JAN - APR 2021 | VOL V

ADR E-NEWSLETTER

An Initiative of Alternative Dispute Resolution Board NLUO

IN THIS VOLUME

सत्ये स्थितो धर्मः

ADVISORY BOARD

Niranjan V
Barrister, One Essex Court

Vikas Mahendra
Partner, Keystone Partners
Arbitrator, SIAC & HKIAC

Ekta Bahl
Partner, Samvaad Partners
Mediator, SIMC

Simon Weber
PhD Researcher
King's College
Research Assistant to Prof. Martin Hunter

EDITORIAL TEAM

EDITOR-IN-CHIEF

Nitya Khanna

SENIOR EDITORS

Siddharth Jain Parthsarthi Srivastava Gauri Shyam Yajat Bansal
Priyank Shukla Parul Pradhan

CONTENT EDITORS

Shreya Kapoor Vipasha Verma Abhishek Kurian

COPY EDITORS

Manisha Gupta Tulip Bhatia Sayandeep Gupta Riya Singh

PATRON-IN-CHIEF

Prof. Ved Kumari

FACULTY ADVISOR

Prof. Akash Kumar

EDITORIAL NOTE

MEDIATION FOR RESOLUTION OF INVESTOR-STATE DISPUTES

By Parul Pradhan, Priyank Shukla and Abhishek Kurian

An avenue to the dispute settlement, arbitration has always been the default response to the Investor-State regime. However, given the cost borne by the host countries and the constraints imposed on the ability of the arbitral process, questions have been raised as to whether any supplementary mechanism can be pitched to resolve treaty-based, investor-State disputes.

In the recent times, Investor-State Mediation has increasingly become a popular alternative to, if not a substitute, for arbitration in resolving investment disputes. It aims for both the parties to be approximately aligned, and the black-and-white solution of a legal decision doesn't remain the optimum outcome of a matter meant to have a lasting relationship.

This editorial note is designed to be an introduction to the architecture of Investor-State Mediation, highlighting the existing models, benefits attached and the scope and ways in which it can be creatively combined to provide satisfactory conclusions for parties. Along with the context, it also communicates on the recent examples, challenges and values intricated of using the mechanism and the future it beholds.

INTRODUCTION

Peace is not the absence of conflict, but the ability to cope with it. While every dispute differs in its way, they share one aim in common: to be resolved in the most effective and appropriate way possible.

Mediation is the new buzzword! Long before it was institutionalized, people, including States and governmental bodies, used to informally mediate to architect a solution to their problems. In certain historical cultures, such as China's deeply rooted Confucian philosophy, mediation emanated harmony and conflict avoidance – not as an alternative, but as an essential and integral part of the resolution system. Any successful mediation hinges on good faith, voluntary participation and an insight that a compulsory 'mid-way' regime is necessary for any dispute involving States to make a way out of the obstacles. Governments, investors and institutions have now seemed to be considering meditation (either a standalone process or an adjunct to arbitration) as a vital tool for resolving Investor-State Dispute Settlement ["ISDS"].

Investor-State Mediation ["ISM"], at its core, is a dispute resolution mechanism, emphasising on achieving a harmonious and mutually satisfying result between the host States and foreign investors, shouldered upon the leverage of flexibility, high degree of autonomy and choice. It aids the disputing parties to reach forward-facing, creative settlement arrangements, based on the needs and common interests of the parties in conflict. Underlying the high-profile policy issue conflicts blur the charm for a long-term investment relationship, with hundreds of millions or billions of dollars draining out of the public budgets of the economies. Growing recourse to mediation by investors and States, either for the first time or with increasing frequency, reflects the evolution of ISM and the cultivation of its possibilities.

History remains witness to intermittent dialogue around ISM to be speculative and skeptical, but recent trends indicate a growing interest over the flagship. It,

however, is unlikely to wholly replace arbitration or other compulsory procedures, and may operate as a complementary tool by narrowing the issues or opening lines of communication for later negotiation.

I. CURRENT FRAMEWORK OF INVESTOR-STATE MEDIATION

Over the past decade, calls have grown for ISM with a special believe on its time-and-cost effectiveness and ability to prevent disputes from escalating to four-walled legal rooms. For instance, consider the inclusion of mediation in the dispute settlement provisions of International Investment Treaties ["IIAs"] or Model Bilateral Investment Treaties ["BITs"] or Multilateral Investment Treaties ["MITs"]. The letter and spirit of the mechanism can be embodied with compliant force to amicably settle state–to–state and investor–state disputes. The Norway Draft Model BIT[1] and Australia-Hong Kong Investment Agreement[2] are few of the prime examples of the negotiating text incorporating 'mediation' as a strategy for dispute resolution.

With the apparatus for ISDS much visible to the public eye, global inter-governmental stakeholders, such as the United Nations Commission on International Trade Law ["UNCITRAL"], the International Centre for Settlement of Investment Disputes ["ICSID"], and the Energy Charter Conference ["ECC"] have staked out leadership models for engaging mediation as an early and effective conflict management technique for the inevitable disputes arising in the course of Investor-State relations.

[1] Article 14.2 of Norway Draft Model BIT, 2007.

[2] Article 23.1 of Australia-Hong Kong Investment Agreement, 2019.

The Working Group III of the UNCITRAL has constantly been exploring mediation in the context of ISDS Reform as an academic forum (initiated in March 2020 through Webinars, to resumption of the 40th session in May 2021). ICSID offers mediator training programmes and promulgates Draft Mediation Rules and Procedures, offering as a helpful starting point for parties interested in pursuing investment mediation, and specifically designed even if neither of the host state has ICSID membership status. The ECC endorses a Guide on Investment Mediation (prepared with the collective support of UNCITRAL, ICC, SCC, ICSID) on 'how to' document, making it easier for States to educate representatives to benchmark their mediation efforts against accepted standards, as "a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes at an early stage". The Secretariat of the Energy Community has recently established a Dispute Resolution and Negotiation Centre, as a hub for mediating investor-state energy disputes and assisted by a panel of mediators "of high moral character and recognized competence in the fields of energy negotiations".

The momentum has also been reflected by the UN Convention on International Settlement Agreements Resulting from Mediation ["Singapore Convention on Mediation"], a new multilateral framework for the recognition and enforcement of mediated settlements which came into force in September 2020. While it doesn't expressly extend to investment disputes, there is room for investor–state disputes to fall within its scope.

Even India hasn't remained untouched by the winds of ISM. With a view to curate an atmosphere conducive to foreign

investment coupled with its great merits, the 260th Report of the Law Commission of India on the 2015 Draft Model of Indian Bilateral Investment Treaty carves an arm out for ISM Domestic Model.

Unsurprisingly, attention has also been streamlined on the unique set of skills and qualifications of investment mediators. The Investor-State Mediation Task-Force of the International Mediation Institute ["IMI"] Independent Standards Commission piloted a competency-criterion for investor-state mediators in 2017 for creating a pool from which parties can choose mediators with confidence.

II. BENEFITS OF INVESTOR-STATE MEDIATION

ISM, as a conflict resolution method, can offer certain benefits that long-drawn arbitrations and litigation may not be able to provide. In order to truly appreciate, and perhaps accept it in the near future, it is essential that its benefits are properly understood.

(a) Cost-efficient and time saving: Despite arbitration being extremely popular for investor-state disputes, the amount of time and money spent by the parties on such arbitrations is outrageous. The average time taken for the completion of arbitration proceedings is more than 4 years the average costs are close to $3.8 million for both the parties.[3] ISM can be completed in a faster manner, which would also lead to a lower cost by the end of the process.

(b) Preserves relationships: More often than not, parties in an investor-state arbitration would end up terminating their existing relationship. This in-turn can lead to hampering the already-existing investment treaty. Since mediation focuses on the interests of both the parties, and can lead to mutually beneficial settlement, the scope of preserving the relationship is higher.

(c) Option to move out of the legal confines: Mediation would give the investor and the State, an opportunity to opt for remedies that are not strictly legal in nature. For example, while an arbitral award would most likely end in one party paying the other damages, a mediation could result in the exploration of more creative solutions such as agreement for future investments, favorable changes in investment policies, etc.

(d) Confidentiality: Although confidentiality is to be maintained in arbitrations as well, it is subject to the need for transparency. Provisions in the investment treat provide for ensuring confidentiality of in investor-state arbitration to some extent.[4] However mediation, being a pre-arbitration process, happens to be extremely confidential. This can help in parties resolving their disputes without exposure in the eyes of the public.

III. SCOPE FOR MANDATORY INVESTOR-STATE DISPUTES

[3] 5 Matthew Hodgson, Damages and Costs in Investment Treaty Arbitration Revisited, GLOBAL ARB. REV. (Dec. 14, 2017), https://globalarbitrationreview.com/article/1151755/damages-and-costs-in-investment-treatyarbitration-revisited (last visited Aug. 24, 2019).

[4] 40 Robert Argen, Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration, Brook .J. Int'l L. 207, 210 (2014).

The scope for Mandatory ISM usually stems from provisions regarding the same in the investment treaties of the parties. Such provisions impose an obligation on the parties to attempt mediation or conciliation during the "cooling off" period, before initiating arbitration.[5] While this is a common practice by parties, a change in the system of investor-state disputes would be much appreciated in light of the increasing need for faster and cheaper methods of dispute resolution.

Institutions like the UNCITRAL and ICSID have already taken steps in this direction by discussing mediation as an option for investor-state disputes and also forming institutional rules for mediation.[6] Such institutions can play a crucial role in promotion of mediation by compelling parties to mediate, similar to the practice of court ordered mediations.[7] This would ensure that ISM eventually becomes a favourable alternative for the parties.

IV. Recent Examples of Investor-State Mediation

As highlighted above there's been a developing interest in ISM and the mistrust around the efficacy of the same in resolution of inter-state disputes is gradually declining. Consequently, governmental organizations, investors and institutions are more frequently adopting mediation as a preliminary step or an adjunct to arbitration in investment treaties. The Trans-Pacific Partnership signed in 2018 between 7 nations contained a mandatory mediation clause, similarly, the EU-Canada Comprehensive Economic Trade Agreement, Transatlantic Trade Investment Partnership between the United States and EU as well as the Regional Comprehensive Economic Partnership between the Asian-Pacific nations, all contain a mediation clause to amicably resolve their disputes.[8] Owing to this, notable institutions have adopted bespoke rules, specifically adhering to mediations involving investor-state conflicts. The first among these was the IBA Investor State Mediation Rules released in 2012, following which ICC & SCC Mediation rules were released in 2014 and a Guide on Investment Mediation countersigned by the Energy Charter Conference was released in 2016.

V. Challenges to Investor State Mediation in the Near Future

The adoption of these rules and incorporation of mediation clauses in investment treaties is a welcome step towards instituting a practice of ISM, however, for these clauses and rules to be effective it is pre-eminent that there is coherent understanding through verifiable data of what in effect occurs and affects real time mediation of these disputes. The impediments in practice observed include lack of ability to take decisions by government authorities, lack of coordination, fear of being condemned and difficulties in reaching a settlement due to

[5] 20 James M. Claxton, Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?, Pepp. Disp. Resol. L.J. 78 (2020).

[6] U.N. General Assembly, Possible reform of investor-State dispute settlement (ISDS) Dispute prevention and mitigation – Means of alternative dispute resolution, U.N. Document A/CN.9/WG.III/WP.190 (Jan. 15, 2020), http://undocs.org/en/A/CN.9/WG.III/WP.190.

[7] *Supra* at 6.

[8] Cara Dowling, 'Interest in investor-state mediation is growing' 7 International Arbitration Report 22 (2017).

the absence of authorities, who are on decision making positions, at the mediation.[9] Evidence for such commonly observed difficulties is available, but there still exists absence of consistent indicators and thorough understanding of the diplomacy that goes into settlement of such conflicts or so to say the interrelation of elements that enable such settlements.[10]

Theories and literature do elaborate on such factors and provide an insight to the process but at the best remain anecdotal and are not in the form of cohesive data which can aid in understanding the intricacies involved.[11] Therefore, with the rise of mediation as a dispute resolution mechanism for investment disputes there is also a rising need for collaboration between academic research and UNCITRAL Working Group while it takes discussion pertaining to mediation forward and collates empirical data on this. This will also help in realising the enforceability of such contractually settled agreements in the absence of regimes such as the New York Convention enabling its enforceability, and at the same aid in recognizing if there exists a need for such an enforcement regime.

CONCLUSION

In the recent times and especially after the downturn of Covid-19, the need for a quick, less expensive and amicable dispute resolution process between investor and states has become imminent. Government organizations as well as business enterprises are discerning ways to ameliorate the economic impact of Covid-19. In the midst of this, adopting expensive and adversarial legal processes will not only affect economic stability but also lead to political resentment. Mediation, as a process can help in avoiding these challenges and provide a leeway for resolving conflicts and reaching an amicable settlement. Even though there is a large scope for reformation in the structure adopted for investor-state mediations yet there exist temporary solutions which can be enforced by concerned parties for erecting the necessary substructure. Therefore, states and business enterprises which are looking for harmonious solution to conflicts should embrace mediation as it is the only effective way for achieving these goals.

[9] Priyanka Kher, 'Can International Investor–State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration' 29 ICSID Review 41 (2013).

[10] Sergio Puig, 'Against Secrecy: The Social Cost of International Dispute Settlement' 42 Yale Journal of International Law (2017).

[11] Stephen Schwebel, 'Is Mediation of Foreign Investment Disputes Plausible' 22 Foreign Investment Law Journal 237 (2007).

OP-ED

INTERNATIONAL AND DOMESTIC ARBITRATION IN INDIA

Simon Weber and Vikas Mahendra

(Mr. Simon Weber is a PhD. Researcher at King's College, London and a Research Assistant to Prof. Martin Hunter. Mr. Vikas Mahendra is a Partner at Keystone Partners. They have been contributors in the recently published handbook on arbitration- 'Arbitration in India'. We are glad that they have used our platform to give a brief introduction to the book through this preface.)

In the last decade, there have been multiple judicial and legislative developments in India, which have significantly changed the perception about India as an arbitration destination. Moreover, in the past months and years, the debate on the future of arbitration in India has picked up speed. In particular, the current reform project of UNCITRAL WGIII has attracted scholarly attention. Furthermore, the use of commercial arbitration as an efficient means to resolve business disputes has substantially grown in India. This has resulted in a number of far-reaching changes having been made to the Indian arbitration landscape by way of several recent legislative amendments, ordinances and cases. The endeavour has been to shed previous notions of India as an arbitration destination and adopt a more welcoming approach. A necessary consequence of these changes is a need to look afresh at arbitration in India.

