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EDITORIAL NOTE

IMPACT OF THE VIDYA DROLIA JUDGMENT ON THE ARBITRATION SCENARIO IN INDIA

By Vipasha Verma, Nitya Khanna and Akash Gupta

The Supreme Court judgment in the *Vidya Drolia v. Durga Trading Corporation*[1] ('Vidya Drolia') case can be credited with addressing a host of issues pertaining to the domestic arbitration framework in India. The two most pertinent issues that the case is being considered a landmark judgment for are *the arbitrability of tenancy disputes* for and the significance of the ratio pertaining to the observations about the peculiar landscape of *the arbitrability of fraud* in India. In order to further highlight the importance of the judgment, an analysis into the history is as vital as carefully dissecting the two aforementioned points.

I. HISTORICAL ASSESMENT

The earliest cases involving landlord-tenant disputes and arbitrability was invoked in 1981 in the judgment of the Supreme Court in Natraj Studios (P) Ltd. v. Navrang Studios & Ors[2]. The Court adjudged on the issue whether Section 28(1) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, which provides for exclusive jurisdiction in the Small Causes Court Act to deal with disputes regarding tenants protected within the borders of Greater Bombay, nullify arbitration clauses stipulated in agreements executed by the parties.

The Court held that landlord-tenant disputes under Bombay Rents, Hotel, and Lodging House Rates Control Act, 1947 cannot be referred to an arbitrator. The Court laid down three reasons to support the judgment, first, the dispute was governed by the Bombay Rent Act, second, it is a legislation for welfare with the aim of protecting tenants against harassment by landlords. Pursuant to this, parties are not permitted to contract out of legislative mandate which is grounded in public policy; and last, the Act vested jurisdiction on the Small Causes Court, and can be exclusively tried by it.

Further, in the history of Rent Control Legislation disputes, the case of Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors[3]. is a landmark. The case arose because of an application under Section 8 of the Arbitration and Conciliation Act, 1996. The issue to adjudge upon was whether a dispute regarding enforcement of mortgage is arbitrable.

It was held by the Court that an enforcement of mortgage suit is a right in rem, which is not amenable to arbitration. In contract, a right in personam is arbitrable. Therefore, it was decided that such a suit must be referred to Courts and not arbitral tribunals. Further, it was also stipulated in the judgment that subordinate rights in personam arising from rights in rem are arbitrable.

In the judgment, the Court listed down criterions of non-arbitrable disputes. Regarding landlord-tenant disputes, the Court stated in *obiter* that when governed by special statutes, tenancy disputes are not

[1] 2019 SCC OnLine SC 358.
[2] 1981 AIR SC 537.
[3] (2011) 5 SCC 532.

arbitrable; the tenant enjoys statutory protection against eviction; and only specified courts are conferred jurisdiction to grant eviction or decide the disputes. These examples came to be named as the Booz Allen criterion.

These judgments laid out a precedent in tenant related disputes, failing under the purview of rent control legislations, that they are non-arbitrable, and have to be mandatorily adjudicated before the designated courts. However, in cases of tenants not protected under rent control legislations and governed under the Transfer of Property Act, the questions persisted.

This matter was invoked after the filing of a civil suit for eviction of licensee in the case of *Himangani Enterprise v. Kamaljeet Ahluwahlia*[4]. The defendant (licensee) filed an application under Section 8 of the Arbitration and Conciliation Act, 1996, pleading for the matter to be referred to an arbitral tribunal in terms of the Leave and License Agreement. It was the defendant's contention that as per the premises being excluded from the Delhi Rent Act, the matter was no longer governed under a special statute. Therefore, it failed to meet the Booz Allen Criterion.

The Court held that this mere fact did not make the dispute arbitrable. The exemption was liable to be withdrawn by the government at any moment. In such a scenario, the special statute would apply, thereby nullifying the jurisdiction of the arbitrator. Further, inapplicability of Delhi Rent Act is not enough for it to be referred to arbitration. In any case, the matter will fall under the Transfer of Property Act and be referred to civil courts. The Court held that the facts of this case were covered under the Natraj Studios and Booz Allen case. However, his case was overruled by the *Vidya Drolia* judgment.

II. LEGISLATIVE ASSESMENT OF TENANCY DISPUTES

In the landmark judgment that the Court delivered in the *Vidya Drolia* case, the most striking distinction was made with respect to the question of subject matter arbitrability. The court elaborated upon principles it laid down in the case and applied them to three specific cases in order to ascertain arbitrability. These three cases include determining arbitrability in case of tenancy disputes, fraud and debt recovery tribunal.

With respect to tenancy disputes, the court overruled the decision in *Himangi Enterprise v. Kamaljeet Singh Ahluwalia*[5] case and held that landlord-tenant disputes governed by the Transfer of Property Act are arbitrable. The Court specified clearly that should the circumstances enshrined under Sections 114 and 114A of Transfer of Property Act arise, the Arbitrator before whom such is case brought would take note of the same and act in accordance with the law and be entitled to pass an award. Contrarily, the Rent Act provides statutory protection against eviction and enlists the competent courts which yield the jurisdiction to order eviction or to resolve such other disputes hence clarifying the futility of allowing for arbitration of these specific disputes. Applying this reasoning, the Court clarified that landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when a specific court or forum has been given exclusive jurisdiction to apply and

[4] 2018 SCC OnLine Del 10904.

[5] Ibid.

decide special rights and obligations.

Overruling the Delhi High Court judgment in *HDFC Bank Ltd. v. Satpal Singh Bakshi*[6], with respect to arbitrability in case of Debt Recovery Tribunal, the Court held that matters covered under the DRT Act are non-arbitrable. The observation of the court was that the institutions that the DRT Act has jurisdiction over such as banks and other financial institutions, have been enshrined specific rights by the DRT Act that connote to particular modes of recovery under the Act. Despite the knowledge that arbitral tribunals do not have the power to grant the same breadth of reliefs that a Debt Recovery Tribunal can offer, banks and NBFCs have preferred arbitration, simply because of the convenience and time savings that it offers. In the lieu of the same, the Supreme Court's decision seems to lack a reasonable explanation why in a situation wherein a bank or an NBFC has itself chosen to opt for arbitration, the jurisdiction of the tribunal has been limited and negated. The DRT Act does not in any way or form prohibit the exercise of such powers for grant of reliefs should those flow directly from a contract between banks and its customers and additionally even finds a reflection in public policy wherein the attempts to reduce the burden on courts and tribunals have regularly suggested opting for this route.

Another aspect that must be examined vis-à-vis this present judgment is the lack of clarity on the course that is charted when transactions of identical nature are to be dealt with on the question of arbitrability since the amount of Rs. 20 lakhs are the threshold to approach the Debt Recovery Tribunal and the possibility of different treatments being meted out in similar circumstances rise high enough. These ambiguities that are yet to be clarified leave room for interpretation on the one hand and on the other may also prove to be detrimental for the thousands of cases that appear before the tribunal which may fall prey to this disadvantage.

III. TRACING JUDICIAL DECISIONS ANALYSING ARBITRABILITY OF FRAUD

The position of law on Arbitrability of fraud in India has been an issue in plenty of cases before. Recently, the judgment of the Apex Court in the case of *Vidya Drolia*[7] has provided clarity by reaffirming the presumption in favor of arbitrability in matters relating to fraud, as was held in another recent case of Avitel Post Studioz Limited v. HSBC PI Holding[8] (*Avital*).

Previously, the Supreme Court in the case of *N. Radhakrishnan* v. *Maestro Engineers*[9] held that a dispute involving "serious allegations of fraud" cannot be held arbitrable. The court neither clarified as to what constitutes "serious allegation of fraud" nor provided any criteria to test the seriousness of an allegation.

Thereafter, in the case of *Ayyasamy* v. *Paramasivam*[10] the Apex Court provided some clarity as what constitutes a 'serious' allegation of fraud. The court held that fraud *simpliciter meaning simple allegations of fraud can be arbitrable. However, matters involving criminal allegations of fraud cannot be held to be arbitrable.*

[6] (2013) 134 DRJ 566 [FB].
[7] *Supra* note 1.
[8] 2017 SCC OnLine Bom 717.
[9] (2010) 1 SCC 72.
[10] AIR 2016 SC 4675.

Next in *Rashid Raza* v. *Sadaf Akhtar* [11]the court applying the test laid down in Ayyasamy further held that if the allegations of fraud permeated the entire contract, and especially the arbitration agreement, thereby rendering it void, the matter cannot be said to be arbitrable.

The last such decision was *Avitel* where the Supreme Court interpreted the tests laid down in the cases post *Ayyaswamy*. It held that the first test is satisfied only when it is clear that the party against whom the breach has been alleged, could not have entered into the arbitration agreement in the first place, and thus, no arbitration agreement or clause can be said to exist. The second test is satisfied when allegations of "*arbitrary, fraudulent, or malafide conduct*" are made against either the State or its instrumentalities and thus, require to be heard by a court exercising writ jurisdiction, as the matters lie in the public domain.

Now coming to the latest case of *Vidya Drolia*, the court addressed two justifications given in *N. Radhakrishnan* for rendering a matter non-arbitrable on the grounds of allegations of fraud. The first was the consideration of public policy, which made it essential for any dispute where an allegation of serious fraud had been made, to be resolved in a public forum, such as a court of law.

The court held that exception of fraud is stemmed from misconstruing the grounds laid down under Section 34(2)(b) of the Act. The court held that under sub-clause (i) of the said provision deals with cases where the subject matter is incapable of being decided by arbitration whereas sub-section (ii) states that any award in contravention of the public policy of India is liable to be set aside. It is clear that non-arbitrability of the subject matter of a dispute, and a conflict with public policy, are two distinct and independent grounds for the setting aside of an arbitral award. Considering this, a dispute can only be said to be non-arbitrable for being against public policy if it provided exclusive jurisdiction to the courts for deciding the matters pertaining to that particular stature, barring reference to arbitration. In absence of the same the presumption will always be in favor of arbitrability.

The court finally upheld the test laid down in *Ayyaswamy* which developed further in *Ramiz Raza* and *Avital*. The judgment given in the case of *N. Radhakrishnan was, however, overruled and a comprehensive standard to decide the non-arbirability is laid down based on certain factors like* whether: (a) the dispute affects rights *in rem*, (b), the mandatory law has expressly or implied barred any reference to arbitration. (c) the subject matter has any relation to sovereign or public interest functions of the State, or (d) it affects the rights of third parties, or requires central adjudication In light of the same, the Court held that matters pertaining to fraud can be the subject matter of arbitration proceedings, provided the fraud does not "*vitiate and invalidate the arbitration clause*", or raise questions which affect rights *in rem* and therefore necessitate adjudication in the public domain.

IV. CONCLUSION

It is clear that through this case the Supreme Court intended to reiterate its arbitration-friendly jurisprudence which is a tool in their decades long effort to promote arbitration as a formidable alternate dispute resolution mechanism. By initiating a sense of clarity towards the long winding road of arbitrability

[11] (2019) 8 SCC 710.

of fraud in India, the Supreme Court also instilled a sense of futuristic judgment favoring the dispute resolution outside of the judicial restrictions.

OP-ED

THE COVID-19 REVOLUTION IN ARBITRATION: PROMISES OF A BRIGHT FUTURE?

Gautam Mohanty[12] *and Gaurav Rai*[13]

International Arbitration and Domestic Arbitration were in an unprecedented crisis last year on the arrival of the COVID pandemic. As Tribunal Secretaries and Assistants to prominent Arbitrators in India, the authors witnessed first-hand shortcomings of the traditional approach to International Arbitrations and Domestic Arbitrations, wherein Arbitral Hearings were adjourned *sine die* owing to, *inter alia*, lack of internet awareness, lack of a strong internet connection, lack of scanned files. However, what emerged from the initial setback, in the opinion of the authors, was a watershed moment in arbitration, which as the year ends, has become the "*new normal*" in the arbitration sphere. The changes ushered in out of necessity show no signs of abating with the pre-pandemic practices being a thing of the distant past now, with arbitration shifting to the virtual space. It does not surprise the authors that when forced to choose between adopting new ways of continuing arbitration or suspending arbitration *sine die*, the parties and Tribunals are choosing the former.

I. HOW HAS ARBITRATION RESPONDED TO COVID

To the uninitiated, Arbitration has since long followed more or less the same procedural template: rules and procedures pertaining to initial pleadings, a case management conference with an initial procedural order and timetable, cross - examination of witnesses in case of oral evidence, oral hearings followed by a final award.[14] However, given the current pandemic, the ICC issued a Guidance Note on Possible Measures aimed at mitigating the effects of the COVID Pandemic ("ICC Guidance Note") to encourage Tribunals to conduct remote hearings.[15] In our experience, the number of documents/exhibits used by

[12] Gautam Mohanty is an advocate and also a Lecturer on Leave at Jindal Global Law School India (JGLS) and co-Editor of The Arbitration Workshop. He has previously worked as an Arbitration Associate with Arbitrator Justice Deepak Verma, Former Judge of Supreme Court of India and currently works as a consultant with him on several international and domestic arbitrations. He has assisted various arbitral tribunals as a Tribunal Secretary in international and domestic arbitrations. He is currently pursuing his doctoral studies at Kozminski University, Warsaw, Poland. His research interests include International Commercial Arbitration, International Investment Law and Private International Law.

