DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

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Message to the Readers

The year 2018 is shaping up to be a very exciting year for the Arbitration regime in India as also for us at NPAC. Even earlier the Ministry of Law and Justice had issued a circular (which has been also posted in its website) calling on Government agencies to resolve their disputes through institutional arbitration, mediation etc. Twelve institutional arbitration centres all over India have been named in the said circular. Nani Palkhivala Arbitration Centre is one among them. It is an accepted fact that arbitration has come to grief in this country because close to eighty percent and more of the arbitrations conducted in India are ad-hoc arbitrations. It is high time that contracting parties contemplating introduction of arbitration clause in their contracts devote adequate attention to the options available, especially the possibility of inserting an appropriate institutional arbitration clause.

A report released by Ernst and Young on "Emerging trends in arbitration in India" highlights that "*we have a rapid increase in the number of commercial disputes and clear preference of parties towards arbitration over traditional court litigation for resolution*". The study also highlights (a) growing importance of technology in arbitration; (b) rise in arbitration litigation; (c) increasing tendencies to appoint independent arbitrator who are unbiased to either party; (d) evidence of increasing use of "Hot tubbing" in arbitration proceedings. This is a process that enables lawyers and arbitrators to question experts in the presence of other specialists and challenge each other's evidence; and (e) growing need for expert witnesses. These are healthy signs for the arbitration regime.

In the meantime, a bench of the Supreme Court in ***Board of Control for Cricket in India Vs. Kochi Cricket Pvt Ltd.,*** (decided on 15th March 2018) has held that the 2015 amendments to the Arbitration and Conciliation Act are prospective. It has however further held that the amendments will have a significant impact on court proceedings relating to Arbitrations commenced before the coming into force of the amendments. This judgment must be hailed for its pro arbitration approach and its attempt to make arbitration an effective remedy. Interestingly, in the concluding part of the judgement, the court has also taken note of the press note released by the Ministry of Law and Justice dated 7th March 2018, setting out the proposed amendments to the Arbitration and Conciliation Act. The proposed amendments will introduce a new Section 87 to the Act which would make the amendments of 2015 only applicable to arbitrations commenced after 23rd October, 2015. The Supreme Court has criticised this proposed amendment on the ground that these amendments if passed would result in the 2015 amendments not being applicable to a large chunk of arbitrations which would not then benefit from the progressive regime adopted by the 2015 amendments. Interestingly the court has directed the judgment to be forwarded to the Law Ministry for a more detailed consideration of these issues. It remains to be seen as to how the Government would react to this.

One thing however is sure. Both from the efforts of the Central Government and through various judgments given by courts, there is a huge impetus to making the arbitration regime more efficient and effective. We at NPAC are hopeful of a very bright future for arbitration, especially institutional arbitrations.

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Legal Updates

❖ **New Section 36 of Arbitration Act to apply to applications filed under Section 34 even before the 2015 Amendment: SC**

- In *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.,* the Supreme Court headed by Justices Rohinton Fali Nariman and Navin Sinha held that Section 36 of Arbitration Act (*execution of an award as if it were a decree*) as amended by the Amendment Act of 2015 will apply to Section 34 applications filed before the commencement of the Amendment Act.

- The Court pointed out that the 2015 amendment made to Section 36 clarified that, mere filing of appeal would not amount to stay of enforcement proceedings, and further introduced a provision that, if the award related to payment of money, stay will be only conditional on furnishing security.
https://theindianjurist.com/2018/03/16/new-section-36-arbitration-act-apply-applications-filed-section-34-even-2015-amendment-sc/

❖ **Delhi High Court reaffirms pro-arbitration approach in two recent judgments**

- In *NHAI v M/S. Bsc-Rbm-Pati Joint Venture*, the Court strongly criticised unnecessary challenges to awards, especially by public sector undertakings, noting that it wasted valuable judicial time.

