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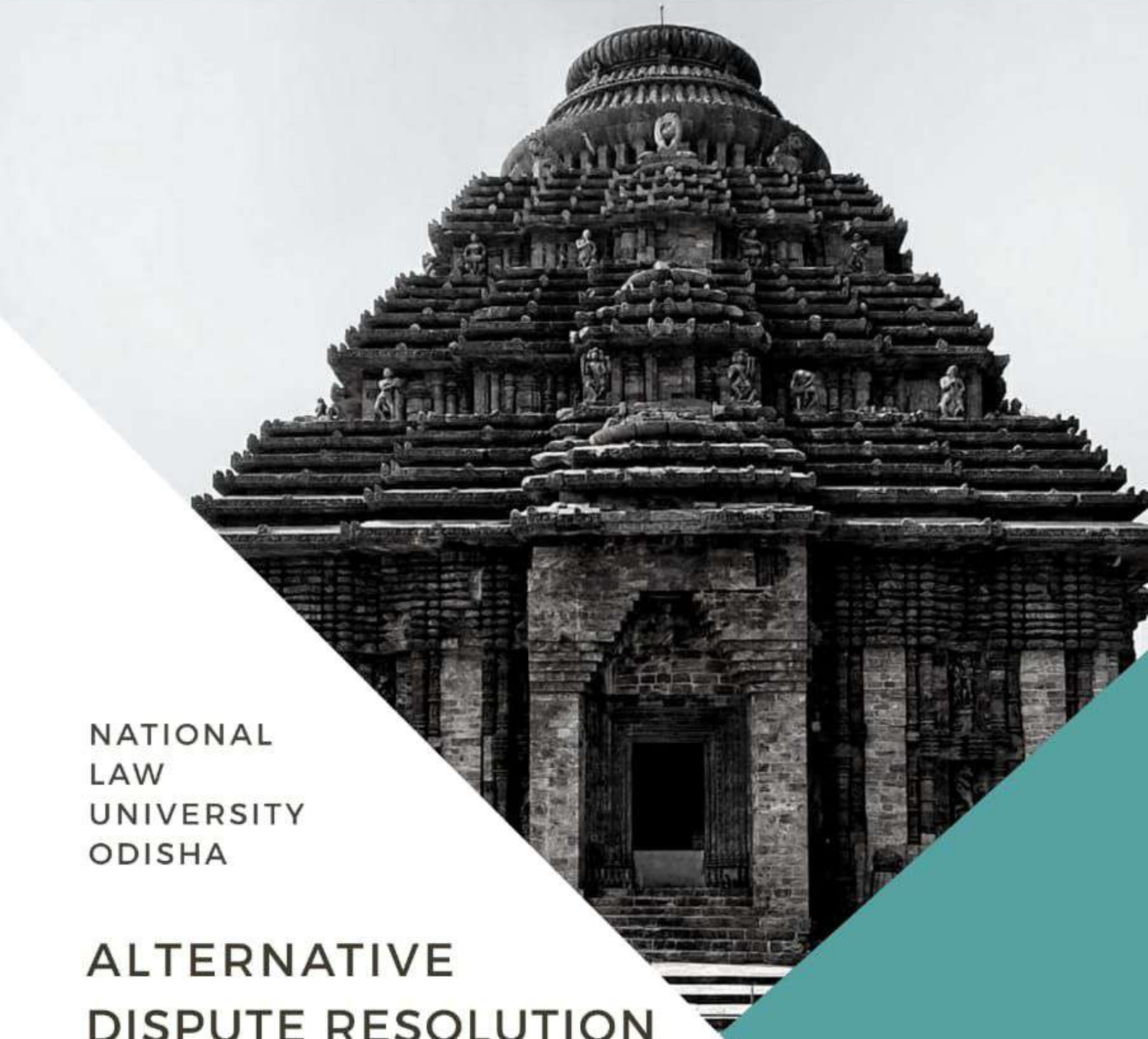

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ALTERNATIVE DISPUTE RESOLUTION

E-NEWSLETTER

VOLUME II

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THE PUBLIC POLICY CONUNDRUM

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To borrow the words of Burrough J. "*public policy is a very unruly horse, and when you get astride, you never know where it will carry you*"[1]. Almost two centuries later, this axiom still holds true as the 'public policy' defence remains the biggest impediment to enforcement of foreign awards in India.

This article examines the interpretation of 'public policy' in two recent decisions of the Supreme Court of India, *Vijay Karia & Ors. v. Prysmian Cavi e Sistemi S.r.l.*[2] (**Prysmian Judgment**) and *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*[3] (**Alimenta Judgment**). While the Supreme Court upheld the foreign award in the Prysmian Judgment, it declined enforcement in the Alimenta Judgment. In each case, although the Supreme Court accepted the position that the scope for curial intervention is narrow and followed the principles laid down in *Renusagar Power Co. Ltd. v. General Electric Co.*[4] (**Renusagar**) the results were diametrically opposite.

In the Prysmian Judgment, a three-judge bench of the Supreme Court, after tracing the development of the law on enforcement, held that the grounds for refusing enforcement of a foreign award under Section 48 of the Arbitration and Conciliation Act, 1996[5] (**1996 Act**) are "*watertight*"[6] and that "*in the guise of public policy of the country involved, foreign awards cannot be*

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[1] *Richardson v Mellish*, [1824] 2 Bing 229, pg. 252.

[2] 2020 SCC OnLine SC 177.

[3] Judgment dated 22 April 2020 passed in Civil Appeal No. 667 of 2012.

[4] 1994 Supp. (1) SCC 644.

[5] Section 48. Conditions for enforcement of foreign awards.—(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

…

(2) Enforcement of an arbitral award may also be refused if the court finds that—(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) the enforcement of the award would be contrary to the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or(ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.].

[6] Prysmian Judgment, Supra Note 2, pr. 46.

set aside by second guessing the arbitrator's interpretation of the agreement of the parties"[7].

The Supreme Court's analysis began with the celebrated Renusagar decision which was the first judgments to set out the scope and ambit of public policy challenge to enforcement of international awards, albeit in the context of Section 7 of the Foreign Awards Act, 1961[8] (**1961 Act**). The Supreme Court noted with approval that as laid down in Renusagar an award would only fall foul of public policy if its enforcement would be contrary to the fundamental policy of Indian law, the interests of India or justice and morality. Further, none of the grounds for resisting enforcement permitted an examination of the merits of the dispute. The Supreme Court also, held that the fundamental policy of Indian law does not contemplate merely a breach of a statute but a legal principle or legislation which can not be compromised and forms part of the "*core-values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts.*"[9] The Supreme Court next adverted to the decision in *Shri Lal Mahal Ltd. v. Progetto Grano SpA*[10] (**Lal Mahal**) which confirmed that the principles laid down in Renusagar under the 1961 Act would apply equally to Section 48 of the 1996 Act[11] and that it is impermissible for the court to take a "*second look*" at the foreign award. In fact, in *Lal Mahal* the Supreme Court went further to clarify that taking into account inadmissible evidence or ignoring or rejecting binding evidence were procedural defects which would not render a foreign award unenforceable[12].

The Supreme Court, in the Prysmian Judgement, noted that the Renusagar and Lal Mahal principles were given legislative sanction by the Arbitration and Conciliation (Amendment) Act, 2015, and stressed that the test as to whether there is a contravention of fundamental policy of Indian law did not permit a review of merits.[13] To that intent, grounds such as perversity and that findings not based on evidence or ignoring vital evidence would only be available to challenge domestic awards as laid down in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[14].

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[7] Prysmian Judgment, Supra Note 2, pr. 45.

[8] Section 7. Conditions for enforcement of foreign awards.
(1) A foreign award may not be enforced under this Act-
…
(b) if the court dealing with the case is satisfied that-
(i) the subject- matter of the difference is not cap- able of settlement by arbitration under the law of India; or
(ii) the enforcement of the award will be contrary to public policy.

[9] Prysmian Judgment, Supra Note 2, pr. 83.

[10] (2014) 2 SCC 433.

[11] Lal Mahal, Supra Note 11, prs. 28 and 29.

[12] Lal Mahal, Supra Note 11, pr. 45.

[13] Prysmian Judgment, Supra Note 2, pr. 37; see also, Section 48 of the Arbitration and Conciliation Act, 1996 (as amended in 2015).

[14] 2019 SCC Online SC 677, pr. 42.

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The Supreme Court drew support by reference to the internationally accepted position that the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**Convention**) (on which both Section 7 of the 1961 Act and Section 48 of the 1996 Act were modelled) has an inherent pro-enforcement bias[15]. The scope for review of an award under the Convention was therefore "*grudgingly narrow*"[16]. The party resisting enforcement would therefore have to restrict its defences to the neat pigeon-holes under Section 48.

Based on these principles the Supreme Court very carefully considered the objections to enforcement raised by the Appellants (but without reviewing the merits) and rejected each of them as beyond the scope of Section 48 of the 1996 Act. The Supreme Court also found that the Appellants were "*flinging mud on a foreign award*" by attacking the fairness of the conclusions arrived at in the award and that such objections would venture into the merits of the matter. Not only did the Supreme Court uphold the foreign award, but also imposed costs of Rs.50 lacs on the Appellants for engaging in "*speculative litigation*"[17].

In stark contrast a three-judge bench of the Supreme Court in the Alimenta Judgement refused enforcement of a foreign award under Section 7 of the 1961 Act). While Renusagar and Lal Mahal were noted, the bench did not deal with the applicability of the principles in relation to the award. Instead, the Supreme Court merely observed that applying the test laid down in Renusagar, enforcement of the foreign award would be against the fundamental policy of Indian law and the basic concept of justice. The question that begs to be answered, however, is how the Supreme Court arrived at its decision that the foreign award was contrary to public policy. It is in this analysis that the Alimenta Judgment departs from the law laid down in the Prysmian Judgment or even in Renusagar.

The most striking inconsistency is that while the Alimenta Judgment purports to rely on Renusagar, the process employed by the Supreme Court is, in fact, at odds with Renusagar. The first such instance is that the Supreme Court, in Renusagar, was at pains to stress that the court could not enter into review of merits. While it may be necessary for the court to make references to the facts and evidence that were before the arbitrator, a sub-cutaneous examination of the merits, as was done in the Alimenta Judgment, is not permissible[18]. The Alimenta Judgment

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[15] *Parsons & Whittemore Overseas Co. v. Societe Generale De LÍndustrie Du Papier,* 508 F.2d 969 (1974); See also Prysmian Judgment, Supra Note 2, prs. 40 and 45.

[16] *Certain Underwriters at Lloyd's London v. BCS Ins. Co.*, 239 F.Supp.2d 812 (2003); See also Prysmian Judgment, Supra Note 2, prs. 42 and 45.

[17] Prysmian Judgment, Supra Note 2, pr. 107.

[18] Prysmian Cavi e Sistemi S.r.l. v. Vijay Karia & Ors, 2019 SCC OnLine Bom 19, pr. 72.

examined the underlying contract in detail and arrived at a conclusion different from the one in the award. The second instance is that while the Supreme Court has noted that in terms of Renusagar a mere violation of a statute would not constitute fundamental policy of Indian law, but something more than a breach of a statute was required, at paragraph 80 of the Alimenta Judgment it has concluded that since enforcement of the award would have violated the law, it was contrary to public policy. There is not even an attempt to explain how the law in question was fundamental policy. This leads to the inescapable conclusion that though the Alimenta Judgment upholds settled principles of law laid down in Renusagar, the application of those principles is illusory.

Even when viewed from a factual standpoint, the Alimenta Judgment is not free from speculation. While it has been noted that the construction, validity and performance of the contract in question was to be governed by English law, the Supreme Court nevertheless examined it with reference to the Indian Contract Act, 1872. The Supreme Court arrived at the conclusion that the contract was void under Indian law since the Export Control Order required permission from the Government to carry forward the unsupplied quantity of the previous year to the next year, which permission had been rejected. According to the Supreme Court, therefore, the foreign award was (at the highest) contrary to Indian law while the contract was governed by English law. The analysis of the Supreme Court, apart from foraying into the merits, appears to be manifestly incorrect.

It is also curious that the Alimenta Judgment does not consider or even make a passing reference to the Prysmian Judgment which was pronounced merely two months prior, especially since the defences raised in both the cases were substantially similar. Whether the conclusion in the Alimenta Judgment would have been different had the Prysmian Judgment been considered will remain shrouded in mystery. In any view of the matter, the Alimenta Judgment being under the 1961 Act, the Prysmian Judgment would continue to be a precedent under Section 48 of the 1996 Act.

