GNLU SRDC ADR MAGAZINE

In the memory of our beloved Professors

Dr. Aruna Kumar Malik and Dr. Anant Deogaonkar

Legal discourse and innovation is highly dependent on the legal community that sustains it. The legal community feeds on the stars that pioneer it and more importantly on the legacy that they leave behind. This issue of the GNLU SRDC ADR Magazine is dedicated to the stars that GNLU lost this year.

Dr. Aruna Kumar Malik was not only a kind soul but a highly qualified professor. He went out of his way to identify talent and provide a head start to aspiring students. He was deeply interested and pioneered the development of foreign policy and international law in the University. He was a hard-working, research-oriented star and an inspiration to the legal community.

Dr. Anant Deogaonkar was a man with steely resolve. He was a jovial person and always had a smile on his face. He was a fighter and battled with cancer. He was impressively qualified and deeply interested in social justice and the criminal laws. He endeavoured and made students' progress his priority and mission.

They were dearly loved by all the students and will be deeply missed.

May God rest their soul in peace.

Om Shanti.

Foreword

MR. RANJIT SHETTY

Senior Partner, Argus Partners

"*The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.*"

- Sandra Day O'Connor

Former Associate Justice of the Supreme Court of the United States

The legal system today is evolving to break away from the shackles of traditional litigation, and offering better options for resolving disputes through arbitration, mediation or negotiation. Curating a healthy Alternative Dispute Resolution (ADR) regime requires the lawmakers and courts to work in tandem and evolve a set of principles which reconcile the differences between the black letter of the law and the grey areas in practice. The evolution of the ADR mechanism has been predominantly driven by resolving issues in a timely and cost-effective manner. To deal with the situation of pendency of cases in courts in India which is further aggravated by the present Covid-19 pandemic, ADR plays a significant role by its diverse and tested/developed techniques which helps to reduce the burden on courts. Professionals and those who wish to engage in ADR in any context must therefore educate themselves on the finer details and the nuanced positions of law in order to advise their clients better and deliver results. This is possible only by enabling a culture of critical academic discourse. A holistic approach involving all stakeholders is the way forward to achieving the required change in the ADR mechanism and the Covid 19 pandemic adds to the reasons that India needs to accelerate these changes.

The GNLU SRDC-ADR Magazine bridges the knowledge gap within the student community on the position of law that is constantly evolving, and to act as a modicum for healthy exchange of views and perspectives. The magazine attempts to promote interdisciplinary research and identify the evolving trends in the practice of ADR. The Magazine employs high publication and editorial standards in order to deliver articles of calibre and insight. The Magazine, under the able guidance of its faculty, advisors and benefactors, support of the administration and dedication of its members, has undertaken progressive measures to live up to its essential function.

ABOUT SRDC

The Student Research Development Council ('SRDC') was established in 2014 as a platform for students to engage in collaborative academic research and to foster discussion around contemporary research questions in law and allied disciplines.

Our objective

The ADR Student Research Group, under the aegis of the Student Research Development Council, is proud to launch its flagship initiative, the GNLU SRDC-ADR Magazine, a publication inviting submissions from experts, working professionals and students interested in the field of Alternative Dispute Resolution. The aim of the Magazine is to keep pace with the recent developments, judicial decisions and practices being adopted in Indian and foreign jurisdictions. The aim is also to allow and promote a comparative and interdisciplinary understanding of various dynamics shaping this field of study.

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Note from Editors

We ensue this note by expressing our immense gratitude to the readers, advisors, contributors and everyone associated with this magazine and the unconditional support that has been extended to the magazine. Their impervious faith in our objectives has been instrumental and enlivening to the success of the inaugural issue of the Magazine. With the magazine making new inroads and gaining recognition, we hope that it obtains a wider readership and becomes a medium for catalysing free exchange of thoughts and a credible platform for learning amongst the section of students and professionals engaged in Alternative Dispute Resolution. For the fourth edition, the editors are pleased to present the feature interview conducted on 01st May, 2021 with Mr. Ranjit Shetty, Senior Partner at Argus Partner, Mumbai. He was most solicitous in sharing his insights and advice with the editorial team. We take this opportunity to extend our gratitude to Mr. Shetty for engaging with us.

This issue features six submissions bearing the following titles: *Power to grant Anti-Arbitration injunctions by the Civil Courts: An Anomaly or Safeguard?, Inter-relation between Disclosure and Confidentiality, Legality of Unilateral Arbitration Clauses in India: A Critical Analysis, The Legal Status of Emergency Arbitration in India: An insight into Amazon v. Future Retails, Binding Non-signatory guarantors to an Arbitration Agreement: A Judicial Scrutiny and Alternative Dispute Resolution under China's Belt and Road Initiative.*

Academic integrity and quality of research have always been the non-negotiable requirements of the GNLU Academia. The same have been dutifully incorporated in the context of the Magazine. We have prudently congregated six articles on contemporary issues of Arbitration which are engaging and informative for both dilettantes and consummates in Alternative Dispute Resolution. We hope our devoted attempt is recognized by our readers and contributors and they continue to extend their support to take our Magazine to new heights.

We hope our readers will enjoy reading the Magazine as much as we did putting it together for you.

POWER TO GRANT ANTI-ARBITRATION INJUNCTION BY THE CIVIL COURTS: AN ANOMALY OR SAFEGUARD?

Mrs. Jyoti A. Singh & Ms. Nishi Agarwal

Founder, AJA Legal and Associates   Associate, AJA Legal and Associates

Introduction

The arbitration regime in India has undergone significant changes in the recent past, wherein the lawmakers have made major efforts to implement every possible and much needed steps that have made India a suitable choice for the '*se*at' of arbitration for foreign parties.

While the tide towards endorsing foreign arbitration has been steady, the likening for domestic arbitration has witnessed an impressive rise. Invariably, the drafters of domestic commercial contracts have started to emphasise much upon the importance of including arbitration [ad-hoc/ institutional] as a reliable alternate dispute resolution mechanism. However, there remain many unsettled positions under the extant setup that require further clarity. One such key issue that needs to be resolved is striking a balance between party autonomy and *kompetenz-kompetenz vis-a-vis* power of the civil courts to grant anti-arbitration injunction.

While there is no set precedent for tracking down a definite answer to this question, the authors of this article make a sincere attempt to analyse the judicial trend, which started as early as 2001. This article reflects upon some of the major judgments in the last two decades, which set out a judicial trend in matters concerning anti-arbitration injunctions. Let us first gather a quick understanding of an anti-arbitration injunction and how it impacts India's arbitration landscape.

Meaning of Anti-Arbitration Injunction: It is referred to as an act of seeking restraining orders from the jurisdictional Court against the initiation or continuation of arbitration proceeding. The grant of an anti-arbitration injunction is often taken against the rule of *kompetenz- kompetenz*, stipulated under Section 16 of the Arbitration and Conciliation Act, 1996 ["**the Act**"].[1]

The Doctrine of kompetenz- kompetenz: In layman's language, it asserts the idea that the tribunal has the competence to decide upon its own jurisdiction. The legislature, by way of Section 16 of the Act, ensures that all jurisdictional questions shall be dealt with by the tribunal itself. It is the cornerstone of all the interpretations concerning the provisions of the Act.

[1] The Arbitration and Conciliation Act,1996, s 16.

In a recent case, *M/s N.N. Global Mercantile v. M/s Indo Unique Flame Ltd.,*[2] the Division Bench of the Supreme Court observed that the doctrine of *kompetenz-kompetenz* implies that "…*the arbitral tribunal has the competence to determine and rule on its own jurisdiction, including objections with respect to the existence, validity, and scope of the arbitration agreement, in the first instance, which is subject to judicial scrutiny by the courts at a later stage of the proceedings*…"

The doctrine of *kompetenz-kompetenz* is built on the premise that the arbitration agreement is separate and independent from the substantive underlying contract in which it is embedded. An extension to this premise further stipulates that an arbitration agreement exists and can be acted upon, irrespective of whether the main substantive contract is valid or not. There are catena of judgments that have harped upon the supremacy of the arbitral tribunal over the civil court's jurisdiction by placing reliance on the principle of *kompetenz-kompetenz*.

Analysing Judicial trend to understand the legal position of Anti-Arbitration Injunction suit in India

The jurisprudence on the subject matter was laid down by the Supreme Court in the case of *Kvaerner Cementation India Limited v. Bajranglal Agarwal,*[3] ["**Kvaerner Cementation**"], wherein the Court heavily relied on the doctrine of *kompetenz-kompetenz,* and observed that by virtue of Section 5 read with Section 16 of the Act, the arbitral tribunal has the power to decide upon the existence and validity of the agreement and therefore, the jurisdiction of civil courts with respect to the same is barred. The judgment lost its radar until 2012 when the Supreme Court cited it in *the case of A. Ayyasamy v. A. Paramasivam & Ors.,*[4] ["***A. Ayyasamy***"].

Thereafter, in the matter of *Modi Entertainment Network v. W.S.G. Cricket,*[5] the Supreme Court extensively discussed the issue and laid down certain important guidelines for the Court to satisfy before using its discretion to grant an anti-suit injunction.

In *SBP & Co. v. Patel Engineering Ltd. & Ors.,*[6] the Seven-Judge Bench of the Supreme Court held that Section 16 of the Act only ensures the tribunal's ability to decide upon its jurisdiction but the same does not mean that the jurisdiction of the civil court is prohibited.

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[2] *M/s N N Global Mercantile v M/s Indo Unique Flame Ltd* 2021 SCC Online SC 13.
[3] *Kvaerner Cementation India Limited v Bajranglal Agarwal* (2012) 5 SCC 214.
[4] *A Ayyasamy v A Paramasivam and Ors* 2016 AIR SC 4675.
[5] *Modi Entertainment Network v W S G Cricket* [2003] AIR SC 1177.
[6] *SBP & Co v Patel Engineering Ltd. & Ors* [2006] AIR SC 540.

The aforementioned judgment was recently overruled by *Vidya Drolia & Ors. v. Durga Trading Corporation & Ors.*,[7] wherein it was held by the Supreme Court that the scope of a civil court to examine the *prima facie* validity of an arbitration agreement include only (a) Whether the arbitration agreement was in writing? (b) Whether the arbitration agreement was contained in an exchange of letters, telecommunication etc? (c) Whether the core contractual ingredients qua the arbitration agreement were fulfilled? (d) On rare occasions, whether the subject -matter of the dispute is arbitrable?

In *Bhushan Steel Ltd. v. Singapore International Arbitration Centre & Ors.*,[8] the Delhi High Court held that if there is a valid arbitration agreement between the parties then the suit for restraining or injuncting the arbitration proceedings is not maintainable.

The Calcutta High Court in *LMJ International Ltd. v. Sleepwell Industries Co. Ltd. & Anr.,*[9] ["**LMJ International Ltd**"] refused to grant any restraining order against the other party from taking steps for an arbitration proceeding seated in London. The Court observed that the contract was signed with full awareness and attention by both the parties and thereby one cannot contest the contention of *forum non-conveniens*.

Likewise, the Delhi High Court in *Sancorp Confectionary* v. *Gumlik*,[10] following the judgment of *LMJ International Ltd,* observed the supremacy of the arbitral tribunal in the matters relating to arbitration and refused to interfere with the arbitration proceedings initiated in the Singapore International Arbitration Centre. It was held that the tribunal is competent enough to decide upon all the matter related to arbitration.

Subsequently, the Supreme Court in *Chatterjee Petrochem Company & Anr. v. Haldia Petrochemicals Limited*,[11] emphasised on the decision laid down in *Ganga Bai v. Vijay Kumar & Ors.*,[12] and upheld that every person has an inherent right to bring a suit of civil nature unless it is barred by statute.

Further, in *World Sport Group v. MSM Satellite Singapore Ltd.,*[13] ["**World Sport Group**"] the Supreme Court explicitly acknowledged the jurisdiction of the civil court in granting such injunction orders. It was emphasised that as per Section 9 of the Code of Civil Procedure, 1908,[14] the civil courts of

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[7] *Vidya Drolia & Ors v Durga Trading Corporation & Ors* 2020 SCC Online SC 1018.
[8] *Bhushan Steel Ltd v Singapore International Arbitration Centre &Ors* 2010 SCC OnLine Del 2236.
[9] *LMJ International Ltd v Sleepwell Industries Co Ltd* 2012 SCC OnLine Cal 10733 (DB).
[10] *Sancorp Confectionary v Gumlik* 2012 SCC OnLine Del 5507.
[11] *Chatterjee Petrochem Company &Anr v Haldia Petrochemicals Limited* 2013 SCC OnLine SC 1084.
[12] *Ganga Bai v Vijay Kumar & Ors* (1974) 2 SCC 393.
[13] *World Sport Group v MSM Satellite Singapore Ltd* AIR 2014 4 SCC 968.
[14] The Code of Civil Procedure 1908, s 9.

India have an inherent power to decide on any civil matter unless such jurisdiction is expressly barred.

Subsequently, the Calcutta High Court in *The Board of Trustees of Port of Kolkata v. Louis Dreyfus Armatures SAS & Ors.,*[15] *held that the civil courts can grant anti-arbitration injunction orders only in exceptional cases.*

Thereafter, in the case of *McDonald's India Private Limited v. Vikram Bakshi & Ors.,*[16] the Delhi High Court placed relied on the judgment of the *World Sport Group*. The Court, while providing clarity on the difference between anti-suit injunctions and anti-arbitration injunction, held that the civil court has the jurisdiction to entertain the suit of injunction related to arbitration, but such power can be used only in limited circumstances: like when the arbitration clause is null, void or inoperative. The principle of *forum non-conveniens* come into play only where there are more than one competing courts. In the case of anti-arbitration injunctions, the arbitral tribunals are the alternate to courts and do not qualify as competing court. It is a forum chosen by the party to avoid the proceeding of the civil courts; hence it cannot be considered as *forum non-conveniens* per se.

In *A. Ayyasamy,* the Supreme Court dismissed the application filed under Section 8 of the Act.[17] The Court relied on the judgment of *Kvaerner Cementation* and held that the court can only overlook the arbitration clause/agreement when there is a serious allegation of fraud. Mere allegation of fraud simplicitor does not nullify the arbitration agreement.

In Bharti Tele-Ventures Ltd. & Ors. v. DSS Enterprises Pvt. Ltd. & Ors.,[18] the Delhi High Court decided that a suit filed for declaring the arbitration agreement invalid or for issuing an injunction to arbitration is not maintainable.

In *Ravi Arya v. Palmview Investments Overseas,*[19] the Delhi High Court held that all the objections in terms of the arbitration including grant on injunction should be raised before the arbitral tribunal.

In *Overseas Himachal Sorang Power Pvt. Ltd. & Ors. v. NCC Infrastructure Holdings Limited,*[20] the Delhi High Court held that the anti-suit injunctions are not similar to anti-arbitration injunctions. The civil court cannot grant anti-arbitration injunctions until it is proved that the arbitration proceedings were vexatious or oppressive in nature.

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[15] *The Board of Trustees of Port of Kolkata v Louis Dreyfus Armatures SAS & Ors* 2014 SCC OnLine Cal 17695.

[16] *McDonald's India Private Limited v Vikram Bakshi & Ors* 2016 (4) ArbLR 250 (Delhi).

[17] *A Ayyasamy v A Paramasivam & Ors* AIR 2016 SC 4675.

[18] *Bharti Tele-Ventures Ltd &Ors v DSS Enterprises Pvt Ltd & Ors* 2018 (6) Arb LR 118 (Delhi).

