DISPUTE RESOLUTIONS

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Message to the Readers

As NPAC tracks the development of the law in the field of arbitration, it has come across two recent judgments of the Supreme Court which raise significant issues in this field. The first of the judgments amplifies and encapsulates the scope of interference with an arbitral award, while the second judgment further spells out the effect of an Arbitration Agreement which is either unstamped or insufficiently stamped

In ***MMTC vs. Vedanta Limited ((2019) 2 ALT 53)***, the Supreme Court following the judgment in ***Associated Builders vs. DDA*** has held that the court does not sit in appeal over an arbitral award and is confined to deciding whether the award is against the public policy of India, which in turn would include a violation of the fundamental policy of Indian Law, the existence of patent illegality etc. While considering the concept of 'fundamental policy of Indian Law', the court has held that it would cover compliance with statutes and judicial precedents, adopt a judicial approach, check compliance with the principles of natural justice and the Wednesbury principles of reasonableness. The expression 'patent illegality' has been held to include within its ambit, contravention of substantive law of India, contravention of the Arbitration and Conciliation Act, 1996 ("**Act**") and contravention of the terms of the contract.

It is noteworthy to point out that in the context of the above principles, the 2015 amendment to the Act has severely curtailed the scope of enquiry in that, an enquiry into a violation of the fundamental policy of Indian law shall not entail a review of the merits of the dispute, while in the case of patent illegality, an erroneous application of law or a reappreciation of evidence would not be permitted.

In ***Garware Wall Ropes Limited vs. Coastal Marine Constructions & Engineering Ltd. [CA no. 3631 of 2019]***, the Supreme Court has upheld the principle laid down in ***SMS Tea Estates [(2011) 14 SCC 66]*** and has concluded that in order to construe whether an Arbitration Agreement exists for the purposes of Section 11 of the Act, it must exist in law and where an Arbitration Agreement is either unstamped or insufficiently stamped it would not meet the aforesaid requirement and consequently, a party cannot seek an appointment of an arbitrator by a Court on the basis of such agreement unless and until such defect has been cured. Several other significant principles have also been laid down in this judgment.

All in all, it is an exciting time to be engaged in arbitration and watch the law unfold, even as amendments are happening in an attempt to keep pace with rapid developments in this field both within the country and abroad.

As always it will be NPAC's endeavor to keep track of such developments and disseminate the same to our readers.

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DELHI HIGH COURT SETS ASIDE THE ARBITRAL AWARD PASSED IN THE AIRPORT METRO EXPRESS DISPUTE

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Introduction

Recently, the Division Bench of the Delhi High Court in ***Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Private Limited***,[1] haspartially set aside an arbitral award under Section 37 of the Arbitration and Conciliation Act, 1996 ("**Act**"). In the recent past, the Courts in India have consistently upheld the validity of awards passed by arbitral tribunals, and the scope for interference has been substantially narrowed. In the instant case, the Delhi High Court departed from the usual practice and observed that there were serious irregularities with the arbitral award, which were too obvious and apparent to be ignored as inconsequential. Resultantly, save and except one finding of the arbitral tribunal, the Delhi High Court set aside the award, and granted liberty to the parties to invoke the arbitration clause again for a fresh adjudication of their claims and counter-claims.

Background to the Dispute:

The dispute arises out of a Concessionaire Agreement ("**Agreement**"), entered into between Delhi Metro Rail Corporation Ltd. ("**Delhi Metro Corporation**") and Delhi Airport Metro Express Private Limited ("**Delhi Airport Metro Limited**") for the construction, operation and maintenance of the Delhi Airport Metro Express Line ("**Airport Express**"). The public-private partnership was entered into for providing high speed metro connectivity. Under the Agreement, the Delhi Metro Corporation had to undertake clearances and bear the costs relating to acquisition of land and construction of all civil structures like tunnels, viaducts, etc.,while the design, supply, installation, testing and commissioning of various railway systems were to be provided by Delhi Airport Metro Limited, as a private partner.

