

FOREWORD

MR. NARESH THACKER

Partner (Dispute Resolution)

Economic Laws Practice

Abraham Lincoln, probably the most prolific national leader in modern history, once said this about litigation

“Discourage litigation. Persuade your neighbors to compromise whenever you can.

Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time.”

It seems that the world has taken note of Lincoln’s words and that perhaps best explains the remarkable surge in the popularity of ADR in recent years. The global ADR machinery has indeed come of age. The growing inclination to resolve disputes amicably as well as expeditiously has forced the conventional litigation route to the sidelines. If we take India for example, as far as commercial disputes are concerned, mediation has already been made mandatory. In fact, the present Chief Justice of the Supreme Court – Hon’ble Justice S.A. Bobde, in one of his recent speeches, has even discussed how comprehensive legislation mandating pre-litigation mediation is the need of the hour. With the fundamentals of the dispute resolution process undergoing this drastic evolution, it is critical that principles of ADR are introduced, encouraged, and inculcated at an institutional level. Also, in these unforeseen times of a global pandemic, as physical hearings get curtailed due to the prevailing restrictions, ADR methods such as mediation and negotiation assume an even greater significance. Thus, there exists a pressing need for initiating an academic debate around the practice and procedure of ADR. In this regard, I extend my sincerest appreciation to the efforts undertaken by the GNLU Student Research Development Council (“SRDC”). The latest edition of the SRDC–ADR Magazine is a truly enriching compilation of well-researched works encompassing various

facets of ADR.

At the heart of the Magazine lies a strong and unrelenting commitment towards legal research. In this era of online 'keyword' case searches, when the process of nurturing legal arguments through painstaking research appears to have substantially diminished, with its extensive peer reviews and editorial checks, the Magazine takes an uncompromising approach to legal research and its quality. I once again congratulate the GNLU faculty, the editorial team, and also the authors for their contributions towards the latest edition of the Magazine. I believe that the lucidity with which the Magazine discusses the most complex ADR issues is an asset in the hands of both students and professionals. I am sure that the ADR community will be immensely benefitted from such a stellar publication. The present edition of the Magazine is a befitting ode to the ever-growing significance of ADR in the global world.

I wish GNLU and the SRDC team continued success.

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 THE EDITORS

At the outset, we express our immense gratitude to the readers, contributors and advisors for their initiative and support extended to our Magazine. Their unflinching faith in our objectives has been instrumental to the success of the inaugural issue of the Magazine. As the Magazine is making newer inroads, we hope that it obtains a wider readership and becomes a medium for catalysing free exchange of thoughts amongst the section of students and professionals engaged in Alternative Dispute Resolution.

For the second edition of the Magazine, the editors are pleased to present the feature interview with Mr. Sitesh Mukherjee, Independent Counsel and former Partner at Trilegal Mumbai. He was most solicitous in sharing his insights and advice with the editorial team. We are grateful to Mr. Mukherjee for engaging with us. Further, we are thankful to Mr. Naresh Thacker and Mr. Samarth Saxena, Partner and Associate respectively at Economic Laws Practice, Mumbai for agreeing to make a Guest Submission. We are also thankful to our second guest author for this edition, Mr. Sameer Jain and Mr. Himesh Thakur, Partner and Associate respectively at PSL Associates & Solicitors, New Delhi.

The second edition features seven articles written on topics such as: *Confidentiality under Indian Arbitration Regime; Public Policy Exception in Enforcement of Foreign Awards; Investment Claims vis-à-vis India's ban on Chinese Applications; Analyzing the Enforcement of Foreign Arbitral Awards through the Austbulk Shipping Case; Enforcement of Foreign Awards in India: Key lessons; Arbitrability of disputes under lease deeds in Real Estate Transactions and Class Action Arbitration for Insurance Disputes in India: A need of the hour.*

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 carefully assembled seven writings on contemporary issues of Arbitration which are both interesting and informative. We hope this attempt of ours 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.

“Public Policy Exception in Enforcement of Foreign Awards” – The Achilles Heel In India’s Dream of Becoming A Global Arbitration Hub

- By Amogh Mittal

Year III, Rajiv Gandhi National University of Law, Patiala

Introduction

The Indian arbitration regime has made considerable efforts to change the existing judicial discourse and legislative intent to make India a global hub of arbitration.¹ However, excessive judicial intervention has been plaguing the success of this vision. The reason for this can be partially attributed to the ‘public policy exception’ employed by the Indian courts. Sections 34, 48 and 57 of the Arbitration and Conciliation Act, 1996 [“Act”] provide for challenges/enforcement exceptions with respect to domestic and foreign awards respectively, *inter alia* on the touchstone of the public policy of India.² Prior to the 2015 amendment, the term ‘public policy’ did not find any definition/explanation in the Act, leaving the job of interpretation completely to the courts. With the 2015 amendment, Explanation 2 to section 34(2) as well as Section 2A have been added, and the scope of public policy was restricted. However, such an amendment also lacked comprehensive meaning and application as some terms were still left undefined.

Apropos the public policy exception, the courts have observed two crucial distinctions. *Firstly*, there is a subtle distinction between the jurisdiction under sections 34 and 48 of the Act; under the former, the court deals with a challenge to the award before it becomes final and executable, whereas, under the latter, the court deals with the enforcement of an award after it becomes final and executable. *Secondly*, in conformity, the courts have established a varying standard of applicability of the public policy exception with regards to domestic awards and foreign awards.³

¹Parikh S, and Sambyal S, 'Enforcement of Foreign Awards In India – Have The Brakes Been Applied? | India Corporate Law' (*India Corporate Law*, 2020) <<https://corporate.cyrilamarchandblogs.com/2020/04/enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied/>> accessed 18 July 2020

²Patkar A, 'Indian Arbitration Law: Legislating For Utopia' 4 *Indian Journal of Arbitration Law* <http://www.ijal.in/sites/default/files/IJAL%20Volume%204_Issue%202_Armaan%20Patkar.pdf> accessed 18 July 2020

³Rajasekaran V, and Ravipati R, 'Enforcement Of Foreign Arbitral Awards: Supreme Court Promotes A "Minimal Interference" Approach' (*Mondaq*, 2020), <<https://www.mondaq.com/india/trials-appeals-compensation/897470/enforcement-of-foreign-arbitral-awards-supreme-court-promotes-a-minimal-interference-approach>> accessed 11 August 2020

The courts have applied the public policy exception liberally in relation to domestic awards, in contrast with foreign awards, where they have followed a narrower and stricter approach.⁴

From *Renusagar* to *Venture Global*: The divergent approach of courts on the public policy exception vis-à-vis enforcement of arbitral awards

The question of what constitutes public policy was first dealt by the Supreme Court [“SC”] in the case of *Renusagar Power Co. Ltd. vs. General Electric Co.*⁵ [“**Renusagar**”]. The court propounded that “the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality”. This case took place before 1996 and hence it was decided under the Arbitration Act of 1961, however, had a great impact on the decisions that followed. Moreover, the court observed that there exists a distinction between domestic awards and foreign awards, and the public policy doctrine should not be applied uniformly. Thus, the court established the narrow application of the public policy exception regarding foreign awards.

However, in a turn of events, the SC in *Oil Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*⁶ [“**SAW Pipes**”] added patent illegality within the meaning of public policy of India. Patent illegality was interpreted to mean any award which was contrary to the terms of the contract or substantive provisions of law.⁷ In essence, it allowed a broader scope of review before the courts, harming the autonomy of the arbitration process.

While the decision was with respect to domestic arbitral awards, this proposition was extrapolated to foreign arbitral awards in the case of *Phulchand Exports Ltd. v. OOO Patriot*⁸ [“**Phulchand**”]. In this case, the court deriving from SAW Pipes held *inter alia* that the scope of public policy under Section 48 should be widened and the award be set aside, if it was found to be patently illegal. Additionally, the court in *Bhatia International v. Bulk Trading SA*⁹ [“**Bhatia International**”] observed that the provisions of Part I of the Act could also apply to arbitrations seated outside India. It meant that the provisions of Part I, including challenging under Section 34 could be applied to foreign arbitral awards, dealt under Part II of the Act. A result of a concomitant interpretation of

⁴ Ben Giaretta and Akshay Kishore, 'Public Policy In Indian Arbitration' (*Ashurst.com*, 2015) <<https://www.ashurst.com/en/news-and-insights/legal-updates/public-policy-in-indian-arbitration>> accessed 18 July 2020

⁵[1994] AIR 860 (SC).

⁶[2003] AIR 262 (SC).

⁷*Hindustan Zinc Ltd. v. Friends Coal Carbonisation* [2006] 4 SCC. 445 (SC); *McDermott International Inc. v. Burn Standard Co. Ltd.* [2006] 11 SCC 181 (SC).

⁸[2011] 10. SCC 300 (SC).

⁹[2002] 4. SCC 105 (SC).

these principles augurs an abuse of the public policy exception. This abuse was witnessed in the case of *Venture Global v. Satyam Computers*¹⁰ [“**Venture Global**”], where the court broadly applied the exception to foreign arbitral awards. In this case, the award was given in London, and the governing law of the contract was of Michigan. However, the SC allowed an application under Section 34 and set aside the award, considering it to be patently illegal.¹¹ This decision, in essence, disregarded the distinction created by *Renusagar* and equated to both domestic arbitral awards as well as foreign arbitral awards. This decision opened the floodgates to numerous petitions where parties to International Commercial Arbitration [“**ICA**”] had an opportunity to virtually re-open the case and argue on its merits.

Balco and Lal Mahal: The remedial measures

In a bid to rectify the mistakes, the apex court overturned its past decisions and held them to be bad in law. In *Bharat Aluminum Company v. Kaiser Aluminum Technical Services Inc.*¹² [“**Balco**”], the court reaffirmed the distinction created in *Renusagar* between a domestic arbitration and a foreign seated arbitration. Moreover, it held that Part I of the Act will be inapplicable to foreign seated arbitrations, thus negating the ratio propounded in *Bhatia International*. Thus, the courts reinforced the narrow scope of public policy exception vis-à-vis the enforcement of foreign arbitral awards. Likewise, the SC in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*¹³ [“**Lal Mahal**”] dealt with patent illegality under public policy as a ground for challenging the enforcement of foreign arbitral awards under Section 48 of the Act, as propounded by the apex court in *Phulchand*. The court explicitly overruled its dictum in *SAW Pipes* and *Phulchand* and held *inter alia* that patent illegality could not act as a ground for challenging the enforcement of awards in a foreign-seated arbitration. The court further remarked that Section 48 should not be exploited to act as a method for re-arguing the case by the losing party. The legislature further acted upon the judicial impetus and introduced the 2015 amendment. The amendment mentioned that an award arising out of an ICA cannot be challenged under a Section 34 petition.¹⁴ Moreover, with regard to Section 48, the amendment explicitly mentioned that a challenge to the enforcement of foreign awards should not entail a review of the merits of the case. Thus, the Apex court granted sanctity to foreign awards.

¹⁰[2008] 4. SCC 190 (SC).

¹¹Dar W, Paulsson M, and Sun W, 'Has The Public Policy Exception Returned To Haunt Indian Courts? - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/>> accessed 19 July 2020

¹² 2012] 9. SCC 552 (SC).

¹³ [2014] 2. SCC 433 (SC)

¹⁴ The Arbitration and Conciliation (Amendment) Act 2015.

***Ssangyong* and *Vijay Karia*: The settled position of law**

The judicial position established in *Balco* and *Lal Mahal* has been treated as the settled principle which has been upheld in a plethora of cases afterwards. In *Ssangyong Engineering & Construction Co. v. National Highways Authority of India*¹⁵ [“**Ssangyong**”], the SC clarified that the ground of patent illegality was restricted to a challenge under Section 34 of the Act and did not extend to a Section 48 petition. Moreover, the court elucidated upon the scope of patent illegality and held that such illegality must go to the very core of the matter. The Delhi High Court in *Cruz City 1 Mauritius Holdings v. Unitech Limited*¹⁶ [“**Cruz City**”] remarked that a mere violation of a particular law cannot be equated with the violation of the fundamental policy of Indian law. Placing reliance on *Cruz city*, the SC in *Vijay Karia v. Prysmian Cavi E Sistemi SRL*¹⁷ [“**Vijay Karia**”] observed that the expression “fundamental policy” connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.¹⁸

In addition, the court stated that foreign arbitral awards should be read as a whole without “nit-picking”. Further, if *prima facie*, it appears that the award has considered the arguments of both parties and is in consonance with the provisions of the contract, then enforcement must follow. Thus, after two-three decades of judicial confusion, the SC awarded a degree of sanctity to the arbitral process, where judicial intervention was limited to manifest and egregious injustice.¹⁹

***NAFED v. Alimenta S.A.*: The Anti-thesis of the judicial discourse**

The apex court, on 22nd April 2020, delivered its judgement in the case of *National Agricultural Cooperative Marketing Federation of India* [“**NAFED**”] *v. Alimenta S.A.*²⁰ The contract between the two parties required NAFED to supply Alimenta with a particular quantity of a commodity. Owing to certain circumstances, NAFED failed to supply the commodity within the stipulated time. Alimenta invoked arbitration against NAFED, which ultimately resulted in the passing of an award against NAFED, ordering them to pay damages to Alimenta. In pursuance, Alimenta applied

¹⁵ [2019] 15. SCC 131 (SC).

¹⁶ [2017] 239 DLT 649 (Delhi).

¹⁷ *SRL* [2020] SCC OnLine 177 (SC).

¹⁸ Singh A, 'Fundamental Policy Of Indian Law And Enforcement Of Foreign Arbitral Awards In India: A Judicial Ping-Pong?' (*CADR - Centre for Alternative Dispute Resolution, RGNUL*, 2020) <<https://rgnucadr.wordpress.com/2020/04/28/fundamental-policy-of-indian-law-and-enforcement-of-foreign-arbitral-awards-in-india-a-judicial-ping-pong/>> accessed 19 July 2020.

