



DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

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Message to the Readers

Establishing an effective arbitration regime is an arduous task. It is not confined merely to putting in place good arbitration halls and efficient secretarial services. It means a lot more since an entire eco system in which arbitrations can flourish has to be created. One of the principal requirements is that the legislature closely follows the development in arbitration law and quickly moves in to plug loopholes as also to constantly improve the system. For instance, Singapore has amended its arbitration laws six times between 2000 and 2016, while between 1996 and 2018 we have just amended it once. It is therefore heartening that the Government of India is moving in the right direction by suggesting further amendments to the Arbitration and Conciliation Act, 1996 close on the heels of the 2015 amendments.

An announcement put out by the Government in this regard discloses the following:

The Arbitration and Conciliation Act, 1996 was amended by the Arbitration and Conciliation (Amendment) Act, 2015 in order to make the arbitration process user friendly, cost effective and to ensure speedy disposal and neutrality of arbitrators. However, to give a boost to institutional arbitration vis-a-vis ad hoc arbitration and to remove some practical difficulties in applicability of the Arbitration and Conciliation (Amendment) Act, 2015, a High Level Committee (HLC) under the Chairmanship of Justice B.H. Srikrishna, Retired Judge, Supreme Court of India, was constituted by the Central Government. The HLC was given the mandate:

- To examine the effectiveness of existing arbitration mechanism by studying the functioning and performance of Arbitral Institutions in India;
- To devise a road map to promote institutionalized arbitration mechanisms in India;
- To evolve an effective and efficient arbitration eco-system for commercial dispute resolution and submit a Report on suggested reforms in the statute.

The HLC submitted its report on 30th July, 2017 and has recommended for certain amendments in the Arbitration and Conciliation Act, 1996. The proposed amendments are as per the recommendations of the HLC.

Benefits :

The Amendments to the Act of 1996 will facilitate achieving the goal of improving institutional arbitration by establishing an independent body to lay down standards, make arbitration process more party friendly, cost effective and ensure timely disposal of arbitration cases.

Salient Features :

- To facilitate speedy appointment of arbitrators through arbitral institutions designated by the Supreme Court or the High Court, without having any requirement to approach the court in this regard.

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It is envisaged that parties may directly approach arbitral institutions designated by the Supreme Court for International Commercial arbitration and in other cases the concerned High Courts.

- ii. The amendment provides for creation of an independent body namely the Arbitration Council of India (ACI) which will grade arbitral institutions and accredit arbitrators by laying down norms and take all such steps as may be necessary to promote and encourage arbitration, conciliation, mediation and other ADR Mechanisms and for that purpose evolve policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration and ADR mechanism. The Council shall also maintain an electronic depository of all arbitral awards.
- iii. The ACI shall be a body corporate. The Chairperson of ACI shall be a person who has been a judge of the Supreme court or Chief Justice or Judge of any High Court or any eminent person. Further, the other Members would be eminent academicians etc. besides other Government nominees.
- iv. It is proposed to amend sub section (1) of section 29A by excluding International Arbitration from the bounds of time limit and further to provide that the time limit for arbitral award in other arbitration shall be without 12 months from the completion of the pleading of Parties.
- v. A new section 42A is proposed to be inserted to provide that the Arbitrator and the arbitral institutions shall keep confidentiality of all arbitral proceedings except award. Further, a new section 42B protects an Arbitrator from suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings.
- vi. A new section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act of 2015 (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

These are the amendments that are in the pipeline. We at NPAC have put together a bunch of further suggestions which our director Ms. Payal Chawla has compiled and the same is also part of this newsletter. It is in the interests of the health of the arbitration regime that the amendments as well as the further suggestions for refinement are considered by the Government at the earliest and the legislative sanction is accorded for the same.

N.L.RAJAH
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Director NPAC
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Inauguration of the Delhi branch of Nani Palkhivala Arbitration Centre



Left to Right: Mr. Jayakumar, Advocate, Madras High Court; Mr. Arvind Datar, Senior Advocate, Supreme Court of India and Madras High Court; Mr. S. Mahalingam, Former CFO, TCS (all Directors of NPAC); Hon'ble Mr. Justice Sanjay Kishan Kaul, Judge, Supreme Court of India and Former Chief Justice of the Madras High Court; Hon'ble Mr. Justice A.P. Shah, Former Chairman, Law Commission of India and Former Chief Justice of the Courts of Madras and New Delhi; Mr. Amitabh Kant, CEO, Niti Aayog and Mr. N.L. Rajah, Senior Advocate, Madras High Court (Director, NPAC)