In conclusion, it can only be hoped that the Alimenta Judgment will be confined to its facts and the ruling will not be pemitted to be used as a backdoor to resist enforcement of foreign awards on merits or in any manner dilute the efforts of the judiciary in developing India as a pro-arbitration jurisdiction from Renusagar in 1984 to the Prysmian Judgment in 2020. To that intent, Lord Denning's epigram comes to mind, *"[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side*

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of justice"[19]

SEAT AND VENUE – THE LAW, THE PROBLEM, A SOLUTION

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I. Introduction

Every contract containing an arbitration agreement refers to terms such as 'venue', 'seat' or 'place' of arbitration. However, the question (and more often than not, confusion) that generally arises is whether these terms are merely loose nomenclatures which can be used interchangeably or whether each of them has a different connotation and its own significance on the arbitration contract. This question becomes more pertinent in the Indian context since the words 'venue' and 'seat' are absent from the Arbitration and Conciliation Act, 199620 ("Arbitration Act"). Even the recent amendments to the Arbitration Act have not addressed this long-standing conundrum and have, in a sense, missed an opportunity to once and for all put to rest this contentious issue.

II. Reference in the Arbitration Act

Although the Arbitration Act does not specifically use the terms 'seat' and 'venue', a reference to these terms can be found in Section 20 of the Arbitration Act, which deals with the concept of 'Place of arbitration'.21 It is clear from a reading of this provision that the 'place' of arbitration is of critical significance, at the very least for the purpose of conduct of arbitral proceedings. Section 20 has been categorised into three sub-sections, each of which merely uses the term 'place'.0

It is only after a careful consideration of Section 20 with the help of several judicial precedents that we derive that the term 'place' used in each of these sub-sections connotes a different meaning. The Supreme Court of India has fortunately drawn a much-needed dichotomy between these subsections by noting that

[19] Enderby Town Football Club Ltd. v. The Football Association Ltd., [1971] 1 All ER 215, pg. 219.

[20] The Arbitration and Conciliation Act, 1996.

[21] Place of arbitration: (1) The parties are free to agree on the place of arbitration. (2) Failing any agreement referred to in sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. (3) Notwithstanding sub-section (1) or sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property. The Arbitration and Conciliation Act, 1996, § 20.

'place' as referred to in Section 20 (1) and (2) infer the commonly known concept of 'seat' while sub-section (3) deals with the concept of 'venue'.[22]

III. Seat of Arbitration

It is settled law that the terms 'seat' and 'place' of arbitration are used interchangeably under Indian law.[23] The juridical seat (or place) of arbitration is a vital aspect of any arbitration proceeding. It is the seat of arbitration which determines the applicable law governing the arbitration proceedings and procedure as well as the jurisdiction of courts exercising judicial review over the arbitration award.[24]

In other words, the seat (as agreed between the parties) decides which court will have supervisory power over the arbitration proceedings. Under Indian law, the seat also becomes crucial since as per Section 2(2) of the Arbitration Act (subject to the proviso set out thereunder),[25] it is the seat, or "place of arbitration", which determines the applicability of the provisions of Part I of the Arbitration Act to arbitration proceedings. This is more so since the Supreme Court of India has repeatedly held that once the seat is determined only the courts at the seat would have exclusive jurisdiction to oversee the arbitral proceedings.[26]

Further, when parties choose a seat of arbitration in a particular country, that choice brings with it and attracts the law of that country.[27] More often than not, the seat of arbitration also carries with it the choice of that country's arbitration/curial law (procedural law). Still, it has been recognised that the mere expression "place of arbitration" in an arbitration clause cannot always form the basis of identifying the intention of the parties to construe 'place' to mean 'seat' of arbitration.[28] It has also been observed that the intention of the parties as to the 'seat' should be determined in a holistic manner after due consideration of other clauses in the agreement as well as the conduct of parties.

IV. Venue of Arbitration

Although 'seat' and 'place' of arbitration can be used interchangeably, it is a settled principle

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[22] Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd., (2017) 7 SCC 678.

[23] Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

[24] Mankastu Impex Private Limited v. Airvisual Limited, Arbitration Petition No. 32 of 2018, Supreme Court of India (05 March 2020).

[25] [PROVIDED that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.] The Arbitration and Conciliation Act, 1996, § 2(2).

[26] Enercon (India) Limited and others v. Enercon GmBH and Anr., (2014) 5 SCC 1; Indus Mobile Distribution (P) Ltd. v. Datawind Innovations (P) Ltd. and Ors., (2017) 7 SCC 678; BGS SGS Soma JV v. NHPC Ltd., 2019 SCC Online SC 1585.

[27] Eitzen Bulk A/S v. Ashapura Minechem Ltd. and Anr., (2016) 11 SCC 508.

[28] *Supra* note 5.

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that the 'seat' and 'venue' of arbitration cannot be used interchangeably.[29] Simply put, venue is the geographical location where the arbitration proceedings are physically held. The venue is more of a logistical consideration dehors any bearing on the process of arbitration.

The venue of arbitration is flexible and is entirely subject to the convenience of the parties (and the arbitral tribunal and lawyers) as is also understood from Section 20(3) of the Arbitration Act. It typically gains relevance during international commercial arbitration, where parties, their witnesses, counsel, and arbitrators from different countries need to come together to resolve the disputes in arbitration. In this day and age of rapid technological advances, arbitrators often record witness testimony by videoconferencing rather than holding a physical hearing. keeping in mind both the interests of parties and also to keep costs down. While the venue of arbitration may change through the course of arbitral proceedings, this does not change the seat of arbitration. Therefore, the venue of an arbitration cannot be equated to the seat of arbitration. Contrary to a venue, the seat (or place) of the arbitration will always remain constant.

V. Confusion over Seat and Venue

One of the primary cases which propounded the difference between "seat" and "venue" is 'Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.'[30] which established the significance of a seat of arbitration in the Indian legal context, while deciding whether Indian Courts should intervene and grant reliefs in foreign seated arbitrations. Despite this landmark decision, there continues to be a dilemma over seat or venue which often stems from an inept arbitration clause which does not specify, amongst other things, the seat of arbitration.

The absence of a seat in an arbitration clause runs the risk of differences arising between the parties over what was originally intended and agreed between them. Such ambiguity may subsequently provide ammunition to a party to file frivolous applications before courts not at the seat of arbitration in order to delay or derail the arbitral proceedings. Resultantly, courts have frequently encountered imprecise arbitration clauses which required judicial interpretation to establish the seat of arbitration.

For instance, to overcome the anomaly in arbitration clauses which do not expressly set out the seat of arbitration but merely mention 'venue' or 'place', the Supreme Court in 'Union of India v. Hardy Exploration and Production (India) INC'[31] held that 'venue' or 'place'

[29] *Supra* note 4.
[30] (2012) 9 SCC 552.
[31] (2018) 7 SCC 374.

cannot ipso facto assume the status of 'seat' and can be equated with 'seat' only if – (i) "no other condition is postulated"; and (ii) "if a condition precedent is attached to the term 'place', the said condition has to be satisfied" so that 'place' or 'venue' can be equivalent to 'seat'. Likewise, in 'Brahmani River Pellets Limited v. Kamachi Industries Limited.', the parties had simpliciter referred to the venue of arbitration without specifying the seat of arbitration, which led the Supreme Court to confer on the venue the stature of the seat on the basis that the parties intended to exclude all other courts.[32]

A similar incongruity arose in the case of 'BGS SGS Soma JV v. NHPC Ltd.', when the Supreme Court had to eventually determine the seat chosen by the parties in a scenario where the parties had merely stated in their arbitration clause that the "arbitration proceedings will be held in …".[33] More recently, the Supreme Court of India was once again embroiled in resolving the complexities of an equivocal arbitration clause for the purpose of determining the seat. In this particular case, the clause did not expressly stipulate the seat of arbitration but merely denoted the "place of arbitration".[34]

VI. Recommendations to circumvent any possible ambiguity

Arbitration clauses are very commonly referred to as "midnight clauses".[35] This is largely since these clauses are typically drafted after a long day of negotiations, with relatively more attention accorded to other apparent deal-breaker clauses, such as for indemnities. Possibly, when drafting the contract, the parties are more focused on a communion instead of contemplating a possible fall-out. Yet, like any other clause in the contract, an arbitration clause is an agreement between the parties to resolve the disputes in a manner agreed between them. The legal consequence of an arbitration clause is equally important, for when the relation between the parties' sours it is the arbitration clause which determines the modalities and helms the dispute resolution process.

Hence, at the very outset, it is vital for parties to have a robust and all-inclusive arbitration clause which leaves no scope for ambiguity or dispute as to the intention of the parties when drafting the arbitration clause. This facet requires the parties to agree and specify, not only the curial law to be applied to an arbitration proceeding, the number of arbitrators, et al but also expressly stipulate in no uncertain terms both the "seat" and "venue" of arbitration. Considering that venue of arbitration is entirely subject to the geographical convenience of the parties, it could be argued that specifying the same in a

[32] (2019) SCC Online SC 929.
[33] 2019 SCC Online SC 1585.
[34] *Supra* note 5.
[35] Sapna Jhangiani, Conflicts of Law and International Commercial Arbitration – Can Conflict Be Avoided?, II(1), BCDR International Arbitration Review, 99 (2015).

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contract may perhaps be entirely trivial when drafting the arbitration clause.

However, acknowledging the prevailing confusion that draftsmen face, it is recommended that both "seat" and "venue" (albeit the venue being subject to any further change) be expressly cited in the arbitration clause, after having understood the meaning, significance and implication of each of these terms. This would not only assist the courts in appreciating the parties' true intention but would also save the parties several rounds of superfluous litigation to determine the inherent basic concepts applicable to their contract. After all, it has always been 'seat and venue' and not 'seat v/s venue'.

AWARDING THIRD PARTY FUNDING COSTS: A DILEMMA IN INTERNATIONAL ARBITRATION LAW

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I. Introduction

The exponential growth in the size and complexities of International arbitration has led to a substantial rise in costs surrounding the entire process. A recent survey has revealed that it has become a lengthy and expensive procedure, often even exceeding the costs involved in traditional court litigation.[36] At this juncture, emerged a seemingly new concept of Third Party Funding (hereinafter referred to as **TPF**) wherein a party not involved in arbitration agrees to provide funds to a penurious party to the arbitration in exchange for an agreed return.[37] However, this concept is plagued with procedural ambiguities bringing about a host of legal issues. One of such issues is the lack of adequate legal framework and consistency in the approach adopted by the tribunal towards awarding of TPF costs.[38]

[36] Paul Friedland, *International Arbitration Survey: The Evolution of International Arbitration* White & Case LLP. https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf (Accessed on: April 12 2020).

[37] Victoria Sahani, Reshaping Third Party Funding, 48 WASHINGTON AND LEE UNIVERSITY OF LAW 110 (2017).

[38] Hardwicke, *Third Party Funding: access to justice or access to profits*, Lexology

This article seeks to examine the liability of the unsuccessful party in arbitration proceedings to pay the TPF costs. It adopts a three-pronged analytical approach to the law surrounding TPF. The first part discusses the jurisdiction of the tribunal to order TPF costs. The second part deals with the circumstances surrounding the allocation of TPF costs. The discussion is then concluded with an analysis of the potential outcomes of passing such an award.

II. Jurisdiction of the tribunal

The contention of the jurisdiction of the court upon the third party funder (Hereinafter referred to as **the funder**) encompasses various aspects, including the law of the seat of arbitration, the law governing the underlying agreement, and relevant international treaties. The Tribunal exercises wide discretion when passing a cost award depending upon the cost-allocation approach adopted.[39] The costs follow event approach is prevalent in several jurisdictions. This stipulates that the losing party shall pay the imposed costs to the successful party. This principle has been broadly applied to include those funding arrangements will not act as a deterrent when recovering costs. [40]

A majority of the prevalent laws state that the Tribunal may pass award of costs for the "parties" to the arbitration.[41] This principle, therefore, brings into question the jurisdiction of the tribunal in issuing an order of costs. Since the award is observed to be binding only upon the parties, it infers that the tribunal does not possess the jurisdiction to include the TPF arrangement when awarding costs.[42] However, there appears to be a growing number of exceptions to this rule, the same shall be discussed briefly.

Firstly, certain common law principles may be applied with regards to the apportioning of costs to the funder. Take for instance; the *principle of equity*, in the past, the award has taken into consideration TPF arrangement when it was found to be equitable to do so. In other words, if the funded party was able to establish caution and lack of foreseeability (i.e.) there was no other option but to approach a funder, the costs for the same were included within the arbitral award.[43] Although, it is interesting to

https://www.lexology.com/library/detail.aspx?g=615b011e-2041-4875-a315-9a1aa619b908 (Accessed on: April 07 2020).

