GNLU SRDC-ADR

MAGAZINE

VOLUME IV | ISSUE II

Gujarat National Law University

GNLU SRDC ADR MAGAZINE

GNLU
STUDENT RESEARCH DEVELOPMENT COUNCIL

ATTALIKA AVENUE, KNOWLEDGE CORRIDOR, PDPU ROAD,
KOBA, GANDHINAGAR

MAY 2024

FOREWORD

Prof. (Dr.) S. Shanthakumar

Director, Gujarat National Law University

There is a saying that an ounce of mediation is worth a pound of arbitration and a ton of litigation. This is true in every respect possible. It is common knowledge that the average litigation period across countries is below any sense of reasonableness. ADR not only eliminates the vices of the traditional justice system but also combines the best of both worlds. It is confidential, speedy and personal. In this fast-paced commercial world, these aspects reign supreme. Multinational enterprises would prefer resorting to ADR to preserve their functioning. It, therefore, does not come as a surprise that ADR has gained immense traction in the past decades. One cannot deny the importance of keeping up with recent developments being made in the field of dispute resolution, a vibrant and multi-faceted legal endeavour, which varies in procedure and substance across jurisdictions and cultures, diversifying with the passage of time and increasing commercial activity. Nations around the world have acknowledged the need for specialisation and diversification of the practice of ADR in order to create a reliable and expeditious dispute resolution mechanism in the interests of a robust economy and reliability of various industry-players. The interplay of the tenets of law with custom, practices and technical aspects in every line of work, and even the interplay of ADR with other branches of law has led to the development of a rich jurisprudence and new avenues for career development. The impact is such that no nation can afford a restrictive legal and judicial framework at the cost of business and growth. Building such a framework entails facing complex questions of law and procedure that pertain to an effective regime of ADR in the country. In recent times, India has been a proponent of ADR and especially arbitration, bringing legislative changes to keep up with international standards. Creating a robust and effective arbitration regime requires confidential proceedings and institutionalisation of the whole realm. Multiple attempts have been made to make this a reality. These attempts are never without fault. At the same time, the faults are never exposed without academic discourse. As a result, there is an incessant need for academic debate and legal research to exact and streamline these attempts. The Magazine aims to revive the skill and art of legal research, an underrated yet crucial skill necessary for every student of law. At the core of the Magazine lies the recognition of the importance of interdisciplinary and holistic research aimed at the varying perspectives of the law and practice of ADR and identifying trends and conundrums. The GNLU SRDC-ADR Magazine, under the able guidance of its faculty, advisors and benefactors, the support of the administration and the dedication of its members, has undertaken progressive measures to achieve the said ideal and live up to its essential function. I appreciate the brilliant editorial team and external peer reviewers whose efforts have culminated into the third issue of the SRDC-ADR Magazine. I hope that the Magazine achieves the intended object and accrues the approval of its readers for its content. I also hope that the support and guidance extended shall remain constant, pushing the Magazine to scale newer heights and achieve grander objectives in the years to come.

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.

ADVISORY BOARD

Justice Dipak Misra

Former Chief Justice of India

Mr. Nitin G. Thakker

Senior Advocate at Bombay High Court
and President of Bombay Bar Association

Mr. Gourab Banerji

Senior Advocate, Supreme Court of India
Overseas Associate, Essex Court
Chambers, London

ADVISORY BOARD

Mr. Naresh Thacker

Partner (Litigation and Dispute Resolution), Economic Laws Practice

Mr. Madhvendra Singh FCIArb

Arbitrator and Chartered Engineer

Mr. Sameer Pandit

Partner (Litigation and Dispute Resolution), Wadia Ghandy & Co.

Ms. Neeti Sachdeva

Secretary General and Registrar, Mumbai Centre for International Arbitration

FACULTY EDITORIAL BOARD

Prof. (Dr.) S. Shanthakumar
Director, GNLU,
Patron and Faculty Editor-in-Chief

Dr. Ambati Nageswara Rao
Assistant Professor of Social Work, Faculty Editor

Prof. (Dr.) William Nunes
Professor, Faculty Coordinator and Editor

Dr. Saira Gori
Assistant Professor of Law, Faculty Editor

Prof. (Dr.) Vikas Gandhi
Professor of Law, Faculty Editor

Mr. Sanjeev Kumar Choudhary
Assistant Professor of Law, Faculty Editor

Prof. (Dr.) Viral Pandya
Dean of Research and Development Cell & Professor of Management, Faculty Editor

EDITORIAL BOARD

EDITOR-IN-CHIEF

Pratyusha Ivaturi

EXECUTIVE EDITOR

Stuti Sehgal

MANAGING EDITOR

Gyanda Kakar

SENIOR EDITORS

Kunal Parekh
Shraddha Sriram
Soumya Suresh
Surya Ravikumar

ASSOCIATE EDITORS

Aditya Sharma
Harshit Upadhyay
Janya Navnitlal
Mansi Verma
Raghav Saha
Sanigdh Budhia
Sanskriti Singh

COPY EDITORS

Aarush Kumar
Aditya Murthy
Anna Maria Abraham
Dishaa Dand
Mohak Chaudhary
Shubhankar Sharan
Vatsal Raval
Yashweer Singh

ALUMNI ADVISORS

CHAITANYA HEGDE
RAHUL KANOUJIA

CONTENTS

NOTE FROM THE EDITORS _____ 09

ARBITRATOR'S DISCRETION: BALANCING CONTRACTUAL PROVISIONS WITH JUSTICE
ADITYA VIKRAM SINGH AND SHREYA CHANDHOK _____ 10

AN INSIGHT INTO THE LEGAL POSITION OF ARBITRATOR'S FEE INDIA
SAVITHITI R. _____ 15

THE ROLE OF MARKET LIBERALISATION IN NAVIGATING INDIA'S ARBITRATION LANDSCAPE
MANSI TRIPATHI _____ 22

CONSTRUCTION ARBITRATION IN THE MAZE OF PROJECT DELAYS AND TIME EXTENSIONS
SHREE DWIVEDI AND SHREYA MISHRA _____ 30

RESOLVING THE CONUNDRUM BETWEEN ARBITRATION AND INSOLVENCY IN INDIA
SAMREEDHI GUPTA _____ 40

FROM ADHESION TO COHESION- RECONTEXTUALIZING THE APPLICATION OF GROUP OF COMPANIES DOCTRINE UNDER THE LAW OF ARBITRATION
SARVAGYA CHITRANSHI AND H A DHRUTI _____ 48

INEQUITY UNVEILED: CHALLENGES TO FAIR APPOINTMENT OF ARBITRATORS
SHIRISH SACHDEVA _____ 58

THE UNSTAMPED ARBITRATION AGREEMENT PEREGRINATION: A RIDDLE RESOLVED
MANSI VERMA AND AARUSH SAJIT KUMAR _____ 66

MONTHLY ROUND-UP (SEPTEMBER 2023 - JANUARY 2024) _____ 73

IN CONVERSATION WITH PROF (DR.) PRABHASH RANJAN _____ 94

NOTE FROM THE EDITORS

We ensue this note by expressing our immense gratitude to the readers, advisors, contributors and everyone associated with this magazine and the unconditional support that has been extended to the magazine. Their impervious faith in our objectives has been instrumental and enlivening to the success of the inaugural issue of the Magazine. With the magazine making new inroads and gaining recognition, we hope that it obtains a wider readership and becomes a medium for catalysing free exchange of thoughts and a credible platform for learning amongst the section of students and professionals engaged in Alternative Dispute Resolution.

For the tenth edition of the Magazine, the editors are pleased to present the feature interview with Dr. Prabhash Ranjan. After dedicating his life towards serving as part of the Indian judicial system, he went on to become a prominent figure in the field of International Arbitration. He was most solicitous in sharing his insights and advice with the editorial team. We take this opportunity to extend our gratitude to Justice Deepak for engaging with us.

Volume IV Issue II of the ADR Magazine features six articles. 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 the six writings on contemporary issues of ADR which are both interesting and informative. We hope this attempt of ours is recognized by our readers and contributors and continue to extend their support 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.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

ARBITRATOR'S DISCRETION: BALANCING CONTRACTUAL PROVISIONS WITH JUSTICE

AUTHOR(S)

Aditya Vikram Singh
Principal Associate, Saraf and Partners

Shreya Chandhok
Associate, Saraf and Partners

Introduction

Alternative Dispute Resolution ["**ADR**"] mechanisms have gained significant traction in India due to their efficiency, flexibility, and adaptability in resolving disputes. Amongst these, arbitration stands out as a preferred method, offering parties a way to resolve their disputes outside of traditional court litigation and by choosing subject matter experts to adjudicate over technical disputes. However, arbitrators being creatures of a contract, it has been a matter of debate as to whether an arbitrator can transcend beyond the mandate of a contract if the disputes require so, to do justice.

Arbitrations are required to operate within the framework of contractual provisions agreed upon by the parties involved. However, arbitrators have the liberty to employ equitable principles while interpreting contractual terms, albeit being the four corners of the contract. As such, while parties may establish the parameters of arbitration through contractual agreements, arbitrators possess expansive powers to interpret these provisions and ensure fairness, equity, and compliance with public policy, even if it means deviating from strict adherence to contractual terms. This flexibility allows arbitrators to address unforeseen circumstances, fill gaps in contracts (*though it does not imply rewriting of contract*), consider equitable principles, and craft remedies tailored to the specific needs of the dispute. Ultimately, the authority of arbitrators to transcend contractual provisions highlights their crucial role in delivering justice effectively within the ADR framework. This article through certain instances (*specifically pertaining to contractual limitation to claim damages)* explores the expansive scope of arbitrators' powers in India to adjudicate disputes pertaining to construction contracts. The article further explores the extent of authority and discretion vested in arbitrators to administer justice to the parties involved while respecting the contours within which they are expected to function.

Challenges in Construction Contracts and arbitrator's scope of discretion

An arbitrator's discretion to award damages in construction contracts is vital for ensuring fairness and effectiveness in resolving disputes, as a majority of the construction contracts are lumpsum turnkey contracts, plagued with delays and instances of unforeseen variations during execution. While construction contracts often include provisions outlining damages for delays, change of scope and escalation of prices, the arbitrators in this context have the flexibility to interpret these terms in a relevant factual context, wherein strict application of contractual provisions may have led to unjust outcomes, as will be detailed further in the subsequent paragraphs. Their discretion allows them to consider various factors, such as the reasons for the delay, the impact on the parties involved, and any extenuating circumstances. Moreover, arbitrators may also deviate from strict interpretation of contractual provisions by using equitable principles if the former would lead to an unjust outcome. The remedies that an arbitrator provides, as traced through evolving jurisprudence, include awarding damages beyond what is explicitly provided in the contract, taking into account the factual circumstances and factors. This discretion enables arbitrators to deliver comprehensive justice and maintain the integrity of the construction industry's dispute resolution process.

Change of contractor's scope of work vis-à-vis contractual limitations

Construction contracts usually contain specific provisions dealing with the allocation of risk regarding scope changes in lumpsum turnkey projects. In lumpsum contracts, the contractor undertakes to finish the project for a predetermined price. However, when there is an expansion in the scope of work, the question arises as to whether a contractor should be entitled to additional costs. This is where the discretion of an arbitrator assumes relevance. In the recent Delhi High Court judgment in *Dedicated Freight Corridor Corporation of India Ltd. v Tata Aldesa*,[1] ["**DFCCIL**"] a contractor incurred additional costs in a railway project due to an increase in the size of roads and bridges ["**RUB**"] related work. As per Clause 2.0 of part 2, volume 1 of the agreement signed between the parties, changes in the list of bridges and other structures shall be considered as 'variation'. Accordingly, the employer contended that this was a minor deviation in the lump sum contract, and not a variation entitling the contractor to additional costs. The arbitral tribunal ["**Tribunal**"] categorically rejected the employer's arguments on the grounds that the variation provision in the contract was broad enough to cover changes in the size of RUBs as well and was not limited to a variation of list of bridges and structures. Moreover, the Tribunal held that such modifications were beyond the contractor's ability to foresee or assess during the bidding process,

[1] *Dedicated Freight Corridor Corpn. of India Ltd. v Tata Aldesa JV* (2023) SCC OnLine Del 5242.

thereby rendering it unjust to expect bidders to account for costs subject to significant fluctuations that might arise from unpredictable increases in scope, type, and magnitude during execution. Consequently, it is inequitable to maintain the position that, in lumpsum contracts, the entirety of the risks associated with scope modifications are borne by the contractor. This judgement is a classic example of an arbitrator exercising its wisdom through the tools of equitable principles while being in the four corners of the contractual provision in order to ensure that the adjudication of a matter is done as a *wise man* who is not bound by the judicial knots.

Employer's delay and Arbitrator's remedial damages vis-à-vis contractual limitations

In construction contracts, when an employer's failure to meet its contractual obligations or delays due to reasons not attributable to the contractor impacts the work schedule, the arbitrator possesses the authority to award compensation to the contractor for the additional costs it incurred even if the contract provides an extension of time to be the sole remedy available to the contractor. The Supreme Court in the case of *K.N. Sathyapalan v State of Kerala and Anr.*[2] ["**K.N. Sathyapalan**"] held that,

> "*Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the Arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of failure of the first party to live up to its obligations*"

In this case, the Court further determined that when the contractor encounters obstructions beyond its control, leading to an inability to fulfill its contractual obligations within the prescribed baseline schedule, strict adherence to the contractual terms must give way to a rather equitable interpretation of the contractual terms.

In *P.M. Paul v Union of India*,[3] ["**P.M. Paul**"] the dispute before the arbitrator was in relation to the claim of the contractor towards escalation price. The arbitrator was seized of the issues pertaining to the delay in the completion of project and the corresponding escalation of prices, wherein the contractual provisions were limited to extension of time being the sole remedy. The arbitrator rendered its finding on delay causation and held that there was a corresponding escalation of cost and price in the additional time that resulted in the contractor incurring additional costs for execution. Thus, the arbitrator concluded that it was reasonable to allow 20% of the compensation under the claim. Accordingly, the arbitrator allowed the same, exercising its discretion in employing

[2] *K.N. Sathyapalan v State of Kerala* (2007) 13 SCC 43.
[3] *P.M. Paul v Union of India* 1989 Supp (1) SCC 368.

equitable tools for interpreting the contract. The Supreme Court, while dealing with the objection to the jurisdiction and scope of the arbitrator's power in travelling beyond the contours of the contract, observed as follows while upholding the decision of the arbitrator:

> "*Escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award. The arbitrator has noted that Claim I related to the losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract from 9-5-1980 for the work under phase I, and from 9-11-1980 for the work under phase II. The total amount shown was* Rs *5,47,618.50. After discussing the evidence and the submissions the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20 per cent of the compensation under Claim I, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done.*"

Likewise, in a recent ruling of the Delhi High Court, the court emphasized upon the arbitral tribunal's power to recognize a contractor's entitlement to compensation regardless of contractual provision limiting extension of time to be the sole remedy. The Court in *Ircon International Ltd. v Delhi Metro Rail Corp.*[4] ["**Ircon International**"] while dealing with a dispute concerning a railways construction project, affirmed the arbitrator's finding which recognized that the delay of 18 months in the completion of the project was on account of the employer's site handover issues. It further upheld the arbitrator's award saying that in such cases, despite the contract providing for an extension of time ["**EOT**"] for such delays to be the sole remedy, the contractor's claim to compensation irrespective of the contractual prescription can be allowed. The Delhi High Court as the Court dealing with objection to the award in terms of Section 34 of the Arbitration and Conciliation Act, 1996, found that through the EOT letters, the contractor has also notified the employer of such additional costs incurred.

In *Asian Tech Ltd. v Union of India,*[5] ["**Asian Tech**"] the Supreme Court held that a provision disallowing compensation for delays caused by the employer does not preclude an arbitrator from granting damages to the contractor, particularly in circumstances where the employer had given assurances to the contractor regarding the resolution of rates through negotiation. Once again, the arbitrator's approach of looking beyond the veil of contractual provisions through the lens of equitable principles was considered appropriate and within its scope.

---

[4] *Ircon International Ltd. v DMRC* (2023) SCC OnLine Del 6368.
[5] *Asian Tech Limited v Union of India* (2009) 10 SCC 354.

Final analysis

In the realm of dispute resolution, the role of an arbitrator is often likened to that of a wise sage rather than a strict judge. In this context, the Supreme Court in the decision of *Associate Builders v Delhi Development Authority*[6] ["**Associated Builders**"] observed as follows:

> *"Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained mind would not be invalid on this score [Very often an arbitrator is a lay person not necessarily trained in law. Lord Mansfield, a famous English Judge, once advised a high military officer in Jamaica who needed to act as Judge as follows: "General, you have a sound head, and a good head, and a good heart; take courage and you will do very well, in your occupation, in a court of equity. My advice is, to make your decrees as your head and heart dictate, to hear both sides patiently, to decide with firmness in the best manner you can, but be careful not to assign your reasons, since your determination may be substantially right, although your reasons may be very bad, or essentially wrong". It is very important to bear this in mind when awards of lay arbitrators are challenged."*

The above-mentioned discussion is an attempt to highlight that in arbitration, contractual provisions do not serve as absolute constraints, as the arbitrator possesses considerable latitude to adjudicate based on factual circumstances and merits of the case. When wielded judiciously, arbitration exhibits a broad and sagacious scope, offering flexibility to address the complexities inherent in disputes. The rationale for opting arbitration as a mode of ADR includes its expeditious resolution and maintaining confidentiality among other factors. Nonetheless, parties ultimately seek justice, a concept not always achievable through rigid procedures, necessitating flexibility. Through this paper, the authors have utilized a nuanced illustration of construction arbitrations to demonstrate how the application of equitable principles by arbitrators can lead to a more justifiable administration of justice. The arbitrator while adjudicating a matter must respect the ethos of ADR i.e., flexibility and adaptability. Hence, the arbitrators while embracing their role as wise arbiters, must ensure that they uphold the integrity of the process, promote fairness, and maintain the delicate balance between honoring contractual confines and dispensing just and fair reliefs to the aggrieved party.

[6] *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

AN INSIGHT INTO THE LEGAL POSITION OF ARBITRATOR'S FEE IN INDIA

AUTHOR(S)

Savithiri R.

Executive at Legal Centre for Development of Telematics

Introduction

The legislative intent behind recognizing arbitration as a dispute settlement mechanism is to remove the burden off the Courts due to the increasing number of litigations and to provide party autonomy in contractual dealings. Initially, arbitration gained widespread attention because it was expeditious, less expensive, fair, efficient, and an effective method for the settlement of disputes compared to time-consuming, complex, and expensive court procedures.

With the introduction of the arbitration law in India, the supervisory role of Courts was minimized and the arbitral award was treated on par with the decree of a Court. The importance of arbitration has grown manifold since 1995 with privatization, liberalization, and globalization. However, during the past few years in India, arbitration has in turn become a 'costly' way of dispute resolution because the 'costs' involved in arbitration include arbitrator's fees and expenses, institutional fees and expenses, advocate charges, witnesses, payment for the venue, hearings etc.

Looking into the etymology, the term 'arbitrator' is derived from the Latin word '*arbiter*' which means 'decision-maker or judge'. Thus, an authority is being conferred by the Parties upon the arbitrator through the arbitration agreement for adjudication of the disputes. In this regard, a question arises as to whether the arbitrator can be the judge for his cause in determining his fee and other related costs involved in the arbitration and the factors involved in fixing the fee. The Hon'ble Supreme Court of India in the case of *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV* ["**ONGC Case**"][7] had clarified the legal position of arbitrators' fees in India. This article discusses the history and concept of the arbitrator's fee, legal provisions of the Arbitration and

[7] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV (2022) SCC Online SC 1122.*

Conciliation Act, 1996 ["**Arbitration Act**"] and analyses the Order in the *ONGC Case* and its jurisprudential progress regarding the essential factors for fixation of arbitrator fee, comparison of arbitrator's fee in different International Institutional Arbitration Centers.

History & Concept of Arbitrator's Fee

Historically, arbitration was considered as a dispute settlement mechanism in a peaceful manner without resorting to force. One of the earliest arbitrators mentioned in the Bible was King Solomon.[8] Even in 333 BC, King Phillip II acted as an arbitrator for the peace treaty negotiations to resolve territorial disputes.[9] Arbitration was conceived as an institution of peace aimed at maintaining harmony amongst people who are meant to live together.

It must be remembered that the overarching principle of 'arbitration' is the concept of 'party autonomy.'[10] Section 2(6) of the Arbitration Act crystalizes the same. The parties are given the freedom to fix the arbitrator's fee with the mutual consent of the arbitrator. Such agreement which is also known as the 'terms of reference'[11] binds the arbitrators and they cannot enhance their fee contrary to the terms of the agreement between the parties unless there is a proviso to do so. Even if the arbitrators attempt to do so, the same is in violation of the principle of natural justice *'nemo judex in causa sua'* which means no man can be a judge for his own cause.[12]

Law Commission of India Report

Arbitration can be categorized into 'Institutional arbitration' and 'Ad-hoc arbitration'. In the case of institutional arbitration, costs and procedures are stipulated by the rules of such institution; in ad-hoc arbitration, the parties have the choice of drafting their own rules and procedures which accommodate their requirements suitably. As ad-hoc arbitrations were preferred more in India, there were alarming issues with respect to the fee charged by the arbitrators. The Law Commission of India, in its 246th Report, raised a concern and mentioned the fee charges to be 'arbitrary, unilateral and disproportionate.'[13]

The report cited the case of *Union of India v Singh Builders Syndicate*[14] wherein the Hon'ble Supreme Court had observed that if a higher fee is charged by the arbitrator and one party who wants to

[8] Frank D. Emerson, 'History of Arbitration Practice and Law' (1970) 19(1) Clev St L Rev 155.
[9] DP Rantsane, 'The Origin of Arbitration Law in South Africa' (2020) 23(1), PELJ <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812020000100037> accessed 01 February 2024.
[10] David D, John Sutton Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell 2015).
[11] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV (2022) SCC Online SC 1122 ¶104.*
[12] Gary B Born, *International Commercial Arbitration* (2nd edn, 2014)
[13] *Law Commission of India, Amendments to the Arbitration and Conciliation Act, 1996 (Law Com No 246, 2014)*
[14] *Union of India v Singh Builders Syndicate* (2009) 4 SCC 523.

object to it may apprehend that it may create bias in favor of the other party who instantly agreed to pay such fee. It was the LCI report that recommended for adoption of a model schedule of fee which was then implemented through the Fourth Schedule of the Arbitration Act in 2015.

Legal Provisions of the Arbitration Act

- Under section 11(14) of the Arbitration Act, after considering the Fourth Schedule of the Act, the High Courts may frame such rules for the determination of fees and the manner of payment of a fee to the arbitral tribunal.
- Section 31 stipulates that 'costs' which include arbitrator's fee, constitute one of the contents of the arbitration award.
- Section 31A deals with the regime for costs relating to the order as to payment of costs by the parties to the arbitration, as decided by the arbitral tribunal.
- The Fourth Schedule of the Arbitration Act deals with the model fee structure for the sum in dispute i.e., claim and counterclaim. It plays a vital role in 'saving arbitration from arbitration costs.'

ONGC Case on Arbitrator's fee

The Hon'ble Supreme Court had clarified various questions relating to the concept and practice involved in arbitrators' fees. The following was laid down in the ONGC Case:[15]

- The Fourth Schedule is not mandatory and it is open to parties by their agreement to specify the fees payable to the arbitrator(s) or the modalities for the determination of an arbitrator's fee. the Fourth Schedule is not applicable to international commercial arbitrations and arbitrations where the parties have agreed that the fees are to be determined in accordance with rules of arbitral institutions. The 'terms of reference' is a tripartite agreement between the arbitral tribunal and the parties to the arbitration, where the fee of the arbitrators along with all necessary components are set out. On the finalisation of such terms of reference, the arbitral tribunal is not open to varying the fee or heads of charges fixed.
- Fees and costs in arbitration play functionally different roles. The expenses incurred that are to be distributed between the parties upon assessment of certain parameters by the Court, or arbitral tribunal, are different from fee which is the payment of remuneration to the arbitrators for their services.

[15] *Oil and Natural Gas Corporation Ltd. v Afcons Gunanusa JV (2022) SCC Online SC 1122.*

- Regarding the arbitrator's fee, the arbitral tribunal cannot issue enforceable or binding orders while passing orders relating to costs in the arbitral award as it violates the cardinal principle of arbitration, which is party autonomy, and one of the principles of natural justice which is no man can be a judge for his own cause.
- A lien for unpaid costs can be exercised by the arbitral tribunal on the arbitral award. But the parties are at liberty to approach the Court in case of such lien for the release of the award and the Court can assess on inquiry if the costs fixed in the arbitration are reasonable or not. This includes the mutually agreed fee of the arbitrators in the arbitration between the parties.
- Under the Arbitration Act, the Fourth Schedule deals with a term called 'sum in dispute'. This means 'sum in dispute' separately to claim and counter-claim and is not cumulative. Thus, arbitrators can charge a separate fee for claim and counter-claim and the Fourth Schedule fee limit of Rupees Thirty Lakhs applies separately to both.
- The maximum ceiling limit of fee payable as per the Fourth Schedule is Rupees Thirty Lakhs. This means that the ceiling applies to the sum of the base amount and variable amount, over and above it.
- The ceiling of Rupees Thirty Lakhs is applicable to each arbitrator and not to the entire tribunal. As per the Fourth Schedule, 25% over and above this amount can be claimed by a sole arbitrator.
- The Union Government was directed to revise the Fourth Schedule fee structure of the Arbitration Act periodically, at least once in three years.