[13] Gaurav Rai completed his BBA.LLB(Hons.) from National Law University Odisha in 2015 and his Master of Laws (LL.M) from University College London in 2016. He is an Advocate registered with the Bar Council of Delhi and has been working in the office of Justice A.K. Patnaik, Former Judge, Supreme Court of India as a Legal Assistant. His primary focus is on arbitration and contract law.

[14] Alec Stone Sweet and Florian Grisel, The Evolution of International Arbitration Judicialization, Governance, Legitimacy (Oxford University Press, 2017) p. 91-92.

[15] ICC, The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic, para. 23, https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possiblemeasures-mitigating-effect...(last accessed Dec. 17, 2020). "…This Guidance Note: (I) recalls the procedural tools available to parties, counsel and tribunals to mitigate the delays generated by the pandemic through greater efficiency, and (II) provides guidance concerning the organization of conferences and hearings in light of COVID-19 considerations, including conducting such conferences and hearings by audio conference, videoconference, or other similar means of communication ("virtual hearing"). To the extent relevant, it may serve in the context of other ICC ADR proceedings as well."

practitioners decreased as well as there was a decrease in requests for documents production.

II.THE DEMOCRATIZATION OF ARBITRATION

As observed by the authors, technology driven changes in arbitration have also opened the field to a wider involvement of junior lawyers in firms, chambers and among women practitioners; as applications of interim reliefs, jurisdiction and other matters which were previously reserved for senior lawyers or more experienced practitioners are now being argued before Tribunals by junior lawyers and women. Moreover, as the lockdown came into effect in 2020, it brought an explosion of arbitration webinars and online courses which invariably provided lawyers of different levels of seniority and regional as well as jurisdictional backgrounds to get together in an online platform and create an online knowledge exchange. Further, the authors witnessed the style of arguments changing significantly wherein oral pleadings became precise and the parties had to rely on pre-written and circulated written submissions for arbitrators to follow the arguments more clearly. This also gave a better structure to the argument sessions and helped in overall efficiency of the process.

III.CHALLENGES OF VIRTUAL HEARINGS - THE DIGITAL DIVIDE

It is undeniable that high-speed internet is critical for remote arbitration, yet the digital divide remains a significant hurdle across the world. In simple parlance, digital divide is the gap between those who have internet access and those who do not. Developed economies, like the United States of America, France, Germany, the United Kingdom, and Japan have the highest access rates, whereas the countries in sub-Saharan Africa, followed by many in emerging and developing economies in Asia, are among those with the lowest access to the internet.[16] The authors in several hearings have witnessed audio and video delays from the sides of arguing counsels and arbitrators that have disrupted hearings for a certain period of time.[17] Although the issue of such delays, in the view of the authors, has not yet had a significant impact on the outcome of the cases, studies conducted on internet connections indicate the potential for such disruptions to manifest themselves as concerns over biases against parties with poorer internet connections. A German Study in 2014 showed that delays on conferencing systems imparted a negative outlook: even delays of 1.2 seconds made the people perceive the responder as less focused or friendly.[18] Further, there is also an economic divide that has manifested because both advocates and arbitrators, had to invest in technological hardware (laptops, video

[16] Mercedes García-Escribano, CNN, Business Perspectives, Low Internet Access Is Driving Inequality, https://www.cnn.com/2020/07/05/perspectives/internet-accessinequality/ index.html (last accessed 20 December, 2020).

[17] According to the 75th round of National Sample Survey conducted between July 2017 and June 2018, just 4.4 rural households have a computer, against 14.4 per cent in urban areas, with just 14.9 per cent rural households having access to the internet against 42 per cent households in urban areas. For further reference, please see https://www.downtoearth.org.in/news/governance/covid-19-lockdown-highlights-india-s-great-digital-divide-72514.

[18] Katrin Schoenenberg, Alexander Raake & Judith Koeppe, Why Are You So Slow?—Misattribution of Transmission Delay to Attributes of the Conversation Partner at the Far-End, 72(5) Intl. J. Hum-Comput St. 477-487.

conference systems) and software (cloud storage services, video conference software) to continue the proceedings.

IV.PROMISES OF A BETTER FUTURE?

The economic impact of the pandemic on arbitration has been severe to the extent that certain parties have been unable to pay the requisite fees of the Tribunal members. The authors believe that there is a silver lining amidst the crisis, wherein parties, given the paucity of funds, will demand for arbitrators with a proven record of efficiency and ability to conduct remote hearings and online hearings. Further, the authors believe that the COVID crisis will ensure that certain unnecessary practices will fall out of favour such as travel by air to attend a one-hour case management conference, while at the same time it may continue to act as a catalyst for more positive changes in arbitration, thereby helping it to flourish once the pandemic is over. Simultaneously, it shall also open doors for the advocates and arbitrators, having the calibre but not residing in the hubs of arbitration, to challenge the position of the current participants in the system.

INTERVIEW WITH AMIT GEORGE, ADVOCATE

Mr. Amit George[19]

1. **What motivated you to take up a career in arbitration, and at what point in law school did you decide to pursue it?**

   During my time at NALSAR, though I was undoubtedly interested in arbitration as a subject, I had not contemplated a specialization in the field as such, and my overall focus remained on civil litigation in general. My interest in arbitration primarily sprung from the experience of working with my father, who has for long been specializing in infrastructure arbitration. After undertaking a year-long judicial clerkship at the High Court of Delhi, I joined my father's chambers where I remained for a period of around three years before I struck out on my own. During this time, I had occasion to participate in a large number of arbitration proceedings which helped me develop an interest in this area of law. This inclination continued once I started an independent practice.

2. **How did your experience pursuing a Master's degree, especially one outside India, impact your career in arbitration?**

   For my LL.M., I opted for a specialization in international dispute resolution, which entailed taking multiple courses on the law and practice of international arbitration. The curriculum was as wide, as it was contemporary, and this helped me in strengthening my understanding of the basic theory underlying arbitration. With the curriculum being focused on international arbitration, I was exposed to influences from both the common- and civil-law backgrounds, and which permitted a more holistic understanding of how arbitration functioned as a system. Ultimately, the true practice of arbitration has to be learnt at the ground level, however, a sound grounding in the normative precepts definitely stands one in good stead in the long run. I would definitely say that the LL.M. has helped me in developing into a more rounded arbitration professional in many ways, both tangible and intangible.

3. **The 'closest connection test' has had a long history of discourse surrounding its implementation, especially in India. At times the difference between its interpretation abroad has been in stark contrast with the judgments delivered by Indian Courts in this regard. In light of the same, how does the recent UK Supreme Court judgment in Enka v. Chubb [2020] UKSC 38 reopen the debate surrounding the 'closest connection test' on arbitration in India?**

   If one examines the historical precedent in this regard that has emanated from the Indian Courts on one hand, and the English Courts on the other, one will notice an important distinction in the way in which the 'closest

[19] Amit George is an Advocate with an Independent Practice at the Supreme Court of India as well the High Court.

connection test' has been put into action. The Indian Courts had largely examined the connection with the overall dispute between the parties in arriving at a conclusion in this regard [*See* NTPC v. Singer AIR 1993 SC 998], whereas the English Courts had sought to discover the connection with a focus on the designated seat of arbitration [*See* Habas Sinai v. VSC (2014) 1 Lloyd's Rep 479]. In the past decade, however, the Indian approach also seems to have veered towards upholding the primacy of the seat of arbitration while applying the closest connection test [*See* Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (2012) 9 SCC 552, Enercon (India) Ltd. v. Enercon GmbH (2014) 5 SCC 1, Roger Shashoua & Ors. v. Mukesh Sharma & Ors. (2017) 14 SCC 722, BGS-SGS Soma JV v. NHPC Ltd. (2020) 4 SCC 234]. Considering the fact that the majority opinion in Enka v. Chubb [2020] UKSC 38 retains the focus on the seat to determine the applicable law in the absence of any express choice of law in the agreement between the parties, I do not think that the judgment has engendered any fundamental recalibration of the consistent approach followed by the English Courts, and which has recently witnessed enthusiastic adoption by the Indian Courts as well.

4. **In your professional experience, to what extent is it important to protect public interest in public-private arbitrations and to what extent can the scope of public policy be expanded to ensure accountability and transparency when public authorities are involved in the arbitral sphere?**

   It is quite evident that with the State and its instrumentalities being parties to a large number of arbitration proceedings, both domestic and international, a large amount of public funds is at stake in the arbitration process. With this being the case, it is imperative that the arbitration process must be fair, transparent and undergird by sterling integrity. In my opinion, the existing understanding of public policy, even in its limited formulation, does protect against failures of any of these essential safeguards. However, it is equally important to protect against a misuse of the public policy/public interest doctrine to attempt to defeat legitimate awards by raising the spectre of the outflow of public money inasmuch as public interest cannot be sought to be expanded to whitewash contractual breaches or to place a premium on inefficiency. I think the real change that must happen is that government officials pay more attention to effective prosecution of arbitration proceedings and are made more aware of the nuances of the process, which will, in turn, automatically increase engagement with the system and remove the element of distrust. Many public-sector undertakings are now taking arbitration quite seriously and beyond engaging specialized arbitration practitioners as legal counsel, many of the in-house legal teams are also being strengthened through regular training sessions on arbitration law. This is the first step to ensure protection of genuine public interest in arbitration proceedings.

5. **The "three - strike rule" which finds legislative backing under Item 22 of the Fifth Schedule of the Arbitration and Conciliation Act, 1996 is another area where the judicial pronouncements are yet to conclude with clarity on. What, in your opinion, would be the most optimal position for the Indian judiciary to settle on and do you see it headed in that direction?**

   The 'three-strike rule' is one which is ripe for contestation on account of the somewhat

imprecise language employed in the statutory provision. One element of the controversy *viz.* the determination of what constitutes the 'third' appointment so as to fall afoul of the provision has been conclusively settled by the High Court of Delhi in Kunwer Sachdev v. Hero Fincorp Limited [(2019) SCC OnLine Del 6694]. A more vexed question as to the qualitative test to be applied in the matter is, however, still a matter of significant controversy. The Supreme Court held in HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited [2018 (12) SCC 471] that even an arbitrator who has been appointed on two or more occasions by a party or its affiliates in the past three years, may yet not be disqualified if it is demonstrated that he/she was independent and impartial on the earlier two occasions. In my view, this approach is a bit problematic inasmuch as the purport of the relevant statutory provision is to put in place an objective criterion, whereas the exception propounded by the Court in HRD Corporation (*Supra*) seems to bring in an element of unbridled subjectivity. What part of the arbitrator's conduct in the earlier proceedings will establish that he/she was indeed impartial in the earlier proceedings and in which manner is such identified conduct to be gauged and measured? This is an area which will evidently witness significant controversy in the days to come.

6. **The arbitration regime in India has been crippled by the conflicts with regards to enforcement of foreign awards. How and when do you think we will reach the point where enforcement is smooth and swift which eases transactions with foreign entities?**

   While there is a lot of justified concern in relation to the difficulties which are encountered in relation to enforcement of foreign awards in India, it is not entirely correct to identify this problem as one that disproportionately bedevils foreign award enforcement actions alone. Ultimately, the root cause of the problem remains the same as what afflicts litigation in general *i.e.,* docket explosion of cases and the resulting prolonged timeline for the resolution of any litigation. Though there are related issues such as lack of subject matter expertise *etc.*, the Arbitration and Conciliation (Amendment) Act, 2015, by vesting exclusive jurisdiction in matters concerning enforcement of foreign arbitral awards upon the High Courts, has ameliorated the earlier difficulties to a large extent in most jurisdictions. Even at the High Court level, however, with the levels of pendency being witnessed even after the establishment of specialized Commercial Courts after the enactment of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, it is impractical and improbable to expect a rapid-fire conclusion of an enforcement action in relation to a foreign award. The situation is only likely to get worse with the debilitating impact that COVID-19 has had on the disposal rate within the judicial system as a whole. Therefore, the only solution in the long run is to ramp up judicial infrastructure, particularly in relation to the number of judges. As a short-term measure, administrative action such as setting up of dedicated arbitration rosters in the High Courts should be implemented, as has been done successfully in certain High Courts like the High Court of Delhi.

7. **The outbreak of the pandemic is causing a surge in Force Majeure issues in dispute. How do you think different ADR mechanisms can best respond to this challenge? How important are Emergency arbitrations in the COVID-19**

scenario?

I think the biggest differentiating factor in terms of the disputes that are being generated because of the pandemic, particularly *force-majeure* issues, as compared to the general category of disputes is that the pandemic has had a debilitating impact on most entities and has obliterated their financial base in most cases. Therefore, even more so in the present times, timely resolution of disputes is essential inasmuch as if ADR mechanisms and processes take their own sweet time in ensuring concrete results for the aggrieved party, then the ultimate relief may turn out to be nothing more than a mirage. Though the inability of parties to be able to reap the fruits of success through an ADR mechanism, particularly arbitration, is already a vexed problem, however, the same may get far more amplified within the specific context of the egregious difficulties engendered by the pandemic. In this background, a fervent embrace of emergency arbitrations is obviously the need of the hour.