Legal Updates

- ❖ **Incorrect reference regarding applicability of Indian Arbitration Act, 1940 wouldn't render entire arbitration agreement invalid: SC**
 - In *Purushottam v. Anil & Ors.* the Supreme Court stated that any reference to the 1940 Act in the arbitration agreement would be of no consequence and the matter would be referred to arbitration only in terms of the 1996 Act consistent with the basic intent of the parties as discernible from the arbitration agreement.
<http://www.livelaw.in/incorrect-reference-regarding-applicability-of-indian-arbitration-act-1940-wouldnt-render-entire-arbitration-agreement-invalid-sc-read-judgment/>
- ❖ **Arbitral tribunal restrains SGX from launching new NSE indices-linked products**
 - The restraint would be till three weeks after the arbitration process is completed even as the tribunal allowed continuation of existing SGX-Nifty contracts.
 - The arbitration proceedings are going on before Justice Vazifdar, former Chief Justice of the Punjab and Haryana High Court.
<https://www.moneycontrol.com/news/business/markets/arbitral-tribunal-restrains-sgx-from-launching-new-nse-indices-linked-products-2598541.html>
- ❖ **Arbitration award directing transmission of shares can be 'enforced' through NCLT: SC**
 - A three-judge bench of the Supreme Court headed by Chief Justice of India Dipak Misra, in *Cheran Properties Limited v. Kasturi and Sons Limited*, upheld proceedings for rectification of records of registration before the National Company Law Tribunal (NCLT) by the claimant company (KSL).
 - The bench dismissed an appeal (by CPL) wherein the main contention was that an arbitral award has to be enforced as a decree of a civil court in view of the provisions of Section 36 of the Arbitration and Conciliation Act and it could not have been enforced by pursuing proceedings before the NCLT.
<http://www.livelaw.in/arbitration-award-directing-transmission-shares-can-enforced-nclt-sc-read-judgment/>
- ❖ **India seeks \$3.8B from Reliance, Shell Unit in royalty row**
 - India's Oil Ministry has demanded that a consortium which includes Reliance Industries Ltd. and a Royal Dutch Shell PLC subsidiary pay \$3.8 billion as the increased share of the government's earnings from the Panna-Mukta oil fields and Tapti gas fields after a UK court rejected challenges to the arbitration award that went against the companies.
<https://www.law360.com/articles/1047236/india-wants-3-8b-from-reliance-shell-unit-in-royalty-row>
- ❖ **Parties working towards single commercial project through several agreements referable to arbitration: SC**
 - The Supreme Court, in *Ameet Lalchand Shah v. Rishab Enterprises & Anr.*, held that only in cases where serious questions of fraud are involved, can arbitration be refused.
 - The Court observed that where several parties are involved in a single commercial project executed through several agreements /contracts, all parties can be covered by the arbitration clause in the main agreement even as the other subsequent contracts do not have an arbitration clause.
<http://www.livelaw.in/parties-working-towards-single-commercial-project-through-several-agreements-referable-to-arbitration-only-cases-of-serious-fraud-out-of-purview-of-arbitration-sc-read-judgment/>
- ❖ **Government may set up arbitration council via Ordinance**
 - The Government is most likely to take the ordinance route to implement the proposed Indian Arbitration Council Act, 2017 to pursue Prime Minister Narendra Modi's idea of making India an international hub for arbitration.
 - The Indian Arbitration Council will be an institute of national importance created with the sole aim of conducting an institutionalised arbitration in an independent and autonomous manner.
 - Various undertakings of 'The International Centre for Alternative Dispute Resolution' will be acquired and transferred to establish the Council.
 - The headquarters will be at New Delhi with branches in other parts of the country.
http://economictimes.indiatimes.com/articleshow/64104011.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ **SEW arm receives 985 crore arbitration award**

- A three member Arbitration Tribunal headed by Justice SB Sinha announced an award of 985 crores for the claims raised in arbitration by SEW Infrastructure on behalf of a special purpose vehicle (SPV) in joint venture with Prasad & Co.
- The SPV had earlier entered into a contract with the Uttar Pradesh State Highway Authority for construction of a highway from Delhi to Uttarakhand border, but disputes arose during execution of the contract for various delays including lack of clearance from the Union Ministry of Environment and Forests.
<https://economictimes.indiatimes.com/news/economy/infrastructure/sew-arm-receives-rs-985-crore-arbitration-award/articleshow/64367534.cms>

❖ **Delhi High Court refuses to stop Vodafone's UK arbitration:**

- The aggrieved telecom giant approached the India-UK BIPA tribunal citing the Indian government's amendments to the tax laws reviving the tax liability of Rs 11,000 crore on Vodafone's acquisition of Hutchison Telecom.
- Vodafone had initiated two arbitrations against India, one under the India-Netherlands BIPA and the other under the India-UK BIPA.
- The Supreme Court, in December 2017, had revoked the stay on the the India-UK BIPA which was imposed by the Delhi High Court in August 2017. The court said that the tax arbitration will continue both in Netherlands and the UK.
[//economictimes.indiatimes.com/articleshow/64059575.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/articleshow/64059575.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

❖ **Arbitration hearings begin in Cairn India's challenge to Rs. 20,500 crore retrospective tax demand**

- In January 2014, the tax department had slapped a tax demand of Rs. 10,247 crore on British oil explorer Cairn Energy plc for alleged capital gains that it made through an internal reorganisation in 2006, that saw the Indian business being transferred to a new firm, Cairn India Ltd.
- Cairn Energy had challenged the tax demand through an international arbitration and it is likely that the final hearing in that case will happen in August. Separately, Vedanta-controlled Cairn India too challenged the order through a different arbitration notice in March 2015.
[//economictimes.indiatimes.com/articleshow/64048838.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/articleshow/64048838.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