In an effort to meet this requirement and to address the growing interest in this particular field of dispute resolution in India, Marike Paulsson, Martin Hunter, Fali Nariman and Dushyant Dave decided to edit a handbook on 'Arbitration in India'. The authors are honoured to be included as contributors in this guide, which would be a worthy addition to the library of every practitioner, scholar and student. A highlight feature of the book is that it draws from the experience of the most well renowned and experienced practitioners of the Indian arbitration landscape. Their insights present the reader with the unique opportunity to look at various issues from a practitioner's perspective rather than from a purely academic one.

The handbook lays the foundation with explaining basic concept then proceeds to consider various complex issues in depth. The book also has several sections devoted to considering the purely practical aspects of the arbitration process to enable users to achieve time and cost efficiencies. A unique feature of the book is that it goes beyond identifying problems and assists with providing solutions and practical tips to the readers. The book does not proclaim to be a digest of all cases on a particular topic. Instead, it focuses on key cases and discusses the practical and theoretical basis of various important decisions.

The book is split into 19 chapters, which address not only the entire arbitral process from the notice of arbitration to the enforcement of an award, but also touches upon cutting edge and contemporary issues such as arbitrating environmental claims. The book also provides a useful comparison of the Indian arbitration regime with Singapore law and English law to better guide users intending to apply foreign jurisprudence in the Indian context. Arbitration greenhorns will find useful information in the chapter on general notes for practitioners. The book is also particularly useful for those looking for a comparison of the most commonly used

institutional arbitration rules in the Indian context. To those looking for an introduction to investment arbitration, the book provides a very useful overview and considers the challenges that lie ahead in this highly controversial field of law.

INTERVIEW WITH GARV MALHOTRA, PARTNER, SKYWARDS LAW

Garv Malhotra is a Partner at Skywards Law based in New Delhi. His practice is focused on commercial laws and arbitration. Prior to his current role, Garv was an International Lawyer with Drew & Napier in Singapore. He is a graduate of GNLU, holds a double master's degree in arbitration (from MIDS & NUS), and enjoys teaching the subject at various institutions.

1. **What motivated you to take up a career in arbitration, and at what point in law school did you decide to pursue it?**

I was inclined towards a career in litigation and dispute resolution ever since I joined law school. I fell in love with arbitration early on due to my exposure to the subject through mooting. Throughout my undergraduate education, I remained split between pursuing a career in criminal law or arbitration. So, I experimented with both. I did many moots and internships with practice leaders.

By the 5th year, I was utterly confused between the two subjects. So, I went for my final two-month internship/pilgrimage under the late Mr. Ram Jethmalani. Mr. Jethmalani was about 90 years old at the time and still active with over 70 years in practice. One morning in his lovely garden, I'd naively blurted: "Sir, I think I have decided! I want to be a criminal lawyer." He retorted in his slightly irked baritone, "boy, your fate will choose the kind of lawyer you will become." In hindsight, he couldn't be more right. I graduated and joined a leading chamber led by two stellar counsels that gave me exposure to a variety of disputes; that of Mrs. Amrita and Mr. Debesh Panda. I simply gravitated towards arbitration cases while under their tutelage.

In 2016, I was offered a full scholarship to move to Switzerland to pursue a Master's in International Dispute Settlement (MIDS). MIDS started a chain reaction which, at the time, led me to take a hiatus from my practice in India, and move to various cities in Europe and Asia to study and work in the field of arbitration.

2. **You have had an illustrious career thus far. From writing a thesis under Professor Gabrielle Kauffman-Kohler at the prestigious CIDS Geneva Center for International Dispute Settlement as well as a Master's degree from National University of Singapore, to being an International Lawyer at Drew & Napier and now being a Founding Partner at Skywards Law, which of these roles have you found most fulfilling?**

Thank you for your flattering question. While each of the roles that I undertook during my stint in Europe and Asia have wonderful parts that I reminisce fondly, I find my current role at Skywards Law the

most fulfilling. Perhaps it's the adrenaline of the challenge, or the ineffable satisfaction of seeing an idea come to fruition that makes me enjoy this role so much.

Here I have the autonomy and flexibility to operate like never before. I am able to focus my practice on specific areas like commercial disputes and working with international colleagues on Indian cases. Also, in addition to working on matters relating to key sectors like construction, technology etc., I am also able to assist small and medium businesses with the kind of fee-flexibility that I have not experienced at my previous firms.

At the same time, I am able to work with clients with a wide range of issues due to the backing of a team of lawyers who are adept at many other practice areas. I am also able to take out some time for other things that I enjoy like academics and policy advisory.

3. **What is your opinion on the debate surrounding the need of specific amendment for inclusion of emergency arbitrators explicitly within the purview of the Arbitration and Conciliation Act 1996? Do you think without having an explicit amendment made, can consistency be reached in enforceability of award rendered by emergency arbitrators?**

My opinion is that the legislature *should* amend the Arbitration and Conciliation Act, 1996 to expressly recognize an Emergency Arbitration tribunal; and an Emergency Arbitrator's decision (award or order). I believe that this would be the most desirable approach to legal certainty, and consistency of practice on this topic. Another way could be through a clear and practical decision by the apex court that provides a comprehensive exposition.

Emergency Arbitration came on the world-scene as a procedural innovation in arbitration around 2010. Ten years of global experience in using this mechanism in various jurisdictions and under various institutional rules shows that this mechanism works efficiently. However, the use of this mechanism has not proliferated much in India. This is perhaps because most Indian arbitration cases are conducted *ad hoc*; and also because the Indian law on the topic has kept evolving without stabilizing since 2012.

Presently, guidance on the enforceability of Emergency Arbitration decisions has to be distilled from a handful of precedents, mostly from the Delhi and Bombay High Courts. This brings uncertainty of effectiveness in times when parties are desperately looking for urgent relief in an emergency situation.

I think that legislative recognition of the mechanism will bring clarity in the law and incline more parties towards using it instead of overloading the court's roster with section 9 applications in cases of emergencies.

4. **There exists an inconsistency in law, with respect to Section 8 and Section 11 of the Arbitration and Conciliation Act. Section 8 allows the right to appeal, whereas Section 11 does not, although both stem from the existence of an arbitration agreement. What according to your knowledge in the practical field can be the possible reasons for such law?**

Section 8 provides for a right of appeal whereas no such appeal is maintainable against a decision under section 11. This is of course with the exception of a special

leave petition (SLP) before the Supreme Court. I do not view the difference in the possibilities of appeal as an inconsistency in law. This is because both section 8 and section 11 serve a different purpose.

Section 8 reflects the court's obligation to respect arbitration clauses; while section 11 empowers the court to support the conduct of an arbitration by appointing arbitrators. An appeal may be required against a section 8 order because such an application can be preferred against the decision of a variety of judicial as well as quasi-judicial authorities such as civil courts and tribunals. In this context, an appeal to correct any infirmity in their assessment serves a valuable purpose.

On the other hand, a section 11 petition is heard by a superior court like the High Court or Supreme Court, and the scope of action is limited to appointment of arbitrators. Usually, once the power under section 11 is exercised, a new adjudicator: the arbitrator, is empowered to make decisions on further issues. This includes the question of his/her own jurisdiction.

As such, I view this as a legislative policy *choice* rather than an infirmity in the law.

5. **The outbreak of the pandemic is causing a surge in Force Majeure issues in disputes. How do you think different ADR mechanisms can best respond to this challenge? How important are Emergency Arbitrations in the COVID-19 scenario?**

The outbreak of the pandemic has led to a surge in a variety of disputes. These include situations where parties seek to rely on *Force Majeure* clauses to delay and evade their contractual obligations.

From my current vantage point, the pandemic has increased the attractiveness of alternatives to litigation because of their inherent flexibility, speed and lower costs. Interest in mediation has increased because many lawyers are rightly advising clients to consider cost-efficient alternatives. Clients also realize that it is often better to resolve disputes instead of tying up cash flows in areas that do not make a business money. This is also the reason why Clients' interest third-party funding of their disputes has also increased substantially.

Emergency Arbitration cases have also increased. For instance, SIAC's records show that 20 such applications were filed in the year 2020, up from 10 such applications in 2019. However, there have been times during the pandemic that we have found approaching Indian courts under section 9 of the Arbitration Act as a quicker and more efficient option instead of approaching an Emergency Arbitrator. Currently, the choice between Emergency Arbitration and a section 9 application is a judgement call that is exercised on a case-by-case basis with no obvious frontrunner.

6. **Recently, with India's loss at the international level in the Vodafone and Cairn arbitration cases, what is your opinion on the arbitrability of such disputes related to taxation. Should they remain arbitrable or be exclusively reserved under foreign law since taxation is a sovereign issue?**

Most of the current investment treaty cases against India are a painful reminder of the enormity of Indian under-preparedness to deal with investment law issues in the 1990s. However, both the subject, as well as governments' understanding of it have evolved ever since.

While taxation as an issue of domestic law may be considered incapable of being arbitrated, the sovereign act of imposing such taxes on foreign investors generally falls within the *ratione materiae* scope of a typical investment treaty tribunal. This is unless taxation has been excluded from the scope of the treaty.

I am of the view that a foreign investor *must* have protections against a sovereign's arbitrary exercise of powers, even if it is exercised in the form of taxation. History of state action from the last 100 years provides innumerable examples of arbitrary measures by sovereign governments against foreign investors. These have often been fiscal measures. Refusing a foreign investor, the treaty-remedy of challenging arbitrary tax measures of the state before a neutral international forum would be self-defeating.

However taxation, much like most contentious issues in international investment arbitration, is a balancing act. Any tribunal must respect and ensure compliance with the fundamental legal principles of the place where the business was operating. Further, tribunals must be mindful of the state's objectives behind being open to international investment and offering protections in the first place.

As such, I believe that taxation decisions of sovereign states are rightly subject to challenge before international investment tribunals. However, any tribunal seized with a dispute relating to functions which have historically been a sovereign prerogative must conduct themselves with caution and be mindful of the broader implications of their decisions. Tribunals failing to conduct themselves responsibly jeopardize the present semblance of an economic system that has taken half a century to develop.

7. Both Article 9 of the UNCITRAL Model Law and Section 9 of India's Arbitration and Conciliation Act, 1996 entitle parties to arbitration proceedings to obtain interim relief from courts but alas recent judgements given by Indian Courts have held that only the winning party in the arbitration proceedings is entitled to obtain interim reliefs from the courts after the award. How, in your opinion, can this practice be better adopted or modified so as to reflect the international standards being set by the UNCITRAL Model Law?

The Model Law is a template recommended to states by the United Nations Commission on International Trade Law. While the Model Law suggests that courts at the seat of arbitration have the power to grant interim reliefs only before or during the arbitration; the Indian Arbitration Act goes a step further and allows the court to grant interim reliefs *after* the final award has been rendered as well.

While interpreting the provision, some High Courts have held that only a winning party can apply for interim reliefs under section 9 *after* the final award has been rendered. The most common need for interim relief after the final award arises in the twilight between when the tribunal becomes *functus officio* and before the conclusion of the enforcement action. These are situations where security of the amount in the award is required to prevent the award-debtor from frustrating the award before its enforcement.

I agree with the position taken by the legislature and appreciate the intent behind it. However, based on a review of international best-practices, I am of the view that the courts should consider *two* key points while interpreting this provision.

First, post-award interim reliefs should only be granted by the courts in rare cases. The scope of post-award intervention should be limited to situations where absence of such orders is likely to result in a travesty of justice; *and* where there is an imminent risk of harm or evidence of asset-dissipation. *Second*, equality of parties is a mandatory principle of Indian law and there may be cases where it is necessary for even the award-debtor to be granted interim relief post an award. A complete disqualification is neither necessary nor aligned with legislative intent.

As such, my academic opinion is that the courts should consider exercising substantial restraint in granting post-award interim measures; as well as make such recourses available to all stakeholders (including non-parties in exceptional cases).

TECHNOLOGY AND ARBITRATION: BLOCKCHAIN ARBITRATION AND SMART CONTRACTS IN INDIA

Arukshita Chauhan, 5th year student, Amity Law School, Noida

Smart Contracts have picked up recognition in the lawful world as well as among the techie millennial. The present paper abridges and investigates the prospective chance of usage of blockchain arbitration and smart contracts. It adventures different startup prospects through bridging the differences amid the legal and the tech world. It additionally evaluates the competency of the prominent impression in India just as the legal hindrances it encounters alongside conceivable measures. Decisively, the degree of innovation is inspected in both the legal and the tech world.

I. INTRODUCTION

A smart contract is anything but a contemporary idea that can be followed back to a technological disclosure by computer expert Nick Szabo in 1990 through envisioning the odds of utilizing solid cryptographic arrangements that would accommodate an unbreachable contractual agreement. Such a contract could be drafted by composing a code via cryptography rather than an intelligible language. A digital algorithm/computation subsequently executes the contractual commitments in a smart contract. It is imperative to recognize that drafting the entire agreement alongside the arbitration agreement or clause necessitates distinctive technical expertise regarding coding. The assent of the parties, the seat of arbitration i.e. the relevant law, appointment of a tribunal acquainted with both law of contracts as well as hold specified expertise in coding, determination of the enforceability of awards in the specific jurisdiction, the manner of execution, and the confidentiality aspect are essentials to decide in a forthright manner whilst drafting a smart contract. An illustration of a smart contract would be an insurance policy where once the information of protection guarantee endorsement is submitted in the insurance office, the claim is naturally paid out sparing the time for procedures and limiting human blunder.

II. SMART CONTRACT VIS-À-VIS TRADITIONAL CONTRACT

A smart contract has its advantages in correlation with traditional contracts like prevention of human mistake and meddling, minimal paperwork, self-executing in nature, conventionality and the programmed execution expands dependability alongside being very secure. Whilst, the drawback would be that it takes out the prospect of the amendment as indicated by the wants of the parties, as one party does not control the blockchain network whereupon the smart contracts are based. It is likewise incredibly challenging to terminate the contract except if the contract has a certain incorporated rationale that terminates the contract based upon eventualities.

