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INDIAN INSTITUTION OF TECHNICAL ARBITRATORS

Proceedings of the

International Conference on

CHALLENGES IN DOMESTIC AND INTERNATIONAL ARBITRATION

Date: September 23-24, 2016
Venue: Crowne Plaza Chennai Adyar Park, Chennai

ARBITRATION

SEPTEMBER, 2016

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FOREWORD

The **Indian Institution of Technical Arbitrators (IITArb)** is a non-profit, All-India professional body of Engineers and Architects, devoted to the promotion of Arbitration as a speedy and cost- effective Alternative Dispute Resolution method (ADR) for settlement of commercial and contractual disputes.

With the advent of globalization, which has witnessed a quantum jump in cross border commercial activity, including execution of mega projects, running into billions of Dollars, in India. Stake holders look forward to an effective dispute resolution mechanism to be in place, so that any dispute that might arise in the course of execution of the projects or later, could be resolved effectively and economically. Arbitration has emerged as the preferred route for resolving such disputes.

The Arbitration paradigm in this country is undergoing metamorphic changes particularly with the enactment of amendments to the Arbitration and Conciliation Act, 1996. It is in this context that the Institution is organizing an International conference on" Challenges in Domestic and international Arbitration" on 23-24, September, 2016 at Chennai and more than 250 delegates from all over the world are expected to participate. Eminent Arbitrators, Techno-legal consultants, Professional engineers / Architects, Builders, Contractors, Law firms, Senior executives and Administrators in Government, Private and public Sector Organizations, Corporate companies, among others, will present papers and lead discussions.

Further, with the economic activity in India poised for quantum jump, with multinational players partaking in a big way in these nation building endeavors, India has high potential for emerging as a hub of International Arbitration. The conference will address all the challenges and opportunities posed by this fast changing environment.

I would like to record my appreciation of the wholehearted co operation received from the members of the Advisory committee and members of the Organizing committee and all members of the Institution.

Learning is a continuous process. I hope the deliberations in the Conference will result in purposeful exchange of views and crystallization of ideas for meeting the challenges in this arena for betterment of the arbitration regime in the country.

Er. P R Seshadri
President, IITArb.

PREFACE

Differences and disputes, big and small, are inevitable in any relationship, more so, in commercial relationships. If differences remain unresolved they mature into disputes. In the case of a contract, this could mean anything from slowdown, or disruption to total stoppage of work, resulting in serious consequences for the smooth progress of a project leading to avoidable delays and cost and time over-run, by which none is benefitted, but everyone connected with the project, losses.

It is in this context, that search for a speedy and cost effective mechanism for resolution of disputes, pointed to alternative dispute resolution methods such as Mediation, Conciliation and Arbitration, which offer the best solutions compared to court proceedings, given the docket explosion situation in Courts, prevailing in the country. Of these methods, Arbitration occupies a place of pride, as an award pronounced in Arbitration proceedings is final and binding. But the experience in India shows that Arbitration award is anything but final and binding, being subjected to post - award litigation proceedings. For this unenviable situation all should share the blame. The claimant, for making exaggerated claims, the owner, too eager to challenge the award if it goes against him, the non-supportive and suspicion oriented administrative setup and vigilance system in Government / Public Sector organizations, which prevents owners from accepting even a fair award, the arbitrators, many of whom lack professionalism and finally the judiciary which intervenes at all stages of the Arbitration proceedings though the spirit of the Arbitration & Conciliation Act 1996 is that for worry judicial intervention should be an exception rather than a rule. Another cause is Courts admitting all applications for setting aside an award, under section 34, rendering the Arbitration process wasteful and redundant.

What is the remedy for this state of affairs? Why arbitration is a preferred route for dispute resolution in other countries, but not in India? Why is it looked upon as a nightmare by claimants and owners? delay; high cost and non-final and non-binding nature of Arbitration award, as it can be challenged under some ground or the other and if no palpable ground is available, then 'public policy' comes handy for challenging the awards, inspite of the fact that the real intent of section 34 is that the grounds for challenging an award should be very very limited.

This calls for a change of mindset and a new Arbitration culture on the part of all concerned: courage on the part of both the parties to accept and implement a fair award, fairness to support a reasonable award, being sensitive to the sufferings of the disputants. Arbitrator endeavouring to achieve excellence and looking at Arbitration as a sacred duty rather than a money making proposition.

Another legitimate aspiration of those concerned with Arbitration in this country is to see India as a hub of International Arbitration. Quite often this idea is subject to uncharitable comments and sceptical remarks by quite a few within and outside the country. Among the factors they point out as non-congenial for India becoming an international arbitration hub are, inbuilt delay and complex legal system, lack of skilled arbitrators of the required calibre, lack of infrastructure etc.

I, for one, would think that instead of resigning to the fate that given the ground realities, India can never aspire to become a preferred seat, leave alone hub, of International Arbitration, a beginning has to be made here and now, even if it might take 10 or 15 years to realise our cherished dream. The IITArb thought it fit to organise this Conference on "Challenges in Domestic and International Arbitration" to discuss thread bare various issues related to Arbitration and hear the views of eminent authors, in order to set the ball rolling for ushering in the desired changes.

Thirty papers on various aspects of Arbitration including training of Arbitrators have been selected for presentation at the conference.

The enormous response to the conference and the number of eminent authors contributing papers are in themselves, indicative of the interest this subject has evoked.

I take this opportunity to express my sincere thanks to Mr. P R Seshadri, President, IITArb. for his untiring efforts and leadership in organising this conference.

I must also express my heartfelt thanks to all the Members of Organising Committee, Members of Advisory Committee and Members of the Institution for their valuable contribution.

I am confident that the deliberations of the conference will take all participants to a level higher by healthy interaction at the conference.

Er. M Velu
Chairman, Organising Committee

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Arbitration and Conciliation (Amendment) Act 2015-Is There Light at the End of the Tunnel?

Anirudh Krishnan
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Introduction

A new regime which combines the right blend of the carrot and the stick was the catalyst that Indian commercial dispute resolution was waiting for. The reforms to the arbitration regime were expected to provide this fillip that was the need of the hour. These much awaited amendments were brought into force on 23.10.15 by way of the Arbitration and Conciliation (Amendment) Ordinance, 2015 which was subsequently replaced by the Arbitration and Conciliation (Amendment) Act, 2015 (the "2015 Act" or the "Act").

The 2015 ACT: Highlights

Broadly speaking, the 2015 Amendments aim at creating an ambience which offers certainty, neutrality, reduces judicial interventions and incentivizes compliance. The provisions which further each of these ends are discussed individually.

Certainty

Time frames and fee slabs

The Act provides certainty in an environment which was hitherto a nightmare from the point of view of corporate budgeting. Not only is a time period fixed both for the arbitration (12 months with a 6 month extension by consent) (Section 29A), in order to meet the timeline, a proviso has been added to Section 24 by virtue of which hearings for evidence and arguments are to take place on a day to day basis with adjournments to be refused except where there is sufficient costs. Arbitrators have also been empowered to impose exemplary costs. While, there are criticisms of the timeline, the timelines provide some kind of certainty to parties involved in the process.

An attempt has also been made to provide certainty from a budgeting perspective by providing a model cost table as a Schedule which sets a slab-wise model fee structure which makes the arbitrators fees dependent on the stakes involved in the dispute. While such a fee structure has not been made binding, High Courts have been empowered to frame Rules to determine the arbitrator's fees.

•Neutrality

"Caesar judging Caesar's wife" model done away with

One of the major problems with the pre-Ordinance legislation was the fact that Public Sector Undertakings ("PSU") were permitted to appoint their own employees as arbitrators. Considering the scenario in India where contracts with PSUs are based on standard terms of the PSU which mostly provide for their employees as the arbitrator(s) and the fact that most disputes with PSUs do not get resolved amicably, the issue of bias played a larger role than it ought to have and necessitated a sufficiently wide system of review by Courts. The 2015 Act does away with the "Caeser judging Caeser's wife" model by incorporating the International Bar Association guidelines on conflict of interest as a schedule to the Act.

Schedule 5 of the 2015 Act sets out a number of relationships which give rise to a presumption of bias. These correspond to the red and orange lists of the International Bar Association Guidelines. Schedule 7 sets out a list of relationships which are prohibited (corresponding with the red list of the International Bar Association Guidelines). The first 19 items of both Schedules are identical. If the relationship falls under the Schedule 7 items, the arbitrator is prohibited from acting unless the parties agree to the contrary after the dispute has arisen between the parties (See Section 12). In case of relationships falling under Schedule 5, there is no automatic bar but if the relationship does exist it has to be disclosed and unless waived, the parties have a right to challenge the entering into reference of the arbitrator; such challenge will lie before the Arbitral Tribunal itself.

Most important among the Schedule 5 and 7 guidelines is Item 1 which states- "The Arbitrator is an employee, consultant, advisor or has any other past

or present business relationship with a party" This item legislatively overrules the decision of the Supreme Court in Indian Oil Corp.Ltd.&Orsvs M/S Raja Transport(P) Ltd.[1] where it was held that an employee of a Public Sector Undertaking can act as an arbitrator in relation to a dispute involving the same Public Sector Undertaking and that there would be no presumption of bias in such a case. Taking a cue from Item 1 of Schedule 7, the Delhi High Court, in Assign-vil-jv v. Rail Vikas Nigam Ltd.[2] has taken the view that this would not be permissible post-amendment.

Attempts to limit judicial intervention

Pre-arbitration interference (Sections 8 and 11)

Judicial intervention has been reduced by restricting the scope of pre-arbitration review by courts to a "prima facie" review of the existence of an arbitration agreement. Specifically, a provision has been introduced in Section 8 to this effect. However, no such provision has been introduced into Section 11 (Appointment of Arbitrators). Section 11 of the Act provides that when the parties fail to appoint one or more arbitrators according to the terms of the arbitration agreement, or when two arbitrators fail to choose the third or presiding arbitrator, or the designated appointment mechanism otherwise fails, the parties can approach the Chief Justice to resolve the stalemate and appoint an arbitrator. A seven-judge bench of the Supreme Court in SBP and Company v. Patel Engineering Ltd[3], while determining the questions that the Chief Justice can entertain while appointing arbitrators under Section 11 of the Act held that the Court can only venture into deciding whether the arbitration agreement exists at the stage of appointment of an arbitrator; however the necessary implication is that for deciding on the existence of the arbitration agreement, a full fledged analysis is impermissible. This is perhaps an issue which ought to have been addressed as it is only logical if the level of pre-arbitration scrutiny is uniform across the Act.

Interference during the arbitration (interim orders)

An amendment to Section 9 (Interim measures, etc., by Court) has been introduced which expressly provides that"Once the arbitral tribunal has been constituted, the Court shall not entertain an application under subsection (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

Prior to the amendments, it was common for parties, even after the constitution of the arbitral tribunal, to approach the courts for interim reliefs under Section 9 of the Act.

Section 17 (Power of the arbitral tribunal to grant interim relief) was rarely used. This was owing to the fact that Section 17 bestowed a narrower power and there was no effective mechanism to enforce an Order under Section 17.[4] Despite innovative methods used by some Courts to enforce such Orders,[5] there were question marks over the correctness of such methods.[6]

The amendments to Section 17 ensure that an Order passed under Section 17 has the same force as an Order under Section 9. Correspondingly, Section 9(3) has been introduced to indicate that by default, parties must approach the arbitral tribunal for interim relief under Section 17. However, a provision has been introduced in situations when the remedy under Section 17 is not efficacious.

Section 17 has been amended so as to make the power of the arbitral tribunal to pass interim orders as wide as the powers of the Court under Section 9. Further, an Order passed by an arbitral tribunal has been given the same force as a judicial order thereby making it enforceable.

Section 17, as it originally stood provided a narrow power to an arbitrator and was "toothless" in the sense that there existed no effective mechanism to enforce orders passed under this provision. The scope of this provision was summed up by the Supreme Court in MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd[7]: wherein it was observed

"… under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof."

The primary deficiencies with the scope of Section 17 were:

- Orders could not be passed against third parties who were not signatories to the arbitration agreement.[8]
- The Orders under Section 17 could not be enforced like an Order of Court.[9]

- The Orders could only be measures of protection, i.e. Orders with a view to preserve the situation prevailing and to keep property available to answer final adjudication as and when final award is passed by the Arbitrator. Further, the Order had to strictly be within the four corners of the agreement.[10]

Even though the Delhi High Court[11] had held that an Order of the Arbitral Tribunal could be enforced by a Court (after the leave of the arbitral tribunal was obtained) owing to the fact that the Arbitral Tribunal had the power of contempt under Section 27(5), this has subsequently been held to be bad law.[12]

As a result, Section 9 was always the preferred option for parties even after the Arbitral Tribunal was constituted. A need was felt to decrease the burden on the Courts since the Arbitral Tribunal is equally competent to grant interim orders in this regard, and in cases where pleadings in the arbitration have already been filed, it was possibly better equipped than Courts to deal with the issue. It is for this reason that the amendments to Section 17 were incorporated.

It is also relevant to point out that under Article 17 of the UNCITRAL Model Law as amended in 2006, the Arbitral Tribunal has wide powers to grant interim relief- the amendments to the Indian law are therefore in tune with the UNCITRAL Model Law.

However, the Kerala High Court has taken the view that an arbitral tribunal, being a creature of contract, cannot issue directions to statutory authorities.[13] It was therefore held that interim orders directing the police to assist an advocate commissioner seize a vehicle purchased under a hire purchase scheme could not be ordered by an arbitral tribunal and a party, to obtain such an order, would have to file an application under Section 9.

Section 17(2) provides a mechanism for enforcement of an Order passed by the Arbitral Tribunal under Section 17(1). As per the mandate of Section 17(2), such an Order would be enforceable under the Code of Civil Procedure ("CPC") as if it were an Order of Court. In other words, non-compliance with the Order would attract the provisions of Order 39 Rule 2A of the CPC.

There is some criticism about the provisions of Section 17(2) being restricted to Orders passed by India seated arbitral tribunals- the criticism is that such a provision must have extended to Orders passed by foreign seated Tribunals as well.[14] However, enforcement of a foreign seated Arbitral Tribunal's Order is something which must be left to the arbitration law governing the seat of arbitration- Indian law cannot extend to cover such situations.

Post-award interference

The 2015 Act has also made attempts to narrow down the scope of challenge to an arbitral award and has most importantly done away with the automatic suspension of the arbitral award till such time the review by Courts was complete.

Public Policy doctrine

The 2015 Act has restrained the ambit of the term "Public Policy" especially in relation to international commercial arbitrations wherein it states that an award passed in an international commercial arbitration, can only be set aside on the ground that it is against the public policy of India if, and only if, – (i) the award is vitiated by fraud or corruption; (ii) it is in contravention with the fundamental policy of Indian law; (iii) it is in conflict with basic notions of morality and justice. The present amendment has clarified that the additional ground of "patently illegality" to challenge an award can only be taken for domestic arbitrations and not international arbitrations.Further, the amendment provides that the domestic awards can be challenged on the ground of patent illegality on the face of the award but the award shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. The result is that the decision in ONGC v. Saw Pipes[15], which set out the "patent illegality" test will continue to apply to domestic arbitrations but not to international commercial arbitrations.

Further, prior notice to the other party is mandatory for an application to set aside an arbitral award according to the new Act. Moreover, a time limit of one year from the date of service of the advance notice on the other parties has been fixed for disposal of the application under Section 34.

Automatic stay

Most importantly, the amendment to Section 36 makes it abundantly clear that the mere filing of a petition under Section 34 will not render the award inexecutable- a defect under the old regime pointed out by the Supreme Court in National Aluminium Co. Ltd v. Pressteel Fabrications[16]. Consequently, a party will have to file an application to stay the operation of the arbitral award at which time the Court can impose conditions upon stay as it would do in case of an appeal from a Court decree. This results in the successful party getting the fruits of its award upfront rather than waiting for the proceeding under Section 34 to finish.

Interference in foreign seated arbitrations

Section 2(2) deals with the applicability of Part-I of the Act to arbitrations outside India. Section 2(2) as it previously stood made a departure from the equivalent provision in the UNCITRAL Model Law, and this had given rise to a fair amount of controversy. An attempt has been made to bring the section in line with the UNCITRAL Model Law.

Article 1(2) of the UNCITRAL Model Law reads as follows:

"The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State."

However, the Indian legislature deemed it fit while enacting the 1996 Act, to exclude the clauses "except articles 8, 9, 17H, 17I, 17J, 35, and 36" and "only".

The Supreme Court in Bhatia International v. Bulk Trading S.A.[17] ("Bhatia")took the view that the omission of the above words must be given some meaning and that the consequence of such omission would be that Part-I would apply mandatorily to arbitration seated both in India and abroad, unless it was expressly or impliedly excluded. One of the reasons for such an interpretation was to deal with situations where urgent interim relief was required under Section 9 of the 1996, in relation to property situated in India, but where the arbitration was seated abroad. The rationale of the Supreme Court in Bhatia was that parties would be left remediless in such situation.

While the decision in Bhatia might have been equitable given the facts of that case, it had far reaching impacts. Given that Section 2(2) did not make any distinction between the applicability of certain provisions of Part-I, the ratio of Bhatia would have to be equally applicable to the rest of Part-I, including Section 34. As was held in Venture Global v. Satyam Computers[18], an Indian court would have the jurisdiction under Section 34 to set aside a foreign arbitral award, unless Part-I of the Act was expressly or impliedly excluded.

What was an express or implied exclusion was not made out in any of these cases. There followed a number of litigations, [with the notable exception of ShreejeeTraco Pvt. Ltd. v. Paperline International Inc.[19] (Lahoti C.J.) which was per incuriamto Bhatia] where the principle was read down and the following principles are now evident:

1. Part-I mandatorily applies where the place of arbitration is in India.[20]
2. Part-I is not impliedly excluded where the seat alone is specified to be a foreign country.[21]
3. Part-I is not impliedly excluded when the law governing the contract is alone specified to be a foreign law.[22]
4. Part-I is impliedly excluded when both the seat and the law governing the agreement are specified to be foreign law.[24]
5. Part-I is expressly excluded when the law governing the arbitration agreement is specified to be foreign.

The decision in Bhatia came to be reconsidered in Bharat Aluminum v. Kaiser Aluminum Technical Services[25] ("BALCO") and a constitutional bench held that the seat would be the 'centre of gravity' of the arbitration and if the seat was foreign Part-I would automatically stand excluded. The decision in BALCO was however, made prospectively applicable to arbitration agreements entered into after the decision in BALCO, i.e. 06.09.2012.

Applying the ratio of BALCO, if the seat was outside India, no provision of Part-I including Section 9 would be applicable. Therefore, the mischief sought to be remedied in Bhatia, namely the seeking of interim relief where the property in question was in India, was reintroduced.

From the above, it is clear that the entire controversy arose because of the departure from the UNCITRAL model law wording in Section 2(2). It is to remedy this situation that the amendment to Section 2(2) was introduced, and is sought to be made in consonance with the UNCITRAL Model Law and the English Arbitration Act, 1996.

The amendments to Section 2(2) make it clear that even when the seat of arbitration is outside India (in a country which is a signatory to the New York Convention), if the arbitration is an international commercial arbitration (see discussion under Section 2(f)), the provisions of Sections 9, 27, 37(1) (a) and 37(3), shall apply unless the parties decide to exclude the same by way of agreement.

Section 9 provides the power to grant interim relief. In cases where the subject matter in relation to which interim relief is sought is situated in India, it is only the order of an Indian court which will be efficacious, and there is no provision in Indian law, to enforce an order of a foreign seated tribunal and an order passed by a foreign court. It is for this reason that this amendment is absolutely critical.

Section 27 provides for taking the assistance of the court in taking evidence. This is also relevant to arbitral proceedings, when certain witnesses, who reside in India refuse to testify before a tribunal abroad, and in such situations, parties can seek the assistance of local courts to issue summons. Such assistance can be sought even when the seat is abroad.

Section 37(1) (a) and 37(3) deal with appeals. However, S. 37(1) (a) as it originally stood referred to appeals from orders in courts granting or refusing to grant any measure under Section 9. It appears that the legislature has drafted the proviso to Section 2(2) keeping in mind Section 37(1) (a) as it originally stood. However, today, Section 37(1) (a) has been amended and that part of Section 37 which provided for appeals against orders under Section 9 has now become Section 37(1) (b). Section 37(1) (a) currently refers to an order "refusing to refer the parties to arbitration under Section 8." There has been an unintentional error that has crept into the proviso to Section 2(2). The reference to Section 37(1) (a), therefore, ceases to make any sense.

Section 37(3) refers to the fact that no second appeal shall lie from an order passed in an appeal under the Section. However, in light of the error pointed out above, the reference to Section 37(3) would not be of any consequence. As a result, if an order is passed under Section 9 of the Arbitration and Conciliation Act, 1996 ("1996 Act") in relation to a foreign seated arbitration, such an order would not be appealable. The only remedy that the party would have would be to directly file an SLP under Article 136.

The new amendments would be in force from 23.10.2015 (See Section 1(2) of the 2015 Act). The said provisions would apply in relation to arbitration proceedings that commenced as a result of issuance of a notice of arbitration, post 23.10.2015. There may again be confusion in this regard, as Section 26 of the Amendment Act makes a specific reference to commencement of proceedings under Section 21 of the 1996 Act. So if a foreign seated arbitration would be commenced, under the laws that govern the arbitration, and these would not be commenced under Section 21 of the 1996 Act unless that law governing the arbitration is Indian law. However, the only logical way to look into the applicability of Section 2(2) would be to see when the notice of the arbitration was in fact issued in relation to the foreign seated arbitration (post-23.10.2015, notwithstanding the anomalies in the language pointed out above, the amendment would take effect).

As a result, courts would have to also be careful of applying three different regimes in the following scenarios:

1. Where the date of the arbitration agreement is prior to 06.09.2012, and the arbitration has commenced prior to 23.10.2015, the Bhatia regime would apply to foreign seated arbitration agreements, unless it has been expressly or impliedly excluded. As a consequence, an application under Section 9, 11 and 34 and other provisions of Part-I can be filed.
2. When the date of the arbitration agreement is post 06.09.2012, and the arbitration and the arbitration has commenced prior to 23.10.2015, the BALCOregime would apply and Part-I would stand excluded. Therefore, no application under Section 9 can be filed if the seat of arbitration is outside India.
3. If the arbitration has commenced post 23.10.2015, notwithstanding the anomaly, the wording of Section 26 of the Amendment Act, the amendments to Section 2(2) would apply and an application under Sections 9 and 27 can be filed when the seat of arbitration is in a country which is a signatory to the New York Convention and the Indian government has notified that such a country has made reciprocal provisions for the purpose of enforcing Indian awards.

Carrot and stick

Introduction of compound interest and "costs follow event" system

Perhaps the most significant measure is the introduction of a realistic interest regime permitting compound interest to be awarded and a "costs follow the event" system which, as a rule of thumb, makes the losing party bear the entire cost of the litigation. Such measures are of paramount importance to encourage.

The UNCITRAL Model law does not contain a specific provision that explicitly deals with the power of arbitrators to award interest and hence there has been some uncertainty in different jurisdictions on the extent of an arbitrator's power to award interest. The amendment to Section 31(Form and Content of Arbitral Award) by way of sub clause (7)(b) ensures that a commercially relevant interest amount is paid as a matter of default. This is of course subject to the power of the arbitral tribunal to award any interest it may deem fit in the facts and circumstances of the case. The previous mandatory rate of 18% per annum was an arbitrary figure and thus the amended default rate of interest is in line with prevailing commercial realities.

This amended rate of interest reaffirms the decision of the 3 judge bench of the Supreme Court in Hyder Consulting (U.K.) v. State of Orissa[26] which settled the conflict in rulings between State of Haryana v. S.L. Arora[27], on one hand, where it was held that future interest would, by default, only accrue over the principal sum, and ONGC v. M.C. Clelland Engineers S.A[28], and UP Cooperative Federation Ltd v. Three Circles[29] on the other.

Further Section 6A makes it mandatory to follow a "costs follow the event" regime, which in other words means that by default the losing party bears the entire costs of the proceeding including the legal costs of the other side and the fees of the arbitrators. This is subject to exceptions including where the successful party has raised a number of frivolous contentions which are rejected. What this system does is that it disincentivizes raising frivolous issues and filing of frivolous claims. In other words, a culture of compliance is ushered in.

Areas Of Concern

Prospectivity of the Act

While the Act has the potential to bring in winds of change into the system, there are two aspects of the Act which cause concern.

Firstly, although the Act states unless and otherwise it has been expressly agreed upon by the parties the Act will not be applicable to arbitrations prior to 2015(Section 26), there is ambiguity as to whether the amendments would apply to court proceedings relating to arbitral proceedings where notice of arbitration was initiated prior to 23.10.15. While the Madras High Court[30], Calcutta High Court Division Bench[31] and Bombay High Court[32] have held that the amendments would apply to such proceedings, the Single Judge of the Calcutta High Court[33] has taken a contrary view. This issue is currently being argued before different fora.

Secondly, the Act includes Section 29A which sets a 12 month time period for completion of the arbitration proceedings failing which parties can agree to a 6 month extension. Should the arbitration not conclude within 12 months or 18 months accordingly, the arbitration proceedings stand terminated unless the Court extends the period for "sufficient cause" upon the filing of an application by one of the parties. When the Court grants such an extension it has the powers to substitute arbitrators and to order a fee cut of up to 5 per cent of the total fees for each month's delay. Further, should the arbitrators complete the arbitration within 6 months, the arbitral tribunal would be entitled to additional fees subject to agreement between the parties.

This novel provision has been introduced for the first time in this Act and was not part of the Law Commission's recommendations which form the sheet anchor for the Act. While the provision has been introduced with the laudable objective of ensuring speedy justice, the words of the Supreme Court in R.N. Jadi v. SubashChandra[34] must be kept in mind- "The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried."

The time frame of 12 months for conclusion of an arbitration proceeding is unrealistic. It is common knowledge that even most international arbitrations take around 18 months for completion. For instance, statistics of the London Court of International Arbitration (LCIA) suggests that three quarters of arbitrations conducted in London took 18 months or less for completion. The LCIA's website further goes on to state that "There is no such thing as an "average" arbitration. Sums in issue, and technical and legal complexity, may vary greatly between one case and another, as may the volume of evidence, oral and written, that may be required to determine the dispute." To, therefore, fix a stringent timeframe of 12 months and impose sanctions upon arbitrators for not adhering to the same may be rather harsh.

Practicality aside, the provision may also face constitutional hurdles. The time period of 12 months has not been fixed based on any rationale criteria. Also to state that the same time period should apply to all arbitrations notwithstanding factors such as the need for oral evidence, existence of counter-claims, appointment of experts etc. would result in a uniform treatment of situations which are inherently different and involve different time frames. Again, the consequences of the arbitration extending beyond 12 months is drastic- a party (which in all cases will be the Claimant) will have to approach Court for an extension and grant of such extension will by itself involve a decision on whether there exists a "sufficient cause" for grant of extension. Though an indicative time limit of 2 months is specified for such a decision to be taken, it is likely that determination of issues as to whether the arbitrators must be substituted or whether a penalty has to be imposed on arbitrators is likely to be time consuming. The consequences of the provision are therefore directly contrary

to the whole concept of Alternate Dispute Resolution (ADR) and the object of the legislation which is to reduce judicial intervention.

While the above provision came to be challenged in Delphi TVS Diesel Systems Limited v. Union of India[35] where the Madras High Court sought the view of the Government as to whether the Law Commission had been consulted before drafting Section 29A, the writ ultimately came to be disposed off without going into the merits on the basis of a clarification that the said provision would not apply to the proceedings in question in that matter as it was a pre-amendment proceeding.

Conclusion- Change in Culture

Notwithstanding the above hurdles, the 2015 Amendments and especially Section 29A, if implemented in letter and spirit, could revolutionize the Indian arbitration system. Such stringent timelines can only be met if Indian arbitrations are aided sufficiently by technology. For instance, most Singapore International Arbitration Centre (SIAC) and LCIA arbitrations use video conference/ tele-conference facilities at the preliminary stages of the arbitration to expedite proceedings. Moreover, the trial itself can be concluded in 3-5 days because of the instant transcribing software used which allows recording of evidence in real time in contrast to the manual recording in India which often causes delays of several years.

Furthermore, such timelines can possibly only be met by having specialized arbitration practitioners and a wider pool of arbitrators. Moreover, the system of time-bound justice dispensation with heavy costs implications would also create incentives for the wrong doer to amicably resolve disputes and this being so, the ultimate beneficiary will be the person/ party for whom the system evolved in the first place- the commercial litigant. After all, as Mahatma Gandhi said- "We win justice quickest by rendering justice to the other party."

Foot Note

[1](2009) 8 SCC 520

[2]230 (2016) DLT 235

[3](2005) 8 SCC 618

[4]M.D. Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619

[5]Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del) (followed in Indiabulls Financial Services v. Jubilee Plots2010-2-LW 75).

[6]IntertollInceCecons. O & M Co. Pvt Ltd. v. National Highways Authorities of India 2013 (1) ArbLr 515 (Del); Bptp Ltd And Others V.Cpi India I Ltd, 2015(4) ARBLR 410(Del)

[7](2004) (9) SCC 619

[8]MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd: (2004) (9) SCC 619

[9]MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd: (2004) (9) SCC 619 ,Sundaram Finance Ltd v.NEPC India Ltd : (1999) (2) SCC 479, BPL Limited v. Morgan Securities and Credits Pvt. Ltd. &Ors. 2007 SCC OnLine Del 1643, Managing Director, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619 at page 646, Areeb Rolling Mills Pvt. Ltd. v. Nkgsb Co-Operative Bank Ltd., 2013 SCC OnLineBom 14.

[10]MD Army Welfare Housing Organisation v. Sumangal Services (P) Ltd: (2004) (9) SCC 619, BPL Limited v. Morgan Securities and Credits Pvt. Ltd. &Ors. 2007 SCC OnLine Del 1643, Indo Pacific Software & Entertainment Ltd. v. Nagpur Improvement Trust, 2010 SCC OnLineBom 1745

[11]Sri Krishan v. Anand, (2009) 3 Arb LR 447 (Del) followed in Indiabulls Financial Services v. Jubilee Plots, 2010-2-LW 75.

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[16](2004) 1 SCC 54

[17]Bhatia International v. Bulk Trading S.A., 2002 (4) SCC 105.

[18]Venture Global v. Satyam Computers, (2008) 4 SCC 190.

[19](2003) 9 SCC 79.

[20]Bhatia International v. Bulk Trading S.A., 2002 (4) SCC 105.

[21]National Agricultural Co-op. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692.

[22]INDTEL Technical Services v. W.S. Atkins Plc, AIR 2009 SC 1132; Citation Infowares v. Equinox Corporation, (2009) 7 SCC 220.

[23]Videocon Industries Ltd. v. UOI, AIR 2011 SC 2040; Reliance Industries v. UOI, (2014) 7 SCC 603.

[24]Dozco India P. Ltd. v. Doosan Infracore Co. Ltd, (2011) 6 SCC 179; Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Co. Ltd., 2011 (9) SCALE 567.

[25]Bharat Aluminum v. Kaiser Aluminum Technical Services, 2012 (8) SCALE 333.

[26](2013) 2 SCC 719

[27](2010) 3 SCC 690

[28](1999) (4) SCC 327.

[29](2009) 10 SCC 374.

[30]New Tirupur Area Development Corporation Ltd v. HCC Co. Ltd. Application No. 7674 of 2015 in O.P. No. 931 of 2015

[31]Tufan Chatterjee vs. Rangan Dhar AIR 2016 Cal 213

[32]Kochi Cricket Pvt Ltd v The Board of Control for Cricket in India, Execution Application (L) No. 2482 of 2015

[33]Nitya Ranjan Jena vs. Tata Capital Financial Services Ltd., G.A. No.145 of 2016 With A.P. No. 15 of 2016.

[34](2007) 6 SCC 420

[35]MANU/ TN/ 3726/2015.

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Laws Related to Construction Arbitration in India-The Grey Areas

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Synopsis

Construction arbitration involves various laws besides the law of arbitration. The mandatory procedural law of India necessarily applies to all arbitration held in India. As per S.28 (1) of the Arbitration Act substantive law of India shall apply to all arbitrations other than international commercial arbitration. In international commercial arbitration substantive law of India shall apply to disputes if so chosen by the parties or if the arbitrator finds it appropriate in the absence of choice of governing law of contract. The law of arbitration agreement that determines the substantive issues of the arbitration agreement may be chosen by the parties or decided by the arbitrator (when there is no choice) and may as well be Indian law. Thus the Indian laws may be relevant even in international and foreign seated arbitration and the substantive procedural divide may have legal and practical consequences if different legal systems are applicable as law of arbitration, law of arbitration agreement and governing law of contract. Inadequacy or uncertainty in certain aspects of laws in India has legal and commercial consequences in construction contract disputes. Some grey areas in laws of construction arbitration are discussed here.

Law of limitation

Limitation is a mandatory procedural law in India. S.43 (1) of the Arbitration Act provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court and S.43 (2) provides arbitration shall be deemed to have commenced on the date referred in S.21 of the Act. S.3 of the Limitation Act requires a 'suit' instituted after the prescribed period shall be dismissed although limitation has not been set up as a defence. The Limitation Act stipulates when the clock of limitation begins to run for a claim. In State of Maharashtra v HCC Ltd and Anr. dt. 01.02.2013 Bombay High Court observed that limitation for making a claim and limitation for making an application for appointment of arbitrator cannot be mixed up and that for invoking the arbitration clause the limitation provided by the Limitation Act for making 'application' will not apply, but the limitation by the Schedule for institution of 'Suit' will apply. In NHAI v Progressive Constructions Ltd dt 04.03.2015, the case was made however, before Delhi High Court under Art.137 of the Limitation Act for commencement of arbitration, i.e. for 'application' (the case was under Arbitration Act, 1996). For breach of contract as per Art.55 of the Limitation Act, limitation would run from the date of breach. Disputes in construction contracts with pre-arbitral process mature for reference in arbitration much after date of breach. Delhi High Court in Progressive Constructions (supra) decided limitation to run from decision of DRE, years after date of breach (contrary to Art.55 of Limitation Act) holding that cause of action for arbitration cannot arise till decision of DRE. In Panchu Gopal Bose v. Board of Trustees for the Port of Calcutta (1993) 4 SCC 338 it was stated "the period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned". The Limitation Act in Art 55 has no provision for extension of time for pre-arbitral process except the date of breach for the limitation to begin to run.

In international commercial arbitration held in India with foreign governing law of contract, limitation as procedural law of India shall mandatorily apply, whereas limitation may fall under substantive law as per foreign governing law of contract, applicable to the disputes. This conflict needs to be resolved in favour of substantive law. When foreign substantive law applies to the arbitration agreement S.28(b) of the Indian Contract Act shall be inapplicable and right to claim can be contractually validly barred unless the law governing the arbitration agreement has similar provision as in S.28(b).

The Arbitration & Conciliation Act, 1996 (as amended in 2015)

a. Excepted matters-Excepted matters may not become arbitrable if referred to arbitration by waiver as per S.4 (b) of the Arbitration Act since "any requirement of arbitration agreement" in S.4 (b) does not apply to the main contract. Arbitration of an excepted matter was upheld in Madani Construction Corp. (P) Ltd v UOI and Ors. (2010) 1 SCC 549 as the procedure to bring it under excepted matter had not been followed.

In Harsha Constructions v UOI 2014(3) Arb. LR 482 (SC) relying on s7(3) of the Arbitration Act it was held that merely if an excepted matter is referred to arbitration arbitrator would not get jurisdiction unless there is a specific written contract to arbitrate as arbitration cannot be presumed. Then arbitrator has to decide his jurisdiction even without a challenge under S.16 of the Act else an award on excepted matter can be set aside without prior challenge under S.16. This is not the scheme of S.16(6) of the Act. Difficulty arises when levy of liquidated damages is an excepted matter with the contract permitting recovery of same from debt due. Damages become debt only by fiat of Court. Withholding money for claim of damages (and not recovery) till adjudication is permissible as decided by Hon'ble Apex Court in Kamaluddin Ansari v UOI dt 12th August 1983 overruling UoI v Raman Iron Foundry dt 12th March, 1974 (distinction though made in other jurisdictions for liquidated damages entitling recovery from debt dues). Even if the Arbitrator without adjudication cannot allow the claim of set off, right to withhold money in contract till decision in Court if allowed would effectively frustrate arbitration, with an arbitral award subject to future outcome in Court. Excepted matters often involve issues common in other disputes. Such issues if decided in arbitration may create bar of res-judicata or issue estoppels even in Court later.

b. Termination of proceedings, S.25(a) of the Act-Claimant as per S.23 of the Act is required to submit his statement of claims with supporting documents and relief sought within time agreed by the parties or as determined by the tribunal, else the arbitral tribunal is obliged to terminate the arbitral proceedings under S.25(a). There are conflicting judgments regarding the nature of action under S.25(a) of the Act i.e. whether it is an "award" [as it does not fall in any category of S. 32(2)] with remedy in S.34 of the Act or an "order" (since the decision is not on merit). Snebo Engineering Ltd. v State of Bihar AIR 2004 Pat 33 relying on similar decision of Bombay High Court considered it an 'order' remediable by resort to writ petition under Article 226 of the Constitution. However, Awasthi Construction Co. 2013 (1) Arb. LR 70 (Delhi) held it as 'award' challengeable under S.34 of the Act. It relied upon various arguments i.e. power to condone delay by arbitral tribunal on showing "sufficient cause" and its inherent power of procedural review even after termination and thus availability of remedy and existence of procedural grounds to challenge an award under S.34 and the fact that law of arbitration is the same in the Act whether the contracting parties are Govt/State within the meaning of Article 12 of the Constitution of India or private parties and the decision by Bombay, Patna & Allahabad High Courts would tantamount to conferring jurisdiction under Article 226 against private arbitrators and parties. Thus the law is not settled on this. In General Exports and Credits Ltd 2015(2) Arb LR 50 it was observed- "….. Arbitration proceedings cannot be terminated by an arbitrator in case a claimant fails to file its statement of claim. This is precisely the reason that Section 2(9) excluded inter alia the provisions of Section 25 from the ambit of the term 'claim'.

The necessary conclusion which would follow, is that, in case the statement of claim is not filed then the learned arbitrator would terminate the proceedings vis-à-vis the statement of claim. It would not follow thus, that the proceedings qua the counter-claim, which the respondent may have filed before the learned arbitrator, shall also stand dissolved."

c. Place of arbitration- There are conflicting decisions in Sasan Power Ltd(First appeal no 315/2015 M.P. High Court) and M/s. Addhar Mercantile Private Ltd (Arbitration Application NO. 197/2014 Bombay High Court) on whether two Indian parties can choose a foreign seat and exclude the applicability of PART I of the Arbitration Act. The amended Arbitration law did not clear the language in Sections 20 & 28 on two Indian nationals choosing foreign "seat" of arbitration. The Supreme Court while deciding the appeal against the decision of M.P. High Court did not decide the main issue i.e. whether two Indian parties by agreement can choose a foreign seat and foreign governing law of contract but upheld the decision of M.P. High Court on the ground that there existed a foreign element in the contract. Hence, the main issue is yet to be decided with certainty.

d. Fraud- Issue of arbitrability of fraud remains unaddressed in the amended Arbitration Act, 2015 without incorporating in S.16 the recommendation of the 246th report of Law Commission of India. Reluctance to repose complete trust in arbitration by the legislature with existing conflicting judicial precedents leaves the matter for Courts to decide either under S.34 or S.37 of the Arbitration Act.

e. Rectification- Unlike the English Arbitration Act there is no express power with arbitrator in the Indian Act for rectification of contract. Russell supported implied authority of arbitrator to rectify a contract even before the statute provided so in England, but the authority in India is otherwise. Power of arbitrator in India is restricted to construction of contract in case of ambiguity but not of rectification. This limits scope in

arbitration where rectification of contract is necessary beyond interpretation.

The law of Contract

a. Issues of procedural unfairness in formation of contracts-The Indian Contract Act, 1872 makes a contract voidable at the option of the party who enters into it under coercion, undue influence, fraud or misrepresentation by the other party. In case of fraud or misrepresentation, the innocent party may even insist on performance of contract (the law then is to put him in a position he would have been if the representations made had been true). Performance of contract, however, may not be possible in every case of misrepresentation or fraud e.g. misrepresentation of site belonging to a third party. The law in S.19 of Contract Act does not provide discretion to the court/arbitrator to award damages in a case when performance is not possible. Some authorities though apply S.75 (i.e. a person who rightfully rescinds a contract in entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract), interpreting "non-fulfillment of contract" can arise out of such rescission only as in case of breach, contract would be performed and damages claimed. Such an interpretation need not be true. S.75 under Chapter VI of the Act is for consequences of breach of contract. Even in breach of contract non- performance is possible. Contract can be rightfully rescinded under ss. 53, 54 and 55 and need not be further performed. These are very well covered under S.75. A voidable contract on procedural unfairness in its formation is a pre-contractual issue giving right to only one party to avoid the contract and is not a case of breach of contract. "Damage" in S.75 refers to a legal injury out of "contractual wrong". Also Indian Contract Act makes no distinction between innocent misrepresentation and fraud so far as the remedy, unlike did the Common Law of England (till Misrepresentation Act, 1967 altered the situation). It is impermissible to import in India the Common Law principle to award damages in fraudulent misrepresentation distinct from restitution in innocent misrepresentation. Further if a fraud/ misrepresentation becomes a term of contract and performance of contract is not possible remedy in S.19 to rescind the contract and claim restitution shall be vastly different in proof, principle, and quantum from claim of damages under S.73 of the Contract Act for breach of contract. Another case is doctrine of "economic duress", a judicial innovation in India following English judgments and applying "undue influence" or "coercion. This is mainly for post contract agreements and not wholly satisfactory in law. Similarly S.64 requires restoration of benefit by the party rescinding and not the other way. Also if employer rescinds a partially performed contract lawfully on knowledge of misrepresentation or fraud by contractor when the part work is already fixed in its property, restoration is not possible. Agreement discovered to be void in S.65 covers undue influence in S.19A or when both parties are under mistake of fact (S.20) and not misrepresentation or fraud in formation of contract. Unless the contract itself has remedy in rescission of voidable contracts for misrepresentation or fraud in formation, the legal remedy of only restitution for rescission on such grounds may not be satisfactory and is inadequate in India.

b. Unfair terms in contracts- Quite distinct from procedural unfairness in making of contract which makes the contract voidable, unfair terms make the agreement void as provided in Ss. 23.24,25,26,27, 28 and 30. But "public policy" or "defeating a provision of law" to invalidate the contract under s.23 does provide no remedy in commercial contracts with unfair terms. The Constitutional remedy against arbitrariness or the judicial innovation of equitable principle of distributive justice has no application to unfair commercial contracts. Whereas there are legislations in almost all major jurisdictions which make exclusion clauses in case of negligence or willful breach of contract & unconscionable terms of contracts void, there is no such law in India as yet. Unfair terms are common in construction contracts. Arbitrator is bound in law to enforce these terms. Though the Courts have discretion under S.20 of the Specific Relief Act not to decree specific performance, there is nothing to prevent a party rely on such terms in arbitration. Hence delivery of justice based on 19th century jurisprudence of freedom of contract and free consent is not adequate for dealing with unfair dotted line contracts laced with exemption clauses.

c. Public Contracts-If contracts by Public authorities are vitiated in procedural arbitrariness in formation, the Courts may declare such contracts void ab initio. If a foreign party with treaty protection has lawfully and in good faith had entered into such contract or as a third party subsequently created interest in a contract, the Court decision might raise important questions of treaty obligation of Indian State. Though treaty by the Executive without ratification by Parliament cannot truncate the power of National Courts even in international contracts, such municipal Courts are part of State in international law and a foreign party may invoke breach of treaty obligation by the State to seek treaty arbitration.

d. Frustration- Even though it is settled by Supreme Court

of India in Satyabrata Ghose v Mugneeram Bangur dt 16th Nov. 1953 that there is no application of the English common law principle of frustration in s.56 of the Indian Contract Act, the more difficult question is to assess the remedy in frustration than holding that the contract was frustrated. Frustration causes involuntary discharge of contract. English common law followed "loss lies where it falls" i.e. the obligations that arose before the frustrating event were unaffected & parties were relieved from obligations that fell to be performed after the frustrating event; without any consideration of equity. Law Reform(Frustrated Contracts)Act, 1943 of England cured the harshness of common law by providing for recovery of money paid or making it not required to be paid though payable as per obligation before frustration and allowing for offsetting expenses incurred by partial performance from amount paid or payable. The remedy in India in frustration when contract becomes void is in S.65 of the Contract Act and is quasi-contractual for compensation to claimant for the advantage received by defendant and not for expenses incurred by claimant. In a contract for the sale of machinery by German sellers to Indian buyers rendered impossible of performance by the outbreak of war in 1939, at a time when machinery representing only a part of value of the total price of ₹1,83,200 had been delivered, but only ₹96,010 had been paid, the supervening impossibility rendered the contract void. The Privy Council in the judgment [Govindram Seksaria v Edward Radbone(1947) L.R. 74 I.A. 295], taking account of the fact that the delivered machinery might be useless without the undelivered part or an available alternative source of supply, held that the sellers had failed to prove an advantage greater than the sums already paid by the buyers [Hudson]. The English Frustrated Contracts Act 1943, with special compensatory provisions is based largely on principles of quasi-contracts. S.65 of Indian Contract Act, however, provides a general remedy by restoration or compensation for all cases. In construction contracts restoration of work done may not be possible. If the agreement is discovered to be void, there is no contract at all and compensation has to be in restitution. In frustration a valid contract becomes void and is not a case of a contract becoming void ab initio. Even if value of work can be assessed contractually before the frustrating event, in s.65 the remedy is only quasi-contractual compensation based on advantage received by employer and needs to be established by the claimant.

e. Novation-Judicial interpretations are in conflict whether novation as per s.62 of the Contract Act is possible even in case breach of contract or not. Law Commission of India had suggested to make the language clear to include breach of contract in the section but this amendment has not been made.

f. S.28 (b) of Contract Act & procedure in contract to make claims- Agreement may specify time limit as part of procedure to make a claim justifiably so to give opportunity to the other party mitigate or remove the cause. Then failure to make a claim in time should bar the claim. However this is hit by S.28 (b) of the Indian Contract Act. This is a substantive law, making such agreement to limit time less than the limitation period void. In Construction contracts performed over a period of time continuously with multiple chains of reciprocal obligations such contractual duty to claim has practical significance and it makes no sense to confer an absolute right to claim upto three years from cause of action. Once such term of contract is void can estoppels be pleaded independent of any contractual requirement? As per Halsbury's laws of England 'Estoppel is often described as a rule of evidence, but the whole concept is more correctly viewed as a substantive rule of law.' Estoppels transfer the burden of proof to the party claiming estoppels and are tougher to prove than relying on a contractual term. Hence it is suggested, amendment be made in s.28 (b) of Contract Act limiting it to only unconscionable contractual terms.

g. Third Party Rights-Even though consideration in India can move from 'any other person' unlike in England the doctrine of privity of contract is firmly rooted in Indian Law. The basis of agreement is "promise". In construction contracts having interested third parties and parties for whose benefit the contract is, there is no law on "third party rights" and only certain exceptions made by Courts.

Partnership Act, 1932

Against popular perception it is judicially settled and no more res-integra (recently by Supreme Court in M/S Umesh Goel vs Himachal Pradesh Cooperative on 29thJune, 2016 & earlier by Calcutta High Court in Sethi Constructions vs Kolkata West International City on 24 June, 2014- referring to other precedents and interpreting s.69(3) of Partnership Act) that for commencement of the arbitral proceedings without intervention of Courts, within the meaning of s.21 of the 1996 Act, the bar under s.69 of the Partnership Act is of no consequence even though the firm was not registered on such date nor names of its partners entered in the registrar of firms.

Conclusion

The amendment to the Arbitration Act might help timely

conclusion of arbitration and enforcement of arbitral awards in India. However, Construction Arbitration involves many other related laws. Such laws related to construction contracts and arbitration are not adequate and sometimes uncertain in India. Judicial precedents are at times inconsistent and need legislative correction. Principles of English Common law may not be exactly applicable in India in every case. Thus there remain grey areas in the law related to construction arbitration in India despite reform in arbitration law.

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Arbitration: Present Status, Opportunities and Challenges

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Introduction

The Indian Arbitration regime was long plagued with unpredictability and uncertainty making it an unviable option for international parties. This perception is being altered by various moves including a proactive judiciary and the amendment of the arbitration act, two decades after it was originally passed in 1996. These definitive and positive changes help usher in a new era in Indian arbitration system which presents with a unique set of opportunities and challenges that are analysed herein.

Arbitration and Alternative dispute resolution methods evolved as a response to the growing "glocalisation" of the world economy. Today, it has become a factor that supplants and supports the growth of any economy. The most recent numbers indicate that in the first quarter of 2016, India recorded 7.9% increase in its GDP(surpassing China's 6.7%[1]); the Indian economy is growing and strengthening. According to Department of Industrial Policy and Promotion, the total amount of For-eign Direct Investments("FDI")received by India during the financial year of 2015-16 (April 2015-March 2016) was USD 40 billion. These encouraging figures can further be attributed to the efforts of the Indian Government via its Make in India[2] programme launched in 2014. In tandem with such steadfast developments, the need for an effective and relevant dispute resolution mechanism espe-cially for commercial disputes is imperative.

The challenges faced by the Indian arbitration regime and its judiciary are the key to the solution herein as these become the very opportunities that can alter the face of both domestic and international arbitration. The challenge in India in terms of commercial disputes has been primarily the long duration it takes in courts to dispose of the matter. In 2015, according to the Head of the Parliamentary Standing Committee on Law and Justice, Justice Natchiappan, more than 2.5 crore cases involving 4 lakh crore Rupees were pending at different stages in various courts in India[3]. Internationally, there arises a need to alter the perception of India to establish it as a "safe seat" for arbitration. As Winston Churchill once said, "a pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty".

Analysing the present

The success of any arbitration regime depends on the development of domestic and international arbitration in tandem. The trajectory of changes thus far indicates that India is looking to not just promote international arbitration, but also at a major overhaul to shift the burden of core commercial litigation from the High Courts and Supreme Courts towards specialised tribunals.

The trend in arbitration in India projects the courts as taking a proarbitration stand. From 2011 to 2013, the growth in disputes referred to arbitration is recorded at a surprising 300%.[4] Traditionally, adhoc arbitration has been the preferred mode of arbitration. However, learning from the success stories in other Asian jurisdictions brings home the necessity or the need for the establishment of institutional arbitration in India. Institutional arbitration will also increase awareness, competency and the network of professionals from legal and other fraternities, which is the key to promoting a healthy arbitral regime.

The entry of professional institutes into the market has brought an efficient structure, competence, world-class facilities, credibility, quality services and effective case management. Endeavours such as the establishment of niche arbitral institutions such as the Indian Institution of Technical Arbitrators are crucial steps in encompassing and complementing the existing ADR system in India, especially arbitration. While there exists many institutions in India and more promising entrants like the cen-tres recently established in Mumbai and Delhi, there is a need for a collaborative interinstitutional approach, both domestically and internationally, that will promote arbitration.