❖ **Cabinet nod for out-of-court dispute resolution for PSUs:**

- The Cabinet approved a mechanism within the government for speedy resolution of commercial disputes of central public-sector enterprises without cases going to courts.
- A new two-tier mechanism will be put in place At the first level, a committee comprising of secretaries of the relevant administrative and secretary department of legal affairs will look at the dispute.
- At the second level, in case the dispute remains unresolved, it will be referred to the Cabinet Secretary, whose decision will be final and binding on all concerned. For the prompt disposal of disputes, a time schedule of 3 months at the first level has been prescribed.
[//economictimes.indiatimes.com/articleshow/64196590.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](https://economictimes.indiatimes.com/articleshow/64196590.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

❖ **Arbitration award in Reliance-ONGC gas row in July**

- An international arbitration tribunal headed by Singapore-based arbitrator Lawrence Boo has concluded hearings on the validity of the government's demand that Reliance and its partners BP plc of UK and Canada's Niko Resources pay USD 1.55 billion for "unfairly" producing natural gas belonging to state-owned Oil and Natural Gas Corp (ONGC).
<https://timesofindia.indiatimes.com/business/india-business/arbitration-award-in-reliance-ongc-gas-row-next-month/articleshow/64527050.cms>

❖ **ICC YAF - Master class on enforcement of foreign arbitral awards:**

- The International Chamber of Commerce's Young Arbitration Forum (ICC YAF) conducted a Masterclass on the Enforcement of Foreign Arbitral Awards on the 12th of May, in collaboration with P&A Law Offices. The event was held at the FICCI Federation House in Delhi.
- Supreme Court judge Justice Sanjay Kishan Kaul, Delhi High Court judge Justice Navin Chawla, and Senior Counsel Gopal Subramaniam were among the legal luminaries who addressed the inaugural session of the event.
<https://barandbench.com/icc-yaf-enforcement-arbitration/>

ARBITRABILITY¹ OF COPYRIGHT DISPUTES UNDER INDIAN LAW

By

Gaurav Pachnanda, Senior Advocate²



In India, arbitration is now seen as the dispute resolution mechanism of choice for commercial disputes. As a result, disputes relating to intellectual property often surface before arbitral tribunals or before courts, while seeking reference of such disputes to arbitration³. However, all kinds of disputes relating to intellectual property are not capable of resolution through arbitration. Under Indian law⁴, arbitration awards that transgress the rule of “arbitrability”, while attempting to conclusively determine the rights of the parties, undermine their own validity and enforceability.

This article is, therefore, an attempt to analyse some interesting Indian judicial precedents with respect to arbitrable and non-arbitrable aspects of copyright related commercial disputes. For clarity, the term “arbitrability” used in this analysis is restricted to the question as to “whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties” (such as, an arbitral tribunal) or whether such disputes would fall exclusively within the domain of public fora (such as, courts or specialized statutory tribunals established specifically for this purpose)⁵.

A combined reading of *Vikas Sales Case*⁶ and *Ayyasamy Case*⁷ suggests that the Supreme Court of India has applied principles applicable to movable property to hold that generally copyright disputes are disputes *in rem* and thus, not arbitrable. However, in *Booz Allen Case*, quoting Mustill and Boyd⁸, the Supreme Court clarified that subordinate rights under an intellectual property right, like license, may be arbitrable, but the validity of the underlying intellectual property is not arbitrable.⁹

Copyright related commercial disputes may arise before arbitral tribunals in the form of claims and counterclaims that seek a determination of (a) rights *in rem*; (b) rights *in personam* and (c) subordinate rights *in personam* i.e., rights that are subordinate to the rights *in rem*. As a general proposition, according to the Supreme Court of India, disputes in category (a) are non-arbitrable but disputes in category (b) and (c) are arbitrable¹⁰.

In practice, however, the distinction between category (a) and category (c) is nuanced and can sometimes lead to blurred boundaries, as discussed later.

¹ While the origin of the expression “arbitrability” is unclear, it is commonly used by Indian courts to describe matters that are capable of determination through arbitration. For example, see paragraph of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Others* reported at (2011) 5 SCC 532 (“*Booz Allen Case*”).

² Gaurav Pachnanda is a Senior Advocate, based in New Delhi, who practices before the Supreme Court and other courts and tribunals in India and abroad; with particular interest in the areas of commercial and corporate litigation, and arbitration. He is also a Door Tenant at Fountain Court Chambers, London and Singapore. The author gratefully acknowledges the research and assistance of Eshna Kumar, Advocate, in writing this article.

³ For the scope of enquiry by courts, see paragraphs 32 and 33 of *Booz Allen Case*

⁴ See Section 34(2)(b) and Section 48(2) of the Arbitration and Conciliation Act, 1996, as amended (the “**Arbitration and Conciliation Act**”).

⁵ See paragraphs 34 (i) of *Booz Allen Case*.

⁶ See paragraph 22 of *Vikas Sales Corporation & Anr. v. Commissioner of Commercial Taxes & Anr.* reported at (1996) 4 SCC 433.

⁷ See paragraph 14 of *A.Y. Ayyasamy v. A. Parnasivam & Ors* reported at (2016) 10 SCC 386.

⁸ 2001 Companion Volume to the 2nd Edn. of Commercial Arbitration

⁹ See paragraph 41 of *Booz Allen Case*.

¹⁰ See paragraphs 37, 38 of *Booz Allen Case*

Copyright related commercial disputes may take various forms, including disputes regarding (i) infringement (ii) ownership or joint ownership or co-ownership (iii) the very existence or validity of the underlying copyright itself. Consequent issues, such as, injunctive relief and/or damages are bound to follow such disputes in most cases.