Dispute arose in relation to the operation of the Airport Express. More specifically, on March 22, 2012, the Delhi Airport Metro Limited requested Delhi Metro Corporation to arrange for a joint inspection of viaducts and bearings, before the expiry of the defect liability period of the civil contractors as contemplated under the Agreement. Subsequently, on May 23, 2012, Delhi Airport Metro Limited once again wrote to Delhi Metro Corporation highlighting serious design and quality issues with regard to installation of viaducts bearings, such as signs of girders having sunk at some locations causing deformation and cracks. Operations of the Airport Express were eventually suspended on July 8, 2012.

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[1] FAO(OS) (COMM) 58/2018 & CM Nos. 13434/2018, 17581/2018 & 31531/2018

On July 9, 2012, Delhi Airport Metro Limited invoked the provisions of the Agreement and set out a non-exhaustive list of defects to be cured by Delhi Metro Corporation within a period of 90 days, and stated that a failure would trigger an event of default under the Agreement. Delhi Metro Corporation denied any contrary assertions and invoked the conciliation mechanism stipulated under the Agreement.

Subsequently, upon obtaining certification from the Commissioner of Metro Road Safety (**"Safety Certificate**"), Delhi Airport Metro Limited resumed their operations on January 22, 2013, however, shortly thereafter, addressed a letter calling upon Delhi Metro Corporation to take over the project and the assets by close of business hours of June 30, 2013.Since July 1, 2013 the Airport Express operations are being handled by Delhi Metro Corporation.

On May 11, 2017, an arbitral award held that the termination notice issued by Delhi Airport Metro Limited was valid; Delhi Metro Corporation had failed to cure the breach within the period specified under the Agreement; and consequently, Delhi Airport Metro Limited was entitled to receive termination payment and interest under the Agreement **("Award")**.

Delhi Metro Corporation assailed the Award before the Single Judge under Section 34 of the Act. The learned Single Judge upheld the Award. Delhi Metro Corporation appealed this judgment before the Division Bench of the Delhi High Court under Section 37 of the Act.

Judgment of Division Bench of the Delhi High Court

Submissions were advanced with respect to the following issues. First, whether participating in the reconciliation process and operating the metro line after terminating the Agreement resulted in a waiver of Delhi Airport Metro Limited's right to terminate the Agreement; second, whether the termination notice was validly issued and the Award correctly decided that Delhi Metro Corporation had not taken effective steps for removal of defects thereby causing 'material adverse effect' on Delhi Airport Metro Limited; and third, whether the termination payment and interest on such payment was correctly computed by the arbitral tribunal.

Waiver of Termination Notice by Election and Conduct:

The Award had held that Delhi Airport Metro Limited had not withdrawn or waived its right to terminate the Agreement by election and conduct. The Division Bench refrained from interfering with this finding recorded in the Award, as such findings were based on the conduct of Delhi Airport Metro Limited, including the letters written by them, which had made it clear that their participation in the conciliation proceedings and re-commencement of the Airport Express were 'without prejudice' to their rights. The Division Bench held that it would be difficult to hold that the Award was flawed on the issue of waiver and as such cannot be corrected under the limited jurisdiction and scrutiny available while assailing a challenge to an arbitral award.

Termination of the Agreement:

The Delhi High Court noted that the arbitral tribunal had relied upon two conflicting effective dates of termination. In the first portion of the Award, the tribunal upheld the termination notice dated October 8, 2012, however, in the second portion of the Award, the tribunal referred to January 7, 2013 as the date of termination. The Division Bench observed that the date of termination was crucial to understand if Delhi Metro Corporation had cured or taken effective steps to cure the defects within the period specified in the Agreement, and opined that the conflicting dates of termination could, therefore, materially change the outcome of the findings by the arbitral tribunal.

The Division Bench also appreciated the fact that the Safety Certificate which permitted re-starting of the Airport Express *albeit* with certain conditions, including a reduced speed limit, essentially related to whether or not the defects in the viaducts had been repaired or effective steps for repair had been undertaken by Delhi Metro Corporation. Consequently, it held that the arbitral tribunal had incorrectly held that the Safety Certificate was not relevant and inconsequential, without providing any reasons. The Division Bench further opined that the Safety Certificate was granted after due verification of the civil structure, and held that its validity was not capable of submission to arbitration and hence, vital evidence had been ignored by the arbitral tribunal.