India cannot attain the desired recognition and set itself as a credible global arbitration hub (and ultimately attract foreign investment) if enforcement of foreign arbitration awards is riddled with many hurdles. The recent amendments to the Act, though laudable, is only a first step towards making arbitration the preferred mode of dispute resolution in India. It must be acknowledged that increased efficiency in arbitration is unlikely to come solely from the imposition of top-down legislative change. A change in the very culture of Indian arbitration

is required which can only be achieved with education, awareness and capacity building. For one, there needs to be a change in the perspective with which arbitration is viewed; from a secondary playing field to Indian courts to primacy by itself. Also, the pool of Indian legal practitioners who specialise in the practice of arbitration has to grow and the pool of arbitrators needs to grow as well. What is needed is the growth of a community of arbitrators unfettered by the traditions of the Indian courts and focussed on growing arbitration in its own right.[5] It is here that institutions such as the Indian Institution of Technical Arbitrators, Chartered Institute of Arbitrators and collaborations with other successful arbitral institutions across the globe will play a key role. The key to this challenge is also a solution that presents itself with opportunities for practitioners and stakeholders alike.

The Indian Economy and its Regional Equilibrium

There are multiple indicators of the growth of international business, among others the foreign direct investment pointers of the United Nations Conference on Trade and Development ("UNCTAD"). These Report (and subsequent others) have reported increased FDI in SEA, as a region. The UNCTAD's 2015 report[6] suggested that all of the so called ASEAN[7] nations saw a rise in the amount of FDI coming their way.[8] The previously cited 2015 report also stated that, as of this day, the quan-tum of FDI that go into the ASEAN make it the largest FDI recipient in the world[9]. Other studies reveal that, as of now, the ASEAN nations (together) receive more FDI than China since 2014[10]. These numbers are crucial in terms of future trends related to the implementation of India's "look east" policy in the early 1990's.[11] The India-ASEAN Free Trade Agreement ("AIFTA")[12] has resulted in trade diversion occurring in India and the ASEAN members. The AIFTA is likely to provide many of the desired results for the countries involved, i.e., improved welfare for most of the countries, increased trade engagement, better market access in the partner country and, to a large extent, trade diversion in the India-ASEAN region. The AIFTA came into effect on 1 January 2010 with regard to Malay-sia, Singapore and Thailand. For the remaining ASEAN members, it will come into force after they have completed their internal requirements. India's benefit lies in its efforts to link allocative effi-ciency to further investment and production efficiency gain in export-oriented sectors.[13]

In general terms, no matter the origin of the investment, the culture or nationality of the investor, the parties involved, the destiny or future usage of the funds, there will always be provisions that call for ADRs. National courts are not the preferred route for resolution of international disputes. International investors prefer more efficient channels; ADRs. FDI has moved nations to offer (and recommend) protection to the nationals of other states[14]. Today, there are more than 2500 enforceable International Investment Agreements ("IIA") between nations[15] and virtually all have provisions that call for ADRs in case of disputes[16].

Bilateral Investment Treaties ("BIT") are agreements between states for the reciprocal protection of investments. In the BIT, the states grant certain guarantees to the nationals of the other state to encourage investment ventures and grants rights of claim to potential investors[17]. This BIT is also considered to function as an offer to arbitration, when investment arbitration provisions are present. Most of the BITs to date include provisions for a number of ADRs[18], including investment arbitration.

On a private level, most investors and international practitioners prefer to resolve differences that may arise in a contractual negotiation through ADRs (specifically, through arbitration) rather than meeting in court[19]. The single most helpful instrument for international investors is the power to enforce awards internationally pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention ("NYC"). It is for these reasons that Arbitration and more widely, an all-encompassing Alternative Dispute Resolution regime will become the harbinger of globalisation with unique local attributes of the Indian economy and commercial setup.

ADR Regional Development- Lessons gleaned

To look to the success of arbitration and its inter-play with the economy, we need to look no further than the many well-established institutions and arbitral regimes all over SEA. Referring only to a few of the many centres, we can refer to sophisticated and international practice in China[20], Hong Kong[21], Indonesia[22], Malaysia[23], Philippines[24], and Singapore[25]. Likewise, at least 4 of the SEA nations have changed, in the last 6 years, from 2010 to date, their local lex arbitri[26]. The development of arbitration in SEA in characterized, from an international perspective, by changing rapidly. In the past, arbitration laws and arbitral institutions in Asia have often been seen as less well developed when compared to their Western counterparts. In recent years, Asian jurisdictions have worked hard to ensure that their arbitration regimes are on par with their Western counterparts. Asian arbitral institutions have travelled very far very quickly; and these efforts look likely to be rewarded.[27] The crucial lesson to be learnt is that converting challenges to opportunities is a collaborative effort where stakeholders play the most crucial role.

The Road Ahead: An Opportunity in Every Challenge

The Indian jurisdiction has the challenge of creating, us-

ing and furthering policies that are compatible with the international development of ADRs (like arbitration and mediation). From a structural point of view, what this essentially means is that the legislators and all other governmental actors that define public policy must put in place and/or make decisions that would change the way and moves into another stage. Unfortunately, India has not had substantial development in integrating and unifying the arbitral practices to the jurisdiction. On the contrary, the practice is decentralised and non-concentrated. ADR avenues and arbitral institution appear diverse as practitioners and institutions remain non integral.

Given that ADR is a mechanism that is preferred by international investors and as such, the investment and cross-border legal consumers generally tend to allot the cases to legal practitioners with a distinct multi or cross-jurisdictional practice experience. Bar associations, institutions and organizations have a particularly large task ahead of them in the development of the capacities in India. It will be paramount to disseminate information, education and common ground rationale for different levels of practitioners, for different practices and for different issues. Notwithstanding the diversity of the practice and the variety of cases that may come up, commercial stakeholders, industry players and the legal fraternity must be ready and be in a position to promote the era of education and information.

The various arbitral institutions in India will have to unify their effort and work as a united front. Notwithstanding their independence and autonomy, the institutions must understand that the trend and future challenges mandate a uniform and standardised approach to arbitration. The multiple organizations in India must look forward and find a way in which they can improve their practice by working together. Arbitral and administering institutions must start considering each other as their most important ally and not each other's toughest competitor. Furthermore, the multiplicity of practices that now exist due to the increased number of competitors, deviate the practice and move farther away from international standards and uniformity, thus reducing its credibility as a whole.

The key determining role lies in the hands of the practitioners. It is their duty and their responsibility to spearhead the next step in evolution of the legal practice in ensuring that arbitral practice in India heads towards a uniform and integrated ADR practice. Even when all other circumstantial elements come together, if practitioners are not convinced or proactive enough to delve deep in the cosmopolitan sophisticated practice, there will be no integration of an arbitral regime.

With recent legislative progress coupled with the strong support of the judiciary, the ground is fertile for rapid development of arbitration in India. The road may be complicated but, in the course of time, it will bring in ample rewards. Every participant in its own position in the map may influence a very important change. It is a moment of opportunity for the whole jurisdiction. The development will not depend just on the judiciary or legal fraternity but on all stakeholders and practitioners including technical specialists and availability of industry specific expertise.

Local businesses and commercial entities stand to gain immensely with a focus on development of arbitration within India. Home grown alternatives to foreign arbitrations or even collaborations with international institutions to offer a domestic alternative will increase the negotiating power of indian commercial entities and also help build the trust of the international community in establishing India as a safe seat and a viable alternative. The success stories of countries like Singapore and Malaysia only help to further establish the role that a successful ADR regime has played in exponentially increasing opportunities not just for the profession of ADR but as a stabilizer of opportunities and a viable alternative to "traditional seats" which are not cost-effective.

The arbitral institutions have the opportunity to prepare for an exponential growth, to grow with the new development movement, to acquire a substantial amount of power and significance in India and abroad, to help direct the future steps and to achieve national and international influence. However, to achieve this high-level practice, arbitral institutions must group together, not merely compete with each other. The success will not depend on the quantity of the arbitral institutions or the multi-tude of options that India provides, but in the unified front it projects while offering options to local and international stakeholders alike.

Converting challenges into opportunities to ensure the establishment of a transformative arbitration and an ADR regime in India that caters to the needs of domestic and international stakeholders alike. It will also go a long way in reposing trust in the regime globally. The 1990's saw a transformation of the Indian economy with its "liberalization." As the status stands, the time is ripe for the "liberaliza-tion" of the ADR regime in India. A continued focus on the opportunities with innovative solutions for the challenges faced will ensure holistic development of arbitration in India which will result in an exponential growth of opportunities. A responsive and dynamic ADR regime will serve as the foundation and platform for the rapidly growing Indian economy.

Foot Note

[1]Riley, C. (2016). India: Where 7.9% growth still isn't good enough. [online] CNNMoney. Available at: http://money.cnn.com/2016/05/31/news/economy/india-gdp-modi/.

[2]See generallyhttp://www.makeinindia.com/about [last consulted on 22th July 2016].

[3]The New Indian Express. (2016). Over 2.5 cr Cases Involving Rs 4 Lakh cr Pending in Courts Across India: Natchiappan. [online] Available at: http://www.newindianexpress.com/cities/hyderabad/Over-2.5-cr-Cases-Involving-Rs-4-Lakh-cr-Pending-in-Courts-Across-India-Natchiappan/2015/06/19/article2875586.ece[last consulted on 22th July 2016].

[4]Deoras, N. (2016). Indian judicial system witnessing pro-arbitration trend: EY report. [online] Business-standard.com. Available at: http://www.business-standard.com/article/economy-policy/indian-judicial-system-witnessing-pro-arbitration-trend-ey-report-113101800507_1.html[last consulted on 22th July 2016].

[5]Shan, P., Blanke, G. and Salaverry, F. (2016). Persisting Problems: Amendments to the Indian Arbitration and Conciliation Act - Kluwer Arbitration Blog. [online] Kluwer Arbitration Blog. Available at: http://kluwerarbitrationblog.com/2016/03/10/persisting-problems-amendments-to-the-indian-arbitration-and-conciliation-act/ [last consulted on 22th July 2016].

[6]See generally ____, UNCTAD World Investment Report 2015 - Reforming International Investment Governance (hereinaf-ter referred to as "Report 2015"), available for consult online at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf[last consulted on 22th July 2016].

[7]Report 2015 at 5. The Report 2015 refers to the Association of Southeast Asian Nations ("ASEAN"). For more information about the ASEAN, see generally the blog of the Association of Southeast Asian Nations, available for online consult at http://asean.org/ [last consulted on 22th July 2016]. In specific, the members of the ASEAN are (i) Brunei Darussalam, (ii) Cambodia, (iii) Indonesia, (iv) Lao People's Democratic Republic, (v) Malaysia, (vi) Myanmar, (vii) Philippines, (viii) Singa-pore, (ix) Thailand, and (x) Vietnam.

[8]Report 2015 at ix. (Key Messages, Global Investment Trends). The Report 2015 states that ("[m]ost regional groupings and initiatives experienced a fall in inflows in 2014. The groups of countries negotiating the Transatlantic Trade and Investment Partnership (TTIP) and Trans-Pacific Partnership (TPP) saw their combined share of global FDI inflows decline. ASEAN (up 5 per cent to $133 billion) and the RCEP (up 4 per cent to $363 billion) bucked the trend").

[9]Ibid.

[10]Ibid.

[11]Baru, S. (2001). INDIA AND ASEAN: THE EMERGING ECONOMIC RELATIONSHIP TOWARDS A BAY OF BENGAL COMMUNITY. Working Paper 61. [online] New Delhi: INDIAN COUNCIL FOR RESEARCH ON INTERNATIONAL ECONOMIC RELATIONS. Avail-able at: http://icrier.org/pdf/baru61.pdf[last consulted on 22th July 2016].

[12]See generally the AIFTA, available at https://www.google.com/search?q=India-ASEAN+Free+Trade+Agreement&rlz=1C1CHBF_enMY697MY697&oq=India-ASEAN+Free+Trade+Agreement&aqs=chrome..69i57.934j0j4&sourceid=chrome&ie=UTF-8 [last consulted on 22th July 2016].

[13]Sikdar, C. and Nag, B. (2011). Impact of India-ASEAN Free Trade Agreement: A cross-country analysis using applied gen-eral equilibrium modelling. Asia-Pacific Research and Training Network on Trade Working Paper Series, No 107. [online] New Delhi: Asia-Pacific Research and Training Network on Trade, pp.40-44. Available at: http://www.unescap.org/sites/default/files/AWP%20No.%20107.pdf[last consulted on 22th July 2016].

[14]Although FDI disputes are generally resolved through investment arbitration, many BITs have recommendations for in-vestors to engage in international commercial arbitration and other ADRs for the resolution of private disputes.

[15]See generally the UNCTAD's International Investment Agreement navigator available for online consult at http://investmentpolicyhub.unctad.org/IIA[last consulted on 22th July 2016].

[16]See note 6 supra; the Report 2015 considers ADRs as a sensible part of the IIAs.

[17]Not all BITs are self-executing treaties that grant rights to individual investors. For thoroughness, it is recommended, on a case by case basis, to review the corresponding provisions of each BIT and the manner of incorporation to the legislative body of each jurisdiction.

[18]See generally, for instance, the US Model BIT, available for online consult at http://www.state.gov/documents/organization/188371.pdf[last consulted on 22th July 2016], and the German Model BIT, available for online consult at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865[last consulted on 22th July 2016].

[19]Although there are no statistics on private contracts and their ADR provisions, it is a trend to include ADR provisions.

[20]See generally, for instance, the Shanghai International Arbitration Centre (SHIAC, http://www.shiac.org/SHIAC/index.aspx[last consulted on 22th July 2016]) and the China International Economic and Trade Arbitration Commission (CIETAC, http://www.cietac.org/?l=en[last consulted on 22th July 2016]).

[21]See generally, for instance, the Hong Kong International Arbitration Center (HKIAC, http://www.hkiac.org/[last consulted on 22th July 2016]).

[22]See generally, for instance, BANI Arbitration Center (http://www.baniarbitration.org/[last consulted on 22th July 2016]).

[23]See generally, for instance, the Kuala Lumpur Regional Centre for Arbitration (KLRCA, http://klrca.org/[last consulted on 22th July 2016]).

[24]See generally, for instance, the Philippine Institute of Arbitrators (PIArb, http://www.philippinearbitrators.org/home[last consulted on 22th July 2016]) and the Philippines Dispute Resolution Centre (PDRC, http://www.pdrci.org/[last consulted on 22th July 2016]).

[25]See generally, for instance, SIAC Singapore International Arbitration Centre (SIAC, http://www.siac.org.sg/[last consulted on 22th July 2016]).

[26]See generally, the Indian Arbitration and Conciliation (Amendment) Act 2015 (available for online consult at http://www.indiacode.nic.in/acts-in-pdf/2016/201603.pdf[last consulted on 22th July 2016]), the Hong Kong Arbitration Ordinance (Cap. 609), 2011 (available for online consult at http://www.doj.gov.hk/eng/public/arbitration.html), the Malay Arbitration (Amendment) Act 2011 (available for online consult at http://www.federalgazette.agc.gov.my/outputaktap/20110602_A1395_BI_A1395%20BI.pdf[last consulted on 22th July 2016]), the Singaporean International Arbitration (Amendment) Bill 2012 (available for online consult at https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclick73ec.pdf[last consulted on 22th July 2016]). It is relevant to note that both Malaysia and Singapore are actively preparing new amendments to their lex arbitri although there are no official projects as of jet.

[27]See Justin D'Agostino, Arbitration in Asia at Full Gallop, Kluwer Arbitration Blog, February 10, 2014, available for online consult at http://kluwerarb itrationblog.com/2014/02/10/arbitration-in-asia-at-full-gallop/[last consulted on 22th July 2016].

Datuk Professor Sundra Rajoo

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He is external examiner at the Faculty of Law, National University of Malaysia.

He has authored several books on arbitration and contract law, including, "Law, Practice and Procedure of Arbitration" (2003); "The Malaysian Standard Form of Building Contract (The PAM 1998 Form)" (1999); the Arbitration title for Halsbury's Laws of Malaysia (2002); and "The Malaysian Arbitration Act 2005 (Amended 2011) – An Annotation" (2013).

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Promoting Institutional Arbitration in India

Mahesh Rai
Associate Director, Drew Napier, Int. Arbitration Council, Singapore

Agenda

1. Why Institutional Arbitration?
2. Ad- Hoc Arbitrations
3. Perception of Arbitration in India
4. Institutional Arbitration in India
5. Benefits – Institutional Support
6. Costs
7. Quality & Speed of Institutional Arbitration
8. Emergency Arbitrations

Perception of Arbitration in India

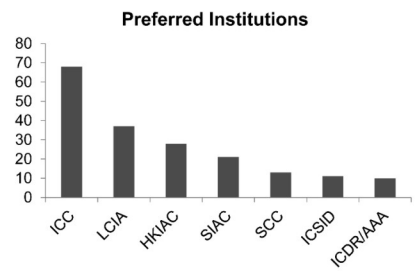
- Survey of in-house counsel of 70 companies in India (PWC 2013):
  - 91% have dispute resolution policy which includes arbitration (not litigation)
  - 61% confirmed inclusion of a dispute resolution policy
  - 47% prefer ad-hoc vs 40% institutional (companies with no prior experience of arbitration indicate preference for ad-hoc)
  - Stated advantage of institutional arbitration – provides mechanism and time frame for selection of the tribunal)
  - Arbitration a preferred dispute resolution mechanism because of (1) speed, (2) flexibility, and (3) confidentiality
  - Delay in ad-hoc arbitrations due to small club of seasoned arbitrators to sit as tribunal (increases costs vs litigation).
- Up to 74% of Indian companies surveyed indicated a preference for agreements to have arbitration clauses, the majority preferred arbitration in foreign / international institutions (E&Y 2011)

Why Institutional Arbitration?

- Easy to include in your contracts
  - Saves you the effort of determining procedure and drafting of the clause
  - You select an institution and incorporate that institution's draft clause into your contract
  - You can add other elements to the clause in some circumstances: for example qualifications of the arbitrator or time within which award should be rendered.
- Ready set of established rules and procedures for each stage of the arbitration
- Ready administrative assistance from the institution (secretariat or court of arbitration)
- A list of qualified arbitrators to choose from
- Assistance from the institution to nudge along reluctant parties to proceed with arbitration
- Downside? Fees

Institutional Arbitration in India

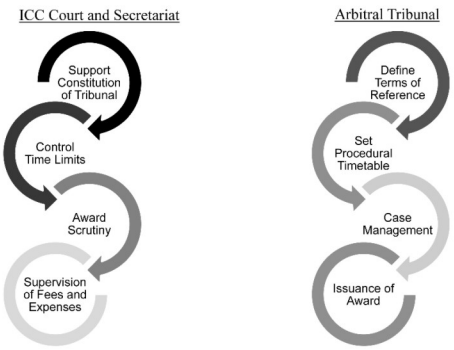
- Overwhelming international preference for ICC Rules – benefits to examined



Ad-Hoc Arbitrations?

- A properly conducted ad hoc arbitration depends on agreement on both sides
- Vulnerable to obstructive tactics – no institutional intermediary / mechanism to prevent frustration of proceedings.
- Efficiency of ad hoc arbitration depends on arbitration clause – intervention by courts?
- Enforcement easier for institutional arbitral awards.
- Lack of administrative support in policing timelines.
- Fluctuation in costs.

Benefits– Institutional Support



Costs

- Online Cost Calculator – easy to estimate ICC administrative expenses and arbitrators' fees
- Payments in instalments permitted
- Fee arrangements for arbitrators set by institution, not parties
- Monitoring of arbitrators' fees by institution

Amount in dispute US$ 1000000

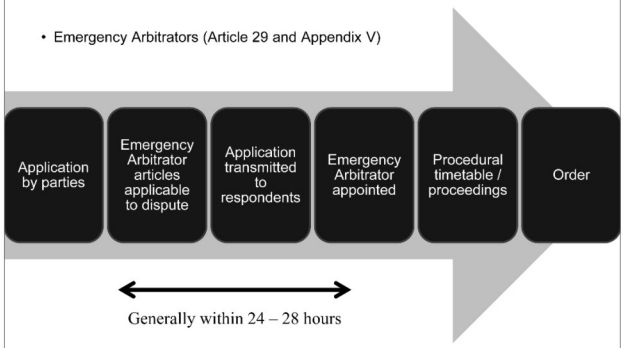
Number of arbitrators 1 3

Calculate

Requested estimation	
Amount in dispute	1000000
Number of arbitrators	3
Year (scale)	2010
Fees per arbitrator	
Min	$14627
Avg	$39378
Max	$64130
Advance on costs (without arbitrator expenses)	
Average fees multiplied by number of arbitrators	$118136
Administrative expenses	$21715
Total	$139850

Emergency Arbitration

- Emergency Arbitrators (Article 29 and Appendix V)



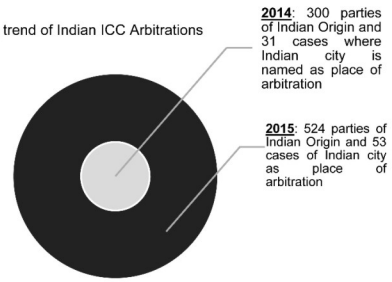
Quality and Speed of Inst. Arbitration

- Time Limits: Timely justice
  - Article 30 ICC Rules: Award to be rendered within 6 months from Date of Reference (ICC Court may extend term)
  - Article 38 ICC Rules: Parties may agree to shorten time limits
- Quality Control: ICC Court provides support

- Refuse confirmation of arbitrators
- Replacement of arbitrators who do not comply with obligations
- Monitor compliance with time limits
- Reduction of Arbitrators' fees
- Scaled fees
- Scrutiny of Draft Award

Focus on India

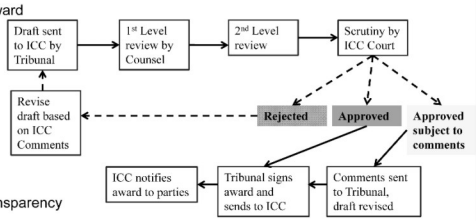
- Increasing trend of Indian ICC Arbitrations



- Indian-origin parties top parties in ICC Arbitrations – top 10 in 2014 and top 11 in 2015

Quality and Speed of Inst. Arbitration

- Scrutiny of Award
  - Process



- Arbitrator Transparency
  - Information on Arbitrators published on ICC Website – Name / Nationality / Role in Tribunal / Method of appointment / if arbitration is pending or closed
  - Article 11: Duty on Arbitrators to disclose conflict of interests
  - ICC publishes reasons for decision of Arbitrator challenge / replacement

Mahesh Rai

"Mahesh acts for clients as counsel in a broad spectrum of litigation and international arbitration matters. He has handled disputes spanning many sectors including information technology, telecommunications, oil and gas, shipping, construction and commodities. He is adept at handling complex disputes involving multidisciplinary technical issues. He has also acted in shareholder and joint venture disputes, employment disputes and fraud claims.

Mahesh regularly appears in international arbitrations and litigations before the Singapore courts. In 2012, Mahesh was also awarded an Excellence in Advocacy Award by the Singapore International Arbitration Academy. He was appointed Young Amicus Curiae by the Supreme Court of Singapore in 2014 and he assisted the High Court on novel points of law in an appeal involving money laundering."

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Salient Features of Arbitration in the United States of America

Jonathan Blank
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Synopsis

Arbitration is strongly favored by the United States legal system. The Federal Arbitration Act, which applies to all courts in the United States, precludes most court challenges to arbitration when a contract specifies arbitration to settle disputes. The Act also provides that courts will enforce awards and will enforce subpoenas issued by arbitration panels for testimony or evidence. Even the question of whether a dispute is subject to arbitration is generally a matter for arbitration, rather than a court question.

Arbitration in US domestic disputes tends to follow many customs of civil litigation in America, including pre-hearing discovery and deposition of witnesses. While strict rules of evidence do not apply, the hearing is similar to court in that evidence is presented by witnesses subject to cross examination.

Courts almost always enforce arbitration awards, and grounds for appeal are very limited. Courts will even uphold awards if no reasons are given for the award, if the parties had agreed.

Although arbitration is common in the United States, and courts favor enforcing arbitration clauses in contracts, their use in consumer contracts has become controversial, and may be looked at as the Supreme Court gets new justices.

The Federal Arbitration Act

In the United States, arbitration of commercial disputes was disfavored under the common law. While courts might enforce an award already issued by an arbitration panel, courts were reluctant to require parties to arbitrate even if they had previously agreed to arbitrate.

The Federal Arbitration Act (FAA), enacted in 1925, was intended to change the law to favor arbitration when the parties to a contract had agreed to submit their dispute to arbitration. However, for the first fifty years after passage of the FAA, the courts remained generally unsupportive of arbitration. In general, courts were concerned that parties might lose their right to the protection of the law through arbitration. For example, in Wilco v Swan, 346 US 427 (1953) the Supreme Court refused to compel arbitration in a securities suit because of a conflict with the Securities Exchange Act, expressing skepticism about arbitration.

That attitude changed dramatically, beginning with Moses H Cone Memorial Hospital v Mercury Construction Corp, 460 US 1 (1983), and Southland Crop v Keating, 465 US 1 (1984). In Moses Cone the Supreme Court held that the FAA applied to state courts, not just Federal Courts. The Southland case created a substantive body of Federal arbitration law preempting state laws to the contrary. The court held that the Federal Arbitration Act precluded a state law that voided any agreement requiring franchisees to waive their rights under the California franchise law. The Supreme Court held by a 7-2 majority that the FAA was a "national policy favoring arbitration" which precluded the states from interfering with that national policy. It is interesting to note that at that time the two dissenting Justices were among the conservatives on the court, claiming that the FAA was not intended to preclude the states from enacting laws protecting their citizens from overreaching by corporations. That position has now reversed, with the conservatives strongly favoring arbitration and the liberal justices wanting limits. (Justice Thomas, the most conservative Justice on the court, did favor arbitration in Keating).

Section 2 of the FAA provides that a written provision to settle disputes by arbitration in any maritime contract or contract involving interstate commerce shall be valid, irrevocable, and enforceable except for such grounds as exist for the revocation of any contract. The important point about Section 2, is that if the contract affects interstate commerce, the FAA requires that an arbitration clause be enforced. It does not matter whether the claim arises from a state law or a federal law, or whether the matter is in state court or federal court, the FAA requires the enforcement of arbitration clauses.

Injunction in aid of arbitration

It is common practice in the United States for a party to an agreement with an arbitration clause to go to court to enforce the agreement if the other side seeks to avoid arbitration and commence a suit in court under the contract. If independent grounds exist for federal court juris-

diction, the party seeking to enforce arbitration can go to a Federal District Court. If not, the party can either defend the state court action with a motion to compel arbitration, or may, under some circumstances, start a separate action seeking to enjoin arbitration. If in Federal Court, Section 3 of the FAA provides that the court will stay the trial of any action subject to arbitration pending the result of the arbitration. If there is no federal court jurisdiction, then the state court is still bound by the terms of the FAA if the matter involves interstate commerce, but the parties do not get to appeal to a federal court until the case has been through all the appeals in state courts. As a practical matter, state courts understand that the FAA does apply, and will generally suspend state court action and refer the matter for arbitration.

In a case in which there are both claims subject to arbitration and non-arbitrable claims arising out of the same facts, the courts must send those that are subject to arbitration to arbitration and not wait for the conclusion of the court proceedings on the other matters, KPMG v. Cocchi, 132 S. Ct 23 (2011). However, it is not yet clear whether the Supreme Court will require that the court action be stayed pending the arbitration if the arbitration as a practical matter would settle the damages awards.

In the United States Federal Courts, and most state courts, there is a strong bias against appeals of "interlocutory" orders – that is, orders that dispose of part but not all of a case. Section 16 of the FAA provides that an appeal can be taken from an order denying a request for a stay of litigation pending arbitration or denying an order to compel arbitration. On the other hand, an order compelling arbitration is not appealable. So as a practical matter, if a party favoring arbitration gets a stay of litigation or an order to compel arbitration, that is un appealable, but if he is denied such an order he can appeal and very well may win.

Arbitrability and the doctrine of Severability

Even before Southland, the Supreme Court had determined that the question of what is subject to an arbitration clause is usually a question not for a court to decide, but rather for the arbitration panel to decide as part of the arbitration. In Prima Paint Corp. v Flood & Conklin Mfg. Co, 388 US 395 (1967) the Supreme Court held that the question of whether a contract had been induced by fraud was for the arbitrators to decide, not the courts. The court developed a doctrine that has become known as severability.

The court separated two questions. First, was the contract procured by fraud? Second, was the arbitration clause itself procured by fraud? The court held that unless the party seeking to void the contract could prove that the arbitration clause itself was procured by fraud, the question of whether the remainder of the contract was procured by fraud was a question to be decided by the arbitration panel.

In practice, since most arbitration clauses are simply inserted without much inducement or negotiation, the question of setting aside a contract for fraud is almost always decided by the arbitration panel. You cannot get out of an arbitration and get to court just by asserting the contract is not valid. If there is a contract with an arbitration clause, whether that contract is valid is almost always decided by arbitration.

Many other questions that seem to go to the question of whether the arbitration panel can decide a question are, in the United States, decided by the arbitration panel instead of a court. In general, the power to decide whether an arbitration panel has the competence to decide a question is a question for the arbitration panel, not the court.

Types of Arbitration in Domestic Disputes

A huge number of disputes in the United States are either decided through arbitration or, at least, subject to being decided through arbitration. Many commercial contracts, negotiated by parties with equal bargaining power, contain an arbitration clause. Often one of the reasons the parties will choose to include an arbitration provision is to maintain confidentiality. In addition, it is believed that arbitration is more efficient, quicker and less expensive than court proceedings, although this may or not be the case, depending on whether the parties seek extensive discovery.

One of the commercial areas in which arbitration is most common is the construction industry. The reasons for including arbitration provisions in construction contracts includes cost and speed, but also stems from a desire to have experts decide complex questions, rather than busy judges who may not understand the technical issues, or juries, who may understand even less. Moreover, the parties may have repeated disputes and want a quick and private means to settle these differences while maintaining a continued business relationship. Construction contracts containing arbitration clauses usually specify the specific rules of the American Arbitration Association construction panel, and generally to be selected for those panels one must have technical expertise.

Another area of the economy where arbitration is making significant in roads is in intellectual property disputes. Because these disputes are often very technical, parties may choose arbitration panels with special qualifications

But in addition to normal commercial contracts, there are whole areas of the economy that are largely governed by arbitration. Almost all union contracts provide that workers grievances are subject to arbitration. Those panels are often thought to generally favor workers over employers. Moreover, many employers now insist their employees, both executive and non-executive, agree to submit employment disputes to arbitration. The securities industry has long required that almost all disputes involving broker-dealers be subject to arbitration. Virtually all reinsurance contracts, and many insurance coverage questions, are subject to arbitration clauses. Increasingly, consumer contracts are also subject to arbitration clauses, discussed below.

In commercial contract disputes, there are both administered arbitrations and ad-hoc arbitrations, as determined by the arbitration clause in the contract. In administered arbitrations the number of arbitrators may be determined by rules of the administering body, such as JAMS or the American Arbitration Association, or by the contract itself. Unless specified in the contract or by the administering association, most arbitrations involve panels of three arbitrators. In ad hoc arbitrations, the party selected arbitrator may represent the interests of the selecting party. However, this is increasingly rare. In almost all administered arbitrations, and many ad hoc arbitrations, all three members of the panel are required to be neutral. Even a neutral arbitrator may consider it his or her role to assure that the side that selected him gets a fair chance to present their case, but he must be unbiased in determining the award.

The American Arbitration Association is the largest administrator of domestic arbitrations. It publishes rules for many different types of arbitrations, and has many expert panels. It tends not to favor former judges as arbitrators. JAMS, another large administrative organization, has many former judges as arbitrators. While many retired judges have become arbitrators, the majority of professional arbitrators are not former judges.

Arbitration Panel Procedure

Although different organizations' rules vary, generally commencing a US domestic arbitration does not require a detailed statement of claim. A letter notification of the dispute is all that is required. Unlike international arbitration which generally requires that the notice of arbitration contain a detailed statement of the case backed up with most of the evidence required to support the claim, US domestic arbitration has no requirements for specificity or proof to initiate the proceeding. Section 5 of the FAA gives the court the authority to appoint an umpire if the parties cannot agree on an appointment.

Following selection of the panel, in most commercial cases there will be a preliminary hearing, including the arbitrators and their counsel. Usually this is held by telephone conference call. At the preliminary hearing the panel will set a schedule for preliminary motions, if any, discovery, and a date for submissions of evidence, hearing, and post hearing briefs, if any.

In general, most commercial disputes are for money judgments, although parties may ask for other relief. In labor disputes, for example, job reinstatement may be the goal. Parties may ask for preliminary relief, if, for example, there is concern that without an injunction there may be insufficient funds to pay an award. An arbitration panel would have the power to award such preliminary relief, although enforcement would require a court order.

Most commercial arbitration provides for discovery, in keeping with the American system of civil litigation. The discovery is somewhat more limited than in court. Written interrogatories are requests for admission are generally not allowed, but it is common practice that the parties will be required to go through their written and computer records and give the other side copies of all relevant documents, including documents and emails that are damaging to the side producing the documents. The search of computer records can be a very extensive and expensive process, and often one side tries to limit the scope of the request for documents. The arbitration panel has almost complete authority to decide the scope of discovery, and courts will almost never interfere.

The hearing process will be similar to a court proceeding in the United States, with both sides presenting witnesses under oath. Therefore, it is customary, at least in large cases, that each party is able to take the deposition of future witnesses or other persons having relevant knowledge of the facts in dispute. Many parties try to eliminate depositions as expensive and wasteful, but generally if a party wants to depose the other side's witnesses or employees, it will be allowed at least some depositions, if not as many as would be possible in a court case.

Many cases have one or both sides presenting expert witnesses. As in court, the panel decides on the qualification of the expert. The expert will be required to present his or her findings before the hearing in written form.

One notable feature of arbitration in the United States is that a panel, at the request of a party, may order that parties or non-parties testify. Section 7 of the FAA gives arbitrators the right to summon the testimony of any person, and if the person does not comply provides that the court will issue a subpoena requiring the testimony or evidence be produced. As a matter of practice, non-parties

are usually required to testify only once, either at a deposition or at the hearing.

The hearing itself is a form of trial. Each party is required to prove its case through documents and witnesses. The witnesses may present their direct case either orally, as in court, or with a written statement. Either way, the witness will be subject to cross examination by the opposing party. Unlike in court, strict rules of evidence are not followed. The biggest difference is that hearsay, which is generally not permitted in court trials, is allowed in arbitration proceedings, although the opposing side will usually try to argue that it is not reliable. In a trial, all documentary evidence generally requires a foundation before admission, i.e., a sponsoring witness who attests to the authenticity and meaning of the document. In arbitrations generally all documents are admitted at the beginning of the hearing without sponsoring witnesses, unless their authenticity is challenged.

Following the hearing, and any post hearing briefing, the record is declared closed, and the panel is given a limited time, usually 30 days, to issue its decision. If it misses that deadline it can void the proceedings.

The form of decision is determined by the parties. The parties can agree on a bare award, which gives no reasons and only finds for one party or the other and makes a monetary or other award. If the parties agree, the courts will uphold a bare award. Alternatively, the parties may opt for a reasoned decision, requiring the panel to lay out in considerable detail its reasoning including the rationale for the amount of any award.

Unless the arbitration contract specifies that costs and attorneys' fees can or must be awarded, the general American rule is that each party bears its own costs, including half the fees of the arbitration panel. The administrative body's rules may provide that certain costs be allocated to the non-prevailing party.

Enforcement of awards

The FAA provides that courts enforce arbitration awards without reviewing the merits of the decision, except in limited circumstances where the award was procured by fraud, where the arbitrators showed evident partiality or corruption, where the panel showed partiality by refusing to hear all the evidence, or other misbehavior, or where the arbitrators exceeded their powers.

The courts are very reluctant to overturn an arbitration award, and it is generally held that a mistake of law by the arbitration panel is not grounds for overturning an award. Appeals of awards, motions to vacate awards, or other means to try to avoid enforcement of arbitration awards very rarely succeed. Conversely, while an arbitration panel has no inherent jurisdiction to enforce its award, and only a court can enforce an award, almost all awards will be enforced without the court reviewing the record for mistakes or errors of law.

Some courts, including some Federal courts, have held that there is an independent judicial authority to vacate awards for manifest disregard of the law, see Stoldt-Neilsen SA v Animal-Feeds Int'l, 548 F. 3d 85 (2008), reversed on other grounds 559 US 662 (2010). This is a minority view, and while often tried, it succeeds rarely.

International Arbitration in US Courts

Section 201 of the FAA provides that The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention) be enforced under the FAA. Subject to the convention, the grounds for seeking to overturn an award of a foreign award must be in the country of the award, enforcement in the US is not subject to even the limited review accorded domestic awards. International arbitrations held in the United States are subject to the FAA, and the courts will defer to arbitration panels as in domestic arbitrations.

Current controversies over arbitration in the United States

Whether the Supreme Court has gone too far in enforcing arbitration clauses has become a hot topic in the United States. On October 31 and Nov 1, 2015 the New York Times ran lead stories on the front pages whether the privatization of dispute settlement was depriving US citizens of their rights. The controversy tends to occur in instances where consumers or employees are offered a take it or leave it contract waiving the right to go to court for any reason relating to the contract.

One of the most controversial cases concerns AT&T's requirement that its customers waive any participation in class action suits against the company, and submit all disputes to arbitration, even though the amounts in dispute are so small as to make case by case arbitration impractical. The practice in the United States is that where there are numerous small claims, they can be aggregated into a large class action brought on behalf of all similarly situated customers or employees. In AT&T Mobility v Concepcion, 563 US 333, (2011), the Supreme Court decided 5-4 that the FAA precluded a class action against AT&T for wrongful charging of tax to its customers because their cell phone contract waived class actions and required arbitration even though the practical effect would be that nobody would ever bring an arbitration over such a small sum. Similar controversies have

arisen with bank charges, and many employment practices.

The Supreme Court decided Concepcion on a liberal vs conservative split. Since the decision, Justice Scalia, who wrote the opinion, has died, and his seat is vacant. If Hillary Clinton wins and appoints a new Justice, the case will probably be overturned. In the meantime, the Consumer Financial Protection Bureau, an agency created after the financial crisis of 2007, has proposed a rule to prohibit waiver of class action clauses in financial contracts such as credit card contracts and bank deposit rules. However, whether those proposed rules can make it to final implementation, and whether they would survive a court challenge, will take some years to decide.

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Arbitration in Dubai; Immunity of Arbitration Tribunals, Recent Judicial Verdicts

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Introduction

Dubai, the commercial hub of United Arab Emirates[1] has seen exponential growth in the past four decades in construction, infrastructure, manufacturing and engineering sectors. Dubai boasts of tallest skyscrapers[2] and longest driver-less metro rail[3] among other things. This city has won the competition to be the venue for world expo[4] in the year 2020.

The Dubai International Financial Centre, commissioned in 2004 has been a great success and this micro jurisdiction[5] is indeed an unique opportunity for international investors to resolve their disputes using Common law, while the main land Dubai continue to follow the civil law-sharia combined legal system. DIFC is fast becoming the popular seat for arbitration and enforcement gateway for international arbitration awards. It's little secret that Dubai aspires to be an international arbitration centre with the likes of Paris, London, Singapore and Hong Kong. Dubai has the world class facilities and connectivity with most of the cities in the world and with billions of dollars is being invested in infrastructure and construction projects, it is only logical to shape this city as a regional arbitration centre.

Although Dubai has shown greater acceptance of arbitration as a mechanism to resolve disputes in construction and commercial industry, there has been doubt over the enforcement of arbitral awards[6] as there were instance where the awards were set aside for minor procedural irregularities and for public policy reasons. However, over the recent years the local courts are highly supportive of the arbitration process and recently they have dismissed two cases[7] wherein the arbitrators were personally sued by the losing Party and by doing so the courts have upheld the principle of arbitral immunity, much to the relief of arbitration practitioners worldwide.

In this article, the author wishes to discuss the concept of arbitral immunity, its history, applicability in common and civil law jurisdictions and institutional rules at both international and domestic centres. The case law and the judicial verdict will be discussed briefly and will finally offer some practical suggestions for international arbitrators to overcome personal liability.

What is "Arbitrator immunity"?

As recipients of bad news are inclined to blame the messenger who brought the bad news, so many a losing party in arbitration will blame the arbitrator[8]. Blaming the arbitrator and dragging them to courts seeking personal damages has a long history in several parts of the world. Unless the neutral party be it arbitrator, umpire or even judge is protected against such personal attacks, it is impossible to provide a certainty to the dispute resolution process and this is the essence of "arbitrator immunity" in nutshell.

Arbitral immunity stems from the judicial immunity which dates back to early century English cases[9], in which Lord Coke announced the rule of judicial immunity. The purpose of such rule was to ensure finality of judicial decisions, preserve judicial independence and maintain confidence in the judicial system.

The United States Supreme Court expressed the doctrine of judicial immunity in the Bradley v Fisher[10] case and it was declared that, "judges are not liable to civil actions even when such acts are in excess of their jurisdiction or are alleged to have been done maliciously or corruptly".

Since the arbitrators are performing the role of private judges (so to say), it is natural to extend the judicial immunity to the arbitrators as well, which was echoed in the US case of Fong v American Airlines where it was said: "the integrity of arbitral process is best preserved by recognizing the arbitrators as independent decision makers who have no obligation to defend themselves in a court[11]". The concept of affording arbitrators a quasi-judicial immunity has continued in USA since the 1880 Iowa decision in the Jones v Brown[12] case and it is a most frequently quoted decision in support of this doctrine.

Common law jurisdictions

In general, common law jurisdictions view the role of arbitrators has quasi-judicial and hence they enjoy immunity from negligence and mistakes in law or fact[13].

The exercise of judicial (quasi) function is an exception to the common rule that any professional person may be

liable for damages for negligence, if he fails to exercise due care and skill.

As we have seen above, arbitrators in United States enjoy the broadest degree of immunity from court actions[14] and courts held that their role is functionally comparable to those of a judge[15] and hence they are granted with the same immunity as judges even though they do not hold federal office[16].

Other common law Statutes granting immunity

Singapore International Arbitration Act[17], The Arbitration Act 1996 of England[18], Hong Kong Arbitration Ordinance[19] and Revised Uniform Arbitration Act 2000 of United States[20] grant immunity save for bad faith and dishonesty. The Australian commercial arbitration Act expressly imposes liability for fraud[21]. Under English law, upon removal of an arbitrator the court may order the arbitrator to repay any fees or expenses already paid[22].

Civil law jurisdictions

Contrary to the common law view of arbitral immunity, civil law jurisdictions adopt a contractual analysis[23] in the sense that the arbitrator performs the service of resolving a dispute for a fee and by imposition of law he has a duty of care to act with due diligence and the duty to act judicially[24]. In view of this the arbitral liability is a contractual term negotiated between the Parties and Arbitrator which is again subject to mandatory provisions of national law[25]. The judge immunity analogy does not apply in civil law jurisdictions and unlike common law judges, civilian judges can be held liable for all culpable and wrongful acts[26].

Uncitral Model law

The Model law contains no provision on the liability of arbitrators for misconduct or error and it is worth noting that, in the drafting of the Model Law, there was general agreement among the members of the working group on International Contract Practices that the question of the liability of an arbitrator could not be appropriately be addressed in the Model Law on Intlernational commercial arbitration[27]. The reason was arbitrator liability was not widely regulated and National laws have different formulations either granting immunity or imposing liability.The Indian Arbitration and Conciliation Act 1996 is broadly based on the UNCITRAL Model law and as such the law does not afford immunity to arbitrators.

Arbitrator immunity under Institutional Rules

In general, the international arbitral institutions[28] grant immunity to arbitrators save for conscious and deliberate wrong doing. The International Chamber of Commerce (ICC) Rules[29], AAA Commercial Arbitration Rules and Mediation Procedures[30] and the International Centre for the Settlement of Investment Disputes[31] (ICSID) grant blanket immunity but ICSID has the power to waive the immunity in certain cases.

United Arab Emirates; Legal system, Arbitration provisions

Before we embark on learning about the arbitrator immunity/liability in UAE and its arbitration centres, it is important to understand a bit of UAE constitution and the legal system. United Arab Emirates is a federation of seven emirates and each of its member exercises sovereignty over its territory[32] and consequently the legal system is of two tiers. While the federal laws applicable for the entire country and the other emirates specific laws are applicable only for that particular emirate[33]. In general the Court system consists of a three tier structure namely; the Court of First Instance, the Court of Appeal and the Court of Cassation(except RasAlKhaimah) and each emirate has its own court system[34].

The legal system of United Arab Emirates is based predominately on the civil law model, adapted to reflect the Islamic and Arab heritage[35]. UAE has adapted a comprehensive civil code modelled on the Egyptian Civil code, which in turn is a derivative of French Civil code.In general the domestic courts are not compelled to follow earlier judgments[36] although the court of Cassation judgments are generally quoted in support of interpretation of law[37].

It should be noted that a matter of law is the only permissible ground of appeal to the Courts of Cassation ('COC')[38]. The Court of Cassation ensure that the lower courts interpret and apply the law correctly by setting out principles of law and procedures for the lower courts to follow.[39]

An appeal to the COC does not suspend the execution of a judgment delivered in the lower court, unless ordered by the COC in a separate special application.[40] The judgments delivered by the Court of Cassation are final.[41]

Arbitration in UAE

Despite being in draft form for several years, specific legislation governing arbitration in UAE is yet to be enacted. In the absence of specific arbitration law, the civil procedure code[42] is the only governing legislation for both domestic and foreign arbitration proceedings. The recognition and enforcement of foreign awards are covered by Articles 235 to 237. It should be noted that the Civil Procedure code is not based on UNCITRAL Model law.

DIFC, the micro jurisdiction

DIFC, the "Common law Island in a civil law ocean"[43] has

its own arbitration law[44], which is drafted based on UNCITRAL Model law and the provisions related to our topic will be discussed in the following paragraphs.

Provisions of arbitrator liability in Dubai

As mentioned earlier, Dubai has two seats, one the main land arbitration centre called Dubai International Arbitration Centre and the other micro jurisdiction Dubai International Financial Centre which is an affiliate of London Court of International Arbitration. Both centres have express provisions on the arbitrator immunity/liability

DIAC Arbitration rules on immunity of arbitrators

Article 40 of the DIAC Rules[45] expressly provides that members of an arbitral tribunal are not liable for anything done or omitted in connection with the arbitration. It states:

"No member of the Tribunal….shall be liable to any person for any act or omission in connection with the arbitration"

Article 24 of the DIAC Statute Rules states

"Neither the Centre nor any of its employees, members of the Board of Trustees, its Committees or members of any dispute settlement panel shall be held liable for any unintentional error in their work related to the settlement of disputes by the Centre."

Provision under Civil Procedure Code

If a party suffers damage caused by fraud or negligence of the arbitrators, he may seek redress in the national courts although there are no specific provisions under the Civil Procedure Code which entitles the party to seek redress. The only provision[46] available under CPC to the arbitrator has to indemnify the parties if he withdraws from his appointment without a significant reason

Arbitral immunity under DIFC Arbitration Law

Under Article 22 of the DIFC Arbitration Law, an arbitrator is not liable for any act or omission done in his capacity as an arbitrator, unless the act or omission is shown to have caused damage by conscious and deliberate wrongdoing. Such immunity does not apply in respect of any liability incurred by an arbitrator as a consequence of his resignation.

Case in Point 1

Meydan Group LLC v. Doug Jones, Humphrey Lloyd QC and Stephen Furst QC, (Ruling of the Dubai Court of Cassation of 17 December 2015) Case No. 284/2015

Background facts

In 2007, WCT Holding (WCT) was awarded a contract to build a race course in Dubai by Meydan group (Meydan) but the Client terminated the Contract in December 2008 citing lack of performance among other things and in turn WCT commenced arbitration proceedings at Dubai International Arbitration Centre (DIAC) claiming monies for work done, repayment of bonds, damages etc., DIAC appointed the arbitration tribunal comprising Doug Jones, Humphrey Lloyd QC and Stephen Furst QC.

Midway through the arbitration, in April 2010, both Parties made an application to the Tribunal requesting to stay the proceedings as they were engaged in settlement negotiations. The Tribunal granted the stay and intimated that the confidential agreement would not be brought to the Tribunal. However afterwards following failure of settlement negotiations the Tribunal issued second order stating that the tribunal had the jurisdiction to review the settlement agreement in order to establish whether an agreement has been reached between the Parties.

Meydan objected to the second order on two grounds; first it is contradicting the first order and second the tribunal has no jurisdiction to review a confidential agreement reached between the parties. Meydan also initiated legal proceedings in UAE courts against the tribunal on the basis that the tribunal has 1) failed to respect the terms of a confidentiality agreement concluded between the parties 2) failed to stay within its mandate. Meydan sought an amount of USD 16 million in damages from the Tribunal. Simultaneously, they have also approached DIAC, the institution under which the arbitration is being governed requesting to disqualify the tribunal on the same grounds stated above. Meydan argued that the tribunal is no longer independent and impartial but DIAC rejected Meydan's application and the tribunal continued their arbitration hearings

In January 2015, Dubai's court of first instance dismissed Meydan's claim against the tribunal. Meydan then appealed in the Court of Appeal which was also dismissed in June 2015. Meydan did not give up and took the case the apex court, the Court of Cassation. While the case was pending at court of Cassation, in September 2015, the tribunal issued an Award in favour of WCT and ordered Meydan to pay around USD 300 million. Finally in December 2015, Dubai's Court of Cassation dismissed Meydan's appeal and upheld the decision by lower courts.

The Verdict by Dubai Court of Cassation

The Dubai Court of Cassation confirmed the rejection of the Claimant's claims on the basis that the Claimant had

failed (i) to submit sufficient evidence in support of its claims and (ii) to establish liability in tort on part of the tribunal. In the Court's own words, "it is established that liability in tort requires proof of three elements, namely error, damage and a causal relationship between the two; failure to prove any one of these will mean that no liability has been established."

Before we embark on the analysis on the Court verdict, let us examine the other case by the same claimant against a sole arbitrator.

Case in Point 2

Meydan Group LLC v. Alexis Mourre, (Ruling of the Dubai Court of Cassation of 8 October 2015) Case No. 212/2014

In 2014, Meydan brought proceedings against Alexis Mourre who was acting as sole arbitrator in DIAC arbitration. DIAC had extended the parties' agreed time schedule several times. Meydan considered this to be a breach of the Arabic version of DIAC's rules and so issued proceedings against Alexis Mourre for USD 191,000 for damage caused by the sole arbitrator's purported failure to suspend the case pending an application to the Dubai Courts in relation to the DIAC Executive Committees extensions of time for rendering a final award.

The Verdict by Dubai Court of Cassation

Dubai Court of Cassation dismissed the case citing the provisions of Article 24 of the DIAC Statue Rules together with Article 40 of the DIAC Rules. The Court has stated:

"[on the basis of those provisions] the arbitrator is not responsible for any unintentional error […] based on authorities provided under the prevailing laws, according to which the power to judge is left to the arbitrator's discretion".

Comment on the judicial verdicts:

The conclusion from Alexis Mourre case judgment is that unless an arbitrator commits a fundamental error, like a failure to comply with an unambiguous legal principle or ignore clearly evident facts he is not liable.In other words, it would appear from the Dubai Court of Cassation's wording that an error short of gross (professional) negligence will not attract an arbitrator's liability under the DIAC Rules[47].

From the judgment of Meydan v Tribunal (Doug Jones and others), it appears that the court interprets the liability of Tribunal is both in Contract and in Tort, which is indeed a deviation from the foregoing discussions in civil law jurisdictions. While the Tribunal is having a contractual mandate of duty of care to the parties, it appears that they are also liable under tort to the extent that those obligations are not contractual.

