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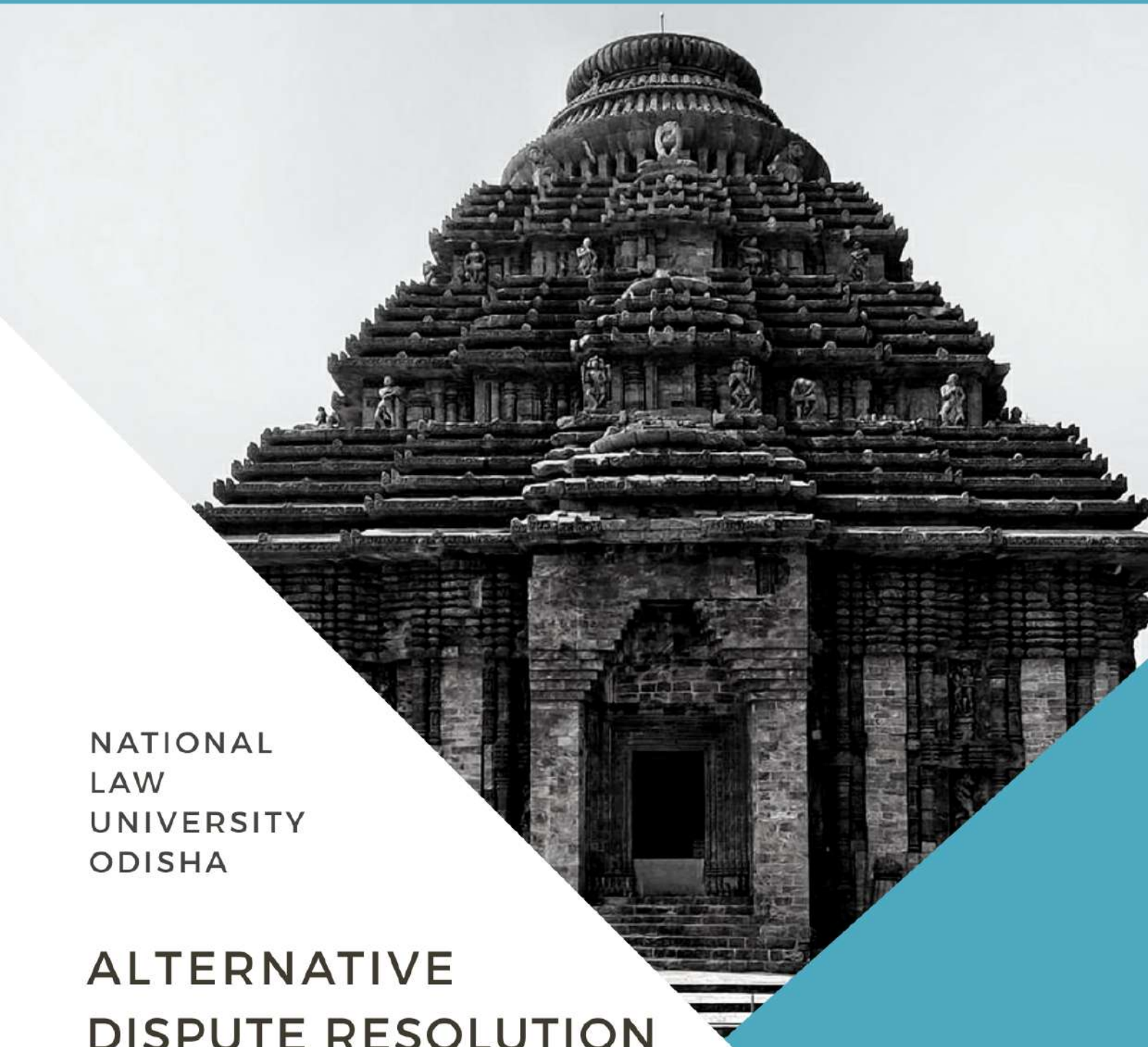

NATIONAL
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ALTERNATIVE DISPUTE RESOLUTION

E-NEWSLETTER

VOLUME I

TABLE OF CONTENTS

CONTENT

INTERVIEW
By: Bharat Chugh.....2

ARTICLES

WHAT IF AN ARBITRAL TRIBUNAL TURNS A CIVIL DISPUTE INTO A CRIMINAL TRIAL! IMPORTANCE OF STANDARD OF PROOF IN THE ARBITRATION
By: Prakhar Deep 10

REVISITING MEDIATION COURSES AS TAUGHT IN LAW SCHOOLS
By: Aman Hingorani 13

SINGAPORE CONVENTION ON MEDIATION SETTLEMENTS & CONSEQUENCES FOR INDIAN MEDIATION MARKET
By: Kritika Krishnamurthy 16

THE TETHYAN AWARD – WHAT'S WRONG WITH THE INVESTMENT LAW REGIME?
By: Syamantak Sen 19

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019: A MISSED OPPORTUNITY
By: Amit Kumar & Ayush Sharma 21

CASE UPDATES

I. SEPTEMBER 25

II. OCTOBER 27

III. NOVEMBER 28

INTERVIEW

Bharat Chugh

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1. **You have been on the different ends of the spectrum, from being an independent practicing lawyer to a judge, and now a partner at L&L Partners, one of the top law firms in India. What is your opinion of Alternative Dispute Resolution methods from all those different perspectives? Is the intention of the legislature of promoting ADR, being met, or is it being lost in the way it is implemented?**

Answer: ADR is definitely the way forward. Having experienced this up close, having been a civil judge myself, I can say that people are turning away from civil actions. Contrary to popular misconceptions, India does not have a very litigious population; our civil litigation ratios are amongst the lowest in the world. People do not like to take even their just and legitimate claims to civil courts for the fear of them remaining pending for years and years, which is well founded. Unfortunately, India has over three crore cases pending across the Supreme Court, the High Courts, and the subordinate courts (As of April 2018). This problematic reality, while keeping courts clogged, also keeps people away from approaching them.

The trials and tribulations of a litigant do not end after obtaining a decree or an award since execution of a decree or an award is a greater mess. Realizing the fruits of the decree in one's hands is a different challenge altogether,

In this background, ADR is definitely the way forward. There has been a huge emphasis on mediation and arbitration in the recent times and for good reason. For instance, statutorily, under the Code of Civil Procedure, 1908 (CPC), there is a strong focus on mediation. This comes in the form of Section 89 of the CPC, which encourages a civil court to proactively refer disputes before it to mediation, and Order X Rules A-G, place a lot of emphasis on pre litigation mediation.

In August 2018, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was amended to require mediation as a mandatory pre-action procedure prior to the filing of a commercial suit (unless a party required urgent interim relief from the courts). These requirements would apply equally to disputes of an international nature being litigated in India.

In the context of arbitration, '*The United Nations Convention on International Settlement Agreements Resulting from Mediation*' or more conveniently, the *Singapore Mediation Convention*, is a huge step forward. India is, in fact, one of the initial signatories of this convention, having ratified it in August 2019. The Convention gives legitimacy and sanctity to mediation settlements and makes them enforceable in the same way as an international commercial arbitration award. The Convention allows parties to a cross-border mediated settlement

agreement to directly seek enforcement of the settlement agreement before the competent authority of a country, without facing the challenges associated with incorporating the terms of settlement in an arbitral award or judgment.

It is envisaged that ratification of the Convention will be accompanied by the adoption of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (the "**Model Law on Mediation**"). The Model Law on Mediation provides a template for a National legislation through which the Model Law on Mediation will be implemented. The success of the Model Law on Mediation will depend to a significant extent on its global adoption by India along with other countries, who will have to enact a national legislation along the lines of the Model Law on Mediation for its effective implementation. This would prove to be a huge shot in the arm for international mediation settlements.

Earlier people were not inclined to opt for mediation in big international commercial disputes for the reason that there were substantial concerns regarding enforceability. Sometimes a mediated settlement would only be taken as a contract which would have to be taken to a court in a particular country, made a decree of that court and then enforced. This two-tier enforcement structure turned away a lot of parties from mediation, but this is changing now.

Apart from India, even US and China have also ratified the Singapore Mediation convention, and US and China being on one page for anything is an un-expectedly pleasant surprise in today's day and age so this is a promising step in the right direction.

The 2019 Amendments to the Arbitration and Conciliation Act ("the 2019 Amendment Act") are a welcome change and addition to the law already in place. There are some concerns on the constitution of the Arbitration Council of India (ACI), with the government being the biggest litigator on the one hand and having a say in the accreditation of arbitral institutions and gradation of arbitrators. However, the move towards institutionalization is welcome. Indian arbitration has suffered from ad hoc-ism for a long time which turns out to be costlier than institutional arbitration. In my opinion, moving towards institutions would not only provide a better framework to Indian arbitration but would also provide a huge impetus to formation of a dedicated arbitration bar in India. If you look at the SIAC statistics, India is one of the biggest consumers of SIAC and what the amendment seeks to do is to create a robust arbitral institution within the country. This intention of the legislature to promote ADR is being met, with judicial intervention and activism becoming a thing of the past.

The recent amendments have minimized the scope of judicial intervention, resulting in the burial of the ghost of patent illegality in international commercial arbitration and to a great extent in the taming of the unruly horse of public policy, by defining strictly what public policy means in the context of a domestic and international arbitration. With this, the challenges are now confined only to cases where the most basic notions of morality and justice and the most fundamental policy of Indian law are under challenge. The recent judicial decisions in

this regard are extremely welcome and a mere transgression of law is not taken to be something that may make the court refuse to recognize a foreign award.

2. **ADR is currently in the limelight and is getting a lot of hype in Law Schools. How different is ADR when it comes to practice?**

Answer: Again, ADR in India suffers from ad-hocism and there's a need to move towards institutionalization. Sometimes, although well-intentioned, ADR in certain cases turns into private hotel room justice which takes away transparency, takes away systematic approach to dispute resolution, and takes away accountability.

These are the challenges which still persist with ADR in India, which the 2019 Amendment Act seeks to do away with. Courts, though sometimes extremely slow, are taken to be more transparent places compared to an ad-hoc arbitration, but I think now with the new amendments, the strict rules regarding conflict of interest, along with the IBA guidelines being incorporated into the scheme of the Arbitration Act itself, India would go a long way in making arbitration as a means of dispute resolution more accountable and transparent, thus making it worth the hype. The hype, in such a scenario, is justified because arbitration is coming up as a huge practice area with more and more commercial disputes going to arbitration instead of courts of law.

