DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

Volume 1 Issue 4 August 2018

Message to the Readers

One of the important requirements in improving "ease-of-doing business" is a robust system to resolve commercial disputes. In most developed countries, almost all commercial disputes are resolved by established institutional arbitration centers. The few cases that go to court are usually those in appeal against the awards of the arbitral tribunals.

Despite repeatedly emphasizing the importance of institutional arbitration, India continues to conduct most of the arbitration cases on an *ad hoc* basis. It is also unfortunate that very few institutional arbitration centres in our country have achieved the prominence of, for example, the Singapore International Arbitration Centre (SIAC). It is this gap that the Nani Palkhivala Arbitration Centre (NPAC) hopes to fill.

The first requirement for promoting institutional arbitration is that commercial contracts of important public sector and private sector companies must contain a standard arbitration clause whereby, the parties to the contract agree to refer their disputes to arbitration that is conducted by a mutually agreed arbitral institution. It is this institution that then takes over the conduct of the arbitration and also of the administrative work that is necessary.

The impetus for institutional arbitration must first come from major public sector units, which are involved in a vast majority of major arbitration disputes. Similarly, several departments of each State Government such as the Public Works Department (PWD), Highways Department, and individual municipal corporations and so on must all agree with the respective private parties to refer their disputes to an institution like the NPAC. Unfortunately, many State Governments have deleted the arbitration clause from their contracts, which is a retrogade step.

It is suggested that a few of the PSUs can start the system of referring disputes to institutional arbitration. Once the advantages of this system become known, then a momentum will be generated whereby institutional arbitration will grow and, hopefully, substitute *ad hoc* arbitrations in the years ahead.

Arvind P. Datar
Senior Advocate, Madras High Court and
Supreme Court of India,
Director, NPAC

Legal Updates

❖ **Arbitration may reduce backlog of pending cases: Justice Kurian Joseph**

- While inaugurating an administrative block in the Himachal Pradesh Judicial Academy (HPJA), Justice Kurian Joseph said that alternate ways of dispute resolution play a vital role in reducing the backlog of pending cases in India.
- He further observed that the HPJA was ideally located for its development as an international centre on arbitration, mediation and conciliation.

https://www.ndtv.com/india-news/arbitration-may-reduce-backlog-of-pending-cases-justice-kurian-joseph-1875848

❖ **High Court imposes Rs. 5 Lakh fine on Hotel Leela for 'forum-hunting':**

- Airport Authority of India (AAI) issued an eviction notice to get its land back from Hotel Leela Venture due to non-payment of dues.
- The hotel filed two petitions challenging the notice and the eviction proceedings and had also filed an arbitration petition.
- Initially, the hotel's counsels sought a division bench to hear the arbitration, but subsequently demanded for a single judge bench.
- The High Court, hence, imposed a fine of Rs. 5 Lakh on the hotel for forum-hunting (bench-hunting).
- The court also vacated an interim relief granted by it earlier by which it had stayed the eviction proceedings initiated by the AAI against the hotel before an eviction officer.

//economictimes.indiatimes.com/articleshow/65009173.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ **Infosys, Bansal arbitration award in September**

- Former CFO of Infosys, Mr. Rajiv Bansal, invoked arbitration to contest Infosys' decision to suspend the payment of about Rs 12 crores of his severance pay.
- Infosys contends that the amount was withheld as Mr. Bansal had failed to satisfy certain obligations. It has allegedly filed counter claims of over Rs. 100 crores against Mr. Bansal for breach of confidentiality agreements.
- Former Supreme Court judge RV Raveendran, the sole arbitrator in the case, is expected to pronounce an award in September.

http://timesofindia.indiatimes.com/articleshow/65304107.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ **Big victory for Reliance Industries in ONGC gas dispute as tribunal rejects government's claim**

