected India's proposed test; i.e. a measure "sufficiently clearly connected to a taxation law or regulation" as such a test could shield state actions that are incidentally connected to a tax law. Instead it preferred the more contextual approach of "who", "what" and "why" (whether the conduct in issue was conduct of state entities empowered by domestic law to deal with taxation; whether the measures in issue were of the type customarily used in that state or states generally to deal with taxation; and whether the measures were 'motivated principally by tax objectives) and deferred the question to the merits stage.

UAE notified as a reciprocating territory for foreign judgments

Ministry of Law and Justice (Department of Legal Affairs) of India issued a notification (the "Notification") which declared the United Arab Emirates (the "UAE") as a "reciprocating territory" under s44A of the Indian Code of Civil Procedure 1908 .

Following the Notification, most civil judgments issued by the UAE courts are now directly enforceable in Indian courts (except judgments (i) relating to taxation, (ii) relating to charges of an administrative nature, and (iii) issued by UAE criminal courts). It is expected that the Notification will have retroactive effect, subject to clarification by the Ministry of Law and Justice.

The Notification only deals with UAE court judgments, and does not deal with the enforcement of arbitral awards passed by tribunals seated in the UAE. While the UAE is not a reciprocating territory under s44 of the Act, we understand that there is an agreement in place between India and UAE that allows for the reciprocal enforcement of arbitration awards.

Source: As reported in Herbert Smith Freehills on May 05, 2020 from website https://hsfnotes.com/arbitration/2020/05/05/recent-developments-in-india-related-arbitration-2/

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Report on the webinar titled

"The New Normal: Impact of COVID-19 on the Arbitration Landscape in India"

in association with Khaitan & Co.
on 16th April, 2020

N G Khaitan
Senior Partner, Dispute Resolution & Real Estate Khaitan & Co., and President ICA

Sanjeev Kapoor
Partner, Dispute Resolution & Environment, Khaitan & Co.

Arun Chawla
DSG, FICCI & Advisor, ICA

Indian Council of Arbitration (ICA) in support of Khaitan & Co. had organized a webinar on 16th April, 2020 titled **" The New Normal: Impact of COVID-19 on the Arbitration Landscape in India"**, to discuss the present challenges caused by the novel coronavirus disease **(COVID-19)**, which has taken the world by storm. While the world is still grappling to cope with the devastation caused by the pandemic to human lives and livelihoods, it is clear that the restoration of the pre-COVID19 times normalcy in any sense may only be a mirage.

Mr. Arun Chawla, DSG, FICCI & Advisor, ICA, in his opening statement stated that, after a prolonged shutdown of business and operations globally in an attempt to battle the pandemic which mandates social distancing, the global economy is trying to cope with a new technology driven 'business as usual' norm.

Mr. Chawla affirmed that, global shutdown has resulted in widespread market disruptions that has resulted and is further likely to result in a deluge of contractual breaches and ensuing disputes. While legal systems across the world attempt to cope with not only with the substantive determination of disputes arising out of contractual breaches caused by the pandemic but also the very logistics for conducting any such dispute resolution proceedings, it is fortuitous that the arbitration community, across the world, has always welcomed innovations in technology with open arms even in the pre-COVID-19 era and therefore is better prepared to cope with the new 'business as usual' norms in an era of social distancing.

Mr. Chawla also expressed his affirmation that, practitioners who have closely followed the evolution of arbitration over the last few decades would vouch that arbitration has been a step ahead of conventional litigation before national courts when it comes to adopting novel techniques to increase efficiency, save time and reduce costs in the resolution of disputes. This is certainly true of the Indian judicial system and its arbitral landscape.

Concluding, Mr. Chawla emphasised that this webinar is an attempt to assess the business readiness of the arbitration community in India post COVID-19 and how the arbitration community has responded to the challenges posed by the pandemic including an assessment of its readiness to minimize disruptions in the long run.

Mr. Sanjeev Kapoor, Partner, Dispute Resolution & Environment, Khaitan & Co., while introducing the participants on the Impact of COVID-19 on arbitrations in India, gave an overview of the current scenario and stated that the Government of India has imposed an all-India lockdown of all trade and services barring essential services for nearly two months between March and May 2020. Therefore, an economy that supports 1.35 billion people was shut down for almost 8 weeks which in itself evidences the scale of the catastrophe unleashed by COVID-19. Naturally, there has been a massive disruption in the markets including supply chain disruptions resulting in a multitude of contractual breaches that are yet to see the commencement of active litigation, arbitration or other dispute resolution processes. Further, the all-India lockdown also resulted in courts and tribunals across the country restricting themselves to only hearing matters of extreme urgency with regular matters including commercial matters being relegated to the back-burner unless there is a dire urgency.

Mr. Kapoor, placed to the credit of the court system in India, led by the Supreme Court and High Courts, courts across the country which have seen a massive push towards digitisation and use of technology for virtual filings and hearings. He was of the view that, while this is a commendable start, courts across the country are still grappling both with putting appropriate technologies in place and changing traditional mindsets of all stakeholders (i.e. litigants, counsel and judges) about physical dispute resolution processes to ensure seamless transition into virtual dispute resolution processes.

Mr. Kapoor emphasised on the fact that, while arbitral tribunals in India have always had a predilection for adopting processes similar to the traditional court systems which may also be driven by the fact that domestic arbitrations still see a strong party preference for appointment of retired High Court and Supreme Court judges as arbitrators, the arbitral community has still seen greater advancement in use of technology such as permitting electronic filings and remote hearings for preliminary and procedural matters. However, traditionally, Indian arbitral tribunals have continued to have a strong preference for physical filings and hearings, which mindset will need to undergo a substantive changes in the post COVID-19 normal. Consequently, the lockdown imposed by the Government of India has also resulted in severely hampering the functioning of arbitral tribunals in India. Several scheduled hearings have had to be deferred leading to avoidable delays. In particular, the deferments have been a hallmark in cases where evidentiary or final hearings were scheduled in this period given strong preference of both parties and tribunals for physical hearings for these phases of proceedings.

Mr. Kapoor also added that, there has also been a delay in rendering awards in matters where the hearings have concluded due to tribunal members not being able to access the record of proceedings from their offices or consult their fellow tribunal members for writing the award.

Mr. Kapoor critically analysed the fact that, tribunal and party preference for physical hearings for the evidentiary and final hearing phases of arbitral proceedings may still hold some merit, there is an urgent need to discourage the practice of permitting adjournments on account of lack of physical hearings for procedural phases of arbitral proceedings such as passing of procedural orders, filings of pleadings and evidence discovery requests etc. In fact, even in case of evidentiary hearings and final hearings, given the

prolonged impact of the pandemic and the need for continued social distancing, it is time for the arbitral community to actively encourage the adoption of virtual hearings even for the same. In fact, best practices may be adopted from the following international conventions to ensure that the integrity of hearings and confidence if litigants is maintained.

Mr. Kapoor, while addressing the concerns around virtual evidentiary hearings, stated that Seoul Protocol provides several best practices guidelines in International Arbitration. The **Seoul Protocol on Video Conferencing in International Arbitration (Seoul Protocol)** was promulgated in 2018 in association with the Seoul International Dispute Resolution Centre. It seeks to establish a framework covering the best practices to be adopted in the use of video conferencing.