III. EFFICIENCY OF ARBITRATION AS A DISPUTE SETTLEMENT MECHANISM IN SMART CONTRACTS

Despite the fact that the odds of questions emerging out of a smart contract are nominal, nonetheless, disputes may emerge between parties because of different conditions. The dispute may emerge between parties as to the sale of faulty goods or because of technical complications or because of the functioning of oracles[12] or if inappropriate or incorrect data has been set into the code of the contract, and so on. Another serious issue that may emerge is in determining the jurisdiction where the dispute must be settled. This is the place where Arbitration, as a dispute settlement mechanism, becomes an integral factor. Arbitration gives a speedier redressal of the disputes besides it is confidential. Smart contracts depend on blockchain technology and so as to the resolution of a dispute related to an agreement dependent on the blockchain, it is essential that the individual settling the dispute knows about the technology which probably would not be conceivable in ordinary courts, however in the event of arbitration, a special tribunal can be established so as to resolve disputes emerging out of smart contracts. The insertion of an arbitration clause in the smart contract will decrease the number of concerns emerging out of the agreement and help in the settlement of disputes in an uncomplicated manner. Since smart contracts are scattered through different computer networks which might be set in various parts of the world, if a clause with respect to the jurisdiction and the governing law is included in the smart contract it will clear out any ambiguity concerning the jurisdiction and the relevant law. In situations where a smart contract is entered into by parties with respect to certain highly sensitive issues, moving to traditional courts in the event of a dispute probably would not be their best option since court proceedings are not confidential. Indeed, in such cases having an arbitration clause in their agreement would be of advantage because arbitration proceedings are confidential in nature.

IV. BLOCKCHAIN ARBITRATION AND INDIA: CURRENT LEGAL FRAMEWORK

There should be a dispute resolution system for smart contracts to function as the plausible issues that can emerge in a smart contract can be threefold relating to the three parties in a contract i.e. a buyer, a seller, and the program on which the code is formed. The issues may emerge in the configuration stage, presentation stage, or after the implementation of the contract. Considering global transactions are concerned and in a majority of the occasions, the parties do not actually have any acquaintance with one another, a centralized administrator could manipulate and there might be a probability of scamming. Consequently, a substitute framework would be blockchain arbitration. Because arbitrations are already based on a contract, they are apt for being drafted in a programming language. The particulars of the contracts are required to be converted into a block code and stowed on the blockchain. The entire practice of blockchain arbitration can be computerized including claim submission, evidence, or even communication with the tribunal. Blockchain arbitration could be a distinct advantage in conditions such as these where a globally approachable online court is the need of the hour. It would give transparent

[12] Vallery Mou, *Blockchain Oracles explained,* Binance Academy https://academy.binance.com/blockchain/blockchain-oracles-explained

justice universally without any bias.[13]

Blockchain Arbitrations are conceivably a vital armament for worldwide dispute resolution with the incline of business transactions alongside the progressions in innovation. Nonetheless, to be in standard with the worldwide progressions, it is critical to examine the enforceability of the awards adjudicated by the blockchain arbitrations in India. So as to comprehend the enforceability of a blockchain arbitration award, it is critical to examine whether the contract is enforceable or not.

The serious issue with the arbitration of smart contracts is the absence of enforceability under International Law since the New York Convention[14] does not acknowledge electronically exchanged agreements as arbitration agreements. In any case, when we investigate the laws with respect to smart contracts in India, we find that Section 7 of the Arbitration and Conciliation Act, 1996 states that a valid arbitration agreement should be "in writing", yet further explains that the agreement would be considered as having been in writing on the off chance that it has been imparted through "electronic means". This was presented through the Amendment Act of 2015. This implies a smart contract, comprising an arbitration clause, can be implemented in India with the consent of the two parties.

Having read the Indian Contract Act of 1872, it enlightens us that Section 10 of the Act builds up specific basics of a substantial agreement. To be a valid contract, any contract in India must meet all the fundamentals.

Examining this regarding smart contracts, an inference is drawn that smart contracts fulfill the conditions under Section 10 of the Act. Additionally, the Information Technology Act of 2000, under Section 5 and Section 10A, marks digital signatures as legal in India and provides validity to the contracts framed through electronic methods. Subsequently, this improves the enforceability of a smart contract in the Indian legal system. It is essential to make reference to that most of the smart contracts are concerned with digital currency, nevertheless, physical assets can likewise be managed under smart contracts. Conversely, there is still a requirement for a regulatory framework to oversee the issues emerging out of smart contracts, which would accommodate the definition and basics of a smart contract, the procedural angle in the result of a dispute, the liability that is incurred, and the penalty for the breach of contract.

In any case, enforcement of an arbitration award probably would not be accommodating by the Indian Courts as specific technical expertise is needed to comprehend the entire question emerging out of smart contracts. Since an arbitration agreement is a type of agreement and an appeal cannot be made regarding the awards passed by an arbitrator of smart contracts, the technologists are surging towards decentralized arbitration where an expert is assigned with the understanding of blockchain customized procedure and the technicality of coding. The awards passed by

---

[13] OpenLaw, *Legally Enforceable Blockchain-Based Arbitration.* (October 18, 2018) https://media.consensys.net/opencourt-legally-enforceable-blockchain-based-arbitration-3d7147dbb56f

[14] New York Arbitration Convention, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York* (June 10, 1958) https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf)

such an arbitrator/mediator would be consequently enforceable without the intercession of a third party i.e. the courts.

V. Smart Contracts Practice in India

Having understood the nature of enforceability of smart contracts in India, it very well may be seen that these smart agreements are viewed as lawful in India which implies that they can be upheld in India by mutual consent of the parties but as yet, there is no enactment set up for the disputes emerging out of smart contracts. Since the agreements are in cryptographic structure and the transactions are likewise cryptic in nature, an administrative system for crypto-currency should be entrenched in India. RBI had restricted regulated financial institutions including banks from offering assistance to organizations in the trade or exchange of crypto-currencies in April, 2018. Notwithstanding, the Hon'ble Supreme Court vide its judgment[15] revoked the ban rendering cryptographic currency operational. It will additionally gain transparency once the Crypto-currency bill is passed in the favor of the use of crypto-currency. In India, there is a known instance of the usage of smart contracts that have been implemented between Bajaj Electronics and Yes Bank[16] which is centered around blockchain seller financing. In the interim, RBI has distributed a white paper on Distributed Ledger Technology, Blockchain, and Central Banks[17] which guarantees prospective utilization of the technology by the financial institutions and is a breakthrough in innovation and the utilization of the rising technology by India.

VI. Smart Contracts- A basis for tech legal startups

As a result of the highlights like transparency, fraud resistance, and hacking evidence, blockchain has produced a thrill in the technological world and a great number of companies are being made based on this innovation. The evolving notion of smart contracts and blockchain arbitration could be an incredible door opener for tech legal startups wherein an automated solution can be coded for the required transactions which have the risk of human error. The new businesses/startups can be founded on outsourcing of drafting of legal agreements of smart contracts and arbitrations to organizations and lawful firms which do not function on blockchain consistently. For instance, a company named Jincore built up a platform, which permits any business to work with smart contracts and cryptocurrency payments where the data is composed and stored in private Jincore Blockchain.

VII. Conclusion

Blockchain technology and smart contracts have significantly a lot to offer yet there is additionally a requirement for a legislative framework that would permit appropriate authorization of such agreements. The

[15] Internet and Mobile Association of India v. Reserve Bank of India, 2020 SCC Online SC 275 (March 4, 2020) https://main.sci.gov.in/supremecourt/2018/19230/19230_2018_4_1501_21151_Judgement_04-Mar-2020.pdf

[16] STA Law Firm, *Overview: The Enforceability of Smart Contracts in India*. (December 12, 2019) https://www.stalawfirm.com/en/blogs/view/enforceability-of-smart-contracts-in-india.html

[17] RBI Bulletin February 2020, *Distributed Ledger Technology, Blockchain and Central Banks*. (February, 2020) https://rbidocs.rbi.org.in/rdocs/Bulletin/PDFs/03AR_11022020510886F328EB418FB8013FBB684BB5BC.PDF

simplest and best approach to determine questions emerging out of such smart contracts is arbitration since a specialized tribunal comprising of individuals possessing ample skills and knowledge can be formed so as to regulate or resolve such disputes. When a legislative framework is made, all the potential difficulties that the parties might have to encounter while framing a smart contract can be managed without any problem.

Blockchain arbitration and smart contracts affirmatively influence international trade just as International Dispute Resolution Process. It has an incredible potential to consolidate the legal and tech and legal world and mark a transformation in the legal field. Through competence, fairness, and trust among the legal experts, technology can truly assist the legal world together with paving the way for tech startups. Despite the fact that the eventual fate of smart contracts looks encouraging, their maximum potential could only be made most of in the event that they are familiarized not just by the Indian Courts and legal fraternity but in addition by the overall population involved in business and the substantial disparity between the tech-savvy fraternity and the legal community should be rectified. On one hand, the legal fraternity should be a more receptive and partiality-free while, the tech world needs to utilize its maximum capacity and accrue sufficient expertise in the field of arbitration and smart contracts and subsequently, then, the disparity can be diminished. Nonetheless, since smart contracts and blockchain tends to be a new zone for arbitration, we shall sit back and watch how its future unfurls.

ARBITRATION IN BANKING AND FINANCIAL DISPUTES: AN INDIAN PERSPECTIVE

Ranu Tiwari, 5th year student, Maharashtra National Law University, Nagpur

I. INTRODUCTION

Historically, arbitration has not been a popular choice of dispute resolution when it comes to financial and banking matters. However, the recent decades point that the trend is changing. Arbitration, as a dispute resolution mechanism, is especially seeing a growing trend when it comes to commercial matters. The reason for this are the various advantages that arbitration promises compared to other methods of dispute resolution such as neutrality, confidentiality and privacy, speed and cost, party autonomy, and so on.

The present article will look into the importance and prevalence of the arbitration process in banking and financial disputes along with some examples of the disputes that arise in this domain. The regulations guiding these areas will also be discussed. The author argues for strengthening the process of arbitration in banking and financial disputes in India and provides certain suggestions for the same

II. ARBITRATING BANKING AND FINANCIAL DISPUTES: OVERVIEW

When it comes to banking and finance,

many disputes might take place including loan recovery, customer complaints about overcharging, letters of credit, disputes between banks resulting from bank-to-bank transactions, etc.[18] The nature of the activity of a bank or a financial institution largely determines what sort of issues might arise. It is to be noted that any transaction entered upon between a bank and a customer or between different financial institutions is essentially a contract where the relevant rules and laws of contract would apply. When it comes to bank customer contracts, some of its forms include:

a. Contracts conducted between banks and large corporate customers

b. Contracts conducted between banks and smaller corporate or unincorporated business customers

c. Contracts are conducted between banks and consumer customers. [19]

Once it is found that there is a contract between the customer and the bank, it is the state regulations that will come into play, in governing this particular relationship.[20] The working of these regulations will be subject to a country's law and policies. In India, there are a variety of legal regulations in place that govern matters in connection with banks, this will be discussed in the next part extensively.

III. THE INDIAN SCENARIO

In India, there are a plethora of laws when it comes to the governance of banking and financial matters. It will be worthwhile to look into some of the important ones and what issues they handle.

A. Banking Regulation Act 1949

This act governs banks and banking activities in India. It deals with the acquisition of banks, certain powers of RBI, legal regulations which the bank has to abide by, etc.

B. The Indian Contract Act, 1872

For any transaction affecting banks and financial institutions, a contract will necessarily come into existence. Bankers carry out works such as depositing money, investing money through means of loans, guarantees, pledges, etc. The issues of agency also come up frequently. This act provides the basic obligations to honour contracts, which behave like the backbone of any commercial transaction. The sections concerned with indemnity, guarantee, pledge, etc. play a very important role in banking contracts.

C. The Recovery of Debts due to Banks and Financial Institutions Act, 1993

This act provides for *"the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and matters connected therewith or incidental thereto"*[21]. This Act is very important in debt disputes connected with banks.

D. Interest Act, 1978

This act is important as it lays down the

[18] Bahar Hatami Almdari, The emerging popularity of international arbitration in the banking and financial sector- Is this a fashionable trend or a viable replacement? (2016) (published Ph.D. dissertation, University of London).

[19] ROSS CRANTON, PRINCIPLE OF BANKING LAW 133 (Oxford University press 2002).

[20] *Id.* at 144.

[21] The Recovery of Debts due to Banks and Financial Institutions Act, No. 51 of 1993, INDIA CODE (1993).

'general law of interest' which is to be applied in any contractual and statutory matter. The act is very short and provides few guiding principles as to the calculation of interest. The act is not applicable in certain cases like debt or damages, compensation under the Negotiable Interest Act, 1881, etc.[22]

E. *The Administrative Tribunals Act, 1985*

This act provides provisions regarding adjudgment by Administrative tribunals of disputes concerning *"recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union of other local authority"*[23]. By covering service matters under its ambit, banks and financial institutions become part of the act. The act provides for Central Administrative Tribunal (CAT) and State Administrative Tribunal (SAT) as well.

F. *The Negotiable Instruments Act, 1881*

It provides definitions of promissory notes, bills of exchanges, and cheques. The main objectives of the act include regulation of negotiable instruments, facilitation of payment settlements and providing legal safeguards to different values of instruments. Certain important presumptions with respect to these instruments are also provided herein such as those contained in sections 118, 119 and 139 of the act. For instance, section 118 outlines presumptions with respect to consideration, date, time of acceptance, time of transfer, stamp, etc.

Having outlined the various statutes present in India with respect to banks and financial institutions, the author will now focus upon how arbitration has worked for these disputes in India.

It has been seen that financing transactions are matters that are often resolved through litigation in India.[24] Interestingly, a similar trend has been seen in some other countries, such as the United Kingdom.[25] There are numerous reasons for the same. One is the absence of summary judgment in arbitration in certain forthright breach claims of any finance document.[26] The litigation course can provide for consolidation of proceedings and addition of extra parties when required to provide sound consistent judgments. Arbitration offers an advantage here as internationally, several arbitration rules help provide the options to consolidate arbitrations on fulfilment of certain requirements, examples include Article 10 of the ICC Arbitration Rules, Article 22.1 of the LCIA Arbitration Rules, and Rule 8 of the SIAC Arbitration Rules.[27]

---

[22] The Interests Act, No. 14 of 1978, INDIA CODE (1978) § 3 and 5.

[23] The Administrative Tribunals Act, No. 13 of 1985, INDIA CODE (1985).

[24] Nishtha Arora and Sounak Chakraborty, *Effectiveness of arbitration in financing document disputes*, INDIA BUSINESS LAW JOURNAL (June 20, 2019), https://www.vantageasia.com/effectiveness-arbitration-financing-document disputes/#:~:text=While%20India%20has%20an%20effective,Indian%20banks%20and%20financial%20institutions.

[25] PETER CARTWRIGHT, BANKS, CONSUMERS AND REGULATION 151 (Hart Publishing, 2004).

[26] *Use of arbitration in finance disputes*, ASHURST (Jan. 19, 2021), https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---use-of-arbitration-in-finance-disputes/.

[27] Jennifer Bryant & Maximilian Schulze, Banking and Finance Arbitration Revisited, 5 Y.B. ON INT'L ARB. (2017) 107, 115.

