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

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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 is expected in the wake of COVID-19,

[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.

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

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[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

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 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 *Concepicon 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

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

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.

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 to 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

[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

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.

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

[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
[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

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 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

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[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> 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

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.

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.