Mr. Kapoor, acquainted the participants with the following guidelines of Seoul Protocol:

1. the video conferencing system at the venue of arbitration should allow a reasonable part of the interior of the room in which the witness is located to be shown on screen while retaining sufficient proximity to clearly depict the witness;[1]
2. the only persons present at the venue should be: (i) witnesses giving evidence along with their counsel; (ii) interpreters; (iii) paralegal assisting with documents; and (iv) party representatives. The identities of individuals present in the room should be provided to each other by the parties. The tribunal should also verify the identities of each individual present in the room where the witness is to give evidence.[2] This will assist with addressing concerns surrounding witness prompting resulting in tampered evidence;
3. all documents on record which the witness may refer to during the course of evidence must be clearly identified, paginated, and made available to the witness[3];
4. the party whose witness is giving evidence should provide an unmarked copy of the Agreed Bundle of Documents at the start of the examination of the witness[4];
5. the parties may agree on utilizing a shared document server to be made available via computers at all venues, provided security is ensured[5];
6. separate display screen may be provided for the witness, if possible: one for video transmission and one for showing relevant documents to the witness[6];
7. however, the tribunal may terminate the video conference at any time if the tribunal deems the video conference so unsatisfactory that it is unfair to either party to continue[7].

Mr. Kapoor asserted that the above are some very significant features of the Seoul Protocol intended to preserve the integrity of the process and ensure that the witness does not take advantage of his/her physical absence to receive external assistance either from lawyers or from a prepared transcript and thereby compromise the evidence gathered. Therefore, adopting some of the above measures as part of virtual hearing processes for taking of witness evidence may go a long way in progressing arbitral hearings in India.

[1] *Seoul Protocol, Article 1.2*
[2] *Seoul Protocol, Article 3.1*
[3] *Seoul Protocol, Article 4.1*
[4] *Seoul Protocol, Article 4.2*
[5] *Seoul Protocol, Article 4.3*
[6] *Seoul Protocol, Article 4.4*
[7] *Seoul Protocol, Article 1.7*

(a) Guidelines for Witness Conferencing in International Arbitration (2019)

Mr. Kapoor while discussing the next topic familiarised the participants on, *"The Guidelines for Witness Conferencing in International Arbitration* ***(Witness Conferencing Guidelines)****"* which was framed in April 2019 by the Chartered Institute of Arbitrators is another useful international benchmark on best practices in witness videoconferencing. These Witness Conferencing Guidelines are offered as a practical document for use by parties, arbitrators, and experts in preparation for and presentation of evidence by witnesses. They provide a very helpful checklist for parties and tribunals to consider in determining whether witness evidence may be taken by video conferencing.

Mr. Kapoor, while giving an overview, mentioned that to ensure a smooth virtual hearing through technology and specifically video conferencing for recording evidence, the Witness Conferencing Guidelines urge arbitral tribunals to consider the following factors and provide adequate directions to parties:

1. Whether the witness conference can be held at a place where the witnesses are together, i.e., at the same place to enable giving evidence side by side? The guidelines provide that the dynamics and ease of communication of witnesses giving evidence side by side are likely to be adversely altered when they are physically dislocated.

2. Ensuring the presence of a duly-empowered legal representative from all parties at the venue where the witness will give evidence to preserve the integrity of the process.

3. Directing the use of a simultaneous or sequential interpreter for the witnesses, where required. Also, ensuring availability of transcription or stenographic services.

4. Ensuring provision and access to all documentation relevant to the witness evidence.

5. Directing testing of the systems to be conducted in advance to avoid glitches.

(b) Protocol on Cybersecurity in International Arbitration (2020)

Taking the webinar further, Mr. Kapoor touched, **The ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020) (Cybersecurity Protocol)** which is another helpful protocol that seeks to provide a framework to determine reasonable information security measures for arbitrations to ensure that the confidentiality and integrity of the proves is not compromised. It includes procedural and practical guidance to assess security risks and identify available measures that may be implemented.

Mr. Kapoor asserted that, The Cybersecurity Protocol also touches upon various areas of concern in the cybersecurity space that all stakeholders need to bear in mind including increasing awareness about information security risks in the arbitral process, the essential role played by individuals involved in the arbitration in effective risk mitigation and measures available to improve everyday security practices.

Mr. Kapoor mentioned, some of the baseline security measures forming part of Schedule A of the Cybersecurity Protocol are a non-exhaustive checklist of general security measures that one may consider implementing as part of arbitration proceedings. These baseline security measures helps in moving towards fully virtual processes to ensure that there are no confidentiality breaches in the arbitral processes.

1. **Knowledge and Education:** Keeping abreast of security threats and solutions and bearing in mind professional obligations relating to cybersecurity. Industry standards and governmental regulations are important factors to consider.

2. **Asset Management:** Identifying sensitive data and taking steps to protect it, limit information on a "need to know" basis, adopting protective measures such as redaction, restricting the use of

public networks for sharing information. It is critical for parties to also consider putting in place document retention and destruction practices.

3. **Access Controls:** Establishing strong password controls and use of multi-factor authentication. Parties should agree on how passwords will be shared and periodically review user privileges.

4. **Encryption:** Parties may consider encrypting data-in-transit and also encrypting data in the cloud.

5. **Information Security Incident Response:** Parties should keep a plan ready and establish procedures for responding to a security breach.

Role of arbitral institutions

Mr. Kapoor emphasized that Arbitral institutions across the world have a key role to play in promoting the adoption of virtual processes by integrating best practices into institutional rules and increasing awareness and adaptability of the same by the arbitral community.

He assured that the Institutional arbitrations have always been the preferred option for complex commercial disputes across the world and is increasing in its popularity in India as well. In fact, the Government of India has made its intent to promote institutional arbitration in India very evident by promulgating the Arbitration and Conciliation (Amendment) Act 2019 **(2019 Amendment Act).**

With an increasing thrust on institutional arbitrations, Mr. Kapoor opined that arbitral institutions in India can play a key role in providing the necessary infrastructure and technology support and training to the parties and arbitrators to transition into virtual filings and hearing processes and adoption of best practices to ensure confidence of parties in the integrity and efficiency of the process.

Mr. Kapoor highlighted several example in this regard, where various leading global arbitral institutions such as London Court of International Arbitration, Singapore International Arbitration Centre, International Chamber of Commerce **(ICC)**, International Centre for Settlement of Investment Disputes have continued to work remotely post COVID-19 and encouraged its users to adopt virtual processes. In fact, the ICC has, also issued detailed guidelines for conducting remote hearings. The Hong Kong International Arbitration Centre has in fact partnered with technology specialists to offer integrated virtual hearing services to parties. The Stockholm Chamber of Commerce (SCC) has its own secure digital platform for communications and file sharing. Recently, in association with Thomson Reuters, the SCC has opened its platform free of charge from start to finish to ad-hoc arbitrations commenced during the COVID-19 outbreak.