Having said the above, I do believe that ADR as taught in law schools is appreciably different from its professional practice. This observation isn't intended to suggest that what is taught in law schools is wrong, but there areA. many more background processes and finer nuances that go into practicing ADR, which remain invisible to someone looking at ADR through a theoretical lens alone.

For instance, there is back-breaking, mind bending reading that is required for one to successfully represent a client in an arbitration. Similarly, one requires enormous insight into a dispute and incisive knowledge of the facts involved to be a mediator. Apart from knowing the facts of each case, one needs to be immensely well-versed with the law applicable to a dispute.

While ADR deserves the interest it commands among the student community in our country, it is important for aspiring ADR practitioners, law students or otherwise to know and witness these proceedings as they pan out in professional settings. I would exhort all students reading this answer, not only to pay attention to the theory of ADR that is taught in law schools, but also to witness the practice of ADR and actively engage in it as interns and moot court participants. This would help them gain insight into the toil that accompanies the practice of ADR. This is extremely important.

3. **Indian dispute resolution system has definitely seen a paradigm shift, majority of the parties to the transactions are willing to take up arbitration as the primary method for settlement over courts. However, the statistics reflect that majority of the arbitral awards have been challenged against in the courts. What do you think is lacking in the system, which compels party to pursue litigation post arbitration?**

Answer: No award would satisfy both the parties. One party would always be dissatisfied with the award and there might

be an incentive to delay the proceedings in order to delay the inevitable enforcement of the award. Judicial recourse against an arbitral award is something that cannot be taken away because there will have to be remedies against an arbitral award. However, given the fact that an arbitrator is somebody that is chosen by the parties, a greater amount of leeway and latitude is given to the arbitrator to decide the disputes in a way that he thinks is just and fair, provided that the broad rules of fair play are observed and each party is given adequate opportunity within that framework.

There is obviously a need for some amount of judicial oversight and that remedy cannot be taken away, however, that remedy also cannot be a first appeal where the court gets into a re-examination of facts and a re-appreciation of evidence. In my opinion, the recent amendments have made it abundantly clear that when the matter comes to a court after an arbitral award, the court ought not to re-appreciate evidence or re-look into the merits of the case. The arbitrator is the ultimate master of the quality and quantity of evidence and the questions of fact; it is only in cases of most egregious disregard of law or the specific grounds laid down in Section 34 of the Arbitration Act that an intervention is called for and I think the data in this regard presents a less negative picture where most awards withstand judicial scrutiny.

Also, since now there is no automatic stay on the execution of the awards till the pendency of the challenge, there are less judicial bottlenecks than there used to be so obviously we can expedite the decision on the 34 petitions and other cases in relation to arbitration pending before courts but for that we need more commercially minded judges who can dispose of such matters in a time bound manner. There would always be an incentive for one of the parties to pursue litigation, but yes, it is for the system to filter out these frivolous cases at the very outset so that people realize the fruits of their arbitral award.

4. **How progressive in your opinion are the changes brought about by the Arbitration and Conciliation (Amendment) Act, 2019? Will these help India become a hub for arbitration for International Commercial Transactions?**

Answer: The changes carried out by the Amendment Act are largely progressive in nature. The amendment to Section 11, to ensure speedy appointment of arbitrators by arbitral institutions designated by the Supreme Court and the High Courts, is in line with practices followed in other arbitration-friendly jurisdictions such as Singapore and Hong Kong, where the task of appointment of arbitrators is assigned to institutions such as SIAC and HKIAC. However, appointment of chairperson of the ACI by the Central Government raises questions of independence of the ACI, thus bringing under the scanner the concept of separation of powers in cases where the government itself is a party.

Another progressive change is the introduction of the phrase "*proof on the basis of the record of the arbitral tribunal*" to Section 34 of the Act. This is in line with the judgments of the Supreme Court in *Girdhar Sondhi* and *Fiza Developers*, in which the Court had held that the proceedings under S. 34 will not require anything beyond the record that is before the arbitrator and that Section 34 proceedings are not in the nature of full-fledged civil suits but are in

the nature of summary proceedings.

The Amendment Act provides immunity to arbitrators against suits or other legal proceedings for anything which is done in good faith or intended to be done under the Arbitration Act or the rules thereunder. The proposed amendment is in line with international practices in this regard. For instance, in Singapore, arbitrators are not to be held liable for negligence in the capacity of an arbitrator, and for mistake in law, fact or procedure in the course of arbitral proceedings or in the making of an arbitral award.

The Act has also amended Section 45 which deals with the power of judicial authorities to refer parties to arbitration in international commercial arbitrations. The amendment has introduced the words *prima facie* in Section 45, presumably to prevent Courts from undertaking a full-scale trial to decide the reference to arbitration. This is in line with the recommendation of the Justice B.N. Srikrishna High Level Committee which had recommended the introduction of a *prima facie* standard of review in Section 45. The Committee's recommendation, in turn, is based on the language used in Section 8 which also requires a *prima facie standard* of scrutiny and the decision of the Supreme Court in *Shin-Etsu v. Aksh Optifibre Ltd.*.

The Court in the aforesaid decision had held that judicial authorities, at the Section 45 stage, should only decide the reference to arbitration on a *prima facie* basis and not undertake a full-scale trial since that would defeat the objective of the parties to avoid litigation and pursue arbitration. Dharmadhikari J. who had concurred with Srikrishna J. in his majority opinion, had held that the *prima facie* standard of scrutiny would only apply in case the judicial authority *decides to refer* the parties to arbitration. If the judicial authority, on a *prime facie* standard, *decides not to refer* the parties to arbitration, it would have to try the issue like a preliminary issue, allow the parties to lead evidence and pass a reasoned order rejecting the reference to arbitration.

This is important because any rejection at the Section 45 stage is an appealable order under Section 50 of the Act. The effect of the introduction of the words *prima facie* is that it may be construed to mean that the refusal to refer parties to arbitration has to only be a *prima facie* conclusion, without any reasoned decision. Clearly, the decision *to not refer* the parties to arbitration, especially when it is appealable, should be reached only after an opportunity has been given to both them to make out their cases. It will be interesting to the see how the Courts interpret the provision. In fact, Justice Nariman has, at a public gathering, indicated that the Court will reject the application of the words *prima facie* because of the absurdity it creates.

The Parliament has also added Section 42A which requires the arbitrator, arbitral institution, and parties to the arbitration to maintain confidentiality of all arbitration proceedings except the award where its disclosure is necessary for the purpose of implementation and enforcement. The language used in the provision is a little vague and flies in the face of party autonomy especially when rules of most arbitral institutions permit the publication of awards only when the parties consent to it and that too in redacted form. A collective reading of this provision along with Section 43K which mandates the Arbitration Council of India (ACI) to maintain a depository of electronic awards,

indicates that there is no opt-out procedure for the parties who don't wish to publish their award or who wish to publish in a redacted form.

The deletion of Section 26 of the 2015 Amendment Act by insertion of Section 87 by way of the 2019 Amendment Act was a regressive step. One can say that it was done to overturn the decision of the Supreme Court in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd*, in which the Supreme Court had held that Section 26 would apply to arbitrations and court proceedings commencing post October 23, 2015, thereby providing that Section 36 of the Act (amended by the 2015 amendment) would apply to all proceedings, thereby, effectively removing the automatic stay on enforcement of awards pursuant to filing of a set aside application which had plagued arbitration.

This change has been recently negated by the Supreme Court in *Hindustan Construction Company & Anr. v. Union of India & Ors.*, wherein it has struck down Section 87 for being manifestly arbitrary under Article 14 of the Constitution. An attempt to change the law on applicability of the 2015 Amendment Act ran the risk of creating chaos as thousands of proceedings across the country – several at a very advanced stage - and following the Supreme Court ruling, would have been set at naught. Such an amendment would not have augured well with the objectives of certainty and predictability, which are the cornerstones for any jurisdiction to establish itself an international arbitration hub.

This also brings to light the aspect of there being the need to have a stable regulatory/legislative environment for India to grow as an international arbitration hub. The Arbitration friendly changes are not unwelcome but there should not be frequent cases of legislative/policy dissonance between the Supreme Court and the Parliament, as this can create a "roller-coaster" effect, which ultimately will make India an unattractive destination to arbitrate in or to even make investments in, which often become contentious and result in an international arbitration dispute.

5. **The 2019 Amendment Act provides for an appointment procedure by arbitral institutions designated specifically by the Supreme Court in cases of International Commercial Arbitration and the High Court in the other cases. In light of the same, how important was it to set up New Delhi International Arbitration Centre (NDIAC) in place of International Centre for Alternative Dispute Resolution (ICADR)?**

Answer: The 2019 Amendment Act by way of establishing NDIAC with an organised governance structure seeks to replace the out-dated ICADR and lay a strong foundation in the institutional arbitration setup in India. Per the recommendations of Justice Srikrishna Committee, NDIAC will take over of ICADR and overhaul its governance structure because of the procedural deficiencies in its functioning. ICADR failed at achieving its objectives, which included promotion of ADR, providing administrative and logistical support for ADR, appointment of arbitrators and providing training in ADR. ICADR was not able to gain any trust on the front of it being a credible alternative to ad-hoc arbitration. The ICADR had a large and ineffective governing council, which led to delays and invoked suspicion.

However, the biggest cause for ICADR's

eventual demise was its failure to address and market itself to prospective parties at the stage of contract formation. Not just private sector entities, but even public/government bodies were reluctant to submit disputes to ICADR managed arbitrations. In NDIAC, these procedural and systemic difficulties are being tackled not only by setting up of a stream-lined governing structure but by also establishing the ACI which will periodically review and grade the arbitral institutions in India. The periodic review and grading will certainly help in promoting the credibility of NDIAC among the foreign investors. It is hoped that NDIAC will change the perception of doing business in our country and will expedite the dispute settlement mechanism.

However, even in the case of NDIAC, the Chairperson shall be appointed by the Central Government *in consultation* with the Chief Justice of India, thus, the Government has not completely distanced itself from the running of the NDIAC. One issue which plagued the ICADR was that it not only suffered from the usual systemic issues which other Government offices in India also suffer from but also from the perception that it was an institution in which, good or bad, the Government had a lot of interference. This resulted in ICADR being witness to as few as 49 cases in 25 years, as compared to an institution such as SIAC which received more than 400 cases in 2018 alone.