- In the case of *Delhi Metro Rail Corporation Limited v Delhi Airport Metro Express Private Limited*, the Court stated that it would not interfere with an arbitral decision if the view taken by a tribunal was plausible, even where an alternative view was possible.
https://www.lexology.com/library/detail.aspx?g=5685aa26-5e1e-41df-8cf7-74a48e24309c

❖ **Justice AK Sikri releases book 'Alternative Dispute Resolution: The Indian Perspective'.**

- Supreme Court judge Justice AK Sikri released a book titled 'Alternative Dispute Resolution: The Indian Perspective' edited by Shashank Garg, Partner, Advani & Co. and published by Oxford University Press, at an event held at the Russian Centre for Science and Culture, New Delhi, on 9th March, 2018
http://www.livelaw.in/justice-ak-sikri-releases-book-adr-alternative-dispute-resolution-indian-perspective/

❖ **Cabinet nod for 2 bills to improve dispute resolution process**

- The Union Cabinet has approved the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Bill, 2018 and Arbitration and Conciliation (Amendment) Bill, 2018 for introduction in the Parliament.

- The former Bill, inter alia, aims to bring down the pecuniary value of the Commercial Disputes from 1 Crore to 3 Lakhs and intends to introduce the Pre- Institution Mediation (PIM) Process in cases where no urgent interim relief is contemplated, in order to provide time to the parties to resolve matters in an amicable way and provides for the insertion of a new section 21A which would enable the Central Government to make rules and procedures for PIM. The latter Bill is intended to increase institutional arbitration and to bring a reasonable surge in the adoption of Alternate Disputes Resolution.
https://theindianjurist.com/2018/03/09/cabinet-approves-amendment-commercial-courts-act/
https://theindianjurist.com/2018/03/09/union-cabinet-approves-arbitration-conciliation-amendment-bill-2018/
http://www.thehindu.com/business/cabinet-nod-for-2-bills-to-improve-dispute-resolution-process/article22970644.ece

❖ **Arbitral award can be executed in the Court where the assets are located without obtaining a transfer of decree from the court having jurisdiction over the arbitration proceedings: SC**

- The Supreme Court in *Sundaram Finance Limited v. Abdul Samad and Another* laid down that enforcement of an arbitral award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the Court, which would have jurisdiction over the arbitral proceedings. There were conflicting views of various High Courts over the said issue which was finally put to rest by the Court.
https://theindianjurist.com/2018/02/15/arbitral-award-can-executed-court-assets-located-without-obtaining-transfer-decree-court-jurisdiction-arbitration-proceedings-sc/

❖ **Foreign Attorneys can conduct International Arbitrations: SC**

- Foreign lawyers may conduct international commercial arbitrations in India, the Indian Supreme Court ruled Tuesday, issuing a decision that also allows foreign lawyers to give legal advice to clients on a "casual" basis only so long as it doesn't amount to a practice.
https://www.law360.com/internationalarbitration/articles/1022047/foreign-attys-can-conduct-int-l-arbitrations-india-court-rules

❖ **Mauritius drags India to ICJ over InduTech Zone case**
http://www.firstpost.com/india/mauritius-drags-india-to-icj-over-indutech-zone-case-all-you-need-to-know-about-the-investment-case-4362169.html

❖ **Maharashtra power firm, Korean JV partner at loggerheads over breach of contract**

- The JV partners have approached the Singapore International Arbitration Centre (SIAC) over the dispute.

- Allegedly, Korea South-East Power Co., a subsidiary of Korea Power Generation, is seeking back around $7.5 million it invested, from its local partner Jinbhuvish Power Generation Pvt. Ltd, claiming that it failed to kick-start the project. Meanwhile, the Indian company has filed a counterclaim in the arbitration tribunal, seeking a compensation of around $600 million (over Rs3,800 crore).
https://www.livemint.com/Industry/PD873cOvhyV8Jf1vNyxznO/Maharashtra-power-firm-Korean-JV-partner-at-loggerheads-ove.html

❖ **Public policy of India refers to law in force in India, whether state law or central law: SC**

- In *M/s Lion Engineering Consultants v State of MP,* while referring to its earlier decision in the case of *MSP Infrastructure Ltd v Madhya Pradesh Road Development Corporation Ltd*., the Supreme Court opined that it does not see any bar to plea of jurisdiction being raised by way of an objection under Section 34 of the Arbitration and Conciliation Act, 1996 even if no such objection was raised under Section 16. However, it overruled the observations in paragraphs 16 and 17 of the judgment in MSP Infrastructures Ltd and held that 'public policy of India' refers to law in force in India whether state law or Central law.
http://www.livelaw.in/public-policy-india-refers-law-force-india-whether-state-law-central-law-sc-read-order/