[19] *Ravi Arya v Palmview Investments Overseas* 2018 SCC OnLine Bom 19886.

[20] *Overseas Himachal Sorang Power Pvt Ltd & Ors v NCC Infrastructure Holdings Limited* 2019 SCC Online Del 7575.

In *National Aluminium Company Limited v.* S*ubhash Infra Engineers Private Limited,*[21] the Supreme Court relied upon the judgment of the *Kvaerner Cementation,* and held that any objections with respect to the validity or existence of the arbitration agreement can only be raised before the arbitrator by way of an application under Section 16 of the Act and the civil court does not have jurisdiction to go into such question in a civil suit. The same is contrary to the judgment of *Duro Felguera S.A v. Gangavaram Port Limited,*[22] wherein it was held that the court needs to look into the validity and existence of the arbitration clause/agreement before appointing an arbitrator.

Eventually, in *Bina Modi & Ors. v. Lalit Modi & Ors.*,[23] ["**Bina Modi**"] it was observed by the Delhi High Court that if the statute has provided for the mode of obtaining the same relief before the Arbitral Tribunal, the Court under Section 41(h) of Specific Relief Act, 1963 ["**SR Act**"][24] would not grant the same relief i.e., of an anti-arbitration injunction. Further, it was observed that the judgment of the *Kvaerner Cementation* is binding on the Court and hence it does not have the jurisdiction to decide upon the validity and existence of the arbitration agreement. Following the principle of party autonomy and competence-competence, the Court held that the same shall only be dealt with by the arbitrator.

The aforesaid judgement was later overruled by the Division Bench of Delhi High Court vide an order dated December 24, 2020.[25] The Bench observed that the Single Judge gravely erred by failing to exercise the jurisdiction vested in the Court, which statutorily required him to adjudicate the dispute between the parties. The Division Bench held that the issue falling under Indian Trust Act, 1882 cannot be the subject matter of arbitration since the same are excluded from the purview of the arbitral tribunal by necessary implication. The Division Bench also clarified that the reference made to Section 41(h) of SR Act in the impugned judgment is fallacious since under Section 16 of the Act, the Court cannot provide any relief in the present case, much less an equally efficacious relief.

Lastly, in *Balasore Alloys Limited v. Medima LLC*,[26] the Calcutta High Court denied the precedential value of the *Bina Modi* case*,* and ruled that the civil courts are well within its power to grant anti-arbitration injunctions order even against the foreign seated arbitration. The Supreme Court

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[21] *National Aluminium Company Limited v Subhash Infra Engineers Private Limited* (2020) 15 SCC 557.
[22] *Duro Felguera S A v Gangavaram Port Limited* (2017) 9 SCC 729.
[23] *Bina Modi & Ors v Lalit Modi & Ors* 2020 (2) Arb LR 446 (Delhi).
[24] The Specific Relief Act 1963, s 41(h).
[25] *Bina Modi & Ors v Lalit Modi & Ors* (2021) (1) Arb LR 1 (Delhi).
[26] *Balasore Alloys Limited v Medima LLC* (2020) 9 SCC 136.

upheld the same by its order dated September 16, 2020.[27] The Court took a holistic view of the facts and relied on the judgment of *Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan & Ors.*,[28] The Court held that the arbitration clause in the main agreement was wider and included matter connected with the main agreement within in its sweep, and thus, it would be inappropriate to invoke another arbitration clause of another agreement when the arbitral tribunal has already been constituted under the main agreement.

A Way Forward

In the authors' view, ousting the jurisdiction of the civil courts is not only an extreme position and an interpretation that stands against the very statute. While giving complete respect to the party's autonomy and Section 16 wherein the arbitral tribunal is empowered to decide the jurisdictional issue; the access to civil courts aids in imparting justice to an aggrieved party by giving it an additional legal remedy.

The concept of independent proceedings is not alien to the arbitral tribunal. However, the same cannot and should not be interpreted in a manner that treats the arbitral proceedings distinct to general relief that the civil court may grant. While the authors believe that the power of interference by the civil court should be restricted to certain exceptional situations so that the sanctity of the arbitration process remains intact, they are also of the opinion that the grant of an anti-arbitration injunction is a general remedy that is outside the jurisdiction of the arbitral tribunal. The power of the arbitral tribunal, while granting any relief which occurs post-initiation of the arbitration proceedings is undoubtedly supreme but at a pre-initiation stage, we certainly cannot bar the jurisdiction of civil court and take away the legal remedy available with the aggrieved party.

[27] ibid.

[28] *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan & Ors* (1999) 5 SCC 651.

INTER-RELATION BETWEEN DISCLOSURE AND CONFIDENTIALITY

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Introduction

One of the defining features of arbitration is its ability to offer '*privacy*' and '*confidentiality*' as compared to litigation in domestic courts. Both of these principles are quintessential for a fair and impartial hearing. Principles of '*transparency*', '*confidentiality*' and '*privacy* are sought to be achieved by way of the requisite need of disclosure to be lmao made by the arbitrators. Parties, arbitrators, and courts face a complex decision as to *what information* the arbitrator should disclose and what *standards* should apply to the disclosure. The 2015 Amendment[1] to the Arbitration and Conciliation, 1996 ["**Arbitration Act**"] now casts a solemn duty on an arbitrator to be impartial between the parties. It requires specific disclosure by the proposed arbitrator under Section 12(1) to that extent. The principle of confidentiality applies to information being disclosed prior to publication of award including the time when the arbitral proceedings are conducted and also to the information on the award arising out such proceedings. Without narrating the settled law concerning disclosure, we discuss the scope of disclosure and confidentiality under various heads including the nature of disclosure, the stage at which disclosure should be made, the standard applicable in relation to disclosure, and the interplay between disclosure and confidentiality.

Scope of Disclosure

> *"[T]he duty to act independently and impartially involves Arbitrators owing no allegiance to the party appointing them. Once appointed they are entering independent of their appointing party and bound to conduct and decide the case fairly and impartially. They are not in any sense… a representation of the appointing party or in some way responsible for protecting or promoting the party's interest."*[2]
>
> \- *Popplewell J.*

The ramification of non-disclosure in terms of Section 12 of the Act is no longer *res integra*.[3] Non-compliance with section 12 read with schedule 5 and schedule 7 not only results into termination

[1]The Arbitration and Conciliation (Amendment) Act, 2015.
[2] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817.
[3]*HRD Corporation (Marcus Oil and Chemical Division) v GAIL (India) Limited (formerly GAS Authority of India Ltd)* (2018) 12 SCC 471; *Omaxe Infrastructure and Construction Ltd v Union of India & Anr* 2018 SCC OnLine Del 8914; *Bharat Broadband Network Limited v United Telecoms Limited* (2019) 5 SCC 755; *Proddatur Cable TV Digi Services v Siti Cable Network*

of ongoing arbitral proceedings irrespective of their stage, but also results into setting aside of the award.[4] *Raison d'être* for Section 12 of the Act is that independence and impartiality of an arbitrator must be squarely and unequivocally established. Having regard to the said raison d'être and Section 12 being the heart and soul of the Act, the following issues need to be addressed:

i. Whether an arbitrator is under a legal duty to disclose when the duty to make such disclosure arises and the perversity of current practice followed by the arbitrators;
ii. What does the phrase '*disclose in writing any circumstances'* mentioned in Section 12 mean;
iii. Which test is applicable at the preliminary stage of '*likely to give rise to justifiable doubts*';
iv. Whether and to what extent an arbitrator may accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias;
v. Whether and to what extent the arbitrator may do so without disclosure in relation to issue 4;
vi. What are the "standards" to apply in disclosure; and
vii. How far the obligations to respect the privacy and confidentiality of an arbitrator constrain his or her ability to make disclosure and would demonstrate a lack of impartiality?

i. <u>Duty and stage of disclosure and perversity of current practice followed by arbitrators</u>

The duty to disclose has been held to be a legal duty,[5] we do not intend to venture into the same. Rather, we intend to elaborate on the *stage of disclosure* and the *current practice*. Prospective arbitrators who are sought to be appointed by the parties, generally accept the appointment and declare themselves to be '*the arbitrator(s)*' without disclosure in terms of Section 12. Accordingly, they begin issuing procedural orders and direct the parties to appear before them. It is only at the first sitting that the; arbitrators make the disclosure. We would ponder upon the perversity of nature of disclosure in the subsequent part.

We are pained to state that even Hon'ble High Courts and the Hon'ble Supreme Court of India, when approached under Section 11, generally pass an order worded as "*Upon consent of the parties,*

Limited (2020) 267 DLT 51; *Haryana Space Application Centre (HARSAC) & Anr v Pan India Consultants Pvt Ltd* Civil 2021 3 SCC 103.

[4] ibid.

[5] ibid.

Mr X is appointed as arbitrator. A copy of the order to be provided to Mr X. Parties shall appear before Mr X and Mr X is to make disclosure under Section 12. Application is disposed of accordingly."

Section 11 (8) uses the phrase "*before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator*", which casts a mandatory obligation on the court to have the disclosure before appointing a person as arbitrator. Section 12 uses the phrase "*approached in connection with his possible appointment as an arbitrator*". The Fifth and Seventh Schedules of the Act are based upon the principles of the IBA Guidelines on Conflict of Interest in International Arbitration ["**IBA Guidelines**"]. General Clause 3 of IBA Guidelines *inter alia* provides that the arbitrator *shall disclose* such *facts or circumstances* if any, *before accepting his or her appointment* or, if thereafter, as soon as they learn of them. By no stretch can '*consent*' recorded in the court orders be said to mean that the parties, without having any knowledge/information, waive the mandatory pre-requisite requirement of Section 12. At the highest and in any case, the '*consent*' is only for the court to consider the prospective arbitrator and nothing more. The obligation under Section 11(8) has multi-faceted objectives, including the following:

(i) power and/or function conferred upon court cannot be delegated to prospective arbitrators, and such delegation is *per incuriam*;

(ii) the court must examine the information/circumstances which are disclosed by the prospective arbitrator especially because entries/items mentioned in Schedules 5 and 7 of the Act are not exhaustive in nature; weed out any prospective arbitrator who suffers from ineligibility to act as arbitrator and not to appoint an arbitrator in relation to whom circumstances exist which give rise to justifiable doubts;

(iii) not to dispose of the application unless an independent and impartial arbitrator is appointed;

(iv) disposal of the application, without the appointment of an independent and impartial arbitrator, exposes the parties to wasted cost and time in so far as the parties are then compelled to approach the court again under Section 14 or file an application before '*arbitrators*' under Section 13 and upon rejection of the application by '*arbitrators*' follow the drill of Section 34.

Prospective arbitrators assume themselves to be '*arbitrator*s' and invariably end up wearing the '*arbitrator hat*' without appreciating that they are still at the stage of '*possible appointment as an arbitrator*'. Such practices followed by courts in appointing the arbitrator and party arbitrators are per incuriam and contrary to the intent of the Act. Prospective arbitrators should make prior

disclosure to the parties and/or the court at the stage of '*possible appointment*' itself and not thereafter.

ii. Meaning of 'disclose in writing any circumstances' under Section 12 and the test to be applied at the stage of 'likely to give rise to justifiable doubts.'

"*Under the common law, judges should disclose facts or circumstances which would or might provide the basis for a reasonable apprehension of lack of impartiality.*"[6]

The disclosures made by the arbitrators are generally worded as "*there is no circumstances or interest which give rise to justifiable doubts under Schedule 5 read with Schedule 7*' or '*I/we do not fall within any of the grounds/ circumstance contemplated under Schedule 5 read with Schedule 7.*"

Section 12 requires the prospective arbitrator '*to disclose in writing any circumstance*' that gets reinforced by the Sixth Schedule which mentions '*disclosing circumstance*'. The intention of the legislature is to ensure disclosure of *information/ circumstance* by the prospective arbitrator and it was not envisaged that the prospective arbitrator would pass an order declaring that no circumstances exits which give rise to justifiable doubts and is not ineligible to act as arbitrator, rather than disclosing the information.

Non-disclosure of the '*circumstance*' defeats the legislative intent. The only reason that items appear in the Fifth Schedule as well as the Seventh Schedule is for the purpose of disclosure by the arbitrator, as unless the arbitrator discloses in writing his involvement in terms of items 1 to 34 of the Fifth schedule, such disclosure would be lacking. In such case the parties would be put at a disadvantage as such information is often within the personal knowledge of the arbitrator only.[7]

General Clause 3 of IBA Guidelines *inter alia* provides if the '*facts or circumstances exist*' that may, *in the eyes of the parties*, give rise to doubts as to the Arbitrator's impartiality or independence, the Arbitrator *shall disclose* such '*facts or circumstances.*'

In light of the aforesaid legislative intent as declared by the Hon'ble Supreme Court of India in *HRD Corporation* read with the IBA Guidelines, it is apparent that the proposed arbitrator is required to disclose the circumstance/information/fact, which need not be limited to the items narrated in the Fifth Schedule. At the stage of proposed appointment warranting disclosure, the test of '*in the eyes of parties*' stands applied to determine what matters can be said to give rise to bias

[6] *Halliburton Company* (n 2).
[7] *HRD Corporation (Marcus Oil and Chemical Division)* (n 3).

and further cause doubts to a prospective arbitrator's independence or impartiality. Therefore, the duty to disclose rests on the principle that the parties have an interest in being fully informed of all facts and circumstances and the proposed arbitrator is duty-bound to put himself in the shoes of the parties at the time of disclosing circumstance/information/fact.

Accordingly, the breach of a legal obligation to disclose a matter, being a legal wrong, is an apparent bias since the non-disclosure itself justifies the removal of the arbitrator on the basis of justifiable doubts to independence and impartiality.[8] Additionally, non-disclosure owing to hindsight/ inadvertence/honest mistake without any wrongdoing or actual bias falls within the contour of '*apparent unconscious bias',* and the arbitrator being guilty of non-disclosure must bear the cost of parties.[9]

Further, the duty to disclose, being continuous in nature, requires the arbitrator to make disclosure not only to the parties in prospective arbitration about the ongoing arbitration but also extends to informing the parties in ongoing arbitration of the prospective arbitration to ensure independence and impartiality. The same becomes more relevant in the case of multiple references concerning the same or overlapping subject matter, which is examined in the next issue.

iii. Appointment in multiple references concerning the same or overlapping subject matter and duty to disclose

The pertinent issue for consideration is what matters are relevant and material to an assessment of an arbitrator's impartiality which may or may not reasonably lead to such an adverse conclusion. Whether and to what extent an arbitrator may disclose the existence of a related arbitration without obtaining the express consent of the parties to that arbitration depends upon whether the information to be disclosed is within the arbitrator's obligation of privacy and confidentiality and, if it is, whether the consent of the relevant party or parties can be inferred from their contract having regard to the customs and practices of arbitration in their field.

The importance of disclosure of information/circumstance at the appropriate stage becomes more crucial when it comes to the appointment of a prospective arbitrator in multiple references concerning the same or overlapping subject matter, whether or not one of the parties is a common party. Non-disclosure thereof stands covered under '*apparent bias*' or '*apparent unconscious bias*' as explained herein above.[10]

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[8] *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48.
[9] ibid.
[10] *Halliburton Company* (n 8).

