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EDITORIAL NOTE

PROTOCOL ON VIRTUAL HEARINGS: THE POST COVID LAYOUT OF ADR

Divyansh Nayar, Senior Editor
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Virtual hearings are generally born out of necessity, either due to unexpected circumstances like the COVID-19 pandemic, or time, money or travel constraints. Depending on the dispute, there are inarguable risks and challenges that exist in conducting an online hearing. The need to manage a host of variables ranging from potential technical issues, to coordination amongst participants, adds incentive for tribunals to adapt the proceedings to minimize reliance on virtually conducted oral hearings. The fundamental keystone of virtual arbitral process is unequivocally the technology that stimulates it. The administration of the proceedings can significantly be enhanced by the right choice of technology, and vice versa. Therefore, parties, arbitrators and arbitral institutions must be prudent in the selection of the technology, and the manner in which it is to be incorporated.

I. PROCEDURAL ARRANGEMENTS AND TECHNOLOGICAL INFRASTRUCTURE REQUIRED FOR A VIRTUAL ARBITRATION PROCEEDING

It is pertinent to prescribe a definitive procedure that has to be complied with at the onset of virtual proceedings to ensure that the parties are not overwhelmed with technology. The following suggestions can be integrated into procedural orders for the purpose of efficiency in manifesting the virtual arbitration proceedings.

1. Allocation of Technological Responsibilities

The tribunal should discuss with the parties, at the preparatory stage, the option of retaining third-party management services. These services, tailor-made for dispute resolution, provide technical support to facilitate virtual proceedings and act as an interface between the participants and the technology. In the absence of a sophisticated institutional framework, parties and tribunals in ad hoc arbitrations may find such services as an efficient option, subject to cost considerations.[1]

2. Conducting Orientation and Training Sessions

Tribunals, counsel and parties may find it cumbersome to manage the various moving parts of the technology along with the arbitration, especially when they are not tech-savvy. This is often an inhibiting factor to

[1] CPR Model Procedural Order for Remote Proceedings.

include technology in arbitration. Familiarity can be established with orientation and training sessions with experts. Furthermore, assistance can be provided to participants, including the tribunal, through tribunal assistants and technical secretaries.

3. Ensuring Confidentiality and Data Security of the Parties

Confidentiality and data security are some of the primary concerns of parties engaging in virtual proceedings. The use of technology raises concerns about data security and data protection. The Seoul Protocol on Video Conferencing in International Arbitration emphasises the need for connections to be protected from third-party interception by means such as 'IP to IP Encryption'.[2] Therefore, platforms that do not have end-to-end encryption must be avoided. Similarly, document-sharing software should be used which assures parties of adequate data security measures.[3] The technology selected must also be compliant with the applicable data protection laws.

4. Establishing a System of File-Management

A system to organise documents will be instrumental in assisting participants with navigating and accessing information referred to. This is especially important if large numbers of documents are exchanged, or if multiple claims are involved in the dispute. With party consultation, tribunals may arrive at formats for naming and organising files, pagination, bookmarking, cross referencing, etc.[4]

5. Maintaining a Record of Proceedings

Parties must come to agreement on how the proceedings must be recorded, either by video recording or written transcription or both and when this record must be circulated to the participants.[5] Parties must consider the advantage of the accuracy in video records and live transcripts. These could help preclude due process challenges, as parties that get offline could be provided a record of the missed hearing.[6]

6. Devising a Contingency Plan

Technical errors may occur, in the course of the hearing, such as the loss of connectivity with a participant. Contingency procedures must be devised by the tribunal, in consultation with the parties.[7]

II. Drawbacks Of The Virtual ADR Protocol

The framers of the protocol have strived to design the provisions regarding the execution of the virtual arbitrations in a manner which is

[2] Seoul Protocol on Video Conferencing in International Arbitration, Art. 2.1 (c); EU Guide on Video Conferencing in Cross Border Disputes, p. 22
[3] Seoul Protocol on Video Conferencing, Art. 4.3;
[4] CPR's Annotated Model PO for Remote Video Arbitration Proceedings, p. 5, ¶ B.3; Kent Phillips
[5] Hogan Lovells Protocol for Use of Technology in Virtual Hearings, Art. 2.6(d).
[6] ICC Guidance Note on Measures for COVID-19, Annex I, ¶ B (v).
[7] African Arbitration Academy Protocol on Virtual Hearings, ¶ 3.5.1.

accommodative and user friendly. However, these provisions still fail to acknowledge some of the core elements which may pose as potential speedbumps in the process of resolving the disputes virtually.

III. Preliminary Considerations Regarding Virtual Platforms

The African Arbitration Academy protocol under paragraph 2.2.1 devises for a method under which, the parties shall be required to agree upon a virtual platform wherein the arbitration proceeding can be performed. The report of the World Bank in 2019, titled 'The Working Group on Broadband for All: A Digital Moonshot Infrastructure for Africa' states that the status quo of internet accessibility in the African region is way below than the global average. In order to address the above concern, the protocol (under paragraph 2.1.5) recommends that the parties should agree upon a back-up internet service provider and an alternative virtual platform, so that in case the original virtual set up faces any glitches, the proceeding may continue on the back-up mediums.

Now, one of the major issues with regards to the above provision is to ensure the accessibility of these mediums to all the stakeholders of the arbitral proceedings (ranging from the parties to the dispute to the witness etc.)

With regards to the involvement of witnesses in the virtual platforms, it becomes all the more important for the institution to ensure the functioning of the online hearing in an efficient manner. This may be foreseen to develop further complications if in case the witness chooses to provide all the relevant evidences via a translator. Then in such a case, the translator too has to be made familiar with the platform and the functionality of the mediums because a translator who struggles with using the virtual hearing platform can potentially hamper the process of witness examination more than a witness who is unfamiliar with it.

IV. Alliance Of The Arbitration Institutions In Africa

The protocol under paragraph 2.1.6 suggests that all such parties who are facing technological difficulties may consider physically approaching arbitral institutions for the execution of their respective arbitral proceedings. This has been devised so as to ease the tensions of accessibility and other elements that the parties to the proceedings are foreseen to face. However, one of the major concerns in this provision lies with the absence of any form of alliance amongst the African arbitral institutions (for eg: Annaba Mediation & Arbitration Centre, Burundi Centre for Arbitration & Mediation etc.) Lack of any alliance structure may give birth to the problems of coordination amongst different institutions during the virtual dispute resolution process.

There are various examples on formation of alliance amongst the arbitration institutions

for an effective functioning of the virtual proceedings like - International Arbitration Centre Alliance, formed by Arbitration Place in Canada, the International Dispute Resolution Centre in London etc. A similar form of model can be adopted by the institutional fraternity of arbitration in Africa in order to ensure the smooth execution of the protocol.

V. SUGGESTIONS AND CONCLUSIONS

Through the Delhi High Court's decision in *Rategain Travel Technologies Private Limited v. Ujjwal Suri*,[8] the court gave a clear message that the arbitral proceedings can continue even via video-conferencing if considered feasible by the parties. However, adopting to the new normal in arbitration i.e. virtual hearings could be challenging especially in the Indian context. Various guidance notes and protocols have been introduced to guide the parties and the arbitral tribunal to conduct virtual arbitrations. However, some key aspects still remain unaddressed which could be covered in the proposed Indian protocol.

VI. PRIVACY AND CONFIDENTIALITY CONCERN

Section 42A of the Arbitration and Conciliation Act, 1996 states that the arbitrator, arbitral institution and the parties shall maintain confidentiality of all arbitral proceedings. In order to prevent leakage of data in sensitive cases parties must choose end-to-end encrypted and reliable platforms. External high-jacking, distribution of hearing recordings, hacking of cloud storage and data protection are some of the key issues that needs to be fixed. Creation of different breakout rooms for claimants, respondents and the tribunal could be an effective medium to maintain confidentiality of the matter. The International Chamber of Commerce's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic addresses the issue regarding confidentiality and privacy. It recommends that the parties must make confidentiality commitments binding. Similarly, the Seoul Protocol on Videoconferencing in International Arbitration talks about enhancing the security of hearings, such as an express prohibition on recording without permission and limiting the number of people attending the hearings to those strictly necessary.

VII. COST ALLOCATION

Various protocols that have been introduced do not address the situation where one or both parties object to a virtual hearing and this could directly affect the cost allocation process by the arbitral tribunal. Section 31A(1) of the Arbitration and Conciliation Act,1996 empowers the arbitral tribunal to award costs and as per the general rule the

[8] *Rategain Travel Technologies Private Limited v. Ujjwal Suri,* O.M.P (MISC) 14/2020

losing party is required to pay the costs. However, one party could object to virtual arbitrations on the grounds of excessive costs and if the tribunal passes an ex-parte order it would affect the other party's right of equal representation and that right could not be taken away on the grounds of non-payment of costs which the party could not bear. Therefore, under such circumstances reference could be taken from the Seoul Protocol on Videoconferencing in International Arbitration which provides that the requesting party must give assurance to bear the extra costs and if that doesn't work out tribunal could also dismiss the requesting party's proposal of virtual arbitration.

OP-ED

MEDIATION OF COMMERCIAL DISPUTES IN THE CURRENT WORLD SCENARIO

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As we celebrate the coming into force of the *United Nations Convention on International Settlement Agreements Resulting from Mediation*' ("**Convention**") on September 12, 2020, it is important to recognize that the Convention is an outcome of several years of deliberation that probably started about 20 years ago.[9]

On August 7, 2019, 46 countries signed the Convention. As at the date of writing this article, 53 countries had signed the Convention and 6 countries have ratified it[10]. India is yet to ratify the Convention. India has recognized mediation[11] as a means for settlement of commercial disputes.

Covid-19 has been disruptive. It has adversely impacted businesses, not just in terms of their financial stability but also in terms of their ability to perform their obligations under contracts. The issues of "*force majeure*" and "*frustration of contracts*", undoubtedly can be litigated, but the question that also needs to be considered is the impact of the outcome of such disputes, especially on already stressed businesses.

Covid-19 has also impacted the functioning of our courts, adding to the burden of an already overburdened judiciary. It could therefore, potentially take years, before litigants could see the outcome of their dispute.

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[9] https://undocs.org/en/A/CN.9/WG.II/WP.116 and https://undocs.org/en/A/CN.9/WG.II/WP.115. The United Nations Commission on International Trade Law ("Commission") mandated the Working Group II (Dispute Settlement) in 2015, to commence work on the topic of enforcement of settlement agreements, including inter alia the possible preparation of a Convention (https://undocs.org/en/A/CN.9/929). On June 25, 2018, the Commission adopted the Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ("**Model Law**") amending the Model Law on International Commercial Conciliation (https://undocs.org/en/A/CN.9/1025), which had been adopted on June 24, 2002. The United Nations General Assembly adopted a resolution with respect to the Model Law on December 20, 2018 (https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/456/60/pdf/N1845660.pdf?OpenElement).

[10] Chapter XXII, Commercial Arbitration and Mediation, United Nations Convention on International Settlement Agreements Resulting from Mediation

[11] In India, Section 12A of the Commercial Courts Act, 2015 was introduced in the year 2018. Further, Section 442 of the Companies Act, 2013 enables parties to refer disputes for mediation. Part III of the Arbitration and Conciliation Act, 1996 deals with conciliation. Section 30 of the Arbitration and Conciliation Act, 1996 enables the arbitrator to use mediation as a procedure to encourage settlement of the dispute.

All disputes come at a cost. The perceived cost of the dispute could include cost of counsel on the assumption that the dispute would end within an anticipated period of time, court fees and other expenditure that is known to the litigants at the time of initiating the dispute. However, the actual cost of the dispute could be substantially higher since it would include the perceived cost of the dispute as well as other intangible and hidden costs such as time and opportunity cost,[12] reputational loss, loss due to disruption, regulatory risks, delays in legal proceedings, enforcement delays and relationship loss. Unfortunately, these non-tangible and hidden costs are often overlooked by litigants in a dispute and are not explored by them till after the outcome.

In an adjudicated form of dispute resolution, both the subject matter and the outcome of a dispute is defined by the boundaries of legal rights and entitlements. Mediation, on the other hand, is a process where the disputants can explore the dispute beyond such boundaries and assess their respective risks and alternatives.

The pandemic has resulted in an increase of disputes relating to contract performance. While mediation is an effective tool for reducing the burden on the courts, it is also a process where entrepreneurs can engage in constructive dialogue to find a solution that not only considers the impact of the pandemic on their business and the performance of the their contractual obligations, but also deal with other intangible or hidden issues that they may have, including preserving relationships.

[12] Benjamin Franklin had coined the term "Time is Money". Further, the concept of "Time Value of Money" is principle financial theory that is commonly used by businesses to ascertain the value of money in hand today vis-à-vis the value of the same amount of money at a given point in the future.

INTERVIEW WITH JEEVAN BALLAV PANDA, PARTNER KHAITAN & CO

Jeevan is a Partner in the Dispute Resolution and Employment, Labour & Benefits Practice Group in the New Delhi office of Khaitan & Co. He brings with him more than twelve years of experience and focuses on handling complex contractual disputes, commercial litigation and arbitration (both domestic and international) and related pre-litigation advisory and claim management and labour and employment advisory and litigation. He recently featured in the Asian Legal Business (ALB) India's Super 50 Lawyers 2020 based on recommendation of clients and external counsel and senior counsel sent directly to ALB.

1. The current trend with respect to enforcement of Arbitral Awards in India, specifically in the Vedanta case, is contributing to India's image as an arbitration friendly jurisdiction. What are your views on this?

There has been a move to make India a preferred destination for arbitration as is evidenced by the various amendments of the Arbitration and Conciliation Act, 1996 ("1996 Act") and laudable efforts of the legislature and the judiciary to minimize interference and, particularly, the adoption of the principles enshrined in the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958.

The principle of limited interference, imbibed in the New York Convention has been adopted both in letter and spirit by the Indian Courts now. These limited grounds of objections have also been incorporated under Section 48 of the 1996 Act.

Under the pre-amendment era, the Courts were sceptical about enforcement of foreign awards and usually preferred delving into merits of the case, consequently, interfering with its findings. This gathered a lot of criticism globally. Later, steps were taken to slowly venture into a pro-enforcement regime with the Supreme Court's decision in Bharat Aluminium Co. v. Kaiser Aluminium Technical Service settling the applicability of Part I to only Indian seated arbitrations.

We have come a long way from the BALCO case today as is reflected in the current legislative scheme as well as the Vedanta case, the Supreme Court re-affirmed the pro-enforcement regime has maintained the position that Courts should not generally interfere in the arbitral awards in line with the prevalent international principles. However, in the facts of the case the Court reinforced position laid down in Renusagar Case – that the upholding of Public Policy would be valid

ground for refusal of an award if the award is contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The Court in Vedanta relied upon Renusagar's Case because it interpreted the amendments to Section 48 to the 1996 Act (which introduced specific criteria for the first time) as being prospective and the court proceedings for enforcement were filed prior to the amendment.

In my view, while keeping with our efforts to showcase India as an arbitration friendly jurisdiction, we are making slow but steady progress and should continue our efforts in this light keeping the fundamental and internationally well recognised principles of judicial interference in mind rather than adopting drastic changes, which may create chaos and confusion and would become counterproductive to our goal of promoting international commercial arbitration.

2. Does the 'public policy' ground to challenge an award pose as a serious impediment to the growth of Arbitration in India? With different interpretations of 'public policy' over the years, does it feel like the Indian courts have excessive powers keeping international practices of other arbitration friendly jurisdictions in mind?