¹⁹ Parikh S, and Sambyal S, 'Enforcement Of Foreign Awards In India – Have The Brakes Been Applied? | India Corporate Law' (*India Corporate Law*, 2020) <<https://corporate.cyrilamarchandblogs.com/2020/04/enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied/>> accessed 18 July 2020

²⁰ Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

before Indian courts for the enforcement of the arbitral award passed in London. The SC passed its judgement stating that the award could not be enforced because it was against the fundamental public policy of India.

In arriving at its decision, the SC seems to have shifted from the established practice as discussed above and has entered into an examination of the merits of the case. In the case, the SC stridently interpreted Clause 14 of the contract, where Clause 14 stated that in the event of an embargo on export or any other legislative or executive act by the Indian government, the remaining part of the contract shall stand cancelled.²¹ In arriving at its decision, the court has departed from the established practice and has entered into an examination of the merits of the case. The court seems to have equated a contravention of an enactment as a contravention of the public policy, which is *per incuriam* considering its decision in Vijay Karia. Thus, the court explicitly ignored the practice of not delving into the substantial matters of the contract.²² Thus, the SC seems to have reverted to its position in SAW Pipes, where the arbitration process was ridden with substantive judicial intrusion.

Conclusion

The principle of judicial non-interference is regarded as the cornerstone of arbitration worldwide. The autonomy of the arbitrator, along with the parties, is essential to any arbitration. Thus, every arbitration focuses on minimizing judicial intervention and respecting party autonomy. Countries like Singapore and France, have accorded the expression “public policy” a very narrow meaning and rendered its application to limited cases. The Indian arbitration regime has made considerable efforts to bring its policy in tandem with international arbitration standards. The judgements of the apex court in Renuagar, Balco, and Vijay Karia, reflect a transformation of the judicial mindset towards a pro-arbitration regime. The minimal-interference approach adopted by the court will help in upholding the essentials of arbitration, which are efficiency and party autonomy. The limited intervention by Indian courts will also help build a robust arbitration mechanism as it will instil more confidence in the finality of the awards. Thus, such decisions reflect a shift of attitude of the judiciary towards facilitating arbitration in the country.

²¹ Sahoo S and Jammula I, ‘*The NAFED Decision: Conundrum of Enforcing a Foreign Award*’ (IRCCL, 2020), <<https://www.irccl.in/single-post/2020/06/06/The-NAFED-Decision-Conundrum-of-Enforcing-a-Foreign-Award#:~:text=Clause%2014%20stated%20that%20in,the%20contract%20shall%20stand%20cancelled.>> ACCESSED ON 11 August 2020

²² Menon N, and Ahmed S, 'Has Supreme Court Taken A Step Back In Its Recent Judgment In "NAFED v. Alimenta S.A."?' (*Mondaq.com*, 30 April 2020) <<https://www.mondaq.com/india/trials-appeals-compensation/925604/has-supreme-court-taken-a-step-back-in-its-recent-judgment-in-nafed-vs-alimenta-sa>> accessed 19 July 2020

Enforcement of Foreign Awards in India: Key Lessons

- *By Naresh Thacker*
Partner and Head (Dispute Resolution), Economic Laws Practice
&
Samarth Saxena
Associate (Dispute Resolution), Economic Laws Practice

Before the advent of the Arbitration and Conciliation Act, 1996 (“**the 1996 Act**”), arbitrations in India were governed by the Arbitration Act, 1940 (“**the 1940 Act**”). The 1940 Act was an attempt by the British-colonial government to consolidate the different arbitration provisions contained in the Indian Arbitration Act, 1899 and Code of Civil Procedure, 1908 (“**CPC**”).¹ Yet, in doing so, enforcement of foreign arbitral awards was one aspect which the 1940 Act failed to address effectively. Instead, the issue of enforcement of foreign awards was governed by two different legislations - *The Arbitration (Protocol & Convention) Act, 1937* (“**APCA**”) and *The Foreign Awards (Recognition & Enforcement) Act, 1961* (“**FAREA**”). While the former concerned itself with the enforcement of awards passed under the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 (“**Geneva Convention**”), the latter contemplated awards made under the aegis of the celebrated New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (“**New York Convention**”).

When India finally liberalized its economic policies in 1991², the loopholes in the then arbitration regime stood exposed. Proceedings under the 1940 Act were often complex and time-intensive. In fact, the Supreme Court (“**SC**”), on one occasion, even condemned the unnecessary hassles created by the 1940 Act and held that *“the way in which the proceedings under the (1940) Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep.”*³

With foreign entities entering the market, the Indian dispute resolution sector too was expected to rise to the occasion. After all, expeditious and streamlined disposal of matters was the need of the hour. The solution to India's arbitration woes was found in the UNCITRAL Model Law on International Commercial Arbitration, 1985 (“**Model Law**”). Therefore, based on the Model Law came the 1996 Act, indeed a step in the right direction. From the viewpoint of foreign arbitral

¹ Law Commission of India, *Report on Arbitration Act, 1940* (Law Com No.78, 1978)

² Rohit Moonka and Silky Mukherjee, 'Impact Of the Recent Reforms on Indian Arbitration Law' (2017) 4 BRICS Law Journal 58.

³ *Gurn Nanak Foundation v. Rattan Singh and Sons* [1981] 4 SCC 634.

awards, it repealed FAREA and APCA by consolidating their provisions within Part II of its own scheme.⁴

The Bhatia-Balco Tussle: Applicability of Part I of the 1996 Act

Even post the enactment of the 1996 Act, India's issues with enforcement did not abate. Throughout its initial days, the 1996 Act was riddled with instances of court intervention in the enforcement of awards without even appreciating whether the award sought to be enforced was foreign or not.

The first in the line of decisions, which was a cause for a lot of consternation amongst the arbitration community, was *Bhatia International v. Bulk Trading SA*⁵ ("**Bhatia**"). In *Bhatia*, the SC had held that "*provisions of Part I would apply to all arbitrations and to all proceedings relating thereto.*" *Bhatia*, till date, is oft-quoted as an example of what plagued arbitration under the 1996 Act.

Relying upon the judgement in *Bhatia*, in *Venture Global Engg v. Satyam Computer Services Ltd.*⁶ ("**Venture Global**"), the SC further held that the grounds for challenging domestic arbitral awards mentioned in §34 of Part I of the 1996 Act would be available to an Award-debtor for challenging foreign awards as well. Such interference by the Indian courts at the time of enforcement, being incompatible with the intent of the New York Convention, was condemned globally.⁷

In 2012, the constitutional bench of the SC, with its now celebrated decision in *Bharat Aluminium Co. Technical Services v. Kaiser Aluminium Inc.*⁸ ("**BALCO**"), finally put to rest this debate. *BALCO*, amongst addressing many other issues, prospectively over-ruled *Bhatia* and *Venture* and clarified that arbitrations seated outside India could only be dealt with Part II of the 1996 Act. Thus, when dealing with the enforcement of foreign arbitral awards, it was no more open for the parties to seek application of any of the provisions of Part I of the Act, including §34. The ruling in *BALCO* was indeed a reassuring step ahead taken by the Indian judiciary. By clarifying that Part I of the Act would have no application over foreign awards, it effectively curtailed the interference that a court could mount while enforcing foreign awards. The ethos of the New York Convention thus stood reinstated in the Indian enforcement process.⁹

⁴ Indu Malhotra, *Commentary On The Law Of Arbitration* (4th edn, Wolters Kluwer 2020).

⁵ 2002] SCC 4 SCC 105.

⁶ [2008] 4 SCC 190.

⁷ Gary B. Born and Suzanne A. Spears, 'International Arbitration And India: "A Truly Excellent Judgment!"' (2012) 1 Indian Journal of Arbitration Law 4,6.

⁸ [2012] 9 SCC 552.

⁹ Born and Spears (n 7).

Public Policy: Both an unruly horse and a black sheep

'Public policy' is often described as an 'unruly horse'.¹⁰ However, during the initial days of enforcing foreign awards under the 1996 Act, the 'public policy' exception to enforcement of foreign awards contained in §48 and §57 of the 1996 Act also held the additional distinction of being the proverbial 'black sheep'.

It may be noted that SC had already defined 'public policy' in a narrow compass even before the enactment of the 1996 Act. In *Renusagar Power Co. Ltd. v. General Electric Co.*¹¹ ("**Renusagar**"), though in the context of FAREA, it had held that a foreign award could not be impeached on merits and "*public policy* in Section 7(1)(b)(ii) had been used in a narrower sense". As per *Renusagar*, to attract the bar of public policy, enforcement of the award must invoke something more than the violation of the law of India. The enforcement of a foreign award would be refused on the ground of being against public policy only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

However, when it came to interpreting the public policy exception under §34(2)(b)(ii) of the 1996 Act, the SC in *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*¹² ("**SAW Pipes**"), opted to rule in favour of a slightly expansive approach. In addition to the public policy definition propounded by *Renusagar*, the decision in *SAW Pipes* also added 'patent illegality,' i.e. illegality going to the root of the matter, as a ground for setting aside the award.

Subscribing to the view held in *SAW Pipes*, in *Phulchand Exports Ltd. v. O.O.O. Patriot*¹³ ("**Phulchand Exports**"), SC further stated that "*the expression 'public policy of India' used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, 'if it is patently illegal'*". This adoption of 'patent illegality' as a ground for refusing enforcement of foreign awards was again seen as being excessively interventionist. By allowing the award-debtor to point out any 'patent illegality' in the award, the court had effectively opened the flood gates to parties seeking a review of the merits of the award.

However, it didn't take long for the SC to remedy this shortcoming. The judgement in *Phulchand Exports* was soon over-ruled in *Shri Lal Mahal v. Progetto Grano SpA*¹⁴ ("**Shri Lal Mahal**"). In *Shri Lal Mahal*, the SC held that for the purposes of §48(2)(b), the expression "public policy of India"

¹⁰ *Richardson v. Mellish* [1824] 2 Bing 229.

¹¹ [1994] Supp (1) SCC 644.

¹² [2003] 5 SCC 705.

¹³ [2011] 10 SCC 300.

¹⁴ [2014] 2 SCC 433.

must be given a narrow meaning, and enforcement of a foreign award would be refused on the ground that it is contrary to the public policy of India only if it is covered by one of the three categories enumerated in *Renusagar*. Inter alia, *Shri Lal Mahal* also clarified that *SAW Pipes* would not be applicable to enforcement proceedings under §48(2)(b) and the scope of inquiry under §48 did not permit review of the foreign award on merits.

Having overcome the ghosts of *Venture Global* and *Phulchand Exports*, the judgement in *Shri Lal Mahal* was truly a turning point in the Indian saga of enforcement of foreign arbitral awards.¹⁵

Turning over a new leaf: The 2015 Amendment and continued pro-enforcement approach

The judgement in *Shri Lal Mahal* paved the way for legislative reforms as well. When the Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Amendment**”) was finally enacted, it narrowed the scope of ‘public policy’ to the *Renusagar* standard and further excluded “interests of India” as a ground for refusing enforcement.¹⁶

The judgement in *Shri Lal Mahal* and the changes brought by the 2015 Amendments unequivocally set out that both, the Indian judiciary as well as the legislature, value their obligations under the New York Convention. Since then, there have been a string of decisions that have held, time and again, that while enforcing foreign awards, the scope of interference by courts is minimal.

In *Ssangyong Engg. & Construction Co. Ltd. v. NHAI*¹⁷ (“**Ssangyong**”), the SC clarified that the expression “public policy of India”, whether contained in §34 or §48, would mean the “fundamental policy of Indian law” and that the expression ‘fundamental policy of Indian law’ is to be understood as per the *Renusagar* standard. Though in the context of §34, *Ssangyong* also held that contravention of a statute not linked to public policy or public interest could not be brought in by the backdoor when it came to setting aside an award on the ground of patent illegality. Since it is settled law that the scope of interference in a foreign award is narrow, it appears that the said reasoning of SC in the context of §34 would also appeal to enforcement of foreign awards.

Most recently, in *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*¹⁸ (“**Vijay Karia**”), the SC reiterated that the object of §48 of the 1996 Act was to enforce foreign awards “*subject to certain well-defined narrow exceptions*” and that “*awards must always be read supportively with an inclination to uphold*

¹⁵ Arpan Gupta, 'A New Dawn For India - Reducing Court Intervention In Enforcement Of Foreign Awards' (2014) 2 Indian Journal of Arbitration Law 10, 21.

¹⁶ Arbitration and Conciliation Act 1996, s 48; Arbitration and Conciliation Act 1996, s 57.

¹⁷ [2019] 5 SCC 131.

¹⁸ [2020] SCC OnLine SC 177.

rather than destroy, given the minimal interference possible with foreign awards under Section 48". Upholding the decision in *Cruz City 1 Mauritius Holdings v. Unitech Limited*¹⁹, the decision in *Vijay Karia* has also made it amply clear that the 'fundamental policy of Indian law' must amount to "*a breach of some legal principle or legislation which is basic to Indian law*".

To further supplement its pro-enforcement stand, the courts have also clarified that an order allowing enforcement of a foreign award is not appealable. Following the judgement in *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*²⁰, in *Kandla Export Corporation & Anr. v. OCI Corporation & Anr.*²¹ ("**Kandla**"), the SC, in the context of §50, held that the 1996 Act was by itself a self-contained and exhaustive code on matters pertaining to arbitration and, therefore, appeals not mentioned therein, including the appeals available under §13(1) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, would not be permissible. The said clarification has also been included in the 1996 Act vide §12 of the Arbitration and Conciliation (Amendment) Act 2019.

The Clouds on the Horizon

There is no denying the fact that in the last few years, India has significantly improved its stance on the enforcement of foreign awards. Considering the recent developments, India may perhaps even be perceived as an enforcement-friendly jurisdiction. Having said that, there still exist certain creases which may have to be ironed out by judicial or legislative intervention in the coming future.