In case of multiple references concerning the same or overlapping subject matter in which the same arbitrator is a member of the tribunal, the party which is not common to the various arbitrations has no means of informing itself of the evidence led before and legal submissions made to the tribunal (including the common arbitrator) or of that arbitrator's response to that evidence and those submissions in the arbitrations in which it is not a party.[11] The common party to two overlapping references might obtain an advantage over its opponent in one or the other arbitration by having access to information about the common arbitrator's responses to the evidence led or the arguments advanced in the arbitration which was the first to be heard, can be a cause of concern to the other party in the arbitration in which the evidence and legal submissions are heard later.[12]

Failure to disclose by the common arbitrator to the party who is not the common party to the references deprives that party of the opportunity to address and perhaps resolve the matter which should have been disclosed.[13] Therefore, the question as to what is the sufficient "*information*" which the proposed arbitrator needs to disclose and what are the "*standards*" that are applicable becomes more crucial and is being addressed in the next issue.

iv. <u>What are the "standards" to apply in disclosure?</u>

> *"[t]he obligation of disclosure extends … to matters which may not ultimately prove to be sufficient to establish justifiable doubts as to the arbitrator's impartiality. However, a failure of the disclosure may then be a factor in the latter exercise".*[14]

An arbitrator, like a judge, must always be alive to the possibility of "*Apparent bias*" and of actual but "*unconscious bias*". The possibility of unconscious bias on the part of a decision-maker is known, but its occurrence in a particular case is not.[15] One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias.[16] Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the arbitrator's involvement in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem.[17]

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[11]ibid.
[12]*Halliburton Company* (n 8); *See also Guidant LLC v Swiss Re International SE* [2016] EWHC 1201.
[13] *Halliburton Company* (n 8).
[14]*PAO Tatneft v Ukraine* [2019] EWHC 3740 (Ch).
[15]*Halliburton Company* (n 8).
[16]ibid.
[17]*Halliburton Company* (n 8).

The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify.[18] But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of arbitrators.[19] The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity.[20]

An arbitrator may fail to disclose for entirely honourable reasons, such as forgetfulness, oversight, or a failure to properly recognize how matters would appear to the objective observer.[21] However, the fact of non-disclosure in a case that calls for it must inevitably colour the thinking of the observer.[22] Duty of disclosure arises out of the parties' interest in being fully informed and disclosure does note the existence of a conflict of interest.[23] There would be matters which, if left unexplained would give rise to justifiable doubts as to an arbitrator's impartiality. They must be disclosed and neutralized by explanation.[24] Similarly, there will be matters, which are more than trivial, which an arbitrator ought to recognize could by themselves or in combination with other circumstances (including a failure to disclose those matters) give rise to such justifiable doubts, if later discovered.[25] Having regard to aforesaid wide range of information which is to be disclosed in light of the private nature of the arbitration, it becomes important to see whether an arbitrator can make the disclosure without obtaining the consent of the parties in the ongoing arbitration.

Confidentiality

There are two crucial stages of confidentiality, firstly, confidentiality prior to the publication of an award, including the time when the hearings are ongoing including notes of evidence and other documents disclosed or generated in arbitration, and secondly, confidentiality after the award is published.[26] Prior to the 2019 Amendment,[27] confidentiality did not have any statutory force.

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[18]ibid.
[19]ibid.
[20]*Almazeedi v Penner* [2018] UKPC 3.
[21]*Halliburton Company* (n 8).
[22]ibid.
[23]*Halliburton Company* (n 8).
[24]ibid.
[25]*Halliburton Company* (n 8).
[26]ibid.
[27]The Arbitration and Conciliation Act 1996, s 42-A.

Strangely, it is still a toothless provision in so far as it does not provide for consequences of breach of confidentiality.

Section 42-A is a non-obstante clause that deprives the parties of their autonomy and this provision supersedes any other law. The only exception statutorily carved is for implementation and enforcement of the award. Surprisingly, Section 42-A does not carve out an exception for any other matter including (i) challenge under Section 34 and further proceeding under Section 37, (ii) extension of time under Section 29A, (iii) proceedings under Sections 14 and 15. The non-obstante clause being later in time may be said to prevail over all the other provisions including other non-obstante provisions. In view of non-exception, Section 42-A raises the question of whether "*transparency*" is more important or "*confidentiality*". Having left with no judgment in India and any statutory provision, we turn to the development in another common law country.[28]

Recently, the Hon'ble Supreme Court of the United Kingdom dealt with the interplay between disclosure and confidentiality.[29] It was held that as a general rule the duty of privacy and confidentiality is not understood to prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent.[30] However, the duty of disclosure does not give an arbitrator a carte blanche to disclose whatever is necessary to persuade a party that there is no justification for doubts about his or her impartiality.[31] If an arbitrator needs to disclose more detail about another arbitration to comply with the duty of disclosure, the arbitrator or proposed arbitrator must obtain the consent of the parties to the arbitration or proposed arbitration about which he or she is making a disclosure.[32]

Consent of the common party can be inferred from its action in seeking to nominate or to appoint the arbitrator.[33] The consent of the other party is not required for such limited disclosure.[34] However, if the information to be disclosed is subject to an arbitrator's duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent.[35] In such a circumstance, if a person seeking appointment as an arbitrator in a later arbitration does not obtain the consent of the parties to a prior related arbitration to make a necessary disclosure about it, or the parties to the later arbitration do not consent to the arbitrator's

[28]*Ayyasamy v A Paramasivam* (2016) 10 SCC 386.
[29]*Halliburton Company* (n 8).
[30]ibid.
[31]*Halliburton Company* (n 8).
[32]ibid.
[33] *Halliburton Company* (n 8).
[34] ibid.
[35] *Halliburton Company* (n 8).

disclosure of confidential matters relating to that prospective appointment to the parties to the earlier arbitration, the arbitrator will have to decline the second appointment.[36]

Disclosure, being mandatory, though arising to a material extent from the voluntary decision of the proposed arbitrator to pursue another arbitration, needs to be acknowledged by the legislature as well as the court in India. Accordingly, the legislature/court must step in to fill the void in view of the aforesaid development.

Conclusion

In order to achieve the legislative intent underlying the statutory duty of the arbitrator to act fairly and impartially, there is a necessity for pre-appointment disclosure. Impartiality would not be complete without transparency. Therefore, if India is to emerge as a hot seat for arbitration, '*disclosure*' and '*confidentiality*' must be given their due importance so that the parties even in International arbitration choose to arbitrate in India for guaranteed neutrality and impartiality.

The aforesaid can never be achieved unless the prospective arbitrator make disclosure and provide the information to the parties rather than passing an order that he is not ineligible to act as arbitration and none of the items in term of Fifth and Seventh Schedule are attracted. It can't lost sight of the fact that the aforesaid practice is per incuriam and the items set out in the said schedules are merely illustrative and not exhaustive in nature. Similarly, the Hon'ble High Court and Supreme Court of India must appoint and dispose of application only upon receipt of disclosure and satisfaction in terms of the Act. We need amendment to section 42A to iron out certain creases as mentioned in '*Confidentiality*' chapter.

[36]ibid.

LEGALITY OF UNILATERAL ARBITRATION CLAUSES IN INDIA: A CRITICAL ANALYSIS

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Introduction

Arbitration as a mode of alternative dispute resolution provides party autonomy and flexibility where they can ensure that the dispute resolution clause is tailor-made according to their commercial needs. When the dispute resolution mechanism in a contract between parties includes an arbitration clause, it can be of two types, namely – bilateral option clauses and unilateral option clauses. The former confers a right upon both the parties to refer the dispute to arbitration while the latter gives such a right to only to one of the parties to the contract. In this article, we are concerned only with unilateral option clauses.

In unilateral clauses, the position of the parties is not equal with respect with respect to the influence one party has over the other during their negotiation. The party at a superior position is able to dominate the inferior party on various terms of the agreement and may often reserve a unilateral right to invoke the arbitration. Such clauses can be referred to by a variety of names such as 'asymmetrical' and 'one-sided'. These clauses are usually challenged on the grounds of unequal positions accorded to contracting parties, imbalance of rights between the parties and being opposed to the public policy of the country. The aspects of mutuality, equality and independence of parties is of paramount importance in arbitration and the same is a ground for debate on the validity of unilateral option clauses. Coupled with a silence in legislation and judicial pronouncements, an analysis into the veracity of such clauses is prompted.

Validity of unilateral arbitration clauses in India

While neither the Arbitration Act nor the Supreme Court has taken a stand regarding the validity of such clauses, on several occasions contradicting jurisprudence has been churned by various High Courts.

Judgements Upholding Validity:-

1. *Castrol India Ltd vs. Apex Tooling Solutions Ltd, 2015*[1] ["**Castrol India**"]

The issue before the Madras High Court was regarding the validity of Clause 23 of an agreement, which operated as the dispute resolution clause giving Castrol India the sole power to refer the matter to either the court or to the arbitrator.

The validity of the clause was defended on two grounds, *firstly*, that Section 7 of the Arbitration Act does not require the agreement to provide for a bilateral reference and *secondly*, the mutuality of rights amongst parties to initiate arbitration is not a mandated requirement under an arbitration agreement. The appellant referred to *Russell on Arbitration*[2], where it has been stated that there is no requirement under the English Law for an arbitration agreement to confer a mutual right upon the parties to initiate a reference, and an arbitration agreement providing an option to one party alone to refer disputes to arbitration was valid[3].

Thus, the emphasis of the appellant was on international practices being followed wherein mutuality is not a pre-condition. The court did not dispute the validity of the clause and held that since the Indian arbitration law has been modelled to be in conformity with the UNCITRAL Model, judicial construction of the clauses under it should be in conformity with international practices.

2. *Jindal Export Ltd. vs. Fuerst Day Lawson Ltd., 2009* [4] ["**Jindal Exports**"]

Before the Delhi High Court, the petitioner had challenged the lack of mutuality in the arbitration clause, thus questioning the unilateral power vested with the respondent under it. Under clause 17 of the contract, both parties had agreed that when a dispute arose between them, the respondent would have the unilateral power to initiate arbitration or to refer the matter to the Courts in England. Due to unfavourable weather conditions, the petitioner failed to deliver the contracted product to the respondent, following which, the respondent invoked the arbitration clause seeking damages. Further, the respondent nominated its arbitrator and persuaded the petitioner to do the same. However, when the petitioner failed to appoint one, the International General Produce Association Ltd. appointed an arbitrator on behalf of the petitioner. This appointment by the IGPA was objected by the petitioner.

The respondent referred to the English case of *Pittalis & Ors. vs. Sherefetin* [5], wherein the court had held that such a clause is a fully bilateral agreement which constitutes a contract and the fact that

[1] *Castrol India Ltd & Ors v Apex Tooling Solutions Limited & Ors* (2015) 1 LW 961.
[2] David Sutton, Judith Gill, Mathew Gearing, *Russel on Arbitration* (23rd edn, Sweet & Maxwell 2014).
[3] *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm).
[4] *Jindal Exports Ltd v Fuerst Day Lawson* [2009] 165 DLT 354.
[5] *Pittalis and Ors v Sherefetin* [1986] 1 QB 868.

the option to invoke the arbitration clause is exercisable by only one party is irrelevant since the parties have agreed upon the same. Relying upon this case, it was argued that mutuality between the parties to initiate arbitration clause i.e. equal rights between the parties to refer the matter to arbitration is not required.

Further, it was discussed that an agreement or a clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement but an agreement to enter into an arbitration agreement in the future. The parties to the case had agreed on future arbitration where the 'in the-future disputes' would be referred to arbitration is a possibility only when both parties consent to it. This aspect distinguishes an agreement to enter into arbitration agreement from arbitration agreement.

The petitioner contended that there is no specific form of arbitration agreement and the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. The court held that even if English law was not applicable to this case, there was an open offer by the petitioner to submit the dispute to arbitration and the power of acceptance to invoke arbitration was with the respondent, and when the option was exercised by the respondent, the arbitration clause became mandatory and thus, the petitioner's claim is not valid.

<u>Judgements opposing the validity:-</u>

1. *Bhartia Cutler Hammer vs. Avn Tubes Ltd., 1991* [6] ["**Bhartia Cutler Hammer**"]

In this case before the Delhi High Court, the plaintiff filed a recovery suit against the defendant. However, it was contended by the defendant that the matter should be referred to arbitration according to the agreement which contained a unilateral clause whereby only the defendant could initiate arbitral proceedings. The plaintiff challenged the validity of the clause on the grounds that it gives power to only one of the parties to refer disputes to arbitration. The plaintiff further relied on the English case of *Baron v Sunderland Corporation* [7] where the Court of Appeals had held that mutuality is an essential ingredient for a valid arbitration agreement.

The defendant argued that as the plaintiff had given his consent to refer the matter to arbitration, no fresh consent would be necessary and the previous consent would bind him throughout and such prior consent makes the clause bilateral. Thus, there was no question of want of mutuality to render the arbitration clause invalid.

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[6] *Bhartia Cutler Hammer v Avn Tubes Ltd* (1995) 33 DRJ 672.

[7] *Baron v Sunderland Corporation* [1996] 2 QB 56.

The Court, however, held that the clause was invalid as the right to invoke the arbitration was restricted only to the respondent, it was one sided and the clause would not amount to a bilateral arbitration agreement and even the pre-consent could not validate such a clause.

2. *Emmsons International Ltd. vs. Metal Distributors, 2005* [8] ["**Emmsons International**"]
The dispute in the above case was with respect to the jurisdiction of the court. The dispute resolution clause between the parties empowered only the seller to refer the dispute to arbitration and the validity of the same was questioned. Although the Court disregarded its validity, the reasoning had a different basis. The plaintiff had argued that the clause was opposed to public policy and was also hit by Section 28 of the Indian Contract Act, 1872, ["**the Contract Act**"], which would effectively render such agreements void on the ground that it absolutely restricts a party to enforce their rights under the contract in ordinary tribunals.

The court held that as the clause imposes an absolute restriction on the party, it is void under Section 28 of the Contract Act, apart from being opposed to public policy. Interestingly, the court also noted that if the contract had partially, and not absolutely, restricted the plaintiff's right to remedy i.e., giving them an alternative choice before other tribunals, then such a clause would have been valid.

Critical analysis

It has been seen that unilateral clauses are usually challenged on the grounds of lack of equality or mutuality between parties, besides being unconscionable and laying an absolute restraint on party's right to legal proceedings and being opposed to public policy of India. We now critically analyse these grounds of challenge along with the judgements of the respective High Courts.

Firstly, the Arbitration Act nowhere provides for mutuality or equality between parties regarding invocation of arbitration as an essential ingredient for a valid 'arbitration agreement' under Section 7 of the Arbitration act, which has been correctly argued in Castrol India.

Moreover, in the case of Jindal Exports, the aspect of future arbitration has been discussed. Such an agreement is valid as it provides the party the option to arbitrate, and whenever such an offer to initiate arbitration is accepted and executed, it becomes a valid agreement. Only because there is uncertainty as to arbitrate at the time of entering into an agreement, cannot be a ground for rejecting the validity of the same. The parties are giving their prior consent to submit future

[8] *Emmsons International Ltd v Metal Distributors* 2005 80 DRJ 256.

disputes to arbitration, thereby satisfying the condition of valid clause under Section 7 of the Arbitration act. Thus, the same has been rightly upheld by the court in the above case.

Additionally, taking into consideration the Bhartia Cutler Hammer case, the aspect of prior consent also needs to be looked into. If the party challenging the arbitration clause has given their consent to the agreement, it should be assumed that it has gone through the provisions of the clause and the same should be binding on them. Consent assumes that there is consensus ad idem between the parties which is a necessary requisite for a valid contract. Further the doctrine of promissory estoppel provides that when one party gives an assurance or promise and other party acts on the same faith or promise, the party making the promise or assurance becomes bound by it and cannot retract from the same due to the application of the law of estoppel. Thus, when the party challenging the clause has given their assurance to be bound by the clause, the party is thereby bound by the doctrine which would defeat their challenge. Thus, the judgement in the case of Bhartia Cutler Hammer does not hold.