- On November 4, 2016, ONGC demanded an amount of $1.47 billion on the RIL-BP-Niko consortium for 'unfairly' producing natural gas belonging to it. An international arbitration tribunal, headed by Singapore-based arbitrator Lawrence Boo, rejected the government's claim by a majority of two votes to one.
- "*All the contentions of the Consortium [RIL, BP & Niko] have been upheld by the majority with a finding that the Consortium was entitled to produce all gas from its contract area and all claims made by the Government of India have been rejected. The Consortium is not liable to pay any amount to the Government of India. The Tribunal also awarded costs of $8.3 million (Rs 56.44 crore) to be paid by the Government of India to the Consortium,*" said Reliance Industries in a regulatory filing.
- However, the government intends to challenge the arbitration tribunal's decision and is also allegedly demanding $174.9 million of additional profit petroleum. The cost recovery issue is reportedly being arbitrated separately.

https://www.businesstoday.in/current/corporate/big-victory-for-reliance-industries-in-ongc-gas-dispute-as-tribunal-rejects-govts-claim/story/280861.html

https://www.moneycontrol.com/news/business/india-to-appeal-arbitration-ruling-on-reliance-ongc-dispute-2800681.html

❖ **Asia's first patent arbitration centre to open in Tokyo**

- Asia's first arbitration centre specialised in intellectual property is slated to open in Tokyo in September to resolve the growing number of disputes in the region.
- The International Arbitration Centre in Tokyo (IACT) would aim at resolving disputes within a period of one year.
  https://www.business-standard.com/article/news-ians/asia-s-first-patent-arbitration-centre-to-open-in-tokyo-118062900518_1.html

❖ **Ashoka Buildcon stock rallied close to 3% on receipt of arbitration award**

- Ashoka Buildcon informed exchanges that it, along with one of its subsidiary had received an amount of Rs 22,44,90,005 vide a Settlement Agreement executed with the National Highways Authority of India.
- This was an outcome of a conciliation process for the resolution of disputes under an arbitration relating to the construction of 4/6 lane access controlled Chittorgarh Bypass - NH-79, in Rajasthan.
  https://www.moneycontrol.com/news/business/markets/ashoka-buildcon-stock-rallied-3-on-receipt-of-arbitration-award-2664531.html

❖ **Nissan close to settling dispute with India over unpaid incentives**

- Nissan Motor Co and authorities in Tamil Nadu are close to settling a dispute over which the Japanese car maker initiated international arbitration seeking more than $729 million in unpaid dues and damages.
- It is likely that Nissan would take a lower payout of about 20 billion rupees ($292 million) in unpaid dues and forego sums it has sought in damages.
  https://in.reuters.com/article/nissan-india-arbitration/exclusive-nissan-close-to-settling-dispute-with-india-over-unpaid-incentives-idINKBN1KM53K

❖ **Kalanithi Maran loses Rs 1,323 crore arbitration against Spicejet; but gets Rs 571 cr refund**

- An arbitration tribunal has rejected Spicejet's previous owner Kalanithi Maran's claim of Rs 1,323 crore as damages, for not issuing convertible warrants and preference shares to him and Kal Airways.
- The tribunal also rejected a bid to take control of the airline by Maran and his company Kal Airways, after a bitter share transfer dispute.
- However, the tribunal consisting of three retired judges from the Supreme Court, Arijit Pasayat, Hemant Laxman Gokhale and KSP Radhakrishnan awarded him a refund of Rs 579 crore plus 12 per cent interest.
  //economictimes.indiatimes.com/articleshow/65092029.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ **AAI wins arbitration case after judge rejects plea by consortium**

- The consortium (Bhadra International India and Novia International Consulting APS) had filed two separate arbitrations for Chennai and Kolkata airports and a few airports in south India, claiming a collective amount of more than Rs 3,000 crore from the Airport Authority of India (AAI).
- AAI was accused of not complying with Ground Handling Regulations, 2007, stating that the airlines operating at the specific airports were allegedly outsourcing the ground-handling services.
- Justice Nijjar said that the agreement between the consortium and AAI does not give exclusive rights to the two entities to provide ground-handling services and that rules do not limit the number of ground-handling service providers at the airports.
  https://www.cnbctv18.com/aviation/aai-wins-arbitration-case-after-judge-rejects-plea-by-consortium-443061.htm

MEMORIAL PLEADINGS VS COMMON LAW PLEADINGS: IS ONE PREFERABLE TO THE OTHER? A CHOICE THAT MUST BE MADE

One of the hallmarks of international arbitration is greater procedural flexibility than domestic proceedings. The latter tend to be governed by defined rules about how the parties need to present their case, the documents that ought to be served with their pleadings and when pleadings need to be served. It will only be in a relatively rare case that courts will allow the parties to stray from the approach set by its procedural rules.