[39] United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules as revised in 2010 art.42 (New York: United Nations, 2011), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. (Accessed on: April 07 2020).

[40] RSM Production Corporation v Grenada ICSID. ARB/05/14 (2011).

[41] English Arbitration Act 1996. Section.61(1); Indian Arbitration and Conciliation Act 1996. Section.31A.

[42] ICCA- QMUL TPF TASK FORCE, ICCA-QMUL TASK FORCE ON TPF IN INTERNATIONAL ARBITRATION SUBCOMMITTEE ON SECURITY FOR COSTS AND COSTS, Draft Report (2015).

[43] Essar Oilfields Services Limited v. Norscot Rig Management PVT Limited EWHC 2361 (2016).

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note that when the funded claim was found to be spurious or opportunistic the courts have even ordered costs against the funder.[44]

The *principle of interest* may also be relevant. In a case where the award has an indirect effect upon the funder other than the loss of its funding, it was equitable for the arbitral award to be drafted so as to have a limited effect towards non-parties.[45] Secondly, a few International arbitration rules have also explored the intricacies of TPF. They stipulate that the tribunal when apportioning costs of arbitration shall have the authority to take into consideration TPF arrangements.[46] Thirdly, The National laws of certain jurisdictions may also be interpreted to include persons claiming through or under them within the ambit of the term 'party'[47] which could be interpreted to include the funders as well[48].

It is to be noted that the mere fact of TPF is not a conclusive consideration when determining costs neither against nor in favour of the party. The jurisdiction upon the funder varies on a fact to fact basis depending upon the nature of the claim, the extent of the economic interest and it becomes specifically relevant in contracts governed by ex aequo et bono.[49] Unless the arbitral practices or international principles are drafted to expressly include funders in the apportionment of cost orders, the same will be governed only by the discretion of the tribunal in interpreting the relevant legal principles.

III. Allotment of Costs

An analysis of the allotment of costs may be made in a three-fold manner. Firstly, the legal provisions under which such costs may be awarded, secondly, the apportionment of such costs, and thirdly, the circumstances that would justify such an award.

While the award of costs is uncertain and unpredictable, it does not completely escape the rule of law.[50] Most legislations do not have specific provisions delineating the categories under which costs may be awarded. The English Arbitration Act is an exception in this regard, which defines the "costs of the arbitration" to include "the legal and other costs of the parties".[51]

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[44] Arkin v. Borchard Lines Ltd. EWCA Civ.655 (2005).

[45] Natalya Bocharova, THE Scope Of THE Arbitral Award Binding Effect (Interests Of third parties in International Arbitration), RUSSIAN LAW JOURNAL, 117-120 (2017).

[46] SIAC INVESTMENT ARBITRATION RULES 2017, Rule 35.

[47] English Arbitration Act 1996. (supra 6).

[48] Vyapak Desai, Third-Party Funding: Liability of Third-Party Funders to Pay Costs in Arbitration; Entitlement of Successful Claimants to Costs of Third-Party Funding IPBA JOURNAL, 132 (2017).

[49] Adeyinka Aderemi, *Ex aequo et bono arbitration*, Mondaq https://www.mondaq.com/Nigeria/International-Law/495492/Ex-Aequo-Et-Bono-Arbitration-To-Be-Or-Not-To-Be (Accessed on: April 04 2020).

[50] Nigel Blackaby & Ors, Redfern and Hunter on International Arbitration Student Version 536 (6th ed., Oxford University Press, 2015).

[51] English Arbitration Act 1996, Section 59.

Institutional rules are often vague – both ICC[52] and SIAC[53] Rules provide for the "costs of the arbitration" to include legal and other costs incurred by the parties. The DIS rules provide for the payment of "reasonable costs" incurred in connection with the arbitration.[54] In most cases, TPF is treated as a component of 'other costs'.

In the *Essar*[55] judgement, an arbitral award (governed under ICC rules) for TPF costs including premium, was upheld by the Commercial Court. The argument that the award must be set aside on the ground of 'serious irregularity' under the English Arbitration Act[56] was held to be inapplicable, since it was merely an erroneous exercise of power, and not an exercise of power unavailable to the tribunal.[57]

If it is assumed that the successful party can be awarded costs for TPF, it becomes pertinent to then delineate that portion of fees that may be compensated for.[58] Most TPF agreements provide for 'premium' or 'success fees' to be paid to the financier in case the funded party wins the matter. In the Essar matter[59], the Court made no distinction between the costs and premium.

Scholars argue that while costs of arbitration actually incurred by the claimant may be reimbursed without much difficulty, payment of premium cannot be justified since it is contingent upon the party succeeding in the matter. Several institutional rules also provide for those costs to be paid which have been '*incurred*'.[60] This suggests that the costs must crystallise prior to the arbitral award. For this reason, it may also be differentiated from a bank loan, where interest has to be paid whether or not the party succeeds.

The ICCA-Queen Mary taskforce also observed that the tribunals should refrain from awarding "funding costs (such as a conditional fee, ATE Premium or litigation funder's return) as they are not procedural costs *incurred* for the purpose of arbitration."[61] The commonality among the costs specified by the taskforce is that they are all premiums of contingent nature, as differentiated from procedural costs already *incurred*.

Lastly, the circumstances under which such awards can be passed may be briefly discussed. The sole arbitrator in the Essar matter

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[52] ICC Arbitration Rules 2017, Article 38.
[53] SIAC Arbitration Rules 2016, Rule 37.
[54] DIS Arbitration Rules 2018, Article 32.
[55] Supra Note 8.
[56] English Arbitration Act 1996, Section 68(2).
[57] Lesotho v. Impregilo 1 AC 221 (2006).
[58] Fry, J., Greenberg, S., Mazza, F., & Moss, B. The Secretariat's guide to ICC arbitration: a practical commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration. (ICC Publications, 2012).
[59] Supra Note 8.
[60] ICC Arbitration Rules 2017, Article 38; DIS Rules 2018, Article 32.
[61] *Supra* Note 7.

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specifically provided for the funding costs to be paid considering the peculiar circumstances of the case. Essar had abruptly discontinued payments, which led to Norscot facing financial issues and consequently being unable to fund its own arbitration expenses. In its judgement, the commercial court also resonated with this reasoning.[62]

Thus, if direct causation is established, it does not seem unreasonable and is in fact, valid in law that the funded party may seek to be put in the same position it would have been had the breach not occurred in the first place.[63] However, scholars are of the opinion that in such a scenario, recovery must be claimed as *substantive damages* and not procedural costs.[64] The ICC-QMUL task force seems to be of the same opinion.[65]

The implications of the treatment of these costs as damages would have two-fold implications – firstly, the damages would require to have a reasonable standing in law; and secondly, in several commercial transactions, parties often limit such liability. It will not thus be permissible for the tribunal to award damages as it deems fit.

IV. **Challenges**

Repercussions of this position cannot be viewed in isolation. Awarding costs for TPF, including premium shifts the risk completely from the funded to the losing party. While the foundation of arbitration lies in party consent being the determinative factor, it cannot be extended to mean consent to the private business of one of the parties. Considering that financiers are commercial creatures[66], this could also result in an exorbitant premium fee becoming the prevailing 'market rate'.

Further, several of the Institutional arbitration rules and national legislations lack a specific reference to TPF, let alone the recoverability of costs for the same. Clarity is required with regard to the recovery of contingent sums, which could also then apply to other claims such as the ATE premium. There has been substantial progress on this front as far as disclosure of a TPF contract is concerned. At the outset, it may be stated that it is reasonable for the arbitrator(s) and the opposite party to be made aware of the TPF arrangement to avoid conflicts of interest. This expectation is amplified if a party may be asked to pay the TPF costs of the successful party.[67]

Finally, it is worth noting that the parties could also consent to an *ex aequo et bono* arbitration, which could confer substantially broader

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[62] *Supra* Note 8.

[63] Chitty, J., & Beale, H. G. Chitty on contracts. *(33rd Ed.,* Sweet & Maxwell, 2008).

[64] Goeler J. V. Third-party funding in international arbitration and its impact on procedure.(Wolters Kluwer, 2016).

[65] *Supra* Note. 7.

[66] Excalibur Ventures L.L.C. v. Texas Keystone Inc. & Ors EWCA Civ 1444 (2016).

[67] *Supra* Note 7.

powers on the arbitrators than otherwise.

V. Concluding remarks

The article on a whole has been a testimony to the growing trend of TPF in international arbitration. Though the concept presents a vast opportunity for arbitration as a viable mode of alternative dispute resolution, it is impeded by the absence of a comprehensive regulatory structure. There has to be a well-placed study on the uncertain aspects within this concept including the awarding of TPF costs within the award. While it is imperative to keep in mind the consensual nature of arbitration, recent practices call for a wider scope to include the funders within the ambit of the award so as to meet the ends of justice.

MEDIATION – AN EMERGING FRONTIER IN INTERNATIONAL DIPLOMACY

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To settle cases requires adjudication by the courts. To further settle the people along with their cases, requires another hand. It is for this reason today that mediation is omnipresent in human interaction and has grown exponentially in the area of international relations.

Historically, we have seen how individuals, groups, communities and states have adopted various devices and mechanisms to ensure peaceful and orderly coexistence in their midst. Mediation has widely affected various matters - from trying to reconcile interests between trade unions and employers, to readjusting borders and creating ceasefires. It has also been used to facilitate reparations and other constitutional settlements and as a tool of last resort to curb on-going violence during wars and hostilities. Mediation is thus an important instrument in the context of preventive diplomacy. Contrary to other preventive instruments, outcomes of mediation tend to be more tangible leading to a greater mobilisation of political support.

In furtherance of this, the article seeks to explore the following avenues: the dynamics of the functions of mediation along with mediators, the transformation of mediation in international relations, its characteristic role in diplomacy and the propositions for further augmenting mediation as a more coherent form of dispute resolution.

One of the central issues in studying the working of mediation in international relations

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is the variance with respect to the most fundamental elements of this conflict management process. In order to better understand this, Jacob Bercovitch and Scott Gartner give two instances[68]: In 1978 when American President Carter mediated between Egypt and Israel at Camp David for 13 days, despite America's bias towards Israel, he was largely successful in facilitating a peace agreement between Israel and Egypt, which lasted almost 20 years. However, two decades later when President Clinton mediated between Palestine and Israel, his efforts failed to bear any fruit. Clearly the issues, personalities, their relations, and international geopolitical atmosphere at both times varied; notwithstanding the factors and variables that produced a desirable outcome in one and a different outcome in another.

To delve deeper into this phenomenon, it is imperative to note the role, a mediator plays in International conflicts in juxtaposition to that of a mediator in domestic conflicts. In 1975 Touval emphasized that a biased mediator is not a liability, instead a potential advantage. This is because he is able to move the party towards which it is biased to reach a negotiated solution.[69] Therefore, impartiality and neutrality not being a prerequisite here, the mediator does not play a passive role, rather an active third-party managing a conflict, whose specific characteristic directly affects the outcome of the mediation process. Hence, we view mediation as a form of joint decision-making in conflict wherein an outsider controls some aspects of the process, or indeed the outcome but the disputants wield the ultimate decision-making power.[70]

However, a major shortfall of this spectacle can be observed with the recent development of a scuffle between Egypt and Ethiopia, due to the GERD (Great Ethiopian Renaissance Dam) being constructed by Ethiopia much to Egypt's chagrin[71]. In 2018, the US Department of Treasury (DoT) stepped in to mediate this issue on Egypt's request. Nevertheless, the DoT here chose to represent Cairo's interests rather than being an impartial and honest broker, leaving Ethiopia isolated. This should have been a rather predictable outcome considering Trump's administrative policies and alliances in the Middle East. Therefore, this has resulted in Ethiopia refusing to sign the draft agreement thus rendering the entire exercise futile.

Another noteworthy element while looking into

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[68] JACOB BERCOVITCH & SCOTT SIGMUND GARTNER, INTERNATIONAL CONFLICT MEDIATION: NEW APPROACHES AND FINDINGS, 1, 2008.

[69] Vukovic, Sinisa, *International mediation as a distinct form of conflict management*, 25. 10.1108/IJCMA-02-2012-0015, INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT, 2014.

[70] JACOB BERCOVITCH & SCOTT SIGMUND GARTNER, *Supra* note 1, at 5.