Secondly, coming to the aspect of unconscionability, lack of mutuality and equality, Section 16 of the Contract Act defines contracts induced by undue influence as being voidable at the option of the party whose consent has been obtained by those means. It covers contracts in which a party is in a position to dominate the will of another and uses the same to obtain unfair advantage over the other which are known as unconscionable contracts. Unilateral option clauses are usually challenged on similar grounds. In the case of *Central Inland Water Transport Corp Ltd v. Brojo Nath Ganguly, 1986*[9] ["**Brojo Nath Ganguly**"], the Supreme Court had struck down an employment agreement which provided for termination of services of a permanent employee by serving a three month notice and held that such a provision was unreasonable, unfair, and opposed to Section 23 of the Contract Act. However, it held that only such unreasonable and unfair clauses would be declared void where inequality of bargaining power results from great disparity in economic strength of the parties or where one party can obtain the means of livelihood by only relying upon the terms imposed by the stronger party. This principle was held to not apply in a commercial transaction and where both parties are businessmen, as considering the amount of large corporations, such myriad situations might arise. Thus, as the concept of unconscionability does not apply in case of commercial transactions, unilateral arbitration clauses, almost all of which are found in a commercial setting, cannot be held as being unconscionable, and those being induced by undue influence, thereby establishing consent, mutuality & equality between the parties with respect to the clause.

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[9] *Central Inland Water Transport Corp Ltd v Brojo Nath Ganguly* 1986 3 SCC 156.

Lastly, public policy also has been a ground for challenge for such clauses. Public policy has been defined as a ground for challenge of awards under section 34 of the Arbitration Act and further elaborated by the Supreme Court in various judgements, such as *Renusagar Power Co. Ltd v. General Electric Co*[10] as something being in contravention with fundamental policy of Indian law or that is in conflict with its most basic notions of morality or justice. Unilateral arbitration clauses restrain a party from invoking the dispute resolution clause, thus restraining a party's right to legal remedy and consequently contravene Section 28 of the Contract Act. However, exception 1 to Section 28 of the Contract act which provides that the rule of agreement in restrain of legal proceedings are void shall not apply in cases where the parties agree to refer the disputes between them to arbitration has not been looked into by the Delhi High Court in the case of Emmsons International. Thus, unilateral option clauses are not void by virtue of Section 28 and public policy concerns. Additionally, the scope of public policy as a ground for challenge of arbitral awards has been well defined under the 2015 amendment of the Arbitration act & the Delhi High Courts' decision invalidating such clauses was pronounced prior to this amendment and thus a re-valuation of whether these clauses violate the recently defined scope of public policy also needs to be relooked.

Recently, the issue of legality of unilateral appointment of arbitrator has been considered by the Supreme Court. In *Perkins Eastman Architects DPC and another v. HSCC (India) Limited, 2019* [11]*,* the respondent company's Managing Director's power of unilateral appointment of sole arbitrator was challenged. The Court held that such a clause is invalid as there exists a possibility that the arbitrator may act to safeguard the interests of the party appointing him thereby negating the principle of party autonomy and neutrality in an arbitration. Thus, impartiality and independence of parties has been a ground of challenge.

However, regarding unilateral arbitration clauses, a party only has the right to decide to invoke the dispute resolution clause, i.e., giving the party procedural right, however the substantive rights of the party remain the same & are not affected. Thus, the process of arbitration remains neutral. Further, here the principle laid down in *Brojo Nath Ganguly* needs to be considered, which establishes that there is an absence of undue influence in commercial transactions, thus proving consent & equality between the parties.

Thus, to settle the dispute, the question before the Supreme Court would be with regard to lack of equality, mutuality between the parties and public policy concerns. The court should consider

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[10] *Renusagar Power Co Ltd v General Electric Co* 1994 Supp 1 SCC 644.
[11] *Perkins Eastman Architects DPC and another v HSCC (India) Limited* 2019 SCC OnLine 1517 SC.

the principle laid down in *Brojo Nath Ganguly*, as in a commercial transaction where unequal positions between parties do exist and it benefits both the parties in some way or other. The authors have also explained how such clauses are not opposed to public policy. Thus, as there is prior consent between the parties, without undue influence and also as no statutory provision invalidates such clauses along with being in conformity with public policy, the authors find no reason why the validity of such clauses should not be upheld.

THE LEGAL STATUS OF EMERGENCY ARBITRATION IN INDIA: AN ANALYSIS

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Introduction

Emergency Arbitration ["**EA**"] is an emerging concept in the jurisprudence of Arbitration where parties can seek interim relief (for example, to protect the evidence or the assets where there are chances of them to be destroyed/lost). Even though it is a relatively new development it has been recognized by several arbitration institutions. For a long time, the status and the legal position of the EA remained unclear in India for two reasons- *firstly*, the definition of arbitral tribunal under the Arbitration and Conciliation Act, ["**The 1996 Act**"] doesn't include emergency arbitrator. Consequently, parties can't get emergency award enforced by resorting to Section 17(2) of the 1996 Act which specifies that any order of arbitral tribunal is deemed to be an order of the court and and can be enforced. *Secondly,* even if emergency arbitrator is recognized as arbitral tribunal, an emergency award in a foreign-seated arbitration can't be enforced as Part II of the 1996 Act lacks a provision similar to that of Section 17(2) of the Part I. Thus, for the time being, in the absence of any concreteness the only remedy appears to be available for the parties is to apply for interim measures under Section 9 of the 1996 Act.

Recently the issue of enforceability of emergency award in India was again brought to light when the Delhi High Court dealt the same in litigation between Future Group and Amazon. This article analyzes the legal standing of the EA in India in light of some earlier judicial pronouncements vis-à-vis Amazon-Future Group litigation.

The Concept of Emergency Arbitration

Emergency arbitration can provide interim relief to parties even before the constitution of the Arbitral Tribunal.[1] In an EA, an emergency arbitrator is mainly appointed by an arbitration institution to deal with certain urgent matters so that interim relief measures can be taken.[2] In India, the power to provide interim relief before the constitution of the Arbitral Tribunal is vested upon the courts as per Section 9 of the 1996 Act.

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[1] Commercial Arbitration Rules of Japan Commercial Arbitration Association 2019, art 77.

[2] King & Spalding, The Emergency Arbitrator: Doubling As An Effective Option For Urgent Relief And An Early Settlement Tool (*JD Supra*, 20 May 2015) <https://www.jdsupra.com/legalnews/the-emergency-arbitrator-doubling-as-an-53241/> accessed 11 May 2021.

This also helps to bridge the time gap between the arising of the dispute and the formation of the tribunal. The tribunal is not immediately established (as it can take several weeks, if not months, to be constituted) on the same date when the dispute arises between the parties; so to cover that duration the concept of emergency arbitration becomes helpful. Following are the requisites to successfully get interim relief from Emergency Arbitrator[3]-

- ***Periculum in mora:*** There's an immediate need for relief and if relief is not given, the party would suffer loss which one would not be able to compensate as damages.
- ***Fumus boni iuris****:* A reasonable inference can be drawn that the requesting party would succeed on merit.

Statutory Provisions

The concept of emergency arbitration was recognized at the international level a long time ago, but we still lack the statutory recognition of the same in India. The Law Commission of India in its 246th report recommended incorporating it within the 1996 Act, by amending Section 2(1)(d) which defines arbitral tribunal.[4] However, when the act was amended in 2015 the recommendation was not adopted. Thus, the statutory position of EA and award is still unclear and ambiguous in India.

Some of the Indian arbitration institution like Mumbai Centre for International Arbitration,[5] Delhi International Arbitration Centre[6], Madras High Court Arbitration Center,[7] and International Commercial Arbitration[8] have provisions to appoint emergency arbitrators. Likewise, many other international arbitration institutions like Hong Kong International Arbitration Centre,[9] Singapore International Arbitration Centre,[10] London Court of International Arbitration,[11] etc provide for the establishment of EA in their rules.

The UNCITRAL Model Law doesn't provide any explicit provision regarding EA, but the same can be derived from the definition of 'arbitration' under Article 2(a). It provides that arbitration is, "*any arbitration whether or not administered by a permanent arbitral institution.*"[12] Further, while initially

[3] Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) [1985] UN Doc A/40/17, Annex I, art 17A.
[4]Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996*" (Law Com No 246, 2014).
[5]Mumbai Center for International Arbitration (Rules) 2016, s 3.
[6]Delhi International Arbitration Centre (Arbitration Proceeding) Rules, r 14.
[7]Madras High Court Arbitration Center (MHCAC) Rules, 2014, under Part IV, s 20 r/w sch A and sch D.
[8]Rule of Domestic Commercial Arbitration and Conciliation (Indian Council of Arbitration), 2016, r 57.
[9]Hong Kong International Arbitration Centre Administered Rules, 2018, art 23 & sch 4.
[10]Singapore International Arbitration Centre Rules 2016 art 30 & sch 1.
[11] London Court of International Arbitration Rules, 2014, art. 9B.
[12]ibid, art 2(1).

there was no provision for EA, the International Court of Arbitration later incorporated the concept of Emergency Arbitrator under Article 29 of the Rules of Arbitrator of the ICC. The rules also provided the process pertaining to EA through Appendix V.[13] Thus, at international level the jurisprudence regarding EA is well established.

Position of Emergency Arbitration in India

The legal position of the EA in India is dealt in two parts i.e. Pre and Post Future Group- Amazon litigation.

i. <u>Pre Future Group- Amazon Litigation</u>
In India, we have a limited number of judicial pronouncements when it comes to EA. The case of *Raffles Design International India Pvt. Ltd. v. Educomp Professional Education,*[14] decided by the Delhi High Court becomes a pertinent one in this aspect. Here, the shareholder agreement contained the arbitration clause where the parties decided to resort to the SIAC rules. Upon the emergence of a dispute between the parties, the petitioner filed an application for the appointment of an emergency arbitrator by invoking the SIAC rules. The emergency arbitrator ruled in petitioner favor and granted him interim relief. To enforce the same petitioner approached the Delhi High Court which held that the award passed by the emergency arbitrator cannot be directly enforced under the 1996 Act and the same is not within the scope of the 1996 Act. Further, it was observed that the parties can file a separate suit before the court and under such suit, the Court can decide whether to enforce the emergency award or not. It is pertinent to note that this was a case of foreign seated arbitration. Additionally, in the case of *HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd.*,[15] it was held that any application under Section 9[16] of the 1996 Act for obtaining interim relief in the case of foreign seated arbitration, will be adjudged independently of the emergency award. Thus, if EA awards are continued to be treated unenforceable without an accompanying suit it's just frustrating the reasons as to why parties chose foreign-seated arbitration in the first place.

These cases also highlighted the limitation of Section 17[17] of the 1996 Act as it is not applicable to foreign seated arbitration. The same is dealt with under the Part II of the 1996 Act which lacks any provision to enforce interim orders. However, this part being governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, the three

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[13]International Chamber of Commerce Arbitration Rules 2021.
[14] *Raffles Design International India Pvt Ltd v Educomp Professional Education* [2016] 234 DLT 34.
[15] *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd* 2020 SCC OnLine 656.
[16] The Arbitration and Conciliation Act 1996, s 9.
[17] The Arbitration and Conciliation Act 1996, s 7.

criteria to be fulfilled as per it to enforce any award is applicable here also.[18] One of the criteria is that the award must be final. However, whether the emergency award is a final one or not, continue to, remain a legal issue. On one hand, the Singapore Court of Appeal held that every award no matter at what stage of arbitration is a final and binding one,[19] but on the other hand, the Southern Court of California[20] ruled that the decision of the emergency arbitrator is not final and thereby non-binding.

In the case of *Ashwani Minda v. U-Shin Ltd*,[21] where the parties had agreed to conduct arbitration proceedings as per Japan Commercial Arbitration Association rules, the Delhi High Court gave primacy to those rules only. The rules contain the only remedy of EA when it comes to interim relief, thereby excluding the jurisdiction of the courts. Therefore, even if the Emergency arbitrator had granted interim relief, such would have remained unenforceable in India due to jurisdictional exclusion of the courts. This shows the lacunae in the Indian law regarding EA.

ii. Post Future Group- Amazon Litigation

Brief Facts

This story can be traced back to August 29, 2020, when Reliance and Future Retail ["**FRL**"] entered into a deal worth INR 24,713 crores. Upon learning the Amazon approached Singapore International Arbitration Tribunal by invoking the provision under Rule 30[22] of the Singapore International Arbitration Centre Rules, 2016 for Interim and Emergency Relief. Amazon relied upon its Shareholder agreement with Future Coupon Pvt. Ltd. ["**FCPL**"], the promoter firm of the FRL. The agreement contained an arbitration clause which provided that arbitration would happen according to SIAC rules.

To this effect, the emergency arbitrator granted interim relief to Amazon and thereby injuncted the Future Group from further moving ahead with the Board Resolution passed on August 29, 2020, pertaining to that deal. Further, they were also injuncted from filing or pursuing any application before any forum or agency in India regarding the said Board Resolution.

Thereafter, Amazon informed the regulators in India (i.e. Competition Commission of India and Securities Exchange Board of India) regarding the injunction issued by the emergency arbitrator so that they do not approve the above deal. Against this FRL approached the Delhi High Court

[18] The Arbitration and Conciliation Act 1996, pt II.

[19] *PT Perusahaan Gas Negara (Persero) TBK v CEW Joint Operation*, [2010] SGHC 202.

[20] *Chinmax Medical Systems v Alere San Diego* 2011 WL 2135350 (SD Cal 2011).

[21] *Ashwani Minda & Ors v U-Shin Limited & Ors* 2020 SCC OnLine Del 721.

[22] Singapore International Arbitration Centre Rules 2016, art 16.

to restrain Amazon from impeding the implementation of the lawful contract on the following grounds-

- The interim award of the emergency arbitrator is not binding. The concept of the emergency arbitrator is alien to our arbitration system as not recognized in Part I of the 1996 Act.
- The emergency arbitrator is not recognized as Arbitral Tribunal, under SIAC rules and is merely considered as a preceding step before the formation of the tribunal. Section 17 of the 1996 Act[23] mentions only "arbitral tribunal." Further, the definition clause of the arbitral tribunal under section 2(d)[24] does not include emergency arbitrator.
- Moreover, this concept was deliberately not included in 1996 Act even after the recommendations made by the 246th Law Commission's Report. Thus, the Emergency award can't be enforced.

Issues before the court

- Whether the provisions of the emergency arbitrator are valid? Whether they are contrary to the public policy of India or the mandatory requirements of the procedural law under the 1996 Act?

Judgment

The single-judge bench of Justice Mukta Gupta of the Delhi High Court observed that prima facie the case is not '*coram non judice*'.[25] Some of the points worth noting from the judgment regarding this aspect are as follows-

1. In this proceeding, the parties by exercising their autonomy agreed to a different procedural code of conduct for arbitration. Therefore, it is assumed that the parties are aware of the terms which provide for the appointment of an emergency arbitrator (EA). Court has to primarily look upon the rules that the parties agreed to and only if they contradict the public policy or compulsory provisions of the law the rules can be overlooked. The same was held in the case of *National Thermal Power Corp. vs. Singer Co. &Ors.* [26]
2. SIAC rules provide that the party can either approach the courts or seek the appointment of an emergency arbitrator for interim relief.