❖ **Limitation period for application for setting aside arbitration award begins from the date of signed copy of the award delivered to the party making it: SC**

- The Supreme Court, in *Anilkumar Jinabhai Patel (D) v Pravinchandra Jinabhai Patel*, has reiterated that the limitation period prescribed under Section 34(3) of the Arbitration and Conciliation Act would commence only from the date of the signed copy of the award delivered to the party making the application for setting it aside.
http://www.livelaw.in/limitation-period-application-setting-aside-arbitration-award-begins-date-signed-copy-award-delivered-party-making-sc-read-judgment/

❖ **Tenure of chairman & members of arbitration tribunals can't be at the pleasure of Govt: SC declares S.4(3)(b) of BPWC arbitration tribunal act unconstitutional**
http://www.livelaw.in/tenure-chairman-members-arbitration-tribunals-cant-pleasure-govt-sc-declares-s-43b-bpwc-arbitration-tribunal-act-unconstitutional-read-order/

❖ **Daiichi wins enforcement of $550M Ranbaxy award in India**

- Daiichi Sankyo Co. Ltd. won enforcement in India of a $550 million arbitral award against the former owners of Ranbaxy Laboratories Ltd., which had concealed information about fraudulent practices and ongoing investigations during negotiation of a $4.6 billion deal in which Daiichi acquired Ranbaxy shares.
https://www.law360.com/articles/1007504/daiichi-wins-enforcement-of-550m-ranbaxy-award-in-india

❖ **Indian exporter seeks ok of $1.3M award over rice contracts**

- An Indian commodities exporter asked a New York federal court to confirm a $1.26 million arbitral award against a Nigerian company it had entered into two contracts with to purchase 12,500 metric tons of Indian parboiled rice, arguing the London-issued award is enforceable under the New York Convention.
https://www.law360.com/internationalarbitration/articles/1028134/indian-exporter-seeks-ok-of-1-3m-award-over-rice-contracts

❖ **Investment arbitration issues must be tackled, speakers say**

- The current ad hoc investment arbitration system provides an important dispute resolution mechanism for international businesses, but acknowledging and addressing its shortcomings is imperative to its survival, speakers said during a conference at Harvard Law School.
https://www.law360.com/internationalarbitration/articles/1026288/investment-arbitration-issues-must-be-tackled-speakers-say

❖ **Road projects see limited gains as most arbitrations get challenged**

- The Union Cabinet in August 2016 approved a mechanism in which government agencies would pay 75 percent of the dues to clear cases that were stuck because of contractual issues, land acquisition- related matters, or other regulatory problems.

- More than 18 months after the Union Cabinet sought liquidity improvement in the infrastructure sector through the easing of arbitration awards, there has not been much progress because most of the arbitration awards are being challenged.
http://www.business-standard.com/article/economy-policy/road-projects-see-limited-gains-as-most-arbitration-get-challenged-118032400775_1.html

❖ **In the absence of written consent, courts cannot refer parties to arbitration on oral consent given by their counsel: SC**

- In *Kerala State Electricity Board v Kurien E Kalathil*, the Supreme Court has observed that "Arbitrator/ Tribunal is a creature of the contract between the parties." Since referring the parties to arbitration has serious civil consequences of taking them away from the stream of civil courts, Civil Procedure Code, 1908 and the Indian Evidence Act, 1972, in the absence of an arbitration agreement, joint memo or joint application of the parties, the courts is not to refer the parties to arbitration based only on the oral consent of the legal counsels of the parties.
http://www.livelaw.in/courts-cant-refer-parties-arbitration-oral-consent-given-counsel-sc-readjudgment/

❖ **Consumer forums need not refer parties to arbitration in terms of valid arbitration agreement: SC upholds NCDRC order**

- Dismissing the appeals filed by a group of builders, the Supreme Court has upheld the order of the National Consumer Dispute Redressal Commission (NCDRC) and has held that an arbitration clause in agreements cannot circumscribe the jurisdiction of a consumer fora, notwithstanding the amendments made to Section 8 of the Arbitration Act.