Most rules set by leading arbitral institutions do not adopt the same approach. Arbitral rules tend to leave procedural matters to the discretion of the Tribunal rather than providing a proscriptive approach. Having considered the preferences of the parties and their respective summaries of the matters in dispute, the Tribunal typically will decide at the first procedural meeting how and when the parties will serve their pleadings, and in what form.

Although a Tribunal's decision on the appropriate form of pleadings can have a considerable bearing on both parties' strategy, in our experience parties give less thought to this issue than they ought to. In this article, we set out the main choices that are available to the parties and the Tribunal when deciding how the parties should set out their respective cases, and we consider how these choices can impact on the arbitral process.[1]

What choices do the Tribunal and the parties have?

Although in principle the Tribunal has a wide discretion on how pleadings should be set out, in reality the choice is between two forms of pleading. The first is the common law form of pleading with which Indian and English lawyers are familiar: pleadings set out the facts and matters that the parties rely upon to support their respective causes of action and defences. Following the service of pleadings, the parties will prepare witness evidence and then expert evidence. Typically, witness evidence and expert evidence are served simultaneously.

The second choice is the memorial style of pleading, which more closely aligns with pleading styles in civil law jurisdictions. Where this approach is adopted, expert evidence and witness evidence are served together with the pleading. Also, unlike more common law style pleadings, memorial pleadings are not limited to a statement of facts and matters that the parties rely upon, but instead contain more argument on evidence and the law.

Traditionally, the parties' legal backgrounds, and those of their lawyers, have driven decisions on the form of pleadings. The Tribunal and the parties often tend to prefer the pleading style that most closely resembles the style adopted in their home jurisdiction. However, as international commercial arbitration rises in popularity, practitioners are expected to be well-versed in both forms of pleading. Some courts have even gone as far as to say that it is inappropriate for parties to adopt domestic styles of pleading in arbitration. In the Scottish case of ***Arbitration Application No.3 of 2011 [2011] CSOH 164*** Lord Glennie held that "*pleadings in arbitration need not, indeed should not, follow the form of pleadings in common use in the Court of Session* [the Scottish High Court equivalent]". This is because, as Gary Born has stated in the second edition of his leading textbook '*International Commercial Arbitration*', the audience for the parties' pleadings "*will often be a multinational tribunal that will be unimpressed, or confused, by domestic litigation formulae and rhetoric*".

---

[1] Born, G. *International Commercial Arbitration* (2nd Edition), page 2255.

What are the advantages and disadvantages of memorial style pleading?

The memorial style of pleading has become the norm in ICC arbitration, and many practitioners favour it for the following reasons:

a) At least in theory, it is possible for the arbitration proceedings as a whole to take less time if the claimant and the respondent serve their pleadings, witness evidence and expert evidence at the same time. Using a more common law style approach, witness evidence and expert evidence might only be served months after the close of pleadings.

b) It is sometimes said that the memorial approach means that the parties are adopting a 'cards up' approach to the dispute. By presenting their factual and expert case at the same time as their pleading, the strength of the parties' respective cases is evident from the outset of the arbitral proceedings. This 'cards up' approach may encourage an amicable settlement at an earlier stage if the parties can be encouraged to take a realistic view towards the strength of their case and the other side's case at the close of pleadings.

These benefits can be somewhat illusory. As to whether memorial pleadings result in an overall saving of time in the arbitral process, an important consideration is that witness statements served by the claimant with a memorial will not respond to the arguments raised by the respondent. As a result, additional rounds of witness statements are often necessary. As to whether memorial pleadings encourage settlement, we are of the view that the content of the pleadings only have a limited impact on parties' decisions to settle. It is more commonly the case that parties decide to settle based on commercial considerations which have little to do with the niceties of a pleading (although it may encourage damaging documents to come to the fore early on).