In general, both the judgments by Dubai apex court have certainly improved the investor and arbitrator confidence and Dubai is proving to be more arbitration friendly. The practitioners comment that, "nothing less should have been expected of Dubai Courts, which have become a major positive contributor to arbitration as an alternative dispute resolution mechanism in the region[48]". There is another view that "if Dubai wants to be a preferred seat of arbitration for international contracts, it must address the issue of arbitrator immunity because if the parties are aware that the arbitrator can be sued in national courts they are likely to prefer jurisdictions where such satellite disputes are unlikely[49]".

What Arbitrators must look for?

Should arbitrators insure?

Given the inconsistent approach in various jurisdictions regarding arbitrator liability, the question arises whether the arbitrator community must insure themselves against potential claims on the lines of professional indemnity. Obviously this cost is going to be passed on to the parties which will make the arbitration process further expensive. In any case, when arbitrators are appointed by an institution, they must review the rules governing the arbitrator's liability before accepting an appointment.

The other possible option for arbitrators is to include exclusion clauses to protect themselves from legal suits involving personal liability. However this approach might be seen as a demeaning exercise and may not give the best impression for the profession as the arbitrators are supposed be neutral and resolve disputes in an informal setting, unlike the rigid legal proceedings in courts[50].

Final thoughts

In the absence of uniform approach regarding arbitrator liability/immunity among the various jurisdictions, it is difficult for international arbitrators to assess the risk before accepting appointment in international arbitrations. The discrepancy in stipulating either immunity or liability stems from the concept of the arbitrator - parties relationship; whether is contractual or quasi-judicial.

There have been some discussions in favour of uniformity in approach at international level with some overriding principles which will provide some certainty on this issue[51]. It is recommended that adoption of a qualified immunity standard which enables the arbitrators to function independently without the concern of facing personal legal suits unless there is a deliberate misconduct[52].

Foot Note

[1]United Arab Emirates is a federation of seven emirates namely Abu Dhabi (Capital), Dubai, Sharjah, Ajman, Ras Al Khaimah, Umm Al Qaiwain and Fujairah.

[2]http://www.burjkhalifa.ae/en/index.aspx

[3]http://www.dubai-metro.me/

[4]http://expo2020dubai.ae/

[5]http://www.difc.ae

[6]The readers are highly recommended to review the author's paper on "Dispute resolution in UAE" presented to IITArb few years ago. A brief presentation is available here http://www.slideshare.net/rmvenkat/dispute-resolution-uaevenkat

[7]Case No. 212/2014 – Meydan Group LLC v. Alexis Mourre and Case No. 284/2015 – Meydan Group LLC v. Doug Jones, Humphrey Lloyd QC and Stephen Furst QC

[8]Dennis R Nolan & Roger L Abrams, "Arbitral Immunity", Berkeley Journal of Employment and Labour Law Volume 11, Issue 2, Article 2, June 1989

[9]Floyd v Barker 77 Eng Rep 1305 (1607) & The Marshalsea 77 Eng. Rep 1027 (1612)

[10](80 US (13 Wall) 335, 351 (1872)

[11]431 F. Supp. 1340, 1343-44

[12]54 Iowa 74, 6 N.W 140 (1880)

[13]Lendon v Keen, 1 K.B 994,999 1916

[14]Alan Redfern & Martin Hunter, "Law and Practice of International Commercial Arbitration", 4th edition 2004

[15]Butz v Economou, 438 U.S 478, 511-12 (1978)

[16]Corey v New York Stock Exchange, 691 F. 2nd 1205, 1209 (6th Cir. 1982)

[17]Section 25 of Singapore International Arbitration Act (excludes liability for negligence, mistakes in law)

[18]Section 29 of English Arbitration Act 1996 (liable for resignation without a reasonable cause, section 25)

[19]Section 2 GM of Hong Kong Arbitration Ordinance, 1997

[20]Section 14 (a) of Revised Uniform Arbitration Act 2000

[21]Section 51 of Australian Commercial Arbitration Act 1984

[22]Section 24(4) of The Arbitration Act 1996.

[23]Redfern and Hunter, note 12 at 5-16

[24]For example, Australian Civil Procedure Code section 595 (4) imposes liability for failure to act in a timely manner.

[25]C. Hausmaninger, "Civil Liability of Arbitrators- Comparative Analysis and Proposals for Reform" Journal of International arbitration 7,11 et seq 19 (1990)

[26]Michael Hwang et al, "Claims against Arbitrators for breach of Ethical duties", Contemporary Issues in International Arbitration and Mediation, The Fordham papers 2007, edited by Arthur W Rovine and published by Martinus Nijhoff Publishers

[27]Report on the working Group on International Contract Practices on the Work of its 3rd edition, U.N Doc A/CN.9/216, at III (5) see http://www.uncitral .org/uncitral/en/commission/sessions/15th.html

[28]For example, London Court of International Arbitration (LCIA) Rules (http://www.lcia.org)

[29]Article 34 of ICC rules (http://www.iccwbo.org) (Neither the Arbitrator nor the Court or its members shall be liable to any person for any act or omission in connection with the arbitration)

[30]Rule 48(b) of AAA Rules (http://www.adr.org)

[31]ICSID Rules Article 20, The Centre shall enjoy immunity from all legal process, except when the Centre waives this immunity. (http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp)

[32]Article 3 of UAE Constitution

[33]Article 151 of UAE Constitution

[34]R. Venkataraghavan, "Dispute Resolution in UAE; An overview of recent developments" Article presented for IITArb conference in 2012

[35]Michael Grose, "Construction law in the United Arab Emirates and the Gulf" (First edition 2016, Wiley Blackwell, UK)

[36]Supreme Court of Cassation Judgment 120 for the year 18; See also Dubai court of cassation judgment 407/94

[37]Dubai Court of Cassation judgment 407/94

[38]Supreme Court of Cassation Judgment 512 for the year 19;see also Dubai Court of Cassation Judgment 238/95.

[39]Dubai Court of Cassation Judgment 63/99

[40]Dubai Court of Appeal Judgment 723/97

[41]Article 187 of Civil Procedure Law; Supreme Court of Cassation Judgment 4 for the year 21 ; Dubai Court of Cassation Judgment 7/96.

[42]CPC Article 203 to 218.

[43]Nov 1, 2008 | Judges' Addresses; Address by Michael Hwang Law Asia Conference, Kuala Lumpur, Malaysia

[44]DIFC law No 1/2008

[45]See also Article 32 of the ADCACC Rules (Abu Dhabi Commercial Arbitration and Conciliation Centre)

[46]Article 207 (2) of Civil Procedure Code

[47]Gordon Blanke, "The liability of arbitrators in the UAE: Quod novi sub sole?",/March 28, 2016; Accessed at http://kluwerarbitration-blog.com/2016/03/28/the-liability-of-arbitrators-in-the-uae-quod-novi-sub-sole/

[48]Gordon Blanke, "The liability of arbitrators in the UAE: Quod novi sub sole?",/March 28, 2016; Accessed at http://kluwerarbitration-blog.com/2016/03/28/the-liability-of-arbitrators-in-the-uae-quod-novi-sub-sole/

[49]Caroline Kehoe, Robert Stephen, Michael Hartley, "Dubai Court of Cassation dismisses claim for damages made against arbitral tribunal". Accessed at http://hsfnotes.com/arbitration/2016/01/21/dubai-court-of-cassation-dismisses-claim-for-damages-made-against-arbitral-tribunal/

[50]Martin Hunter, Arbitration International, vol. 9 no. 3, 1993, p.331

[51]Redfern, Alan and Hunter, Martin, Law and practice of international commercial arbitration, 2004 p. 288

[52]Susan Frank, "The liability of international arbitrators: a comparative Analysis and proposal for qualified immunity" New York Law School Journal of International and Comparative Law, vol. 20, nº 1, 2000.

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Tangled Web of Liquidated Damages in the Context of Arbitration

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In case you are wondering about the title to this Article, it was chosen for the reason that the provisions relating to liquidated damages have been sought to be interpreted in several judgments. While a closer reading of these judgments would establish that the Courts are in fact reiterating the same legal position, the approach of the Courts in some of those has resulted in certain ambiguious positions and as a result some arbitral tribunals have drawn starkly contrasting conclusions in this regard., I am therefore in this Article, attempting to reconcile the principles of these judgments, and to outline the principles, which should in my opinion, be the guiding factors in the matter of the award of Liquidated Damages.

Before dealing with the issue of Liquidated Damages as such, it would be useful to consider the general principles governing the award of damages, liquidated or otherwise.

Damages are understood broadly as monetary recompense for a breach of contract. The intent of providing for a party who breaks a contract to compensate the other party for loss or damage caused, is to ensure that contracts are performed. In the event of the contract not being performed as contemplated, the party in breach is to put the other party as closely as possible to the position he/she would have been in, had the contract not been broken.

Damages can be said to be one of the fundamental facets of commercial law, as they follow the basic underlying expectation in all contracts and transactions, that both sides keep their respective bargains. However, and since realities in business and commerce have shown that all parties do not always perform contracts as committed for a range of reasons, it is important to have a clear regime of contractual liability that compensates the party who suffers as a result of a breach.

The basic principles of damages are codified in Sections 73 & 74 of the Indian Contract Act, 1872. Section 73 sets out the following ingredients for damages to be payable:

- a contract must have been broken;
- in case of such breach, the party who suffers as a result, is entitled to receive from the party who breaks the contract, compensation for loss of damage caused by such breach;
- the loss or damage must be such that it either 'arises in the usual course of things', or which the parties knew when they made the contract, to be likely to result from the breach of it.

The essence of these ingredients is that while the right to be compensated is provided in terms of this provision to a party who suffers from a breach of contract, the compensation can only be for 'loss or damage suffered' i.e. actually suffered. The loss or damage must also arise in the usual course of things, meaning that there must be a reasonable nexus between the breach, and the loss or damage. In the alternative, it must be a loss which the parties knew when they made the contract to be likely to result from the breach of it. The purpose of these requirements is to exclude damages for losses which are remote or indirect. For an indirect loss to be compensated, there must be some indication of the parties' intent to contemplate such a loss as capable of following a breach, and providing for it to be compensated.

While the principles underlying Section 73, form the basis of the Indian legal regime governing damages, the Act has envisages the concept of 'liquidated damages'. The common dictionary meaning of the word 'liquidated' is 'to reduce to order', or 'to determine the amount of'. As would be apparent even from these common-sense meanings, the idea of liquidated damages is to reduce to a tangible sum in the agreement, or pre-determine, the sum to be paid as damages in the case of breach. Stipulations providing for liquidated damages were intended to serve the following purposes:

- provide parties with certainty and clarity on the liability likely to follow in the event of either party breaking the contract;
- avoid the complicated and often lengthy process of proving damages to a Court/Arbitrator under Section 73.

In terms of Section 74 of the Act, the following are the essential ingredients. As in the case of Section 73, there

must be a breach of contract. In the event of such breach, the party complaining of it, is entitled to receive from the party who has broken the contract (a) reasonable compensation not exceeding the sum named in the contract as the amount to be paid in case of such breach; or (b) if the contract contains any other stipulation in the nature of penalty, the penalty stipulated for.

The difficulty in this regard in the language of Section 74, and which is the subject of an ongoing process of interpretation by Courts, beginning with judgments passed in the 1960's, is that Section 74 uses the words 'whether or not actual damage or loss proved to have been caused thereby'. The contrast between this and the language contained in Section 73 which provides for compensation to the party suffering from the breach for 'any loss or damage caused to him thereby', is evident. At first blush, it would appear that where the contract contains a provision for liquidated damages, then on the mere occurrence of a breach, the party complaining of such breach would become entitled to liquidated damages since he is not required to prove the occurrence of actual loss or damage. However this needs to be weighed against the basic concept that damages whether general or liquidated are intended to be a measure of compensation. Therefore the particular words used in Section 74 are required to be interpreted keeping this in mind. To understand this better, let's look at some of the judgments that have analyzed and interpreted Section 74, and the principles emerging from them.

(i) No distinction between LD and Penalty; Court's jurisdiction only to award reasonable compensation not exceeding the amount mentioned - Fateh Chand v/s Balkishan Das

One of the earliest judgments on the concept of liquidated damages and Section 74, is that of a 5 judge bench of the Supreme Court in Fateh Chand v/s Balkishan Das[1]. The relevant portion provides as follows:

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where a contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty…..". "The measure of damages in case of breach of stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the maximum stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case…. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage is proved to have been caused by the breach. Thereby it merely dispenses with proof of 'actual loss or damages'; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach."

This judgment is significant for several reasons. Firstly, it did away with the English law distinction between the concept of liquidated damages and a stipulation by way of penalty in-terrorem. As the Court held, irrespective of the category to which the stipulation in the contract belongs, the party who has suffered as a result of a breach is only entitled to receive 'reasonable compensation' not exceeding the sum named. The Court with this, put the concept of damages squarely within the realm of compensation – the idea being to provide recompense for losses, and not as a device of penalty that can operate to deter a breach. One more significant feature of the judgment can be noticed from its use of the words contained in Section 73 which deals with general damages. By invoking these in the context of Section 74, the Court effectively drove home the point that a Section 74 scenario was not all that different from that envisaged by Section 73.Compensation can only be for loss or damage suffered, and secondly, loss must be of the nature set out in Section 73. The words 'whether or not actual damage is proved to have been caused thereby' only dispenses with proof of actual losses. To describe the tangible loss or damage that a breach must necessarily lead to, the words 'legal injury' are used. If there is no proof of legal injury, as held by the Court, there can be no award of compensation.

The question then arises of how a Section 74 scenario is at all different from general damages, as also the purpose of providing a stipulation by way of LD. Further judgments on this subject, help articulate this better.

(ii) Dispensation of proof of actual loss only in cases of impossibility of proof - Maula Bux v/s Union of India follows Fateh Chand

Maula Bux v/s Union of India (AIR 1970 SC 1955)essentially followed the judgment in Fateh Chand, which was delivered by a 5 Judge Bench of the Supreme Court. The relevant extracts from the judgment are as follows:

"It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reason-

able compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, whereas in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him".

The Supreme Court, has while reinforcing the principles laid down in the case of Fateh Chand, gone a step furtherto interpret the words "whether or not actual damage or loss is proved to have been caused thereby". This is construed as referring to those classes of contracts where it may be impossible for the Court to assess compensation arising from breach. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

From these judgments, the evolution of the law is discernible. While the language of Section 74, on the face of it, seem to dispense with the need to prove any actual loss or damage, in Fateh Chand this has been held not to dispense with the concept of legal injury but only to the question of actual quantification while in Maula Bux this last aspect has been construed as only dispensing with proving damages in a case of impossibility of proof.

(iii) Damages as compensatory - State of Kerala v/s United Shippers and Dredgers

The above principles have also been discussed and applied by a Division Bench of the Kerala High Court in the case of State of Kerala and others v/s United Shippers and Dredgers Ltd[3]. The Court has discussed Section 74 specifically as follows:

"…Section 74 dispenses with proof of the extent of real or actual factual loss or damage, but provides for grant of reasonable compensation, subject to the condition that it shall not exceed the sum stipulated as penalty in the contract. The proof of extent of loss or damage suffered in fact, i.e. proof of extent of actual loss or damage suffered is sought to be dispensed with in Section 74 of the Act. It is only in this light that the expression "whether or not actual damage or loss is proved to have been caused thereby" has been introduced in Section 74 of the Act. This historical background of the provision would explain the purport of Section 74 of the Act".

"…Viewed in this light, it is not possible to accept the contention of the appellant that what Section 74 dispenses with is the basic condition of the breach resulting in any loss or damage which can be called "legal injury". The interpretation canvassed by the appellant would go against the legislative purpose in using the word "compensation" in all three sections, i.e. Sections 73, 74 and 75 of Chapter VI of the Act. One cannot compensate a person who has not suffered any loss or damage."

The judgment, which follows the line of thinking in Fateh Chand and Maula Bux, is important for its articulation of the idea of damages as compensatory. It points to the use of the word 'compensation' in the three provisions that establish the legislative scheme governing damages for this purpose. Again, the emphasis is to compensate for loss actually suffered. One more interesting question emerges from these judgments - what constitutes that category of contracts where it is impossible to assess compensation. Is this impossibility to be judged with reference to the ability to establish tangible monetary losses, and measure them. Or could it be losses that are by their very nature, simply not calculable in monetary terms. Much after the principles of Fateh Chand and Maula Bux were laid down, and which held the field for decades, the occasion to consider this question arose before the Supreme Court in 2005.

(iii) What categories of contracts present an impossibility of assessing damages - Oil & Natural Gas Corporation Ltd. v/s Saw Pipes Ltd.

In my view, and while the language employed in this judgment seems to suggest otherwise, this position in relation to Section 74 laid down by the Supreme Court, has not been altered in any manner in the judgment in Oil & Natural Gas Corporation Ltd. v/s Saw Pipes Ltd.[4]. This case was decided by a Bench of two judges of the Supreme Court, and could not have modified the ruling of the larger Bench of 5 judges in Fateh Chand v/s Balkishan Dasor of three judges in Maula Bux. Further, and on a closer reading of the relevant portions of the judgment, it can be seen that it does not actually make any departure from the position in Fateh Chand and Maula Bux.

The Court has at Para 63, Page 47 of the Judgment observed as follows:

"Section 74 emphasizes that in case of breach of contract, the party complaining of breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach.

Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of a penalty, the consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence to prove that no loss is likely to occur from such breach".

The Court has gone on to provide the example of a case where there is a delay in the construction of a road or a bridge, in which case, it would be difficult to prove the loss suffered by Society/State. The Court, in this context, goes on to observe: "in our view, in such a contract, it would be difficult to prove exact loss or damages which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record to show that compensation contemplated by the parties was in any way unreasonable."

It is in this background and context that the Supreme Court has laid down the following principles.

- Section 74 is to be read along with Section 73, and therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damages is proved to have been suffered in consequence of the breach of a contract.
- In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as a measure of reasonable compensation.

As can be seen from the contents of the relevant portion of the Judgment, the emphasis is on the question of proving actual loss. The question the Court was considering was in the context of those classes of contracts where it would be difficult or impossible to prove losses, such as in the case of delays in building a bridge/road, resulting in losses to the Society at large/State which cannot be assessed. It is in this background and context that the principles laid down by the Court and set out above, are to be read and understood. The Court has only held that in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him, meaning only that the party is not required to prove the quantum of the loss suffered by him. This is further clarified by the reference made to contracts where it is impossible for the Court to assess the compensation. The Court was also considering only such categories of contracts as seen even from the examples provided. The Judgment cannot be read as meaning that a party can claim damages even in a case where a breach has not resulted in a legal injury. The Judgment in Oil& Natural Gas Corporation Ltd. cannot therefore be read in a manner contrary to the ruling in either Fateh Chand or Maula Bux. ONGC's reference to, and emphasis on classes of contracts where it might be impossible to prove damages, is also consistent with the references to the same in the judgment in Maula Bux. Maula Bux explains the words 'whether or not actual loss is proved to have been caused thereby' as intending to refer to such cases of impossibility of proof.

(iv) Later law on the subject – judgments in Maya Devi, Delhi Development Authority, and Construction & Design Services:

Subsequently, these principles have once again been recognized clearly in recent judgments of the Supreme Court in Maya Devi v/s Lalta Prasad[5] and Kailash Agencies v/s Delhi Development Authority[6]. The latter judgment has clearly summed up the principles relating to liquidated damages as follows:

- Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
- Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

The recent Judgment of the Supreme Court in Construction & Design Services v/s Delhi Development Authority[7], however appears to have made a departure from these principles. In this case, the Court while quoting the ruling in ONGC v/s Saw Pipes with approval, however, went on to hold that while evidence of precise amount of loss may not be possible in the absence of any evidence by the party committing the breach that no loss was at all suffered, the Court has to proceed on guesswork on the quantum of compensation to be awarded. The Court, on the facts of the case, felt it was fair that half of the amount claimed be awarded. While a portion of the ONGC judg-

ment does refer to the onus being on the breaching party to prove that no loss had been suffered at all as a result of the breach, the final conclusions in that judgment are fairly clear. Here again it can been seen that in the absence of proof, the Court has proceeded on the basis of guesswork on quantum. This judgment does not appear to alter the requirement of legal injury being suffered as an entitlement to damages. However in the case of quantification it appears to shift onus on the party in breach to prove the negative and where he has failed to do so, in that case, they chose to award half of the amount agreed. How this principle is going to play out in the context of individual cases, remains to be seen.

In conclusion, in terms of the principles governing liquidated damages as laid down by the Supreme Court, a party claiming damages has necessarily to prove that not only was there a breach on the part of the Claimant, but that such breach did in fact result in a legal injury. Once both these aspects have been proved then the question would arise as to the issue of quantification and it here that "reasonable compensation not exceeding the sum named" can be awarded especially where it is impossible to prove actual damages.

This brings us to one final aspect of Liquidated Damages namely that it is a cap on damages and it would not be open to a party to ignore such provision in a contract and claim general or unliquidated damages.

Foot Note

[1]AIR 1963 SC 1405
[2]AIR 1970 SC 1955
[3]AIR 1981 Ker 281
[4]AIR 2003 SC 2629
[5]AIR 2014 SC 1356
[6](2015) 1 SCALE 230
[7]MANU/SC/0313 2015

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A New Approach in Adjudication of Delay and Disruption Claims in Construction Arbitration in India

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Engineering, Procurement and Construction Contracts, by their unique nature related to the construction industry, multitude of parties and factors, unforeseen circumstances, market risks, weather, regulatory issues etc. often result in disputes related to the performance of the contract. Very often, the claims are fault based, in the sense that the basis of the claim is often a default or a breach by the other party.

These issues arise during the execution of the contract but are not often highlighted till the conclusion of the contract at least, in the Indian context. This is because escalation of issues during the period of performance of the contract results in disagreements and stand offs which may disrupt the project. This is why the disputes are raised at the time of final settlement of accounts. More often than not, the claims are inflated in order to compel the other side to settle at a higher amount. After the conclusion of the project, there is often no incentive for either party to back down or reduce the quantum of claim and arrive at a settlement. As a consequence, disputes often escalate into litigations in such situations.

Most construction contracts mandate arbitration because of the high value of the claims often raised, voluminous documentation and the specialized nature of the industry which may require expert adjudication. The arbitrations are often, time consuming and prohibitively expensive as the evidence is a plethora of paperwork without clear indication or connectivity to causation or quantification. Correspondences exchanged between the parties often form the bulk of evidence - to discern and identify facts relevant to the claim is a time consuming process. This results in a prolonged adjudicatory process.

One of the major reasons for prolongation of adjudicatory process is due to the fact that the parties are leading evidence on both causation / liability and quantification / quantum simultaneously. The evidence for causation for the claim would involve establishing the contractual basis / liability for the claim. The quantification would involve evidence which would establish the quantum of the claim under each head. For instance, if a contractor were to raise a claim on idling charges and loss of profit due to delay in handing over revised drawings, delay in handing over possession of site, and change in scope resulting in additional work, then he will be simultaneously leading evidence on causation/liability as well as quantum in respect of three heads of claim.

It is important to note that questions on the quantum of losses usually follow questions on liability in the normal course of events. Unless there is contractual liability to pay, any evidence on quantum is unnecessary. This paper aims at using an illustrative construction arbitration scenario and this paper proposes an alternative approach to adjudication of claims by suggesting that the trial be split into two parties, one to establish the contractual liability to pay and only if such a liability is established, lead evidence on quantum of such liability. For the purpose of simplicity, the focus will mostly be on claims relating to delay and disruption and also Extension of Time claims by the Contractor coupled with Levy of Liquidated Damages claim by the Owner.

Construction Contracts are typically time bound projects. Any delay will entail levy of Liquidated Damages('LD') by the Owner on a contractually stipulated basis. The Contractor is entitled to apply for Extension of Time ('EoT') on the ground that the delay was not caused due to Contractor's fault but due to the Owner's fault or that there were disruptions in the work due to Force Majeure events or due to Owner's defaults. When there is a delay or disruption, it often results in increased costs to the Contractor and Owner in terms of establishment cost, labour cost and other miscellaneous claims that may arise in a given factual scenario.

Delay events are essentially delays by the owners in handing over site or drawings or instructions, modification of drawings etc. or delays by the Contractor in completing any portion of the work. Disruption events relate to interferences, disturbances, interruptions, or hindrances that may occur during the contract period. Both delays and disruptions result in the non-adherence to the construction schedule.

Upon occurrence of a delay or a disruption event, the concerned party is required to issue a written notice bringing such a delay or disruption to the notice of the other party. The Owner has to then decide on the responsibility for the delay and on the grant of an EoT. However, in many cases, no definitive decisions or claims are made during the contract period as it may result in stoppage of work or stand offs or result in difficult working conditions due to hostile attitude of the parties.More often than not, these situations are accompanied by a plethora of correspondences disclaiming, limiting or denying liability or responsibility on various facets of the issues. As a result of this, in many cases, claims are raised only at the end of the contract and not as and when they arise; compounding not only the issues but also the huge amount of paperwork.

Consider this in the context of the following illustration.

ABC, a power generation company appointed XYZ Corp a EPC Contractor for the purpose of construction of a thermal power plant on a turnkey basis under a Construction Contract.

The key terms of the Construction Contract were broadly:

(i) Construction to be completed within 2 years from the date of hand over of Site failing which LD was to be imposed at the rate of Rs.1 lakh per day.

(ii) ABC was to hand over the Site from the Project Commencement Date.

(iii) XYZ Corp was required to handle security arrangements and towards that end, build a boundary wall to prevent any kind of security breach.

(iv) ABC was required to facilitate with Governmental Authorities in the event of any such requirement.

(v) XYZ Corp was also required to build an access road at its cost for the purpose of connecting to the highway for smooth transmission of supplies. The land for the access road was acquired by the Government and given on lease to ABC for the duration of the Project.

(vi) ABC was required to arrange for electricity.

The following issues were faced during the Contract Period

a. The villagers in the surrounding area created frequent disruptions by way of strikes, hartals etc. at the Project Site and XYZ Corp was unable to construct a proper access road or a boundary wall.

b. Three of XYZ Corp's technical consultants who were Pakistani citizens were unable to get visa and it took XYZ Corp sometime to arrange for alternative consultants.

c. The villager's disruption and also visa issues were brought to ABC's notice and its intervention was sought for, but ABC did not respond to the same.

d. ABC was unable to arrange for electricity but agreed to pay XYZ Corp to purchase electricity.

e. The resultant situation was a delay of 8 months in completion of the Project.

The issues that relate to causation / liability are:

1. Whether disruption caused by the villagers of surrounding land was due to the fault of ABC's improper acquisition process OR XYZ Corp's failure to take sufficient safety and security measures as mandated under the Construction Contract.

2. Whether ABC was required to facilitate the grant of visa to XYZ Corp's technical personnel by liaising with the Governmental Authorities or in the alternative, whether XYZ Corp was required to take sufficient steps to arrange for alternative technical personnel given the foreign policy of India.

3. Whether XYZ Corp is entitled for EoT or is ABC entitled to levy LD for the delay.

The issues that would relate to quantum are:

1. What is the total number of days of delay resulting from the disruption of villagers?
2. What is the total loss suffered by XYZ Corp as a consequence of the delay?
3. What is the total number of days of delay resulting from denial of the visa to XYZ Corp's technical team of personnel?
4. What is the total loss that was caused to XYZ Corp as a consequence of the delay?
5. Whether XYZ Corp is entitled to EoT, and if so, for how many days?
6. Is ABC entitled to levy LD and to what extent?

Let us examine the kind of evidence that needs to be produced for each of these sets of issues. The issues relating to causation or liability require a two-fold analysis. One relates to tracing the liability under the contract and the second relates to understanding the cause of the liability. This would require the interpretation of the Construction Contract and correspondences exchanged between the parties for the purpose of examining if such a claim is permissible under the Construction Contract and invoked correctly in the facts of the case. In certain cases, external evidence may also be required such as weather reports, newspaper publications and other such documents which may assist in attracting the applicabil-

XYZ raised the following claims:	ABC responded as under:
i. Due to improper land acquisition process and insufficiency of compensation paid by ABC, the villagers were protesting and this resulted in disruption. Further, ABC did not facilitate with Police Authorities in order to prevent the disruption. Hence, ABC is liable for compensation to XYZ Corp for losses caused due to such disruption including increased labour cost and other misc. expenses.	i. The entire disruption from the villagers arose as a consequence of XYZ Corp not taking sufficient measures for security including building boundary walls, recruiting sufficient security men.
ii. ABC also did not facilitate Governmental approvals and visa process for XYZ Corp's technical staff resulting in delay.	ii. Matters relating to visa are governed by Indian policy and XYZ Corp was required to exercise a reasonable degree of care to understand the same before engaging technical personnel from countries like Pakistan and also that XYZ Corp ought to have made alternative arrangements earlier.
iii. XYZ Corp arranged for generators for the electricity resulting in a claim for purchase of diesel generators and also diesel which is to the account of ABC as agreed post signing of the Contract.	iii. ABC only agreed to pay the cost of electricity on the basis that XYZ Corp would purchase it from outside. XYZ Corp is not entitled for cost of generator and diesel as it was required to incur least possible expenses for procurement of electricity.
iv. XYZ Corp is entitled for EoT as the delay was entirely caused due to ABC's defaults or alternatively due to force majeure conditions.	iv. ABC is entitled to levy LD as the delay was entirely caused due to defaults on part of XYZ Corp.

The potential claims and contentions of both parties may be summed up as follows:

ity of force majeure clauses.

In the present case, XYZ Corp may need to utilize correspondences exchanged, third party information etc. in order to prove the disruptions to the construction schedule by the villagers. XYZ Corp would additionally need to prove that reasons for the said disruption were solely due to improper land acquisition process and insufficient compensation paid to the villagers which are attributable to ABC. ABC may need to lead evidence on how a construction of a boundary wall and adequate security arrangements would have prevented such disruptions. Insofar as the issue on visa is concerned, XYZ Corp has to lead evidence on the interpretation of the contractual clause relating to Governmental Assistance and also on India's visa policy and how it was not a reasonably unforeseeable event.

Evidence on quantum requires a data driven analysis to establish dates on which the delays/ disruptions occurred, how the delays / disruptions impacted the construction schedule viz. critical path analysis, the means and mode of calculating the economic impact of such delays or disruptions i.e. the losses suffered by the concerned party.

Ordinarily, evidence on quantum of losses incurred would involve production of record books, daily register or daily progress reports, entry and exit registers, construction schedules, weather reports, comparative data, price indices, evidence on various factual aspects, correspondences exchanged between the parties and other evidence for proof of facts etc. Towards this end, the parties may also depose subject matter experts who are well versed in industry practices in order to substantiate the methods adopted by the parties in calculating of quantum of loss suffered, and as proof of global claims such as idle charges, loss of profits etc.

The evidence required for establishing causation / liability is therefore different from the evidence required for establishing quantum. It is therefore possible to lead evidence on both aspects separately. The legal issues involved are also different and severable.

However, when there is a combined trial, there are several cost and time overruns. In a single trial, the parties have to simultaneously lead evidence on causation / liability and on the quantum of losses suffered. In order to substantiate huge claims, voluminous correspondences and other evidences may be produced without clearly distinguishing their probative value.The examination of witnesses including expert witnesses on quantum requires detailed preparation and cross-examination of these witnesses often take considerable time as well. More often than not, the evidence on quantum and causation (liability) are not segregated in the correspondences or the evidence of the parties. The arguments on both issues together will necessarily involve additional time and effort. The Tribunal is then left with the unenvious task of adjudicating both quantum and causation (liability).

The adjudication on all issues of quantum would be totally unnecessary if the Tribunal comes to a conclusion that the liability of the Owner is legally unsustainable in respect of certain claims. Hence, a separate trial on both issues may actually lead to greater clarity and understanding thus aid the passing of a more reasoned award.

Keeping this in mind, the practice followed in most International Arbitrations, is to split up the trial into two parts. The first trial will involve establishment of liability under the Contract for the claims. Arguments are then heard and the Tribunal passes an arbitral award. This would be a 'partial award' as it only deals with half the dispute which relates to liability or causation, the other part being quantum of claims. The award so rendered is on the merits of the liability and would hold as to what claims would require evidence on quantum and what claims are dismissed.

In the illustration above mentioned, the Tribunal could make a partial award as under:

> The Arbitral Tribunal passes the following partial award on causation:
>
> I. The Tribunal holds that ABC is not responsible for delays caused due to disruptions by the villagers. However, the same being a force majeure event, XYZ Corp is entitled to for Extension of Time but not entitled to any compensation for the same.
>
> II. The Tribunal holds that ABC is not in any manner liable for any delay caused due to visa issues for XYZ Corp's technical consultants and XYZ Corp is not entitled to EoT on that ground.
>
> III. The Tribunal holds that XYZ Corp is required to lead evidence on actual quantum of money spent on generation of electricity and ABC is entitled to lead evidence to rebut the same.
>
> IV. ABC is entitled to levy Liquidated Damages on XYZ Corp for delay in the completion of the Project. Both parties to lead evidence on the same. However, while quantifying the delay, the time lost due to disruptions by villagers is to be excluded.

The net consequence of this situation is that the parties are not required to lead voluminous evidence on quantification of claim relating to losses caused due to disruptions by villagers, no requirement to lead evidence on quantum of delay caused due to non-grant of visa for XYZ Corp's technical personnel, no requirement to lead evidence on quantum of losses under this head. This reduces the evidentiary burden on the parties and adjudicatory burden on the Tribunal.

It is necessary to examine the legal status of such a partial award under the Indian law. The partial award will be considered as an 'interim arbitral award' under the Arbitration and Conciliation Act, 1996 ('A&C Act'). 'Interim arbitral award'or 'interim award' is not specifically defined under the A & C Act. However, the definition of "arbitral award" in Section 2(1)(c) includes an interim award. Section 31 (6) provides that the Tribunal may make an interim arbitral award on any matter with respect to which it may make a final arbitral award. Therefore, by virtue of Section 31 (6), it is possible for parties to request for an interim arbitral award. This interim arbitral award can be on causation or liability based issues.

The difficulty that arises when an interim award on causation is passed is that such an award also qualifies as an award for the purpose of Section 34 of the A & C Act i.e. an application may be made for setting aside the award before a Civil Court. The time period for the challenge of the award is 90 days from the date of receipt of the award with a possible extension of another 30 days. If the award is not challenged within this time, it becomes final and binding. In such circumstances, expecting a final award on quantum to be passed within a short duration so as to enable the parties to challenge the combined arbitral award within the total available time period of 120 days is unrealistic. This is because detailed evidence on quantification may be required and parties may need some time to prepare for trial. In any event, it would result in denial of justice to the aggrieved party as they would have lesser time to challenge it.

Obviously, any person who is aggrieved by the interim award is entitled to the challenge the same under Section 34 of the A&C Act ('Section 34 Petition'). By virtue of the 2015 Amendment to the A & C Act, Section 34 Petitions have to be decided within a time period of one year. The time period does not however apply to any appeals filed under Section 37 of the A & C Act against the order passed in a Section 34 Petition. Given this, it can be safely assumed that the matter may not reach a conclusion within a period of one year.

The question that requires to be answered then is - what happens to the main arbitration during the pendency of the Section 34 Petition before the Court.

There are two options available to a party, one is to file an application for stay of the arbitral proceedings till the Section 34 Petition is decided, or in the alternative continue the arbitral proceedings pending adjudication of the Section 34 Petition.

Both choices present unhappy consequences. If one were to seek stay of the arbitration proceedings, the arbi-

tration has to be adjourned sine die and restarted subsequent to the decision in the Section 34 Petition. Section 34 Petition may have one of two possible results, the first being that the Court may find no grounds to interfere under Section 34 or alternatively may find grounds to interfere and set aside the award and remand the matter back to arbitration. As and when the Arbitration proceedings are restarted subsequent to the decision in the Section 34 Petition, the process of accumulating the documents and the witnesses so also reconstituting the Arbitral Tribunal will take some time and effort.

For a claimant whose heads of claims may have been restricted by the interim arbitral award, it would make better sense to ensure that the final arbitral award is not passed. This is because a final arbitral award would be restricted to quantum of claims which have been permitted, thus reduces the total amount that a successful claimant may receive.

If the interim award is left unchallenged, there will be very limited grounds to challenge the final arbitral award which is passed consequent to the interim award. It would mean that the affected party will not be able to challenge the interim award on liability and it would stand accepted by both parties.

It is however possible to argue that if the Tribunal does not 'sign' the arbitral award or if the party does not 'receive' the arbitral award, the period of limitation would not commence under Section 34(3) of the A & C Act.[1] This argument is made on the strength of Section 31(5) of the A & C Act which requires a signed copy of the award to be made available to both parties. Hence, one could possibly defer the filing of the Section 34 Petition till the final award is passed. However, this is an extremely risky proposition to advance inasmuch as non-delivery of a signed copy could be construed as misconduct on part of the Tribunal unless it has been previously agreed between the parties.

Given the challenges and complexities in the interim arbitral award system and the law in India, this paper proposes another system.

The Arbitral Tribunal can pass an "Evidentiary Order" which basically directs the parties to lead evidence only on certain aspects of their claim, thus implicitly deciding the claim. The reasons for allowing evidence on only certain aspects of their claim will be covered in the final arbitral award that is passed. This reduces the adjudicatory burden on the Arbitral Tribunal. In the facts of the illustration as indicated above, the Arbitral Tribunal can pass the following Evidentiary Order:

> Evidentiary Order:
>
> The Arbitral Tribunal hereby directs the parties to lead evidence on the following:
>
> I. XYZ Corp to lead evidence on the total cost incurred in the procurement of electricity and ABC to lead evidence on what efforts could have been expended by XYZ Corp for purchase of electricity at a lower cost.
> II. ABC to lead evidence on the total number of days of delay for which LD is to be levied.

A perusal of the above Order would show that the Tribunal has implicitly rejected the claims of XYZ Corp by stating that XYZ Corp is not entitled to lead evidence on any delay caused due to lack of visa or disruption by villagers to dispute the total number of days of delay as claimed by ABC.

The next query that arises related to the source of power for the Arbitral Tribunal to pass such orders. One may examine Section 19 of the A & C Act in this regard. Section 19(1) provides absolute discretion to the Tribunal to determine its own procedure. Section 19(2) provides that the parties may agree upon such procedure as they deem fit and in the absence of such agreement, Section 19(3) provides discretion to the Tribunal to determine its own procedure. Section 19(4) provides that the Tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.

The Tribunal can thus pass an order under Section 19(4) on what is the evidence that it considers material for the purpose of passing an arbitral award. Civil Courts also rule on admissibility of individual documents in terms of the provisions of the Indian Evidence Act. This is at the stage of evidence i.e. when the documents are produced. However, the Tribunal is pre-empting this situation by holding a trial on liability and based on its findings, it is deciding as to what evidence it requires to adjudicate on quantum even before the stage of evidence. This finding is not the admissibility of individual documents but on the nature of the claim itself.

Therefore, the question that arises is whether it is a procedural order or a substantive order. If it is a substantive order, is it possible to pass such an order under Section 19(4) of the A & C Act. If the order is procedural but with the substantive effect i.e. impeding the rights of the parties in some way, it is possible to construe it to be an adjudicatory order, therefore, it is possible to argue that it is an interim arbitral award. However, if no reasons are given and if there is only a direction as to the type of evidence to be led, it is difficult for any court to presume that it is an interim arbitral award.

The Arbitral Tribunal has the power to determine its own procedure under Section 19(4) which procedure however, is amenable to challenge or dispute by the parties. Therefore, if the parties agree at the very beginning of the arbitration that the Tribunal can pass a procedural order restricting the scope of evidence in the manner as stated above, the procedure cannot be disputed later on. The Arbitral Tribunal can record an order to this effect as a procedural order at the beginning of the arbitration to pre-empt any issues later on. An illustrative order is provided for this purpose:

> The parties have agreed and requested the Arbitral Tribunal to split the adjudication into two trials. One trial regarding proof of liability and causation and the second trial regarding quantum. Based on this request by the parties, the Arbitral Tribunal shall allow both parties to lead evidence on liability and causation first and thereafter hear parties on the said issues. The Arbitral Tribunal shall then pass an Evidentiary Order directing the parties to lead evidence on such aspects of quantum as it deems necessary. The Arbitral Tribunal shall give elaborate reasons for passing the Evidentiary Order in the Arbitral Award that it renders in the dispute and the parties shall be entitled to challenge the Arbitral Award only at that point in time and not any time earlier.

This system has benefits in adjudication of delay and disruption claims for the following reasons:

(i) The evidence in relation to delay and disruption claims is capable of being split up into liability and quantum issues. The liability issues will deal with the broader issues relating to contract and conduct and the quantum issues are restricted to quantification. It clarifies, simplifies and staggers a complex construction claims arbitration into two smaller parts thus placing lesser burden on the Tribunal, parties and their counsel in terms of preparation of evidence, cross-examination and arguments.

(ii) Once the liability is established, it is possible for the parties to negotiate and arrive at a settlement on quantum as it gives parties a realistic assessment of their claims. The standard practice of contractors is to inflate the claims and there is no incentive for the owners to accede to such claims. If an interim arbitral award or an Evidentiary Order is issued, it allows parties to have a bird's eye view of the potential final arbitral award, the possibilities of challenging such an award and also create more opportunities for settlement than a standard arbitration.

(iii) It is possible for the Civil Court to remand the matter back on specific issues in the event it finds any patent illegality. For instance, if the Civil Court finds that the finding on liability in respect of one head of claim is incorrect, it can pass an order to that effect and remand the matter back to the Tribunal on that specific aspect. The Tribunal can then record evidence on quantum in respect of that head and pass a modified award. The power to do so is available under Section 34(2)(a)(iv) read with sub-section (4) of the A & C Act The situation would be entirely different if there was a composite award which were intrinsically connected with each other..

(iv) The grounds for challenge of an arbitral award are restricted under Section 34(2) and sub-section (2A) of the A & C Act. The possibility of challenge of an arbitral award under these provisions would be extremely limited inasmuch as the award on quantum would mostly relate to appreciation of evidence on record i.e. pure issues of fact. Hence, the possibility of judicial interference in respect of such awards would be minimal.

The easier approach, one might say is to hear evidence on all issues and then make a combined decision on the matter. However, it does consume time and effort to do so. Given the time directive imposed under the 2015 Amendment to the A & C Act[2], entertaining voluminous evidence may be time consuming and not in the best interest of time, efforts and cost. Moreover, when all issues are decided in one shot, there is far more uncertainty and parties would rather attempt fate and reap complete benefits than give up their claims for apparently no reason.

Given the challenge our burgeoning legal system faces with its pendency and a three tier appeals viz. District Court, High Court and Supreme Court, arbitration must be considered as a mode of resolving disputes rather than adjudicating them. In most international arbitrations, this system is accepted and parties do not normally appeal or challenge arbitral awards unless there are serious procedural lapses or legal errors. If it is considered as a mode of dispute resolution, then an interim arbitral award or an Evidentiary Direction is really a pathfinder for the parties, an advisory opinion of sorts, which incentivises parties to resolve their disputes by rationalizing their claims.

Mr. Fali Nariman, in his article, "Ten Steps to Salvage Arbitration in India"[3] talks about the crying need for Indians to develop l'espirt d'arbitrage – loosely translated as the spirit of arbitration, i.e. one must learn to respect arbitral awards and not challenge them for the sake of challenging it and prolonging the proceedings. By creating effective mechanisms for proper adjudication, we can ensure that the right to challenge an arbitral award be used in a meaningful and reasonable manner.This approach, one hopes would be considered as a step in that direction.

Foot Note

[1]See the decision of the Bombay High Court in E-Square Leisure Pvt. Ltd., Pune vs. K.K Dani Consultants and Engineers Pvt. Ltd., Pune 2013 SCC OnLine Bom 183 : (2013) 3 Mah LJ 24 : (2013) 2 Bom CR 689

[2]See Section 34(6) of the A & C Act

[3]Fali S Nariman, Ten Steps to Salvage Arbitration in India: The First LCIA-India Arbitration Lecture, Volume 27, Issue 2, Arbitration International (2011)

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The Incomplete 'Mcdermott (2006)'

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Introduction

Sharing seat on Arbitral Tribunals comprised on Judges and also while arguing before the Judges, it has been found extremely difficult to strike rapport with the Tribunal on computation of claim and particularly the delay damage claims. While for decades, we proudly used Hudson Formula, we fail to recognise computation of "Delay" in performance of project. For us it remained a "calendar exercise" to compute period of delay. Inspite of our knowledge various types of delay, we fail to appreciate impact of various delays on one another and hence we could not compute Critical Compensable Delay. McDermott judgement of 2006 encouraged us to boldly use the other two formulas the Emden and Echileay, it failed to warn us that "Period of Delay" is a complex and mathematical resolution, besides the Echileay Formula being used only for extended head office overheads. Thus, the McDermott Judgement remains incomplete and hence the paper.

Risky & Dispute Prone Industry

Construction Industry is one of the largest activities in civilized world. It is highly volatile and risky, and offers low return at high capital investment and some risk.

It is the industry, which is very sensitive and dispute prone. The disputes are almost inevitable by product of this development process. It is easier to say that the best way is to anticipate and avoid. This is easily said than done. While the process calls for the best co-operative relationship, it is a paradox why it generates bitter conflicts. No amount of hard work or check on credentials of parties can guarantee zero dispute situations.

The process is usually handled through well written documents, defining the rights, responsibilities, risks and even provisions for resolutions. Such contracts are hardly negotiated and drafted. They are boiler-plate contracts, pre-drafted by the Employer/Owner and the Contractors virtually sign it without demur. These are the contracts of adhesion.

The Principle Ingredients

The principle ingredients of such contracts are Time for Completion and Extension of Time, Liquidated Damages, Change Orders, Variations, Terminations, Payment, Change of Conditions, Dispute Resolution Mechanism and Protection through Insurance, With most ideal conditions and excellently balanced draft Of all the claims above, delay damage claims make the largest impact on the outcome of contract and relations between the parties to contract. This paper deals with scientific method to compute delay damage where the present approach is highly simplistic and does not yield desired results. It is not the intention of this paper neither to deal with various reasons from which disputes originate nor to deal with various types of delays such as Excusable, Non excusable, Concurrent and Critical and Compensable or Non compensable. It is not to cover list of what types of delays constitute Non excusable delays for Contractors and Owners.

Closely related to the phenomenon of delay is the one known as "Time as Essence of Contract" and its consequences. However, the main aim of the paper is to examine computation of delay claims.

Computation Of Delay Claims

The burden of proof lies with the Contractor, who seeks compensation and the general rule is that he cannot be compensated for the event within his control. This is "mitigation of losses". The most important issue before the Court/Arbitral Tribunal is the computation of the period, for which such delay claims need be compensated. The events causing delays are special and complicated, and, therefore, it is a net effect of breach caused by other parties with direct relationship to the losses suffered have to be established before any amount of compensation is to be decided and there are various methods for working out this sensitive element for the "Net Delay Effect" (N.D.E.). The Indian Law provides clear provision as to what should be the approach to compute the delay.

Section 73 of Indian Contract Act, 1872 allows as substitutional relief the compensation only and cannot levy any penal amount. Losses, for which the compensation is demanded, must arise as a natural consequence of such a breach or which the parties knew when they entered into the contract. This clearly means that there should be

damages for any prudent person to imagine that in the usual course or expressly provided event of breach, for which compensation is required to be paid. The Employer may provide for Liquidated Damages to be covered by provision of Section 74 and where the contract gets aborted due to voidable element and rightfully rescinded, parties must make restoration of whatever gain made out of such contract in due course, when it was being performed before rescission. (Section 75)

Paras 109, 110 and 111 of AIR 2006 SCW 3276 "McDermott International Inc. and Burn Standard Co. Ltd." deals with method for computation for damages and in para 116 of the judgment is very clear statement of law "Sections 55 and 73 of the Indian Contract Act do not lay out the mode and the manner as to how and in what manner the computation of damages of compensation has to be made". This statement is likely to be misused, particularly as the significance of the element "period of delay compensable is not clearly dealt with". There is nothing wrong about this formula except that this period of delay has to be a result of a thorough search with scientific and mathematical models of Time Impact Analysis (TIA). As this element is not discussed nor the difference between Hudson and Emden on one side and Eichleay on the other for different usages. Way back in the paper in 1989, we have attempted to canvass Eichleay formula but clearly stating that it only covered the main office overheads and that is the correct approach. Formulas are as below :-

A) Hudson's formula:

$$\text{Contract head office overhead \& Profit percentage} \times \frac{\text{contract sum}}{\text{contract period}} \times \text{period of delay}$$

B) Emden's formula:

$$\frac{\text{Head office overhead \& profit}}{100} \times \frac{\text{Contract sum}}{\text{Contract period}} \times \text{period of delay}$$

C) Eichleay's formula:

Step (1)

$$\frac{\text{Contract billings}}{\text{Total billing for contract period}} \times \text{Total overhead for contract period} = \text{Overhead allocable to the contract}$$

Step (2)

$$\frac{\text{Allocable overhead}}{\text{Total days of contract}} = \text{Daily overhead rate}$$

Step (3)

$$\text{Daily contract overhead rate} \times \text{Number of days of delay} = \text{Amount of unabsorbed overhead}$$

It is encouraging to see that Indian Courts will not hesitate to accept the computation of delays based on these formula. However, it is required to be warned to the computers that the period for compensable delay has to be arrived at through Time Impact Analysis (TIA).

As it is observed through the 2006 judgement law is laid down that use of any of these formule would be meeting the requirements of computing delay damage and that Court may not insist upon books of accounts to be examined.

The immediate reaction from Contractors and Techno-legal Consultants was that the computation has become very simple and for them the last factor "period of delay" is simply the date of stoppage of work and its recommencement. This is the fiction under which there was euphoria claiming simplicity. Drafters started looking for evidence to "stop" order and its reversal. However, they paid no attention to concurrency or non criticality of delay. So even the simple exercise would result in bizarre computation because the other attributes of delay, are ignored. For example Owner's stopped work for 30 days and concurrently there was labour strike for the same period. The result could be extension of time for 30 days but no compensation however, if the labour strike is for 27 days, the extension of time would be 30 days while the damage payable is for 3 days only.

THE VARIOUS CPMs

This gives us an idea that we need to study CPM and analyse schedules.

Following are the types of schedules which need be studied:

1. As Planned Schedule
2. As Built Schedule
3. Comparison of as planned and as built
4. Global Impact Approach
5. Net Impact Approach
6. Adjusted as Planned CPM Approach
7. Adjusted as Built CPM Approach
8. Collapse as Built schedule approach
9. Impacted CPM Approach
10. Time Impact Analysis Approach

The most popular and acceptable the "Time Impact Analysis Approach" The Industry knows that CPM schedule is used during the course of construction as part of contemporaneous representation of activities. Once construction is over, it is important to have step by step exercise determining the impact of delays.

The as planned schedule should be analysed its validity. This schedule verification should be carried out at various stages of construction. To determine impact the as planned schedule must be updated at critical intervals.

To obtain an accurate impact upon the overall project completion, the schedule revision should be integrated into the updated schedule.

It is not necessary that every time we should use CPM as there is nothing basically wrong with scheduling a project with a Bar chart. Bar chart has been used long before CPM. A good bar chart can provide as much information as a CPM schedule. Bar charts can be used to work out Time Impact Analysis (TIA). Bar charts can be used to show relationship of activities.

The process of quantifying delay using bar charts is similar to use of CPM. The as built schedule is most useful in arriving at the Impact study.