- Further, a three member bench of the NCDRC, presided by Justice DK Jain made the following observations:

  → The disputes which are to be adjudicated and governed by statutory enactments, established for specific public purpose to sub-serve a particular public policy are not arbitrable

  → There are vast domains of the legal universe that are non-arbitrable and kept at a distance from private dispute resolution;

  → The subject amendment was meant for a completely different purpose, leaving status quo ante unaltered and subsequently reaffirmed and restated by the Hon'ble Supreme Court;

  → Section 2(3) of the Arbitration Act recognizes schemes under other legislations that make disputes non-arbitrable;

  → In light of the overall architecture of the Consumer Act and Court-evolved jurisprudence, amended sub-section (1) of Section 8 cannot be construed as a mandate to the consumer forums, constituted under the Act, to refer the parties to Arbitration in terms of the Arbitration Agreement.

http://www.livelaw.in/consumer-forums-neednt-refer-parties-arbitration-terms-valid-arbitrationagreement-sc-upholds-ncdrc-order-read-order/

THE ROLE OF THE NATIONAL COURTS OF THE SEAT IN INTERNATIONAL ARBITRATION

Extracts from the keynote address delivered by the ***Honourable Chief Justice Sundaresh Menon, Supreme Court of Singapore,*** *at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre*

There can be little doubt today that arbitration has emerged as the preferred mode of resolving transnational commercial disputes. For commercial parties, one of arbitration's major attractions is the benefit of finality that is assured by the general exclusion of any right of appeal. But the experience of the international community shows that, finality and certainty still remain tantalisingly out of reach– this concerns the effect of decisions of the seat court on subsequent enforcement proceedings.

However, this does not mean that the goals of (a) enhanced predictability in the enforceability of awards, (b) avoiding re-litigation of the identical issues in different fora, and (c) greater finality and certainty in international arbitration cannot be achieved, at least in part. Common law jurisdictions such as India and Singapore have within their legal arsenal certain doctrines that can be employed in a principled manner to answer the question of how an enforcing court should treat decisions of the seat court. I suggest that even in the absence of treaty-based reform, individual jurisdictions can play a part in promoting greater finality and certainty by adopting these doctrines in a broadly consistent manner.

Several years ago, I had the honour of delivering the Patron's Address at the Chartered Institution of Arbitrators London Centenary Conference. In my address, I identified what I considered to be the basic architecture of a successful arbitral seat. These were: (a) laws that augment the practice and conduct of arbitration, (b) an independent judiciary experienced in, and respectful of, the fundamental precepts of international arbitration, (c) freedom of choice in representation, (d) purpose-built first-in-class dispute resolution facilities, and (e) a staunch adherence to international arbitration treaties. In my view, these five factors remain key today and I am heartened to see that India has made significant progress on all of these fronts in the last decade or so.

I begin with the first two factors –laws that augment the practice and conduct of arbitration, and an independent judiciary that respects the fundamental precepts of international arbitration. The overall tenor of recent judicial pronouncements and legislative amendments strongly suggest that India is taking concerted steps to position itself as an arbitration-friendly jurisdiction.

A few years ago, the Indian Parliament passed the Arbitration and Conciliation (Amendment) Act of 2015. Among the changes made was the introduction of section 34(2A), which makes it clear that Indian courts do not have the jurisdiction to set aside awards rendered in foreign-seated arbitrations. This section is essentially a codification of the holding in *Bharat Aluminium*, in which the Indian Supreme Court overruled its earlier decision in *Venture Global* and held that section 34 of the Arbitration and Conciliation Act of 1996 did not permit the Indian courts to set aside foreign-seated awards. Another noteworthy amendment is the addition of an explanation to section 34 to clarify that "the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute." This appears to have been directed at reversing the holding in *Oil & Natural Gas Corp v Saw Pipes Ltd*, which was criticised as having given too expansive a reading to the doctrine of public policy because it effectively granted Indian courts the mandate to conduct a merits review of an award. This is contrary to the principle of minimal curial intervention that is the bedrock of the modern international arbitration regime.

I come to the third factor – freedom of choice in representation. In international arbitration, there can be no monopoly on the provision of legal services. The reality is that foreign parties will not readily agree to arbitrations in India if they are denied legal representation of their choice. I note that in the Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, it was recommended that the Advocates Act of 1961 should be amended to allow foreign lawyers to participate in arbitrations in India, so long as they do not advise on matters of Indian law. If this is accepted, I have no doubt that India's attractiveness as a seat jurisdiction will be enhanced.