There has to be a pro-active and concerted effort by the government and the executive alike to iron out the creases of partiality which the NDIAC and ACI suffer from, as neutrality is a factor which attracts many parties to an international arbitration centre, more so in case of India where arbitration disputes with government bodies constitute a major chunk of high-stake arbitral disputes.

Another area of concern is the ambiguity with respect to a foreign professional not being qualified for appointment as an arbitrator in India, as one of the requirements under the Eighth Schedule of the Act for a person to be appointed as an arbitrator is that he/she should either be an Advocate/Chartered Accountant/Cost Accountant or a professional within the four corners of an Indian service or an Indian undertaking. This may discourage foreign parties from seating their arbitrations in India as the parties may not be able to appoint foreign legal professionals as arbitrators or otherwise would be stuck in litigation over the ambiguity prevalent between the language of proposed Section 43J and the Eight Schedule. These two factors are in the teeth of the findings of the famous 2015 Queen Mary University Survey, which was also relied upon by the Srikrishna HLC Report, which states that perceived neutrality and the free choice of arbitrators (no exclusive list of arbitrators maintained by an arbitral institution) are 2 of the 4 most important factors which parties consider while choosing an arbitral institution.

All in all, the setting up of NDIAC certainly qualifies as a step in the right direction, but for it to be a giant leap for institutional arbitration in India there are further changes required and for that an investor friendly procedural framework must be adopted. A transparent process for appointment and removal of the members must be incorporated. Separately, the Central Government's involvement/ interference in the functioning and funding of NDIAC must be phased out to gain

investors' confidence.

6. **In your opinion, will the NDIAC set up in 2019, be able to meet the high standards set up by the other institutions such as SIAC, LCIA and VIAC, which are preferred by parties across the globe?**

Answer: SIAC, LCIA, VIAC, even HKIAC, are giants in the field of international institutional arbitration. NDIAC has the benefit of hindsight and can stand on the shoulder of giants like the SIAC and HKIAC, which have become a hub for international arbitration in such a short period of time, especially as far as the economic landscape of Asia is concerned. However, the growth of the NDIAC, or any such institution, is dependent on multiple complimentary factors which foster the practice of arbitration. SIAC, for example, grew by leaps and bounds because of having a national policy of minimal intervention of the Courts – one where Courts support and facilitate arbitral tribunals and do not aim to displace them.

Further, courts in Singapore are also understood to be highly competent and quick when it comes to grappling with complex questions of international law, treaty interpretation, and international arbitral jurisprudence. In fact, one of the recommendations in the B.N. Srikrishna HLC Report of 2017, was the creation of specialist arbitration benches, with judges trained in arbitration law and practice, just as it is the case in Singapore, Hong Kong and the UK.

There are other policy measures which the Government must undertake in order to directly attract arbitrations to the jurisdiction of India and also to incentivize foreign professionals by reducing their barriers to enter and to participate in not only international commercial arbitrations seated in India but also local arbitrations. Singapore, for example, incentivized participation of foreign professional by relaxing their visa norms.

One huge advantage which India has, as a country, is the use of English as an official language. The growth of HKIAC and SIAC, if one pays close attention, is also due to how welcoming these two countries have been for international practitioners and corporates when it comes to dispute resolution as far as prominent usage of English language is concerned.

7. **What is your advice to students who want to pursue a career in ADR?**

Answer: Students, at times, view ADR as an area of practice where lawyers sit in swanky rooms, wearing their suave suits, and engage in a mellowed presentation of their client's case to appeal to the rational senses of an Arbitrator. However, this is only the tip of the ice-berg and there is a multitude of other aspects which one ought to consider before deciding whether they should pursue a career in ADR or not. One has to realize that to practice and to pursue a career in 'Alternative' Dispute Resolution, one has to first equip themselves with the effective tools of resolving a dispute legally, irrespective of the forum. For this, students need to equip themselves with effective knowledge of substantive and procedural laws, which form the *grundnorm* of any legal regime. These subjects include but are not limited to Contract Law, Law of Evidence, Procedural Laws, Corporate Law, Principles of statutory and contractual interpretation, legal strategy, *et al.*

There is a lot of background reading and extensive paper-work involved before one steps into arbitration and puts their best foot forward for their client during the proceedings. Since arbitrations often involve 'technical' issues and questions, which are not in the realm of law, one has to extensively prepare and be on the same page as their client as far the subject matter of the dispute is concerned; this may include learning about almost any subject, ranging, for instance, from how high-rises are constructed to learning how off-shore under-water gas drilling takes place. Basically, a lawyer who wants to be on top of a matter should be a jack of all trades and a master of one – the one being the law involved in that dispute.

Unlike court proceedings, time is of the essence in arbitrations being conducted under the rules of an international institution and for this reason it is imperative that one inculcates the skill of time management; it is not only important but can also make or break your case if you are not concise and crisp in your argumentation and presentation.

Students these days, I believe, have a plethora of avenues, such as moot courts and client counselling competitions, where they can practice and learn about essential soft-skills which are essential for arbitration. I have detailed what law students looking at a successful practice in ADR should do in answer 2 above. In conclusion, I believe that students must make the best of these opportunities, going forward in their journey to becoming successful legal practitioners.

WHAT IF AN ARBITRAL TRIBUNAL TURNS A CIVIL DISPUTE INTO A CRIMINAL TRIAL! IMPORTANCE OF STANDARD OF PROOF IN THE ARBITRATION

Prakhar Deep

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I. Introduction:

Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to the court. Choosing the private dispute resolution procedure simplifies the process of adjudication as the arbitrators are not bound by the technical and strict procedures of Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

But the question arises that whether an Arbitral Tribunal can deviate from the basic principles of adjudication process? While it's true that Chapter V of the Arbitration and Conciliation Act, 1996 ("Arbitration Act"), i.e. the Conduct of Arbitral Proceedings gives power to the Arbitral Tribunal to determine the admissibility, relevance, materiality and significance of evidence. However does this power also gives the Arbitral Tribunal, the freedom to apply any standard of proof of its choice?

<u>An illustration below explains the scenario:</u>
A dispute arose between X (Claimant) and Y (Respondent) out a commercial contract which was referred to an Arbitral Tribunal. The Claimant alleged breaches against the Respondent and as a consequence filed certain

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monetary claims. Along with the Statement of Claim, the Claimant filed several documents to support the claims against the Respondent. In response, the Respondent rebutted all the breaches alleged by the Claimant.

The Arbitral Tribunal adjudicated the claims and passed the award. While rendering the award, the Arbitral Tribunal was of the view that both the parties have failed to prove their case. The Arbitral Tribunal observed that the defence put forward by the Respondent was weak, however at the same time, the evidence led by the Claimant was also insufficient to prove Respondent's breach. Thus, the Arbitral Tribunal gave a benefit of doubt to the Respondent and did not find it guilty of contractual breach.

To conclude the findings in Award, the Arbitral Tribunal did find the Respondent's actions questionable, but exonerated the Respondent it from any financial liability by rejecting the Claimant's evidence as insufficient.

As per the Claimant, the evidence it filed before the Arbitral Tribunal in support of the claims was sufficient and more than probable, than not proving a case against the Respondent. The Claimant was of the view that the dispute between the parties was a civil dispute and Arbitral Tribunal while adjudicating the same applied the higher standard of proof, as if it was adjudicating a criminal trial where the standard of proof required is beyond reasonable doubt.

In premise of the above facts, can the Claimant challenge the award under Section 34 of the Arbitration Act? The above factual scenario raises an important issue in the law of arbitration regarding the manner in which an Arbitral Tribunal is expected to adjudicate the dispute referred to it.

II. What is "Standard of proof"?

Standard of proof is the level of certainty and the degree of evidence necessary to establish proof. A person responsible for proving a case has the duty to apply the correct standard of proof. There are different standard of proofs applicable in different circumstances. These circumstances, as we know it are the nature of disputes.

While adjudicating a dispute, the foremost thing a Court or any adjudicating authority looks for is the nature or type of dispute before it. The next step is to apply the standard of proof required to adjudicate the dispute and then weigh the evidence against it to discharge the burden of proof. It is a settled principle of law that while adjudicating a civil dispute the standard of proof applicable is balance of probability or the preponderance of the evidence and not the higher standard of "proof beyond reasonable doubt" as applied in criminal case.

III. Standard of Proofs applicable to the civil dispute and in the arbitral proceedings

The Supreme Court in the recent *Ayodhya dispute* verdict[1] relied on "Phipson on Evidence" to explain the principle of "Preponderance of Probability". The Court observed that in a civil dispute, the evidence is such that if the Court can say that "*we think it more probable than not*", the burden is discharged, but if the probabilities are equal, it is not. Courts have even observed that in matters where serious allegations of fraud have been made in a civil case, there is no requirement to establish such allegations beyond reasonable doubt.[2]

[1] M. Siddiqq (D) through L.R. v. Mahanr Suresh Das and Ors, Supreme Court, Date of Decision: 9 November 2019.
[2] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. Bombay High Court, relying on the five judges bench

But is the Arbitral Tribunal also expected to apply any specific standard of proof while adjudicating a dispute? One may argue that a dispute referred to arbitration arises out of a contract and it falls within the meaning of a civil dispute. Therefore, an Arbitral Tribunal is expected to adjudicate a dispute referred to it using the balance of probability test. Further, an obligation to apply a correct standard of proof in a dispute is a settled law and deemed to be a "substantive law for the time being in force in India" as set out under Section 28 of the Arbitration Act. Therefore, application of wrong standard of proof would be in violation of Section 28 by the Arbitral Tribunal.

The counter argument to it is that the Arbitral Tribunal is not bound by the strict rules of the Indian Evidence Act, 1872 as set out in Section 19(1) of the Arbitration Act, since it can frame its own procedures. Further, the argument of contravention of substantive law of India, by itself, is no longer a ground available to set aside the award as held by the Supreme Court in the recent case of *Ssangyong Engineering* v. *National Highways Authority of India*.[3] This is because raising the same ground would result in re-appreciation of evidence.

IV. Whether a party can raise a ground in Section 34 Proceedings that the Arbitral Tribunal failed to apply the standard of proof required to adjudicate the civil dispute?