The Impediments to Computation

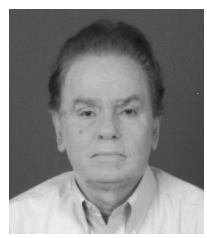
In absence of good TIA, it becomes difficult to grant claims related to Time Impact or Extension of Time. The major impediments are

i. It is wrong to assume that extension of time is automatically linked to compensation
ii. Lack or delay of notice on part of Contractor denies the compensation
iii. Failure to maintain contemporary records cause impediments to decision
iv. Pressure to complete on time, irrespective of delays and hence postponement of submission of claims.
v. Poor presentation of claims

There need be study of a single cause of delay on the critical path as well as single cause of delay on non critical path to appreciate TIA. It is not always necessary to make extension of time equal to delay. A contractor may be in advance of planned progress and an event justifying extension of time will only have the effect of him using that advantage. Any float in representation of Contractor's planning can be used for the benefit of the contract. Any delay on part of Employer which reduces the float must be considered for the time required for the completion. For example say, a 4 weeks delay occurs at the outset of the project reducing a float of 12 weeks to 8 weeks. In that case, no extension of time is necessary as the completion is not to be delayed.

Conclusion

The McDermott judgment simply recognised the universally accepted truth that delay damages can be computed on the basis of various recognised formulae. However, in the absence of pure analysis of delayed period through use of computerised CPMs of different nature, the last factor that is "period of delay" cannot be computed by mere calendar of events. The judgment should have included the warning note that the period of delay should be extensively analysed for computation. To that extent, IT IS THE INCOMPLETE MCDERMOTT.



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Approach of International Law to Computation of Damages Including Global Claims

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Introduction

This is in continuation of a small treatise titled 'DELAY DAMAGE DISPUTE' an enclosure, with the planner, 2012-2013-2014. The write up mentioned types of claims with exclusive treatment on delay damage claim. It was then indicated that certain documentary evidence could be necessary. It was with reference to AIR 2006 SCW 3276 "Mc Dermott International Inc. v. Burn Standard Co. Ltd." that hint was given to work out Time Impact Analysis (TIA). Even at this stage, it would be appropriate to recall approach of international law of computation of damages including discussion on Global Claims Approach.

Approach

It is essential that we recognise type of damage component required to be included in computation of various claims, which essentially include four types:

a. Scope of work Claims (Change Orders)
b. Delay Damage Claims (Time Overrun)
c. Acceleration Claims (ordered by Employer)
d. Change in Site Conditions (Differing Site Condition)

It is important that Contractor appreciates the different types of cost to be included in a claim. Once the types are indentified, it facilitates Contractor to keep appropriate record. With the ability to identify this element with respect to specific claim, the Claimant can include in the claim justification, the computation, graphs, charts etc.

From the point of view of Owner, the ability to identify these components can help him to prepare defence by rejecting inclusion of redundant cost component, if any.

Cost Components

Information collected through, industry survey* conducted by questionnaire is tabulated for the above four types of claims. Following are the types of cost component, required to be Generally Included (GI), Not Included (NI) and Sometime Included (SI)

Type of cost claim	Type of claim			
	Scope of work claim	Delay Damage Claim	Accel-erat-ion Claim	Changes in site Condition Claim
1. Additional Labour (Hours)	SI	GI	GI	SI
2. Increased Labour Wages	SI	GI	GI	SI
3. Increased Material Cost	GI	NI	SI	SI
4. Additional Sub-Contractor Work	GI	GI	NI	SI
5. Equipment Rental	GI	SI	GI	GI
6. Job Overhead Cost (Variable)	GI	SI	SI	GI
7. Job Overhead Cost (Fixed)	NI	GI	NI	SI
8. Company Overhead Cost (Variable)	SI	SI	SI	SI
9. Company Overhead Cost (Fixed)	SI	GI	NI	SI
10. Interest	SI	GI	SI	SI
11. Profit	GI	SI	SI	GI

* Extract from ME thesis (1993) of Prof. Dr. Vandana Bhatt

In addition to above four claims, a fifth and an important claim is presented as Lost Productivity Claim (LPC).

Methods

There are some popular methods to compute these claims

1. Cost Method on Job Basis

   This is computed by increase in actual cost with estimated cost as basis.

2. Cost Method on Item Basis

This is computed by increase in cost with reference to estimated cost for specific item.

3. Measurement Approach with Time factor

   This is method includes comparison of productivity for a specific item before delay and after delay.

4. Measurement Approach with Scientific Models

   Labour time cards on daily basis will show labour spent on various work item. This will help one to compute scientifically the productivity loss.

5. Expert Witness Approach

   In the case of this approach, one can add a third party's opinion and credibility to actual claim.

The Productivity can also be ascertained with reference to Method-Time-Measurement (MTM) system. which is the method of determination of time and cost. We do not have in India, productivity model for various jobs in terms of labour as we have for machineries and equipments and therefore, it will be fair to include a percentage loss with reference to original provision.

As far as TIA is concerned, the planner of 2012-2013-2014 listed number of different CPMs whose superimposition can be done through a computer programme to work out Net Attributable Delay. It is in this context that the Mc Dermott judgement (2006) cannot be operated using any of the formulae approved without computing net delay which is result of computer exercise.

TIA Approach

TIA is concerned with modelling of effect of single change or delay events, it requires CPM schedule that is capable of showing difference between impacted delay and original time. The difference for project completion between non impact schedule and that of the schedule with the impact amounts to net impact delay in time.

In the context of computation for the claims, we need to have Expert's input CPMs, change notices, minutes of meetings, job correspondence, progress reports, equipment log books, progress photographs in addition to computer output for Time Impact.

Global Claims

Global Claim is so named because of a global or composite sum is demanded as damage arising out two or more separate claims stating that it would be impracticable to provide separate sums for each of the cause and effect. Global Claim is a claim which is worked out by subtracting the tender cost of work from the final cost. Claimant has the responsibility to lead evidence to prove essential elements of global claims such as breach of contract, causation, the loss suffered and prove the same through events and breaches of the total sum of loss. The Claimant asserts that the events caused the losses.

Global Claim is permissible where it is not easy to disentangle one claim from the other, arising out the same cause.

The Global Claim is defined as one in which the contractor seeks compensation for a group of Employer Risk Events but does not or cannot demonstrate a direct link between the loss incurred and individual Employer Risk Events. It is further defined as "A global claim.....is one that provides an inadequate explanation of the causal nexus between the breaches of contract or relevant events/matters relied upon and the alleged loss and damage or delay that relief is claimed for." Global claim is also called "rolled up" or "total cost claim".

The short cut and simple approach which is becoming fast trend is the Global Claim approach. For this, the Claimant owns the burden to prove that the breach of contract has actually occurred and that the dependent is legally answerable, for the losses suffered. As per HUDSON "Global Claims may be defined as those where a global or composite sum, however computed, is put forward as the measure of damages or of contractual compensation where there are two or more separate matters of claim or claimant, and where it is said to be impractical or impossible to provide breakdown or sub-division of sum claimed between those matters"

Basic Principle of Global Claim

The basic principles to consider global losses are:

1. A breach of contract has occurred due to default of defendant who is legally responsible
2. The breach has resulted in loss
3. Loss has been suffered which cannot be precisely computed on item basis.

In short, the main principles of Global Claims are breach of contract, the breach causing the loss and the Claimant having burden to prove the loss.

Global Claims are useful where loss is attributed to number of events with more specific link to each part of claim and specifically cannot be identified as the cause and effects linkage. Global Claims are not simple for parties and tribunal to handle. A global claim is often made in situations resulting from combination of events. All the events that contribute to causing global loss must be liability of other party. In fact the method of handling the global claim and its pleading is in contradiction to fundamental principles of pleading. It is the privilege of opposite party to know full particulars so that it is not handicapped from raising proper defense. Such technique is often called "forest technique" Here the pleading does not inform the other party of exact nature of claim made against them. A global claim in essence merely states the list of delay and

disruptive events for which the Defendant is identified to be responsible. The nexus between events and period caused is missing in the pleadings.

Types of Global Claims

1. Loss and expenses
2. Delay and Disruption

These claims arise upon allegation of numerous variations events which impede, interrupt and interfere with the progress. It is interesting to note that since 2004 when global claims were pleaded (Laing Management (Scotland) Ltd vs John Doyle Construction Limited) before Extra Division of inner house court of session, it was recalled "the logic of a global claim demands that all the events which contribute to the causing of the loss be events of which the party against whose claim is made is responsible" (2004 BLR 295). It is also mentioned that "there is no doubt advancing a global claim for loss and expense remains risky exercise" International Construction Law Review (ICLR) 2003 Pg. 543.

In appreciating global claims, attention need be paid to "contribution claims" where extension of time was certified by Architect. The Employer, having settled the claim, made demand against Architect for negligent certification, identifying the lapse on the part of Architect as "contribution claim" ICLR 2003 Pg 542. Sometime, internationally "pass-through" claims may be recognised. It is defined as "A claim by a party who has suffered damages against responsible party with whom he has no contract and which is presented through an intervening party, who has a contractual relationship with both" ICLR 2003 Pg 377.

Proof for Global Claims

To succeed in Global Claims as per Laing Management (Scotland) Ltd vs John Doyle Construction Limited, Claimant must prove three issues.

1. Event for which the defendent is responsible
2. Loss and expenses
3. Causal link between the event and the loss

There are objections to the approach "Total claims, Composite claims or Rolled up claims" and particularly to the Global Claim Approach. As mentioned in John Doyle, the Defendant and Court should not have to do Claimant's job. Global Claims do not explain causes of additional cost for which Employer is not responsible viz. low tender price, low productivity than average or material shortage. These are unfair claims to the Defendant. In the event of Global Claims, all requirements for a valid claim need be complied with. The claim must be factually true. The Claimant must give proof that he would not have incurred the loss in any event and while compiling the claim all matters for which the Employer is not responsible need be eliminated. Wherever, it is possible to demonstrate the causal link, the same should be clearly avoided to be linked with global claims.

Disruption

In appreciating value of global claim, we must not ignore the clear concept of "Disruption". It is defined as "Disturbance, hindrance or interruption of a Contractor's normal work progress, resulting in lower efficiency or lower productivity than would otherwise be achieved. Disruption does not necessarily result in a Delay to Progress or a Delay to Completion." (The Society of Construction Law Delay and Disruption Protocol Society of Construction Law, October 2002).

In defence of Global Claims, one may state that the totality of breaches cannot establish individual claims and hence generalised claims should not be entertained. The contractor is then said to have failed to prove the entire claim. Another defence is that the Contractor failed to prove that but for the Employer incurred any loss.

Payment of Interest

In case of interest, to be paid as opportunity loss, it is interesting to quote 2004 BLR 275 Earl Terrace Properties Ltd vs Charter Construction PLC "....no damages are recoverable if no loss of any kind can be established. If it can be established that a party lost the opportunity to make commercial use of the money in question but cannot precisely quantify that loss, it is in principle acceptable for a Claimant to quantify that loss by reference to reasonable return that it could have earned by placing the money on deposit and then collecting reasonable commercial rate of interest over the relevant period of delay."

Considering the orthodox approach of Indian Courts and Tribunals, it is not advisable to attempt Global Claims approach in Construction. It has been noticed that in the absence of discipline for accurate processing and presentation, Global Claims are being canvassed. While computation is difficult being without basis and linked to impact of events, the conservative approach requires each claim to be made "pure and being firm" on its own footing provable through recognised technique through TIA through computer processing. The standard of technolegal consultancy has come up with appropriate answers to the need of proving and pricing.

Caution

While the Global Claim approach could be in order, under certain circumstances, the same is not a professional presentation and therefore, care need be taken in calculating construction damages. A construction claim must answer Entitlement and Computation. Without establishing both these aspects clearly, the chances of success in

getting the claims fairly adjudicated are not bright. Poor or inadequate analysis of valid construction claims, make the case weaker. When a claim is required to be defended, the same equation of Entitlement and Computation requires accurate approach. The main reason for thorough analysis is need to succeed in totality. To lose partly on entitlement and succeed in computation or vice-versa is like winning a battle and losing the war.

To begin with, quick calculation need be done to determine claim and approximate damage. While defending a claim, it is required to focus attention on quality of supporting records. The golden rule for success for defense of a claim is to have detailed cost accounting data. In process of reviewing the cost overrun, there may be no job delays, if we appreciate effect of time necessary for change orders.

Sometimes damages are considered under the two heads viz. General or Direct and Consequential damages which are not caused by the claim event but that may be the reason for event. Following are the two methods.

1. Actual Cost Method: Where one compares the actual cost incurred vs one ought to have incurred.
2. Total Cost Method: It is based on recognising total cost incurred against the bid amount, on assumption that the Contractor has taken all the care to mitigate losses. This method is defended on the basis that the quote is not accurate, errors and deviation from the work planned, poor management of contract.

In establishing the causal connection, one must study concurrent delay arising out of delay to obtain construction material at site in timely manner, failure to employ appropriate equipment and machinery, failure to furnish shop drawings for approval in timely manner and poor management.

In a 2009, US District case of New Jersey (AMEC Civil LLC vs DMJM Haris Inc) rejected cumulative impact theory of causation saying **"the plaintiff seeking recovery for delay damages must demonstrate which of their specific damage proven to reasonable delay of engineering certainty are casually related to defendants alleged negligence"**.

In view of above discussion, there are number of judgements from various jurisdictions emphasizing the necessity for appropriate critical path analysis for delay claims (Winter vs. United States -23 Cl.Ct. 241 (1991))

Contractor may incur extra cost sometime because of action of Owner of their consultant and vendors, and errors of contractor at the bid stage such as

1. Misreading difficulties in performance by labour input and equipment hours
2. Miscalculating time required to perform
3. Making unjustified assumptions

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Promotion of Arbitration: Opportunities and Challenges

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Let me start by emphasising the possible need to elaborate on the topic that I have chosen and why the word 'promotion'. This lies in the fact that I am a believer in the power and efficiency of arbitration as a method of disputes settlement both on national and international levels. However, ever since I entered into this field as a student and later in other capacities, I noticed that practice of arbitration suffers from a number of shortcomings. Indeed, a cursory examination of arbitration and, in particular its pathology especially at international level, points to certain problems that have caused serious concerns in recent years. It would be far beyond the scope of this presentation to even try to give a list of these problems. However, perhaps, one could point out the view of the EU Commission expressed in their efforts to turn away from arbitration as a means of investor-state arbitration disputes resolution through introduction of a court-like body comprising of a standing panel of judges. On the other hand, we have cases such as Yukos where the magnitude of criticisms have been the basis for expressing concerns by, among others, a number of experts in the field. For one thing, it may have been the result of that case and the role played by the tribunal's secretary that greater emphasis has been placed on the role of secretaries to arbitral tribunals and their training. These all point to the fact that there may be some resentment directed at the current state of affairs with arbitration.

In the light of the above, a question may arise as to whether these criticisms would go to the root of arbitration as an effective means of disputes resolution. It is submitted that the main reasons in support of arbitration as an informal, flexible, confidential and speedy means of disputes resolution, which provides a great degree of autonomy for the parties, still remain quite valid. It may be the misapplication of rules of law and in some cases failure to do so and also, perhaps, misconduct by a limited number of individuals have given rise to a situation whereby the whole integrity of the process is questioned.

Without trying to put any individual cause of such situation under a microscope, attempts are made to shed some lights on some underlying causes of the situation.

Whether we are an adherent of the jurisdictionalist or the contractual theory of arbitration, one thing is granted that arbitration is based on parties' agreement and other obligations which are created accordingly between parties and arbitrators, parties and their counsel, etc. In all these agreements, if we follow Professor Lipstein thesis on primary and secondary obligations or what in the Swiss law is referred to as the main characteristic performance of the contract, in the context of arbitration agreement, the main characteristic performance is the resolution of a or a number of dispute/s according to parties agreement and the relevant applicable law/s. Other considerations such as promotion of the seat as being arbitration friendly, remuneration of arbitrators, counsels, arbitration institutions and the like should be considered as secondary relevance. This argument could also be considered as compatible with the relevant provisions of the UN Draft Convention on Contractual Obligations. In actual practice, however, it would appear that in many quarters this distinction is not followed and often primacy is given to otherwise secondary obligations as described above. In other words, professional aspects of the process which demand a high degree of integrity, independence, impartiality, knowledge and experience utilised through a transparent system of appointment would be overshadowed and replaced by a type of old public school club culture following business interest. This, it is argued, in long term will not be conducive even to the goals pursued by these 'imaginary' clubs for lack of sustainability. The argument presented here is not based on morality or ethics, which in actual fact could be. It is presented as a logical defect of the improper arbitration practices not compatible with the theory of primary and secondary obligations emanating from an arbitration agreement.

Furthermore, it is argued that an effective arbitration should be based on a balance between party autonomy and the relevant public policies. This balance can be seen in regimes of the New York Convention in its recognition of party autonomy and regard for the relevant national public policies. As to investor-state arbitration subject of ICSID Convention one could argue the provisions relating to the execution of awards has been drafted in such a different way than other parts of the self-contained regime of the Convention to address the requirements of

the relevant public policies. In practice, however, it may be argued that the balance has tilted towards arbitral autonomy seemingly presenting a degree of favouritism towards private vis-à-vis public interest or in other words, in those cases, primacy may have been given to the interest of international business community rather than that of international community at large.

Question may arise as to the effects of the shift of balance between arbitral autonomy and the relevant public policies. Generally speaking, a shift in favour of arbitral autonomy would create much more space for private interests and their prevalence over those of public. At the world stage, private businesses will have more control over the fate of territorial communities which could demonstrate itself in various forms. In terms of legislations, more arbitration-friendly laws are introduced which is usually favoured by businesses and also the arbitral bar.

More specifically, in the context of jurisdiction of arbitral tribunals, a pro-arbitral autonomy approach could lead to expansion of jurisdiction of arbitral tribunals. This could particularly be the case in areas such as scope of application of two doctrines of separability of arbitration clause and competence/competence where, in a given case, the arbitrator may exercise almost uncontrolled powers assuming jurisdiction beyond the limits allowed by the relevant laws and, possibly, beyond the scope of arbitration agreement. This is what seems to have happened in the Yukos where the tribunal in a very debatable manner issued awards in region of 50 billion dollars against Russia. The awards came under considerable amount of criticism from various arbitration quarters on many grounds. However, later they were set aside on jurisdictional grounds and there was no reason for the court to go any further to examine challenges on grounds of misconduct which could shed more light on the extent that things went wrong in that case. The Hague District Court, which was competent to hear Russia's claim in the setting aside proceedings on the basis that The Hague was the place of arbitration, reached its decision on the grounds that the arbitral tribunal that had rendered the awards lacked jurisdiction. Accordingly, the Court annulled the three interim awards of 30 November 2009, as well as the three final awards of 18 July 2014.In relation to the Tribunal, the Court considered whether (i) the Energy Charter Treaty was provisionally applicable pursuant to Article 45 ECT and (ii) whether or not the arbitration clause of Article 26 ECT was consistent with Russian law. The Court first examined the effect of what has been labelled as the "limitation clause" of Article 45(1) ECT, which provides that each ECT signatory State agrees to apply the ECT provisionally pending its entry into force "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations".

The Russian Federation submitted that the clause requires a "piecemeal" approach, which involves analysing whether each provision of the ECT is consistent with the Constitution, laws and regulations of the Russian Federation. In contrast, the former Yukos shareholders argued that the inquiry is an "all-or-nothing" exercise which requires an analysis and determination of whether the principle of provisional application per se is inconsistent with the Constitution, laws or regulations of the Russian Federation. Whilst the Tribunal had followed the former Yukos shareholders' "all-or-nothing" approach, the Court accepted the Russian Federation's interpretation of Article 45(1) ECT, finding that its wording necessitated an examination of each separate article of the ECT to determine whether the provisions contained therein were contrary to the constitution or other legislation or regulation of the State concerned. The Court held that the Russian Federation, which never ratified the ECT, was only bound by those provisions of the ECT reconcilable with Russian law, including the 1993 Russian Constitution. In reaching its conclusion, the Court looked to the Vienna Convention on the Law of Treaties to interpret the "limitation clause", finding that the ordinary meaning of the words contained in Article 45(1) ECT supported the interpretation advocated by the Russian Federation. The Court also considered that for the purposes of interpreting the "limitation clause", significance should not be attached to the fact that the Tribunal's opinion was supported by the opinion of another tribunal – incidentally chaired by the same person – in another ECT-based arbitration, namely the Kardassopoulos v. Georgia case. Based on the analyses contained in the experts' reports relied on by the Russian Federation, the Court found that the arbitration clause of Article 26 ECT did not have a legal basis in Russian law and was incompatible with the principles laid down therein. Specifically, the Court was satisfied that Russian law confines the option of arbitration to civil law disputes, and does not provide a basis for the arbitration of disputes arising from legal relations between foreign investors and the Russian Federation of a predominantly public law nature.

The concept of international public policy, as distinct from national public policy, has been introduced to reduce the limiting effect of the relevant national public policies on the scope of arbitration. There have also been awards and jurist writings in favour of adoption of transnational public policy which is defined by arbitral tribunals and not national laws. The effect of pro-arbitral autonomy approach could also be felt in the context of sovereign immunity and the Act of State doctrine in arbitration. Within the context of investor-state arbitration, this approach may lead to situations where an arbitrator may extend his jurisdiction beyond the agreement of the parties and the

relevant public policy limits to cover matters relating to sovereign prerogatives of the state party.

On the question of control in arbitration, Kerr, L. J., stated long ago that ""No one having the power to make legally binding decisions...should be altogether outside and immune from this system. This system is our bulwark against corruption, arbitrariness, bias, improper conduct and - where necessary- sheer incompetence in relations to acts and decisions with binding legal effect for others. No one below the highest tribunals should have unreviewable legal powers over others. Speaking from experience, I believe this to be as necessary in relations to arbitrations in England and abroad as in all other contexts." This, I believe held true then and so in current time. However, a tilt in the balance between arbitral autonomy and public policy in arbitration in favour of arbitral autonomy, could create situations than arbitrariness could come to life. The issue more vividly seen in the context of procedure and conduct of arbitral proceedings, presence and application of procedural remedies. In an older project on the matter, it was concluded that "the development of national laws in popular seats of arbitration in the West,it would appear that public policy control is increasingly compromised in favour of interests of international trade." In ordinary commercial contracts between two businesses this may not seem problematic. This, it is submitted, that it may not be necessarily the case as often public policy considerations are easily ignored not necessarily intently but just due to ignorance of the parties on the matter. The question becomes much more serious in the context of investor-state arbitration. In principle, a liberal approach towards arbitral autonomy in this context could not be conducive to public law aspects of such contracts to be sufficiently understood and appreciated. By comparison, arbitrations subject to judicial control could relatively be more compatible with the interest of the state party to investor-state arbitration.

On the question of the determination of applicable substantive law in international commercial arbitration, a distinction should be made between, on the one hand, those national laws which impose a duty on the arbitrator to follow a conflict-of-law approach, and, on the other hand, those laws which give him a higher, and sometimes almost uncontrolled freedom to decide on the matter. The latter is the form which gives more weight to arbitral autonomy vis-a-vis public policy. The more liberal and sometimes non- interventionist attitudes of a number of national laws towards arbitration have created possibility of delocalisation of the applicable substantive law by allowing the arbitrator to subject the contract to rules of the lex mercatoria or other non-national rules. Given the general commitment of the lex mercatoria to promotion of stability of contractual relations, its sensitivity to the demands of public interest, which could at times require flexibility of contractual arrangements, is highly questionable. In particular, in the context of investor-state arbitrations entirely following the lex mercatoria, in order to meet the sometimes changing demands of underlying contracts is doubtful.

Another area of substantive law which could be influenced by adoption of a more liberal approach and pro-arbitral autonomy may be put forward is substantive remedies including, but not limited to, the choice remedy, standard of compensation and valuation. These all are complex matters and highly controversial. In the context of investor-state arbitration, the focus of controversy is on a conflict between, on the one hand, the position of state parties who favour such remedies which would not impede the exercise of their sovereign discretions with regard to their contract when allowed by national and international law, on the one hand, and the position of private investors supporting allowing such remedies which would fully uphold sanctity of contracts. Obviously, a choice of particular remedy, or standard of compensation or a particular method of valuation of expropriated investment could largely negate the effect of a lawful state act. It would be only a tribunal familiar with various aspects of the matter both in international and national law and with an international outlook i.e. capable of putting matters in an international perspective and leaving parochial national views aside could be suitable for deciding such matters. These matters and decisions thereon are highly sensitive and can have grave effect on territorial communities. Therefore, a high level of familiarity with international arena away from adverse pre-dispositions is absolutely necessary.

Within the context of recognition and enforcement of awards, the importance attached to public interest importance could be identified in the New York Convention relating to the public policy grounds of non- enforcement, The ICSID Convention provisions relating to execution of awards which are subject to relevant national laws entirely parting from the self-contained regime of the Convention which has tried to stay away from national laws and their intervention. This is the recognition of the fact that interfering with state property is an important matter with public policy and should not be taken lightly. This is similarly the case in international law related to execution of awards against states and the immunities concerned. The fact that arbitral awards could be scrutinised against strict national public policy requirements acts as a deterrent against arbitrary decisions of tribunals, misconduct and excess of power, among others. Setting aside procedure of place of arbitration is to safeguard proper

conduct of arbitration and make sure that unscrupulous tribunals could not evade the rules of law and natural justice. Whatever well-intented we presume the supporters of elimination of this level of control are, the fact remains that without this, an award-winning party would be in a position to try to forum-shop for the enforcement of their award and be successful in that. Elsewhere in this paper, we summarily referred to Yukos Awards and the level of criticism it attracted even before they were set aside. Yet, the award winners are now, as it was on the news, trying to enforce the awards in other countries despite the fact that they have been set aside in the country of the seat of arbitration.

I believe that, in the light of a strong argument in support of the case for international arbitration, it should still be promoted as such. In that process, it is submitted, that account should be first taken of causes of criticisms directed against arbitration and address them. One of them, perhaps, would be through more emphasis being placed on the theoretical aspects of arbitration which make it easier for the user of the service to detect any deviation from the underlying principles of arbitration as soon as they might occur. Looking at various courses, long and short, on arbitration, one may see too much emphasis on practice and various stages of conduct of arbitration which would, in turn, be influenced by financial gains of all concerned. This would, however, leave the student of arbitration with a gap in their studies as to the theoretical foundations which, among others, discuss interests, values and visions involved in proceeding with this method of disputes resolution.

Interests

The content of awards, and as has often been argued 'law' made by arbitration, may be influenced by various interests of arbitrators who largely come from legal profession. For one thing, these decisions, one may argue, could follow the pattern of their specialisation which, in turn, is somewhat related to their professional interests. In the area of consumer laws, for example, a study has shown that "lawyers" interests and their values affect the way they represent clients and that reforming laws, such as new laws favouring consumer interests, need to have incentives built into them to encourage lawyers to use them and advise their clients of them. International commercial arbitration for long was predominantly manned by Western private lawyers whose professional interests and knowledge were often geared to the protection of private interests. On the role of lawyers' group interests in the context of adoption of liberal legislations on arbitration and control of arbitration based on public interest, it was once observed: "The abdication of responsibility for providing some system of control over international commercial arbitration occurring within their jurisdiction by a number of major industrial states appear to have resulted from pressure from small segment of the bar anxious to attract more arbitral business. By some mysterious process …, the interests of these small groups have been portrayed as the interests of the polity as a whole. What they are asking is the privilege of resolving disputes without any control over any control over anything that may be done."

Despite all the efforts made to change the situation one may argue that there is still plenty of that type of thinking found in arbitration practice. Yukos is just one example of the above type of attitudes in practice. In reaction to the liberal attitude of arbitration circles with regard to various interests involved, arbitration has come under strong criticism from various angles. In the context of investor-state arbitration, many countries have been trying to fend themselves against the adverse effects of an arbitral awards against their public interests. In the context of the European Union, the Commission has put forward a type of state-like courts to replace arbitral tribunals. In this model, cases are not heard by arbitrations appointed in each given case, but rather from a list of state appointed judges. The scheme has been subject of criticism, some quite valid. However, the proposed courts could also be viewed as effects, rather than cause, of certain problems with the existing system of arbitration. One of the major criticisms in this context is that the appointment of arbitrators is not conducted with sufficient transparency and many time appointments are from rather a limited list of long-established people in arbitration. In Yukos, for instance, it has been contested that the chairman of arbitral tribunal was so old that often he fell asleep during the proceedings. Indeed, due to this problem, much of his tasks where fulfilled by the secretary to the tribunal including certain amount of award writing. This, despite any justification which may be put forward, is far beyond the ambit of arbitrators' brief to delegate such an important task to an admin person. In the event, the related awards have been set aside by the court of the place of arbitration i.e. The Netherlands. However, despite this, the award-wining party has declared that they are intent to seek the reinstatement of the awards. Looking at the mount in question which is something in the region of 50 billion dollars, one can imagine what kind of effect this award could have on the respective country. As an experienced person in the field of energy once told me, when the amount of an award goes anywhere near this level, the matter certainly touched upon public interests involved and any wrong doing could give rise to internal tension in the country concerned. Now, the question will arise as to whether a private body of certain individuals should be in a position to make decisions of such far-

reaching consequences on national and international level with the level of integrity and regard for the rule of law which has been claimed to have been prevalent in the case discussed.

It has been largely due to a similar objection that ICC has decided to publicly announce the name of arbitrators in each case.

Values

The values shared by various participants in transnational economic activities are not limited to those of the international business community i.e. universal market-economy values. There are values linked to cultural, economic and political structure of territorial communities to be promoted which often have not much to do with mechanical growth and profit maximisation as those are highly regarded in a purely market-ruled entities. National public policies, in a sense, manifest such values.

The lex mercatoria as a cornerstone of the fee market has been claimed to be connected to a type of transnational public policy which in a way is to serve the "universal notions of contractual morality" and the "fundamental interests of international trade" in that the promotion of stability in contractual relations would be a primary concern. Thus it is in the nature of a transnational trade policy. Transnational public policy in this sense assumes universal virtues of market economy for all territorial communities and the world as a whole. This notion has been challenged, among others, by those who seek the promotion of such policies allowing for the promotion and protection of the interests of the economically and otherwise weaker members of the international communities. Professor Reisman of Yale maintains that "[M]odern law is increasingly a complex and nuanced social instrument designed to achieve a wide range of quite detailed social and economic objectives. It is changed frequently, for our period is marked by radical changes in context and goal and equally rapid adjustments in legal instruments. The older legal methods,, were cogent in their context but are so not in this setting. If they are applied in a modern context, their effect will be simply to ignore and exclude prescribed national public policies that would otherwise be relevant." World development following entirely a market-economy pattern is achieved through a kind of mechanical or undifferentiated economic growth by continued increase in the level of production. The maintenance of this sustained economic growth would be the underlying objective and a requirement of this system. It has been argued that this type of growth may not be necessarily beneficial to various members of international community and to the mankind at large.

Visions

To think that the vision beset mankind's endeavour is limited to self-satisfaction and interests of individuals, it is argued, does not correspond to reality and would be largely parochial. It used to be and is still argued that different territorial communities have different visions of the world. These visions are often is in line with what they consider as their fundamental value. Laws, and disputes resolution mechanisms contained therein, should take account of these divergent visions. It is only in certain areas where the humankind at large share the same vision. Development of the under-developed regions, protection of the environment and sustainability are among some of the most topical issues where, a bit more deeply studied, one could easily detect divergence of visions. But, compared to 20-30 years ago, when such divergence would be largely defined in the context of the views belonging to territorial communities and that through respective states, now they are expressed by multitude of sources among them states, non-governmental organisations and also individuals. The digital revolution has and will play a very important role in spread of the related information on world priorities and would lead to further isolation of opportunistic views in support of self-serving parochial practices on a global level including those related to arbitration. One of the places one could find these visions articulated is where public policy priorities are reflected both on national and international levels. To deny due regards to public policy requirements by arbitration law and practice would be contrary to the interests of the communities concerned.

Concluding Remark

It would be wrong for the student and practitioner of arbitration to put undue emphasis on party autonomy considerations of the balance between arbitral autonomy and public policy of the process as it could lead to situations where protection of interests of businesses as a minority would take precedence over that of wider public at large. However, before challenging the sincerity of any such attempt, one should question the level of familiarity and knowledge of those involved in arbitration to the level where they could see arbitration and their role therein in a wider context where the decisions made and the conduct of decision maker can have far-reaching effect on territorial communities and world at large. If the answer is no, then it might be possible to partially rectify the situation through education. Certainly this type of education could not be offered by arbitration schools and institutions acting as offshoot of the same arbitral establishment and recruitment ground which have proved not entirely capable of being in charge of arbitration on a global level where various types of interests, and not only internation-

al business interests, are to be protected. Various other measures could be adopted which will be dealt with elsewhere.

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Minimizing Disputes in Construction Contracts by Using Contracts Based on Design & Build and Turnkey Models of Contract

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The real difficulty in changing the course of any enterprise lies not in developing new ideas but in escaping from the old ones. - John Maynard Keynes

Synopsis

Traditionally, contracts for civil engineering works are based on conditions of contract for works designed by the employer, where the employer is a micro-manager and assumes almost all risks of designs and unforeseeable conditions. The bureaucracy of the public service is not oriented towards bold and prompt decision making in the implementation of contracts and therefore the delays in providing site, providing drawing, issuing change orders, obtaining/providing permits of various public agencies and determining claims, eventually result in disputes and increased time and costs. This paper discusses the need for adopting design and build and turnkey type contracts such as FIDIC Yellow Book and Silver Book Model of Contract in order to ensure certainty of contract time and cost and minimize many sources of dispute.

Use of Design–Build and EPC/Turnkey Form of Contract

Employer Design type, also called Design Bid Build (DBB) type of contract is the traditional or most widely adopted form of Contract. A variant to this type in the form of partly or wholly contractor designed type of contract have been followed by many countries since a long time but their use is still limited though the trend of their use is increasing. In United States of America, more than half of non-residential construction above $10 million is using Design-Build(DB) form of contract, the use of Design-Build constitutes over 40 percent of the non-residential construction[1]. Study in U.S.A. have shown that design-build contracts are 6.1 % lower in cost, 12% faster in construction speed, 33.5% faster in delivery speed, and 5.2 % less in cost[2] compared to traditional form of employer design (DBB) contracts.

Engineer Procure and Construct (EPC) or Turnkey type of contract form is another form of contract where design is the full responsibility of the contractor. This form of contract is mostly used by Concessionaire in Public Private Partnership (PPP) form of infrastructure delivery system. Study carried out by Melbourne University for the period 2000 to 2008 analyzing 25 PPP style projects and 42 traditional style projects showed that[3]:

- In meeting budgets, PPPs were 35.1 % better than traditional procurement
- Post contractual closure, PPPs had an average cost escalation of 4.3%, compared to 18 % for traditional projects
- During construction, the average PPP delay was 2.6 %, while the average for traditional was 25.9%

India had invested ₹ 8.37 trillion in infrastructures in the tenth plan (2002-2007). In the eleventh plan period, 37 percent of the total investment of ₹ 23.74 trillion was invested by private sector. The 12th Plan (2012-17) allocated ₹ 40.99 trillion for investment in infrastructure out of which 47 % was expected from private investment. The first two years of twelfth plan indicated likely shortfall of about 43 % in private investment and 20% in public investment due to slowdown in infrastructure investment[4]. As result the PPP/BOT mode of infrastructure delivery in India has a tendency of adopting to the EPC form of contract[5].

Claims and Disputes in the Employer Design Type, also called Design, Bid, Build (DBB) Form of Contracts

Even though the Employer Design type of contract are the traditional and the most commonly used contract

form, the contractor is too dependent on the employer and the susceptibility to claims and disputes is high in this form of contract, particularly in case of large and complex public works contracts. The micro-management by the employer not only allocates most of the risks to the employer, but also inculcates a dependency syndrome that inhibits creativity, innovativeness and professional pride and confidence building in the contractors. Perpetuation of such environment is not in conformity with the expectations of a democratic, open and competitive society of modern days.

The causes of claims and disputes in the E-D type of contracts are unclear design, design changes, delay in availability of design, unforeseeable ground conditions, delay in approval of schedule, delays in testing, price increase, delay in approval of variation, delay in settlement of claims, delay in payments, delay in time extension, difference in the instruction of the engineer (consultant employed by the employer) and the employer, change in law, delay in land acquisition, availability of site, force majeure, mile stones, liquidated damage, etc. Public sector officials representing the employer at site do not usually have enough authority to decide promptly. Bureaucratic processes are hierarchical, time consuming and process oriented rather than result oriented. Therefore, delays in decision making in the procurement and project management are obvious and the decision mostly go in favor of the contractor.

There is a general tendency of the public sector employers to prepare the design and cost estimate under time constraint and a number of issues surface during the actual implementation. All requirements of the employer are loaded in the specification, drawings and BOQ items and the contractor is required to read them all and accept them without any condition in their bids. Contractors are in a hurry, in the face of extreme competition and limited time, for putting together their bids. The bidder has to accept the items in the bill of quantities and provisions in the specification and drawing such as including all leads and lifts, as directed by the engineer, and as approved by the engineer even though many of them are either unclear or underestimated. The pre-bid clarifications rarely lead to substantial changes in the bidding documents based on contractors' queries or inputs. Contractors, in reality, rely on the Government estimates, which they manage to know even if they are kept confidential and do not give attention to the blanket condition or some statements hidden somewhere in the specification or ITB about all risk passed on to the contractor. Contractors' main objective is to win the bid and since conditional bids are not allowed, they are forced to expect all these uncertainties and imperfections on the part of the employer to be addressed by compromises in the quality, variations and claims during the implementation.

Contracts provide for submission of programme of works after the notice of commencement. In earlier contracts, the approval of engineer was required but the recent contracts provide that "unless the Engineer, within 21 days after receiving a programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other obligations under the Contract." Such provisions have created a complicated situation that there is never a programme agreed by both the engineer/employer and the contractor because contractor submits program/ revised programs indicating delays they think excusable, whereas the engineer/employer do not want to commit any program that shows the completion time beyond the time of completion stated in the contract. In the absence of a baseline program during the bid invitation, showing critical path, it is very difficult to compare the future programs and analyze the delays to identify excusable and in-excusable delays. Analysis of claims for time extension, price escalation, and prolongation costs becomes very difficult under these circumstances.

In Nepal, major contracts under employer design form of contract following FIDC Red book CC have experienced time and cost overruns ranging from 50 to over 100 percent, claims of about fifty percent of the contract price and arbitral awards of about 25 % of the contract price.

Standard Bidding Documents (SBDs)

At the time of project appraisal/feasibility, enough time should be devoted to procurement planning to decide what type of contract form would be most appropriate and which standard bidding document is to be used. Different countries and agencies have their own version of different form of contracts. Innovating new forms of contract to suit the needs is not uncommon. Examples are Alliance Contracting[6] and Inverted bid model of contract to maximize PPP type of infrastructure delivery and Integrated Project Delivery type of contract of American Institute of Architects which involves a collaborative project delivery approach that utilizes the talents and insights of all project participants through all phases of design and construction.

Most organizations have produced SBDs for employer-design type works of different sizes and complexity. SBDs for Design and Build and EPC type of contracts may not be easily available. International Federation of Consulting Engineers (FIDIC) has produced in 1999, a family of standard contract forms including D&B and EPC contract

forms. Green Book: 1999 - short form of contract, is suitable for wholly employer designed or wholly contractor designed simple and small works. The FIDIC Red Book 1999 and the Pink Book 2010 (harmonized for use by multilateral funding agencies) editions are the latest version of the conditions of contract based on works designed by the employer. Yellow Book 1999: Plant and Design Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor applies to the lump sum contract project where the Contractor takes participation in the design work. Silver Book: 1999 – EPC/ Turnkey applies to the turnkey projects of infrastructures or large-scale factories, where the Contractor takes on more work and risk while the Employer's participation is small (private financing or government financing), but it is strictly defined upon the investment and construction period. Gold Book 2008: DBO - Green Field, ODB-Brown Field. The Contractor responsible for design, build and 20 years' operation.

The advantages of Plant Design-Build or Turnkey type contracts over the traditional type are one main contract with Employer, minimal Employer coordination between contractor and designer, overall time may be reduced through phasing, application of value engineering if contractor is skilled and experienced.

Yellow Book uses the principle of balanced risk sharing as the designs are partly employer's and partly contractor's responsibility. Disadvantages of Plant Design-Build form of Contract are: Contractors may abuse this option and the Contractor may have tendencies to skew design decisions towards minimum capital cost options.

EPC type of Contract is used for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project or other type of development, where employer wishes a higher degree of certainty that the agreed contract price and time will not be exceeded. Employer is willing to pay more initially in return for the Contractor bearing the extra risks associated with enhanced certainty of final price and time. The Contractor carries out all the Engineering, Procurement and Construction (EPC), providing a fully-equipped facility, ready for operation (at the "turn of the key"). The employer does not wish to be involved in the day-to-day progress of the construction work, provided the end result meets the performance criteria he has specified. Therefore, the Engineer (Consultant) is not required in this form of Contract. The risks of unforeseeable physical conditions are allocated to the contractor.

The disadvantages of EPC contract are i) contractor may under-design to cut the costs, ii) cost of bidding is high because the contractor has already invested a lot of money for the design at the time of tender, and lesser competition compared to other delivery methods.

Case Law on FIDIC EPC/Turnkey form of contract

Though case laws on FIDIC Silver Book applications are rare, the Case of "Obrascon Huarte Lain SA v. Attorney-General for Gibraltar"[7] decided by the UK Technology and Construction Court on 16 April 2014, relating to a substantial contract for infrastructure works in Gibraltar carried out under the FIDIC Yellow Book 1999 edition, provides some insight into the effectiveness of the provisions of FIDIC Silver Book CC4.12 Unforeseeable Difficulties, CC4.10 Site Data, CC20.1 Contractor's Claims relating to time bar, and CC15 Termination by Employer.

The contractor's claim for unforeseen ground conditions as per CC4.12 was rejected by the court on the grounds that the contractor had not ascertained the site conditions as required by CC4.10

The court also rejected the contractor's claim for time extension under CC8.4 on the grounds that the contractor had failed in its obligation to submit the claims in time in accordance with CC20.1.

On the contractor's claim against the termination of the contract by the employer, the court found that the employer was entitled to terminate the contractor's employment when it did, in particular in the light of its continued lack of expedition during the course of the contract which had led to a two-year delay on a two-year contract as against which there was a minimal entitlement to an extension of time.

Caution on Some of the Provisions in the FIDIC EPC/Turnkey Form of Contract

FIDIC Conditions of Contract(CC) including the D&B and EPC /Turnkey are very useful as a standard contract documents to be adopted by procurement agencies of various countries. However, it is important that the procuring entities seeking turnkey solutions need to make adjustments in these CC not only to conform to the substantive laws and implementation culture and environment of the country in question but also to match with the extent of risk transfer expected by the Client. The following are some of the specific issues in this regard.

Clause 19.4 Consequence of Force Majeure of FIDIC MDB 2010 CC allows time extension only for the events under CC19.1 Force Majeure but CC 17.4 Consequences of Employer's Risks allows costs for similar events under CC17.3.

It may also be noted that CC19.4 does not allow cost in case of events or circumstances under 19.1(v)natural

catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

Clause 17.6 Limitations on Liability and Clause 8.4 Extension of Time are not strong enough to maintain the turnkey nature to expedite the Contractor to adhere to the time and costs

CC 8.3 provides for submission of time programme and the revised programme by the Contractor. The consequence of the revised programme exceeding the time of completion due to delays on the part of the contractor or changes in the baseline schedule and the activities and their duration is not clear in this clause, thereby leaving confusion on the certainty of the turnkey character.

Design liability

The issue of design liability can play a major role in determining the extent to which the turnkey solution is deliverable. Numerous disputes arise in practice where there are changes in the design of the works following award of the contract. Such variations in design will be argued to give rise to relief for the contractor in terms of time and money entitlement.

The provision of Clause 5.1 'The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information, except as stated below. Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from his responsibility for the design and execution of the Works' allocates the entire risks of designs to the contractor. However, in practice this risk allocation is frequently changed. There may be other provisions in the contract, such as provisions in the standard specification requiring engineer's or employer's approval on drawing, or notes on drawings or process diagrams forming part of the employer's requirements, that indicate that the contractor is to depend on the subcontractor or equipment vendor for the design and drawing. Such notes or conditions relieve the contractor of his responsibility for design and give rooms for claims and complications in the smooth implementation of the contract.

Preconditions for a Successful D&B and Turnkey Contracts

Macro Level Planning

In many cases, the real source of claims and disputes are seeded from the feasibility stage itslf, particularly in case of public sector works. Whether it is donor agency funded projects or government funded project, there is generally an under-budgeting in the feasibility or project appraisal stage because either the people involved in budgeting are not adequately experienced or they do not have time for sufficient homework or they are not bold enough to tell the whole truth. Even the consultants manipulate the cost to the initial allocations of the client so that the project is made feasible and the scope of future work for them is open. Moreover, every government is faced with demands more than available resources and consequently resource allocations are spread thinly to cover maximum numbers of projects. Thus, a conservatism of the higher level of bureaucracy is carried over to all other levels of implementation. The seeds planted starts growing in terms of delays, cost increase and disputes.

Cost Estimates and Bidding for EPC Contracts

Lack of thorough understanding of the principles and practices of EPC/Turnkey contract may lead to a mismatch, whereby employer-design conditions of contract are converted to EPC contracts and vice versa just by introducing some clauses in the conditions of contract that attempt to pass on the risks to the contractor without either balancing the risks in case of D&B contracts or duly passing risks of cost and time overruns in case of EPC contracts. It must be remembered that the traditional cost estimating based on standard norms is not suitable for EPC cost estimating because EPC cost must include the cost of additional risks passed on to the contractor besides the cost of supervision and design.

Total cost of the project to the Employer includes cost of design, supervision, construction, price adjustment, variations and disputes (T = D+ S + C+ P+ V+D) whether it is done through ED or EPC type contract. The illusion is that the Employer Design Type Contract is cheaper though initially includes only the cost of construction(C) in the above equation and eventually expenses are incurred in all other components. Whereas in an EPC type contract, it includes all costs upfront. Early benefits due to reduced time overrun, if accounted, further supports the DB or EPC form of contract. Life cycle costing is a valuable tool to assess the true costs of an infrastructure delivery system.

Cost of an EPC type contract initially could be about 45 % more than the cost of ED type contract though at the end, the cost of the traditional (ED) type contract may total to more than the cost of EPC type contract. The indicative additional costs of EPC type estimate or contract are:

Additional cost for Design – 3 to 5 %, depending upon the complexity of the work

Additional cost for Supervision – 4 to 6%, depending upon the nature of work

Additional cost of price adjustment – 10 %, depending upon the time period of construction

Additional cost of additional risks of design, subsurface conditions, etc. – 20 – 30 %, depending upon the complexity of the works

Total additional cost over the employer design type = 45 % (approx.)

Research on the cost of design, supervision and extent of time and cost overruns contributions of claims and disputes, variation in design and scope of work, and price adjustment in the specific context would be helpful in preparing the norms for costing including the risks components.

Procurement Laws for Public Works

Generally, the procurement laws are based on employer design type contracts and are not conducive to other type of contracting. The procurement laws relating to the norms of cost estimating for public works and the requirements for preparation of bid documents, bidding and evaluation and award of the bids must allow room for the specificities of D&B and EPC contracts. Rigid procurement laws discourage innovative forms of contract and maximization of value for money for the infrastructure delivery services.

Conclusion

1. Use of FIDIC form of D&B and EPC contract with adjustments to the substantive laws, and implementation environment of the place of implementation has the potential to minimize claims and disputes in construction contracts.
2. Care must be exercised in planning D&B or Turnkey form of contracts that the mindset of traditional contract does not introduce conditions that it actually reverts the risks back and converts an EPC contract to the traditional employer design type contract.
3. Capability of contractors needs to be enhanced in EPC/Turnkey type of contracts whether it is for PPP to EPC or EPC to PPP approach to improve the infrastructure service delivery.
4. Encouraging the use of design and build and turnkey type of contracts requires cost estimating norms and supportive procurement regulations.

Foot Note

[1]Design Build Institute of America, 2014

[2]"Comparison of U.S. Project Delivery Systems," Mark Konchar & Victor Sanvido, Journal of Construction Engineering and Management, Vol. 124, No. 6 (1998), pp. 435-444

[3]Colin Duffield, National PPP Forum – Benchmarking Study, Phase II, University of Melbourne, 2008

[4]Abhilasha Mahapatra, UNESCAP Policy on PPPs in Infrastructure, Kathmandu, September 2015

[5]Dr. Indrasen Singh, Dean, EPC/ Turnkey Contracts in Highway Sector, National Institute of Construction Management and Research, Goa, NBMCW July 2009

[6]National Alliance Contracting Guidelines, Sept 2015, Australian Government. Department of infrastructure and Regional Development

[7]"A Significant New Case on the FIDIC Form by Herbert Smith Freehills LLP, United Kingdom, May 1 2014".

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Court Intervention in International Commercial Arbitrations

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Synopsis

Arbitration has fast emerged as the preferred choice of multinational firms to settle cross-border commercial disputes. It is well understood that the main aim of arbitration is to resolve disputes in a cost-effective manner while endeavoring to arrive at the final binding decision expeditiously, with the least amount of litigation. Evidently, arbitration being an alternative to mainstream dispute resolution methods, the judicial wing of any nation merely exercises a supervisory role over the conduct of an arbitration dispute, in particular an international commercial arbitration dispute. This being the case, the judiciary of any nation bears the burden of denying justice, where it abuses this supervisory jurisdiction entrusted to it..

This paper comprehensively analyses the success of the Indian Judiciary in fulfilling their role as a supportive but non-interventionist stakeholder with the aim of promoting the basic objects of arbitration. The exercise of the role by the Indian Judiciary is dealt with and analyzed under three broad heads viz A) Before Arbitration B) During Arbitration and C) After Arbitration.

Object of the Arbitration Act

In India, arbitration is governed by the Arbitration and Conciliation Act, 1996 ("Act"). The Act was drafted with the primary aim of implementing the UNCITRAL Model Law on International Commercial Arbitration and modifying the regulations in line with the other Member nations to the New York Convention and Geneva Convention. The Act strived to bring about a pro-arbitration envirnment. The Act is divided into two parts. The first part deals with arbitration that is held in India (including international commercial arbitration held in India) and the enforcement of such awards. The second part of the Act deals with the enforcement of foreign arbitral awards and implements the provisions of 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("Geneva Convention").

Unfortunately, the aim of the Act was not fulfilled, and the nation witnessed a slew of cases with heavy intervention by the Courts. The arbitration proceedings were expensive, time-consuming and vexatious; a clear contrast to the primary purpose of the Act and the UNCITRAL Model Law.

In 2015, the 1996 Act was amended to make arbitration proceedings more effective in terms of time and cost. It also throws light on certain issues that were until now shrouded in grey such as, the availability of interim relief to a party in an international commercial arbitration and the scope of public policy under the Act. The Act has also clarified an important issue regarding the applicability of Part I of the Act to international commercial arbitrations.

However, despite the aim of executive, the judiciary has intervened in the many stages of arbitration proceedings, including during the institution of the arbitral tribunal.

As per the 2015 amendment, Sections 9, 27, 37(1)(a) and 37(3) of Part I of the Act shall also apply to international commercial arbitration, even if the place of arbitration is outside India.