8. **Lastly, what advice would you give to the arbitration enthusiasts looking to pursue a career in the same field as yourself?**

As I have optimistically stated many times in the past when this question has been put to me, the field of arbitration is poised to grow manifold and become one of the largest prospective areas of practice in India. Therefore, the potential is unlimited as far as law students or young practitioners are concerned and arbitration is an extremely promising avenue for the future. It is very important, in my view, for young arbitration practitioners to be up to date with the rapidly evolving law as reflected in the relevant judicial precedent. While reading in this sense is important, I would also recommend writing on aspects of contemporary relevance in arbitration at an early stage in the career. Further, while it is increasingly possible to have a career focused purely on arbitration, it is important that practitioners, at least in the early years, also dabble in general litigation to whatsoever extent possible to better augment their skill set for an arbitration-centric practice and the trial-advocacy that it requires.

EMERGENCY ARBITRATION IN THE INDIAN REGIME: NEED OF THE HOUR

Ms. Iram Majid[20]

I. INTRODUCTION

At the juncture of India's delayed proceedings and Traditional Courts of Law, it is pertinent to understand that the parties involved compromise on their needs and expectations. The reason behind the same is the current backlog of cases in India, due to which the parties may get a result within 1 year or 10 years or even a time frame that exceeds the latter.[21] Thus, in such a scenario, the need for the parties to resort to Alternate Dispute Resolution (ADR) practices arises. In ADR, the parties tend to resort to Arbitration, considering its sound legal and binding structure in the Indian context.

However, the problem with respect to traditional Arbitration is that it mandates the formation of an Arbitral Tribunal according to Part 1, Chapter III of the Arbitration and Conciliation Act, 1996.[22] This composition must be completed in 12 months from the filing of the claims.[23] This time period again brings us back to square one: DELAY. Therefore, such delay leads to the rise of Emergency Arbitration (hereinafter referred to as "**EA**").

II. CONCEPT OF EMERGENCY ARBITRATION

Emergency Arbitration is based on the concept of "*urgent pro tem or conservatory measures.*" In other words, it is for the parties who cannot await the long-drawn formation and composition of an Arbitral Tribunal.[24] The reason behind the same is their need for interim relief at the earliest time frame possible, to either protect their position or to prevent the other party from the continuation of the breach they committed, until the issue is finally adjudicated. It is agreeable that the Courts are capable of granting interim reliefs as well, but the same comes at the cost of compromise in efficiency and confidentiality, which neither of the parties may appreciate.

Two legal maxims that form its genesis are: firstly, the reasonable possibility that the claimant would succeed on merits *(fumus boni*

[20] Iram Majid is a legal professional with experience of 16+ years in handling wide range of criminal, matrimonial, civil, commercial, banking and finance matters cases inside the court as Advocate and outside the court as Mediator. She is the Executive Director of APCAM and she is empaneled as mediator with Global Panel of United Nations Development Program of Ombudsman and as mediator with WIPO.

[21] Law Commission of India, Report No. 245 Arrears and Backlog: Creating Additional Judicial (wo)manpower, Government of India, https://lawcommissionofindia.nic.in/reports/report_no.245.pdf (last accessed 21 December, 2020).

[22] Arbitration and Conciliation Act, 1996, Part 1, Chapter III.

[23] Pradeep Nayak, Sulabh Rewari and Vikas Mahendra, Arbitration procedures and practice in India: overview, Thomson Reuters Practical Law, https://uk.practicallaw.thomsonreuters.com/ (last accessed 22 December, 2020).

[24] Sweta Madhu and Kanika Tandon, Emergency Arbitration in India, Singhania and Partners (2017), https://singhania.in/emergency-arbitration-in-india (last accessed 22 December, 2020).

iriuris), and secondly, the claimant would suffer irreparable harm if the measure were not granted immediately *(periculum in mora)*. This could be considered as a special-purpose Arbitral Tribunal, whose mandate gets terminated once their function is performed.[25]

This method is used by Parties as an alternative to Courts for obtaining interim relief. It has attained preference over the national courts lately, because of the principle of party autonomy. Resorting to Court for interim relief not only increases the litigation cost and hampers the expedited arbitration procedure, but also raises the chance of leaking confidential information of the parties. This could be attributed as one of the major reasons as to why many international institutions like SIAC and ICC, and developed jurisdictions like Singapore and Hong Kong have adopted statutorily the provisions concerning EA. An Emergency Arbitrator has broad powers to award any interim relief, which may be deemed necessary to safeguard the interests of the succeeding party, and this may include injunctive reliefs, measures for conservation of the subject property and measures to secure the amount in dispute.

III. Failure of Statutory Implementation of EA in India

As we argue on these argumentation lines of EA, we also need to comprehend the fact that India does not have any provisions with respect to EA. Although the Arbitration and Conciliation (Amendment) Act of 2015 suggested amendments, such as the amendment to Section 9 of the Principal Act and so on, the primary concern of EA was not addressed. Prior to this, the Law Commission of India, in its 246th Report, lucidly suggested the need for a concept of "Emergency Arbitrator". The Commission intended to bring this under the ambit of Section 2, which defines an Arbitral Tribunal, by broadening the definition and including the concept of EA.[26] However, as already witnessed from the Amendment Act of 2015, the same was not incorporated.

IV. Filling of Lacunae in EA through Courts and Indian Arbitral Institutions

Even though there exists a lacunae with respect to EA and its legislations, the Courts of Law have addressed the same in their judgments. In the case of ***HSBC PI Holdings (Mauritius) Ltd. v. Avitel Post Studioz Ltd***.[27] the Parties resorted to an Emergency Arbitrator seated in Singapore. There was a favourable order given to the Party that sought to enforce the same in India and to the Indian legislature's dismay, the High Court upheld the arbitral award. Further, in the case of ***Raffles Design International Private Limited v. Educomp Professional Education,***[28] the Delhi High Court upheld the Emergency Arbitrator's decision seated in Singapore and granted measures that were in tandem with that of the EA. In ***Ashwani Minda v. U-Shin Ltd.,***[29] the dispute concerning the joint venture agreement arose between the parties. The Indian party initiated the arbitration against the Japanese party and applied for EA

[25] Emergency arbitration: where does the India stand - iPleaders iPleaders, https://blog.ipleaders.in/emergency-arbitration-india-stand/ (last accessed Jan 19, 2021).

[26] *Supra* note 1.

[27] 2020 SCC OnLine SC 656

[28] 2016 SCC OnLine Del 5521.

[29] 2020 SCC OnLine Del 1648.

under the Japan Commercial Arbitration Association ("JCAA") rules provided in the agreement. The Emergency Arbitrator declined the relief to Indian parties. Therefore, the party approached the Delhi HC under Section 9 of Arbitration and Conciliation Act for obtaining the emergency relief that had been rejected by Arbitrator. The Court opined that by adopting JCAA rules, the parties have impliedly excluded the applicability of Section 9, Part 1 of the Act. The Court also held that after being rejected in their attempt to obtain relief in EA, the petitioners cannot appeal before the court for the Emergency Arbitrator's judgment.

In the United States of America, a number of judicial rulings have recognized emergency arbitral awards and allowed enforcement of such awards. The United States Court of Appeals, Sixth Circuit, vide its order dated 15 March 1984, in the matter of Island Creek Coal Sales Company v. City of Gainsville, Florida,[30] recognized the authority of an Arbitral Tribunal to grant interim reliefs under the American Arbitration Association (AAA) Commercial Arbitration Rules.

In England, the England & Wales High Court has held in the matter of ***Gerald Metals SA v. Timis***[31] that the Court does not have the power to grant urgent relief in cases where the parties have sufficient means to obtain interim relief from the Emergency Arbitrator under the London Court of International Arbitration (LCIA) Rules. Thus, the High Court gave precedence to the powers of the Emergency Arbitrator under the LCIA Rules over the judicial Court's power to grant interim reliefs under the English Arbitration Act, 1996.

The "finality" of an arbitral award was also interpreted in the decision given by the Singapore Court of Appeal in ***PT Perusahaan v. CEW Joint Operation***,[32] wherein the Court held that all the awards, despite the stage of arbitration at which they are issued, have the effect of being final and binding.

Finally, we need to take cognizance of the fact that EA provisions have been included by the major Indian Arbitral Institutions such as Delhi International Arbitration Centre. The previously mentioned Centre has incorporated the provisions related to EA in Rule 14, which is proceeded by "the appointments, procedure, time period and powers of an Emergency Arbitrator."[33] It has also been incorporated by the Mumbai Centre for International Arbitration Rules, 2017, with Rule 14 that explicitly addresses "Emergency Arbitration".[34] Further, EA has been included by the following institutions:

a. **Court of Arbitration of The International Chambers of Commerce- India**: Article 29 of the Arbitration and ADR Rules read with Appendix V enumerate the provisions of EA and Emergency Arbitrator.
b. **International Commercial Arbitration (ICA)**: Section 33 read with Section 36(3) enumerates the provisions of EA and Emergency Arbitrator.
c. **Madras High Court Arbitration Center (MHCAC) Rules, 2014**: Part IV, Section 20 read with

[30] 729 F.2d 1046 (6th Cir. 1984).
[31] 2016 EWHC 2327 (Ch).
[32] 2014 SGHC 146.
[33] Rule 14, DIAC (Arbitration Proceedings) Rules 2018.
[34] Rule 14, Arbitration Rules of the Mumbai Centre for International Arbitration 2020.

> Schedule A and Schedule D enumerate the provisions of EA and Emergency Arbitrator.

In finality, it is of pertinent importance to note that in the very recent case of Future Retail v. Amazon,[35] the Delhi High Court held that there is no provision in the 1996 Act that prohibits the parties from obtaining Emergency relief from an Emergency Arbitrator and the High Court proceeded to state that:

> *"It cannot be held that an Emergency Arbitrator is outside the scope of Section 2(1)(d) of the A&C Act, because the Parliament did not accept the recommendation of the Law Commission to amend Section 2(1)(d) of the A& C Act to include an 'Emergency Arbitrator'. It cannot be held that the provision of Emergency Arbitration under the SIAC rules are, per se, contrary to any mandatory provisions of the A&C Act."*

Thus, we observe that the ray of hope for EA is undying in our country.

V. Conundrums with respect to potential Implementation of EA in India

Firstly, the conundrum of enforceability of EA Awards remains a grey area. In Part 2, Chapter I and II of the Amendment Act of 2015, we observe that the foreign awards passed through the New York Convention and the Geneva Convention respectively are enforceable. However, the fix that arises is that these two conventions address the enforceability of final adjudicated matters only, not EA-related matters. Therefore, the same mandates an address by the Indian Statute. In such a scenario, International Conventions like ICDR, ICC, SIAC, SCC and LCIA that have introduced the concept of Emergency Arbitrator Procedures can be referred to.

The second conundrum that we may observe with respect to EA is the Court's jurisdiction on the non-concerned parties. In other words, we observe that the Courts have the power and jurisdiction to entertain parties other than the two main parties in a suit before Civil Courts under the Civil Procedure Code. However, the same does not seem possible in EA because of the principle of party autonomy. Only those two parties that have signed the arbitration clause/agreement are bound by their respective Arbitration Agreement. Confidentiality of the matter and prevention of interference by any other party is also important. In such a scenario, either the EA is given special powers regarding the same, or any other provision may be made that specifically speaks out about the mandatory inclusion of an EA clause in an Arbitration Agreement to enforce the same.

VI. Conclusion and the way forward

The situations requiring Emergency Arbitration have been increasing globally in massive numbers, however, most of the jurisdictions have failed to cope up with the same. The interim reliefs given by the Emergency Arbitrators are uncertain and many at times, with no enforceability. That is precisely the reason the parties are bound to approach national courts. The

[35] 2020 SCC OnLine Del 1636.

recommendations given under the 246th Law Commission Report and the amendment suggested by it in Section 2(1)(d) of the Act would bring India on to the same pedestal as other countries and help attain the global trend with respect to Emergency Arbitrations.

The problem can be addressed in two ways, one in which the seat is in India and other when the seat of arbitration is decided as foreign state. The main problem arises in case of foreign seated arbitration, as Domestic Arbitration Tribunal, emergency orders can be enforced under Section 17(2) of the Act. There remain many more ambiguities with respect to India's take on Emergency Arbitration. For example, considering that Emergency Arbitration is workable only under the ambit of institutional arbitration, what will be the outcome when a party has chosen for ad-hoc instead of institutional arbitration, can the party invoke Emergency Arbitration using such an agreement? In such a scenario, should the Courts be conferred the power to appoint an Emergency Arbitrator? Will the parties have to enter into a separate agreement to choose arbitral institutions for providing an Emergency Arbitrator? In the absence of regulatory legislation governing this aspect and judicial clarification, answering such questions is certainly not easy.

With the amendments brought by the 2015 Act and the subsequent Arbitration and Conciliation Amendment Bill of 2018 being silent about the various concerns regarding Emergency Arbitration, parties, for now, are without guidance as to how they should proceed with Emergency Arbitration if at all. However, it is pertinent to note that if Indian arbitration law does eventually embrace Emergency Arbitration, catch-all phrases in enumeration of interim measures granted by Tribunals should be substituted with a more illustrative rather than an exhaustive list similar to the English Arbitration Act, 1996.