The fourth factor concerns the availability of dispute resolution facilities. It is appropriate, at this juncture, to look to the organisers of today's 10th Annual International Conference. The Nani Palkhivala Arbitration Centre has bold aspirations to become a centre of excellence in the field of institutional arbitration. A combination of supporting laws plus a nation-wide commitment to the development of first-in-class dispute resolution facilities will only make India a more compelling destination for arbitration.

Finally, I come to the fifth factor – a staunch adherence to international treaties designed to sustain an international system of arbitration. India is already a signatory to the New York Convention and it has adopted, in large measure, the provisions of the Model Law in the Arbitration and Conciliation Act of 1996. Yet, what remains is for full effect to be given to the spirit of these provisions. One key way in which this can be done is if the common law approach, which I believe is congruent with the key objectives of the New York Convention and Model Law to achieve consistency and regularity in the worldwide treatment of arbitral awards, is adopted.

A proposed common law approach

The root of the problem lies with the drafting of Article V of the New York Convention – exactly what are the circumstances under which the enforcing court "may" enforce an award that has been set aside by the seat court? When may the enforcing court choose to deviate from the seat court's decision? The lack of guidance as to how Article V of the New York Convention should be interpreted has led to the emergence of inconsistent and conflicting decisions around the world.

Common law doctrines of the recognition of foreign judgments and issue estoppel, may be applied in a principled manner in the arbitral context. My proposed approach towards the treatment of decisions rendered by seat courts can briefly be summarised as follows. Where the seat court has rendered its decision on a setting aside application, the enforcing court should first decide whether it will recognise the decision of the seat court. If it decides that the decision of the seat court should not be recognised, then it would not be constrained by the decision in any way. If, however, it decides that the foreign judgment should be recognised, then the judgment should be examined further to consider the issue it has decided so as to determine whether it *may* be relied on to raise an issue estoppel in the enforcement proceedings. And if an issue estoppel is found to arise, the decision of the seat court would serve as the once-and-for-all determination of the parties' rights in relation to that issue. In my view, such an approach has the potential to alleviate the problems of re-litigation and inconsistent judicial outcomes mentioned above, and will ultimately contribute to greater finality and certainty in international arbitration.

In the arbitral context, an argument might be made that a party's *failure* to challenge the award before the seat court precludes it from subsequently opposing the recognition and enforcement of the award before an enforcing court. This is on the basis that arguments that may be raised at the enforcement stage could and should have been raised at the setting aside stage. However, I would argue that this view is wrong for two reasons. First, where no setting aside application has been made, there are no earlier proceedings to speak of in which the point ought to have been taken. Second, and consistent with this, in my view, it would be contrary to what the Model Law contemplates to hold that a party resisting enforcement may be penalised for not having tried to set aside the award.

The "choice of remedies" is at the heart of the Model Law's design and it cannot be said that an award debtor who only invokes its passive remedy is, in any way, guilty of abusing the court's process. That being said, there might arguably be room for the extended doctrine of *res judicata* to operate in the situation where an award debtor *has decided* to invoke its active remedy. In such a case, the award debtor must then consider carefully which grounds it wishes to raise at the setting aside stage. If it could have relied on a certain international grounds like procedural irregularity, but did not do so, the extended doctrine of *res judicata* might well operate to preclude the award debtor from raising that same ground subsequently at the enforcement stage.

A return to the pre-eminence of the seat court?

In summary, the approach I propose envisions the combined application of the doctrines of the recognition of foreign judgments, issue estoppel, and possibly in some circumstances, the extended doctrine of *res judicata* to the field of the enforcement of arbitral awards. These are all tools which are ready to hand, as they are established features of the jurisprudence of common law jurisdictions. In the absence of treaty-based reform, it seems to me that they offer a sound way of achieving greater certainty in this area. Quite apart from the practical benefits, it seems to me that they are grounded powerfully in the principles of the comity of nations and finality, and there is much to commend their adoption.