We have in fact come a long way since the times when the ground of "public policy" was often viewed as a roadblock for enforcement of an arbitral award. The 2015 Amendment to the Arbitration and Conciliation Act, 1996 and its interpretation by Courts in the recent times is testimony to the fact that there is a constant and conscious thought process which has gone into behind introducing these amendments. It is in this backdrop that the ground of "public policy" as interpreted by the Renusagar's Case has been further narrowed down by dropping the phrase "interests of India" in the 2015 Amendment in so far as it relates to Section 48(2)(b) of the 1996 Act as contradistinguished from the usage of the same expression "public policy of India" in Section 34(b)(ii) of the 1996 Act is concerned. The Law Commission in its supplementary report while formulating and proposing the recommendations found the expression "interests of India" as vague and capable of interpretational misuse, particularly in the light of the judgment of ONGC Vs Western Geco which had expanded the scope of judicial review. Accordingly, it was clarified by way of explanations which were introduced by the 2015 Amendment that an award can be set aside on public policy grounds under Section 48 of the 1996 Act only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice". It was further clarified that the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. In the aforesaid premises, in my view, from a legislative standpoint substantial changes have been made so as to align the 1996 Act with

international best practices and with the narrowing down of the ground of "public policy", the scope of judicial interference has been further reduced. The same is also reflected in the recent decisions of various High Courts and the Supreme Court. It is the right time for the judiciary to continue its pro-active approach in giving the various provisions a balanced interpretation with reduced interference while upholding "public policy" in its true sense, which will uplift the image of India as an arbitration friendly jurisdiction and parties will consider it a preferred seat in the years to come.

3. Online Dispute Resolution has gained considerable popularity recently owing to the concerns regarding physical meeting during COVID-19. How do you think this will shape the future of Arbitration?

In these unprecedented times when physical functioning of Courts has been suspended throughout the country and social distancing norms are continued to be followed, Online Dispute Resolution is a necessity to continue justice dispensation. The pandemic has been a major set-back to dispute resolution as understood in its traditional sense, particularly for dispute lawyers who usually thrive in a Court's ecosystem. However, most Courts in the Country have adopted and adapted technology and particularly the Constitutional Courts have embraced it rather promptly and effectively. On another note, it is pertinent to highlight that we have not been able to effectively use technology in lower courts particularly in smaller cities and towns, where majority of the backlog of cases are. This is mostly due to inadequate infrastructure or technological competence of both the Bar and the Bench. Therefore, in my view the popularity (or use of technology) is mostly limited to the Supreme Court and the High Courts. Consequently, arbitration in metros and Tier – I or Tier – II cities have also adopted hearings through virtual mediums, though there is general reluctance in accepting it as a substitute to physical meetings/ hearings.

In my view we already have several available platforms to enable the smooth conduction of arbitrations virtually, including various documents sharing platforms and video-conferencing platforms, which may be customized hearing solutions offered by some providers, licensed publicly available platforms or free-to-use platforms. Most lawyers today have learnt to adapt to the new way of working and have found their way around technical difficulties that had initially arisen. With the rising level of comfort in the new way of working, in my view the future of arbitration in a post Covid era will be a mix of the traditional and new age means of conducting proceedings. While one cannot discount the legitimacy of the traditional means, it is difficult to ignore the convenience that the virtual proceedings bring with it. However, endeavour should be made to slowly but steadily extend widespread usage of technology in smaller cities and towns as well,

both in the lower judiciary and in arbitration, together with knowledge sharing/ training sessions so as to make Online Dispute Resolution an effective and viable substitute to physical functioning.

4. Are virtual arbitrations as effective as parties arbitrating in physical presence of each other? What are the major practical issues with virtual arbitrations?

At the outset, most of an arbitral proceeding can be conducted smoothly and in an economical and environmentally friendly manner over video conferencing. Venue, travel and associated costs are absent and the use of paper is significantly reduced in an online proceeding, making it a commercially viable and effective alternative from a client's perspective.

Body language and expression plays a pivotal role particularly during cross-examination. Depending on the same, the counsel can frame and formulate the next question accordingly. However, this is one of the few impediments I foresee in conducting an arbitration online, at the stage of recording of evidence. For instance, a party might, during the examination, feign a technical glitch, terminate the call and seek clarification from his/ her lawyer to guide him as to how best to answer the question. Alternatively, a third party may be prompting the witness being questioned, through another device, or by simply being physically outside the line of sight of the camera. In such a situation, despite having the best of technology, like AI proctored system, the entire process will fail. The Supreme Court of India, taking suo motu cognizance of the above issue but not in relation to arbitration particularly, vide its order dated 06.04.2020, directed the suspension of conduction of evidence through online mode.

However, there are ways around it. For instance, a possible solution to the same can be envisioned through the appointment of a Local Commission, who could be present to monitor the situation. That may defeat the very purpose of having a virtual hearing to some extent, but all of the above can be explored with suitable changes so as to effectively reap the benefits of online hearings during COVID-19.

5. From a disputes lawyer perspective, how convenient and practical are E-mediations and E-Negotiations as a substitute to traditional means of dispute resolution?

While conducting an arbitral proceeding (most stages) may be comparatively effective, efficient, convenient and practical through virtual medium, however, the same may not be completely true for e-mediations and e-negotiations.

Other forms of ADR including - mediation and negotiation are typically less popular modes of dispute resolution as compared to arbitration. While significant efforts are being made both at the legislative level as also through pro-active judicial pronouncements to introduce such other forms of ADRs in mainstream dispute resolution process, the same would take some

time. For instance, arbitration itself took several decades for being accepted by litigants as a viable substitute to litigation and we still have a long way to go compared to some other developed jurisdictions. Therefore, in my view, e-mediation and e-negotiation though may appear to be an effective and efficient alternative to physical mediation and negotiation, but considering these modes do not have wide spread acceptability, e-mediation and e-negotiation may not be as effective as their respective physical form.

Moreover, the most important factor in such non-adversarial forms of ADR, like – mediation and negotiation is the humane connect and approach, which would be missing in a meeting held through virtual medium. Therefore, practically, it would be difficult to make an impact on the parties and impress upon them the best way forward to arrive at a middle ground by balancing the pros and cons of the respective merits of the parties to the dispute. In most cases, where factors other than negotiation and legal skills play a role, a hearing/ session conducted virtually may not be a viable substitute.

In my view, the future of ADR mechanism will be a mix of the traditional and new age means of conducting proceedings subject to the convenience and comfort of all parties involved.

6. What advice would you give to our readers who wish to equip themselves with newer techniques of arbitration during COVID-19?

Arbitration as a practice is similar to a simplified version of a civil suit. Therefore, understanding of trial and practice of original side of the courts is most important before choosing arbitration as an area of practice. This along with good domain knowledge on the first principles and command over procedural laws and applicable substantive laws like – Civil Procedure Code, laws relating to limitation and Contract laws is pivotal for arbitration practice. The aforesaid pointers are elementary and fundamental for arbitration practice which remains unchanged whether it is physical hearings or virtual hearings.

Now coming to the arbitration proceeding during COVID-19, in my experience over the last six months or so, I have come to learn that aside from being comfortable with using technology and finding our way around the technical glitches that the use of such technology brings with it, being extremely thorough and meticulous with your content and documents and to learn to think on your feet in the face of adversity is the need of the hour. This is more so because in the present times, when most of us have been working from our respective homes and virtual hearings are the norm, it is unlikely to have support of your colleague to assist in the traditional sense of physical hearings. The camera has a tendency to catch every hesitation and fumble in a more magnified manner than while interacting face to face, consequently, drawing attention to every

minor deviation/ slip-up.

Needless to mention, adoption and adaption of technology is a must and being equipped with the same definitely gives an advantage to a lawyer in the present times. One of the few impediments I foresee, however, is at certain stages of proceedings such as the recording of evidence. However, practically speaking there is still a lot of reluctance to adopt, adapt and embrace technology amongst arbitrators (particularly adhoc ones) even for conducting procedural and other stages of an arbitration which are comparatively easier to conduct through virtual medium and with the prevalent situation, I am hopeful that slowly but steadily use of technology will help achieve the larger objective of efficient, inexpensive and expeditious adjudication through arbitration.

ARTICLES

INDIA AND THE ICSID REGIME: AN OPPORTUNE UNION (?)

Anubhab Sarkar, Partner, Triumvir Law & Rumella Jain, 4th Year student at Rajiv Gandhi National University of Law, Punjab.

The past decade has been a watershed period for the Indian economy both in terms of foreign investment potential and a transformation in policy attitude towards the same. In spite of *White Industries (2011)*[13] casting a serious question on the well-being of foreign investors looking to venture into the Indian market, India continues to be a lucrative global investment hub for the foreseeable future. The Indian Foreign Direct Investment ('FDI') policy, however, does not seem to be reflecting the reciprocity to take advantage of this overwhelming potential for collaborative growth.

In July 2016, the NDA government informed the Parliament about its plan to unilaterally terminate Bilateral Investment Treaties ('BITs') signed with 58 countries and the same were allowed to expire by April 1, 2017;[14] implying a general deficit of trust towards the present investor-state dispute settlement ('ISDS') framework. This lack of trust also reflects in India's reluctance to be a signatory to the International Centre for Settlement of Disputes ('ICSID') convention. However, the sudden termination of BITs will, in all probability, subject India to a barrage of ISDS claims and in such a situation, a retreat from the global ISDS regime is impractical.

Despite India's reservation towards the ICSID convention, a notable consideration is the fact that all G-7 countries as well as India's sub-continental neighbours (Pakistan, Bangladesh, China, Sri Lanka and Nepal) are all ICSID signatories. Keeping in mind India's attempts to emerge as a premier destination for international investment arbitration, the ICSID convention becomes a commitment it can no longer evade, in the absence of any other reliable alternative ISDS framework.

However, a major deterrent in India becoming an ICSID signatory is most probably the Latin-

[13] *White Industries v. Republic of India,* Final Award, November 30th, 2011.

[14] Department of External Affairs, *Bilateral Treaties/Agreements* <https://dea.gov.in/bipa> last accessed 7th September, 2020.

American experience[15] (particularly Venezuela and Bolivia) which implies the general perception of the ICSID regime being a grossly lopsided deal for emerging economies.

In an attempt to circumvent its perceived reservations associated with the ICSID convention, India framed its Model BIT in 2015[16], on the basis of which, it recently entered into Bilateral Investment Treaties with Brazil and Cambodia[17]. This model, however, doesn't stand as an adequate substitute to the ICSID ratification - primarily due to the lack of recognition towards the same by Western economies. The Model BIT and its revisionist provisions, therefore, might mitigate some policy and/or political concerns around ISDS, but ratifying the ICSID convention is something India needs to consider more seriously in order to induct itself into the global ISDS regime. While the 'developing nation paradox'[18] causes India to remain wary of the ICSID regime, isolating the economy from a global ISDS framework hardly seems to be an ideal solution.

Like any developing nation, India seeks to gain tremendously from bilateral trade arrangements which, in addition to BITs, are also heavily centred around treaty-sourced protections. Therefore, being an ICSID signatory, at the very least, facilitates a relatively encumbrance-free treaty formulation and execution process between India and a considerable number of nations around the world. This will, in turn, facilitate faster flow of investments and a general restoration of faith and credibility of potential investors in the Indian FDI regime, showcasing the Indian market in a more investor-friendly light. Therefore, in light of the above, the ICSID ratification can quell a fair share of anxieties that India harbours with respect to the convention and its caveats:

Firstly, considering the current global ISDS regime, systemic reform emerges as the primary need of the hour for the Indian economy. However, the formulation of a new multilateral investment framework different from the ICSID convention is highly impractical on account of the absolute overhaul of the present system it will require; an especially challenging task for a few developing economies to assume charge of. Considering the improbability of such a drastic step in the international ISDS regime by a small number of developing economies, a feasible alternative, therefore,

[15] Nicholas Boegin, *ICSID and Latin America,* Brettonwoods Project <https://www.brettonwoodsproject.org/2013/12/icsid-latin-america/> last accessed 20th September, 2020.

[16] Department of External Affairs, *Model Text for the Indian Bilateral Investment Treaty* <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf > last accessed 22nd September, 2020.

[17] Department of External Affairs, *Bilateral Investment Treaties (BITs)/Agreements/ Joint Interpretative Statements (JISs) signed subsequent to adoption of Model BIT text 2015* <https://www.dea.gov.in/bipa?page=9> last accessed 4th October, 2020.

[18] Dominic Npoanlari Dagbanja, *The Paradox of International Investment Law: Trivializing The Development Objective Underlying International Investment Agreements In Investor-State Dispute Settlement*, UNCITRAL Papers for Programme <http://www.uncitral.org/pdf/english/congress/Papers_for_Programme/96-DAGBANJA-The_Paradox_of_International_Investment_Law.pdf> last accessed 6th September, 2020.

would be to ratify a widely recognized global convention and move for desirable reforms within the same.

Secondly, the Model BIT which India currently hails as a straitjacket solution to all its ISDS woes, presents a rather bleak deal to aggrieved investors by mandating them to avail all local remedies before initiation of any treaty-based claims; thereby defeating the core purpose of any alternate dispute resolution mechanism. The ICSID appeal mechanism, in contrast to the afore-mentioned position, provides a much more considerate relief to foreign investors in terms of uniformity and accommodation.

Thirdly, attempts to forge an amalgamation between domestic legislation and protections in line with those guaranteed by treaties will again demand an unrealistic systemic overhaul and eventually bring us back to square one, i.e., in dire need of a uniform, fairly global ISDS framework.

Lastly, the Indian arbitration legislation defines 'foreign awards' as awards arising out of legal relationships '*considered as commercial under national law'*[19] *in compliance with Article 1(3) of the New York Convention, 1958 ('NYC'). This is a highly contentious caveat for India since Indian legislation does not place investment arbitral awards under the category of 'commercial legal relationships'*[20]*; thereby making investment award enforcement a very discouraging consideration for potential investors due to the lack of jurisdiction Indian courts face in awards that do not comply with the NYC prerequisite.* Contrarily, an ICSID ratification provides signatories with a far more stable and predictable enforcement regime on the ground of all ICSID awards carrying final, binding, and direct enforceability. The above reservations are a few of many that an ICSID ratification can mitigate, if not remove, for the Indian FDI industry.

In conclusion, India is a long way from being recognised as an absolutely encumbrance-free investment hub despite its immense growth opportunities and favourable market conditions. The lack of a supportive legal framework, in this situation, stands as a strong deterrent in inviting foreign investments into the domestic economy. Ratifying the ICSID convention is currently one of the most viable options in lieu of seeking a globally recognised mechanism which will reinstate investor interest and trust which was substantially effected as an aftermath of White Industries.

An ICSID ratification can prospectively emerge as an evolutionary landmark in the history of Investment Law operations in our domestic geography, ensuring safety to investors who will not then be ensnared in the burdensome local remedy exhaustion mandate. The convenient appeal mechanisms quell potential hesitations, and their ability to spotlessly amalgamate with the domestic legislative framework of the country is an irrefutable advantage.

From an economic perspective, the ratification

[19] The Arbitration and Conciliation Act 1996, s. 44.

[20] *Union of India* v. *Khaitan Holdings (Mauritius) Ltd. and Ors.*, MANU/DE/0271/2019.

of the ICSID can safely be regarded among the few remaining mechanisms available to India in attempting to improve and stabilize the declining GDP and in turn facilitate the transformation of India's market reputation into an investor-friendly state.