Considering that the concept of Emergency Arbitration is at a nascent stage, it certainly does not come without obstacles. It is definitely hoped that with the various arbitration institutions providing for Emergency Arbitration and the Government's push towards institutional arbitration as highlighted in the Arbitration Amendment Bill, 2018, the incorporation of provisions dealing with Emergency Arbitration in the Indian legislation will be encouraged in the near future.

INDIAN PARTIES CHOOSING FOREIGN SEAT: WHAT THE COURTS SAID

Shubham Sharma[36]

I. INTRODUCTION

Seat and venue remain one of the most convoluted and highly contested topics in the realm of arbitration. Before even the

[36] *3rd year student, Guru Gobind Singh Indraprastha University*

institution of the arbitration proceedings, the choice of seat in the arbitration agreement constitutes a decision of far-reaching consequences. As held in Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd[37], fixing the seat confers exclusive jurisdiction over arbitration proceedings to the courts of that jurisdiction. Therefore, a mistake in choosing the right seat ends up costing a lot more to parties than the initial estimate. Also, as arbitration is a creature of an agreement[38], it is trite law that for the determination of the seat, only the arbitration agreement must be looked into.

A plethora of factors guide the parties in choosing the seat of arbitration, top of them being the enforceability of the award, the rules of arbitration, and its cost. Evidently, these factors make it favorable for domestic parties to deter from choosing an offshore seat as the arbitration arising out of the same would burn a bigger hole in their pockets. However, there exists no express bar in the Arbitration and Conciliation Act, 1996 (The Act) on domestic parties pursuing their resolution venture in a foreign seat. In a recent decision of Ge Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd.,[39] the Gujarat High Court legitimized parties choosing an offshore seat and upheld the resulting award. Although the courts in the past have discussed and adjudicated upon the issue, the jurisprudence around the same remained in a dreadlock due to the dithered decision between two High Courts. The providential decision of the Gujarat High Court not only provided clarity but also resolved accompanying issues such as the nature of such award and the validity of seeking interim relief in such arbitration.

The present article attempts to analyse and trace the entire controversy surrounding domestic parties choosing a foreign seat and how the newest developments have paved the way for the development of arbitration practice.

II. ATLAS DECISION

The issue first darkened the door of the Supreme Court in the 1999 decision of M/S Atlas Export Industries v. M/S Kotak & Company[40]. The respondents therein contended that an agreement (including the arbitration agreement) which compels the Indian parties to seek foreign arbitrators and exclude the option to seek relief under the Indian laws would be an agreement opposing the public policy of India and therefore, void vide Section 23 of the Indian Contract Act, 1872.

The court rejected the contention and recognised that the situation where parties seeking foreign arbitration falls squarely within Exception 1 of Section 28 of the Indian Contract Act, 1872 which grants immunity to contracts by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration. The Supreme Court further held "Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly agreed. Moreover, in the case at hand, the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them."[41] The Supreme Court, therefore, gave implied recognition to

[37](2017) 7 SCC 678.
[38] AIR 2002 SC 1139.
[39] 2020 SCC OnLine Guj 2432.
[40](1999)7 SCC 61.
[41]Ibid.

parties choosing a foreign seat. However, the decision was prior to the enactment of the Arbitration and Conciliation Act, 1996.

III. ADDHAR MERCANTILE DECISION

The issue subsequently arose in 2015, before the Bombay High Court in Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.[42] The petition pertained to Section 11 (6) of the Act and the arbitration agreement reflected the clear intention of the parties to have the seat either in India or Singapore.

The Bombay High Court held that if parties would be allowed to choose Singapore as the seat of arbitration, it would be in clear violation of the Supreme Court's decision of TDM Infrastructure Pvt. Ltd. v. UE Development India Private Ltd[43] (TDM), and thereby in violation of the Public Policy of India. In TDM, the Supreme Court examined the scope of Section 28 of the Act and held: "The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country." The High Court thus struck down the part of the agreement which chose Singapore as the seat of arbitration and directed the arbitration to be conducted under the aegis of Indian substantive law.

IV. SASAN DECISION

In the same year, the issue also fell in the lap of the Madhya Pradesh High Court in the decision of Sasan Power Limited v. North American Coal Corporation India Pvt. Ltd[44] (Sasan). The court in Sasan gave a welcoming green signal to parties choosing their arbitration seat beyond India as it relied upon the decision of Atlas and not TDM. Concerning the decision of TDM, the court held that the same, under paragraph 36, clearly stated that the decision laid down was only for the determination of jurisdiction under Section 11 and therefore did not apply to the case at hand.

The second issue before the court was whether the provisions of Part I or Part II would apply to such arbitration. The scheme of the Act is such that Part I of the Act deals with Domestic and International Commercial Arbitration while Part II deals with the enforcement of Foreign Awards. The court relied upon Section 44 of the Act and held that nationality of the parties has a bearing on whether the arbitration is domestic or international. However, the same has no applicability while determining whether the award is a foreign award. Consequently, the applicability of Part II is determined solely based on the seat of the arbitration and whether the seat country is a signatory of the New York Convention.

It is pertinent to note that both Sasan and Addhar were decided prior to the enactment of the Amendment and Conciliation Amendment Act of 2015 and 2019.

V. GE POWER V. PASL

The conflicting views of Addhar and Sasan posed a deadlock situation. This discordant position in law was also recognised by the High-Level Committee tasked to review the Institutionalisation of Arbitration Mechanism in India[45]. The committee

[42] 2015 SCC OnLine Bom 7752.
[43] (2008) 14 SCC 271.
[44] 2015 SCC OnLine MP 7417.
[45] Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India, Ministry of Law and Justice, India, (July.13.2017), https://legalaffairs.gov.in/sites/default/files/Report

lamented in its report: "inconsistent judicial precedent on several crucial issues has contributed to uncertainty regarding the law, with severe consequences for India's reputation as a seat of arbitration."[46]

Gujarat High Court's recent decision of Ge Power Conversion India Pvt. Ltd. v. Pasl Wind Solutions Pvt. Ltd (Ge Power)[47] marks an important development in the jurisprudence of party autonomy as it upheld domestic parties choosing a foreign seat and further built on the decision of Sasan.

The factual matrix of the case is as follows. In the year 2010, both the Indian companies entered into a supply agreement. Certain disputes arose in the year 2012, which were subsequently settled in 2014 by crystallising a settlement agreement. Although the settlement contract was executed in India, the parties decided to choose the seat of arbitration at Zurich, Switzerland. As disputes further arose, the parties initiated arbitration under the aegis of the International Chamber of Commerce (ICC), which appointed Mr. Ian Meakin as the sole arbitrator. In the year 2019, the sole arbitrator delivered a reasoned award in favour of the petitioner and the petitioner moved the Gujarat High Court seeking to enforce the award and obtain interim relief U/S. 47 read with S. 9 of the Arbitration & Conciliation Act, 1996 (the Act).

VI. WHETHER THE AWARD IS A FOREIGN AWARD

To determine the nature of the award, the court reserved its examination to Section 44 of the Act and upheld the same as the sole repository for determining whether an award can be categorized as a foreign award. The court further culled out the following ingredients under Section 44:

1. It must be an arbitral award
2. The award must be deduced upon an adjudication of a dispute between parties
3. Such dispute must be owing to and/or arise from a legal relationship between the parties
4. Such legal relationship, may or may not be contractual, however must borne out to be commercial in nature
5. Must be pursuant to an agreement in writing to which the New York Convention applies
6. Must be made in a territory recognized by the Central Government as a territory to which the New York Convention applies.

With others essentials being fulfilled, what remained was to determine the venue of the arbitration so as to examine the points 5 and 6 from the above essentials of Section 44.

The petitioners contended that the seat of the arbitration was Zurich, Switzerland, as stated in the arbitration clause of the agreement. The respondent contended that through application of the 'closest connection test' relying upon the intention of the parties, the seat would be determined as Mumbai, India.

The Court relied upon the arbitration agreement and the many documents of the arbitration expressly deciding upon the seat issue and declared the seat to indeed be in

-HLC.pdf (last accessed 1 January, 2021).

[46] Ibid, p. 22.

[47] *Supra* note 36.

Zurich, Switzerland.

VII. Whether Foreign Award is against Public Policy

The respondent raised the same issue which was settled in Atlas. The respondent contended that choosing the seat outside India can be construed as excluding remedies available within the Indian Law which would hit the arbitration with Section 23 read with Section 28 of the Contract Act, 1872.

Besides clearly recognising that arbitration is exempted from the public policy defence under Explanation 1 of Section 28 of the Contract Act, the Court relied on the decision of *Renusagar*[48] and *Glencore*[49] and held that 'opposing public policy' does not mean contravening law alone. The public policy defence argument must be construed narrowly where the award shall contravene more than just the law and must include elements of fraud or corruption. Failing the above standard, the award was held to be enforceable.

VIII. Applicability of Section 9 in such Arbitration

The complexity arose with respect to granting interim relief under Section 9 of the Act. Section 2(2) was added vide Arbitration and Conciliation Amendment Act, 2015 to treat the anomaly of interim relief not being available to award holding parties in International Commercial Arbitration. Section 2(2) stated that certain provisions, including Section 9, would also be applicable to International Commercial Arbitration 'even if the place of arbitration is outside India or the award made or to be made in such place is enforceable and recognised under the provisions of Part II of the Act'. The Court held that the above section qualifies only to International Commercial Arbitration.

International Commercial Arbitration, defined under Section 2(f) of the Act clearly means an arbitration arising out of legal relationships where at least one party to the contract is an individual, body corporate or association of body not from India. With the provision being non applicable to the present case involving domestic parties, the arbitration cannot be qualified as International Commercial Arbitration and therefore falls out of the purview of Section 2(2) of the Act. Therefore, the Court held that in cases when the arbitration award arises out of Indian parties who pursued their arbitration dispute in a foreign seat, Indian Courts would not be able to grant interim relief.

IX. Conclusion

The Gujarat High Court decision is definitely a welcomed one as the same upholds the very value which is unique to arbitration- Autonomy of Parties. Following the decision, we may see a rise in companies adopting foreign seats for their arbitration ventures which is a call for India to make its enforceability regime more robust, efficient and reliable.

Although the decision deals with the issue in detail, it must be noted that the decision of a High Court is only binding upon its jurisdiction and does not act as a precedent in other courts. To fully lay the issue to rest, we shall await the Hon'ble Supreme Court to

[48] Renusagar Power Co. Ltd. v. General Electric Company, 1994, Supp. (1) SCC 644.

[49] Glencore International Ag v. Dalmia Cement (Bharat) Limited, 2017 SCC OnLine Del 8932.

take note of it sometime in the future.

IGNORED ASPECT OF NEGOTIATION THEORY IN RELATION TO ADVERSARIAL BARGAINING


Ayush Yadav & Harsh Chandan[50]

I. INTRODUCTION

With the globalisation and business advancement, there arises various complications in regard to the functioning and management of companies and one such issue was over legalization. In traditional times, even if a small dispute arose, parties could be seen knocking the doors of the courts to address them. However, the modern commercial practices involving Alternative Dispute Resolution (ADR) mechanisms encourage parties to attempt to reach a voluntary settlement/agreement of their problems. In the recent times, with judicial advancement and ADR progress, many civil contracts contain a dispute resolution clause that provides that if a dispute arises, a party must not commence court proceedings unless that party has participated in the negotiation process in good faith. Negotiation which is referred to as "*an interactive communication process that potentially takes place whenever parties want something from someone else or from each other*"[51] is one such effective platform. An average person negotiates at least once in a day, be it a negotiation of Rs100 at a vegetable market or a negotiation involving a sum of Rs 100 crore on the corporate desk. However, the major challenge before them is the kind of negotiation. In common law countries, majorly two types of negotiation have been widely recognised. These are (i) Adversarial or Distributive Bargaining theory and (ii) Problem or Principal based negotiation. The antagonists of Principle based negotiation claim that it often fails when the parties are adamant, rigid and over-confident. Moreover, the premeditated mindset of Indian Society makes the process more vulnerable to its failure. The article criticises the comprehensive adoption of Principle based negotiation without realising its backlashes in the Indian legal circuit.

II. KINDS OF NEGOTIATION

A. Adversarial/ Distributive Bargaining Approach

According to the writings **"distributive bargaining assumes a zero-sum game and aims at the division of a fixed quantity of benefit: one side's gain is the other's loss**."[52] This mode of negotiation tends to approach the negotiation through competitive means. It is a competition between the parties who are represented by their respective negotiators, wherein, the tougher and more aggressive negotiator wins,

[50] *3rd year students, Maharashtra National Law University, Nagpur*

[51] Anirban Chakraborty, Law & Practice of Alternative Dispute Resolution in India: A Detailed Analysis 108 (Lexis Nexis 2016).