To determine whether a particular dispute, as presented to an arbitral tribunal for determination by way of a claim or counterclaim, relates to category (a) above and is, therefore, not arbitrable or that it relates to categories (b) or (c) above and is, therefore, arbitrable will necessarily involve a clearer understanding of when the arbitral tribunal's decision would result in the determination of a right *in rem* and when it would result in the determination of either a right *in personam* or a subordinate right *in personam*.

The clearest test would be for the arbitral tribunal (or the court, as the case may be) to ask whether the arbitral tribunal's decision on the dispute, presented to it for determination by way of a claim or counterclaim, would necessarily confer upon or take away from any person any legal character, or declare any person to be entitled to any such character, or entitle a person to any specific thing, not against a person but absolutely.¹¹ Indian judicial precedent has further modulated this test to add another qualification i.e., whether the determination by the arbitral tribunal, of the claim or counterclaim presented to it, would involve the determination of such legal character arising purely out of a contract or out of a statute (or at common law). The former, is generally arbitrable while the latter is not.

To clarify, would the arbitral tribunal's decision necessarily result in the determination of a right *in rem*, a right exercisable against the world at large, at any time against anyone who claims an interest in the property, as contrasted from the determination of a right *in personam*, which is an interest protected solely against individuals and entails determination of rights and interests of the parties only.¹²

Straightforward disputes regarding infringement, ownership, joint ownership or co-ownership may arise between the owner of a copyright and a party claiming rights subordinate to the owner's copyright, based upon purely contractual commercial relationships, such as, a license or assignment. Such disputes may not fail this test and would be capable of being decided through arbitration. In *Lifestyle Equities Case*¹³, the Division Bench of the Madras High Court held that a claim of better right of usage of the copyright made by both the parties against each other, pursuant to the terms of the contract, may be *prima facie* arbitrable¹⁴, while the validity of the underlying intellectual property in question is not arbitrable. However, the Division Bench of Madras High Court left the issue of arbitrability of the dispute to be decided by the arbitral tribunal based upon the claims and counterclaims to be made by the parties. A similar view was expressed by the Division Bench of Delhi High Court in *Tandav Film Case*¹⁵ regarding a claim for infringement arising out of a license agreement.

The Bombay High Court's decision, in *Eros International Case*¹⁶, also involved a dispute between the licensor and licensee, in which the term sheet granting the license had expired and neither of the parties were using copyright protected material.

¹¹ See Section 41 of the Indian Evidence Act, 1872

¹² See paragraph 37 of *Booz Allen Case*.

¹³ See *Lifestyle Equities CV & Ors. v QD Seatoman Pvt. Ltd. and Ors.*, reported at 2017 (72) PTC 441 (Mad.) [DB]

¹⁴ See paragraphs 5(p) and 5(t) of *Lifestyle Equities Case*

¹⁵ See paragraphs 5, 9, 10, 21 and 22 of *Tandav Film Entertainment Pvt. Ltd. v Four Frame Pictures and Anr.*, reported at 2010 (114) DRJ 219 (DB).

¹⁶ See paragraphs 4, and 18 of *Eros International Media Limited v. Telex Links India Private Limited* reported at 2017 (71) PTC 510 [Bombay]

In these circumstances, the claim being asserted was purely a money claim restricted to damages for unauthorised use after the period of expiry of the license. The Bombay High Court, therefore, held that since the relief sought in that case “was a decree in damages and injunction” based upon the alleged breach of the term sheet, an arbitral tribunal was competent to grant such relief.

Similarly, in *Angath Arts Case*¹⁷, the dispute related to the joint ownership of copyright, pursuant to the assignment of one half of the copyright owner's own interest in favour of the assignee. The Bombay High Court, therefore, held such a dispute to be capable of decision through arbitration.

On the other hand, slightly complex disputes may sometimes invite the arbitral tribunal to render a decision that confers upon or takes away from either party any legal character or declare either party to be entitled to any such character absolutely, arising out of a statute (or at common law). In such cases, the arbitral tribunal's award would be a decision determining rights *in rem*.

The *IPRS Case*¹⁸ before the Bombay High Court was a case where the licensee had prayed for various declarations before the arbitral tribunal, which were in the nature of challenge to the right of the licensor to claim license or royalty in relation to broadcasting of the sound recording. The licensee claimed that since underlying literary/musical works had merged with sound recording, the copyright owner in the underlying literary work/musical work cannot exercise any right qua that sound recording. The arbitral tribunal accepted this argument and granted such a declaration, holding that the licensor no longer enjoyed copyright in underlying work. The Bombay High Court, while setting aside the award, held that the award had granted various declarations which were in the nature of a challenge to the right of the licensor to claim license or royalty in relation to broadcasting of the sound recording; and were in the nature of adjudication on an action *in rem*.

The Bombay High Court clarified that the validity of the underlying copyright or the question as to whether a new product is capable of independent copyright protection are not matters that are capable of decision through arbitration. The rationale being that adjudication on the absolute legal character of an intellectual property would necessarily have to be a decision *in rem*. Obviously, such a determination would (and did, in *IPRS Case*) involve the determination of such legal character pursuant to the statutory provisions (and not under contract).