Arbitration as a form of alternate dispute resolution, runs parallel to the judicial system, and attempts to avoid the prolix and lengthy process of the courts and presupposes that parties consciously agree to submit a potential dispute to arbitration with the object of actively avoiding a confrontation in the precincts of the judicial system. If a court is allowed to review the decision of the Arbitral Tribunal on the law or on the merits, the speed and, above all, the efficacy of the arbitral process would be lost.

The position of law stands crystallized today, that findings, of fact as well as of law, of the Arbitral Tribunal are ordinarily not amenable to interference either under Sections 34 or Section 37 of the Arbitration Act. The scope of interference is only where the finding of the Arbitral Tribunal is either contrary to the terms of the contract between the parties, or, ex facie, perverse, that interference, by Court, is absolutely necessary. The Arbitral Tribunal is the final arbiter on facts as well as in law, and even errors, factual or legal, which stop short of perversity, do not merit interference under Sections 34 or 37 of the Arbitration Act. The grounds available to the party challenging an award are very limited. It is true that in exercise of powers under Section 34 of the Act, Courts cannot act as a Court of appeal and re-appreciate the evidence led before the Arbitral Tribunal. The Supreme Court of India in the recent decision of *Ssangyong Engineering* v. *National Highways Authority of India* has explained the narrow scope of Section 34 after the enactment of the 2015 amendments.[4]

The Court clarified that a mere contravention of the substantive law of India, but itself, is longer a ground available to set aside an award. However if an Arbitral Tribunal gives no reasons for an award and contravenes Section 31(3) of the Arbitration Act, that would certainly amount to patent illegality on the face of the arbitral award.

decision of the Supreme Court of India in Seth Gulabchand v. Seth Kudilal and Ors, AIR 1966 SC 1734.

[3] Civil Appeal No. 4779 OF 2019, Supreme Court, Date of Decision: 8 May 2019.

[4] *ibid.*

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Further, the Court also held that after the enactment of 2015 amendments, law laid down by the Supreme Court in *ONGC* v. *Western Geco International* wherein juristic principles i.e. judicial approach, Wednesbury principle of reasonableness which were added to fundamental policy of Indian Law are no longer applicable.

V. Analysis

In premise of the above observations of the Supreme Court, a wrong application of standard of proof cannot be covered within the meaning of Section 34(2)(b)(ii) of the Arbitration Act as it may not fall within the restricted meaning of "public policy".

However, a party may succeed in applying Section 34(2A) of the Arbitration Act, as the wrong application of the standard of proof would go into the root of the matter and the award rendered on the same would be unreasoned and thus patently illegal. The recent decision of the the full bench of the Supreme Court in case of *Dyna Technologies Pvt. Ltd.* v. *Crompton Greaves Ltd.*[5] has elaborated the three important characteristics of a reasoned award i.e. proper, intelligible and adequate. The rationale given in the *Dyna Technologies* may aid the case of the party challenging the methodology adopted by the Arbitrator.

Therefore, if the Arbitral Tribunal applies a wrong standard of proof while making an award, then the very basis of the decision-making process would be flawed. As a result, the reasons in the award may become of the basis for challenging the same under Section 34 of the Arbitration. It will be interesting to see how the jurisprudence develops on this issue.

[5] Civil Appeal No. 2153 of 2010, Supreme Court, Date of Decision: 8 May 2019.

REVISITING MEDIATION COURSES AS TAUGHT IN LAW SCHOOLS

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It is, indeed, heartening that mediation is becoming popular amongst students and is now integral to the curricula in virtually all Indian law schools. The teaching methodology to impart mediation skills to students, however, remains traditional. Mediation is invariably taught through a mix of lecture and class simulation exercises. Most mediation courses introduce the students to the theory of mediation and, in the process, detail the importance of communication and negotiation.

The course then requires the students to do role plays. This entails the grouping of the students into three, with one student being the mediator and the other two being the parties. The faculty leads the discussion post the role plays on how the mediation sessions have - played out. The students acting as the parties are usually asked to give feedback to the mediator student, while the faculty gives general feedback on aspects that he/she may have happened to observe with respect to any particular mediator student while the exercise was on. In some courses, the faculty shows videos of actual mediations, highlighting the elements of an opening statement and ground rules of mediation.

Having taught mediation as adjunct faculty since 1998 in various law schools and other

institutions, and having acted as a mediator for the same period, I believe that newer teaching methodologies need to be adopted which emphasize mediation as a performance skill. One of the major flaws in the teaching methodology adopted in India for performance skills courses, whether it be for ADR, or indeed, for advocacy through moots or mock trials, is the absence of an individualized and structured feedback or review by the faculty on the performance of each student. The very purpose of the "learning by doing" session is lost if the student is not made aware there and then about the areas of concern in his or her performance and is not told how to address it.

There are, of course, many scientific ways of giving a review. The one I use has been borrowed from South Eastern Circuit Advanced Advocacy Course, Keble College, Oxford. In order to give an effective review to, say, the mediator student, the faculty should not only be able to share with the student the area of concern, the reason for it to be a matter of concern and remedy to fix it, but should also be able to briefly demonstrate his or her suggestion.

The idea is that the faculty observes the performance of the mediator student on any stage of the mediation process, notes down verbatim what the mediator student is saying and then gives the review lasting for few minutes using the above structure which should flow seamlessly through its constituent parts. The review is given in the presence of all students in the class so that the students learn the "dos" and "don'ts" of mediation through this method, as opposed to the lecture method.

Such individualized structured review in class should be supplemented by a separate video review, preferably in the privacy of another room. The purpose of a video review is to assist the mediator student with stylistic problems rather than issues of substance, such as fiddling, lack of clarity of speech, high speed of talking, absence of eye contact, waving of hands, chewing the pen top, inappropriate body language or posture and so on so forth. Video reviews tend to be more conversational and cover several aspects of the performance, though the faculty could include the same structure of giving the reason for a particular aspect to be a matter of concern and suggest the remedy.

Drafting a mediation settlement agreement is yet another performance skill that requires to be reviewed by the faculty. The faculty ought to provide sufficient time within each exercise to enable the mediator student to draft the settlement agreement where one has been arrived at. Each settlement agreement too should be assessed and evaluated by the faculty, before proceeding to give a review using the structure indicated earlier.

Another essential element of the modern teaching method is that every exercise must be preceded by a faculty demonstration to indicate to the students as to how they are expected to perform. This in turn mandates that the faculty themselves must possess the mediation skills they are seeking to transfer to the students.

Then there is the need to include in the existing mediation curricula more contemporary content. At least two areas merit mention. The first is the provision for training students in pre-mediation dispute analysis and the second is the need to integrate strands of restorative justice practices in mediation relating to cases having an emotional component.

In most jurisdictions, there exist dispute

analysis modules whereby the mediator, before commencing the mediation, has the benefit of getting information in confidence from the parties as to their perspective of the dispute, their respective underlying interests and how they would like to see the dispute resolved. The advantage of this is obvious. The mediator gets at the outset a framework of possible common underlying interests of the parties on which he or she can build during mediation. Further, the mediator is able to assess as to whether he or she is actually comfortable in doing that mediation. If the dispute for instance relates to a trademark or copyright violation, a mediator practicing only matrimonial law may feel inadequate in taking on that mediation. It is, of course, true that the mediator has merely to control the process, leaving the parties to decide the outcome. However, a mediator, well conversant with the substantive and procedural law on the subject matter of the dispute as also accepted practices, may be more effective in that particular mediation.

As per the current practice in Court-annexed mediation in India, the mediator is usually simply provided with the reference order and in some mediation centres, a copy of the pleadings. The mediator is expected to refrain from doing any kind of pre-mediation exercise, lest he or she prejudges the matter or gets influenced by the merits of the case. Such expectation overlooks the distinction between dispute analysis geared towards identifying the possible common interests of the parties and case analysis aimed at sifting through the facts of the case in light of the legal rights of the parties so as to formulate a case theory in order to litigate. While the latter is not appropriate for mediation, the former in fact facilitates effective mediation and must become part of the mediation process. This is particularly so given that, in actual practice, the mediator does not merely open communication channels between the parties or convey inter-se proposals. Rather, the mediator invariably performs a more pro-active role, assisting the parties in identifying issues, clarifying their respective priorities and interests, and generating possible solutions. Nor is such pro-active role prohibited by law.

The second area that requires attention, not just in India but across the world, is the need to integrate strands of restorative justice practices in mediation. It will be readily agreed that while a win-win mediation settlement agreement may end the dispute, it may not necessarily bring about a closure to the emotional trauma attendant to that dispute. If mediation is about rebuilding relationships, it cannot but also provide the healing touch to bring about emotional closure in order to enable the disputants to move on. For that to happen, not only would the mediators need to be well-versed in restorative justice practices but the conventional process of mediation itself would need to be revisited.

Drastic changes are, therefore, needed in the way mediation is taught in law schools. The suggested teaching methodology would necessarily require the faculty to be trained in the technique of giving structured class and video reviews as also on how to proceed with such reviews for sensitive and effective individualized teaching among the diverse constituency at the course. The time management and mechanics of conducting video reviews would need to be put in place; with facilities to record each performance and to play it out with each mediator student. A higher faculty to student ratio would be required, once adequate faculty is trained in the teaching method. The assessment criteria for marking students would need to be evolved. The course itself needs to be leaner, with increasing focus on including contemporary content.

It is only after the student becomes familiar with mediation and has acquired such mediation skills through 'learning by doing' sessions that he or she should be permitted to intern with a mediator or to witness actual mediation sessions (though of course with the consent of the mediator and the parties). Else, the student will simply not be in a position to spot in a mediator's performance the reason for running the mediation session in a particular way. A few law schools are toying with the possibility of setting up mediation clinics on their campuses, with a view to provide hands-on exposure to the students in conducting mediation, for instance, in neighbourhood markets. Such clinics would also serve to provide internship opportunities. At the end of the day, mediation is a performance skill, and the earlier the student internalizes it the better it is for him or her to build a robust mediation practice.