It can be understood that the Order has contributed immensely to bringing more transparency and clarity concerning the law governing arbitrator's fee in India.

In addition to considering the national practices, the practices followed in different international jurisdictions like Germany, Sweden, the UK, and Italy were discussed in detail by the Supreme Court. A common scenario which was observed in these jurisdictions is that the parties to the arbitration fix the fee payable to the arbitrators by a separate agreement or it is fixed by them well before the arbitration. Thus, the arbitrators consequently were bound to accept the fees determined by the Parties. However, in case of no prior agreement between the parties, the liberty is provided to arbitrators to determine their fee subject to review and scrutiny by the Courts.

Essential Factors for Fixation of Arbitrator Fee

Thereafter, in the case of *M/s. EDAC Engineering Ltd. v M/s. Industrial Fans (India) Pvt Ltd* ["**EDAC Case**"][16] the Hon'ble Madras High Court opined that the law relating to payment of the arbitrator's fee had been well settled in the *ONGC Case*. In the instant case, the arbitrator had exercised Lien over the arbitral award[17] as the applicant failed to pay the arbitrator's fee. The applicant alleged that an exorbitant arbitrator's fee was charged by the learned arbitrator who had been appointed by the Hon'ble Madras High Court. The Court held that the Fourth schedule applies only to cases where the Court while appointing the arbitrator had directed the parties to pay the fees as per the Fourth schedule. In the earlier Order passed for appointing the arbitrator, the Court has granted liberty to the arbitrator to fix his fees.

As the applicant had not raised any dispute in the meetings for terms of reference in order to fix the arbitrator's fee, the allegation that the fee was exorbitant shall not arise and the Court dismissed the application stating it to be vexatious. The Court also laid down that the fees payable to an arbitrator have to be necessarily treated as a preferential payment even in cases where Corporate Insolvency Resolution Proceedings ["**CIRP**"] are pending. It is a priority payment and stands on a higher pedestal and the arbitrator cannot be deprived of the fee for the services he had rendered in arbitration.

Further, it was observed that the fixation of fees by an Arbitrator depends upon (a) the complexity of the disputes, (b) the difficulty or novelty of the questions involved, (c) the skill, specialized knowledge, and responsibility of the Arbitral Tribunal, (d) number and importance of documents to be studied, (e) value of the property involved or the amount or the sum in issue and (f) importance of the dispute to the parties.

Arbitrator's Fee in International Arbitral Institutions – A Comparison

International Chamber of Commerce

The arbitrator's fee is fixed by International Chamber of Commerce ["**ICC**"] according to the fee scale based on the sum in dispute, or where the sum is not stated, based on its discretion.[18] The fees of the arbitrator(s) involve factors like the diligence and efficiency of the arbitrator, the time

[16] [2023] SCC OnLine Mad 6010
[17] The Arbitration and Conciliation Act 1996, s. 39(1).
[18] International Chamber of Commerce Rules 2021, app III (Arbitration Costs and Fees), art 2(1).

spent, quickness in proceedings, complexity of the dispute, and the timeliness of the submission of the draft award.

London Court of International Arbitration

The Arbitral Tribunal shall agree in writing upon fee rates conforming to the Schedule of Costs prior to its appointment by the London Court of International Arbitration ["**LCIA**"]. The fee is charged at rates appropriate to particular circumstances of the case, work done including its complexity, and any requirements as to special qualifications of the arbitrators.[19]

Singapore International Arbitration Centre

The fees are fixed by the Registrar of Singapore International Arbitration Centre ["**SIAC**"] in accordance with the Schedule of Fees on the basis of the amount in dispute.[20] The time spent on the matter and the complexity of the dispute are considered for the determination of fees. The parties have the discretion to provide an alternative method of determining the fees prior to the constitution of the arbitral tribunal.

Hong Kong International Arbitration Centre

The parties determine the arbitrator's fees based on either the sum in dispute or at an hourly rate[21]. For hourly rates, then a co-arbitrator will negotiate and agree on their fees with the nominating party, and a sole or presiding arbitrator will negotiate with parties jointly. If the fees are decided based on the sum in dispute, then the fees will be fixed based on the guidelines and fee table provided in the Rules.

International Centre for Dispute Resolution

The International Centre for Dispute Resolution ["**ICDR**"] case administrator fixes the daily or hourly rate for arbitrator(s). The determination of fees may involve an element of negotiation between the parties and the arbitrator(s). The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.[22]

[19] London Court of International Arbitration Rules 2020, Schedule of Arbitration Fee and Costs.
[20] Singapore International Arbitration Centre Rules 2016, r. 36(1).
[21] Hong Kong International Arbitration Centre Rules 2018, art. 10.1.
[22] International Centre for Dispute Resolution Rules 2021, art. 38.

Conclusion

In the case of ad-hoc arbitration, it is evident from the comparative study of international jurisdictions that there is no absolute power for the arbitrators to determine their fee. In the case of institutional arbitrations like ICDR, SIAC, and HKIAC allow a certain level of negotiations between the parties and arbitrator(s) for the determination of fees payable to the arbitrators, upholding the principle of party autonomy. However, none of the international bodies (including arbitral institutions) confer absolute or unilateral power to the arbitrator(s) to decide their fees.

Ad hoc arbitration proceedings take precedence over the institutional arbitration proceedings in India and thereby it was essential to ensure the cost-effectiveness and efficiency of such arbitral process. A rationalized system of fixation of costs and arbitrator fee along with a transparent mode of payment is essential for the success of arbitration. There were several doubts regarding the unilateral power of arbitrators to fix their fees and the legal provisions under the Fourth Schedule of the Arbitration Act. The same was put to rest and the Hon'ble Supreme Court of India has upheld the principle of party autonomy in fixing the arbitrator's fee by providing vital importance to 'terms of reference'. Nevertheless, the arbitrators who spend their valuable time and efforts in settling the disputes under arbitration cannot be deprived of the fee he is entitled to. Therefore, in order to avoid embarrassing allegations and disagreements regarding the payment of the arbitrator's fee later, it is imperative that transparently, the arbitrators should state the fee they would like to charge for the Arbitration during the 'terms of reference' clearly.

Apart from this, guidelines for the conduct of ad hoc arbitrations in India were also laid down by the Hon'ble Supreme Court through the powers vested with it under Article 142 of the Constitution of India. Thus, this article concludes by stating that the Hon'ble Supreme Court vide its Order in the ONGC Case had ensured that arbitration as a dispute settlement mechanism in India is affordable and equitable thereby helping more and more parties to adopt arbitration as their preferred mode of dispute resolution, in turn paving way for an increase in the ease of doing business in India.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

THE ROLE OF MARKET LIBERALISATION IN NAVIGATING INDIA'S ARBITRATION LANDSCAPE

AUTHOR(S)

Mansi Tripathi

III Year, B.Sc. LL.B. (Hons.) Student at School of Law, Forensic Justice and Policy Studies

Introduction

With a GDP exceeding $3 trillion, India's economy dwarfs those of Canada, Russia, Brazil, and Australia, presenting immense economic prospects. With such an expected influx, the heads of companies are optimistic that the expansion would lead to a substantial increase within the country's market.[23] In a recent exchange with Bar&Bench, Claudia Salomon, who is the first female president of the International Chamber of Commerce's International Court of Arbitration, stated in her valuable insight that continued endeavour to liberalise the Indian market might lead to the emergence of a more competitive arbitration landscape.[24]

In the past few decades, India has undertaken substantial initiatives to establish the efficiency and effectiveness of dispute resolution processes by, aligning with international standards and fostering a more conducive business environment. Arbitration, as a pivotal Alternative Dispute Resolution ["**ADR**"] mechanism on a global scale, is gaining paramount space in the Indian legal landscape as the country embarks upon the journey of market liberalisation which is, a strategic initiative meticulously crafted to catalyse economic growth, attract foreign investments, and fortify global trade relations. This paradigm shift toward opening up the market carries the potential to not only

[23] Jessica Seah, "Bracing for Impact: The Liberalization of India's Legal Market is Huge, Which Firms Will be Most Affected?"; (*Law.com International*, 16 March 2023); <www.law.com/international-edition/2023/03/16/bracing-for-impact-the-liberalization-of-indias-legal-market-is-huge-which-firms-will-be-most-affected/> accessed 2 January 2024.
[24] Pallavi Saluja, "Liberalization of Indian market can lead to a more competitive arbitration landscape: ICC Court of Arbitration President Claudia Salomon"; (*Bar&Bench*, 20 December 2023); < www.barandbench.com/interviews/claudia-salomon-first-woman-president-icc-court-of-arbitration-interview> accessed 2 January 2024.

influence but also redefine the mechanisms, challenges, and opportunities within the realm of arbitration, thus, marking a crucial juncture in India's economic and dispute resolution landscape.

This research paper explores the relationship between market liberalisation and India's arbitration landscape, focusing on the potential advantages and challenges that can arise from the evolution of the country's arbitration mechanisms. The paper emphasizes the benefits of arbitration as a flexible, efficient, and cost-effective dispute resolution method, contributing to a conducive business environment in a liberalized market. The paper also discusses the implications and challenges of this relationship.

Background

In 1991, India initiated a process of economic liberalisation aimed at making the Indian economy more market-oriented to acquire a seat at the highest table.[25] This reform had a significant impact on the Indian economy by leading to an increase in foreign investment and a shift towards a service-oriented economy. With liberalisation, India has not only had success at the macro level but it has also impacted people in terms of per capita income at the micro level.[26] The introduction of technology and innovation in India has significantly boosted productivity growth, thereby enhancing the country's economic growth. Alongside this exponential expansion, disputes between the businesses also increased proportionately[27]. Since these disputes need speedy resolution, litigation is often the least preferred method because the Indian judicial system is plagued by delays which causes businesses to suffer losses. Thus, arbitration became the most commonly used mode of ADR methods for resolving these disputes offering a cost-effective, neutral alternative to lengthy court proceedings[28]. Globally, arbitration has been the most effective method for resolving disputes, promoting a conducive environment for international commerce.

Arbitration in India has flourished since the end of the nineteenth century and has been statutorily recognized as a form of dispute resolution for the first time with the enactment of the Indian Arbitration Act, 1899 ["**1899 Act**"].[29] However, after the enactment of the 1899 Act, there were

---

[25] Chetan Agrawal, "The Effects of Liberalization on the Indian Economy: A Labour Force Perspective"; (2013) 38 (4) MLS 373-398; <https://doi.org/10.1177/0258042X13513135> accessed 2 January 2024.
[26] Kishore G. Kulkarni and Shreesh Bhattarai, "A Case Study: Impact of International Liberalization on the Indian Economy", (November 2012) 4 JEKEM; < www.researchgate.net/publication/271237356_A_Case_Study_Impact_of_International_Liberalization_on_the_Indian_Economy> accessed 2 January 2024.
[27] Anurag K. Agarwal, "Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court"; (2008) IIMA Working Papers WP2008-12-03 <Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court (repec.org)> accessed 3 January 2024.
[28] ibid.
[29] Tariq Khan and Muneeb Rashid Malik, "History and development of Arbitration Law in India", (*Bar & Bench*, 30 April 2020); <https://www.barandbench.com/columns/history-and-development-of-arbitration-law-in-india>; accessed 3 January 2024.

various amendments to the Arbitration Act, 1940 ["**1940 Act**"][30] and following the economic liberalisation in 1991, measures were implemented to draw foreign investment, necessitating a conducive business environment and business-friendly practices. Consequently, the Arbitration and Conciliation Act, 1996 ["**1966 Act**"] was enacted to replace the 1940 Act.[31] Notably, the 1996 Act was founded on the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNICITRAL Model**"] which, encompasses both domestic and international arbitration.[32] The foremost objective behind implementing the 1996 Act was to minimise arbitration delays to position India as a cardinal hub for arbitration proceedings.

India's Present Arbitration Landscape

The implementation of the 1996 Act in India marked a substantial shift towards favouring arbitration as a preferred dispute resolution method. India, being an early adopter of the UNCITRAL Model, aligned its arbitration laws with global standards, hence making it an appealing destination for international commercial arbitration.[33] As the seventh nation to ratify the New York Convention, India not only enhanced the efficiency and credibility of its arbitral procedures but also positioned itself as a regional centre for international commercial arbitration.[34] Despite these positive developments, India has made minimal concrete advancements toward arbitration reform and continues to grapple with its image as an "*arbitration-unfriendly*" jurisdiction.[35] To outsiders, the primary obstacle to arbitration reform in India is the perceived excessive intervention by the Courts, which is seen to be undermining the arbitration process.[36] However, insiders believe the issues plaguing the Indian arbitration framework are more complex. It is unique to India that over 90% of the total arbitrations are believed to be conducted ad hoc, as a result of limited institutional supervision and inadequate promotion of the arbitration process. This absence of coordination impedes the advantages of uniform rules, such as predictability, transparency, and consistency in treatment.[37]

---

[30] Sukhleen Saluja, "History and Development of Arbitration Law in India"; (*LawLex.Org*, 23 May 2020); <https://lawlex.org/lex-pedia/history-and-development-of-arbitration-law-in-india/20489>; accessed 3 January 2024.

[31] Anurag K. Agarwal, "Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court"; (2008) IIMA Working Papers WP2008-12-03 <Resolving Business Disputes in India by Arbitration: Problems Due to the Definition of Court (repec.org)> accessed 3 January 2024

[32] Vikash Kumar Singh, 'Arbitration in India: Recent Developments and Key Challenges', (2011) 11(7) IJCRT, < IJCRT2307247.pdf >, accessed 3 January 2024.

[33] Hiro N. Aragaki, "Arbitration Reform in India: Challenges and Opportunities", (2017); Los Angeles Legal Studies Research Paper No. 2017-51, <https://ssrn.com/abstract=3088355>, accessed 3 January 2024.

[34] Ibid.

[35] Hiro N. Aragaki, "Arbitration Reform in India: Challenges and Opportunities", (2017); Los Angeles Legal Studies Research Paper No. 2017-51, <https://ssrn.com/abstract=3088355>, accessed 3 January 2024.

[36] Charu Singhal, 'Arbitration in India: A study of issues and challenges', (*Lexforti*, 23 April 2020), <https://lexforti.com/legal-news/arbitration-in-india-a-study-of-issues-and-challenges>, accessed 3 January 2024.

[37] *Hiro N. Aragaki* (note 11).

After this act, three other amendments were made in the year 2015, 2019 and 2021. The Arbitration and Conciliation (Amendment) Act, 2015 ["**2015 Act**"] and 2019 ["**2019 Act**"] were aimed at improving arbitration procedures and jurisdictional clarity in India. The 2015 Act narrowed the relevant court for international arbitration,[38] extended provisions to international commercial arbitrations outside India, and empowered courts to refer parties to arbitration despite prior judgments.[39] The 2019 Act proposed the creation of the Arbitration Council of India ["ACI"] to promote alternative dispute resolution.[40] The Arbitration and Conciliation (Amendment) Act, 2021 ["**2021 Act**"] aimed to curb the misuse of arbitration laws and prevent misuse of arbitration laws by "fly-by-night operators" for fraudulent gains, introducing provisions like removing arbitrator qualifications, granting courts the power to stay awards based on fraud or corruption, and regulating arbitrator accreditation through an arbitration council.[41]

Arbitration and Liberalisation

In recent decades, India's economic growth has surged, largely attributed to the liberalizing reforms implemented by the government in 1991, signalling the end of the "*License Raj*" era.[42] Liberalisation denotes a shift from a regulated, planned economy to a market-driven one,[43] involving the removal of regulatory barriers to encourage domestic and international participation.[44] With increasing globalisation and liberalisation policies, the arbitration landscape in India needs a conducive environment for it to flourish to constitute India as an international arbitration hub.[45] However, liberalisation of the legal market has been a debatable matter since decades which led to foreign

[38] Ms. Zabeen Motorwala, "Arbitration And Conciliation (Amendment) Act, 2015 - Key Changes And Circumstances Leading To The Amendments", Bharati Law Review, April – June 2016, pg: 261-266, (Manupatra), <ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 - KEY CHANGES AND CIRCUMSTANCES LEADING TO THE AMENDMENTS (Manupatra.In)>. Accessed 23 February 2024.

[39] PRS Legislative Research, "The Arbitration and Conciliation (Amendment) Bill, 2015", (prsindia.org), <The Arbitration and Conciliation (Amendment) Bill, 2015 (prsindia.org)>. Accessed 23 February 2024

[40] AZB & Partners, "The Arbitration and Conciliation (Amendment) Act, 2019-Key Highlights", (Mondaq, 27 August 2019), <The Arbitration And Conciliation (Amendment) Act, 2019 – Key Highlights - Arbitration & Dispute Resolution - India (mondaq.com)>, accessed 23 February 2024.

[41] Ganesh Chandru, Aditi Sheth, Hrithik Merchant, "The 2021 Amendment to Arbitral Legislation in India: Is it a Step in the Right Direction?", Vol. 7 issues 2 (2021), National Law School Business Law Review, <repository.nls.ac.in/cgi/viewcontent.cgi?article=1099&context=nlsblr>

[42] Anna Robinson, "1991 Economic Liberalisation Reforms in India: A Micro-Level Analysis", (Master of Science in Contemporary India Dissertation University of Oxford, 2017), < https://www.southasia.ox.ac.uk/sites/default/files/southasia/documents/media/robinson_a_dissertation.pdf>, accessed 4 January 2024.

[43] V. Basil Hans, "Economic Liberalisation in India", (*SSRN*, 20 June 2017), <https://ssrn.com/abstract=2989420> accessed 4 January 2024.

[44] BusinessEssay, "Market Liberalization for Developing Countries", (*BusinessEssay*, 12 December 2022), < https://business-essay.com/market-liberalization-for-developing-countries>, accessed 4 January 2024.

[45] Zil Shah, 'LIDW 2023: India: Trends, Opportunities, and Challenges', (*Kluwer Arbitration Blog*, 20 May 2023), < https://arbitrationblog.kluwerarbitration.com/2023/05/20/lidw-2023-india-trends-opportunities-and-challenges/> accessed 5 January 2024.

lawyers having to operate on a fly-in, fly-out basis when it comes to India-related deals.[46] It was only in the case of *Bar Council of India v. A.K Balaji,*[47] that the Apex Court clarified the definition under Section 2(1)(f) of the 1996 Act by stating that an arbitration matter would be termed as "International Commercial Arbitration" if it involves disputes, contractual or otherwise, where at least one party is habitually residing abroad, irrespective of their nationality.[48] After this judgement, few measures have indicated towards a potential liberalisation of India's legal sector. In 2021, an agreement was reached between the United Kingdom ["**UK**"] and India which aimed to increase exports and investments between the two countries with both nations pledging to eliminate obstacles in the Indian legal services sector which hinder lawyers based in UK from practising international and foreign law in India.[49]

Early in 2023, the Bar Council of India ["**BCI**"] released the Bar Council of India Rules for Registration and Regulation of Foreign Lawyers and Foreign Law Firms in India, 2022 in order to facilitate the registration and practice of international lawyers in India.[50]

This change is expected to alter the competitive landscape for Indian law firms, which have been dominating as legal advisors for a long time. This global competition is expected to accelerate economic growth[51] and improve the quality and efficiency of legal services.[52] It could also provide Indian lawyers with opportunities to expand their practices internationally with many analysts and scholars strongly believing that liberalising the legal market could result in increased job opportunities for Indian lawyers, along with improved compensation and working conditions.[53] Also, the liberalisation of the arbitration market, coupled with strategic reforms and strong institutional support, enables India to model itself along the lines of the United States of America, Singapore, etc., in becoming a globally competitive arbitration hub.

---

[46] Jessica Seah, "India Finally Liberalizes its Legal Market, Foreign Firms Set to Move In", (*Law.com International*, 15 March 2023), < https://www.law.com/international-edition/2023/03/15/india-finally-liberalizes-its-legal-market-foreign-firms-set-to-move-in/>, accessed 5 January 2024.

[47] *Bar Council of India v. A.K. Balaji [2018]* 5 SCC 379.

[48] Durgesh Shukla, "Liberalization In Indian Arbitration: The Curious Case Of Foreign Arbitrators In India", (2018) 4(8) JCIL 35-46, <https://jcil.lsyndicate.com/wp-content/uploads/2023/06/LIBERALIZATION-IN-INDIAN-ARBITRATION-Durgesh-4.pdf >, accessed 5 January 2024.

[49] *Jessica Seah*, (note 23)

[50] Bhadra Sinha, "Bar council finally allows entry of foreign lawyers and firms in India, but these conditions apply", (*The Print*, 15 March 2023), <https://theprint.in/india/bci-finally-allows-entry-of-foreign-lawyers-and-firms-in-india-but-these-conditions-apply/1445354/>, accessed 5 January 2024.

[51] *Economy watch, "Benefits of International Trade", (Economy Watch, 24 April 2018),* < http://www.economywatch.com/international-trade/benefit.html> accessed 5 January 2024.

[52] *Jayanth K. Krishnan, "Globetrotting Law Firms" (2010), Articles by Maurer Faculty,* https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1226&context=facpub > accessed 9 January 2024.

[53] *Niriksha Sanghvi and Rich Sharma, "Liberalization of Legal Profession in India- Opening Doors for Foreign Law Firms", (2017) 3(2) JCIL.*

Case Study: Allen & Overy's Entry into the Indian Arbitration Market

Allen & Overy, a leading international law firm, entered the Indian arbitration market in response to India's liberalization efforts and the growing demand for specialized legal services in arbitration.[54] The firm adopted a collaborative approach, forming strategic alliances with prominent Indian law firms to navigate the regulatory landscape and establish a foothold in the market. These partnerships allowed Allen & Overy to offer a comprehensive range of legal services, including arbitration, to clients operating in India.

The firm's dedicated team of arbitration lawyers offered tailored solutions to multinational corporations facing complex disputes in the Indian market. With a deep understanding of international arbitration practices and procedures, Allen & Overy provided clients with strategic advice and representation in arbitration proceedings. Allen & Overy has represented Vodafone, Nissan, Reliance industries, etc. in many arbitral cases.[55]

The firm's entry into the Indian arbitration market had a significant impact on the legal landscape, contributing to the development of arbitration practices in India and promoting international best practices and standards. By offering access to top-tier arbitration expertise, Allen & Overy enhanced the competitiveness of the Indian market and raised the bar for quality legal services.

Despite facing regulatory challenges in establishing its presence in India, Allen & Overy successfully overcame these challenges through strategic partnerships and a commitment to compliance. Allen & Overy's entry into the Indian arbitration market exemplifies the intersection of liberalization policies and the evolution of legal services in emerging economies. By leveraging global expertise and forming strategic alliances with local partners, the firm has successfully established itself as a leading provider of specialized arbitration services in India.

Challenges in Arbitration and Market Liberalisation

Market liberalisation in India has stimulated economic growth and global cooperation, attracting foreign companies and facilitating cross-border transactions. However, this process introduces complexities, particularly in the realm of arbitration. While liberalisation promotes economic expansion, it also gives rise to disputes that necessitate arbitration, revealing the impact of foreign entities on domestic legal systems.

---

[54] Bar & Bench, "Allen & Overy Singapore Partners Sheila Ahuja and Pallavi Gopinath Aney to jointly chair firm's India Group", (*Bar & Bench*, 25 May 2021, 4:52 pm), < https://www.barandbench.com/news/corporate/sheila-ahuja-pallavi-gopinath-aney-jointly-chair-allen-overy-india-group>, accessed 1 March 2024

[55] Chambers and Partners, "Dispute Resolution in India", <https://chambers.com/department/allen-overy-dispute-resolution-global-2:467:110:6:7>, accessed 1 March 2024

In the context of arbitration, power dynamics can be skewed, with multinational corporations often exerting influence over local mechanisms. The Chevron Corporation vs. Ecuador case[56] exemplifies this, casting doubt on Ecuador's legal sovereignty.[57] Transnational arbitration tribunals, operating beyond national frameworks, raise concerns about accountability and transparency, lacking appellate mechanisms.

Enforcing arbitral awards against sovereign states poses challenges to the international legal order. Although the New York Convention facilitates recognition and enforcement, it restricts states' ability to contest awards based on public policy grounds, as demonstrated in the Philip Morris v. Australia case.[58]

Given the interconnectedness of the global economy, arbitration plays a crucial role in resolving disputes. However, its vulnerability to foreign influence necessitates thoughtful reforms. Despite India's progress in economic liberalization and dispute resolution, obstacles remain, including resistance from traditional legal practices.

To enhance the effectiveness of arbitration, a balanced approach is essential - one that ensures transparency, accountability, and respect for sovereignty. India must create an environment conducive to fair arbitration, reaping the benefits of liberalization while safeguarding legal integrity.