The decision of the Bombay High Court in *IPRS Case* does not appear to be inconsistent with the decision in *Eros International Case*. As a matter of fact, the Bombay High Court had specifically clarified in *Eros International Case* that a party's entitlement of having obtained or acquired copyright, as a statutory right or common law right, would always be a right *in rem*.¹⁹

¹⁷ See *Angath Arts Private Limited v. Century Communication Limited*, reported at 2008 (4) Mh.L.J. 926

¹⁸ See *The Indian Performing Right Society Ltd. v. Entertainment Network (India) Ltd.*, Arbitration petition No. 341 and 1017 of 2012, dated 31 August 2016

¹⁹ See paragraph 17 (last sentence) of *Eros Case*

NPAC HAS ESTABLISHED A NEW CENTRE AT DELHI

As a first for the nation, Nani Palkhivala Arbitration Centre has set up a branch in New Delhi, which was inaugurated in an event held on the 27th of April, 2018 at the India International Centre, New Delhi. The occasion saw an eminent panel of speakers and guests.

Mr. Fali Nariman, Senior Advocate, Supreme Court of India, recollected and quoted Justice Vivian Bose as to what the constitutional provisions meant to the first judges of the apex court- *“We have upon us the whole armour of the Constitution and walk henceforth in its enlightened ways, wearing the breastplate of its protecting provisions and flashing the flaming sword of its inspiration”* and urged all judges to fulfil his vision. He stated how *“in these troublesome times, we can do no better than to remember and pay our tribute to India's greatest lawyer who saved the constitution when it needed to be saved”*. He wished the centre success by blessing *“May it last as long as arbitration lasts, which I assure you will be forever”*.

This was followed by Mr. NL Rajah, Senior Advocate, Madras High Court who spoke of the journey of NPAC so far and reiterated the purpose of establishing the Nani Palkhivala Arbitration Centre stating that it was to provide quick efficient and cost effective arbitration services, promote institutional arbitration and to guide the developmental growth of information relating to arbitration.

Mr. Amitabh Kant, CEO, Niti Aayog, elucidated three fronts on which sharp interventions were required to build a strong structured arbitration ecosystem in India –Streamlining the governance framework for arbitration, creating suitable positive infrastructure to promote arbitration, promoting domestic arbitration and making India as a preferred international arbitration venue. He *inter alia* spoke about nurturing an arbitration institution with international standards and elaborated by stating that there was a need for a central arbitration institute; extremely vibrant leadership in institutions supported by well-trained supporting staff and library apart from physical and technological infrastructure; a pool of professional arbitrators and a dedicated bar. He appreciated the NPAC for top class infrastructure and stated how this would aid in encouraging international arbitration.

Hon'ble Mr. Justice Sanjay Kishan Kaul, Judge, Supreme Court of India and Former Chief Justice of the Madras High Court spoke on making arbitration a feasible, practical and important method for resolution of disputes in our Country. He mentioned the unfortunate growth in criminal litigation which is used as a tool for settling civil disputes, which is bound to happen if civil disputes are not settled within a reasonable period of time and stated how arbitration is not merely an option but a necessity today. He added that *“If the dispute resolution process does not go hand in hand with the concept of doing business in India, investors would naturally be apprehensive. Thus while in ease of doing business in India, we are ranked 100 out of 190 by the World bank and under the under the head of ‘enforcing contracts’, Indian was ranked 164 out of 190 by the World Bank”*. He also urged that it was essential for the governments and public authorities to change their approach towards litigation and arbitration, as the government is a major litigant.

Hon'ble Mr. Justice A.P. Shah, Former Chairman, Law Commission of India and Former Chief Justice of the High Courts of Madras and New Delhi suggested certain amendments to be made to the Arbitration and Conciliation Act, 1996. He stated that Section 16 of the Act should be amended so as to clarify on the jurisdiction of the arbitral tribunal in cases of fraud, as various High Courts have given divergent views over this issue. He then expressed his opinion that Section 29A is best applied when it is restricted to ad hoc arbitrations. He went on to illustrate that though in principle the Indian Evidence Act and Code of Civil Procedure don't apply to arbitrations, arbitrators and lawyers bring in the court culture, which is a setback to arbitration in India. Further he stressed on how institutions should not merely rent out their facility for the conduct of arbitrations, but should rather focus on monitoring arbitrations. Hon'ble Mr. Justice A.P. Shah was also a member of the arbitral tribunal which conducted the first arbitration at the new centre in Delhi on 29th April, 2018.

The vote of thanks was delivered by Mr. Arvind Datar, Senior Advocate, Supreme Court of India and Madras High Court.

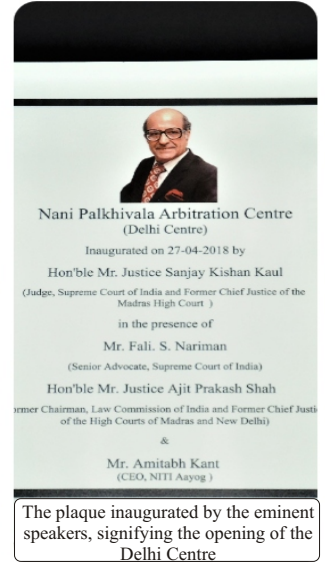
The Delhi centre is located at Dr. Gopal Das Bhawan, 28 Barakhamba Road, Conaught Place, New Delhi 110 001 and has been functional since 29th April, 2018. With three spacious halls for Arbitration and a discussion room, the Delhi centre can cater to the need of a large number of arbitrations with ease. Equipped with state-of-the-art technology and infrastructure including projectors and printers, the centre is also backed by efficient stenographers for recording the proceedings and other support staff for providing all the necessary facilitation. NPAC is all set to serve as the forerunner of an ideal institution for conducting and promoting of institutional arbitrations, thus spearheading the movement to make India a preferred destination for arbitrations.