Soon after its decision in *Vijay Karia*, the SC refused to enforce a foreign award under FAREA in *National Agricultural Cooperative Marketing Federation of India v. Alimenta SA*²² ("**NAFED**"). In *NAFED*, the petitioner and the respondent had entered into a contract of supply of groundnuts. As the entire contracted quantity could not be supplied by the petitioner, the petition sought to supply the leftover quantity in a subsequent shipment. The subsequent supply was not permitted by the Ministry of Agriculture under its export policy. The ensuing arbitration found in favour of the respondent and therefore directed the petitioner to pay damages. Observing that the government had declined permission to the petitioner to supply and, therefore, the contract had become void, the SC held that the supply, if made, would have contravened the public policy of

¹⁹ [2017] 239 DLT 649.

²⁰ [2011] 8 SCC 333.

²¹ [2018] 14 SCC 715.

²² [2020] SCC OnLine SC 381.

India relating to export and enforcing such an award would be against the fundamental public policy of India.

When read along with *Vijay Karia*, the judgement in *NAFED* appears problematic for two primary reasons. *Firstly*, in *NAFED*, the Court did in fact, venture into both - the interpretation of the contract and the merits of the award. *Secondly*, by holding that contravention of export policy would be against the fundamental policy of India, the Court has again mooted the question of what constitutes fundamental policy of India, a debate very ably settled by *Vijay Karia*. It may be noted that while the judgment in *NAFED* considers *Renusagar, Saw Pipes, Shri Lal Mahal* and *Ssangyong*, it fails to make any mention of *Vijay Karia*. It remains to be seen whether the conflict between *Vijay Karia* and *NAFED* has watered down the test of fundamental policy of India or not.

Additionally, in light of the decision in *Bank of Baroda v. Kotak Mahindra Bank*²³ (“**Bank of Baroda**”), the question regarding the applicable period of limitation for enforcement of award has also been revived. In *Cairn India Ltd. v. Government of India & Ors.*²⁴, *M/s. Compania Naviera 'SODNOC' v. Bharat Refineries Ltd. & Anr.*²⁵ and *Imax Corporation v. E-City Entertainment (I) Pvt. Ltd. and Ors.*²⁶, the Delhi, Bombay and Madras High Courts, respectively, had held that the limitation period for seeking enforcement of a foreign award was 12 years under Article 136 of the Limitation Act. However, in *Bank of Baroda*, in the context of the execution of foreign judgements under §44-A of CPC, the SC stated that the limitation law of the country where the decree is issued would be applied even when enforcement is sought in a different jurisdiction. In addition, it also held that Article 136 of the Limitation Act would be inapplicable to a foreign decree as it contemplated execution of decrees of ‘civil courts’ and a civil court, as defined in India, may not be the same as that in a foreign jurisdiction.

While *Bank of Baroda* didn’t involve enforcement of a foreign award, it is hoped that its findings would be applied to the enforcement of foreign awards *mutatis mutandis*. However, its application to foreign awards can also be resisted as Explanation 2 to §44-A of CPC expressly mentions that the word “decree” used therein excludes arbitration awards.

The aforementioned issues aside, perhaps the biggest impediment in India’s path to being recognized as a pro-enforcement superpower is the ‘gazetting’ requirement under §44(b) of the 1996 Act. As per §44(b), for an award to qualify as a ‘foreign award’, it must be made in the territory

²³ [2020] SCC OnLine SC 324.

²⁴ Del. HC, 19 February 2020 in O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015.

²⁵ [2007] AIR Mad 251.

²⁶ [2020] (1) ABR 82.

of a nation which “*by notification in the official gazette*” is declared by the Central Government as a territory to which the New York Convention applies. It is noteworthy to mention that along with being in direct contravention to the spirit of New York Convention, such a pre-condition is also against the reservations expressed by India while signing the New York Convention. The Indian reservation to the New York Convention had, *inter alia*, contemplated application of the New York Convention to all awards made in the territory of another contracting State irrespective of any gazetting requirement.

Conclusion

From *Renusagar* to *Vijay Karia*, the Indian regime for enforcement of foreign awards has indeed come a full circle. By substantially reducing court intervention, the Indian courts seem to have finally cracked the code behind embracing a firm ‘pro-enforcement’ stance.

While it may be argued that the judgement in *NAFED* has again brought the enforcement machinery to cross-roads, as was the case with *BALCO* and *Shri Lal Mahal*, it shouldn’t be long before the judiciary rectifies this anomaly in favour of enforcing foreign awards.

As is borne out from the above, the present enforcement regime for foreign awards is still far from being perfect. However, the fact that both the legislature and judiciary have been working collectively towards achieving their pro-enforcement ambition is truly promising.

Analysing the Enforcement of Foreign Arbitral Awards through the Austbulk Shipping Case

- by *Kanak Mishra*
Year IV, O.P. Jindal Global Law School, Sonipat

This paper attempts to track the genealogy of the enforcement of foreign arbitral awards through the unique case of *P.E.C Limited v. Austbulk Shipping*¹. The case propounds a fascinating interpretation of section 47 of the Arbitration and Conciliation Act, 1996 (“Act”), holding that ‘shall’ should be treated as ‘may’ to submit the arbitral documents at the time of application of the enforcement of the foreign awards.

The article has distinct sections, the first being an introduction of the topic, followed by a summary of the Austbulk case. The second section comprises an in-depth analysis of the two direct issues and the reasoning behind the mandatory submission of the original arbitration agreement for the enforcement of foreign arbitration awards in India. The third section will help in further analysing the enforcement of foreign awards through the precedents laid down in the judgment. Lastly, the value of fairness in the dispute resolution process as envisaged by this judgment is analysed. In the backdrop of such an analysis, this article seeks to comprehend the judicial reasoning and evaluate the impact of this case on the Indian Arbitration law.

The role of courts has always been placed on a high pedestal because of the jerky road towards the initiation of arbitration in India as an alternative to legal discourse. The Act has been modified time and again with the recent amendments in furtherance of its objectives to give effect to the UNCITRAL Model laws as adopted by the United Nations Commission on International Trade Law (UNCITRAL), 1985.² The modifications or amendments have been quite centric towards evaluating the role of the courts in the process of arbitration, whereas, in recent times focus has been on diminishing the role of the courts to a great extent to further the scope of Alternative Dispute Resolution (referred to as ADR hereinafter). The reasoning given in the judicial precedent has been direct in clarifying the stance that the interference of courts, beyond what is stipulated in the Act will not be tolerated as it defeats the whole purpose of establishing a separate dispute mechanism system by way of ADR.

¹[2019] AIR 105 (SC).

²*Arbitration and Conciliation Act 1996.*

The enforcement of foreign arbitral awards as valid in India has been vigorously debated time and again. However, this process has transcended above and beyond its traditional understanding because of the development of International Commercial Arbitration.

Summary

The case concerns a disputed Chartered Party agreement between the appellants (P.E.C. Limited) and the Respondent (Austbulk Shipping Company).

The Appellants hired the Respondent shipping company for the transportation of chickpeas in bulk from Geraldton Port, Australia, to Jawahar Lal Nehru Port, India (JNPT). In pursuance of the same, a final freight account was submitted by the Respondent taking into consideration the dispatch at Geraldton and the demurrage at Bombay. The final freight account showed that the Appellant owed some USD 150,000 to the Respondent.

The Sole Arbitrator passed an arbitral award directing the Appellants to pay the pending amounts. The enforcement of the arbitral award was rejected by the High Court for the absence of the arbitration agreement at the time of filing the application for the enforcement. The enforcement was also rejected on the grounds of the parties not being the signatories to the Charter party agreement. The Supreme Court, while adjudicating the matter, decided in lieu of the object and purpose of the New York Convention that “*at the initial stage of filing of an application for enforcement, non-compliance of the production of the documents mentioned in Section 47 should not entail in the dismissal of the application for enforcement of an award. The party seeking enforcement can be asked to cure the defect of the non-filing of the arbitration agreement. The validity of the agreement is decided only at a later stage of the enforcement proceedings.*” The Supreme Court re-interpreted section 47 to mean that “the word *shall* in the section relating to the production of the evidence as specified in the provision at the time of application has to be read as ‘*may*’ only in the initial stage of the filing of the application and not after that”.

The Supreme Court reiterated that an application for enforcement of a foreign award could be rejected only on grounds specified in Section 48. However, the very same section does not include the non-filing of documents mentioned in Section 47 as a ground for rejection of enforcement of foreign arbitration awards. This reasoning also lent support to the view that the requirement to produce documents mentioned in Section 47 (i.e., the arbitration agreement) at the time of application was not intended to be mandatory in the first place. Concerning the second issue, regarding the existence of an arbitration agreement even for the non-signatories to the Charter Party, the Supreme Court held that the *conduct* of the parties alone can be the valid basis for an

arbitration agreement. Such *conduct* can be determined by the existence of written correspondences between the parties, which in the present case was a set of correspondences exchanged as letters. Thus, *signing* the Charter Party is not a pre-condition to a valid arbitration agreement.

A legislative analysis of the reasoning provided by the court

This case is ‘one of a kind’ as the bench comprising **J. A.M Khanwilkar and J. L. Nageswara Rao** took up a highly contrasted interpretation of the word ‘*shall*’ as used in Section 47 of the Arbitration and Conciliation Act 1996. Such an argument has merits and demerits. The merit is that this interpretation acts as a respite to the party who intends to get the foreign arbitral award enforced upon the other party. Thus, in a broader sense, it can be understood as a *furtherance of the object of the New York Convention*,³ which is safeguarding the enforcement of arbitration agreements and arbitral awards and thus, providing an additional measure of commercial security for parties entering into cross-border transactions.

In this case, the foreign arbitral award was made in London, and, since the United Kingdom is a party to the New York Convention, the object and scope of the New York Convention was given utmost importance in the way in which the decision of the case turned out to be. The judges referred to Article II (Settlement by arbitration), III (state’s obligations to enforce the arbitral awards), and IV (parties bound to submit arbitration agreements for enforcement of arbitral award) of the New York Convention and Article 35(2) of Chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration to ensure a *swift* and *smooth* enforcement of the foreign awards, irrespective of the country in which the award was made.⁴

Another interpretation could be the *Decolonization Theory*,⁵ which propounds that the arbitration seat should be construed as separate and distinct from the judicial seat. Such a separation gives absolute autonomy to the parties in a dispute to be able to keep their dispute in one forum only, i.e., arbitration and not courts. This theory is thus a confluence of the idea that judicial decisions must not be able to influence arbitration as that would defeat the purpose of resorting to arbitration. The nature of Foreign Awards is ‘International,’ and hence, national frontiers such as

³*P.E.C. Ltd.* (n 1).

⁴ AMLEGALS, ‘Arbitration and Conciliation Act, 1996 - Non-Production of Requisite Documents ‘At the Time Of Application’ Not A Ground For Dismissing Foreign Award Enforcement Application’ (Mondaq, 20 December 2018) <www.mondaq.com/india/trials-appeals-compensation/766818/arbitration-and-conciliation-act-1996--non-production-of-requisite-documents-at-the-time-of-application39-not-a-ground-for-dismissing-foreign-award-enforcement-application> accessed 6 July 2020.

⁵Nikhil Suresh Pareek, ‘International Commercial Arbitration in India: Governing Law Issues’ (2013) 18 Uniform Law Review 154 <<https://academic.oup.com/ulr/article/18/1/154/1693567>> accessed 6 July 2020

courts should not be able to limit these. The landmark judgment of *BALCO*⁶ was the first case to consider decolonization theory in India in terms of its scope of no intervention of Domestic substantive law in International Arbitration.

The demerit of interpreting a ‘*shall*’ provision as a ‘*may*’ provision at the time of application for enforcement of the foreign arbitration award is that it would compromise the *Theory of Separation of Powers*. Indian history is a testament to the legislature making the laws and the courts merely interpreting the law. In the present case, the legislative intent to use the word ‘*shall*’ would have been to require the production of documents at the time of the application for enforcement of a foreign arbitral award. Thus, by reading in between the lines, an opposite interpretation by the judges, even if it is favouring the rights of the parties, is problematic. It not only defeats the Separation of powers theory but also portrays an extremely purposive interpretation rendered by the courts, which is not always ideal for interpreting the law. A purposive perspective brings in morality in the law,⁷ as opposed to a positivist perspective, which aims at interpreting the law as it is. While the purposive approach to law tries to find what the law ‘*ought*’ to be, a positive approach looks at law as it ‘*is*.’⁸

Precedent value

A significant precedent used to support the reasoning behind interpreting the word *shall* as *may* in Section 47, was *Mohan Singh v. International Airport Authority of India*.⁹ In this case, *the judges had made a critical observation of the mischief which could ensue if all the statutes were to be interpreted literally. The judges prescribed a more liberal view wherein the job of the judges would be to ascertain the intention of the legislature, and this could be done by comprehending the “design and scope”¹⁰ of the section.*

To further support their naturalist approach of altering the meaning of section 47, the judges relied on a foreign case of *Caldow v. Pixwell*.¹¹ The judges sided with the reasoning of this case to assert their claim that “*The scope and object of a Statute are the only guides in determining whether its provisions are directory or imperative.*”¹² Chief Justice Jervis, in the famous precedent of *Abley v. Gale*,¹³ had pointed out that a ‘*Literal or a Positivist Interpretation*’ would strictly mean interpreting solely the plain

⁶*Bharat Aluminum Co v. Kaiser Aluminum Technical Service, Inc.* [2012] 9 SCC 552

⁷ Michael Freeman, *Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2007) 74-83

⁸ Suri Ratnapala, *Jurisprudence* (1st edn, Cambridge University Press 2009) 21-57

⁹[1997] 9 SCC 132.

¹⁰ William Feilden Craies, *Craies On Statute Law*, (5th edn, Sweet & Maxwell 1971)

¹¹*Caldow v Pixwell* [1876] 2 C.P.D. 562

¹²*P.E.C. Ltd.* (n 1).