In our experience, memorial pleadings can also be inappropriate in certain types of cases where expert evidence has a substantial impact on the key issues in the arbitration, such as construction disputes. An expert witness appointed by the claimant will encounter difficulties drafting a truly independent expert report if they have drafted their expert report without the respondent having pleaded their case or served any documents. It is almost inevitable that experts will need to revise their reports after the close of pleadings in order to consider the arguments raised by the other side.

Memorial pleadings tend to work best in cases with relatively limited factual disputes or where the issues between the parties have been well defined in pre-arbitration correspondence or in an agreed list of issues. In these cases, there is a more limited risk that the parties' resources will be wasted preparing documents on issues that turn out to be agreed.

What are the advantages and disadvantages of common law style pleading?

Is the common law style of pleading preferable? In certain cases, it can be but there is no 'one size fits all' approach. The main advantages are as follows:

a) Parties can prepare witness evidence based upon the matters in dispute, and do not need to go to the expense of preparing voluminous witness evidence on issues where there turns out to be no dispute. If the memorial style of pleading is adopted, the claimant may not know which issues will be disputed and which will be agreed when they serve their memorial. As a result, they may seek unnecessarily to support their entire factual case with witness evidence.

b) The time gap between pleadings and witness evidence within the procedural timetable means that litigants do not have to bear the burden of presenting their entire case at once. This can mitigate the costs burden of the arbitration and may in some cases be the only fair way to deal with the issues in the case if these are voluminous and document heavy.

These advantages apply if the parties do narrow the issues between them, in their pleadings successfully. However, this is not always the case. All too often the ambit of a dispute swells from Statement of Claim to Defence to Reply to Rejoinder. Further, even where the actual dispute between the parties is comparatively narrow, we regularly see witness statements that range far and wide and canvass issues that need never have been addressed or which are not properly the subject of witness evidence as opposed to submission.

Key Considerations when deciding on forms of pleading

The decision as to whether to opt for one form of pleading or another often turns on whether it suits a party to be up front about their factual case at an early stage, or whether it wishes to postpone the service of witness statements until after the close of pleadings. A number of factors may come into this decision, including whether or not a party's legal team has sufficient access to potential witnesses and documents in advance of the date for submission of pleadings. If it does not, that party may prefer the additional time for the preparation of witness evidence that a more common law style of pleading affords. Equally, a party may wish to hold back witness evidence for strategic reasons which are specific to the particular dispute. In other cases, timing and costs issues may dictate the route chosen. However, it is a choice that should be considered and made rather than something which is never thought about at all.

Conclusions

The '2018 International Arbitration Survey', jointly prepared by Queen Mary University in London and White and Case LLP[2], surveyed nearly a thousand practitioners, in-house counsels and arbitrators from around the world on current trends in international arbitration. When asked "*what are the three worst characteristics of international arbitration*?", 67% of those surveyed stated that it was cost , while 34% claimed that it was lack of speed.

Views differ on whether the adoption of a particular style of pleading accelerates arbitral proceedings or reduces overall cost. In our view, neither form of pleading is necessarily preferable to the other it all depends on the circumstances of that specific case. However, the parties need to be alive to the potential pitfalls and advantages of both forms of pleading and whether or not a particular form of pleading better suits their dispute. Most importantly, the parties need to consider which form of pleading will best assist the Tribunal in understanding the key issues between the parties well in advance of any hearing.

Ms. Anneliese Day QC *is a barrister and arbitrator at Fountain Court Chambers, London. Described as an "outstanding lawyer of her generation" she specialises in commercial disputes focused around professional liability, energy and natural resources, construction, and insurance, acting in very high-value cases both domestic and international.*

Mr. Sanjay Patel *is an English junior barrister specialising in construction, financial services and general commercial disputes. He is listed as a leading junior in the Legal 500 (EMEA) directory and described as "infectiously enthusiastic, and excellent at getting down into the details of a case". The bulk of Sanjay's practice is in large-scale arbitration where the seat of arbitration is commonly outside of the UK. Sanjay acts both as sole advocate and with leading counsel.*

[2] https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration?s=Queen%20Mary

LEADERSHIP CAMP FOR COLLEGE STUDENTS

Palkhivala Foundation, Nani Palkhivala Arbitration Centre (NPAC), Chennai in association with Forum of Free Enterprise, Mumbai is conducting a Leadership Programme for the eighth year. Over 850 students from Chennai and other parts of Tamil Nadu have benefited from this camp. It is conducted by two leading experts from Mumbai Mr.Vivek Patki and Mr. Sachin Kamath. In view of the overwhelming response that this programme has received in the last seven years, we had the initiated the Leadership Camp in Trichy last year and plan to induct the same in Madurai from this year.