[52] Ibid.

and the more conciliatory one loses.[53] The bargaining initiates with high demands and subsequently ends with small concessions. Adversarial bargaining lost its credibility around 1990's. Data suggests that out of 58 articles published on negotiation, only 10 were related to adversarial and rest focused on Principle-based negotiation.[54] The most dominating text in that regard was that of Fisher and Ury's *'Getting to Yes'*.[55] However, the authors of 'Getting to Yes' failed to put any limitation in their book which attracted a lot of criticism. They portrayed adversarial negotiation in a very bad light and manipulated the world to opt for principle-based negotiation. But this must not be the case. The stance can be more understandable once the Principle-based negotiation is discussed in detail.

B. Principle Based-Negotiation

Principle Based Negotiation is a widely recognized ADR practice which leaves mutual gains on the negotiation table for both the parties. The celebrated 'Win-Win' mantra of ADR can be best understood through the process of Principle based negotiation. The Marry Parker Follet writing in 1942 was the initiation point for the interest-based negotiation which was further substantiated by Fisher and Ury's work of 'Getting to Yes'.[56]

It is worth mentioning that interest-based negotiation is based on idealistic principles and is based on the premise that the other party will cooperate fully, to share problems and works as allies. This might be a good process, but one cannot ignore the hard-core reality of the society where personal interests are always put before general interests. Therefore, such naïve model sometimes makes it difficult for the parties to adopt. Most of the times during a dispute, the parties, though not enemies, but are antipole to one other. Hence, there is less chance that one party would want to increase other's gain by putting up more options. In India, people think that there is only one way to win i.e to defeat the other side. Interest-based theories and techniques will certainly get one close to much of the time, but it will be old fashioned haggling over price and terms that will get one to agreement most of the time.[57]

III. THE FALLACIES OF INTEREST-BASED NEGOTIATION

A. The Significance of Initial Offer

In the adversarial mode of negotiation, usually the disputants make a high initial offer which determines their stance in any mediation process. Though, the risk attached to making of such critical opening is high as it could easily offend the other party, but, in certain circumstances where the position of the party is powerful, the risk of offending the other party is worth taking. The data suggests that high initial opening demand fetches more favorable outcomes than moderate or low opening demands.[58] The claim can be further substantiated by the

[53] Pon Staff, Mediation: Negotiation A More Satifactory Divorce, HLS Daily Blog, (https://www.pon.harvard.edu/daily/mediation/mediation-negotiating-a-more-satisfactory-divorce/ (last accessed 15 October, 2020).

[54] Ross Buckley, Adversarial Bargaining: An Ignored Aspect of Negotiation Theory, 75 ALJ, 108 (2001).

[55] ROGER FISHER & WILLIAM URY GETTING TO YES 96-98 (Penguin Books 1991).

[56] Mary Parker Follet, Dynamic Administration, 3 ADRJ, 132 (1942).

[57] Compare Wade, The Last Gap in Negotiations: Why is it Important? How can it be Crossed?, 6 ADRJ 95 (1995).

[58] Leo Hawkins, The Legal Negotiator 135 (Sweet & Maxwell 1991).

trend of excessive damages claims in the United States. It is unlikely that attorneys expect higher returns but they know the higher the opening demand, the higher the final pay-out is likely to be. It works just like the brand-value plays with a/the person's psychology. For instance, if a person is a brand-freak and is highly attached to any particular brand, no matter how high the prices are, he will buy the product at any cost.

The success of Principle based negotiation underlies in one its feature through which parties are able to share the maximized profits after providing a lot of options throughout the negotiation process. However, it becomes difficult when the options are scarce and limited. In such circumstances, the parties are inclined towards adversarial mode and make the best out of it. For instance, a person is willing to purchase a sea-face penthouse. His options are limited by his conditions because there are not many sea-face apartments are present in a particular city or town. Therefore, the seller can adopt a soft high approach in order to put a billboard with a high price. This will fetch the maximum output for the seller. Similarly, the buyer can put his own value for his sea-face penthouse, as there are not many purchasers in the market who could afford such luxurious apartments. Therefore, for the seller also the options are less which could manipulate him to offer the penthouse at least cost. Interest of the parties has the least role to play in abovementioned circumstances. Therefore, the opening proposition is a crucial element in any negotiating process.

In Interest-based negotiation, the opening may set the tone of the whole process but is not considered as significant as in adversarial bargaining, which is the most crucial point of which decides the range of the entire negotiation.

B. The Exploitation of Weakness is Legitimate

Interest based negotiation is the most effective when all the parties to negotiation have roughly equal bargaining power and are dependent on one another to get the shared benefit. When either of the party is dominant and confident about the outcome of their proposal, it is very unlikely that such party would weigh the potential negative consequences and hence have no reason to engage in interest-based bargaining.[59] This situation may arise when the surrounding circumstances or the nature of the dispute is likely to give more leverage to another party.[60] For instance, an active employee on whom the company heavily relies, seeks to negotiate his salary increment is likely to dominate the process which is characterized by his importance in the company.

In a limited survey conducted in the England involving interviews with 30 solicitors, 20 barristers and 12 insurance company, it was found that if the other party is weak, advantage may be taken of such weakness.[61] Though, the researcher does not advocate or intends to propagate such behaviour, but it is a human tendency to make the best out of someone's worst and hence it is generally accepted norms of conduct. According to the report, the incompetent lawyer or his lack of study on the case prior to the initiation of the proceedings reflects the party's weakness. The reluctancy to litigation, lack of financial

[59] Gary Goodpaster, Rational Decision-Making in Problem-Solving Negotiation: Compromise, Interest-Valuation, and Cognitive Error, 8 OSJDR, 312 (1993).

[60] Ibid.

[61] *Supra* note 47.

and emotional support and inexperienced lawyer are some of the additional factors which determines the weakness of other party. In the bargaining process, the party with the best information has the edge over the other part. A well skilled negotiator tends to disclose the information very selectively and at the right point of time. Some negotiators mislead the other party by hiding the important information or providing with the wrong details. Competitors withhold and manipulate information to maximize their own individual gains. On the other hand, principle-based negotiation is based on the basic premise which promotes exchange of information. The process is viable once the parties reveal all the interests and information to the other party. Consequentially, the party looks for mutual gains through disclosed information. Not disclosing information altogether destroys the interest-based negotiation. Therefore, the parties with significant and substantial information are reluctant to opt for principle-based negotiation.

C. Dealing with Difficult People

Negotiation becomes an obvious choice if done with the right sense of mind. Principle based negotiation requires full cooperation from the opposite parties. If the party is unwilling to coordinate, no matter how experienced a person is at negotiation, he has to face encounters and challenges from time to time. If a person is antagonist in general or has specific reasons to believe, then it is likely that he will give everyone a hard time. Dealing with these people will limit the options and opportunities of maximizing the joint profits. An agitated person would not share his interest and consequentially his constant disruption to the process might eventually lead to end the whole process.

The most evident example of cases where interest-based bargaining will fall short of producing a good result is where the bargaining involves parties who frame issues in terms of fundamental values or ideologies which conflict. For instance, a negotiation for cultural exchanges to arm the controls between the two-fierce rival countries, the Soviet Union and the United States was impossible. Similarly, it was hard for America and Ayatollah's Iran to negotiate about values of Western capitalist civilization and Islamic fundamentalism unless there was some position or bargaining involved. The negotiation was only possible with the release of American hostages in lieu of Iran's release of frozen assets in the United States.

In this regard, interest-based negotiations again fail to keep up with the expectation of parties. Moreover, if the parties are arch-rivals, then all efforts to communicate and collaborate proves futile.[62]

IV. CONCLUSION

The usual approach to conclude which type of negotiation is best and effective is by comparing the advantages and disadvantages of each type of processes. However, this conventional strategy of 'either-or' underpins the most effective way to resolve dispute. If interest-based negotiation and position-based negotiation can be used concurrently than the resolution becomes more effective. More importantly, as we have seen that India has adopted all these procedures from the western countries. The implementation of every law, be it substantive or procedural, varies from country to country and therefore the law or practice which is rampant and

[62] *Supra* note 51.

effective in one country does not necessarily mean that the same would be effective in other countries too. Every country needs to analyse the shortcomings and its adoption in regard to the society, culture, psychology, socio economic conditions etc. The best example is in this regard is the Lok-Adalat which is Sui generis ADR process of India. It is effective in India because its implementation is based on the prevailing situation of the Country. Therefore, it is highly recommendable that India should also develop its own type of negotiation which will be best not for the party only but for the public's interest also.

CYBER-SECURITY & PROTECTION OF DATA IN VIRTUAL ARBITRAL HEARINGS

Anjeeta Rani[63]

I. INTRODUCTION

Many of us have experienced firsthand global health crisis which has popularized virtual hearing and rendered them a necessity in arbitrational proceedings. However, there are some serious cyber security issues associated with transitioning to a virtual hearing course. The threat is real but what does it mean in the context of an arbitration and what the tribunals and arbitral institutions need to do to protect themselves. They have to do some training but when it comes down to actual cyber risks, institutions simply don't have the capacity to actually act and actually prevent or react to the risks. [64]

Institutions only maintain the ability to affect online filings and perhaps organization of hearings which is as a proportion, a quite minor amount of the time when cybersecurity events could actually happen. How can arbitral institutions have any impact whatsoever on the vast majority of arbitration activities?

It is a misunderstanding of the issue to say that just because institutions do no't control the server from which the arbitrator is sharing emails for communications about the case means that the institution can't have some influence over the way that data is dealt with by the arbitrators. The arbitral tribunal has the obligation to protect the integrity of the proceedings that includes preventing cybersecurity risks. Arbitral institutions have the resources to immune themselves from cyber-attacks, hence, they should take care of cyber security when the parties don't have the immunity, the ones that have the actual obligation to protect the clients' information. [65]

II. CYBERSECURITY

[63] *4th year student, Chanakya National Law University, Patna*

[64] Frederico Singarajah, The hitchhiker's guide to virtual hearings (Part 1), Practical Law Arbitration Blog, http://arbitrationblog.practicallaw.com/the-hitchhikers-guide-to-virtual-hearings-part-1/ (last accessed 8 November, 2020).

[65] David Turner, Gulshan Gill, Addressing emerging cyber risks: reflections on the ICCA Cybersecurity Protocol for International Arbitration, Practical Law Arbitration Blog, http://arbitrationblog.practicallaw.com/addressing-emerging-cyber-risks-reflections-on-the-icca-cybersecurity-protocol-for-international-arbitration/(last accessed 8 November, 2020).

CONCERNS IN INTERNATIONAL ARBITRATION

We have seen highly publicized reports of data breeders in regard to the cybersecurity breaches. For example, it was recently in a report that Australian institutions including hospitals are the target of a planned hacking operation by a state-based hacker. These kinds of attacks on businesses, on law firms and arbitral institutions can have very serious financial and reputational consequences.[66] In fact, there was another highly publicized attack on the Permanent Chamber of Arbitration (PCA) website in relation to the Philippines-China arbitration where the PCA website was implanted with a malicious code that posed a risk to not just the parties but anybody visiting the website.[67]

With the number of people involved in arbitration like lawyers, Arbitrators, interns, paralegals, secretaries, their assistants, the parties of the arbitral institutions and their witnesses who access their query providers of virtual hearing data platforms are all the vectors of cyber security risks. The problem is that the institutions are doing close to nothing about it. Most arbitral institutions do not make provision for cyber security issues nor address how vulnerable information is to be identified. This leads us to question what the arbitral institutions must do to address cybersecurity risks in international arbitration.

By looking at an example as to what actually is a cyber-risk that can happen. Let's say an arbitrator opens an email one day, downloads an attachment and encrypts the computer. The nearly completed award is now no longer accessible and the threat actors are asking them to pay some amount of bitcoins in order to maybe get a code that will release their decrypted data and get their award back.

The institutions are not managing how an arbitrator is storing files but the institution puts out a guide that provides detailed information and support for arbitrator decisions on how to deal with various management problems and every security matter. Most parties and arbitrators simply lack the experience and knowledge required to properly assess cybersecurity risks and implement corresponding cybersecurity measures to be effective.

There is no one-size-fits-all solution for every arbitration but there are commonalities and baseline measures to be adopted by arbitrations. They're all too different in terms of scale of the arbitration, the number of parties, the quality of arms and that's why each party has to come together and decide what cybersecurity measures they're going to have in place for that particular arbitration. Therefore, there are guidelines already available for parties to use as a baseline that is formed by a systematic approach to cybersecurity issues and come to an agreement, collaborate and increase or amend those guidelines.

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[66] Australia concerned over 'malicious' cyber-attack on hospitals, Gulf Times, https://m.gulf-times.com/story/663670/Australia-concerned-over-malicious-cyber-attack-on-hospitals (last accessed 9 November, 2020).

[67] Luke Eric Peterson, Permanent Court of Arbitration website goes offline, with cyber-security firm contending that security flaw was exploited in concert with China-Philippines arbitration, Investment Arbitration Reporter, https://www.iareporter.com/articles/permanent-court-of-arbitration-goes-offline-with-cyber-security-firm-contending-that-security-flaw-was-exploited-in-lead-up-to-china-philippines-arbitration/ (last accessed on 9 November, 2020).