¹³*Abley v Gale* [1851] 20 L.J.C.P. 233 (N.S.)

text of the section even if it leads to giving an unfair or absurd sense of justice. It is interesting to observe the causality with which the overruled reasoning had been relied on by the judges when, in fact, that judges need to ascertain the scope and object of the statute from the words of the section itself.¹⁴

Considering both these precedents, it can be observed that the legislative intent was in favour of the production of documents before the application of enforcement of foreign awards.¹⁵ The reason for this could be to avoid the wastage of the court's time and resources later. In several cases, parties had fraudulently wasted the court's time when they did not have any valid arbitration agreement in the first place. The reasoning of the judgement also relies on Section 48 of the Act to justify the stance by saying that the non-production of documents, as stipulated under section 47, is not a ground for the rejection of the enforcement of the foreign award.¹⁶ This reasoning is slightly problematic due to the possibility of a legislative gap which the legislators forgot to fill, i.e., it could be possible for there to be an explicit absence of law. Thus, a mere lack of a rule cannot and should not be the basis of core judicial reasoning by the courts. If such an absence of laws can be allowed to be filled by judges, then the entire Separation of Powers theory would be defeated.

With respect to the second issue, the Supreme Court decided whether the parties compulsorily needed to be signatories to the Charter Party to constitute a valid arbitration agreement. It was found by way of evidence that both the parties formulated a Charter Party agreement together, wherein an arbitration clause was agreed upon. To this contention, the Supreme Court decided that signing the Charter Party is not material; what is material is that there should exist a valid arbitration agreement which is discernable through other correspondences between parties. In the case at hand, the Supreme Court held that even if the Charter Party is not signed, it is a valid correspondence between the parties and hence, constitutes a valid arbitration agreement. We have noticed Supreme Court adopting a purposive approach inclined towards the motive of granting relief to the party claiming the existence of the arbitration agreement.

Conclusion

The UNCITRAL Model Law was adopted for the modernisation of Indian arbitration. However, the judicial intervention by the courts acted as a difficulty for the production of all documents during the time of application of the enforcement of foreign awards itself. The *Austbulk* case did

¹⁴*Abley* (n 13).

¹⁵*Abley* (n 13).

¹⁶*P.E.C. Ltd.* (n 1).

away with such procedural challenges by specifying that it is not compulsory to produce documents at the time of application, as that can be done later in the proceedings. This was based upon the interpretation of 'shall' as 'may' in Section 47 of the Arbitration and Conciliation Act, 1996.

This article was an attempt to cull out the 'Purposive Approach' which has been taken up by the court to arrive at a landmark decision. The reasoning employed by the judges may not be very concrete in itself because they are merely relying upon the absence of a law for rejection of the application under section 48 if it is unaccompanied by the documents. Yet this reason does not suppress the greater good which this case puts forth.

In my opinion, the judges have been successful in establishing a fair parameter for the party applying for the enforcement of the foreign award by giving them the option of presenting the documents required under section 47 at a later stage in the proceedings. Such procedural fairness is not only beneficial for the parties applying under section 47 but also adds value to Indian Arbitration as a whole.

Arbitrability Of Disputes Arising Out Of Lease Deed(S) In Real Estate Transactions

- *By Sameer Jain*
Founder and Managing Partner, PSL, Advocates and Solicitors

&
Himesh Thakur
Associate, PSL, Advocates and Solicitors

Real Estate is one of the biggest markets in the world and was also responsible for the global downfall of markets and the economy in the year 2008 which shook the entire world. Now, with the advancement of time, real estate transactions have also become complex and are no more like the vanilla transactions of sale, leasing, and licensing, that used to take place in the past. With respect to commercial properties, there are companies involved who incur huge costs on developing the properties as per the specifications and the needs of the individuals/companies before finally leasing them. Further, co-working spaces have really picked up the pace and have become the perfect thing for start-up individuals and companies.

The properties are sometimes leased out to the concerned companies after the investment of huge costs in the fit-outs and development of the property as per the needs and specifications of the lessee at no extra costs usually, but based on an understanding that the lessee would occupy the property and pay rent for a particular period of time. This is a hybrid leasing and asset financing model.

Usually, in a co-working space, a bigger area is divided into sub parts and is then licensed to the interested people/companies. The real estate sector is catering to the new generation of entrepreneurs and companies as per their needs and continuously evolving to match the market needs which, however, has made the transactions complex.

All the above-mentioned transactions include entering into separate agreements for specific works or entering into one consolidated agreement consisting of all of them. The complex transactions have also made the disputes complex. The adjudication of disputes in courts, arising out of immovable properties usually are a time-consuming process and always may not be an effective remedy for getting the disputes adjudicated. Arbitration is a boon for such transactions and almost all the agreements consist of an arbitration agreement. A lot of confusion was created when the

judgment in *Himangni Enterprises v Kamaljeet Singh Ahluwalia*¹ was delivered by the Hon'ble Supreme Court. The judgment came to be interpreted by many to mean that all and every dispute under lease deeds cannot be arbitrated upon and hence became inarbitrable.

On the other hand, the courts, over a period, have set the position with respect to minimal judicial intervention in cases where an arbitration agreement exists. It is a well settled position of law that only the disputes involving rights *in personam* are arbitrable and the rights *in rem* are beyond the scope of arbitration in India.

The Arbitration and Conciliation Act, 1996 (“**the Act**”) does not expressly exclude any category of disputes treating them as non-arbitrable, however, the Courts, over years, have clarified the position on what disputes are arbitrable and what are not. In *Booz-Allen & Hamilton Inc. v SBI Home Finance Ltd.*,² the Hon’ble Supreme Court, while deciding the arbitrability of dispute arising out of mortgage deed, held that mortgage is a transfer of a right in rem. Therefore, a mortgage suit for the sale of the mortgaged property was held to be an action in rem, for enforcement of a right in rem. The Court observed that such questions involving rights *in rem* will have to be decided by the courts of law and not by Arbitral Tribunals. Further, the court laid down an indicative list of the disputes which are not arbitrable as under:

“The well-recognized examples of non-arbitrable disputes are:

- (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offenses;*
- (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;*
- (iii) guardianship matters;*
- (iv) insolvency and winding-up matters;*
- (v) testamentary matters (grant of probate, letters of administration, and succession certificate); and*
- (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”*

The Hon’ble Supreme Court further in *A. Ayyasamy v A. Paramasivam & Ors.*³ clarified that the following categories of disputes would be non-arbitrable:

- “(i) patent, trademarks, and copyright;*
- (ii) anti-trust/ competition laws;*
- (iii) insolvency/ winding up*
- (iv) bribery/ corruption*

¹ *Himangni Enterprises v Kamaljeet Singh Ahluwalia* [2017] 10 SCC 706 (SC).

² *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd.* [2011] 5 SCC 532 (SC).

³ *A. Ayyasamy v A Paramasivam & Ors.* [2016] 10 SCC 386 (SC).

- (v) fraud;
- (vi) criminal matters.”

The Court while examining whether the disputes are capable of adjudication and settlement by arbitration, held that in cases where the subject matter falls exclusively within the domain of the public for a viz. the courts, such disputes would be non-arbitrable and cannot be decided by Arbitral Tribunals, but by the Courts alone.

In *Natraj Studios (P) Ltd. v Navrang Studios*⁴ while adjudicating the dispute arising out of leave and license agreement, it was held that wherein an agreement had an arbitration clause, the provisions of Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 would have an overriding effect due to the non-obstante provision in the Act. The Court observed that:

“Tenancy Acts are a welfare legislation aimed at the definite social objective of protection of tenants against harassment by landlords in various ways and public policy requires that contracts to the contrary which nullifies the rights conferred on tenants by the Act cannot be permitted and it follows that arbitration agreements between parties whose rights are regulated by the Bombay Rent Act cannot be recognized by a court of law.”

To understand the arbitrability of disputes arising out of lease deeds better, it becomes imperative to bifurcate the disputes into the following two categories:

- 1) Disputes arising out of lease deeds, the subject matter of which is covered under the Tenancy Acts
- 2) Disputes arising out of lease deeds, the subject matter of which is not covered under the Tenancy Acts

In *Ranjit Kumar Bose v Anannya Chowdbury*,⁵ the Hon’ble Supreme Court had clarified that the Tenancy Acts will have an overriding effect on the Act, and hence, only the Civil Judge having jurisdiction will be empowered to order or decree for recovery of possession in a suit filed by the landlord. The Hon’ble Court while relying on the non-obstante clause in the Tenancy Act had observed that it overrides the agreement between the parties and hence, such arbitration clauses will have no validity.

The Hon’ble Supreme Court in *Agri Gold Exims Ltd. v Sri Lakshmi Knits & Wovens*⁶ had held that when there was an arbitration clause in the memorandum of understanding and there existed no

⁴ *Natraj Studios (P) Ltd. v Navrang Studios* [1981] 1 SCC 523 (SC).

⁵ *Ranjit Kumar Bose v Anannya Chowdbury* [2014] 11 SCC 446 (SC).

⁶ *Agri Gold Exims Ltd v Sri Lakshmi Knits & Wovens* [2007] 3 SCC 686 (SC).

statutory bar to arbitration, the disputes between the parties could be adjudicated through arbitration. In such cases where there exists an arbitration agreement, the Courts as per Section 8 are under an obligation to refer the parties to arbitration in terms of the arbitration agreement. A similar position was also taken by the Hon'ble Supreme Court in *Magma Leasing & Finance Ltd. v Potluri Madhavalata*,⁷ reiterating that Section 8 is in the form of a legislative command, and where there is no statutory bar and prerequisite conditions are satisfied, the courts must refer the parties to the arbitration.

A lot of controversy was stirred up regarding the arbitrability of disputes arising out of lease deed due to the decision of the Hon'ble Supreme Court in the matter of *Himangni Enterprises v Kamaljeet Singh Ahluwalia*.⁸ Brief facts of the cases are that a lease deed was executed between the appellant and respondent for the premises for a period of three years. However, the lease deed had expired by efflux of time, and as no fresh lease deed was executed between the parties, the tenancy became monthly. The appellant on being served with the notice of the civil suit had filed an application under Section 8 of the Act. The application under Section 8 was dismissed by the Additional District Judge and the High Court at New Delhi and hence, came for consideration before the Hon'ble Supreme Court. The appellant in the present case contended that the Tenancy Act (Delhi Rent Control Act, 1995) was not applicable by virtue of Section 3 of the Act and therefore, the dispute between the parties should be referred to arbitration. Section 3 of the Delhi Rent Control Act, 1995 provides the exclusions for the applicability of the said act, however the Supreme Court while deciding the said matter held as follows:

“The Delhi Rent Act, which deals with the cases relating to rent and eviction of the premises is a special Act. Though it contains a provision (Section 3) by virtue of it, the provisions of the Act do not apply to certain premises but that does not mean that the Arbitration Act, ipso facto, would be applicable to such premises conferring jurisdiction on the arbitrator to decide the eviction/rent disputes. In such a situation, the rights of the parties and the demised premises would be governed by the Transfer of Property Act and the civil suit would be triable by the civil court and not by the arbitrator. In other words, though by virtue of Section 3 of the Act, the provisions of the Act are not applicable to certain premises but no sooner the exemption is withdrawn or ceased to have its application to a particular premises, the Act becomes applicable to such premises. In this view of the matter, it cannot be contended that the provisions of the Arbitration Act would, therefore, apply to such premises.”

⁷ *Magma Leasing & Finance Ltd v Potluri Madhavalata* [2009] 10 SCC 103 (SC).

⁸ *Himangni Enterprises v Kamaljeet Singh Ahluwalia* [2017] 10 SCC 706 (SC).

The Court further held that where the Transfer of Property Act, 1882 applied between landlord and tenant, disputes between the said parties would not be arbitrable, though, the Court did not refer to any provision of the Transfer of Property Act, 1882 which ousted such jurisdiction of arbitral tribunals. The Court while relying on the decisions of the Supreme Court in *Natraj Studios (P) Ltd. v Navrang Studios*⁹ and *Booz Allen & Hamilton Inc.*¹⁰ dismissed the petition. The Court also overruled the following decisions passed by various High Courts which were relied upon by the petitioner and further held that any decision of the High Court, which has taken a view contrary to the view of the Court in the present case, i.e. *Himangni Enterprises v Kamaljeet Singh Abluwalia*¹¹ would stand overruled:

(i) *Anjuman Taraqqi Urdu (Hind) v Vardhman Yarns & Threads Ltd.*¹²

The defendant had moved an application under Section 8 of the Act while relying on the arbitration clause in the lease deed in a suit for recovery of possession. The lease had expired by efflux of time and the tenancy had become on a month-to-month basis. The Delhi High Court held that since the lease deed was duly stamped and registered, the arbitration clause therein must be given full play and the Court had no option but to refer the case to arbitration and the suit was thus not maintainable.

(ii) *Lovely Obsessions (P) Ltd. v Sahara India Commercial Corp. Ltd.*¹³

The petitioner, in this case, had filed a revision petition against the decision of the Additional Civil Judge which allowed the application under Section 8 of the Act and referred the disputes arising out of the lease deed to arbitration even though the lease deed had expired due to efflux of time. It was contended that the matter shall be decided by the Civil Court as per the Haryana Urban (Control of Rent and Eviction) Act, 1973 however, the Court held that application under Section 8 of the Act had been rightly allowed by the trial court. It was observed that the arbitration clause does not become defunct or inoperative merely because the lease period under the lease deed had expired. Further, regarding the applicability of the Rent Act, it was held that the said issue could also be decided by the arbitrator because all disputes as per the arbitration agreement need to be decided by the arbitrator.

⁹ *Natraj Studios (P) Ltd v Navrang Studios* [1981] 1 SCC 523 (SC).

¹⁰ *Booz-Allen & Hamilton Inc v SBI Home Finance Ltd.* [2011] 5 SCC 532 (SC).

¹¹ *Himangni Enterprises v Kamaljeet Singh Abluwalia* [2017] 10 SCC 706 (SC).

¹² *Anjuman Taraqqi Urdu (Hind) v Vardhman Yarns & Threads Ltd.* [2012] 2 ILR 655 (Del HC).