Therefore, it is evident that the leading arbitral institutions across the globe have been proactive in leading the way to adoption of virtual processes and minimising the disruption to dispute resolution proceedings in these difficult times.

ICC Guidance Note on mitigating the impact of COVID-19

Mr. Kapoor further, discussed in detail, that ICC has also come up with a detailed guidance note on possible measures aimed at mitigating the effects of the COVID-19 pandemic **(ICC Guidance Note)**. The ICC Guidance Note serves as a very useful framework for some do's and don'ts to be adopted by parties in these difficult times. The focus of the guidance note is on minimizing the disruption to be caused as a result of this pandemic. It suggests several measures in the form of remote hearings, document-only arbitrations, e-exchange, and preparation of a cyber protocol to protect sensitive data.

From an arbitrator's point of view, the ICC Guidance Note recommends that this time can be used to consult co-arbitrators via virtual processes and prepare draft awards in matters which have already been reserved. It also recommends identifying if the matter can be decided and resolved only on the basis of documents or if the inspections by experts can be replaced by video

conferencing with a view to save time and maintain continuity in these times.

For security considerations, the ICC Guidance Note recommends for tribunals to ensure that any video sharing platform that is used for virtual hearings is licensed and is set to maximum security settings.

Mr. Kapoor acclaimed that, in India, the **Indian Council of Arbitration (ICA)** has been at the forefront of ensuring that the arbitration community does not suffer as a result of the present crisis. In its message to the parties[8], ICA has encouraged parties to utilize information technology and video conferencing tools to conduct arbitration proceedings, given the importance of access to justice even in these tough times. There is an urgent need for other arbitral institutions to adapt to and encourage parties and tribunals to proceed with dispute resolutions in the 'new normal' times by means of virtual processes. Further, he asserted that ICA has also been at the forefront in creating awareness amongst stakeholders in the arbitration community concerning use of technology and virtual processes as the 'new normal' for arbitral proceedings. ICA has conducted helpful webinars with eminent arbitration practitioners discussing the impact of COVID-19 on the arbitration landscape in India and how stakeholders may equip themselves to cope with the same.

Challenges and Concerns

One of the most important issues that Mr. Kapoor highlighted was that, while there is no doubt that technology is here to stay, there are some challenges and concerns, which, if addressed, can certainly encourage more stakeholders to make more use of technology in conducting arbitrations, thereby greatly enhancing time and cost efficiencies.

He mentioned, that according to An International Arbitration Survey conducted by The Queen Mary University, London in association with White & Case in 2018[9] in which views were sought from a diverse pool of participants in the international arbitration sphere, including in-house counsel, arbitrators, private practitioners, arbitral institutions, academics, experts and third-party funders reveals that:

1. "Cost" was seen as the worst feature of arbitrations. 80% of participants thought arbitral institutions were best placed to influence the future of international arbitration.

2. On technology, "due process" paranoia was found to be one of the main reasons that users believed was preventing arbitral proceedings from being more efficient. Participants believed that increased use of technology would lead to more efficiency.

3. 61% of participants thought that "increased efficiency, including through technology" was likely to have a significant impact on the future of international arbitration.

4. An overwhelming majority suggested that video conferencing (89%), cloud-based storage (91%), and hearing room technologies (98%) are tools that arbitration users should use more often.

5. As can be seen above, many advocated the greater use of technology. However, 78% of the users also indicated that they had either never or rarely used virtual hearing rooms.

6. Many users also believed that the main reason for the lesser use of IT and artificial intelligence was lack of familiarity and concerns of cost.

Therefore, as is evident from the findings above, while participants seem to be inclined to advocate greater use of technology in principle, there appear to be a few un-addressed misgivings that are holding back such use.

(a) Interruptions in Technology

Mr. Kapoor has put prominence on the Connectivity issues and interruptions can certainly be a major disincentive for parties considering the use of technology for conduct of

[8] *Notice issued by the Indian Council of Arbitration..*

[9] *2018 International Arbitration Survey: The Evolution of International Arbitration. Queen Mary University, London in association with White & Case*

virtual hearings. In fact, a few such instances in recent court hearings given that many participants join from different and sometimes remote locations has created a few sceptics of the process. Therefore, best practices across the globe in terms of testing of systems and building adequate infrastructure are critical. Additionally, the question to be addressed is, what will happen when a hearing fails/gets interrupted? Putting in place contingency plans such as whether the hearing will be rescheduled for such disruptions, which will go a long way to alleviate disinclinations to use technology.

He stated that, Arbitral institutions in India need to take the lead and spread awareness about the availability of and ease associated with technology and also putting in place guidance on proper planning and contingency provisions associated with virtual hearings. The transition is not difficult but requires proactive steps to be taken in creating awareness and a change in the mindset of stakeholders adapting to the same.

(b) Confidentiality

On Confidentiality of proceedings, Mr. Kapoor opined that it is another major concern for stakeholders, and it is critical to address any concerns associated with confidentiality to preserve the integrity of the process. He stated that, confidentiality now finds a mention in Section 42A of the Arbitration and Conciliation Act 1996 **(Arbitration Act)** as amended by the 2019 Amendment Act. Section 42A provides that the arbitrator, arbitral institution, and the parties to the arbitration agreement shall maintain the confidentiality of all arbitral proceedings except the award where its disclosure is necessary for the purpose of implementation and enforcement of the award.

While parties and arbitral institutions must always look at using encrypted and reliable platforms, it may also be useful to also obtain an undertaking of confidentiality from the parties.

Impact of COVID-19 on potential/ongoing arbitrations

Mr. Kapoor in his concluding remarks stated that, while the Supreme Court of India[10] has extended the limitation period for all timelines prescribed under Arbitration Act with effect from 15 March 2020 until further orders, which extension has also been mirrored by the Delhi High Court's order of 11 May 2020[11], the practical impact of how the arbitral community copes and adopts to virtual processes will determine whether India may see the growth of other alternate dispute resolution **(ADR)** mechanisms. Given the uncertainty and limited functioning of courts/tribunals, it is expected that there will be a surge in other ADR mechanisms like mediation and negotiations, particularly in cases where parties either do not have strong claims or the claims are for substantial amounts.

President ICAPost COVID-19: Future of Arbitrations in India

Mr. N G Khaitan, Senior Partner, Dispute Resolution & Real Estate, Khaitan & Co., and President, ICA while concluding the webinar highlighted that, the major concern perhaps for stakeholders in dispute resolution at the moment is what after COVID-19? Will the arbitration community return to the pre-COVID19 times? While it is difficult to accurately predict the future, given the uncertainty and peculiarity of the situation, the arbitral community may expect the following:

1. Technology is here to stay and is likely to dictate the 'new normal' in arbitral processes. Extensive use of video/teleconferencing is likely to be adapted. Physical hearings, at least for procedural matters, could very well be a thing of the past.

2. The popularity of tech-savvy arbitrators is likely to go up. Given increasing cost and time considerations, arbitrators refusing to adapt are not likely to figure in the parties' choices at the time of nomination.