Computation of termination payment:

As per the Agreement, Delhi Metro Corporation was liable to pay (i) the debt due; and (ii) 130% of the adjusted equity[2] due to an event of default resulting from their default. Conversely, the Agreement prescribed that Delhi Metro Corporation was liable to pay 80% of the debt due to a similar default on behalf of the Delhi Airport Metro Limited. The dispute pertained to the definition of adjusted equity. While the promoters of Delhi Airport Metro Limited advanced Rs. 685 crores as the share application money, subsequently, through a board resolution, the same was converted as a 'subordinate debt' in its books of accounts. However, Delhi Airport Metro Limited contended that the share application money be treated as equity in order to avail of the 130% of adjusted equity as a part of the termination payment. The arbitral tribunal acceded to treating the same as adjusted equity.

The Delhi High Court set aside the finding of the arbitral tribunal and held that in spite of overwhelming and material evidence to the contrary, the Award treated the amounts as equity while ignoring that the share application money was converted as subordinate debt by clear choice and election. It was further observed that Delhi Airport Metro Limited had intentionally and deliberately opted to convert the share application money into subordinate debt to protect and insulate itself in the event they ran into a default, and the payment was to be made in lieu of such default

Relying on the principles set out by the Supreme Court in the case of ***Associate Builders v. Delhi Development Authority***,[3] the Delhi High Court set aside the findings of the arbitral tribunal on the ground of irrationality and held that no reasonable person in the given circumstances would have arrived at such a conclusion.

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[2] Under the Agreement, "Adjusted Equity" is defined as equity funded in Indian Rupees on the first day of the current month ("**Reference Date**"), in the manner set forth in the Agreement, to reflect the change in its value on account of depreciation and variations in the wholesale price index. Under the Agreement, the computation for the adjusted equity varies on the basis of the time of occurrence of the Reference Date.

[3] (2015) 3 SCC 49.

Computation of the interest on termination payment:

While Article 36.2.6.1 of the Agreement stipulated that where an award is for payment of money, no interest shall be payable on whole or any part of money till award is made, on the contrary, Article 29.8 of the Agreement prescribed that a termination payment from Delhi Metro Corporation becomes due and payable within 30 days of demand by Delhi Airport Metro Limited, failing which interest is payable at SBI PLR[4] plus two per cent for the period of delay on such amount. Delhi Metro Corporation had contended that the interest pursuant to Article 29.8 was not payable considering the restriction in Article 36.2.6.1.

The Delhi High Court refused to interfere with the findings of the Award on this aspect and observed that since the award on termination payment, including the payment of adjusted equity is being set aside, a finding on the interest payment would become infructuous.

In view of the above, the Division Bench of the Delhi High Court entirely set aside the Award except to the extent where it upheld the arbitral tribunal's finding that Delhi Airport Metro Limited had not waived its rights to terminate the Agreement.

Practical Implications

There have been series of judgments by the Supreme Court, as well as various High Courts, where courts have adopted a least intervention approach, consistent with the international standards, while hearing a challenge to an arbitral award. In fact, recently in the case of ***National Highway Authority of India v. BSC-RBM-PATI Joint Venture***,[5] the Delhi High Court held that it is not for the court to re-appraise the evidence and reconsider factual findings on the merits of an arbitral award. However, there cannot be an absolute rule, and the Delhi High Court has correctly intervened in this matter by holding that:

- Glaring and obvious errors on the face of an arbitral award are grounds for setting aside of an arbitral award;
- Non-consideration of vital evidence and defiance of logic in an arbitral award entitle the courts to consider setting aside of an arbitral award;
- An arbitral award should not be perverse or irrational, i.e. findings based on no evidence, or the arbitral tribuna taking into account something irrelevant to the decision or ignoring the vital evidence in arriving at the decision;
- An arbitral award is perverse and irrational if no reasonable person would have arrived at the same decision.