Before Arbitration

Any experienced lawyer would always include a mechanism for dispute resolution no matter how friendly the circumstances are when the parties enter into the contract. It is always a measure of last resort, yet it is crucial that the same is drafted unambiguously and with clarity . The dispute resolution mechanism chosen by parties increasingly tends to be arbitration. Arbitration clauses in a contract decide the number of arbitrators, process to select an arbitrator and the seat and substantive law for the arbitration. In such circumstances, arbitration clauses need to be well structured. Incomplete/ inappropriate Arbitration clauses results in court interference.

Courts must refer the parties to arbitration

Courts on examining and noticing prima facie the existence of an arbitration agreement must refer the parties to Arbitration and not take up the suit if an application is filed under Section 8. It was held in P. Anand Gajapathi Raju and Ors. v. P.V.G. Raju (Dead) and Ors. (2000) 4 SCC 539 that applications under Section 8 of the Act would be outside the ken of Section 42. It is also held

that, a party who applies under Section 8 does not apply as dominus litis, but has to go wherever the 'action' may have been filed. Thus, an application under Section 8 is parasitical in nature, i.e. it has to be filed only before the judicial authority where the suit to be referred to arbitration is pending in an attempt to avoid/circumvent Arbitration.

For international commercial arbitrations, arbitration involving nations to which the New York Convention applies, parties are to be referred to arbitration under Section 45. Section 54 is the corresponding section involving parties belong to nations to which the Geneva Convention applies. In such cases also, Indian Courts would mandatorily refer the parties to Arbitration and will not be inclined to entertain a suit.

Interim Measures

A party or a person is entitled to interim protection when the action of the other party is either in breach of the terms of the agreement or militates against equity, fair play or natural justice. They can file an application under Section 9 for an interim relief, either before the initiation of arbitration, during the course of arbitration or even after passing of an award.

In Bharat Aluminum v Kaiser Aluminum Technical Service [2012] SCC 552, the Supreme Court held that in a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.

In appeal (2016) 4 SCC 126 the Supreme Court held that Part I would be applicable only to those cases in which agreements stipulate that the seat of the arbitration is in India or on whose facts a judgment cannot be reached on the seat of the arbitration as being outside India. It is also held that Part I would be applicable to only those agreements which stipulate or can be read to stipulate that the law governing the arbitration agreement is Indian law.

The confusion created was clarified by the Amendment Act 2015. The Amendment clearly specifies that Part I of the Act does not apply to foreign seated Arbitrations unless otherwise it is specified so expressly in the agreement signed between the parties. However, a proviso to Section 2(2) of the Act stipulates that in the case of international commercial arbitration - Section 9 among other sections will apply to foreign seated arbitration unless otherwise agreed between the parties.

An order passed under Section 9 of the Act is appealable. At this juncture, it is pertinent to note that, the Amendment has also fixed a timeline for the initiation of arbitration proceedings from the date of the interim order under Section 9. Arbitration proceedings must commence within 90 days from the date of such an order.

Constitution of Arbitral Tribunal

Court shall intervene in the appointment of arbitrator(s) only when there is no consensus between the parties. Section 11 of the Act deals with the appointment of Arbitrators. For an international commercial arbitration, applications are made to the Supreme Court of India under Section 11 of the Act. As per the recent amendment to the Act, the appointment of an arbitrator can be made even by a Supreme Court designate.

In Nimet Resources v Essar Steels (2000) 7 SCC 728 the Supreme Court held that if there is any 'doubt' in the mind of the Chief Justice or his designate as to the existence or validity of an arbitration agreement, the same must be referred to the arbitral tribunal to be resolved. It is only if the Chief Justice 'can be absolutely sure' that there is no arbitration agreement in existence between the parties that the power of appointment under s 11 can be declined.

In Antrix Corp. Ltd. v Devas Multimedia JT 2013 (7) 394, the Supreme Court adopted a pro-arbitration approach. It held that once an arbitration agreement has been invoked in a dispute and an arbitrator has been appointed, the other party to the dispute cannot again separately invoke the provisions of the arbitration agreement. In short, once the power to appoint an arbitrator has been exercised, there is no power left for the Court to refer the same dispute again to arbitration under Section 11 of the Act.

Therefore, if the party establishes the validity of an arbitration clause and that the dispute is arbitrable, the judiciary must appoint an arbitrator.

However, it is to be noted that the Courts have taken a narrow view of disputes that can be arbitrated. For instance, disputes that involve allegations of fraud may be held to be non-arbitrable.

Law applicable to Arbitration

In International Commercial Arbitrations, it is now well established that there may be more than one country's legal system of law which will play a part on the international arbitration. The first is the substantive law which governs the substantive rights of the parties under the contract; second is the law governing the arbitration agreement; third is the curial law which governs the conduct of the arbitration proceedings between the parties to the dispute.

If the local law is selected, it is referred to as the governing or proper law of contract. In case, the governing law is not expressly mentioned in the contract, the law of the contract with which the arbitration agreement is most closely connected as inferred from the intention of the parties to contract depending upon the surrounding factors shall be the governing law. The law governing the arbitration has importance because it determines the validity, effect and interpretation of the arbitration agreement. The Arbitrator also relies upon the governing law to determine the scope of his powers and the procedure to be followed by the Arbitral Tribunal.

In case of conflicts, the court shall determine the substantive law and curial law for conducting the arbitral proceedings.

Seat of Arbitration

The seat of arbitration determines the applicable law governing the arbitration including the procedural aspects. If the parties have not specifically chosen the curial law to conduct arbitration expressly or by necessary implication, the conduct of the arbitration proceedings will be determined by the law of the place of the seat of arbitration.

For procedural aspects such as the appointment of any arbitrator the curial law determines which court you must approach for the same. The regulation of conduct of arbitration and the challenge to award has to be done by the courts of the country in which the seat of arbitration is located. That court will have power to annul the award. However, the law governing the dispute, i.e. the substantive law may be of a different jurisdiction.

In case of Bharat Aluminium Company Ltd. Vs. Kaiser Aluminium Technical services Inc. ("BALCO"), the Supreme Court held that the choice of another country as the seat of arbitration inevitably imports an acceptance that the law of that country relating to conduct and supervision of arbitration will apply to the proceedings.

The seat and venue of arbitration are not the same and are independent of each other as far as arbitration proceedings are concerned. The seat of arbitration remains unaffected even if the arbitral proceedings take place in venues situated in different countries. The venue is deemed to be a mere physical location where the arbitration proceeding is conducted, with no legal implication to the same. In Enercon India Ltd. Vs. Enercon Gmbh (2014), Supreme Court held that the express mention in the arbitration clause that London was the venue of the arbitration could not lead to the inference that London was to be the Seat. The law governs the contract and the procedural/ curial law that governing arbitration were chosen to be Indian law as the closest and most real connection was with India. Though the seat of arbitration was not mentioned, the Indian courts should have exclusive supervisory jurisdiction and English Courts could not have concurrent jurisdiction.

During The Arbitral Proceedings

Interim Measures

If a party requires interim measures after commencement of an arbitration, the party must apply to the Arbitral Tribunal under Sec 17 of the Act. The recent amendment has widened the scope of S.17 of the Act to bring under its purview all but a few reliefs. It has also been explicitly clarified that a court shall not entertain application under S.9 of the Act, after the constitution of an arbitral tribunal.

This should greatly reduce the intervention of the courts during an arbitration proceedings.

Challenge of Arbitrator

Recent amendments require an Arbitrator to disclose in writing either at the time of appointment or during the arbitral proceedings any circumstances such as the existence of direct or indirect relationship with parties or counsel in the past or present or any interest whether financial, business, professional or other kind which is likely to give rise to justifiable doubts as to his independence or impartiality.

The grounds for challenge are mainly based on the justifiable doubts as to independence and impartiality of the arbitrator and non-possession of qualifications by the arbitrator as agreed to by the parties. The procedure to challenge varies from nation to nation.

Mandate of the Arbitral Tribunal

Section 12 - 15 of the Act deals the mandate of the arbitrator and its termination on different grounds. For instance, Section 12 deals with the grounds for an arbitrator's challenge relating to circumstances that could give rise to justifiable doubts as to his impartiality and independence and Section 14 sets forth the reasons for challenging an arbitrator due to his legal or physical inability to perform his function as an arbitrator.

A mandate of an arbitrator may be terminated automatically, by the arbitrator, by the parties or by order of the tribunal. If a controversy remains concerning any of the grounds referred to in above, a party may, unless otherwise agreed by the parties, apply to the court to decide on the termination of mandate.

The intervention by the Courts under the said section are permissible intervention by the Courts. However, it is to

be noted, that as far as possible the Courts attempt to not terminate the mandate of an arbitrator frivolously on the application of a party attempting to frustrate or circumvent the arbitration proceedings.

In Vandana Gupta and Ors. Vs. Kuwait Airways Ltd. and Ors, the Hon'ble Supreme Court held that mandate of the Tribunal had not ended because the Tribunal kept the proceedings in abeyance due to non-payment of advance on cost in full and not because the tribunal had become de jure unable to perform its functions

After Arbitration

After the arbitral tribunal passed an award, each party has the right to have the same enforced or set aside as the case may be. The Act provides the power to the Courts to intervene in this regard.

In most jurisdiction an arbitration award can be categorized into two distinct types; a domestic award or a foreign award. A domestic award is an award passed in an arbitration in a dispute involving parties from India or in an international commercial arbitration with its seat in India. A foreign award is an award passed by an arbitral award with its seat outside India.

In India, the enforcement of a domestic award is regulated as per Part I of the Act. The enforcement of a foreign award is governed by Part II of the Act, which gives effect to the provisions of the New York Convention and the Geneva Convention.

Setting Aside the Award

Section 34 of the Act provides a party recourse to a court against an arbitral award. An award can be set aside only on the grounds set out under Section 34 which include among others public policy, patent illegality, fraud or misrepresentation, limitation and the award being contrary to the law of the country in which the award was rendered .

The language of Section 34 is mandatory, i.e. that the courts can only set aside the arbitral award on the ground enumerated in Section 34. However, as we will see below, the Judiciary has tended to provide a broader approach to terms such as public policy and fraud.

In Renusagar Power Co Vs General Electric Company case, 1994 Supp (1) SCC 644 the Supreme Court of India held that the courts while exercising their powers with regard to the enforceability of a foreign international award, the courts should give a narrow interpretation to the term "Public policy". It also held that merely a violation of Indian laws would not suffice to attract the bar of public policy to enforce a foreign award in the context of International arbitration. Since the foreign awards Act is concerned with recognition and enforcement of foreign awards which are governed by the private International law, the expression in that Act "Public Policy" must be construed in the sense the doctrine of Public policy is applied in the field of Private international law. Applying the said criteria it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) Fundamental Policy of Indian law or (ii) The interests of India or (iii) justice or morality.

In ONGC Vs SAW pipes (2003) 5 SCC 705 the Supreme Court of India expanded the scope of public policy by taking a wider view and held that Pubic policy means the statutory provisions of Indian law or even the terms of the contract. But it also held that "patent illegality" going into the root is necessary to come to a conclusion that an award is violative of "public policy". In the said case it was held that patent illegality includes the violation of contractual principles and violation of contract law. Hence the term "patent illegality" included by the Supreme Court into the definition of "Public policy" in addition to the Renusagar principles and substantially increased the scope of interference of the courts into the arbitration awards while exercising their jurisdiction of dealing with the challenge to International awards passed in India under Section 34 of the Act.

In a recent Judgment dated 04.09.2014 a three Judge Bench of Supreme Court of India in ONGC Vs Western Geco International Ltd (2014) 9 SCC 263 further has expanded the scope of "Public policy" including reasonableness, fundamental principles providing a basis for administration of Justice and enforcement of law in addition to the principles laid down by the above said SAW pipes judgment. Hence the term public policy as per the Western Geco Judgment includes all the following aspects; (i) Judicial Approach (Judicial approach ensures the authority to act in a fair, reasonable and objective manner and not based on some extraneous considerations. (ii) Application of mind and recording reasons. (iii) Decision should not fall out of reasonableness if tested on the touch stone of Wednesbury principle of reasonableness.

The Supreme Court, in World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd. (Civil Appeal No. 895 of 2014), held that in foreign arbitrations seated outside India, arbitrators had the right to decide issues of fraud. The Indian Courts could decline to enforce an award only if it reaches the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, but could not do so on the grounds that allegations of fraud or misrepresentation are involved.

In Union of India v. Microwave Communication, the Delhi

High Court was called on to consider a very important issue relating to the relationship between the Arbitration Act and the Limitation Act. In a remarkably clear decision, involving the interpretation of decisions of the Supreme Court and conflicting dicta from High Courts, the Court concluded that all provisions of Limitation Act, except section 5, apply to applications under section 34 of the Arbitration Act.

It is to be noted that if an award is set aside by a court of the seat of arbitration, the enforcing court may refuse to enforcing the foreign award.

Judicial review

In most countries courts may vacate decisions of perverse arbitrators who have ignored basic procedural fairness, as well as those of alleged arbitrators who have attempted to resolve matters never properly submitted to their jurisdiction. In some countries judges may also correct legal error or monitor an award's consistency with public policy. Public scrutiny of arbitration is inevitable at the time of award recognition. Judges can hardly ignore the basic fairness of an arbitral proceeding when asked to give an award res judicata effect by seizing assets or staying a court action.

Enforcement of Award

Section 48 for New York convention and Section 57 for Geneva convention of the Act lays down the grounds where the enforcement may be refused if the objector can prove one of the following grounds: (i) Incapacity: that a party to the arbitration agreement was, under the law applicable to him, under some incapacity, (ii) Invalid Arbitration Agreement: that the 'arbitration agreement' was invalid under the law to which the parties subjected it, or, failing any indication thereon, under the law of the country where the award was made, iii) Due process: that a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, iv) Jurisdictional defect: that the award deals with a difference not contemplated by the terms of arbitration agreement. v) That the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the law of the country where the arbitration took place. vi) That the award has not yet becomes binding on the parties, or has been set aside or suspended by a competent authority of the country, in which, or under the law of which, it was made.

It is pertinent to note that only the awards passed by countries that India has deemed to be recognized under the New York Convention by way of gazette notification are enforceable in India. For example, awards made in countries such as Australia, United States, United Kingdom and Singapore are enforceable in India. A major world and Asian power such as China was recognized only a few years back.

Therefore, in India, this is the key stumbling block for an enforcement of a foreign award.

Conclusion

The object of arbitration is to provide recourse to an autonomous, cost-effective and swift resolution to a dispute. The aim of the Act, modeled on the UNICTRAL rules is to facilitate international commere and business, to ensure finality of foreign awards and to promote autonomy by reducing judicial intervention. Unfortunately, the traditional judicial system has been loathe to give up its reins completely and adopt its designated supervisory rules. This has led to a chaotic system completely against the core objectives of arbitration. Promisingly, the trend of interference is being discouraged by the judiciary throughout. It is yet to be seen if the amendments to the Act, bring about the assured changes in the system. It is crucial for any system to succeed that all the stakeholders work towards the common goal. In this case, it is just as important that the parties to the dispute, apart from the Judiciary and the Executive work towards reducing the time and costs of arbitration. It may emerge that the opportunity for the judiciary to intervene will no longer exist. It is the fond hope that International Commercial arbitration soon becomes the mainstream dispute resolution.

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International Commercial Arbitration and Cultural Challenges: India Becoming an Arbitration Hub

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Introduction

Globalisation has opened up new avenues in the arena of international arbitration. Despite this being a growth area, little attention has been paid to conflicts of culture when compared to other conflicts, such as conflicts of laws, conflicts of interest and conflicts of political contribution. With my experience in conflict resolution procedures, I have learnt that it is necessary to approach an unresolved issue by viewing its holistic dimension, in general, and cultural dimension, in particular.

International arbitration aims to become an ideal forum for the resolution of disputes between parties from different jurisdictions and many times from different cultures. However, the challenge that comes with the diversified culture is inherent in the process. Unless the participants understand and embrace this diversity, the full potential of the process will not be unravelled.

Lack of cultural understanding and or sensitivity to the cultural diversity will become a major hurdle in international arbitration when arbitrators fail to understand the basics of these before commencing their venture with the assumption and belief that the entire the world operates in similarity to their own culture.

Arbitration in international arena has no immunity to the differences in the cultural and legal backgrounds of the parties involved. Aiming to achieve a position as an arbitration hub in the region, India has recently amended its Arbitration Act of 1996. In my view, India needs to focus on cultural issues as one of the major criteria when arbitrating in the international arena.

Being the largest democracy in the world, India has gained importance as one of the commercial arbitration hubs in the world economy, with the launching of its economic liberalisation policy in 1991. The increase in domestic and international trade increases the commercial disputes as well. As a result, the need for effective mechanisms of dispute resolution, in general, increased in India, and arbitration gained considerable significance.

History of Indian Arbitration

India has an inbuilt system of arbitration associated with its culture, as panchayat or village councils paved the way for consensus settlements in the olden days, which was later regulated in the 1772 Bengal Regulations. In British India, Arbitration and Conciliation Act, 1940 was introduced and it was not successful. Based on the Model UNICTRAL Law and observations from the Supreme Court and Law Commission reports as the background, the Arbitration and Conciliation Act 1996, with amendments of the earlier Act of 1940, was born. However, the shortcomings of this Act can be listed as follows:

- Failure to achieve cost- and time-effective outcomes, the very the purpose the Act
- Failure to satisfy the international trade participants by making it efficient
- Questioning the administration of justice process in India
- The ambiguous nature of the act often ending up in judicial intervention
- Enforcement of arbitral awards intercepted by public policy.

In the past two decades, India's economic growth demanded a more effective dispute resolution process consistent with international standards. In addition, international organisations such as the London Court of International Arbitration (LCIA) and Singapore International Arbitration Centre (SIAC) entered the Indian market. This proved to be an eye-opener for realising the need for a new approach to arbitration in India. Thus the Arbitration and Conciliation Amendment Act 2015 came into effect, with the purpose of

- making quicker and more streamlined process;
- minimising interference by the courts;
- attracting foreign investors;
- improving the comfort of doing business in India; and
- upgrading Indian arbitration standards to global standards.

This new Act includes changes to (a) Part I, governing the domestic arbitrations, (b) the comprehensive scheme for the conduct of arbitration, based on the UNCITRAL Model Law and (c) Part II governing offshore arbitrations, confined to enforcement of foreign awards, on the basis of the New York Convention.

The most significant element would be the seat of arbitration under Part I of the Act, which applies to arbitrations where the seat is in India unless a contrary agreement is entered between the parties.

In cases where the seat of arbitration is outside India, Part I has the provisions of

- seeking interim relief from courts [Section 9];
- seeking the assistance of the court in taking evidence [Section 27]; and
- appealing against the order of a court where the court refuses to refer the parties to arbitration [Section 37(1)(a)].

In addition, in conformity with the UNCITRAL Model Law, agreement and communication by electronic means included under Section 7 is expected to elevate efficiency to the international standards.

The other key changes in the new Act are the following:

- Fast tracking and speedy completion of arbitration proceedings (Section 29)
- Ensuring neutrality of arbitrators (Section 12)
- Availability of interim relief (Sections 9 and 17:24)
- Restricting the ambit of "public policy" (Section 34)
- Including the High Courts in the jurisdiction (Sections 2 and 11)
- Including time limits for arbitrations (new Section 36)
- Conferring arbitral tribunal the same powers to pass interim measures as the court order (new Sections 17 and 28).

Undoubtedly, these changes will enhance the level of Indian 'legal culture' to international expectations.

Legal Culture

While differences in conflict resolution processes have historically been discussed under the banner of "cultural differences," we all could surely agree that "legal cultures" do not exist in an intellectual vacuum. Rather they are the products of the fundamental values of the society, based on history, language, and the perceptions of justice and social norms[1]

'Legal culture' differs from one nation to another. The term includes the legal systems and understandings, leading to arbitration expectations. It influences many aspects of law, attitude, thought process, legal reasoning and decision making patterns that are significantly influenced by the cultural background. Here comes the role of 'culture'. It then becomes necessary to understand cultural differences in order to identify the issues and resolve the disputes effectively.

Human Culture

In international arbitration, clients from various countries will have latent or patent cultural differences, which may result in differences in forming opinions and action behaviours. A Chinese chairperson, an Indian arbitrator and an English counsel will not have the same cultural appetite. Therefore, it may require resolving the cultural conflict in order to resolve the conflicting issues referred to arbitration, It becomes important that parties involved in arbitration be aware of and receptive to the differences in approach, as the participants will bring along the understanding attached to their cultural and professional backgrounds, which, in turn, influence procedures. It becomes important to take account of the traditions and practices of the participants in the arbitration process, as some countries follow consensual and others follow confrontational arbitration.

The concept of culture itself is complex in nature, encompassing multiple disciplines. The simple answer is that culture means shared values, traditions or behaviours, and these elements distinguish one culture from the other. Therefore, it automatically implies that there is bound to be differences in opinions and possibility of conflict. Culture plays a predominant role in forming opinions and influencing actions following such opinions. At the same time, 'cultural differences' in forming opinions and deciding actions will lead to a 'conflict of culture' as part of the process.

India, with its unique cultural heritage, always followed unity in diversity policy. Its traditional dispute resolution methods such as panchayats followed consensual method rather than confrontational methods.

The major arbitral institutions in Asia with cultural differences include the following:

a. Mongolian International Court of Arbitration (MICA)
b. Japan Commercial Arbitration Association (JCAA)
c. China International Economic and Trade Arbitration Commission (CIETAC)
d. Hong Kong International Arbitration Centre (HKIAC)

e. Korean Commercial Arbitration Board (KCAB)
f. Philippine Dispute Resolution Centre (PDRC)
g. Thai Arbitration Institute (TAI)
h. Singapore International Arbitration Centre (SIAC)
i. Kuala Lumpur Regional Arbitration Centre for Arbitration (KLRCA); and
j. Badan Arbitrasi Nasional Indonesia ("BANI") in Indonesia.

Comparing the arbitration process in some of these nations with cultural differences, the following have been identified:

Arab nations[2]

- The mentality, history and customs of Arab nations play a vital role.
- Their cultural foundation is based on Islamic faith.
- The sole sources of law determine the jurisdiction-based Constitution and Quran.
- Hearings are a fundamental procedure and witnesses are in the form of written evidence.

China[3]

- Gaps and ambiguous provisions in current legislation.
- Lack of party autonomy.
- Administrative interference in arbitration practice.

Japan

Japan with Asian and European culture combination with the international respect achieved in the legal profession should have attained a position as a leading centre for international arbitration. However, arbitration is very rarely used in Japan.[4]

Indonesia

"Cultural differences also come into play in arbitral proceedings. There is a greater readiness in Indonesia to delegate decision making to someone else. One would be reluctant to use in Indonesia the aggressive approach that someone in Australia may be enthusiastic about adopting. Face saving is important in Indonesian culture and there is no enthusiasm for wanting to make people look bad."[5]

Singapore

However, Singapore has set a successful model as the preferred destination for International Commercial Arbitration.Huangbin[6] identifies one of the reasons for this success is 'To bring into full play the expertise and cross-cultural advantages of the legal and technical experts in different industries in China to resolve cross-border commercial disputes involving Chinese enterprises'.

Singapore's success as an arbitration hub is due to five main factors[7]:

- Supportive legislative framework in the form of the International Arbitration Act (IAA), which is built on Model Law.
- Commercially experienced judiciary, which has developed a pro-arbitration jurisprudence.
- Singapore's neutral venue, straddling the East and the West, has also given it an advantage.
- Its connectivity to the rest of the region and the world.
- Government's efforts in actively consulting industry partners and in being swift in responding by amending laws and policies.

India, while attempting to address most of the issues to emerge as an arbitration hub by introducing the new Act, needs to consider the above factors to meet the requirement to become an arbitration hub.

It is necessary for India to take into account multiple factors to face the challenges as suggested by Zweigert and Kötz: 'One must take into account not only the legislative rules, judicial decisions, the "law in the books", and also of general conditions of business, customs, and practices, but in fact ofeverything whatever which helps to mould human conduct in the situation under consideration'.[8] In addition, it needs to pay attention to cultural challenges it may face.

D'Silva and Magdalene, suggest that culture and values in international arbitration have an impact on 'the professional and personal qualities, credentials, experience and reputation of international arbitrators is arguably about assessing their ethical cultural approach and predicting how they will exercise their individual discretion in the management and resolution of a dispute. International arbitrator assessment is, therefore, one of the most difficult aspects for lawyers and their commercial clients in practice'[9].

Further, D'Silva and Magdalene quote Meason and Smith as saying:

'[T]he current institutional arbitral system reflects two things. First, it is ...the Western World's answer to commercial disputes... Second, when one notes ... the many arbitration centres that have hung out their shingles in many developing countries, one is faced with recognising the lack of uniformity that exists...It has been argued

that an essential element in the increased resort to arbitration has been the emergence of general international consensus regarding applicable substantive law... But such a statement could not be further from the truth. The 'consensus' really only reflects the imposition of Western values ... showing our ignorance of ... cultural differences'.[10]

Realising the importance of cultural challenges, following are some of the major challenges to be considered in International Commercial Arbitration[11]:

- Cultural bias and stereotyping
- Politics and religion
- Miscommunication (verbal and non-verbal)
- Cultural precepts for negotiation

International commercial arbitration is gaining momentum where Asian arbitration centres are competing with each other and India, in trying to establish its position as an arbitration hub, should understand that much more work needs to be done to match the challenges and the competitive nature of the market.

Asia will undoubtedly face many challenges in the coming decades as issues related to arbitration are progressing, with Singapore and Hong Kong in the forefront. Flexibility, independence, extensive support from the government, cultural understanding, ethical approach and judicial support are few suggestive frameworks for enhancing the standards.

Suggestions

Michael Hwang[12], one of the famous arbitrators, has pointed out that "there are still many parties and lawyers who do not fit into the global mould, and who will, accordingly, not conform to expected modes of behaviour". He further quoted many examples of 'cultural misunderstanding' between developed "Western" economies and other jurisdictions, and between civil law and common law.

Despite culture being a non-threatening factor in arbitration process, many cultural differences may affect the arbitration processes, in such areas as the examination of witnesses, the active or passive role of the tribunal, use of written pleadings and oral submissions, use of expert evidence, application of foreign law, international commercial law and award writing.

Ian Meredith and Hendrik Puschmann identify the following areas where communication accompanied by cultural understanding will reasonably influence the arbitration process.[13]

- An expert witness faltering under cross-examination
- Coaching witnesses
- A tribunal relying on documentary evidence to the exclusion of witness testimony
- Fact witnesses under cross-examination
- Document production
- The reasoning of arbitration awards

To address the issues arising due to cultural misunderstanding, it is necessary to consider the background of all the participants, in particular, in terms of their "home" legal culture, and how it may influence their expectations of the proceedings.

A common understanding by all parties is necessary to understand culture as a factor in the process. Therefore, it is important to take into consideration all the cultural factors surrounding the matter in a dispute to minimise cultural ignorance and to increase cultural awareness and cultural competence. This will involve pre-arbitration research and conferences to make the participants to understand each other's culture.

While considering the cultural issues, one needs to be mindful that not every cross-cultural conflict needs to be considered where issues need specific attention.

Communicating across cultures is also challenging. Understanding the culture and appropriate communication needs to be paid attention in future in arbitration-related education and training programmes. It is necessary to include cultural awareness and cultural competency in the professional development programmes in the field of arbitration to avoid culturally ignorant participation.

Power difference and cultural imbalance are other additional hindrances in the arbitration process.

Where there are aggravating factors escalating the issues of disputes due to cross-cultural differences in the arbitration process, flexible procedures will have to be adapted to resolve the differences.

If India can focus on the cultural challenges in arbitration process, it will give India an additional qualification to become an attractive and successful arbitration hub.

Foot Note

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Selection and Determination of Applicable laws in International Commercial Arbitration

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When the parties enter into a commercial contract that has parties from more than one Country, the parties require to decide the laws applicable to the contract and incorporate their choice of law either in the same contract or can enter into a separate agreement with regard to choice of law. The parties, if they are from the same country, they do not have right to make a choice of law since most of the national laws do not permit the citizens to circumvent the law of their own country. But in the international contracts parties have the power to choose the laws applicable to the contract. Such an express selection by the parties will avoid wastage of time and resources in determining applicable law by Tribunals or Courts. Such a determination may not finally express the actual intention of the parties, while entering into the contract. In the absence of an express selection by the parties the tribunals and courts try to determine the applicable laws, on the basis of various laws, Rules and global Practice. Determination of the law applicable to the contract without taking into consideration the will of the parties to the contract can lead to unhelpful uncertainty because of differences between solutions to the disputes, from State to State. For this reason, among others, the concept of "party autonomy" to determine the applicable law has been developed and thrived[1]. The concept of party autonomy in international contracts to choose the applicable lawsensures the power of parties to a contract to choose the law that governs that contract. The said concept recognises that parties to a contract may be in the best position to determine which set of legal principles is the most suitable one for their transaction. Mostly the parties try to choose a law that enhances certainty and predictability in case of a dispute between them. Many countries have recognised this concept and, as a result, giving effect to party autonomy to choose their law in international arbitrations is a globally accepted concept today.

Hence parties while finalising the terms of the contract, should also choose the applicable laws to the contract and incorporate their choice of laws into the contract. The parties require to choose procedural law, substantive law and the law governing the arbitral agreement. They may choose three different laws from three different countries or laws from two or even one country. But while choosing the laws they should understand the effects and implications of that selection, in case of a dispute between the parties. The Supreme Court of India in Dozco India (P) Ltd case[2], explained the above said concepts clearly

13. The Supreme Court of India in ONGC Ltd. [(1998) 1 SCC 305] (at SCC p. 313, para 10) relied on the observations in Mustill and Boyd[3] to the effect:

"It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws-

1. The proper law of the contract i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.
2. The proper law of the arbitration agreement i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour the award.
3. The curial law i.e. the law governing the conduct of the individual reference.

i. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal; the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award; the question whether the parties have been discharged from any obligation to arbitrate future disputes.
ii. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.
iii. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute."

The first endeavour of the author is to deal with the importance and significance in expressly selecting the ap-

plicable laws and the factors to be taken into consideration while selecting them. The second is to deal with the principles to be followed by the courts / arbitral tribunals while determining the applicable laws to a contract, in case of failure of the parties to expressly incorporate their choice of law into the contract.

Procedural law or Lex Arbitri:The Procedural law or Lex Arbitri or the crucial law is the law, which governs the procedure of an international arbitration. That means the arbitration shall be conducted as per the provisions of the procedural law. For example, if parties have chosen Singapore International Arbitration Act (IAA), as the procedural law, the arbitration proceedings will be governed by IAA. That goes without saying that the procedural law governs the procedure to appoint arbitrators, removal of arbitrators, interim orders, court assistance with regard to seeking presence of witnesses, challenging of the arbitral awards etc., The parties should decide the said procedural law, keeping various issues that may arise from that choice of procedural law.

The Supreme Court of India relied on the observations made by Dicey and Morris in Sumitomo Heavy Industries case[4] about the legal frame work of arbitration as follows:

"13. Mr Sorabjee relied upon observations in Dicey and Morris[5] on The Conflict of Laws. The first rule under the heading "Arbitration" in the chapter on "Arbitration and Foreign Awards" reads thus:

"57. (1) The validity, effect and interpretation of an arbitration agreement are governed by its applicable law.

(2) The law governing arbitration proceedings is the law chosen by the parties, or, in the absence of agreement, the law of the country in which the arbitration is held."

In discussing clause (2) of the rule aforementioned, it is stated:

"The procedural law of the arbitration will determine how the arbitrators are to be appointed, insofar as this is not regulated in the arbitration agreement; the effect of one party's failure to appoint an arbitrator, e.g., whether an arbitrator may be appointed by a court, or whether the arbitration can proceed before the sole arbitrator appointed by the other party, and whether the authority of an arbitrator can be revoked. That law will also determine what law the arbitrators are to apply, and whether they are expected or allowed to decide ex aequo et bono or as amiables compositeurs, and, if not, whether the parties can give them this power or impose on them this duty. That law will also determine the procedural powers and duties of the arbitrators, e.g., whether they must hear oral evidence (but not their jurisdiction to decide the dispute, which is governed by the arbitration agreement and the law applicable to it) or whether the arbitrators have been guilty of misconduct. It will also determine what judicial remedies are available to a party who wishes to apply for security for costs or for discovery or who wishes to challenge the award once it has been rendered and before it is sought to enforce it abroad, and the circumstances in which judicial remedies may be excluded."

Seat of Arbitration and Procedural law:The simple meaning of Seat of Arbitration is the place/ country where the parties want to have their arbitration. But the legal consequence of choosing a seat of arbitration is not just giving a geographic location but much more than that. Once a party chooses a seat of arbitration, the arbitration law of that place automatically becomes the procedural law applicable to the contract. This is because the scheme of arbitration not only provides for a private mechanism to adjudicate the disputes between the parties but also provides the procedural law and also a court to supervise the arbitration proceedings. On that basis the Court having jurisdiction over the seat of arbitration becomes the Court with supervising powers for that particular arbitration, exercising the powers under the procedural law. Hence by choosing a seat of arbitration, parties automatically choose the procedural law applicable to the arbitration and the supervisory courts. A contract cannot have Chennai as the seat of arbitration and Hong Kong law as the procedural law, because the Courts in Chennai can exercise only the powers under Indian law and not under the Arbitration Ordinance of Hong Kong. In the same way a Court in Hong Kong will not be able to supervise an arbitration happening in Chennai. Hence to have a valid arbitration clause the seat, the procedural law and the supervising courts, should be chosen from the same Country. In a very recent Judgement in Eitzen Bulk case[6],Supreme Court of India confirmed the relationship between the seat and the procedural law as follows:

"34. As a matter of fact, the mere choosing of the juridical Seat of arbitration attracts the law applicable to such location. In other words, it would not be necessary to specify which law would apply to the Arbitration proceedings, since the law of the particular country would apply ipso jure".

In Channel Tunnel Group case[7], an English Court held that the presumption in favour of the law of the seat was irresistible in the absence of an explicit choice of law.

Many Countries, to avoid any confusion, have expressly incorporated provisions in their arbitration laws making the procedural law of that country be applicable only to the international arbitrations seated in their country. In England, the 1996 Arbitration Act does not allow any

scope for having a seat in England even with an express specification of a foreign procedural law, in an arbitral agreement. Swiss law also allows the applicability of the Swiss Arbitration law only for the Swiss Seated Arbitrations. Hence seat of arbitration determines the procedural law which will apply to the international arbitration.

Venue of Arbitration and Seat of Arbitration: The seat of arbitration has a jurisdiction element in it and hence it determines the procedure of arbitration, Procedural law and consequential rights and responsibilities of the parties. But for the convenience, the actual arbitration hearings may be happening in various countries or cities. In some arbitration clauses, even parties may choose to incorporate the venue in which the actual arbitration hearings will happen, in case of disputes. Such a mentioning of the venue of arbitration does not have any legal impact over the procedural law or the seat of arbitration. That means if parties choose Delhi as the seat of arbitration and Singapore as the venue of arbitration, the procedural law applicable will be "Arbitration and Conciliation Act,1996" and the supervising court will be courts in Delhi. In some Arbitration clauses parties signify a place of arbitration in one country and the procedural law of another country, while determining the seat the courts gave a meaning of "venue" to the "place of arbitration" and not the seat of arbitration. In such interpretations, always the tribunals and courts try to read the actual intention of the parties, while entering into that contract. The Supreme Court of India while dealing National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd., (2007) 5 SCC 692 at page 697, it held as follows:

"9. The rules of interpretation require the clause to be read in the ordinary and natural sense, except where that would lead to an absurdity. No part of a term or clause should be considered as a meaningless surplusage, when it is in consonance with the other parts of the clause and expresses the specific intention of parties. When read normally, the arbitration clause makes it clear that the matter in dispute shall be referred to and finally resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (or any statutory modification, enactment or amendment thereof) and the venue of arbitration shall be Hong Kong. This interpretation does not render any part of the arbitration clause meaningless or redundant. Merely because the parties have agreed that the venue of arbitration shall be Hong Kong, it does not follow that laws in force in Hong Kong will apply. The arbitration clause states that the Arbitration and Conciliation Act, 1996 (an Indian statute) will apply. Therefore, the said Act will govern the appointment of arbitrator, the reference of disputes and the entire process and procedure of arbitration from the stage of appointment of arbitrator till the award is made and executed/ given effect to."

The Supreme Court of India discussed the frame work of International Arbitration including the differences between the seat of Arbitration and venue of Arbitration in detail in Enercon (India) Ltd[8]. case

"152. This apart, we have earlier noticed that the main contract, the IPLA is to be performed in India. The governing law of the contract is the law of India. Neither party is English. One party is Indian, the other is German. The enforcement of the award will be in India. Any interim measures which are to be sought against the assets of Appellant 1 ought to be in India as the assets are situated in India. We have also earlier noticed that Respondent 1 has not only participated in the proceedings in the Daman courts and the Bombay High Court, but also filed independent proceedings under the Companies Act at Madras and Delhi. All these factors would indicate that Respondent 1 does not even consider the Indian courts as forum non conveniens. In view of the above, we are of the considered opinion that the objection raised by the appellants to the continuance of the parallel proceedings in England is not wholly without justification. The only single factor which prompted Respondent 1 to pursue the action in England was that the venue of the arbitration has been fixed in London. The considerations for designating a convenient venue for arbitration cannot be understood as conferring concurrent jurisdiction on the English courts over the arbitration proceedings or disputes in general. Keeping in view the aforesaid, we are inclined to restore the anti-suit injunction granted by the Daman Trial Court."

New York Convention and Procedural law: While choosing the procedural law/ seat of Arbitration it is important to keep in mind that the seat should be a seat from a New York Convention country and also recognised by the countries, in which the final award may get enforced. The main reason for companies choosing international arbitration as the dispute resolution mechanism than the National Court litigations is the global enforceability of International Arbitral awards. The power of the said enforceability of International arbitral awards comes from the New York Convention[9] 1958. The said convention is signed by about 140 countries as of 2015, agreeing to recognise the international arbitral awards passed in the arbitral seats falling within the convention countries, subject to certain conditions. Even though all the signatories do not recognise the arbitral awards passed in all the member countries, the popular seats of Arbitration including London, Paris, Singapore, New York etc., are recognised by almost all the countries. India recognised China and Hong kong only from 2012 on reciprocity ba-

sis. Hence the seat chosen by party or the procedural law chosen by the party should lead to an arbitral seat which is recognised by the countries where the possible enforcement of the arbitral award will be. Hence the choice of Procedural law does not only decide the seat and supervising courts, but also determines the capability of the award getting enforced. Hence Parties should select the procedural law after taking into consideration all the above said implications.

The Substantive law or Law Governing the Contract: The substantive law is the law which has to be applied by the arbitral tribunal while determining the disputes between the parties. The Parties may be from India and Malaysia but they can even choose a third law, say the UK law as the law governing the contract between the parties. It is not necessary that a third law has to be chosen always, but in their endeavour to have an equal (dis)advantage, parties these days chose the law of a neutral country as the governing law of the contract. The parties need not choose three different laws of three different countries as procedural, governing law and as the law governing the arbitration agreement but they should specifically express their choice for these three categories of law. While choosing three different laws for an arbitration agreement, the parties should keep in mind that finding an arbitrator or a counsel having some exposure to all the three laws may become a very difficult issue.

Determination of Substantive law in the absence of agreement between Parties: If the parties fail to expressly state their choice of laws, the courts or tribunals are required to determine them. While considering the choice of substantive law it is essential to distinguish between two circumstances, viz (1) Situations where there is no choice of law agreement and the tribunal must select the substantive laws solely by applying conflict of laws rules or directly choosing an applicable substantive law and (2) The situations where the parties have agreed upon the applicable substantive law. All Courts and all arbitral institutions do not even hesitate to apply the choice selected by the parties if they have expressed their choice of governing law in the contract. However the approach of different courts, institutions and tribunals to the selection of the governing law, in the absence of a choice-of-law agreement is not uniform. But all the National Arbitration legislations provide the authority to arbitrators and tribunals to select law governing the substance of the dispute. For example, Article 28 of the UNCITRAL Model Law empowers for the arbitrators to apply either the law chosen by the parties (Article 28(1)) or, in the absence of a choice of law agreement, the law chosen by the tribunal (Article 28(2)). The only difference is some National legislations expect the tribunal to apply the "conflict of laws Rules", while some allow the tribunal directly choose the applicable law which they consider appropriate and some provides narrow scope by stating certain conditions to such a determination by the tribunal. For Example, the English Arbitration Act,1996 is providing in S.46(3) that" if or to the extent that there is no choice or agreement the tribunal shall apply the law determined by the conflict of Laws rules which it considers applicable". New Zealand Arbitration Act, S28(2) provides "apply the law determined by the conflict of laws Rules which it considers applicable". Indian Arbitration and Conciliation Act S.28(1)(b)(iii) provides for application of Rules of law it considers to be appropriate in the given circumstances surrounding the dispute. The US law also provides for full freedom to the tribunal. In BALCO[10] case, the constitution Bench of Supreme Court of India dealt with the above said section and confirmed the powers of the tribunal under S.28 of the Act, which deals with the powers of the tribunal to determine, the Governing law. It was held that

"118. It was submitted by the learned counsel for the appellants that Section 28 is another indication of the intention of Parliament that Part I of the Arbitration Act, 1996 was not confined to arbitrations which take place in India. We are unable to accept the submissions made by the learned counsel for the parties. As the heading of Section 28 indicates, its only purpose is to identify the rules that would be applicable to "substance of dispute". In other words, it deals with the applicable conflict of law rules. This section makes a distinction between purely domestic arbitrations and international commercial arbitrations, with a seat in India. Section 28(1)(a) makes it clear that in an arbitration under Part I to which Section 2(1)(f) does not apply, there is no choice but for the Tribunal to decide "the dispute" by applying the Indian "substantive law applicable to the contract". This is clearly to ensure that two or more Indian parties do not circumvent the substantive Indian law, by resorting to arbitrations. The provision would have an overriding effect over any other contrary provision in such contract. On the other hand, where an arbitration under Part I is an international commercial arbitration within Section 2(1)(f), the parties would be free to agree to any other "substantive law" and if not so agreed, the "substantive law" applicable would be as determined by the Tribunal."

The tribunals have to make their decision to apply a particular substantive law, keeping in mind the approach provided by the procedural law of the seat of arbitration. If the procedural law does not provide for any restriction, then the tribunals can apply their own selection method or follow "any conflict of law Rules "appropriate" or "applicable" in their opinion. If the procedural law provides for any restriction, then it is better for the tribunal to follow

the directions of the procedural law, in order to avoid any future challenge to the award, on the ground of failure to apply the directives of the procedural law. For Example, earlier, Courts in United States have taken a view that the substantive law of the seat of arbitration should be applied in the absence of choice of substantive law, selected by the parties, since it was felt that it was in line with the intention of the parties. But now the approach is slowly changing. In all Civil law countries, there has been uniformity to apply the Conflict of Laws Rules of the seat to determine the applicable substantive law. Some Tribunals have taken a view that the Conflict of Law Rules of the State with close connection to the dispute shall be the basis for determination of the applicable substantive law. Some other tribunals have applied "closest connection" Rule and have taken a view that the substantive law of the State with closest connect to dispute shall be the best possible choice of law. In some other cases Institutional Rules provide certain guidelines for determining the substantive law, which can be followed if those institutions are administering the arbitration and it is not in conflict with procedural law of the seat of arbitration.

The Law Applicable to the Arbitration Agreement: Historically some Countries, surprisingly came out with amendments and laws, making the arbitral agreements unenforceable. Hence the international community invented the concept of seperability to make the arbitration clause survive even if the main contract does not survive. The law applicable to the arbitral agreement begins with the separability presumption. The law applicable to the Arbitration agreement has to be chosen by the parties and incorporate it into the arbitral agreement. The separability doctrine does not mean that the law applicable to the arbitration clause is necessarily different from that applicable to the underlying contract[11]. The procedural law governing the arbitration or the substantive law governing the contract may be or may not be the same. But it is necessary for the parties to specifically choose a law governing the arbitration agreement, failing which the tribunal is required to determine the same. The international arbitration agreement between the parties is separable from the underlying contract with which it is associated. It is important that to maintain an arbitration proceeding under an arbitration agreement, the agreement requires to be a valid one under the law to which parties have subjected to it.

Determination of the law governing the Arbitration agreement in the absence of express agreement between Parties: The New York Convention Article V(1)(A) which provides that an award need not be recognised if the arbitration agreement was not valid under the law to which parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[12]. Hence New York Convention indirectly made a connection between the law Governing the arbitral agreement and the procedural law.

Another contemporary approach to selecting the law governing an International Arbitration agreement is application of the law Governing the underlying contract. In support of that view, various authorities have reasoned that, when entering into a contract, businessmen and business women do expect that the law they chose to govern their contract will also apply to the arbitration clause contained within their contract[13]. Our Indian view is also more or less the same which can be seen from the Judgments of the Supreme Court which are given below. In Shin-Etsu case[14] relying on the Judgment of the Supreme Court in NTPC case, Supreme Court held as follows:

80. There is yet another strange result which may come about by holding that Section 45 requires a final finding. This can be illustrated by reference to the facts of the present case. The parties here have subjected their agreement to the laws of Japan. The question that will arise is: When a court has to make a final determinative ruling on the validity of the arbitration agreement, under which law is this issue to be tested? This question of choice of law has been conclusively decided by the judgment of this Court in National Thermal Power Corpn. v. Singer Co. [(1992) 3 SCC 551] where it was observed:

"23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption." [Ibid., at SCC p. 563, para 23, per Thommen, J.]

One of the most popular English Court Judgments in the case of Sulamerica[15] prescribed three stage test for determining the law applicable to an arbitration agreement and the steps are as follows: (1) Whether the parties expressly chose the law of arbitration agreement (2) Whether the Parties made an implied Choice of law of the arbitral agreement (3) In the absence of either the express or implied choice of parties, the system of law with which the arbitral agreement has the "closest and most real connection". The three step analysis is accepted and followed by many arbitral tribunals and courts all over the world. But the above English court came to the conclu-

sion that the substantive law mentioned in the arbitration agreement has the "Closest and real connection" to the arbitration agreement was accepted by Courts in India but some other courts including the Singapore Court does not agree the said view of the English Court.

The Singapore High Court in First Link Investments case highlighted the importance of making an express choice as to the law Governing an arbitration agreement and found that, in the absence of indications to the contrary, parties will have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration.

Conclusion

It is very important that the parties to an international agreement to expressly choose the procedural, substantive and the law applicable to the arbitration agreement and incorporate into the main contract. In the absence of such an express selection of law by the parties, the arbitration may end up in unexpected interpretations either by the tribunal or by the courts which may delay the whole process of arbitration and frustrate the parties.

Foot Note

[1]The Hague Principles on Choice of Law in International Commercial Contracts approved on 19th March 2015

[2]Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd., (2011) 6 SCC 179 : (2011) 3 SCC (Civ) 276 at page 185

[3]The law and Practice of Commercial Arbitration in England by Mustill and Boyd 2nd Edition

[4]Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (1998) 1 SCC 305 at page 314

[5]The Conflict of laws by Dicey and Morris, 12thEdn

[6]Eitzen Bulk A/S Vs AshapuraMinechem Ltd (2016) SCC online SC 523

[7]Channel Tunnel Group Ltd Vs Balfour Beatty Construction Ltd (1993) AC 334

[8]in Enercon (India) Ltd. v. EnerconGmbh, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59 : 2014 SCC OnLine SC 129 at page 66

[9]New York Convention on Recognition and Enforcement of Foreign awards 1958

[10]Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552 : (2012) 4 SCC (Civ) 810 : 2012 SCC OnLine SC 693at page 618

[11]Final award in ICC case No.1507, in S.Jarvin& Y Derains

[12]See A Ven Den Berg, The New York convention of 1958 282-83 (1981)

[13]Gary Born International Commercial Arbitration (Kluwer Law International 2nd Edition, 2014)at P 580.

[14]Shin-Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd., (2005) 7 SCC 234 at page 269

[15]Sulamericacia Nacional De Seguros SA Vs EnesaEngenharia S.A. (2012) EWCA Civ 638

[16]First Link Investments Corp Ltd V GT Payment Pte Ltd and others (2014) SGHCR 12

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Dispute Management In PPP Projects – A Case for Dispute Boards

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Synopsis

This Article examines the needs for best dispute management practices in Public – Private Partnership (PPP) projects in India. These projects have come to stay in India despite problems in some sectors. Dispute avoidance, prevention and quick resolution hold the key to attract foreign investment into these projects. India has huge investment targets in the 12th five year plan as well as beyond and 15 years of experience in PPP proved that this model of building public projects is viable proposition in the long run. Massive outlays are possible only when the projects are attracted by Foreign Direct Investment. To create confidence in the FDIs, it is necessary to ensure that their capital is safe and well protected subject to the commercial risk they undertake. In this context, if one can ensure dispute free ambience and necessary preventive and curative mechanisms for prevention and quick resolution of disputes, it will be an attractive element for foreign direct investors as well as it saves Indian Government from possible claims in the International Fora under Bilateral Investment Treaties. Best conflict management lies in use of Dispute Boards to handle issues in PPP projects primarily in contemporaneous period.

Growing importance of PPP in infrastructure building

India requires massive investments in infrastructure to create manufacturing base all over to absorb working hands in view of demographic projections that India will be by 2030 a country having largest working age population requiring 180 million new jobs. Traditionally, infrastructure is created by the Government itself or through its agencies formulating project, preparing plans and designs and entering contracts on lumpsum / item rate basis. The last two decades saw contracts on EPC basis, giving the responsibility for designs and engineering also to the Contractor. In Private Public Partnerships (PPP), the Contractor who is called 'Concessionaire' has to typically design, build, finance, operate and transfer the public facility so created to the Government. Because of the shortage of finance, PPP projects have come to be the most significant method of building infrastructure in the Country. Currently 1200 PPP projects are in various stages of implementation with a total investment of ₹ 7.2 Lakhs crores. 87% of these projects are in Road / Transport sector only. India stood highest in Asia Pacific Region for using PPP model for infrastructure building and creating a good eco-system. The country has also earned positive recognition for its efforts on PPP and for being largely successful despite certain hiccups and problems. Since, investments are to be tapped from private sources, PPP is only viable method to achieve growth in the infrastructure sourcing funds from abroad as well as within in the country.

Foreign Investment in PPP Projects

Normally an investor in PPP projects raises funds by way of equity and debt. Equity and debt can be, apart from indigenous sources, by way of Foreign Direct Investment (FDI) as well as External Commercial Borrowings (ECB) respectively Country policies encourage FDI but discourage external commercial borrowings. In order to attract FDI to infrastructure sector, the investor risk perception should be low. Any investor from a overseas country first looks at return on investment, its quick realization and faster exit options. They would also like to see their capital not stuck in disputes that out break during the project implementation. Therefore, it is imperative to ensure for an external investor that PPP projects are attractive and competitive in the Global market. What are the features one should incorporate in concession agreements to attract global investments in infrastructure is the question bothering the policy makers. As stated above, one should first and foremost ensure that project will not be bogged down in disputes that can be resolved easily.