[10] *Order dated 6 May 2020, In Re: Cognizance for Extension of Limitation, Suo Motu Writ (Civil) No. 3 of 2020.*

[11] *Order dated 11 May 2020, Rategain Travel Technologies Pvt. Ltd. v. Ujjwal Suri, O.M.P. (Misc.) No. 14/2020.*

3. From a time and cost-efficiency point of view, the benefits are expected to be remarkable and likely to intensify parties' acceptability of virtual processes. For this purpose, India must also look to adopt international best practices in virtual proceedings to allay all concerns.

4. It is time for Indian arbitral institutions to rise to the occasion as they are likely to be the driving force for commercial arbitration in India in the near future. As highlighted earlier, arbitral institutions like the ICA have already taken useful steps in this direction.

5. The parties should be incentivized to strive for greater use of technology and to minimize delays. Some interesting measures that can be considered in this regard are:

   (a) the parties and tribunals may consider whether issues to be determined by the tribunal may be bifurcated. In cases where the tribunal is fully briefed on one of the issues in the arbitration, subject to party consent, that issue may be determined by way of an interim award on a documents only basis without leading additional evidence or oral arguments. In the event a party without sufficient reason refuses to agree to such determination, the costs award may adequately compensate the other party to lost time and increased cost;

   (b) the parties and tribunals may consider working together to narrow the scope of the dispute. In this context also, cost orders can be used to disincentivize parties from adopting an unreasonable stance;

Mr. Khaitan stated that, the tribunals ought to ensure that the procedural orders adopting the above measures are sufficiently detailed and well-reasoned to avoid the risk of challenge to the enforceability of the ultimate award.

Further, one of the most under-used provisions of the Arbitration Act is Section 29B, which permits fast track arbitrations on a documents only basis. Parties must be encouraged to resolve disputes vide document-only arbitrations, particularly in cases that do not necessarily require oral evidence. This may be a very useful tool for disputes that are not high value or complex in nature.

While presenting the concluding remarks, Mr. Khaitan stated that, striving to further increase time and cost efficiencies by means of adoption of technology driven processes is the only viable solution for 'business as usual' in these extraordinary times. This will in fact bring in numerous benefits in the form of cost efficiencies when tribunal and parties are located at different places and do not need to physically congregate and resulting time efficiencies in terms of schedule conflicts on account of travel times etc. Therefore, it would be in the best interests of development of arbitral systems across the world for adoption of a technology oriented approach.

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ICA INDIAN COUNCIL OF ARBITRATION

Report on the webinar titled

SIAC- Indian Council of Arbitration Webinar- Part-1 "Arbitration in India - The Way Forward: Techniques, Tips and Strategies for Efficient Arbitration"

in association with SIAC on 16th May, 2020

Indian Council of Arbitration (ICA) in support of SIAC had organized a webinar on 16th May, 2020 titled "***SIAC- Indian Council of Arbitration Webinar- Part-1 Arbitration in India - The Way Forward: Techniques, Tips and Strategies for Efficient Arbitration***" to discuss the latest Arbitral Developments across the globe. The webinar aimed to discuss unique insights and perspectives on strategies for effective conduct of arbitration proceedings.

Mr. Arun Chawla, DSG, FICCI & Advisor, ICA in his welcome address acknowledged the ever-increasing pendency of cases in the Indian courts is now an accepted phenomenon and has plagued our judicial system in delivering justice. The alarming figures of pending suits

ICA INDIAN COUNCIL OF ARBITRATION

are sufficient to discourage growth of business and in particularly foreign investment. However, one of the most significant global trends has been increasing popularity of arbitration as a preferred alternative for resolving commercial disputes. Indian Courts have adopted a pro-arbitration approach, reinforcing and promoting arbitration as an effective means of dispute resolution in India. Government through its legislation has shown an inclination towards strengthening of arbitral institutes and the entire ecosystem to make India as the preferred seat of arbitration and to change the dynamics of India's International Arbitration regime.

Mr. Zarir Barucha, Partner ZBA, whilst portraying a global trend stated that arbitration is regarded as the one of the most prominent form of traditional out-of-court process in order to escape the rigidity, time and cost associated with it. However, arbitration has now failed to live up to its purpose and is termed as *"worst of both worlds"*. It has become a highly expensive, time-consuming process alternative dispute resolution mechanism. The finality of awards is also a major concern for the parties. Thus, there is a need to discuss the techniques to be adopted so as to ensure that arbitration remains what it was originally envisaged namely, a dispute resolution mechanism that is quick, fair, cost effective and final.

The below are few common issues which need to be addressed:

a. Arbitration Agreement and its validity

b. The choice of the seat of arbitration

c. The choice & conduct of arbitrator

d. Security for costs is an interim measure - Common grounds and potential difficulties for seeking security for costs

e. Summary proceedings and grant of Anti-Arbitrations injunctions

f. Enforceability of the award- Issues and Challenges

Emphasizing on the significance of the place and seat of arbitration.

Mr. Nakul Dewan, Senior Advocate, Supreme Court of India; Barrister, Twenty Essex, stated the aforementioned issue has been a litigator's delight. Though the UNCITRAL Model Law only states the place of arbitration, there lies a distinction between seat and venue. Both Indian and English law have grappled with reasoning in many of their decisions on the distinction between seat and place of arbitration and therefore, it extremely necessary for the parties to expressly individualize the seat of arbitration and place wherein arbitration is held. The selection of the seat determines the law governing the Arbitration procedure and often, more importantly, the process and rights relating to enforcement of the arbitration award. Referring to the latest judgment of *BGS SGS Soma JV vs. NHPC Ltd.,* that the 'venue' of arbitration designated in the arbitration agreement between the parties is really the 'seat' of the arbitral proceeding and the respective court had the exclusive supervisory jurisdiction. Concluding, Mr. Dewan remarked that for it to become a non-issue, if courts across India for domestic and courts across the globe for international arbitration adopting a homogeneous standard for place, seat, and venue.

On the issue of anti-arbitration injunctions, Mr. Dewan stated that English courts have adopted the doctrine of exceptional circumstances to grant anti-arbitration injunction in very few cases. The matter of jurisdiction is falls within the preview of the Arbitral Tribunal themselves and hence interference must be minimal.

Mr. Avinash Pradhan, Partner, Rajah & Tann Singapore LLP, while sharing the concept, procedure and practice on Security for costs stated that the application for security of cost are interim protective measures available during an arbitration to control vexatious

litigation. Mr. Pradhan pointed out that when the court is of the view that the Claimant is impecunious, the Court shall lean in favour of providing an order of security for cost. In addition to the above, the Court also considers the ease of enforcement of the order for security.

Mr. Dimitrios Katsikis, Senior Associate, Shearman & Sterling LLP, explained the meaning and importance of "security of claim" in order to enable enforcement of an award at the end of the arbitration. In doing so, Mr. Katsikis outlined the importance of gathering evidence in support of an application for security of claim and discussed cases where security of claim is available even where there is no dissipation of assets.

Mr. Katsikis further discussed whether an arbitral tribunal needs to obtain the parties' consent to run proceedings efficiently and whether the tribunal is bound to proceed in accordance with the parties' agreement.