III. INTERNATIONAL REGULATIONS

Following the significant changes worldwide such as the introduction of the General Data Protection Regulation (GDPR)[68] in the European Union, the Personal Data Protection Bill 2019[69] based on the GDPR model in India, and the recognition of the right to privacy as a fundamental right in countries like India[70], the discourse on data protection and cybersecurity in the area of arbitration has gradually led to a dialog on data protection and cybersecurity in the field of arbitration.

For e.g., let's say that there is a fictional conflict between the EU and the USA in which the arbitration is conducted in Singapore or in some third jurisdiction of the arbitral institution. The tribunal, parties and lawyers must comply with the data privacy legislation of all three jurisdictions, since the information would be passed across several jurisdictions. Therefore, there is a need for tailor-made rules expressly addressing international arbitration due to the multiplicity of data privacy regulations in arbitration around the globe.

A joint task force has recently been set up by the International Convention for Commercial Arbitration and the IBA to examine and compile a document for the stakeholders on the applicability of data privacy legislation in international arbitration. The Task Force has prepared a roadmap discussing the problem of data security in arbitration and has taken as its reference an intergovernmental policy framework, the GDPR, as it is currently the most appropriate data protection legislation in the world.[71]

The entire procedure as to how the GDPR functions is complicated, but even though the participants are not in Europe or the seat is not based there, it may be important in the field of international arbitration. In the guidelines, the ICCA-IBA Task Force raised this issue and clarified how data privacy laws would respond to the international arbitral framework and used the GDPR to address them.

Arbitral members and relevant agencies, such as service providers, consultants and tribunal secretaries, shall ensure compliance with these GDPR guidelines in accordance with the ICCA-IBA roadmap. There needs to be a balance between the data subject's transparency and the privacy of the proceedings. Consequently, at the outset of the trial, the ICCA-IBA roadmap recommends discussing the data subject's rights and also addresses this in the data security protocol identified in the roadmap.[72]

The Roadmap further addresses the distinction depending on the form of arbitration in the enforcement of data privacy laws. For example, the steering wheel would be the ICSID or the PCA with respect to Investor-State arbitration, and those international organizations would be omitted from the implementation of data privacy laws. The ICCA-IBA roadmap states that the treaties have some safeguards and rights for

[68] Regulation 2016/679 of May 4, 2016, General Data Protection Regulation, 2016 O.J. (L 119) 1 (EU).
[69] The Personal Data Protection Bill, 2019, Bill No. 373 of 2019 (India).
[70] Justice K. S. Puttaswamy (Retd.), and Anr v. Union of India and Ors., (2017) 10 SCC 1.
[71] The ICCA-IBA Roadmap to Data Protection in International Arbitration, Public Consultation Draft, https://www.arbitration-icca.org/media/14/18191123957287/roadmap_28.02.20.pdf (last accessed 26 February, 2020).
[72] Ibid, p. 23-25.

arbitral members in the cases mentioned above and therefore, they are immune from ensuing the data protection laws.[73]

In addition, in the data privacy framework, the roadmap also accepts some basic standards, such as data security, accuracy, data minimization, transparency, lawful and fair processing of data and proportionality, and indicates that these principles should be implemented in arbitration.[74]

In collaboration with the New York City Bar Association ("NYC Bar") and the International Institute for Conflict Prevention and Resolution Institute ("CPR"), the ICCA also has made considerable advancement in the field of cybersecurity concerns by introducing the "the Protocol on Cybersecurity in International Arbitration".[75] The aim of the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration is to have a mechanism for the evaluation of reasonable information security measures for each arbitration proceedings, providing procedural and practical directives for the determination of privacy concerns and identification of possible measures that may be taken.[76]

The ICCA-NYC Bar-CPR Cybersecurity Protocol lays down certain considerations for applying the specific information security measures in an arbitration which are asset management, access controls, encryption, communications security, physical and environmental security, operations security and information security incident management.[77] It also puts a responsibility on the parties to raise and discuss the data protection issues at the first case management conference.[78]

Furthermore, when we look at the guidelines that exist currently for cyber security, many of them even focus on things like educating arbitrators on how to protect their own data that is stored on their own computer not within the server of the institution, things like changing the password regularly, etc.

IV. CONCLUSION

Increase in frequency of cyber-attacks coupled with the harsh consequences, preachers should make data protection and cybersecurity a top priority for all stakeholders in the international arbitration. From a cyber-security standpoint, the guidelines need to be more advanced in order to account for the more advanced cyber security risks.

Lawyers ought to start encouraging drafting arbitration agreements which actually insert some requirements regarding cybersecurity responsibilities. The arbitration clauses already talk about confidentiality. Cybersecurity is simply the next step of confidentiality and we need to interpret confidentiality into arbitration clause to include a mandate to the panel to address this issue.[79]

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[73] *Supra* note 66, p. 37.

[74] *Supra* note 66, p. 14-15.

[75] ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf (last accessed 26 February, 2020).

[76] Ibid.

[77] *Supra* note 70, p. 2.

[78] Supra note 70, p. 2.

[79] Myfanwy Wood & Lucy McKenzie, Arbitration and COVID-19: Cybersecurity and data protection, Ashurst (Nov 11, 2020, 07:11 PM),

Each custodian in the arbitral process represents a target for cyber attackers and the cybersecurity measures are only as strong as the weakest of those custodians in administered arbitrations. The point of convergence between the participants generally is the arbitral institution and their document repositories thus in addition to their obligations to the data they receive, the virtual institutions should have an interest in ensuring that everyone who's involved in the original proceedings protects its data adequately.[80]

Cybersecurity measures must apply to the arbitrator's as well as the parties and the arbitral institution. This is normally achieved not by procedural orders that the tribunal would rule upon but by rules that the arbitral institutions would adopt. Arbitral institutions have always led the way. This is nothing new. Arbitral institutions have been even before friends of change and they should be at the forefront of change now in setting the cybersecurity standards in international arbitration.

https://www.ashurst.com/en/news-and-insights/legal-updates/arbitration-and-covid-19---cybersecurity-and-data-protection/ (last accessed 11 November, 2020).

[80] Ibid.

ADR UPDATES

M/S Vidyawati Construction v. Union of India.

17 November 2020 | First Appeal from Order No. 3316 of 2013 | Allahabad High Court

Principle: Upon the existence of an arbitration agreement no derogation in the appointment of an arbitrator can be made where the clause specifically provides for certain persons to be appointed as arbitrator. Section 10 of the Arbitration and Conciliation Act, 1996 prohibits appointment of even number of arbitrators.

Facts: In the event of breach of payment terms, w.r.t to the contract, the Petitioners invoked the arbitration clause of the agreement, which provided for the constitution of an arbitral tribunal with one arbitrator appointed by each party, and an umpire to be appointed by the two arbitrators, from the Railway Dept., who would act as a presiding arbitrator, whose decision would be binding in case there is a difference of opinion.

A de novo arbitral tribunal was constituted by the appointment of a sole arbitrator. After an arbitral award was passed through subsequent arbitrations, objections were filed under Section 34, claiming that the appointment of arbitrators was not in accordance with the arbitration agreement and an even number of arbitrators could not be appointed. The High Court set aside the award and heard the matter.

Judgment: The Court held that arbitration is creature of agreement and, the parties cannot be allowed to deviate from the same where the agreement is a valid agreement as per Section 7 of the Act. Additionally, it was held that since the appointment of Arbitral Tribunal had been made as per the agreement clause invoked by the appellant before this Court in the year 1997, and constituting a fresh Arbitral Tribunal without replacing the earlier Tribunal or terminating its mandate, was against the agreement entered into between the parties.

Odeon builders Pvt ltd. v. Engineers India ltd.

1 October 2020| Arb. P. 247/2020 | Delhi High Court

Principle: The 1996 Act does not envisage the enforcement of an award against a stranger to the arbitral proceedings. 'Party' is defined in Section 2(h) of the Act as meaning — a party to an arbitration agreement. Juxtaposed with clauses in the GCC/SCC and the definitions, as incorporated in the arbitration agreement, holistic reading reveals the competent parties to an agreement, who would act opposite to each other.

Facts: The Petitioner sought, by this petition under Section 11(6) of the Act, the appointment of an arbitrator, on behalf of the Respondent.

In 2010, a contract was executed between the National Institute of Immunology (NII) and the Respondent. In the said contract, NII acted on behalf of itself, the Regional Centre for Biotechnology (RCB) and the Translational Health Science and Technology Institute (THSTI) to establish a Biotech Science Cluster Campus. Further, NII had selected the Respondent to provide Project Management Consultancy services, as specified in the contract.

In 2011, bids were invited by the Respondent for the construction of Phase 1 of the campus. In response, the Petitioner emerged

as the successful bidder. On 11th July, 2011, a formal agreement was executed between the Respondent and the Petitioner. Consequent to the execution of the agreement, work commenced, and as is nearly inevitable in such cases, disputes surfaced. The Petitioner accused the Respondent of delays in handing over of the site and delay in modification of the lift machine room, among other infractions. This resulted in huge losses having to be incurred by it, as a consequence of which the Petitioner claims an amount of ₹ 17,53,20,589/- from the Respondent. On 3rd October, 2019, the Petitioner wrote for setting out its claims and requesting that the matter be amicably settled through arbitration.

The Respondent conflicted that they are not a party to the agreement as RCB remains the 'Owners' of the agreement. Hence, the Petitioner is advised to raise any claims, that it may have, with the RCB and to withdraw the notice issued to the Respondent. It is in these circumstances that the present petition was moved before the Court and as the matter has neither been settled, nor has any arbitrator been appointed by the Respondent, the task of appointing an arbitrator, on behalf of the respondent, devolves on the Court under Section 11(6) of the Act.

Judgment: After notably examining the facts of the case, when attention is drawn to the agreement (dated 11th July, 2011), it's crystal clear from the said covenant that the parties to the agreement were the petitioner and the respondent, and not RCB.

Clause 66.0 of the Special Conditions of Contract (SCC) clearly provide that any award passed by the Arbitral Tribunal would be enforceable only against the Respondent. In fact, there is no covenant, in any of the documents executed between the parties, providing for enforcement of the arbitral award against RCB. Significantly, there is no reference in the General Conditions of Contract (GCC) of RCB as a party to the contract. Rather, the covenants of the agreements clearly set out the responsibility of the respondent, vis-a-vis the petitioner, which were independent and distinct.

Section 2(h) of the Act defines 'Party', as meaning — a party to an arbitration agreement. Hence, a conjoint reading of the definition of parties in the agreement dated 11th July, 2011, with Clause 83.3 of the GCC, Clause 66.0 of the SCC and Section 11 of the Act, clearly discloses that the petitioner has correctly preferred the present petition against the respondent, and not against RCB.

NTPC Ltd. v. AMR India Ltd.

3 November 2020 | O.M.P.(T) COMM 13/2020) | Delhi High Court

Principle: The mandate of an arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; or when the parties agree to terminate his mandate.

Facts: Upon certain contractual breaches committed by AMR India ("Respondent"), NTPC Ltd. ("Petitioner") invoked the arbitration clause of the contract, thereby leading to the appointment of a Sole arbitrator as opposed to the contractual terms that provided for the constitution of an Arbitral Tribunal of three arbitrators. The arbitration invoked was to be conducted in terms of the 'Fast Track Procedure' under Section 29B of the Arbitration and Conciliation Act, 1996 ("Act"). The terms of payment were accepted with regard to the

Fast Track Procedure.

Subsequently the nature and volume of the pleadings increased and the setting of the arbitration became a full-fledged proceeding. The Arbitrator through an order revised his fee in view of the change in the nature of the proceedings, stating that the parties continued to participate in the proceedings. The Petitioner expressed its refusal to not pay the revised fee and filed for the recall of the order by the Arbitrator.

Judgment: It was held that the Arbitrator having accepted certain fees upon appointment cannot deviate from the terms of the appointment to claim a higher fees, which would make the Arbitrator therein de jure unable to perform his functions as an arbitrator. While the Arbitrator could avoid the proceedings in view of the change in proceedings, he could not have increased the fees relying on the provisions of the Act.

GE Power Conversion India Private Limited v. PASL Wind Solutions Private Limited

3 November 2020 | Arb. Petition No.131 of 2019 | Gujarat High Court

Principle: Nationality of the parties is not an essential condition for the enforcement of a Foreign award. Two Indian parties can choose a foreign seat of arbitration and the award decreed therefrom could be enforced as a foreign arbitral award in India. Such choice of seat does not breach public policy. However, the parties are not entitled to seek interim relief pursuant to Section 9 of the Arbitration and Conciliation Act, 1996.