Judicial decisions must, if they are to mean anything at all, confer certainty and stability; and no legal system would be able to function if all decisions were open to constant and unceasing challenge. In like manner, an arbitral decision must represent a final and binding determination of the rights and liabilities of the parties concerned; and nothing can be as corrosive of confidence in the arbitral process than the prospect of endless litigation with the attendant risk of inconsistent outcomes. If the seat court has rendered a decision on a particular matter, and if the regular processes of appeal and review as provided by the law of arbitration have been exhausted, then the decision should be given due effect and the matter should end there. One possibility is that it would incentivise commercial parties to actively approach the seat court for a once-and-for-all solution, with the hope of using the judgment to found an issue estoppel and thereby stave off any further litigation.

This is perhaps a high risk, high reward strategy for the award debtor because if it fails to set aside the award, it may find itself estopped from raising the same issues in all subsequent enforcement proceedings; but if it succeeds, subsequent enforcement proceedings should be plain sailing. It is for this reason that it seems to me that the choice of a seat will become an even more important consideration for parties who are contemplating arbitration.

1. Sundaresh Menon, Patron's Address, Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) accessible at https:/www.supremecourt.gov.sg/docs/default-soruce/default-document-library/media-room/ciarb-centenary-conference-patron-address.pdf> ("2015 Patron's Address").

2. *Bharat Aluminium & Company & ors v Kaiser Aluminium Technical Service Inc & Ors* (2012) 9 SCC 552 ("*Bharat Aluminium*").

3. *Venture Global Engineering v Satyam Computer Services Ltd & another* AIR 2010 SC 3371 ("*Venture Global*"). In this decision, the Indian Supreme Court left open the possibility that a foreign award could be challenged in India despite the clear choice of a foreign seat. However, the Indian Supreme Court clarified in *Bharat Aluminium* that this was not the case. Legislative reform by way of section 34(2A) has now put the matter beyond doubt.

4. India, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* (30 July 2017) (Chairman: Justice BN Srikrishna) at pp 7980.

5. Maxi Scherer, "Effects of International Judgments Relating to Awards" (2016) 43 Pepperdine Law Review 637 ("Scherer (2016)") at 640.

6. See, *eg*, Nazzini, *supra* n 17, at 152157.

7. The Hong Kong Court of Appeal also reached this conclusion in *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and Others* [2016] HKCA 595 at [69].

8. *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 at [1] and [47].


Nani Palkhivala
10th Annual International Conference on
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STRENGTHENING ARBITRATION IN INDIA: CHAL-
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Ms. PALLAVI S.SHROFF

In Conversation with Ms. Nandini Khaitan, Dispute Resolution Partner Khaitan & Co.

1. What impelled you to pursue dispute resolution as your practice area?

This might come as a surprise but I started out wanting to do corporate law and had not considered dispute resolution till just after I graduated and I learnt very early on that corporate law did not interest me. When Mr. Chakrapani Misra joined our Mumbai office to head the dispute resolution practice, he was given, in his words "27 files and one fresher as legacy" to deal with. Mr. Misra was the best mentor one could ask for and with his guidance I started off on the path to dispute resolution and found it to be a good fit.

2. What is your opinion on alternate dispute resolution ("ADR")?

Litigation is expensive and so time consuming that it just makes sense to pursue ADR in most of the civil cases. Mediation should be pursued seriously especially in family cases, as most of them that I worked on were ultimately settled through some form of mediation. Just last week in a matter (between family members) in which we appeared in the Supreme Court, the Court decided to mediate the matter themselves in Chambers and in just two sittings there was a resolution. In a complex arbitration that we did, the entire matter from filing pleadings to delivery of the Award was completed in two years. A suit filed at the same time has not even come up for hearing once since. Some do say that arbitration gives rise to multiple proceedings like section 9, 11, 34 proceedings etc, however, it must be kept in mind that those proceedings are similar to interim applications and appeals filed in court in regular suits and there is no multiplicity of proceedings.

3. What is the difference in how a company personnel views a commercial dispute as compared to a lawyer?

Company personnel are largely concerned with quick results and cost efficiency. It is sometimes difficult to explain all the practices and procedures that one has to undertake while litigating in Court. Foreign clients especially cannot understand why a matter which was specially listed did not reach hearing or why when it was especially fixed on a date for hearing there was an adjournment which was easily granted. For the purpose of client handling alone, arbitration is a better forum to litigate in. Further, often the clients look at a particular matter with a Nelson's eye. As a lawyer, I always look at a matter objectively and advise the client about the possible outcome which may or may not be in their favour.