IMPETUS TOWARDS STRENGTHENING THE ONLINE DISPUTE RESOLUTION MECHANISM IN INDIA

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In the wake of the Covid-19 crisis and given the paucity of technical, personnel, and financial resources in lower and mid-level judiciary to dispose the matters virtually and subsisting pendency in courts and tribunals. This has arisen a need for strengthening the alternate dispute resolution mechanism. It is a more convenient, practical and cost-effective manner to settle disputes out-of-courts. While the 2018 amendment[21] to the Commercial Courts Act, 2015 made it mandatory for the parties to exhaust the remedy of traditional[22] means vis-a-vis pre-litigation mediation before instituting a commercial suit, there is no such regulation in place for non-commercial disputes.

The recently notified Consumer Protection Act, 2019, propagates the need to resort to third-party mediation for e-commerce, among business-to-commerce disputes, much like employment, family, guardianship, property, and other civil matters. However, it is not mandated and can be resorted to only on the discretion of the disputing parties. Consequently, there is a pendency of 95,19,986 civil cases in courts across India.[23] This is worrisome, given the current economic downturn and persisting financial distress in the country as unsettled legal disputes stall the economic activities further, leading to unemployment, mounting operating losses, loss of investor confidence, foreign direct and portfolio investment, among other roadblocks, in smooth conduct of business activities; thereby, pushing away the dream of 'Make in India' and making India a business hub

While alternative dispute resolution mechanisms such as arbitration, mediation, conciliation, and negotiation, are being promoted by all the stakeholders such as the Bar Council of India (BCI), judges, advocates, and clients; they have proven beneficial to a

[21] Commercials Courts Act 2015, s 12.
[22] Haitham A. Haloush, *Jurisdictional Dilemma in Online Disputes: Rethinking Traditional Approaches.* The International Lawyer 42, 3 (2008): 1129-146.
[23] *National Judicial Data Grid,* (Sep, 26, 2020), https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard.

certain extent in efficiently resolving national and international commercial and corporate disputes. There are a few roadblocks such as the high cost involved, uncertainty about the seat of arbitration, appealability of awards in High Courts under Section- 34 of the Arbitration and Conciliation Act, 1996, which challenge the enforceability of international arbitration[24] awards in the home country, among others, that hinders the widespread adoption and enforceability. This has arisen the need for further reforms. One such innovation that seems promising vis-a-vis revolutionary and has paced up amidst the current pandemic is Online Dispute Resolution (ODR).

Recently, two online Lok Adalats have been entirely conducted digitally in Delhi[25]and Rajasthan on Sama's ODR platform. Around 77 courts from 11 districts across Delhi came onto Sama's ODR platform, to settle disputes online through calling, video conferencing, and electronic signatures. A total of 5838 disputes were settled, with total settlement value crossing 46.2 crores in Delhi[26], while in Rajasthan[27], 350 courts from 37 districts, settled 26,914 disputes with amount crossing over 63 crores, thus giving impetus and momentum to Lok Adalats throughout the country. Madhya Pradesh, Chhattisgarh,[28] and Karnataka have been other states where virtual Lok Adalats have set a precedent for the online dispute resolution mechanism. Centre for Online Resolution of Disputes (CORD), founded by Mr. Vikas Mahendra and Mr. Badarivishal Kinhal, Indian Dispute Resolution Centre (IDRC), inaugurated by Justice Sikri and Online Consumer Mediation Centre by NLSIU Bangalore are some other ODR platforms revolutionising the dispute redressal mechanism amidst the pandemic.

With the evolution of Information and Communication Technology (ICT), ODR has been an efficacious mechanism of resolving disputes by leveraging technologically advanced tools such as artificial intelligence, smart technologies, and peer-to-peer encrypted digitized platform by empaneling skilled, experienced and fair-minded arbitrators and/or mediators. It facilitates face-to-face live discussions between the disputing parties, records electronic evidence, maintains confidentiality, and ensures enforceability and appealability of out-of-settlements based on mutually agreed decisions.

The significant levels of digital divide is a growing cause of concern, leading to the

[24] Goldstein, Marc J. *International Commercial Arbitration.* The International Lawyer 34, 2 (2000): 519-32.

[25] Lydia Suzanne Thomas, *Justice NV Ramana presides over Delhi Legal Services Authority's first Online Lok Adalat*, BAR AND BENCH (Sep. 26, 2020), https://www.barandbench.com/news/dslsa-organises-first-online-lok-adalat?fbclid=IwAR3V_lr3b-Vu-c9YL7_gTna1dnpuJpeU2SENavFQtd2bX-IzT2KMKqKHrp.

[26] *E-Lok Adalat- 8th August,* (Sep. 26, 2020), http://dslsa.org/2020/08/09/e-lok-adalat-8th-august-2020-report-by-sama/.

[27] *E-Lok Adalat - 22nd August,* (Sep. 26, 2020), http://www.rlsa.gov.in/pdf/OLA%20Guideline.pdf.

[28] Rintu Mariam Biju, *Virtual Lok Adalat organised in Chhattisgarh amid COVID-19 pandemic disposes of 2,270 cases in a day,* BAR AND BENCH (Sep. 26, 2020), https://www.barandbench.com/news/virtual-lok-adalat-organised-in-chhattisgarh-amid-covid-19-pandemic-disposes-of-2270-cases-in-a-day.

violation of fundamental, legal, and human rights, thereby, causing a delay in dispensing justice to the victims. The rules for the interpretation of the sign language, symbols, and signals, vis-a-vis special educators which are binding on subordinate courts, have been laid down by Delhi High Court for video calls and conferencing. Persons with disabilities (PWD) face justice delivery and dispensation issues, which raises concerns of inclusivity. Therefore, an initiative has been taken by the e-committee to enable the files and judgments of virtual courts in a machine-readable format. To build confidence in the system and safeguard information privacy, an ODR platform provides private virtual rooms for discussion between an advocate and her/his clients, parties, and arbitrators and/or mediators, in case there are more than one. However, having more than a single arbitrator can cause inconvenience, making the process lengthier and costly; thereby, defying the purpose of the whole system.

ODR has the potential to conveniently and seamlessly resolve commercial and non-commercial disputes concerning employment, rental, loan defaults, specific performance, consumer grievances, bank frauds, insurance, among other contractual disputes. Informational access, as well as the availability of the support system from the governmental agencies, becomes imperative for online redressal of the disputes and grievances. However, given the complications involved in cross-examining witnesses, recording and assessing the sanctity of the accused's testimony, identification parade, and other procedural requirements of criminal matters, ODR might not be as suitable as in the case of commercial and corporate disputes. In addition to being efficacious, it offers manifold advantages such as reduced cost of litigation, as it saves travel time and the opportunity cost of lawyers, transparency, given the hearings are recorded and can be used as evidence in courts in case of any misconduct on the part of arbitrators and/or parties, time-bound, and result-oriented dispute settlement, prevents sabotaging of long- term professional and personal relationships by proposing amicable and mutually- agreeable solutions, among others.

There being two sides to every coin, ODR also poses certain challenges such as lack of robust and inbuilt technological infrastructure, jurisdictional issues, enforceability concerns, lack of investment by the government, admissibility and relevance of electronic evidence and contracts, digital divide, inadequate technological training among lawyers, arbitrators, mediators and aggrieved persons, security and data breach threats, possibility of surveillance and infringement of privacy, inability of vulnerable groups in the society such as elderlies, women prone to domestic violence, LGBTQ+, children with special needs and people with disabilities, among others, possibility of tutoring of

witnesses and/or parties to give false statements, inability to assess the body language of persons concerned and resistance in its adoption from various stakeholders such as government, bar associations and individual practitioners given the threat that technological inadequacy might make them lose clients to better technologically- equipped lawyers and/or arbitrators.

Having said that, these challenges, though increasingly complex, are not inherent; they are rather amenable. They can be resolved by multi-disciplinary and multi-organizational approach undertaken by various stakeholders such as the judiciary, government, Bar Council of India, NGOs, educational organisations, and the Indian Council of Arbitration (ICA) - like arbitration[29] bodies. The security and data breach threats could be mitigated by storing data in an anonymized and pseudonymized manner, deploying encrypted peer to peer network, having robust security policy in place, conducting regular cyber audits, mandating formulation of monthly cyber reports, need of international convention in cyberspace[30], having a technical personnel around in every hearing, issuing Quick Response (QR) codes and One Time Passwords (OTPs) in order to access the network, among other measures; imparting adequate technological training to lawyers and arbitrators.

The government needs to invest in setting-up ODR platforms based on open-source software such as Free and Open Source Solutions (FOSS) as deployed in the e-courts model or attach ODR cells with existing Lok Adalats, ADR centres and/or courts; corporate houses can initiate their own in-house ODR set-up (for e.g. eBay was a pioneer in setting up its ODR platform that later went on to resolve disputes of other corporate houses as well); reduce digital divide; and make justice accessible to the vulnerable groups and LGBTQ+ communities. In addition to the above- mentioned suggestive measures, coordination between BCI, courts, government, and ICA can give ODR a much-needed impetus. It can be incorporated in the ADR clause in business[31] contracts and can be promoted by research programs, by sensitization of business houses and the general public and by having in place effective monitoring practices by the authorities. Further, third-party arbitration funding as in the case of developed economies can be promoted along with impaneling legal luminaries, professors and experienced people from non-legal backgrounds, as in Australia, among other countries, as arbitrators in ODR platforms as compared to the current practice of having retired judges as arbitrators, to resolve matters more efficaciously and in a just manner.

Integrated cooperation and policy formulation

[29] Sindhu, Jahnavi, *PUBLIC POLICY AND INDIAN ARBITRATION: CAN THE JUDICIARY AND THE LEGISLATURE REIN IN THE 'UNRULY HORSE?* Journal of the Indian Law Institute 58, 4 (2016): 421-46.
[30] Mukerji, Asoke. *The Need for an International Convention on Cyberspace.* Horizons: Journal of International Relations and Sustainable Development, 16 (2020): 198-209.
[31] Anurag K. Agarwal. *Resolving Business Disputes Speedily.* Economic and Political Weekly 41, 24 (2006): 2417-418.

by the authorities such as formulating Hong-King like ODR scheme[32] to have a robust domestic ODR policy in place and ratifying Singapore Convention on Mediated Settlement Agreements[33], more formally known as the United Nations Convention on International Settlement Agreements Resulting from Mediation[34], to which India currently is a signatory, can help in recognising e-signatures, electronic documents and settlements in addition to making international settlements based on mutually-settled agreements enforceable in India.

ODR is the unprecedented need of the hour and has significant essence for the future. While the restrictions imposed on movement amidst the lockdown and the closing of several grievance redressal as well as governance institutions, the inclusion of virtual along with digital services became an indispensable need for social and economic justice as well as for providing the legal assistance. Smart technologies, artificial intelligence (AI) and the Internet of Things (IoT) could be incorporated through various automated technologies and machine learning programs to assist the legal practitioners, researchers and judicial staff, thereby reducing the manual tasks. In the contemporary context, India stands to benefit heavily by mandating incorporation of virtual mediation and arbitration hearings and ODR mechanism in the ADR clause of commercial and non-commercial contracts.

TAKING THE ARBITRARY OUT OF ARBITRATION

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Mandatory arbitration policies have attracted a lot of criticism lately. The difference between voluntarily opting for arbitration and being drawn to a position where one's right to sue stands entirely waived at the cost of an employment opportunity is being highly realised. This paper makes an effort to highlight why employers themselves have re-introspected into their policies and pondered upon whether mandatory arbitration policies are essentially serving their purpose today.

Here is a historical background of how laws pertaining to the aforementioned theme have

[32] Steven Grimes, Terence Wong and Christy Leung, *Hong Kong Introduces COVID-19 Online Dispute Resolution Scheme.* (Sep. 26, 2020), https://www.lexology.com/library/detail.aspx?g=472b3759-61ea-487f-92c8-4507e11d1dda.

[33] *Singapore Convention on Mediation* (Sep. 26. 2020), https://www.singaporeconvention.org/.

[34] *United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation"),* (Sep 26, 2020), https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

evolved across the globe.

In *Alexander v. Gardner Denver,*[35] the Supreme Court of the USA had held that no mandatory arbitration policy should be imposed upon individual employees keeping in mind their statutory rights. In 1991, the Supreme Court had held that a stockbroker employee was bound to act as per the standard arbitration clause of the contract to fight an age discrimination case. This very verdict of *Gilmer v. Interstate/Johnson Lane* spawned a whirlwind of opinions pro and against mandatory arbitration policies.[36] This not only involves such clauses in employment contracts but individual consumer matters. This issue drew the attention of the Supreme Court ten years later in *Circuit City Stores Inc. v. Adams*[37] where it held that the Federal Arbitration Act applies to all employees except those employees involved in transportation, seamen and railroads. They highlighted the maxim: *Ejusdem Generis* – where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words thus denying the respondent his claim.

In *EEOC v. Waffle House.*[38], the Court considered whether the EEOC was barred from seeking victim-specific judicial relief, such as back pay, reinstatement, front pay and other damages for an employee who had signed a mandatory arbitration agreement. The Court sided with the EEOC against the employer, holding that, because the EEOC had not agreed to arbitrate and had interests independent of those of the individual employee, the agency could bring an action seeking individual relief for that employee. Significantly, however, the EEOC brings relatively few such actions (only 332 nationwide in 2002), and so the practical effect of the decision is limited.[39]

Debates mainly raised after the Gilmer case led to the need of some elaborate research on the topic for a better analysis.

I. A MIDDLE GROUND:

The concept of due process was explained by the December 1994 Dunlop Commission Report[40] on the Future of Worker-Management Relations and in the May 1995 Due Process Protocol for Mediation and Arbitration of Statutory Disputes created by Employment Relationship, a joint effort by a task force whose members involved representatives of the American Bar Association, the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, the National Employment Lawyers Association and the Society of Professionals in Dispute Resolution. Both the Dunlop report

[35] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[36] Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991).
[37] Circuit City Stores Inc. v. Adams, 532 U.S. 105 (2001).
[38] EEOC v. Waffle House Inc., 534 U.S. 279 (2002).
[39] Robert M Shia, *Should employers require that workplace disputes be arbitrated?*, MASSACHUSETTS EMPLOYMENT LAW BLOG, (Oct. 12, 2019, 7.50 a.m.), https://www.morse.law/news/arbitration.
[40] Final Report, Dunlop Commission on the Future of Worker Management Relations (1994).

and the Due process protocol were parallelly compatible and conveyed that:

1. Arbitrator must be appointed by the joint efforts of both parties. Selection of an arbitrator by the employer only is seriously questionable. If the authority granting an award is biased towards the employer (especially if the employer is a well-experienced repeat player), it is greatly unjust to the employee.
2. Discovery provisions in the pre-trial phase must be allowed. This would enable both parties to substantiate their stance and the arbitrator to make a better-informed decision.
3. Both parties should equally share the costs. In most cases, employers attempt to justify mandatory arbitration because they bear the cost of the whole arbitral procedure. The report and the protocol analyse this situation and point out that such behaviour may/may not influence the arbitrator looking for a better incentive. Keeping in mind the worst-case scenario, the employee should be equally liable to pay for the process to avoid a more adversarial outcome.
4. One of the most important provisions is that the remedies decided by the arbitrator should be in sync with those prescribed by the statute, neither less nor more.
5. Analogous to the third principle of natural justice, an award must be self-explanatory. The award must speak for itself and not commit circular fallacy. Hence it is important to deliver an award with reasons.
6. There must be a provision for judicial review.