Need for dispute free implementation of PPP projects

It requires to be noted that unless a dispute free environment is created, one cannot develop the fertile ground for foreign investment. A foreign investor who forms a Special Purpose Vehicle (SPV) to promote a PPP project, in the event of dispute, can proceed not only against the Concessioning Authority to recover the losses and in some circumstances can even proceed against the Government of India for recovery of losses suffered due to

factors attributable to the Government. All over the world, various Nations enter into investment agreements whereby one State assures the safety of investments made by the citizens of other Countries. In other words, it is assuring the citizens of other states that their investments in the host country will be protected and guaranteed by the Government. Under the Investment Treaties, the disputes relating to protection of the investments are arbitrable and fully covered by the Convention on the settlement of Investment Disputes between States and Nationals of other States and the forum for resolution of this disputes is ICSID. Investments made in PPP projects by an external funding agency is squarely covered under the above regime. Therefore, it is not Concessoning Authority alone but the concerned Government also would be responsible. In order to mitigate this situation, it is incumbent upon the Governments as well as Concessioning Authorities to create an envirnment of dispute free conditions. A dispute free or minimum dispute project can be ensured firstly by formulating a fair, balanced and equitable document wherein the mutual rights and obligations of the parties are embodied. India has developed Model Concession Agreement in an effort to minimize the disputes for Highway and Ports sectors. Any document however carefully it is framed at the beginning, it is unrealistic to think that one can eradicate disputes through intelligence and careful drafting alone. Therefore, not only Concession Agreements have to be free from any ambiguities arising from absence of clearest possible language but also should provide for dealing with unforeseen circumstances that may erupt in the long period of contract.

Investor claims against Government of India in recent times

In an Investor - State Arbitration initiated by an Australian company against Indian Government, India lost significant amount in having to pay on account of Arbitral Award which went against it. Australian entity has gone against India on the ground that arbitral award secured by it could not be enforced because of the extreme delay of more than nine years in the procedural rigmarole of Indian Courts in deciding challenges to Arbitral Award. One has to ensure that the same is not repeated in PPP projects otherwise the losses on account of this will be enormous. Similarly, in Antrix-Devas Multimedia case, though it is not a Concession Agreement but long term lease of transponders on satellite including spectrum owned by ISRO, there is strong possibility that India may have to cough up staggering amounts towards payment againt Arbitral Award. The agreement was cancelled and the matter landed up in the International Fora for arbitration. The Foreign Investors who held equity in Devas proceeded against Indian Government claiming amongst others that their investment was subject to appropriation because of the cancellation of the contract and these contentions of investors prevailed both in ICC arbitration and in arbitration before Permanent Court of Arbitration. In the Antrix-Devas Arbitration, awarded amount is more than Rs.6000 Crores though it has not been paid so far. Thus, it is amply clear that not only Concessioning Authority which might be a State or Central Government entity but Indian Government has to ensure that FDI's that takes equity in SPVs of Concession projects do not proceed against Indian Government and has to ring fence itself from possible ambush and this requires continuous watch from the side of Indian Government of PPP projects in the country.

State and Central Government pacts

In this regard Govt. of India is taking steps to ensure fair treatment to the investors from countries with whom it has entered into Bi-lateral Investment Treaties. Although for some major projects, Govt. of India Agencies are Concessioning Authorities but a great majority of projects are handled at State level where Concessioning Authorities are State Governments. If a particular State Government fails in assuring fair treatment to a foreign investor in the equity of an SPV handling the Concession, Union Government will be held responsible under BIT although a State Government which is autonomous under the constitution is responsible for frustrating the investments. To mitigate this, Central Government is mulling the idea of entering investment Pacts with the states so that a non-discriminatory treatment is assured to the foreign investors. In this regard, investor State Dispute Settlement Mechanisms are likely to be set up and power of Tribunals to Award monetary compensation against investors will be minimized. The manner in which it will take shape practically on the ground has to be seen.

Prevention of Disputes

One of the best ways to make a dispute free project execution is to prevent the disputes. Preventive action starts with having a contract drafted in the clearest possible language without leaving any scope for misinterpretation. Another aspect is there has to be a machinery to detect outbreak of disputes in the early stage and alerting the stake holders to address the same so that differences do not harden into a disputes thereby nipping in the bud. In Construction / Concession Contracts, a simmering dispute would be a great hindrance to the progress, infective and would fester more disputes. In some PPP agreements, although there are provisions for dispute resolution through amicable settlement and arbitration, there are not many instances of settlement achieved by the parties by operating the clause for amicable settle-

ment. In any case, amicable settlement or arbitration is activated by a party aggrieved by the actions of opposite party. This is a reactive process. But what is required is a proactive process which detect the disputes at an early stage and triggers the mechanism to resolve the same.

Dispute Resolution in Highway PPP Projects

Existing PPP projects in road sector have typically a clause in the contract for mediation by Independent Consultant at the first level and thereafter, Chairman of Concessioning Authority and Concessionaire to explore amicable settlement before it goes to arbitration. There are hardly any instances where mediation by Independent Engineer was accepted by all the parties. One party being a Government agency and the decision makers would often find it extremely difficult to determine the issues on commercial considerations since they apprehend that for no fault of theirs, they will have to face probing questions from Vigilance agencies. Next level of resolution where Chairman of Concessioning Authority is to be involved also fails more or less for similar reasons and on account of no decision taken at the level below. There are some committees which were set up to go into disputes in Item Rate / EPC contracts and by and large it yielded some positive results. Disputes under 84 packages in National Highway Authority of India (NHAI) were settled at an amount of approximately 10% of the claim value. However, there is no such mechanism with same success rate in PPP projects.

Dispute Boards (DB)

To preven disputes at early stage and to address the crystallized disputes, multi disciplinary Dispute Boards can be considered. Disputes Boards have real time value since they are established at the commencement of the project and regular visits to the project site keeps them actively involved throughout the construction process and also concession period. It is the regular forum for discussion of difficult and acrimonious matters and a platform to identify corrective mechanisms in informal manner creating valuable opportunities for the parties to avoid disputes by keeping communications alive. Another advantage with Dispute Board process is, it is an inquisitorial process unlike an arbitration which is invariably an adversarial procedure in a quasi judicial set up. Because of the pro-active approach of DB members, the causes of disputes are traced at the early stage itself and even during the enquiry this approach would lead to immediate resolution of the disputes. The documentation created in this process can be presented as an evidence in case the matter goes to arbitration and it will have significant influence on the decisions in the arbitration and no party would easily venture to move the matter to arbitration.

Functioning of DB in other Countries

Dispute Boards, from the experience all over the World, have been found to be most effective in preventing and resolving the disputes at the early stage and to ensure that dispute did not hinder the progress of the projects. Although, concept of DRB germinated in 1970s in United States (US) especially in civil engineering projects, it later expanded to many countries in the world as well as to the long term contracts of financial services, engineering projects and trade. In fact, World Bank was pioneer in popularizing this concept all over the world by prescribing Dispute Review Expert / Dispute Review Board to be in standard form contracts as a first level decision making authority on disputes. The first reference of any dispute is to be DRE/ DRB as standing body that exists right from the beginning with the consent of parties. After World Bank, FIDIC also adopted this approach by revising its standard form of contracts. Thereafter, International Chamber of Commerce formulated ICC Dispute Board Rules not limited to construction industry alone but to other forms of contracts as well.

Indian experience with DB's

There is considerable amount of literature which lead to the conclusion that DRB's in India are not as effective as in USA and other countries. In India there are certain misgivings about the functioning of DRBs in that DRB recommendations are not immediately implemented or accepted by the effected party. In India, although, the decisions are quiet often not accepted anecdotal evidence shows that about 90% of the DRB decisions which are the factual findings were not disturbed by Arbitrators or Higher Courts. This shows that contemporary assessment of the claims and its adjudication will find favour with next forums of resolution and this itself signifies the success of DRBs to a great extent. In Indian Road Sector, DRBs recommendations are rarely accepted because the claims are always from the Contractor against the Employer. So in accepting the DRB recommendation there is no give and take since the Counter Claims from the side of Employer in road projects are very few. In other countries claims and counter claims are brought before DRBs and DRB recommendations in favour of both the parties depending upon the merits of their claims will create a situation of give and take. In India, Employer also should use the DRB forum more effectively so that their claims against Contractor are also settled.

Kelkar Committee Report

Although, use of DRB was mooted in PPP sectors, the

same has not found place either in Kelkar committee report or Model Concession Agreements drafted by the Government of India for Road sector. Kelkar Committee report released in November 2015 addressed the issue of stalled PPP projects and those hit by what they called 'Actionable Stress'. Actionable stress is conceptualized as Circumstances that pose imminent threat to the economic foundation of any PPP project. There is a mechanism proposed to deal with Actionable Stress if any,noticed after 18 months of completion of construction of the project. An Infrastructure PPP Project Review Committee (IPRC) and PPP Adjudication Tribunal (IPAT) was proposed and IPRC is to be constituted by inducting experts from various disciplines such as finance, economics, technical and legal. IPAT would consist of technical, financial and judicial members. This will trigger only upon Actionable Stress circumstances occur in the project. In other words, this mechanism is proposed to takeover once a PPP project reaches near bankruptcy level.

Need for Dispute Boards in PPP Projects

There is no good reason why DB's cannot be set up in PPP projects to achieve the same degree of accomplishment as in USA and other countries. International Chamber of Commerce has become an active supporter of Dispute Boards since 2015 and its use has been extended to many important projects. It is more particularly useful in long term concession projects in infrastructure. Dispute Boards would keep the direct cost of resolution of disputes to low level not exceeding 0.15% in many cases. The larger the project size the smaller would be the proportionate cost of DB. A constitution of Dispute Board and naming the DB in the tender documents itself can lead to lower bid prices since the Contractors need not inflate their prices for possible risk of injustice and delay without Dispute Board. Even the Foreign Direct Investors at the tendering stage are more likely to be attracted because they would know that the presence of DB would minimize the risk of disputes and safe guard the investment.

Types and Composition of Dispute Boards

There are three forms of Boards, (i) Dispute Adjudication Board (ii) Dispute Review Board (iii) Combined Dispute Boards. Typically, a DB will consist of members and each of them jointly appointed by the parties. That is a standing board functional right from commencement of the project. DB thoroughly reviews the contracts and progress reports through regular meetings and site visits. The role of Concessionaire is not a pure construction contractor but it combines in itself the functions of designer, fundraiser, investor, procurer of good and services and operator of the facility. This requires DB members to have multi-disciplinary skills and ideally it can have either three members or five members with talent drawn from experts.

In the Channel Tunnel Project in UK, DB had 5 members and quorum was 3 in practice all five members heard all disputes. In a very large project where multi-disciplines and multi contracts are involved, one can create a panel of DB members from various disciplines having specified back grounds and as and when the dispute comes up the Members of the board can be drawn from the panel. In some projects, two panels are constituted one is purely technical and another finance and legal. Several studies indicate that the training of potential DB members in their domain knowledge as well as with special aptitude for problem solving and endowed with mediation and conciliation skills have to be properly identified for filling the DBs This can be improved as a large body of knowledge and experience accumulates over a period.

Conclusion

In view of the above discussions, it is time to have best practices in place to handle differences and resolve disputes at the early stage. It is imperative if one has to attract Foreign Direct Investments into PPP projects. With global experience of Dispute Boards in PPP projects, new direction and policy can be formulated suitably modified to suit Indian conditions. Sometimes mere presence of DB itself is an attractive element for investors both overseas as well as in India. However, lot of thinking has to go into how to structure the Dispute Boards depending upon nature of project and to develop guidelines incorporating best practices elsewhere. Although, several committee have been constituted including Kelkar Committee, these have addressed the issues at the macro level and to revive the stalled projects in PPP sector but contemporary mechanism to avoid and resolve disputes has not been addressed at National level in a scientific way. This deserves immediate attention to create among global investors interest at tendering stage itself instead of after the facility is created and at Operation and Maintenance stage.

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Making India a Desirable Destination for International Arbitration

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This paper seeks to examine three aspects:

a) Why is it necessary for India to make itself an attractive destination for International Arbitration?
b) How far have we travelled in this direction?
c) What needs to be done further?

Let us look at each of these aspects in greater detail.

I.Why is it necessary for India to make itself an attractive destination for International Arbitration?

a) There is a present and urgent need to decongest Indian courts so that the problem of huge pendency in courts could be addressed effectively. We have more than three crore cases pending in various courts. Of these, at least one-third are civil cases, of that a substantial number are commercial disputes. No society, however financially strong, can hope to maintain a sustained growth trajectory unless supported by a system that fosters institutionalised rule of law. If this is so for developed societies and countries the need for an effective justice dispensing system can hardly be overstated for a country like India.

b) At a global level, India loses out to other countries in its ease of doing business ranking partly because its legal systems are not responsive to the needs of quick and effective adjudication.

c) The ease of doing business index is meant to measure regulations directly affecting businesses. A nation's ranking on the index is based on the average of 10 sub-indices which are set out below:-

i) Starting a business – Procedure, time, cost and minimum capital to open a new business.

ii) Dealing with construction permits – Procedures, time and cost to build a warehouse / factory.

iii) Getting electricity – Procedures, time and cost required for a business to obtain a permanent electricity connection for a newly constructed warehouse / factory.

iv) Registering property – Procedures, time and cost to register commercial real estate.

v) Getting credit – Strength of legal rights index, depth of credit information index.

vi) Protecting investors – Indices on the extent of disclosure, extent of director liability and ease of shareholder suits.

vii) Paying taxes – Number of taxes paid, hours per year spent preparing tax returns and total tax payable as gross profit.

viii) Trading across borders – Number of documents, cost and time necessary to export and import.

ix) Enforcing contracts – Procedures, time and cost to enforce a debt contract.

x) Resolving insolvency – The time, cost and recovery rate (%) under bankruptcy proceeding.

d) Of the above ten sub-indices, "enforcing contracts" is directly dependant on a country's ability to provide an effective dispute resolution system.

e) Former Chief Justice of the U.S Supreme Court, Warren Burger, once suggested that it is the legal system's responsibility to seek the most agreeable solution for both parties. "The obligation of the legal profession is to serve as HEALERS of human conflicts. To fulfil this traditional obligation of our profession means that we should provide the mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants. That is what a system of justice is all about."

f) The United States, at that point of time, was also feeling the heat of backlogs and court arrears. However, in 1984, the US Supreme Court instituted an Alternative Dispute Resolution (ADR) Program which provided for multi-door access to the resolution of conflicts. Under the amended Civil Rule 16 every civil case is now subject to compulsory ADR.

g) These measures also resulted in a huge number of cases being shifted to ADR systems in the U.S. Today the American Arbitration Association (AAA) through its nearly thirty five centres handles almost three mil-

lion cases a year. This is the model we hope to replicate with appropriate modifications to suit our conditions. Indeed, in the U.S. and the U.K., the number of cases decided through arbitration are far in excess than those decided by courts.

h) In India as well, the legal provisions to make Alternate Dispute Resolution more effective are already in place after of the recent amendments to the Arbitration and Conciliation Act, 1996.

i) India is yet to be seen as a preferred destination for International Arbitrations. The following is the caution sounded in the note put up in the International Bar Association's website about arbitration in India:

"Arbitrations are very common in commercial contracts in India (especially in cross border agreements). Indeed arbitration clauses are not only advisable, they are perhaps necessary. This is because the ordinary civil courts, which would entertain a suit for damages or breach of contract, are so badly clogged with a backlog that it can become pointless to pursue these remedies. Added to that are ad valorem court fees payable up front in civil suits. In most cases, such court fees do not have any cap.

The principal disadvantages of an arbitration in India are: the lack of a pool of trained arbitrators; the tendency to conduct arbitrations like court proceedings in terms of rules and procedures; the absence of strong domestic arbitration institutions; and local arbitrators and the bar not in sync with the best practices of international commercial arbitration."

j) Further, the following observations in the IBA's website reveals how Indian Institutional Arbitration regimes are next to non-existent in the international legal community's perceptions:

"Most arbitrations are ad hoc. UNCITRAL Rules are sometimes used in ad hoc international arbitration.

Amongst the domestic arbitration institutions, the Indian Council of Arbitration (ICA) (headquartered in New Delhi) is frequently used. LCIA India is a new option for international arbitrations seated in India. The International Chamber of Commerce (ICC) is popular in off shore arbitrations. Of late, the Singapore International Arbitration Centre (SIAC) has gained enormous popularity, chiefly for reasons of costs and convenience. The American Arbitration Association (AAA), however, is rarely used."

k) All this is not good for the growth of the country's economy. As a recent report by ASSOCHAM observes:

"Sums ranging in the billions of dollars are leaving India every year in arbitration costs headed overseas, with Singapore the most popular site for arbitration cases filed by Indians.

Scores of projects worth more than 4 trillion rupees ($64 billion) are under litigation in different courts and tribunals, the report said.

Delay in the timely disposal of high-value cases is leading to a drop in GDP," said D.S. Rawat, secretary general of ASSOCHAM. "If it could be tackled, it would expand economic activity and provide more avenues for jobs."

l) The Law Commission of India has also observed in its 253rd Report relating to "Commercial Divisions and Commercial Appellate Divisions of High Courts and Commercial Courts Bill 2015" as follows:

A. The Need for Commercial Courts in India

The concept of commercial court – a dedicated forum aimed at resolving complex commercial disputes between parties – is an idea that has merit in its own right. This can be seen from the fact that around the world, many nations have adopted commercial courts as a means to ensure speedy delivery of justice in commercial cases. A more elaborate discussion covering many countries that have set up commercial courts can be found in the 188th Report of the Commission and the same is not being repeated here for the sake of brevity. However, it would be worthwhile to briefly restate the justifications for a commercial court in India.

(i) Economic growth

a. The importance of a stable, efficient and certain dispute resolution mechanism to the growth and development of trade and commerce is well established. Quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered are absolutely critical to encourage investment and economic activity, which necessarily involves the taking of financial and enforcement risks. A stable, certain and efficient dispute resolution mechanism is therefore essential to the economic development of any nation.

b. Where the legal institutions such as the Judiciary are not effective, an improvement in substantive law may make very little difference. Studying the transition countries of Eastern and South-Eastern Europe and the former Soviet Union, it was found that despite the substantial changes in the corporate and bankruptcy laws during the period from 1992 to 1998, there was remarkable improvement in financial markets only in those countries where the legal institutions became more effective.

c. Finally, slow or over-burdened judicial systems hamper growth by fostering an inefficient use of (time and monetary) resources and technology; increasing transaction costs such as enforcement costs or delays; and moving countries away from their best possible output. When contract and property rights are not properly enforced, firms may decide not to pursue certain activities, foregoing the opportunity to specialise and exploit economies of scale; and not allocating their production among clients and markets in the most efficient fashion, thus keep resources unemployed.

(ii) Improving the international image of the Indian justice delivery system

As the 188th Report of the Law Commission has pointed out, there is an impression among foreign investors and companies that India is a difficult place to do business, inter alia, for reasons of the slowness and inefficiency of the judicial system. This is also reflected in the World Bank's annual "Doing Business" report, which measures business regulations. This report, inter alia, looks at the ease or difficulty of enforcing contracts in a given nation. Among 189 nations surveyed in the 2014 report, India was ranked 186th in the category of "Enforcing Contracts", unchanged from its 2013 position. According to the data collected by the Bank, contract enforcement takes 1,420 days (i.e. nearly four years) and costs of enforcement aggregate to nearly 40% of the value of the claim. Since the World Bank first started the series of reports in 2004, these numbers have not changed, either in terms of number of days it takes to enforce the contract or the costs involved. The Report also finds that there has been no major reform in India in the last six years in contract enforcement."

m) A recent study by Ernst and Young revealed the following interesting facts:

- Arbitration clause: 74% of the survey respondents highlighted that the arbitration clause is an essential part of their legal contract.
- Type of arbitration: The survey highlighted the mixed usage of the arbitration mechanism. Out of the total respondents, 24% of the respondents have undertaken Indian ad hoc arbitration, whereas 20% of the respondents have undertaken international commercial arbitration. 27% of the respondents have undertaken both Indian ad hoc arbitration and international commercial arbitration.
- Arbitration institutes: During the selection of institutes outside India, 60% of the respondents preferred the Singapore International Arbitration Centre (SIAC), and while selecting institutes within India, 34% of the respondents preferred the London Court of International Arbitration (LCIA), India.
- Indian regulations: The survey highlighted the importance given by the Government of India to the improvement of the arbitration mechanism. More than 50% of the respondents said that the Ministry's recent steps to develop dispute resolution mechanism are in the right direction.
- Enforcement of the arbitral award: 78% of the respondents revealed that they were satisfied with the arbitral award.
- Cost and time disadvantage: Around 50% of the respondents said that arbitration in India is expensive and does not provide timely resolutions, which highlights the need for radical changes in procedural aspects.
- Arbitrator selection: 68% respondents believed that subject matter experts should be appointed as arbitrators, as against 22% who believed that retired judges should play this role.
- Role of experts: The survey highlighted the growing importance of experts such as forensic accountants in the arbitration process as more than 50% of the respondents said that they have used expert services and they believe that experts advice make difference in their arbitration process.

n) The concluding note to this report observes:

"Key factors such as entry of global Institutions & law firms, strengthening of regulatory environment and building up of expertise in technical aspects would be essential for the future of arbitration. In spite of several challenges, consolidated efforts by all stakeholders in this direction can result in a robust arbitration mechanism in India that will attract faith of global companies as well."

---- Arpinder Singh, Partner & National Director - FIDS, EY India

o) It is noteworthy that in the World Bank report for 2015, India ranks 186 out of 189 countries for its enforcement of contracts. The capacity to enforce contracts is one of the key metrics in computing the ease of doing business ranking that the World Bank comes out with each year. For the year 2015, in the ease of doing business ranking brought out by the World Bank, India occupies the 142nd rank. This is deplorable by any standards. This situation has resulted largely on account of the fact, that firstly we do not have effective Alternate Dispute Resolution (ADR) systems. Secondly till recently we have not had the concept of "Commercial Courts". Thankfully the framework to address these deficiencies have been put in place by passing the amendments to the Arbitration

and Conciliation Act 1996 and The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015. However as stated earlier, these legislations provides just the framework. We need to work on building institutions that would keep the framework in place. If we do so we can hope to convert India into a desirable destination for international Arbitration.

How far have we travelled in making India a hub for international Commercial Arbitration ?

a) Before the amendments to the Indian Arbitration and Conciliation Act, 1996 ("the Act"), India's aspiration to become a major hub for international arbitration and an effective destination for domestic arbitrations was constrained by a largely ineffective Act and arbitration regime.

b) In order to address these issues, the Indian Government promulgated the Arbitration and Conciliation (Amendment) Bill 2015 which was passed by the Lok Sabha on 17 December 2015 and the Rajya Sabha on 23 December 2015 to make arbitration a preferred mode for settlement of commercial disputes by making arbitration more user-friendly and cost effective, hoping that that would lead to the more expeditious disposal of cases. This, in turn, was intended to improve the 'ease of doing business' in India.

c) Some of the major changes brought about by the amendments, which will promote the use of arbitration in India, as well as promote India as a venue for international arbitrations are as follows:

i) Arbitrator's Neutrality

Earlier neutrality of the arbitrator was one of the major problems of Indian arbitration. A substantial number of the public sector arbitrations had this anomaly. The arbitrator named in the arbitration clause would be their own officer or a person appointed by them. The rival party was bound by such clauses on account of rulings of various courts including the Supreme Court. On account of the recent amendments the neutrality of Indian arbitrators has been made to be at par with international arbitrations. Similar to the IBA (International Bar Association) Guidelines on Conflicts of Interest in International Arbitration, Schedule-V relating to the grounds for justifiable doubts relating to the independence and impartiality of arbitrators and Schedule-VII relating to categories of ineligibility for appointment as arbitrator has been inserted under Section 12.

ii) Fees charged by arbitrators

One of the main reasons for delay in completing arbitration proceedings was on account of the "per-sitting" fee charged by the arbitrator in ad-hoc arbitrations. The situation had become so impossible that even the Supreme Court of India had to observe that there is no doubt that the cost of arbitration becomes very high in many cases where retired Judges are Arbitrators. Courts have also expressed their opinion that it was necessary to find an urgent solution for this problem to save arbitration from the arbitration costs. Courts have also observed that Institutional arbitration has provided a solution. This is because in Institutional arbitration, Arbitrators' fees is not fixed by the Arbitrators themselves, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. The present amendments have also helped to settle this issue by inserting Schedule-IV, under Section 11(14) prescribing a model fee and making a scheme for the High Court to frame rules accordingly. This provision is not made applicable to international arbitrations and also for institutional arbitrations, thereby giving importance to institutional arbitrations, party autonomy and quality of arbitrators.

iii) Time limit for completion of arbitration

Likewise in respect of fixation of time limit, a provision is made under Sec. 12(1) (b), where the arbitrator at the time of appointment itself has to give in writing a declaration that he is able to devote sufficient time for arbitration and that he will be able to complete the arbitration within 12 months. An amendment has also been made in Section 24 making it mandatory to hold arbitration hearing on a day-to-day basis and not to grant adjournments without valid reasons. Important amendments have also been made by inserting a new Section 29A, where the award has to be made within a period of 12 months from the date of reference. An incentive has also been provided that if the arbitrator could finish the proceedings within 6 months, he becomes entitled to receive additional fees.

iv) Amendments that have improved the climate for International arbitration

There were complaints that the 1996 Act was meant just for domestic arbitrations and did not have effective provisions to support international arbitrations, especially procedural aspects covered under Part I of the Act. Through the recent amendments procedural backups are provided for international arbitrations. Provisions of Sections 9, 27, 37(1)(a) and 37(3) – i.e., provisions relating to interim measures by courts, court assistance in taking evidence and appeals against orders under section 9 – are made applicable to international arbitrations, even if the place of arbitration is outside India and enforceable under Part II of the Act. Another important change that has been brought about in the case of international arbitration is that all applications to "court" has to be made to the High

Court having jurisdiction rather than the principal civil court in the district.

v) Challenge & Execution of Awards

A major change that has been introduced in Section 34 regarding challenge of awards is that a prior notice to the other party that the award is going to be challenged has been made mandatory and the party challenging the award has to file an affidavit endorsing compliance of the above requirement.

vi) The problem posed by the concept of Public Policy

The ambiguity created by some of the decisions of the Supreme Court with respect to "public policy" as a ground for challenge has been clarified and restricted to fraud, corruption, contravention of fundamental policy of Indian law and conflict with the most basic notions of morality and justice.

vii) Automatic stay of arbitration awards repealed

An important change that has been brought out by this amendment is in Section 36. This provision relates to execution of awards. The original position that provided for automatic stay of execution during the pendency of Section 34 (Setting Aside proceedings) is taken away and after the period of time for challenging the award has expired, the award becomes immediately executable, unless the court grants an order of stay of the operation of the arbitral award. This will promote the use of arbitration in commercial disputes.

viii) Arbitral Tribunal and interim orders

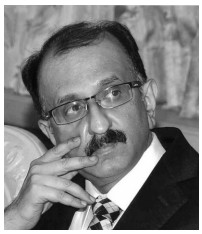
The amendments have also given more powers to the Arbitral Tribunal to pass interim orders. After the amendments the power of the court to give interim orders of protection under Section 9 has been limited up to the stage of constitution of the tribunal. Once the arbitral tribunal is constituted the tribunal gets powers under Section 17 to pass interim orders and the said orders will be deemed to be orders of the court and shall be enforceable under the Civil Procedure Code in the same manner as a court order.

- These amendments have definitely created a very conducive atmosphere for arbitration in India- both domestic and International. We can however hope to reap the benefits only if we provide the corresponding Institutional support.
- Needless to add, the establishment of such Institutions would give a huge impetus to trade and commerce and to ease of doing business in India. Another collateral benefit will be creation of job opportunities for the youngsters. The promise of effective and quick dispute redressal systems if offered and realised would definitely give India a leading edge over other competing countries in the Asian region.
- To address these shortcomings and to strengthen the arbitration regime in India drastic steps have to be taken.

III. What needs to be done further ?

- Government must establish a National Institute to promote arbitration in India. In this regard the Nani Palkhivala Arbitration centre has already submitted a proposal for the Government to establish a National Institute for Promotion of Arbitration and this is already being considered by the Government in right earnest.
- Government must then through this institution identify/ help establish Model ADR Institutions in various cities across the country..
- Each of these centres will act as a catalyst in the areas of dispute resolution and will thereby achieve inter-alia the overall objective of ease of doing business in India.
- Government should ensure that all arbitration clause in contracts entered into by PSUs and Government undertakings must include NIPA affiliated centres as their institutional arbitration centres in respect of disputes under these contracts.
- The amendments to Sec.29 A of the Act has caused a lot of consternation in the International arbitration community since it is felt that the timelines set therein are unrealistic and complicated arbitrations cannot be completed within such a short time. The section has to be amended to provide that it will apply only when there is no agreement between parties relating to the timelines for completion of arbitrations.
- The National Institute for Promotion of Arbitration must hold frequent interactions with the National Judicial Academy and the State Judicial Academies to constantly update them on the advances in arbitration laws not only in India but all over the world.

If these suggestions are implemented there is good reason to hope that India will become a desirable destination for International commercial Arbitrations.



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Last year he was nominated as member of an expert committee appointed to prepare the 246th report of the Law Commission of India to suggest amendments to the Arbitration and Conciliation Act 1996.

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International Arbitration

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An Overview

International arbitration is a method for resolving disputes arising from international commercial agreements and other International relationships. It is a creature of agreement between the parties. The Parties from different countries submit their disputes to a binding resolution by one or more arbitrators selected by or on behalf of the parties. Neutrality, Confidentiality, Specialist Decision, Finality and Enforceability are the preferred reasons for choosing this method of dispute resolution.

This method offers the parties relief from agitating their causes in their respective jurisdictions. Normally, in the case of disputes, the respective parties may approach their local jurisdictions, which would prolong the process and often the other party may consider the jurisdiction not neutral. This method can offer a shield from sensitive information and trade secrets from reaching the public and other interested parties. An expert or technical person can be chosen as arbitrator to resolve the dispute, when the domestic courts may be ill equipped. The awards assume finality, for there are no appeals provided and the parties are constrained by to limited grounds for challenge. International arbitral awards are enforceable in the countries which are signatories to the commonly known "New York Convention".

Arbitration – Indian Arena

The Indian Economy is growing fast. It is expected that it would expand to 7.5% in 2015-16 and at a slightly faster 7.8% in 2016-17. India is likely to comfortably maintain a faster growth rate than China over the next few years. When the economy announces such optimistic note, there is always a concern; the legal service industry could not take advantage of the situation. On the other hand, support of a professional dispute resolution mechanism is indisputably important criterion for its growth. It may not require too much statistics to conclude that the legal service industry in general and alternative dispute resolution techniques in particular are not performing as they should have been.

Detailed Observation

Foreseeing India as an international arbitrational hub is a dream of many. Let it be the industry, profession or the government. Translation of this dream into a reality requires many hurdles to cross. This paper explores the challenges India faces in developing into an Intentional Arbitration Hub.

Arbitration in India pre 1996

In the year 1940, the British India enacted Arbitration Act 1940, following the footsteps of the English Arbitration Act. The existing Indian Arbitration Act, 1899 and the second schedule of the Code of Civil procedure 1908 were repealed. The Supreme Court and the High Court interpreted every other provisions of the Act. The awards passed under the statute were contested till the Apex Court, almost in all cases. The net result being that the adjudication appeared to be a better option than the alternate dispute resolution.

Arbitration and Conciliation Act 1996 and thereafter

The UN Commission of international Trade Law has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985. The General Assembly of the United Nations recommended to all countries to adopt the Model law in legislating Arbitration Law, in order to bring about uniformity in the arbitral procedures and to promote international commercial arbitration practice. In response to the UN recommendation, the Government of India passed the Arbitration and Conciliation Act 1996, repealing the 1940 Act. The Act is now 20 years old. Now the most Important Question is- Did it achieve the desired goals, projected for the enhancement?

In 2001, the Law Commission of India made the 176th report the Arbitration and Conciliation (Amendment) Bill 2001. The Law Commission had to suggest various amendments to the 1996 Act, because it is found that there are several short comings to the Act. After considering the recommendations of the 176th Report, the Government decided to accept almost all recommendations and accordingly, introduced the 'Arbitration and Conciliation (Amendment) Bill, 2003 in the Rajya Sabha. Subsequently, in the wake of the report of the Justice Saraf Committee the Bill was referred to the Department Related Standing Committee on Personnel, Public Grievances, Law and Justice. The standing committee found that the law insufficient and contentious and finally the Bill was withdrawn.

In 2010, the Ministry of Law and Justice issued a con-

sultation paper, inviting suggestions from eminent lawyers, judges, industry members, institutions and various other stakeholders. After receiving various responses to the Paper, the Ministry held several national conferences and prepared a Draft Note for the Cabinet. The Ministry thereafter asked the Law Commission to study the amendment proposed to the Act in the Draft Note for the Cabinet. The Law Commission in its 246th report in Chapter III included the proposed amendments.

Approach

The Law Commission of India, found that the amendments suggested to the Arbitration and Conciliation Act ,1996, would be incomplete without having a relook at the term 'public policy' in Section 34 of the Act especially in the light of the interpretations given by the Apex Court in ONGC Ltd Vs. Western Geco International Ltd; and Associate Builders vs. Delhi Development Authority. Hence, the Law Commission produced a supplementary to its Report No. 246, with the title "Public Policy" - Developments post Report No. 246. The report is dated 6th February 2015. The Government without much delay after the reports of the Law commission passed Act 3 of 2016 on 1st January 2016. Whether the 2016, amendment will be sufficient to meet the challenges is a matter which time alone can prove. As things stand, it can only be said that the Indian experience after 20 years, Arbitration is still in its infancy. The immediate implications are that otherwise domestic arbitrations, are taken out of the country to international locations like the London, Hong Kong etc.

International Arena

The England Arbitration

The Law Commission in the Supplementary report the legal services sector in United Kingdom contributed 20.9 billion GBP to the economy in 2011, a majority on which would have come from arbitration given that London is the leading preferred centre for arbitration. The commission has converted the currency to say that the amount would be 2.9 lakh crores in a year. Singapore and Hong Kong may have similar stories to tell.

The English Act, itself declares its principles and ideology for construction of the statute. They are (a) impartiality, (b) party autonomy and (c) restriction in the interference of the court. Another striking area is the duties of the arbitral tribunal and also the duties of the arbitrators. Interestingly, the statute clearly spelt out the consequences for the failure by the tribunal to comply with the general duties in Section 68(2)(a), namely it will be serious irregularly, which is sufficient to challenge the award. A thorough scrutiny of the Act would clearly indicate that it was worth a decision to take to reject to the proposal in the UN Model law. The English Act has proved to be a success story, ever since its inception. The 20 years of experience that it gained has largely assisted it to become a major international arbitration hub.

Hong Kong Arbitration

Pro-arbitration approach of the Courts

Hong Kong is recognized as one of the international arbitration hubs for several reasons. The courts generally take a pro-arbitration ruling where parties have agreed to settle their disputes through arbitration, courts will stay the court proceedings in favour of arbitration and will respect the wide discretion of arbitrators and the flexibility of the arbitral process. This is reaffirmed in the case of Ever Judger Holding Co Ltd v Kroman CelikSanayii Anonim Sirketi [2015], where the parties entered into a charter contract with an arbitration clause governed by the English law and any dispute shall be referred to arbitration in Hong Kong. A ship owned by Ever Judger Holding delivered a cargo to Turkey which was found damaged. Kroman, the buyer, obtained an arrest of the ship by the Turkish courts. Ever Judger Holding then obtained an ex parte "anti-suit injunction" in Hong Kong on the ground that the arbitration agreement provided a dispute resolution procedure in Hong Kong. Kroman's challenge against the application of "anti-suit injunction" was dismissed by the Hong Kong Court of First Instance for reasons that it was necessary for the parties to comply with the arbitration clause. In the past five years, Hong Kong courts did not refuse to enforce a majority of arbitral awards.

Strong legal profession

Having strong and highly qualified legal professionals and a diverse pool of international arbitrators also reminisce Hong Kong as an international arbitration Hub. In 2015, there were over 1,200 barristers including 93 Senior Counsel, over 800 Hong Kong law firms and 70 foreign law firms with over 8,600 local practicing solicitors and about 1,300 registered foreign lawyers. Many legal-techno arbitrators are specialized in different areas of disputes such as construction, commercial, maritime, intellectual properties and domain names disputes. Other than lawyers, many professionals in other disciplines such as accountants, bankers, engineers, architects and surveyors, also serve as arbitrators or take on other roles such as counsel for parties or expert witnesses in arbitration proceedings. Arbitrators on the Hong Kong International Arbitration Centre's Panel and List of arbitrators are of diverse nationalities and professional background.

User-friendly arbitration legislation

The Hong Kong Arbitration Ordnance (Cap. 609) was

drafted based on the UNCITRAL Model Law on International Commercial Arbitration, which is well understood by the international arbitration community. It reinforces the advantages of arbitration, including respect for parties' autonomy as well as savings in time and costs for parties. The ordinance was updated from time to time to reflect the most recent developments in the international arbitration scene. Hong Kong is the first Asian jurisdiction to adopt the latest version of the UNCITRAL Model Law which creates an user-friendly and unitary system that applies to both international and domestic arbitrations.

Arbitral awards made in Hong Kong are enforceable in over 140 countries who are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Subject to the leave of the Court, Section 61(1) of the Hong Kong Arbitration Ordnance (Cap. 609) expressly provides that "An order or direction made, whether in or outside Hong Kong, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect." This order and direction include interim measures and it states that a decision of the Court to grant or refuse to grant leave under Section 61(1) is not subject to appeal.

World-class arbitration institutions

The Hong Kong International Arbitration Centre provides effective and efficient administrative support and is a well-known arbitration centre housed in excellent facilities. Arbitration rules and procedures are kept up to date including the 2015 HKIAC procedures for the administration of Arbitration under the UNCITRAL Arbitration Rules, the 2013 Administered Arbitration Rules and the 2014 HKIAC Domestic Arbitration Rules.

The growth of India as an International Arbitration Hub is not only beneficial for the industry or the economy, but also for the nation as well. The English and Hong Kong experience discussed above would suggest that India needs to move swiftly with firm steps for achieving the desired goal; for which a few suggestions are made.

Conclusion

Developing India as an International Arbitration Hub

- Professional bodies in Arbitration should be recognized by statute.
- The membership in such professional bodies should be a pre-requisite for arbitrators engaged in international arbitration.
- Arbitration professionals should be trained and certified, by such professional bodies. Professionals specialized in other disciplines should be provided with arbitration training to elevate them to International standards.
- The Chief Justice of the Supreme Court while exercising the power to appoint international arbitrators may consider such trained professional arbitrators for appointment.
- The huge pendency in the Indian Courts should not be a hurdle when it comes to international arbitration. Suitable Amendments in the Arbitration and Conciliation Act 1996 should be made so that applications under the Act do not turn out to be another ordinary litigation. It is advisable that proceedings during the conduct of international arbitration are fast tracked. This should apply to appeals from the original proceedings as well.
- The huge reliance placed on retired judges as arbitrators should be discouraged, if they are not professionally trained as arbitrators.
- Corruption and misconduct of the professional arbitrators should be checked by such professional bodies.
- Necessary constitutional amendments need to be made to limit the interferences by the courts including constitutional courts in arbitration related proceedings.
- Necessary provisions should be incorporated in the Arbitration law, specifying the rules of construction, as in done in the English Arbitration Act, to give guidance to Courts.
- Encourage the entry of Foreign Lawyers and Law Firms.

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Developing India as a Hub of International Arbitration: A Misplaced Dream?

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In the past few years, several ministers and Government representatives have expressed the desire to make India a hub of international arbitration and to improve India's position in the Ease of Doing Business rankings published by the World Bank.[1] The recent amendments to the Arbitration and Conciliation Act, 1996 have been regarded as a step towards these goals. Better rankings in the Ease of Doing Business Report and the choice of India as the seat of international arbitrations are signals of a robust legal system. However, these alone are not pointers to an efficient and an effective dispute resolution mechanism.

The paper argues that the recent amendments to the 1996 Act are only the first steps towards a better legal system and suggests certain areas of reforms for a legal system which is efficient, effective, and most importantly, inexpensive. The reforms suggested include qualitative improvement in Indian arbitral institutions, elimination of corruption in the legal system, improvement in the quality of arbitrators, implementation of the Commercial Courts Act across India, overhauling contract law, reduction of arbitration and litigation costs to the parties, and creation of a pool of specialized arbitrators.

The paper proceeds as follows: Part II of the paper discusses the question as to what it means to a hub of international arbitration and lists out the reasons why India has a potential to become a centre for international arbitration. Part III delves into two theses. The first thesis is that in aspiring to become a centre of international arbitration, we should take care not to import the current shortcomings of the system. The second thesis is that although it is good to have such aspirations, the road to an efficient commercial dispute resolution system is a long march ahead. Part IV concludes.

What does it mean to be a hub of international arbitration?

What are the features of a prominent arbitration destination? To ask the question differently, what are the factors which make parties choose one seat of arbitration over another? A list of such factors is given below[2]:

- Party to the New York Convention: The New York Convention is the most comprehensive international treaty on arbitration till date laying down minimum standards for recognition and enforcement of international arbitration agreements and arbitral awards. Unless a country is a party to the New York Convention or has a better system than that of the Convention in place, it becomes immensely difficult for the parties to enforce arbitral awards in their favour. Therefore, it is essential an arbitral seat adheres to the New York Convention.
- Corrupt - Free Legal System: Absence of corruption is one of the most important hallmarks of a developed legal system. Among other things, it conveys the inability of a party to procure a favourable verdict through extraneous means. Prominent arbitration jurisdictions stand better placed in the indices showing least corruption.[3] Empirical evidence also indicates that neutrality and impartiality of the seat's legal system is a significant reason why parties choose a particular seat.[4]
- Quick and Efficient Settlement of Disputes: Finality of the arbitral award is one of the most important features of a hub of international arbitration. Arbitral awards are not easily overturned and disputes are resolved quickly. This also constitutes an important reason why parties choose one arbitral seat over another.[5]
- Limited Grounds for Annulment: Another import factor influencing parties' choice of seat is the reputation of the seat providing restricted grounds for annulling the arbitral award.
- Supportive Arbitral Regime: A prominent arbitral seat would be able to balance between non-interference in the arbitral process and acting in support of arbitrations. A regime which can give full backing to the arbitral process such as in appointment of arbitrators, ordering interim measures, anti-suit injunctions and so on within short time will be chosen by the parties over others.
- Availability of competent professionals in other areas: International arbitration does not merely involve participation of legal experts. It also requires experts from areas such as interpreters, translators, secretar-

ies, etc. A seat in which these facilities are abundantly available can support arbitration in a big way.

- Effects on Choice of Procedural Laws and Arbitral Tribunal selection: Certain jurisdictions have idiosyncratic national, linguistic or religious requirements for becoming arbitrators.[6] In addition, certain peculiar procedural rules may be insisted upon such arbitral seat. A jurisdiction where party autonomy is preserved in the tribunal selection and no such idiosyncratic requirements are present would be chosen by the parties considering that it preserves their autonomy. Further, the legal training or lack thereof of the arbitrators might influence the arbitral procedures. Hence, these factors also have a bearing on conducting arbitrations. Therefore, these are important aspects in parties' choice in selecting the arbitral seat.
- Convenience of Location: Convenience of location in terms of accessibility, the cost of stay, etc. are also factors for parties to choose a particular place as the seat of arbitration.

India as a Hub of International Commercial Arbitration

As envisioned by several successive Governments, India has immense potential to become a centre for international commercial arbitration. Following are some of the factors in India's favour:

- Common Law System: Indian legal system is based on the common law system which is followed widely throughout the world and English is the language used. Hence, in terms of the commonality of language and legal traditions, India is better suited as a seat of international arbitration.
- Strong Legal Institutions and Traditions: India has a well-structured dispute resolution infrastructure with District Courts (which generally hear arbitration matters) at the lower rung and the Supreme Court at the apex. The decisions of the Indian Courts especially those of the Supreme Court are cited in courts of several countries.
- Availability of Quality Lawyers and Experts in other Professions: India has one of the finest legal professionals in the world. To become a prominent arbitral destination, it is not enough if there are law professionals alone. The industry has to be supported by other professionals such as interpreters, translators, accountants, engineers, financial experts and experts in other fields who can immensely contribute to resolve a dispute effectively. India has no dearth for such professionals.
- New York Convention: India is a signatory to the New York Convention. Currently, the Government of India has notified more than 40 countries as affording reciprocity treatment in line with the reciprocity reservation it took in the New York Convention and as recognized statutorily in Section 44 of the 1996 Act.
- Limited Grounds for Annulment: The 2015 Act restricts the grounds on which an award could be set aside. Prior to 2015, public policy was expansively interpreted.[7] The 2015 amendments curb this expansive notion in two ways. Insofar as international commercial arbitration is concerned, the amendment seeks to do away with the patent illegality test.[8] As regards domestic arbitration, the amendment clarifies that although an award could be set aside on the ground of patent illegality, such illegality should appear on the face of the award and a review for patent illegality shall not amount to setting the award aside merely by re-appreciation of evidence or on account of erroneous application of law.[9] In either of the cases, a review on merits is made impermissible.
- Supportive Arbitral Regime: 2012 has been a watershed moment in the history of Indian arbitration law.[10] There has been more or less a pro-arbitration approach by the Indian judiciary since then. The recent amendments to the 1996 Act and the enactment of the Commercial Courts Act create a pro-arbitration environment.

Thus, one would not be too wrong in arguing that India has a great prospect of becoming an important player in international commercial arbitration.

While it is good for India to aspire to be a hub of international commercial arbitration, there are formidable challenges in reaching the said goal. These can be roughly classified into those hurdles that are inherent in the current international arbitration system and those specific to India.

Current Challenges in International Arbitration:

The Problem of Costs: The first and perhaps the most important failing of the present system of international commercial arbitration is the prohibitive costs involved.[11] International Arbitration Survey 2015 found that the cost involved in international commercial arbitration was its worst feature.[12] When queried about the worst feature of international commercial arbitration, about 68% of the Respondents stated that prohibitive costs was the worst feature in international arbitration.[13] An ideal legal system encouraging arbitration should provide for the following

- Expediteous resolution of commercial disputes
- Resolution of such disputes without compromising on natural justice

- Resolution of disputes in a cost effective manner.

International arbitration is a costly affair. Even if India-seated international arbitrations increase, the high costs of such arbitrations could have a spill-over effect on domestic arbitration.

Therefore, the legal system should be just, efficient and, importantly, inexpensive. If a robust arbitration machinery has to be established in India, it must be inexpensive. If there are least amount of delays in dispute resolution, if the legal system is fair and effective, India would automatically become an "international arbitration" hub. What is important is that justice should be economical.

Judicialisation of International Arbitration: One frequent complaint of the recent developments in international arbitration is the excessive judicialisation of arbitration.[14] Frequently, the challenges in international arbitration such as the constitution of the tribunal, increasing costs, excessive discovery, the tribunal's inefficiency in narrowing down issues, the obsession for oral evidence even when unnecessary, etc. make international arbitration akin to litigation. As a consequence, arbitration loses its procedural flexibility and informality. There are many causes to this. For instance, the lack of simple and uniform evidentiary rules given the diverse legal traditions of the parties and their counsel is cited as a main reason for this.[15] When a party makes a request for oral evidence even when these are not required in the opinion of the arbitrators, the obsessive concern towards due process forces the tribunal to accede to such request.[16]

Lack of Insight into Efficiency of Arbitrators and Efficiency of Arbitral Institutions: The lack of insight into efficiency of arbitrators and that of the arbitral institutions are significant defects of the current international arbitration system.[17] The International Arbitration Survey conducted in 2010 revealed that half of the interviewees were disappointed with arbitrator's performance.[18] Some of the important reasons attributed by the interviewees for this disappointment were: bad decision or outcome, excessive flexibility or failure to control the process (12%), delays attributable to arbitrators, poor reasoning in the award and lack of expertise of the arbitrator in the subject matter of the dispute.

Hurdles Specific to India

Apart from the aforesaid aspects, we have a long way to go to achieve the aim of becoming a hub of international arbitration. Following are the reasons.

Costs: Once an efficient and effective international arbitration system is in place, it is possible (and likely) that costs regime would have a spill-over effect on domestic dispute resolution thereby increasing those costs as well. Hence, in aspiring to become a major centre for international arbitration, the relative advantage of India in terms of costs should be an important factor to keep in mind.

The 2015 Amendment Act attempts to address the issue of costs but does not perhaps go the whole way in doing so. The newly inserted Section 11(14) provides that the High Court may frame rules for determination of the fees of the arbitral tribunal and the manner of its payment and in doing so, the High Court may take the rates specified in Schedule IV of the Act (as amended) into consideration. The newly inserted Schedule IV provides the Model Fee to be paid to the tribunal based on the sums in dispute. The placement of Section 11(14) is perplexing. Would the fact that it is placed in Section 11 mean that the High Court while framing Rules on this account can only restrict it to arbitrators appointed through Section 11?

Convoluted Court Fee Regime: The cost of litigating and the costs awarded at the end of litigation affect the litigation behaviour. Although not completely settled, the notion that a reasonable amount of ad valorem court fee acts as a constraint for a party from filing an unmeritorious claim is intuitive.[19] Assuming the absence of incentives in prolonging enforcement of an arbitral award (say, such as accrual of interest), fee plays a significant role in filtering out bad litigation.

This is the reason why the court fee in civil suits is a percentage (usually 7.5%) of the value of the claim. An appeal against a judgement is also subject to ad valorem fee. Shockingly, the fee for challenging an arbitral award, the (more restrictive) counter-part of challenging a court-judgement, is out-of-sync with this rationale. For instance, the court fee for setting aside an arbitral award in Tamil Nadu is merely ₹ 5,000/-. Unless the court fee for challenging an arbitral award is made a percentage of the amount claimed or its equivalent, frivolous challenges will continue to exist. The court fee for all commercial cases/proceedings has to be reviewed as court fee has the potential to discourage frivolous litigation.

Corruption: As stated previously, corruption is seen as one of the major factors in not selecting a particular arbitral seat. Despite the same, corruption in the judiciary, especially the lower judiciary seems to be high if sources are to be believed.[20] Assuming the truth of these reports, it would be extremely difficult for India to get out of the hold of corruption in judiciary and elsewhere. There are several other aspects of corruption in India. Ultimately, the level of corruption is a signal to the degree of rule of law in a country. Corruption gives a bad signal about the strength of a legal system and gives a bad impression about it to the outside world. It could be rightly argued

that corruption presents a major hurdle in India becoming a hub of international arbitration.

Lack of Insight into Efficiency of Arbitrators: A survey conducted in 2015 identifies the lack of insight into efficiency of arbitrators as a major drawback of the international arbitration system.[21] The problem is more acute in India. Except for the word-of-the-mouth, we have not been able to devise a system where it would be simpler for the parties to select the most appropriate arbitrators for a particular dispute. Given the fixedtime limits within which award has to be passed[22], it is of utmost importance that the parties have a clear idea about the arbitrators they choose. Unfortunately, the parties have least amount of information in arbitral selection.

Possible methods to ensure this is to have a certifying agency providing transparent ratings based on pre-determined criteria such as time taken to pass the award, adoption of procedural innovations, etc. Arbitral institutions could play an important role in this regard. Another important reform that is to be carried out is the availability of a pool of specialised arbitrators who could also be rated in terms of their efficacy and expertise.

Lack of Insight into Efficiency of Arbitral Institutions: World over, institutional arbitration is more popular than ad hoc arbitrations. India is an exception where ad hoc arbitrations exceed institutional arbitrations. There are a few reasons for this: many of the arbitrations consisted of government and its instrumentalities. In most of such arbitrations commencing prior to 23 October 2015, the government's senior employee was the arbitrator. Further, with the available infrastructure such as conference rooms, stenographer, etc., it was not difficult for the parties to arrange for the hearings in the offices of such entities. There seems to be an impression that if the tribunal fee is controlled, ad hoc arbitrations are more cost-effective than institutional arbitration.