This is a well-reasoned judgment which explains that the Award suffers from perversity, irrationality and patent illegality in the form of ambivalence as to the date of termination as well as non-consideration of vital evidence. This judgment serves as a good reminder that when there are glaring errors, unfounded interpretations and perverse findings in an arbitral award, courts cannot turn a blind eye to them. In such exceptional situations, courts can intervene in the findings of the arbitral tribunal and set aside arbitral awards. Delhi Airport Metro Limited has filed an appeal against the instant judgment before the Supreme Court and it remains to be seen whether the Supreme Court will uphold the findings of the Division Bench of the Delhi High Court.

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[4] SBI PLR refers to the State Bank of India's prime lending rate.

[5] FAO (OS) (COMM) 107/2017& CM Nos.18458-59/2017.

IMPACT OF THE 2018 AMENDMENT ON SECTION 11: A STEP TO MORE HARM THAN GOOD?

By Moksh Ranawat, Symbiosis Law School, who was awarded the 2nd prize at the Satya Hegde Essay Competition, 2018 (below is an abridged version of the Article, provided by Moksh)

The Arbitration and Conciliation (Amendment) Bill, 2018 ("**Bill**") was introduced on 18th July, 2018 and passed on 10th August, 2018 by the Lok Sabha in order to bring more clarity, conformity and consensus on arbitration in India in lieu of the international arbitration framework; an objective which the 2015 Amendment failed to accomplish.[1] The proposed amendments of the bill are based upon the recommendations of the "High Level Committee to Review the Institutionalization of Arbitration Mechanism in India", formed and chaired by Justice B N Srikrishna, a former Supreme Court judge.[2]

While the Bill is still pending for further consideration in the Rajya Sabha, it aims to introduce key changes in the current arbitration framework through the formation of an Arbitration Council of India (ACI), relaxation of time periods, introduction of express provisions for arbitral immunity and confidentiality and the addition of a schedule with regard to qualifications while appointing arbitrators.[3]

Under the 2018 Amendment, the courts have to designate arbitral institutions to the parties, which would look into appointment of arbitrators. For international commercial arbitration, appointments are to be made by the institution designated by the Supreme Court.[4] For domestic arbitration, appointments are to be made by institutions designated by the concerned High Courts.[5]In case there are no arbitral institutions available, the Chief Justice of the concerned High Court can maintain a panel of arbitrators to perform the functions of the arbitral institutions.[6]

Section 11 finds its essence in the fact that the courts have power to appoint arbitrators, but through this amendment, this power of appointment shall shift to the hands of the ACI which shall look into such appointments. Such a shift of power stands to make Section 11 obsolete as the appointment power no longer stands subject to judicial discretion[7]. While such a measure aims at easing the process of appointment of arbitrators, it seems to create more problems than it solves. Two major issues which arise through this enactment are:

A. Before this enactment, questions regarding existence of an arbitration agreement were decided by the courts through Section 11(6A) prior to appointment of arbitrators. Now, as Section 11(6A) has been omitted through this bill, the question regarding who shall undertake this task is uncertain. Further, even if the arbitral institutions undertake such determination, no standard rule or provision has been set up hence leading to ambiguity in the process of appointment.[8]

B. Secondly, ACI is a government body that regulates arbitrators and arbitrations, and therefore is antithetical to the very concept of arbitration, i.e., government regulation should have no intervention in any arbitration friendly jurisdiction. Further, in a country where the Government is the biggest litigant, ACI cannot act as supervisor over the very arbitrators who are hearing cases against the Government.[9] There exists a clear conflict of interest when an arbitrator is hearing a dispute involving the government if a body appointed by the government will also proceed to review grading of the arbitrator as is envisaged under the Bill.[10]

Hence, a need for proper discussion and reconsideration in the 2018 Amendment is imperative while the Bill stands on the horizon of being passed by the Rajya Sabha. The Bill in its current state may end up doing more harm than good, and therefore deter foreign players from the arbitral process in India. The scope and objective of Section 11 needs to be understood in order to allow future conformity and clarity with respect to appointment of arbitrators.