II. IN THE EYES OF AN EMPLOYEE:

Forced arbitration has always been a subject of employee resistance and scepticism. Clauses enshrining conditions of forced arbitration are usually tucked in computerised applications on websites, workplace kiosks, company vide common emails, job offers, etc. thus limiting any scope for adequate negotiation, sometimes even due realisation under the pretext of boilerplate language and fine print. For instance, in *Karp v. CIGNA Healthcare*, employer sent a company-wide email referencing a new employee handbook that contained an updated forced arbitration provision, a female health care network employee was forced to arbitrate her gender discrimination claim.[41] However, it has been observed that mandatory employment arbitration is consistent with other aspects of employment over which employees rarely negotiate upon, like health and life insurance, non-competition agreement, severance, paid leaves, pension provision plan, etc., all of which employers typically present to the employees on a take it or leave it basis. Commentators argue

[41] Karp v. CIGNA Healthcare, Inc., 882 F. Supp. 2d 199 (D. Mass. 2012).

that a sufficient explanation has not been rendered as to how the aforementioned factors of employment are adequately distinguished from the only factor of mandatory arbitration. However, the concept of party autonomy - the ground-norm of International arbitration requires parties to empower themselves to select the substantive and procedural laws that bind that contractual relationship.

III. In the eyes of the employer:

For a lot many years, conventional wisdom has been that mandatory arbitration works in favour of the employers. The employer and the employee both are typically concerned with the speedy process and reasonable expense which arbitration is known to guarantee. Employers have an upper hand when the appointment of the arbitrator is entirely left upon them to decide, they place caps on damages which can be imposed upon them, etc. The main reason why employers shy away from litigation is the undeniable factor of reputation. Arbitral proceedings are private in nature, often complemented with a clause/declaration of secrecy ought to be signed by the employee which saves them from the risk of public scrutiny. Let's first deal with the two factors of better efficiency in time management and expense and examine if mandatory arbitration is entirely successful in serving its purpose in these areas. Over the years employers have chosen to opt for mandatory arbitration with the assumptions that the above-mentioned benefits outweigh some inherent limitations of the same like no right to appeal, inability to prevail a dispositive motion, the inability of an unfavourable arbitration award being subject to judicial review, etc. However, there seems a shift in trends of employment arbitration which have duly started taking into consideration, discovery and pre-hearing proceedings analogous to the provisions enshrined in civil code procedures, evidence codes, etc. that usually find their place in litigation practice. Ashcroft vs. Iqbal has been propositioned by the commentators to explain that federal judges can dismiss all claims right at the initial stages of a suit if the complaint fails to show a factual allegation corresponding to all the elements of the claim. Employers may view such judgements as an opportunity to seek dismissal of non-meritorious claims at the earliest stages of litigation and thereby substantially decrease the disposition time and cost of resolving the matter.[42]

Now that we have discussed the nature of employment arbitration, effects on both parties, the evolution of laws pertaining to it, etc., let's move on to the effect of abovementioned factors on the current scenario.

New York Times recently reported that Google paid exit cheques of huge amounts to male executives accused of sexual assault. Thousands

[42] Vol. 25, No. 2, *ABA Journal of Labor & Employment Law*, pp. 227-239, (Winter 2010).

of employees of Google walked out of their offices and took to the streets on November 1st, 2018 to let the company address pressing concerns of inclusivity. One of these demands was to end forced arbitration. Vicki Tardiff, a staff linguist on Google's search team have played the role of silencing the victims and shielding the predators especially in light of the #MeToo movement. Tanuja Gupta, another organiser of this walkout made a threefold demand: Arbitrations should be voluntary, employees should be permitted to bring about class action suits and that the claims should not be curtailed under the shackles of confidentiality. The ginormous and worldwide nature of the protest came in the eyes of the media and under the pressure of negative publicity, the tech giant partially caved. In response, Sundar Pichai, the CEO, released a statement that assault and sexual harassment claims brought about by full-time employees would not be forced into arbitration henceforth. Even so, the employees were not satisfied because this didn't solve their problem in its entirety. They pointed out that claims involve many other aspects like gender claims, discrimination claims, etc. and that such provisions would make the part-time employees even more vulnerable.

In conclusion, we have seen efforts taken by the Large employers, Judiciary and the Legislature to make sure that laws revolving around arbitration are relevant enough to address the issues raised in it. The reason arbitration has amassed massive success as a dispute resolution technique is because the national, as well as international laws surrounding it, have never turned a blind eye to what time has demanded. With the realisation of #MeToo movement and need for more inclusivity, people have called out mandatory arbitration as an anarchical practice that has no place in today's paradigm. But it is pertinent to acknowledge that putting an end to mandatory arbitration will diminish the role of arbitration as a whole to a great extent. As far as it is important to not impose adhesion clauses on the employees, it is equally important to realise that arbitration does help in saving a great deal of expense and time and should not be driven out of the picture. In order to make sure that the real benefits of arbitration are realised, that it grows in scope and places, we need to go a step beyond curbing mandatory arbitration and focus on enforcing "due process" in voluntary arbitration. This is the only way arbitration will neither be completely ruled out nor suppress the status quo and rights of the employees. Instead of marking 2020 as the beginning of the end of mandatory employment arbitration, it should be aimed at beginning a new era of voluntary employment arbitration.

CONFLICT RULES IN INTERNATIONAL COMMERCIAL ARBITRATION: A DYING BREED OR AN EVOLVING SYSTEM?

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I. INTRODUCTION

Private International Law (also known as '*Conflict of Laws*') is applied by domestic courts in an international commercial law dispute where one particular national law cannot be applied or is not chosen. The conflict of rules system of the place having jurisdiction over the dispute (*lex fori*) has traditionally been linked to be applied in such indecisive circumstances. Transposition of this prevalence to International Commercial Arbitration implies that the conflict laws of the place of arbitration (*lex arbitri*) would be applied by the arbitral tribunal. This traditional practice is still sparingly prevalent, although highly criticized today because it may not be possible to identify one particular place of arbitration in certain cases[43] and more importantly, the place of arbitration may not have the closest and most significant connection with the substance of the dispute.

Ideally, parties are expected to explicitly provide for a governing law clause in their contracts. This would result in a sense of contractual clarity and there would be no complicate application of the conflict of law rules. However, a perfect contract is as scarce as hen's teeth. Arbitration clauses are thus, often poorly negotiated provisions of a contract leading to application of conflict of law principles.

This article aims to study the role played by conflict rules in International Commercial Arbitration and how the arbitrators use them to solve conflict of law issues in such disputes. The article also touches upon the role of conflict rules in enforcement proceedings before Courts and finally discusses whether the conflicts mechanism is becoming a dying breed. The role played by conflict of laws rules has undergone a dynamic change in the context of International Commercial Arbitration. Through this article, the author aims to study the role of Private International Law in International Arbitration used by arbitrators to solve conflicts issues in international disputes. The author also aims to consider the role of conflicts rules and approaches at each stage of an arbitration. Finally, conflict of laws rules at the stage of enforcement and recognition are

[43] Modern international arbitrations may be conducted at different venues for sake of convenience.

also considered.

II. ANALYSIS

1. Conflict of Laws

In applying conflict of laws rules to an international commercial dispute, a court/tribunal is first tasked with determining whether it has the jurisdiction to hear that dispute. Secondly, which system of law will be applicable in determining the obligations and rights of the parties is to be identified. Now, this article deals with the application of conflict of laws system in an international commercial dispute. So, the governing law that determines the rights and obligations of the parties may be identified in one of two ways: the parties may either expressly choose a particular law to govern their contract; or where the parties have not made any express choice of law, the lawyers/arbitrators can apply conflict rules to identify which nation's conflicts principles may apply to resolve that dispute.

Currently, most institutional rules and national arbitration laws have their own conflict of laws rules. In the event that the arbitrators/lawyers choose these rules, they will replace the conflicts rules prescribed by the arbitration law of the seat. The recent system allows the arbitrators to apply the conflict rules that they consider to be the 'most appropriate'. For example, UNCITRAL Rules provides: "*The arbitral tribunal shall apply… Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.*"[44] A similar approach has been adopted by the Indian Arbitration and Conciliation Act, 2015.[45] A likewise discretion is afforded to arbitrators under the European Convention on International Commercial Arbitration (1961),[46] as well as Danish,[47] English,[48] French,[49] Dutch[50] and Swiss[51] arbitration law.

Indian courts have gone a step ahead of the traditional approach which linked the governing law with the place of arbitration or *lex loci arbitri*. In the landmark Indian case of *NTPC*[52], the Courts have held that if there is no substantive law defined, the law of the seat will be deemed to be the governing law as the law bearing the *closest connection* to the dispute.[53] This close connection may be presumed to be established generally from one of two streams of legal systems: *lex loci contractus* (where the contract is entered into) or *lex loci solutionis* (law of the place where the contract is performed). However, in case of *lex loci solutionis*, this presumption is rebuttable in contracts whose performance occurs at multiple places.

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[44] Art. 33(1), UNCITRAL Arbitration Rules.
[45] Section 28(b)(iii), Indian Arbitration and Conciliation Act (2015).
[46] Art. VII(1), European Convention of ICA (1961).
[47] Art. 28(2), Danish Arbitration Act (2005).
[48] Sec. 46(3), English Arbitration Act (1996).
[49] Art. 1496, French New Code of Civil Procedure (1981).
[50] Art. 1054, Dutch Arbitration Act (2015).
[51] Art. 187, Swiss Private International Law (1987).
[52] National Thermal Power Corporation v. Singer Company, 1992 SCR (3) 106 (India).
[53] *Id.*

2. Traditional Approach

(a) Choice of Forum

'A choice of forum is a choice of law' (*qui indicem forum elegit jus*). In an arbitration agreement where the parties have chosen a forum, it is presumed that the *lex fori* will act as the governing law of the contract (including the arbitration clause). So, if a tribunal is constituted in England, then English conflict of laws rules will be applied to determine the legal system to be applied to resolve the dispute.

Although this approach was at its peak in the 1900s, it is now declining as a mode to determine the governing law, despite still being sparingly used to determine the law governing the arbitration agreement. The last two decades have led to the Choice of Forum approach giving way to the modern approach of Doctrine of Direct Choice, which is dealt with below.

(b) Lex Mercatoria

Also understood as Merchant Law, *lex mercatoria* is a system of law used by trade merchants since the medieval period to exercise contractual freedom and avoid legal intricacies. This is a type of customary international trade law, made up of treaties and conventions, institutional instruments like the UNIDROIT Principles and the UNCITRAL Model Law, and trade usages[54]. It declined post medieval times majorly because States adopted their own national commercial law codes, which led to *lex mercatoria* being replaced with national codes.

3. Modern Approach

(a) Amiable Compositeur (*ex aequo et bono*)

Often, parties are not in favour of choosing any national law or institutional rules to govern their dispute. This may be because customs of that particular trade restrict the application of any other international law. So instead, the parties empower their arbitrators to decide without applying any law *per se*, on the basis of what is just and right. It is important to observe that this approach is not completely lawless. Arbitrators (as *amiable compositeurs*) are still bound to follow procedures in a fair manner, with due regard to the subject matter of the dispute. However, this approach is rarely exercised as financial stakes are often high in international commercial arbitrations.

(b) Direct Choice approach

This approach is a principle whereby arbitrators are not bound by any one particular conflict of law rule or system and have the freedom to directly apply the laws (either conflict rules or national laws) as they deem appropriate. This is different from the indirect method (or *voie indirecte*) in the sense that the latter applies a set of conflict of law rules in order to reach to a particular governing law.[55]

(c) Cumulative approach

Lastly, this approach guides the arbitrators to simultaneously examine all the conflict rules of legal systems with which a particular dispute is related. In the event that all of these conflict

[54] A 'trade usage' is a rule that is so well known to traders in a particular market that, when they contract, those traders consider it an implied term.

[55] See supra notes 1-8 for legislative examples of voie directe.

rules lead to the application of the same substantive law, the arbitrators apply this to the merits of the case. However, it is vital for the resulting laws to converge into one substantive law.[56] In a landmark ICC dispute, a Paris-seated tribunal was dealing with French, Yugoslav and Egyptian conflict of law rules together. Even though the French conflict rules applied *lex domicilii* of Yugoslav; Yugoslav conflict rules applied *lex loci actus* of Yugoslav; and the French conflict rules referred to the *lex contractus* of Yugoslav; coincidently, all the three conflict systems were leading to the Yugoslav substantive law.[57]

4. Recognition and Enforcement

The New York Convention facilitates the recognition and enforcement of foreign arbitration awards. The enforcement framework of the Convention is subject to certain exhaustive restrictions under Article V which consist of grounds to refuse enforcement of an arbitral award. It is pertinent to note that there exists discretion to enforce an award notwithstanding the grounds of exceptions which refuse enforcement.[58] This is consistent with the pro-arbitration policy of the Convention, whereby a contracting State is not bound to refuse enforcement under any circumstances. More so, the State can even enforce an arbitral award despite an exception under Article V being established. This autonomous approach has far-reaching consequences. This notion is problematic in the sense that it enforces even those awards that have been annulled at the seat.[59] For example, in an enforcement proceeding of an award before a UK Court passed by a tribunal seated in Paris, the award *may* not be enforced by the UK court if the Paris courts have annulled it. Interestingly, the enforcement of an award may also be refused if the arbitration clause was not valid under the governing law chosen by the parties. Failing any choice of law, *lex arbitri* is deemed to be the governing law.[60]

As of June 2020, there are 164 contracting States to the Convention, making the enforcement framework almost universal. Thus, awards being subject to a non-New York Convention framework have become increasingly rare. However, in the event that a party seeking to enforce an arbitral award prefers an alternative, more favourable multilateral or bilateral treaty, Article VII of the Convention allows the treaty which is more beneficial to enforcement may prevail. Other prevalent examples of deviation from the Convention have been observed – 1) by applying globally accepted non-New York

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[56] Yves Derains, *Jurisprudence of International Commercial Arbitrators Concerning the Determination of the Proper Law of the Contract*, INT'L. BUS. LAW. J. 514, 529 (1996).
[57] ICC Case No. 6281 (1989).
[58] Art. V of the New York Convention emphasises that enforcement 'may be' (rather than 'shall be') refused on the specified grounds.
[59] Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907, 912-13 (DDC 1996).
The award was set aside by the court of the arbitral seat, Egypt following a substantive review. The US Court eventually enforced the award on cogent grounds despite its annulment at the seat.
[60] Art. V(1)(a), New York Convention (1958).