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[23] The Arbitration and Conciliation Act 1996, s 17.
[24] ibid, s 2(d).
[25] *Future Retail Ltd v Amazon.Com Investment Holdings LLC & Ors* 2020 SCC OnLine Del 1636.
[26] *NTPC v Singer Co & Ors* [1992] (3) SCC 551.

3. Further, the Court relied on the case of *BALCO v. Kaiser Aluminium Technical Services Inc*,[27] to conclude that the parties can derogate from the provisions of Section 9 of the 1996 Act when the arbitration is International Commercial Arbitration under Section 2(2) of the 1996 Act.
4. The court also referred to the case of *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd* [28] to emphasize the importance of party autonomy in arbitration. One cannot expect Arbitration proceedings without having party autonomy as it is one of the core facets of the concept of arbitration. They referred the Section 2(8)[29] of the 1996 Act which allows the parties to select the procedural laws according to which they wish to conduct the Arbitration.
5. While dealing with the contention of the deliberate exclusion of EA by the legislature even after the Law Commission Recommendations, it was observed that merely because any recommendations of the law commission was not accepted by the Parliament we can't say that it can thwart the process of development of law by the Supreme Court. The same was concluded by referring to the judgment of. *Avitel Post Studioz Ltd.*[30]
6. It is worth noting that Court did not go into the legality on the merits of the EA order because the same was not challenged.

Aftermath

Later, Amazon approached the same High Court to enforce the award given by the emergency arbitrator under Section 17(2) of the 1996 Act read with Order XXXIX Rule 2A of the Code of Civil Procedure, 1908. The bench of Justice Midha of the Delhi High Court granted interim relief to Amazon directing all authorities and parties to maintain the status quo on the deal until a detailed interim order on the case.[31] It further observed that prima facie the Emergency Arbitrator is an Arbitrator, and the award is enforceable as an order of this Court under Section 17(2) of the Arbitration and Conciliation Act.

Aggrieved by this order FRL filed an appeal before the bench of Chief Justice DN Patel and Justice Jyoti Singh of the Delhi High Court. The division bench on February 8, 2021, stayed the status quo order delivered by the Justice Midha bench. The order noted that the arbitration agreement was between Amazon and FCPL; thereby, FRL was not a party to the same. Amazon has appealed to the Supreme Court of India against this decision.

[27] *BALCO v Kaiser Aluminium Technical Services Inc* [2012] 9 SCC 522.
[28] *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* [2017] 2 SCC 228.
[29] The Arbitration and Conciliation Act 1996, s 2(8).
[30] *Avitel Post Studioz Ltd & Ors v HSBC PI Holdings (Mauritius) Ltd* [2020] SCC OnLine 656.
[31] *Future Retail Ltd v Amazon.Com Investment Holdings LLC & Ors* [2021] SCC OnLine Del 1279.

It remains to be seen how the events unfold in this long-stretched imbroglio of litigations and appeals. The authors hope to get some clarity regarding the legal status of the EA in India.

Conclusion: A Way Forward

It can be concluded by observing that while interpreting or applying any law the purpose behind adopting such law must be kept in mind. The whole purpose when it comes to emergency award gets vitiated when it comes to the enforceability of it in India because of the lack of statutory recognition. Moreover, speedy justice, party autonomy, and elimination of the judicial proceedings are some core facets of the concept of Arbitration. Non-recognition of the EA affects these core facets negatively. Now it is for the legislators to amend the 1996 Act to make it harmonious with the International standards, as is done by various countries like Hong Kong,[32] Singapore,[33] etc. As a note of caution, the parties must be careful about the selection of institutional rules having the provision of EA till the position of EA remains fluid in India.

[32] Hong Kong Arbitration (Amendment) Ordinance 2013 s 22B (1).
[33] International Arbitration (Amendment) Act 2012 (SG), s 2(1).

CHINA'S BELT AND ROAD INITIATIVE: REFORMING PRACTICES IN INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION

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Introduction

The Belt and Road ["**BRI**"] is an international infrastructure development initiative launched by the People's Republic of China in 2013. Rooted in the history of Silk Roads, it is an ambitious project which consists of a land-based belt and a maritime road stretching from China to the Middle East and Europe. It is one of the world's largest ever infrastructure plans and involves more than seventy sovereign states in addition to independent investors, contractors and developers. Given the magnitude and complexity of the project, disputes will inevitably arise, and lawyers practicing dispute resolution will play a significant role. Three kinds of disputes are most likely to occur under the BRI:[1]

- Disputes between commercial entities in relation to provision of ancillary services like financing, foreign exchange, and customs clearance.
- Investor-state disputes commonly resolved through the mechanism of Investor State Dispute Settlement in accordance with multilateral & bilateral investment instruments and treaties.
- State to State trade disputes normally resolved under the framework of the World Trade Organization.

Projects under the BRI are capital intensive, involve various contractual agreements, and are spread across jurisdictions. Therefore, it is reasonable for parties to prefer alternative modes of dispute resolution over the local court system which involve concerns regarding impartiality of local judges, applicability of local law, and international enforcement of local judgments. International arbitral institutions are conscious of the increasing demand for arbitration due to BRI, and competition is rising among many of them to exploit this opportunity. Therefore, many of them have made amendments to their rules, focusing particularly on the BRI, in order to maintain competitiveness. In 2018, China itself developed its own commercial court – The China International Commercial Court ["**CICC**"] for arbitration and mediation of disputes under the

[1] Jue Jun Lu, 'Dispute Resolution along the Belt and Road: what does the future hold?' (*Thomson Reuters Practice Law Arbitration Blog* , 2 August 2018) <http://arbitrationblog.practicallaw.com/dispute-resolution-along-the-belt-and-road-what-does-the-future-hold/> accessed 10 March 2021.

BRI.[2] This paper attempts to discuss and analyze some developments taking place in the field of dispute resolution, in view of this initiative.

The Unique Legal Challenges of BRI

The BRI, owing to its cross-border nature and its involvement of a vast number of parties, poses some unique challenges in dispute resolution. Contingent on the circumstances of the host state, BRI projects run the risk of political instability, are clouded with concerns over security and local protectionism, and face regulatory and legal hurdles. Some unique challenges which ought to be addressed with respect to dispute resolution under the BRI are:

Mitigating Differences

Ever since its announcement in 2013, China has asserted that one of BRI's primary goals would be to guarantee and advance certain internationally recognized standards in the rule of law.[3] Such a goal has been set, keeping in mind the fact that cross-border projects under the BRI are spread across a variety of political and legal systems, which makes enforcement by a single forum difficult.[4] There are over forty civil law, eleven common law, and four Islamic law countries within the BRI, besides nine others with a mixed legal system.[5] Disparities in legal systems, jurisprudences and expectations from the law complicate the manner in which disputes ought to be resolved in the event of a default or breach.[6] Therefore, BRI's smooth operation depends on the development of a system which can mitigate the differences between existing legal systems of participating nations.[7] Legal practitioners and mediators are of the opinion that BRI's goal of a seamless international economy can be realized only if countries are willing to revise their legal systems and bring a degree of uniformity in their domestic laws.[8] The introduction of CICC is itself seen as one of the attempts

[2] 'China has established International Commercial Court for commercial disputes under BRI' (*Rodl & Partner*, 25 September 2018) <https://www.roedl.com/insights/china-international-commercial-court-commercial-disputes-bri> accessed 28 May 2021.
[3] 'Building the Judicial Guarantee of International Commercial Court "Belt and Road" Construction An Exclusive Interview with Gao Xiaoli, Vice President of the Fourth Civil Division, The Supreme People's Court, PRC' (*China International Commercial Court*, 19 March 2018) <http://cicc.court.gov.cn/html/1/219/208/209/774.html> accessed 28 May 2021.
[4] Jingzhou Tao and Mariana Zhong, 'The Changing Rules Of International Dispute Resolution in China's Belt And Road Initiative' in Wenxian Zhang, Ilan Alon and Christopher Lattemann (eds), *China's Belt and Road Initiative: Changing the Rules of Globalization* (Palgrave 2018) 305.
[5] ibid 308.
[6] ibid.
[7] Poomintr Sooksripaisarnkit, 'Harmonisation of Choice of Law Rules in Commercial Contracts in the One Belt One Road Countries: Will the Hague Principles on Choice of Law in International Commercial Contracts Serve as a Good Model?' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018).
[8] ibid.

to create an international business environment that is stable, transparent, and committed to appropriate rule of law.[9] However, the institution shall be faced with its own legal challenges due to inconsistencies in the legal culture of China and questions raised against the past role of courts in the country. Some of these include partiality of judges, involvement of the government in adjudication, and opaqueness of laws and regulations. They shall be discussed in greater detail in the third chapter of the paper.

Enforcement of Awards

In cross-border disputes, enforcement of judicial pronouncements or arbitral awards is a pressing question. Enforcement is an extremely relevant factor considered by parties who enter into an arbitration agreement or any other contract which ensues the risk of potential international litigation. In negotiating and drafting clauses relating to the choice of forum and choice of law, they carefully consider the impact of such clauses on the disputes that may arise. The complex and high-cost nature of BRI projects imply that the stakes are very high for negotiating parties, more particularly when it comes to arbitration, termination, or clauses of breach. Scholars have opined that enforcement of foreign decisions in China is currently the most important topic in private international law with respect to BRI.[10] In the absence of sound enforcement capability, contracting parties may arbitrate their disputes and receive an award in their favor, only to realize that it is not enforceable and thus useless in effect. Historically, the international business and legal community has viewed China with a lens of caution when it comes to reciprocity and enforcement of foreign judgments.[11] The launch of BRI has induced China to move towards a system that guarantees reciprocity as an important principle.[12] The country has entered into over thirty bilateral treaties for legal assistance, and the mutual recognition and enforcement of civil and commercial judgments.[13] It is also actively participating in the negotiation on recognition and enforcement of judgments in civil and commercial matters at the Hague Conference on Private International Law, and exploring the possibility of ratifying the convention.[14]

[9] 'A Brief Introduction of China International Commercial Court' (*China International Commercial Court*, 28 June 2018) <http://cicc.court.gov.cn/html/1/219/193/195/index.html> accessed 11 March 2021.
[10] King Fung Tsang, 'The role of Hong Kong in the dispute resolutions of One Belt One Road' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *China's One Belt One Road Initiative and Private International Law* (Routledge 2018) 201.
[11] ibid 205.
[12] Interview with Gao Xiaoli (n 3).
[13] ibid.
[14] ibid.

Choice of Dispute Resolution Forum

Primarily concerned with international construction of infrastructure, projects under the BRI involve a large number of companies, both Chinese and non-Chinese, besides the Chinese government and other sovereign states. These parties have a range of competing options available to them for dispute resolution ranging from domestic courts and arbitral institutions to international arbitral institutions, mediation institutions and ad hoc options. This part discusses various factors which should be considered by parties in deciding the appropriate forum to resolve their disputes under BRI.

Difference in Arbitral Institutions

International arbitration, with its numerous advantages, has been the most preferred mode of dispute resolution for parties involved in BRI. Due to rising demand, tough competition is arising among arbitral institutions to maintain parity in their rules and secure a competitive position in the market.[15] However, noteworthy differences continue to exist and parties to the BRI ought to take them into account while deciding the appropriate forum for themselves:[16]

- Confidentiality: Maintenance of confidentiality is a very important factor in choice of arbitral institutions by concerned parties. Significant disparities exist in the approaches taken by different arbitral institutions on this issue. For example, International Chamber of Commerce ["**ICC**"] Rules don't contain any clear provision on confidentiality whereas rules of the International Centre for Dispute Resolution expressly prohibit the disclosure of any confidential matter in relation to the proceeding or the arbitral award.[17] Similarly, London Court of Arbitration Rules ["**LCIA**"] provides that all information relating to the arbitral proceeding and award should be confidential.[18]
- Scrutiny: The degree to which arbitral awards are scrutinized is also different for different arbitral institutions. When it comes to the ICC, awards given by the arbitrator are subject to scrutiny and approval of the institution in order to ensure consistency and a good standard in writing awards.[19] On the other hand, institutions like the Singapore International Arbitration

[15] James Rogers, Alfred Wu and Anita Fong, 'Belt and Road Initiative disputes – Bumps in the road?' (*Norton Rose Fulbright*, October 2018 <https://www.nortonrosefulbright.com/en-fr/knowledge/publications/7b9bd0cc/belt-and-road-initiative-disputes--bumps-in-the-road> accessed 11 March 2021.
[16] ibid.
[17] International Centre for Dispute Resolution, International Arbitration Rules, art 37.
[18] London Court of Arbitration, LCIA Arbitration Rules, art 30.
[19] International Chamber of Commerce, Arbitration Rules, art 34.

Centre ["**SIAC**"] and the Hong Kong International Arbitration Centre ["**HKIAC**"] do not undertake scrutiny of arbitral awards.

- Fees: Fee structures are also different for different arbitral institutions. Some of them charge on the basis of a fixed hourly rate of service while others base it on the amount of dispute. Parties need to be informed of these differences so that they can select that institution which suits their concern.

Responses of Arbitral Institutions

The UN Convention on Recognition and Enforcement of Foreign Tribunal Awards, forms the legal basis for international commercial arbitration, and signatories to the convention have an obligation to enforce arbitral awards given in their jurisdiction. Of more than seventy countries involved in BRI projects, it is important to note that only five are not signatories to this convention.[20] This implies that enforcement of arbitral awards shall be relatively convenient for signatory states. Most prominent arbitral institutions are therefore improvising on their mechanisms to capitalize on this opportunity. The ICC, in March 2018, proposed the establishment of a dedicated commission to take up the resolution of BRI disputes and published a statement that it would make concerted efforts to promote mediation, followed by arbitration in such cases.[21] Soon thereafter, HKIAC also announced a "Belt and Road Programme" which will consist of a road advisory committee, an industry focused belt and an online resolution platform dedicated especially to BRI disputes.[22] HKIAC amended its rules in the year 2018 to bring in many new features such as an online repository of documents, alternative modes of resolution such as Arbitration-Mediation-Arbitration ["**Arb-Med-Arb**"], funding by third parties, and multilingual procedures.[23] It is seen by many commentators as one of the most preferred forums for arbitration due to its proximity with China, a stable legal system based on common law, long positive experience of arbitration, and its familiarity with Chinese companies and foreign investors. The latest SIAC rules brought in 2016 contain provisions for multiple contract arbitration, joinder of new parties, and quick dismissal of defenses and claims.[24] Since 2014, it already had a protocol in

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[20] Rogers (n 15).

[21] 'ICC Court Launches Belt and Road Initiative Commission' (*International Chamber of Commerce*, 5 March 2018) <https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/#:~:text=The%20International%20Court%20of%20Arbitration,China's%20Belt%20and%20Road%20Initiative> accessed 11 March 2021.

[22] 'HKIAC announces Belt and Road Programme' (*Hong Kong International Arbitration Centre*, 26 April 2018) <https://www.hkiac.org/news/hkiac-announces-belt-and-road-programme> accessed 11 March 2021.

[23] 2018 Administered Arbitration Rules, Hong Kong International Arbitration Centre.

[24] Eric Lai, 'SIAC 2016 Rules: The Key Changes' (*Singapore International Arbitration Blog*, July 11 2016 <https://singaporeinternationalarbitration.com/2016/07/11/siac-2016-rules-the-key-changes/> accessed 11 March 2021.

association with the Singapore International Mediation Centre ["**SIMC**"] to enable Arb-Med-Arb between the involved parties.[25] In another major development, the China International Economic and Trade Arbitration Commission ["**CIETAC**"] adopted a special set of rules for investment arbitration aimed at timely resolution of investment claims in relation to BRI.[26] Considering these changes and their impact on time and cost of resolution, parties should carefully weigh the pros and cons before selecting the suitable institution.