Ms. Shaneen Parikh, Member, SIAC Court of Arbitration; Partner, Cyril Amarchand Mangaldas, discussed the use of interim relief as a tool to run an arbitration efficiently, particularly in case of recalcitrant respondent. Ms. Parikh further discussed various factors that parties must consider in determining whether interim relief be obtained from court or arbitral tribunal.

Lastly, Ms. Parikh explained the benefits of consolidation and joinder, and the broad criteria that must be satisfied in respect of the arbitrations to be consolidated and for additional parties to be joined in an arbitration.

Conclusion:

To reinforce the point, the arbitration must be conducted cost effective manner as well as speedy disposal, and ultimately the goal is to ensure the award is enforceable and notwithstanding to any biased or prejudice to anyone.

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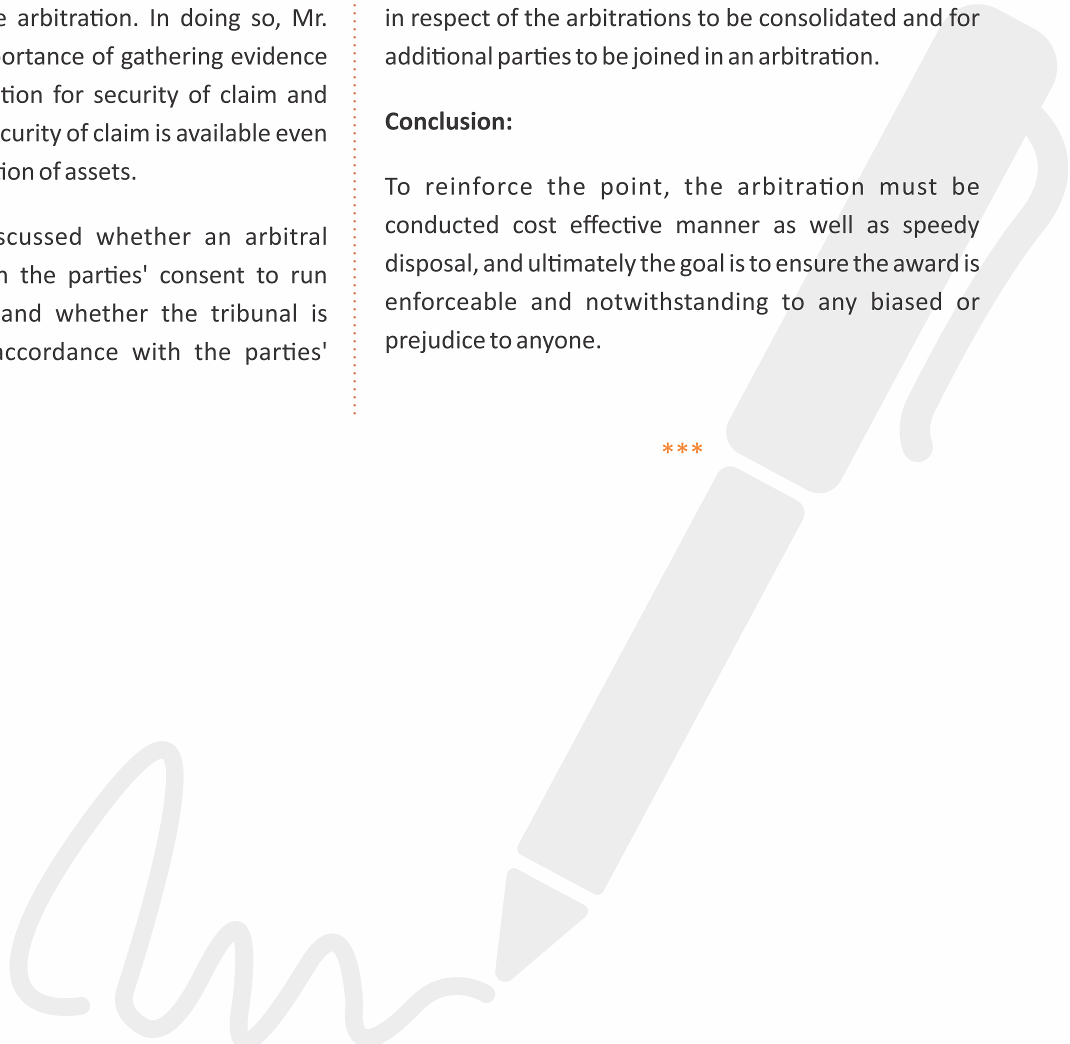

ICA INDIAN COUNCIL OF ARBITRATION

Report on the webinar titled "Assessing the impact of COVID-19 on Rental Contracts"

in association with FICCI on 21st May, 2020

Indian Council of Arbitration (ICA) in association with FICCI had organised a webinar on "***Assessing the impact of COVID-19 on Rental Contracts***" on 21st May, 2020 with an objective to deliberate upon the intricacies of rental contract and demystify the ambiguity around contracts enforcement during the current COVID-19 crisis. The webinar was chaired by ***Hon'ble Mr. Justice Arjan Kumar Sikri, Former Judge, Supreme Court of India & International Judge, Singapore International Commercial Court (SICC)*** and addressed by eminent set of panellists from judiciary and industry.

Mr. Arun Chawla, DSG, FICCI & Advisor, ICA in his opening remarks stated that in the wake of Covid-19 the landlords and tenants of both commercial as well as residential properties are witnessing unprecedented circumstances. As the revenues of businesses and individuals have dwindled due to government-imposed restrictions and social distancing measures, leaseholders are finding it difficult to fulfil their rent obligations. Many commercial lease holders have already invoked *force majeure* clause in their lease deeds for seeking suspension of rent during the period of lockdown. Mr. Chawla mentioned that the object of this webinar was to debate, deliberate a plethora of questions that arise in the mind of stakeholders such as applicability of force majeure in rental contracts, the doctrine of frustration as provided in the Indian Contract Act and the provisions related to Transfer of Property Rights Act. Related to these issues, the discussion may veer on the "future proofing of rental contracts".

Mr. Chawla specified that countries around the world have implemented changes to real estate policy in order to lessen the burden on tenants and in some cases the landlords. In various locations across Europe, commercial and residential tenants have been offered mortgage and rent holidays. In parts of Asia, some landlords have offered temporary rental rebates and rent discounts. In India as well, the Government of India has announced that the Ministry of Housing and Urban Affairs will advise the States and UTs and their regulatory authorities to treat Covid-19 as an event of *force majeure*, leaving many grey areas and questions unanswered.

Hon'ble Mr. Justice Arjan Kumar Sikri, highlighted that the real estate rental agreements and contracts will continue to prevail during the current Covid-19 scenario and the Force Majeure will continue to be applicable as mentioned in the contract. He informed that the real estate rental agreements and contracts are between two parties and the government cannot enforce any notification. He also added that in Covid-19 scenario, Section 108, the transfer of property act, which has a very high threshold may not apply.

Mr. Sanjay Dutt, Joint Chairman, FICCI Real Estate Committee and Managing Director and CEO, Tata Realty and Infrastructure Ltd, raised pertinent queries on the importance of rental agreement and Force Majeure in an agreement. He added that global office markets like Tokyo and Hong Kong have waived off rent, which stands at $600 per sq ft per annum for office

space. In India, the top office markets stand at $15 per sq feet per annum.