Convention criteria to refuse enforcement, 2) by contravening the provisions of the Convention, in paradox to their international law obligations, 3) passing domestic laws containing additional grounds for refusal of enforcement incompatible with the New York Convention.[61]

Such enforcement obstacles are faced by parties when seeking to enforce their rights awarded in an international arbitration. The New York Convention was meant to create uniform grounds of refusal for enforcement of arbitral awards and avoid an issue of conflict.[62] However, it is argued that this lack of uniformity has not arisen because the countries who have ratified this Convention are intentionally violating it, but because there lies an underlying issue of conflict within the Convention itself. The Convention establishes two sets of laws than a national court can use to govern the enforcement proceedings: its own provisions and the domestic laws of the State-parties.[63] However, in doing so, the very object of the Convention to achieve uniformity in enforcement proceedings across its member-states would stand defeated.[64]

III. CONCLUSION

Ultimately, arbitration is a creature of contract and consent. It is driven by the parties' and the arbitrators' intent to resolve a dispute efficaciously. Although it may appear that the conflict of laws principles is not a dying breed and not arbitration-friendly, it may not necessarily be the case. The author believes that the adoption & application of conflict rules is evolving with the boom of the pro-arbitration approaches adopted by most courts and tribunals today. The parties want to save themselves the complicated, localized hassle of applying the traditional conflict of laws rules to select a governing law. They prefer to directly choose and apply the substantive law or adopt a set of neutral institutional rules. In the event that they fail to choose so, the arbitrators must pay heed to the principle that 'arbitration only owes obedience to its parties' and not apply a governing law the parties themselves wouldn't want to.

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[61] Article 459 of the Vietnamese Code of Civil Procedure prohibits enforcement of a foreign arbitral award that is contrary to basic principles of Vietnamese law.

[62] *Id.*

[63] Art. III, New York Convention (1958).

[64] Alexander Bedrosyan, *The Limitations Of Tradition: How Modern Choice Of Law Doctrine Can Help Courts Resolve Conflicts Within The New York Convention And The Federal Arbitration Act*, UNIV. PA. LAW REV. 208, 209 (2015).

CONVOLUTION OF UNILATERAL ARBITRATOR APPOINTMENTS IN INDIA

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The significance of the two-fold requirement of Impartiality and Independence in judicial and quasi-judicial processes cannot be emphasized much. Consequentially, these non-negotiable limbs extend their relevance with equal veracity to Arbitral proceedings across jurisdictions. While party autonomy forms the core of arbitral proceedings, its tussle with the key considerations of independence and impartiality of arbitrators has often moved the courts to action, particularly in matters of unilateral appointments of arbitrators. The debate over the practice of incorporating such arbitration clauses is far from being a novel concept and has received divergent views in different jurisdictions. In India, as well, an obscurity had clouded the validity of such arbitration clauses. However, the uncertainty has bidden adieu with the decision of the Supreme Court (hereinafter 'SC') in *Perkins Eastman v. HSCC*[65] (hereinafter 'Perkins Eastman'), finally declaring them as invalid.

The issue that sparked debates over such clauses was whether they compromised with the Legitimacy of Arbitral proceedings. Admittedly, party autonomy forms the fulcrum of arbitral proceedings by virtue of which the parties enjoy the liberty to deliberate and mutually agree on a procedure for the same, including the method of appointment of arbitrators. This method of appointment of arbitrators should be such so as to instill the spirit of confidence and faith of the parties in the arbitration process and the consequential award.[66] Therefore, the considerations of impartiality and independence of arbitrators must be viewed parallelly and examined with due consideration.

Briefly, independence and impartiality are distinct concepts. Independence of an arbitrator is based on an objective test and is concerned with the existence of any relationship between the arbitrator and one of the parties. Whereas, impartiality has its foundations in the lack of an actual or apparent bias of the arbitrator, either in favour of a party or any issue pertaining to e dispute. It, thus, has its associations with the more subjective and abstract concept related to the state of mind.

[65] AIR 2020 SC 59.

[66] Michal Malaka, *Party Autonomy in the procedure of Appointing Arbitrators*, International and Comparative Law Review.93,109 (2017).

Professor Jan Paulsson as the Holder of the Michael R. Klein Distinguished Scholar Chair at the University of Miami in 2010 delivered the inaugural lecture entitled 'Moral Hazard in International Dispute Resolution',[67] where he strongly advocated against unilateral arbitrator appointments in matters of International Arbitrations involving private parties, which according to him, have the potential of putting to disadvantage the party who is in the right. Making a sweeping jump of miles to India, now, for the restrictions of this Article, a similar dissatisfaction has cropped up in bits and pieces in different times. Situations where an employee of one of the parties has been mutually agreed to act as the sole arbitrator or has the authority to appoint one, have prominently been the bone of contention. Before 2015, the courts, in a catena of cases, have decided in favour of the validity and enforceability of these contracts. Interestingly, the 246th Law Commission Report,[68] took the contrary view. Under the section of 'Neutrality of Arbitrators' it expressed its discontentment with the then existing provisions of the Arbitration & Conciliation Act, 1996 (hereinafter 'Act') as failing to achieve the objective of setting up a 'Neutral' tribunal particularly in arbitration agreements that prescribed for unilateral arbitrator appointments. The report went ahead to express its indignation at the court's inclination towards deciding in favour of such agreements and turning their backs to procedural fairness. The report firmly advocated that party autonomy should not be given the playing field pushing to margins the conditions of impartiality and independence in arbitration proceedings. Subsequently, with the inflow of 2015 Amendments to the Act, these considerations reckoning to be fundamental to an arbitrator, have derived a legal validity.

The key considerations of independence and impartiality of arbitrators have made their place in the Indian statutory regime under Section 12(5) and the Fifth & Seventh Schedules of the Act, echoing the tones of UNCITRAL Model Law of International Commercial Arbitration and the International Bar Association (IBA) Guidelines on the subject. The Fifth Schedule enlists the grounds that may give rise to justifiable doubts. Further, if the relationship with the arbitrator falls squarely under any of the items provided in Schedule Seven, the arbitrator shall be declared to be ineligible under section 12(5) of the Act. It is in lieu of these 2015 Amendments, 246th Law Commission Report and relevant precedents, the Apex Court in Perkins Eastman case has finally discarded the validity of unilateral arbitrator appointment.

The factual matrix of the case involved a

[67] Professor Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture, University of Miami (April. 29, 2010), https://www.arbitration-icca.org/media/0/12773749999020/paulsson_moral_hazard.pdf.

[68] 246th Law Commission Report, *Amendments to the Arbitration and Conciliation Act 1996* (Aug.5, 2014), http://lawcommissionofindia.nic.in/reports/Report246.pdf.

contract between the Consortium of Applicants (Appellants) and Hospital Service Consultancy (Respondents). The contract consisted of a Dispute Resolution Clause which allowed for the parties to submit to arbitration in the event of a dispute, while the Chief Managing Director (hereinafter CMD) of the Respondent was conferred the authority to appoint a sole arbitrator within 30 days from the date of receipt of an arbitration notice. The said appointment was challenged by the applicant under section 11(6) of the Act on the following two grounds:

1. Delay in the appointment of Arbitrator
2. Non-fulfilment of the requirements of impartiality and independence of Arbitrator

While the argument of delay in appointment was rejected by the court on ground of hyper technicalities, the second argument was elaborately considered to be of substance. Relying on section 12(5) read with the Fifth and Seventh Schedule of the Act, the Applicant made it as regards the ineligibility of the appointed arbitrator appointment arbitrator in the matter. The court, thus, dealt with the issue if the CMD who attained authority vide a contract to appoint a sole arbitrator could legally exercise it or not.

Answering this in the negative, heavy reliance was placed on the observations of *TRF Ltd. v. Energo Engineering Projects Ltd* (hereinafter TRF case).[69] It classified the unilateral nomination clause into categories of two: first where the clause permitted the MD or the officer/employee of the contracting party to be the sole arbitrator or granted the authority to appoint another person as one (as in the TRF case); second where the MD or any officer could not act as the sole arbitrator but had an authority to appoint one, derived from the contract itself. While the Perkins Eastman's case fell into the second category, the decision culled its reasoning from the ratio as laid in the TRF case.

The court applied the principle of what cannot be done directly may not be done indirectly, a doctrine often used to describe a 'fraud on the Constitution'. The CMD who had the authority to act as the sole arbitrator vide a contract in this case on becoming ineligible for being directly interested in the dispute was not empowered to appoint another arbitrator. Despite noting the difference vis-à-vis the dispute resolution clause in TRF and the case at hand: Perkins, the court held that the logic would squarely apply to the latter. CMD's interest in the outcome of the dispute would make him ineligible to act as the sole arbitrator or to appoint one. The ineligibility shall persist in both the events, whether the CMD acted as an arbitrator himself or exercised power to appoint an arbitrator as it would invariably extend to the appointed arbitrator, thereby, making him ineligible too. This ineligibility

[69] (2017) 8 SCC 377.

would strike at the very root of an arbitrator's power to arbitrate as well as appoint someone to conduct arbitration proceedings.

The Perkins Eastman's case has, thus, taken arbitrator appointments to a direction that deprecates a one-sided approach adopted in the institution of an arbitral tribunal. Following the ratio of Perkins Eastman, the HC of Bombay in *Lite Bite Foods Pvt Ltd v. Airports Authority of India*[70] appointed a sole arbitrator for dispute resolution despite the parties agreeing to a procedure for the same. Here, the Airports Authority of India (Respondent) had the authority to appoint a sole arbitrator in the event of any dispute between the parties via the agreement. The court categorically noted that the factual matrix of the case was similar to that of Perkins Eastman and undoubtedly fell within the ratio laid in there. Therefore, the court in the light of guiding principles, of neutrality, independence, fairness and transparency to arbitral-forum selection process, appointed a sole-arbitrator overriding an agreement pertaining to the selection procedure of the tribunal.

Later in *Proddatur Cable TV Digi Services v. Citi Cable Network Ltd.*[71], the HC of Delhi acknowledging that fairness, transparency and impartiality are virtues of prime importance, unequivocally applied the Perkins Eastman's logic. It was ruled that any procedure laid down in an arbitration clause, despite the presence of mutual consent of the parties and their free will, cannot supersede the considerations of impartiality and fairness in arbitration proceedings. Here, the Respondent Company was empowered by the Arbitration clause to appoint a sole arbitrator and therefore, in the light of the ruling as laid down in the Perkins Eastman's case, it stood to be vitiated under law. It was noted that the ineligibility of the company to act as an arbitrator on account of its interest in the outcome of the dispute would permeate seamlessly to the person it would nominate as an arbitrator making the latter ineligible, de jure.

Thus, Perkins Eastman's case has finally settled the law of the land. The ineligibility of a person to act as an arbitrator denudes him of the ability to appoint one too, irrespective of possessing the authority contractually. Invalidating unequal arbitration agreements lessens the chances of biasness, partiality and unfairness to a large extent. In doing so, the Indian courts have taken the same road as a few Civil Law countries such as France & Russia. This is opposite to the rulings of the Common Law nations such as United Kingdom, Unites States and Singapore which have unequivocally upheld these clauses as valid.[72] Proscribing unilateral arbitrator appointment clauses in India is a step ahead in placing India in the league of pro-arbitration jurisdictions. A greater tendency of taking recourse to reputed Arbitral

[70] 2019 SCC OnLine Bom 5163.

[71] 267 (2020) DLT 51.

[72] Krusch Antony, *Unilateral Arbitration Clause and Arbitrator Appointments*, Lexocology (Feb. 10, 2020), https://www.lexology.com/library/detail.aspx?g=33b489a6-5951-41aa-94f1-1d6ca2c993f8.

Institutions is foreseeable. Such coherence to the international standards of arbitration, principles of impartiality and independence as sacred to the arbitral tribunal helps achieve equality between the parties, thereby minimizing imbalances and complying with public policy norms. Finally, moving in line with the international norms laid in regards to arbitrator appointments furthers the objective of speedy dispute resolution, maintain sanctity of the process and doing justice.

ADR UPDATES

Jindal Steel & Power Limited v. State Tradings Corporation of India Limited and Ors.

29 April 2020 | O.M.P. (I) (COMM.) 89/2020 | Delhi High Court

Principle: An interim relief is an aid to final relief and the applicant must demonstrate its intention to refer the matter to arbitration by raising a dispute before Section 9 petition could be entertained.

Facts: This petition was filed under Section 9 of the Arbitration and Conciliation Act, 1996. In the present case the respondent entered into an MoU with a foreign buyer and thereafter the respondent entered into an agreement with the petitioner for the supply of steel rails which were to be supplied to the foreign buyer. An addendum to the agreement was executed between the petitioner and the respondents by which the petitioner was required to provide performance bank guarantee for a total sum of Rs. 81,94,90,000/-. The petitioner argued in the said case that as the work has been satisfactorily executed and the contract having been fully performed the performance bank guarantees must be released in their favor.

Judgment: The court held that if the performance bank guarantees are allowed to be released in favor of the petitioner then it shall be granting of the final relief in the petition under Section 9 of the Act, which would rather make this petition infructuous for the reasons the interim relief has to be in the aid of the final order, but cannot be the final order itself. Further, the court pointed out the fact that the petitioner has failed to raise any dispute between the parties so as to bring a petition under Section 9 of the Act. Section 9(2) of the Act rather the petitioner itself urges there being no dispute by stating that the contract has been satisfactorily completed. The court clarifies that when an application under section 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intension on the part of the applicant to take recourse to the arbitral proceedings and it must be implicit that a dispute must have arisen which is referable to the arbitral tribunal. Therefore, the court held that an interim relief is an aid to final relief and the applicant must demonstrate its intention to refer the matter to arbitration by raising a dispute before Section 9 petition could be entertained.

AVR Enterprises v. Union of India

8 May 2020 | MANU/DE/1024/2020 | Delhi High Court

Principle: Provision for pre deposit of 75% of the award, as a precondition to appeal the award under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 ("MSMED Act"), would apply only to proceedings initiated under section 18 of the MSMED Act and would not apply to an award published by an arbitrator appointed by the parties otherwise.

Facts: The parties entered into a contract for procuring Cover Waterproof. The parties referred to arbitration for a dispute arising out of the contract with regards to supplies and a sole arbitrator was appointed by the respondent to adjudicate the claim. The arbitrator published his award in favour of the petitioner reducing the quantum of liquidated damages and directed the respondent to pay the balance amount with compound interest. The award was challenged by the respondents under Section 34 of the Arbitration Act before the Trial Court. The petitioner contended that the challenge was liable to be dismissed because the respondent had not deposited 75% of the awarded amount as stipulated in Section 19 of the MSMED Act. The Trial Court held that the provisions of MSMED Act were not applicable and rejected the preliminary objection raised by the petitioner. The petitioner thus filed an appeal.

Judgement:

The Delhi High Court reaffirmed the decision of the trial court. Since there was no reference made to Micro and small Enterprises Facilitation Council by the petitioner, no proceedings were conducted by the Council under Section 18 of the MSMED act. There was also no reference made by the Council to any Institution or Centre for conducting conciliation. There was no conciliation either by the Council or by any Institution or Centre providing alternate dispute resolution services. The Council also did not take up any dispute for arbitration nor did it referring any dispute to any Institution or Centre providing alternate dispute resolution services for such arbitration. The arbitration in the present case was not an Institutional Arbitration as contemplated under section 18 of the MSMED Act but was conducted under the Arbitration Act by an arbitrator privately appointed by the respondent.

South East Asia Marine Engineering & Construction (SEAMEC) Ltd. v Oil India Ltd.

11 May 2020 | Civil Appeal No. 673 of 2012 | Supreme Court

Principle: Arbitral awards cannot be interfered with unless the perversity of the award goes to the root of the matter, without the possibility of alternative interpretation to sustain the arbitral award and, if it portrays perversity unpardonable under Section 34 of the Act.