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[1] Vyapak Desai, Ashish Kabra and Vikas Mahendra, Arbitration Bill 2018 Regressive and Retrograde, (22 December, 2018, 9:58 AM), https://barandbench.com/arbitration-bill-2018-regressive-and-retrograde/.
[2] Press Information Bureau Press Release, Constitution of High Level Committee to Review Institutionalization of Arbitration Mechanism in India, (21 December, 2018, 8:47 PM), http://pib.nic.in/newsite/PrintRelease.aspx?relid=155959.
[3] Rangon Choudhary, Analysis of The Indian Arbitration and Conciliation (Amendment) Bill, 2018, IPleaders Blog, (19 December,2018, 9:45 AM),https://blog.ipleaders.in/arbitration-and-conciliation-amendment-bill-2018/.
[4] Ministry of Law & Justice, The Arbitration & Conciliation (Amendment) Bill, 2018, PRS India,(20 December, 2018, 2:35PM), https://www.prsindia.org/billtrack/arbitration-and-conciliation-amendment-bill-2018
[5] Id.
[6] Id.
[7] Id.
[8] *At 39 in the full version.*
[9] Id.
[10] *At 42 in the full version.*

ESSENTIAL RULES FOR COUNSEL IN PREPARATION FOR AN INTERNATIONAL COMMERCIAL ARBITRATION

*[The following is an abridged version of the keynote address delivered by **Lord Peter Goldsmith QC, PC** at the XI Annual International Conference of Nani Palkhivala Centre. The full speech is available on NPAC's website]*

Introduction

Last year, my learned colleague and friend, the Honourable Chief Justice of Singapore Mr. Sundaresh Menon spoke on "The Role of National Courts of the Seat in International Arbitration".[1] In his address, he outlined five key attributes underlying a successful arbitral seat and noted the significant progress made by India on all fronts. Progress has been considerable and I was looking forward therefore to commending the progress and expressly sharing share Chief Justice Menon's optimism that India can establish itself as a leading international arbitration hub.

But that was before I studied the changes to the law proposed in the 2018 Arbitration. Bill. Some of the changes proposed are welcome although some undoubtedly controversial such as the proposal to count the time for completion of the arbitration from the close of pleadings which will make a major change to the flagship provision in the Ordinance to make arbitration swifter; or the provision for blanket confidentiality.

But my concern - and I believe the concern of the international community centres on two other changes. First the proposed provisions for the new body the Arbitration Council of India not merely to promote arbitration as was recommended. But apparently also to regulate it The idea that a government appointed body should regulate arbitration and arbitrators is anathema to the idea of free and autonomous arbitration.

Secondly, the proposals for the required qualifications of arbitrators. These are to be found in proposed new section 43G which provides mandatory requirements for the qualifications, experience and norms for accreditation of arbitrators as specified in the Eighth Schedule:

The first requirement is that *"A person shall not be qualified to be an arbitrator unless he*

(i) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate; or…"

These would appear at a stroke to prohibit the appointment of foreign lawyers as arbitrators in Indian seated Arbitrations. The conservatism of the Indian legal regulatory bodies in not allowing foreign legal professionals is notorious. What will these changes do if they become law? Foreign businesses will not be prepared to sign up to agreements providing for Indian arbitration if they will not have the chance to appoint arbitrators from jurisdictions with which they are more familiar. They will I predict set back the cause of Indian arbitration by many years, perhaps a generation. Though this was not what I had originally intended to say it is I think my most important message.

I turn then to the topic I had been asked today to speak about; to offer my reflections on the "essential rules" for counsel regarding preparation for an international commercial arbitration. Having spent many years of my early career at the commercial bar in London, the following "essential rules" are lessons I have learnt from the practice of courtroom litigation juxtaposed against the modern practice of international arbitration.

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[1]Sundaresh Menon CJ, Role of the National Courts of the Seat in International Arbitration, (2018) 4 SCC J-1, 14-05-2018.

Essential Rule 1 Know your Tribunal

While parties cannot select their judges in a court hearing, parties to an international arbitration can. In nominating an arbitrator, parties and counsel will consider many factors, including the arbitrator's legal background, industry experience, approach to specific issues of law or evidence,[2] and possibly even the dynamics between tribunal members.