Another important point here is that the arbitration process does not have the concept of precedents. Preclusion rules, though, are as much applicable in arbitration as in any other law.[28] A judgment given by a court is also entitled to have a preclusive effect on the arbitration.[29] The next impediment is the issue regarding finality. As stated earlier, claims of merits are not appealable under the Arbitration and Conciliation Act, 1996,[30] it only allows for procedural defects to be challenged.[31] This is a necessary provision which the parties cannot waive. Two concerns arise here, one is that the parties will forego their chance to raise the claim again, and second, even these procedural issues most often take a long time to resolve. So the finality aspect is sort of a double-edged sword for a party.

Financial institutions would be more inclined to opt for litigation since it provides precedents, unlike arbitral awards.[32] This helps in avoiding such a matter again. Also, there are sometimes issues arising as to the right to appoint the arbitrator given only to one party. The incorporation of these unilateral arbitration clauses is not unique to India. Banks and financial service providers often make such an attempt[33] because of certain vested interests. In these cases, there is a high chance that these financial institutions that get a better deal, as can either litigate or arbitrate depending on what suits their interests, giving rise to the twin issues of equal treatment and natural justice.

Litigation forums allow for taking selective actions against the defaulting borrowers. The financial institutions, too, use a variety of tactics to recover their loans. These are considered at times more efficient than the arbitration recourse as it allows the parties to strategize the potential solutions in a speedy and cost-effective manner.[34]

IV. THE WAY FORWARD- FOR INDIA

The course India should take, in the light of the present discussion, must reflect the ease of arbitration as practiced in arbitration hubs of the world. It should also take into account the global nature of disputes that are ought to arise when it comes to banking and finance. In cross-border disputes especially, the need is to incorporate 'risk-mitigating measures' by the parties. A well-drafted arbitration clause can work wonders here, providing much-needed protection to the parties against uncertainties. There are certain model clauses provided by certain arbitration institutions such as the CIETAC in Beijing, the City Disputes Panel in London, the European Centre for Financial Dispute Resolution in Paris, and P.R.I.M.E Finance in The Hague. These can always be resorted to, for guidance.

One important area which needs immediate

---

[28] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, VOL. I 3776 (2nd Ed., Kluwer Law International, 2014).

[29] *Id.* at 3775.

[30] Mahip Singh Sikarwar, *Validity And Grounds For Challenging An Award,* MONDAQ (May 15, 2017), https://www.mondaq.com/india/arbitration-dispute-resolution/594102/validity-and-grounds-for-challenging-an-award.

[31] South East Asia Marine Engineering And Constructions Ltd. (SEAMEC LTD.) v. Oil India Limited, 2020 SCC OnLine SC 451.

[32] *Supra* note 5.

[33] James Freeman, *The Use of Arbitration in the Financial Services Industry,* 16 BUSINESS LAW INTERNATIONAL (2015) 1, 78.

[34] *Supra* note 5.

reforms is the issue of arbitrability in India. There is a need to focus on bringing clarity to the concept. The *Booz Allen*[35] ratio, though simple in theory, is complex in the application[36] as various cases have shown. The need is to bring some list of rules or guidelines to help parties and courts to decide what can be arbitrated and what cannot. In financial matters, there is even a lack of awareness as to the effectiveness of arbitration as a dispute resolution method, owing to the fact that there are so many existing regulating legislations in place.

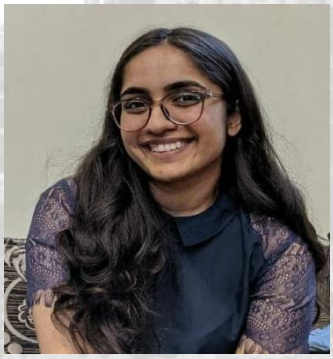
It is to be realized that bank and financial litigation is becoming less feasible because of the increasing technicalities in these disputes.[37] The expert resolution, which arbitration provides, is, therefore, a good option. But it has been observed that there is difficulty in selecting a suitable institution. There is a shortage of such institutions which specifically handle banking and finance arbitration. Here, the author proposes that the arbitral institutions can equip their arbitrators with training programs on these issues. They should also focus on spreading awareness amongst the general public especially the primary stakeholders in such disputes. The P.R.I.M.E. Finance, in this regard, seems to be a promising solution. It contains experts on banking and finance matters who are trained to handle such disputes. It also provides for mediation services, emergency arbitrator procedures, provisions regarding speedy resolution,[38] confidentiality, etc.[39]

Lastly, Indian courts and lawmakers need to strengthen the arbitration practice more to address the concerns of the commercial world.

V. CONCLUSION

While researching the topic, the author has found that the topic finds very little place in arbitration literature. It is mainly this reason that has led to the creation of doubts in this domain. The arbitration community and the lawmakers will have to address it if this mechanism has to be promoted in the said field. The pro-arbitration approach, being followed the world over, should in no way be curtailed when it comes to banking and finance transactions in India, while keeping all the intricacies of the matter in view.

WHEN DOES THE RIGHT TO APPOINT ARBITRATOR(S) FORFEIT?: GREY AREAS OF *DATAR SWITCHGEARS*



[35] Booz Allen v. SBI Home, (2011) 5 SCC 532.

[36] *See*, Arthad Kurlekar, *A False Start – Uncertainty in the Determination of Arbitrability in India,* KLUWER ARBITRATION BLOG (June 16, 2016), http://arbitrationblog.kluwerarbitration.com/2016/06/16/a-false-start-uncertainty-in-the-determination-of-arbitrability-in-india/; Chakrapani Misra, Sairam Subramanian, Rajeswari Mukherjee, *Arbitrability of consumer disputes: loophole in Booz Allen framework?*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=6409bf5b-dc54-4736-b406-b99e3100edf3.

[37] David Leibowitz and Claire Lester, '*Banking and Finance Disputes*' in RUSSELL CALLER (ED.) ADR AND COMMERCIAL DISPUTES 13 (Sweet and Maxwell 2002) .

[38] Art. 17 (1), P.R.I.M.E Finance Arbitration and Mediation Rules.

[39] Art. 34 (5), P.R.I.M.E Finance Arbitration and Mediation Rules.

Chelsea Sawlani, 3rd year student, National Law University, Delhi

I. INTRODUCTION

The procedure for the appointment of an arbitrator under the Arbitration and Conciliation Act, 1996 ["1996 Act"] is premised on the arbitration agreement between the parties.[40] The 1996 Act puts no fetters on the parties to an arbitration agreement to determine the procedure for the appointment of an arbitrator- including, *but not limited to*, aspects like stipulation of a pre-arbitral procedure, specifying a *persona designata*, and prescribing a time limit for the appointment of an arbitrator.[41] The procedure for appointment of an arbitrator and the right of a party to approach the Chief Justice or her designate under section 11(6) of the 1996 Act have been subject of numerous decisions. This article will analyse one such aspect of the controversy, namely, the **forfeiture of the right to appoint an arbitrator**.

This controversy came to the Supreme Court in the case of ***Datar Switchgears Ltd. v Tata Finance Ltd.***[42]wherein the Court held that the right to appoint an arbitrator does not automatically get forfeited upon the expiry of 30 days, but extends till a section 11(6) application is filed by the other party. This view of the division bench has subsequently been approved by a three-judge bench of the Court in ***Punj Lloyd Ltd. v Petronet MHB Ltd.***[43] and has been relied-on by various subsequent decisions of the Supreme Court and High Courts. However, it must be noted that in *Data Switchgears* and many cases dealing with forfeiture of the right to appoint, there was no time-limit prescribed in **the arbitration agreement itself**. The matter to be deliberated upon is whether in cases where the right of said party to appoint an arbitrator ceases to exist upon expiration of the time period stipulated *within the arbitration agreement here* and the party responsible for the appointment fails to make it within that time-period. This article analyses and attempts to answer this question in light of the jurisprudence on the forfeiture of the right to appoint, the theme of primacy of the agreement between the parties and a recent decision of the Delhi High Court in ***Valecha Engineering Ltd. v Delhi Metro Rail Corporation***[44] where this question came to the forefront. It argues that the position laid down in *Datar Switchgears* needs to be revisited, at best, or clarified, in the least, to resolve this ambiguity.

II. THE LEGACY OF DATAR SWITCHGEARS

In 2000, the Supreme Court was called upon to adjudge whether, for the purpose of section 11(6), the party to whom a demand for appointment of an arbitrator is made, forfeits her right to do so if she fails to make the appointment within 30 days.[45] The facts of the case are crucial- the appellant and

[40] The Arbitration and Conciliation Act, 1996, s 11(2), No. 26, Acts of Parliament(1996).

[41]P C Markanda, Law Relating to Arbitration and Conciliation283 (2nd ed. 2016) (2016).

[42] Datar Switchgears Ltd. v Tata Finance Ltd., 8 SCC 151, (2000).

[43] Punj Lloyd Ltd. v Petronet MHB Ltd., 2 SCC 638, (2006).

[44] Valecha Engineering Ltd. v Delhi Metro Rail Corporation, ARB.P. 234/2020 (Del.2021).

[45]Datar Switchgears Ltd. v Tata Finance Ltd., 8 SCC 151, (2000).

respondent were parties to a lease agreement containing an arbitration clause. When certain disputes arose, the appellant sent a notice invoking arbitration to the respondent, and when the respondent failed to make the appointment even after 30 days had lapsed, the appellant filed an application under 11(6) application. During the pendency of the application, the respondent appointed an arbitrator and subsequently the High Court rejected the application in light of the appointment.[46]

It is important to note that, here, **neither the arbitration clause[47] nor the notice requesting appointment[48] stipulated any time-period** for the appointment of an arbitrator. The Court went on to hold that since no time period was prescribed by section 11(6), the right to appoint an arbitrator does not get extinguished upon the expiration of 30 days and continues till an application under section 11(6) is filed by the other party. However, the Court was cautious in conditioning its decision with a caveat that it was not considering a case where the appellant *"gave a notice period for appointment of an arbitrator and the latter failed to comply with that request"*[49]. The Court also laid emphasis on **"freedom to contract"** and noted that when the parties have settled on a procedure, due importance has to be given to it.[50]

However, in various later decisions[51], the Court approved the decision of *Datar* Switchgears even where a notice-period was provided. For instance, in *Punj Lloyd*, the appellant had served a notice to the respondent, seeking the appointment of an arbitrator within 30 days.[52] The Court reiterated the decision in *Datar Switchgears* and allowed the section 11(6) application. Similarly, in ***Union of India v Bharat Battery Manufacturing Co. (P) Ltd***[53], despite the notice invoking arbitration calling on the opposite party to appoint its arbitrator within 30 days, the right was held to be forfeited only after a section 11(6) petition was filed. In ***Denel (Proprietary) Ltd. v Ministry of Defense***[54], the respondent was directed by the District Court to appoint an arbitrator in accordance with the arbitration agreement but the respondent made the appointment *only after* a petition under section 11(6) was filed by the petitioner. The appointment was held to be infructuous as the respondent forfeited the right to appoint once the application under section 11(6) was filed.[55]

While these decisions echoed the ruling in *Datar Switchgears* despite the existence of a notice-period, it must be noted that in none of these cases did the *arbitration clause itself* prescribes a time-period for the appointment of an arbitrator.

III. PREMCO DKSPL CASE: PRIMACY OF THE ARBITRATION

[46] *Id.* at para. 2.

[47] *Id.* at para. 9.

[48] *Id.* at para. 14.

[49] *Id.*

[50] *Id.*at para. 23.

[51] Bharat Sanchar Nigam Ltd. v Motorola Pvt. Ltd., 3 SCC 337, (2009); Bharat Sanchar Nigam Ltd. v Dhanurdhar Champatiray, 1 SCC 673, (2010).

[52] Punj Lloyd Ltd. v Petronet MHB Ltd., 2 SCC 638, (2006).

[53] Union of India v Bharat Battery Manufacturing Co. (P) Ltd, 7 SCC 684, (2007).

[54] Denel (Proprietary) Ltd. v Ministry of Defense, 2 SCC 759, (2012).

[55] *Id.* at para. 19.

AGREEMENT

This controversy reached a division bench of the Supreme Court in ***Union of India v Premco DKSPL***[56] where the arbitration agreement between the Respondent and the Railways required that Respondent to make a written demand for arbitration. Pursuant to that, the Railways were permitted 60 days' time from the date of receipt of notice to send the names of a panel of arbitrators to the Respondent.

After sending a written demand to the railways, and *before the expiration of 60 days*, the respondent filed an application with the High Court for the appointment of an arbitrator, which was allowed. The Supreme Court, reversing the decision of the High Court, held that the High Court had failed to appreciate the terms of the agreement between the parties. It **distinguished *Datar Switchgears*** and noted that the arbitration clause in the case lacked a time period stipulation like the 60 days in this case, and therefore, the right to appoint an arbitrator would be forfeited upon expiration of the 60 days period. The terms of the arbitration clause "*will be* ***material for deciding when the right of a party to appoint arbitrator will suffer forfeiture***"[57] and when an application under section 11(6) may be moved.

This decision evidently highlights the **grey area** left out by *Datar Switchgears*, *Punj Lloyd* and subsequent cases- when the right to appoint arbitrator suffers forfeiture in cases where the arbitration clause prescribes a time period for appointment. While *Premco DKSPL* offers some clarity by expounding the significance of the terms of agreement, on facts, the section 11(6) application was itself filed *before the expiration of 60 days*- leaving ambiguous the validity of an appointment made *prior to* filing of s 11(6)application but *after* the stipulated time period in the arbitration agreement.

IV. VALECHA ENGINEERING CASE: RESOLVING THE QUANDARY

In January 2021, the Delhi High Court in Valecha Engineering was dealing with a section 11(6) petition wherein the arbitration agreement read, "The Arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party"[58]. Therefore, unlike previous cases on this point, the arbitration clause itself prescribed a time limit for the appointment of an arbitrator. The petitioner had addressed a notice to the respondent to appoint an arbitrator in accordance with the agreement and upon their failure to do so within 30 days, the petitioner moved to the High Court.

The petitioner argued that the petition was maintainable as an arbitrator was appointed after the expiry of 30 days. T he question before the Court was whether, applying the law laid down in Datar Switchgears, the right to appoint an arbitrator extended till the petition was filed. The Court, agreeing with the contention of the petitioner, observed that the law laid down in Datar Switchgears was squarely **inapplicable** and distinguished as the arbitration clause itself **expressly** stipulated a time period in this case. The period having elapsed, the

[56] Union of India v Premco DKSPL, 14 SCC 651, (2016).

[57] *Id.* at para 8.