Facts: The Appellant (SEAMEC) was awarded a work contract pursuant to a tender floated by the Respondent (OIL) for the purpose of well drilling and other auxiliary operations in Assam. Subsequently, the price of High Speed Diesel (HSD) increased, which was essential to carrying out the drilling operations. The Appellant raised a claim that this increase in price of HSD, being essential for carrying out the contract triggered the “change in law” clause under the contract (Clause 23) and the Respondent was liable to reimburse the same. After Respondent’s rejection of the claim, the

dispute was referred to an Arbitral Tribunal. The tribunal allowed the Appellant's claim and awarded in their favour. It held that the said clause fell within the ambit of Clause 23 as it had the "force of law". The Respondent appealed to the High Court after the award was upheld by the District Court. The High Court set aside the award, empowered under Section 37 of the Arbitration Act, finding it erroneous and against public policy. On appeal, the issue before the Supreme Court was whether the interpretation of the contract in the Tribunal's award was reasonable and fair so as to pass the test under Section 34 of the Arbitration Act.

Judgement: Relying on Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd, the Court observed that it can set aside the award only on the grounds provided in the Arbitration Act, as interpreted by the Courts and, it cannot interfere merely because an alternative interpretation exists. The Court held that it was not required to examine the merits of the interpretation in the award if it was done reasonably. Yet, delving into the merits, the Court did not subscribe to the Tribunal's liberal interpretation as it failed to read the contract as a whole and as mutually explanatory. It also rejected the High Court's reasoning in considering that Clause 23 was inserted by the parties in furtherance of frustration, rather than to mitigate the consequences of frustration as was the matter. Noting the contractual terms, the Court observed that the contract recognized Regulations of the Government as "Force Majeure" and the parties had agreed to the payment of force majeure rate to tide over such temporary event in separate clauses, not Clause 23. Further, the contract was based on a fixed rate and the Appellant agreed to the contract after taking the risk of price increase into account. The parties hadn't agreed to a broad interpretation and no evidence was produced by the Appellant to prove otherwise in order to include change in HSD rate. Hence, price fluctuations couldn't be brought under Clause 23 unless specific language pointed towards its inclusion. The Court held that the Tribunal's interpretation of the clause was perverse, as it would completely defeat the explicit wordings and purpose of the contract. Thus, the award was set aside.

Galaxy Infra and Engineering Pvt. Ltd v. Pravin Electricals Pvt. Ltd

12 May 2020 | MANU/DE/1582/2020 | Delhi High Court

Principle: The existence of an arbitration agreement flows from the conduct of the parties and the documents exchanged between them.

Facts: The petitioner was in the business of consultancy services in electrical design and building for various state government projects. The respondent provided electrical services. They entered into a consultancy agreement which contains the disputed arbitration clause on 07.07.2014. Several correspondences were made between the parties relying on the

agreement. The petitioner raised several invoices which the respondents did not pay in full.

The only issue in the petition that the High Court was required to examine was the existence of an arbitration agreement between the parties. The petitioner contended there exists a concluded contract between the parties which contains an arbitration clause while the respondent's argued that no agreement was executed between the parties and the agreement sought to be relied upon by the petitioner is a forged and fabricated document. However, on several occasions when correspondences were exchanged between the parties, the respondent had not even once denied the existence of the Agreement.

Judgement: The Delhi High Court held that the email correspondences between the parties relying upon the draft agreement shows that the agreement was entered into by the parties. Even in the absence of a signed formal agreement between the parties, the arbitration agreement would be deemed to have come into existence when it is discernible from the conduct of the parties or the correspondences exchanged between them.

Relying on the Supreme Court's judgement in Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research, the court held that the conduct of the parties by way of emails reflects the existence of an arbitration agreement between the parties and squarely falls within the ambit of Section 7(4)(b) of the Act.

Salar Jung Museum & Anr v. Design Team Consultants Pvt Ltd

21 May 2020 | O.M.P.(COMM) 44/2017 | Delhi High Court

Principle: Permissibility of jurisdiction objection being raised for the first time in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996.

Facts: The Petitioner entered into a contract with M/s Design Team, a firm of Architects which in the interregnum, constituted into a private limited company (the Respondent). The contract was for making architectural designs, consultancy and for supervision of the construction of the buildings. During the execution of the contract, dispute arose as to the consultancy and supervision charges payable to the Respondent as per the revised estimate of the entire project. Subsequently, the Respondents invoked arbitration in which the award was rendered in their favour ordering the Petitioner that the fees of the Respondent be paid as per the revised estimates and not as per the original estimate mentioned in the contract. Pursuant to which the Petitioners challenged the award before the Delhi High Court. In the proceedings before the Delhi High Court, the Petitioner raised objection as to the tribunal's findings on merit as well as its finding on the maintainability of the claims since the agreements was signed by the firm and not the private limited company which had invoked the

arbitration. Further, the Petitioner's also raised objection as to the arbitrator's jurisdiction in considering the Respondent's claim of security deposit and balance of charges for supervision, given that the proceedings were only referred to for determining the consultancy charges and not the others. The Respondent objected to Petitioner's objection as to the jurisdiction of the arbitrator since the same was not raised before the tribunal and so the right to raise such objection was waived and hence cannot be raised for the first time in a petition under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, 'the Act').

Judgement: The Court noted that the objection as to the jurisdiction of the arbitrator was not raised by the Petitioner's before the Ld. Arbitrator. In view of the same, it held that the public policy ground for challenge under Section 34 of the Act cannot be invoked by the aggrieved if the aggrieved participates in the arbitration proceedings, contest the claim on merits and thereafter raise jurisdictional objection as to the reference order through a Section 34 petition. The court observed that since the Petitioner did not object during the arbitration proceedings it can be assumed that it had agreed to submit the additional claims (other than those related to consultancy fees) also to be adjudicated by the tribunal. Thereupon, the court rejected the other preliminary objection as to the maintainability as well, upholding the tribunal's finding that the contract had the successor-in-office of the Architects firm also included within the definition of the consultant. Ultimately, the court also upheld the tribunal's finding on merits and asked the Petitioner's to pay the Respondent as per the revised estimates of the project.

Patel Engineering Ltd. v. NEEPCO

Dated: 22nd May 2020 | Special Leave Petition (C) NOS. 3584-85 OF 2020 | Supreme Court of India

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

Facts: The dispute between Patel Engineering Ltd. ("PEL") and North Eastern Electric Power Corporation Ltd. ("NEEPCO") arose out of a works contract in three packages, each of which contained a separate arbitration clause. The parties' dispute culminated into three separate awards, all in favour of PEL.

NEEPCO challenged these awards by filing applications under section 34 of the Act before the Additional Deputy Commissioner (Judicial) Shillong; who dismissed the applications and upheld the awards. NEEPCO challenged the awards under section 37 of the Act before the Meghalaya High Court (HC). The Meghalaya HC, by way of a common judgment, allowed

the appeals and set aside the awards.

Aggrieved, PEL challenged the Meghalaya HC's decision before the Supreme Court by way of special leave petitions (SLPs). However, the Supreme Court dismissed each of the SLPs. Thereafter, PEL filed Review Petitions before the High Court. The High Court dismissed the Review Petitions (Order) and held in favour of NEEPCO. Aggrieved by the dismissal of the Review Petitions, PEL preferred three Special Leave Petitions (SLPs) before the Supreme Court arising from the Order.

Judgment: The primary issue in the present case was whether the Meghalaya HC rightly dismissed the review petition which was filed by PEL contending that the Meghalaya HC erroneously applied the provisions as applicable prior to the 2015 Amendment and relied on the decisions, which are no longer good in law. While holding that the Meghalaya HC rightly dismissed the petitions, the Supreme Court reaffirmed the scope of 'patent illegality'. It held that the domestic award it to be set aside only if it is patently illegal on any of the grounds that the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at the same; or, the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.

Afcons Infrastructure Limited v. Konkan Railway Corporation Limited

June 2, 2020 | Arbp no. 10 of 2019

Principle: According to Section 12 of the Arbitration and Conciliation Act,1996, an arbitrator can be challenged if the circumstances of its appointment raise concerns with respect to the independence or impartiality of the arbitrator.

Facts: The contract between the parties comprised of an arbitration clause, as per which, the arbitral tribunal was to consist of three gazetted railway officers. This panel was to be prepared by the Respondent which would be shared with the Petitioner who would be asked to suggest up to two names out of the panel for appointment as the Petitioner's nominee. The power to appoint the nominee arbitrator of the Petitioner vested with the managing director of the Respondent with the only rider that he shall appoint at least one out of the two names suggested by the Petitioner. The power to appoint the rest of the arbitrators from within or outside the panel and the presiding arbitrator from amongst those three arbitrators, vested with the managing director of the Respondent.

Judgement: The court held that, the procedure for appointment of the arbitral tribunal, mentioned in the clause violates the amended provisions of Section 12 read with the Fifth and Seventh Schedule of the Arbitration Act, introduced by the Amendment Act, 2015. The court, allowed the Petitioner to constitute an

independent arbitral tribunal, thereby declaring the procedure envisaged under the contract for appointment of arbitrator as invalid.

Centrotrade Minerals and Metals Inc v. Hindustan Copper Limited

2 June 2020 | AIR 2020 SC 3163| Supreme Court

Principle: The Court deliberated upon whether a settlement of disputes or differences through a two-tier arbitration procedure is permissible under the laws of India.

Facts: The partied had entered into a contract for sale of copper concentrate. Dispute between the two parties arose regarding the dry weight of the goods and M/s. Centrotrade had invoked the arbitration clause. The clause allowed for a right to appeal to a second arbitration in London. The second arbitration had passed its award upholding the validity of the arbitration clause and Centrotrade's claims, after a NIL award from the Indian Council of Arbitration. An application for enforcement was moved before the Calcutta High Court, which had been allowed. However, an appeal was filed by Hindustan Copper Limited against the decision before a division bench which declared the second award invalid. The judgment was again challenged before a three-judges bench.

Judgment: The Hon'ble Supreme Court had held that the Arbitration and Conciliation Act, 1996 does not prevent, either explicitly or implicitly, the parties' autonomy to agree to a procedure for arbitration of the dispute between them. The party autonomy is upheld to the extent that they may agree to a procedure whereby the arbitral award might be reconsidered by another arbitrator or panel of arbitrators by way of an appeal. The Hon'ble Supreme Court has accepted two-tier arbitration as an integral part of arbitration in India.

Entertainment City Limited v. Aspek Media Private Limited

3 June 2020 | O.M.P. (T) (COMM) 24/2020 | Delhi High Court

Principle: The fourth schedule of the Arbitration and Conciliation Act, 1996 contain no binding effect for the determination of the fees of an arbitrator.

Facts: Post the arbitral dispute arising between the petitioner and the respondent of the present case, the parties approached the court for the appointment of the arbitrator for the resolution of their dispute. The court issued an order in the same regard to appoint a sole arbitrator. However, the said order did not contain any specifications regarding the fees that shall be charged by the arbitrator. Consequent to this, the arbitrator so appointed proceeded to hear both the parties and subsequently asked for the fees payable to him. The petitioner in the present case has contended that the fees charged by the arbitrator is in violation of Section 14 read with Section 12 (4) of the Arbitration and Conciliation Act, 1996. The

petitioner had also stated that the fees so demanded had infracted Section 11 (4) of the Act, read with Fourth Schedule thereto.

Judgement: The Court in this case upheld that Section 11(4) does not stipulate any definite rules under which the fees of the arbitrators can be said to be have governed. Hence, any of the fees fixed as per the fourth schedule of the Arbitration and Conciliation of 1996 do not carry any binding effect on the arbitrator.

Quick Heal Technologies Limited v. NCS Computech Private Limited and Anr.

5 June 2020 | Arbitration Petition No. 43 of 2018 | Bombay High Court

Principle: The employment of 'shall' with reference to amicable discussion and, 'may' for referring disputes to arbitration in the language of the same clause signifies that the reference to arbitration is optional and not mandatory.

Facts: Quick Heal Technologies (Petitioner) and NCS Computech Private Limited and Innovative Edge (Respondents) entered into a Software Distribution Agreement ('Agreement'). Despite confirmation of balance, the Respondents failed to pay the amount as due on 31st March, 2013. Consequently, the Petitioner invoked the Arbitration Agreement contained in Clause 17 of the Agreement, proposed the name of a Sole Arbitrator pursuant to the agreement and filed the present petition under Section 11(6) of the Act seeking appointment of a sole arbitrator. The issues before the Court were to decide whether amicable settlement was a possibility or had been exhausted and, the maintainability of the petition and if it contained a mandatory arbitration agreement under Sub-clause (a) and (b) of Section 17 respectively.

Judgement: The Court observed that the Petitioner and Respondent sought meetings to work out different issues and had disagreements over venue of the meeting for amicable settlement. Further, before the filing of the present petition, the Respondent had already filed a Suit before the High Court at Kolkata followed by the Petitioner questioning the maintainability of the said Suit. Therefore, there was no scope for an amicable settlement. Secondly, there was no pre-existing agreement between the parties that they "should" or "will" refer their disputes to arbitration or to the Court at any stage. The words 'shall' and 'may' used in sub-clauses (a) and (b) of Clause 17 were used after proper application of mind and could not be read otherwise. Under Clause 17(a), which categorically provided for "all disputes", the parties had first agreed that all disputes under the Agreement "shall" be amicably discussed for resolution by the designated personnel of each party, thereby making it mandatory to refer all disputes for amicable discussion. It was thereafter agreed in Clause 17(a) itself, that if such disputes could not be resolved by the designated personnel within 30 days, the same "may" be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration. The 'option'

of arbitration was further clarified by Clause (c) which gave exclusive jurisdiction to the Courts in Pune to enable the parties to pursue any remedy available to them at law or equity, if the parties decided not to exercise the option of Arbitration. Clause 17(b) couldn't operate independently as, it referred to a situation where under Clause 17(a) the parties had agreed, through a fresh consent to refer their disputes to arbitration, after failure of the amicable settlement process. Hence, the petition was dismissed on the ground that there was no binding Arbitration Agreement.

Glencore International AG v. Hindustan Zinc Limited

8 June 2020 | O.M.P. (EFA) (Comm.) 9/2019 | Delhi High Court

Principle: The Court deliberated upon whether the petitions for enforcement of foreign award filed by the Petitioner are maintainable before the Delhi High Court.

Facts: Petitioner and respondent entered into contract for supply of goods being shipped from Australia to India. The contract stated that it was governed by the laws of England with the venue of arbitration to be in London. In pursuance of disputes arising between the parties, invoked the arbitration clause and submitted disputed to the LCIA. It passed two final awards concluding the arbitration. One was awarded on costs and interest of costs, this was challenged by the petitioner before the High Court of Delhi.

Judgment: The Court concluded that for an enforcement of an award, the party can only approach that Court within whose jurisdiction the properties or assets of the Respondent are located. Therefore, in the instant case, the Court concluded that as per the provisions of the Civil Procedure Code, 1908 and the Act, the Delhi High Court had territorial jurisdiction to entertain the petition. It directed the Respondent to file an Affidavit and disclose assets within a period of 5 weeks. Therefore, the Court settled that the maintainability of a foreign award enforcement application would depend upon the location of the properties whether moveable or immoveable of the Respondent.

Blue Coast Infrastructure Development Pvt. Ltd. v. Blue Coast Hotels Ltd. & Anr.

June 10, 2020 | O.M.P.(I) (COMM) No. 35/2020 and I.A. 3251/2020 | Delhi High Court

Principle: Debriefing whether the Court possesses the power to issue an interim direction against a third party, it is to be laid that the scope of power of a court, under Section 9 of the Act, isn't restrictive or limited to parties to an arbitration, and the court can issue interim directions against parties un-related to the dispute.