Whilst for many the ability to influence the composition of the panel is a key advantage of arbitration, the ability to select one's arbitrator has long given rise to doubts on the independence of party-appointed arbitrators. In his 2010 lecture at the University of Miami, Professor Jan Paulsson argued that the established practice of unilateral appointments is incompatible with the concept of impartial dispute resolution.[3] He proposed instead that all arbitrator appointments be made by a neutral body. Professor Paulsson's view has gained some traction. The Canada-EU Trade Agreement, the EU-Vietnam free trade agreement and the EU-Singapore free trade agreement have jettisoned the party-appointment mechanism in favour of a two-tiered investment court system.

Paulsson's view however, does not seem to have dislodged the established practice in commercial arbitration. In terms of legitimacy, Judge Brower of the US-Iran Claim Tribunal has argued that parties tend to have greater confidence in proceedings in which they have invested through the appointment of an arbitrator.[4]

To address grey areas in the appointment of arbitrators, the International Bar Association in 2014 published its Guidelines on Conflicts of Interest in International Arbitration ("**2014 IBA Guidelines**").[5] The guidelines are coded "red", "orange" and "green" to denote the level of risks of conflicts of interest in different situations. The 'red list' consists of two parts: a non-waivable 'red list' and a waivable 'red list'. Situations on the 'orange list' which gives rise to justifiable doubts about arbitrator's impartiality or independence must be disclosed. Dissatisfied parties may make a "timely objection" 30 days under the guidelines or be "deemed to have accepted the arbitrator". Tellingly, the IBA deemed it was necessary to prepare a 'green list' of situations where there were "no doubts" as to the arbitrator's impartiality, presumably to minimise unmeritorious disqualification applications.

Issues concerning the selection and appointment of tribunals continue to be a complex area in international arbitration which we, as counsel, need to pay close attention to, particularly given the proclivity of using this as a means to derail arbitration proceedings.

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[2]Common law judges decide the case based on what the parties elect to present. Civil law takes a more active approach in the conduction of proceedings and in the collection of evidence, including the examination of witnesses. See Redfern and Hunter, International Arbitration (Sixth Edition), pg. 376-377, [6.78] [6.79], citing a Swiss international arbitration specialist to the effect that even within civil law jurisdictions in Continental Europe, there is no common origin on the rules of evidence and each is dependent on local rules, customs and educational backgrounds of the judges.

[3]J. Paulsson Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, "Moral Hazard in International Dispute Resolution" (29 April 2010), available at https://www.arbitration-icca.org/media/4/69377396990603/media012773749999020paulsson_moral_hazard.pdf.

[4] C. Brower, The (Abbreviated) Case for Party Appointments in International Arbitration, in: ABA Section of International Law, 2013, Volume 1, Issue 1, pg. 10-13.

[5]The IBA Conflict Guidelines may be found at **[Tab 2]**. There were 19 experts involved in the 2004 working group which originated from common law jurisdictions such as Australia, Canada, Singapore, South Africa, the U.K, and U.S.A, as well as civil law jurisdictions such as Belgium, France, Germany, Mexico, the Netherlands, and Switzerland.

Essential Rule 2 Understanding the Applicable Rules and their Limits

In *A Theory of Justice*, John Rawls was attempting to devise a set of universal principles which would apply justice in all cases. Given the similarity between litigation and arbitration, one would have thought the general principles of litigation would be identical. Not so.

In the context of domestic litigation, the parties' obligations in respect of the disclosure of documents are typically governed by strict rules of evidence and civil procedure. Disclosure in the realm of international arbitration is significantly different. Rather than clear and strict rules prescribing the parties' disclosure obligations, what is expected of the parties often depends on the tribunal's wide discretion. Typically, national arbitration laws devolve issues concerning evidence and procedure to the tribunal.

In other areas arbitration has moved away from court litigation and arbitration has developed its own rules national and transnational. It would be negligent to attempt to practise arbitration by simply relying on one's knowledge of home state litigation and without familiarising oneself with the particular rules and practices of the relevant system of arbitration.

This then takes us to transnational guidelines such as the 2010 IBA Rules on the Taking of Evidence ("**IBA Rules**").[6] The IBA Rules, which have been in circulation for close to ten years, are now a staple of international arbitration. They and other such rules and guidelines have evolved to meet the problem of different national rules and experiences of counsel and parties from different tradition.