Opportunity in Arbitration and Market Liberalisation

Market liberalization in India attracts foreign investments by creating a conducive environment for businesses to operate, boosting economic growth and requiring robust dispute-resolution mechanisms. This expansion of the legal services sector also necessitates the development of arbitration infrastructure and enhanced legal expertise to meet global demands. To fully leverage market liberalization opportunities, India must invest in arbitration infrastructure, establishing state-of-the-art facilities and cultivating a skilled pool of arbitrators. Targeted training programs are essential for enhancing the skills of legal practitioners, including lawyers, judges, and arbitrators, to navigate cross-border transactions and international arbitration proceedings effectively. Regulatory reforms are crucial for creating a predictable and business-friendly environment, attracting foreign investments, fostering confidence among businesses, and positioning India as a competitive global arbitration hub. India must strike a delicate balance between preserving

[56] Chevron Corp. v. Republic of Ecuador, PCA Case No. 2009-23.
[57] San Ramon, "Dutch Supreme Court Rules for Chevron in Ecuador Dispute", (Chevron.com, 15 April 2019), < https://www.chevron.com/ecuador/press-releases/archive/dutch-supreme-court-rules-for-chevron-in-ecuador-dispute#:~:text=In%202011%2C%20the%20Ecuadorian%20plaintiffs,%2C%20witness%20tampering%2C%20judicial%20bribery%2C>, accessed 1 March 2024
[58] Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12

tradition and embracing innovation to enhance its global standing in arbitration, contribute to economic growth, and foster international collaboration in dispute resolution.

Conclusion

The interaction between the liberalisation of the market and India's arbitration landscape represents a pivotal moment in its economic and dispute-resolution journey. The endeavours towards liberalisation have not only stimulated economic expansion but have also paved the way for progress in arbitration. Despite advancements, challenges such as perceptions of excessive Court involvement persist. The opening up of opportunities for international corporations due to market liberalisation necessitates robust dispute resolution mechanisms. By emulating successful models like Singapore International Arbitration Centre, India has the potential to enhance its global standing in arbitration. However, obstacles like intricate regulations and resistance from conventional legal practices still exist. Addressing these challenges requires a delicate balance between preserving tradition and embracing innovations. Market liberalization can attract foreign investments by creating a more conducive environment for businesses to operate in India. In the legal services sector, market liberalization can broaden opportunities for legal professionals by allowing foreign law firms to operate in the country and enabling domestic firms to collaborate with international counterparts. To fully capitalize on market liberalization opportunities, India needs to invest in Arbitration Infrastructure which includes, state-of-the-art facilities and a well-trained pool of arbitrators, which is essential for instilling confidence in investors and businesses.

Also, India should implement Targeted Training Programs to adapt and enhance their skills to meet the demands of a globalized marketplace. The targeted training programs can aim at equipping lawyers, judges, and other legal practitioners with the knowledge and expertise required to navigate cross-border transactions, international arbitration proceedings, and the complexities of foreign legal systems. India should undertake reforms to streamline regulatory processes, reduce red tape, and enhance clarity and consistency. This will create a more predictable and business-friendly regulatory environment, attract foreign investments, and foster greater confidence among domestic and international businesses. Such a strategic approach would position India as a competitive global arbitration hub, therefore contributing to its economic growth and fostering international collaboration in dispute resolution.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

CONSTRUCTION ARBITRATION IN THE MAZE OF PROJECT DELAYS AND TIME EXTENSIONS

AUTHOR(S)

Shree Dwivedi
IV Year, Student at Symbiosis Law School Noida

Shreya Mishra
IV Year, Student at Symbiosis Law School Noida

Introduction

Construction business is one of the highest drivers of the Indian Economy. The significance of the Construction Industry is evident from the Foreign Direct Investment ["**FDI**"] inflows in the construction sector including infrastructure activities which have increased in the last two years from $1861 million to $2402 million.[59] Attracting a major portion of Government expenditure, the Construction Industry gives birth to complex legal issues which is further aggravated by extreme technicalities.

Construction Contracts are primary instruments that govern the execution of the projects as well as the relationship between the parties involved. In simple terms a contract negotiated between parties for construction of a particular asset such as roads, bridges, buildings, ships etc. is a construction contract.[60] There are a multitude of documents and parties involved in a single Construction Project, wherein the employer is usually the principal, and the contractor and subcontractor are engaged by the principal. The construction contract law is the application of general principles of the Indian Contract Act ["**ICA**"] to a specific situation.[61] A contract is the backbone of any dispute and the same ought to be drafted in a way which provides a mechanism for the resolution of such disputes. In India, the most commonly used mechanism is Arbitration.

[59] Department for Promotion of Industry and Internal Trade, *Fact Sheet on Foreign Direct Investment (FDI) Inflow;* <https://dpiit.gov.in/sites/default/files/FDI_Factsheet_September_2023.pdf> accessed 20 January 2024.
[60] Accounting Standard (AS) 7
[61] Chitty J and Beale HG, *Chitty on Contracts* (35th edn, Sweet & Maxwell, Thomson Reuters 2023).

A construction contract lays down the specific timelines to complete the construction project. When these timelines are not met or the manner of performance is not in accordance with the provisions of ICA, it results in a breach of contract. Delay on the part of the contractor is one of the prominent causes of dispute that arises when there is an obligation on the contractor to complete the construction project at a fixed date.[62] However, the same can be remedied once the breach is established.[63]

This paper delves into the intricate web of project delays, claims of liquidated damages and grants of extension of time. Furthermore, it explores the status of non-signatories in construction arbitration and emphasizes the delays caused due to the role of expert advisory in arbitration proceedings.

Navigating Construction Delays

In the intricacies of construction projects, delay stems out as a ubiquitous challenge. Certain delays can be attributed to the employer, while others are attributed to the contractor. When the delay is caused by the contractor, the contract typically contains a mechanism to assess the Liquidated Damages ["**LD**"]. On the other hand, the delay can be traced back to the employer, which includes but is not limited to, delay in site possession,[64] appointment of key personnel, delay in issuing of drawings,[65] instruction and material[66] or due to insufficient funding.[67]

Interplay between 'Project Delays', 'Grant of Extension of Time' and 'Liquidated Damages'

The breach of contract can be remedied by claiming LD in accordance with Section 74 of ICA if the amount is pre-estimated into the contract.[68] The nature of a contract plays a vital role in determining the applicability of the LD clause if it establishes that 'time is the essence of contract.' In the case of *Hind Construction Contractors v State of Maharashtra*,[69] ["**Hind Construction**"] the contractor was unable to complete the work within the timeframe mentioned in the contract and thereby sought an extension of time. The contention of the employer was that time being the

[62] The Indian Contract Act 1872, s 55
[63] *Indian Oil Corporation vs Llyod Steel Industries Ltd.* 2007(4) Arb LR 84, 2008(1) Arb LR 170 (Del).
[64] *National Highways Authority of India v NCC-KNR* 2013 SCC OnLine Del 600, *Wells v Army & Navy Co-operative Society* [1902] 86 L.T. 764 (U.K.).
[65] *Krishna Bhagya Jala Nigam Ltd. vs G. Harishchandra Reddy* (2007)2 SCC 720.
[66] *Union of India v Indian Proofing & General Industries* 1998 (Supp) Arb LR 181, 1998(3) RAJ 281 (Del).
[67] *Hyderabad Municipal Corporation Vs M. Krishnaswami Mudaliar* AIR 1985 SC 607.
[68] *Fateh Chand v Balkishan Das* AIR 1963 SC 1405.
[69] *Hind Construction Contractors v State of Maharashtra* (1979) 2 SCC 70.

essence of the agreement, an extension could not be granted. Finally, the employer used the performance guarantee to terminate the agreement and withheld the payment of the contractor.

The court observed that to determine the validity of the termination, it is important to ascertain the intention of the parties. The contract explicitly contained clause 2 wherein it was mentioned that the time was the essence of the contract. But the court decided to examine two more clauses, the LD clause, which levied the damages for delay caused by the contractor weekly, and the extension of time clause. The court did not plainly read that time was of the essence but went on to interpret the other clauses as well. On reading all the three clauses, the Court observed that the presence of a time extension clause nullifies the time being the essence of the contract. Thus, the apex court laid down two conditions to determine if time is the essence of contract: the first is the presence of a time extension clause, and the second is the LD clause for the delay. However, the court might have overreached by not strictly interpreting the bare text of clause 2 of the contract. Examining other provisions becomes crucial for determining the true intentions of the parties only in cases where the plain text of the contract is ambiguous.[70]

At the same time, it is pertinent to note that the mere presence of a time extension clause and allowing an extension to complete the project does not always render time as the essence of the contract.[71] The same principle was extended in the case of *Arson Enterprises*[72] wherein there was no explicit mention of 'time being the essence' of contract, but the court, by interpreting the termination clause and extension of time clause, said that time is not the essence of the contract. The ratio in both cases was the same, however, in the Arson Enterprises Case the Supreme Court did not deviate from reading the plain text of the contract. The Hon'ble Court,[73] while interpreting Section 55[74] as well as deciding the issue of levy of LD, held that a delay clause and an extension of time clause in the same contract were contradictory in nature, thus making time irrelevant to the contract.

There is confusion when the employer claims damages on the basis of 'time is the essence' despite the fact that time was not originally stipulated in the contract, raising the question of whether time is the essence of the contract.

[70] *Abdulla Ahmed v. Animendra Kissen Mitter.* AIR 1950 SC 15.
[71] *ONGC Ltd. v Saw Pipes Ltd.* (2003) 5 SCC 705.
[72] *Arosan Enterprises Ltd. v Union of India*, (1999) 9 SCC 449.
[73] *McDermott International Inc. v Burn Standard Co. Ltd.*(2006) 11 SCC 181.
[74] Indian Contract Act 1872, s 55

Employers cannot cancel contracts under Section 55[75] if not performed by the original date but are not obligated to extend indefinitely.[76] Indian courts allow employers to issue notice after the original time period expires, specifying a new completion date.[77] The notice must be clear[78] and terms agreed upon by both parties thereby making unilateral extensions invalid.[79]

The situation where the delay caused by the employer ultimately leads to an overall delay in the completion of the project raises the question of whether the contractor can claim a reduction in the LD levied. It is a well-settled fact of law that the amount levied as LD is reduced if the delay is also caused by the employer. LD can be claimed up to the amount for which the contractor is liable.[80]

Beyond the Signature: The Position of Non-Signatories in Construction Arbitration

The next question that perplexes the construction industry is what happens when a subcontractor suffers the consequences of the delay caused in the construction project due to any of the parties involved.

Before 2015, under the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] only the signatories were bound by the contract. Over time, the position of non-signatories has changed dramatically. The original position did not allow non-signatories to be a party to the arbitral dispute in domestic[81] as well as international[82] arbitration. However, in *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.*,[83] ["**Chloro Controls**"] the court took a broader interpretation and held that even non-signatories could be parties to an arbitration dispute. The court gave four factors to consider:

1. Whether there exists direct relation with the party who actually signed the agreement.
2. A direct subject matter similarity between the parties,
3. The combined nature of the terms of the contract.
4. Whether it would be justifiable to include such non-signatory parties.

[75] ibid. 4
[76] *N. Sundareswaran v Sri Krishna Ref.* AIR 1977 Mad. 109.
[77] *Mulla Badruddin v Master Tufail Ahmed* 1960 SCC OnLine MP 170.
[78] *Tandra Venkata Subrahmanayam v Vegesana Viswanadharaju* 1967 SCC OnLine AP 7 [7].
[79] *Claude-Lila Parulekar v Sakal Papers* (P) Ltd. (2005) 11 SCC 73.
[80] *Kailash Nath v NDMC* ILR (2002) 1 Delhi 441 [5], [11]-[6].
[81] *Sukanya Holdings Pvt. Ltd. v Jayesh H Pandya* AIR 2003 SC 2252.
[82] *Sumitomo Corpn. v CDC Financial Services (Mauritius) Ltd.* (2008) 4 SCC 9.
[83] *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.* (2013) 1 SCC 641.

This case discussed the Group of Companies Doctrine ["**GOCD**"], which is the idea of 'claiming through or under,' as stated in Sections 8[84] and 45[85] of the Arbitration Act. Thus, allowing non-signatories to approach the tribunal. But in the Judgement of *Cox and Kings v SAP*,[86] ["**Cox and Kings**"] the court held that the Chloro case is incorrect to the extent that 'non-signatories' could be included by interpreting the phrase 'party claiming through or under' which is typically intended to involve successor-in-interest of a party in a derivative manner. Thus, the law established through this case was that arbitration agreements can bind non-signatories in accordance with GOCD.

The Indian Arbitration Act allows non-signatories to refer a matter to arbitration and be bound by an arbitral award if they meet the requirements of Section 35 of the Act,[87] which defines parties and persons claiming under them. This was made clear by the court in the case of *Cheran Properties Ltd. v. Kasturi and Sons Ltd.*[88] ["**Cheran Properties**"] This shows that Indian courts have accepted arbitral verdicts against non-signatories and acknowledged their right to participate in an arbitral proceeding.

The issue is whether arbitration agreements can be extended to subcontractors who are the non-signatories to the agreement. The bare perusal of the provision makes it quite clear that a non-signatory, through an application, can initiate the arbitration. But a non-signatory can only be allowed to the arbitration proceeding if the original parties as well as the non-signatories agree.[89] The *onus probandi* on the non-signatory increases to show that there is a direct consequence of the arbitration upon them.[90]

Globally, the doctrine is one of the well-recognized methods through which non-signatories usually become a party to the dispute. In France, the case of *Dow Chemical v. Isover Saint Gobain,*[91] ["**Dow Chemicals**"] provided that if the parties had a common intention, then the arbitration agreement could be extended to non-signatories. Whereas, the English law has taken a restrictive approach in implementing the GOCD.[92] In the USA, although the GOCD is explicitly accepted, it has used different consensual as well as non-consensual doctrines to bind non-signatories to the agreement.[93]

---

[84] The Indian Arbitration and Conciliation Act, 1996, s 8
[85] The Indian Arbitration and Conciliation Act 1996, s 45
[86] *Cox and Kings v SAP* (2022) 8 SCC 1.
[87] The Indian Arbitration and Conciliation Act 1996, s 35
[88] *Cheran Prop. Ltd. v Kasuri and Sons Ltd.* (2018) 16 SCC 413
[89] *Chloro Controls India (P) Ltd. v Severn Trent Water Purification Inc.* (2013) 1 SCC 64.
[90] ibid. [143]-[158].
[91] *Dow Chemical v Isover Saint Gobain*, ICC Award No. 4131, YCA 1984, at 131.
[92] *Peterson Farms INC v C & M Farming Limited* [2004] EWHC 121 (Comm).
[93] *American Fuel Corp v Utah Energy Development Co, Inc*, 122 F.3d 130.

In the Indian context, It is not possible for a subcontractor who is not a signatory to the arbitration agreement between the main contractor and the employer to initiate arbitration proceedings against the employer for losses incurred as a result of that employer's conduct. The subcontractor's claim against the main contractor, and vice versa, will be governed by the subcontractor's 'Subcontract Agreement.' In *Mcdermott International Inc vs Burn Standard Co. Ltd.,*[94] a subcontractor claimed damages under the arbitration clause of the subcontract due to delays by the main contractor. The main contractor was held liable for compensating the subcontractor. Thus, if the subcontractor causes delays, the main contractor can seek indemnification, depending on the sub-contractual terms. In India, arbitration between the employer and subcontractor is not mandatory. It depends on the consent of both parties.

Recently in 2023, the Constitutional bench has held that the GOCD must be incorporated in the Indian arbitration jurisprudence considering it is quite important to determine the intention of the parties while entering into complex agreements.[95]

From Delayed Projects to Prolonged Arbitration: Role of Expert-Advisory in Construction Arbitration

The construction industry is prone to delays, and in order to establish those delays, parties need to supplement the same with evidence. This is where the need for expert evidence arises. It is primarily due to *Folkes v. Chadd,*[96] that expert witnesses were introduced into construction and engineering disputes. Mr. Smeaton's expertise in harbors and construction demonstrated the importance of expert opinions based on factual understanding in this case, which established the first rules regarding the admissibility of opinion evidence. During the trial, the court recognized that expert opinions with solid factual foundations were valuable for determining complex issues, such as the cause of harbor decay.

The construction contracts, which include a variety of complex issues such as claims for extension of time or interpretation of the terms such as 'general industry standards or financial evaluation of disruptions and delays,[97] expert evidence is essentially required to provide clarifications with respect to the majority of these technically complicated points. It is also advisable for the parties to engage an Expert at the early stages of arbitration to save time and present their case in a more

[94] *Mcdermott International Inc vs Burn Standard Co. Ltd,* (2006) 11 SCC 181.
[95] *Cox & Kings Ltd. v SAP India (P) Ltd.* 2023 SCC OnLine SC 1634.
[96] *Folkes v Chadd* 99 E.R. 589.
[97] Horne R and Mullen J, 'The Expert Witness in Construction' [2013] John Wiley & Sons, 51.

conducive manner.[98] Furthermore, it is a well-settled principle in both domestic[99] and international[100] arbitration that the opinion of an Expert is just advisory in nature, therefore the tribunal is not bound by such evidence.

The next essential question is: How are these experts appointed? There are primarily two ways to appoint an expert: tribunal-appointed experts and party-appointed experts however, such appointment is subject to the law of the determined seat.[101] Additionally, if the parties expressly agree to submit themselves to an institutional arbitration, then the expert appointments are subject to the procedure prescribed by such institution. For instance, Article 29 of the UNCITRAL Arbitration Rules specifically mentions tribunal-appointed experts,[102] while Article 27(2) of the same rules refers to party-appointed experts.[103] A comprehensive approach is provided by the ICC Rules, which address parties' appointed experts in Article 25(3),[104] while tribunal-appointed experts are addressed in Article 25(4)[105] under the broader category of 'Establishing the Facts of the Case.'

Expert evidence is further classified into the following three categories:[106]

- Technical Expertise provides a specialized area of knowledge where the lacks knowledge.
- Legal expertise assists the tribunal pertaining to relevant laws.
- Expertise in 'Delay, Disruption and Quantum' helps in filtering the facts crucial to evaluate claims.

Pitfalls of Expert Evidence

The concept of evidence expert was introduced to save time and help the tribunal to understand the parties' point of view in a better way, however, the process often leads to delayed arbitral proceedings. Some of the essential problems are discussed below:[107]

---

[98] 'Strategic Considerations after a Dispute Has Arisen' (*Global Arbitration Review*) <https://globalarbitrationreview.com/guide/the-guide-ip-arbitration/second-edition/article/strategic-considerations-after-dispute-has-arisen> accessed 20 January 2024.
[99] *Malay Kumar Ganguly v/s Dr. Sukumar Mukherjee* (2006) 6 SCC 269.
[100] *UK Queens Bench Division UMS Holding Ltd and others Vs Great Station properties SA and another* (2018)Bus LR 650.
[101] United Nations Commission on International Trade Law, 'Model Law on International Commercial Arbitration' (1985, with amendments adopted in 2006) arts 19, 26; International Chamber of Commerce, 'Arbitration Rules' (2017) arts 25(3), 25(4).
[102] UNCITRAL Arbitration Rules 2014, art 29
[103] UNCITRAL Arbitration Rules 2014., art 27
[104] ICC Arbitration Rules 2017 art 25(3)
[105] ICC Arbitration Rules 2017 art 25(4)
[106] Nigel Blackaby and Alex Wilbraham,'Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration' (2016) 31 ICSID Review 655, 660.
[107] Mirna Monla, 'Testing the Reliability of Expert Evidence in International Arbitration' (2022) 16 Disp Resol Int'l 169.

- Bias in Party Appointed Experts

It is the primary duty of the expert to testify truthfully over the duty they owe to the party that appointed them.[108] Most of the party-appointed experts are biased towards the party which appointed them which ultimately leads to the appointment of a new expert by the tribunal. This attracts an additional cost which could have been avoided if the expert was appointed by the tribunal since the beginning.[109] Furthermore, as the party-appointed experts act as a partisan advocate towards their appointers, a lack of confidence is prone to be formed between the parties. Since the appointment of the experts is from a limited pool of people, the same people tend to get appointed again and again by the same party which causes the experts to be biased towards the same people in order to maintain the steady appointment and income.

- Divergent Approaches in Expert Reports

There are instances where the tribunal's corresponding experts utilize different database and methods to construe their reports.[110] There is a flawed assumption that experts form their reports on the basis of objective facts which leads to the same conclusion. Cases where multiple experts are forming reports on the same issue mostly end with conflicting opinions. The reliance of experts on a diverse array of methods is a pivotal issue pertaining to delay and disruption experts, as well as other experts in fields with different methods to analyze the data.

- Asymmetric Deployment of Experts and the Rising Peril of Over-Reliance

One party may wish to present expert evidence on a specific topic when the other party does not think it is necessary, or one party may have called many experts on a certain topic, whereas the other party may only appoint one expert. In many cases, parties attempt to bolster their arguments by using expert evidence, believing that the number of experts they call increases the strength of their arguments. The arbitral process is often degraded by excessive and unnecessary reliance on expert evidence, which ultimately delays the proceedings.

Charting The Course Ahead

In construction disputes, particularly those involving small amounts, pursuing arbitration may not be economically justified, leading contractors to forgo their entitlements under contract agreements. This disproportionately affects construction contractors, and to address this issue, it is recommended to establish a single joint expert for construction contract agreements specified

[108] ICC digital library <https://library.iccwbo.org/content/dr/COMMISSION_REPORTS/CR 0041.htm?l1=Commission+Reports> accessed on 20 Jan 2024.
[109] Paul Friedland and Stavros Brekoulakis, '2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process' (Survey, 2012) 29.
[110] Paul Friedland and Stavros Brekoulakis, '2018 International Arbitration Survey: The Evolution of International Arbitration' (Survey, 2018) 33.

in the arbitration clause. This expert, appointed jointly by both parties or ordered by the tribunal, aims to provide objective and professional opinions, potentially saving costs and time. The same was affirmed in the Judgement of *Chun Wo Building Construction Ltd v Metta Resources Ltd,* ["**Chun Wo**"] wherein the Judge emphasized the abundance of expert witnesses, suggesting that employing a single joint expert for each discipline could have halved their number. This approach would lead to a shorter trial, earlier hearing, faster resolution, and substantial cost savings.[111] The use of a single joint expert is particularly advocated for smaller cases, where the traditional adversarial approach involving individual party-appointed experts could be prohibitively expensive.[112]

When multiple expert witnesses and contentious issues are involved in an arbitration, the technique of witness conferencing is highly beneficial. Through witness conferencing, which has roots in common law courts, experts are able to address opposing views directly, thus promoting efficiency, cost-effectiveness, and focused resolutions. As outlined by institutions like the Chartered Institute of Arbitrators, expert witness conferencing guidelines and procedures enhance the process and ensure a just, quick, and cost-effective outcome[113]. With this methodology, expert partisanship is reduced and meaningful discussions are promoted, which contributes to positive outcomes in international arbitration.

Assisting the tribunal in determining the objective truth are the functions of tribunal-appointed experts in civil law jurisdictions. The use of party-appointed experts in arbitration remains prevalent; however, tribunal-appointed experts are increasingly being sought to alleviate some of the issues observed with their party-appointed counterparts. By removing financial incentives, tribunal-appointed experts are perceived to reduce bias; however, they may also limit parties' autonomy and put the tribunal at risk of over-relying on expert opinions[114]. Despite possible disadvantages, tribunal-appointed experts offer an alternative means of resolving disputes, emphasizing impartiality and speeding up the process.

Conclusion

A construction dispute involves intricate and multiple interactions between timelines, liquidated damages, and arbitration mechanisms. As a result, construction arbitrations are complicated by the issue of whether time is an essential component of the contract and the subsequent implications

[111] *Chun Wo Building Construction Ltd vs Metta Resources Ltd* [2016] HKCFI 1357.
[112] *Quarmby Electrical Ltd v Trant (t/a Trant Construction)* [2005] EWHC 608 (TCC).
[113] Chartered Institute of Arbitrators, 'Guidelines for Witness Conferencing in International Arbitration' (April 2019) 11.
[114] Klaus Sachs and Nils Schmidt-Ahrendts, 'Protocol on Expert Teaming: A New Approach to Expert Evidence', (ICCA Congress Series No 15, Kluwer Law International, 2011) 135, 141.

for claims and terminations. The evolving position of non-signatories in arbitration agreements, expands the scope of participation in arbitration proceedings. There are still challenges, however, especially regarding subcontractors' rights and the need for explicit agreements between parties.

Construction arbitration also possesses opportunities as well as pitfalls due to the indispensable role of expert evidence. Although the opinions of experts play a crucial role in comprehending intricate technical matters, biases and diverse methodologies among experts appointed by parties might present difficulties. The effectiveness of arbitration processes may be hampered by the possible over-reliance on expert testimony and the unequal appointment of experts.