¹³ *Lovely Obsessions (P) Ltd. v Sahara India Commercial Corp. Ltd.* [2012] SCC Online P&H 11449.

The effect of the judgment passed by the Hon'ble Supreme Court in the *Himangni Enterprises case*¹⁴ was that even the cases which were out of the scope of the Tenancy Act became a subject matter of trial by the Civil Court. The interpretation given by the Supreme Court in this matter had the effect of ousting the applicability of the Arbitration Act and thereby creating confusion in the minds of the litigants.

Finally, the Hon'ble Supreme Court had the opportunity to revisit the law laid down in the Himangni case while deciding *Vidya Drolia & Ors. v Durga Trading Corp.*¹⁵ The Court while referring the decision to the larger bench held that the view taken in the *Himangni case* was not correct. The judgment to be passed by the three-judge bench of the Supreme Court has been reserved on 04 February 2020 and it would finally put to rest the controversy created by the *Himangni* judgment.

The relationship of the lessor and lessee when dealing in commercial properties is usually not governed by the tenancy acts, as, the primary condition for the applicability of the tenancy acts, i.e., a particular limit of rent, is much higher in the commercial properties. Therefore, the disputes between the lessor and the lessee can be arbitrated upon without any hindrance or bar under the tenancy acts if there exists a registered lease deed and an arbitration agreement under it. Further, as explained in the preliminary paragraphs, the lease between the lessor and lessee has become complex and doesn't include just the transfer of property(ies) but also has a service element to it. Therefore, all such disputes can also be arbitrated upon. It is expressly when a tenancy law or any other law ousts the jurisdiction of an arbitral tribunal and only with respect to disputes provided therein that such disputes cannot be arbitrated upon.

¹⁴ *Himangni Enterprises v Kamaljeet Singh Abluwalia* [2017] 10 SCC 706 (SC).

¹⁵ *Vidya Drolia & Ors. v Durga Trading Corp.* [2019] SCC Online SC 358.

Investment claims vis-à-vis India's ban on Chinese applications: Mapping India's position under India-China BIT

- by *Rakesh Kumar Sahu, Year IV*
National University of Study and Research in Law, Ranchi

&

Rajarshi Singh, Year IV
National University of Study and Research in Law, Ranchi

Introduction

The recent India-China border standoff has stressed the relationship between the two Asian superpowers. The effects of this tension, in addition to the border, are now being felt equally in the arena of commerce. This is manifest in India's decision to penalize China financially by implementing a ban on 59 Chinese mobile applications. This decision, however, is not free from ramifications and can potentially backfire against India in the form of investment claims arising under the India-China BIT of 2006 (BIT). Though this BIT was unilaterally terminated by India in 2018, the sunset clause under Article 16(2) of the India-China BIT provided that in case of unilateral termination, the treaty shall continue to be effective for a further period of 15 years from the date of termination for the investment made prior to the termination date. Consequently, allowing Chinese investors to bring claims against India, for breach of standards of protection as envisaged in the BIT, for any investment made prior to the date of termination. The authors through this paper attempt to ascertain whether the standards of protection envisaged under the India-China BIT are impinged by the government's decision to ban Chinese apps, and what are the defenses that India can take recourse to under the BIT and customary international law, in investment arbitrations arising from such a breach.

FET and the mandate of due process

Chinese investors may base their claim on violation of the Fair and Equitable Treatment clause ("FET") under Article 3(2) of the BIT. An FET clause obligates the parties not to act arbitrarily and to abide by the due process of the law with respect to the investments made. This protection reflects upon the manner in which the ban on Chinese apps was implemented. The Government

of India on June 29, 2020, notified a press release invoking its powers under section 69A of the Information Technology Act 2000 (“IT Act”) to effectuate a ban on 59 Chinese applications.¹

It is pertinent to note that the sudden press release seems to bypass the procedure laid down in the IT (Procedures and safeguards for blocking for access of information to public) Rules 2009² for implementing such ban. The procedure established in these Rules stipulates that a prior notice ought to be given to the concerned intermediary, which should then be followed by a hearing before a final order banning such intermediary is issued. Such an action can only be justified in cases of emergency in accordance with Rule 9 of the above Rules. The emergency rule empowers the government to impose a ban on a particular intermediary without prior notice or due process. Additionally, the validity of such action depends on the necessity and expediency of the situation. If such measure could be justified as necessary, an FET clause violation due to the ban could be resisted. However, if India fails to demonstrate the element of necessity a strong presumption can be drawn in favor of the arbitrariness of this decision. This may provide a strong footing for Chinese investors to claim a violation of FET. It is important to note that India in this regard does not have a good track record. Previous investment arbitration tribunals, in which India was the responding state, have held India guilty of violating the FET protection by arbitrarily canceling contracts of foreign investors without adhering to due process.³

Expropriation, MFN, and limitation of liability

Expropriation occurs when a state takes control of the foreign investor’s property in the host country. The India-China BIT under article 5 affords such right against expropriation, which bars India from dispossessing the Chinese investors of its investments made pursuant to the treaty and further from introducing measures equivalent to such expropriation. The provision, however, exempts actions in furtherance of a ‘public purpose’ in accordance with the law on a non-discriminatory basis and against fair and equitable compensation. Thus, it is pertinent to prove that the action was in furtherance of a public purpose and was not discriminatory in nature.

¹ Ministry of Electronics and Information technology, ‘Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order’ (29 June 2020) <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1635206> accessed on 5 July 2020.

² Information Technology (Procedures and safeguards for blocking for access of information to public) Rules (27 October 2009) <https://upload.indiacode.nic.in/showfile?actid=AC_CEN_45_76_00001_200021_1517807324077&type=rule&filename=blocking_for_access_of_information_rule_2009.pdf> accessed on 25 August 2020.

³ *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Pvt. Ltd., Telecom Devas Mauritius Ltd. v India* PCA Case No. 2013-09, Award [25 July, 2016]; *Deutsche Telekom v India* PCA Case No. 2014-10, Interim Award [13 December, 2017].

Maintenance of ‘public order’ in the press release as one of the reasons to justify the ban could be argued in such a situation. However, it also has to be justified on a non-discriminatory basis.

The India-China BIT also provides for a National Treatment clause and a Most Favored Nation (MFN) clause to accord similar treatment to Chinese investors as is accorded to domestic and third state investors. This clause obligates the host state to not indulge in discriminatory conduct against foreign investors. The MFN clause gains relevance in light of the fact that though these apps were banned on account of safety concerns, all of these apps were Chinese. None of the apps on this list of banned apps were from any other state. Hence, a claim of discriminatory conduct may find support under the present factual matrix.

A claim of violation of MFN clauses could be resisted in accordance with the limitations on the operation of MFN clauses. It includes certain implicit limitations that tend to emerge from the text of the treaty itself. In the case of India-China BIT, this limitation springs from article 14, which is the exception clause. An exception clause shields host states from liability arising out of actions taken in exceptional circumstances to protect their essential security interests. If a measure can be justified under the stringent requirements of an exception provision, it is difficult to envisage a situation where it would have violated standards of protection in the first place.⁴ For instance, in *CMS Gas Transmission v. Argentina*,⁵ the tribunal rejected the argument that the MFN clause overrides the emergency clause (exception clause) in US-Argentina BIT.⁶ It was consequently deliberated that the exceptions which preclude the application of a BIT as a whole cannot be overridden by the operation of an MFN clause of the same treaty.⁷ It follows the rule of *ejusdem generis* whereby the operation of the MFN clause does not exceed beyond the scope and application of the basic treaty itself. Thus, it can be argued that the exception under Article 14 of the India-China BIT has the potential to resist claims of MFN clause violation stemming from the treaty. The ambit of the exception clause contained in Article 14 is discussed in depth in part IV of this article.

In addition to investment law, violation of MFN status is also relevant from the lens of international trade law and could potentially trigger a breach of World Trade Centre (“WTO”) obligations existing between India and China. However, it is pertinent to note that member states

⁴ Andrew Newcombe, ‘General Exceptions in International Investment Agreements’ (BIICL Eighth Annual WTO Conference, London, May 2008).

⁵ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award [May 12, 2005] (‘CMS v Argentina’)

⁶ Treaty concerning the Reciprocal Encouragement and Protection of Investment United States/Argentina (signed 14 November 1991, entered into force 20 October 1994) (‘United States/Argentina BIT’) art 11.

⁷ Trung Nguyen, ‘Most Favoured Nation Clause in Investment Treaties’ [2015] SSRN Electronic Journal 39.

are allowed to refrain from being bound by these obligations on certain matters involving ‘national security’. Article XXI of the General Agreement on Tariffs and Trade⁸ (“GATT”) provides for such exceptions known as ‘Security exceptions’; interestingly it states that the exemption is granted to any action which is considered necessary for the protection of ‘essential security interests’. It was on 5th April 2019 that in a WTO settlement between Russia and Ukraine,⁹ WTO upheld the invocation of the national security exception under GATT to justify the trade blockade by Russia which breached certain WTO obligations, for purpose of national security.

Protection of essential security interest: Treaty-based exception

Since arbitration jurisprudence is guided largely by contractarian origins, these treaties typically set out procedural preconditions for submitting a claim, the substantive obligations owed by the contracting states to a foreign investor, and remedies available in the event of a breach.¹⁰ These BITs provide the legal basis for investor-state claims by defining the contours of a State’s obligation to foreign investors. This is of particular significance since the India-China BIT includes an exception clause that stipulates:

“Article 14: Exception - Nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.”

This exception clause, unlike other BITs,¹¹ does not subject the invocation of “essential security interest” defense, to the condition of necessity. This essentially means that India does not have to demonstrate that the ban was ‘*necessary*’ to secure its ‘essential security interest’, rather it can avail this defense merely on the premise that its actions were ‘*for*’ securing such interests. Though this provision exempts the host State from incurring responsibility if its actions are in furtherance of the protection of ‘essential security interests’, it does not go on to define what constitutes an ‘essential security interest.’ The factual matrix, before a State can invoke this defense under a BIT, must demonstrate that (i) there is a legitimate threat; (ii) the threat qualifies the threshold of

⁸ General Agreement on Tariffs And Trade (1 January 1948) BISD I/14-15, art XXI.

⁹ WTO, *Russia - Measures Concerning Traffic in Transit* (5 April 2019) WT/DS512/R.

¹⁰ Beharry, Christina L. & Melinda E. Kuritzky. ‘Going Green: Managing the Environment Through International Investment Arbitration.’ (2015) 30(3) *American University International Law Review* 383-429.

¹¹ *Argentina/United States BIT* (n 5).

“essential security”; and (iii) the measure taken by the host State has a nexus to such security interests of the state.¹²

An “essential security” clause temporarily limits the application of substantive provisions under investment treaties, abrogating certain investor rights against the host state.¹³ However, what qualifies as “essential security” is devoid of a uniformly accepted definition in the realm of international investment law. To this end, the arbitral tribunal in *CMS v Argentina*,¹⁴ deliberating on this very same question, held that “essential security interest” includes immediate political and national security concerns.¹⁵ Such an interpretation also finds support from the definition according to this provision in other BITs. For instance, the US–Ukraine BIT notes that ‘essential security interests would include security-related actions.’ These provisions, however, must be interpreted in a restrictive manner.¹⁶

Since India’s decision to ban these apps was driven by concerns about national security and data breaches, it does have a solid footing to defend Chinese claims under this exception. Moreover, if India is able to prove before the tribunal, as it has claimed in the press release, that the activities engaged in by these apps were “prejudicial to sovereignty and integrity of India, defense of India, security of the state and public order”, in principle, it should be able to meet the threshold of “essential security interest” as envisaged under this BIT.

Defenses stemming from customary international law

In addition to the treaty-based defenses, India can also take recourse to defenses enshrined in customary international law.

a) Necessity

One such defense is that of necessity as originating from Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also

¹² Anirudh Krishnan and Radha Raghavan, ‘Economic measures against China: a BIT to chew on’ (*The New Indian Express*, 17 July 2020) <<https://www.newindianexpress.com/opinions/2020/jul/17/economic-measures-against-china-a-bit-to-chew-on-2170843.html>> accessed on 18 July 2020.

¹³ Jose’ E. Alvarez, *The Public International Law Regime Governing International Investment* (Hague, Hague Academy of International Law 2011) 282–4; Boru Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford, OUP 2011) 181–2.

¹⁴ *CMS v Argentina* (n 4).

¹⁵ *CMS v Argentina* (n 4) ¶¶359–360.

¹⁶ *Enron Corp., Ponderosa Assets, L.P v Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment [July 30, 2010] ¶331.

consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse.¹⁷

The existing state practice, decisions of international forums, and scholarly writings¹⁸ amply support that a restrictive approach must be taken while considering the claim of necessity. Hence, the applicability of this defense will depend on a case-to-case basis, bestowing attention to the obligations arising out of the instrument as well as the surrounding circumstances applicable such as the nature of the obligation, the extent of the impact, the expediency of the disputed measure and the underlying factual situation.

b) Police Power

The tribunal in *Philip Morris v Uruguay* considered that the police power of States was reflected in customary international law and applies to the expropriation analysis accordingly.¹⁹ This holding was further acknowledged in *Saluka v Czech Republic*.²⁰ In *Philip Morris*, the tribunal held that the “*State’s reasonable bona fide exercise of police powers in such matters as the maintenance of public order, health or morality, excludes compensation even when it causes economic damage to an investor and that measures taken for that purpose should not be considered expropriatory.*” Hence, India can invoke the doctrine of police power since the ban was in furtherance of ‘public order.’

Conclusion

Looking at the crystal ball, the ban can potentially trigger several investment disputes against India. Though the ban garnered public support in India, as a retaliatory measure with regard to the ongoing tensions with China, it significantly affected the Chinese investors who had investment interests in India. The essential interest exception under the India-China BIT, stemming from national security, would be the strongest justification and undoubtedly forms the core argument in favor of India. However, the BIT does provide ample room to accommodate the claims of Chinese investors. It would hence be interesting to note how these investment claims would be addressed by arbitral tribunals or other judicial or quasi-judicial platforms.