4. Do you feel ADR is more suitable to address commercial disputes effectively? If so, why?

There is no question that ADR is more suitable due to multiple reasons. One of the main advantages is that those who have the experience in the field concerning the dispute may be appointed as arbitrators as opposed to a judge who may not have the industry or domain knowledge. The other reasons are the general ones like timeliness, privacy, cost efficiency (unless it is a 5 star arbitration, meaning the arbitration is held at 5 star hotels on multiple occasions).

5. How different is the approach of a court towards commercial disputes as compared to that of an arbitrator?

The main difference I feel, lies in the fact that arbitration is less procedure driven than a regular litigation. This allows the focus to remain on the substance of the dispute rather than on the multiple procedures one has to follow in a civil litigation. In a recent arbitration we worked on, both sides did away with a separate procedure of admission and denial of documents and the arbitrator decided that the same would be inferred from the pleadings. In another arbitration, submission of draft issues was done away with as the tribunal decided they would frame the issues from the pleading. Courts always insist on formal proof of every document which often turns out to be a cumbersome thing. In arbitrations, more often than not, such formal proof is dispensed with.

6. How important is the clause on 'governing law and jurisdiction' in contracts between parties?

Call us biased, but most dispute resolution lawyers consider that the most important clause of any contract. This clause determines what law is applicable to the contract and where the disputes will be adjudicated. In fact you may call it the bread and butter clause of dispute resolution. The Arbitration clause is mostly a separate clause. The seat of arbitration determines where the applications under the Arbitration Act like those under section 9 will be filed. Usually the jurisdiction clause and the seat of the arbitration are located in the same place. However, when the two are differently located, it could give rise to ambiguity in certain cases.

7. Though you can find an arbitration clause in most commercial contracts, the presence of a reference to Institutional arbitration is rare, unless there is an international element involved. What is your opinion on this?

The perception that institutional arbitrations are expensive is a big deterrent to its inclusion in domestic arbitrations. The practice of party nominated arbitrator is also a deeply entrenched one that most litigants find comfort in and would not want to give up easily. However, once awareness spreads on how institutions appoint arbitrators suited to the case at hand and are usually more time efficient, the scenario may change. In International Commercial Arbitrations, I cannot emphasize the importance of institutional arbitration enough. The Arbitrator appointed by the institution would be a credible one with experience. The parties wouldn't have to worry about managing the logistics of the procedure sitting in one part of the world as there would be someone monitoring the whole process. Hopefully the domestic situation will also progress to an institutional arbitration one sooner than later.

The Cabinet has recently approved the Arbitration and Conciliation (Amendment) Bill, 2018, which is based on the report of the Committee constituted under the chairmanship of Justice BN Srikrishna. The aim is strengthening institutional arbitration, which, consequently, would improve dispute resolution in the country. One of the important recommendations in the report is the constitution of a council that would grade arbitral institutions in India and facilitate accreditation of arbitrators. However, the committee has cautioned against the council serving the role of a regulator. How the Government will react to the caution remains to be seen.

8. How do you think we can improve the landscape of arbitration in India, particularly the visibility of institutional arbitration?

My experience with institutional arbitration was one where time lines were adhered to more strictly. In one matter, an Award in favor of our client was challenged on the ground that the arbitrator had not given the party a chance to be heard when all the arbitrator had done was refused to entertain further documents after the time had passed. If delay in the system is one of the main reasons for arbitration to emerge as a favourite, then it is even more important that arbitrations in India are not delayed at any cost. This is easier for the institutional arbitrations to achieve rather than ad hoc arbitrations. I am seeing a lot of arbitration seminars and panel discussions being organized by various institutions like ICC, NPAC, SIAC etc. These are a good way to both learn and spread awareness and should be pursued not just in Delhi and Bombay but in all other metros.

One other important point is a dedicated Arbitration Bar which will only do arbitrations. Currently the lawyers attend Court during the day and do arbitrations mostly during the evening and on weekends. Without a dedicated Arbitration Bar, it would be difficult to maintain strict timelines. Various efforts are being made in this regard as well. One such effort is the Indian Arbitration Forum which is an association of arbitration practitioners attempting to streamline the arbitration process in India. NPAC is another premier arbitration institution of the country. As discussed above, the new amendment bill brings in sweeping reforms and it will be interesting to watch how the reforms pan out.