[71] Dr Mehari Taddele Maru, *Can Trump resolve the Egypt-Ethiopia Nile dam dispute?*, AL JAZEERA, 26 April, 2020.

International mediation is the concept of 'ripeness', a terminology prominent in alternative dispute settlement literature. William Zartman developed this concept which he described as a point at which the parties reach a 'mutually hurting stalemate'[72]. Although "ripeness" in this sense cannot be fitted into a straight-jacket formula, it must be regarded as a stage where there lies a possibility of a negotiation and an outcome.

While throwing light upon the concept of "ripeness", Hon. Marilyn Warren AC, Chief Justice of the Supreme Court of Victoria presents an interesting perspective: *"Judicial experience tells us that in litigation it is a bit like picking fruit. We need to pick the "mediation peach" when it is ready – too early it will be hard to penetrate the fruit; too late it is over-ripe."* [73]

Placing this statement in the context of international disputes, a pre-mature mediation may prove counterproductive, this is because the parties will not have a comprehensive understanding of their claims along with the evidence necessary, which could have otherwise been attained, had the dispute continued for a little longer. Secondly, where a conflict is in its nascent stage the parties will back their ability to either settle it themselves or prevail in the conflict. However, a substantial delay in mediation may cause the disputant states to resort to coercive means or worse yet, war.

However views differ on whether this concept is in essence practicable. Some scholars suggest that mediation may only succeed if the parties themselves agree to bring an end to the conflict and acquiesce, so as to make a compromise[74]. Whilst some experts support an early intervention before violence takes place, the others prefer a later intervention when both the sides have exhausted their military solutions and other alternatives to the conflict.

Uncertainty about the nature of hostilities in today's world and the unsuitability about the existing tools have commenced the quest for new techniques and strategies.

A new framework within the avenue of conflict management is the stage of post-liberal mediation.[75] This stage encompasses the leanings of capitalism and liberalism of the 20th century and the neoliberal world of the 21st century, comprising a wider range of actors

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[72] INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR, RIPENESS: THE HURTING STALEMATE AND BEYOND, National Academic Press, Chapter 6, 225 (2000).

[73] Marilyn Warren AC, *ADR and a different approach to litigation,* LAW INSTITUTE OF VICTORIA "SERVING UP INSIGHTS" SERIES, 18TH MARCH 2009, RACV CLUB MELBOURNE, (May 2, 2020, 18.37 PM), http://www.austlii.edu.au/au/journals/VicJSchol/2009/2.pdf.

[74] Irena Sargsyan, *International Mediation In Theory and Practice: Lessons of Nagorno–Karabakh*, 5, THE ARMENIAN CENTER FOR NATIONAL AND INTERNATIONAL STUDIES, 2003.

[75] Richmond, Oliver, A GENEALOGY OF MEDIATION IN INTERNATIONAL RELATIONS: FROM 'ANALOGUE' TO 'DIGITAL' FORMS OF GLOBAL JUSTICE OR MANAGED WAR?, COOPERATION AND CONFLICT, 10, (2018).

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from local to global, formal to informal, violent to non-violent[76]. In simpler words, post liberal approaches highlight the accommodation of informal actors, networks, and their entities which are not part of the State, but have become prominent presently and in some instances have also gained diplomatic positions due to prevailing political instability (Taliban in Afghanistan, al-Shabaab in Somalia).

From the perspective of mediators, engaging with such groups requires understanding the group's *modus operandi*, their objectives, interests, and most importantly finding out their internal structures and key political and military leaders. For example, a mediator who has been negotiating with mara leaders (gang leader) in Nicaragua recently recognised that while he might reach local truces with these leaders, he never really knows who is actually making decisions above them.[77] Thus post-liberal mediation involves mediating the tension between different historical epochs, different scales, cultures, and identities, different material circumstances, and different forms of legitimate authority.[78] In furtherance of this, the hierarchies of diplomacy and the chain of command that was claimed in mediation earlier have now become more difficult to sustain.

Another interesting phenomenon of mediation that has been developing since the end of Cold War is the theory of Multiparty Mediation[79]. Since an International system lacks central authority, due to diversity of interests they require more attention in the form of simultaneous interventions by more than one mediator. However, the past examples of multiparty mediation in the former Yugoslavia, Rwanda, and Somalia, *inter alia*, have pointed out the difficulty in managing the complexity arising from the presence of a number of mediators with different interests and priorities.[80] Especially in Rwanda, it was argued that the failure of the peace process in the country was due to the lack of coordination among different third-party efforts rather than the weakness of any single effort.[81]

In addition to this, another genus of mediation is shuttle mediation. It consists of the disputant persons or States in two separate rooms or places as the case may be, with the mediator "shuttling" between the two. This is particularly

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[76] Jose Pascal da Rocha, THE CHANGING NATURE OF INTERNATIONAL MEDIATION, (Vol.10 June 2019).

[77] Organisation of American States seminar, Washington, DC, *Searching for Common Approaches to Deal with Unconventional Conflicts and Violence in the Americas*, February 12th-13th 2015.

[78] Richmond, Oliver, *Supra* note 8, at 13.

[79] TETSURO IJI & HIDEKI FUCHINOUE, TOWARD A BETTER UNDERSTANDING OF MULTIPARTY MEDIATION IN INTERNATIONAL RELATIONS, HIROSHIMA PEACE SCIENCE, 31, (2009).

[80] Jose Pascal da Rocha, *Supra* note 9.

[81] Bruce D. Jones, *Peacemaking in Rwanda: The Dynamics of Failure,* BOULDER, CO: LYNNE RIENNER, 2001; Saadia Touval, *Mediation in the Yugoslav Wars: The Critical Years, 1990-95,* Basingstoke, UK: PALGRAVE PRESS, 2002.

useful in cases where the parties have a hostile attitude towards one another or there is a sense of impending war or also in cases where it is not physically possible for the parties to meet at a single place at a given time. For instance, during the outbreak of Coronavirus, with the world under a lockdown, shuttle mediation through video conferencing may prove useful in continuing the process of pacific settlement of disputes.

At the outset, mediation is not only restricted to between nations or organizations for international conflict resolution. A major portion of mediation has steered *inter alia* towards managing trade and other related dealings amongst nations. A dynamic field evolving with an increase in inter-country business, trade and ventures, International Commercial Mediation has predominantly been guided currently by the likes of International Chamber of Commerce and UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Singapore Convention on Mediation).

Shortcoming and recommendations

In light of the present international milieu, characterized by heterogeneity and structural shortcomings, the absence of generally accepted rules or norms and a centralized authority has been reverberating. To begin with, States themselves are reluctant to mediate as there are no uniform procedures governing inter-country mediation except to an extent in case of commercial disputes. A recent case in point to elucidate this problem has been undertaken in Gambia as explained by Prof. Jose Pascal Da Rocha. He calls it 'multi-layered mediation[82]', taking form of a 4 tier model.

Theoretically we can presume this structure as: 1) Western powers, providing leadership (eg. UN); 2) Regional organisation, providing knowledge (eg. African Union); 3) NGOs, providing field knowledge; 4) local/traditional entities. Co-facilitation at this systematic level was characterised by effective communication and policy soundness, bringing together not only the elites but the representatives of all the political, social or community forces involved. This was further engineered into a *policy of recognition* in particular of cases where poor countries are destabilized with internal wars.

Similarly, the presence of a central governing body may provide the necessary incentive for the nations to start reposing their faith in alternative dispute settlement methods like mediation. Further, such bodies or institutions can also ensure that the mediators do not transgress their positions and manoeuvre the situation to their end as is currently happening in the Ethiopia and Egypt situation mentioned

[82] Jose Pascal da Rocha, *Supra* note 9.

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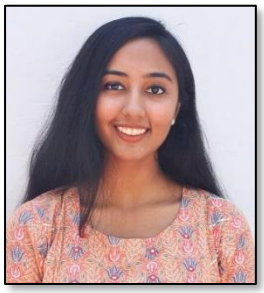
above. In this situation, it would be wise to engage the African Union so as to secure the correct political space and thereby engage with the national stakeholders, rather than letting a country get bullied into a deal which it does not support.

However, we must understand that whether mediation succeeds or fails, depends on many factors, which we need to methodically study as prescriptively as possible.

MEDIATION: TAKING THE MIDDLE PATH OUT OF CORONAVIRUS



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I. Introduction

It is out of habit that the first thing the term 'dispute resolution' brings to mind is a battle fought between parties through litigation. One is reminded of men with a serious countenance, dawning black robes and carrying large books, bound to hold within them a series of precedents and legal arguments. The mere suggestion of taking on such an arduous task proves to be a deterrent.

Litigation is often seen as a war between two parties- the superiority of arguments and expediency in finding the appropriate precedents determines who the winner will be. It becomes a combat of wits and resources, overpowering the true purpose of dispute resolution. This article discusses alternative methods, focusing on mediation, which are more suitable to the changing conditions of the world, especially with regard to the Coronavirus.

"When the actual needs of the parties are ascertained- rather than converted by their attorneys to impersonal demands or/and injunction- the possible means to a mutually acceptable and ultimately more satisfying dispute resolution rise dramatically. By appointing attorneys to represent them in the most adversarial, hard-nosed fashion, disputants forfeit their humanity vis-a-vis each other. Lost are the solutions which the natural human sentiments of sympathy would engender." [83]

Therefore, a little away from the limelight and in line with the true spirit of dispute resolution are other forms of resolving disputes, the Alternative Dispute Resolution (ADR). Mediation is one such form whose distinct approach highlights the real needs of the parties, making it particularly viable in this case. It involves a discussion between parties in the

[83] Marvin E. Frankel, Partisan Justice (1980).

presence of a mediator who guides the session towards a more effective conclusion. The mediator is selected, formally or casually, based on the approval of both the parties and ought to be unbiased. Any decision reached is not binding, but merely suggestive. Mediation allows disputes to remain confidential, freeing them from the hullabaloo and intricacies surrounding legislation.[84]

The attitude of the parties gradually shifts from thinking about their rights and liabilities towards accepting their actual needs; they are keener on solutions and mutual interests.[85] In the early stages, the mediator establishes conditions sine qua non to each side. Exposing one side to the perspective of the other helps elucidate the rationales and justifications behind a proffered proposal as well as understand the constraints under which the other side is operating.[86] This is especially helpful in a crisis situation where the immediacy of resolution is paramount as the cost is both monetary and human. In this background, mediation as a recourse in the face of an unprecedented crisis like the novel coronavirus is discussed in the next section.

II. Covid-19: An Antagonist in the Rising

As the virus stormed through the world, nations, states, cities, all went into lockdown. The world was barely given any transition time to ready itself for its consequences. Industrial activities halted, production diminished, offices, institutions, markets were indefinitely closed resulting in a sudden change on the lives of people across countries.

III. Individual-Legal Aspects of the Covid-19 Crisis

Arguably the heaviest economic cost was paid by pink and blue collar workers, i.e., the working class or manual labour who depend largely on their daily or monthly wage to buy basic amenities, catapulting these workers into the open arms of poverty. They were retrenched from their workplace, or asked to "go on leave/furlough", despite administration persuading employers to continue with regular salaries for workers.

Another direct impact of the lockdown has been the inability of tenants to pay rent. Tenants have to choose between paying rent, the money for which they do not have, or risk losing the house with no care for their belongings. The demands of rent being excused for a few months have also been met with

[84] Christopher W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict (4d ed. 2014).
[85] Sriram Panchu, Mediation Practice and Law: The Path to Successful Dispute Resolution (2d ed. 2011).
[86] Gary S. Mendoza, Mediation as an Instrument for Crisis Management, Yale L.J. (1981).

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impassive faces because the landlords themselves need the money for sustenance.

The virus has infected lakhs of people who have landed on hospital beds needing critical medical treatment. Inability to pay bills leads to treatment being abruptly stopped and lives being lost. The families of these sufferers are left behind with no recourse or help. There has also been a sudden rise in the cases of domestic violence, sexual assault and harassment in households. Disconnected from social support systems, the victims of such violence are distraught and in need of assistance.

Such problems have arisen for individuals across the world and will need judicial attention. Invariably, upon the discontinuation of the lockdown, a plethora of new cases will be unleashed upon the judicial system, which have limited functioning during lockdown.[87] India's shortage of judges and lawyers has been pointed out by the Supreme Court with a warning that it would lead to a delay or denial of justice, often considered the same, attacking the basic structure of the Constitution[88] and rule of law.[89] Mediation dispenses speedy justice, which was declared a fundamental right arising out of Article 21 of the Indian Constitution by the Supreme Court.[90] It allows out-of-court settlements and can be voluntary or court mandated.[91] Further, it is significantly less formal than a court trial and there is no need for a lawyer, making the whole endeavour much less expensive.