Prospects of Mediation

In the last few years, a global trend towards combining different modes of alternative dispute resolution is becoming popular, most particularly because of BRI. Led by China, experts are of the view that participating countries will reflect Asian values and take a more consensus-based approach to dispute resolution, promoting mediation in the way.[27] End-users, academics and reforms undertaken by Chinese courts themselves highlight the important role that mediation is likely to play in disputes under BRI.[28] Some of the most important advantages of mediation of BRI disputes are:[29]

- Flexible and informal: Mediation normally follows a broad standard process, but its procedures are quite flexible and informal, and can be changed easily to suit the needs of the mediating parties.
- Confidentiality: Normally, all documents used in the mediation process are kept confidential and cannot be relied upon for the purpose of any subsequent arbitration or litigation proceeding in the future.
- Saves time and cost: Mediation is set up in very quick time upon agreement and appointment of a mediator. Little cost is involved in organization, and most mediation proceedings hardly last for a day.

Three important BRI jurisdictions – China, Hong Kong, and Singapore have taken notable steps to promote mediation for resolution of BRI disputes. In 2019, a memorandum of understanding was signed between the China Council for the Promotion of International Trade ["**CCPIT**"] and the Singapore International Mediation Centre ["**SIMC**], to establish a panel of skilled dispute

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[25] SIAC-SIMC Arb-Med-Arb Protocol 2014.
[26] China International Economic and Trade Arbitration Commission, International Investment Arbitration Rules, 2017.
[27] 'Mixed-Mode Dispute Resolution: China's Belt and Road is Driving Change' (*Herbert Smith Freehills: ADR Notes*, 26 March 2019) <https://hsfnotes.com/adr/tag/belt-and-road-initiative/> accessed 11 March 2021.
[28] ibid.
[29] 'The Role of Mediation in the Resolution of Belt and Road Disputes' (*Herbert Smith Freehills*, 11 October 2017) <https://hsfnotes.com/asiadisputes/2017/10/11/the-role-of-mediation-in-the-resolution-of-belt-and-road-disputes/> accessed 11 March 2021.

resolution professionals for ensuring "a high settlement rate and a high level of user satisfaction".[30] Rules, enforcement procedures, and case management protocols shall also be established under this MoU.[31] Recently, the ICC also published a special guidance document on mediation of BRI disputes, which promotes mediation either as a standalone method or a mixed-mode process along with arbitration.[32] The chair of ICC Court's Belt and Road Commission also commented that with the Belt and Road nexus, a mixed-mode combining both mediation and arbitration can be quite efficient in resolving disputes.[33]

China's Plans on Dispute Resolution

International businesses partnering in BRI projects include in clear terms in their contracts to establish a forum for resolution in the event of dispute, be it mediation, arbitration, or some mixed method. Spearheading most of its projects, China has made the most significant efforts to develop mechanisms which can expeditiously resolve BRI disputes. The China International Commercial Court constituted by the Supreme People's Court of China ["**SPC**"] is emerging as an important development in this respect. A brief comparison of the CICC with existing forums in Singapore and Hong Kong can help us understand the international perception, benefits and potential questions that may arise in respect of CICC and China's overall plan of emerging as a global dispute resolution hub:

- Hong Kong: Hong Kong's dispute resolution forums for both arbitration and mediation, are recognized as quite reliable and transparent.[34] Therefore, parties with a greater concern for judicial impartiality and experience are more likely to opt for a mechanism in Hong Kong over China. However, China does not recognize judgments from Hong Kong as Chinese judgments, subjecting the parties to domestic civil procedures.[35] Moreover, there are complicated issues of reciprocity accompanying enforcement of arbitral awards in China as has been discussed before.[36] In recent years however, there has been a considerable change in the approach of

[30] 'SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes' (*Singapore International Mediation Centre*, 25 January 2019, <http://simc.com.sg/blog/2019/01/25/simc-and-ccpit-mediation-center-establish-international-mediator-panel-to-resolve-bri-related-disputes/> accessed 11 March 2021.
[31] ibid.
[32] International Chamber of Commerce, Guidance Notes on Resolving Belt and Road Disputes using Mediation and Arbitration.
[33] 'Mixed-Mode Dispute Resolution: China's Belt and Road is Driving Change' (n 27).
[34] Catherine Smith, 'The Belt and Road Initiative: Dispute Resolution along the Belt and Road' (*HFW Briefing*, August 2018) <https://www.hfw.com/The-Belt-and-Road-Initiative-Dispute-Resolution-along-The-Belt-And-Road> accessed 12 March 2020.
[35] Tsang (n 10).
[36] Alyssa V M Wall, 'Designing a New Normal: Dispute Resolution Developments along the Belt and Road' (2019) 52 N Y U Journal of International Law and Politics 279, 311.

Chinese Courts. The most notable of them was the decision of SPC to enforce the Singaporean judgment of Kolmar AG Group. In its decision, the court noted that treaties signed by China for mutual recognition and enforcement of commercial and civil cases ought to be respected, and doing so was in accordance with Article 282 of China's Civil Procedure Law.[37] This has been seen as a significant step in the direction of observing reciprocity of international judgments by Chinese courts. However, much more needs to be done to build confidence among private parties and states that international judgments shall be enforced as per these treaties.

- Singapore: For now, SIMC has partnered with CCPIT to develop rules and procedures for examination of conflicts and assistance of dispute resolution between parties involved in BRI.[38] Soon however, the two of them may turn into potential competitors, considering the continued zest with which CICC is pushing to strengthen its services in both mediation and arbitration. Like Hong Kong, Singapore has also earned a reputation among international businesses and practitioners for its well-developed commercial courts and a strong judiciary. Insofar as the CICC is concerned, there are widespread apprehensions amongst investors, that arbitral awards, especially the ones which are against the Chinese government or Chinese corporations, will not be enforced in time.

The SPC is cognizant of these problems with the CICC and has in fact constituted an international commercial expert committee to address them. The committee's functions include: (i) presiding over mediations; (ii) providing advisory opinions on special legal issues; (iii) providing suggestions and advice on the development of CICC; and (iv) consider other matters entrusted by the CICC among others.[39]

Conclusion

The success of Belt and Road Initiative is contingent upon the ability of parties to resolve their disputes in an amicable and timely manner. Given their sheer magnitude and cross-border nature, BRI projects encounter some unique difficulties in enforcing awards and mitigating the legal differences which exist between different jurisdictions. It is important that parties, especially China, take concrete steps keeping these considerations in mind. In so far as the investors are

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[37] Alison Lu Xu, 'Belt and Road Typical Case 13: Towards a Liberal Interpretation of the Reciprocity Principle for Recognition and Enforcement of Foreign Judgments' (*Stanford Law School China: Guiding Cases Project*, 15 June 2018) <https://cgc.law.stanford.edu/commentaries/clc-1-201806-insights-3-alison-xu/> accessed March 12, 2020.

[38] 'SIMC and CCPIT Mediation Center establish international mediator panel to resolve BRI-related disputes' (n 26).

[39] 'Working Rules of the International Commercial Expert Committee of the Supreme People's Court' (China International Commercial Court, 5 December 2018) <http://cicc.court.gov.cn/html/1/219/208/210/1146.html> accessed March 12, 2021.

concerned, choice of dispute resolution forum is the most important question, and intense competition is emerging among various international institutions to make their rules for both arbitration and mediation attractive and simple. Besides procedural rules, parties are considering other factors like the experience of arbitrators and flexibility of the institution to provide for mediation and mixed modes of resolution such as arb-med-arb. Therefore, these institutions will have to take important steps, not only to improve their quality of service but also to specialize in newly emerging trends in dispute resolution.

BINDING NON-SIGNATORY GUARANTORS TO AN ARBITRATION AGREEMENT: A JUDICIAL SCRUTINY

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Introduction

Section 7(4) of the Arbitration and Conciliation Act, 1996 provides that arbitral proceedings must take place in furtherance of an arbitration agreement, which must be in writing and duly consented to, and signed by both parties. In the absence of such agreements, following Section 89 of the Civil Procedure Code, a joint memo has to be filed with the consent of both parties, showing joint intention to resolve the dispute through arbitration.[1] However, in reality, most commercial transactions are multi-layered with several parties and interconnected agreements. In such cases, when an arbitration agreement exists between two parties, the question that arises is whether a non-signatory, who is also a stakeholder in the transaction between the contractual counterparts, can be joined to the arbitration proceedings.

In this paper, the author will be addressing the more specific question of binding arbitration agreements between guarantors who are not signatories to an arbitration agreement that exists between the Principal borrower and the Creditor. The research objective is to critically examine and trace the legal developments and judgements delivered both in favour of and against binding non-signatory guarantors to an arbitration agreement. The author will draw conclusions from pronouncements by the Indian Judiciary, with help from an International perspective, while concurrently providing a critical analysis to the research question.

Tracing the developments on Non-Signatories and Arbitration Agreements

Global Scenario:

On an international level, *Dow Chemical v. Isover-Saint-Goblain* ["**Dow Chemicals**"] was instrumental in laying down the position on whether a non-signatory is bound by an arbitration agreement, where the non-signatory was a parent company of one of the parties involved in the Arbitration.[2] Here, a preliminary objection was taken by the parent-company on the grounds that only the subsidiary company was a party to the arbitration agreement under which the Arbitration was initiated. The tribunal laid down the Doctrine of "*Group of Companies*", which stipulates that mere

[1] *Afcons Infrastructure Ltd v Cherian Varkey Construction Co (P) Ltd* (2010) 8 SCC 24.
[2] *Dow Chemical v Isover St Gobain*, ICC Award No 4131.

corporate tie between a group of companies cannot lead to a conclusion of binding non-signatories to an arbitration agreement. Instead, the non-signatory company must have played an essential role in the *"conclusion, performance or the termination of the contracts*". This ruling set a strong precedent for all disputes that involved a non-signatory being forced to join an arbitration.

Another concept recognized by Dow Chemicals is that of "*une realité économique unique",*[3] which leads to the suggestion that the Group of Companies doctrine may be invoked where there is a tight organizational structure or financial links, thereby forming a single economic unit or reality. Example, where the funds of the parent company is used to financially restructure the subsidiaries. However, this doctrine has not received much traction and has been critically reviewed and rejected by most tribunals and countries.[4]

Indian Scenario:

In India, the first landmark case pertaining to the binding nature of arbitration agreement on non-signatories was in 2003, in *Sukanya Holdings Ltd. v. Jayesh. H. Pandya*. ["**Sukanya Holdings**"] Here a dispute arose over one transaction involving multiple parties, some of who were not signatories to the arbitration agreement. The Supreme Court upheld party autonomy, stating that "*causes of action against different parties cannot be bifurcated in a single arbitration*".[5] In pursuance of Section 8 of the Arbitration and Conciliation Act, 1996, the Court held that an arbitration agreement will bind only signatory parties and the court refused to join the other entities as a party to the arbitration.[6]

A decade later, the Apex Court in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification* ["**Chloro Controls**"] ruled in favour of joining the non-signatory to an arbitration agreement.[7] The Court laid down the concept of a "*composite transaction*", where the "*performance of the principal agreement would not be feasible without the aid and execution of an ancillary agreement"* both of which are entered into, in furtherance of a common objective.[8] In such cases, where agreements are interlinked, an entity can be bound by an Arbitration agreement it is not a party to. The Court further filled the loopholes by stating that if the mutual intention of the parties was to bind a non-signatory as well, then the same can be proceeded with. The *composite transaction* concept has been

[3] ibid [131], [136]
[4] *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pvt Ltd* [2014] SGHC 181, [100]-[102], [134].
[5] *Sukanya Holdings (P) Ltd v Jayesh H Pandya* (2003) 5 SCC 531.
[6] Arbitration and Conciliation Act 1996, s 8.
[7] *Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc* (2013) 1 SCC 641.
[8] ibid [73].

applied in multiple arbitral proceedings and has become a way of exercising jurisdiction over a non-signatory party.[9]

What is important to note in Chloro Controls is that it was a foreign arbitral proceedings, where the parties were referred to arbitration under Section 45 of the Arbitration and Conciliation Act, 1996. Unlike Section 8 of this Act (which deals with domestic arbitration), Section 45 has wider mandate and provides that even "*persons claiming under*" the signatory party can be added to arbitral proceedings.[10] However, Section 8 was amended in October, 2020 and the 246th Law Commission Report elaborated the scope of Section 8 to match that of Section 45.[11] Therefore, it is evident that Chloro Controls can be relied upon, even in cases of domestic arbitrations. Although Sukanya Holdings was never formally overruled, the findings in Chloro Controls have taken precedence over it.

Following Chloro Controls, the Courts have permitted for the non-signatory to be added to a domestic Arbitration proceeding.[12] These positions of law laid down by various courts were consolidated in *Cheran Properties Limited v. Kasturi and Sons Limited*.[13] The Apex Court reiterated the principle of composite nature of a transaction having common subject matter, and the Group of Companies doctrine was applied along with the condition of mutual intention to bind. It was held that it is imperative to find the essence of a business transaction and to unravel the multi-layered arrangement, in order to asses if the role played by certain entities was sufficient to add them as a party to an arbitral proceedings, they initially did not agree upon. In addition, the court also stated that even an arbitral award under Section 35 of the Arbitration and Conciliation Act, 1996, can be binding upon a non-signatory, provided that he is a person claiming under the signatory.

Finally, cases decided in 2019 include the *Mahanagar Telephone Nigam Ltd. v. Canara Bank and Ors.*[14] ["**Mahanagar Telephone**"] and the *Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited and Ors.*[15] The bench in both instances did not depart from the previously laid down principles. It ruled against joining the non-signatory, noting that the non-signatory was not involved in any way, in the negotiations or execution of the principal agreement and once again pressed on mutual intention and necessity of a "*direct relationship*" between the parties. A similar position was taken in *Magic Eye Developers v. Green Edge Infra Pvt. Ltd.*, a 2020 case of the Delhi High

[9] David St John Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration* (23rd edn Sweet and Maxwell 2009)
[10] Arbitration and Conciliation Act 1996, s 45.
[11] Law Commission of India, 246th Report, 2014.
[12] *Ameet Lalchand Shah v Rishabh Enterprises* (2018) 15 SCC 678.
[13] *Cheran Properties Ltd v Kasturi & Sons Ltd* (2018) 16 SCC 413.
[14] *Mahanagar Telephone Nigam Ltd v Canara Bank* 2014 SCC OnLine SC 1762.
[15] *Reckitt Benckiser (India) (P) Ltd v Reynders Label Printing (India) (P) Ltd* (2019) 7 SCC 62.

Court, which held that the non-signatories were group companies with common intention to arbitrate[16].

Controversy in case of Non-Signatory "Guarantors"

In the international arena, in a landmark Swiss International Arbitration decision in 2008, the parent Italian company gave a guarantee to its subsidiary company, which did not have an arbitration clause.[17] The Federal tribunal stated that the arbitration agreement only binds the signatory parties, unless the non-signatory involves itself into the contractual relationship.[18] Given the factual context, the guarantee was governed by Italian laws and the tribunal held that the guarantor would be bound if he assumes a "*joint and several liability*" with the subsidiary debtor company. However, if the guarantee was governed by Swiss laws which have a stricter mandate, the guarantee must include an explicit reference to the arbitration clause, otherwise the guarantor will have no obligation to submit to the jurisdiction of the arbitral tribunal.