[58] Valecha Engineering Ltd. v Delhi Metro Rail Corporation, ARB.P. 234/2020 para. 4 (Del. 2021).

respondent's right to appoint stood forfeited.[59] Referring to further decisions like Punj Lloyd, the Court noted that the time period in those cases was "reckoned from the issuance of the notice invoking arbitrator"[60] and not the agreement per se.

Adopting the reasoning of Premco DKSPL, the Court further noted that where the terms of the contract between the parties prescribed a procedure for appointment, the same must be respected. Section 11 of the 1996 Act itself gives prominence to the terms of the agreement between parties.[61] Therefore, the **right of the respondent stood forfeited the moment the stipulated period expired and not on the date the petition was filed**.

V. CONCLUSION

The decision in *Valecha Engineering* is illuminating in resolving the quandary highlighted in this article. Giving primacy to the terms of the arbitration agreement and noting that *Datar Switchgears* and subsequent cases are distinguishable on facts, the position of the Delhi High Court on this point is befitting. However, having been approved by a three judge bench of the Supreme Court, the law laid down in *Datar Switchgears* must be clarified to be limited to instances where no time period is stipulated by the arbitration clause itself. Party autonomy, freedom to contract and minimization of court interference are fundamental pillars of the 1996 Act, and call for the primacy of the agreement between the parties on the procedure of appointment of an arbitrator. Therefore, in cases like *Valecha Engineering* and *Premco DKSPL*, where the arbitration clause itself prescribes a time limit, the law laid down in *Datar Switchgears* has no applicability.

[59] *Id.* at para. 22.

[60] *Id.*at para. 23.

[61] Northern Railway Administration v. Patel Engineering Co. Ltd, 10 SCC 240, (2008).

ODR: A POTENTIAL TOOL FOR SETTLING CROSS BORDER E-COMMERCE DISPUTES

Suyash Shrivastava, Student of Indore Institute of Law

I. INTRODUCTION

The ubiquity of the internet has offered us tremendous opportunities, earlier what was only limited to the exchange of information,[62] has now disseminated in every sector leading to their growth, and the Judiciary is not an exception either. The conventional court system had already been overwhelmed by the voluminous amount of pending cases, also the high cost for litigation and time-consuming structure made it more of a formalistic or cumbersome process, even the judgment takes years to see the light. The Supreme

[62] Dionysia Lemonaki, A Brief History of the Internet – Who Invented It, How it Works, and How it Became the Web We Use Today, FREECODECAMP (April 25, 2021, 10:05 AM), https://www.freecodecamp.org/news/brief-history-of-the-internet/.

Court of India addressed the issue in the case of *Guru Nanak Foundation v. Rattan Singh and Sons.*[63] To overcome such problems it became imperative to come up with some other form of judicial mechanism and that's how modern-day Alternate Dispute Resolution (ADR) came into being. The ADR mechanism involves a neutral adjudicator who would settle the dispute between the parties in an amicable way and without following conventional court practices. It was introduced in the US but gradually other countries also started adopting this system during the late '90s.[64]

The article will attempt to brief the need for a common regulation at the international level, that will mandate the countries to adopt the mechanism of Online Dispute Resolution (*hereinafter* ODR) pertaining to the cross border e-commerce disputes, in order to meet the ends of justice.

II. PARADIGM SHIFT FROM ADR TO ODR

The ADR system started getting recognition because of its acceptance by both the legal professionals and the general public as it outweighed the shortcomings of the conventional court systems, but owing to the massive technological augmentation with the internet at the helm, even a new alternative to ADR was introduced. This newly introduced alternative is ODR, which refers to adapting the ADR techniques to the online world.[65] The ODR carries a different set of advantages such as it does not require a corporeal meeting place but just software or a website that can help you connect with other parties, and the flexibility *vis-à-vis* to rules is unmatched to any other mode.

The major, already established, economic sectors faced heavy losses during the dotcom bubble burst,[66] and the 2008 financial crisis (major impact was seen in the western countries), but the digital economy was rapidly achieving new milestones which led to the rise of e-commerce businesses and consequently, the disputes arising out of such transactions also started coming up.[67] For the speedy disposal of these cases, people started to sought redressal from the governments to ensure such mechanism that can settle disputes on an online platform and for rules in cyberspace that have the same validity as that in the physical world.[68] Moreover, it is a logical argument that disputes which occur online deserve to be settled online. 'eBay', an e-commerce platform, was one of the earliest one to seize the opportunity and the company is using its

---

[63] AIR 1981 SC 2075.

[64] Carrie Menkel-Meadow, *The history and development of "A"* DR, VOELKERRECHTSBLOG (April 25, 2021, 1:23 PM), https://voelkerrechtsblog.org/de/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/.

[65] Aresty, Jeffrey M. "*The Internet and ADR: Educating Lawyers about Online Dispute Resolution.*" 23(1) GPSOLO 30 (2006).

[66] Janet Brown, The Secret To Investing In 2021? Look To The 2000 Dot-Com Bubble, FORBES (April 26, 2021, 11:01 AM) https://www.forbes.com/sites/investor/2021/02/11/the-secret-to-investing-in-2021-look-to-the-2000-dot-com-bubble/?sh=38e81dfd4c93.

[67] María Mercedes Albornoz and Nuria González Martín, *Feasibility Analysis of Online Dispute Resolution in Developing Countries*, 44(1) THE UNIV. MIAMI INTER-AMERICAN L.R. 43 (2012).

[68] Virginia La Torre Jeker, et al. *E-Transaction Law and Online Dispute Resolution: A Necessity in the Middle East,* 20(1) ARAB LAW QUARTERLY 48 (2006).

own ODR system from the late 1990s,[69] and even offering their platform to other firms for the resolution.

III. THE WORKING OF ODR

ODR provides various ways to resolve the dispute; one such is negotiation, where the disputing parties present their views, shreds of evidence supporting their claim, desired outcomes, and an online negotiation tool will keep a track of the points of agreement, and ultimately they can reach to a conclusion without the interference of any third party.[70] Generally, parties do not get the desired outcome through negotiation and they go for online mediation or arbitration for assistance by a professional in resolving the matter. Before opting for either of them and formulating their rules the parties are apprised about the binding (arbitration) and non-binding (mediation) nature of the awards.[71] Here, the arbitrator or the mediator helps, assists, communicate their proposals, and works on a middle ground, in an unbiased and impartial manner.

IV. HOW THE EU RESPONDED TO THE NEED OF ODR

The European Union (EU), a confederation of 28 European countries (currently 27 after the Brexit), by making efficient use of its digital supremacy has already been using various ODR platforms for the resolution of e-commerce or online shopping disputes. Through its regulation no. 524/2013, which after several rounds of negotiations came into force in 2016, the commission has made it mandatory for all the online retailers and traders to provide an accessible link to the ODR platform and an email address for the platform to contact the trader.[72]

The Commission had been contemplating on bringing in the extra-judicial mechanism for solving disputes with the assistance of Information and Communication Technologies (ICT's) since 2001,[73] when only few regions of the world had access to such technologies, or particularly only the developed countries. However, it cannot be said that EU's ODR platform is quintessential in itself, as though the platform makes it mandatory for e-businesses to provide the ODR link, but they aren't legally bound to respond to the complaints received, like many other platforms this too works on the consent of both parties.[74]

To provide easy, safe, and economical access to justice, it is pertinent for all the countries to unite on the issue and implore blueprints that can eventually evolve a

---

[69] Curators of the University of Missouri, Online Dispute Resolution: Companies Implementing ODR, UNIV. MISSOURI (April 27, 2021, 9:20 PM), https://libraryguides.missouri.edu/c.php?g=557240&p=3832247.

[70] VIRGINIA, *supra* note 7, at 61.

[71] Pablo Cortés and Fernando Esteban de la Rosa, *Building a Global Redress System for Low-Value Cross-Border Disputes,*62(2) THE INT'L AND COMP. L.Q. 426 (2013).

[72] European Commission, Online Dispute Resolution, https://ec.europa.eu/consumers/odr/main/?event=main.trader.register, (last accessed 28 April 2021).

[73] European Commission, Widening consumer access to alternative dispute resolution, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001DC0161, (last accessed 28 April 2021).

[74] Victoria Hobbs, *EU Online Dispute Resolution- All Bark and No Bite*?, BIRD&BIRD (April 29, 2021, 10:23 PM), https://www.twobirds.com/en/news/articles/2017/global/eu-online-dispute-resolution-all-bark-and-no-bite.

robust mechanism where it will be mandatory for all the major e-commerce giants (having transnational reach) to provide access to an ODR platform, in case disputes arise. Such a mechanism will, unarguably, take years to come into existence as the "digital divide" between the rich economies and the developing economies is conspicuously broad. The developing economies are obliged to spend heavily on the social outlook of the nation, owing to mass poverty and huge population, rather than on the modern-day infrastructural facilities or the ICT's, which is the *sine qua non* for evolving a platform that will cater to the legal needs of millions around the globe.

V. LACK OF A COMMON REGULATORY BODY

One of the major hindrances in this sphere is the lack of a common regulatory body or an agreement that binds all the nations to compulsorily resolve transnational e-commerce disputes online. The United Nations Commission on International Trade Law (UNCITRAL) is a widely recognized international organization on this aspect, which seeks to promote harmonization and unification of international trade law; at present, there are 60 member countries of this body.[75] UNCITRAL has always been vigilant of the upward trend in transnational e-commerce transactions and recognized the need for a dispute resolution mechanism. Over the years the body has sporadically came up with various model laws that urged the members to promote the use of electronic methods in arbitral procedures.[76]

One of the major limitations associated with the body is that its guidelines and circulars are advisory in character and not mandatory, which paves the way for countries to design their own resolution mechanisms as per the domestic needs, due to which a common regulation never came into being. In the year 2016, too, UNCITRAL through its resolution no. 71/138 recognized the importance of ODR and recommended the use of such methods in cross-border commercial transactions,[77] but due to the non-obligatory character, it didn't have a significant impact. Even if the body makes it mandatory the digital divide between the member countries will act as an impediment, as only the rich economies will be able to achieve the prerequisites of common regulation and the denizens of such countries will have greater access as compared to that of others due to lack of resources and income inequality.

VI. THE WAY AHEAD FOR ODR

Needless to say, achieving a common regulation will be a perilous journey, the challenges are not just limited to the lack of a common regulatory body, some others involve lack of trust, feeble ICT infrastructure, cultural challenges,[78] burden to prove evidence *vis-à-vis* the technicalities

[75] United Nations Commission on International Trade Law, Origin, Mandate and Composition of UNCITRAL, https://uncitral.un.org/en/about/faq/mandate_composition, (last accessed 29 April 2021).

[76] *Id.*

[77] United Nations Commission on International Trade Law, UNCITRAL Technical Notes on Online Dispute Resolution (New York: United Nations, 2017), https://uncitral.un.org/sites/uncitral.un.org/files/media documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf, (last accessed 29 April 2021).

[78] MARÍA, *supra* note 6, at 53.

of a product,[79] *inter alia*. The COVID-19 pandemic depicted that it is not always plausible to follow the conventional court practices and travelling to far-off places for resolving the dispute, instead, a finer way would be to imbibe ICT's in this process and make use of the ODR, which will in many ways going to be conducive for both the buyers and the sellers.

The role of developed economies, especially the western nations, will be at the helm in order to achieve the goal, as initial investments, technical know-how, guidance by the stalwarts and their expertise will have to pour from these nations only. It is encouraging to see developing nations like India are also eyeing the use of ODR in the e-commerce segment and are striving to achieve this goal.[80] Incentivizing the business houses in stationing an ODR platform, awarding certain marks to e-businesses to build a sense of trust amongst the consumers, removal of the language barrier between consumers and sellers of different nationalities will further enlarge its acceptance and in turn, it will ramp-up the process of common regulation. Also greater user confidence in reliable sellers will transform e-commerce into a more competitive market. [81]

VII. CONCLUSION

The year 2020, witnessed an unprecedented growth where more than 2 Billion people purchased goods and services online,[82] along with the further expansion of transnational e-commerce transactions in the near future the disputes arising out of it will also surge, and travelling to other nations for seeking remedy will in no way concede justice to the aggrieved party. UNCITRAL, with assistance from developed member countries, will have to fill the technological void in this sphere between developed and developing countries in order to achieve a common regulation and ushering its benefits to reality. More nations should also be inspirited to join this initiative which will ultimately bring the global online market to a level playing field.

[79] PABLO, *supra* note 10, at 421.

[80] The NITI Aayog Expert Committee on ODR, Designing the Future of Dispute Resolution: The ODR Policy Plan for India, https://niti.gov.in/sites/default/files/2020-10/Draft-ODR-Report-NITI-Aayog-Committee.pdf (last accessed 30 April 2021).

[81] PABLO, *supra* note 18, at 438.

[82] Daniela Coppola, *E-commerce worldwide- Statistics and Facts*, STATISTA (May 3, 2021, 12:07 PM) https://www.statista.com/topics/871/online-shopping/#dossierSummary.

ADR UPDATES

Bhaven Construction through Authorised Signatory Premjibhai K. Shah v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Anr.

6 January 2021 | SCC Online SC 8 | Gujarat High Court

Principle: Under normal circumstances, discretionary powers under Article 226 of the Indian Constitution should not be used to interfere with the arbitral procedure established by the Arbitration and Conciliation Act, 1996.

Facts: The appellant and the very first respondent entered into an agreement for the manufacture and supply of bricks (Agreement). As a result of the parties' disagreements, the appellant invoked the arbitration clause and requested the appointment of a single arbitrator. The first respondent opposed the appellant's request for an arbitrator by filing the application under Section 16 of the Arbitration Act. The first respondent claimed that now the arbitration was time-barred because the matter was not subject to the Arbitration Act. Regardless of the first respondent's objections, the only arbitrator was chosen. The arbitrator upheld the arbitral tribunal's jurisdiction to adjudicate the instant dispute, rejecting the first respondent's application under Section 16 of the Arbitration Act.

The first respondent, who was dissatisfied with the sole arbitrator's decision, filed a writ petition with the Gujarat High Court (High Court) under Article 226 of the Constitution. The writ petition was dismissed by the single judge. The first respondent, who was dissatisfied with the Single Judge's ruling, filed a writ appeal, which was granted by the Division Bench. In the instant case, the appellant has challenged the decision of the Division Bench of the High Court. The appellant argued that the High Court's Division Bench erred by interfering with the Single Judge's order. The fact that the first respondent also filed a challenge to the final decision under Section 34 of the Arbitration Act demonstrated that the first respondent was attempting to circumvent the enactment's framework. As a result, we have the current situation.

Judgement: The Supreme Court ruled that the Arbitration Act is a code in and of itself, with clear legal implications. The non-obstante clause in Section 5 of the Arbitration Act, for example, is intended to avoid undue court intrusion. Section 5 specifically stipulates that no judicial authority may interfere in the arbitral process unless the legislation clearly authorizes it.