¹⁷ Commentary to the Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Yearbook 2001/II (2), 80 ¶2; *CMS v Argentina* (n 4) ¶317.

¹⁸ August Reinisch, ‘Necessity in Investment Arbitration’ (2010) 41 Netherlands Yearbook of International Law 142; Eric Wyler, *L’Illicite et la Condition des Persones Privées* (Paris, Pedone 1995) 192; Badar AlModarra, ‘The Defence of Necessity in International Law and Investor Versus State Dispute Settlement’ (2019) 23(37) *Journal of Legal Studies* 78.

¹⁹ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award [July 8, 2016].

²⁰ *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award [March 17, 2006].

Confidentiality Under Indian Arbitration Regime: Is It Really Justice Behind Closed Doors?

- *By Shantanu Pachahara*
Assistant Professor, Manipal University Jaipur

&

Shivank Datta
Associate Legal Manager, Reliance General Insurance

Introduction

Confidentiality of arbitration proceedings is a contentious unresolved subject matter amongst the authorities and users of arbitration around the world. A majority of authorities and users of arbitration often regard confidentiality as one of the essential tenets of an arbitration proceeding, as it facilitates efficient and efficacious dispute resolution. Whereas on the other hand, substantial detractors refute this proposition by asserting that it is neither essential nor a beneficial feature of the arbitration process. The notion that users consider confidentiality as an indispensable characteristic of an arbitral process which enforces compulsion upon the parties not to release any information concerning the proceeding to a third party in contrast to the view that confidentiality is comparatively insignificant to arbitration users¹ is much tenable, as the former view is supported by a plethora of evidence including both, empirical data and anecdotal views of experienced users.² In order to avoid any equivocation, it is imperative to distinguish the two synonymous yet distinct expressions, “privacy” and “confidentiality” concerning the arbitral process. Privacy denotes the exclusion of a third party from attending and participating in the arbitration proceeding thus preventing extraneous intervention in the proceeding whilst the latter refers to a broader spectrum, excluding not only attendance of the third party from the arbitration proceedings but also

¹ Naimark & Keer, 'International Private Commercial Arbitration – Expectations and Perceptions of Attorneys and Business People', in C. Drahozal & R. Naimark (eds), *Towards A Science of International Arbitration: Collected Empirical Research* (Kluwer Arbitration 2005); Harris B, 'Report on the Arbitration Act 1996', (2007) 23 *Arbitration International* 437

² Bühring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes', in C. Drahozal & R. Naimark (eds), *Towards A Science of International Arbitration: Collected Empirical Research* (Kluwer Arbitration 2005) 25, 35 ("confidential is considered as the third most important feature of arbitration"); Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration' (2010) 5, 29 ("corporations...have strong preferences regarding confidentiality": "62% of respondents said confidentiality is very important to them in international arbitration"); Queen Mary, University of London, 2008 International Arbitration Survey: International Arbitration: Corporate Attitudes and Practices' (2008) 6 (54% of respondents cited privacy as one of key advantages of arbitration"); Queen Mary University and White & Case, The 2018 International Arbitration Survey: The Evolution of International Arbitration' (2019) ("87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature.")

prohibiting disclosure to a non-party of any or all documents, submissions or result of the arbitration proceedings.

Thus, “confidentiality of the arbitral proceedings serves to centralise the parties’ dispute in a single forum and to facilitate an objective, efficient and commercially-sensible resolution of the dispute, while also limiting disclosure of the parties’ confidences to the press, public, competitors, and others”.³

The extant provision regulating non-disclosure of the information under the Indian arbitration regime is of a recent origin. Section 42A, which reads “confidentiality of information” is inserted in the principal Act via the Arbitration and Conciliation (Amendment) Act, 2019.⁴ It imposes a mandatory and non-derogatory duty on the parties, the arbitrator, and the institute to keep all the information concerning the arbitration process classified except in cases where its discovery is necessary for the execution of the award. The authors within this note explore and examine the nature and scope of confidentiality obligation under the Indian arbitration regime in comparison to the approach adopted by other jurisdictions, specifically Hong Kong and Australia, and the various challenges this newly inserted section would pose in rendering justice behind closed doors.

National Laws: Confidentiality of Arbitration Proceedings

The present conundrum of uniformity in the disclosure of proceedings of an arbitral process owes its existence to the absence of international norms. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 or the European Convention on International Commercial Arbitration, 1961 are all silent on the subject of confidentiality of arbitration proceedings. The justification for such absence is the recognition of parties’ procedural independence vis-à-vis the non-disclosure of information of the arbitration proceedings, which is an established principle of almost all developed legal systems.⁵ The parties through the agreement regulate the character and extent of the disclosure of information relating to an arbitral process which is recognised and given effect by the national courts. In the wake of

³ Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014)

⁴ The Arbitration and Conciliation (Amendment) Act, 2019, s 9 (India)

⁵ See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Article II (1); Report of the Secretary-General on Possible Features of A Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207(1981), 12.1.1986.

such a situation, various national legal systems have adopted different approaches to the aspect of confidentiality of arbitration proceedings while few are still silent on this subject.

Hong Kong provided a comparatively recent and innovative approach via legislation for confidentiality. Section 18 of the Arbitration Ordinance (Cap. 609), 2011, provides for an express provision unfolding the confidentiality of the arbitration process and the arbitral award. The section opens with a derogation clause allowing parties to agree to the contrary and lays down that parties to an arbitration proceeding will not publish, disclose or communicate any information concerning the arbitration proceedings or the final award passed, except when such disclosure is necessary for protecting any legal right or interest of the party, or for execution or setting aside the award before any judicial authority, or when the party in compliance to a legal obligation has to disclose such information to any governmental body or court, or lastly in cases of disclosure to seek professional assistance.

The Australian national law on arbitration, International Arbitration Act 1974 (Act of 1974), Section 23C to 23G provides explicitly for stipulations concerning the disclosure of confidential information of arbitration proceedings and instances when it can or cannot be disclosed. As per Section 22, Sections 23C to 23G are opt-in provisions. It means that the said provisions apply to an arbitration proceeding only if the parties have expressly opted for these provisions under the agreement or otherwise in writing.

Section 23C expresses that the parties to the arbitration proceedings and the tribunal shall not reveal confidential material or information in relation to arbitration proceedings which has commenced upon an arbitration agreement except under the following circumstances:

1. Disclosure is permitted under Section 23D which provides for the followings instances under which confidential information may be disclosed:
 - a) upon the consensus of all the parties to the arbitration proceeding; or
 - b) when disclosing information to any professional or other specialists of the party to the arbitral proceeding; or
 - c) where disclosure is necessary and reasonable in order to provide the party a complete opportunity to put forth its case; or
 - d) where disclosure is necessary and judicious for establishing or protecting the legal right of a party to the arbitration proceeding concerning a third party; or
 - e) for the objective of implementing the award; or
 - f) where disclosure is necessary for the purpose of the Act of 1974; or
 - g) under an order of the court; or lastly
 - h) where disclosure is pursuant to any relevant law or order of any regulatory body.

2. Upon the order passed by an arbitral tribunal under Section 23E in the circumstances excluding those enumerated under Section 23D and in the absence of court order under Section 23F; or lastly
3. In pursuance of a court order made under Section 23G.

Under the Act of 1974, sections 23F and 23G provide for circumstances under which the court may through an order, prohibit or allow disclosure of confidential information respectively. The factors which the court takes into consideration for either prohibiting or allowing the disclosure of confidential information include public interest and reasonableness of such disclosure. The court, while deciding under Sections 23F and 23G takes into account the balance of probabilities resting on the circumstances of the arbitral proceeding bearing in mind the public interest favouring disclosure or non-disclosure of confidential information. Thus, if the circumstances of the arbitral proceedings in view of the public interest favouring disclosure outweigh the circumstances of the arbitral proceedings favouring non-disclosure, the court shall pass an order of disclosure and vice-versa.

Upon analytical comparison of the provisions pertaining to the confidentiality of arbitral proceedings under the Indian, Hong Kong, and Australian national laws, it is axiomatic that all provisions, in general, prohibit disclosure of confidential information pertaining to an arbitral process and apply automatically. The authors observe, upon closer scrutiny that the Indian provision is somewhat unwarranted as it does not take into consideration various inevitable situations where disclosure becomes imperative either in the public interest or for the parties' interest. Moreover, in comparison to the Hong Kong provisions, Australian provisions are better suited for the current arbitration users as they are more detailed and take into account the circumstances favouring disclosure or non-disclosure from all angles. The express discretionary power vested in the courts under sections 23F and 23G of the Act of 1974 allows the court to evaluate each case based on the facts and circumstances involved, covering miscellaneous instances which are not covered under 24D of the Act of 1974. Such provision is absent under the Hong Kong legislation. Lastly, the Hong Kong legislature has adopted an opt-out approach while the Australian legislature has adopted an opt-in approach. Out of both the approaches the users are more inclined towards the opt-out approach as it always provides an extra layer of protection in case of any omission on part of the parties in the agreement.

India's Attempt to Deliver Justice behind closed doors: Challenges

Judicial pronouncements across various jurisdictions have thrown light upon the aspect of confidentiality in arbitration proceedings, forming an essential element that either has a direct or an implied effect on the arbitral process or its outcome. The confidentiality aspect relates to the extent to which it applies and its scope governing the rights of the parties in an arbitral agreement.

According to English jurisprudence, the aspect of confidentiality in an agreement may be implicit, which in turn is predicated on the inherent private agreement between the parties.⁶ Moreover, as the jurisprudence developed, the English Court of Appeal, in *John Forster Emmott v. Michael Wilson & Partners Ltd*⁷, clarified that apart from inherent confidentiality of trade secrets and other documents relating to arbitral proceedings, there is an implied obligation on the parties against disclosure of any information pertaining to documents and proceedings, except where the parties consent to the same, or it is required by an order or with the leave of the court. However, the Australian High Court dissented from the view of implied confidentiality in arbitral proceedings. In *Esso Australia Resources v. Plowman*⁸, the Australian High Court held that although an arbitral agreement is essentially private in nature, it is not ipso facto confidential. The court, therefore, recognised privacy in arbitration but vacated the duty to maintain confidentiality.

The Singapore High Court, in *AAZ and Others v. AAZ*⁹, while agreeing with the English jurisprudence, observed that wherever an arbitral agreement is not specifically acquiesced by the parties to be of a confidential nature, the obligation of confidentiality will apply as a default. This obligation, however, does not apply where the public interest is involved concerning the disclosure of information about public authorities. Now analysing in light of these paramount judicial interpretations, Section 42A under the Indian arbitration regime is ambiguous and is potentially equivocal. The applicability of Section 42A has not been adequately defined and is somewhat limited in its scope as it provides for disclosure of information only for the implementation of the award and fails to incorporate other important instances where disclosure of information becomes imperative, such as for the protection of the right of the party to the proceeding; or the protection of third party's right; or in the interest of justice; or last but not limited to, due to operation of law. Thus, there may arise several challenges by the parties to the arbitral agreement against disclosure mandated by public authorities or private parties who would enter into a different commercial agreement with the parties to the arbitral agreement. Indian arbitration law, despite referring to the

⁶ *Dolling-Baker v. Merritt*, [1991] 2 All ER 890 ECA Civ; *Hassneh Insurance Co. v. Mew*, [1993] 2 Llyod's Rep. 243 Q.B. (Comm. Ct.), and *Ali Shipping v. Trogir*, [1998] 2 All E.R. 136 (CA).

⁷ *John Forster Emmott v. Michael Wilson & Partners Ltd*, [2008] EWCA Civ 184, [2009] Bus LR 723.

⁸ *Esso Australia Resources v. Plowman*, [1995]HCA 19, [1995] 128 A.L.R 391.

⁹ *AAZ and Others v. AAZ*, [2009] SGHC 142, [2011] 1 SLR 1093.

concept of confidentiality, is still devoid of the possibilities under which the provision may have a conflict with other statutes and legal compliances which may lead to problematic situations such as:

1. Disclosure in due diligence process: In due diligence, obligations may potentially affect the confidentiality in arbitration or related documents pertaining to a business transaction. A potential acquirer in a merger and acquisition transaction may want to conduct thorough due diligence which may affect the confidentiality obligation of the target company. Specifically, for public companies, the due diligence process makes a business transaction transparent and also forms a part of better corporate governance.
2. Regulatory authorities: Disclosure obligations from regulating authorities such as the *Securities and Exchange Board of India* (SEBI) or The Insurance Regulatory and Development Authority of India (IRDAI) or other regulatory bodies may also negatively affect confidentiality obligations in arbitration. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 necessitate listed companies to make periodic disclosures of information in the public interest that are necessary to assess the status of that company.
3. Challenging the award: The confidentiality of the award or at least the operative part of the award is subject to disclosure before a competent court of law if the aggrieved party seeks to challenge the final award under section 34 of the Arbitration and Conciliation Act, making it a public document.¹⁰
4. In pursuance of a court order: Wherein an arbitral proceeding is still pending, and a party to such an arbitral proceeding is also involved in litigation with a third party who is not within the covenant of confidentiality of the arbitral proceeding. The court, if it considers necessary for unprejudiced disposal of the case upon the application of the third-party may pass an order directing the arbitral tribunal to disclose relevant documents produced in arbitral proceedings thus nullifying the covenant of confidentiality.
5. Claim against a third-party: In the circumstances where the award contains certain assertions that the party to the arbitration may utilize to either establish or defend any legal right against a third party, then in such circumstances, the confidentiality of the award may be compromised.

Conclusion

¹⁰ Lise Bosman, ICCA International Handbook on Commercial Arbitration, (ICCA & Kluwer Law International 2020).