SINGAPORE CONVENTION ON MEDIATION SETTLEMENTS & CONSEQUENCES FOR INDIAN MEDIATION MARKET

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Adopted in December 2018 and opened for signatures of countries in August 2019, the United Nations Convention on International Settlement Agreements resulting from Mediation, also known as the "Singapore Convention on Mediation" gives enforceability equivalent to arbitration awards to international settlement agreements resulting from mediation in signatory jurisdictions.[6] This instrument was the product of negotiations that began in 2014, following a proposal made by the US to develop a multilateral convention that would promote the enforceability of international commercial settlement agreements reached through mediation in the same way that the New York Convention facilitates the recognition and enforcement of international arbitration awards.[7]

The New York Convention paved the way for an expansion in the resolution of international disputes through arbitration proceedings. Since the New York Convention is widely seen as a success, it is expected that the Singapore Convention on mediation will be widely endorsed. If so, the Singapore Convention will create significant momentum in favour of the use and recognition of the mediation of international disputes just as the New York Convention led to a rise in the use and recognition of arbitration. Only time will tell. But if history is any indicator, the Singapore Convention is very good news for businesses looking to resolve controversies expeditiously and confidentially.

Like the New York Convention, the Singapore Convention requires implementation in domestic legislation. Such laws may of course differ between jurisdictions. Significantly, the Working Group recognised that difficulties might arise due to their failure to obtain consensus on certain provisions,[8] and it remains to be seen whether differences in

[6] UNCITRAL, United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> last accessed 28th December 2019.

[7] Eunice Chua, The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution (2019).

[8] United Nations, General Assembly, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-eighth session, A/CN.9/934, (5-9 February 2018), available from https://undocs.org/A/CN.9/934, [64].

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domestic legislation prove to be problematic.

Before addressing the substance of the Singapore Convention, the fact that there was a convention instead of a softer instrument is an achievement in itself. In the 65th session of the UNCITRAL Working Group II (the Working Group), many delegations supported preparing model legislative provisions instead of a convention due to concerns about the lack of a harmonized approach to the enforcement of settlement agreements, both in legislation and in practice. The Working Group recognized that a binding instrument such as a convention would bring certainty and would contribute to the promotion of mediation in international trade. However, it also recognized that the notion of mediation was new in certain jurisdictions and that flexible model legislative provisions would be more feasible. Nevertheless, at its 66th session, the Working Group arrived at a creative compromise proposal on five key issues, including the form of the instrument, which would involve a model law and convention being prepared simultaneously.[9]

The Singapore Convention has great potential to impact the conduct of international dispute resolution in Asia, where mediation is viewed as a valuable tool to resolve commercial disputes as it is consistent with Asian sensibilities and culture. In an exploratory survey conducted by the International Institute for Conflict Prevention and Resolution in 2011, out of 122 respondents comprising in-house counsel and external counsel from the Asia-Pacific region, seventy-two percent indicated that their company or firm generally had a positive attitude to mediation (compared to sixty-nine percent for arbitration) and seventy-eight percent indicated that their company or clients had used mediation to resolve disputes in the past three years.[10]

The Singapore Convention does not apply to settlement agreements that are concluded in family, consumer and employment related transactions. This may act as a deterrent to the outreach of the convention especially in jurisdictions like India where almost all the multinational corporations of Indian origin are run by extended families and any shareholder disputes intertwined with partition or other personal disputes may remain outside the purview of the convention.

The Singapore Convention also does not apply to settlement agreements that have either been approved by a court or concluded in the course of proceedings before a court, or are enforceable as a judgment in the State of that court or have been recorded and are enforceable as an arbitral award. This also reminds us of the urgent need to amend and upgrade Sections 13 and 44A of Code of Civil Procedure, 1908 which in their present state are woefully inadequate for the reciprocity of enforcement of foreign judgments under private international law.

India was one of the first group of signatories to the convention in August 2019. This step has brought us within a group of 46 countries many of whom have well developed and structured mediation markets. Apart from hailing the benefit of the convention, it is also now important to pause and think- is the Indian mediation market ready for the Indian mediation market's globalization?

The consequences on the mediation market in India so far has been largely positive. In view of the International and Constitutional obligations under Article 253 of the Constitution, India has to enact a new law on

[9] Eunice Chua, The Singapore Convention on Mediation – A Brighter Future for Asian Dispute Resolution (2019).

[10] Singapore Academy of Law, "Study on Governing Law and Jurisdiction Choices in Cross-Border Transactions" (2016), online: CIArb.

mediation, setting out the process for enforcement. In order to draft a new mediation law, the government has already set up a committee.[11] In addition to this, the Chief Justice of India also suggested starting degree and diploma course to ensure qualified and well-trained mediators.[12] In addition to this, the Chief Justice of India also stressed up how all commercial disputes must go through mediation before approaching the courts.

However, at the ground level, much needs to be done. We still lack a uniform grading and accreditation system for mediators in India., We are still heavily reliant on international certifications which do not meet the criterion of the customized conditions required for sustainable growth of the Indian mediation market. Indian mediators need higher exposure to commercial disputes and commercial disputes need mediators with experience of commercial transactions and disputes. This has led to a chicken and egg situation. This situation can be resolved only when the demand side of commercial mediation in India is strengthened.

In a recent Delhi High Court case of Daramic Batteries, the disputants refused to participate in mandatory pre litigation mediation under Commercial Courts Act, 2015 because the dispute required a mediator who is also an expert in the battery industry and the Legal Services Authority was unable to provide such a mediator. We have experienced similar demand in the insurance industry where industry experts are demanded by insurance companies as a pre-condition to give mediation a try.

The above examples are clear indicators that the market is willing to adopt commercial mediation only if the mediator shows experience of not just mediation but also sectoral or corporate experience. It is important for us to create this interface for successfully competing with international mediators who already have sector or industry focused practices.

Further, it is important for the government and private institutional mediation centres to lead mediation in India. Unlike arbitration, it is important that we do not lose the lion's share of the market to foreign institutional setups owing to our preference for unorganized, ad hoc ADR. An institutional setup brings with it standard operating procedures that ensure compliance of international best practices. It creates ease of record creation for corporate clients by providing documents and forms for each step of mediation and mediation settlement. It also assists in ease of grading and accreditation of mediators by providing authentication to vital information of the mediator's practice such as number of mediations, sectoral highlights, client feedback.

It's an old adage that the best way to teach someone to swim is to push them in the swimming pool at the deep end. Such is presently the status of Indian market for commercial mediation. It remains to be seen whether we realise our predicament and attempt to float or become victims of inaction. Various peer run initiatives across India have cropped up attempting to create mediator databases which may also assist in creating market symmetry. Concentrated efforts from supply side and government is required to remain relevant internationally. There is also a dire need to empathise with the demand side, reach out to them and understand their must

[11] Ajmer Singh, Supreme Court forms committee to draft mediation law, will send to government (*Economic Times*, 19th January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms> last accessed 21st January 2020.

[12] Ibid.

haves to cater to them rather than constantly honing our tusks waiting for a battle to come to us.

THE TETHYAN AWARD – WHAT'S WRONG WITH THE INVESTMENT LAW REGIME?

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In early 2019, an International Centre for Settlement of Investment Disputes ["**ICSID**"] based arbitration tribunal ["**the Tribunal**"] ordered Pakistan to pay a massive 5.8 billion USD to Tethyan Copper Company ["**the Company**"] in compensation in an Investor-State Dispute[13]. The Company had invested more than 220 million USD to discover copper and gold reserves in Reko Diq in Baluchistan[14]. In 2006, both the regional and federal governments in Baluchistan offered to assist the Company in developing the mine[15]. The mine is considered to be one of the largest copper reserves in the world with an estimated lifespan of 50 years[16]. However in 2011, following extensive tests and trials, the Company was removed from the project by the regional government in Baluchistan and hence the dispute arose in 2011 with commencement of arbitration in 2012[17]. The arbitration was brought under the Australia-Pakistan Bilateral Investment Treaty[18] ["**BIT**"][19].

It was a hard fought legal battle with submissions being made on issues as serious as corruption and illegality, besides routine submissions being made on want of jurisdiction as well as disputes on fact and law[20]. To top it all, the Government of Pakistan initiated litigation at their appellate courts to oust the jurisdiction of the Tribunal[21].

After the Tribunal rendered the award, Pakistan tried settling with the Company. However, it now seeks to challenge the Tribunal's award in accordance with procedure laid down under the ICSID Rules[22]. This change in course of action can be surely attributed to the Company moving a court in the United States of America for enforcement of the award[23]. It is safe to assume that millions of dollars have already been spent by the Pakistani State on legal costs from the public purse[24].

Given Pakistan's present economic downfall[25], the impact of the award becomes even more pertinent. In the past couple of decades, Pakistan has been involved in close to 20 investment disputes under various BITs,

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13 Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, <https://www.italaw.com/cases/163> last accessed 20th December 2019.

14 Ahmad Ghouri, Pakistan's Woes with Foreign Investors – Ways to Prevent the Tethyan Saga (Dec. 30, 2019, 1:05 AM), Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/11/18/pakistans-woes-with-foreign-investors-ways-to-prevent-the-tethyan-saga/> last accessed 20th December 2019.

15 Xavier Grange, Debevoise wins USD 6 billion Pakistan arbitral award, ICLG News, 6 Aug. 2019, <https://iclg.com/news/9939-debevoise-wins-usd-6-billion-pakistan-arbitral-award> last accessed 19th December 2019.

16 *Ibid.*

17 *Ibid.*

18 Australia - Pakistan BIT (1998), <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/215/australia---pakistan-bit-1998-> last accessed 21st December 2019.

19 *Supra* note 3.

20 *Ibid.*

21 *Ibid.*

22 *Supra* note 2.

23 *Ibid.*

24 *Ibid.*

25 Michael Kugelman, Another tough year for Pakistan's economy, East Asia Forum, 23 Dec. 2019, <https://www.eastasiaforum.org/2019/12/23/another-tough-year-for-pakistans-economy/> last accessed 20th December 2019.

including recently with a Kuwait-based investor[26] and Mauritius-based investor[27]. The millions of dollars already incurred in legal costs in such disputes are in addition to the impending risk of losing them and paying billions of dollars in compensation.

This Article seeks to convey that this less than desirable scheme of things is not merely limited to Pakistan. This common thread, of incurring disproportionate legal expenses followed by shelling out extravagant compensation amounts, runs through most developing countries that have BITs in place.

India, which is in a relatively better position amongst this subset of developing countries, fares equally worse, having lost 4.8 million USD excluding legal costs in 2011, against an Australia-based investor[28]. India is also involved in several other high stake investment disputes wherein it could ultimately end up paying billions of dollars in compensation alone[29]. Other South Asian countries like Bangladesh[30] and Sri Lanka[31], similarly, have not only lost billions of dollars in compensation so far, but are also involved in more investment disputes that are pending adjudication[32].