Facts: The petitioner GE Power Conversion India Pvt Ltd and the respondent PASL Wind Solutions Pvt Ltd, were Indian companies. In 2010, the respondent issued three purchase orders to the petitioner for supply of six converters. Certain disputes and differences arose between the parties in respect of the purchase orders. In order to resolve them, the parties entered into a settlement agreement. Since the disputes could not be resolved, the respondent issued a request for arbitration and in August, 2018, the parties agreed to the resolution of disputes by a Sole Arbitrator. The seat of Arbitration was Zurich, Curial law being Swiss law. The substantive law governing the settlement agreement was Indian law. The petitioner had filed a preliminary application challenging the jurisdiction of the arbitrator on the ground that since the two parties were Indian parties, they cannot have a foreign seat of arbitration. That was opposed by the respondent and the Tribunal held that the Arbitration Clause in the Settlement Agreement is valid and proceeded to apply the Swiss Act because the seat of Arbitration was Zurich. The order was not challenged either by either party. For the purposes of final hearing, the petitioner suggested Mumbai as the venue being a convenient location for hearings. The Arbitrator passed a detailed and a reasoned award ("foreign award"). The arbitrator rejected the claim of the respondent and granted the petitioner INR 25,976,330.00 & USD 40000.00 in legal costs and expenses with accumulated interest. The present petition was filed for enforcement and execution of this award passed by the Arbitral Tribunal as no payment was made by the respondent. The case was concerned with the following questions:

(I) Is the Award in question a Foreign Award?

(II) Whether the award in question, if a foreign award, is enforceable in India?

(a) Whether conditions of enforceability are fulfilled?

(b) Whether the award can be said to be against the public policy of India?

(III) Whether an application under Section 9 in the context of the agreement in question is maintainable before this Court?

Judgment: In answering whether the Award in question is a Foreign Award, relying on the BALCO case the Court culled out the ingredients of a foreign award from Section 44 which defines a foreign award as: arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made after 11th October, 1960 in pursuance of an agreement in writing for arbitration to which the New York Convention applies, and, in one of such territories as the Central Government declares to be territories to which the Convention applies. Out of this, the dispute was only over the territorial ingredients i.e. applicability of New York Convention to the agreement and the Venue/seat of the award where the award can be said to have been made. In furtherance and to conclude whether the present award is a 'foreign award', the Court first determined the seat of arbitration. In this regard, the Court held that the nationality of the parties has no relevance for considering the applicability of Part II of the Act, which is determined solely based on what is the seat of arbitration, whether it is in a country which is signatory to the New York Convention and only then, Part II will apply. Thus, the contentions of nationality of the parties and the domestic elements involved in the award, being irrelevant for the purpose of determining the nomenclature of the award, were overruled. In ascertaining the seat, reliance was placed on BALCO and BGS SOMA. The Court also turned to the express designation of the seat of arbitration in the agreement which was Zurich. Bearing these considerations in mind, the Court concluded that the juridical seat of the arbitration was Zurich. With such finding the Court held that the award, in as much as it is made in Zurich- a territory declared by the Central Government to be one to which the New York Convention applies and in the absence of a dispute on any other ingredients prescribed in Section 44 of the Act, is a Foreign Award.

On the second question, i.e. 'Is the foreign award in question enforceable in India', the Court was guided by the Fuerst Day Lawson Ltd case. It held that it had jurisdiction to decide upon the application seeking enforcement of the award in question because the subject-matter of the present proceedings i.e. the assets of the respondent against which enforcement is sought, are located in its jurisdiction. On the question of the enforceability of the award, the Court held that no ground other than that provided for under Section 48 is available to resist enforcement of a foreign award. In this regard, the Court only considered the public policy defense for resisting the enforcement of the foreign award where it had been contended that to the extent the arbitration agreement involves two Indian parties who have acceded to designating their seat of arbitration to be outside India, such agreement would be inconsistent with Section 28 of the Indian Contract Act and therefore hit by Section 23 of the Act, rendering the contract to be illegal, hence against the public policy of India. Placing reliance on the Renusagar case, wherein it was held that the public policy defense should be construed narrowly and that, contravention of law alone will not attract bar

of public policy and something more than contravention of law is required; and the explanation in Section 28 excluding a reference of arbitration from the ambit of Section 28(a), the Court found that what is also discernible is that the Act , does not per se prohibit two Indian parties from designating a foreign court and vesting in it exclusive jurisdiction to supervise its arbitration proceedings and therefore even with the parties designating the seat of arbitration at Zurich do not infract any Indian law much less it being forbidden by any Indian laws. Hence, the foreign award in question is not against the policy of India, thus, enforceable in India.

The final question was 'Whether an application under Section 9 in the context of the agreement in question is maintainable before this Court?'. Differing from the Trammo case wherein it was held that Section 9 inter alia is available in enforcement of foreign awards, the Court held that the application under Section 9 is not maintainable because, Trammo involved adjudication in the context of an International Commercial Arbitration whereas the uniqueness of this case is the involvement of Indian parties having designated a foreign seated arbitration which arbitration however is not an International Commercial Arbitration. Therefore, the Court found the award in question to have become final as per the Curial law and satisfied that the award in question is enforceable and held that the award shall be deemed to be decree of this Court.

M/s. Water Angels v. Bengarluru Metro Rail Corp. Ltd.

17 November 2020 | Civil Miscellaneous Petition No. 68 of 2020 | Karnataka High Court

Principle: Disputes pertaining to licensee and licensor relationship are arbitrable.

Facts: The Petitioner filed a petition under section 11 of the Arbitration and Conciliation Act 1996 (hereinafter 'The Act') in the Karnataka High Court seeking an appointment of the Sole Arbitrator, in pursuance of Clause 18.1 of the License Agreement entered between the Petitioner and the Respondent. Clause18 of the aforementioned License Agreement provided for the dispute Resolution clause as per which the appointment of the arbitrators had to take place. However, when the parties failed to reach an agreement for the appointment of the Sole Arbitrator, the Petitioner moved the Petition before the Karnataka High Court.

Judgment: The Court rejected the Respondent's contention regarding the dismissal of the Petition in view of dismissal of petition filed by the Petitioner under Section 9 of the Act. Additionally, the Court stated that the reasoning of the apex court in Himagni Enterprises v. Kamaljeet Singh Ahluwalia (2017) 10 SCC 706, cannot be used to decide the maintainability of the Petition since the present agreement does not create a relationship of landlord/lessor and tenant/lesse between the parties. The apex court in Himagni held disputes pertaining to lessor and lesse are non-arbitrable and hence the current dispute relating to the licensing agreement is arbitrable. In view of this the Court allowed the Petition and ordered the Petitioner to appear before the Managing Director of the Respondent for resolution of the dispute. In the event of failure of the dispute resolution process before the Managing Director, the Court ordered for referral of the dispute to the Ld. Sole Arbitrator Shri Justice A.N. Venugopala Gowda.

Cars24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP

17 November 2020 | ARB. Petition 328/2020 |Delhi High Court

Principle: The Court of the seat of arbitration would not have exclusive jurisdiction to regulate the arbitration proceedings, if there exists an exclusive jurisdiction clause in the arbitration agreement.

Facts: The Petitioner entered into a lease agreement with the Respondent under which an interest free refundable security deposit of Rs. 52,80,000 was paid, by the Petitioner, to the Respondent, and the monthly lease rental of Rs. 7,30,000 was to be paid by the Petitioner. The Petitioner was meeting all its liabilities without default, however, due to the COVID-19 pandemic it suspended its operations completely and informed the Respondent that it intended to terminate the lease deed, invoking Clause 13.2 thereof (which dealt with force majeure). Subsequently, the Petitioner requested the Respondent to return the interest free refundable security deposit of Rs. 52,80,000 paid by it during the conclusion of the agreement. The Respondent refused to return the security stating that it did not have any such liability towards the petitioner. This ultimately led to a dispute due to which the Petitioner invoked arbitration under Clause 25.2 to 25.4 of the lease deed.

However, the parties failed to unanimously chose an arbitrator, thereby causing the Petitioner to move this petition under Section 11(5) of the Arbitration and Conciliation Act 1996 (hereinafter 'The Act') before the Delhi High Court. In the proceedings before the Court, the parties submitted to the jurisdiction of the Delhi High Court as the seat of arbitration had been fixed as New Delhi, Delhi High Court had exclusive jurisdiction to appoint the sole arbitrator.

Judgment: The Court noted that Clause 25.4 of the lease deed provided for an exclusive jurisdiction clause by virtue of which the power for appointment of the sole arbitrator in terms of the Act had been particularly vested upon a court of competent jurisdiction at Haryana. In view of this the Court distinguished the present situation from the long line of cases cited by the parties to show that courts having jurisdiction over the seat of arbitration, provided for in the agreement, possess jurisdiction over the arbitral proceedings including matters relating to Section 9, 11 and 34 of the Act. The Court stated that cited decisions do not pertain to a situation in which the contract per se contained a distinct exclusive jurisdiction clause, vesting jurisdiction on a court other than the one having jurisdiction over the seat of the arbitration. Thus, the Court, relying on the reasoning lain down in Mankastu Impex Pvt. Ltd. v. Airvisual Ltd. 2020 SCC OnLine SC 301, held that as exclusive jurisdiction pertaining to the appointment of the sole arbitrator under Section 11 has been conferred upon courts at Haryana, that clause has to be accorded due respect. Hence, it refrained to exercise Section 11 jurisdiction in the matter and dismissed the petition.

Mumbai International Airport Limited v. Airports Authority of India & Ors.

27 November 2020 | 2020 O.M.P. (I) (COMM.) 174/2020 | Delhi High Court

Facts: On 17th February, 2004, the respondent Airport Authority of India (hereinafter referred to as "AAI") issued an

Invitation to Register Expression of Interest, inviting Joint Venture (JV) bidders, to partner with AAI, in MIAL, which had been incorporated for designing, developing, constructing, financing, managing, operating and maintaining the Chhatrapati Shivaji Maharaj International Airport at Mumbai, Maharashtra.

MIAL and AAI executed an Operation, Management and Development Agreement (hereinafter referred to as the "OMDA") on 4th April, 2006. Under the OMDA, AAI leased, to MIAL, the areas stipulated in the Schedule to the OMDA – which, essentially, included the CSI Airport and associated areas. Concomitantly, MIAL was responsible for the operation and management of the Airport, and for the performance of all activities and services undertaken therein. AAI undertook to provide operational support to MIAL for three years, for which the Operation Support Cost was fixed as ₹ 95 crores. MIAL was required to "operate, maintain, develop, design, construct, upgrade, modernise, manage and keep in good operating repair and condition the Airport, in order to ensure that the Airport at all times meets the requirements of an international world class airport", and in accordance with internationally accepted standards.

As per the agreement between the two parties signed in 2006, MIAL pays 38.7 per cent of its projected revenue as an annual fee. An escrow account has been set up and all receivables of the Mumbai airport are deposited in it, and are then used to pay statutory dues and annual fee to AAI.

In March, MIAL invoked the force majeure clause under the agreement to suspend the revenue share agreement as the pandemic was impacting traffic flows and revenue. The AAI allowed a three month deferral till July 15 for April-June dues "on account of a force majeure event". However, it said the fee would have to be paid from July.

MIAL said it should be entitled to force majeure benefit for the entire duration of the pandemic. It moved the HC seeking interim relief under the Arbitration and Conciliation Act after Rs 29 crore was transferred from the escrow account to AAI on July 7.

Judgment: In its judgment, the HC said that prima facie a case exists in favour of MIAL, as regards the adverse financial impact of Covid-19 and the resultant restrictions. The court said it was not enough for the AAI to emphasise that MIAL was required to pay a percentage of its revenue to it, but also demonstrate that MIAL had the financial wherewithal to do so. "It cannot be said, on the basis of the materials on record that the AAI has succeeded in bridging this gap," Justice C Hari Shankar observed.

Dhargalkar Technoesis Ltd v. Mumbai Metropolitan Regional Development Authority

3 December 2020 | ARB. PETITION (L) NO. 55 OF 2020 | Bombay High Court

Principle: A clear and unequivocal agreement or at least clear intentions to arbitrate in the agreement are necessary for reference of disputes to arbitration.

Facts: The Applicant has applied for an order under section 11 of the Arbitration Act for reference of the contractual dispute with the Respondent to arbitration. It contends that the main agreement of 2004 clearly indicates the intention of the parties to arbitrate the dispute, though the words 'arbitration', 'arbitrator', etc have not been explicitly mentioned. The Respondent

contends that disputes can be arbitrated only when both parties agree to the same, which is not the case in the present dispute due to the lack of consensus ad idem.

Judgment: The court referred to the Supreme Court decision of *Jagdish Chander v. Ramesh Chander & Ors.* and held that even though the precise words have not been used, the intention of the parties to refer disputes to a private tribunal should be clearly evident from the agreement. The same is lacking in the present case. Thus, lacking an arbitration agreement, the present dispute cannot be referred to arbitration.

The Union of India and Ors. v. Manikkam Engineers (Pvt.) Ltd. and Ors

01 December 2020 | O.P.No.249 of 2014 | High Court of Madras

Principle: Substantive challenge to an award should be adjudicated by a Court where the seat of arbitration is situated.

Facts: Southern Railways (Applicant) filed an Original Petition before the High Court of Madras under section 34 of the Arbitration Act 2015 against the Contractor (Respondent). The Respondent contends that the court lacks jurisdiction owing to section 42 of the Act and that (a) the entire arbitral proceedings were conducted in Kerala; (b) the order by the division bench of the Madras High Court dealt with the condonation of delay application and was unrelated to the jurisdiction issues. Thus, the same cannot be considered by the court. In response, the appellant contends that (a) the associated contractors' principle is applicable which implies that the order by the Kerala High Court does not attract section 42; (b) the provisions of the Agreement do not categorically specify the place of arbitration in the dispute settlement clause as Kerala; (c) the cause of action arose in Chennai.