In order to streamline the arbitration process, single joint experts, witness conferences, and the careful use of tribunal-appointed experts are recommended. Through these measures, construction arbitration can be made more efficient, costs can be reduced, and impartiality can be promoted. As the construction industry continues to burgeon, addressing these challenges becomes imperative for fostering fair and expeditious dispute resolution, ultimately contributing to the sustained growth of this vital sector in the Indian economy.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

RESOLVING THE CONUNDRUM BETWEEN ARBITRATION AND INSOLVENCY LAWS IN INDIA

AUTHOR(S)

Samreedhi Gupta

IV Year, B.A. LL.B. (Hons.) Student at O.P. Jindal Global University

Introduction

The intersection of arbitration and insolvency has assumed greater significance with the evolution of a new insolvency regime in India. Often referred to as a 'conflict of near-polar extremes'[115] and driven by divergent goals with respect to their policies, insolvency exerts an inexorable pull towards a centralised policy, whereas, arbitration advocates a decentralised approach toward dispute resolution.[116]

Moreover, a theoretical conflict between arbitration and insolvency becomes apparent due to the opposing interests of the Corporate Debtor ["**CD**"] and creditor where the CD is inclined towards challenging the impending insolvency application against them and, subsequently, resolving it through arbitration. This choice is premised on two arguments, namely, the existence of a 'default' in payment and a cross-claim against the creditor. The stay on insolvency proceedings allows the CD to retain control over their company's assets and steer the arbitration proceedings by appointing arbitrators, forums, and tribunals of their choice. On the contrary, the Insolvency and Bankruptcy Code, 2016 ["**The Code**"] strives to safeguard the creditor's stake by maximising the CD's assets.

This paper sheds light on the current conundrum of the arbitrability of insolvency disputes in India. The first part of the paper focuses on legal provisions pertaining to the *arbitrability of insolvency matters and lays down the trajectory of the legal pronouncements on the subject. The second part outlines American*

[115] Lexa Hilliard, 'International Arbitration and Insolvency: A Conflict of Near Polar Extremes' (2009) 14 Int Corp Rescue 83 .
[116] *In Re United States Lines Inc.* 197 F 3d 631 (2d Cir. 1999).

jurisprudence and draws a comparison between the two legal frameworks. Finally, the paper concludes by suggesting a prudent and calculative approach that consolidates the benefits of both systems.

The Interplay of Arbitration and Insolvency in the Indian Context

The issue of arbitrability and insolvency disputes is the conflict of a "choice of forum" wherein parties have chosen to submit themselves to the jurisdiction of the arbitrators and an insolvency regime that forces them to submit to the jurisdiction of the specialized insolvency courts. Several arbitration matters and ensuing court enforcements have confronted parallel insolvency proceedings that grapple with complicated legal issues.

The absence of a standard dispute resolution court to decide such disputes with global recognition impedes legal proceedings worldwide.[117] Since both the Arbitration Act and the Code remain silent on the issue, it has made way to uncharted territory and raised pertinent questions about applying insolvency and arbitration proceedings in each other's vicinity. Insolvency judges and practitioners have also dealt with complex cases of failing enterprises with assets spread worldwide.

This Section sheds light on the relevant provisions under the Indian insolvency regime and the Arbitration Act that outline the current jurisprudence on their intersection in the Indian sub-continent.

Arbitrability of Subject-matter

In an attempt to settle the position of law on the issue of the arbitrability of insolvency disputes in India, the Apex Court clarified that the Code shall prevail over all statutory enactments, including the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"].[118] In other words, an application seeking reference to arbitration under Section 8 of the Arbitration Act is not maintainable if it is filed after the admission of an insolvency proceeding under Section 7 of the Code. In another recent judgement, it pronounced that insolvency and arbitration proceedings could not be conducted simultaneously.[119]

While it sought to crystallise the guidelines determining the arbitrability of insolvency proceedings, the court was cautious of the fact that arbitration could be used as a moonshine defence by the CD to delay the insolvency proceedings. To avoid such occurring, it laid down that arbitration

[117] Simon Vorburger, '*International Arbitration, and Cross-Border Insolvency: Comparative Perspectives' (Kluwer Law International*, 2014).
[118] *Indus Biotech (P) Ltd. v Kotak India Venture (Offshore) Fund* [2021] SCC OnLine SC 268.
[119] *M/s. KK Ropeways Ltd. v M/s. Billion Smiles Hospitality Pvt. Ltd.* [2021] Comp. App (AT) (CH) (INS.) No. 246 of 2021.

proceedings shall depend on the existence of a 'default' within the meaning of the Code and be maintainable only after the latter is dealt with and consequently rejected by the adjudicating authority.

Furthermore, the National Company Law Appellate Tribunal ["**NCLAT**"] opined that there is no embargo on the Operational Creditor to invoke Section 9 of the Code for recovery of payment instead of relying on the arbitration clause in the agreement.[120] The ruling aligns with the scope and objective of the Code, which describes the insolvency tribunal as a 'Resolution' and not a 'Recovery' forum. However, unwilling parties may use it to commence judicial or insolvency proceedings, thereby derailing arbitral proceedings.

Additionally, the Supreme Court noted that insolvency and winding-up matters are not arbitrable under the current Indian jurisprudence.[121] Since insolvency disputes are concerned with the rights of third-party creditors and their interest in the resolution process, such disputes were categorised as non-arbitrable by the court.[122] A three-judge bench of the Apex Court envisaged a four-pronged test to determine the arbitrability of disputes. According to the test, the disputes in which the subject matter or cause of action is arising from an action *in rem* is non-arbitrable,[123] rendering insolvency disputes inarbitrable in nature.

Yet, conflicting with the settled practice, the Supreme court has recently allowed the aggrieved creditor to pursue their unpaid dues before an arbitral tribunal, after their claim was rejected under CIRP.[124] Similarly, it took a progressive stance in PASL Wind Solutions case[125], and held that domestic parties have the right to choose a foreign seat of arbitration to pursue insolvency proceedings against foreign entities. Such arbitral awards shall be recognised as "foreign awards" under Section 48 of the Arbitration Act. Thus, while the Code has firmly established itself as a landmark legislation yielding successful results in a short span of time, India must adopt a prudent and calculative approach to further the ends of the Insolvency Code. Hence, considering its rapidly developing and globally outward-looking economy, the adoption of arbitration as a means to resolve insolvency disputes in India would attract foreign investment and foster investor confidence in the business system.

In Rem v. In Personam Rights

---

[120] *Shahi Md. Karim v Kabamy India LLP* [2023] SCC OnLine NCLAT 180.
[121] *A. Ayyasamy v A. Paramasivam* [2016] 10 SCC 386.
[122] *Booz Allen and Hamilton Inc. v SBI Home Finance Ltd.* [2011] 5 SCC 532.
[123] *Vidya Drolia v Durga Trading Corpn* [2021] 2 SCC 1.
[124] *Fourth Dimension Solution Limited v. Ricoh india Limited and Ors.* [2022] Civil Appeal 5908/2021.
[125] *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited* [2021] AIR 2021 SC 2517.

Although the *Vidya Drolia* case confirmed that insolvency disputes fall within the ambit of actions *in rem*, it clarified that a mere application under Section 7 of the Code would not automatically render the action *in rem* non-arbitrable. Therefore, whether to proceed with insolvency proceedings or refer the disputes to arbitration still remains unanswered. This has led to several courts carving out exceptions to this position, thereby jeopardising the existing stance of the Apex authority. Presently, arbitration proceedings that maximise the value of the CD's assets or do not injure their company's assets have been allowed.[126]

Section 7 would be applicable only if the following factors are satisfied- (i) a debt exists; (ii) default should have occurred; (iii) debt should be due to the financial creditor; (iv) such default which has occurred should be by a corporate debtor.[127] Upholding the same, the Calcutta High Court[128] and the National Company Law Tribunal[129] ["**NCLT**"] have observed that arbitration proceedings must take precedence over insolvency disputes. In other words, the insolvency application becomes infructuous if a pre-existing dispute is pending under Section 34 of the Arbitration Act against the award and the final adjudicatory process is yet to occur.[130]

By pronouncing that insolvency proceedings become *in rem* only upon admission, the adjudicatory body has prevented the "dressing up" of relief such that a financial creditor could not escape the mandatory arbitration clause in their agreement by merely filing an application for insolvency proceedings. Drawing precedence from this rationale, the High Courts have restricted themselves to adjudging the existence of a valid dispute under the Arbitration Act. They have taken the view that arbitration and insolvency can continue simultaneously till the application under the Code has not been admitted[131] or the moratorium under Section 14 has not been imposed.[132] However, it has failed to highlight the circumstances where the tribunal may admit the arbitration application, paving the way for a uniform legislative guide in issues pertaining to the arbitrability of insolvency claims. The suggested legislative guide would not only clarify what is arbitrable and what is not, but also law the foundation of a fair, and predictable dispute resolution adjudicatory system that conforms to international standards, and encourages foreign businesses.

Impact of the Moratorium

[126] *Power Grid Corpn.of India Ltd. v Jyoti Structures Ltd.* [2018] 246 DLT 485.
[127] *Innovative Industries Limited v ICICI Bank and Another* [2018] 1 SCC 407.
[128] *Sirpur Paper Mills Ltd. v I.K. Merchants Pvt. Ltd.* [2020] SCC OnLine Cal 2939.
[129] *Anuratan Textiles Private Limited v Amalra International Private Limited* [2021] SCC OnLine NCLT 12028.
[130] *K. Kishan v Vijay Nirman Co.* [2018] 8 MLJ 177.
[131] *Jasani Realty (P) Ltd. v Vijay Corpn.* [2022] SCC OnLine Bom 879.
[132] *Millennium Education Foundation v Educomp Infrastructure and School Management Limited* [2022] SCC OnLine Del 1442.

A bare reading of 14 of the Code envisages the declaration of the moratorium period that puts a stay on all arbitration proceedings against the debtor[133] to provide a 'calming period' to the debtor. It serves a two-fold purpose- to maximise the value of the assets owned by the debtor and to retain the value of all assets owned by the debtor by putting a stay on all legal actions against them. The broadly-worded Section 14(1)(a) of the Code invites problems as the ban on an arbitrator to render awards under the statutory insolvency framework has been equated to the non-arbitrability of insolvency matters.[134]

A CD who has defaulted on their payments may seek initiation of the Corporate Insolvency Resolution Process ["**CIRP**"] by submitting an insolvency application before the concerned authority. The arbitration proceedings initiated after the commencement of CIRP are considered *non-est in law,*[135] *and the arbitral award rendered against the CD will constitute a 'default', as defined in the Code.*[136] *Such* proceedings which are pending on the date of commencement of CIRP could not proceed during the moratorium[137] and shall not be perceived as a hindrance to the initiation of CIRP under the Code.[138] It can be reinstated only after the CIRP has been finalized. While the scheme prevents a multiplicity of proceedings against a financially distressed company and provides for a centralised framework,[139] the Delhi High Court adopted a purposive approach and held that Section 14 would not apply to proceedings for value maximisation of the assets of the CD.[140] Therefore, the continuation of arbitration proceedings after the declaration of the moratorium would be determined based on whether the claims are for the CD or in the nature of debt recovery action against the CD.

The USA Insolvency Framework- A Preview

Jurisdictions like the United States of America ["**USA**"] and the United Kingdom ["**UK**"] have attempted to harmonise the international insolvency framework and cross-border dispute resolution mechanisms, making them much more settled in this regard. Akin to Section 14 of the Code, the USA Bankruptcy Code imposes an automatic stay on all proceedings, including arbitration, when the bankruptcy is filed,[141] and renders those awards in contradiction with the stay void.[142] In considering the question of arbitrability of insolvency claims and allowing arbitration to

---

133 The Insolvency and Bankruptcy Code 2016, s 14

134 Kanishka Bhukya, 'At the Crossroads of Insolvency and Arbitration: Which Way Forward?' (2022) 16 Rom. Arb. J 111.

135 *Alchemist Asset Reconstruction Co Ltd v Hotel Gaudayan Pvt Ltd.* [2021] AIR 2017 SC 5124.

136 *Annapurna Infrastructure Pvt. Ltd. & Anor vs. Soril Infra Resources Ltd* [2017] SCC OnLine NCLAT 380.

137 *K.S. Oils Ltd. v State Trade Corpn. of India Ltd.* [2018] SCC OnLine NCLAT 352.

138 *Reliance Commercial Finance Limited v Ved Cellulose Ltd. [2017] (IB)-156(PB)/2017.*

139 P. *Mohanraj v Shah Bros. Ispat (P) Ltd.* [2021] 6 SCC 258, *Dena Bank v C. Shivakumar Reddy* [2021] 10 SCC 3307.

140 *Power Grid Corpn. of India Ltd. v Jyoti Structures Ltd.* [2018] 246 DLT 485.

141 11 U.S.C, s 362 (a)

142 *Acands Inc v Travelers Cas & Sur Co.* [2006] 435 F.3d 252,(3d Cir. 2006).

proceed, the courts have endeavoured to make a distinction between "core" and "non-core" insolvency disputes,[143] wherein the "core" subject matter is reserved for insolvency courts and primarily emanates from the Code, and the matters within the purview of non-core include those that can be filed outside the Code,[144] including arbitration.[145] Thus, the courts have usually lifted the stay on arbitration proceedings involving non-core matters.[146]

However, there seems to be a lack of consistency in the decision of the Indian courts while emulating the same. The Apex court has categorically held that the NCLT has jurisdiction only to the extent of adjudicating matters concerning the insolvency of the corporate debtor.[147] Following a different line of reasoning, others have elaborated on the "residuary jurisdiction" of the NCLT under Section 60(5)(c) of the Code[148] which allows it to adjudicate upon all facts in issues arising from or in relation to insolvency proceedings.

While the contrast between the "core" and "non-core" matters is apparent, specific instances, such as those affecting the corporate debtor's value, can potentially broaden the ambit of the original jurisdiction of the Special Court. It may open Pandora's box that gives discretion to the NCLT in dealing with issues relating to the creditor and CD, leading to ambiguity in the distinction sought to be achieved. Thus, considering the recent *Gujarat Urja* judgment, its implementation and interpretation in Indian courts must be observed to draw a conclusive distinction between "core" and "non-core" matters to bridge the void in the moratorium provisions of the Code, deviating from the overarching reliance on its scope and objective.

A Legislative Guide- The Need of the Hour

The Indian Judiciary has taken a progressive approach towards the controversy surrounding the arbitrability of insolvency disputes. It can be deduced through recent pronouncements that it has made a conscious effort to balance arbitration with insolvency proceedings, thereby preventing collision between them and adopting a global approach in this regard. However, India has yet to achieve better results, as shown on the 'Resolving Insolvency' index.[149]

Moreover, the pertinent question still remains inconclusive- Are all disputes pertaining to insolvency non-arbitrable? In the absence of statutory guidance on the interplay of these

[143] *In Re Winimo Realty Corp.* [2001] 270 B.R. 99 (S.D.N.Y. 2001).
[144] *Hays & Co. v Merrill Lynch, Pierce, Fenner& Smith, Inc.* [1989] 885 F.2d 1149 (3d Cir.1989).
[145] *In re White Mountain Mining Co.* [2005] 403 F3d 164, 169 (4th Cir. 2005).
[146] *In re Bethlehem Steel Corp.* [2007] 479 F.3d 167 (2d Cir. 2007).
[147] *Gujarat Urja Vikas Nigam Limited v Amit Gupta & Ors*, [2021] 7 SCC 209.
[148] The Insolvency and Bankruptcy Code 2016, s 60(5)(c)
[149] World Bank, 'Doing Business- Resolving Insolvency Score' (*World Bank*, 2020) <https://subnational.doingbusiness.org/en/data/exploretopics/resolving-insolvency/score>.

contrasting proceedings, several high-profile arbitration decisions have suffered hindrances due to the commencement of insolvency proceedings.[150] Hence, the author suggests that a defined legislative framework based on the USA Insolvency Model would eliminate the possibility of misuse of the existing conundrum by the parties and bring overall predictability and certainty to the system.

Although it allows debtors to initiate insolvency proceedings in contrast with India where it is primarily creditor-driven, the idea is to draw a distinction between "core" and "non-core" issues to determine the arbitrability of such matters. Therefore, the answer to whether all disputes are arbitrable lies in the fact that an insolvency proceeding that remains *in personam* if it assesses the liability of the corporate debtor shall be "deemed" as a non-core issue and determined by the arbitral tribunal. However, when the proceeding becomes a recovery suit, thereby transforming into an *in rem* action, it shall be treated as a core issue and be dealt with in an Insolvency Court. Since arbitration would be required to determine the liability of only the CD and its enforcement lies before the executing court, such contractual disputes shall be arbitrable even post-initiation of the insolvency proceeding.

Furthermore, the author proposes a third "residuary" category, which allows one to be cognizant of any claims pertaining to the arbitrability of insolvency matters that may arise in the future. While the idea of a "residuary" category seems like a draconian undertaking and may suggest the origin of severe dysfunction, a test to determine the deciding authority is plausible. Inspired by the McMohan test,[151] the issue would be examined based on the language, history, scope, and objective of the statute to decipher its arbitrability. In case of a dispute, the doctrine of harmonious construction can be employed such that both statutes are read in parlance and do not defeat the purpose of the other statute. The courts must also examine the reason behind the initiation of the insolvency proceedings. "Dressed up petitions" which have been purposely initiated to oust the arbitration agreement or disrupt the arbitration proceedings such that they are vexatious or *mala fide*, must not be admitted by the insolvency courts, as held by the Supreme Court in the case of *Rakesh Malhotra v Rajinder Kumar Malhotra.*[152]

Thu, the tripartite Policy Guide for harmonising arbitration and insolvency proceedings, which includes the determination of dispute as a "dressed up petition" or *bona fide* claim, followed by the existence of a valid arbitration agreement between the parties. If it is a *bonafide* claim, the courts shall proceed to identify whether the claim is a core or a non-core one, or falls under the residuary

[150] Wolfgang Kuhn, 'Arbitration and Insolvency' (2011) 5 Disp Resol Intl 203.
[151] *Shearson/AmericanExpress, Inc. v McMahon* [1987] 482 U.S. 220.
[152] *Rakesh Malhotra v Rajinder Kumar Malhotra* [2015] 192 CompCas 516 (Bom).

category. After such determination, the adjudicating body shall resolve the matter according to its laws.

With India's current focus on becoming a global arbitration hub, insolvency arbitration serves as a viable option for resolving cross-border creditor disputes. While the prescribed period for concluding an insolvency proceeding is 330 days, the average time taken to complete a process under the Code in 375 days.[153] The hybrid structure allows flexibility to the parties, as well as reduces the delay in insolvency proceedings.

In conclusion, the recommended solution allows for catalysing complicated issues concerning arbitration and the execution of arbitral awards vis-à-vis insolvency proceedings. It not only aligns with India's pro-arbitration policy but also advances an efficient system that replaces the convoluted stance of the Indian judiciary on the issue. It could help national courts and International Arbitration Tribunals to foster a uniform transboundary approach to the arbitrability of insolvency disputes, thereby benefiting the international business community at enormous and increasing lucidity in the International legal regime.[154]

[153] Rajiv Mani, 'Mediation in Insolvency Matters' (*IBBI*, 2020) <https://ibbi.gov.in/uploads/resources/1acc8439aab101c013221a481fe108a6.pdf >

[154] Stephan Madaus, 'The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings' [2020] 37 J Int Arb 449.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

FROM ADHESION TO COHESION- RECONTEXTUALIZING THE APPLICATION OF THE GROUP OF COMPANIES DOCTRINE UNDER THE LAW OF ARBITRATION

AUTHOR(S)

Sarvagya Chitranshi
IV Year, Student at Gujarat National Law University

H A Dhruti
IV Year, Student at Gujarat National Law University

Introduction

The 'group of companies' doctrine is one of the essential doctrines used under the law of arbitration to impose the obligations of an arbitration agreement on non-signatories. It recognises them as a single economic unit despite being separate legal entities. This doctrine, originating from taxation and company law,[155] imposes contractual obligations on all members due to their shared economic relationship. It essentially serves as an exception to the principles of privity of contract and party autonomy in arbitration law, allowing for broader arbitration coverage within corporate groups. While effective commercially, it however, conflicts with central tenet of arbitration: party autonomy.

The doctrine was introduced in the 1980s through the award passed in *Dow Chemical v. Isover-Saint-Gobain*[156] ["**Dow Chemicals**"]. A three-pronged rationale was adopted by the Tribunal to invoke the group of companies doctrine. It was stated that firstly, both the signatory and non-signatory parties involved must belong to the same corporate structure. Secondly, the active role of the non-signatories in the conclusion and performance of the agreements was required to be established. Lastly, a common intention of all the parties, signatories, and non-signatories, to arbitrate was essential.

[155] Disha Surpuriya, 'Group of Companies Doctrine: Caveats to Consider before its Application' (2022) 2 IRIArb 2.
[156] *Dow Chemical v. Isover-Saint-Gobain*, ICC Case No. 4131, Award (1984).

This doctrine was first followed by the Supreme Court in the case of *Chloro Controls India Pvt. Ltd. v Severn Trent Water Purification Inc.*[157] ["**Chloro Controls**"]. The Apex Court stated here that an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates. However, the rationale followed by the judgment was questioned by J Surya Kant in the case of *Cox & Kings Ltd. v. SAP India (P)* Ltd ["**Cox & Kings**"]. Consequently, in December 2023, the Apex court clarified several nuances for the application of the Group of Companies doctrine.

Rationale for the Doctrine

The fundamental idea behind the doctrine is that a multinational corporation usually functions through various subsidiaries stationed in several countries. It is an efficient business model which has been adopted by various companies. However, both the academia and the jurists of several jurisdictions have not accepted the doctrine to be a rightful inclusion, specifically under the law of arbitration. The courts of the United States have consistently favoured traditional concepts of contract law over the doctrine.[158] Justice Langley of the UK Commercial Court made it very clear that the group of companies doctrine finds no place in English Law. [159] Likewise, Lee Kim Shin JC of the Singapore High Court observed that the doctrine has had little traction in the international arbitration community. He further opined that application of the doctrine would disrupt other settled doctrines of law.[160] This is due to its antithetical nature of the doctrine to the principle of party autonomy which is at the heart of the law of arbitration.

Party autonomy, a cornerstone of arbitration law, grants parties the freedom to choose arbitration. Multiple provisions in the UNCITRAL MODEL Law,[161] and national legislation,[162] have strived to ensure the same. The Group of Companies doctrine, while an exception to this principle, is universally recognized as applicable only in exceptional circumstances. This is also the position that exists in the Indian jurisdiction. However, due to the complex nature of the doctrine, it is not sufficient to proceed on the basis of such a statement.

Dichotomy between the "Doctrine" and the "Principle"

---

[157] *Chloro Controls India Private Limited v. Severn Trent Water Purification Inc* (2013) 1 SCC 641.
[158] *Fisser v. Int'l Bank*, 282 F.2d 231 (2d Cir 1960); Thompson-CSF, *S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995); See also Virginia Harper Ho, "Theories of Corporate Groups: Corporate Identity Reconceived" (2012) Seton Hall L Rev 879.
[159] *Peterson Farms Inc v C & M Farming Ltd* [2004] APP.L.R. 02
[160] *Manuchar Steel Hong Kong Limited v Star Pacific Line Pte Ltd*, [2014] SGHC 181.
[161] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985),Art 1(1), ('UNCITRAL MODEL Law').
[162] Arbitration and Conciliation Act 1996, s 2(6).

Party autonomy is the core tenet of arbitration. The right and permission to seek arbitration constitute the first step towards ensuring party autonomy. As a result, the group of companies doctrine is essentially an exception to this principle of arbitration. This leads to a dichotomy between the two. The clash becomes more apparent in multiparty contracts. Moreover, in large scale commercial contracts the entity that concludes the arbitration agreement need not necessarily be the company that performs the contract. Therefore, while the parties mentioned in the contract ordinarily become party to the arbitration, those that are not entirely barred from being called as parties to the agreement. It is for the latter that doctrine is applied.

By establishing an inalienable structure between a signatory and a non-signatory, the arbitration clause can be widened to include a non-signatory even against its express will. Often in such cases, the request to widen the clause comes from the claimant but refuted by the respondent. This prima facie violates the party autonomy of the respondent. Thus, this dichotomy can be only be harmonised by setting a reasonable threshold beyond which party autonomy will give way to the application of the doctrine. This was done for the first time in the landmark case of Dow Chemicals.[163] The case laid down the three requirements to be fulfilled for the application of the doctrine. They are:

1. Tight group structure
2. Active role of the non-signatory in the contract
3. The mutual intention to arbitrate.

Globally, the three requirements for the Group of Companies Doctrine have remained consistent. However, the inconsistency lies in their application. In the Dow Chemical case, no priority was dictated among these requirements, leading to ambiguity regarding consequences for non-compliance.[164] Analysing these requirements in line with current corporate practices is crucial for updating the doctrine and reconciling it with party autonomy principles.

Indian Context

As for the Indian context, the Apex Court in the Chloro Controls case relied on the test laid down in the Dow chemicals' case to come up with its own test. These were:

1. direct relationship
2. direct commonality of the subject-matter;

[163] *Dow Chemical v. Isover-Saint-Gobain*, ICC Case No. 4131, Award (1984).
[164] Ana Kombikova, 'Extension of the arbitration agreement to third parties based on 'Group OF Companies' and 'Piercing the Corporate Veil' Doctrines (LL.M. Short Thesis, Central European University 2012).

3. composite nature of the transaction; and
4. whether referring disputes would "serve the ends of justice.

The terms 'direct relationship' and 'commonality' have been drawn from the second prong of the Dow chemical test i.e., 'Active role of the non-signatory in the contract'. The last two requirements are ancillary tests that the Court has developed through its own expertise. However, in doing so, neither of the four factors mentioned reflect a requirement of a tight group structure for the application of the doctrine.