The lighting of the 'kuthuvilakku' by Hon'ble Justice Mr. Venkatachaliah, Mr. Soli Sorabjee, Hon'ble Justice Mr. Sanjay Kishan Kaul, Hon'ble Justice Mr. A.P. Shah, Mr. Arvind Datar, Mr. Fali Nariman and Dr. Durgalakshmi



Mr. Fali Nariman addresses the gathering



The plaque inaugurated by the eminent speakers, signifying the opening of the Delhi Centre



The speakers at the Inauguration of the Delhi Branch of NPAC



The audience applaud during the opening of the NPAC Centre at Delhi



Members from the audience

Pictures of NPAC's new centre at Delhi



THE 2018 PROPOSED AMENDMENTS AND THEIR MISSING PROVISIONS

By
Ms. Payal Chawla



The Arbitration and Conciliation (Amendment) Bill, 2018 recently received Cabinet approval. The proposed amendments are based on the recommendations of the High Level Committee set up by the Government under the Chairmanship of Justice B.N. Srikrishna, former judge of the Supreme Court of India. The amendments are certainly well thought out, and are geared towards promoting arbitration in India, making India into an arbitral destination and promoting institutional arbitration.

That said, there are however some distinct lapses in the proposed 2018 amendments. It is imperative that the amendments are comprehensive so as to avoid repeated attempts at amending the Arbitration and Conciliation Act, 1996 (“Act”).

Section 2(1)(d)

The issue of emergency arbitration has been debated *ad nauseam* in India, and the fact is that for India to be a serious player in the arbitration arena, the law must provide for emergency arbitrators. It is therefore pertinent to amend s.2(1)(d) as recommended by the 246th Law Commission Report (“LCR”)¹, and the same should read: “‘*arbitral tribunal*’ means a sole arbitrator or a panel of arbitrators and in case of an arbitration conducted under the rules of an institution providing for appointment of an emergency arbitrator, includes such emergency arbitrator.”

Section 2(1)(e) & Section 42

It is important to amend s.2(1)(e)(ii) by replacing the words “*international commercial arbitration*” with “*institutional arbitration*”. Such an amendment would have the effect of giving jurisdiction to High Courts for court proceedings in relation to *institutional arbitrations*, encouraging parties to opt for institutional arbitration.

A proviso to s.2(1)(e) needs to be added, which states: “*Notwithstanding anything herein contained, once 'seat' is designated it shall have the effect of conferring exclusive supervisory jurisdiction on the court of the seat and ss. 16-21 of the Code of Civil Procedure, 1908 shall have no application to proceedings in relation to arbitrations once 'seat' has been designated. It is clarified that enforcement proceedings may be filed anywhere in India where the Award is executable.*”

The aforesaid proviso would be required to bring the Act in line with judgments of *Indus Mobile Distribution Pvt. Ltd. v. Datawind Innovations Pvt. Ltd.* and *Sundaram Finance Ltd. v. Abdul Samad*². Such an amendment would legislatively overrule *Swastik Gases Pvt. Ltd. v. Indian Corporation*⁴ to the limited extent it holds that ss.16-21 of the Code of Civil Procedure, 1908 applies to arbitrations.

When 'seat' is designated, s.42, in the wake of *Indus Mobile* and *Sundaram Finance*, would be redundant. The decisions, when read together, hold that supervisory jurisdiction will follow 'seat', and enforcement can be filed anywhere where the award is executable. The manner of determination of the 'seat', when 'seat' has not been specifically designated, has been referred for consideration before a larger bench in the matter of *Union of India vs. Hardy Exploration & Production (India) Inc*⁵. It appears that once the mode of designation has been clarified, the redundancy of s.42 would be complete.

¹ Page 37, 246th LCR

² (2017) 7 SCC 678

³ (2018) 3 SCC 622

⁴ (2013) 9 SCC 32

⁵ 2018 SCC OnLine SC 474

Section 2(1)(h)

It is imperative to amend the definition of 'party' in s.2(1)(h) to read: “*party' means a party to an arbitration agreement or any person claiming through or under such party*”.

The above amended definition had been proposed by the 246th LCR⁶ in order to reinforce the decision of *Chloro Controls v. Severn Trent Water Purification*⁷, where the phrase '*or any person claiming through or under*' appearing in s.45 was given a meaning to include non-signatories, in the appropriate context, in arbitration. The three-judge bench in *Chloro Controls* gave this meaning to the phrase by drawing a linkage with the words “*in respect of a defined legal relationship, whether contractual or not*” appearing in s.44. The benefit of these words, albeit present in s.7, cannot be linked to s.8 and hence brought to bear in domestic arbitration and Indian seated international commercial arbitration, without amending s.2(1)(h).