Coronavirus and its rampant spread have been a huge shock to the world and, seen in a practical light, most actions of individuals have been acts of self-preservation and done out of compulsion, perhaps even compunction. Therefore, in a court hearing, where it is about winning or losing, the courts may find it difficult to give a decisive verdict and it may be unfair to one party or the other. Mediation, which focuses on finding solutions best suited to both parties may go further in the way of ensuring justice.

IV. Commercial-Legal Aspects of the Covid-19 Crisis

Force Majeure is one of the terms being thrown around a lot during this crisis; individuals as well as businesses and organizations might come to think of it as a panacea for their contractual difficulties, but reality is far more complex. Ideally, there should be a Force Majeure clause with a 'pandemic' as one of the circumstances under which it can be invoked, although even that doesn't necessarily tie the court's hands as a contract can still be avoided if the court treats it as a Frustration[92] or an

[87] High Court Of Delhi: New Delhi No.R-43/Rg/Dhc/2020.
[88] Law Commission of India Rep. No. 245, (2014); All India Judges' Association v. Union of India, AIR SC 2493 (1993).
[89] Brij Mohan Lal v. Union of India, 3 JT SC 503 (2002).
[90] Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar, AIR SC 1369 (1979).
[91] The Arbitration and Conciliation Act (1996).
[92] The Indian Contracts Act § 56 (1872).

Impossibility[93] under the Indian Contracts Act, 1872. However, in the very recent CERC judgement,[94] the threshold for a situation to come under Force Majeure for avoiding contractual obligations has been set quite high to prevent wriggling out of contractual obligations.

According to the judgement, for the clause to be effectuated, there has to be a direct and unavoidable correlation between the Pandemic and the subsequent impossibility of performance, despite taking all reasonable and prudent steps and exhausting all alternatives, which is quite the undertaking. For illustration, failure in successful trade with a vendor due to Coronavirus does not translate into avoidance of payment by the bank via Letters of Credit for that sale.[95]

Another problem is the recovery of loss due to Coronavirus, as it is contingent on the approach each individual insurance company would take for providing cover, not just for individual medical expenses but for businesses as well. This is bound to give rise to a number of disputes, which will make for a very drawn out and expensive litigation. With nearly 157 million claims filed for Health Insurance cover alone,[96] the situation will be simply unsustainable. The same goes for the employer-employee disputes triggered either directly by the lockdown/epidemic or the inevitable economic decline which will follow (France, Italy and Spain are already in recession while the US is reporting record levels of unemployment.[97])

V. **Mediation: A Saviour?**

Mediation would be a far more prudent solution to this glaring problem as the economic repercussions of the pandemic are far reaching, and as such, the aim should always be to find a solution which protects both the insurer and the insured/the employer and the employee from such unsustainable liabilities. Cooperation and collaboration in mediation is of paramount importance in the present unchartered territory as they are the only way to ensure effective long-term recovery. The employers will need their employees again and a business will need to restore the supply chain once this crisis is over. A little amiability might go a long way.

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[93] The Indian Contracts Act § 32 (1872).

[94] Energy Watchdog v. CERC, 14 SCC SC 80 (2017).

[95] Standard Retail Pvt. Ltd. v. M/s. G. S. Global Corp & Ors., Order dated April 8, 2020 passed by the Bombay High Court in Commercial Arbitration Petition (Lodging) No. 404 of 2020.

[96] *Rs. 15.75 crore coronavirus health insurance claims lodged till date*, Business Standard (May 1, 2020, 05:16 PM), https://www.business-standard.com/article/pf/rs-15-75-crore-coronavirus-health-insurance-claims-lodged-till-date-120050100889_1.html.

[97] William Horobin and Jeannette Neumann, *Euro Area's Record Slump Adds Urgency to Fiscal Aid Calls*, Bloomberg (April 29, 2020, 10:30 PM), https://www.bloomberg.com/news/articles/2020-04-30/french-economy-shrinks-almost-6-in-worst-quarter-on-record.

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There are certain other features as well which make Mediation, and ADR in general, the most viable alternative. Currently, the courts in India are only dealing with essential matters and piling on to the already humongous pendency will not be helpful. The level of control and flexibility which mediation provides over the process to the parties is unparalleled to almost any other dispute resolution mechanism. Further, it does not require filing, can be effectively done online (ODR) or even over the phone, which is in line with our new reality of social distancing and particularly useful for international parties, complex supply disputes and avoiding jurisdictional issues which even Arbitration might encounter.

Although there are no concrete laws enacted to protect parties from contractual liabilities like Singapore's COVID-19 (Temporary Measures) Act, 2020, the government and courts can still play a proactive role in minimising the problem. The authors recommend a mandatory pre-trial mediation for all COVID related disputes, commercial or otherwise. Such mandate is not unheard of; the 2018 Amendment to Commercial Court Act, 2015[98] makes pre-institution mediation mandatory except when urgent relief is sought. The parties can rely on authorities constituted under the Legal Services Authorities Act, 1987 for a mediator, and if a settlement is reached on agreed terms, it shall have the same status and effect as if it is an arbitral award.[99] This takes away the rigidity of arbitration as the solution is coming through the parties, and not through an Arbitrator, while retaining the binding effect, the main drawback of mediation.

In such trying circumstances, a dispute resolution mechanism such as Mediation can be a saviour not only for the people but also the judicial machinery, ideals of justice and peace of the society. Even though the success of the mediation process cannot be certainly predicted, what can be said with certainty is that this underdog has proven[100] its capabilities in the present paradigm, making it a reliable and mighty alternative today and for the foreseeable future.

[98] The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act (2018).

[99] The Arbitration and Conciliation Act § 30(4) (1996).

[100] *Coronavirus Impact to cut costs, corporates now opting for pre-litigation mediation over force majeure*, Money Control (May 01, 2020, 03:33 PM), https://www.moneycontrol.com/news/business/corporate-action/coronavirus-impact-to-cut-costs-corporates-now-opting-for-pre-litigation-mediation-over-force-majeure-5211321.html.

CFC & HCFC AS AGENTS OF CLIMATE CHANGE: SOLUTIONS AND ITS ENFORCEABILITY THROUGH ADR MECHANISMS


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I. Introduction

Today the world is dealing with major environmental concerns including global warming, deforestation, disposal of waste and many others but the most significant of all which is severely affecting every living organism on this planet is the depletion of the ozone layer in the stratosphere. The ozone layer is a thin layer all over the earth stratosphere which protects it from harmful UV-Rays.[101] Depletion of this layer can cause skin cancer & cataract amongst others and can lead to the destruction of crops & forests due to absorption of ultraviolet rays.[102] This situation is not too far if human beings continue to not contemplate their actions regarding environmental problems. Man-made chemicals like Hydro chlorofluorocarbons (HCFCs) and Chlorofluorocarbons (CFCs) are the major contributing agents in the depletion as they have a long lifespan.[103] Emission of these chemicals is very dangerous as it acts as a carrier of chlorine molecules to the higher atmosphere thus depleting the layer which then causes global warming.

The effect of CFC is so harmful that it is evident from the hole in the ozone layer above Antarctica which is reduced by 50%.[104] The consequences of this depletion due to HCFCs and CFC emission will be devastating for the life present on earth. To deal with these ozone depleting substances, Montreal Protocol was made and adopted on 15th September 1987.[105] The main aim of this Protocol was to phase out these substances. CFC's were used worldwide

[101] Nasa, *What is Ozone? The Chemistry of Ozone*, 1 (2010) https://www.nasa.gov/pdf/752034main_Ozone_Hole_Poster.pdf.

[102] United States Environmental Protection Agency, *Health and Environmental Effects of Ozone Layer Depletion*, (Jan. 19, 2017) https://www.epa.gov/ozone-layer-protection/health-and-environmental-effects-ozone-layer-depletion.

[103] Minnesota Pollution Control Agency, *Chlorofluorocarbons (CFCs) and hydrofluorocarbons (HFCs)*, (Apr. 29, 2020) https://www.pca.state.mn.us/air/chlorofluorocarbons-cfcs-and-hydrofluorocarbons-hfcs.

[104] *Why has an "ozone hole" appeared over Antarctica when ozone-depleting substances are present throughout the stratosphere?*, 1-4, (2010), https://www.esrl.noaa.gov/csl/assessments/ozone/2010/twentyquestions/Q10.pdf.

[105] '*Montreal Protocol on Substances that Deplete the Ozone Layer (with annexe)*. Concluded at Montreal on No. 26369, United Nations, (Sept. 16, 1987) https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf.

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in air conditioners and refrigerators which were replaced by HCFCs with low Global Warming Potential (GWP) followed by Hydrofluorocarbons (HFC's)after Montreal protocol. These HCFC's are non-depleting substances but carry high GWP and due to this when these substances are used in a large amount it leads to global warming. To control these substances an amendment was made to the Montreal Protocol in 2016 known as the 'Kigali Agreement' which aims at phasing out HCFC's but simultaneously reducing HFC's and preventing the climate change caused due to it.[106]

An overall attempt to reduce climate change was made recently, known a Paris Agreement, in which the Countries pledged to control their harmful gas emissions to reduce climate change.[107] However, disputes as to more emissions by developed nations and less by the underdeveloped or developing has led to a clause in the agreement stating that developed nations will pay a reparation to the developing countries against the damage that; they have already done to the environment due to their industrialization. When there is a self-imposition clause, disputes tend to arise, in this short article we will see how through 'Mediation' and 'Arbitration' these issues can be resolved for the betterment of the nation states and the globe as a whole.

II. India on HCFC and HFC Reduction

Among Article 5 countries, India is considered to be the second largest country after China for the production and consumption of HCFC's. Air Conditioner and refrigerant sectors consume the major part of these gases, apart from this, it is generally used in the foam sector.

By January, 2010 India succeeded in removing CFC, halons and methyl chloroform. The beginning of a plan to phase out HCFC's from India was started in 2009. HCFC Phase-out Management Plan (HPMP) was conducted in 2 stages. Phase 1 of this plan was particularly concerned at reducing HCFC 141-b which was consumed in foam manufacturing industries. This was implemented by replacing the HCFC's to non-ODs such FCC cyclopentane technologies in 15 large enterprises for the foam industry. This stage was in action for a period of 4 years from 2012-2016 and aimed at reaching the freeze in consuming these

[106] Kigali Amendment to the Montreal Protocol: A Crucial Step in the Fight Against Catastrophic Climate Change,
EIA Briefing to the 22nd Conference of the Parties (CoP22) to the United Nations Framework Convention on Climate Change (UNFCCC), (Nov. 7-18, 2016), https://eia-international.org/wp-content/uploads/EIA-Kigali-Amendment-to-theMontreal-Protocol-FINAL.pdf.

[107] Paris Agreement, United Nations, (2015), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

chemicals by 2013 and 10% reduction in HCFC's by 2015 in line with the Montreal Protocol. The impact of stage-1 was successfully reducing HCFC's to the ideal targets. The second stage of the HPMP was introduced in February 2017 with the aim of completely removing HCFC's from foam manufacturing industries by 2020 furthermore reduction of HCFC from top 6 brands of room air conditioners till 2022 and to provide training to technicians for efficient and better services and to design buildings in manners which can curb ozone depletion. The successful implementation of this stage would make huge reduction in HCFC's and would comply with the targets India aims to achieve under the Montreal Protocol.

Apart from HPMP, HFC's with 0-ODP (Ozone Depletion Potential) were introduced to replace HCFC leading to their reduction but with the increasing amount of HFC usage it is also harmful for the environment and thus came the Kigali Agreement to remove both of these chemicals simultaneously which was also ratified by India in 2016. India is one of the largest producers and consumers of HCFC's ,43% of this HCFC is used in air conditioners and refrigerators, 21% is consumed by the foam industry and the rest in refrigerants for new appliance manufacturing.[108] In 2015, major amount of HCFC was used in refrigerants for air conditioners in building sectors due to which the building sector plays a significant role in HCFC emission. In most of the developing countries, the demand for building insulation is increasing. Walls, roofs etc. are insulated in order to keep the heat of the building intact, these insulations have been done for a long time with the use of these chemicals to get thermal resistance but now there is a need for them to be replaced by thinner substances which will in result, give better thermal resistance.

One of the many uses of these chemicals is fire fighting, the chemicals used in these equipment are still OD's. There should be initiatives taken in this matter to find an alternative substance.