Facts*:* The petition seeks an interim direction from the Delhi High Court for securing the money lying with Respondent II from the sale proceeds of an auction of a hotel in Goa (owned by Respondent I).

Respondent 1 is a Public Listed Company in hotel business and previously owned the Park Hyatt Hotel in Goa. It submitted to a bidding process and secured the rights from Delhi International Airport Limited (DIAL) to develop a commercial space, called Aerocity Project. Further, it floated a Special Purpose Vehicle from Silver Resort Hotel India Private Limited for convenience. Contemporaneously, Silver Resorts and the Petitioner entered into an agreement, where the former authorized the latter to collect monies for construction of the Aerocity Project from prospective buyers. Owing to certain disputes, the agreement was terminated and the project was never completed. As a result, the investors and unit holders of commercial spaces sought a refund of the consideration paid by them from the Petitioner.

Respondent I had undertaken a corporate loan for the development of the Aerocity Project, which was executed between Respondent I and Respondent II. As Respondent I defaulted in its obligation of re-payment, Respondent II initiated proceedings under SARFAESI Act, 2002 and pursuant to which, it auctioned the Goa property belonging to Respondent I. It is averred that Respondent I had filed a Writ Petition before the High Court of Bombay, wherein it sought to exercise its 'Right to Redemption' of the Goa property (under Section 60 of the Transfer of the Property Act, 1882) against Respondent II. The only question pertaining to Arbitration is whether the relief claimed by the Petitioner for directing Respondent II to deposit the auction amount (Rs. 85 Crores), lying in the banks in the form of fixed deposits in the custody of Respondent II, and a further direction not to disburse the same to Respondent I, be granted?

Judgment: The scope of power of a court under Section 9 of the Act is not just limited to parties to an arbitration agreement. The court can also issue interim directions even against a third party. Hence, the objection raised by Respondent II, on being a non-party and non-signatory to the arbitration agreement, becomes irrelevant.

The distinction between the powers under Section 9 and Section 17 of the Act has a clear rationale. An Arbitrator is a creature of the contract between the parties and therefore, cannot venture outside the contract to issue directions to parties who are non-parties to the arbitration agreement. However, it is noteworthy that the same limitation is not applicable to a Court exercising its powers under Section 9 of the Act and can pass interim measures against non-parties.

The State of Jharkhand v. M/S Gitanjali Enterprises

June 10, 2020 | Arb. Appeal No. 09 of 2017 | Jharkhand High Court

Principle: Any settlement, as envisaged under Section 30 (2) of the Act, cannot be found at fault merely because a written settlement signed by the parties has not been part of the arbitral

award. Section 73 of the Act is not required to be complied with, if a settlement is arrived at between the parties to an agreement in an arbitration proceeding.

Facts: The present appeal lies against the judgment dated 08/02/2017, which was dismissed concerning the challenge of the award by the dispute's sole arbitrator.

A dispute arose between the parties with respect to the terms of the agreement, eventually leading to the matter being placed for arbitration. During its pendency, the parties entered into a settlement and requested for the arbitral award on the agreed terms. The issue, which arose for consideration before this Hon'ble bench, was whether there lies any mandatory requirement of having a specific settlement agreement in writing and duly signed by the parties involved (as specified under Section 73 of the Act) when the parties arrive at a conclusive settlement?

Judgment: The Jharkhand High Court held that, whilst both Section 30 and Section 73 of the Act deals with settlement of disputes; the requirements specified under Section 73 is not required to be complied with, if a settlement is arrived at between the parties to an agreement in an arbitration proceeding. The Court made it crystal clear that as far as Section 73 is concerned, the same is in Part III of the Act (and is applicable only to conciliation proceedings, as has been categorically mentioned under Section 61) and bears no applicability on Section 30, which falls under Part I of the Act. Hence, the award, which is the subject matter of challenge in this appeal, is not bad for non-compliance of Section 73 of the Act.

Overnite Express Ltd. v. Delhi Metro Rail Corporation

12 June 2020 | O.M.P. (I) (COMM) 254/2019 | Delhi High Court

Principle: Whether interim relief of mandatory injunction in the form of specific performance of the contract can be granted to an aggrieved party from the Court under Section 9 of the Arbitration & Conciliation Act, 1996

Facts: The Respondent Corporation opened by E-tender for licensing of commercial space/area on different floors/levels at New Delhi Metro Station of Delhi Airport Express Line of DMRC network on 'as is where is basis'. The E- tender provided for a pre-bid site inspection and survey. The bidders including the representatives of the Petitioner requested for taking photographs/videography of the floors/levels in order to record the condition, status and facilities existing at the site, before formulating the bids, but the same was not permitted by the Respondent citing security reasons. After the conclusion of bids, which the Petitioner won, the Petitioner wrote to the Respondent bringing to its notice, the damaged conditions of the Levels and the possession not having been taken over. However, contrary to the tendered terms, the respondent materially altered and damaged the Areas. Thus, the

petitioner requested that the respondent be restrained from terminating the Agreements and the subject matter in aid of the Arbitration be preserved and protected. The power and jurisdiction of the Court under Section 9 of the Act is unfettered and Court can pass any order as may appear to the Court to be just and convenient to preserve the subject matter, till the time, the Arbitral Tribunal is constituted.

Judgement: An order under Section 9 of the Arbitration and Conciliation Act cannot be passed by the Court directing specific performance of the contract. The power and jurisdiction of the Court under Section 9 of the Act is unfettered and Court can pass any order as may appear to the Court to be just and convenient to preserve the subject matter, till the time, the Arbitral Tribunal is constituted.

Starcon India Ltd & Anr. v. Prasar Bharti

June 15, 2020 | O.M.P(ENF)(COMM) 232/2018, I.A. 13741/2018, E.A. 376/2019, E.A. 721/2019 | Delhi High Court

Principle: Merely because no quantification (*of the amount payable*) has been done by the Court while upholding a part of the award, it cannot be said that no amount is payable to the decree holder at all.

Facts: The application is filed by the Decree Holder (DH) for seeking the release of a sum deposited by the Judgment Debtor (JD), along with interest, in compliance to an award allowed by the Arbitrator (award dated 26/12/2016), whereby the DH is entitled to receive compensation for the shortfall of broadcasting rights for 17 cricketing days. Upon challenge by the JD, a Coordinate Bench of Delhi High Court (vide judgment dated 13/03/2020) set aside a part of the award and specifically upheld the remaining part thereof, i.e. the DH is entitled to 7 days of shortfall of cricket. However, the question arose as to whether the non-quantification of the amount by the Court is impediment in the execution of justice while upholding a part of the arbitral award?

Judgment: What notably emerges is that; out of the claim for 17 days shortfall, the learned judge of the Coordinate Bench set aside only the finding qua 10 days of the shortfall, while finding no infirmity in the award of the learned arbitrator qua the remaining 7 days shortfall, which is in consonance with the well settled principle of severability and partial validity of an award.

The learned judge, while deciding, didn't deal with the calculation for either 17 days or for 7 days, and therefore, left it to the DH to raise a claim towards the amount payable to it. This is, evidently, for the reason that the award granted compensation on a per day basis and, therefore, the quantification for 7 days shortfall was never really an issue. Hence, the enforcement of the part of the arbitral award was permitted.

Nandini Bhatia v. Navil Ratish Kadwadkar

18 June 2020 | O.M.P.(I) 4/2020 | Delhi High Court

Principle: According to Section 9(3) of the Arbitration Act, pursuant to the appointment of an arbitrator, a pre-existing petition under Section 9 of the Arbitration Act would no longer be maintainable before the Court, and the arbitrator would have to be moved in an application under Section 17 of the Arbitration Act.

Facts: The present case involves a married couple who were estranged due to some conflicts. This led to multiple proceedings against the Respondent, in the course of which he undertook to pay a sum of 1.25 lakhs per month as maintenance to the Petitioner along with the school fees of their daughter. Additionally, on 17th October, 2019 an irrevocable Family Settlement was entered into between them which stated that a total amount of Rs. 9.75 crores were payable by the Petitioner to the Respondent. Clause 8 of this Settlement stated that any disputes between the parties were referable to arbitration by Mr. S.S. Handa. A petition is preferred by the Petitioner, application for interim measure and moving the learned arbitrator under Section 17 of the Arbitration Act.

Respondent contests that it was outrageous to demand for the said sum of Rs. 9.75 crores and thereby questions the jurisdiction of the arbitrator to adjudicate on the said dispute and the maintainability of the application under Section 17.

Judgement: The court noted the objection made by the Respondent and decided that the said objections and validity of the claims are to be kept open, reiterating that a pre-existing petition before the court would not be valid after the appointment of an arbitrator.

Gammon India Ltd. & Ors. v. National Highways Authority of India

23 June 2020 | OMP 680/2011 (New No. O.M.P. (COMM)392/2020) & I.A. 11671/2018 | Delhi High Court

Principle: Permissibility of reliance on the findings of a subsequent award in determining the objections as to the previous award.

Facts: A construction contract was entered between Gammon-Atlanta JV and the National Highway Authority of India (NHAI) in December 2000. Gammon-Atlanta was a joint venture between Gammon India Ltd. and Atlanta Ltd. (the contractor). During the execution of the construction project in Orissa certain disputes arose between the parties. Thereupon, the contractor invoked arbitration. In the arbitration proceedings the contractor raised three claims out of which two were accepted and the third one was rejected. The award was challenged before the Delhi High Court which upheld the validity of the award with respect to the first two claims and granted liberty to the contractor to raise the third claim (which was rejected by the first tribunal) before the second arbitral tribunal.

The Contractor invoked arbitration before the second tribunal for additional claims along with the third claim raised before the first tribunal.

The claim was decided by the tribunal through a 2:1 majority against granting of the same. The award was challenged before the Delhi High Court and was the subject matter of the proceedings in which the afore-mentioned judgement has been given.

Amidst this, the contractor invoked a third arbitration for recovery of amounts collected as liquidated damages, along with other claims. The contractor's claim was allowed by the arbitral tribunal and it was observed that NHAI had failed in its duty to provide site free from all hindrances and it had also taken over the road. This observation could impact the claim of the contractor which was rejected by the arbitral tribunals and was pending before the Delhi High Court. Subsequent, to the rendering of the award in the third arbitration NHAI paid the awarded sum to the parties and so the Award No. 3 gained finality.

Question arose as to whether the observation made by the tribunal in granting award no.3 be relied upon by the Delhi High Court in deciding the present proceedings.

Judgement: The court held that the awards stand independently and are not to rendered illegal or contrary to law due to the findings of a tribunal in a subsequent award. The award has to be examined on its own merits and reasoning which if is in accordance with the terms of contract, will not be affected by any subsequent findings in a different award. Therefore, the court upheld the rejection of the third claim in Award no.2 irrespective of the observation of the tribunal in the third award.

However, the court observed that if the core issue underlying all the arbitration is same then the disputes should be dealt by a single tribunal only. In light of the above observation it laid down guidelines for tackling multiplicity of the proceedings, which are as follows:

- If there are multiple disputes arising between two parties from a contract or a series of contracts, they should endeavour to seek resolution of their disputes through one arbitral tribunal only.
- A party invoking arbitration ought to raise all claims that have already arisen on the date of invocation of the arbitration. If the same is not done then the right of the party raising the remaining claims shall deemed to be waived. The party should be allowed to condone the non-inclusion by the arbitral tribunal only if it proves that there existed legally justifiable or sustainable reasons for their non-inclusion in the prior proceedings.
- If there arise further disputes with respect to a contract or series of contracts, for which arbitration has been invoked earlier, the subsequent disputes shall also be referred to the original tribunal in order to avoid contradictory findings.
- Where proceedings are initiated challenging arbitral awards, the party shall disclose the status of any other proceedings (if any) relating to the same contract or series of contract and also the forum in which the

proceedings are pending or have been decided. Parties also ought to seek disposal of all such challenge petitions together in order to avoid irreconcilable decisions and findings.

DSC Ventures Pvt. Ltd. V. Ministry of Road Transport and Highways

29 June, 2020 | 2020 SCC online Del 669 | Delhi High Court

Principle: Section 11(6) of the act has application only if there is a failure to appoint the substitute arbitrator in accordance with section 15(2) i.e. as per the arbitration agreement.

Facts: On May 8, 2003, DSC Ventures Pvt. Ltd. (Petitioner) and Ministry of Road Transport and Highways (Respondent) entered into a Concession Agreement. Clause 19.2 of the said Agreement provided for reference of disputes to a three-member arbitral tribunal. After disputes arose between the parties, a three-member arbitral tribunal as per the Arbitration Clause was constituted. Unfortunately, right before the award was to be announced, the arbitrator nominated by the Respondent passed away. On March 2, 2020, the surviving arbitrators held an internal meeting and directed the Respondent to appoint its nominee arbitrator as per Section 15 of the Arbitration and Conciliation Act, 1996. Upon the expiry of 30 days as available with the Respondent for appointing the substitute arbitrator, the Petitioner moved the present petition before the Delhi High Court under Section 11(6) of the Act praying for the appointment of a substitute arbitrator. During the pendency of the present proceedings, on June 8, 2020, the Respondent appointed its substitute arbitrator.

Judgement: Finding in favour of the Respondent, the Court dismissed the present petition. In support of its conclusion, the following reasons were given by the Court:

Section 11(6) of the Act has application only if there is a failure to appoint the substitute arbitrator in accordance with Section 15(2) i.e. as per the arbitration provision contained in the agreement. In the present case, the Arbitration Clause specifically required issuance of a notice by the Petitioner to the Respondent for appointing an arbitrator. No such notice was issued by the Petitioner. In the absence of any such notice, the Petitioner was not entitled to plead extinguishment of the Respondent's right to appoint the Substitute Arbitrator. The Petitioner was not able to point out any principle emanating either from a statute or precedent, to justify their assertion that the period of 30 days for appointment of the substitute arbitrator was to be reckoned from the date when the Respondent acquired knowledge of the demise of the arbitrator. The Respondent did appoint its Substitute Arbitrator later on, which cannot be regarded as unreasonable given the restrictions imposed due to Covid-19. The appointment of the Substitute Arbitrator was also in line with the

Arbitration Clause and also the Appointment Order.

In view of the above findings, the Court did not deem it necessary to return any observation, regarding the reliance placed by the Respondent on the order passed by the Supreme Court on May 6, 2020 in In re Cognizance for Extension of Limitation.

Barminco Indian Underground Mining Services LLP v. Hindustan Zinc Limited

20 July 2020 | ICL 2020 Raj. 136 | Rajasthan High Court

Principle: The Court deliberated upon which would be the relevant court to entertain a Section 9 application, arising out of a foreign seated arbitration proceeding, where both the parties to the dispute are Indian entities.

Facts: The Petitioner entered into a contract to provide its services for development of a mine of the Respondent. Claims raised under two clauses were not paid by respondent during the course of the work. The contract was terminated on the basis of Clause 15.3 of the Contract, alleging that the Petitioner had failed to honour the clause. The Petitioner demanded an unpaid amount which was counter-blasted by the Respondent. The Petitioner preferred the present application under Section 9 of the Act seeking injunction, while apprising the Court of the arbitration clause in the contract.