Although the Supreme Court in the recently decided matter of *Ameet Lalchand Shah v. Rishabh Enterprises*⁸ relegated non-signatories to arbitration (relying on *Chloro Controls*), it is important to consider that not amending the definition of 'party' in s.2(1)(h) could leave non-signatories remediless since the aforesaid phrase does not appear in ss.7, 9, 11 & 34. The position would now be more stark, since awards can be enforced even against non-signatories, as has been held in *Cheran Properties Limited v. Kasturi and Sons Limited*⁹ in view of the presence of the expression '*parties and persons claiming under them*' in s.35.

Section 2(1)(hh) & Section 20

An additional s.2(1)(hh) to define '*seat of arbitration*' should be added to s.2. This was recommended by the 246th LCR¹⁰ in order to provide clarity '*that seat of arbitration*' is different from the '*venue of arbitration*'. Consequently, the expression '*place*' appearing in s.2(2) and s.20(1) and s.20(2) should be replaced with '*seat*' and '*place*' appearing in s.20(3) with '*venue*'. This was the meaning first assigned to these expressions in the matter of *BALCO v. Kaiser Bharat Aluminium Company*¹¹ by the Constitution Bench, thereafter recommended by the LCR and recently re-affirmed in *Indus Mobile*.

Section 16

The amendment of s.16 by adding sub-clause (7) is long over-due. The amendment recommended by the LCR was: “(7) *The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc*”.

The amendment was proposed by the 246th LCR¹² with a view to legislatively overrule the Supreme Court's decision in *N. Radhakrishnan v. Maestro Engineers*¹³, “*which appear to denude an arbitral tribunal of the power to decide on issues of fraud*”. Post the 2015 amendments, the Supreme Court in the matter of *Ayyasamy v. Paramasivam*¹⁴ has *inter alia* held serious fraud, constituting a virtual case of criminal offence, to be non-arbitrable. The inclusion would have the effect of legislatively over-ruling *Ayyasamy*.

⁶ Para 61 to 64 of 246th LCR and at note (iv) at page 38.

⁷ (2013) 1 SCC 641

⁸ (2018) SCC Online SC 487

⁹ (2018) SCC Online SC 431

¹⁰ Page 39, 246th LCR

¹¹ (2012) 9 SCC 552

¹² Page 50, 246th LCR

¹³ (2010) 1 SCC 72

¹⁴ (2016) 10 SCC 2016

Section 34

In keeping with the recommendation proposed by the Supreme Court in the matter of *Indian Farmers Fertilizers Co-operative Limited v. Bhadra Products*¹⁵ the Parliament must consider adding a new provision to s.34 whereby interim awards can be consolidated with the final award in order to avoid challenges piecemeal. The Court in the above mentioned matter had observed, “we are of the view that Parliament may consider amending Section 34 of the Act so as to consolidate all interim awards together with the final arbitral award, so that one challenge under Section 34” can be made after delivery of the final arbitral award. According to the Court, piecemeal challenges to awards lead to “unnecessary delay and additional expenses”. Sub-section (7) can be added to s.34 which could read- “It is clarified that all interim/partial Awards shall merge into the final Award and shall be challenged only with the final Award”.

However, there could be the exceptional circumstances where the partial/interim award is imperative to challenge. Therefore, a proviso must be added whereby the tribunal is vested with the requisite power to stay the interim/partial award and/or direct the same to take effect along with the final award.

In s.34(2A), the words '*international commercial arbitration*' are to be replaced with the words '*institutional arbitration*'. This will remove the current disparity between domestic arbitrations on the one hand and Indian seated international commercial arbitrations and foreign-seated arbitrations on the other hand, with regard to the test of 'patent illegality'. The classification would only be with regard to domestic ad-hoc arbitration and institutional arbitration. This would have the effect of giving an impetus to institutional arbitration and also retaining our domestic arbitration within the country - thus killing two birds with one stone.

Conclusion

The other amendments proposed by the 2018 Amendments are progressive and need to be implemented except s.13 of the proposed Amendment Bill, which intends to incorporate s.87 to the Act. The said amendment, if brought in, will have the effect of putting the '*Amendment Act on a back-burner*' and '*result in the increased interference of courts in arbitration matters*', as has been pointed out by the Supreme Court in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*¹⁶ (“*BCCI*”). The current s.13¹⁷ of the proposed Amendment Bill ought to be replaced with the ratio in the *BCCI* Matter.

By way of a background, when the 2015 amendments came into effect, they contained a 'repeal and savings' provision. This seemingly innocuous provision became the cause of much dispute.

The language of this provision did not clarify whether the court proceedings that had been filed after the amended Act came into effect on October 23, 2015, in relation to arbitrations that had commenced prior to the amendments taking effect would continue to be governed by the un-amended Act or by the amended Act. Litigations were filed in various High Courts around the country, which took contrary views on the controversial provision. Parties felt that rights had vested in them for instance, scope of the interference of the court in setting aside an award, or in its enforcement, etc., under the un-amended regime, and that the amendments had the impact of taking away those vested rights.

¹⁵ (2018) 2 SCC 534

¹⁶ 2018 SCC OnLine SC 232

¹⁷ After section 86 of the principal Act, the following section shall be inserted and shall be deemed to have been inserted with effect from the 23rd October, 2015, namely: "87. Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall (a) not apply to (i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; (ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015; (b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings".