III. Solutions to phase out HCFC's and HFC's:

It has been established until now that buildings are a major factor in the consumption of HCFC and hence the most important sector to be dealt with in the process of reduction of HCFC. The approach towards phasing out HCFC should be focused on developing building designs and cooling equipment energy efficient, finding alternative substances in place of HCFCs.

[108] United Nations Environment Programme, *HCFC Phase Out and Energy Efficiency in Buildings, Ozone Cell Ministry of Environment, Forest and Climate Change*, Government of India, EESL, (Sept. 12, 2017) http://eeslindia.org/content/dam/doitassets/eesl/pdf/programmes/HPMP/pdf/HCFC%20Booklet%20final.pdf.

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Energy efficient buildings should be designed in a manner where both architecture and engineering combined form a place for less usage of mechanical cooling. Thermal loads are set up in buildings for the increase or decrease of heat. With the decrease in the loads, smaller cooling capacity air conditioners which use less refrigerants can be set up; the rest of the load should be dealt with alternative substances leading to whole removal of HCFCs. Efficient building designs would need proper structure, shading at particular places of the building, high thermal resistance material for the building envelope should be used, cool roofs should be formed, focus on natural ventilation. Specific building codes should be formed focusing on enhancing the building efficiency.

IV. Energy efficiency of cooling equipment

The Air Conditioners should be made energy efficient with developed technology and keep better maintenance and installation of Air Conditioners cleaning its fans and parts for smooth working, controlling overuse of Air Conditioners by putting sensors which automatically shut it down when it is not necessary.

V. Usage of alternative substances

Other than HCFC's, alternative substances should be used in Air Conditioners, like Fluorocarbon refrigerants which are made with a mix of 2 or 3 HCFC components. Ammonia, water and carbon dioxide can also be used in low capacity Air conditioners. Under stage-2 of HPMP many alternative substances such as cyclopentane, n-pentane, have been formed for making building insulation as earlier it was made in foam industries with HCFC. Fire-fighting equipment's can easily replace HCFC from simple CO2, dry chemicals and water.

VI. India's current status

India has a National Building Code which contains the requirement of all 0-OD agents for the construction of buildings and efficient air conditioning. It also has an Energy Conservation Building Code; it was formed in 2007 and was renewed in 2017 it covers all the commercial buildings. With the ratification of the Kigali Agreement, India aims at phasing down HFCs by 2028 and reducing it by 15% till 2047.

India has successfully reduced 70% of ODs through 250 projects with 100 projects still working.[109] Indian Country Programme was prepared to phase out the ODs which was followed by ODs phase out project in consumption and production sector, Halon and Carbon tetrachloride (CTC) production phase out project and many other projects working in different sectors. Different sets of regulatory

[109] Ozone Cell, *Save Our Sky: Protect the Ozone Layer from Depletion, Ministry of Environment, Forest and Climate Change*, 1-42, (2004) http://www.ozonecell.com/uploads/files/SS-2004.pdf.

and institutional frameworks are set up to carry out this reduction of chemicals.[110]

VII. How ADR can facilitate these solutions:

As we have already discussed in the Indian Context, how measures are being taken to adhere to our commitments to the Montreal Protocol and also the Paris Agreement to reduce emissions affecting climate change, to make these measure enforceable and eradicate disputes there is a need of Alternate Dispute Resolutions. As the Courts are not well equipped to deal with technical matters involving science and chemistry, the experts in the field should be made mediators and arbitrators to resolve these disputes.

In order to make the above-mentioned measures implementable there has to be an agreement between the government as well as different players in the sector such as building and electronics to adopt the changes recommended. There can be issues relating to pricing or affordability which can be amicably solved through mediation. Hence, it is a serious endeavour of the researchers to ensure implementation of the above measures and eradicate the functional disputes amongst various parties involved in the process, there shall be arbitration to settle such issues.

As far as International Issues are concerned for trade or implementation of these mechanisms of HCFC and HFC emission controls in neighbouring countries, it can be resolved through mediation by making an international body such as The Intergovernmental Panel Climate Change (IPCC) as the mediator. The respective organisations dealing with the making of buildings under the Code mentioned above or electric appliances shall be a party to the mediation and their claims should be looked into before they are amicably settled. This will ensure smooth implementation of the solutions provided and ADR can play a pivotal role in making these solutions implementable.

The issue of climate change can be addressed only through consensus, after thorough research is made about the solutions proposed and ironing out the creases through ADR mechanisms. This will give us a ready framework to fight climate change with efficiency.

CASE UPDATES

I. February

SSIPL Lifestyle v Vama Apparels

(Judgment dated 19.02.2020 in I.As. 2744/2019)

[110] Ozone Cell, *Ministry of Environment, Forest and Climate Change*, (May 1, 2020) http://ozonecell.in/home-page/montrealprotocol-implementation-in-india/ods-phaseout-in-the-country/.

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Principle: The arbitration clause, can thus be waived by a party under dual circumstances-one by filing of a statement of defence or submitting to jurisdiction and secondly, by unduly delaying the filing of the application under Section 8 by not filing the same till the date by which the statement of defence could have been filed.

Facts: Vama issued a notice dated 21st August, 2017 wherein refunds were sought of outstanding amounts. By a letter dated 20th October, 2017, SSIPL terminated the agreement and there was continuous correspondence between the parties including a notice under Section 138 of the Negotiable Instruments Act for dishonouring of a cheque for a sum of Rs. 5 lakhs. The present two suits were filed on 17th February, 2018 seeking recoveries. Vama then moved two applications under Section 8 of the Arbitration and Conciliation Act, 1996 in each of the suits. There is a dispute as to when exactly the said applications were filed by Vama. SSIPL objected to the applications made by Vama Apparels on 11 February 2019 in view of the expiry of the limitation period according to section 8 of Arbitration Act and argued that an application under section 8 cannot be filed.

Judgment: The Court, therefore, dismissed SSIPL's application under section 8 of Arbitration Act and observed: "The Defendant (Vama Apparels) cannot defeat the intention behind the amendments in the Civil Procedure Code and the Arbitration Act, by choosing to file a Section 8 application at its own sweet will."

Dharmaratnakara Rai Bahadur v Bhaskar Raju & Brothers & Ors.

(Judgment dated 14.02.2020 in Civil Appeal No. 1599 of 2020)

Principle: A lease deed that is insufficiently stamped cannot be relied upon for determination of appointment of an arbitrator for a dispute.

Facts: The present case challenges a judgment appointing an arbitrator to conduct proceedings by way of appeal. Certain re-negotiations regarding the existing contract failed to materialize. A suit was filed by the Appellant suing the respondents for paying due balance amount towards the security deposit. The Respondents took part in the proceedings for 2 years and then filed a petition under section 11(6) of the Arbitration Act before the High Court of Karnataka. On being served with notice, the Appellant prayed for dismissal of the petition.

Judgment: The appeal is allowed. The impugned judgment and order dated 1.12.2014 passed by the High Court of Karnataka in 2013 is quashed and set aside. The petition/application filed by the Respondents

Under Section 11 of the Arbitration Act is rejected. There shall be no order as to costs.

Power Mech Projects Ltd. v. Sepco Electric Power Construction Corporation

(Judgment dated 17.02.2020 in O. M. P. (I) (COMM.) 523/2017)

Principle: Under appropriate circumstances depending on the facts of the Case, the Court can direct the deposit of the entire amount, before hearing a challenge petition under Section 34 of the Arbitration and Conciliation Act or before staying the enforcement of the Award.

Facts: A petition [OMP (COMM) 432/2017] was filed under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') challenging the arbitral award dated 17.10.2017, by SEPCO Electric Power Construction Corporation ["Petitioner"] against Power Mech Projects Ltd. ["Respondent"]. Subsequently, the respondent filed a petition [O.M.P. (I) (COMM) 523/2017] on 11.12.2017 under Section 9(ii)(b) of the Act seeking to secure the entire amount awarded to it under the Award.

During the course of the proceedings, the Court issued notice in this petition and directed the petitioner to file an affidavit detailing its assets (moveable/immovable), bank accounts and the amounts lying in the banks within the Territory of India. The petitioner was also directed to deposit 10% of the amount available in the bank account referred to in para-5 of the same affidavit, with the Registry of the Court. Any further deposits in the said accounts to the extent of 10% were also to be deposited, every 15 days. Since the deposited amount was meagre in comparison to the total Award, the respondent filed an application praying inter alia that the petitioner be directed to deposit the complete awarded amount with interest after giving credit of the earlier deposit that was already made.

Judgement: While it cannot be said as a principle of law that there is a mandate that in every case the Court must insist on a 100% deposit, before hearing a petition under Section 34 of the Act or before staying the enforcement of the Award, as the amount of deposit would depend on the facts of the case and is in the discretion of the Court hearing the petition, the circumstances and the facts of the present case warrant that the petitioner should be directed to deposit the principal amount awarded to the respondent before the petitioner is heard on merits.

The Court placed reliance on *Hindustan Construction Company Limited Vs. Union of India*, *SREI Infrastructure Finance Limited vs. Candor Gurgaon Two Developers and Projects Pvt. Ltd.* and *Manish vs. Godawari Marathawada Irrigation Development Corporation*, to direct a 100% deposit of the awarded amount of Rs.142 Crores

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(principal amount) with the Registry of the Court, after adjusting the bank guarantee of Rs.30 Crores and further deposit of Rs.2.74 Crores which had already been deposited, to secure the respondent.

MBL Infrastructures Ltd. v. Rites Limited

(Judgment dated 25.02.2020 in O.M.P.(MISC.)(COMM.) 56/2020)

Principle: Amended Section 29A(5), introduced by way of the Arbitration & Conciliation (Amendment) Act, 2019 could not be said to have a retrospective operation. Thus, the extensions granted by the Arbitral Tribunal or Court after the expiry of the statutory period under the unamended provision will be valid.

Facts: Arbitral Tribunal entered upon reference on 14.03.2018. Statutory period of twelve months under Section 29A(1) of the Act expired on 13.03.2019. With the consent of the parties, by an order dated 04.05.2019, Tribunal extended the time by a period of six months which expired on 13.09.2019. Thereafter, the parties approached the Court for extension of time and, the same was extended by a further period of six months from 13.09.2019 to make and publish the Award by an order. The said period was expiring on 12.03.2020. The present petition was filed under an impression that the Arbitration & Conciliation (Amendment) Act, 2019 which was notified on 30.08.2019 would apply to the present arbitration proceedings.

Judgement: It is evident from a bare perusal of the Notification that it does not have a retrospective effect. In the present case, the statutory period of 12 months under the unamended Section 29A of the Act expired on 13.03.2019 since under the unamended provision, period of 12 months was to reckon from the date the Arbitral Tribunal entered upon reference. Thereafter, subsequent extensions were given either by the Tribunal or by this Court. Therefore, the Notification will not apply to the facts of the present case and the extension granted by this Court would be valid.

M/s Morgan Securities & Credits Pvt. Ltd. v. Videocon Industries Ltd.

(*Judgment dated 26.02.2020 in FAO(OS)(COMM) 9/2020*)

Principle: Post-award interest is to be granted on the principal sum plus the interest component, taken collectively or not under Section 34 of The Arbitration & Conciliation Act, 1996.

Facts: The Arbitrator had passed an Arbitral Award to be paid by Morgan Securities, i.e., the petitioner. It filed a petition against the impugned award on the grounds that the Arbitrator has erred in granting post-award interest at 18% per annum, whereas it ought to

have been granted on the principal sum plus the interest component, taken collectively. Lastly, it was urged that while awarding interest, the learned Sole Arbitrator could not have deviated from the terms of the contract governing the parties whereunder it was agreed that the normal agreed rate of interest for providing bill discounting facility would be 36% per annum.

Judgement: The Court held that it shall be assumed that the arbitrator has granted the post award interest only on the principal sum with full intent and while doing so, was mindful of the respective claims of the parties, the relevant merits/demerits of the please taken before him, the equities required to be balanced between the parties and all other relevant factors for granting the rate of interest as awarded. The Court further held that the view taken by the Arbitrator for granting interest cannot be treated as patently illegal or perverse so as to go to the root of the matter.

Parmeet Singh Chatwal & Ors. v. Ashwani Sahani

(*Judgment dated 14.02.2020 un O.M.P. 1445/2014*)

Principle: Arbitration clause reproduced at the bottom of an invoice in a small font is valid or not under Section 34 of The Arbitration & Conciliation Act, 1996.