The leadership programme is specifically designed to benefit students in Colleges and Management Schools and will cover important topics including goal setting, time management, self-esteem and communication skills. The number of students enrolled is being restricted for effective interaction. It is scheduled to be conducted as follows:

DATE	VENUE
3rd & 4th September, 2018	Subbalakshmi Lakshmipathy College of Science, Aruppukottai Road, Madurai
6th & 7th September, 2018	National College, Dindigul Road, Trichy
8th & 9th September, 2018	Guru Nanak College, Velachery, Chennai

Timings: 9.00 am to 4.00 pm
Eligibility: Students pursuing their degree.
Procedure: They will have to send their filled in Registration Form, with a Bonafide Certificate from their college and a nominal fee of Rs. 500/-
Lunch will be provided for the participants on both days. Participation Certificates will also be issued to all students who attend the training programme.

WELCOME TO THE NEWEST MEMBER OF THE NPAC FAMILY!

Ajit Prakash Shah, born on 13.2.1948, practiced in the Bombay High Court, specializing mainly in civil, constitutional and labour law. He was appointed as a Judge of the Bombay High Court in 1992 and was later elevated to the office of Chief Justice, Madras High Court in 2005, and on transfer took over as Chief Justice, Delhi High Court in May 2008 till his retirement in 2010.

During his term as a judge of the Bombay High Court, he gave impetus to mediation in Maharashtra, reorganized movement of Lok Adalat, started Pension Lok Adalats and took a keen interest in the legal literacy mission. Justice AP Shah was also involved in preparing a dedicated panel of arbitrators consisting of retired High Court Judges, retired District Judges and senior members of the Bar who agreed to work for a nominal fee. He also took initiative in starting an ADR Certificate Course, in collaboration with Mumbai University. He had also dealt with large number of commercial cases including admiralty, company law, trademark and patent laws, arbitration, etc.

Additionally, Justice Shah was the Chairman of the Twentieth Law Commission of India, which submitted 19 reports to the government during his tenure. Six of these reports have been already enacted into law, including the laws on arbitration and commercial courts.

Justice Shah has headed three government-appointed committees, dealing variously with issues on privacy and data protection law, direct taxes and recently, in 2016, a dispute pertaining to gas blocks in the Krishna-Godavari Basin. He has also acted as ombudsman for sports bodies, such as the Board of Control for Cricket in India. He has acted as an arbitrator in several international and domestic commercial arbitrations.

We are elated that Justice A.P. Shah has joined the Governing Council of NPAC and are excited to grow with his guidance and support.

Reflections

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

"Institutional arbitration is growing in India and has a good career scope. I choose to intern in this area to explore and experience the field of institutional arbitration. Last year, I participated in the Satya Hegde Essay Competition organized by Nani Palkhivala Arbitration Centre and later chose to intern with NPAC.

During the course of my internship, I was provided with various research topics pertaining to the field of arbitration, which enhanced my knowledge on the subject. I was also given an opportunity to witness arbitration proceedings, both ad hoc and institutional in nature, on a regular basis. This helped me to further understand the functioning of ad hoc and institutional arbitration.

I would recommend that all those who have an interest in the field of arbitration should try to get an internship under NPAC because here you get both theoretical and practical exposure to arbitration. Additionally, you also get a chance to build your network of people from this field."

Ayushi Chouksey is a 4th year law student from Jagran Lakecity University, Bhopal. She is deeply intrigued about arbitration and plans to take up active practice in this field in the future. She is also interested in the areas of intellectual property, company law and service law.

"As a student of law with an engineering background, I wanted to explore the prospects of arbitration in Intellectual Property Rights cases. Though I was not able to witness any IPR specific arbitration proceedings during the course of my internship, the other cases I witnessed gave me an insight into arbitration and that motivates me to go push boundaries

To explore the prospects of arbitration in IPR after I graduate. I found the arbitration proceedings to be very captivating, be it the arguments or the cross examinations. The fact that the arbitrators appointed are retired judges and/or technical experts further fascinated me as the arbitral tribunals were strong in the legal as well as the technical aspects.