It is not only the Indian arbitration regime that faces a conundrum with reference to the extant provision on confidentiality, but it is a global concern as there is an absence of authoritative directive on the aspect of confidentiality in arbitration proceedings. This has resulted in the adoption of diverging practices on the issue of confidentiality by different countries in light of the judicial precedents of such jurisdictions. An arbitral process surely is subject to privacy and confidentiality, but it is not absolute. The authors are of the view that the insertion of Section 42A is a lackadaisical attempt to render justice behind closed doors because the provision is weak in its scope and will lead to a plethora of judicial interpretations in the future in view of the disclosure requirements posing as challenges to Section 42A. Unlike the Hong Kong or Australian jurisdictions, the Indian provision is susceptible to other practical, commercial, and legal implications which pose as a hindrance in the arbitral proceeding. Neither is Section 42A an opt-out provision which the authors consider as a paramount feature of the law of arbitration.

It is commendable that the Indian legislature decided to cover this emerging concern beforehand via the Amendment Act of 2019. However, it seems that the legislature failed to apply its mind towards considering the numerous challenges such a rigid provision would result into, as Section 42A seems to be a mirror emulation of Section 75 which is an existing provision concerning confidentiality in conciliation. Expansion of the scope of confidentiality and inclusion of certain exceptions will lead to having a robust provision that minimizes the scope of dispute and promotes business opportunities that support the Indian economy to stay ahead in the global market.

Class Action Arbitration for Insurance Disputes in India: A need of the hour

- *By Venkata Surpeeth. K*
Year IV, Gujarat National Law University

&

Yash Khanna
Year II, Gujarat National Law University

Introduction: COVID-19 and the changes in Indian Insurance Industry

The SARS-nCovid-19 pandemic (**COVID-19**) has taken the world by storm, often being touted as a cause of great disruption in both business and law.¹ Due to the lockdown, litigation has seen drastic measures being implemented, such as deferrals for filing and closure of court premises in the interest of public health. As India commences the process of unlocking its economy, experts worry about an upsurge of COVID-19 cases which place daunting costs in terms of human lives as well as material progress.²

The Lloyds insurance and reinsurance marketplace predicts that the global claims payout will be in the range of USD 107 billion in 2020 alone, with a caveat that it might increase in case the global lockdowns extend to the third quarter.³ The business of insurance is, first and foremost, the business of providing financial security against the risk of loss. But when losses occur, the business of insurance becomes the business of resolving claims. Given the number of insurance policies against various risks bought by individuals and companies, the onset of COVID-19 will result in an immense number of claims that will require processing. The sheer volume of claims running through the insurance system is so large, however, that even a small percentage of claims where the insurer and insured disagree on the appropriate resolution translates into a massive number of disputed claims which would require adjudication.⁴ The implosion in insurance-dispute litigation

¹ Steve Evans 'Lloyd's forecasts \$107bn Covid-19 industry loss for 2020' *Reinsurance News* (14 May 2020) <www.reinsurancene.ws/lloyds-forecasts-107bn-covid-19-industry-loss-for-2020/> accessed 4 August 2020

² Sana Shakil & Kumar Vikram "Unlock 1.0' sees 60 per cent of all COVID-19 deaths in India' *The Ne Indian Express* (07 July 2020) <www.newindianexpress.com/nation/2020/jul/07/unlock-1-sees-60-per-cent-of-all-covid-19-deaths-in-india-2166337.html> accessed 06 August 2020

³ *Supra* note 1.

⁴ Robert H. Jerry II, 'Dispute Resolution, Insurance, and Points of Convergence' (2015) J. Disp. Resol. 255.

is expected in the wake of COVID-19, which will place an additional burden on courts and arbitral tribunals, which are already strained, adding to delays and unproductive costs.⁵

The bargaining position of corporate defendants (who typically draft the contracts) in arbitration has been more beneficial vis-à-vis individual claimants. Many agreements are standard form of contracts, where the consumer has little or no choice and is often not cognizant of the arbitration clause, its scope and alternative means of settlement. For an individual plaintiff policyholder, the costs entailing individual arbitration or claim resolution can be prohibitive; coupled with the fact that the costs of arbitrators' and counsel's fee will be borne by the policyholder in a scenario when the claim is decided against his/her favour.⁶ Therefore, creating a barrier for the policyholders to knock on the doors of arbitrators for justice. Insurance disputes pose limited options to claimants who must choose between litigation and, if provided by the contract, alternative dispute resolution in their personal capacity to establish their claims, upon rejection by the insurers. In this scenario, the authors propose that COVID-19 poses a unique situation for policymakers to explore developments in the arena of Class Arbitration to solve insurance disputes.

This article, *firstly*, examines the jurisprudence surrounding class arbitration in the United States, a country which explored the contours of class arbitration in the past two decades; *secondly*, it discusses whether the Indian Arbitration legal framework permits Class Arbitration; and *thirdly*, the hurdles which will be in adopting class arbitration, and possible solutions to overcome them.

Class Action Arbitration in the United States: A brief overview

The United States has been the most active country in dealing with class arbitration as a concept. The Supreme Court and several state courts in the U.S have laid down decisions which are guiding forces for class arbitration in other jurisdictions, which is why an analysis of class arbitration in the U.S is key to determine legal basis in other countries.

The Federal Arbitration Act, 1925 ('FAA') is the primary law governing arbitration in the United States. The FAA does not explicitly allow or dis-allow the practice of class arbitration. In 2013. The Supreme Court, in the *AT&T Case*,⁷ held that - due to the age of the act, presently dating back to ninety-five years, the legislature could not have contemplated the idea of class arbitration as a

⁵ Deepika Kinhal, 'Virtual Courts in India: A Strategy paper' (*Vidhi Centre for Legal Policy*, 1 May 2020) https://vidhilegalpolicy.in/wp-content/uploads/2020/07/20200501__Strategy-Paper-for-Virtual-Courts-in-India_Vidhi-1.pdf Accessed 05 August 2020

⁶ Diogo Duarte Ribeiro, 'International Class Arbitration: Protecting Groups with Inferior Bargaining Power' (2013) 3 J. Alternative Disp. Resol. 42, 44

⁷ *AT&T Mobility LLC v. Concepcion* - 563 U.S. 333, 131 S. Ct. 1740 (2011)

concept. Regardless of this standing in 2013, the Supreme Court has allowed the practice of Class Arbitration in several cases.

Class Arbitration as a practice received its greenlight from the Supreme Court in 2003, when it heard the *Green Tree v. Bazzle*⁸ case. The Court gave two primary decisions in that ruling – *firstly*, it was up to the arbitrator/s to decide whether or not class arbitration could be held, when the agreement was silent on the same; and *secondly*, the decision of the arbitral tribunal in the above-mentioned context would be subject to minimum judicial review. The bench ruled that agreements enforcing class arbitration would fall under the ambit of Section 2 and Section 4 of the FAA.

The liberal approach of the Supreme Court in enforcing class arbitration applications and providing arbitrator autonomy was curtailed in the *Stolt Nielsen Decision*.⁹ The Court was of the opinion that in order to enforce class arbitration, there had to be a contractual basis wherein parties had implicitly or explicitly expressed their intent to arbitrate on either a collective basis or on class basis.¹⁰ The Supreme Court in *Concepcion v. AT&T*¹¹, a highly criticized judgement, mentioned that Class arbitration was excessively formal in procedure and destroyed the essence of arbitration. Regardless of this opinion, the Court, in its latter judgements, such as *Oxford Health LLC*¹² and *Varela v. Lamps Plus (2019)*,¹³ held that class arbitration will only take place if, contractually, there is party intent to do so. An analysis of the American jurisprudence on class arbitration reflects that there has been a shift from a liberal ‘Arbitrator Approval’ basis to a more narrow ‘Contractual Approval’ approach, thereby retaining the contractual principle of party consent in arbitration.¹⁴

Although the Courts have done little to assist in the procedural aspects of class arbitration, the Arbitral Institutions have prescribed a clear and coherent set of rules dealing with class arbitration. Institutions such as the American Association for Arbitration (‘AAA’) and the Judicial Arbitration and Mediation Services (‘JAMS’) have played instrumental roles in determining the procedural aspects to class arbitration by introducing the Supplementary Rules for Class Arbitration (‘SRCA’) and the Class Action Procedure (‘CAP’) respectively.

⁸ *Green Tree Financial Corp. v. Bazzle* 539 U.S. 444 (2003)

⁹ *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.* 559 U.S. 662, 130 S. Ct. 1758 (2010)

¹⁰ S. I. Strong, ‘Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared’ (2011) 37 N.C. J. Int'l L. & Com. Reg. 921

¹¹ *Supra* note 7

¹² *Oxford Health Plans LLC v. Sutter* 569 U.S. 564 (2013)

¹³ *Lamps Plus, Inc. v. Varela* 139 S. Ct. 1407 (2019)

¹⁴ Gary Born and Claudio Salas, ‘United States Supreme Court and Class Arbitration: A Tragedy of Errors’ The Symposium, (2012) 2012 J. Disp. Resol. 21,35

The Rules of Class Arbitration commonly provide for – *Firstly*, Clause Construction, to determine whether the arbitration agreements allow for class arbitration and to determine the scope of arbitration; *Secondly*, Class Certification and Class Determination Award – to ascertain whether or not the present dispute contains parties who share common questions of law or fact and to see if other factors fulfilling parties’ status as a class are achieved in the said dispute; and *Thirdly*, the final award, addressing the questions of law and fact, and deciding whether the class is favoured or not.

The Arbitral institutions have also played a pivotal role in assisting courts to adjudicate over gateway issues to arbitrate and other facts which are crucial to setting landmark jurisprudence for class arbitration. An example of this was seen in the *Stolt Nielsen Case* where the AAA submitted an amicus brief highlighting the merits of class arbitration.

Why Class Arbitration in India?

It is estimated that insurance claim-related disputes in both Life Insurance, as well as General Insurance markets are bound to increase.¹⁵ Under the given uncertain conditions, excessive judicial intervention as well as slower dispute resolution may be counter-productive to India’s pro-arbitration policies.¹⁶ Hence, the onus rests on the Indian justice system to allow conditions for the arbitration regime, both ad-hoc and institutional, to flourish and cater to the ever-growing concerns of businesses.¹⁷

Plaintiffs bringing consumer class actions routinely attempt to avoid or invalidate mandatory arbitration clauses due to the added expense of arbitration and the potential bias of certain arbitral forums due to the *repeat-player effect* and its consequent *potential arbitrator bias*.¹⁸ Viewed in this context, class arbitration is being proposed in insurance disputes as a viable alternative for the following reasons:

- a. Efficiency and reducing the costs of having to arbitrate numerous single claims.

¹⁵ PwC India, ‘COVID-19: Impact on the Indian Insurance industry’ <www.pwc.in/assets/pdfs/services/crisis-management/covid-19/covid-19-impact-on-the-indian-insurance-industry.pdf> Accessed on 05 August 2020

¹⁶ Mridul Godha & Karthikey M, ‘The New-found emphasis on Institutional Arbitration in India’ (*Kluwer Arbitration Blog*, 7 January 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/?print=print>> accessed 4 August 2020

¹⁷ Narasimhan Vijayaraghavan, ‘Time for Insurance Companies to respect the remedy of Arbitration’ (*Bar & Bench*, 23 March 2019) <barandbench.com/columns/insurance-companies-arbitration-avoid> accessed 4 August 2020

¹⁸ Matthew R. Hamielec, ‘Class dismissed: Compelling a look at Jurisprudence surrounding Class Arbitration and proposing solutions to asymmetric bargaining power between parties’ (2018) 92(4) *Chi. K. L. Rev* 1227, 1244

b. By means of procedures such as class certification and clause construction, it is guaranteed that all claimants are treated equally and avoids the danger of conflicting decisions when different tribunals are confronted with the same set of facts.

c. Further, class arbitration secures access to justice, as it provides claimants with the opportunity to bring a claim when the individual amounts do not justify initiating a proceeding.¹⁹

d. Finally, it also enables claimants to command more resources by combining their cases, giving them “greater leverage by compounding the defendant’s risk of loss.”²⁰

Class arbitration and the Indian framework of arbitration laws

Class Arbitration as a concept is very alien to India. The closest India has come to class arbitration is while enforcing the ‘group of companies’ doctrine to initiate non-signatory group members as a party to an arbitration dispute. Arbitration Jurisprudence in India has reflected that both the arbitration practice and the Arbitration and Conciliation Act, 1996 are ‘contract driven’. Although unexplored in India, arbitration agreements which contemplate class arbitration as a concept can fall well within the ambit of Section 8 of the Arbitration & Conciliation Act, 1996.

If parties to an arbitration agreement contemplate the possibility of class arbitration within their contracts, and by fulfilling the requirements provided under Sec. 8 of the Arbitration & Conciliation Act, 1996, approach the Court to enforce such an agreement, the courts, in theory, would be bound by the parties’ wishes (as expressed in the agreement). Such arbitration agreements, if explicit about class arbitration as the dispute resolution process, would fulfil the contractual test of ‘intention of parties’, an approach accepted by the Indian Courts, as in *Cheran Properties v. Kasturi & Sons Ltd.*, as well as an approach followed by the U.S. Courts.

However, when applied to the Indian insurance context, this conclusion on class arbitration comes with its own hurdles. *Firstly*, the arbitration clauses in insurance contracts and the jurisprudence around insurance arbitration make it difficult to support class arbitration. *Secondly*, the absence of

¹⁹ Sarah Clasby Engel and Sherry Tropin, ‘Class Action Arbitration: A Plaintiff’s Perspective’ (2010) 5 FIU L. Rev. 145,151

²⁰ Francisco Blavi et. al, ‘Class Actions in International Commercial Arbitration’ (2016) 39 (4) Fordham Int’l. L. J 794, 797

class construction guidelines in class arbitration would prove to be an impediment for the policyholders to group together as a class.

The Hurdles and Possible Solutions to overcome them

The first hurdle revolves around two aspects - the arbitration agreements and the insurance arbitration jurisprudence in India. The Arbitration Agreements in Insurance policies and contracts are designed in such a way so as to provide a layer of protection to the insurers from the claims of the policyholders.²¹ The arbitration agreements do not provide for arbitration based on claim admission; rather, it allows for arbitration only when the quantum of the claim is under dispute.²² Additionally, the arbitration agreements do not provide for any dispute resolution on the basis of class arbitration. The possibility of courts taking a liberal and wide interpretation of such contracts to accommodate class arbitration is bleak as the Indian Supreme Court's *Vulcan Insurance Co. Case*²³ rule would apply, which states that insurance contracts are to be strictly interpreted in the words the contract is expressed by.