Mr. Raj Menda, Joint Chairman, FICCI Real Estate Committee and Corporate Chairman, RMZ Corp, said that commercial parks are operational and they are working hard to function seamlessly. He added that his organization has convinced its clients to pay the rent.

Mr. R K Sanghi, Advocate, stated that, to provide relief to both landlords and tenants, the Indian government may look at coming out with a temporary law as being done by some of the countries today like the US and Singapore.

Mr. Sudip Mullick, Partner, Khaitan & Co., said that the key is the agreement and the notifications of the government on deferment or non-payment of rent by tenants are primarily moral obligations and not legal obligations. He added in Covid-19 situation, the contract between the landlord and tenant will prevail.

Mr. P V Kapur, Senior Advocate & Bar at Law, said that the best solution in a situation like COVID-19 is that the landlord and tenant find a way out with mutual negotiations. He added that in case of triggering Force Majeure in an agreement, the party will have to give a notice.

Mr. Vinod Rohira, Managing Director & Chief Executive Officer- Commercial Real Estate and REITS, K Raheja Corp, said that 60 per cent of office space leasing in India is by Fortune 500 companies that are financially robust. All partners understand that rent is oxygen for developers or they default.

The webinar was attended by more than 300 delegates including real estate developers, lawyers, international property consultants, private equity funds, financial consultants; academicians and research scholars.

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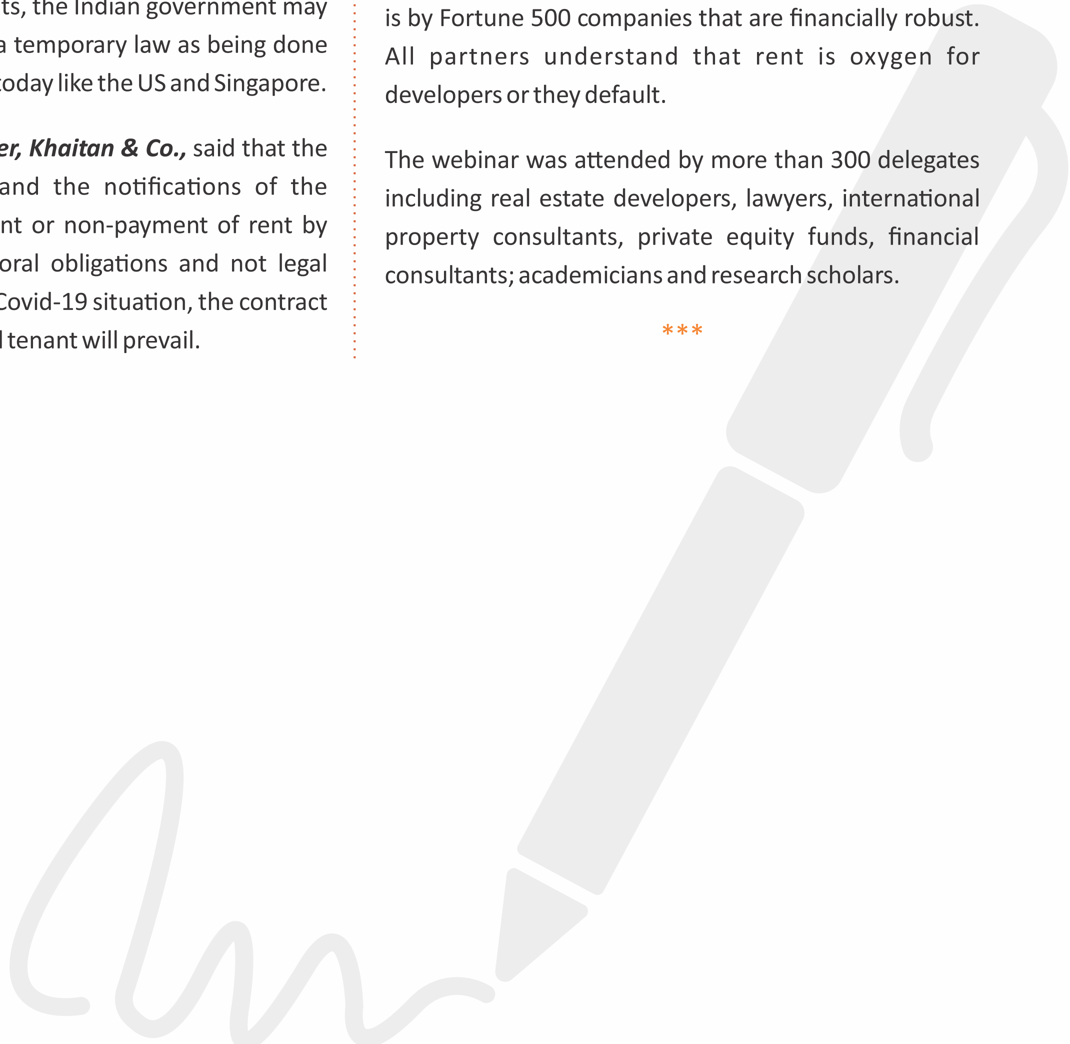

CASE HIGHLIGHTS

Patel Engineering Ltd. Vs. North Eastern Electric Power Corporation Ltd.

In this case, the Hon'ble Supreme Court of India has revisited the concept on the test of patent illegality as a ground to set aside an arbitral award contained in Section 34(2A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**Act**"). The Hon'ble Court was of the view that an interference in the arbitral award stands justified if it is against public policy doctrine under Section 34 (2) (b) of the Act amounting to unjust enrichment.

Briefly stated, the sole arbitrator in the captioned arbitration matter had passed an arbitral award dated 29th March, 2016 in respect of Package-I holding. Similar Declaratory Arbitral Awards were passed in respect of the other two Arbitral References in respect of contracts pertaining to Package-II and Package-III of the project by the Ld. Arbitrator.

North Eastern Electric Power Corporation Ltd. (NEECPCO) (hereinafter referred to as the "**Respondent**") then filed 3 separate applications under Section 34 of the Act before the Additional Deputy Commissioner (Judicial), Shillong to set aside each of the arbitral award passed by the Ld. Arbitrator on the ground of public policy. The Additional Deputy Commissioner (Judicial) vide common judgment dated 27th April, 2018, upheld all the three arbitral awards and dismissed the applications filed by the Respondent under Section 34 of the Act. The Respondent then filed an application under Section 37 of the Act to the Hon'ble High Court of Meghalaya, which by a common judgment dated 26th February, 2019 allowed the appeal filed by the Respondent, and the judgment of the additional Deputy Commissioner was set aside.

Aggrieved by the judgement of the High Court, Patel Engineering Ltd. (hereinafter the "**Petitioner**") preferred an appeal through Special Leave Petition before the Hon'ble Supreme Court. The Supreme Court vide order dated 19.07.2019 refused to interfere in the matter and consequently, the petitions were dismissed. The petitioner then filed review petitions before the High Court on the ground that its judgment dated 26.02.2019 had not taken into consideration the amendments incorporated to Arbitration and Conciliation Act, 1996 by Amendment Act of 2015 and suffered from an error apparent on the face of the record. The review petition was dismissed by the High Court and aggrieved, the Petitioner for a second time approached the Supreme Court in the present Special Leave Petitions ("**SLPs**").