Reflections

The column 'Reflections' feature the experience/ opinion of different people, on varied aspects. Views expressed are personal *and do not reflect Nani Palkhivala Arbitration Centre's views.*

"I met Mr. Arvind Datar on a case we were doing and he introduced me to NPAC. I remain very grateful for the introduction! I feel ADR is a key part of any commercial lawyer's practice or should be. My expectation of the conference was high, because I had been to previous NPAC conferences. However, as on previous occasions, the conference exceeded my expectations. The topics were well-focused and a good mix of the practical and the more theoretical. The quality and the degree of engagement of the attendees at NPAC makes this conference unique".

-Mr. David Wolfson is a Queen's Counsel practising commercial law in London.

"I always had an inclination towards the field of arbitration and want to practice post my studies too. My internships in firms specializing in arbitration, further accelerated my interest towards the subject. The conference was beautifully organized, the topics were aptly chosen and covered all the aspects. The panelists were leading marvels in the field of arbitration and gave deep insights into each and every topic along with practical highlights. Listening to the interpretations offered by the panelists made us think and changed our approach towards issues. My experience was very different and I loved the way in which it broadened our perspective, way beyond books ever could. Totally loved the conference and would be glad to be a part of the same in the coming years".

-Bhavinee is a student pursuing LLM from Vivekananda Institute of Professional Studies, GGSIPU, and specializes in ADR.

"I am convinced that the judicial infrastructure is not sufficient to handle the large volumes of disputes in view of the ever increasing population and economic activities. We need to have alternative/private dispute mechanism in place as a compliment to judicial/quasi-judicial institutions to resolve private disputes. Arbitration is a good mechanism to deal with disputes arising from commercial and business matters".

-Mr. K. Srinivas works as Head Legal with Amara Raja Batteries Limited and has experience in the areas of litigation, contracts, intellectual property and industry experience in manufacturing, biotechnology and engineering companies.

"I expected that the conference would be a series of lectures by the panel members. However, it turned out to be an extremely engaging discussion of ideas about the law and where it is headed. Mr. Anirudh Krishnan's presentation on the march of law was extremely educational in this regard. The areas of law covered by the four panels was very educational for a student such as myself, giving me the opportunity to hear the opinion of those facing the law on a daily basis in legal practice. The conference was very well organized, with great speakers from various practices of the legal field- corporate firms, in-house legal, the judiciary, and litigation, the backbone of the entire industry. The speech delivered by the Chief Justice of Singapore was particularly enlightening. NPAC's initiative in opening a new centre in New Delhi, at the heart of Indian litigation, will help several practitioners use the facilities of a non-profit, professionally run centre".

-Nikhil Variyar is a fifth year student at National Law University, Jodhpur, who won second place in the Satya Hegde Essay Competition for the year 2017.

NANI PALKHIVALA ARBITARTION CENTRE IS TO ESTABLISH A NEW CENTRE AT DELHI

The Governing Council, the Board of Directors and the entire team of Nani Palkhivala Arbitration Centre (NPAC) take great pride in inviting you for the inauguration of its new centre at Delhi. The event is scheduled on **Friday, the 27th of April, 2018**, at the **India International Centre**, Max Mueller Marg, Delhi and is all set to witness a congregation of distinguished speakers and eminent guests.

The **Hon'ble Mr. Justice Sanjay Kishan Kaul**, Judge, Supreme Court of India and Former Chief Justice of the Madras High Court has kindly consented to preside over the function, inaugurate the new centre and deliver the inaugural address.

On this occasion, **Mr. Fali. S. Nariman**, Senior Advocate, Supreme Court of India, **Hon'ble Mr. Justice Ajit Prakash Shah**, Former Chairman, Law Commission of India and Former Chief Justice of the High Courts of Madras and New Delhi and **Mr. Amitabh Kant**, CEO, NITI Aayog, will also address the gathering.

The Delhi Centre is located at Dr. Gopaldas Bhavan, 28, Barakhambha Road, Conaught Place, New Delhi-110001and will be functional from the 1st of May, 2018.

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