From an analysis of the above-mentioned factors, it is evident that the 'tight group structure' finds neither explicit nor implicit mention among the tests laid down by the court. The doctrine from its name itself signifies that a 'group' structure is imperative for its application. Without this requirement, the doctrine falls flat of establishing its own separate application or distinction. The Apex Court incorrectly interpreted the Dow chemical test and consequently widened the ambit of the application of the Doctrine. It has thus failed to capture the true scope of the doctrine. Such approach is antithetical to the very fundamental of arbitration. It was this ambiguity that led to discrepancies in the Indian context. In the latest judgement of Cox & Kings, the Apex Court was successful in clarifying several such questions. However, it failed to establish a procedure under which this doctrine can be invoked in a given set of circumstances. This leads to patent ambiguity regarding the doctrine correct application

Resolution of the conundrum

The above-mentioned conundrum led to a dire need to systematic procedures to be laid down. This can be done by assessing each step of the Dow Chemical test in the appropriate context i.e., the Tight Group structure followed by Significant Involvement and finally concluding with the mutual intention to arbitrate

The first requirement established by Dow Chemicals, necessitates a strong affiliation between entities within a group. It is not enough for both entities to merely be part of the same group.[165] It is therefore, important to breakdown the test and understand how it can be objectively fulfilled. The analysis of entity structure involves two steps: examining corporate ties and determining a 'single economic entity'.[166] This can be done based on various factors like intellectual property,[167]

[165] Adyasha Samal, Extending Arbitration Agreements to Non-Signatories: A Defence of the Group of Companies Doctrine'(2020) 11 KING'S STUDENT L. REV. 73, 16.
[166] Gizem Halis Kasap, 'Etching the Borders of Arbitration Agreement: the Group of Companies Doctrine in International Commercial Arbitration under the U.S. and Turkish Law' (2017) 2 University Of Bologna Law Review. 87, 92.
[167] ICC Case No. 2375 Award (1975).

human resources,[168] and finances.[169] However courts lack fixed criteria and therefore rely on preliminary facts. Tight group structure requires close corporate links. This goes beyond mere shareholding.[170] This requirement must not be construed liberally to include individuals or entities that merely share a contractual relationship with the party to the arbitration agreement. Unfortunately, there have been cases where the 'Group of companies' doctrine has been conveniently used to include natural persons as party to arbitral proceedings.[171] Expanding the scope of the doctrine to include natural persons will open up a floodgate of new problems, as often shareholders are mere investors in a company. They cannot be seen as the same economic entity as the company.[172]

Despite this theoretical priority, recent trends show that courts often skip this step, leading to misapplication of the doctrine and the inclusion of unrelated third parties. [173] This requirement has faced several disputes notably in cases where parties with only contractual ties to the signatory are included in arbitration. [174] Tribunals have had divergent views on the same. Unrelated entities, like guarantors or agents have been included under the doctrine for merely aiding in fulfilment of the original contract.[175] This inconsistency highlights the need for a clearer interpretation of the requirement to avoid misapplication in arbitration proceedings.[176] The tension between a liberal approach and the sound commercial practice of separate legal entities is evident. However, the Venezuela Tax exemption case upheld the practice of using subsidiaries to shield parent companies from liability, affirming it as a valid international trade practice not constituting arbitral consent. [177]

In the Indian context, as the trend of the doctrine evolved, the inclination of the courts leaned majorly towards the last two requirements. The first requirement was presumed to be met without following a uniform criterion. The criteria prescribed by subsequent cases give considerable importance to mutual consent and involvement over existing corporate structure.[178] Courts have inconsistently prioritized the three requirements of the Group of Companies Doctrine,[179] emphasizing mutual consent but neglecting a tight group structure.[180] Therefore, while parties with

[168] *Kis France v. Societe Generale*, (1992) Rev. Arb. 90.
[169] Indu Malhotra, *The Law & Practice of Arbitration and* Conciliation, (Thomson Reuters 2014) 211.
[170] ICC Case No 8910, Award (1998).
[171] ICC Case No 9517, Interim Award (30 November, 1998).
[172] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[173] Prince George (City) v. Sims (A.L.) & Sons Ltd. et al., (1995) 61 B.C.A.C. 254 (CA).
[174] ICC Case No. 10818, Partial Award (2005).
[175] ICC Case No. 13774, Award (2009).
[176] STCI Finance Ltd. v. Shreyas Kirti Lal Doshi & anr, 2020 SCC OnLine Del 100.
[177] ICC Case No. 11160, Final Award (2002).
[178] ONGC Ltd. v. Discovery Enterprises (P) Ltd (2022) 8 SCC 42.
[179] KKR India Private Financial Services Ltd. v Williamson Magor (I) (Comm) 459/2019.
[180] Mahanagar Telephone Nigam Ltd v. Canara Bank (2020) 12 SCC 767.

contractual relationships may join arbitration, this doctrine cannot be used to do the same.[181] The Apex Court made a reference to the 'tight group structure' in Cox & Kings. However, this requirement has been given a secondary stature as compared to mutual consent. While it is not denied that consent is inextricable to arbitration, the establishment of a tight group structure is essential to the application of this particular doctrine. If this requirement is overlooked by courts in their assessment, it will lead to unnecessary widening of the scope of the doctrine. This is discussed in the later sections of the article.

The second requirement by Dow Chemical mandates active involvement of the non-signatory in contract conclusion, performance, or termination. Mere corporate structure is not enough; there must be a strong link binding group members to the signatory. This link includes:

1. Entities with significant control over the signatory or
2. Those affected by its terms.

It is important to note that the doctrine requires the joining of parties in their own right. If this joinder is premised only on a commercial reality, it would effectively be the legal enforcement of a commercial principle for the sake of judicial convenience.[182] The element of significant involvement was relied upon primarily in the Dow Chemicals' case.[183] In that case, involving two Dow Chemical subsidiaries and Boussois-Isolation, disputes arose from distribution agreements with ICC arbitration clauses. The tribunal, noting significant involvement of non-signatories, invoked the Group of Companies Doctrine to include them. The factual context showed active non-signatory participation in agreement conclusion and performance. Therefore, in the present case, the conduct of the non-signatories was assessed to determine inclusion.

From the aforementioned reasoning, the 'group of companies' doctrine seems based on piercing the corporate veil, to reveal the alter ego. However, this would mean implied consent of the non-signatory group entity which could run contrary to the principles of arbitration. It is therefore, important to separately contextualise these concepts under the law of arbitration. Various international authorities have concluded that a party that has not executed or expressly assented to a contract containing an arbitration clause may still be bound by it only in exceptional circumstances.[184] The International Court of Justice ["**ICJ**"] clarified in the judgement concerning

[181] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[182] Ibid.
[183] Dow Chemical v. Isover-Saint-Gobain, ICC Case No. 4131, Award (1984).
[184] Gary B. Born, International Commercial Arbitration, (Wolters Kluwer 2014) 515.

Barcelona Traction, Light & Power Co.[185] that the process of lifting the corporate veil or disregarding the legal entity would be justified only in certain circumstances.

Establishing alter ego status to pierce the corporate veil is challenging,[186] due to the underlying presumption of separate legal entities for parent corporations and affiliates.[187] Evidence of one entity's domination over another is necessary. *Anderson v. Abbot*[188] ["**Anderson**"] emphasizes limited liability as the norm, requiring substantial proof for invoking the alter ego doctrine. Corporate structures aim to establish separate legal entities.[189] These are vital for legitimate purposes but are often incorrectly undermined by general agency relationships. The award of *Baque Arabe et Internationale d'Investissement v. Inter-Arab Inv. Guarantee Corp.*,[190] highlighted the voluntary nature of arbitration. It held that only parties to a written arbitration agreement can participate in the proceedings as opposed to traditional courts where interested parties join. Courts should therefore, systematically establish the rationale for invoking the *alter ego* doctrine and based on that, analyse if the group of companies doctrine can be invoked. A mere joint cause of action or a corporate structure alone should not suffice the requirement for invoking the doctrine under the arbitration law. This is in contradistinction to the general civil or commercial law where autonomy is not a criterion to adjudge the locus standi of a party.

In the India pretext, in *Magic Eye Developers v. Green Edge Infra Pvt. Ltd. and Ors.,* [191] ["**Magic Eye Developers**"] the Indian court utilized the alter ego doctrine to refer non-signatory group companies to arbitration. The issue however, with this judgement highlights the larger problem that exists with the Indian Courts adopting the group of companies' doctrine. The judgment lacks substantive reasoning for invoking the doctrine, a trend seen in Indian jurisdiction. Properly invoking the alter ego doctrine could strengthen the case, but the judgment lacks detailed rationale, relying instead on the absence of counterarguments from the sister companies. Such approach reiterates the importance of following a top-down approach and executing a step-by step analysis of the facts at hand in accordance to the three-step test.

Lastly, as for the third requirement, the most actively pursued ground for inclusion of non-signatories is that of mutual consent. It serves as the primary basis for including non-signatories

[185] Barcelona Traction, Light, and Power Company, Ltd [1970] ICJ 1.
[186] Indu Malhotra, *The Law & Practice of Arbitration and* Conciliation, (Thomson Reuters 2014) 212.
[187] Bridas 345 F.3d at 356.
[188] 321, U.S. 349, 362 (1944).
[189] ICC Case No. 8385, Award (1995).
[190] Baque Arabe et Internationale d'Investissement v. Inter-Arab Inv. Guarantee Corp. XXI Y.B. Comm. Arb. 13, 18 (1996).
[191] Magic Eye Developers v. Green Edge Infra Pvt. Ltd. and Ors., CS(COMM) 1290/2018.

in arbitration, rooted in the preceding requirements and central to the doctrine. [192] The tribunal must ensure mutual agreement to arbitrate, whether implicit or explicit, for the doctrine's application. This aligns the doctrine with arbitration law fundamentals and upholds party autonomy.[193] The leeway to prove mutual consent lies in the phrasing of Article 7 of the UNCITRAL Model law. While the arbitration agreement is mandated to be in writing, it can be 'concluded orally, by conduct or by any other means.'[194] Furthermore, Article 7(4) also provides that an arbitration agreement is said to exist if there is enough record via electronic, letter or telecommunication to prove the agreement[195]. Section 7 (3) of the Arbitration and Conciliation Act, does not allow contain the words "concluded orally, by conduct or by any other means."[196] However, Section 7(4)(b) is similar to the Article 7 (4).[197] This has led courts to look for exchange of emails, letters and invoices to ascertain this mutual intent.[198] Another approach taken by the courts is the use of the extent of fulfilment of the prior two requirements to deduce intent to arbitrate.[199] This however is can lead to unnecessarily Widening the Scope of 'Consent'.

The requirement of consent in including non-signatories in arbitration has faced challenges due to a broad interpretation of the term. Rather than a top-down approach, courts often infer consent from minor connections in the factual context.[200] This deviation leads to a subjective analysis by adjudicating bodies, eroding the objective sense of consent. [201] There have been cases where a mere presumption of knowledge of the existence of an arbitration agreement has been construed as consent to arbitrate.[202] Such liberal interpretations risk undermining party autonomy, allowing claims for non-consenting non-signatories based on presumptions, and threatening fundamental arbitration principles.

In India, the approach to the consent requirement varies, with some cases strictly adhering to the three-step approach, like *Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing India Pvt. Ltd.* ["**Reckitt Benckiser**"]. This case relied on *Godhra Electricity Co. v. State of Gujarat*,[203] to exclude

[192] Alona Kiriak, Arbitral Jurisdiction over Non-Signatories: The Group of Companies' Doctrine, (LL.M. Short Thesis, Central European University 2015).
[193] Stavros Brekoulakis, Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories (2017) 8 Journal Of International Dispute Settlement 619.
[194] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985) ('UNCITRAL MODEL Law') art 7.
[195] UNCITRAL Model Law on International Commercial Arbitration, (Entered into force of 1 June 1985) ('UNCITRAL MODEL Law') art 7 (4).
[196] Arbitration and Conciliation Act 1996, s 7(3).
[197] Arbitration and Conciliation Act 1996, s 7(4).
[198] Gary B. Born, International Commercial Arbitration, (Wolters Kluwer 2014).
[199] ICC Case No. 15116, Interim Award (2008).
[200] Stavros Brekoulakis, Rethinking Consent in International Commercial Arbitration: A General Theory for Non-Signatories (2017) 8 Journal Of International Dispute Settlement 619.
[201] *Cheran Properties Ltd. v. Kasturi and Sons Ltd.*, (2018) 16 SCC 413.
[202] *Societe Korsnas Manas v Societe Durand-Auzias*, Rev Arb 692 (1989) 694.
[203] *Godhra Electricity Co. v. State of Gujarat* [1975] 1 SCC 199.

post-contractual negotiations to determine consent, as subsequent conduct cannot be construed as involvement.[204] However, recent judgments have deviated, focusing on determining intention of parties through surrounding facts,[205] compromising the objectivity of the requirement.[206] Furthermore, the High Courts have unjustifiably applied this doctrine in the context of varied commercial considerations to join non-signatories, completely overriding the principle of a separate legal entity.[207] Despite multiple judicial precedents set by the apex court, the discrepancy persists.

In December, the Apex Court gave its latest verdict in the case of Cox and Kings. This judgement is far more advanced as compared to its precedents in that the court as at least recognised the elements of the three tests in Dow Chemical. The Court has made a reference to the need of a 'Tight Group Structure'. However, the importance given to it is secondary. It has rather emphasised the importance of mutual consent quite elaborately. However, in doing so, the Court seems to have blurred the lines between the second and third requirements laid down by Dow Chemical. The court has concluded that the actions of the of the parties can be used to determine their subjective intent of the parties.[208] It is opined that the court has erred in interpreting that relationships among legal entities and their involvement in contract performance indicate mutual intentions. The fulfilment of the first two requirements do not automatically lead to the fulfilment of the third. This error is observed in the previous judgements as well. This is also why neither Cox and Kings, nor the preceding judgments have been able to chalk out an objective and structured procedure for their tests to be followed. Without this, there is no clarity in when and how this doctrine ought to be applied

Conclusion

The 'group of companies' doctrine, while intended for exceptional circumstances, exhibits inherent flaws in its application. Courts often disregard the sequential assessment of its three requirements, prioritising mutual intention to arbitrate. However, such errors are not irreparable.

The first of these flaws is that in the modern practical approach, the doctrine has been turned upside down by the courts. Then, directly proceed to assess whether there is a mutual intention to arbitrate. The first, and in some cases, even the second requirements are ignored. Therefore, a top-

[204] Achyutha GM, Pranika Correa, 'Group of Companies" Doctrine & Post-Negotiations in the Context of an Arbitration Agreement' (IndiaCorp Law, 12 September 2019) < https://indiacorplaw.in/2019/09/group-companies-doctrine-post-negotiations-context-arbitration-agreement.html > accessed 29 September 2023.
[205] M/s SEI Adhavan Power Private Limited v. M/s Jinneng Clean Energy Technology Limited. 2018 SCC OnLine Mad 13299.
[206] *Mahanagar Telephone Nigam Ltd v. Canara Bank* (2020) 12 SCC 767.
[207] *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power* Ltd 2021 SCC OnLine Del 2875.
[208] UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3 78.

down approach of the three requirements is proposed, emphasising equal importance for each requirement, starting with a 'tight group structure' assessment. However, lacking an objective threshold for this structure poses a challenge. Courts must establish a universal threshold that contains the elements that are to be fulfilled.

Secondly, proving 'significant involvement' demands clarity on actions indicating control. To be bound by the agreement, a party must establish (or disprove) that there is a common thread of intention between the signatories and the non-signatories.

Thirdly, while 'consent' under other aspects of law finds wide application, it must be restricted to truly determine the presence of mutual intent under the arbitration regime. This can only be done if the second requirement is cleared of all ambiguity regarding what actions constitute substantial involvement and control.

In conclusion, to enhance the doctrine's application, recontextualization is proposed, restricting it to genuinely exceptional cases. Bridging the gaps in current tests is crucial, ensuring a comparative analysis between global practices and India's approach to maintain the integrity of the arbitration regime. Upholding party autonomy remains paramount, safeguarding the Indian arbitration landscape from the casual application of the doctrine. This approach fosters an environment where parties' autonomy is respected, strengthening the arbitration framework's effectiveness.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

INEQUITY UNVEILED: CHALLENGES TO FAIR APPOINTMENT OF ARBITRATORS

AUTHOR(S)

Shirish Sachdeva

IV Year Student at Gujarat National Law University, Gandhinagar

Introduction

Ensuring the impartiality and independence of arbitrators is paramount in arbitration proceedings, as it upholds the key tenets of natural justice. The foundation of the entire arbitration system hinges on the confidence parties placed in arbitrators entrusted with adjudicating their disputes. This confidence is essential in arbitration proceedings as parties themselves participate in the appointment of their arbitrators.[209]

In the Indian arbitration landscape, there are nuanced challenges in ensuring the independence and neutrality of arbitrators while upholding the binding nature of contracts and ensuring autonomy of parties in the appointment procedure. Therefore, this spirit of party autonomy at times overlooks the inherent unfairness in the appointment of arbitrators in certain situations, particularly when it comes to contracts with public sector undertakings and other statutory corporations. A big reason as to why such a trend is observed is that contracts with PSUs and other statutory corporations tend to give unilateral rights of arbitrator appointment to these entities which in turn gives rise to the question of bias.[210] In practice, there is a dearth of metrics to evaluate the independence and impartiality of these arbitrators, this has allowed state entities to nominate individuals which have some sort of designation linked with them to preside over their dispute. On that note, it is imperative to note that the practice of nominating serving employees as arbitrators in their dispute was not expressly prohibited in the now repealed Arbitration and

[209] Maria Nicole Cleis, *The independence and impartiality of ICSID Arbitrators* (Brill 2017).
[210] Vikram Hegde and Archana Vaidya, 'The challenges of Statute Mandated Arbitration under The National Highways Act, 1956' (*Live law*, 2 August 2023) < https://www.livelaw.in/articles/arbitration-act-statute-mandated-arbitration-challenges-national-highways-act-234175?infinitescroll=1> accessed 25 September 2023.

Conciliation Act, 1940, ["**1940 Act**"] and subsequently under the Arbitration and Conciliation Act, 1996 ["**1996 Act**"] as well.

The court's first brush with this subject was documented in the case *Voestalpine Schienen GmBH v Delhi Metro Rail Corpn. Ltd* ["**Voestapline Schinen GmBH**"] [211] wherein the apex court examined the core tenets of arbitrator independence. However, the position held, did not offer a steady solution and left much more to be desired and it underscored the need for a more comprehensive understanding of judiciary's role in the appointment procedure.

The 2020 landmark judgment of the Supreme Court in *Perkins Eastman Architects DPC and Ors v HSCC (India) Ltd* ["**Perkins Eastman**"][212] altered the then-prevailing view on the disqualification of arbitrators. It held that "a person disqualified to ***act*** as an arbitrator is also disqualified to ***appoint*** an arbitrator*"*. This has set in motion a flurry of resignations and termination petitions of arbitrators in various ongoing arbitrations and warrants critical examination. In the wake of the Perkins Eastman, it is necessary to understand the practical implications of this judgement and try to find out whether or not this position is in consonance with the legislative intent.

The 2015 amendment was a notable positive development in transforming the landscape governing arbitrator appointments, with the schedules demarcating criteria for arbitrator ineligibility and inclusion of party representation in the appointment process to ensure neutrality. The question, of whether the legislative changes actually translate to practical safeguards and adequately deal with the deficiencies in the pre-amendment framework still remains pertinent.

Navigating Party Autonomy and Procedural Fairness – Pre-2015 Amendment

Prior to the 2015 amendment, arbitration clauses or agreements that allowed one of the parties to nominate their own employee as an arbitrator were generally acceptable even though prima facie, it seems grossly violative of the principle of *nemo judex in causa sua.* This situation came about due to a legislative gap in clear disqualification criteria for arbitrators for want of independence and neutrality. This led to the dominant party always getting away with an arbitrator of their choice.

The courts too, supported such clauses in the name of 'party autonomy' and ignored the unequal bargaining power of the parties and the standard nature of these contracts with PSUs and statutory corporations. The only exception that was carved out by the Apex Court was in the case of *Indian Oil Corporation v Raja Transport Ltd.*[213] Here, it was held that such appointments would be invalid

[211] *Voestalpine Schienen GmBH v Delhi Metro Rail Corpn. Ltd* (2017) 4 SCC 665.
[212] *Perkins Eastman Architects DPC and Ors v HSCC (India) Ltd* (2020) 20 SCC 760.
[213] *Indian Oil Corporation v Raja Transport Ltd* (2009) 8 SCC 520.

under section 12 if the arbitrator was in a position of control or was directly subordinate to the officer whose actions constituted the subject matter of the dispute. This exception also found mention in the 246th Law Commission report which described it as inadequate.

The issue of arbitrator neutrality was taken up by the Law Commission of India which carried out a comprehensive examination of this deficiency in the working of the act in 2014. They came out with a comprehensive report, report no. 246.[214] This document served as the inspiration and source for major amendments to the 1996 Act, including the 2015 amendment. The amendment led to the addition of the fifth and seventh schedules, which focused on ensuring the independence and neutrality of arbitrators as they contain guidelines as to what constitutes justifiable doubts to the independence and impartiality of arbitrators. However, the issue has become a little complex with the courts subjectively interpreting section 12(5) of the 1996 Act, along with the fifth and seventh schedules, which has led to dissonance between judicial standpoints. The aforesaid section is produced below for reference and clarity-

> S. 12(5) – *"Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

The 246th Law Commission Report[215] was instrumental in bringing about the 2015 amendment.[216] It stressed the importance of minimum levels of arbitrator independence and impartiality notwithstanding any express agreements. It took the stance that the parties should not be made to waive their right to natural justice, especially when the state assumes the appointing authority. Among its recommendations were amendments to sections 11, 12, and 14 to introduce a "de jure" test of impartiality as opposed to the prevailing de facto disqualification criterion. Thus, it proposed to make potential arbitrators inherently ineligible if their relationships with the parties fell within categories specified in the fifth and seventh schedule. Moreover, the report also borrowed the concepts of orange and red lists from the "International Bar Association Guidelines on Conflicts of Interest in International Arbitration" to recommend a framework, capable of assessing doubts on an arbitrator's independence and neutrality.

---

[214] Law Commission of India, '*Amendments to Arbitration and Conciliation Act, 1996'*, (Report No 246, 2014).
[215] Ibid.
[216] Arbitration and Conciliation (Amendment) Act, 2015.

Salient Features of the 2015 Amendment

Post amendment, section 12 makes it compulsory for the arbitrators to disclose any relationship or interests that could be construed as a justifiable doubt about their fairness using a designated format, found in the sixth schedule. We see the adoption of the aforementioned IBA guidelines in the fifth and the seventh schedules. The fifth schedule takes note of low-severity circumstances, considering de-facto grounds, equivalent to the ground listed in the orange list. The seventh schedule incorporates those disqualification grounds that are similar to those in the red list concerning the more serious, de-jure disqualifications for specific relationships, thereby enabling a comprehensive evaluation of an arbitrator's eligibility vis-à-vis the disqualifying criteria.[217]

Section 12(5) has a waiver clause now, allowing parties to evade this provision, however, it is not universal. The waiver must satisfy the conditions such as an express agreement in writing is compulsory, it should be made after the dispute has arisen, and also be open to judicial scrutiny to ensure no undue advantage is being exercised by one party as held in *Bharat Broadband Network Ltd v United Telecoms Ltd.* ["**Bharat Broadband Network Ltd.**"][218]

In the challenge procedure for appointments that are in contravention of the fifth schedule, a challenge is made to the arbitral tribunal itself u/s 13(2) and 12(3) of the 1996 Act. If the arbitral tribunal does not accept the challenge, it passes a non-appealable order, and the only option that remains with a party is a section 34 petition to set aside the award. In cases where the arbitrator is judged to be ineligible under the seventh schedule, it implies that the arbitrator inherently lacks the jurisdiction to conduct the proceedings. In such cases, the remedy is to file a termination application under section 14(2) of the 1996 Act. In cases where the arbitration clause or the arbitration agreement itself is of such nature that the appointment naturally results in a de-jure disqualification, then the parties have the remedy of approaching the court under section 11 for a fresh appointment of an arbitrator.

Changing Nature of Unilateral Arbitrator Appointments: Judicial Trends

During the introduction of the new schedules, a fair amount of objectivity was observed in the appointment procedure amendment. PSUs and other state entities could not nominate their existing employees, consultants, and advisors as arbitrators. However, there is no bar on them to

[217] Prerona Banerjee and Vishal Sinha, 'What goes around, comes around: The 2015 amendment on appointment of arbitrators in India' (*Bar and Bench*, 25 March 2023) <https://www.barandbench.com/columns/what-goes-around-comes-back-around-the-2015-amendment-on-appointment-of-arbitrators-in-india > accessed 26 September 2023.
[218] *Bharat Broadband Network Ltd v United Telecoms Ltd* (2019) 5 SCC 755.

appoint their retired and/or former employees as long as they have been retired for 3 years since their nomination date, as discussed by the Court in Voestapline Schinen GmBH.