The Hon'ble Supreme Court found in this case that the appellant had followed the processes set forth in the Agreement to pick the only arbitrator. The first respondent then invoked Section 16(2) of the Arbitration Act to contest the sole arbitrator's authority. Following that, the first respondent filed a petition under Article 226 of the Indian Constitution challenging the arbitrator's order under Section 16(2) of the Arbitration Act. It was noted that, as is customary, Section 34 of the Arbitration Act allows for a challenge process. The use of term "only" under Section 34, according to the Hon'ble Supreme Court, served the dual aims of establishing the Arbitration Act a full code and establishing the mechanism for challenging arbitral verdicts. The Supreme Court held that the High Court had erred in

exercising its discretionary power under Articles 226 and 227 of the Constitution.

Dholi Spintex Pvt. Ltd. v. Louis Dreyfus Company India Pvt. Ltd

18 November 2020 | CS(COMM) 286/2020 | Delhi High Court

Principle: In arbitration proceedings, two Indian parties could normally choose foreign law to regulate the substantive dispute between them, and the Court's right to overturn that choice should be used sparingly and only if the choice amounts to a "flagrant and gross violation" of morality and justice principles.

Facts: The parties agreed to sell and buy raw cotton imported from the United States. Because the Plaintiff refused to acknowledge delivery of the package, it was delayed. The contract stipulated that the dispute would be resolved through arbitration under the norms of the International Cotton Association. Arbitration was provided for in the International Cotton Association rules under the English Arbitration Act 1996.

The Plaintiff was ordered to nominate the International Cotton Association's nominee arbitrator after the Defendant sought arbitration. The Plaintiff refused to participate in the arbitration, claiming that: (a) because the contract was entered into between two Indian parties and it was to be performed in India, only Indian law can apply; (b) the contract also stipulated that the New Delhi Courts have exclusive jurisdiction; and (c) the International Cotton Association bylaws are incompatible with and in violation of Indian public policy, which requires that all contracts be performed in India.
Judgement: The Court ruled in the Defendant's favor. It emphasized that an arbitration agreement is distinct from a substantive contract, and that the parties might pick a separate governing law for the arbitration agreement. As a result, there was no reason why two Indian parties couldn't choose foreign law. Taking into account the extra (though non-determining) consideration of a foreign element to the contract, this was determined that the parties could have consented to an arbitration under English law. In terms of the seat, it was determined that both sides had agreed to submit all complaints to the International Cotton Association, and therefore that London would be the seat. As a result, granting authority to the courts of New Delhi had no bearing on the location of the seat.

Mohini Electricals Limited v. Delhi Jal Board

22 January 2021 | OMP (ENF)(COMM) 2 of 2020 | Delhi High Court

Principle: An arbitral award is only subject to stamp duty when it is enforced, and a photocopy of an award is not a "instrument" under the Indian Stamp Act 1899, therefore it cannot be impounded.

Facts: A petition to implement an arbitral award was filed by the decree holder. A photocopy of the award was filed in support, demonstrating that the award was inadequately stamped. The decree holder submitted an application for an exemption from publishing the original award, which was granted because the judgment debtor had no objection. After paying the necessary amount of stamp duty, the decree holder filed the original award.

The judgment debtor was ordered to deposit the funds granted by the court. The

judgment debtor objected, claiming that a photocopy of the award revealed that it had been improperly stamped and that it should have been impounded well before deposit orders were issued. The subsequent payment of stamp duty, according to the judgment debtor, was little.

The Court ruled that there is no necessity to pay stamp duty at the moment of the award's signature or proclamation. Stamp duty is only due when parties "begin taking actions" to implement the award under Article 36 of the Arbitration & Conciliation Act 1996, according to Supreme Court decisions2. The Tribunal lacks the authority to order the litigants to pay stamp duty over a certain term.

The judgment debtor may have complained whenever the photocopy of the award was first filed, indicating that insufficient stamp duty had been paid, but because it did not, the judgment debtor had wasted its chance and could not ask for the photocopy to be impounded subsequently.

Judgement: In order to correct the deficiency, an execution court would have to detain an unstamped award and send it to the collector for stamp duty collection, but a photocopy is not a "instrument" under the Indian Stamp Act 1899 and hence cannot be seized.

Haryana Space Application Centre (HARSAC) and Anr. v. Pan India Consultants Pvt. Ltd.

20 January 2021 | C.A. No. 131 of 2021 (arising out of SLP (C) No. 13503 of 2020) | Supreme Court of India

Principle:

Section 12(5) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) read with the seventh schedule is mandatory and non-derogable in nature.

Facts: HARSAC had awarded a contract to four vendors including Pan India Consultants Pvt. (Pan India) with regard to modernisation of land records and based on this the parties signed a Service Level Agreement (SLA) on 29 March, 2011. Even after being given two extensions Pan India failed to complete the work allotted to it causing delay to the entire project. The appellant therefore invoked the Performance Bank Guarantee on 18 March, 2014. Pan India challenged this action before the Delhi High Court. The Court directed the appellant to not encash the guarantee until the dispute was resolved. Pursuant to the Court directive the appellant under clause 6.11 of the SLA constituted an arbitral tribunal on 14 September, 2014 with the Principal Secretary of the Haryana Government as the nominee arbitrator. However, the arbitration proceedings remained incomplete even after more two years of the first hearing on 7 November, 2016. The appellant contended that the mandate of the tribunal stood terminated as it exceeded the one-year statutory period as well as the six-month extended period.

The respondent then filed an application under section 29A(4) of the Arbitration Act before the Additional District Judge, Chandigarh. The District Judge granted a three-month extension of the arbitration tribunal for the conclusion of proceedings. The appellant filed a civil revision petition before the Punjab and Haryana High Court against the district judge order. However, the High Court granted a four-month extension to the tribunal in view of the pandemic. The appellant then filed a special leave petition before the Supreme Court to

hear the matter.

Judgement: The Supreme Court observed that since the Principal Secretary of the Haryana Government would have a controlling influence over the appellant, being a nodal agency of the state; he would be ineligible to be appointed as the nominee arbitrator under section 12(5) of the Arbitration Act read with the seventh schedule. It held that the section is mandatory and non-derogable and hence a substitute arbitrator must be appointed. Both parties consented and under section 29A(6) a substitute arbitrator was appointed by the Court who was directed to conclude the remaining proceedings and pass an arbitral order within six months.

Chintels India Ltd. v. Bhayana Builders Pvt. Ltd.

11 Feb 2021 | Civil Appeal No. 4028 of 2020 | Supreme Court of India

Principle: An order refusing to condone the delay under Section 34(3) of the *Arbitration and Conciliation Act, 1996* is appealable under Section 37 of the Act.

Facts: The appellant filed a petition before the High Court of Delhi to set aside an award passed by the Arbitration Tribunal accompanied by an application seeking condonation of delay of 28 days in filing and 16 days in re-filing the petition. The High Court dismissed the application for condonation delay and set aside the petition, as the same was beyond the statutory period provided by Section 34 of the 1996 Act.

Thereafter, the Appellant filed an appeal before a Division Bench of the High Court which held that an appeal is not maintainable from such an order. However, the Division Bench issued a certificate under Article 133 read with Article 134A of the Constitution of India, 1950 to the Appellant granting liberty to approach the Supreme Court, which was availed of by the Appellant.

Judgement: The Court held that the expression 'setting aside or refusing to set aside an arbitral award' in Section 37(1)(c) of th6e Act has to be read with the expression 'under Section 34'. The Court observed that Section 34 is not limited to grounds set-out in Section 34(2) and that a literal reading of the provision would demonstrate that a refusal to set aside an arbitral award since the delay was not condoned would certainly fall within Section 37(1)(c). In other words, the expression 'under Section 34' refers to the entire section and not merely to Section 34(2). The decision of the Court was based on the judgment in M/S Essar Constructions vs N.P. Rama Krishna Reddy which deals with Section 39 of the Arbitration Act, 1940.

The Court further held that the principle of minimal intervention by the Courts as enshrined in Section 5 of the 1996 Act cannot be interpreted in a manner such that it limits the statutory provisions, including the right to appeal as mentioned under Section 37 of the Act.

The Court also reaffirmed the settled position that Section 5 of the Limitation Act 1963 does not apply to Section 34 challenges and, therefore, no delay beyond 3 months and 30 days in filing an appeal can be condoned.

Unitech Limited vs. Telangana State Industrial Infrastructure Corporation & Others.

17 Feb 2021 | Civil Appeal No. 317 of 2021 | Supreme Court of India

Principle: The presence of an arbitration clause in a contract is not an absolute bar to availing remedies under Article 226 of the Constitution.

Facts: The Andhra Pradesh Industrial Infrastructure Corporation Ltd ("APIIC") entered into a development agreement with Unitech for developing and constructing a township project which consisted of an arbitration clause. However, the project did not proceed further as Telangana State Industrial Infrastructure Corporation (TSIIC), which took over issues related to project from APIIC after the state's bifurcation, could not ensure encumbrance-free handover of land to the real estate firm which took legal recourses for refund.

In this case, the Division Bench of the Telangana High Court upheld the order of a Single Judge of the High Court on the liability of TSIIC to make a refund of an amount of 165 crore rupees to Unitech. The Division Bench however made a modification to the prior order and confined the TSIICs liability to pay interest only with effect from 14 October 2015. However, Telangana State Industrial Infrastructure Corporation filed a petition before the Supreme Court of India contending that the High Court should not have entertained a Writ Petition filed before it under Article 226 of the Constitution in '*a pure-contractual*' matter which also contains an *Arbitration Clause.*

Judgement: The Supreme Court held that State or any of its instrumentality will not be exempted from acting fairly in their business dealings on the ground that they have entered into a contract. Previously, in **AB**L International Ltd v Export Credit Guarantee Corporation of India [ABL Case] the Supreme Court held that "*Writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution.*"

It held that while exercising its jurisdiction under Article 226, the court is entitled to enquire whether the action of the State or any of its instrumentalities was arbitrary, unfair or in violation of Article 14 of the Constitution. If the State instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 would lie.

The Supreme Court noted that TSIIC, being a State instrumentality, had not only breached its contractual obligations but also failed to refund the amounts admittedly payable to Unitech. In view of the foregoing, the Supreme Court held that the Single Judge and the Division Bench rightly invoked their jurisdiction under Article 226 and the writ petition filed by Unitech was maintainable.

Union Of India v. Associated Construction Co.

5 February 2021 | Special Leave Petition No.18079/2020 | Delhi High Court

Principle: An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order by granting or refusing to grant any measure under section 9, setting aside or refusing to set aside an arbitral award under section 34.

Appeal shall also lie to a Court from an order granting of the arbitral tribunal accepting the plea referred in sub-section (2) or sub-section (3) of section 16 or granting or refusing to grant an interim measure

under section 17.

No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Facts: For the supply of OTM Accommodation for CASD at Delhi Cantt-10, the Union of India signed a contract with the Associated Construction Co.

Certain disagreements arose between both the parties during the course of the work, and Arbitration was sought in accordance with the contract's terms. Both claims were granted by the sole arbitrator, who awarded a fixed sum against each claim and rendered simple interest of 12 percent per annum in the respondent's favour.

Having followed the judgment of the Supreme Court in Consolidated Engineering Enterprises v. Principal Secretary, Irrigation Department, the said Award was questioned before a learned Single Judge, who rejected the petition on the grounds that the Sole Arbitrator had pronounced the award in accordance with the contract, and the division bench's appeal was dismissed against the single judge order on the grounds of delay.

As a result, the union of India filed a Special Leave Petition.

Judgement: The Supreme Court, citing the decisions in Union of India v. Varindera Constructions Ltd2 and N.V. International v State of Assam & Ors3, determined that the statute of limitations for filing an appeal within Section 37 must be the same as per Section 34, i.e. 120 days.

The Court stated that just because an application under Section 34 must be filed within a maximum of 120 days, an appeal under Section 37, which is a prolongation of the original proceedings, must be filed within the same time limit. The 120-day period for filing an application under Section 34 was created by adding a 30-day grace period if justifiable cause for delay is demonstrated, on top of the 90-day statutory limitation provided by Article 116 of the Limitation Act.

The Hon'ble Court further stated that if the appellant fails to file an application within 120 days of its petition being approved or dismissed under Section 34, the delay would not be excused because it would be contrary to the Act's goal of expeditious dispute resolution.

Anglo American Metallurgical Coal v. MMTC Ltd.

17 December 2020 | C.A. No. 4083 of 2020 | SLP (C) No. 11431 of 2020) | Supreme Court of India

Principle: The arbitral tribunal is the final judge of the quality, as well as the quantity of evidence before it.

Facts: The appellant and the respondent entered into a long-term contract on 7 March, 2007, whereby the appellant was supposed to deliver coal at an agreed price of $300 per metric tonne to the respondent, over five different phases. However, a dispute broke out between the two parties regarding the fifth shipment of coal. The appellant then referred the matter for international arbitration with New Delhi being the seat of arbitration. After careful examination of the emails a majority arbitral award was passed on 12 May, 2014 in favour of the appellant.

The respondent challenged the arbitral award in Delhi High Court under section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). On 10 July, 2015, the single judge of the High Court upheld the majority award. The respondent then filed an appeal under section 37 of the Arbitration Act in the Delhi High Court. A division bench allowed the appeal and on 2 March, 2020 set aside the arbitral award. The appellant then appealed this judgement in the Supreme Court which struck down the judgement of the division bench of the High Court.

Judgement: After going through the evidence on record and taking help of proviso (6) illustration (f) of section 92, section 94 and section 95 of the Indian Evidence Act, 1872 (Evidence Act), the Supreme Court concluded that instead of considering the emails as a whole the division bench has erred by cherry picking three emails. The Court cited the Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd[83] judgement to illustrate this contemporary contextual approach towards interpreting contracts. In light of these arguments the arbitral award by the arbitration tribunal and the decision of the single High Court judge was correct.

The Court referring to its judgement in Sudarsan Trading Co. v. Govt. of Kerala[84] also stated that, "It is well established that the arbitral tribunal is the final judge of the quality, as well as the quantity of evidence before it". In light of these judgements the Court struck down the order of the division bench and restored the arbitral award.

[83] [2008] SGCA 27.

[84] (1989) 2 SCC 38.

CRSC Research and Design Institute Group Co. Ltd v. Dedicated Freight Corridor Corporation of India Limited & Ors

30 September 2020 | O.M.P.(I)(COMM.) 184/2020 | Delhi High Court

Principle: The court has broad powers under Section 9 of Arbitration and Conciliation Act, 1996 to grant temporary measures of protection that appear to the court to be fair and reasonable, such as retention, interim custody, or selling of goods that are the subject of arbitration, securing the sum in question, interim injunction, appointment of a receiver or guardian, and so on.