Facts: Respondent invoked arbitration for recovery of an outstanding balance from the petitioner. The arbitral tribunal decided in favour of the respondents. Aggrieved by the award rendered in favour of the respondent, the petitioner filed a S.34 petition under the Arbitration Act to challenge the award and the arbitration agreement itself. It was the case of the respondent that invoices raised against the petitioner in their usual trade had mentioned an 'arbitration clause' which was produced at the bottom of an invoice in a small font. The issue is whether there is an arbitration agreement and whether is entitled to recover his amount.

Judgement: The Court noted that on facts, there is no record of any finding regarding the intention of the parties to agree to settle their dispute through arbitration. The award merely concluded the existence of an arbitration clause without giving any reasons. The Court was further of the opinion that the question of agreement to arbitrate aside, the clause itself was vaguely structured. Therefore, such a clause would not be an arbitration agreement, and the parties were not *ad idem* in this regard. As there is no arbitration agreement, the award and the proceedings shall be vitiated.

Meera Goyal v. Priti Saraf

(*Judgment dated 26.02.2020 in O.M.P. 2/2020*)

Principle: When there has been no determination by an arbitrator on the objections raised by the petitioner it cannot be stated that any right of the parties has been determined and hence such an order cannot be

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termed as an interim award under Section 31(6).

Facts: The factual background of the case arises by an agreement dated 24.12.2011 under which the Petitioner terminates the agreement based on a breach made by the Respondent by failing to pay the balance amount by the stipulated time. Disputes arising out of the case led to the filing of two petitions by M/s Meera Goyal. The first petition dealt with setting aside of an order passed by the Arbitrator which was to be termed as an 'interim award'. The second petition sought termination of the mandate of the present Arbitrator and appointment of a substitute Arbitrator.

Judgment: The two petitions filed were disposed by the Court stating that determination of rights of the parties is a pre-condition for an order to be termed as an interim award and since the Arbitrator has stated that objections of the Petitioner would be decided at the time of the final award it cannot be deemed as a rejection of the Petitioner's objections. Hence, the impugned award does not qualify as an interim award for the purpose of being challenged under Section 34. The second petition was disposed on the grounds that it is not possible for the Court to entertain the present petition seeking removal of the learned Arbitrator under Section 14(2) of the Act on the ground that he has become "de-facto and de-jure" unable to perform his function as an Arbitrator. The Petitioner will have to await the pronouncement of the Award and if aggrieved thereby, seek appropriate remedies under Section 34 of the Act.

Vijay Karia and Others v. Prysmian Cavi E Sistemi SRL and others

(*Judgment dated 13.02.2020 Civil Appeal No. 1544 of 2020 arising out of SLP (Civil) No. 8304 of 2019*)

Principle: The legislative policy for the recognition of foreign awards is that an appeal can be filed against a judgment refusing to enforce and recognise an award but not for a judgment that does recognise such an award under Section 48 and because India is a signatory to the New York Convention, 1958

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Facts: The present case deals with an appeal filed by the Appellant against the judgment of a Single Judge of Bombay High Court regarding four final awards made by an arbitrator in London, that were held to be enforceable. The dispute arises out of Joint Venture Agreement between both the parties, which leads to an arbitration proceeding in London by the rules of LCIA (London Court of International Arbitration).

Judgment: It was held that the four awards were exhaustive and were completely based on merits which is plainly proscribed by Section 48 of the Act. The awards by LCIA must be challenged within the strict time limit provided

in Arbitration Act,1996. The appeals under Section 136 were dismissed with Rs 50 lakhs to be paid to the Respondent.

Cairn India Ltd. & Ors. v GOI

(Judgment dated 19.02.2020 in O.M.P.(EFA)(COMM.) 15/2016)

Principle: Application for enforcement of a foreign arbitral award can be filed up to 12 years from the date of the arbitral award.

Facts: A Production sharing contract was executed between the parties for the development of Ravva oil and gas field. The dispute arose for the non-payment of development costs and was referred to the arbitration, seated in Malaysia. The tribunal in 2011 passed an award in favour of the petitioner. GOI challenged the award before the Malaysian High Court and Federal Court, which was rejected in 2014. In 2014, the petitioner filed for the enforcement of the award under section 47 and 49 along with the condonation of delay application to which GOI sought objection under section 48. Hence, the key issue, which arose, was that whether the application was barred by limitation and while construing limitation article 136 and 137 of the limitation act will apply.

Judgement: The court held that to give effect to the purpose and objective of the Arbitration Act, it would make sense to refer to the provisions of the Limitation Act pragmatically rather than in a meticulous manner. Furthermore, there is no restriction on the forum for recognition and enforcement of the international arbitral award. Therefore, it was decided that Article 136 of the Limitation Act would apply to an enforcement petition and the present enforcement petition is not barred by limitation.

Badri Singh Vinmay Private Limited v. MMTC Limited

(*Judgment dated 6.01.2020 in O.M.P. 225/2015*)

Principle: A communication with a claim for a disputed amount, and contemplating arbitration in the alternative, is sufficient notice of a request for arbitration.

Facts: In this petition under §34 of the Arbitration and Conciliation Act, 1996 ['Act'], the petitioner (award debtor) claimed that the proceedings of the arbitration were vitiated on the grounds of improper invocation of the arbitration. On these grounds, the petitioner sought for the award to be set aside.

The petitioner claimed that there was no notice invoking arbitration proceedings served upon them in compliance with §21 of the Act, and Rule 15 of the Rules of Arbitration of the Indian Council of Arbitration.

The respondent (award creditor) argued that disputes regarding improper invocation of the arbitration should have been raised before the

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arbitrator in the arbitration stage.

Judgement: The Delhi High Court ('Court') examined the contention regarding the notice of arbitration by going through the correspondence of the parties.

The Court noted that in the communication dated 14.12.2012, addressed by the counsel for respondent to the petitioner, said the following: *"… Under the facts and circumstances stated herein above, I by way of this notice to pay a sum of Rs.88,08,932/- alongwith interest @ 18% p.a. w.e.f. 05.10.2011 till the date of payment/realization; to my client within a period of 15 days from the receipt of this notice, failing which my client shall be constrained to initiate appropriate legal action against you for recovery of the said amounts and interest thereon including initiation of arbitration proceedings entirely at your risk, costs and consequences. Copy of this notice is retained in my office for taking further action in the matter."*

The Court observed that §21 requires a party to send to the counter-party a request to refer the dispute to arbitration, and that the communication dated 14.12.2012 met this requirement. The facts which led to the dispute and the nature of claim was made sufficiently clear in this communication.

The Court also placed reliance on the judgement by the Rajasthan High Court in *RIICO Ltd. Jaipur & Ors. v. Manoj Ajmera and Anr.,* holding that a communication claiming a disputed amount and contemplating arbitration in the alternative, is sufficient notice of request for arbitration.

Additionally, the Court cited correspondence between the ICA and the respondent to hold that the requirements of Rule 15, ICA were met.

Shapoorji Pallonji and Co. Pvt. Ltd. v. Jindal India Thermal Power Limited

(Judgment dated 23.01.2020 in O.M.P.(MISC.)(COMM.) 512/2019*)*

Principle: §23(4) and §29A(1) of the Arbitration and Conciliation Act ['Act'], as amended by Arbitration and Conciliation (Amendment) Act, 2019 ['2019 Amendment'], are procedural laws and therefore would apply to pending arbitrations as on the date of amendment.

Facts: Under the unamended §29A(1) of the Act, the arbitral award had to be made within a period of 12 months from the date of tribunal entering upon reference, which was on 26th May, 2018.

§29A(1) of the Act was amended with effect from 9th August, 2019 by the 2019 Amendment, and the time period for completion of the arbitration proceedings was extended up to 12 months from the date of completion of pleadings. So also, amended §23(4) of the Act provided for a period of six months as the time period for completion of pleadings.

The parties had further extended the time period by 6 months by mutual consent under §29A(3).

Judgement: The Court held that amended §23(4) and $29A(1) of the Act were procedural law and therefore would apply to pending arbitrations as on the date of amendment, and that the time period for arbitration had not expired. It was also noted that the time period of 12 months for the completion of arbitration proceedings shall start after the conclusion of the 6 month time period for completion of pleadings as prescribed in the amended sections.

Therefore, since the arbitral tribunal entered upon reference on 26th May, 2018, by the working of amended §23(4) and $29A(1), the time period for conclusion of proceedings is up to 25th November, 2019.

Additionally, since the parties had mutually agreed to extend the time period further by 6 months under §29A(3), the time period was further extended till 23rd May, 2020.

II. March

UCO Bank v National Textile Corporation Ltd. and Another

(*Judgment dated 5.03.2020 in 2020 SCC OnLine SC 300*)

Facts: The case was brought to the Supreme Court through SLP (Civil) against a judgment passed by a division bench of the Delhi High court. UCO Bank(Appellant) is a nationalised bank which extended loans to M/S Shree Sitaram Mills Pvt. Ltd. Shree Sitaram Mills was taken over by the National Textiles Corporation Ltd. (Respondent 1) and then nationalised w.e.f. 1/04/1994. The Ministry of Textiles (Respondent 2) was the guarantor for the said loans.

Upon the amount being due, the Appellant filed recovery proceedings before the Debt Recovery Tribunal, however, those proceedings were adjourned sine dine after Shree Sitaram Mills filed an application mentioning that it had been declared a 'sick company' as per the (erstwhile) Sick Industrial Companies (Special Provisions) Act, 1985. Thereafter, the Appellant submitted its claim to the Commissioner of Payments under Textile Undertaking (Nationalisation) Act 1974, who allowed recovery of only a part of the claimed amount while the rest of the amount to the tune of about 100 Cr was disallowed citing the lack of requisite jurisdiction.

In the meanwhile, on 22 January 2004, the Central Government through a Memorandum provided for arbitral settlement of disputes between Public Sector Enterprises inter se and Public Sector Enterprises and the Government through Permanent Machinery of Arbitrators. Relying on the same, the appellant filed for arbitration against Respondent 1 and Shree Ram Mills for the recovery of the remainder amount. The tribunal was formed and it directed the parties to submit their claims and counter claims. The Respondent challenged the maintainability of arbitral proceedings claiming

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that the tribunal was neither formed by the consent of the Respondent nor by a statutory obligation. The challenge was rejected by the tribunal and the proceedings continued. Thereafter, the Respondent approached a single judge bench of Delhi high court by a civil writ petition to quash the arbitral proceedings but the high court rejected the petition and reasoned that the parties being public enterprises were covered in the Memorandum. The Respondent then, through an LPA, appealed to a division bench of the Delhi high court. Respondent claimed that recovery proceedings can not be initiated against it because:

a) As per the Textiles Undertaking Act 1974, the previous loan recovery liabilities of a nationalised entity has to be recovered from previous owners themselves, and nevertheless,
b) Only the textile undertaking of Shree Sitaram Mills Pvt. Ltd was taken over by the government and not the complete company itself, therefore, the entire loan liability can not be recovered from the Respondents and the part of it that can be, has been recovered pursuant to the directions of the Commissioner of Payments.

The division bench accepted these submissions and quashed the arbitral proceedings.

Issue: Whether arbitral proceedings can continue concurrently if there is a dispute regarding issues that give rise to the arbitration but are out of the adjudicatory scope of the tribunal.

Judgment: The supreme court ruled that the decision of the division bench was misconceived as the issue regarding the liability of the respondents for the loans extended to Shree Sitaram Mills constitutes a separate cause of action that had to be decided afresh after bringing requisite evidences on record and hearing both parties in an appropriate forum and the therefore the conclusion regarding non-liability of the respondent was set aside and the DRT was empowered to continue this matter which was previously adjourned sine dine. However, since there is a fundamental dispute and objection regarding the liability and nature of takeover itself these questions need to be decided first in an appropriate forum therefore the arbitral proceedings for recovery were held to be rightly quashed by the division bench. The appeal was therefore partly allowed.

Mankastu Impex Private Limited v Airvisual Limited

(Judgment dated 5.03.2020 in 2020 SCC OnLine SC 301*)*

Principle: There is a vital difference between "venue" and "seat", and both cannot be used interchangeably. It is imperative to look at the intention of the parties as to the "seat"; it should be determined from other clauses in the

agreement and the conduct of the parties.

Facts: A Memorandum of Understanding ("MOU") was entered between, Mankastu Impex Private Limited ("MIPL") and Airvisual Limited ("AVL") according to which MIPL was to be the exclusive distributer of AVL's air quality monitors products for a period of five years. A dispute arose between the parties and MIPL decided to invoke the arbitration clause in the MOU; Clause 17 which read -

"*17.1 This MoU is governed by the laws of India, without regard to its conflicts of laws provisions and courts at New Delhi shall have the jurisdiction.*

17.2 Any dispute, controversy, difference or claim arising out of or relating to this MoU, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered in Hong Kong.