The consequent impact – developing countries trying to wriggle out of their obligations under the existing BITs. This is evident from India's new model BIT[33] which excludes the Fair and Equitable Treatment ["**FET**"] standard and Most Favoured Nation ["**MFN**"] Treatment Provision[34]. This is understandable given that it is widely believed that developing nations suffer from an inherent disability when the FET standard is invoked against them under BITs[35].

The reasoning behind propagation of such a belief cannot be dismissed easily. Put simply, the FET standard puts an obligation on the host state to render "fair and equitable" treatment to the investors. The vagueness of the phrase might very well lead to its downfall[36]. It has been interpreted differently by various investment tribunals; however, one grey lining that runs through most of these

[26] Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8, <https://www.italaw.com/cases/1786> last accessed 17th December 2019.

[27] Progas Energy Ltd. v. Islamic Republic of Pakistan, https://www.italaw.com/cases/2044.

[28] White Industries Australia Ltd. v. The Republic Of India, https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

[29] Aditi Shah; Sudarshan Varadhan, Arbitration court rejects India's plea in case against Nissan, Reuters, 29 May 2019, <https://in.reuters.com/article/nissan-india-arbitration/exclusive-arbitration-court-rejects-indias-plea-in-case-against-nissan-sources-document-idINKCN1SZ0X2> last accessed 19th December 2019.

[30] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, https://www.italaw.com/cases/951.

[31] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, https://www.italaw.com/cases/1745; Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, https://www.italaw.com/cases/96; Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, https://www.italaw.com/cases/documents/703.

[32] Telenor serves legal notice on the president, The Daily Star, 20 Dec. 2019, <https://www.thedailystar.net/frontpage/news/telenor-serves-legal-notice-the-president-1842655> last accessed 17th December 2019.

[33] Model Text for the Indian Bilateral Investment Treaty, Ministry of External Affairs, Government of India, 16 Dec. 2015, <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf> last accessed 21st December 2019.

[34] Trishna Menon; Gladwin Issac, Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative? (Dec. 30, 2019, 1:21 AM), Kluwer Arbitration Blog, <http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/> last accessed 30th December 2019.

[35] Armand de Mestral, The Impact of Investor-state Arbitration on Developing Countries (Dec. 30, 2019, 2:38 AM), Centre for International Governance Innovation, <https://www.cigionline.org/articles/impact-investor-state-arbitration-developing-countries> last accessed 30th December 2019.

[36] Joanna Jemielnak et al., The Vague Meaning of Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications, Legal Interpretation in the Practice of International Courts and Tribunals, Oxford University Press (upcoming).

interpretations is that they demand a very high standard when seen through the prism of a developing country. What this leads to, far too often, is the concerned tribunal holding that the host state has violated the FET standard and awarding the investor compensation for such breach. It is pertinent to note that domestic investors in these developing countries, if entitled to such a standard, could also claim such breach. Therefore it becomes unreasonable on part of tribunals across the investment law jurisprudence to ignore ground realities in developing countries and expect host states to not provide foreign investors with the same protection accorded to domestic investors, but rather a higher degree of protection than that accorded to domestic investors.

Relatively better off countries like Argentina and Brazil, rejected entering into a global investment agreement, citing the heavy expenses involved[37]. Legal costs average roughly 4.5 million USD for each side per case, but can be much higher[38]. In a dispute between Russia and an investor based in the Isle of Man[39], the investor incurred legal expenses to the tune of 74 million USD alone[40]. Additionally, the arbitral tribunal's fees totalled 7.4 million USD[41]. Since awarding costs is conditional upon the discretion of the tribunal, a host state, even after successfully defending a claim, may incur millions of dollars in legal expenses.

This represents a deeper underlying problem with the investment arbitration regime. When pushed to their financial limits by the existing system, States will have no choice but to either wriggle out of certain obligations that they find problematic or avoid entering into investment agreements in totality. Both situations are not conducive to economic prosperity, either in the developing countries or the developed ones. It is pertinent to note that while foreign investors from richer countries have control over the financial capital required to run a successful business, certain factors, such as availability of resources and cheap labour, are not available "back home", necessitating their need to invest in developing countries. In the absence of an investment agreement regime, such foreign investors would be left to the mercy of the host state and its domestic courts.

Therefore it is important for the international arbitration community to recognize the problem that plagues the investment arbitration regime and try to find a suitable remedy. One possible solution would be to replace the onerous FET standard with a standard that prescribes treatment at par with domestic investors.

ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019: A MISSED OPPORTUNITY

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The Arbitration and Conciliation

[37] India rejects attempts by EU, Canada for global investment agreement, The Hindu, 23 Jan. 2017, <https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece> last accessed 20th December 2019.

[38] *Supra* note 22.

[39] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227, <https://www.italaw.com/cases/1175>.

[40] Investment Court System (ICS): The Wolf in Sheep's Clothing, Public Services International, May 2016, <http://www.world-psi.org/sites/default/files/documents/research/en_wolfics_web.pdf> last accessed 19th December 2019.

[41] The cost of Yukos, Global Arbitration Review, 29 July 2014, <https://globalarbitrationreview.com/article/1033587/the-cost-of-yukos> last accessed 20th December 2019.

(Amendment) Act, 2019 (hereinafter, 2019 Amendment Act) received President's assent on August 9, 2019.[42] The latest amendments are based upon the recommendations of ten member High-Level Committee constituted under the chairmanship of Justice (Retd.) B. N. Srikrishna.[43] The committee had submitted its report on 3 August 2017 giving recommendations on "making India a hub of international arbitration".[44] The 2019 Amendment Act has introduced several key changes to the regime which are supposed to change the arbitration scenario in the country in the coming years. In this article, we analyse how the amendments fare in the way of making India a domestic and global hub for arbitration.

I. Institutionalisation of arbitration

Until recently, Section 11 of Arbitration and Conciliation Act, 1996 (the original act), which provides for the appointment of an arbitrator, was strictly interpreted as a judicial function.[45] Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter, 2015 Amendment Act) paved the way to free the process from judicial control by providing that delegation of the authority for the appointment of arbitrators under section 11(6)(b) shall not be treated as a delegation of the judicial function.[46] 2019 Amendment Act has gone a step further to institutionalize the whole arbitration regime.

The 2019 Amendment Act has inserted Part 1A in the principal act to provide for the creation of the Arbitration Council of India (ACI). ACI will be composed by a chairperson who could be a retired judge of supreme court or high court or an eminent arbitration practitioner, appointed by the central government after consulting the Chief Justice of India; two members one each having special knowledge and experience in the field of arbitration practice and academics; two *ex-officio* members from Ministry of Law and Justice and Ministry of Finance, one ex officio CEO; and one part-time member from a recognised body of commerce and industry. This body will effectively regulate the alternative dispute resolution mechanisms in India.

The latest amendment empowers the Supreme Court (for international commercial arbitration) and the High Court (for all other arbitrations) to designate arbitral institutions for the appointment of arbitrators.[47] These arbitral institutions should necessarily be ones graded by the ACI. In case of non-availability of arbitral institutions, the appointment function can be discharged by a panel of arbitrators formed by the Chief Justice of the concerned High Court. While institutionalisation of the ADR mechanism is indeed a progressive step, the framework adopted for this purpose has given rise to some new concerns.

The number of arbitral institutions in developed and internationally popular arbitral jurisdictions like Singapore and Hong Kong is limited.[48] However, in India, as provided by

[42] Nicholas Peacock & Rebecca Warder, 'India: India Introduces Key Amendments To Arbitration And Conciliation Act 1996'(*Mondaq*,21 August 2019)<http://www.mondaq.com/india/x/838380/> accessed 30 December 2019.

[43] Raj Panchmatia et al., 'India: The Arbitration And Conciliation (Amendment) Act, 2019 – Entering A New Domain'(*Mondaq*,23 October 2019), <http://www.mondaq.com/india/x/856642> accessed 30 December 2019.

[44] *High-Level Committee on Making India Hub of Arbitration Submits Report*, PRESS INFORMATION BUREAU (Aug 04, 2017, 03:36 PM), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=16962> last accessed Dec. 30, 2019.

[45] *SBP & Co. v. Patel Engineering Ltd.* [2005] 8 SCC 618.

[46] Arbitration and Conciliation (Amendment) Act 2015, No. 3, Acts of Parliament, 2016 (India), s 6.

[47] Arbitration and Conciliation (Amendment) Act 2019, No. 33, Acts of Parliament, 2019 (India), s 3.

[48] 'Choosing an arbitration centre in Asia – Hong Kong or Singapore?'(*Pinsent Masons*,2o October 2015)<https://www.pinsentmasons.com/out-law/guides/choosing-an-arbitration-centre-in-asia--hong-kong-or-singapore>accessed 30 December 2019.

the amendment, the Supreme Court and High Courts will have the liberty to designate as many arbitral institutions as they wish, from the pool of graded arbitral institutions.[49] The idea was to minimise judicial intervention. But in the present framework, a designation still requires the exercise of judicial wisdom by courts, which will again create a lot of disputes, as the courts will be interpreting the grading variously. Overcrowding of arbitral institutions will result in compromise with the quality. It will also create unnecessary confusion to the parties who will have too many arbitral institutions to choose from.

Grading of arbitral institutions by ACI has its disadvantages. It restricts the freedom of the parties to choose the arbitrator, as they cannot opt for any ungraded arbitral institution. The 2019 Amendment Act has fixed the qualification of arbitrators in the eighth schedule under newly introduced section 43J.[50]

New provisions say that only an Indian advocate, cost accountant, company secretary or in some cases, government officers with a certain level of experience are qualified for playing the role of an arbitrator. It means foreign practitioners are not qualified for grading. This will discourage foreign parties to opt for arbitration in India. Moreover, the composition of ACI indicates that it will be a government-controlled body. This raises concern that the process of grading will be fraught with bureaucratic rigidity and favouritism. Institutionalization of the regime is surely a forward step, but the suggested framework fails to achieve the aim of minimal judicial and executive intervention.

[49] Arbitration and Conciliation (Amendment) Act 2019, No. 33, Acts of Parliament, 2019 (India), s 3.
[50] *Ibid.*, Part- 1A.