The Supreme Court, in the *BCCI* matter, putting an end to these disputes, held that any court proceedings filed after the effective date of the amendment, even in relation to arbitrations commenced prior to the said effective date, would be governed by the amended Act.

Interestingly, during the course of the hearing of the afore-mentioned case, the proposed 2018 Amendments were brought to the attention of the Court, which had *inter alia* incorporated a 'repeal and savings' provision. According to the proposed 2018 Amendments, any Court proceedings arising out of or in relation to arbitral proceedings filed prior to 23rd October, 2015, irrespective of whether such court proceedings are commenced prior to or after the said date, would be governed by the un-amended Act. It was in this context that the Supreme Court advised the Government to reconsider the language of the proposed amendment, and to bring the same in line with the judgement passed by the Court in the aforesaid matter. It is hoped that the Government will pay heed to this cautionary note of the Supreme Court.

Lastly, the Parliament must consider legalizing third party funding, by way of a separate and comprehensive enactment, to bring India at par with other jurisdictions such as Singapore and Hong Kong. It would additionally require the laws regarding champerty and maintenance to be legalized as well. It might not also be out of place to mention that the time has come to allow Indian lawyers to charge contingency fees/ undertake value billing. This will also lay the foundations for creating a level playing field for Indian lawyers as and when we are ready to open our doors to foreign lawyers.

Payal Chawla is the founder of JusContractus, a Delhi based full-service law firm, with primary focus on arbitrations. She is also one of the Directors on the Board of Nani Palkhivala Arbitration Centre. For feedback, contact payalchawla@juscontractus.com. This article is for informational purposes only, and is not intended to provide, and should not be relied on for legal advice. Readers are advised to seek independent legal advice with their peculiar facts and circumstances.

WELCOME TO THE NEWEST MEMBER OF THE NPAC FAMILY!

Mr. Aditya Ghosh, former President of IndiGo, joined the Board of Directors of Nani Palkhivala Arbitration Centre on the 11th of June, 2018.



Mr. Ghosh became the General Counsel of InterGlobe Group at the age of 28. He was elected to the Board of IndiGo in 2007 and took on the role as its President in August 2008.

Prior to that he practised law with the firms, J. Sagar Associates and K&S Partners (formerly Kumaran & Sagar. He is a member of the Bar Council of Delhi and the Inter-Pacific Bar Association. He is also a member of the Executive Council of the Federation of Indian Airlines.

Mr. Ghosh received the GQ Businessman of the Year award in 2013. He was nominated for the CNN-IBN Indian of The Year 2013 in the business category. He was also awarded 'CEO of the year' award by SABRE in July 2013. In 2012, Aditya Ghosh was ranked 27th globally in Fortune Magazine's "40 under 40 list". He received the 'Young Business Leader 2011' award at NDTV Profit Business Leadership Awards, 2011. He received the Low Cost Leadership award at the "World Airline Awards", London 2011. He has been a Wholetime Director of InterGlobe Aviation Limited since April 01, 2014. Mr. Ghosh has also been identified as one of India's "Hottest Young Executives" by the Business Today magazine in 2011. He holds a Bachelor's degree in Law (LL.B) and History from Delhi University.

We are elated to have him on 'board' at this opportune time and endeavour to continue providing the much needed impetus towards the promotion of arbitration, especially institutional arbitration in India.

NPAC CIArb Courses

Nani Palkhivala Arbitration Centre & Chartered Institute of Arbitrators (UK) India branch jointly announce the following upcoming courses:

- (1) **'Associate Level Arbitration Course'** scheduled to be conducted on the **18th & 19th of August 2018** (Saturday & Sunday) from 9.30 am to 5.30 pm (2 day course), CIArb Introductory Certificate course for Associate grade (ACIArb).

Who Can Attend?

Chartered Accountants, Company Secretaries, Arbitrators, Lawyers, In-house Counsels, Brokers, Academicians, Financial Intermediaries and other Professionals.

Over 2 days at NPAC, Chennai by CIArb-approved tutors.

Candidates will have to appear for an online assessment exam after the course.

- (2) **'Member Level Module I Arbitration Course'** is scheduled to be conducted from **July 7th 2018** onwards.

In order to register for the Course, candidates must have successfully completed a CIArb 'Introduction to Arbitration' course or a course offered by a CIArb Branch.

This course is intended for individuals who may not have studied law previously and wish to gain an understanding of the elements of the law of obligations and civil evidence that affect matters in civil and commercial disputes. It is suitable for anyone with a general interest in dispute resolution and is essential for individuals who wish to go on to become qualified arbitrators, adjudicators or mediators

The course is delivered with a combination of private study and face-to-face tutorials. Written Exam will be conducted on **August 17, 2018**.

- (3) **'Member Level Module II Arbitration Course'** is scheduled to be conducted from July 7th 2018 onwards and the tutorials will be held from **17th to 19th of August 2018** (Friday, Saturday & Sunday) from 9.30 am to 5.30 pm.

The course is delivered with a combination of private study and tutorials. Written Exam will be conducted on **August 19, 2018**.

- (4) **Course on Award Writing** is scheduled to be conducted on **18th August 2018** (Saturday) from 9.30 am to 5.30 pm. The candidates will be given a prior one day tutorial in the month of July 2018.

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