Another aspect of arbitrator appointment that is relevant, is the appointment procedure itself, focusing on "who appoints the arbitrator". Now, these arbitration clauses, or agreements that give unilateral rights to one party, have come under judicial scanner; such arrangement prima facie indicates non-compliance with principles of party autonomy. While the seventh schedule lays down ineligibility criteria for a person to act as an arbitrator, it lays no such grounds for the 'appointing authority'. Therefore, the act in no way explicitly bars such unilateral appointments, what is mandated is merely the safeguard of the seventh schedule. If a person is not barred de jure, then the appointment is to be deemed valid, even if it is made unilaterally. At the very outset it seems like a gross violation of party autonomy, placing both parties at an unequal ground. Plenty of High Courts subscribed to this view before the landmark judgments of the Apex Courts, which will be covered below.

Analysis: Landmark Judgements post-2015 and the current positions of law

In the domain of unilateral arbitrator appointments, the courts have focused on a few specific types of appointment clauses –

i. "*Appointment of a disqualified person or nominee of disqualified person"*
ii. *"Appointment of nominee of one of the parties as sole arbitrator"*
iii. *"Appointment of arbitrator/s exclusively from a panel proposed or suggested by one of the parties"*

The first kind of appointment clause was the subject matter of the landmark case in *TRF Ltd v Energo Engg. Projects Ltdb.* ["**TRF case**"][219] The arbitration clause in the dispute nominated the Managing Director or a nominee of the MD. The court observed it to be a situation wherein the MD was acting vicariously by naming a nominee and the MD himself being de jure ineligible under section 12(5) (Amended section), he had also lost the power to nominate someone else.

This line of reasoning was also followed by the court in Bharat Broadband Network Limited. The appointment clause in question here was similar to the TRF case and it led to a challenge. Interestingly, the party that nominated the arbitrator itself was challenging the appointment. The court held, drawing from the TRF case, that de jure ineligibility of the arbitrator(s) renders the proceedings null and void, and no question of estoppel by conduct arose. In both these cases, the arbitration clause gave two powers to the parties that were disqualified: one to be the arbitrator themselves or appoint the arbitrator. These types of clauses were dealt with separately by the courts

[219] *TRF Ltd v Energo Engg. Projects Ltd* (2017) 8 SCC 377.

and clauses that did not confer these 'twin powers' were virtually facilitating unilateral appointments of a sole arbitrator. This is the second of the aforementioned category of appointment clauses. This was settled in the case of Perkin's Eastman.

The two judges' bench of the Apex Court in Perkins Eastman identified and rectified a very plausible ground of bias that plagued situations wherein one of the parties has the power to appoint sole arbitrators. The Supreme Court invalidated arbitration agreements with appointment clauses granting unilateral appointment rights declaring that -

"a person with an interest in the outcome of the dispute cannot have the power to appoint the sole arbitrator".

The apex court, in all its wisdom, thus declared such clauses invalid. The story of unilateral appointments, however, is far from over; the third category of clauses is appointment from a panel(s) chosen by one of the parties.[220]

The court, having invalidated unilateral appointments in a series of cases shown above, took a contradictory stance in the case of *Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML (JV)* ["**Central Organisation**"].[221] In the Central Organisation case, the arbitration clause provided for a panel maintained by one of the parties. The Court recalled the position laid down in the Voestalpine Schienen in which a similar arbitration clause was held valid when the party maintaining the panel increased the number of names and provided more options than just its former employees as it became a broad-based panel**.** Coming back to the Central Organisation case, we see non-conformity with the broad-based panel principle. The arbitration clause authorised Indian Railways to appoint three arbitrators from a panel composed of its retired employees. The other party was allowed to choose two names from the four available potential arbitrators, with the Managing Director ["**MD**"] of the railways having the authority to nominate the arbitrator out of the two. Additionally, the MD also possessed the authority to nominate the other two arbitrators. Surprisingly enough, the Apex Court considered this a broad-based panel, which is quite disconcerting as in the Voestalpine Schienen case, the court specifically noted the absence of former employees of DMRC from the proposed list, which was absent in the Central Organisation case.

Following the principles laid down by the TRF judgment and then the Perkins Eastman case, functional neutrality is achieved only when parties have equal power over the appointment procedure. The court did not take into account that when a panel is maintained by only one party,

[220] R. Sudhindher, 'Perkins- Critical Analysis', (*Argus Partners*, 2 May 2020) <https://www.argus-p.com/papers-publications/thought-paper/perkins-a-critical-analysis/> accessed 26 September 2023.
[221] *Central Organisation for Railway Electrification v ECI-SPIC-SMO-MCML (JV)* (2020) 14 SCC 712.

they are not on equal footing. If a party is not allowed to unilaterally appoint a sole arbitrator, then logically, they should not be allowed the corpus of available arbitrators, restricting the choices of the other party. All the more so in matters like Central Organisation, wherein the panel maintained was not broad-based either. This tears away at the semblance of neutrality that was achieved in the Voestalpine case, and takes away incentives from the PSUs and other such entities to have broad-based panels. The Supreme Court has recently upheld the correctness of the Perkins Eastman, emphasising that a person interested in the outcome of a dispute cannot be allowed to unilaterally appoint a sole arbitrator. In striking down an arbitration clause that allowed the Ministry of Law and Justice to appoint on its own officers as the sole arbitrator on behalf of the Union of India on the as the officer is an employee of the Union, making him ineligible for appointment under schedule VII read with Section 12(5).[222] The court also observed that the Central Railways case had been challenged and referred to a larger bench in *Union of India v Tantia Constructions* ["**Tantia Constructions**"][223] and *JWS Steel Limited v Southern Railways* ["**JWS Steel Ltd**"].[224]

The Way Forward

The Central Organisation case has brought out the issue of law that is not yet lucid and is negatively affecting arbitration proceedings across India due to its soft approval of certain unfair appointment clauses. The current position of law is being debated by a three-judge bench of the Supreme Court in Tantia Constructions, wherein the bench has cast aspersion on the position held in Central Organisation. A larger bench is yet to be constituted. Meanwhile, this deadlock and the order passed by the new bench in Tantia Constructions has become a ground for a stay on arbitral awards where the appointment of the arbitrators has been unilateral via a panel controlled by one of the parties. The correctness of the Central Railways Judgment is being debated in the matter of JWS Steel Ltd as well. Thus there remains the hope of reversion back to the principle of a broad-based panel as per the Voestalpine Schienen case so as to promote utmost fairness, impartiality, and neutrality in the appointment procedure of arbitrators.

Conclusion

The Arbitration space in India is growing rapidly, and has succeeded in providing objectivity in terms of appointment of arbitrators, but the battle is only half won by now. The lack of a uniform approach in dealing with unilateral appointments is apparent, and there is a pressing need to tie up all loose ends. It is imperative to foster transparency, and parties should rethink unilateral appointment clauses in their arbitration agreements. The judicial solution of broad-based panels is

[222] *M/S Glock Asia-Pacific Limited v Union of India* 2023 SCC ONLINE SC 644.
[223] *Union of India v Tantia Constructions* SLP No. 12670/2020.
[224] *JWS Steel Limited v Southern Railways* SLP No. 9462/2022.

a welcome reform and upholds the principles of natural justice, from which the mechanism of arbitration derives its legitimacy. Another solution to address the woes in the appointment procedures is a systemic and long term fix, which is fostering the growth of institutionalized arbitration in India, having a robust framework to take care of the rapidly growing number of commercial disputes in India.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

THE UNSTAMPED ARBITRATION AGREEMENT PEREGRINATION: A RIDDLE RESOLVED

AUTHOR(S)

Mansi Verma
IV Year, Student at Gujarat National Law University

Aarush Sajit Kumar
III Year, Student at Gujarat National Law University

Background

The enforceability of arbitration agreements contained within unregistered and unstamped instruments remained a contentious and unresolved area of Indian Arbitration law until very recently when the courts gave a resolute verdict on the enforceability of such contracts in its *Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* Judgement[225] ["**NN Global 3**]. Conflicting legal precedents and a complex interplay of statutory regulations created considerable ambiguity for those seeking to utilize the alternate dispute resolution mechanisms. Several High Courts and even Supreme Court pronouncements in the past failed to lay down a conclusive position as to the enforceability of arbitration clauses contained within instruments subject to mandatory stamping under the Indian Stamp Act, 1899.[226] ["**Stamp Act**"] At the heart of this conundrum lied section 35 of the Stamp Act which declared that instruments which are unstamped or insufficiently stamped are inadmissible as evidence and unenforceable in Court.[227] Such a verdict created a conundrum which underwent a meandering journey of conflicting verdicts before finding resolution in the NN Global 3 judgement.

[225] *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act,* 2023 SCC OnLine SC 1666.
[226] Indian Stamp Act 1899
[227] Indian Stamp Act 1899, s 35.

SMS Tea Estates: The Pre Amendment Implications of an Unregistered Instrument

SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Co. Pvt. Ltd.[228] ["**SMS Tea Estates**"] was one of the first cases wherein the Supreme Court dealt with the issue of an arbitration agreement included in an unregistered contract. This case marked the starting point of the conflict wherein a Division Bench of the Supreme Court addressed the enforceability of an arbitration clause contained within an unregistered instrument. Examining Section 35 of the Stamp Act, the court opined that such a clause could potentially remain valid and enforceable even if the document embodying it was not registered, despite being mandatorily registrable under the law. However, the unregistered document, including the arbitration clause, could not be admitted as evidence in court until the deficiency of unpaid stamp duty is cured and penalty paid under Section 35.

Post 2015 Amendment: Scope and applicability of SMS Tea Estates

In pursuance of the 246th Report of the Law Commission of India,[229] the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] was amended in 2015. The amendment sought to align India's arbitration framework with contemporary international best practices. This resulted in the inclusion of section 11(6A) in the Act, which specifies that the Court's assessment of the arbitration agreement during the appointment phase should solely focus on verifying the "existence" of such an agreement. **This amendment raised several questions on the authority of the court to adjudicate on the "validity" of unstamped agreement at the Section 9 stage**.[230] The limited scope of the newly inserted provision implied that disputes, regardless of the stamping or registration status, had to be referred to arbitration, allowing the tribunal to determine the agreement's validity.

In the case of *Gautam Landscapes Pvt. Ltd. v. Shailesh S. Shah*[231]["**Gautam Landscapes**"], the Bombay High Court, sitting in a full bench, *inter alia,* examined the question of whether courts can grant relief under Section 9 of the Arbitration Act when the original arbitration agreement is found in a document that lacks proper stamping or has insufficient stamping. The Bench distinguished between the court's authority and scope of inquiry under Section 9 applications compared to those under Section 11 applications. The Bench referred to the Supreme Court's decision in *Firm Ashok Traders v. Gurumukh Das Saluja*,[232] ["**Firm Ashok Traders**"] emphasizing that the scope of inquiry

[228] *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66.
[229] 246th Law Commission Report of India, Amendments to the Arbitration and Conciliation Act 1996, (246th, 2014)
[230] Arbitration and Conciliation Act 1996, s 9.
[231] *Gautam Landscapes Pvt. Ltd. v Shailesh S. Shah* 2019 SCC OnLine Bom 563.
[232] *Firm Ashok Traders v. Gurumukh Das Saluja* (2004) 3 SCC 155.

in a Section 9 application is constrained to verifying the existence of the arbitration agreement. The doctrine of severability, as enshrined in Sections 7(2) and 16(1)(a) of the Act,[233] was reaffirmed. It highlighted that Section 9 pertains to interim or ad interim reliefs to protect the eventual award. It stated that technical objections based on insufficient stamp duty should not hinder the grant of necessary relief through a Section 9 application.

A swift shift in precedent: Garware Wall Ropes

In *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd,*[234] ["**Garware Wall Ropes**"] the Supreme Court promptly overturned the verdict in Gautam Landscapes within a span of one week. This judgment, delivered by a division bench, reaffirmed the Court's prior stance in SMS Tea Estates, rejecting the contention that an arbitration clause contained within an agreement can be treated as an independent entity, separate from the broader agreement itself. On a thorough reading of the statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2016, the Court held that the introduction of Section 11(6A) did not bear upon or supersede the reasoning established in SMS Tea Estates in any manner. The Court observed the Stamp Act, the Arbitration Act, and the Contract Act when read harmoniously, dictate that an unstamped agreement, including its embedded arbitration clause, cannot be said to form a valid agreement or a contract. In *Vidya Drolia v. Durga Trading Corporation,*[235]["**Vidya Drolia**"] a three-judge bench of the Apex Court reiterated the decision in *Garware Wall Ropes* and held that existence and validity are inextricably linked. Consequently, an agreement is deemed to be non-existent if it is either illegal or fails to fulfil the mandatory prerequisites for enforceability, such as the appropriate payment of stamp duty.

The conflicting judgements in the aforementioned cases created significant challenges for parties seeking to rely on arbitration agreements within unstamped contracts. It was unclear whether courts would uphold such agreements and refer disputes to arbitration, or deem them inadmissible and unenforceable.

The NN Global Peregrination

The conundrum regarding the interplay of Indian Stamp Act and the Arbitration finally sought resolution in the *Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration*

[233] Arbitration and Conciliation Act 1996, ss 7(2) & 16(1)(a).
[234] *Garware Wall Ropes Ltd. v Coastal Marine Constructions & Engg. Ltd.* (2019) 9 SCC 209.
[235] *Vidya Drolia v Durga Trading Corporation* (2021) 2 SCC 1.

and Conciliation Act 1996 and the Indian Stamp Act 1899.[236] A three judge bench of Supreme Court under *NN Global v. Indo Unique Flame*[237] ["**NN Global 1**"] held that the arbitration agreement included in an unstamped contract can be enforced as the arbitration agreement is separate from the main contract and it is valid and enforceable even when the underlying contract is declared invalid, unenforceable or non-existent. The bench came to such a conclusion based on Section 11(6A)[238] of the Arbitration Act, which stipulates that the court shall confine their examination under Section 11[239] to the existence of the arbitration agreement alone. Additionally, the court opined that it is a curable defect. However, in light of the contrary position taken in Vidya Drolia and Garware Wall Ropes, the bench in NN Global 1 referred the matter to a constitution bench ["**NN Global 2**"].

Thereafter, the constitution bench while upholding the separability presumption, refused to apply the doctrine in the context of Sections 33 and 35 Stamp Act.[240] The court noted that agreements lacking proper stamping or with insufficient stamping are not enforceable under the Stamp Act. These agreements only gain legal validity after undergoing the validation process specified in the statute. By a narrow 3:2 majority, the court held that the arbitration clause, being distinct from the main contract, cannot be utilized if the document is unstamped, as it would constitute a separate transaction.

In the background of this judgement, the matter was referred to a 7-judge bench to determine the validity of an arbitration agreement included in an unstamped contract or an unstamped arbitration agreement. The Supreme Court, while examining the interplay between Indian Stamp Act and the Arbitration Act held that unstamped agreements despite being inadmissible under the Stamp Act are not void or unenforceable. Non-stamping of an arbitration agreement is a curable defect and that the courts shall merely examine as to whether the Arbitration agreement prima facie exists or not.

The Main Iterations of NN Global 3: An Analysis of the Verdict on Enforceability

The main commercial contract in NN Global case did not pass muster under Chapter IV of the Indian Stamp Act, particularly Section 33 and 35.[241]

---

[236] *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act,* 2023 SCC OnLine SC 1666.
[237] *NN Global Mercantile Pvt. Ltd. v Indo Unique Flame (2021) 4 SCC 379.*
[238] The Arbitration and Conciliation 1996, s. 11(6A).
[239] The Arbitration and Conciliation 1996, s. 11(6).
[240] Indian Stamp Act 1899, S. 35.
[241] Indian Stamp Act 1899, S. 35.

Lex Specialis to prevail over Lex Generalis: Under the general rule of Interpretation of Statutes, when two laws are in conflict with each other and harmonious construction of the two legislations is not possible, then the special legislation shall prevail over the general law.[242] In the present case, the Arbitration Act is the lex specialis whereas the Stamp act and the Indian Contract Law are the general legislations with respect to the law governing arbitration agreements. The Bench identified an incongruity between the provisions of the Stamp Act and the well-established principle of party autonomy enshrined within the Arbitration Act. Consequently, the court held that the provisions of the Arbitration Act shall prevail since it is the lex specialis legislation dealing with the subject matter at hand with respect to the contracting parties' freedom to enter into dispute resolution through mutually agreed-upon arbitration agreements.[243]

Doctrine of Competence-Competence: The ruling expands the Kompetenz-Kompetenz principle, granting arbitral tribunals the authority to rule on matters arising from improperly stamped arbitration agreements. This expansion is enabled through a broad interpretation of Sections 33 and 35 of the Stamp Act,[244] acknowledging that the arbitral tribunal, deriving its jurisdiction from the "consent of parties," possesses the competence to handle and settle disputes arising from such agreements.

Doctrine of Severability: The doctrine of Severability permits the "Arbitration Clause" to stand independently from rest of the contract and its clauses. This principle, rooted in Article 16(1)[245] of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and included under Section 16 of the Arbitration Act,[246] is further upheld by numerous decisions of the Supreme Court. These decisions affirm that the invalidity of a contract or any of its clauses does not impair the separate existence of an autonomous arbitration clause. This doctrine was upheld by the 3-judge bench of NN Global 1.

It is crucial to grasp that Section 34[247] of the Arbitration Act effectively incorporates the 'Doctrine of Severability' as outlined in the proviso to Section 34(2)(a)(iv).[248] This proviso grants the court the authority to nullify solely those segments of the arbitral award that were not subjected to arbitration, given they can be distinctly separated from the rest of the award. Hence, if such separation isn't feasible, the court retains the discretion to invalidate the entire arbitral award. In

---

[242] G.P. Singh, *Principles of Statutory Interpretation,* (15th edn, Lexis Nexis 2021).
[243] *Re: Supreme Court Reference on Interplay between Arbitration agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act,* 2023 SCC OnLine SC 1666.
[244] Indian Stamp Act 1899, S. 33.
[245] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 16(1).
[246] The Arbitration and Conciliation Act 1996, s. 16.
[247] The Arbitration and Conciliation Act 1996, s. 34.
[248] The Arbitration and Conciliation Act 1996, s. 34(2)(a)(iv).

the NN Global 3 judgement, the doctrine of severability was upheld and relied upon to conclude that the arbitration agreement is separately and differently situated from the main unstamped agreement.

The NN Global 2 judgement lacked clarity regarding the protocol for addressing urgent requests for interim relief or emergency awards in cases where there are concerns about the sufficiency of stamp duty. As per the NN Global 2 ruling, it seemed that parties must initially resolve the stamping matter before pursuing such requests. One of the impending challenges posed by such an arrangement is that despite the interim relief being granted to one of the parties in the interest of justice, if it subsequently emerges that the arbitration agreement lacked proper stamping, it could nullify the entire agreement. NN Global 3 rectified the possibility of such an outcome by upholding party autonomy.

One significant outcome of NN Global 3 is that objections concerning stamping will not obstruct the courts from exercising their authority under Section 8,[249] and Section 11[250] of the Arbitration Act since the courts will merely refer the parties to arbitration and seek the appoint of an arbitrator without requiring to address the question of whether the arbitration agreement or the underlying contract is sufficiently stamped or not. This promotes a more efficient and hands-off judicial approach, aligning with the legislative intent of Section 5 of the Arbitration Act. Moreover, by discouraging courts from prematurely adjudicating stamp duty matters, the Supreme Court has underscored the significance of the competence-competence principle as embodied in Section 16 of the Arbitration Act.

Additionally, the ruling, in tackling the contentious stance seen in NN Global 2, broadens the application of the kompetenz-kompetenz principle, strengthening the jurisdiction of arbitral tribunals. This development is consistent with legislative objectives, aiming to minimize judicial interference and promote swift resolution and commencement of proceedings. Such harmonization with the legal frameworks of the UK and the US signifies a convergence in interpretation. The verdict highlights a deliberate endeavour to streamline legal procedures in India, bringing them in line with established international norms and practices.

Conclusion

The ruling notably improves the arbitration landscape in the nation, representing a notable advancement toward India's ambitions of becoming a prominent centre for international

[249] The Arbitration and Conciliation Act 1996, s. 8.
[250] The Arbitration and Conciliation Act 1996, s. 11.

arbitration. Nevertheless, various challenges may emerge following the judgment, requiring thorough deliberation and analysis. These potential issues encompass the potential deceleration of arbitral processes as tribunals confront stamp duty-related conflicts. Improper stamping of arbitration agreements could also be exploited as a strategic delaying tactic by parties with ulterior motives. An effective remedy involves advocating for a disciplined and universally recognized practice of separately fulfilling stamp duty obligations prior to initiating arbitration proceedings.

MONTHLY ROUND-UP (SEP 2023 – JAN 2024)

SEPTEMBER

1. **"Not all arbitrators may have legal training; some decisions rely on equity," the Supreme Court on the extent of judicial intervention in arbitral awards.**

   The Supreme Court, in *Batliboi Environmental Engineers Ltd. v Hindustan Petroleum Corp. Ltd. and Anr.*,[251] ruled that when an arbitral award under Section 28(3)[252] of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] has to be declared void, the arbitrator has the authority to reasonably interpret contract terms. As the final decision on the construction of contract terms lies with the arbitrator, such interpretation cannot be a reason to annul the award. The Bench also observed that an arbitral tribunal is the ultimate master of quality and quantity of evidence. An award cannot be regarded invalid merely for being passed on little or no evidence or on the grounds that the arbitrator is not trained in law. In cases where the decisions are made on equity, being just and fair, such decisions cannot be set aside, alleging arbitrariness.

2. **Security offered by a party for a stay of arbitral award must be 'clean, unblemished with good exchange value'.**

   The Calcutta High Court, in *Sarat Chatterjee and Co. (VSP) Private Ltd. v Sri Munisubrata Agri International Ltd.*[253] emphasised that the security provided by an award-debtor for the stay of an arbitral award must have genuine currency value and should not be based on a speculative or uncertain value, even if there is an earlier division-bench judgment securing goods for the award amount. The Court rejected the argument of using unsold goods as security, expressing concern about the proposed security and emphasising the need for actual currency value.

3. **In the presence of conflicting arbitration clauses in two connected agreements, priority should be given to the clause in the main agreement.**

---

[251] *Batliboi Environmental Engineers Ltd. v Hindustan Petroleum Corp. Ltd. and Anr.* [2023] SCC OnLine SC 1208.
[252] Arbitration and Conciliation Act 1996, s 28(3).
[253] *Sarat Chatterjee & Co. (VSP) (P) Ltd. v Sri Munisubrata Agri International Ltd.* [2023] SCC OnLine Cal 2548.

The Delhi High Court, in *Amit Guglani v L&T Housing Finance Ltd.*[254] ruled that priority should be given to the clause in the primary or umbrella agreement in the presence of conflicting arbitration clauses in two interconnected agreements. The Court stated that when disputes arise under two connected agreements with different arbitration clauses, the dispute's resolution and determination of arbitration seat should be according to the clause set out in the primary agreement.

4. Section 42 bars multiple court petitions; only the first court can examine fraud or collusion allegations.

The Delhi High Court, in *Liberty Footwear Co. v Liberty Shoes Ltd.*[255] clarified that under Section 42[256] of the Arbitration Act, a petition under Section 9[257] will be barred if it is filed in a court other than where the initial application was made. Section 42 grants exclusive jurisdiction to the first court in arbitration cases. Only the first court can address petitions alleging fraud, collusion, or malafide. If the court determines that the proceedings were tainted by fraud or there exists a lack of jurisdiction, Section 42 would not apply.

5. No award of agreed liquidated damages without proof of actual loss.

The Delhi High Court, in *Vivek Khanna v OYO Apartments Investment*, clarified that the agreed sum for liquidated damages does not eliminate the need for the claiming party to prove actual loss. The Court emphasised that such a sum is not a penalty but a pre-estimate of potential loss in case of a contract breach. Liquidated damages are not payable if no actual loss is suffered, and the quantification of loss does not require substantiation if the parties agree upon a pre-estimated sum.

6. Once the party unconditionally accepts, the arbitrator's determined fees are not subject to challenge.

The Madras High Court, in *EDAC Engineering v Industrial Fans (India) Pvt. Ltd.*[258] ruled that if a party unconditionally agrees to the fees set by the arbitral tribunal during the arbitration process, it is barred from subsequently disputing the tribunal's fees through a petition under Section 39(2)[259] of the Arbitration Act.

---

[254] *Amit Guglani v L & T Housing Finance Ltd.* [2023] SCC OnLine Del 5206.
[255] *Liberty Footwear Co. v Liberty Shoes Ltd.* [2023] SCC OnLine Del 5125.
[256] Arbitration and Conciliation Act 1996, s 42.
[257] Arbitration and Conciliation Act 1996, s 9.
[258] *EDAC Engineering v Industrial Fans (India) Pvt. Ltd.* [2023] SCC OnLine Mad 6010.
[259] Arbitration and Conciliation Act 1996, s 39(2).

7. The place designated for arbitration does not transform into the arbitration seat if exclusive jurisdiction is granted to courts in a different location.

The Rajasthan High Court, in *Aseem Watts v Union of India*[260] held that when exclusive jurisdiction is vested in the court of a different location, designating a place as the venue of arbitration does not automatically make it the seat of arbitration. The Bench also emphasised that if a place is labelled as a 'venue' and exclusive jurisdiction is granted to the courts of another location, it serves as a clear indication to the contrary, preventing the designated place from becoming the seat of arbitration.