Given the dearth of robust sanctions, counsel may need to turn to local courts for assistance. In order to minimise curial intervention, the English and Singapore Courts have imposed certain limitations in deciding when arbitrating parties can seek their assistance in the area of evidence.

Depending on where the parties and potential witnesses are based, one possible tool could be an application under Section 1782 of Title 28 of the United States Code in the US Courts. This provision allows discovery in aid of proceedings in *"a foreign or international tribunal"*. Although there is an extant debate on whether Section 1782 can be used to obtain evidence for international arbitration proceedings,[7] dicta from the Supreme Court in ***Intel v AMD***[8] suggests that the phrase *"foreign or international tribunal"* in the provision includes foreign arbitration panels, and most recently, the section was applied by a New York District Court in ***In re Kleimar N.V.***, 2016 WL 6906712 (SDNY Nov. 16) in relation to an international arbitration under the rules of the London Maritime Arbitration Association. Under Section 1782, there is no need to obtain permission from the foreign tribunal.[9]

In December 2018, a new set of evidential guidelines to rival the IBA rules was published. The so-called "Prague Rules" were prepared by some 50 arbitration practitioners with civil law backgrounds who argue that the common law approach as encapsulated within the IBA Rules has led to dissatisfaction with excessive time and costs incurred in arbitration proceedings.

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[6]The IBA Rules may be found at [Tab 3]. See also IBA, 2016 Report on the Reception of the IBA Arbitration Soft Law Products, [27] and [54]. The IBA Arbitration Guidelines and Rules Subcommittee found that the IBA Rules of Evidence were referenced in only 33% of arbitration proceedings in India, and considered binding in 50% of cases in India.

[7] There are a handful of cases supporting the notion: In re Roz Trading, 469 F. Supp. 2d 1221 (N.D. Ga.2006); In re Hallmark Capital, 534 F. Supp. 2d 951 (D. Minn. 2007);

[8] Intel v. AMD, 542 U.S. 241, 259 (2004).

[9] In re Malev, 964 F.2d 97, 101 (2d Cir. 1992).

In an earlier draft of the Prague Rules, the committee argued that *"[t]he procedures for taking evidence, particularly document production, using multiple fact and expert witnesses and their cross-examination at lengthy hearings ... are, to a large extent, reasons for [the] dissatisfaction [with time and costs]."* To counteract this, the Prague Rules favour the use of the civil law *"inquisitorial model of procedure"* and a *"more active role of the Arbitral Tribunal"*. Early responses to the Rules have been mixed.

Essential Rule 3 Understanding Tools for Efficiency

The third rule that I want to touch on concerns counsel's need to utilise all available tools to make arbitration more efficient.

The maturity of arbitration as a mode of dispute resolution has also meant more scrutiny over perceived excesses. Cognisant of some of these issues, my firm, Debevoise & Plimpton, first published an "efficiency protocol" in 2010, and recently updated it in 2018.[10] Some examples of our suggestions include:

(1) Getting arbitrators to confirm their availability to administer the case before appointing them. We also suggest obtaining a confirmation that arbitrators will not take on new appointments which would reduce their ability to conduct the arbitration efficiently. The Indian Arbitration Act, as amended in 2015, also provides for a similar provision. It requires a potential arbitrator to disclose any circumstances *"which are likely to affect his ability to devote sufficient time to the arbitration within a period of twelve months"*.[11]

(2) Requesting an early procedural conference to establish the procedure for the case. As appropriate, we also suggest that clients and opposing clients be invited so as to give meaningful input on aspects of case procedure.

(3) Using electronic filings and encouraging paperless arbitrations.

(4) Avoiding having multiple witnesses testify about the same facts.

(5) Encouraging the use of the chess-clock process at the merits hearing (i.e., fixed time limits).