Judgment: The determination of whether the proceeding would qualify as *international commercial arbitration* was significant for determining the jurisdiction of the court to entertain Section 9 application, which jurisdiction vests with principal civil court of original jurisdiction. Section 2(1)(f) of the Arbitration Act is a nationality centric definition which clearly suggests that for an arbitration to be termed or treated as an international commercial arbitration, the agreement has to have at least one foreign party or a company whose nationality is other than that of India. In the instant case, as both the parties were of Indian origin (and conversely, none of the parties were a foreign party), the Court noted that, such an arbitration would not qualify as an *international commercial arbitration*, although the award may be a foreign award. In the instant case, as High Court of Rajasthan lacked original jurisdiction or a separate commercial division, it was held that the High Court lacked the jurisdiction to entertain Section 9 application.

ONGC Petro Additions Limited v. Fernas Construction Co. Inc

21 July 2020 | OMP(MISC) (COMM) 256/2019, I.A. 4989/2020| Delhi High Court

Principle: Time line of 12 months applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015, except International Commercial Arbitration under the Arbitration and Conciliation Act, 1996 ("Act"). Section 29A of the Act inserted by way of amendment in 2015 (“2015 Amendment”) prescribes the time

limit for passing an arbitral award

Facts: The Respondent filed an anti-arbitration injunction against the Petitioner contending that it is not bound by the arbitration clause, which was rejected by the Delhi High Court in April 2019; the Delhi High Court granted the Respondent liberty to raise this issue before the Arbitral Tribunal. The Petitioner requests for an extension of time limit under Section 29 of the Act which was granted by the Judge for a period of 18 months effective from 24 June, 2019. However, during these proceeding the Section 29A was amended . Additionally, since the Respondent was a company based in Turkey, this constituted an International Commercial Arbitration. The parties were asked to seek clarification from the court regarding the same.

Judgement: The Delhi High Court held that Section 29A applies retrospectively. It concluded that Section 29A (1) is applicable to all pending arbitrations seated in India as on 30 August 2019 and commenced after 23 October 2015.It further clarified that if the arbitration is adjudicated to be an international commercial arbitration, the arbitral tribunal would not be bound by the time line prescribed vide order of the court dated 25 September 2019.

JMC Projects (India) Limited v. South Delhi Municipal

13 August | ARB. P. 632/2017| Delhi High Court

Principle: A sole Arbitrator can be appointed by the court in the case where the parties fail to appoint an odd number of Arbitrators.

Facts: In the above case the parties had entered a contract for carrying out the work of covering of Nallah. Under the contract, the parties had decided to refer to 'Dispute Resolution Committee' in case of any dispute that may arise between the parties. Prior to this the petitioner in the above case had requested to the Respondent to enter into a supplementary agreement for incorporating Arbitration clause. After one year of the above incidences, dispute between the two parties arose and petitioner sent a notice to the Respondent invoking the Arbitration Agreement and sought appointment of an Arbitrator. Failure on to appoint an arbitrator led to the filing of the petition in the present case under section 11 (6) of the Arbitration and Conciliation Act, 1996.

Judgement: The Court in this case upheld the pronouncement in M.M.T.C. Limited v. Sterlite Industries (India) Limited and stated that an arbitration agreement cannot be held invalid merely because the number of arbitrators appointed for arbitration. The court held that in case of even numbers of appointed arbitrators, the agreement still stands valid. However, in such a situation the court can appoint a sole arbitrator to provide an odd number of Arbitrators under Section 10(1).

Avantha Holdings Limited v. Vistra ITCL India Limited

Dated 14th August 2020 | Case No: O.M.P.(I)

(COMM.) 177/2020 | Delhi High Court)

Principle: Section 9 of the ACA gives the Court broad powers to grant interim orders before, during, or even after arbitration proceedings (but before the award is enforced). Once the arbitral tribunal has been constituted, Section 9 (3) says, the Court shall not entertain an application for interim relief "unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious".

Facts: Avantha Holdings borrowed INR 1265 crores from a consortium of lenders (KKR, L & T and BOI). Against the borrowing, it issued non-convertible debentures. To secure certain debentures, Avantha had pledged equity shares held by it in companies called CGP and BILT. Vistra, the respondent, was the Debenture Trustee. The dispute related to invocation of the pledge and the consequent sale of the debentures by Vistra on the ground that Avantha committed numerous defaults. The shares of CGIP were sold in the open market between July to November 2019. Some shares of BILT were sold on 15 July 2020 (after a notice was issued in the petition by the court), and some of it remained to be sold when the matter was heard. The sold shares were purchased by KKR and L&T. Avanta filed an application under Section 9 of the Act pleading for injunction against the sale of shares of BILT and for transfer of the pledged CGP shares back into its Demat account.

Judgment: The court held that no interim direction could be issued because the pledge had already been involved and a majority of the shares had already been sold in the open market. Howsoever wide its amplitude, the court noted, Section 9 cannot justify setting the clock back to a stage anterior to the invocation of the pledge, by Vistra, which took place as far back as in March 2019. The court denying to stop the sale of BILT shares held that any such direction would amount to a proscription, on Vistra exercising the rights, conferred and vested in them by the covenants of the Debenture Trust Deeds. This, on the face of it, is impermissible; in any case, no such relief can be granted, in a proceeding under Section 9 of the Act.

Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited

19 August 2020 | CIVIL APPEAL NO. 5145 OF 2016 | Supreme Court

Principle: In case of a contract vitiated by fraud rendering the contract voidable, the arbitration clause survives because of the principle of separability.

Facts: Avitel and HSBC entered into a Share Subscription Agreement on 06-05-2011, whereby the parties agreed that HSBC's investment of USD 60 Million would be utilized by Avitel to fulfil its contractual obligations with BBC. HSBC later found that Avitel had no contract with BBC. Consequently, in compliance with the Agreement, it initiated arbitral proceedings at

Singapore International Arbitration Centre (SIAC), where the Arbitrator passed two Interim Awards against Avitel freezing its accounts in India and UAE. Meanwhile, HSBC filed a petition under section 9 of the Arbitration Act 1996 before the Bombay High Court for interim relief, demanding that Avitel keeps USD 60 Million in its bank. The same was allowed, after which an appeal was filed by Avitel, which was dismissed. However, the division bench reduced the minimum balance to USD 30 Million. The tribunal passed the final order holding Avitel guilty of fraudulent representation. It directed Avitel to pay USD 60 Million with 4.25% interest. Avitel challenged the order before the Bombay High court, failing which it filed an appeal in the Supreme Court. HSBC filed a cross appeal, challenging the division bench's decision of reducing the amount to USD 30 Million.

Judgment: The Supreme Court held that the act of inducing HSBC to invest USD 60 Million in Avitel on a false representation that the same is to be used for a contractual obligation with BBC amounted to fraud under section 17 of the Indian Contract Act, 1872, rendering the contract voidable at the instance of HSBC. Yet, this does not render the arbitration clause void, as the same is to be read independently. Additionally, the decision of the Bombay High court of reducing the damages to USD 30 Million was not justified.

Deccan Paper Mills Co Ltd v Regency Mahavir Properties and others

19 August 2020 | Civil Appeal No 5147 of 2016 | Supreme Court

Principle: An action instituted under section 31 of the Specific Relief Act, 1963 is an act *in personam*, and not an action in rem. Thus, it is arbitrable.

Facts: A suit was filed by Deccan Paper against Regency for cancellation of three written instruments. Regency, on the other hand, pleaded to refer the dispute to arbitration, which the court accepted. Deccan Paper filed a write petition before the High Court, which was dismissed followed by an appeal before the Supreme Court. Referring to section 31 of the Specific Relief Act 1963, Deccan Paper contended that the matter cannot be referred to arbitration as the action under Section 31 is an action in rem and therefore non-arbitrable. For the same it relied on the decision of the High Court of Judicature at Hyderabad for Telangana and Andhra Pradesh in Aliens Developers Pvt. Ltd. v. M. Janardhan Reddy, (2016) 1 ALT 194 (DB).

Judgment: The Supreme Court, relying on Muppudathi Pillai v. Krishnaswami Pillai, AIR 1960 Mad 1, observed that 'any person' in section 31 is strictly restricted to a party to the written instrument or a person who can bind such a party, and does not include a third party. It overruled the decision in Aliens Development and held that the act of registering a document which is otherwise a private document does not clothe it with any

higher legal status. It further held that "*An action that is started under section 31(1) cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled.*".

Jmc Projects India Ltd v. Indure Private Limited

20 August 2020 | O.M.P. (T) (COMM.) 33/2020 and I.A. 6023-25/2020 | Delhi High Court

Principle: "Express agreement in writing" is mandatory for waiver of Section 12(5) of the Arbitration and Conciliation Act, 1996.

Facts: The Petitioner moved a petition under section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter 'The Act') in the Delhi High Court, seeking termination of the mandate of the Ld. Arbitrator, arbitrating over the dispute between the two parties. The Petitioner also sought for the appointment of another arbitrator, in the place of the current arbitrator, to arbitrate over the dispute between the parties.

Clause 14 of the General Conditions of the Contract entered between the parties provided for the dispute resolution clause. According to which, any dispute between the parties shall be resolved by arbitration which would take place before a Sole Arbitrator. The Sole Arbitrator shall be nominated by Mr. N. P. Gupta, Chairman of Design Private Limited. A dispute arose between the parties in 2016, pursuant to which the petitioner invoked the arbitration clause in 2016. Mr. N.P. Gupta nominated a retired judge of the Delhi High Court as the Sole Arbitrator.

The arbitration proceedings commenced in November 2016 and were at the stage of evidence when the Petitioner sought relief under Section 14 of the Act for termination of the arbitrator. The Petitioner claimed that the Ld. Sole arbitrator is de jure unable to continue with the proceedings due to his inability as per the prescription provided in section 12(5) of the Act. The Respondent relied upon the proviso to Section 12(5), stating that the Petitioner had in writing agreed to the adjudication of disputes by the Ld. Sole Arbitrator, it has continued to participate in the arbitration proceedings before the Ld. Arbitrator and has sought, inter alia, extension of time to file the affidavit by way of evidence of its witness etc., thus its conduct amounts to a waiver of the application of Section 12(5) as per the proviso of the same section.

Judgement: The Court held that for the proviso to Section 12(5) to be applicable there has to be an express agreement in writing by the parties. The agreement must indicate awareness on part of the parties to the application of the said provision and the knowledge of the invalidation of the mandate of the Ld. Arbitrator due to its application. It must show the intent of the parties to waive the applicability of the aforesaid provision in the pending dispute between them.

In light of the same, the court held that in the

present case the parties had not expressly waived the application of Section 12(5) as participation in arbitration proceedings or seeking of extension for filing affidavit etc. do not constitute an agreement in writing for the proviso of 12(5) to be applicable. Therefore, it terminated the mandate of the Ld. Sole Arbitrator appointed by Mr. N.P. Gupta and appointed a substitute arbitrator in his place for adjudication of the disputes between the parties.

Consumer Protection (Mediation) Rules, 2020

The Ministry of Consumer Affairs, allowing with Department of Consumer Affairs and Food and Public Distribution enacted the Consumer Protection (Mediation) Rules, 2020 with effect from 20 July 2020.

Constitution of mediation cells: Under the rules, every mediation cell set up in a commission shall comprise of a panel of mediators recommended by the selection committee.[73]

Matters excluded from mediation[74]: The following matters cannot be referred to mediation:

- Matters concerning medical negligence resulting in grievous injury or death
- Matters concerning defaults for which application for compounding of offences has been made
- Matters concerning serious allegations of fraud, fabrication of documents, forgery, impersonation, coercion
- Matters related to criminal or non-compoundable offences
- Matters involving public interest

Other provisions:

- Refund of fee[75]: Where the dispute has been referred to mediation by the Commission, the applicant shall be entitled to the full fee paid for application of the compliant.
- Bar on arbitration or judicial proceedings[76]: Once the matter has been referred to mediation, the parties are barred from initiating any arbitral or judicial proceeding in respect of the same subject matter.
- Enforcement of settlement Agreement[77]: in the event of death of any of the parties, the settlement agreement may be enforced against the legal representatives of the deceased.

United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention')

India is one of the signatories to the Singapore

[73] Consumer Protection (Mediation) Rules 2020, s 3.
[74] Ibid, s 4.
[75] Ibid, s 5.
[76] Ibid, s 6.
[77] Ibid, s 7.

Convention on Mediation which is also known as the United Nations (UN) Convention on International Settlement Agreements Resulting from Mediation. With this, the businesses will now have greater assurance to enter into cross-border transactions and rely on mediation as a mode of dispute resolution for that the mediated outcomes shall now carry an enforceable effect. With the ratification to the convention, India would have to bring her domestic laws pertaining to mediation in consonance with the provisions of the protocol. This may include reconsideration of - requirement for enforcement of settlement agreements of Mediation, the scope of public policy etc. With Ecuador being the most recent country to ratify the Convention, joining Singapore, Fiji, Qatar, Saudi Arabia and Belarus, the number of countries who have ratified the Convention stands at six. India's position on the world rankings of Ease of Doing Business is expected to get strengthened by providing the cross-border trading partners the ability to resort to a structured method of dispute resolution.

The countries that have ratified the convention, will gain recognition and enforcement of mediated settlements, when multiple jurisdictions are involved, in an expedient and straightforward manner. With this, the international commercial disputes will now be provided with a holistic framework which will have enforceable dispute settlement agreements arising out of mediation. It is pertinent to note that the convention is not applicable to the disputes dealing with Employment law, transactions engaged in by a consumer for personal, family or household purposes etc.

The decision to ratify the Singapore Convention is likely to provide credibility of mediation for resolving cross-border commercial disputes.

London Court of International Arbitration Rules

The London Court of International Arbitration released its updated Arbitration Rules on 11th of August 2020. The rules will come into effect on the 1st of October 2020 and will replace the existing 2014 LCIA Arbitration Rules. The 2020 LCIA Arbitration Rules intend to bring the modern international arbitration trends to LCIA tribunals. The major changes to the 2020 rules are:

- Article 22.1(viii) – The tribunals now have an express power of early dismissal in relation to claims which are not maintainable as they are beyond their jurisdiction or manifestly unmeritorious. This power was implicit under articles 14.4(ii) and 14.5 of the 2014 rules.
- Article 22A – Additional powers of the LCIA Court and individual tribunals to order consolidation and concurrent conduct of arbitrations. In addition to the conditions under the 2014 rules, the 202 rules allow the tribunals to order the

consolidation of arbitrations commenced under the same arbitration agreement or any compatible arbitration agreement and arising out of the same transaction or series of related transactions. Tribunals also have the power to order that such arbitrations shall be conducted concurrently where the same arbitral tribunal is constituted in respect of each arbitration.

- Article 14.3 – the tribunals and parties have to mandatorily make contact within 21 days of the tribunal's appointment.
- Changes specific to Covid-19:

1. Article 19.2 – Virtual hearings have been addressed in greater detail.
2. Article 4.1 – electronic communication is the primary mode of communication for request of arbitration as well as the response to it and it can be done in paper form only with prior written approval of LCIA's registrar.
3. Article 26.2 – E-Awards have been recognised.

Bar Council of India makes Mediation as a mandatory subject

The Bar Council of India issued a letter to all Universities issuing L.LB degrees on the 13th of August 2020 making Mediation (with Conciliation) a compulsory subject. The direction requires all Universities to incorporate the same as a compulsory subject from academic session 2020-21. The Chief Justice of India, S.A. Bobde, via a letter to BCI expressed his interest in mediation and that the "*art of Mediation ought to be taught to LLB students as it would go a long way in reducing the backlog of cases.*" The letter also includes a recommended syllabus that the Universities can follow for a 45 hour subject in a semester.