Another issue of concern is the quality of arbitral institutions in India. A party which wishes to choose an arbitral institution should have enough data to choose among the existing arbitral institutions. Unfortunately, this data is lacking. In contrast, if a party wishes to choose a prominent arbitral institution outside India based on performance, the party could do so by not only comparing the Arbitration Rules but also the performance of these institutions. To elaborate, several famous arbitral institutions such as the SIAC and the LCIA publish such statistics. The Annual Report of the Singapore International Arbitration Centre (SIAC), for instance, publishes useful statistical information such as the number of new cases handled by the institution for the year, the nationality of the parties, the sectors from which disputes arise, the nationality of the parties, the number of arbitrators appointed, nationality of the arbitrators appointed by it and by the parties, dates of contracts in which disputes were referred, the Governing Law of Contract, the number of applications for emergency arbitrators, the number of awards passed, the number of appointments made in ad hoc arbitrations and so on.[23]

But the arbitral institutions in India do not provide any such information. Take for instance, the latest Annual Report of the Indian Council of Arbitration.[24] The Report reads like the annual report of a corporate entity but does not contain any useful information to ascertain its performance. In fairness, the Annual Report provides for number of disputes referred to the Council and the disputes resolved by it but these statistics are not enough to ascertain the council's performance.[25]

It is high time that Indian arbitral institutions publish useful data such as the annual number of arbitrations referred, the share of international arbitrations in the annual number of awards passed, the nationality of the parties, the nationality of the arbitrators, the nature of the parties, time taken for disposal of references and emergency arbitrator petitions, etc. In sum, it is important to create an environment so as to foster heralthy competition among Indian arbitral institutions.

A Dynamic Legislature?: The three-Judge Bench in Bhatia International v. Bulk Trading SA[26] observed that the 1996 Act was not well-drafted.[27] On the other hand, the 2015 Amendment Bill places the blame of the failure of the 1996 Act on the courts.[28] In this blame game as to who was responsible for the failure of the 1996 Act, the ultimate sufferers are the "consumers" of arbitration or the parties. The five-judge Bench of the Supreme Court in Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Co. Ltd.[29] gave a literal reading to the fundamental question involved: whether interim measures under Section 9 were available in respect of foreign seated arbitrations. The structure of the 1996 Act vis-à-vis interim measures was similar to Singapore.[30] Interestingly, it appears that Singapore had its own Bhatia International in Swift-Fortune Ltd v Magnifica Marine SA [2007] 1 SLR(R) 629 but it decided similar to what our constitutional Bench in Bharat Aluminium did- it upheld the legislative mandate that Singapore could not pass orders for interim measures in foreign seated arbitrations:

"Thus, whilst we can accept counsel's realistic assessment of how international arbitrations are conducted today, the potentially adverse consequences spelt out by counsel are par excellence policy considerations within the purview of Parliament. Secondly, it is reasonable to assume that the framers of the IAA were aware of these

considerations and would have factored them into the drafting of the IAA. If they have not been taken into account in the IAA, we doubt very much that we can do so, without arrogating to ourselves the power to decide such policy issues…"

Singapore's International Arbitration Act has been amended at least six times since its enactment, including empowering the Singaporean Courts to do so.[31] Indian Arbitration law on the other hand has been amended only in 2015. Given these aspects, it is questionable if the Government was correct in placing substantial blame on the courts for the failure of the 1996 Act. Despite widespread criticism since 2002, the Government/ Parliament did nothing to amend the Act. Despite several reports such as the Law Commission's Report in 2003 and the DAC Report in 2005, the Government did not take steps to amend the most controversial aspects of the law at once.

The second aspect relating to the failure of the Government/ Legislature is legislating in secrecy. Except for the Travaux of the Model Law based provision, the drafting history of the 1996 was unavailable to the Courts for interpretation. Hence, it was difficult to cull-out the legislative intent from provisions which were taken from various sources. Some of the Cabinet Notes marked "Secret" prior to the making of the Arbitration & Conciliation Ordinance, 1996 and the 1996 Act are indicative of this legislating in secrecy.[32] Another indication of this is the non-availability of reasons for the Government to diverge in many respects from the suggestion made in the 246th Report of the Law Commission.[33] The intent behind this divergence is not available in the public domain. Given the absence, it is perplexing how the Courts can determine the legislative intent. This is exemplified by the Hon'ble Madras High Court in Delphi TVS v. Union of India[34] where the Court was left to wonder why the 2015 Ordinance did not contain Section 85A recommended by the Law Commission.

In order for India to achieve the goal of becoming a centre for international arbitration, the Government and the Legislature should be more dynamic in correcting erroneous interpretations of law.

Substantive Law of Contract: The recent amendments focus on the commercial justice delivery mechanism. As such the amendments predominantly address procedural law in resolving commercial disputes.[35] This is in line with the methodology adopted by the World Bank Doing Business in India Report. The Report focuses mainly on how efficiently justice is delivered.[36] One would notice looking at the methodology of the rankings that there is virtually no focus on the qualitative aspects of the substantive law. There could be two possible reasons why such a criteria was not adopted: (1) the innate difficulty in comparing two substantive laws, and (2) owing to the extraordinary difficulty in embarking on such comparison, the existence of mechanisms that lead to efficient evolution of substantive law can be examined. For instance, one of the criteria in the methodology is to look at whether the country under study has separate commercial courts. Specialised commercial courts would mean specialised decision making and thereby leading to evolution of commercial law.

However, it would be a blunder to ignore the substantive contract law from the reform lens altogether. It is noteworthy that one of the most important (and surprising) factors that determines seat selection seems to be the substantive law of contract of the seat.[37] Considering this, the quality of substantive law has an important role to play in seat selection. This is true especially as regards basic contract law. At present basic Contract law in India can be summed up in the following words: incoherent and haphazard. Notwithstanding the extraordinary quality of draftmanship of the Indian Contract Act, 1872, the law remains unclear. It is of absolute importance to look at how basic contract law has evolved since independence. Urgent corrective measures are required in several areas of contract law. Jurisdictions such as England & Wales, Australia, Singapore, Australia, New Zealand have advanced a lot in this regard. We still do not have a coherent structured approach to basic contract law. Some areas that require urgent re-examination are the law on time as essence, risk purchase, contractual set-off, party autonomy in determination of breach by a party, etc. The law regarding the contractual relationship between the Government and its instrumentalities on the one hand and private persons on the other remains murky even now.

Hence, it is of utmost importance for urgent measures to provide coherence and unity to basic contract law. Broad reforms could be undertaken on the following lines. First, the entire basic contract law should be redefined or restated in terms of default and mandatory rules. Second, the party autonomy doctrine should be recognised as the central principle in contract law and party autonomy should be subservient only in cases where overarching public policy dictates otherwise. Third, a proper distinction should be made out on the cases where courts will interfere through their extraordinary jurisdiction in relation to contractual cases where government is a party should be specified and followed properly. The courts should be extremely circumspect in exercising that jurisdiction in these cases. So is the case with interfering in the tendering process. Fourth, courts should not usurp party autonomy in cases where the parties have the sole

right to determine contractual breach at the first instant. Fifth, courts should be absolutely circumspect in interfering in enforcement of bank guarantees and the like instruments. Sixth, courts should award reasonable costs more or less reflecting actual costs in commercial cases.

Commercial Courts: It is interesting to note that one of the chief pointers in the Ease of Doing Business survey is the creation of separate Commercial Courts to adjudicate commercial disputes.[38] India enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act in 2015 and the statute came into force on 23 October 2015.[39] The Ease of Doing Business in India Report for the year 2016 captures data only up to 1 June 2015.[40] Hence, the ratings are likely to increase only in the 2017 Report insofar as the creation of separate courts is concerned.

While there is a legislative instrument available in the statute book, it is too early to judge the effectiveness of the Commercial Courts Act for the simple reason that most of the States have not implemented the said enactment in full. The Act contemplates creation of Commercial Courts at the District level[41] and Commercial Divisions and Commercial Appellate Divisions at the High Court level.[42] The Act is yet to be implemented in most of the States.

It would be premature to do an assessment of the Commercial Courts for two reasons: (1) it would be temporally too early to decide its efficacy since it has been implemented only a few months ago; the impact can be comprehensively gauged when the Commercial Courts Act is implemented fully throughout the nation. However, one would not be too wrong in questioning the structure of the commercial courts and selections of judge thereto. For instance, it would be better if at least one member of a Commercial Division is manned by a transactional lawyer familiar with a vast variety of transactions.

The paper began by exploring what parties expect from an arbitral seat. The paper then went on to analyse the perennial problems of international commercial arbitration- costs, excessive judicialisation and the lack of information on the efficiency of arbitrators and arbitral institutions. It was cautioned than in desiring to become a prominent player in international arbitration, India should take care to address these problems. Part III of the paper examined the reasons why we have a long way to go in achieving the dream of becoming a hub of international arbitration.

To be fair, several measures are being by the Government to address problematic areas of Indian commercial law. Examples are the recent proposed amendments to the Specific Relief Act, 1963[43] and the attempt to open up legal services to legal professionals from outside India. Even so, it is important to do an honest audit of what ails the system and take corrective measures without delay.

Foot Note

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[2]See, Gary B Born, International Commercial Arbitration Vol. II 1680-1686, Wolters Kluwer (2009); White & Case et al, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 14 (2015), available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 18 June 2016).

[3]The ranking of prominent arbitral jurisdictions are given in brackets in the Corruption Perceptions Index 2015 published by Transparency International: Netherlands (4), Singapore (8), United Kingdom (10), United States (16), Hong Kong (18) and France (23). India stands at the 76th position in the said Index. See, Transparency International, Corruption Perceptions Index 2015 (2016), available at https://www.iaca.int/images/news/2016/Corruption_Perceptions_Index_2015_report.pdf (accessed on 19 June 2016). Also see, Katharine Freeland, Singapore: Dispute Resolution Hub, The Law Society Gazette 7 March 2016), available at http://www.lawgazette.co.uk/practice/singapore-dispute-resolution-hub/5054039.fullarticle (accessed on 30 June 2016).

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[5]Ibid.

[6]Gary B Born, International Commercial Arbitration Vol. II 1683, Wolters Kluwer (2009).

[7]ONGC v. SAW Pipes (2003) 5 SCC 705; Delhi Development Authority v. RS Sharma (2008) 13 SCC 80; ONGC v. Western Geco International Ltd. (2014) 9 SCC 263.

[8]See, Explanation 1 & 2 to Section 34(2)(b)(ii) of the 1996 Act.

[9]Section 34(2A) of the 1996 Act

[10]Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Co. Ltd (2012) 9 SCC 552 was decided by the Supreme Court holding, among other things, that Indian Courts did not have supervisory role over foreign seated arbitrations.

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[21]White & Case LLP & Queen Mary University of London, International Arbitration Survey: Improvements & Innovations in International Arbitration (2015), available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 28 June 2016).

[22]Section 29A of the amended 1996 Act.

[23]See, Singapore International Arbitration Centre, Annual Report 2014, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2014.pdf (accessed on 17 January 2016). For statistics on the London Court of International Arbitration, see, London Court of International Arbitration, Registrar's Report 2013, available at http://www.lcia.org//media/download.aspx?MediaId=376 (accessed on 17 January 2016); Singapore International Arbitration Centre, Annual Report 2013, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf (accessed on 17 January 2016).

[24]Indian Council of Arbitration, 50 Annual Report 2014-15 (2015), available at http://www.icaindia.co.in/annual-report2015.pdf (accessed on 18 June 2016).

[25]Ibid.

[26](2002) 4 SCC 105

[27]Ibid, Para 35

[28]Para 2 ,Statement of Objections & Reasons to the Arbitration & Conciliation (Amendment) Bill, 2015 reads: "Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act."

[29](2012) 9 SCC 552.

[30]The Hon. The Chief Justice Sundaresh Menon, Patron's Address: Chartered Institute of Arbitrators London Centenary Conference (2 July 2015), available at http://www.ciarb.org/docs/default-source/ciarbdocuments/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0 (accessed on 14 July 2016).

[31]The International Arbitration Act of Singapore was amended at least six times: 2001, 2002, 2005, 2009, 2012 and 2012 (twice in 2012)

[32]Some of the Cabinet Notes are available at https://drive.google.com/file/d/0B-ZUXtJuPbi3R0pHdFJxZjZLRzQ/view?usp=sharing (accessed on 14 July 2016).

[33]Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act, 1996 (August 2014), available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (accessed on 7 July 2016).

[34]MANU/TN/3726/2015

[35]See, the Statement of Objects and Reasons of the Arbitration & Conciliation (Amendment) Bill, 2015, which states, inter alia, that "it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic

activity." Available at http://www.prsindia.org/uploads/media/Arbitration/Arbitration%20and%20Conciliation%20bill,%202015.pdf (accessed on 18 June 2016).

[36]As regards the methodology employed to measure enforcement of contracts, the Report "measures the time and cost for resolving a commercial dispute through a local first-instance court. In addition, this year it introduces a new measure, the quality of judicial processes index, evaluating whether each economy has adopted a series of good practices that promote quality and efficiency in the court system." World Bank, Enforcing Contracts Methodology (2016), available at http://www.doingbusiness.org/methodology/enforcing-contracts (accessed on 18 June 2016).

[37]White & Case et al, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration 12 (2015), available at http://www.arbitration.qmul.ac.uk/docs/164761.pdf (accessed on 18 June 2016).

[38]World Bank, Doing Business: Enforcing Contracts Methodology (2016), available at http://www.doingbusiness.org/methodology/enforcing-contracts (accessed on 21 June 2016). A score of 1.5 out of 36 is given in the assessment of enforcement of contracts for a country having a commercial court setup.

[39]Available at http://www.indiacode.nic.in/acts-in-pdf/2016/201604.pdf (accessed on 21 June 2016).

[40]World Bank, Doing Business 2016: Economy Profile 2016: India 4 (2016), available at http://goo.gl/AAqWby (accessed on 21 June 2016).

[41]Section 3(1)

[42]Sections 4(1) & 5(1).

[43]An Expert Committee has been recently constituted to review the Specific Relief Act, 1963 and the said Committee has given its recommendations to the Law ministry. See, Shreeja Sen, What is the Specific Relief Act and why does the govt want to change it?, Live Mint, 23 June 2016, available at http://www.livemint.com/Politics/uNG9gJVysAolCNjYNW9XII/What-is-the-Specific-Relief-Act-and-why-does-the-govt-want-t.html (accessed on 14 July 2016).

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Deciding the Issue of Arbitrability in Indian Context

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Nowadays, parties are increasingly resorting to ADR mechanism to settle their disputes and they preferred choice is arbitration .. However, all commercial disputes cannot be settled through arbitration because, there are restrictions on some disputes. In other words certain disputes are excluded from arbitral tribunal's perview. Therefore, before referring a dispute to arbitral tribunal the parties must make sure about the arbitrability of dispute. The concept of arbitrability is very significant in international commercial arbitration because, it involes with contractual aspects of the parties and jurisdictional aspects of the arbitral tribunal. Further, there is no uniformity in the determination of arbitrability of disputes between countries; so, it also influences the enforcement of the arbitral award in the domestic as well as foreign country. In this paper the author is going to analyze the importance of arbitrability in arbitral proceedings, when and who decides the issue of arbitrability and how Indian courts are handling arbitrability issue. The author bestows special attention to how arbitrability issue arise in construction disputes and how it can be resolved.

Arbitrability-meaning and definition

As per the civil procedure code, the civil court can hear the disputes which are of civil nature and there is no express or implied bar on those suits. [1]For example, a suit for declaration of a member of a caste refrained from invitation to a caste dinner, Suit for expulsion of a member from the caste, Suits involving purely religious rites or ceremonies are not considered as a matter civil nature. Rent related cases and family issues (matrimonial) cannot be heard by the civil courts because of the establishment of special forums for handling such cases. Likewise the same, in arbitration the concept of Arbitrability covers the very fundamental jurisdictional aspects of the arbitral tribunal.

Arbitrability means to find out whether a particular dispute is capable of being settled through arbitration or not. It is one of the important issues in the arbitration proceedings.

Carbonneau said that Arbitrability establishes the respective domains of law and arbitral adjudication. It is the essential dividing line between public and private justice[2]

Significance of Arbitrability

Brekoulakis has explained the importance of Arbitrability in these words,-

"Arbitrability is a specific condition pertaining to the jurisdictional aspect of arbitration agreements. Arbitrability is a condition precedent for the tribunal to assume jurisdiction over a particular dispute (a jurisdictional requirement), rather than a condition of validity of an arbitration agreement (a contractual requirement)". Unless the particular dispute which got referred is capable of settlement through arbitration ,the entire arbitration process cannot succeed[3]

Former Supreme court Judge, Justice R V Raveendran in Booz-Allen & Hamilton Inc. vs Sbi In Home Finance Ltd. & Ors case it was held that,

Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable. He further explained three tests for determining Arbitrability.

(i) whether the disputes are capable of adjudication and settlement by arbitration or not?

(ii) Whether the disputes are covered by the arbitration agreement or not?

iii) Whether the parties have referred the disputes to arbitration or not?[4]

Though these three directly deal with the jurisdictional aspects of the arbitral tribunal still, all are not coming under the category of objective arbitrability. The set aside provision under Arbitration and conciliation Act has made different bifurcation / section for challenging the arbitral award on these grounds[5].

The arbitrability of a dispute can be determined by two key factors.

a) public policy considerations
b) special forum is having the jurisdiction of the particular dispute.

Types of Arbitrability

Arbitrability is classified into two types

1) Objective orbitrability
2) Subjective arbitrability

Subjective Arbitrability

It is otherwise known as ration personae which refer to identifying whether the disputing parties are having capacity to settle the dispute through arbitration or not. National laws of some countries prohibit or impose some restrictions on the state or state owned entities related disputes. It also includes multi-party arbitration. In short, subjective arbitration refers to the determination of the capacity of the parties to arbitrate a particular dispute or not. Most of the construction contracts entered into by the construction industries are with the state and state owned entities. So, subjective Arbitrability is very important in construction disputes.

Objective Arbitrability

This is otherwise known as ration materiae which refers to the subject matter involved in a particular dispute is capable of settlement through arbitration or not. This determination is based on public policy considerations. For example, matrimonial disputes are non arbitrable in India. In some countries, IP validity related issues are not arbitrable. When a construction dispute is non arbitrable as per the place of the arbitration as well as as enforcing country then, the arbitral proceedings and arbitral award become redundant and parties will suffer huge loss.

Indian arbitration Act states that this Act doesn't affect the current Law. It allows the exclusion of certain disputes which are heard by the special forum. Indian courts also lay down some principles through various decisions, which also point tot the non-arbitrable disputes.

In MangHal Fateram Mahesari v. Devicharan Mangallal[6] and Ladha Singh v. Bhag Singh [7]Supreme court has held that Insolvency proceedings are non-arbitrable

In ChiranjUal Shrilal Goenka (Deceased) through Lrs v. Jasjit Singh and Ors[8]; and Mt. Khela Wati v. Chet Ram Khub Ram[9] supreme court has held that probate proceedings, questions relating to genuineness of a will or revocation of probate related disputes are not arbitrable.

In Jai Krishna v. Babu[10] supreme court has held that suits relating to public trust disputes (suits under section 92 of civil procedure code) Are not arbitrable.

In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd[11] supreme court has held that winding up of company procedure under companies Act are governed by the companies Act provisions and the jurisdiction of these issues has given to various special forum so, the disputes pertaining to winding up of a company is not arbitrable. In another case,Ssupreme court has held that A winding up petition and an arbitration are different proceedings. An arbitration is possible only when there is a dispute. Winding up is permissible only when there is no dispute about liability. Where a company admits liability, winding-up proceedings should not be stayed[12].

In Sami Chetti v. Adaikalam Chetty[13], supreme court has held that appointment of guardian related issues should not be decided by the arbitrator.

In Natraj Studios (P) Ltd v Navrang Studios[14], Supreme court has held that since, rent control tribunal has been given the power to decide the disputes pertaining to rent (tenancy) related matters. These matters cannot be referred to the arbitrator or arbitral tribunal for adjudication due to the legislative mandate and public policy.

In N Radhakrishnan v Maestro Engineers, Supreme Court held that Allegations of fraud and manipulation of accounts against a partner by another partner in a partnership firm is not the normal contractual dispute which can be decided by the arbitrator. So, as per section 8 referral petition, the trial court no need to refer such disputes to arbitration[15].

In Swiss Timing Limited v Organising Committee, Commonwealth Games 2010, Delhi[16], Supreme Court has held that even if criminal cases were pending regarding the alleged corruption, the dispute pertaining to termination of contract and non-payment of dues under the contract was arbitrable. It also stated that the decision of N Radhakrishnan case by the Supreme Court is per incuriam.

Who decides the issue of arbitrability?

The issue of arbitrability will come fordetermination before the appropriate forum in the following four stages.

1). One of the parties to the arbitration may raise objections regarding non-arbitrability of the disputes before the arbitral tribunal.
2). When one of the parties who might approach the court for refer the dispute to the arbitral tribunal or constitution of the tribunal (appointment of arbitrators), the other party can object or resist the arbitral process on non-arbitrability ground. Sometime one of the party may approach the state court to stop the proceedings (anti arbitration injunction) on the ground of non-

arbitrability of the disputes and at the time of granting interim measures.

After passing of the partial award on jurisdiction or final award by the arbitral tribunal the affected party can raise the issue of arbitrability at the time of filing of the set aside petition.

At the time of recognition and enforcement of a foreign arbitral award, the affected party or loosing party could resist the award on non-arbitrability ground.

Competence of arbitral tribunal to rule on its jurisdiction

The arbitral tribunal is having the power to rule on it's own jurisdiction which includes deciding on the validity of the arbitration agreement in the light of the issue of arbitrability. for this purpose. The arbitration clause in a contract is considered as separate from the main contract. the non-arbitrability plea must be raised by the affected party at the time of filing of his defense statement[17]. Whenever, the parties come to know that the arbitral tribunal is exceeding it's jurisdiction on (arbitrability aspect too) they can raise this objection before the tribunal the moment they come to know about the same.

In both circumstances, arbitral tribunal either accepts the lack of jurisdiction or uphold the jurisdiction. If the arbitral tribunal accepts it's lack of jurisdiction then, arbitral proceedings will be terminated and the aggrieved party may file an appeal against the order /decision of the arbitral tribunal. Whereas, if the tribunal has upheld it's jurisdiction then, it will continue the arbitral proceedings and pass the award[18]. The affected party must wait till the passing of the award and then, it can file the set aside petition on the ground of lack of jurisdiction as well as non arbitrability under section 34[19]. The Indian arbitration Act differs from UNCITRAL model laws. While the UNCITRAL model law allows the party to challenge the rejection of "jurisdiction plea", the Indian Act shows a pro arbitration approach

In National Thermal Power Corporation Ltd. v. Siemens Sellschaft[20], Supreme Court held that Competence of the arbitral tribunal to decide on its own jurisdiction only arises when the matter has been referred to it by the parties themselves without the court intervention under section 11(6) of arbitration and Conciliation Act. If the arbitral tribunal decides lack of jurisdiction then affecting party may file an appeal against that order under section 37.

In Kitiku Imports Trade Pvt. Ltd v. Savitri Metals Ltd[21], the apex court has justified the rationale of section 16 of Indian Arbitration and Conciliation Act in the following lines. If the arbitral tribunal has passed an award without having jurisdiction then, it can be set aside by the court. It will lead to wastage of time and money. But considering the past experience of repeated recourse to courts at all possible stages, the lesser evil seems to have been preferred and the court's intervention is minimized specially during the proceedings. However, it is also important that people are not supposed to roam around the arbitral tribunals and judicial forum again and again and they should not incur too much cost for nothing.

Babar Ali v. Union of India

In this case, the constitutionality of section 16(5) has been challenged by the petitioner. He contended that section 16 has lays down two different clauses; one clause is arbitral tribunal has accepted it's lack of jurisdiction and another clause is the arbitral tribunal has rejected the plea of lack of jurisdiction; The former clause has been given the chance of appeal whereas, the latter clause hasn't been given the same treatment. He further stated that "judicial review" is the basic structure of the Indian constitution so, it must be followed under all circumstances.

After considering the legislative intent, the Supreme court has held that section 16 is constitutionally valid and the rejection of jurisdiction clause under section 16 of Arbitration and Conciliation Act doesn't take away entire judicial review. After passing of the award the aggrieved party may challenge the award under section 34[22]. However, the court ought to have considered the impact of these bifurcation and other corresponding provisions and procedure contemplated under section 8, section 9 and section 17 along with UNCITRAL model law article 16 which itself provided appeal mechanism for the same.

Powers of the court to decide the issue of Arbitrability & other jurisdictional issues

(I). @ the time of reference

When valid arbitration agreement or arbitration clause exists and the same dispute is pending before any civil court then, after examination of the validity of the arbitration agreement, the court shall refer the same dispute to the arbitration for adjudication. While the determination of the validity of the arbitration agreement is pending before the civil court, the arbitration may be commenced and the arbitral tribunal may pass an award; but, the validity of the award is subject to the verdict of the trial court which is hearing the referral case.[23] This Indian stand is completely opposite to UNCITRAL model law, which states that until the trial court decides the validity of the arbitration agreement, the dispute shall not be referred to arbitration[24].

S.B.P& Co. vs. Patel Engineering Ltd

In this case, the apex court held that it is the duty of the

judicial authority to decide the validity of the arbitration agreement and whether the particular dispute is covered under the arbitration clause or not. It also held that "It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it and mechanically refer the parties to an arbitration"[25].

N Radhakrishnan v Maestro Engineers

Supreme Court has held that if there is an allegation of fraud and manipulation of accounts made by one party against another party is not a proper dispute which can be decided by the arbitrator. So, as per section 8 referral petition, the trial court need not refer such disputes to arbitration[26].

Booz Allen Hamilton v SBI Home Finance

In this case, the court has once again held that it is the duty of the judicial authority or court to decide the validity of the arbitration agreement and the issue of arbitrability; the arbitral tribunal is not supposed to decide the same if the arbitration referral plea has been raised before the civil court under section 8. In this case, Supreme Court has laid down some key principles about the duty of the trial court at the time of hearing the arbitration referral application. They are,-

(i) whether there is an arbitration agreement between the parties (valid arbitration agreement) or not.

(ii) whether all parties to the suit are parties to the arbitration agreement or not.

(iii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement or not.

(iv) Whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute; and.

(v) Whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration or not[27].

(II). At the time of the appointment of the arbitrator by the courts

If the parties are not having consensus about the arbitrator or are unable to constitute the arbitral tribunal then, they can seek the help of High court (if the arbitration is of domestic arbitration) and Supreme court (if the arbitration is of International commercial arbitration) for the appointment of arbitrator[28]. At the time of appointment of arbitrator, whether the court can decide the issue of arbitrability or not is a very debatable issue.

Booz-Allen & Hamilton Inc. vs Sbi Home Finance Ltd. & Ors. on 15 April, 2011

In this case, Supreme Court observed that the nature and scope of consideration or determination of issues by the appointing court is narrow (under section 11) than the trial court's scope of determination of issues while referring the dispute to arbitration (under section 8). While hearing the appointment petition, the court should not get into the merits of the disputes and leaves the issue of arbitrability for adjudication by the arbitral tribunal. Aggrieved party can challenge the decision under section 34 of the Indian arbitration and conciliation Act[29]. This observation has been made by the apex court while dealing the case which wass related to the trial court's role under section 8 of Indian Arbitration and Conciliation Act.

S.B.P & Co. vs. Patel Engineering Ltd[30]

In this case, the apex court held that the appointing court (chief justice or his designate) has the powers to decide the validity of the arbitration agreement, arbitrability of the dispute and the qualification of the arbitrator while dealing the the petition relating to appointment of arbitrator under section 11 of Indian arbitration and conciliation Act 1996.

National Insurance Co v Boghara Polyfab[31]

The apex court has categorized the issues that may arise for determination in a petition under Section 11 before the appointing court and has laid down the key principles about the exclusive, concurrent , jurisdiction of the appointing court and exclusive jurisdiction of the arbitral tribunal in the following manner,-

First category-the issues which will be decided by the appointing court

(a) Whether the party making the application has approached the appropriate High Court. Or not

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

Second category-the appointing court may decide or leave it to the arbitral tribunal to decide the issues below.

(a) Whether the claim is a dead (time-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

Third category-the issues should be left to the arbitral tribunal to decide

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in arbitration."

Supreme Court has further stated that If the appointing court has chosen to decide the issues under category 2 then, arbitrator cannot decide the same during arbitral proceedings. it also stated that where allegations of forgery/fabrication are made in regard to the document recording and discharge of contract by full and final settlement, it it would be appropriate if the same matter can be decided by the appointing court.

Swiss Timing Limited v Organising Committee, Commonwealth Games, 2010 Delhi,

The apex court referred a dispute to arbitration which involves the allegation of fraud. It has stated that Maestro Engineers decision is "per incuriam " because in this case, , the apex court could not consider the previous decisions on the same issue by the apex court and the competency of the arbitral tribunal to decide the issue of arbitrability under section 16 of the Arbitration and Conciliation Act[32]. However, this case failed to address important issues with regards to section 16. Indian Arbitration Act S 16 is wider than UNCITRAL model law article 16 and previous decision of the Supreme court in National Insurance Co v Boghara Polyfab has held that the appointing court is having the power to choose whether issue of arbitrability need to be adjudicated by itself or the arbitral tribunal.

(III). Interim measures under section 9

Indian arbitration Act allows any party to approach the court to render interim measures before or during arbitral proceedings and before the enforcement of arbitral award. This measures include inspection of documents and goods, appointment of receiver, sale of perishable goods or preservation of goods and other measures. While rendering interim measures, whether the court can decide other issues including issue of arbitrability is not mentioned in the Act directly. However, Indian Act states these measures need be granted in accordance with section 36 of the arbitration Act[33].

Sundaram Finance Ltd v. NEPC India Limited

In this case, the Supreme Court held that at the time of rendering interim measures, the trial court which is dealing with the interim measures petition under the Indian Arbitration Act must consider the aspects of validity of arbitration agreement and arbitrability of disputes. this particular case where the party had asked the trial court to render interim measure before the commencement of arbitration and the Supreme Court held that the trial court is having the power to render interim measures before the commencement of arbitration too[34].

(IV) Setting aside proceedings

Under section 34 of Arbitration Act, aggrieved party of an arbitral award may challenge the arbitral award on the ground of non-arbitrability[35]. This ground of challenge is very important as for as Indian Arbitration Act is concern because, the party dissatisfied with the award regarding jurisdiction (under section 16) may challenge only under this section in the court.

(V). at the time of Recognition and enforcement of foreign arbitral award

The aggrieved party of a foreign arbitral award may have a chance to stop the enforcement court from recognition and enforcement of foreign arbitral award on the ground of non-arbitrable dispute[36]. As per the New York convention, arbitrability dispute is having two facets; 1). the dispute must be capable of settlement through the place in which the arbitration has actually been conducted (juridical seat) and 2). The dispute must also be an arbitrable one as per the enforcing country's law. Under New York convention, the state court can make reservation about "commercial nature". which gives rise of differences in arbitrability of dispute from one country to another. India has expressed reservation on "commercial matter". Recognition and enforcement refusal provision of New York convention got incorporated in the part II of Indian aArbitration Act[37].

Objective arbitrability in construction disputes

Generally subjective arbitrability is the common feature of the construction contracts since, such contracst quite often involve multiparty contract. However, there is also the possibility of objective arbitrability issue arising in such construction contracts. The following issues may arise in the construction contracts they are,-

1) Not obtaining the proper permission

2) A special authority or forum which is having the jurisdiction to decide certain issues which is otherwise decided by the arbitral tribunal.

Reliance Industries Limited & Anr vs Union of India may 28th 2014[38]

In this case, Indian government contended that the claims relating to royalty, {As per petroleum and Gas rules, Royalty issues must be referred to arbitration in accordance with the rule 33 (P&G rules 1959)], cess, service tax, the

Comptroller and Auditor General's ("CAG") audit are not arbitrable.

Since, this case is relating to set aside of an arbitral award rendered from a foreign country (London), the apex court was reluctant to interfere this dispute. It also observed that the affected can approach English court for rendering the relief; Indian court will interfere when the same award comes for enforcement in India.

3). Allegations of fraud[39] (still the law is un settled)

4). Mortgage related issues[40]

5). Insolvency issues (if one of the party become insolvent)

Conclusions

It is important duty of the parties while drafting the contract as well as referring a dispute to an arbitral tribunal must make sure that dispute is an arbitrable one. Otherwise, it will lead to judicial interventions latter. Sometimes issue of arbitrability become invisible in such circumstances the parties as well as the arbitral tribunal act due diligently so that it can avoid future consequences. An arbitrator must make sure that dispute is arbitrable not only with respect to the place of arbitration, but also the likely enforcing country. Though public policy is wider than arbitrability still, it is also playing a vital role in International commercial arbitration including construction contracts.

Foot Note

[1]Section 9 of civil procedure code 1908.

[2]Loukas A. Mistelis, Part I Fundamental Observations and Applicable Law, Chapter 1 - Arbitrability - International and Comparative Perspectives in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), Arbitrability: International and Comparative Perspectives, (Kluwer Law International 2009) pp. 1 - 18

[3]Ibid.

[4](2011) 5 SCC 532

[5]Section 34 (a) and (b) of Indian arbitration and conciliation Act 1996 (amended in 2015).

[6]AIR 1949 Nagpur 110

[7]AIR 1916 Lahore 170.

[8]MANU/ SC/0496/1993: (1993) 2 SCC 507

[9]AIR 1952 Punjab 67

[10]AIR 1933 Nagpur 112.

[11]AIR 1999 SC 2354 and 1999 (2) Arb LR 685 (SC):.

[12]S.M. Enterprises Pvt. Ltd v. Sanpaolo Hambro Nicco Finance Ltd, (1999] 96 Comp Cas 691 (Cal)

[13]AIR 1924 Mad. 484

[14]AIR 1981 SC 537

[15]Indian Kanoon - http://indiankanoon.org/doc/626171/

[16]www.judis.nic.in/supremecourt/imgs1.aspx?filename=41548

[17]Section 16 of Indian arbitration and conciliation Act 1996 (amended in 2015) and article 15 of UNCITRAL model law on arbitration 1985.

[18]Section 16(5) of arbitration conciliation Act 1996 (amended in 2015).

[19]Section 16(5) and (6)of Indian arbitration and conciliation Act 1996 (amended in 2015).

[20](2007) 2 SCALE 657 2007

[21]1999 (2) Arb LR 405 (Bom).

[22](2000) 2 SCC 178.

[23]Section 8 of Indian arbitration and conciliation Act 1996 (amended in 2015).

[24]Article 8 of UNCITRAL model law on arbitration 1985 (amended in 2006).

[25]2005 (8) SCC 618,

[26]Indian Kanoon - http://indiankanoon.org/doc/626171/

[27](2011) 5 SCC 532

[28]Section 11 of Indian arbitration and conciliation Act 1996 which is corresponding UNCITRAL model article 11.

[29](2011) 5 SCC 532

[30]2005 (8) SCC 618

[31]2009 (1) SCC 267,

[32]www.judis.nic.in/supremecourt/imgs1.aspx?filename=41548

[33]Section 9 of Indian arbitration and conciliation Act 1996.

[34]Indian Kanoon - http://indiankanoon.org/doc/507484/

[35]Section 34 (2) (b) (i) of arbitration and conciliation 1996 (amended in 2015).

[36]New York convention on recognition and enforcement of foreign arbitral award article V (2) (a).

[37]Section 48 of Indian arbitration and conciliation act 1996 (amended in 2015).

[38](2014) 7 SCC 603.

[39]N Radhakrishnan v Maestro Engineers, (2) (2010) 1 SCC 72 and Swiss Timing Limited v Organising Committee, Commonwealth Games 2010, Delhi av, available @ www.judis.nic.in/supremecourt/imgs1.aspx?filename=41548

[40]Booz-Allen & Hamilton Inc. vs Sbi Home Finance Ltd. & Ors, (2011) 5 SCC 532

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Dispute Resolution in India: What Ails Business?

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Synopsis

The authors attempt to trace the developments in the field of arbitration in India and how such changes have been brought about with the intention of enabling faster and more efficient resolution of disputes. This paper also attempts to capture the role of the judiciary in particular in the development of arbitration in India.

The paper specifically focuses on certain key amendments brought about through the Arbitration and Conciliation (Amendment) Act, 2015 and how such changes have been brought about to restore confidence of businesses in the arbitration regime in India. The authors attempt to analyse whether the changes brought about through the amendments successfully address the issues which had a negative impact on the arbitration regime in India and the role required to be played by the judiciary, parties and lawyers in ensuring that the legislative intent behind the aforesaid amendments is preserved and enforced.

Dispute Resolution in India: What Ails Business

In the global economic scenario, where countries in the west are battling a major slowdown and its consequences, India is widely viewed as one of the countries which even in such adverse global conditions is on the growth path. To achieve this target, various governments in India, at both state and centre, have taken a number of steps to ensure that India as an investment destination becomes increasingly appealing to foreign investors and companies.

The present government at the centre, which came to power in the year 2013, has also attempted to fast track a number of measures and introduced various schemes to attract foreign investors and companies. Various sops have been announced to encourage production and manufacturing in India, an entire campaign has been launched to encourage manufacturing in India – 'Make in India', restrictions on foreign direct investment have been eased and in some cases entirely lifted and an overall attempt has been made to project India as a destination where it is easy to do business.

Legislative History

In addition to various socio-economic steps taken by various governments to project India as a viable destination for international businesses and investors, successive governments have also realised the need to introduce and amend various laws, in order to provide an overall environment where business can be conducted with ease.

The judicial system in India has been known to be complex and slow. Courts are faced with problems on multiple fronts. The first and most basic problem is the large volume of cases which are pending before various courts throughout the country. To compound this, there are a large number of vacancies in so far as judges are concerned. Irrespective of whether it is the lower courts or the high court of a state, in many courts even the sanctioned number of judges have not been appointed. This has meant that India has one of the highest judges to population ratio amongst developing countries. These factors have contributed significantly towards the problem of pendency in courts. The delay caused in disposal of cases by courts has meant that parties, particularly where the dispute is commercial in nature, have increasingly started opting for arbitration as their preferred mode of dispute resolution.This paper will specifically focus on the growth of arbitration in India and how the law on arbitration has been codified and developed.

Arbitration is by far one of the most popular forms of alternative dispute resolution worldwide. It gains further significance in an economy like India, where the judicial system has acquired the reputation of being over-burdened and slow. It is a widely accepted fact that businesses prefer a destination where disputes can be settled in a timely and cost efficient manner. Realising this, efforts have been made by the legislature in India to ensure that the arbitration regime in India is on par with global standards and is able to meet the needs of such parties who opt for arbitration in India.

The first step in this direction was the introduction of the Arbitration and Conciliation Act, 1996 ("Act of 1996"),

which replaced the Arbitration and Conciliation Act, 1940 ("Act of 1940"). Amongst the major criticisms of the Act of 1940 was that it provided for judicial intervention in arbitration at too many stages, the grounds of challenge to an award were extremely wide and that arbitration proceedings were virtually mirroring court proceedings due to the procedure being followed.

Post economic reforms brought about in 1992-1993, the need to put in place an efficient system wherein commercial disputes could be resolved in an efficient and speedy manner. This led the Parliament to promulgate the Act of 1996. Since the Act of 1996 was meant to cure the lacunae which existed in the Act of 1940, the Act of 1996 closely mirrored the model law on Arbitration adopted by United Nations Commission of International Trade Law ("UNCITRAL").

The Act of 1996 was definitely an improvement over the Act of 1940 and made the option of arbitration a viable method of alternative dispute resolution. However, over a period of time, it became apparent that not all issues which had afflicted the Act of 1940 had been addressed. Additionally, some new issues were faced which again meant that the whole purpose of parties opting for arbitration, was being called into question. The primary issues with the working of the Act of 1996 arose due to lack of clarity on procedure and judicial interpretation of various provisions, which often went against the principle of minimal interference by Courts in arbitration proceedings.

Judicial Intervention

Perhaps the biggest stumbling block in the affective functioning of the Act of 1996 came from decisions of the Supreme Court of India and various High Courts. The decisions highlighted a common theme – a lack of understanding that Courts ought to interfere to a minimal extent in arbitration proceedings as well as the inability of Courts to interpret provisions as was intended by the Legislature.

The primary examples of judicial interference which adversely affected the arbitration regime under the Act of 1996 are the interpretation placed by the Supreme Court of India on the grounds available to challenge an award in Oil and Natural Gas Limited vs. Saw Pipes Limited[1], the decision of the Supreme Court of India to widen the scope of the role of Courts in appointment of arbitrators in SBP & Co. vs. Patel Engineering[2] and National Insurance Co. Ltd. vs. Boghara Polyfab Pvt. Ltd.[3] and the decisions in N. Radhakrishnan vs. Maestro Engineers & Ors.[4], wherein the Hon'ble Supreme Court ruled that allegations of fraud could not be adjudicated upon in an arbitration and Booze Allen and Hamilton vs. SBI Home Finance Ltd[5], wherein the Hon'ble Supreme Court introduced certain criterion which a Court under Section 8 had to apply before referring disputes to arbitration.

These decisions of the Hon'ble Supreme Court apart from being in divergence to the common practice of minimal judicial interference in arbitration were also contrary to the legislative intent behind the Act of 1996 to a certain extent. But perhaps, the biggest source of upheaval in the arbitration regime under the Act of 1996 has centred around the interpretation of Section 9 and whether parties which had opted for a foreign seated arbitration could seek interim reliefs before Indian Courts. In Bhatia International vs. Bulk Trading S.A. & Anr.[6], the Hon'ble Supreme Court while adjudicating upon the applicability of Section 9, found in Part I of the Act of 1996, to arbitrations where the parties had chosen a foreign seat, held that even in such cases, parties could seek interim relief before Indian Courts. The decision in Bhatia International meant that in cases where a party had assets in India, an interim order, if obtained could potentially be enforced in time to secure such assets.

However, the decision in Bhatia International was subsequently overruled by the decision of a Constitutional Bench of the Hon'ble Supreme Court in Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc.[7], wherein the Hon'ble Supreme Court held that the seat of arbitration was the determining factor in deciding which Court a party should approach for interim reliefs. Therefore, where the parties had decided that the seat of arbitration was to be outside India, the parties could not approach Indian Courts for interim relief under Section 9 of the Act of 1996. The decision in Bharat Aluminium Company further clarified that it would operate with prospective effect i.e. to agreements executed after the judgment was passed. The change brought about by the decision in Bharat Aluminium Company meant that in agreements involving parties, where assets of either party were located in India, the party seeking interim relief could not approach Courts in India under Section 9 of the Act of 1996 but instead had to approach the Courts in the country where the seat of arbitration was situated, obtain such relief there and then enforce this in accordance with Indian laws in India. In effect, this meant a long and cumbersome procedure to obtain interim relief and also provided the party against whom such order was sought with sufficient time to dispose of assets, thus defeating the whole purpose of arbitration and interim relief.

Procedure Followed in Arbitrations

A vast majority of arbitrations in India are ad-hoc in nature i.e. parties appoint their arbitrators and the arbitration

in conducted at a venue and under rules of procedure which are decided by concurrence of the parties. The ad-hoc nature of proceedings has often led to a situation wherein the arbitration has virtually turned into a proceeding akin to a trial before the Civil Court. While parties in an arbitration are free to decide on the procedure they want to follow, it is often seen that instead of following a summary procedure which would help expedite the proceedings, the parties ending up in following the provisions of the Code of Civil Procedure, 1908, strictly. This is a major reason for delay caused in arbitration in India. This practice is also a result of the decisions of various Courts, including the Supreme Court of India in Saw Pipeswhere challenges to arbitral awards on the grounds of strict procedural law, such as provisions of Code of Civil Procedure, 1908 and Indian Evidence Act, 1872, not having been followed, have been allowed.

Ad-hoc arbitrations also face the issue of delays caused to the non-availability of the lawyers, parties and often the tribunal itself. On the other hand, institutional arbitration, which is slowly gaining in popularity offers a much more supportive environment for conducting arbitration proceedings. The institution itself provides for rules of procedure and a strict timeline which all parties are expected to follow. There is often a cap on fee payable, both to the tribunal as well as the institution. Amongst the institutions most preferred by businesses in India are the Singapore International Arbitration Centre ("SIAC"), London Maritime Arbitrators Association ("LMAA"), The London Court of International Arbitration ("LCIA") and the International Court of Arbitration ("ICC"). While these institutions are well established and are widely acknowledged as amongst the best, in recent years, there has been a move by the judiciary in India to promote institutional arbitration. This has resulted in establishment of arbitration institutions in Delhi, Chennai and Bengaluru, under the aegis of the jurisdictional High Courts.

Issues with Enforcement of Awards

One of the major criticisms of the Act of 1996 has been the inability of parties to enforce awards in a time bound and efficient manner. As pointed out above, due to excessive judicial interference, often the passing of an award itself is substantially delayed due to delays faced in obtaining interim relief and appointment of a tribunal. After obtaining an award, the party in whose favour the award has been passed faces further challenges. While the legislature intended for the grounds of challenge to an award to be very limited and narrow in scope, decisions such as Saw Pipes Limited, have created a jurisprudence where the meaning of public policy has been stretched to such an extent, that parties are often successful in getting appeals against awards admitted, thereby delaying enforcement by a substantial time. Further, as a result of the approach adopted during hearing of appeals against arbitral awards, it has often been observed that Courts go into intricate questions of evidence, procedure and also on issues such as applicability of the laws to the facts in question, thus virtually making such appeals into a fresh round of arbitration between the parties.

Viability of Arbitration in India

Over a period of time, the cumulative effect of the above mentioned factors has dented the image of the arbitration regime in India. This has led to parties increasingly opting to arbitrate outside India, in places such as Singapore and London, even though it is possible to conduct arbitration proceedings in India under the rules of various international arbitration institutions.

The failure to build confidence in the enforcement mechanism does have an effect on businesses which are trying to enter the Indian market. One of the key elements which every business evaluates prior to entering a market, is the prevalence and enforcement of the rule of law. This is key, as businesses are more likely to grow and benefit in an environment where contracts are strictly enforced and any breach penalised heavily, than where the enforcement procedure is lax or non-existent.

As a result of this, there has been a growing concern that the failure to set up an effective arbitration regime, has not only burdened the entire judicial system in India, with pendency at an all-time high, but has also affected the image of India as an investment and business destination. Realising this, the Indian Parliament has enacted the Arbitration and Conciliation Amendment Act, 2015 ("Amendment Act"). The Amendment Act has introduced various new provisions and has amended certain prevalent provisions of the Act of 1996. The main intention behind the Amendment Act has been to fix the above mentioned issues, which had been affecting arbitrations in India.

This move by the Parliament to introduce the Amendment Act also has to be viewed in a wider perspective, wherein the Government of India, has taken effective steps to help build confidence in the legal regime in the country and to project India as an attractive destination for business and investment. Apart from amending the Act of 1996, the Government has also taken steps to overhaul various labour laws, has passed the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, has eased the restrictions imposed on foreign direct investment in a number of key sectors and has also passed the Goods and Services Tax Act in Parliament. All these measures are part of a

concerted effort by the Government of India to project India as a viable destination for businesses and investors.

Critical Provisions of the Amendment Act

The most important change brought about by the Amendment Act is undoubtedly the introduction of the Section 2(1)(e)(ii), where "Court", for the purposes of international commercial arbitration has been defined to mean the High Court. Further, a proviso introduced to Section 2 clarifies that the provisions of Section 9 (interim relief), Section 27 (Court assistance in taking evidence), Section 37(1)(a) (appeals from an order refusing to refer parties to arbitration under Section 8) and Section 37(3) (bar on second appeal except appeal to Supreme Court).

The combined effect of these two changes has meant that the ratio laid down by the Hon'ble Supreme Court in Bharat Aluminium Company has been effectively negated and even parties who opt for arbitration outside India, can now approach Indian Courts for interim relief under Section 9 of the Act. It may be noted that the Amendment Act still provides the parties the option of ousting jurisdiction of Indian Courts through an agreement. However, this amendment to allow parties to approach Indian Court for interim relief, when the seat of arbitration is not in India, is a fillip for foreign parties, who after the judgment in Bharat Aluminium Company often found themselves in a situation where they could not take immediate and effective steps to secure assets located in India.

Amendment to section 9 also require that arbitral proceedings be commenced within ninety days of obtaining an interim order, if such order is obtained prior to commencement of arbitral proceedings and bars a Court from entertaining an application for interim relief, if a tribunal has already been constituted, unless the Court finds that the remedy under Section 17 may not be efficacious,. These safeguards are important as they are meant to prevent a situation wherein a party after obtaining interim relief takes no steps to commence arbitration, thereby defeating the whole purpose of arbitration, while at the same time enjoying the benefit of an interim relief. Section 17 of the Act of 1996 has also been overhauled. Section 17 as it stands subsequent to the Amendment Act provides powers to the arbitral tribunal to pass wide ranging orders for interim protection, ranging from appointment of a guardian for a minor or person of unsound mind for the purposes of the arbitration proceedings to passing orders for preservation, interim custody or sale of goods which are subject matter of the arbitration. The tribunal also has the power to order securing of the amount in dispute, detention, preservation or inspection of a property or thing which is the subject matter of the dispute, preservation or inspection of samples for the purposes of evidence, appointment of a receiver and other interim measures as the tribunal may deem fit.

It has been further clarified through introduction of Section 17(2) that any orders passed under Section 17 shall be deemed to be an order of the Court and shall be enforceable under the code of Civil Procedure, 1908. The wide range of powers granted to the tribunal under Section 17 significantly narrows the scope of judicial intervention under Section 9 of the Act, once the arbitral tribunal has been appointed.

The Amendment Act has also attempted to enforce a strict timeline for arbitration proceedings and has incentivised the tribunal to ensure fast disposal of proceedings.As per the new provisions introduced in the Act of 1996, an endeavour has to made to dispose of proceedings for appointment of an arbitrator, within sixty days from the date of service on the opposite party. Once the arbitral proceedings have commenced, the tribunal to the extent possible, must try to conduct hearings on a day to day basis. If the tribunal pronounces the award within six months of commencement of proceedings, the tribunal is entitled to an additional fee, as may be determined by the parties. Measures have also been introduced to penalise parties for delays caused and to ensure that extension of time and adjournments are not granted as a matter of course. In this regard, a significant provision is the introduction of Section 29-A, which requires the tribunal to pass an award within twelve months from the date of entering upon reference. The parties have a right to extend this period by a further six months, but any extension beyond can only be granted by permission from the Court.

Another significant change brought about through the Amendment Act is the narrowing of the grounds for setting aside an award. The scope of the term 'public policy' has been restricted through explanations introduced in Sections 34 and 48.

While the provisions aimed at making arbitral proceedings a time bound exercise and narrowing the grounds of appeal are steps in the right direction, it remains to be seen how these are interpreted by Courts. An interpretation such as the one given to Order VIII Rule 1 of the Code of Civil Procedure, 1908, in Salem Advocate Bar Association vs. Union of India[8] could render all these provisions as discretionary, which would effectively negate their intended purpose. In this regard, arbitration tribunals and Courts have a vital role to play in ensuring that the provisions of the Act of 1996 are enforced in the manner, as intended by the legislature.

Applicability of the Amendment Act

The most obvious drawback of the Amendment Act lies in

the lack of clarity regarding its application to agreements executed prior to its notification i.e. prior to October 23, 2015. While Section 26 of the Amendment Act does state that its provisions will not apply to such proceedings where a request for referring a dispute to arbitration had been made before commencement of the Amendment Act, unless the parties agree to the contrary.