Facts: The Petitioner and the Respondents signed an agreement (with arbitration clause) for the execution of a project worth Rs. 471 crores, with various goals set for completion over years. A project management specialist was also hired as part of the deal (PMC). The petitioner provided four Advance Bank Guarantees totaling 38.06 crores and one Performance Bank Guarantee totaling 23.55 crores.

The Performance Bank Guarantee is valid until June 24, 2021, and the Advance Bank Guarantee is valid until May 1, 2021. A success extension was granted on April 22, 2020. However, due to a pandemic and a government decree, force majeure would apply, and the duration would be extended once more.

A letter requesting an extension on March 31st resulted in the company's temporary inability to fulfil its contractual obligations. As a result, the complainant approached the high court under Section 9 of the Arbitration and Conciliation Act, 1996, claiming that the respondent will invoke and

encash the Bank Guarantees given by it.

Judgement: The single bench of Delhi High Court chaired by Hon'ble Justice C. Hari Shankar with respect to section 9 held in above case that in order to grant interim protection the following three prerequisites are required:

i) the presence of an arbitration clause as well as the petitioner's manifest intention to invoke the clause and initiate arbitral proceedings;

ii) the presence of a prima facie case, balance of convenience, and irretrievable loss justifying any grant of interim relief to the claimant;

iii) and the existence of an emergent need so that if interim relief is not issued by the court, just before arbitral proceedings begin, the petitioner will suffer irreparable harm.

NTPC Ltd. v. AMR INDIA Ltd.

3 November 2020 | MANU/DE |1952/2020 | Delhi High Court

Principle: An arbitrator's mandate will expire if:

(a) he would become de jure or de facto being unable conduct his operations or fails to act without unreasonable delay for other causes; and

(b) he resigns from his position or the parties comply with the dismissal of his mandate.

Facts: NTPC Ltd. ("Petitioner") invoked the contract's arbitration clause in response to several contractual violations by AMR India ("Respondent"), resulting in the assignment of a Sole arbitrator rather than the contractually required formation of an Arbitral Tribunal of three arbitrators. The arbitration was about to be conducted in accordance with Section 29B of the Arbitration and Conciliation Act, 1996's 'Fast Track Procedure' ("Act"). With reference to the payment terms, they were accepted. Following that, the type and amount of the pleadings grew, and the arbitration was established as a full-fledged proceeding. In light of the alteration in the character of the proceedings, the Arbitrator reduced his fee in an order, noting that the parties proceeded to engage in the proceedings. The Petitioner stated that it would not repay the revised charge and requested that the Arbitrator reconsider the order.

Judgement: It was decided that an arbitrator who accepted specific fees upon appointment could not stray from the conditions of the appointment in order to demand a larger price, since this would render the arbitrator de jure unable to discharge his duties as an arbitrator. Although the Arbitrator may have avoided the proceedings due to the change in circumstances, he wouldn't have raised the fees based on the Act's requirements.

PASL Wind Solutions Pvt. Ltd v. GE Power Conversion India Pvt Ltd

20 April 2021 | Civil Appeal No. 1647 of 2021 | Supreme Court of India

Principle: Two Indian parties can arbitrate outside India and the resulting award will be valid and enforceable in India

Facts: The two Indian parties had entered into an agreement for sale of converters and later got into a dispute to a purchase agreement for converters. The settlement agreement signed between them stipulated that arbitration would take place in Zurich

under ICC Rules. The Tribunal's jurisdiction was questioned on the grounds that two Indian parties choosing a foreign seat and law was against national policy.

PASL argued that the seat of arbitration was India and since both the parties were Indian companies, it was a 'domestic arbitration'. According to the Court, the nationality of the parties and other domestic aspects in the arbitration were deemed "irrelevant" in deciding whether an award was a foreign award and hence the location of the arbitration would be the sole determining factor.GE argued that the term 'International commercial arbitration' in section 2(2) should be interpreted as relating to all arbitrations seated outside India.

For such a clause to be effective, several courts had previously decided that at least one party must be a non-Indian person or company. The Supreme Court clarified this clause by saying that the ruling issued by an arbitral tribunal would be enforceable in India under such circumstances, and that the parties might also seek interim relief in India.

Judgment: The Supreme Court ruled that Indian parties are entitled to choose a seat outside of India and that the Arbitration & Conciliation Act 1996 does not prohibit them from adopting a foreign law. It stated that the resulting foreign award would be enforced in India under Part II of the Act.

Amazon.Com NV Investment Holdings LLC v. Future Coupons Private Limited & Ors.

18 March 2021 | O.M.P(ENF)(COMM) 17/2021 | Delhi High Court

Principle: *The Arbitral Tribunal has the same powers to render an interim order as the Court under Section 17(1) of the Arbitration and Conciliation Act, and Section 17(2) makes such an interim order enforceable in the same way as a Court order.*

Facts: Amazon.com NV Investment Holdings LLC ("Amazon") filed this petition under Section 17(2) of the Arbitration and Conciliation Act, 1996, seeking the execution of the Emergency Arbitrator's interim order dated October 25, 2020.

In 2019, the petitioner had entered into a transaction with the respondent, Future Coupons Private Limited ("FCPL") by acquiring its 49% equity stake. Amazon was allowed a call option to purchase all or part of FCPL's shareholding in Future Retail Limited, ("FRL") which could be exercised from the third to the tenth year of the agreement. A business provision in the agreement designated Reliance as a restricted company to invest in FCPL.

In 2020, FCPL and Reliance allied to sell FRL's retail, wholesale, and logistics businesses without Amazon's consent. Amazon filed for an emergency arbitration under Singapore International Arbitration Centre (SIAC) Rules to stop the respondents from executing the sale of assets, which was in violation of the contract.

According to the petitioner, FRL controlled by Biyanis approved transactions relating to the transfer of its retail assets to Reliance to release its debt burden. The Emergency Arbitrator had directed FRL to put on hold its transaction with Reliance on grounds that it violated Amazon's contractual rights borne out of an agreement to invest Rs 1,431 crore in FCPL.

The respondents objected to the compliance of the interim order, claiming that the appointment of an Emergency Arbitrator under SIAC Rules was unconstitutional since an Emergency Arbitrator is

not an arbitrator under Section 2(1)(d) of the Arbitration and Conciliation Act 1996.

Judgment: A single-judge bench of Justice JR Midha upheld the Emergency Arbitrator's interim award in favor of the petitioner. The court concluded that the respondents willfully violated the interim order, hence they are liable for the consequences enumerated in Order XXXIX Rule 2A of the Code of Civil Procedure. It dismissed all objections by the respondents and requested that Rs 20 lakh be deposited in the Prime Minister Relief Fund to provide COVID vaccination to Delhi's senior citizens who fall into the BPL category. It ruled that the Emergency Arbitrator's decision was valid and enforceable under Indian law.

Sanjiv Prakash v. Seema Kukreja and Ors.

6 April 2021 | Civil Appeal No. 975 Of 2021 | Supreme Court of India

Principle: Under Section 11 of the Arbitration and Conciliation Act,1996 ("Act"), courts cannot usurp the jurisdiction of the arbitral tribunal. Civil courts cannot enter into a mini-trial or elaborate review of the facts and law unless the matter is related to non-arbitrable contentions.

Facts: This appeal arose out of the dismissal of a petition filed before the High Court of Delhi under Section 11 of the Act. Here, the petitioner (Sanjiv Prakash) was the brother of the respondent (Seema Kukreja).

In 1996, the petitioner and the respondents (family members) signed a Memorandum of Understanding ("MoU") concerning their company, ANI Media Pvt. Ltd., that included a succession plan and management scheme, among other things. Later in 1996, the family members also signed a Shareholders Agreement ("SHA") and a Share Purchase Agreement with Thomson Reuters Corporation. The SHA set out the terms regulating the operation of the shareholders and stated that this agreement would supersede any or all prior agreements, MoUs, and arrangements. Over time, a dispute arose *vis-à-vis* the transfer of shares among the said members. Owing to the dispute arising out of and in relation to the MoU, the petitioner invoked the arbitration clause 12 of the said MoU and issued a notice for invocation of arbitration dated November 23, 2019, to the respondents.

The Petitioner claimed that the MoU was a different agreement from the SHA, therefore the dispute should be decided by the Arbitral Tribunal appointed as per the arbitration agreement contained in the MoU. In addition, the petitioner relied on aSection 58(2) of the Companies Act, 2013 for the enforceability of transfer of shares under the MoU. Further, Section 5 of the Act, read with Sections 11 (6A) and 16 of the Act, as well as the principle of "kompetenz-kompetenz", were used to justify the jurisdiction of the Arbitral Tribunal in determining the validity of the MoU.

On the contrary, the Respondents contended that the MoU ceased to exist as SHA superseded it under Section 62 of the Indian Contracts Act, 1872, and accordingly the arbitration clause in the MoU was nullified by the novation of the MoU. Thus, relying on the MoU was invalid.

The Delhi HC had to decide if the contested MOU was void as against the SHA and, if so, if the arbitration clause found therein could be implemented. The Court held that if a contract is superseded by another, the

arbitration clause, which is a component/part of the earlier contract, falls with it, or if the original contract is terminated in its entirety, the arbitration clause, which is a part of it, also ends.

Judgment: The SC observed that due to the limited jurisdiction of a court under Section 11 of the Act, the matter of novation of an agreement cannot be determined by the courts. Arguments on whether or not an agreement with an arbitration clause has been novated cannot be determined in the exercise of a narrow prima facie analysis of whether an arbitration agreement exists between the parties. The Court extensively discussed the law laid down in the recent judgment in Vidya Drolia v. Durga Trading Corporation (2021), especially paragraph 148, where it was held that the Court can only intervene at the pre-reference stage if it is evident that the allegations are ex facie time-barred and dead, or if there is no subsisting conflict. All other cases should be sent to an arbitral tribunal to decide their validity.

Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund

26 March 2021 | Arb. Petition (Civil) 48/2019 | Supreme Court of India

Principle: Under Section 8 of the Arbitration and Conciliation Act, 1996("Act"), Arbitration Reference is not maintainable if it has been filed after admission of Insolvency Resolution Application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC").

Facts: The applicant, Indus Biotech Private Limited("Indus"), issued Optionally Convertible Redeemable Preference Shares (OCRPS) to the respondent, Kotak India Venture Fund ("Kotak"). The parties agreed to the terms of the OCRPS conversion and redemption in a Share Subscription and Shareholders Agreement (SSSA) that included an arbitration clause.

When Indus failed to redeem the OCRPS, Kotak filed a petition to the National Company Law Tribunal (NCLT) under Section 7 of the IBC, seeking the initiation of the corporate insolvency resolution process. Subsequently, Indus invoked the arbitration clause under the SSSA requesting that the NCLT refer the parties to arbitration under Section 8 of the Act. According to the NCLT, under Section 7 of the IBC, a judicial determination of whether there has been a 'default' within the scope of Section 3(12) of the IBC is needed. Considering that the dispute was contractual in nature, the NCLT directed the parties to settle their dispute by arbitration and dismissed the Insolvency Application under Section 7 of the IBC.

Aggrieved by the decision of the NCLT, Kotak approached the SC by way of a special leave petition. Kotak argued that the parties' disagreement was a matter *in rem*, and therefore not arbitrable. Indus, on the other hand, argued that the NCLT had taken the right decision and that the case should be referred to arbitration because there was no default under the Code.

Judgment: First, the SC reaffirmed that, as defined by Section 238 of the IBC, the position of law under the IBC supersedes all other rules. Even if an application under Section 8 of the IBC is filed simultaneously, the Adjudicating Authority is required to deal with the inquiry under Section 7 of the IBC by examining the material presented to it and recording a satisfaction as to whether

or not there is a default.

In addition, the SC relied on the test set out in *Vidya Drolia &Ors. v. Durga Trading Corporation (2019)* to hold that an insolvency proceeding becomes *in rem* only after it is admitted. An admission results in the establishment of a third party right in all the creditors of the corporate debtor creating an *erga omnes* effect. In conclusion, the Apex Court stated that the moment an insolvency application is admitted under Section 7 of the IBC, the dispute becomes inarbitrable, and the application under Section 8 would no longer be maintainable.

Government of Maharashtra v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.

19 March 2021 | C.A. No. 995 of 2021 (@ SLP (C) No. 665 of 2021) | Supreme Court of India

Principle: Delay in filing appeals under section 37 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) is permissible provided there is sufficient cause for the delay and it is short.

Facts: The Bombay High Court, Delhi High Court and Madhya Pradesh High Court passed three separate judgements with regards to the condonation of delay in filing of appeal under section 37 of Arbitration Act. The Bombay High Court and the Delhi High Court dismissed the appeals filed by the Maharashtra Government and Union of India following the precedent in *M/s N.V. International v. The State of Assam*[85] *that a delay beyond 120 days for filing appeals would not be condoned.* However, the Madhya Pradesh High Court found there was divergence in the ruling of *M/s N.V. International v. The State of Assam and Consolidated Engg. Enterprises v. Irrigation Department*[86] *with regards to the limitation period. Having made this observation Madhya Pradesh High Court referred the matter to the Supreme Court. The three cases were then together decided in the Supreme Court.*

Judgement: The Supreme Court acknowledged the fact that limitation period for appeals filed under section 37 of the Arbitration Act is different for differing values of dispute. For appeals having value less than three lakh rupees, the limitation period under section 116 and 117 of the Limitation Act, 1963 (Limitation Act) is either 90 days or 30 days. For those appeals having value in excess of three lakh rupees the limitation period is 60 days as per section 13(1A) of the Commercial Courts Act, 2015. So, for any condonation of delay beyond the above-mentioned periods there has be "sufficient cause" for the delay as per section 5 of the Limitation Act. The Court stated that the definition of sufficient cause is "*is elastic enough to yield different results depending upon the object and context of a statute*".

However, the main objective of the Arbitration Act is to ensure speedy resolution of disputes. Keeping this in mind any delay beyond 90, 60 and 30 days must be condoned "*by way of exception and not by way of rule*". The Court further stated that:

> *"In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite*

[85] (2020) 2 SCC 109.

[86] (2008) 7 SCC 169.

party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches."

Thus, the Court overturned its previous judgement in *M/s N.V. International v. The State of Assam.*

Naresh Kanayalal Rajwani v Kotak Mahindra Bank Ltd.