The place of arbitration shall be Hong Kong.

The number of arbitrators shall be one. The arbitration proceedings shall be conducted in English language."

AVL in its reply to the notice of arbitration argued that the tribunal shall be seated in Hong Kong, however, MIPL in its interpretation of Clause 17 felt that the arbitration was to be seated in India. An application under Section 11 of the Arbitration and Conciliation Act, 1996 was filed in the Supreme Court of India for appointment of an arbitrator.

Judgement: It was observed by the Supreme Court that merely having the words "place of arbitration shall be Hong Kong" cannot be the basis to determine the intention of the parties, that they have intended that place as the "seat" of arbitration. The words, "the place of arbitration shall be "Hong Kong", have to be read along with Clause 17.2. Clause 17.2 mentions "….*shall be referred to and finally resolved by arbitration administered in Hong Kong.*" and the reference to Hong Kong is not just for the purposes of the venue of arbitration but for final resolution by arbitration administered in Hong Kong. A reading of the clause in its entirety makes it evident that the parties not only intended Hong Kong to be the "venue" of arbitration but also the "seat". Since the "seat" was determined to be Hong Kong, the applicable law is the law of Hong Kong as well and the Section 11 application does not lie with the Supreme Court of India.

Hindustan Construction Company Ltd. v NHPC Ltd. and another

(Judgment dated 4.03.2020 in 2020 SCC OnLine SC 305)

Principle: Once the seat of arbitration is designated, then such clause becomes an exclusive jurisdiction clause. Only the courts where the seat is located would then have jurisdiction to the exclusion of all the other courts.

Facts: The seat of arbitration in the agreement was decided to be at Delhi. The contract was

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executed between the parties at Faridabad, and part of the cause of action arose there, thus the jurisdiction would lie with courts in Faridabad as well. The jurisdiction of the Faridabad Court was invoked first and under Section 42 of the Arbitration and Conciliation Act 1996, the Faridabad Court would have jurisdiction to decide all other applications.

Judgement: The Supreme Court, while relying on its judgement in BGS SGS Soma JV v. NHPC and reiterating the principle laid down in the landmark judgement of Bharat Aluminium Company and Ors. v.
Kaiser Aluminium Technical Services Inc. and Ors. decided that the parties have designated the seat as New Delhi. It was further held that even if an application was first made to the Faridabad Court that application was made to a court without jurisdiction. Thus, the Section 34 application that had been filed at Faridabad court was stand transferred to the High Court of Delhi.

Gateway Distriparks Limited and Others v Ranjiv Kumar Bhasin

(*Judgment dated 2.03.2020 in 2020 SCC OnLine Bom 475*)

Principle: The arbitrator is the person to primarily interpret and construct the contract, however it should be done in a manner that a fair-minded or reasonable person would and shouldn't wander beyond the confines of the contract. The court reiterated this principle, as laid down by the Supreme Court in Ssangyong Engineering Construction Company Ltd v. National Highway Authority of India, where the facets to challenge an arbitral award on the ground of perversity was discussed.

Facts: The respondent, was issued sweat equity shares by the petitioner companies. The term of this tripartite contract was five years. These shares were subjected to staggered lock-in periods of three plus one plus one year under clause 4 of the contract. Clause 6 provided for the sale back and transfer of the sweat equity in case an employee leaves the services during the statutory lock-in period. The respondent had the services during the five year staggered lock-in period. The dispute arose regarding the interpretation of clause 6.
The sole arbitrator opined that the claimants' argument regarding the interpretation of the clause was unsustainable. The interpretation of the contract proffered by the claimant required the sole arbitrator to disregard the word "forthwith" that was contained in clause 6, and to introduce the word "held" not contained in it. Thus requiring the arbitrator to do what the law prohibits.

Judgement: The court held that the arbitrator's view cannot possibly be said to be an 'unreasonable' view, or one no fair-minded person would take, or one that is simply not possible to bring within the perversity standard

under the patent illegality head contemplated by *Ssangyong Engineering*. To the contrary, if the sole arbitrator had accepted the petitioners' argument, then it might have been completely perverse. The view that the sole Arbitrator has taken is not only reasonable, rational and fair but also the only possible view upon a fair reading of the contract.

Maytas-Rithwik (JV) Konkan Railway Corporation Limited

(Judgment dated 18.03.2020 in 2020 SCC OnLine Bom 499)

Principle: An application under section 9 shall not be entertained before a court, if a section 17 application praying for the same relief is pending with the arbitral tribunal.

Facts: On 24th of October 2019, a three member arbitral tribunal closed the proceedings for pronouncement of award. The award had not been passed at the time of filing this petition. In February 2020, the petitioner submitted an application to the tribunal for parties to be re heard on the ground that there had been a lapse of substantial time since the closing of the proceeding. The application of the petitioner was heard by the tribunal on 13th March 2020 and was closed for orders. In the meantime, the petitioner on an apprehension that the respondent may invoke the mobilization bank guarantees, moved an interim application before the arbitral tribunal under Section 17 of the Act praying to direct the respondents to not to take any steps towards invoking and/or encashing the bank guarantees furnished by the claimant for a period of at least 90 days from the receipt of the arbitral award. The tribunal didn't decide any date to hear the section 17 application and thus an application under Section 9 of the Act has been moved by the petitioner, praying for the same relief.

Judgement: The court disposed off the Section 9 application. An application of the petitioner praying for the same relief was pending consideration before the arbitral tribunal and it would be appropriate that the arbitral tribunal hears the parties on this application first. If the award is not being immediately pronounced by the tribunal, then they are required to pass appropriate orders in that regard. The petitioner was permitted to bring this order to the notice of the arbitral tribunal so that the tribunal can take further appropriate steps to hear the parties on the pending application.

III. April and May

South East Asia Marine Engineering and Constructions Ltd. (Seamec Ltd.) vs Oil India Limited

(Judgment dated 11.05.2020 in Civil Appeal No. 673 of 2012 and Civil Appeal No. 900 of 2012)

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Principle: Where an arbitral tribunal while pronouncing an arbitral award, commits an error in the interpretation of a contractual provision, the same can be nullified by a court.

Facts: The appellant in this case was offered a work order concerned with well drilling and other auxiliary operations in Assam. The contract which effectuated the relationship between the appellant and the respondent was initially agreed for a period of 2 years but subsequently, both the parties agreed to extend it for a period of 2 additional years. Now, meanwhile the prices of one of the components essential for carrying out the process of drilling increased. Thus resulting in change of circumstances (clause 23 of the contract) and the appellant asked for the reimbursement of the same. The claim was rejected by the respondent, upon which, the parties approached the Arbitral Tribunal.

Judgement: the Supreme Court in the said case held that the arbitral tribunal failed to take into consideration all the clauses of the contract while interpreting clause 23. The court recognised that - the document forming a written contract should be read as a whole and so far as possible as mutually explanatory. The same was not followed due to which the court invalidated the award passed by the tribunal.

In re: Cognizance for Extension of Limitation – Order, but pertinent in light of COVID

(*Dated 23.03.2020 in Suo Motu Writ Petition (Civil) No(S).3/2020*)

Principle: Under Article 142 read with Article 141, the Supreme Court of India adjudicated upon the question of limitation period in the times of COVID 19.

Facts: The court took a suo moto cognizance in light of the prevailing pandemic, as the litigants faced the difficulties of filing their representations before courts/tribunals etc.

Judgement: The court ordered that across the country including this Court, a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.

Quippo Construction Equipment Limited vs Janardan Nirman Pvt. Limited

(Judgment dated 29.04.2020 in Civil Appeal No. 2378 of 2020)

Principle: Any objection with respect to the lack of jurisdiction of the Arbitrator would be deemed to be waived if it is failed to be raised at any stage of the proceedings.

Facts: The present case is a dispute arising out

of disagreement upon the venue of arbitration. The respondent chose not to participate in the arbitration proceedings which were initiated by the appellant on account of the respondent's failure to make payments for construction equipment provided by the appellant. It was only at the stage of preferring petition under Section 34 of the Arbitration and Conciliation Act, 1996 that a submission was raised about the venue of arbitration.

Judgement: Basing its reliance on Sections 4, 16 and 20 of the Arbitration and Conciliation Act, 1996, the Court held the respondent failed to participate in the proceedings before the Arbitrator and did not raise any submission that the Arbitrator did not have jurisdiction or that he was exceeding the scope of his authority, the respondent must be deemed to have waived all such objections.

Sk. Talim Ali vs Hindustan Petroleum Corporation Ltd. and Others

(*Judgment dated 24.04.2020 in* W.P.(C)No. 6639 of 2020)

Principle: Serious allegations of fraud were held to be a sufficient ground for not making a reference to arbitration.

Facts: the HPCL authority, during the Field Verification of Credential (FVC), asked the petitioner to submit Residential Certificate issued by the Tahasildar, Rasulpur which the petitioner provided. Finally, he was found suitable for final award of distributorship. On receiving a complaint, it was discovered that the furnished "Residential Certificate" mentioned him to be the resident of Brahmabarada alleged to be false and incorrect as he is not an ordinary resident of advertised location "Brahmabarada" which is under Rasulpur Block. Upon perusal of records, petitioner was found to be the resident of village Chandapur and not Brahmabarada. The Dealership Agreement provides for an Arbitration Clause in Clause-38.

Judgement: Relying on the decision of the Chancery Division in Russell v. Russel, the Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. In case the party charging the fraud objects to arbitration, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved.

Firm Rajasthan Udyog and Others vs Hindustan Engineering & Industries Ltd.

(Judgment dated 24.04.2020 in Civil Appeal No. 2376 of 2020)

Principle: Whether an Arbitration Award, which determined the compensation amount for the land to be paid under agreement for sale, can be directed to be executed as a suit for specific performance of agreement, when the reference to the Arbitrator (as per the agreement) was only for fixation of price of

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land in question, and the Arbitration Award was also only with regard to the same.

Facts: In the present case, the respondent filed Civil Suit No. 60 of 1996 seeking specific performance of an agreement dated 01.02.1980 between the respondent and the appellant. The question before the Court is as to whether the reference to the Arbitrator, in terms of the Agreement dated 01.02.1980, was merely for fixation of price of land to be sold by the appellant to the respondent in terms of the agreement, and if that be so, could a direction to execute the sale deed have been issued vide order dated 04.07.2016, even though the Civil Suit No. 60 of 1996 seeking specific performance of Agreement dated 01.02.1980 filed by the respondent was unconditionally withdrawn by the respondent on 13.02.2006.

Judgement: The Court in the present case held that the Award passed by the Arbitrator could not be independently executed, as the same was only for fixation of the price of land and not for the enforcement of the Agreement. Since, the Award was only declaratory of the price of the land, what was thus executable was the agreement, and not the Award.

National Agricultural Cooperative Marketing Federation of India vs Alimenta S.A.

(Judgment dated 22.04.2020 in Civil Appeal No. 667 of 2012)

Principle: A foreign award that violates Indian law and therefore contrary to the public policy of India is unenforceable.

Facts: NAFED and Alimenta S.A. entered into a contract for the supply of 5,000 metric tonnes of Indian HPS groundnut. NAFED was not able to perform a part of its contractual obligations owing to imposition of a ban by the Government of India ('**GOI**') on a contractual commodity which was the subject of bargain amongst the parties in their underlying contract. However, under the prohibition clause of the underlying contract, the parties specifically agreed that in such an eventuality (prohibition of export by executive order or by law), the contract will stand cancelled. Alimenta S.A. initiated arbitration proceedings before FOSFA and subsequently an order was passed by which NAFED was directed to pay a sum of USD 4,681,000. The enforceability award was challenged by NAFED on the ground that it opposed the public policy of India and was in contravention with Section 7(1)(a), (b), and (c) of the Foreign Awards (Recognition and Enforcement) Act, 1961.

Judgement: The Supreme Court interpreted the prohibition clause in light of Section 32 of the Indian Contract Act, 1872 which renders a contingent contract void in case the underlying contract between the parties itself provides for contingencies upon happening of which

contract cannot be carried out. Clearly, by way of prohibition clause, the parties have considered and agreed to render the contractual bargain as void in the eventuality of imposition of such a ban by GOI. This in turn renders such an award as passed against the fundamental policy of Indian law (without considering Section 32 of the Contract Act) falling in teeth of 'public policy' ground of refusing to enforce a foreign award provided under Section 7(1)(a), (b), and (c) of the Foreign Awards (Recognition and Enforcement) Act, 1961 which is akin to Section 48 of the Arbitration & Conciliation Act, 1996

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