In the Indian context, the Delhi High Court before this Swiss decision, back in 2004 itself held in *Canbank Financial Services Ltd. vs. M/s. SFL Industries Ltd.*, that the guarantor could be joined in the Arbitral proceedings as the lease agreements (which contained the arbitration clause) were specifically referred to; in the guarantee deed. In the deed, the guarantor had agreed that his liability would be joint and several. Therefore, the court allowed the non-signatory guarantor to be joined as a party of the arbitral proceedings.[19]

However, this position been impliedly overruled by the 2009 judgement in *M. R. Engineers and Contractors v. Som Datt Builders Ltd.*[20] The Supreme Court took a different view and held that Section 7(5) of the Arbitration and Conciliation Act, 1996 indicates that merely referring to a text does not imply incorporation of the arbitration clause, and that the reference should be made in such a way that it demonstrates the desire to incorporate the arbitration clause. If the Guarantee deed does not make special reference, indicating mutual intention to incorporate the arbitration clause, the non-signatory guarantor cannot be joined to the proceedings.

Following this, the Supreme Court in the landmark ruling in *N. Prasad v. Monnet Finance Ltd.* ["**N. Prasad**"] reiterated its position, if not, made it more rigid.[21] It categorically stated that in the absence of a valid arbitration agreement, either in writing or through subsequent statements of

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[16] *Magic Eye Developers Pvt Ltd v Green Edge Infra Pvt Ltd* 2020 SCC OnLine Del 597.
[17] *X v Y and Z*, 4A_128/2008 (Swiss International Arbitration Decision).
[18] ibid [3.2].
[19] *Canbank Financial Services Ltd v M/s SFL Industries Ltd* (2004) ILR 1 Delhi 430.
[20] *M R Engineers & Contractors (P) Ltd v Som Datt Builders Ltd* (2009) 7 SCC 696.
[21] *S N Prasad v Monnet Finance Ltd* (2011) 1 SCC 320.

claim, no one can be made a party to arbitral proceedings. The court went as far as rejecting the contention that the guarantor should be joined even if his liability is joint and several with that of the principal borrower.

The position again became unpredictable with *Sahyadri Earthmovers v. L&T Finance* which took a different view and held that the guarantor, even though not a party to the arbitration agreement, can be joined, as all transactions between the principal debtor and guarantor are interlinked and inexorably interconnected.[22] The judge distinguished the N. Prasad case on vague grounds that the borrower nowhere denied the arbitration clause and consequently even the guarantor cannot take shelter of non-mentioning of specific Arbitration clause in the guarantee deed. However, the position of law changed in the following years.

The Delhi high Court in 2014 and 2016 in *Sunil Nanda v. L&T Finance*[23] and *STCI Finance Ltd. v. Sukhmani Technologies Pvt Ltd.*[24] respectively, returned to the original ruling and stated that the arbitrator had erred in binding guarantor in the arbitral proceedings and subsequently the award. This was affirmed in 2018 in *MSTC Ltd. v. Omega Petro Products*, where the loan agreement and the guarantee deed were held as completely independent contracts and that the arbitration clause needs to be specifically incorporated in the latter.[25] The position in MSTC Ltd. was reiterated in 2020 in *STCI Finance Ltd. v. Shreyas Kirti Lal Doshi*, where the Delhi High Court stated that an application to join the non-signatory to arbitration would be totally misconceived if the intention was not to include the guarantee deeds within the arbitration clause.[26]

Analysing the Inconsistency

Based on the developments that have been chronologically traced above, it appears that this issue lacks judicial clarity. As far as the general question of a non-signatory's position in an arbitral proceeding is concerned, the position has been standardised through the application of the Group of Companies doctrine to ascertain whether the dispute arises from a composite transaction with the presence of a mutual intention to resolve through arbitration. However, there is an ambiguity with regards to the specific question pertaining to a non-signatory, who is the guarantor to a loan agreement. Until the N. Prasad judgement, the test was to check whether the guarantor had joint and several liability with that of the signatory principal debtor. However, this too was rejected.

[22] *Sahyadri Earthmovers v L&T Finance* 2011 (6) BomCR 393.
[23] *Sunil Nanda v L&T Finance* 2014 SCC Online Del 1057.
[24] *STCI Finance Ltd v Sukhmani Technologies Pvt Ltd* 235 (2016) DLT 150.
[25] *MSTC Ltd v Omega Petro Products* 2018 SCC OnLine Bom 487.
[26] *STCI Finance Ltd v Shreyas Kirti Lal Doshi and Ors* 2020 SCC OnLine Del 100.

This mixed position of law leads to the question of why non-signatory guarantors are treated differently when compared to non-signatory persons.

Although there is a fundamental difference in the nature of the relationship between corporate transactions and loan agreements with a guarantee deed, it is important to note that in the absence of a guarantee deed, certain loan agreements may not even be executed or concluded. Further, it has been stated that the liability of the guarantor is always co-extensive with that of the principal debtor.[27] A guarantee deed is collateral to a loan agreement with the common objective of facilitating credit or loan and has a collective bearing on the dispute and hence may be referred to as being part of a composite transaction. Nevertheless, the intention of the parties must also be considered to look more closely at the rationale behind the structure of the transaction. The difficulty lies in proper understanding of the specific and dynamic characteristics of a contractual relationship and therefore, more attention should be paid to the examination of facts that allow for the extension of an arbitration agreement to third parties.[28]

In the author's views, even though the guarantee deed is an independent contract, if the guarantor assumes joint liability with the principal borrower and the deed is part a composite transaction, it is intelligible to bind the non-signatory guarantor to the arbitration agreement. The author believes that the Sahyadri case, where the guarantor was allowed to be bound to an arbitration agreement because all transactions between the principal debtor and guarantor are interlinked and inexorably interconnected, follows correct reasoning. The N Prasad judgement, by refusing to hold the non-signatory guarantor as a party to the arbitration, even though the guarantor had joint liability, may have made the position rigid, which could also be used by the non-signatory as a way to avoid settlement through arbitration.

Conclusion

In multi-layered commercial disputes which have multiple parties overlapping over each other, it is important to make a detailed analysis before taking an overzealous approach to join a non-signatory party to the arbitration. It is appropriate to draw a line between the legal consequences of a mere guarantee undertaking and the assumption of a debt. However, this should not lead to an over-cautious approach like the view taken in N Prasad. If the standardised position of law applied in case of non-signatory persons were applied to non-signatory "guarantors", the latter could be joined to arbitration proceedings as they satisfy all the conditions laid down by Indian

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[27] Pollock & Mulla on *Indian Contract and Specific Relief Act*, (10th Edn LexisNexis) [728]; *State Bank of India v. M/s. Indexport Registered* (1992) SCC (3) 159.
[28] Marc Blessing, *The Law Applicable to the Arbitration clause*, ICCA Congress Series No 9 Paris (1999).

cases and align with the international perspective. However, subject to the facts and circumstances of each case, if there is evidence that the non-signatory intended to be bound by the arbitration agreement, there is implied consent and the guarantor assumes joint liability, then the non-signatory guarantors should be joined to the arbitration agreement.

INTERVIEW: IN CONVERSATION WITH MR. RANJIT SHETTY

Editor's Note: Mr. Ranjit Shetty is a Senior Partner at Argus Partners. With almost 20 years of experience in litigation and dispute resolution, he has advised on a wide range of contentious matters relating to commercial matters, government tenders, banking & finance, real estate and challenges to legislations.

Editorial Board (EB): ***How has your journey been as a lawyer since your initial years, up until now? Could you take us through some of the most memorable experiences that you wish to share with our readers?***

Ranjit Shetty (RS): In the nascent phase of my profession, I started as an Articled Clerk (internship before appearing for a Solicitors exam) at M/s. Kanga and Co., under Ashir Amin. He was my mentor. I am what I am because of him. It was his approach towards work and his interactions with clients, associates, interns etc. which moulded my personality. After the internship, he guided me to join M/s. Bachubhai Munim & Co. After that, I'd been a rolling stone till I joined Argus Partners –a firm of likeminded partners having the same drive/passion not only towards work, but also towards life!

I have had many memorable moments. There is this one particular case however, which stands out. Once in a potential arbitration dispute, the client had given only one simple instruction: to delay the matter. What started as a simple letter (then faxed to us), went to being a law point and further to being heard by a Constitutional Bench of the Supreme Court. This happened before the arbitral tribunal had even been constituted. I must mention that the law point, that was ultimately decided in my client's favor, was handled responsibly and was one which laid down the correct law.

EB: We understand that you graduated from GLC Mumbai, would you like to share your law school experience?

RS: I was in the morning batch which commenced at 7 a.m. Though I would reach the college on time, my main challenge was to attend classes which I was not very regular at. I was more regular in attending the canteen – so I had a normal law college life.

EB: Considering the COVID-19 pandemic, there have been a lot of disruptions in the supply chain, and parties are often finding themselves to be incapable of performing their contractual obligations. Consequently, a flurry of activity has been initiated revolving around force majeure clauses. Can you share your comments on this and share your thoughts on possible remedies for parties whose contracts do not adequately address the COVID-19 situation?

RS: Contractual clauses need to be drafted and considered carefully. In my view, except in maritime contracts, very few contracts in India would have actually considered pandemics as one of the *force majeure* events, or included it as an exemption for non-performance of contracts. That said, if a contract exposes a party and the pandemic (Covid-19) is not factored in, then the only possible recourse would be to rely on Section 56 of the Contract Act i.e. frustration of contract or impossibility to perform. However, this defence would depend on a lot of factors, especially the contract scope and the facts which lead to the contract frustration, or impossibility to perform. There would be a heavy onus on the party to show that it was not in a position to perform the contract.

EB: What are some of the key concerns that must be kept in mind while drafting a dispute resolution clause?

RS: I am a litigator, and if I may say so, I have the benefit of seeing how a dispute resolution clause is interpreted in court. In my view, two things are extremely important during the drafting or the negotiating of the dispute resolution clause. One, is to understand from the client, their preference in the event of a dispute scenario; what is it that the client wants. The preference could be which courts to have jurisdiction, whether they want arbitration, mode of appointing an arbitrator, mode of appointing arbitrator(s), number of arbitrators, governing law etc. Once that is done, the draftsman is expected to get familiar with the law of the subject.

Just to give a simple example, under the Civil Procedure Code, no party can give jurisdiction to a court which otherwise would not have jurisdiction. However, should the parties decide to opt for arbitration, they can mutually decide on a court/jurisdiction dehors the law decided on this under the civil procedure code. Similarly, being oblivious of how the Courts have explained the terms "*venue*" and "*seat*" in the context of arbitration, can have serious implications.

EB: Parties often tend to disregard the good faith negotiations required by the dispute resolution clauses and proceed directly to arbitration. The various High Courts are also divided on the issue of the enforceability of such clauses. What is your take on the issue?

RS: I believe that if parties have a chance to try and settle the matter, that is something they should certainly explore. Even under the Commercial Courts Act, mediation is mandatory before you file a suit; the only exception is if you have to seek some kind of interim relief. But otherwise, I feel that if there is a scope for someone to try and explore settlement avenues, then that is something they must do.

As a matter of practice, the first thing I enquire with my client, is whether there is being a scope for settlement. And if there is a scope for settlement, then ofcourse you handle/strategize the matter accordingly. Yes, the law is not yet settled on this point of structured negotiation before parties eventually landing up in a legal forum.

EB: Which newer technologies may be adopted to aid arbitration lawyers, especially now that during the pandemic, arbitration hearings have moved online?

RS: Technology is quite relevant today, especially in light of the ongoing pandemic. I'm sure you must have heard of Mr. Virag Tulzapurkar, Senior Counsel at Bombay High Court. He used to tell me that he is digitally challenged. Forget a smart phone, he wasn't even using a cell phone till recently. In the last year of the pandemic, it was a pleasure to see him argue in online hearings through e-briefs. If someone like him can adapt to technology, then I'm sure that any reasonable tech savvy lawyer can easily adapt and should adapt themselves to online hearings. What is really required is a mindset to settle with online hearings.

In the arbitration scenario, a lot of hearings have taken place online. The only possible challenge to arbitration is the conduction of cross-examination of the witness. As the witness is not in the same room, there may be a situation where someone is prompting him with leads and answers. Generally, one could have a representative of the opposing team go and sit in the same room with the witness to ensure that he is not prompted; but in the pandemic scenario, no one from the opposing team would want to volunteer to sit in the same room as the witness. So that is one challenge we face at the moment.

I also think that this could be disadvantageous from the witness' perspective. Some witnesses may not be familiar with online hearings; they may not be able to maintain direct eye contact with the camera. The arbitrator, at such times, might think that the witness is engaging in unfair means, including being tutored by his lawyer or prompted on the arbitrator's question.

EB: If there is any one element that you would like to change in the Indian arbitration regime, what would it be as part of improving the process?

RS: Recently, an arbitrator, a Retired Chief Justice of a High Court during the course of an arbitration where even I was involved, mentioned to all parties that this entire process of admission/denial of documents is archaic and should no longer be followed. I tend to agree with him. Also, because arbitrators are doing so many arbitrations at a point of time, there are no short dates given or available. I personally believe that this is one of the biggest reasons why the arbitration process in India has failed.

Under the Bankruptcy and Insolvency Law, there have been some discussions about restricting the number of assignments that a professional can take up. The same should apply to arbitrators too. To a large extent, there has been an attempt to deal with this aspect in recent amendments which required the arbitrators to disclose the number of matters handled by them, but I'm not sure if it has worked effectively.

EB: As part of advising your clients on incorporating dispute resolution clauses, specifically in international commercial arbitration with one Indian party and another foreign entity, how often do you encounter uncertainty in application of Indian curial law? What factors weigh in when advising your clients regarding the appropriate choice of law?

RS: A foreign entity always has majorly two concerns while negotiating a dispute resolution clause with an arbitration agreement. One is the delay in concluding an arbitration proceeding. Second is the issue involving enforcement of an award. After the 2015 and 2019 amendments, arbitration proceedings are expected to be concluded in a time bound manner, so there was an effort to allay that concern. However, the 2019 amendment has again carved out an exception of this time bound process for international arbitrations.

On the enforceability part, though the grounds of challenge to an award have been narrowed down substantially post the 2015 amendment and some recent landmark judgements of the Supreme Court, there still seems to be uncertainty from an international perspective. For them it's still a

grey area. One of the reasons could be the multi-layered appeal remedies within India, which eventually delays the award holders from enjoying the award and its benefits.

EB: There is a myth in law schools that if you join the Dispute Resolution team in a law firms, your work will be solely limited to Alternative Dispute Resolution, which is not true. Can you please provide a brief outline of the work profile of persons working in a Dispute Resolution team?

RS: I disagree. Unless you are in a firm that has an exclusive ADR/Arbitration vertical and an associate is a part of that team, an associate of a dispute resolution team is exposed to all kinds of matters including/involving real estate, mismanagement & oppression, shareholders disputes, take overs, probate issuance/revocation, summary suits, partition suits, specific performance and ofcourse the Insolvency & Bankruptcy Code. I feel that whilst a lawyer may take up a niche practice area within the litigation arena, he should have a flavor of other litigation practices too.

EB: So according to you, what are the subjects a law student should know before joining disputes, or any litigation team?

RS: This reminds me of what a friend's senior once told her: *"A good lawyer is someone who knows something about everything, and everything about something"*.

So, for litigation you need to be familiar, not necessarily well versed, with all the laws. But I would say that the Civil Procedure Code is your bible and you can't run away from that. Similarly, the Arbitration Act. The Insolvency & Bankruptcy Code is also something that is coming up in parallel with the two. Other Acts depend on the issues involved in the matters. For example, if you have a mismanagement & oppression issue, you need to look into Companies Act; and for probate, you will need to dive into the Succession laws, etc.