II. Modification in Time limits

The 2019 Amendment Act has introduced a new section 23(4), which provides that the statement of claim and defence shall be completed within six months from the date when the arbitrator receives the notice of appointment.[51] It has also revised the section 29A of the act to relax the strict deadline of 12 months for declaration of the arbitral award.[52] Now the 12 months deadline are to be counted from the completion of pleadings instead of the appointment of the arbitrator, as introduced by the 2015 Amendment Act. In the case of international arbitrations, this deadline is recommendatory only.[53] These modifications will help to expedite the completion of arbitration proceedings. However, a rigid timeline for completion of the statement of claim and defence ignores the procedural complexities of multi-party arbitrations. In such specific cases, the decision of timeline by consent of all parties could have been a better option.

III. Confidentiality

Confidentiality of proceedings is a major reason for which Arbitration is preferred as a mechanism for dispute resolution.[54] Before the 2019 Amendment Act, there was no specific provision for confidentiality in arbitration proceedings. Section 75 of the original act, which talked about confidentiality was only applicable to conciliation. The 2019 Amendment Act has inserted a provision for confidentiality of arbitration proceedings under section 42A.[55] It reads as follows:

[51] Arbitration and Conciliation (Amendment) Act 2019, s 5.
[52] Arbitration and Conciliation (Amendment) Act 2019, s 6.
[53] Arbitration and Conciliation (Amendment) Act 2019, s 6.
[54] Mayank Samuel, 'Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?'(*Kluwer Arbitration Blog*,21 February 2017)<http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/ >accessed 30 December 2019.
[55] Arbitration and Conciliation (Amendment) Act 2019, No.

> "*Notwithstanding anything contained in any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for implementation and enforcement of the award.*"

Confidentiality in arbitration was a much-needed provision, but the vague language used in the exception to the provision is likely to create confusions and raise disputes which will require interpretation by the judiciary. Several provisions of the Act are made applicable unless otherwise agreed by the parties. Such an exception by mutual agreement is missing in section 42A, further restraining the party autonomy. Also, the provision does not talk about the possibility of breach of confidentiality by persons other than the arbitrator, the arbitral institution, and the parties and there is no mention of legal consequences in case of non-compliance. In its present form, the provision is bound to give rise to disputes which will lead to the unnecessary delay caused by litigation in court.

IV. Retrospective vs. Prospective

In its judgement in *BCCI v. Kochi Cricket (P.) Ltd.*[56], the Supreme Court of India had ruled that the provisions of the 2015 Amendment Act are to be applied retrospectively. The 2019 Amendment Act deleted the section 26 of the 2015 Amendment Act and inserted a new section 87.[57] The newly introduced section 87 again provided that the provisions of the 2015 Amendment Act shall apply prospectively. In effect, the newly inserted section 87 completely negated the judgement of Supreme Court in *Kochi Cricket (P.) Ltd.* (supra)[58] and restored the position before the 2015 Amendment Act for petitions originating from awards declared before the notification of the 2015 Amendment Act, i.e. an "automatic stay" on arbitral awards where it has been challenged under section 34. The insertion of section 87 in the 2019 Amendment was challenged in the Supreme Court in the case of *Hindustan Construction Company Limited & Another v. Union of India*[59]. Deciding the case, the Hon'ble Court struck down the introduction of section 87 and the deletion of section 26 of the 2015 Amendment Act. Supreme Court declared that section 87 is manifestly arbitrary and contravenes the object and purpose of the 2015 Amendment Act. It was also held to be against the public interest as it delayed the disposal of arbitral proceedings. The Supreme Court quoted its BCCI judgement and declared that it will continue to apply to make applicable the benefits of the 2015 Amendment Act.[60] The 2019 Amendment Act had created confusion as to the applicability of 2015 Amendment Act. In this regard, the judgement of the Supreme Court is a sigh of relief.

V. Conclusion:

The 2019 Amendment Act has introduced some key changes to the arbitration regime in India. It is being touted as a milestone in the way of making India a hub of international arbitration. But in our analysis, it has turned out to be a missed opportunity. Several new provisions appear to be targeted at minimizing the interference of judiciary and executive in the process of arbitration, but in effect, they end up increasing the same. In this sense, the legislation seems to be confused in itself.

33, Acts of Parliament, 2019 (India), s 9.
[56] [2018] 6 SCC 287.
[57] Arbitration and Conciliation (Amendment) Act 2019, ss 13, 15.
[58] [2018] 6 SCC 287.
[59] [2019] SCC OnLine (SC) 1520.
[60] *Ibid.*

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Institutionalization of arbitration is surely the way forward, but the creation of multiple arbitration institutions will make it difficult to lay down a standard and will cause unnecessary confusion. Composition of ACI will render it susceptible to bureaucratic maladies.

Restriction on completion of arbitral proceedings is a welcome step but it would have been better if some scope of flexible timeline had been left in specific cases of complex multi-party arbitration. Confidentiality was again a much-required provision but a vague exception and absence of legal consequences will give rise to lawsuits requiring interpretation by court, which would again be a setback to the goal of expediting the process of dispute resolution. Insertion of section 87 was a cunning attempt to negate the direction of the Supreme Court of retrospective application of the 2015 Amendment Act, but the court struck it down soon after, to restore its directions. Aside from these, the amendments did not make any movement towards better enforcement of foreign awards as India's obligations by being a signatory of the 1958 New York Convention.[61] The 2019 Amendment Act is certainly an improvement upon the earlier regime but it is not enough to change the perception of the international community of India being a "non-friendly" place for arbitration. Hopefully, some salutary benefits will appear in time and the drawbacks will be removed in later amendments.

[61] Subhiksh Vasudev, 'Has India Truly Delivered on Its Obligations Under Articles I and V of the New York Convention Over the Last 60 Years?', (*Kluwer Arbitration Blog*, 29 November 2018) <http://arbitrationblog.kluwerarbitration.com/2018/11/29/has-india-truly-delivered-on-its-obligations-under-articles-i-and-v-of-the-new-york-convention-over-the-last-60-years/> accessed 30 December 2019.

CASE UPDATES

I. September

Rashid Raza v Sadaf Akhtar
(Civil Appeal No. 7005 of 2019)

Principle: Mere allegation of simple or plain fraud may not be a ground to nullify the effect of arbitration agreement between the parties.

Facts: The present case arises out a partnership dispute. A FIR was lodged by one of the partners alleging the siphoning of funds. An arbitration petition was filed by Sadaf Akhtar before the Ld. High Court under Section 11 of the Act seeking appointment of an Arbitrator under the Arbitration Clause forming part of the partnership deed between the partners.

Judgement: Referring to the tests laid down in *'A. Ayyasamy v. A. Paramasivam and Others'* [(2016) 10 SCC 386], it was held that disputes raised between the parties were arbitrable, and hence, a Section 11 application under the Arbitration Act would be maintainable.

M/s Mayavati Trading Pvt. Ltd. v Pradyuat Deb Burman
(Civil Appeal No. 7023 of 2019)

Principle: the court's power in an application for appointment of arbitrator under section 11 of the Arbitration and Conciliation Act, 1996, is confined only to the examination of the existence of a valid arbitration agreement, and the court cannot decide on the arbitrability of a dispute.

Facts: The present case arises out of a breach of agreement. Said agreement also contains arbitration agreement under clause 16 therein. Mayavati Trading had nominated its arbitrator,

however, respondent not having appointed its arbitrator within stipulated time, the petitioner is before court for appointment of nominee arbitrator.

Judgement: The Supreme Court, after considering the 246th Law Commission Report (2014), held that the law prior to the 2015 amendment, i.e., while entertaining a section 11 petition for appointment of an arbitrator, which included going into preliminary objections, has now been legislatively overruled by the 2015 Amendment Act, and therefore the courts should now only look into whether there is an arbitration agreement or not, nothing more, nothing less.

APM Air Cargo Terminal Services & Anr. v Celebi Delhi Cargo Terminal Management India Pvt Limited & Anr.

(Judgment dated 13.09.2019 in O.M.P. (I) (COMM) 204/2019)

Principle: The qualification which the person, invoking jurisdiction of the Court under Section 9, must possess is of being *"party"* to an arbitration agreement and a person not party to an arbitration agreement cannot enter the Court seeking protection under Section 9 of the Arbitration and Conciliation Act, 1996.

Facts: Celebi invited proposals from service providers for providing SLA and issues a LOA in favor of APM Air Cargo. Clause 12 of the agreement stipulates the terms between the parties, which elaborately provides for mechanism of dispute resolution. Celebi never raised any dispute nor started any negotiations. It was considered that there was a dispute necessitating invocation of Bank Guarantees.

Judgment: It was held that as the respondent had not signed the contract which stipulates the arbitration clause, there was no valid arbitration agreement between the parties. Referring to Section 7 of the Arbitration and Conciliation Act, 1996 which defines "arbitration agreement", it was upheld that respondents met no criteria for an agreement to exist.

NCERT v Skywing

(Judgement dated 18.09.2019 in C.R.P 233/2018)

Principle: In case of silence of a post award interest, the same must be assumed to be 18%.

Facts: Petitioner impugns order whereby the petitioner has been directed to pay interest at the rate of 18% per annum on the awarded amount for the period post award till the date of payment of amount in terms of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 as it stood prior to the amendment of the Arbitration Act by Act 3 of 2016. Aggrieved by the said direction, petitioner has filed the subject petition.

Judgement: Section 31(7)(b) clearly implies that if the award is silent with regard to post award interest then the same has to be 18%, however, in case the award specifies a post award interest then the award has to be implemented as it is. Clearly as the arbitral tribunal had not awarded any post award interest, the petitioners were liable to pay interest at the rate of 18% for the period post award till payment.

Union of India v M/s JCB India Ltd

(Decided dated 27. 09.2019- Caveat No. 191/2019)

Principle: Where the court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the court shall be excluded in computing the time prescribed by the

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Limitation Act, 1963, for the commencement of the proceedings with respect to the dispute so submitted.

Facts: The case is filed under Section 34 of The Arbitration and Conciliation Act,1996. It deals with an appeal regarding a dispute that had arisen between the parties in relation to an agreement dated 17.08.1993 for the supply of 32 JCB excavators. The sole arbitrator, while adjudicating the dispute rendered an award on 14.10.2016 in favour of the respondent thereby directing the appellant to pay to the respondent, a sum of Rs. 46.83 lacs (Rupees Forty Six Lacs Eighty Three Thousand) in terms of liquidated damages with simple interest @ 9% per annum from the date on which such damages had become due and payable, along with sum of Rs. 3,47,000/- (Rupees Three Lacs Forty Seven Thousand) towards costs.