9 March 2021 | Com. Arb. Petition (L) No. 1444 of 2019 | Bombay High Court

Principle: If a party accepts the jurisdiction of a court that is not the seat of arbitration in the first round of arbitration then the party shall be deemed to have waived its right to object to the jurisdiction of the Court in the second round of arbitration.

Facts: Naresh Kanayalal Rajwani had taken certain loan from the Kotak Mahindra Bank. Under the terms of the loan agreement any dispute that may arise was to be resolved through arbitration. The lender would appoint a single arbitrator while, New Delhi was chosen as the seat of arbitration.

Dispute broke out between the parties and arbitration proceedings were initiated in New Delhi. On 30 January, 2013 the arbitral award was passed in favour of Kotak Mahindra bank. This award was challenged by the petitioner before the Bombay High Court under section 34 of the Arbitration and Conciliation Act, 1996 (Arbitration Act). On 17 August, 2015 the Court set aside the arbitral award. This decision was accepted by the respondent and fresh arbitration proceedings were initiated by them on 9 February, 2018 at New Delhi. On 4 August, 2019 a second arbitral award was passed by the sole arbitrator. This award was again challenged by the petitioner before the Bombay High Court. However, this time the counsel appearing on behalf of the respondent contended that the Court lacked the jurisdictional competence to hear the matter under section 34 of the Arbitration Act. The respondent therefore urged the Court to decide on the jurisdictional issue before deciding the petition on merits.

Judgement: The respondent had contended that as per the Supreme Court judgements of *BGS SGS Soma JV v. NHPC Ltd.*[87] *and State of West Bengal v. Associated Contractors*[88] no other Court, other than one designated as seat of arbitration, can have jurisdiction over the petition under section 34 of the Arbitration Act. To this the petitioner argued that the respondent by participating in the first round of proceedings before the Bombay High Court, without raising any objection and then acting on the order passed by the Court has waived their right to object to the territorial jurisdiction now. Under these circumstances section 42 of the Arbitration Act is applicable. The petitioner further argued that relying on the *State of West Bengal v. Associated Contractors* judgement, the words "with respect to an arbitration agreement" in section 34 of the Arbitration Act, have a wide connotation and includes all applications made before, during or even after the arbitration proceedings are over. Thus, only the Bombay High Court has the jurisdiction to hear the case now.

The Court observed that none of the cases cited by the respondent supported their position. It concurred with the argument of the petitioner that the respondent has waived its right to object to the territorial

[87] (2020) 4 SCC 234.

[88] (2015) 1 SCC 32.

jurisdiction of the Court and that section 42 of the Arbitration Act shall apply in this case. Thus, the Court ruled that it has jurisdiction to hear the petition under section 34 of the Arbitration Act and it listed the case for admission before it on 6 April, 2021.

Bharat Sanchar Nigam Ltd. & Anr v. M/S Nortel Networks India Pvt. Ltd.

10 March 2021, Civil Appeal Nos. 843-844 Of 2021, SC

Principle: The period of limitation for filing an application under Section 11 is governed by Article 137 of the Limitation Act, 1963 and begins to run from the date when there is failure to appoint the arbitrator. In rare and exceptional cases, where the claims are ex facie time barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference to arbitration.

Facts: BSNL issued a tender notification inviting bids for planning, engineering, supply, insulation, testing and commissioning of GSM based cellular mobile network in southern India. Nortel was awarded the purchase order but, on the completion of the work, BSNL withheld some amount towards liquidated damages and other levies. After Nortel's payment claim was rejected by BSNL, it invoked the arbitration clause after a period of 5.5 years. The Kerala High Court referred the dispute for arbitration. BSNL contended that the notice for arbitration was time-barred.

Judgement: There were two issues before the Supreme Court: (i) the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996; and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are ex facie time-barred?

On the (i) issue, the Court held that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article that is, Article 137 would become applicable. Resultantly, the period of limitation to file an application under Section 11 is 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days', whichever is earlier. It was also suggested that the Parliament should consider amending Section 11 to provide a period of limitation for filing an application under this provision, which is in consonance with the object of expeditious disposal of arbitration proceedings and not contrary to the scheme of the Act. The application under Section 11 in this case, was filed before the High Court within the period of 3 years of rejection of the request for appointment of the arbitrator. Hence, it was upheld.

On the (ii) issue, in line with the 2019 amendment to the Act, the Court held that while exercising jurisdiction under Section 11 as the judicial forum, it may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time barred and dead, or there is no subsisting dispute is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon the arbitral tribunal's jurisdiction. In the present case, Nortel's claims were ex facie time

barred by over 5.5 years since it failed to take any action to extend the period of limitation after the rejection of its claim by BSNL. There must be a clear notice invoking arbitration setting out the "particular dispute" (including claims / amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

P Mohanraj and others v. M/s Shah Brothers Ispat Ltd

01 March 2021| LL 2021 SC 120 |Supreme Court of India

Principle: The expression *"the institution of suits or continuation of pending suits"* section 14 of the Insolvency and Bankruptcy Code 2016 cannot be read disjunctively and includes the institution of arbitral proceedings. The term *"proceedings"* in the same, include "*any judgment, decree or order"* and "*any court of law, tribunal, arbitration panel or other authority"*.

Facts: In the initial case, Shah Brothers Ispat Private Ltd (SBIPL), the supplier of steel products, had filed a criminal complaint under Section 138 of the Negotiable Instruments Act, 1881, before a trial court against directors of Diamond Engineering Chennai Ltd (corporate debtor) after 51 cheques were dishonoured due to "insufficient funds." In another plea by SBIPL, a corporate insolvency resolution process under the IBC had been initiated against Chennai in the National Company Law Tribunal (NCLT). Later, the NCLT approved the resolution plan submitted by the promoters as a result of which the previous moratorium order ceased to have effect. While the NCLT held no further complaints can be filed during the moratorium period, NCLAT ruled that Section 138 is a penal provision, which empowers the trial court to pass order of imprisonment or fine. Thus, parallel criminal proceedings under the Negotiable Instruments Act (NI Act) can continue even as the resolution process is on. The directors of Diamond Engineering then moved to the Supreme Court.

Judgment: The Supreme Court held that criminal proceedings cannot be initiated against a corporate debtor under the cheque bounce law if the NCLT has already passed an order of moratorium under the Insolvency and Bankruptcy Code. However, it said that such proceedings can continue against erstwhile directors/persons in charge of and responsible for the conduct of the business of the corporate debtor. The SC said that moratorium under Section 14 of IBC also includes criminal proceedings for cheque bounce cases under Section 138 of the Negotiable Instruments Act, thus parallel proceedings against a corporate debtor cannot be allowed.

While discussing the institution of "*proceedings"* under the section 138 of the NI Act, the SC declared that it shall be covered under the relief of the moratorium offered by S 14(1) (a) of the IBC. It will be noticed that the expression "or" occurs twice in the first part of Section 14(1)(a) – first, between the expressions "institution of suits" and "continuation of pending suits" and second, between the expressions "continuation of pending suits" and "proceedings against the corporate debtor". This is a wide provision and includes the award by an arbitration panel as well. Thus, this institution includes an arbitration panel and proceedings include any judgment, decree or order by an arbitration panel. If a statute is constructed to be used in a wide sense, the *ejusdem*

generis and *noscitur a sociis* cannot be used to interpret it in plain meaning.

The SC further held that, object of the moratorium provided under section 14 of the IBC is to ensure that there is no depletion of a corporate debtor's assets during the insolvency resolution process so that it can be kept running as a going concern during this time, thus maximising value for all stakeholders.

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

8 March 2021 Civil Appeal No. 825 Of 2021 (Sc)

Principle: A deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same. Further, a dichotomy exists in so far as cases decided under Section 8, where a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 is not appealable. Consequently, the Parliament needs to have a re-look at Sections 8 and 11 are brought on par qua appealability.

Facts: Pravin Electricals was awarded a contract of strengthening, improvement and augmentation of distribution systems capacities in Bihar. Galaxy Infra was in the business of providing consultancy services and alleged that it was entitled to a commission for facilitating the aforementioned contract. A dispute arose between the parties with respect to payment of consultancy charges vis a-vis an alleged agreement between the two. The arbitration clause was invoked but the very existence of the arbitration agreement was questioned. The matter went to the High Court for appointment of an arbitrator pursuant to Section 11(6) of the Arbitration and Conciliation Act. The High Court found that an arbitration agreement does exist between the parties and referred the matter to arbitration. An appeal was filed against this decision.

Judgement: The existence and validity of an arbitration agreement are intertwined, and an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement. In this case, the Court could not find sufficient evidence to conclude that a concluded contract containing an arbitration clause prima facie exists between the parties. The Court further noted that the issue of existence of an arbitration agreement would involve the examination of documentary evidence and witness testimony. Since the proceedings under Section 11 of the Act are summary in nature, questions on the existence of an arbitration agreement cannot be examined solely from a factual perspective. A deeper consideration concerning the existence of an arbitration agreement is to be determined as a preliminary issue by the arbitrator. Consequently, the Supreme Court set aside the impugned High Court judgment in finding a conclusive arbitration agreement between the parties. However, it upheld the ultimate order appointing a Sole Arbitrator. The Arbitrator was directed to first determine as a preliminary issue whether an arbitration agreement exists between the parties, and go on to decide the merits of the case only if it is first found that such an agreement exists. Separately, the Court also observed that Section 37 of the Act exhaustively enlists orders against which an

appeal can be preferred by parties under the Act. A party can prefer an appeal under Section 37, inter alia, against an order of the court refusing to refer the parties to arbitration under Section 8. However, parties cannot prefer an appeal under Section 37 against an order of the court under Section 11.

ICC Arbitration Rules 2021 Come Into Force

The amended ICC Arbitration Rules (**"Rules"**) 2021 came into force on 1st January 2021 which shall be applicable to all arbitrations initiated from this date onwards. In line with the spirit of previous amendments to the Rules, no radical developments have been made. However, some significant changes have been made to the joinder and consolidation provisions along with other minor changes in a bid to increase efficiency, transparency and due process in proceedings. Under the 2017 Rules, it was necessary to have unanimous consent of all the existing parties including the additional party, to join the additional party to the proceedings. However, under the 2021 Rules, Article 7(5) has been introduced which accords the arbitral tribunal with the discretion to grant a request for joinder after the confirmation or appointment of any arbitrator, even without such unanimous consent, taking into account all the relevant circumstances such as whether the tribunal prima facie has jurisdiction over the additional party, the timing of the Request, possible conflicts of interest and the impact of the joinder on the arbitral procedure. This discretion however, is contingent on the additional party accepting the constitution of the tribunal and agreeing to the Terms of Reference.

Further, the 2017 Rules were ambiguous on whether consolidation was possible only when all the claims arose out of a single arbitration agreement stemming from a single contract or, also permitted when claims arose out of multiple contracts with identical arbitration clauses. The 2021 Rules have clarified this position by permitting consolidation of claims arising out of the same arbitration agreement(s) as well as claims made under different arbitration agreements if the ICC court finds the arbitration agreement(s) to be compatible between the same parties, in connection with the same legal relationships. The automatic threshold for expedited procedure and emergency arbitrations has also been increased from US$ 2 million to US$ 3 million.

Other changes include a revision of Article 26(1) which grants the tribunal the discretion to choose the appropriate mode of communication, inter alia as physical or virtual after consulting the parties and considering all the relevant circumstances. Article 3(1) has also been amended which provides that all the relevant documents "shall be sent" to all parties, all arbitrators, and the Secretariat, and that the Secretariat shall be copied on communication from the tribunal. This marks a shift to electronic communication away from bulky paper filings. Additionally, the 2021 Rules have introduced Article 11 (General Provisions) regarding the independence, impartiality and conflicts of interests of the Arbitral Tribunal. Among other things, this provision clarifies the issue of disclosure of third party funding under Article 11(7). Limits to changes in Party Representation have also effectively been introduces under Article 17 in a bid to prevent the derailment of proceedings by manufacturing conflicts of interest. Amended Article 12(9) empowers the ICC Court with a 'fall-back

discretion' to deviate from any agreement by the parties on the method of constitution of the arbitral tribunal, and appoint the entire tribunal "in exceptional circumstances".

The Other changes include the ability to form an "additional award" under Article 36, clarity on the applicable time limits for submission of documents pursuant to Article 5(1), a confirmation under amended Article 13(6) that no arbitrator shall have the same nationality as any party to an arbitration that arises under a treaty (unless agreed otherwise), and disapplication of the Emergency Arbitrator Provisions under Article 29.6(c) for disputes arising from a treaty and a clarification under Article 43 that any claims arising out of or in connection with the ICC Court's administration of an arbitration shall be governed by French law and resolved by the Tribunal Judiciaire de Paris.

Arbitration and Conciliation (Amendment) Act, 2021 Comes Into Force

The Arbitration and Conciliation (Amendment) Act, 2021 ("**Act**") received Presidential assent on 11th March 2021. The notification follows the Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated in November 2020. The Act has amended Section 34 by adding a proviso empowering the Courts to grant an unconditional stay on arbitral awards pending disposal of the challenge under section 34 to the award, if they are prima facie satisfied "(a) the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced or affected by fraud or corruption". Moreover, the proviso has a retrospective application and is deemed to be in effect from 23rd October 2015, to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Further, the 2021 Act has substituted Section 43J and deleted the Eighth Schedule of the primary Act, which listed an exhaustive set of qualifications that an arbitrator needed to possess. Section 43J provides that, "The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations." The aforementioned regulations direct to Section 2(1)(j) of the Act and refer to the regulations made by the Arbitration Council of India.

FDPPI to Set up a Data Disputes Mediation and Arbitration Centre

The Foundation of Data Protection Professionals in India (FDPPI) are in the process of setting up a Data Disputes Mediation and Arbitration Center (DDMAC). The development is significant due to the fact that the upcoming Personal Data Protection Act (PDPA) shall require the Data Fiduciaries to build up a grievance redressal mechanism. The FDPPI through the DDMAC is seeking to provide that support. Initially only requests for mediation will be accepted by the FDPPI. Eventually, they plan to provide arbitration services too, as per the dispute redressal mechanisms under the PDPA and/or the Information Technology Act, 2000. The DDMAC will be striving to settle disputes between Data Principals and Data Fiduciaries or Consent Managers or Data Processors or Data Processing Sub-contractors.

The DDMAC will be an Online Dispute

Resolution (ODR) platform hosted over odrglobal.in. It will be following the Arbitration and Conciliation Act, 1996 and the seat of arbitration will be India. Experts in Data Protection Law will be providing their services as both counsel and arbitrator for the Center. FDPPI is planning to allow only their registered supporting members to provide such services. However, all such members will be required to undergo a mandatory program under the Cyber Law College on *Certification in ODR under Indian Arbitration Act.*