Judgment: The court held that the "*parties have consciously chosen Ernakulam (Kerala) as the place (venue/seat) for the arbitration and therefore that i.e., Kerala becomes the exclusive territorial jurisdiction qua case*" on hand if BGS SGS Soma principle is applied. Thus, the courts in Madras lack jurisdiction to entertain cases concerning the award.

H.S. Bedi and Ors. v. STCI Finance Limited

7 December 2020 | OMP (Comm.) 546/2020 and I.A. 10618/2020) | Delhi High Court

Principle: If amendment is not allowed in Statement of defence, then the substantive rights of the petitioner gets decided and then the petitioners cannot in future, claim relief as they sought for in form of an amendment. This judgment supports the principle that the substantive rights affected ought to be seen, while determining what kind of orders are challengeable.

Facts: The Petitioners stated that there were 2 loan accounts of M/s. Cedar Infonet Pvt. Ltd. and M/s. Sukhmani Technologies Pvt. Ltd. Loan extended by STCI Finance Limited was Rs. 50 Crore each in favor of Cedar and Sukhmani accounts and the same was invoked by the respondent. The value of shares at the time of invocation from both accounts was Rs.76,72,28,880/-.

Rs.10,97,11,034/- and Rs. 6,52,88,416/-, was deposited regularly in both accounts. Despite invoking above mentioned share, its credit was not given in the bank accounts, instead, the respondent represented that both accounts were under default and to prevent them from being declared as Non-Performing Assets (NPA). The plea

regarding equitable set-off of the petitioner, regarding Rs.15 Crores of loan advanced by the respondent in the two loan accounts, that there were no outstanding dues in the account of Cedar and Sukhmani. Further, the petitioners are seeking an adjustment of Rs.15 Crores, which was taken as a loan from the respondent and returned on the same day to the respondent as was received by the petitioners. Therefore, the petition was filed u/s 34 of the Arbitration & Conciliation Act, 1996 against the order dated 17.10.2020.

Judgment: The court relied on the counter submission stating that the impugned order is only a procedural order and not an interim award and cannot be maintained u/s 34 of the Act of 1996. The court was satisfied with the petitioner's submission and stated that the impugned date was in the form of an interim award, hence the petition was maintainable. The Court observed that if the rejection is done in the present case, then the substantive rights of the petitioners will be decided and then the petitioners cannot in future, claim relief as they sought for in form of an amendment. But the Court refrained from commenting on whether the case does or does not have all the ingredients of equitable set-off, so as to be allowed to be incorporated in the Statement of Defence. Accordingly, allowed the petition for incorporating amendments subject to Rs. 1,00,000/- payment to the respondent.

Future Retail Ltd. v. Amazon.com Investment Holdings LLC & Ors.

21 December 2020 | CS(COMM) 493/2020 | Delhi High Court

Principle: Parties in an international commercial arbitration seated in India can by agreement derogate from the provisions of Section 9 of the A&C Act. Where the curial law is different from the governing law, the court will look at the former for conduct of the arbitration to the extent that the same is not contrary to the public policy or the mandatory requirements of the law of the country in which arbitration is held. Emergency Arbitrator prima facie is not a *coram non judice.*

Facts: The plaintiff, Future Retail Ltd. ("FRL") filed the present suit impleading Amazon.com NV Investment Holdings LLC ("Amazon") as defendant No.1; Future Coupons Pvt. Ltd. ("FCPL") as defendant No.2; the promoters of the plaintiff ("Biyanis") as defendant Nos.3 to 11, Future Corporate Resources Private Limited ("FCRPL"), Akar Estate and Finance Private Limited ("AEFPL") as defendants No.12 and 13 respectively, and Reliance Retail Ventures Limited ("RRVL") and Reliance Retail and Fashion Lifestyle Limited ("RRFLL") as defendant Nos.14 and 15 respectively (together "Reliance").

Amazon was to acquire 49% of the share capital of FCPL, (a wholly owned subsidiary of FCRPL; FCPL and FCRPL being owned and controlled by the promoter group, that is, Biyanis) and pursuant to the proposed combination, the control of FCPL including day-to-day operational matters and policy decisions were to remain with FCRPL which had 51% of the shareholding. FCPL SHA and FCPL SSA were to determine the rights and obligations of Amazon and the promoters as shareholders of FCPL. Subsequently, a transaction was entered into between Reliance and FRL, to acquire the latter to avert insolvency. The transaction is presently at the stage of seeking various regulatory approvals. Amazon instituted arbitration proceedings under the FCPL SHA citing violation of its contractual rights, resulting in the interim award which purports

to injunct FRL from proceeding with the transaction with Reliance including by prosecuting the applications before the various authorities. Amazon invoked emergency arbitration under the SIAC Rules and on the same date filed an application for emergency interim relief. Interim order was passed by the Emergency Arbitrator, to restrain various regulatory approvals from the different bodies in respect of the transaction.

Through the interim application, the plaintiff sought an interim restraint on Amazon to not interfere before the authorities in relation to the lawful 'transaction' between FRL and Amazon pending consideration before the Regulators and statutory authorities. Inter alia, a major issue before the Court was whether the Emergency Arbitrator lacks legal status under Part I of the A&C Act and thus *coram non judice* and whether FRL is entitled to an interim injunction.

Judgment: On the issue of maintainability, the Court relied on Section 9 of the Code of Civil Procedure to say that only where the jurisdiction of the civil court is expressly or impliedly barred, the civil court will have no jurisdiction. In the present case, the cause of action in the present suit pleaded by FRL being the alleged tortious interference in its future course of action in entering into the transaction with Reliance, whereas the cause of action before the Emergency arbitrator being the alleged breach of the FCPL SHA and FRL SHA as pleaded by Amazon against FRL. Therefore, the present suit is based on a distinct cause of action and thus maintainable.

In the present suit, seeking the relief against tortious interference by Amazon, one of the grounds urged by FRL is the invalidity of the Emergency Arbitrator amounting to use of 'unlawful means' in its representations to the authorities. Therefore, FRL in these proceedings is entitled to challenge the legal status of Emergency Arbitrator, to the extent required for making out the ingredients of 'unlawful means'. The issue in the present suit is not the violation of the EA order or whether the EA order is binding on FRL or not, but whether this Court can consider the legal status of the Emergency Arbitrator or that the same can be decided only in proceedings as envisaged under Part-I of the A&C Act. Case of the FRL is that since Amazon is trying to enforce and act upon the EA order before the Statutory Authority/Regulators and as the Emergency Arbitrator is a *coram non-judice*, this Court can go into the validity of the same to the extent asserted in the present suit. In the present suit, the cause of action pleaded by FRL is the tortuous interference by Amazon in its lawful transaction and to determine the ingredients of the said cause of action, i.e. whether use of 'unlawful means' is being resorted by Amazon. Relying on *Hira Lal Patni v. Sri Kali Nath* and *Sushil Kumar Mehta* the Court said that prima facie the present suit cannot be held to be not maintainable on two grounds: the EA order cannot be challenged in the present proceedings and secondly, that the grounds urged by FRL before have already been urged and considered by the Emergency Arbitrator.

The arbitration between FCPL and Amazon is an International Commercial Arbitration seated in New Delhi, India and governed by Part I of the A&C Act, however, conducted in accordance with SIAC Rules. Relying on *NTPC v. Singer*, the Court said that while it is perfectly legal for the parties to choose a different procedural law, the issue which is required to be considered is whether the provisions of Emergency Arbitration of such procedural law, are in any manner contrary

to/repugnant with the public policy of India, or with the mandatory requirements of the procedural law under the A&C Act. In the present case, the parties have expressly chosen the SIAC Rules as the curial law governing the conduct of arbitration proceedings which are self-sufficient to govern the proceedings under arbitration at every stage. Hence, in such cases the express choice of the parties, subject to the public policy of India and the mandatory provisions of the A&C Act has to be upheld. Rule 30 of the SIAC Rules deals with Interim and Emergency Relief and in clear terms provides that the parties to the arbitration are also entitled to apply to a judicial authority for grant of interim relief, and that such request for grant of interim relief shall not be incompatible with the SIAC Rules. Therefore, the SIAC rules themselves recognize and uphold the right of a party to avail interim relief under Section 9 of the A&C Act. Since the SIAC rules provide an option to the aggrieved party to either approach the emergency arbitrator for interim relief, or to approach a judicial authority for the same i.e. the Courts under Section 9 of the A&C Act; the Court found that the SIAC Rules do not take away the substantive right of the parties to approach the Courts in India for interim relief. Thus, Amazon has exercised its choice of the forum for interim relief as per the arbitration agreement between the parties. Nothing in the A&C Act prohibits the parties from doing so.

The Indian law of arbitration allows the parties to choose a procedural law different from the proper law, and there is nothing in the A&C Act that prohibits the contracting parties from obtaining emergency relief from an emergency arbitrator. An arbitrator's authority to act is implied from the agreement to arbitrate itself, and the same cannot be restricted to mean that the parties agreed to arbitrate before an arbitral tribunal only and not an Emergency Arbitrator. Further the parties having deliberately left it open to themselves to seek interim relief from an emergency arbitrator, or the Court in terms of Rule 30.3 of SIAC Rules, the authority of the said emergency arbitrator cannot be invalidated merely because it does not strictly fall within the definition under Section 2(1)(d) of the A&C Act.

Under the proviso to Section 2(2) of the A&C Act, in the case of an International Commercial Arbitration even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of the A&C Act, provisions of Section 9, 27 and Section 37 of the A&C Act, would be applicable, subject to an agreement to the contrary between the parties. Thus, parties by agreement can decide to the inapplicability of these provisions. The parties have chosen SIAC Rules that grant them freedom to approach the Court also under Section 9 of the A&C Act to obtain interim relief, thus, to that extent there is no incompatibility between Part I of the A&C Act and the SIAC Rules. From a conspectus of the discussion above, this court arrives at the conclusion that the Emergency Arbitrator prima facie is not a *coram non judice* and the consequential EA order not invalid on this count.

The main tests for grant of interim injunction in the present case are in respect of "balance of convenience" and "irreparable loss". Even if a prima facie case is made out by FRL, the balance of convenience lies both in favour of FRL and Amazon. If the case of FRL is that the representation by Amazon to the statutory authorities /regulators is based on illegal premise, Amazon has also based its

representation on the alleged breach of FCPL SHA and FRL SHA, as also the directions in the EA order. Hence it cannot be said that the balance of convenience lies in favour of FRL and not in favour of Amazon. Further, if Amazon is not permitted to represent its case before the statutory authorities/Regulators, it will suffer an irreparable loss as Amazon also claims to have created preemptive rights in its favour in case the Indian law permitted in future. There may not be irreparable loss to FRL for the reason even if Amazon makes a representation based on incorrect facts thereby using unlawful means, it will be for the statutory authorities/Regulators to apply their mind to the facts and legal issues therein and come to the right conclusion. Moreover, no interim injunction can be granted in the present application because both FRL and Amazon have already made their representations and counter representations to the statutory authorities/regulators and now it is for the Statutory Authorities/Regulators to take a decision thereon. Therefore, the present application is disposed of as this Court finds that no case for grant of interim injunction is made out in favour of the FRL and against Amazon. However, the Statutory Authorities/Regulators are directed to take the decision on the applications/objections in accordance with the law.

Singapore Convention

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the **"Singapore Convention"** or the **"Convention")** came into force on 12 September 2020. The Singapore Convention is a significant step for international commercial dispute resolution, enabling enforcement of mediated settlement agreements among its signatories. For international businesses this means that they are presented with another viable and effective alternative to litigation and arbitration in resolving their cross-border disputes, especially during the global COVID-19 pandemic.

The Singapore Convention has the potential to greatly increase the appeal of mediation as a mechanism of resolving commercial disputes with a cross-border dimension. The Convention provides parties who have agreed a mediated settlement with a uniform and efficient mechanism to enforce the terms of that agreement in other jurisdictions, in the way that the New York Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention") does for international arbitral awards.

Where a State has ratified the Convention, the Convention commands that a relevant court (or other competent authority) in that State enforces an international mediated settlement agreement in accordance with the Convention and its own rules of procedure, without the parties needing to initiate new proceedings for its recognition and enforcement.

Ordinance

The President issued an ordinance to amend the arbitration law to ensure that all stakeholder parties get an opportunity to seek an unconditional stay on enforcement of arbitral awards where the arbitration agreement or contract is "induced by fraud or corruption". The ordinance which further amends the Arbitration and Conciliation Act, 1996 also does away with the 8th Schedule of the Act which contained the necessary qualifications for accreditation of arbitrators.

Till recently, an arbitration award was enforceable even if an appeal was filed

against it in the court under Section 36 of the law. But the court could grant a stay on the award on condition as it deemed fit. As per the latest amendment brought through the ordinance, if the award is being given on the basis of an agreement based on fraud or corruption, then the court will not impose a condition to stay the award and grant an unconditional stay during the pendency of the appeal if it has been challenged under Section 34 of the arbitration law.