EB: In your career, which arbitration dispute did you find the most challenging? Could you please share with us key takeaways from that experience?

RS: I was recently leading the team in an international commercial arbitration which involved complex questions relating to enforcement of contractual rights arising from an investment agreement. The dispute involved interplay between cross-border investments, securities law,

foreign exchange laws, along with the aspect of proving laws in a claim of damages arising out of a breach of a contract. While conducting the arbitration, the law on the subject matter was not settled and we had undertaken extensive research on complicated questions of law. We had taken out precedents on each of the points of law to argue the case while making some innovative arguments on the issue of damages. The issue of damages was our primary concern, and we were pretty confident about the award. While the award was ultimately passed in our client's favour, a challenge to the award has gone to the Bombay High Court involving the interpretation of fundamental policy of Indian law under the Arbitration Act, in the context of claim for damages.

This will be an interesting challenge, since the Court will now have to strike a balance between the limited scope of Courts to interfere in the arbitration award vis-à-vis the well enshrined principles of proving loss in a claim for damages. The judgement of the Bombay High Court in the matter would be a landmark judgement on the interpretation of 'Fundamental Policy of Indian Law' in the context of a claim for damages. Fingers crossed!

EB: What are the most important skills that a young lawyer in the field of Dispute Resolution should definitely have? What is your advice for law students in their penultimate and final years who are seeking employment in the post COVID-19 scenario?

RS: Lawyers in the field of dispute resolution are very fortunate. They have the advantage of learning not only from their own team, but also from their opponents. Knowledge of law is certainly important, but according to me, the knack of handling a particular situation in which a client is placed (legally, contractually, or factually), understanding a client and being able to handhold them is of equal significance. A client is as important as the matter itself! This is something which a young lawyer should always keep in mind.

As regards advice to the students, in Argus we have a bookmark, which I would say is my advice to all students:

"Read,
Read,
Read,
Read,
Read,
……
Lead!"

QUATERLY ALTERNATE DISPUTE RESOLUTION ROUND-UP

(JANUARY- MARCH 2021)

January

1. Powers under Articles 226 and 227 should be used sparingly by High Courts while interfering with arbitral proceedings.

The Supreme Court of India in the case of *Bhaven Construction v Executive Engineer Sardar Sarovar Narmada Nigam Ltd*[1] held that the High Courts should take the preamble of the Arbitration and Conciliation Act, 1996 ["**the Act**"] into account, which is based on the UNCITRAL principle of "unified legal framework for the fair and efficient settlement of disputes" while exercising powers under the Article 226 and 227 of the Constitution of India. The Apex Court relied on the case of *M/s Deep Industries Limited v Oil and Natural Gas Corp Ltd*[2] to state that Section 16[3] of the Act mandates the issue of the jurisdiction to be first dealt by the arbitration tribunal before court hears the same under Section 32[4] of the Act. It added that the court interference in the arbitral proceedings should be minimal and to be allowed only wherein one side is rendered remediless under the Act or in case of direct display of "bad faith" by one of the parties.

2. Principles of Order XXXVIII Rule 5 of the CPC are applicable to Section 9 of the Arbitration and Conciliation Act, 1996.

The Delhi High Court in the case *of Beigh Construction Comp P. Ltd v Vahara Infra Ltd*[5] held that an order under Section 9 of the Act to secure an amount cannot be made disregarding substantiated propositions provided under Order XXXIX Rules 1 and 2 and Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ["**CPC**"]. This is because the petitioner while asserting the amounts seeks an order in the nature of attachment before judgement. Therefore, the court observed that Order XXXVIII Rule 5 of the CPC would govern the grant of such relief. It enumerated two conditions required to be fulfilled for the same: (i) the petitioner must establish the existence of a prima facie case and ii) the behaviour of the defendant is to defeat the realisation of the decree from being carried out.

[1] *Bhaven Construction v Executive Engineer Sardar Sarovar Narmada Nigam Ltd* [2021] SCC OnLine SC 8.
[2] *M/s Deep Industries Ltd v Oil and Natural Gas Corp Ltd* [2019] SCC OnLine SC 1602.
[3] The Arbitration and Conciliation Act 1996, s 16.
[4] The Arbitration and Conciliation Act 1996, s 32.
[5] *Beigh Construction Company P Ltd v Vahara Infra Ltd* IA 207/2021.

3. **Challenge to arbitrability is a jurisdictional issue and cannot be decided under Section 14 of the Arbitration & Conciliation Act, 1996.**

The Delhi High Court in the case of *Medisprouts India Pvt Ltd v M/S Silver Maple Healthcare*[6] held that the arbitrability of disputes affects the jurisdiction of the arbitral tribunal and the same does not fall under the domain of Section 32(2) of the Act. Relying on the case of *Indian Farmers Fertilizer Cooperative Limited v. Bhadra Products*[7] and the *kompetenz – kompetenz* principle, the court held that the arbitral tribunal's jurisdiction is to be determined by the tribunal itself. The court further held that the challenge to the arbitrability of dispute is not a subject of recourse under Section 14 of the Arbitration Act unless to challenge the eligibility of an arbitrator as under Section 12(5) of the Act.

4. **The non-payment or underpayment of stamp duty does not invalidate anarbitration agreement.**

The Supreme Court of India in the case of *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. & Others*[8] observed that an arbitration agreement is a "separate and distinct agreement" extraneous from the underlying commercial contract by relying on the doctrine of separability and the kompetenz–kompetenz principle. It held that (i) an arbitration agreement is not chargeable under the stamping acts and (ii) the non-payment or underpayment of duty on the contract does not preclude the parties from confiding in the contract encompassing the arbitration agreement. However, the adjudication of rights and duties would only commence after the parties abide by the mandatory stamp duty provisions. The Court, therefore, overruled its previous ruling in *SMS Tea Estates Pvt Ltd. v M/s Chandmari Tea Co Pvt Ltd* [9] and distinguished from its findings in *Garware Wall Ropes Ltd v Coastal Marine Constructions and Engineering Ltd* [10] ["**Garware Wall Ropes**"] Since a three-judge bench of the court has recently reaffirmed the findings of Garware Wall Ropes in the case of *Vidya Drolia & Ors v Durga Trading Corporation* [11] the court referred the issue to a Constitutional Bench.

[6] *Medisprouts India Pvt Ltd v M/s Silver Maple Healthcare* OMP (T) (COMM) 88/2020.
[7] *Fertilizer Cooperative Limited v Bhadra Products* [2018] 2 SCC 534.
[8] *N N Global Mercantile Pvt Ltd v Indo Unique Flame Ltd & Ors* 2021 SCC OnLine SC 13.
[9] *SMS Tea Estates Pvt Ltd v M/s Chandmari Tea Co Pvt Ltd* 2011 14 SCC 66.
[10] *Garware Wall Ropes Ltd v Coastal Marine Construction and Engineering Ltd* 2019 SCC OnLine SC 515.
[11] *Vidya Drolia & Ors v Durga Trading Corp* 2020 SCC Online Del 313.

5. **An order terminating arbitration proceedings under Section 32(2)(c) of the Arbitration & Conciliation Act, 1996 is not an award.**

The Delhi High Court in case of *PCL Suncon v National Highway Authority of India*[12] clarified the difference between an order and an award. The court held that an order terminating the proceedings upon the claimant's failure to file its statement in the stipulated time is an order under Section 32(2) of the Arbitration Act. The court observed that an order which results in the conclusion of the arbitral proceedings as the tribunal finds it impossible or unnecessary to proceed with the same is not an order. It is merely an expression of the pronouncement of the arbitral tribunal to discontinue the proceeding. The court reasoned its ruling by stating that an arbitral award must resolve or decide on any of the issues between the parties to the arbitration by relying on *IFFCO Ltd v Bhadra Products*[13]. It noted that an award would be a final award in instances where it is dispositive of the whole dispute addressed to the arbitral tribunal, resulting in the termination of the arbitration proceedings. The court further held that in such cases, the recourse available to the parties lies under Section 14 instead of Section 34 of the Act.

6. **Mere commonality of scope of agreements is insufficient for entertaining a composite petition for the appointment of arbitrator.**

The Madras High Court in the case of *Tamil Nadu Road Sector Project II, Highways Department v. IRCON International Ltd and Ors*[14]dealt with the issue as to whether a composite arbitration proceeding can be conducted despite the fact that the petitioner and the respondents had signed two distinct contracts, and the work to be done by the two was interconnected. The court observed that though the two contracts provided for work to be done in an intrinsically intertwined manner but the procedure for the appointment of arbitrators provided therein are totally different. Therefore, the court while dismissing the petition held that mere commonality is insufficient for entertaining the petition for the additional reason of non-compliance with the procedure on the petitioner's part.

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[12] *PCL Suncon v National Highway Authority of India* 2021 SCC OnLine Del 313.
[13] *IFFCO Ltd v Bhadra Products* (2018) 2 SCC 534.
[14] *Tamil Nadu Road Sector Project II, Highways Dept v IRCON International Ltd* and Ors OP 34/2020.

7. Party resisting arbitration as the preferred mode of dispute resolution and opposingthe appointment of arbitrator under Section 11 would deprive itself from claiming interim relief.

The Punjab and Haryana High Court in the case of *Innovative Facility Solutions Pvt Ltd v AEC Digitial Studio Pvt Ltd & Ors*[15] held that a party must have an intention of referring the dispute to arbitration for invoking the jurisdiction of the court under Section 9[16] of the Act. In the absence of the intention and in case where a party opposes the appointment of arbitrator under Section 11, it would not be entitled to interim relief under Section 9 of the Act. However, the court stated that the party would be entitled to get suitable relief from the arbitral tribunal providing it agrees to refer the dispute to arbitration.

8. Seat of arbitration clause prevails over jurisdictional clause contained in the arbitration agreement.

The Bombay High Court in the case of *Aniket SA Investments LLC v Janapriya Engineers Syndicate Pvt Ltd and Ors*[17] held that the choice of seat of arbitration is itself a reflectance of party autonomy and it has the effect of conferring exclusive jurisdiction on the courts of the seat. The court held that in case where two different places have been decided by the parties under seat of the arbitration clause and exclusive jurisdiction clause, the former would prevail over the latter. Therefore, the court affirmed the ruling of *BGS SGS SOMA JV v NHPC Ltd* [18] in which it was held that *Bharat Aluminum Co v Kaiser Aluminium Technical*[19] judgment should be read as a whole and on correct interpretation, it holds that the courts of seat of arbitration would have exclusive jurisdiction if any dispute occurs in the arbitration.

9. Key changes in the 2021 Rules by the International Chamber of Commerce.

The International Chamber of Commerce ["**ICC**"] has introduced new rules for arbitration ["**2021 Rules**"][20] that will apply to cases filed from January 1, 2021, onward. The 2021 Rules respond to the global pandemic by modernizing procedures and increasing the role of technology.

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[15] *Innovative Facility Solutions Pvt Ltd v AEC Digital Studio Pvt Ltd & Ors* FOA No. 2917/2021 (O&M).
[16] The Arbitration and Conciliation Act 1996, s 9.
[17] *Aniket SA Investments LLC v Janapriya Engineers Syndicate Private Limited and Ors* COMAPL 516 of 2019.
[18] *BGS SGS SOMA JV v NHPC Ltd* 2019 SCC *Online SC 1585*.
[19] *Bharat Aluminium Co v Kaiser Aluminium Technical* (2012) 9 SCC 552.
[20] The 2021 ICC Arbitration Rules, <https://iccwbo.org/dispute- resolution-services/arbitration/rules-of-arbitration/> accessed April 4, 2021.

(a) Increased Use of Technology

Article 3(1) removes the reference to the paper filing by providing that all pleadings and written communications “shall be sent" instead of “supplied in a number of copies” to each party, each arbitrator, and the Secretariat. Additionally, arbitrators will now have increased discretion to conduct a virtual arbitration.

(b) Expanded scope for expedited proceedings

In 2017, the ICC created a simplified procedure for smaller quantum or less complex claims, to improve cost-effectiveness and accessibility. Expedited arbitrations are often decided on a “documents only” basis. Building on the success of these procedures, the 2021 Rules increase the opt-out threshold for expedited arbitrations from $2 million to $3 million USD.

(c) Robust Case Management and Consolidation Procedures

The new Article 10(b) clarifies that the court may, on a party’s request, consolidate where the claims are made under the same arbitration agreement or agreements. Furthermore, Article 10(c) allows consolidation even when the claims are not made under the same arbitration agreement or agreements, provided that the arbitrations are between the same parties, the disputes arise in connection with the same legal relationship, and the court finds the arbitration agreements to be compatible. Article 7(5) of the 2021 Rules now permits joinder of additional parties after the constitution of arbitral tribunals upon a party’s request. The consent of all parties is no longer a requirement, unlike under the 2017 Rules.

(d) Preventing Unequal Treatment and Conflicts of Interest of Interest

Article 12(8) in the 2021 Rules allows the Court to disregard “unconscionable arbitration agreements.” The new Article 12(9) limits the right of parties to nominate their own arbitrator in “exceptional circumstances” where there is a “significant risk of unequal treatment and unfairness that may affect the validity of the award.”

10. Arbitrator may not choose the type of hearings absent an agreement between the parties.

The Singapore Court of Appeal has dismissed an appeal against the decision of the High Court on the annulment of an award for violation of the principles of natural justice *CBP v Credit*

Burueau Singapore ["**CBP v CBS**"].[21] The court held that the arbitrator could not examine the dispute based only on documents and without the consent of the parties. The dispute arose from contracts for the supply of coal between a Singaporean supplier and an Indian buyer. The contract contained an arbitration clause on the referral of disputes to the Singapore Chamber of Maritime Arbitration ["**SCMA**"]. The arbitral tribunal suggested the parties to agree whether to hold an oral hearing or, if they failed to do so, suggested issuing an award based on provided documents in accordance with the arbitration rules. The tribunal decided that absent an agreement between the parties to continuethe proceedings based only on the documents available, the hearing would be held, but withoutthe witnesses, since the buyer failed to demonstrate the material value of such testimony. The arbitrator's award on the merits was subsequently set aside by the High Court of Singapore onthe ground that the parties were not given the opportunity to fully present their case. The Court of Appeal held that the arbitrator had no right to choose the type of hearing or impose a requirement for the buyer to prove the material value of witness testimony.

11. Paris Court Agreed with the ICC Decision to Appoint Five-Member Arbitral Tribunal.

The Paris Court of Appeal upheld a USD 646 million award against a company owned by Angolan billionaire Isabel dos Santos,[22] ruling that the ICC could appoint five arbitrators to consider the dispute and dismissed allegations of bias against two arbitrators. The arbitration clause provided for each party to appoint an arbitrator, with the presiding arbitrator to be chosen by the parties' appointees. The claimant argued that due to the fact that there were three respondents in the case, constitution of the arbitral tribunal in that matter would contradict theprinciple of equality (égalité), a mandatory rule of French arbitration law. Despite the objections of the respondents, ICC agreed with the claimant's position and appointed the whole tribunal. Eventually, the Court of Appeal determined that ICC, as an institution administering the arbitration, was entitled under French law to resolve this dispute in accordance with its rules and the principle of the equality of the parties.

[21] *CBP v Credit Bureau Singapore* [2020] SGHC 23.
[22] *PT Ventures v Vidatel and Ors* ICC Case No 21404/ASM/JPA (C-21757/ASM).