8. Party eligible for interim protection under Section 9(1) of the Arbitration Act, regressive to relegate to CPC procedure.

The Calcutta High Court in *Prathyusha-AMR JV v Orissa Steel Expressway (P) Ltd.,*[261] approved applications for the appointment of an arbitrator under Section 11[262] and for interim protection under Section 9(1)[263] of the Arbitration Act. The Court emphasised that a turning point in negotiations may revive the limitation period, sustaining a live claim. In granting interim protection, the Court highlighted the need for timely and effective relief, distinguishing Section 9(1) from Order 38 Rule 5 of the Code of Civil Procedure, 1908. The Court allowed the appointment of an arbitrator based on ongoing communication, insolvency proceedings, and admitted claims.

9. Calcutta High Court clarifies limits and timelines of arbitral tribunal mandate under the Arbitration Act.

The Calcutta High Court in *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.*[264] ruled that as per Section 29A[265] of the Arbitration Act, the authority of an arbitral tribunal concludes unless prolonged within its specified tenure. It stressed the obligatory nature of adhering to statutory timelines for issuing awards, asserting that any continuation beyond these deadlines constitutes a jurisdictional error, given the legal termination of the mandate without provisions for renewal. The Court further clarified that any plea for an extension

[260] *Aseem Watts v Union of India* [2023] SCC OnLine Raj 1462.
[261] *Prathyusha-AMR JV v Orissa Steel Expressway (P) Ltd.* [2023] SCC OnLine Cal 3107.
[262] Arbitration and Conciliation Act 1996, s 11.
[263] Arbitration and Conciliation Act 1996, s 9(1).
[264] *Rohan Builders (India) Pvt. Ltd. v Berger Paints India Ltd.* [2023] SCC OnLine Cal 2645.
[265] Arbitration and Conciliation Act 1996, s 29A.

under Section 29(4)[266] must be presented while the mandate is still in effect rather than subsequently.

10. The severability doctrine applies to arbitral awards if the rest of the parts can survive independently.

The Allahabad High Court, in *Hindustan Steelworks Construction Ltd. v New Okhla Industrial Development Authority*[267] upheld the application of the severability doctrine in arbitral awards, permitting the isolation of independent and unaffected segments. The Court specified that there are no limitations imposed by the Arbitration Act on the Court's authority to invoke severability under Section 34[268] It emphasised that the Court can set aside a portion of the award while maintaining the rest, provided it does not alter the tribunal's findings on any issues.

[266] Arbitration and Conciliation Act 1996, s 29(4).
[267] *Hindustan Steelworks Construction Ltd. v New Okhla Industrial Development Authority* [2023] SCC OnLine All 2146.
[268] Arbitration and Conciliation Act 1996, s 34.

1. An award claiming loss of anticipated profits devoid of significant evidence is in conflict with "public policy of India" holds Supreme Court.

In *M/S Unibros v. All India Radio,*[269] a claim of damages granted by an arbitral award for "*loss of profit*" cannot be held valid if it is against "*public policy of India*." The interpretation of '*public policy*' was done in context of the existing pronouncements by the Apex Court to compare with the spirit of the legislations, fundamental policy of law, approach of the judiciary, natural justice and apparent illegality. It was held that substantial evidence awarding claims for loss of profit is essential for the pronouncement of such an award.

2. Supreme Court adjudicated upon the eligibility of an arbitrator for unfairly revising fee and termination of their mandate on grounds not prescribed in the Schedule.

Taking note of the importance of the Schedule V and VII determining the grounds for termination of the arbitration process in the Arbitration Act,[270] the Apex Court in *Chennai Metro Rail Ltd. v. M/s Transtonnelstroy JV*[271] held that ineligibility must be "*going to the root of the jurisdiction, divesting the authority of the tribunal, thus terminating the mandate of the arbitrator*". The claim by the appellants on the unenumerated basis for termination of the arbitration procedure was denied.

3. Bar under Section 42 of Arbitration Act not applicable on the execution of an award holds Allahabad High Court

The Allahabad High Court in *Madhyanchal Vidyut Vitran Nigam Ltd v. Shashi Cable*[272] determined the non-applicability of Section 42. The section prohibits the filing of a petition in a different court when another petition has already been filed in relation to the arbitration agreement. It held that Section 42 does not prohibit the petition for claiming enforcement of the award by relying on the judgments in *Sundaram Finance*[273] and *Cheran Properties.*[274] The requirement to obtain a transfer of the decree/award from the Court would not be applicable in the scenario.

[269] *M/S Unibros v. All India Radio* [2023] INSC 931
[270] Arbitration and Conciliation Act 1996
[271] *Chennai Metro Rail Ltd. v. Transtonnelstroy Afcons JV* [2023] SCC OnLine SC 1370
[272] *Madhyanchal Vidyut Vitran Nigam Ltd v. Shashi Cable,* [2023]: AHC-LKO:66805
[273] *Sundaram Finance v. Abdul Samad,* [2018] 3 SCC 622
[274] *Cheran Properties ltd. v. Kasturi,* [2018] 16 SCC 413

4. **The Calcutta High Court held that the whole contract would be deemed to be duly stamped if the correspondence of the Contract contains letter with requisite stamp.**

The Calcutta High Court in *Power Mech Projects Limited v. BHEL*[275] held that a letter with the necessary stamp, if included in the correspondence forming part of the contract, would have the deeming effect of making the whole contract as being duly stamped. The Court laid down that proviso (c) to Section 35 removes the statutory obligation of stamping each and every letter or document included in the correspondence for a party, wherein proper stamping for either one of the letters has been done.

5. **Non-inclusion of arbitration clause within the main agreement is not significant in case another agreement containing arbitration clause is specifically incorporated.**

The Calcutta High Court in *Power Mech Projects Limited v. BHEL*[276] held that the non-inclusion of a clause for arbitration in the main agreement is inconsequential if it includes specifically another agreement providing an arbitration clause. Section 7(5) of the Arbitration Act provides for the arbitration agreement's incorporation by reference, and where the earlier agreements containing arbitration clauses are incorporated, the application of the said section becomes inevitable.

6. **Delhi High Court states that Settled claims under a resolution plan cannot be the subject of arbitration and reference to such claims would amount to reopening the resolution plan itself**

The Delhi High Court in the case of *IOCL v. Arcelor Mittal Nippon Steel India Limited*[277] pronounced that the approval of a resolution plan by the Committee of Creditors ["**CoC**"] and by the adjudicating authority would extinguish all prevailing claims by any of the parties against the corporate debtor, and no fresh challenges concerning any claim as part of the resolution plan can take place.

7. **Delhi High Court concludes that order to secure disputed sum under Section 9 without proper pleadings cannot be passed**

The High Court of Delhi in *Dr. Vivek Jain v. PrepLadder Pvt. Ltd.*[278] held that the petitioner must broadly satisfy the conditions under Order XXXVIII of the Code of Civil Procedure

[275] *Power Mech Projects Ltd. v. BHEL* AP 444 of 2023
[276] ibid.
[277] *IOCL v. Arcelor Mittal Nippon Steel India Limited* [2023] SCC OnLine Del 6318
[278] *Dr. Vivek Jain v. PrepLadder Pvt. Ltd.* [2023] SCC OnLine Del 6370.

before the relief under Section 9 of the Arbitration Act can be passed. This relief can be sought only if it is shown that the defendant is trying to dispose of a part/whole of the property with the intention to obstruct the execution of decree passed against them.

8. When agreement confers exclusive jurisdiction on a Court in a different place, can the place of arbitration amount to seat? asks Gujarat High Court

In *InstaKart Services v. Megastone Logiparks*[279] the Gujarat High Court ruled that in the presence of conflicting exclusive jurisdiction clause, the place of arbitration only refers to the seat and cannot be synonymously used as the seat of arbitration. The bench led by Justice Sunita Agarwal concluded that the place where arbitration is held would be the venue of arbitration, even if an exclusive jurisdiction clause confers jurisdiction on the court in a different place.

[279] *InstaKart Services v. Megastone Logiparks* R/Petn u/ Arbitration Act No. 159 of 2022.

1. Court adjudicating the arbitral award under Section 34 of the Act has the power to recalculate compensation awarded under NHAI Act, 1956.

Justice Jaspreet Singh of the Allahabad High Court, while deciding an appeal in *Chandra Kishori v. Union of India Thru. Chairman Of National Highway Authority Of India And 2 Others*[280] under Section 37 of the Arbitration and Conciliation Act, 1996[281] decided that a court adjudicating an arbitral award under Section 34[282] can recalculate the compensation awarded under the National Highway Authority of India Act, 1956.

He laid down that the court can do so if the calculation is patently illegal or if the award is against the public policy of India.

2. Despite N N Global Judgement, Court can still grant interim relief under Section 9 for insufficiency of stamp duty.

A single judge bench consisting of Justice Bharati Dangre, in *L&T Finance Limited v. Diamond Projects Limited,*[283] held that the judgement of the Constitutional Bench of the Supreme Court of India in the N N Global Case[284] does not have any effect on the power of the court to grant interim relief.

The court reasoned that under Section 9,[285] the court is not required to determine the validity of the arbitration agreement unlike under Section 8 or 11. The bench also opined that the court has to follow the three-fold test to determine the granting of interim relief i.e., (a) prima facie case (b) balance of convenience and (c) irreparable injury. The Court held that an inadequately/insufficiently stamped instrument/document/agreement shall not preclude the party from seeking interim measures as contemplated under Section 9 of the A&C Act.

3. Mandatory Injunction can be granted at interim stage under Section 9 of the Act when a builder commits multiple breaches

[280] *Chandra Kishori v. Union of India Thru. Chairman Of National Highway Authority Of India And 2 Others* Appeal under Section 37 of Arbitration and Conciliation Act 1996 No. 55 of 2022.
[281] Arbitration and Conciliation Act 1996, s 37.
[282] Arbitration and Conciliation Act 1996, s 34.
[283] *L&T Finance Limited v. Diamond Projects Limited* 2023 BHC 13473.
[284] *N.N. Global Mercantile Pvt. Ltd. v Indo Unique Flame Ltd.* (2021) 4 SCC 379.
[285] Arbitration and Conciliation Act 1996, s 9.

A Bombay High Court bench of Justice Manish Pitale, in *Swashray Co-op. Housing Society Ltd v. Shanti Enterprises,*[286] opined that a court exercising powers under Section 9[287] can grant a mandatory injunction at the interim stage when the builder has committed multiple breaches leading to a loss of confidence of the cooperative society in the builder.

The bench also opined that mandatory relief cannot be granted in every case but the Court would ought to grant it in cases where withholding the remedy would be unjust and unconscionable.

4. An exclusive jurisdiction clause in one agreement overrides a generic jurisdiction clause in another agreement between the parties

The bench of Justice Shekhar Saraf of the Calcutta High Court, in *R.P. Infosystems Pvt Ltd v. Redington (India) Limited,*[288] held that when an arbitration agreement clause confers exclusive jurisdiction on the Court at a particular place or the seat of the arbitration is declared, it would mean that all the courts would not have the jurisdiction to entertain petitions arising out of the agreement.

The bench held that the moment such an exclusive jurisdiction clause is included, it overrides other generic jurisdictions contained in any other agreement between the parties.

5. Arbitration would be considered an alternative remedy making writ petitions non maintainable for disputed questions of facts

The Calcutta High Court bench consisting of Justice Sabyasachi Bhattacharya in the case of *ILEAD Foundation v. State of West Bengal,*[289] held that when a petition involves disputed questions of facts requiring detailed assessment.

The bench further elaborated that the availability of alternative remedies does not always bar writ petitions. However, it would be beyond the domain of a High Court in writ jurisdiction to conduct a detailed assessment of material facts and evidence. Therefore, proper adjudication would require referring the dispute to arbitration.

6. When terms and conditions of invoice are accepted and acted upon, the arbitration clause included therein is binding.

---

[286] *Swashray Co-op. Housing Society Ltd v. Shanti Enterprises* 2023 BHC 13075.
[287] Arbitration and Conciliation Act 1996, s 9.
[288] *R.P. Infosystems Pvt Ltd v. Redington (India) Limited* AP/626/2018.
[289] *ILEAD Foundation v. State of West Bengal* WPA/25102/2022.

A bench consisting of Justice Shekhar B Saraf, opined in the case of *R.P. Infosystems Pvt Ltd v. Redington (India) Limited,*[290] that the arbitration clause contained in a tax invoice would be considered valid if the invoice is accepted and acted upon.

The bench further elaborated that when a party accepts an invoice which includes within it a clear arbitration clause and then acts upon the invoice, the party cannot later refute the existence of such arbitration clause. The bench also laid down that arbitration clauses have no particular shape or form. The only requirement that exists is that the intent of the parties to arbitrate should be clear.

[290] *R.P. Infosystems Pvt Ltd v. Redington (India) Limited* AP/626/2018.

1. Arbitration clauses in unstamped agreements are valid.

In *Re, Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*,[291] a seven-judge constitutional bench of the Supreme Court held that arbitration clauses in unstamped or inadequately stamped agreements are enforceable.

The Court held that non-compliance with stamp duty requirements constitutes a curable defect, rendering the agreement valid but temporarily inadmissible as evidence in Court proceedings. Notably, the Court emphasized that disputes concerning the adequacy of stamp duty do not fall within the purview of sections 8 or 11 of the Arbitration Act,[292] but rather constitute issues for determination by the arbitral Tribunal itself. This approach stands in stark contrast to the Court's prior pronouncements in *N.N. Global Mercantile Pvt. Ltd. v M/s. Indo Unique Flame Ltd.*[293] *And Ors* and *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Co. Pvt. Ltd* [294] wherein the Court held that an unstamped or insufficiently stamped document could not be enforced as per section 35 of the Indian Stamp Act, 1899.[295]

2. Supreme Court upholds the applicability of 'Group of Companies' in Indian Arbitration jurisprudence.

The Supreme Court in *Cox and Kings Ltd v. SAP India Pvt Ltd.*[296] held that the 'Group of Companies' doctrine through which an arbitration agreement can bind non-signatories will be valid in Indian arbitration proceedings.

The Court held that the approach in *Chloro Controls India Private Limited v. Severn Trent Water Purification*[297] to the extent that it traces the 'group of companies' doctrine to the phrase 'claiming through or under' as given under Section 8 of the Arbitration Act[298] was erroneous and against the well settled principles of contract in commercial law. The Constitution Bench emphasized the necessity of maintaining the 'group of companies' doctrine within Indian arbitration jurisprudence, highlighting its significance in deciphering the parties' intentions, especially in intricate transactions involving multiple entities and agreements. The Court

[291] *Re, Interplay Between Arbitration Agreements Under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899* Curative Petition (C) No. 44 of 2023.
[292] Arbitration and Conciliation Act 1996, ss 8 and 11.
[293] *N.N. Global Mercantile Pvt. Ltd. v Indo Unique Flame Ltd.* (2021) 4 SCC 379.
[294] *SMS Tea Estates Pvt. Ltd. v Chandmari Tea Co. Pvt. Ltd.* (2011) 14 SCC 66.
[295] Indian Stamp Act 1899, s 35
[296] *Cox and Kings Ltd v SAP India Pvt Ltd* 2023 SCC OnLine SC 1634.
[297] *Chloro Controls India Private Limited v Severn Trent Water Purification* (2013) 1 SCC 641.
[298] Arbitration and Conciliation Act 1996, s 8.

Highlighted that the written arbitration agreement does not mean that non-signatories will not be bound by it. Instead, it emphasized that a clear legal relationship between signatories and non-signatories, coupled with demonstrated intent through conduct, can establish the latter's obligation under the agreement.

3. Referral Court can examine whether arbitration agreement violates Article 14 while considering an application under Section 11(6).

In *Lombardi Engineering Ltd v. Uttarakhand Jal Vidyut Nigam Ltd*,[299] the Supreme Court held that while considering a petition filed under Section 11(6) of the Arbitration Act for appointment of an arbitrator under an arbitration agreement, the Court could test the validity of an arbitration clause against the anvil of arbitrariness enshrined under article 14 of the Constitution of India. The Supreme Court relied on the Grundnorm theory by Kelsen to hold that the Grundnorm in the context of an arbitration agreement would be:

i. Constitution of India, 1950;

ii. Arbitration Act and specifically Section 7 of Arbitration Act; and

iii. All other Central/State Laws.

Consequently, for an arbitration agreement to be valid, it must adhere to the aforementioned Grundnorm. Rejecting UVN's contentions based on 'party autonomy', the Supreme Court affirmed that contractual consent cannot override the imperative of upholding the rule of law. In light of the above, the Supreme Court constituted the arbitral Tribunal, dismissing UVNL's argument that Lombardi violated party autonomy by first agreeing to the pre-deposit clause and subsequently challenging its constitutionality.

4. Dispute arising from cancellation of deed is arbitrable as it is an act in personam.

The Supreme Court in *Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj*[300] allowed arbitration in a matter related to the cancellation of a Conveyance deed and registered Development Agreements. Notably, neither the Conveyance Deed nor the Development Agreements contained an arbitration clause. However, the defendant was allowed to invoke Section 8 of the Arbitration & Conciliation Act, relying on the expansive scope of the arbitration clause embedded in the Tripartite agreements that formed the foundation of these transactions.

---

[299] *Lombardi Engineering Ltd v Uttarakhand Jal Vidyut Nigam Ltd* 2023 SCC OnLine SC 1422.
[300] *Sushma Shivkumar Daga v Madhurkumar Ramkrishnaji Bajaj* Diary No.- 1164 – 2022.

The plaintiff contended that the cancellation of the conveyance deed constituted an action in rem. The Court, however, rejected this argument, emphasizing that seeking cancellation or asserting rights arising from a deed falls within the realm of actions in personam and is therefore amenable to arbitration. The Court also considered the allegation of fraud raised by the appellants, deeming it to be internal affairs of the parties - an act in personam. The Court clarified that if an allegation of fraud is strictly confined to the involved parties, it would not be categorized as a serious form of fraud and would not preclude arbitration.

5. Debt owed to financial institutions under the RDDB Act is not arbitrable.

In *Tata Motors Finance Solutions Ltd v. Naushad Khan,*[301] the Bombay High Court distinguished between debts covered solely by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ["**SARFAESI Act"**] and those falling within the ambit of both the SARFAESI Act and the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ["**RDDB Act"**]. The Court ruled that debts exclusively governed by the SARFAESI Act are amenable to arbitration. However, debts subject to both the SARFAESI Act and the RDDB Act are not arbitrable.

The Court observed that the RDDB Act provides a comprehensive framework for both debt determination and recovery, whereas the SARFAESI Act concentrates solely on enforcement mechanisms, lacking provisions for debt determination. Accordingly, the Court concluded that debts encompassed by the RDDB Act's purview are non-arbitrable due to the Act's exhaustive nature.

6. Service of a signed arbitral award upon a party's lawyer or agent, by itself, does not constitute valid delivery.

The Delhi High Court in *Ministry of Health & Family Welfare and Anr. v. M/s Hosmac Projects*[302] held that a copy of the signed arbitral award served only on the lawyer or agent of the party in the absence of delivery to the party himself does not constitute a valid delivery.

The Court directed that for a valid delivery of an Arbitral Award under Section 31(5) of the Arbitration and Conciliation Act, 1996 (Act), the service of the award must be specifically directed to the concerned party, not their agents or advocates. The Division Bench observed that, *"party as defined in Section 31(5) and Section 2(1)(h) of the Act can only mean the party themselves*

[301] *Tata Motors Finance Solutions Ltd v Naushad Khan* Commercial Arbitration Petition (L) No. 8654 of 2022.
[302] *Ministry of Health & Family Welfare and Anr. v M/s Hosmac Projects* FAO(OS) (COMM) 326/2019.

and not their agent, or their Advocate and to constitute proper compliance, only service on the party himself is required".

7. Arbitral Tribunal must record prima facie opinion regarding relevancy/admissibility of evidence before allowing application under section 27.

The Delhi High Court held that an application filed by the petitioner under section 27 of the Arbitration and Conciliation Act cannot be mechanically allowed by the Arbitral Tribunal and it is bound to scrutinise, at least on a prima facie level, that there is relevancy of the witness sought to be produced.

In *SAIL v. Uniper Global Commodities,*[303] The Court observed that although the Arbitral Tribunal is not bound by the rules of procedure under the Code of Civil Procedure and the Evidence Act, it must still exercise discretion in permitting the examination of witnesses under Section 27. The court emphasised that while the Tribunal is entitled to conduct proceedings in the manner it deems appropriate, it must consider the relevancy and materiality of the evidence sought to be produced before allowing the petitioner to approach the court.

8. Bombay High Court holds that dispute referred to arbitration by one partner in the absence of others is invalid.

The Bombay High Court in the case *of Shailesh Ranka and Ors v Windsor Machines*[304] Limited has held that the implied authority that the partner of a partnership firm has under s 19 of the Partnership Act does not extend to referring a dispute for arbitration in the absence of other partners. Such a reference without the consent of the remaining partners is invalid.

S 19 of the partnership act[305] deals with the implied authority of the partner to act as an agent of the firm. However, S 19(2)(a)[306] envisages an express bar on the implied authority to refer a dispute relating to the business of the firm for arbitration.

9. Delhi High Court holds that an arbitration panel consisting of merely 3 members is not broad based and therefore imbalanced.

[303] *SAIL v Uniper Global Commodities* 2023 SCC OnLine Del 7586.
[304] *Shailesh Ranka and Ors v Windsor Machines* Commercial Arbitration Application (L) No. 38198 of 2022
[305] The Partnership Act, s. 19.
[306] The Partnership Act, s. 19()2(a).

The Delhi High Court in the case of *Smaaash Leisure Ltd. v Ambience Commericla Developers Pvt Ltd.*[307], has held that a party cannot be compelled to choose an arbitrator from a panel of three arbitrators as it is not a broad-based panel. The arbitration panel must be diverse inclusive and fair so an to bolster the legitimacy of the proceedings.

Additionally, the court also reiterated that mere involvement in arbitration proceedings does not automatically imply a waiver of the application of Section 12(5) of the Arbitration and Conciliation Act[308]. Consequently, a party cannot be prevented from contesting the tribunal's jurisdiction solely based on their participation in the arbitration proceedings if the objection fundamentally questions the authority of the arbitrator and renders them ineligible.

10. The Delhi High Court holds that damages cannot be awarded for breach of a Memorandum of Understanding by an arbitration tribunal.

The Delhi High Court, in the case of *NEC Corporation India Private Limited v M/S Plus91 Security Solutions*[309], has held that an arbitral tribunal lacks the authority to grant damages for breach of a Memorandum of Understanding ["**MoU**"]. The court opined that an MoU constitutes a definitive intention to form a contract and nothing more and therefore damages cannot be awarded for the breach of an MoU. This verdict holds significant importance for MoUs that entail no financial implications and specifically exclude the monetary liability for breach of the same.

Signing of an MoU cannot translate to mean entering into an actual contract. The act is mere exploratory in nature and therefore the court said that damages cannot be awarded for breach of an agreement.

11. Telangana High Court holds that an arbitrator cannot pass an order for restoration of dealership in light of the legal bar under S. 14(1)(c) of Specific Relief Act.[310]

The Telangana High Court in the case *of Sri Venkatswara Service Station v IOCL*[311] that an arbitrator cannot order for restoration of dealership due to such a contract being specifically non enforceable in light of the legal bar envisaged under s. 14(1)(c) of the Specific Relief Act.[312]

---

[307] *Smaaash Leisure Ltd. v Ambience Commericla Developers Pvt Ltd.* OMP(COMM) 180/2022.
[308] The Arbitration and Conciliation Act, s. 12(5).
[309] *NEC Corporation India Private Limited v M/S Plus91 Security Solutions* OMP(COMM) 244 of 2023.
[310] Specific Relief Act, s. 14(1)(c).
[311] *Sri Venkatswara Service Station v IOCL* WP No. 12345 of 2011.
[312] Specific Relief Act, s. 14(1)(c).

In this case, the Indian Oil Corporation Limited terminated the dealership awarded by it in favour of Venkateshwar Service Station. Such termination was held to be illegal by the arbitral tribunal. However, an order for restoration of the dealership is outside the authority of an arbitral tribunal.

1. The forgery of an arbitral order is a serious offence.

In *Vipul Jain v State through Government of Delhi & Anr*,[313] the Delhi High Court held that forging an order of an Arbitrator is a serious offence which requires detailed investigation by the Police. The application for anticipatory bail was filed by the appellant in the FIR lodged against him alleging offences of cheating, forgery and criminal intimidation.[314]

The appellant was alleged to have produced before the Police a forged and fabricated order passed in an arbitration proceeding purportedly initiated by Kogta Finance Bank against the complainant in the matter of recovery of a car loan.

2. Malawian entity's PCA claim restrained by Delhi High Court due to breach in appointment of Arbitrator.

The High Court of Delhi granted an anti-arbitration injunction against the defendant with the effect to restrain continuance of arbitration proceedings before the Sole Arbitrator since such proceedings are not founded on the arbitration clause in the Agency Agreement between the parties.

The plaintiff in *Techfab International Pvt Ltd v Midima Holdings Ltd* [315] approached the High Court with the prayer to declare the orders passed by the Sole Arbitrator appointed by the Council for National and International Commercial Arbitration, Chennai as null and void. It had been stated that the appointment made by the Permanent Court of Arbitration, the Hague of an Arbitrator who holds arbitral proceedings in Kuala Lumpur is in violation to the arbitration agreement between the parties since the arbitration proceedings initiated by the defendant in the absence of mutual consent of parties with respect to the appointment.