Judgement: The court held that the outer limit for filing a challenge to an award under section 34(3) of Arbitration Act, could not be sought to be extended by a subsequent filing before a wrong forum when the initial filing was itself beyond the outer –limit stipulated, and that Section 14 of the Limitation Act, 1963 ('Limitation Act' would not come to the rescue of the aggrieved party in such case.)

UOI v. G.I Litmus Events Pvt. Ltd

(Judgment dated 30.09.201. Later, 29.01.2020- O.M.P. (COMM) 30/2020)

Principle: The Arbitral Tribunal has in its Award, through paragraphs 31 to 62 examined, cross-examined each allegation/witness/evidence, and passed its verdict.

Facts: The Indian Olympic Association was given the mandate to hold the Commonwealth games in NCR Delhi region which they assigned to the Organizing Committee. A turnkey agreement for the prices with vendors was executed between the OC and the Consortium. The games commenced and ended on the designated dates but dispute arose between the OC and the G.L. Aggrieved by the withheld payments provisions of GTCA were used to resolve the disputes.

Judgement: The court observed that it was within the remit of the arbitral tribunal to invoke the principle of estoppel by conduct, which is a rule of evidence, even though waiver in terms of a contractual provision may not be strictly attained.

II. October

State of Jharkhand v. M/s HSS Integrated SDN

(Judgment dated 18.10.2019 SLP No. 13117 of 2019)

Principle: The hon'ble Supreme Court reiterated the powers of the court to interfere with an award under sections 34 and 37 of the Arbitration and Conciliation Act, 1996 ("the Act")

Facts: The present special leave petition arises out of a consultancy agreement dated 28th August 2007. On 25 November 2011, the executive engineer issued a letter to the Respondent, inter alia, instructing it to remove certain deficiencies in its work failing which the payments due to the Respondent would be suspended as per the Contract. Subsequently, the Petitioner invoked the contractual provision for suspension of payments on the grounds of impending deficiencies and from 12 March 2012, the petitioner terminated the contract.

Judgement: the Court concluded that the

finding of the tribunal that the termination of the Contract was illegal and without following the due procedure under the provisions of the Contract, being a finding based on appreciation of evidence was neither perverse nor contrary to the evidence on record and thus couldn't have been interfered with by the courts. Since cogent reasons were given by the tribunal while allowing the respective claims, the Court held that there was proper application of mind by the tribunal.

Oriental Insurance Co. Ltd. v. M/s Tejparas Associates and Exports Pvt. Ltd.
(Judgment dated 03.10.2019 CIVIL APPEAL NO. 6524 OF 2009)

Principle: Time period spent in a court without jurisdiction can be excluded when the application under section 34 of the Act is re-presented in the court having jurisdiction only if the proceeding was bona fide in the court without jurisdiction.

Facts: The appellant in the present case, has filed a special leave petition (SLP) before the Supreme Court. This comes after the appellant's suit had been dismissed by the arbitral tribunal in June 2004. Then in 2008, appellant's application under section 14 of the Limitation Act seeking exclusion of the time spent in the proceedings held before the Jaipur Court was also dismissed by the Jodhpur Court.

Judgement: The SC recognized that the time period spent in a court without jurisdiction can be excluded when the application under section 34 of the Act is re-presented in the court having jurisdiction only if the proceeding was bona fide in the court without jurisdiction. However, in the present case, seemingly, since the order of the Jaipur Court does not record any mala fide on the part of the Appellant and the delay under consideration was merely for 8 days weighed in on the court, the SC did not re-examine the Respondent's contention that the Appellant mala fide filed the Petition before the Jaipur Court.

III. November

Hindustan Construction Company Limited v. Union of India & Ors.
(Writ Petition (Civil) No. 1074 of 2019)

Principle: The Supreme Court in a pro-arbitration move has stuck down Section 87 of the Arbitration & Conciliation Act, 1996 (Act) in Hindustan Construction Company Limited v Union of India, which was inserted earlier this year by way of the Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment), which clarified that all provisions of the Arbitration and Conciliation (Amendment) Act, 2015 (2015 Amendment) applied prospectively.

Facts: The appellant entered into a contract with the Union of India, the respondent, for the construction of certain highway bridges. Due to unforeseen circumstances disputes arose between the two parties which lead them approaching an arbitrator first and then the court of law. Due to this the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (Act) was challenged.

Judgement: The Supreme Court on November 27, 2019 in Hindustan Construction Company v. Union of India (Hindustan Construction) struck down Section 87 as unconstitutional for being arbitrary and revived Section 26 of the 2015 Amendments. The emphasis of the Court's decision was in its policy approach to providing award creditors the benefit of an award by way of security and not letting any automatic stay stymie the execution for several years. Its

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purpose was to give the benefit of the 2015 Amendments to all arbitrations, regardless of whether they commenced before or after October 23, 2015.

Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd.

(Judgment dated 27.11.2019 SLP No. 11476 of 2018)

Principle: Relying on the doctrine of kompetenz – kompetenz enshrined in Section 16 of the Arbitration & Conciliation Act, 1996 (Arbitration Act) and the legislative intent to restrict judicial intervention at pre-reference stage, the Supreme Court held that the issue of limitation would be decided by an arbitrator.

Facts: The factual background of the case arises from an agreement dated 21/10/2012 entered into between the parties, under which the Petitioner – Contractor was to provide security to the Respondent – Company around the clock on need basis, as per the agreed contractual rates. Disputes arose between the parties with respect to payment of amounts under the contract by the Respondent – Company, and the deduction of the security amount from the running bills.

Judgement: In the present case, the Notice of Arbitration was issued by the Petitioner Contractor to the Respondent Company on 09/03/2016. The invocation took place after Section 11 was amended by the 2015 Amendment Act, which came into force on 23/10/2015, the amended provision would be applicable to the present case. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11 :first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under subsection (6A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the preference stage.

M/s. Mitra Guha Builders (India) Company versus Oil and Natural Gas Corporation Limited

(Civil Appeal no.5512 of 2012)

Principle: Once the parties have decided that certain matters are to be decided by a designated person and his decision would be final, the same cannot be the subject matter of arbitration.

Facts: The appellant, Mitra Guha Builders entered into two contracts pertaining to construction with the respondent, ONGC. Upon certain claims which were raised by the appellant against the respondent for both the contracts with respect to delay in construction being refuted, they invoked the arbitration clause (Clause 25) of the agreement.

An arbitrator was so appointed who allowed the claim of the claimant and disallowed the liquidated damages/compensation and rejected the counter claim of respondent-ONGC, who then filed a petition before the High Court of Delhi, where again the award passed by the arbitrator was upheld. Another appeal was filed contending the interpretation of Clause 2 of the contract regarding liquidated damages levied by the Superintending Engineer and the finality attached to it, the same being an "excepted matter" and not arbitrable under the said clause.

The Division Bench reversed these findings and set aside the award upholding clause 2, stating that the Superintending Engineer's

decision on damages was final and that the same could not have been agitated in the arbitration proceeding. The present case was filed in the Supreme Court to decide if the levy of pre-estimated liquidated damages and reasonable compensation by the Superintending Engineer via Clause 2 of the contract between the parties was "arbitrable" and whether ONGC was right in contending that these damages are final and an "excepted matter", not falling within the jurisdiction of the Arbitrator.

Judgement: In the present case, the parties themselves have agreed that the decision of the Superintending Engineer in levying compensation is final and the same is an "excepted matter" and the determination shall be only by the Superintending Engineer and the correctness of his decision cannot be called in question in the arbitration proceedings and the remedy if any, will arise in the ordinary course of law. The right to levy damages for delay is exclusively conferred upon the Superintending Engineer and Clause 23 2 of the present agreement is a complete mechanism for determination of liability and when such compensation is levied by him, the same is final and binding. So far as the liquidated damages determined and levied, by virtue of Clause 2, is out of the purview of the arbitration especially in view of the fact that under the very same clause, the parties have agreed that the decision of the Superintending Engineer shall be final.

The Oriental Insurance Co. Ltd. & Anr. v. Dicitex Furnishing Ltd.

(Judgment dated 13.11.2019 CIVIL APPEAL No. 8550 OF 2019)

Principle: If a party which has executed the discharge voucher, alleges that the execution of such document was on account of coercion or economic duress at the behest of the other party, and if that party establishes the same, then such discharge voucher is rendered void and cannot be acted upon and consequently, any dispute raised by such party would be arbitrable. Further, the concerned court has to be prima facie convinced about the credibility of the plea of coercion, to prevent denial of a forum to the applicant as that would finalize the finding, preventing the applicant's right to approach a civil court.

Facts: Dicitex, the respondent, issued an insurance policy by Oriental Insurance Co. Ltd, the appellant to cover their goods. Clause 13 of the said policy contained an arbitration clause. The goods in question caught fire and were complete destroyed, as a response to which the respondent informed the appellant and appointed a surveyor who assessed the damages to be Rs. 12,93,26,704.98/. They also informed the respondent of their financial distress and requested a settlement of the claim on a priority basis and furnished a large volume of documents, approximately 35,000 in number to the respondent for the same. The appellant appointed a Chartered Accountant to carry out a resurvey of the claim.

A cheque for Rs. 3.5 crores was made to Dicitex after they signed a discharge voucher. The new surveyor estimated the amount at Rs. 7.6 crores however no basis for the same was provided; Dicitex suffering from financial constraint, accepted it, following due procedure as requested by the respondent. Further correspondence ensued whereby the respondent moved to invoke the arbitration clause due to a large disparity in the surveyed amounts and also cited economic duress and coercion being the reason for signing the discharge voucher. The issue before the court was the arbitrability of the dispute with respect to clause 13.

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Judgement: It was held that while the court is conscious of the fact that an application under Section 11(6) is in the form of a pleading which merely seeks an order of the court, for appointment of an arbitrator, it cannot be conclusive of the pleas or contentions that the claimant or the concerned party can take, in the arbitral proceedings.

Therefore, the court which is required to ensure that an arbitrable dispute exists, has to be prima facie convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding final, thus, precluding the applicant of its right event to approach a civil court. To this effect, the appeal was dismissed.

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