The issues before the Hon'ble Supreme Court revolved around the maintainability of the present suit since the earlier SLP's filed by the Petitioner were dismissed ?

The Ld. Counsel for the Petitioner relied on the judgments of ***Bussa Overseas and Properties Private Limited and Anr. v. Union of India and Anr. (2016) 4 SCC 696 and Durga Shankar Mehta v. Thakur Raghuraj Singh and Ors. (1955) 1 SCR 267*** submitted that although Order 47 Rule 7 of the Code of Civil Procedure,1908 (CPC) bars an appeal against the order of the court rejecting the review, this does not curtail the plenary jurisdiction under Article 136 of the Constitution of India by taking recourse to the provisions in the CPC. In addition to the above, it was prayed that the order of the Hon'ble Court was a non-speaking order and hence the review petition was maintainable and should be allowed. The Ld. Counsel for the Respondent however was of the view that all the issues have already been take-up in full length before the Hon'ble Supreme Court and thus cannot be allowed to reagitate the matter by filing a review petition.

After hearing both the sides, the Hon'ble Court stated that it is not necessary to go into the question of maintainability of these SLPs preferred against the order rejecting the review, after the challenge to the main judgment had been rejected in the earlier SLPs. As noted

earlier, in this case, the judgment of the High Court Under Section 37 of the Act was challenged before the Supreme Court and the SLPs were dismissed by the Supreme Court after hearing the parties vide order dated 19.07.2019.

However, through the decision in ***Shanker Motiram Nale Shiolalsing Gannusing Rajput (1994) 2 SCC 753*** stated that as no liberty was taken to file the review before the High Court, the Hon'ble Supreme Court are not inclined to go into this aspect any further. In the aforesaid context, Hon'ble Supreme Court observed that *"It has to be understood that the Court has evolved and formulated a principle that if the basic judgment is not assailed and the challenge is only to the order passed in review, this Court is obliged not to entertain such special leave petition. The said principle has gained the authoritative status and has been treated as a precedential principle for more than two decades and we are disposed to think that there is hardly any necessity not to be guided by the said precedent".*

The second issue before the Hon'ble Supreme Court is whether the amendment to the Act would be applicable in the present case? The Ld. Counsel for the Petitioner contended that the High Court in its judgement dated 26.2.2019 had erroneously applied the provisions as applicable prior to the Amendment Act, 2015 and therefore suffers from error apparent on the face of the record since the High Court relied upon the decision in Saw Pipes Ltd. and Western Geco International Limited, which are no longer good law after the Amendment Act, 2015 brought into effect from 23.10.2015. The Hon'ble Supreme Court while affirming the decisions in ***Board of Control for Cricket in India (2018) 6 SCC 287*** held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after 23.10.2015 (the day on which the Amendment Act came into force). In the present case, undoubtedly, as the arbitral awards dated 29.03.2016 and the applications under Section 34 of the Act filed before the Judicial Commissioner, Shillong, were in consonance with Board of Control for Cricket in India, the provisions of the Amendment Act would apply.

However, the most pertinent question in this case was whether the Hon'ble Supreme Court was justified in setting aside the award based on "patent illegality" as provided under Section 34 of the Act?

For the purposes of deciding the aforesaid issue, Hon'ble Supreme Court referred the case of Saw Pipes Ltd. which had discussed "Patent illegality" as a ground for setting aside a domestic award, if it is contrary to the substantive provisions of law; or, provisions of the 1996 Act; or, terms of the contract. Hon'ble Court in the case of ***Associate Builders v. Delhi Development Authority (2015) 3 SCC 49***, observed that *"An arbitral tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do."*

The vast and varying interpretations of public policy as a ground for setting aside an award has always been a cause of concern for stakeholders in arbitration. As with time, the scope of "public policy" kept on expanding and it brough with itself wide spread criticism. Therefore, to narrow the interpretation, the Law Commission in its 246th Report, recommended the insertion of the ground of 'patent illegality' for setting aside a domestic award by the insertion of Clause (2A) in Section 34 of the Act which reads as :

> *(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:*
>
> *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.*

The Hon'ble Court accepted the findings of the High Court after delving into the interpretation propounded by the Ld. Arbitrator in regard to the terms of the contract. The court affirmed that the observation made in the award suffered from the vices of irrationality and perversity. The Ld. Arbitrator had ignored vital clauses

but taken into account irrelevant factor to deliver the award. The Hon'ble High Court stated that interpretation of the Clauses of the Contract should have been in accordance with the established rules of interpretation and stated in paragraph (51) *"that no reasonable person could have arrived at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and in defiance of all logic. The relevant extract reads:*

> *51. ...Clause 33(iii) specifically provides that "if the rates for such items of work cannot be determined in the manner as specified in Clause 33(ii), the rates for such items to be executed shall be determined by the Engineer-in-Charge on the basis of actual and analysed cost taking the following into consideration the rates for such items of works as are required to be executed due to deviations as stated in Sub-clause shall be payable in the manner as stated hereunder.....". We are of the firm view that this is the only possible interpretation of Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. No reasonable person would arrive at a different conclusion while interpreting Clauses 2.7 and 3.4 of the BoQ and Clauses 32(ii)(a) and 33(iii) of the Conditions of Contract. Any other interpretation of the above clauses would definitely be irrational and defiance of all logic. Hence the 3 (three) Arbitral Awards dated 29.03.2016 passed by the learned Arbitrator warrant interference in these appeals Under Section 37 of the Arbitration and Conciliation Act, 1996".*

The Hon'ble Supreme Court while discussing the case of ***Ssangyong Engineering and Construction Company Limited*** noted that the expansive interpretation given to "public policy of India" in the cases of Saw Pipes and Western Geco International Limited, had been done away with, although the principle of natural justice was retained. New ground of "patent illegality" was introduced which would apply to applications under Section 34 made on or after 23.10.2015. Furthermore, the Hon'ble Court held that insofar as domestic awards are concerned, "patent illegality" would include a perverse and irrational decision. *However, re- appreciation of evidence was not permitted under the ground of "patent illegality" appearing on the face of the award.*

The Hon'ble Court has gone further in giving additional grounds for setting aside the award as it amounted to unjust enrichment which was contrary to the fundamental policy of India.

Therefore, the Hon'ble Supreme Court upheld the order of the High Court and held that the awards passed by the arbitrator suffer from irrationality and perversity and falls under the purview of "Patent illegality" under Section 34 of the Act. The Appellant had failed to establish sufficient ground to challenge the validity of the High Court judgment and therefore all the special leave petitions were dismissed by the Hon'ble Supreme Court with no order as to costs.

Quippo Construction Equipment Limited Vs. Janardan Nirman Pvt. Limited

The Hon'ble Supreme Court in the said case, that if a party to an arbitration agreement willingly abstains from participating in the arbitral proceedings, that party is deemed to have waived its right to raise objections regarding jurisdiction of the arbitral tribunal or the scope of its authority at a later stage.