NPAC is a very popular name and indispensable in the field of arbitration and has been promoting institutional arbitration for several years now. It was formally recognized by the Madras High Court in 2005. There cannot be a better place than this for a law student wanting to learn the nuances of arbitration.

During the course of my internship, I researched and wrote articles examining the provisions of Section 11 and 16 of the Arbitration and Conciliation Act, 1996 and Section 89 of the Civil Procedure Code, 1908. In my course curriculum, I would get to learn the subject of Alternate Dispute Resolution (ADR) only in the third year, but with the experience gained at NPAC, I am sure studying this subject in my law school is going to be a piece of cake.

The Registrar of NPAC, Chennai, Dr. J. Durgalakshmi, the arbitrators and the counsels have always been very encouraging. Apart from research work, interacting with them and getting guidance is also an important takeaway from this internship and this has made it a wholesome experience."

Sathyagopal. N is currently pursuing his second year in LLB (Hons) in Intellectual Property Rights at IIT Kharagpur. He has previously completed his bachelor's in engineering in Electronics and Communication. After a short stint of about six months at a startup, he went on to pursue PG Diploma in Advanced Computing at the Centre for Development of Advanced Computing (C-DAC), an R&D organization of the Ministry of Electronics and Information Technology (MeitY).

"Settlement of disputes in an amicable manner is what attracted me towards arbitration. It is an emerging field of law which is an effective alternative to litigation. NPAC deals with matters assigned by the Madras High Court and also takes up individual matters and I choose to apply for the internship at NPAC to broaden my understanding about arbitration.

Research work on various issues and attending various arbitration proceedings were the primary tasks assigned. My internship with NPAC has helped me understand the elementary rules and procedures of arbitration. It was an enriching experience with a lot of exposure. One gets to witness and learn from multiple retired Senior Advocates and High Court Judges presiding over the proceedings. The judges also interact with the interns and have discussions on contemporary issues. It helps one learn about their experience while dealing with different cases and understand the psychology of various judges, which I feel is very important for a lawyer".

Disha Mazumdar is a 4th year student from KIIT Law School, Bhubaneswar. She is a member of the Chartered Institute of Arbitrators and also a part of the editorial board of KIIT Students Law Review. Apart from arbitration, she also has a keen interest in Human Rights and has done field research on POCSO cases in the state of West Bengal.

"I chose to intern at NPAC because it is a dream for any law student to be interning at such a successful institution which has been promoting institutional arbitration for a long time. Every internship gives you a chance to learn something new. The same happened with me at this internship as I attended arbitration proceedings for the first time. Since I had studied arbitration as a subject in college in the previous semester, witnessing the proceedings at NPAC gave me a chance to appreciate the practical application of what I had studied.

Further, I was engaged in researching about varied aspects of arbitration. The topics of my research included 'arbitrability of cases of fraud', 'the unilateral appointment of arbitrators with the aid of an arbitration clause' and 'the applicability of CPC and Evidence Act to arbitration proceedings'. The best thing about this internship was that I got to interact with various judges who were all very helpful and supportive. I also had the opportunity to assist with NPAC's Newsletter."

Ritika Sharma is a 5th year law student from the Institute of Law, Nirma University, Gujarat, and is deeply interested in the areas of criminal law, taxation and arbitration.

NANI PALKHIVALA ARBITRATION CENTRE

Chennai : New No.22 Karpagambal Nagar, Mylapore, Chennai 600 004, India
+91 44 24987145/ +91 44 24987745/ +91 44 24986697
E: nparbitration@npac05.in/ hallbookingschennai@npac05.in/ info@npac05.in

New Delhi: Dr. Gopaldas Bhavan, 28, Barakhambha Road, Conaught Place, New Delhi-110001
011- 2332 5616/ 011-4561 2115 / 011-4561 2114
E: npacdelhi@npac05.in/ hallbookingsdelhi@npac05.in
W: www.nparbitration.in