Since the notification of the Amendment Act, a number of parties where agreements were executed prior to October 23, 2015 have approached various High Courts seeking reliefs and have found themselves in a situation where the applicability of the provisions of the Amendment Act has been challenged on the ground that the agreement was executed prior to coming into force of the Amendment Act and therefore, its provisions will not apply. In the context of agreements where the seat of arbitration is outside India, parties claiming that provisions of the Amendment Act will not apply have relied on the fact that intention of the parties while executing the agreement was to oust the jurisdiction of Indian Courts and follow the ratio in Bharat Aluminium Company. This line of thought is further backed by certain judicial precedents, including judgments of the Supreme Court, where it has been held that once parties agree to the seat of arbitration being outside India and apply a foreign law to the arbitration agreement, then in effect the applicability of Part I of the Act of 1996 is excluded. Unfortunately, the Amendment Act itself does not address this issue and this issue in now pending before various High Courts for consideration. In this scenario too, the interpretation placed by the judiciary on the applicability of the Amendment Act will have far reaching consequences.

Conclusion

It is no doubt true that the changes sought to be brought about through the Amendment Act, were long required and ideally should have been notified long ago. The amendments aim at bringing the arbitration regime in India on par with practices followed in various jurisdictions across the world, even though there still exist multiple instances where the Courts can interfere in the proceedings. Nonetheless, the amendments brought about are a step in the right direction.

The changes are especially important as they are part of a larger concerted effort to project India as a destination where enforcement of legal rights is possible in a time bound and cost effective manner. This is important for any business or investor which is contemplating on entering the Indian market. Additionally, the changes if implemented in the right manner, will also assist in dealing with the huge backlog of cases which the judiciary in India is currently confronted with. However, merely passing of a well-intentioned legislation will not by itself solve the issues which the arbitration regime in India is facing. The success of the arbitration regime in India in large part depends on the enforcement of the provisions by the tribunal and Courts. The extent to which tribunals strictly enforce the provisions, especially those relating to time management and imposition of costs and penalties, will determine the success of the Amendment Act. In fact, imposition of fines and penalties may altogether discourage arbitration and may increase the possibility of settlement. Similarly, Courts must ensure minimal interference in arbitration proceedings and most significantly, must ensure that the provisions are read and interpreted as was intended by the legislature. Strict interpretation of the amendments and their enforcement will also ensure that parties to the arbitration do not have much scope to indulge in dilatory tactics.

Foot Note

[1]AIR 2003 SC 2629
[2]2005 (8) SCC 618
[3]2009 (1) SCC 267
[4]2009 (13) SCALE 403
[5]2011 (5) SCC 532
[6]2002 (4) SCC 105
[7]2012 (9) SCC 552
[8]AIR 2005 SC 3353

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Trainning of Arbitrators on Ethics: Bias & Corruption

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Synopsis

This paper considers the issue of Arbitrator ethics with reference to the recent developments in England and Wales under the Arbitration Act 1996. The paper will focus on the two different dimensions of Arbitrator ethics: the first being the internal test focusing on the conduct of the Arbitrator 'himself' especially in relation to the issue of apparent 'bias' and/or 'impartiality' with reference to the cases of Sierra Fishing Co v Farran [2015] EWHC 140 (Comm) and Cofely Ltd v Bingham [2016] EWHC 240 (Comm) where Arbitrators were removed. The second dimension of Arbitrator ethics is in relation to the issue of 'public policy' and the ethical balancing exercise to be performed by an Arbitrator, where one of the parties to the proceedings raises issues of 'bribery' and 'corruption' in the underlying contract and its impact on the validity of the Arbitral proceedings as a whole with reference to the recent case of National Iranian Oil Company v Crescent Petroleum Company International Ltd, Crescent Gas Corporation Ltd" [2016] EWHC 510 (Comm); where the Court focused on the enforceability of an illegal contracts as opposed to enforceability of a contract procured by corruption and bribery.

Introduction

Arbitrators as the private judges in a commercial /business disputes are in unique and privileged position of settling commercial disputes which often has far reaching consequences on the parties to the Arbitral proceedings; thus it is essential that an Arbitrator conduct himself 'ethically' through out the proceedings. This paper will examine the foremost key ethical issues that an Arbitrator must consider himself before considering the 'ethical' behaviour of the parties to the Arbitral proceedings.

The Oxford English Dictionary defines 'ethics' as moral principles or rules of conduct. A Code of Ethics provides a set of moral principles according to which one should conduct one's affairs. In the Arbitral proceedings context, international institutions such as the Singapore International Arbitration Centre[1] and Chartered Institute of Arbitrators ("CIArb") have set out specific ethical code of conduct for Arbitrators.[2] The CIArb Code of Professional and Ethical Conduct ("CIArb Code of Conduct") for Members sets out nine Rules, which any Arbitrator must abide by and have at the forefront when conducting an Arbitration. Rules 2, 3 and 4 of the CIArb Code of Conduct are particularly important as it goes to the heart of the fairness of the Arbitral proceedings as whole. Rule 2 requires that an Arbitrator must act with integrity and fairness and where that is not possible, the Arbitrator shall withdraw from the proceedings. The issue of integrity and fairness must be judged by an individual Arbitrator, which will be very fact specific subject to the nature of the dispute, the location of the dispute with reference to cultural, geographical and political sensitiveness of the Arbitral proceedings.

Similarly, Rule 3 requires that an Arbitrator must ensure that there is no 'conflict of interest' between his role as an Arbitrator and the dispute resolution process as a whole. Both before and throughout the dispute resolution process, an Arbitrator shall disclose all interests, relationships and matters likely to affect the Arbitrators 'independence' or 'impartiality' or which might reasonably be perceived as likely to do so. Where an Arbitrator is or becomes aware that he is incapable of maintaining the required degree of 'independence' or 'impartiality', the Arbitrator shall promptly take such steps as may be required in the circumstances, which may include resignation or withdrawal from the process. Again how and when an issue of 'conflict of interest' may arise will be a question of fact and degree, to which the Arbitrator must be alive to and must act expeditiously to resolve the issues in the interest of justice.

Rule 4 sets out another major ethical consideration for an Arbitrator is that he should only accept an appointment or act as an Arbitrator only if appropriately qualified or experienced. It is essential that an Arbitrator shall not make or allow to be made on the Arbitrators behalf any representation about the Arbitrators experience or expertise which is misleading or deceptive or likely to mislead or deceive. This is an extremely important consideration for an Arbitrator as the business world is huge and disputes can arise from wide variety of circumstances such as breach of contracts in defence industry to oil and gas pipeline projects with the involvement of laws of multiple countries. The major advantage of an Arbitral proceedings is that it allows parties to select an Arbitrator or in

essence a 'Private Judge', who has the particular experience and expertise within a selected industry, so that the Arbitrator has an understanding of the nuances of the issues at stake as well as having a first hand knowledge of the operation of the industry as a whole for e.g. dispute arising in construction industry.

The importance of Rule 3 and 4 is also reflected under Article 12 (1) and (2) of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) ("Model Law 2006"); which states that:

" (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

In practice an Arbitrator must ensure that there are no doubts by the parties as to his impartiality or independence. Mustil and Boyd, Commercial Arbitration (2nd edition, p 252) describe the test to be performed by the Arbitrator in evaluating the questions of impartiality and independence as: 'The question is not whether an arbitrator really is impartial, but whether a reasonable outsider might consider that there is a risk that he is not'.

In England and Wales, Rule 3 and 4 of ClArb Code of Conduct and Article 12 (1) and (2) of the Model Law 2006 is reflected in section 24 (1) (a) and (b) of the Arbitration Act 1996, which in so far as relevant states that:

"(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;"

Bias & Impartiality

The issue of whether there is a 'bias' or 'impartial' behavior by an Arbitrator will be very fact specific. England and Wales High Court have considered the issue of Arbitrator 'bias' and 'impartiality' on numerous occasions. In 2003, in the case of Argonaut Insurance Co v Republic Insurance Co [2003] EWHC 547 (Comm),the Court considered the issue as to whether an Arbitrator should be removed on the basis of 'bias' as he had given a witness statement on an earlier dispute as to the meaning of a 'clause' in an insurance contract. The Court rejected the allegations of 'bias' on the basis that the Arbitrator was a witness of fact and no more. In rejecting the appeal, David Steel J held that: "I do not regard the fact that he[3] has stated in a statement in another arbitration an opinion about the meaning of a clause when he was to be called, if he was to be called at all, as witness of fact, carries with it any implications as to his impartiality. It seems to me that there are no adequate grounds to conclude that there is any real possibility objectively perceived for a fair-minded and informed observer to conclude that there is a real possibility that Mr. Simons is biased."

However, more recently in February 2016, in the case of Cofely Ltd v Bingham [2016] EWHC 240 (Comm)an Arbitrator was removed by the England and Wales High Court on the basis of apparent 'bias'; where the issue of the Arbitrator's relationship with the defendant was in contention. Hamblen J removed the Arbitrator on the basis that the evidence indicated that over the last 3years, 18 per cent of the Arbitrator's appointments and 25 per cent of his Arbitrator's income derived from cases involving the defendant; thus giving the impression of apparent 'bias'.

Hamblen J referred to The ClArb Code of Professional and Ethical Conduct for Members (October 2000) r.3, which required its members to disclose "all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so". The "acceptance of nomination" form required disclosure by the Arbitrator of "any involvement, however remote" with either party over the last five years. Acting as Arbitrator or Adjudicator in previous cases involving one of the parties was "involvement" for the purposes of the Code of Practice. It was immaterial that the appointments might have been made by an appointing body rather than by the party itself. This case is a salutary reminder to Arbitrators to ensure that they do not unwittingly give the impression of being 'biased' or 'influenced' by a party, even though, there may be no actual bias but merely due to the volume of engagement from a particular individual or a company.

In another instance, in January 2015, in the case of Sierra Fishing Co v Farran [2015] EWHC 140 (Comm), Popplewell J removed an Arbitrator(Mr Ali Zbeeb) on the

basis of 'bias' and held that the fair-minded observer would conclude that the connections between the Arbitrator and the law firm in which the Arbitrator has financial interest gave rise to a real possibility that the arbitrator would be predisposed to favour the first respondent in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three. That possibility was not significantly diminished if the financial benefit accrued to the Arbitrator's father rather than to the firm.

Popplewell J also particularly referred to the guidance provided by the International Bar Association Guidelines on Conflicts of Interest in International Arbitration[4] ("the IBA Guidelines") with focus on the Red, Orange and Green list ("the Appications List"). The Red List contains those circumstances regarded as giving rise to justifiable doubts about the Arbitrator's impartiality or independence and is divided into a Non-Waivable Red List and a Waivable Red List, whose titles are self explanatory. The Orange List contains situations where, depending on the facts of a given case, there may be justifiable doubts as to the Arbitrator's impartiality or independence such that the arbitrator has a duty to disclose them to the parties under General Standard 3(a). Waiver of a Waivable Red List conflict of interest requires express acceptance of the Arbitrator acting by a party who has actual knowledge of the situation. Constructive knowledge is insufficient. An Orange List conflict of interest can be waived by inactivity following disclosure by the Arbitrator. However, situations that, such as those set out in the Green List, could never lead to disqualification under the objective test set out in General Standard 2, need not be disclosed. As reflected in General Standard 3(c), a disclosure does not imply that the disclosed facts are such as to disqualify the Arbitrator under General Standard 2.

As such, when conducting an Arbitration, an Arbitrator must be astute and proactive in ensuring that he has complied with the personal disclosure requirements of any 'relationship' that may cast doubt on his ability to act impartially as required by the international standards in ethical behaviour; for e.g. under the CIArb Code of Conduct or the IBA Guidelines.

Public Policy & Corruption

The second issue that this paper will examine is the issue of 'public policy' and ethical balancing exercise to be performed by the Arbitrator, where one party to the proceedings raise the issue of underlying 'corruption' and 'bribery' in relation to the contract subject of the Arbitral proceedings. Corruption and bribery is undoubtedly one of the evils of the business world, which affects the global community. Transparency International define corruption generally as 'the abuse of entrusted power for private gain'.[5] It includes acts of bribery, embezzlement, nepotism or state capture. It is often associated with and reinforced by other illegal practices, such as bid rigging, fraud or money laundering.[6] Corruption and bribery is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike. It has direct impact on the business community as corruption increases the cost of doing business, leads to waste or the inefficient use of public resources, excludes poor people from public services and perpetuates poverty and corrodes public trust, undermines the rule of law and ultimately delegitimises the state.

The impact of corruption has been recognised by international community, which has resulted in a number of international conventions against corruption with a view to eradicating corruption as follows: UN Convention against Corruption (2000), African Union Convention on Preventing and Combating Corruption and the Inter-American Convention Against Corruption (2003) and Organization for Economic co-operating and development convention on combating bribery of foreign public officials in International business transactions (1997). In furthering the aims of the international conventions, the UK has enacted two significant legislations with wide reaching power to combat corruption and bribery under Bribery Act 2010 and the Proceeds of Crime Act 2002.

An Arbitrator must always act ethically by ensuring that the proceedings they are involved in are not furthering the process of corruption or bribery. In international commercial Arbitration cases, allegations of bribery can always surface, whether it is raised by the parties to the Arbitral proceedings or by the Arbitrator himself. This raises delicate issues as to the role to be played by an Arbitrator. An arbitrator is not investigator and does not have the issue of pubic interest to consider; as he is there to adjudicate upon a private business dispute. This is significantly different from a judge from a State Court who does have a duty to act in the public interest and uphold national laws especially criminalising corruption and bribery. However, now, there is an acceptable trend towards an Arbitrator setting aside whole or part of the law chosen by the parties where granting an award would lead to a situation that is contrary to international public policy as the Award could be refused recognition and enforcement for example under art. V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

In March 2016,the issue of public policy and corruption was considered by the England and Wales High Court in the case of National Iranian Oil Company v Crescent Pe-

troleum Company International Ltd, Crescent Gas Corporation Ltd" [2016] EWHC 510 (Comm).The case related to asubstantial Arbitration proceedings involving breach of long term gas supply and purchase contract ("GSPC") which lasted for some 30 days with live evidence from 12 witnesses of fact and 9 expert witnesses. At the end of the oral hearing the tribunal was provided with almost 1400 pages of written submissions. After deliberating for over a year the tribunal produced an award which ran to 362 pages and 1387 paragraphs. The Award was granted by two arbitrators with the third one dissenting in which the allegations of corruption in the GSPC was dismissed. The Tribunal held that

(i) The GSPC itself was not an illegal contract (such as those, for example, in Kaufman v. Gerson [1904] 1KB 591 , Lemenda Trading Co. Ltd v. African Middle East Petroleum Ltd [1986] QB 448 or Soleimany v. Soleimany [1998] QB 785).

(ii) The GSPC was not procured by corruption.

(iii) There was misconduct by a number of named persons, but the Arbitrators did not conclude that any of it was of any material consequence in respect of the GSPC subsequently entered into.

The Claimants appealing against the Arbitral award alleged that the English Court should not enforce the Award as the GSPC was procured or tainted by corruption; thus it is contrary to the English public policy pursuant to section 68(1) and 2 (g) Arbitration Act 1996 which provides that:

"68 (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy"

Burton J, reviewed the major authorities in which the English Court have refused to enforce an illegal contract, even if valid in law such as a contract to pay a bribe (Lemenda[7]) or an action to recover an amount paid over which was itself a bribe (Nayyar v. Denton Wilde Sapte [2010] Lloyd's Law Rep (Prof Neg) 139)

In addition, Burnton J at paragraphs 43 and 44 referred to the test to be performed in considering the issue of illegality, where distinction must be drawn between the enforcement of contracts to commit fraud or bribery and contracts which are procured by bribery as follows: "in particular, in Honeywell International Middle East Ltd v. Meydan Group LLC [2014] 2 Lloyd's Law Rep 133an application by a party, who had failed in an arbitration, to challenge enforcement of the award as contrary to English public policy under S.103 of the 1996 Act failed. It failed on the grounds of the absence of any fresh evidence (to which I shall return below), but it also failed because Ramsey J accepted the submissions of the party seeking to enforce the award and resist the section 103 application that (at 178):—

"even if Meydan's allegations of bribery were established, they would not, as a matter of English law, result in enforcement being contrary to public policy. It submits there is no principle of English law to the effect that it is contrary to English public policy to enforce a contract which has been procured by bribery. It submits that the distinction must be drawn between the enforcement of contracts to commit fraud or bribery and contracts which are procured by bribery. It says that whilst contracts to commit bribery are contrary to public policy and as such will not be enforced, contracts which have been procured by bribery would be rendered voidable by English law, provided that counter-restitution can be made. Honeywell relies on the decision in Wilson v. Hurstanger …thus, as a matter of English law public policy, the courts will enforce a contract procured by bribery subject to the innocent party having, in the appropriate circumstances, a right to avoid the contract."

44 Ramsey J considers the authorities at some length and concludes: —

"185. It follows that, whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which had been procured by bribes are not unenforceable."

On review of the substantial number of English Authorities, Burnton J dismissed the appeal against the Award and held that:

(1) English public policy applies so as to lead a court to refuse to enforce an illegal contract, even if not illegal at relevant foreign law, such as a contract to pay a bribe. The contract cannot be enforced because ex turpi causa haud oritur actio : out of a disgraceful cause an action cannot arise. The supply contract enforced by the Arbitrators was not and is not suggested to be an illegal contract, and the action to enforce it does not arise out of a disgraceful cause.

(2) There is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.

(3) There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct. The siren call of Ms Dohmann, referring to recent international Conventions to outlaw bribery, and the increase of legislation to criminalise it, is attractive. But to introduce a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy. There may be many contracts which have been preceded by undesirable conduct on one side or other or both – lies, fraud, threats and worse – but the Court would not interfere with a contract entered into by such parties, even if one or more of those parties had committed criminal acts for which they could be prosecuted, unless the contract itself was illegal and unenforceable, or one or more of the acts of such parties induced the contract, in which case it might be voidable at the instance of an innocent party so induced.

(4) In any event, in this case, the conclusion to which the Arbitrators came was that the GSPC was not procured by bribery, after full consideration and evidence. The English Court should not interfere with the Arbitrators' decision under s.68, or s.103 , without fresh evidence of which there is none, or save in very exceptional circumstances, of which there are none.

As such, in any Arbitration proceedings, the Arbitrator must consider the issue illegal contract as opposed to contract procured by corruption. This case was an exemplary demonstration of how an Arbitrator should evaluate the allegations of corruption and bribery with reference to factual and expert evidence.

Conclusions

As can be seen from the review of the most recent English judgements in the cases of Cofely Ltd and Sierra Fishing Co, in which Arbitrators have been removed due to apparent 'bias' and 'impartiality'. These cases demonstrate the evolving nature of Arbitrators ethics and highlights the vigilance required of an Arbitrator. It is extremely important that an Arbitrator gives due weight and consideration to the issue of personal disclosure from the outset to ensure that any pertinent issues in terms of conflict of interest and/or personal expertise are disclosed immediately to the parties; so that appropriate steps could be taken forthwith to avoid unnecessary expense being incurred by the parties. Similarly, when dealing with Arbitration cases, an Arbitrator must have the issue of 'public policy' at the forefront of his mind to ensure that they examine the nature of the contract subject of the Arbitral proceedings carefully as in National Iranian Oil Company to ensure that they do not unwittingly become involved in providing Awards in illegal contracts, which are based on corruption and bribery; thus perpetuating the evil of corruption and accumulation of proceeds of crime contrary to international conventions and standards.

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4. UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) ("Model Law 2006")
5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"

International Conventions

6. UN Convention against Corruption (2000),
7. African Union Convention on Preventing and Combating Corruption and the Inter-American Convention Against Corruption (2003)
8. Organization for Economic co-operating and development convention on combating bribery of foreign public officials in International business transactions (1997)

UK – Legislation

9. Arbitration Act 1996
10. Bribery Act 2010
11. Proceeds of Crime Act 2002

England and Wales (Cases)

12. Argonaut Insurance Co v Republic Insurance Co [2003] EWHC 547 (Comm)
13. Sierra Fishing Co v Farran [2015] EWHC 140 (Comm) and Cofely Ltd v Bingham [2016] EWHC 240 (Comm)

14. National Iranian Oil Company v Crescent Petroleum Company International Ltd, Crescent Gas Corporation Ltd" [2016] EWHC 510 (Comm)
15. Kaufman v. Gerson [1904] 1KB 591 ,
16. Lemenda Trading Co. Ltd v. African Middle East Petroleum Ltd [1986] QB 448
17. Soleimany v. Soleimany [1998] QB 785
18. Nayyar v. Denton Wilde Sapte [2010] Lloyd's Law Rep (Prof Neg) 139
19. Honeywell International Middle East Ltd v. Meydan Group LLC [2014] 2 Lloyd's Law Rep 133

Foot Note

[1]http://www.siac.org.sg/images/stories/articles/rules/Code_of_Ethics_Oct2015.pdf

[2]http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/code-of-professional-and-ethical-conduct-october-2009.pdf?sfvrsn=2

[3]The reference is to the Arbitrator

[4]http://www.ibanet.org/

[5]http://www.transparency.org/what-is-corruption/

[6]https://www.oecd.org/cleangovbiz/49693613.pdf

[7]Lemenda Trading Co. Ltd v. African Middle East Petroleum Ltd [1986] QB 448

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Effective Resolution of Delay Claims

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Synopsis

In Indian Construction Industry, time slippages in completion of projects are HIGHLYprevalent. As per a report, more than 84% construction projects are presently undergoing time overruns which eventually result in cost overruns. Because of such delays in execution of projects, obviously disputes will arise between project owners and the contractors. The Owners/Employers levy the liquidated damages (LDs) and penalties attributing the delays to contractor. On other side the contractors lodge delay claims as compensation for the losses for prolongation of the contract, citing owner caused delays. Thousands of crores Disputes involving thousands of crores of rupees are locked up in various stages of litigation by way of such delay claims, pending to be resolved. These delay claims constitute a majority of the pending disputes in Indian construction sector. The resolution of such delay claims is quite complex since it involves numerous issues and there is no standardized, rational approach followed across the industry in framing these claims. The Arbitrators do have tough time in not only judging the cause and responsibility for the delay, but also in many cases find it difficult in judging the quantum of compensation. This paper reviews the methodologies, approaches in framing such delay claims and discusses the complexities involved in their resolution. Discussion is presented on the methodologies and approaches to be followed for substantiation of delay claims thereby drawing appropriate conclusions. It is imperative that speedy and effective resolution of disputes pertaining to delay claims to ensure harmonious growth of Indian construction industry.

Introduction

In India Construction industry contributes about 9% of GDP, sector wise. It is second and only next to agriculture in terms of employment generation in the country. As per a survey conducted it is estimated that presently disputed amounts by way of unresolved claims in construction sector amount to ₹ 50,000 Crores. Prolonged litigations ultimately hamper the growth of the industry. Majority of the disputes raised are because of delays caused during execution of projects.

Basically there are three types of delays.

1. Compensible, Excusable delays (CD): Normally owner caused delays are categorized wherein together with time, the cost compensation is admissible.
2. Non excusable delays (ND): The contractor is responsible for the delays wherein the Liquidated damages (LD) are levied for delay as per the contract terms
3. Non compensable excusable delays (NCD): Often caused by a third party or force majeure wherein the delay is excused but no compensation is payable.

The owner caused delays are such delays for which the owner has to directly assume the responsibility, such as delays in handing over work fronts, delay in payments, delays in approvals, supply of drawings and decisions etc. Because of such delay events, the contractor not only seeks extension of time but also claims the cost compensation. For contractor caused delays normally compensation clauses are built in the contract by way of liquidated damages (LD). These are considered as pre estimated, genuine compensation agreed by the parties and law is well settled on these issues. If owners can prove the quantum of delay attributable to contractor, then they are legally entitled to levy the LDs as stipulated in the contract. On the other hand the delay claims lodged by contractors for owner attributable delays are extra contractual that is not supported by any contract terms and conditions but based on law. Such delay claims are potential sources of conflict since their resolution involves complex issues. The Arbitrators have tough time in judging the cause and responsibility of delay and also in arriving at a reasonable compensation.

A rational approach and methodology is inevitable for effective resolution of the delay claims.

For resolving the delay claims, delay analysis is vital and important for establishing the cause and quantum of delay besides establishing the responsibility for the delay.

Delay Analysis Methodologies

The CPM schedule based methods are more popular and there are three types of delay analysis methodologies as mentioned below:

1. Conventional methods: A schedule is prepared as a project plan which is compared with actual execution for ascertaining the delays. In 'As planned schedule' method, the bidding time estimate is taken as a base which is used to analyze delays in various activities. This assumes that the estimates of time duration during planning stage are accurate.

   'As built schedule' 'analysis method is a widely accepted method. It exhibits how the work is actually performed which can be compared with a planned base line schedule.

   In 'Impacted as planned schedule' analysis, the delays encountered as activities are incorporated in to 'As planned CPM schedule' to see how project completion date is affected.

   'Modified as built schedule analysis', In this method the base line or planned schedule is updated for each delay event to draw a revised schedule which is compared with as built. Thus, it is dynamic and updated for assessing the impact at various delay events.

2. Collapsing methods: In collapsing methods, rather than adding delays in to 'As planned 'schedule as in conventional methods, the delays are subtracted from schedules.

   In 'Collapsed as built schedule analysis', the delays encountered are subtracted from 'As built schedule' to see how the project could have been completed but for the delays encountered.

3. Contemporaneous schedule analysis: In 'Snapshot method', the impact of delays is reviewed and assessed at different points of time of execution, called snap shots or windows and a window based analysis is carried out updating the schedule for delays encountered in the period , leaving the balance as planned.

In 'Time impact analysis', the schedule is updated before and after each delay occurrence, to represent the actual status of project before each delay event. Such delay impact is calculated and the process repeated for all delays. Often, the various types of delays occurring are not stand alone types, but they will be overlapping, which are termed as 'concurrent delays'. In case of concurrent delays, the delay analysis becomes more complex.

Delay and disruption Costs

Disruption is often treated in the Industry practice as if it is the same as delay. These are however two separate issues. Disruption is the interruption to the planned work sequence or flow of planned events that impede the contractor from completing the works as planned. Delay is lateness where as disruption is loss of productivity, disturbance, hindrance or interruption in contractor's normal working methods resulting in lower efficiency. Disrupted work is carried out less efficiently than it would have been done originally without any disruption. The assessment of loss of performance or productivity due to disruptions in work is complicated.

Typical Heads of Recovery of Delay / Disruption costs

The quantification or assessment of impact of the delay is important for the delay claim. Nevertheless any delay event will cause the prolongation of work beyond stipulated period of the contract. Due to owner caused delays, the work out turn will be reduced wherein the resources deployed like manpower, machinery are not productively utilized. Thus, the claims are essentially productivity related. Because of the reduced turnover and drop in productivity, the costs incurred on establishment and overheads are not fully recovered resulting in losses by way of under recovery of costs. This is termed as unproductive or under utilization of resources causing losses and claims are framed assessing such losses in the form of unabsorbed costs.

The quantification of delay claim or its substantiation by the contractor will be normally done by projecting the costs incurred under various heads as follows:

- Manpower (technical, non technical, labour)
- Machinery and Equipment
- Site / Field over heads (FOH)
- Head office over heads (HOOH)
- Insurance, bond extension costs
- Loss of profit

Though it is easy to lodge such claims, the substantiation of such claims and quantification is a difficult task. Obviously the burden of proof of the claim for such losses lies with the claimant who needs to establish the cause besides rational quantification. Because of this delay claims are major source of conflict in the construction industry and also one of the most difficult problems to resolve.

Methodologies for framing Delay Claims

The approaches and methodologies normally followed for quantifying delay claims and working out over head costs are mentioned as below.

1. Actual cost method: This consists of calculating extended field over head costs in support of delay claim. Classification of each cost amount is carried

out as time related and non time related. The time related overheads (OH) costs for extended period are segregated and calculated. Again average daily overhead costs are assessed for project period to calculate extend period OH Costs.

2. Total cost Method: When it is not easy to assess and segregate the over head costs in the above method, total cost method is used which is acceptable by courts also when no other quantification is possible. The total costs incurred at the end of project completion are calculated and the field overheads costs that were considered while bidding will be deducted to assess extra costs which are treated as unabsorbed due to work prolongation.
3. Modified total cost method: In this the contractor deducts certain self imposed damages from calculated difference between as bid and actual field OH costs assessed by total cost method.
4. Jury verdict method: When no quantification can be presented or agreed and when there is a clear proof of injury, the arbitration tribunal or court can arrive at a reasonable, equitable adjustment of cost compensation for delay. Such assessment is termed as Jury verdict method.

Resolution of Delay Claims

For effective resolution of delay claims the important issues, relevant factors and suggestions are presented in the following discussion.

1. For resolution of delay claims existing methodologies and approaches need to be studied to understand various methods followed in framing such claims.
2. The Authors have conducted a study (1) by conducting a survey among the three distinct stake holders on the methodologies, approaches followed in framing delay claims. The first group is the Project owners as Employers and the second group is the Consultants and Arbitrators who are involved in resolution of delay claims. The third group is the Contractors who frame and lodge the delay claims.
3. It is found that as a general practice delay claims are lodged for all types of delays except contractor caused once. Since compensable delays are only to be considered for awarding compensation, segregation or categorization of delays as mentioned above is important for establishing who is responsible for the delays caused.
4. As per the study it is found that there is not much awareness on delay analysis methodologies to substantiate delays and the impact. The delay analysis methods are being employed to substantiate delays only for some cases. Predominantly 'As Built delay analysis' is mostly used. In the absence of appropriate delay analysis, the resolution of delay claims will become difficult.
5. As is seen even for major projects, maintenance of suitable records and documentation is not done properly during execution stage. By this there will be problems in applying proper methods for delay analysis. In such cases due to no availability of records, justification of delays is done as a post mortem exercise which has many limitations. Substantiation of delays will be a problem in such cases.
6. While framing delay claims the costs under various heads like manpower costs, machinery hire charges, site and office overheads besides loss of profit are mostly projected. For head office overheads assessment is done by formulae based approach. Hudson's formula is popularly used which has also judicial recognition.
7. Normally the quantification of claim presented under the above mentioned heads is challenged by the other party if these are not supported by accounts, financial records and books. The Arbitrators have tough time in not only judging the merit of the claim but also in ascertaining the rational of compensation that is claimed.
8. There are two ways of structuring a delay claim. One approach is claiming the costs during execution of project by way of underutilization / idleness. Another approach is claiming the costs in extended period treating the total prolongation is due to owner attributable delays and all costs incurred compensable. Each approach has its own merits and demerits. While the former is based on actual costs incurred at the incidence of delay occurance. But the actual underutilization of the resources needs to be established. In case of total disruption of work for some period of time, this approach proves genuine since all idling costs as incurred in the specific instance can be justified. In the later approach the exact delay period due to owner attributable causes needs to be established for substantiation of the delay claim.
9. Normally the parties take such pleadings that time is the essence of the contract but often fail to establish that they are not at all responsible for any delay during performance . When the Arbitrator concludes that both the parties are equally responsible for the delay, the merits of the delay claims are diluted or weekend.
10. In most of the cases for the delay claims 'Breach of contract 'and provisions of Sections 73, 74 of Indian contract act are pleaded. As per the provision of this section the party who suffers by such breach is en-

titled to receive from the other party causing breach, compensation for any loss. Such compensation is not to be given for any remote and indirect loss as per law. It means the loss suffered should flow directly from breach. Compensation claimed for the delay shall be direct and not "notional "and shall be proved with such evidence. The legal principle is that the compensation shall put the party suffered, in such a position as if the contract is performed without any alleged breach. In a nutshell it is easy to allege a breach but difficult to prove it, beyond doubt.

11. For effective resolution of delay claims good record keeping during execution stage is essential. Further employing suitable delay analysis methodologies for establishing and substantiating delays, causes are inevitable.
12. Since there is no universal method of delay analysis and the methods yield different results, it is suggested that the parties agree on application of suitable method of delay analysis while entering in to contract to avoid conflicts at later stage. Because of the above cited reasons the United Kingdom Society of Construction Law (SCL) has published the delay and disruption protocol in October 2002 to provide useful guidance on common issues that arise in relation to construction contracts. The Protocol aims at providing a means by which the parties can resolve these matters and avoid unnecessary disputes.

Delay and Disruption Protocol by SCL

The protocol contains core principles relating to delay and compensation and guidance notes on four sections as below.

1.Core principles and other matters relating to delay and compensation

This section explains the core principles on delay, compensation. Firstly it deals with principles on EOT that the benefit to the contractor of an EOT is only to relieve the contractor of liability for damages i.e. LDs. The benefit for Employer is that it establishes a new contract completion date which prevents completion time becoming "at large". A guiding principle is stated that applications for EOT to be made and dealt in time as far as possible. The goal of EOT procedure is ascertainment of appropriate contractual entitlement to EOT and not based on whether contractor is liable for LDs. The grant of EOT automatically will not entitle for claim on costs i.e. compensation. Also this section deals with important aspects on float, concurrency of delays, mitigation of delay, financial consequences of delay and valuation of variations. Also it deals with important aspects like compensation for prolongation which specifies that it should be based on actual additional cost incurred by contractor. Also principles specified on mitigation of loss, claims on interest payment, Head Office Over Heads (HOOH), profit, acceleration of work and disruption. It is stated that delay is lateness but disruption leads to loss of productivity.

2.Guidelines on preparing and maintaining programmes and records

This section is on guiding principles on construction programme, acceptance of programme and its updating. Also it deals with the agreement on usage of software and requirement of records.

3.Guidelines on dealing with Extension of time during the execution of project

Guiding principles on time extension procedures, role of contract administrator and risk events to parties are described.

4.Guidelines on dealing with disputed EOT issues after completion of project retrospective delay analysis

The guiding principle for a forensic analysis on establishing delay after completion is given. The nature of proofs required, applicability of delay analysis and methods deliberated in detail based on availability of records.

The Protocol provides a suggested approach to deal with a contractor's claim for EOTs and compensation for delay events. Thus the protocol has been designed as a code of good practice to be used during for framing the contract as well as during administration of the contract. Also it provides good practices for assessing claims and resolving disputes. It is recommended that the parties consider and agree on procedures and entitlements while drafting contracts to avoid uncertainties and ambiguities which are potential causes of disputes.

However the protocol provides only the guiding principles based on balanced approach and is not intended to supersede the terms of the contract. It is mentioned that the delay and disruption issues in dispute need to be decided by adjudicators, arbitrators and judges for which these could act as fair, equitable and just principles. The protocol recommends that in deciding EOT the adjudicator, arbitrator or judge should so far as practicable put him/ herself in the position of contract administrator.

The protocol also consists of model specification, records clauses, model programme, etc in various appendices to protocol, for ready reference and guidance.

Conclusions

1. For substantiation of delay claims good record keep-

ing and evidence based on records is essential. The party who lodges the claim should understand that the burden of proof lies on it rather than depending on Arbitrators or adjudicators to decide the issue.

2. For establishing the merit of the claim, cause of the delay, responsibility and its impact needs to be proved. Application of suitable delay analysis methods are vital and there is a need for bringing awareness in the industry on such methodologies.
3. Delay and disruption protocols of U.K. SCL can be used as guidelines on procedures to be agreed between the parties to construction contract so that disputes can be minimized and prolonged litigations can be avoided.
4. These protocols as guiding principles can be used by adjudicators, arbitrators and judges while resolving the disputes on delay claims.

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Law of damages in Engineering Contracts

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Synopsis

Damages are primary remedy in breach of contract in Common Law, but its jurisprudence is complex. Damages, distinct from debt or restitution, involve issue of causation, remoteness, knowledge, mitigation, reasonableness etc in a factual matrix. Certain classical interpretations have since yielded to commercial realties. The inherent nature of engineering contracts gives rise to challenges in claims of damages. Delay and disruption, partial or complete prevention, repudiation, contributory negligence, apportionment, acquiescence, waiver, termination when time is essence, anticipatory breach, extension of time & its relation to liquidated damages & penalty, concurrent delays, post termination contractual claims etc have received judicial attention. To clear such hurdles, standard contract forms incorporate specific provisions. The paper explains the basic law and principles of damages in Common Law, later adopted in India and the judicial precedents as applicable to law of damages in engineering contracts.

Basic principles of 'damages' in Common Law in contracts

The law of contract in India follows the English Common law. Hence the basic principles and evolution of the law of damages in Common Law in England is useful to understand Indian law. There is no categorical definition of "damages" in English or Indian law. As per Oxford Companion to Law "damages" are "pecuniary compensation payable by one person to another for injury, loss or damage caused by one to the other by breach of a legal duty". An action of damages pre-supposes a wrong i.e. a wrongful act or omission of some kind committed either by the defendant or by someone for whose acts he is responsible affecting the claimant. "Wrongful act" is not synonymous with "fault" and damages do not cease to be damages merely because no blame attaches to the defendant. Once a breach of contract is established, first an enquiry is to be made on factual and legal causation. Damages exclude liabilities to unconnected third parties that may out of a wrong. It is an order that the defendant pay the claimant a sum of money. Hence it differs from an injunction preventing future wrongful acts or an order that an unsatisfied contractual obligation be performed. "Compensation" is different from "damages" in a way duty to compensate those suffering loss need not necessarily arise out of a wrong act e.g. in rightful acquisition of land by State. An award of damages is not only an order to pay money but to pay an abstract sum. It is distinct from an award of interest to the claimant holding defendant's money.

Ordinarily it is a reparation for some past act or omission but award of damages is possible for future infringement of claimant's right e.g. by refusing injunction for defendant's wrongful activity and instead awarding damages or damages for anticipatory breach of contract. An action on claim of damages is distinguished from action for an agreed sum. Damages exist to indemnify the claimant for the effects of a wrong committed against him, but agreed sum to carry into effect an existing obligation to pay a sum of money. The claimant sometimes claim both for 'debt' and 'damages' in the same action. Damages, unlike debt, require duty of mitigation & proof of compensable loss. Damages may be available for late payment of debt, whereas only interest and not damages are admissible for late payment of damages. Though benefit of damages can be freely assignable, a potential liability in damages can be assigned only sub modo. Set-off in respect of claims to pay damages is less readily available than for debts (though the difference in set-off is strictly between unliquidated and liquidated claims). A promise to pay money conditional or otherwise gives rise to debt, but an action on a warranty is an action on damages and not an action in debt. A warrantor is regarded as promising that a particular state of affair exists, and hence liable for loss suffered by promisee, if it does not. His liability cannot be characterized as a promise to pay money, conditional on the warranty being broken. Similar principles apply to an action on indemnity against loss suffered in a transaction. LD clauses have been consistently held as involving liability in damages and not in debt; though in clauses of this sort, it may appear, primary liability is to pay the sum concerned conditional only on the defendant being in breach in the stipulated way and the claimant suing for an agreed sum like a seller of goods sues for the price. Damages pre-suppose a wrong but remedy in restitution is an action based on unjust enrichment. Gain

by defendant may or may not be out of wrong on his part. Common law may permit action both in restitution or in damages in the same situation e.g. if 'A' pays in advance to 'B' for goods which 'B' fails to deliver, 'A' may sue 'B' either in damages for breach of contract or for repayment of money paid for a consideration that has totally failed.

The duty in law to pay damages for a wrong is a secondary obligation, once the primary obligation is broken and is independent of the continued existence of that primary obligation e.g. rescission of a contract puts an end to the primary obligations to perform the contract, but gives rise to secondary obligation of the party in breach to pay damages. The aim of damages in contracts is only compensatory i.e. the victim in breach is to be put so far as money can do it in the same situation as if the contract had been performed. There can be no damages if no legal injury is suffered. The compensatory aim of award of damages can be achieved by protecting the expectation interest of the parties i.e. the position had the contract been performed. However, when claimant seeks to recover loss of opportunity and such loss is difficult to assess and is very speculative or difficult to prove, the claimant may instead recover damages on reliance interest i.e. to put the claimant into the position it would have been had it not entered into the contract. This happens either when it is more favourable to the claimant or Courts find expectation interest as too speculative. Non-pecuniary losses like mental agony or emotional stress are generally not allowed in damages in commercial contracts.

The judicial precedents in England–Hadley v Baxendale(1854) 9 Ex 341 established the principles for award of damages in contracts in Common Law in England. Damages for breach of contract would be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Thus the Court clarified the relevant test of remoteness of damage in contract law. These principles of remoteness of damage have been questioned and modified by the Courts in England over the years. In Victoria Laundry Ltd v Newman Industries [1949] 2 KB 528 and Koufos v C Czarnikow Ltd[1969] 1 A.C. 350, the focus was on knowledge of both the parties at the time of formation of the contract for any abnormal loss.

Whereas it is wider "reasonably forseeable" test in tortious damages, it is stricter "reasonable contemplation" test in contract (the jurisprudence presumes a freely negotiated contract where a party can protect itself against unusual risk by drawing attention of the other party at the time of contract unlike in tort; questionable in dotted line standard contract documents). In Parsons (Livestock) Ltd v Uttery Ingham & Co ltd[1978] Q.B. 791 loss of pigs was decided recoverable but not loss of future profit, being too remote. The question was dealt as 'physical harm' for loss of pigs vs 'economic loss' for future los of profit. The minority decision of Lord Denning M.R. applied wider tortious test of 'reasonably forseeable' for physical harm whereas the stricter 'reasonable contemplation of both the parties' contractual test for economic loss. Lord Denning argued, it should be the type of loss suffered that should determine the test of remoteness and not whether the claimant decides to frame his action in contract or in tort. A new principle to principles of remoteness i.e. "assumption of responsibility" test was declared by House of Lords in Transfield Shipping Inc v Mercetor Shipping Inc [2008] UKHL 48. But Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd [2010] EWHC 542 shows assumption of responsibility approach would be limited to exceptional cases. In case of contributory negligence the position in law is certain in tort to reduce the damages, but not so certain in contract. This is governed by statute i.e. the Law Reform (Contributory Negligence) Act 1945 in England. It refers to 'fault'. Forsikringsaktieselskapet Vesta v Buthcer[1989] A.C. 852 held, where the only obligation is a strict contractual obligation damages cannot be reduced as a result of contributory negligence. This was confirmed by Court of Appeal in Barclays Bank Plc v Fairclough Building Ltd[1995] Q.B. 214. However, if the Claimant has breached the contract by acting negligently that can be considered by Court or Arbitrator in a contractual claim.

In case of liquidated damages, in Common Law, the amount would be recoverable irrespective of the actual loss suffered but a provision of penalty is invalidated in law. There is no need of determination of remoteness for award of LD. However, the Courts in England till recently looked upon LD clauses with great suspicion and these were invalidated more often than not by applying the "prevention principle" strictly. Thus new rules of construction evolved on extension of time and delay related LD. A contractor would be released from liability in LD even in case of a minor prevention by employer unless there is an appropriate time extension clause for such prevention. Prevention need not be necessarily a breach of contract by employer and a contractual action ordering extra work without corresponding extension of time provision would constitute prevention. In Dodd v Churton[1897] 1 Q.B. 562, it was held that unless there is a sufficiently specific clause , it is not open to the employer, where the contract date is ceased to be applicable to make out a kind of debtor and creditor account allowing so many days or weeks for delay caused by the employer

and, that after crediting that period to the builder, to seek to charge them with damages at the liquidated rate for the remainder.

Hence contracts now are carefully drafted providing for extension of time for employer caused delays and power to employer or its engineer to give extension of time even without application by the contractor. Since in many judgments expression like "beyond the control of the contractor" was interpreted not to include any prevention by employer (except in a few recent cases which are controversial) specific provision was made for time extension for delay caused by employer. Similarly in LD clauses related to final completion, in absence of a proper contractual mechanism of LDs linked to sectional completion, were held inoperable if partial possession was taken by employer before completion. To ensure due diligence throughout and to indemnify any damage for lack of intermediate progress e.g. third party liability of employer in other linked contracts or deprived of sectional use of the building/road, many contracts now provide for intermediate levy. If LDs are levied for non-completion of work on extended date, this date from which LD is to run has to be fixed in each case. If variation is ordered once LD has started to run; employer often re-fixes the date to run LD by adding additional days as per contract for variation on earlier date of LD. The contractor may claim the LD clause to have become inoperative (prevention principle) or at least refuses LD prior to date of such variation. Variation though contractual, who was responsible for its late occurrence raise difficult questions of fact. LD already imposed from earlier date is invalidated and require retrospective correction.

The law of 'Damages' in India & Engineering Contracts- The Indian Contract Act, 1872 fathered in England based the law in s.73 of unliquidated damages on Hadley v Baxendale(1854) 9 Ex 341. It thus stipulated the principles of loss naturally arising in usual course of things from breach or knowledge of those likely to result from breach, relied on causation, allowed no compensation for any remote or indirect loss, incorporated the principle that for claim of abnormal loss there has to be knowledge at the time of formation of contract. It also provided remedy in breach of quasi-contractual obligations same as to that of breach of contract. Claimant has a duty of mitigation. Illustrations are used in the statute.

In engineering contracts factual causation i.e. whether there exists a sufficiently close nexus between the wrongful act and the loss suffered makes it difficult to analyze when a number of events contribute to the damage suffered by the claimant. For cause and effect, the degree of causal connection or 'potency' is relevant. In some jurisdictions the contracts use terms such as "effective or predominant cause" and "real and effective cause". If the chain of causation is broken between the earlier wrong and the subsequent loss, damages may not be admissible. Damage would not have occurred unless the breach of contract had been committed- is a necessary condition before factual causation can be established.

Damages, as per the principles of law, are to be assessed on the date of breach. In engineering contracts there may be gap in time between the defective work done by the contractor (i.e. breach) and when it is discovered and later if made good by the employer (i.e. loss). The principle of law on timing is relaxed for bonafide delay to discover the defect but duty of mitigation by employer in rectifying defect applies. In case of unreasonable delay by employer and extra loss only diminution value for loss shall be awarded.

Duty of mitigation incorporated in s.73 in 'Explanation' is relevant only for assessment of damages and not for its admissibility. It is for the defendant to show failure to mitigate. Engineering contracts involve large mobilization, which cannot be demobilized or remobilized easily. The contractor is obliged to take only reasonable steps to mitigate loss. It is essentially a question of fact in circumstances of each case and not law. The Supreme Court of India in M Lachia Setty & Sons v The Coffee Board Bangalore AIR 1981 SC 162 relied on Halsbury's Laws of England that duty of mitigation cannot be too exacting. As famously held by Lord Macmillan in Banco the Portugal v Waterlow [1932] A.C. 425 the measures which the innocent party may be driven to adopt to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty [Hudson p. 1004].

Partial vs total prevention by employer will have different remedies. In partial breach the contract may be performed with claims for increased head office and site overheads; increased cost to plant and machinery for delay or disruption; acceleration cost etc. In case of total prevention the contractor may rescind the contract and discharged from the obligation to perform the balance work & claim of loss of profit on balance work. Delay and disruption are distinguished in breach of contract. Disruption of a non-critical activity does not delay overall completion and loss is only due to idling of resources. The principle for performance of the contract with claim of damages in partial prevention may create difficulty if the contract has no-damage clause for such prevention, as if the contract is to be performed the contractor would be remediless. Hence in such case the innocent party must be entitled to rescind the contract in law. Practically this endangers the retention and performance money of contractor till relief in Court/ AT.

Right to rescind a contract may be lost by acquiescence to a breach unless there is a fresh breach or the breach continues. Since time is not considered essence for performance of work in case of provision of extension of time or levy of compensation for delay or if time ceases to be of essence due to conduct of parties; determination of such contract for non-performance on specified time without fixing a firm and fresh date and making that essence for performance by contractor, shall be illegal. To avoid this, some contracts provide express right of determination for breach of due diligence provision alone. S.39 of Contract Act upholds the principle of anticipatory breach, unless acquiesced and one need not wait till completion date to terminate a contract. Only time essence contracts as per S.55 of Contract Act require notice to claim compensation. Unless a contract is avoided by innocent party as per S.55 (in time essence contract), the contract remains in force on expiry of time specified even without an extension of time and non-extension of time by reasonable period only sets time at large with associated consequences.

The contract may contain express delay related LD clauses or other forfeiture clauses as penalty. The law in India as per s.74 of the Contract Act is that when a contract is broken and a sum is named in the contract as the amount to be paid in case of such breach, or the contract contains any other stipulation by way of penalty, the party complaining of breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. The Constitution Bench in Sir Chunni Lal Mehta &Sons v Century Spinning & Manufacturing Co. AIR 1962 SC 1314 disapproved claim or ascertainment of unliquidated damages if there is provision of liquidated damages in the contract. In Chunni Lal Mehta, however, it was not a case under consideration of a LD clause having become inoperative or of penalty. In Fateh Chand v. Balkishan Das, 1964 SCR (1) 515, the Constitution Bench distinguished the law in India in S.74 from the English Common Law, since s.74 provides a uniform principle applicable to all stipulations naming amounts to be paid in case of breach and stipulations by way of penalty. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.In Maula Bux v. Union of India , 1970 (1) SCR 928,(3 judges) it was held that under the terms of the contract if the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. The expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules.

Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate, may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. In a recent judgment in Kailash Nath Associates v DDA and Anr dt. 9th January, 2015 the Apex Court interpreted S.74 again referring to previous decisions. It held that only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre- estimate of damage or loss, can be awarded. S.74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, S.74 would have no application. Compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.

It is pertinent that Fateh Chand, Maula Bux and Kailash Nath Associates, all were dealing with penalty provisions in case of forfeiture and not delay linked LD and disallowed the same either on evidence of no loss or lack of evidence of loss. Delay linked sum stipulated unless unreasonable are likely to be upheld, particularly in works where the loss may be intangible, irrespective of actual loss, but only if the breach is proved, loss is there and due procedure in contract and law is followed. Due drafting and operation of extension of time clause is more important, so as not to make the LD clause inoperative or invalidate it.

The distinction w.r.to English Common law in India on treatment to LD clauses is evident from the decision by Supreme Court in UoI v Raman Iron Foundry dt 12th March, 1974 which held that LD claim is no different from unliquidated damages claim and that a right to damages

accrues only with fiat of Court and not merely by a provision in the contract. Though this was partially overruled in Kamaluddin Ansari v UOI dt 12th August 1983, to the extent upholding withholding of money against LD as per terms of contract till adjudication by arbitrator or in Court, yet no recovery is permissible till then. This is in contrast to the jurisprudence in English Common Law, which even applied waiver of right to claim if LD was not recovered from on account bills as per contract(modern jurisprudence vary). The issue of levy of LD in engineering contracts post termination there are differences among authorities. If termination is to merely put an end to obligation to perform the work under the contract and not to discharge the whole contract itself, which need to be operated anyway for settlement of pre-terminated obligations e.g. settlement of measurements and accounts, labour liabilities (other than arbitration clause); the LD clauses need not be inoperative post termination as per modern jurisprudence, even if the contract is silent on this.

The statute does not lay down any mode or manner for computation of damages. If admissible, the legal principles of reasonable compensation on factual evidence by objective analysis need to be assessed.

Conclusion

Damages are common law remedy in breach of contract. The same principles were largely adopted in India in the Indian Contract Act, 1872 with some exceptions. In engineering contracts both the factual matrix and legal principles need due consideration in determination of damages.

A proper understanding of legal principles of damages in engineering contracts by the parties and consultants shall be useful in framing better contracts, enforcing the same, reducing disputes and mitigating risks in large value engineering contracts. A clear understanding of jurisprudence of damages by practicing arbitrators shall bring professionalism, objectivity and predictability of outcome.

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