3. Sections 34 and 37 of the Arbitration & Conciliation Act, 1996 cannot be utilised to modify arbitral awards.

The Supreme Court reiterated in the case of *S. V. Samudram v State of Karnataka* [316] that modification of arbitral award was not permissible when adjudicating petitions under Sections 34 and 37 of the Arbitration & Conciliation Act, 1996[317] since the arbitral award is

[313] *Vipul Jain v State through Government of Delhi & Anr.* [2024] DHC 256.
[314] Indian Penal Code 1860, ss 420, 467, 468, 471, 506 and 34.
[315] *Techfab International Pvt Ltd. v Midima Holdings Ltd.* 2024 SCC OnLine Del 699.
[316] *S. V. Samudram v State of Karnataka & Anr.* [2024] INSC 17.
[317] Arbitration and Conciliation Act 1996, ss 34 and 37.

unassailable on the grounds of public policy, thus limiting the extent of judicial interference with arbitral awards under Sections 34 and 37 of the Arbitration & Conciliation Act, 1996.

The Appellant had approached the Arbitrator in order to settle claims amounting to Rs. 18,06,439 with interest payable at 18% p.a. which had arisen as a result of delay in payments by the Public Works Department. However, on appeal by the State, the Civil Judge reduced the claim amount to Rs. 3,71,564 with interest payable at 9% p.a.

The question before the Court was as to "*whether the High Court was justified in confirming the order under Section 34 of the Arbitration & Conciliation Act passed by the Senior Civil Judge, Sirsi, whereby the award passed by the learned Arbitrator was modified and the amount awarded was reduced.*" The Supreme Court restored the award of the Arbitrator with a direction to the State of expeditiously pay the amount awarded through arbitration.

4. Arbitral Tribunal permitted to exceed contractual provisions to grant relief when contract illegally restricts remedies of aggrieved party.

The Delhi High Court in *MBL Infrastructures Ltd v Delhi Metro Rail Corporation*[318] held that monetary damages by way of unliquidated damages could be awarded by an Arbitral Tribunal as compensation in an instance wherein the agreement stipulates that extension of time would be the only remedy available when delay has been caused by the actions of the employer especially when the contract has been terminated by the employer already, thus rendering void the contractual remedy.

It had been held by the Arbitral Tribunal that the termination of contract and encashment of performance guarantees by the Delhi Metro Rail Corporation was both illegal and unjustified since the Respondent had breached the contract by delaying the project.

5. Under Article 226, Court cannot refer disputes to arbitration in the absence of arbitration agreement.

The Patna High Court held that it was beyond the ambit of a Court in the exercise of its powers under Article 226 of the Constitution to refer a dispute to arbitration in the absence of an agreement between the parties. The Court in *State of Bihar & Ors. v Bihar Rajya Bhumi Vikas Bank Samiti*[319] stated that "*the remedy of arbitration is the creature of a contract and the same*

[318] *MBL Infrastructures Ltd. v Delhi Metro Rail Corporation* [2023] DHC 9067.
[319] *State of Bihar & Ors. v Bihar Rajya Bhumi Vikas Bank Samiti* MA No. 238 of 2021 (Pat).

cannot be utilised in the absence of a written agreement between the parties as provided under Section 7 of the Arbitration & Conciliation Act."

The petitioner bank approached the Patna High Court in order to compel the State of the Bihar to pay outstanding dues of agricultural loans amounting to Rs. 570.79 crores along with its accrued income. The High Court directed the parties to appoint an Arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 to resolve the conflicting claims, and reserved liberty of the Appellant-State to challenge the jurisdiction of the tribunal on the ground of absence of agreement. Following an unsuccessful Special Leave Petition, the appointed Arbitrator directed the State to pay Rs. 493.7 crores along with an interest at 8% p.a. in case of delay in payment. On appeal to the High Court against the arbitral award passed, the award was set aside by holding that the Arbitrator did not have any jurisdiction to adjudicate the dispute between the parties.

6. Issues of Arbitrator's bias cannot be dealt under Section 29A of the Arbitration & Conciliation Act.

It has been held by the Delhi High Court in *Vivek Aggarwal & Anr. v Hemant Aggarwal & Ors.*[320] that issues regarding Arbitrator's bias while conducting arbitral proceedings between the parties cannot be determined by a Court under Section 29A of the Arbitration & Conciliation Act, 1996. Under Section 29A of the Act which deals with the time limit for arbitral award, scope of Court's power is restricted to the examination as to whether extension is to be granted.

The parties to the current dispute had provided for an arbitration clause in a Memorandum of Settlement in order address the settlement of disputes arising out of the agreement. Owing to pendency of appeals under Section 17 and the Covid-19 pandemic, the time stipulated for the completion of the arbitral proceedings expired following which the petitioner filed an application under Section 29A twice. In the present appeal, the Court, while extending the mandate of the Arbitrator by one year, held that *"the grievance of a party with the conduct of arbitral proceedings or any other substantive challenge cannot be decided by the Court under Section 29A."*

7. Aggregate value of claims and counter-claims under Section 34 of the Arbitration & Conciliation Act, 1996 does not include pendente lite value and future interest.

[320] *Vivek Aggarwal & Anr. v Hemant Aggarwal & Ors.* [2024] DHC 289.

Delhi High Court held that in the determination of pecuniary jurisdiction of the Court under Section 34 of the Arbitration and Conciliation Act, 1996, the value of pendente lite and future interest cannot be included in the aggregate value of the claims and counter-claims which form the basis so as to determine the Specified Value provided under Section 12 of the Commercial Courts Act, 2015.[321]

In *Simentech India Pvt Ltd v Bharat Heavy Electricals Ltd*,[322] it has been stated that under Section 12 (2) of the Commercial Courts Act, the computation of interest which is to be considered as a part of the arbitration claim can be considered only until the date of invocation of arbitration which is the definitive cut-off for calculating the aggregate value for establishing pecuniary jurisdiction of a Court.

8. Contravention of substantive law not a ground to challenge arbitral award under Section 34 of the Arbitration & Conciliation Act, 1996.

The Jharkhand High Court, while dismissing the appeal, has held that a mere contravention of substantive law by itself does not constitute a valid ground for setting aside an arbitral award subsequent to Arbitration & Conciliation Act's 2015 amendment. In line with previous Supreme Court judgements, the High Court in *Bharat Petroleum Corporation Ltd v Anant Kumar Singh*[323]observed that "*as per Section 34 (2A) as introduced vide 2015 amendment, a domestic arbitral award may also be set aside if the Court finds that it is vitiated by patent illegality appearing on the face of the award and it has been provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.*"

The appeal was in response to the ruling of the Arbitrator wherein it was held that though wrong information provided by the Respondent regarding the leasehold of the impugned Bharat Petroleum retail outlet, the Appellant should restore dealership to the Respondent since the given wrong information was not very serious and was made inadvertently.

9. Directors of company cannot be made parties to arbitration by applying Group of Companies doctrine.

In *Vingro Developers Pvt Ltd v Nitya Shree Developers Pvt Ltd,*[324] the High Court of Delhi held that doctrine of Group of Companies cannot be applied in order to make directors of a company parties to arbitral proceedings. Since the relationship between that of a company

[321] Commercial Courts Act 2015, s 12.
[322] *Simentech India Pvt Ltd. v Bharat Heavy Electricals Ltd.* [2024] DHC 254.
[323] *Bharat Petroleum Corporation Ltd. v Anant Kumar Singh & Anr.* Commercial Appeal No. 15 of 2020 (Jha).
[324] *Vingro Developers Pvt Ltd. v Nitya Shree Developers Pvt Ltd. & Ors.* ARB.P. 667/2023.

and its director is that between a principal and his agent as under Section 182 of the Contract Act,[325] the agent cannot be held to be personally responsible for the acts done on the principal's behalf under Section 230.[326]

The petition in the instant case under Section 11(6) of the Arbitration & Conciliation Act arose owing to the failure of the parties in appointing an Arbitrator to adjudicate the dispute regarding the development of residential township under the Builder Buyer Agreements between the parties. The Court held that in the absence of an express provision in the agreement to make the directors personally liable for any action as provided in Section 230 of the Contract Act, the directors of the Respondent company cannot be held to be personally liable. Hence, the dispute between the two developers would be adjudged without making the directors party to the arbitration.

10. Reduction of interest amounts to modification of original arbitration award.

The Allahabad High Court, in *Sushil Kumar Mishra v State of U.P,*[327] held that the Court under Section 34 of the Arbitration & Conciliation Act, 1996 does not have the power to modify an award though the Court has been empowered to sever parts of the award to set aside if the severance does not impact the remaining award as was held by the Supreme Court in *Larsen Air Conditioning and Refrigeration Company v Union of India.*[328]

The appeal is preferred against the District Judge's order by which the rate of interest awarded to the Appellant by the Arbitrator had been reduced from 14% to 6% p.a.

[325] Indian Contract Act 1872, s 182.
[326] Indian Contract Act 1872, s 230.
[327] *Sushil Kumar Mishra v State of U.P & Anr.* [2024] AHC 9904.
[328] *Larsen Air Conditioning and Refrigeration Company v Union of India & Ors.* 2023 SCC Online SC 982.

GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE II

IN CONVERSATION WITH PROF (DR.) PRABHASH RANJAN

Editor's Note: Mr. Prabhash Ranjan is an Associate Professor with the Faculty of Legal Studies at the South Asian University. He has also been serving as a Professor and Vice Dean at the Jindal Global Law School. He graduated from Delhi University in 2003 and pursued his LL.M at SOAS University, London. He holds a PhD in law from King's College, London. He is an International Fellow at the National Institute of Military Justice, Washington DC. He has been a Visiting Scholar at Brookings India and a Visiting Fellow at the Lauterpacht Centre for International Law, Cambridge University. He was also a member of the team that drafted the 260th report of the Law Commission of India on the 2015 draft Model Indian bilateral investment treaty.

Editorial Board (EB): Your involvement in international trade and investment law has showcased interdisciplinary dimensions by integrating fields like environmental law and intellectual property rights (IPR) law. From your experience, how interconnected do you find these areas, and what guidance would you offer to a student interested in exploring such interdisciplinary perspectives in research?

Prabhash Ranjan (PR): My research work is focussed on international trade and investment law. I have also tried to look at how they have interacted with other areas of law like intellectual property. I think that this is very useful as I often find students unable to build bridges between different subjects they study. Students studying an area like investment arbitration may think of it in silos, unconnected to any area, for instance, commercial arbitration. However, that is not the case. Likewise, International trade law is connected to international investment arbitration. Though the connection may not be very strong, you do have several investment related clauses in WTO and TRIPS agreements. In fact, recently, there is a quest to create an investment facilitation agreement in the WTO committee.

There has to be a connection that has to be drawn. I believe that the reason students are unable to draw such connections is because they have been taught to study the subjects in silos. For instance, when teachers teach trade law, they should be able to draw from economics,

international relations, among others. The students will see links being drawn and that would serve as an example for students to draw connections.

Let me give you an example- Let's say India issues a compulsory license on a medical patent and the company wants it challenged under expropriation. So, under this you have IPR, international trade and investment law in one umbrella. If all this is taught in one class, where linkages are drawn, the student will also be able to draw such linkages. My advice/guidance to students would be to not study subjects in silos. The onus is on the academics to draw such connections, and on the students to pick them up.

Being an academician myself, I understand the pressures of completing the syllabus. But, that cannot be a justification for a failure to demonstrate linkages. Academics can always give extra readings to students. Any student interested in them will definitely benefit from them.

For students, the best way would be to choose a topic and get 3 different perspectives through 3 different people. The experts would talk on the same topic but through a different lens. Students could explore the topics through dimensions different from law. For instance, trade law has economic dimensions. Students interested in trade law could read upon what economists have contributed to the topic, that is one way to go about it.

A student who wants to explore this should see if there's a dimension different from the specific law and find literature on it through data bases. You all have a legal methods course and should follow what is taught there. Identify the topic, find available sources and literature and identify interlinkages amongst streams.

EB: The WTO MC 13 took place recently, and in light of the failed negotiations at Abu Dhabi, how tenable is the affirmation of the Ministerial Declaration in terms of reviving the Dispute Settlement Body?

PR: The crisis at WTO is that the Appellate Body does not exist. It is largely the doing of one country. But that country happens to be the most influential player. The mandate is to have an effective and functional dispute settlement body by the end of 2024. This was reiterated in the Abu Dabhi Ministerial Declaration. To be honest, I do not see the appellate body coming back. As I tell my students, the appellate body is dead. The reason for this is that the US is moving towards "dejudicialization" of international trade relations. It does not want their regulatory conduct (which affects trade) to be scrutinized by any international body.

Interestingly, the WTO was created in a world when neoliberalism was on the high. At that point, it was established that there was only one, unchallenged hegemon, which had just defeated the USSR in the cold war. The belief was that this is how it would go on for a very long period of time. But this got disturbed by the rise of China. As a result, the US does not want its trade actions to be scrutinized. That is the reason the US does not want a functioning appellate body. Therefore, practically speaking, I do not see the dispute settlement body being revived.

EB: What are the alternatives?

PR: One distinct possibility is that there would be a multi-party interim arbitration arrangement ["**MPIA**"], as proposed by the EU, with 20-24 States having currently accepted it.

The other option, which I wrote about, in a paper co-authored by Ms. Anuradha RV (Partner at Clarus Law), is a diluted appellate body, A body without compulsory jurisdiction. Only countries who want to opt for the jurisdiction would be subject to it. Whether this would be acceptable to all countries, I am not sure.

India's opinion is that "If you cannot take US to the appellate body then what's the point of the appellate body?" For some, the MPIA will become popular. For others, it might just be the panel and an appeal into the void. That again, cannot go on for long. So, it will be an unstable and uncertain world.

EB: How do we navigate India's recent inability to successfully enter into BITs with States like the USA and Canada, considering that there are concerns that the current Model BIT is skewed in favour of the host State's regulatory powers? What suggestions would you, as an expert in the field, provide for India to adopt in negotiations of new trade agreements to keep future claims at a minimum?

PR: India's model BIT was adopted in late 2015/early 2016. Eight years have passed and India has managed to sign BITs with Brazil, Belarus, Kyrgyzstan, Taiwan and UAE very recently. The India-Brazil BIT is mostly based on Brazilian model. The rest are not investors in India. This basically means that India has been unable to sign any significant BIT with any significant investors. India knows that its model is not acceptable to most of its treaty partners but I do not think it wants to do anything about it. Unless India departs from its model, I do not think even the UK-India BIT or the EU investment protection agreement would be signed.

India's model is very state centric. It needs to scale down on those. It offers very little protections to investors. You need to give something to the investors. For instance, inclusion of MFN provisions, a provision on Fair and equitable treatment, etc. If these reforms are made, India might be able to sign BITs with significant countries.

The Government believes that "we are the best, everyone will come to us," If it were true, the FDI inflows would not have fallen. The kind of incentives we have to give someone to just assemble, not even build, phones in India, shows how the narrative may not even be true. If it is such a great place to invest, people would come on their own. There would be no need to give such incentives. There is always a difference between a narrative that you build and actual investment. These treaties play a role in bridging the gap. In India, the belief is that even without the treaties, the investment will come. This needs some reality check.

While it is not the investment treaties alone which bring in investments, they play a crucial role. Two empirical studies have shown that India's decisions to unilaterally terminate treatise led to rerouting of investments through countries which already had BITs with India.

EB: In the past, there have been legitimate concerns around arbitrary regulatory action by the Indian Executive. Does India's termination of existing BITs, absent safeguards against such arbitrary actions in its new model, reflect a flawed view of sovereignty?

PR: The fact that you signed a treaty is also an exercise of sovereignty. When you sign a treaty, you surrender to the treaty voluntarily. You may think that this exercise of sovereignty did not yield us the returns we expected, but to call it an encroachment into one's sovereignty would be a different argument. You have voluntarily ceded to ISDS to decide a claim against you. When ISDS does it, you cannot call is an encroachment upon your sovereignty. You cannot have it both ways. To be fair, India is not the only country that has reacted to the ISDS.

India's decision to review its BITs was a good decision, but the manner in which it went about reviewing them was not. What India should have done was that it should have started to renegotiate its BITs with all these countries and then replace the new text with the existing text, rather than unilaterally terminating them and hoping that the investors would sign again.

Now, we are in a vacuum because of this. For instance, if any investment comes from the UK, we have no treaty protection. If any investment goes to the UK, we have no treaty protection.

EB: Given your upcoming chapter on the intersection of BITs and environmental matters, could you provide some insights into your research on this topic?

PR: Investment law and environment are clearly interlinked. There are several disputes under the energy charter treaty, where fossil fuel companies have brought claims against European countries for their climate change related regulatory measures. In my paper, which will appear as a chapter in a book published by Oxford University Press ["**OUP**"], I have looked at India's investment treaties and whether they contain provisions for protecting the environment. Therein, I have divided India's investment treaties into 2 periods – Before 2015 and After 2015.

While I have been critical of the model BIT, one thing it got right is that it contains provisions which allow states to take measures for protection of the environment. If India decides to shut down a coal-based power plant involving a foreign investor, and the investor brings a claim before ISDS – If the claim were to be heard under the older generation (Before 2015) investment treaties, then India would be on a shaky wicket because we do not know how the tribunal would interpret environment protection into the treaty. Those treaties do not have any provisions which recognize India's right to regulate for protection of the environment. But the Model BIT and some of the newer BITs, including the investment chapters in some of India's FTA with Singapore, Malaysia, Korea, etc recognize environment as a legitimate ground for India to deviate from its treaty obligations. In this chapter, what I have tried to show is that the newer treaties provide for better regulatory freedom for environment protection. This becomes very important in light of the Paris Agreement and other international environmental obligations.

EB: What is your opinion on the intricate balance between fair and equitable treatment and the exception of public purpose in international investment arbitration? How do you perceive this equilibrium being maintained, and what factors contribute to its evolution in the context of the contemporary global investment landscape?

PR: If we were to compare the ISDS jurisprudence in the early 2000s and the ISDS jurisprudence in the last eight years, we find a very interesting shift in the jurisprudence on fair and equitable treatment. In early 2000s, any minor regulatory change by the state was presumed to be a violation of the investors' legitimate expectations. This was obviously an onerous burden on the States, in a way asking states to freeze their legal and regulatory systems.

More recent arbitral awards have deviated from this stance. They argue that a balance must be struck between the interests of the investors and the State's right to regulate. To achieve this balance, they have come up with a proportionality test. A change in the regulatory structure

alone does not breach the obligations of fair and equitable treatment. As long as the change is proportionate to the benefit the State wants to achieve, it would not breach the obligations.

Interestingly, in the Cairn Energy case against India, which was a case of a retroactive taxation, the tribunal said that even a retroactive change is okay as long as there are justifiable reasons on public policy grounds. So, this test of proportionality is one way to balance public purpose and fair and equitable treatment obligations.

EB: As an academic and policy contributor, you come from a perspective on the intersection of theory and practice in ADR. Could you discuss how your academic research in ADR has influenced your contributions to policy-making, particularly in the context of drafting the 260th Report of the Law Commission of India on the 2015 draft model Indian bilateral investment treaty?

PR: While I do not know if I can call myself a 'policy contributor,' as an academic, because of my research work on India's international and investment law, there have been quite a few occasions where I could make direct intervention in the discourse. Justice AP Shah, who was the chairperson of the law commission at that point in time, was unofficially asked by Mr. Arun Jaitley, who was the finance minister at the time, to look into the draft model BIT. Justice Shah took up the task and he wanted to constitute a team of experts. Generally, in India, academics are not considered 'experts'. I was surprised to receive a call from the office of Justice Shah because he wanted to meet me, after having read my work. He said he wanted a team constituting members beyond simply partners from law firms. He wanted different perspectives, and not simply those of practitioners. That is how I became part of the committee.

I feel that there are several issues which require deep research. Practititoners may know what those issues are but they do not have the time to research on them as deeply as an academic can. Their research is customized to the needs of their client. The academics can research, without focusing on a client's needs.

For instance, India signed a treaty with EFTA countries, which says that the EFTA countries will 'try' to invest 50 billion dollars in India in the next 10 years. This, however, has been sold as EFTA countries 'will' invest those billion dollars in 10 years. But when I read the fine print is when I found that they will only 'try' to invest. It is an obligation, not of result, but of conduct. These are issues, which practitioners perhaps might not be able to catch.

The law commission report is one instance. The other instance which I can tell you is regarding the parliamentary committee on external affairs, which took up a study on India's BITs. I was invited to report on it as an expert witness. There, I was able to give my critical understanding of the model BIT. To be fair to the parliamentary committee, they were quite open to the criticism. They penned it down in the report and actually told the government to change the model BIT. That is another policy intervention that I was able to make based on my research.

The third one that comes to my mind are the dispute settlement negotiations that I have advised the Ministry of commerce on.

My point is that academicians have a very different perspective. The system, however, does not give them many options. In another paper, which is published by the Cambridge International Law Journal, I looked at the people India has nominated to International bodies like the ICJ, ITLOS, ILC, the WTO Appellate Body, etc. Most of them were retired judges or bureaucrats, barring maybe Professor Bimal Patel. There seems to be something in India's mitti which tells the policy makers that academicians are good for nothing. This I think should change.

EB: As an educator, what do you think should be the key elements of ADR education and training for law students who aspire to specialize in international investment law and international investment arbitration? Are there any specific reforms or innovations in ADR that you believe could significantly impact the field of international investment law?

PR: First, I think Investment arbitration should not be taught as just the last chapter in a commercial arbitration book. It should be taught as a separate subject.

Second, since my background is more from a Public International Law ["**PIL**"] perspective, rather than arbitration, I advocate for strengthening the PIL course and curriculum as very important. Most students do not take PIL seriously due to the belief that it will not fetch them jobs. That is a wrong perception to have. No one subject will fetch you a job. They will get their jobs based on their analytical skills and knowledge. Knowledge cannot be restricted to just one topic.

Third, offering more electives on International economic law, where Investment law can be one of them.

So, looking at investment law solely from ADR prism may not be sufficient. It has a life of its own. It needs to be nested within the nest of PIL.

EB: Any specific reform you would suggest?

PR: On reform that comes to my mind is that there were two Delhi High Court decisions stating that Arbitration and Conciliation Act does not apply to investment treaty arbitration. Now, this has a created a controversy relating to which law applies to enforcing an ISDS award in India. Would such award be enforced through the Civil Procedure Code? That would be a nightmare. This reform is very critical. We need a clarification, either through the Supreme Court or an amendment through law that the Arbitration and Conciliation Act applies to investment treaty arbitration. In my opinion, the better reform would be an amendment by the Parliament, adding a separate chapter or section providing that the Act extends to investment treaty arbitrations.

EB: Considering your highly enriching academic contributions in international arbitration alongside international trade and investment law, what advice would you give to a law student who is interested in writing on such niche topics? What is a good starting point for them?

PR: My first advice would be to read as much as you can before you start to write. I often see people think that I am discouraging students from writing. But, I am not. I always want my students to read first. How will you write if you have not read? Read deeply. Only when you do this is when you will be able to identify the niche, unresearched and unexplored areas. The identification of niche areas could be jurisdiction specific, i.e., specific to India.

The identification of a niche and writing would truly depend on what you want to achieve through your piece. It could be a policy intervention, a theoretical intervention, etc. For a policy intervention, a country specific niche would be more useful. For a larger theoretical intervention, identifying a global niche would be more useful. The objective should never be just to publish a piece for the CV. It must be beyond that; how my intervention would help, and contribute to the discourse.

EB: What would you recommend to students aspiring to pursue a career in academia, particularly with a specialization in arbitration, especially investment arbitration?

PR: My advice to students who want to enter academia is first, pursue a LLM and a PHD. Do not enter academia without one. Second, you cannot think of entering academia with just one subject in mind. Keep your options open and be ready to teach other subjects. In fact, this will also help you draw connections between different subjects. In such situations, you teach the

subjects assigned to you and the offer electives based on your research. Third, understand that academia may be challenging, especially in India. You may be inundated with teaching and may not find time to research. Academicians are not merely teachers; they must also be researchers. University professors are not merely to disseminate knowledge. They must also be able to produce knowledge. You will have to find time to research and publish, if you want to make a name for yourself and contribute to the discourse.

EB: About a PHD, not everyone may not have the financial situation to be able to do one. Can they not be successful based on their research alone?

PR: There are certain mandatory requirements. While you can become an assistant professor with a LLM, you cannot move up the ranks without a PHD. It is possible to be successful, but your career could be stagnant without one.

I did my LLM, taught at NUJS for a year and then went to get my PHD. But now when I look back, I think it would have been better if I had done my PHD right after my LLM. But I agree that financial resources may get in the way of students' attempting to get a PHD. But one may do a PHD from India, which would impose a significantly lesser financial burden, when compared to getting a PHD from abroad.

CONTACT US

srdcadr@gnlu.ac.in

https://www.linkedin.com/company/gnlu-srdc-adr-magazine/

@srdcgnlu

https://gnlusrdcadrmagazine.com/

PHOTOGRAPHY BY SHIVAM KAITH