In the said case, the parties to the dispute had entered into four consecutive yet distant agreements for the supply of the construction equipment. Janardan Nirman Pvt. Ltd. (hereinafter the "**Respondent**") which was engaged in the business of infrastructure development activities whereas Quippo Construction Equipment Ltd. (hereinafter the "**Appellant**") was engaged in the business of providing equipment for infrastructure activities. Out of the four, three contracts conferred exclusive jurisdiction to the courts of New Delhi to decide any dispute arising out of the agreement to be conducted under the aegis of Construction Industry Arbitration Association (hereinafter referred as "**CIAA**"), however the last and final agreement in this series was entered between the parties conferred exclusive jurisdiction to the courts of Kolkata to deal with any dispute arising out of the agreement, to be administered by the Construction Industry Arbitration Council (hereinafter referred as "**CIAC**").

According to the contract entered by the parties, the Appellant used to provide construction equipment's as per requirements of the Respondent and payment was to be made within seven days from the submission of the bills failing which interest were applicable for delayed period. As the payment were not released by the Respondent even after repeated reminders, Claimant invoked the arbitration clause and Sole Arbitrator was appointed as in accordance with the Rules of CIAA in New Delhi. The Respondent however denied the existence of arbitration clause in the agreement in its reply and neither did participate in the proceedings. Moreover, the Respondent filed an application for injunction restraining the Claimant from relying on the Arbitration clause in the Court of Civil Judge (Junior Division), Sealdah . The Court passed an order to stay the arbitration proceedings.

The Appellant then filed application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "**Act**") to refer the dispute to arbitration which was allowed by the Trial Court and the plaint filed by the Respondent was directed to be returned.

As the Respondent didn't participate in the arbitration proceedings, the Arbitral Tribunal passed an ex-parte award covering all the four agreements in favour of the Claimant, which later was challenged by the Respondent before the Hon'ble High Court of Calcutta. The challenge was however dismissed on the ground of lack of jurisdiction. The Respondent challenged the award and approached the court of District Judge at Alipore where non-existence of arbitration agreement was pleaded. The Respondent asserted that neither any arbitration agreement existed between the parties and nor did the Arbitrator had the jurisdiction to conduct arbitration in New Delhi. The Respondent submitted that the arbitration proceedings were to be conducted in Kolkata and hence challenged the jurisdiction of Arbitral Tribunal under Section 16 of the Arbitration and Conciliation Act, 1996. The petition again got dismissed on the ground of lack of jurisdiction. The Hon'ble Court stated that the jurisdiction was conferred on the courts of the place where the arbitration is usually conducted, ie. New Delhi and therefore only courts of New Delhi can exercise supervisory jurisdiction over the proceedings. The Hon'ble Supreme Court stated that :

" After perusal of the case record I find that there was an arbitration Clause in the agreement and the Arbitrator was appointed at New Delhi and the Ld. Arbitrator has passed the award in favour of the opposite parties. The question of jurisdiction of Section 34 has been raised. There are several case laws as cited by the Ld. Lawyer for the opposite parties. From the said case laws it is found that the jurisdiction of Section 34 is where the arbitration award was passed or in the place where the seat of arbitration was agreed by the parties. In the recent case laws reported in Indus Mobile Distribution Pvt. Ltd. v. Datavind Innovations Pvt. Ltd. MANU/SC/0456/2017 : (2017) 7 SCC 678. I find that the jurisdiction is exclusively in that place where the arbitration was done. Ld. Lawyer, for the Petitioner referred the agreement in between the parties stating that there is a Clause of arbitration at Kolkata but in reply the Ld. Lawyer for the opposite parties stated that there are several agreements and the place of arbitration is mentioned in other agreements is at Delhi and accordingly the arbitration has made at New Delhi and this Court has no jurisdiction to entertain of this Misc. Case Under Section 34 of the Act and only Courts at Delhi have the jurisdiction to entertain the same.

Accordingly, after careful scrutiny of the case record as well as the observation of the Hon'ble Apex Court I find that the arbitration award was passed at New Delhi and accordingly the Court of New Delhi has the jurisdiction to entertain the application Under Section 34 of the Arbitration and Conciliation Act. This Court has no jurisdiction. So, the present case is bad for want of jurisdiction."

The Respondents nevertheless filed a revision petition against this order before the Calcutta High Court which was also dismissed on the ground of existence of alternative remedy u/ Section 37 of the Act.

After which, an appropriate petition was filed by the respondents before the Calcutta High Court by which the order passed by the Alipore court upholding the award was dismissed and the case was restored back to the court of Additional District Judge Alipore. This order was brought to challenge before the Supreme Court.

The issue before the Hon'ble Supreme Court was on the notion of waiver of the right of a party to arbitration under

Section 4 of the Act. If a party to the dispute does not raise objection to the jurisdiction of the Arbitral Tribunal u/ Section 16 of the Act, the venue of the arbitration, the existence of the arbitration agreement, do they waive their right to object at a later stage?

While answering the aforesaid issue, the Hon'ble Supreme Court relied upon the judgement of the ***Narayan Prasad Lohia V. Nikunj Kumar Lohia and others (2002) 3 SCC 572*** to understand the amplitude and applicability of Section 4 of the Act. Section 4 has been produced below for ready reference:

4. Waiver of right to object.-A party who knows that-

a) Any provision of this Part from which the parties may derogate, or b) Any requirement under the arbitration agreement,

Has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, ***shall be deemed to have waived his right to so object.***

The Hon'ble Court has observed that Respondent not having raised any objection to the existence of the agreement, composition and jurisdiction of the arbitral tribunal during the arbitral proceedings itself, the Respondent would be deemed to have waived its right to object at a later stage. It was clarified and observed that the appropriate time to having raised an objection was at the first instance of the arbitral proceedings.

The Respondent could have raised its submissions pertaining to each of the agreements be considered and dealt with separately, before the Ld. Tribunal. It was also possible for him to contend that in respect of the agreement where the venue was agreed to be at Kolkata between the parties, the arbitration proceedings should be conducted in Kolkata only.

As to the challenge under Section 16 of the Act, the Arbitral Tribunal is solely to rule on its own jurisdiction. The Hon'ble Supreme Court referred the case *of* ***Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. (2002) 2 SCC 388*** that:

"Section 16 the Arbitral Tribunal can Rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority Under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, Under Section 16, a party cannot challenge the composition of the Arbitral. Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken, Under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator.

Needless to state a party would be free, if it so chooses, not to raise such a challenge..... If a party chooses not to so object there will be a deemed waiver Under Section 4."

Considering the facts that the Respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the Respondent must be deemed to have waived all such objections.

Answering the next issue on the relevance of the Place of Arbitration in domestic arbitrations, the Hon'ble Supreme Court stated that specification of "place of arbitration" may have special significance in disputes having International Commercial Arbitration, where the "place of arbitration" determines which curial law would apply. However, in the present case, despite all the similarities, the only distinction in one of the agreements was Kolkata as the venue for arbitration. In either case, may the venue be New Delhi or Kolkata, the applicable substantive as well as curial law would be the same.

Allowing the appeal, it was held that the respondent had, by its conduct, waived all objections to the venue of arbitration and consolidation of disputes.

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