However, as expressed in the first section of this article, since class arbitration is the need of the hour for the policyholders, the government can introduce guidelines to support class arbitration in the current situation by suggesting that - disputes in which the policyholders have claims involving a similar question of law, class arbitration can be invoked, whereby policyholders as a class can move against the insurance companies. This will provide not only for class arbitration but also will extend the scope of arbitration to matters concerning quantum and claim liability. The parties are still faced with the lesser issue of the absence of class guidelines for arbitration in India.

This hurdle can also be overcome by introducing new arbitration rules in India, as there are sufficient guiding forces to assist arbitrators to do so. Since the major difference between bi-party arbitration and class arbitration is the number of parties, arbitration rules can remain the same in class arbitration insurance proceedings. The only difference in procedure would entail class certification by the tribunals.

²¹ Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, 'Arbitration procedures and practice in India: overview' (*Thomson Reuters*, 1 October, 2019) <[https://uk.practicallaw.thomsonreuters.com/9-502-0625?__lrTS=20171014041831054&transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-502-0625?__lrTS=20171014041831054&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 4 August 2020

²² *Oriental Insurance Company v. M/S Narbheram Power and Steel* (2018) 6 SCC 534

²³ *Vulcan Insurance Co. Ltd v. Maharaj Singh & Anr* AIR 1976 SC 287

Procedural rules for class certification in arbitration can be framed keeping in mind the already existent rules of the SRCA and the CAP by AAA and JAMS respectively, as prevalent in the United States. The practice of framing class guidelines for arbitration by the AAA and JAMS was done by keeping Rule 23 of the Federal Rules of Civil Procedure- the rule which laid down guidelines on class constitution in litigation which is very similar to the Indian Framework on representative suits under Order I, Rule 8 of the Code of Civil Procedure.

Arbitrators and Arbitration Institutions in India can form class guidelines for Indian class arbitration proceedings by considering the guidelines under Order I, Rule 8 of the CPC – which lays down elements of class construction for class litigation in India. Additionally, arbitrators may use the guidelines of ‘class’ in consumer class disputes, which would help them identify the commonality of interests of the policyholders.

Conclusion

It is imperative to note that currently, India lacks the requisite policy and institutional framework to conduct class arbitrations. The COVID pandemic is a threat as well as an opportunity to make insurance dispute resolution in India more efficient and inclusive. With the exposure of litigation and bi-party arbitration to multiple claim disputes, the policyholders will experience impediments in the form of delayed adjudication and high costs, thereby threatening businesses and stakeholders of the Insurance industry. In such a situation, class arbitration seems to have the potential to provide the policyholders with necessary and efficient access to justice.

Although the contours of class arbitration have not yet been drawn in India, the pandemic provides Indian policymakers with a unique opportunity to create a mechanism with greater accessibility and safeguards for the interests of the insured, as well as provide a future roadmap for developing a pro-arbitration regime by empowering the arbitral institutions to adjudicate class action claims.

IN CONVERSATION WITH MR. SITESH MUKHERJEE

Editor's Note: Mr. Sitesh Mukherjee is an independent legal practitioner and appears before the High Court, Supreme Court, and other tribunals. Previously he was a partner and head of Dispute Resolution of Trilegal which he built and led for over 11 years. Mr. Mukherjee has twenty-five years of experience in handling a variety of corporate commercial disputes, including high stakes arbitrations in diverse stakes arbitrations in diverse industries such as power, infrastructure, and banking.

Editorial Board (EB): *You have practiced firm litigation for the most part of your career and now decided to start independent counsel practice. Could you please take us through the thought process? What would your advice be to young lawyers who want to pursue litigation but are confused between firms and chambers?*

Sitesh Mukherjee (SM): Before I started at Trilegal, I worked as an independent lawyer for the initial part of my career. That's a background many law firm partners may not have, Therefore, the thought I always had was to get back to individual counsel practice at some point in time. It's not that the firms are not the right place to do litigation or develop a litigation practice. In fact, I believe that the future of litigation practice in India is in the firms, be it full-service firms or specialized dispute only firms. Eventually, there will be more dispute lawyers in firms who will be front-ending litigation. As things stand today, it is still a process of transition. The litigation practice in India is still getting organized and corporatized. We still have a situation where the face value is more important in courts, and that comes from volume-driven practice. While courts and clients are increasingly demanding more attention to detail, it is a process of transition that will take some time.

As I said, volume-based practice gets you in front of the courts, in terms of your aspiration of becoming a counsel. Large firms are still not in a position where they can have their partners regularly appearing in court. As we practice in specialized tribunals and specialized practices, I see partners in large firms, increasingly appearing before the court. It's a process that will take time.

EB: *You have had an experience of practicing both in Mumbai as well as Delhi. It's widely known that the litigation in both these cities differs widely. Could you please tell us about that?*

SM: I spent 23 years practicing in Delhi and have been stationed in Mumbai more prominently in the last four years so I am more familiar with the court set up in Delhi. In Delhi, due to many tribunals and smaller courts, the opportunities to build up the practice are more. Bombay on the other hand has a more solicitor-driven culture, The settlement of the draft and trial strategy are decisions of counsel, whether it be junior or senior counsels.

However, I have noticed that things are changing in Bombay. For example, in the NCLT, I found increasing participation of firm lawyers. For a long time, SEBI was the only major all India tribunal in Bombay, and we did have firms specializing in SEBI work, and some of them were as good as any counsel in Bombay. I believe that if there are more specialized tribunals in Bombay over a period of time, individual lawyers will take up more work themselves.

The second thing is with the emergence of arbitration as a specialized practice area, I find lawyers and law firms, both in Delhi and Mumbai, have the opportunity to work on the matters in their entirety, including arguing, as they are better equipped than lawyers who are briefed for a short period of time. I feel that in India, as in other countries, the solicitor-based work will be reduced and lawyers, and even litigation lawyers, in law firms, will have to start fronting their own cases before various tribunals.

EB: It is observed that Mediation is emerging as a preferred method of alternate dispute resolution. How are the law firms responding to this change? Are firms trying to recruit people who are experienced in mediation?

SM: A lot of good things, are being said about the importance of mediation. Unfortunately, mediation is still not a significant practice area, because courts in India do not penalize people for adventurous litigation or arbitration. There isn't enough disincentive for embarking on litigation. As a result, not enough importance is given to mediation, especially because of the consequence of losing in payment of interest, at most, which is also negligible. Costs need to be awarded more regularly at a higher level by courts in order to disincentivize people from embarking on luxury litigation or adventurous litigation. Until that happens, mediation will not emerge as a serious practice area.

EB: How do you think we can improve mediation in India as a method of resolving disputes?

SM: We need to develop the practice area for practitioners to excel in it. You can keep training people and having seminars, but until it emerges as a practice area that clients want to rely upon and find useful, there is no way for people to get practical hands on experience.

Right now, we are looking for statutory changes, policy changes, and things to legislate overall, including court prescriptions. This reminds me of the time when the new Arbitration Act was introduced, it was based on the UNCITRAL model. But it didn't take off till the BALCO judgment. We have to change the ground rules. One of the biggest ground rules is to disincentive litigation. The only way to disincentivize litigation is to impose costs.

Similarly, if you look at it from the perspective of plea-bargaining, if the court process was fast, one would have the incentive, because one could get convicted faster if the offence was proved. If the trial is going to stretch on for years, there is no incentive to have a plea-bargaining system. As long as courts are slow and award minimal costs, mediation will not become popular. Personally, I see it holding a lot of potential for future lawyers.

EB: Since the last few years, climate change is being extensively discussed across the world. How do you think this development will affect the process of arbitration specifically regarding the energy industry?

SM: The energy industry, as you know, is already familiar with the arbitration process internationally and nationally. In India the difficulty is that we have tribunals for most of the downstream and mid-stream activities, we have arbitration only for the upstream activity and for the trading activity in oil and gas, which limits its scope in India. Nonetheless, the energy industry, on the whole, is used to arbitration.

When environmental arbitration is introduced, the energy industry, in general, will be able to cope with it pretty well. There are two or three things that are in favour of having environmental arbitration in the energy industry for large infrastructure projects. One is that Arbitration brings a lot of expertise.

Large projects, particularly in the energy sector, have long, tremendous costs to the environment, as well as long-term social costs. In order to have accountability for these costs, arbitration is a very good means to ensure that energy companies pay costs for the damage to the environment.

Along with the expertise, the quality of evidence is an important concern, which is much better in arbitration because of the experts and the disclosure requirements. This also supports arbitration in environment related disputes, especially in the energy sector. There are already precedents. Like DRVs which are already working, and ad hoc tribunals like the deep-water tribunal for oil spills. The International Oil Pollution Tribunal discusses the oil pollution caused by oil tankers and parties can make their claims there. The Energy Industry has an idea of how the arbitration process works.

In energy arbitration, there is an element of public interest and multiplicity of parties, hence you will find that they resemble claims tribunals rather than arbitration in the way we recognize it. Arbitration jurisprudence needs to move to accommodate multiple party interests and public interests in order to cater to this area.

EB: In the coming future, to what extent we can address the scope of Human rights concerns, e.g., er have seen the issue of Sterlite protests concerning the copper industry in Tamil Nadu and instances of police brutality.

SM: I do not believe that Human Rights can be decided through arbitration. The basis of many of those rights are in public law, and there is also a larger socio-political element to these aspects, which reflects on the whole nation-state and the government. So Human Rights would need to be addressed through the statutory tribunal. Arbitration is not the solution to that. However, environmental claims are different as (a) they require a significant amount of expertise, (b) the authority of evidence in an arbitration process is higher by virtue of the disclosure requirements, and (c) there is also the time factor which courts in India and arbitration tribunals don't have, therefore for such specialized matters, so Dispute Resolution Boards should be able to function better in that respect as well.

EB: In terms of human resources, what are the needs and requirements of clients engaged in the energy sector when they seek legal assistance?

SM: I would say there is a challenge to the development of the human resource. When I talk of human resources, I refer to young lawyers and their opportunities in sector arbitrations and international arbitrations in India. A lot of the positions are developing in Europe, and we don't have that level of expertise in India. For India to turn into a seat to reckon with, we need to open up the market to international firms. There will be specialized expertise that foreign firms and lawyers will bring in, which will provide confidence to the International Investors to actually arbitrate in India.

On the transactional side, ply in and ply out, a lot of the documentation and meeting can happen internationally. Therefore, the participation of international lawyers will be easier, even if they cannot be accommodated in India. In International arbitration, if India is to be a prominent arbitration seat, foreign firms should have a more prominence here, with a more permanent setup. There are only a handful of firms in India, the top tier or even the next level, only a dozen of such firms, overall, with the experience in international arbitration. Whereas the people who are interested in working in the area are much more.

The culture of arbitration is really permeating in India. We have a lot of law firm partners who are focused on the subject of arbitration, international arbitration especially is turning into a niche, specialized practice in India. People don't have to go to court to develop a name in arbitration. There is a lot of expertise that is being developed. The process would however greatly be assisted if international practitioners were involved.

EB: *What are the challenges ahead for developing the arena of institutional arbitration in the Indian Energy sector?*

SM: I think much of the energy sector is governed through statutory tribunals. From my practice in this area, I notice that the detail with regard to evidence is key to solving disputes. The tribunals operate under a *prima facie* case on documentary evidence. Even if you talk about the PNGRB or the CERC, a lot of them are faced with the question of damages, change in law, and force majeure. The evidence is almost never taken there. So, personally, if there is a need to regulate some parts of the value chain in the energy sector, there should be a mechanism to ensure that cases that require a significant amount of expertise and evidence should be referenced to arbitration so that we don't do a cut and dried process of assessment in areas where detailed evidence and expertise is required.

I think on the development of international arbitration in the energy sector, we have to ensure that even if we are going to have regulators there should be room for arbitration as well. The *Gujarat Urja v Essar Power* judgement of the Supreme Court, early in the day after the electricity Act came in, spelled out that if a particular subject matter is covered by the jurisdiction of the electricity tribunals, then there is no question of those contracts being arbitrated by tribunals. That has been followed in other areas of regulatory problems as well. There should be space for arbitration to take place in appropriate cases.

EB: *Any final advice for students who are entering the post COVID employment market. How do you see law firms adapting to the change in conditions? What would be expected of young associates initiating their careers?*

SM: Of course, it's a difficult time for people who are graduating from law schools, the opportunities are likely to be few because of two reasons. One, the work from home creates a certain amount of efficiency, where associates required by firms will reduce. Secondly, Mentorship is difficult in an online mode, therefore learning is difficult in a mentorship-based method. The employment opportunities have been reduced and the learning opportunities are reduced. So far

as the law firms are concerned, they are still trying to find a way to bring on board the new hires for this year. They will find a way to do it, but it is still a challenge.

I think that people should look for roles in in-house situations because companies are more active, and the legal departments are going to have more face-to-face interaction. Secondly, you must use your time to continue with your education and learning if you are not getting a job. Read the most recent judgements, and participate in seminars and webinars. A lot of senior lawyers are coming and sharing their experiences and thoughts that provide you with a great alternative to personal mentorship.

If you feel that you are satisfied, continue with your education, do an LL.M. come back when things are better. Overall, there is a lot of self-help that will be required for lawyers who will be graduating now and are facing the challenge of getting to their first jobs. You will have to learn to motivate yourself. You can also do an LL.M., part-time maybe if you already have a job. That would be my advice-Use the time gainfully to develop expertise by developing your knowledge.

P.S.: We express our sincere gratitude to Mr. Sitesh Mukherjee for his valuable time and for providing us with insights into his practice area. We hope the interview is as enriching and fruitful for our readers as it has been for us.