In addition to what counsels can do, legal institutions have kept pace by introducing rules which would increase efficiency. Members of the audience will be familiar with the use of summary judgment or strike-out in litigation proceedings.[12] This allows for the early disposition of claims or particular issues without a full hearing. The SIAC, ICC[13] and Stockholm Chamber of Commerce ("SCC")[14] have now all introduced summary procedures in various forms.[15]

The ICC, SIAC and SCC procedures however require tribunals to grant the parties a fair and reasonable right to object to summary dismissal,[16] thereby minimising any due process concerns. The ICC Court in particular, scrutinises any award made on an application for expeditious determination, in principle, within one week of receipt by the ICC Secretariat.[17]

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[10] Debevoise Efficient Protocol 2018, [Tab 5].
[11] Arbitration and Conciliation (Amendment) Bill 2015, Bill No. 252, amendment of section 12 in the principal Act.
[12] See English Civil Procedural Rules, at Rule 3.4. c.f. See Three Rivers District Council v. Bank of England No 3 [2001] UKHL 16, [117].
[13] ICC, "Note to Parties and Arbitral tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", 1 January 2019, [74]-[79].
[14] SCC Rules, Article 39.
[15] C. Rae, "ICC Court Clarifies Summary Dismissal Procedure in Arbitration", Latham & Watkins, 5 December 2017, available here.
[16] Kartikey M. and R. Raheja, Recognition of Summary Procedures under the ICC Rules: Considerations, Comparisons and Concerns, Kluwer Arbitration Blog (4 December 2017) available here [Tab 7].
[17] ICC, "Note to Parties and Arbitral tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration", 1 January 2019, [79].

Essential Rule 4 Understanding Due Process and Enforcement Risk

The last rule I will discuss today concerns counsel's awareness of due process issues and enforcement risks. One benefit of international arbitration is the ease of enforcement under the New York Convention. However, the Convention also sets out various grounds on which enforcement can be refused. Of note is the "due process" ground under Article V(1)(b), which provides:

> *"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case".*

Surveys of court decisions shows that NY Convention Article V(1)(b) claims are among the most popular grounds raised to resist enforcement. This has led to a phenomenon called *"due process paranoia"* where arbitrators fear that their award may be set aside on due process grounds. What is interesting to note, however, is that a careful review of case law across several jurisdictions suggests that this phenomenon of "due process paranoia" is unfounded. A widely-cited study in 2008 suggests that up to ninety percent of parties who bring due process claims are unsuccessful.[18] What is more, a recent paper[19] in the Asian International Arbitration Journal has found that enforcement courts typically adopt a robust approach, by the following means:

(1) Rigorously examining the record to discourage challenges based on trivial matters. Courts tend to look closely at relevant correspondence, transcripts and the award.

(2) Courts will attempt to identify if the decision sought to be impugned was essentially a case management one. Courts prefer to show deference to tribunals on case management decisions.

(3) Substantively, for a due process challenge to succeed, the applicant must show that the tribunal exercised its procedural powers in such a way as to deprive the applicant of a real chance to present its case on a material issue.

A robust approach was demonstrated by the Privy Council decision in ***Cukurova Holding AS v Sonera Holding BV.***[20] Here, the applicants, Cukurova, applied to set aside a US$932 million award arguing, amongst other things, that the award was made without the tribunal having heard its key witness, one Mr Berkmen, who was undergoing a medical procedure during the time of the main hearing. The record showed that the tribunal in fact asked for proposals to deal with Mr. Berkman's evidence. The parties agreed that in post-hearing briefs the applicant would provide the tribunal a list of areas in which Mr Berkmen's evidence would be decisive. The applicant failed to do so and merely reiterated its general stance that Mr Berkmen should be heard. Consequently, the tribunal concluded that it was not necessary to hear Mr Berkmen in person. Thus, although Mr Berkmen's testimony may have been critical, the Privy Council found that Cukurova had every opportunity to present its case. It did not seize its opportunity and could not complain.

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[18] Herman Verbist, "Challenges on Grounds of Due Process Pursuant to Article V(1)(B) of the New York Convention" in Emmanuel Gaillard and Domenico Di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards, (United Kingdom: Cameron May, 2008), pg. 679, 692 ff. Cited in Maxi Scherer, "Violation of Due Process, Article V(1)(b)" in Reinmar Wolff (ed), New York Convention (Hart Publishing 2013), pg. 280 [130] and L. Reed, 'Ab(use) of due process: sword vs shield', (2017) Arbitration International, 372.

[19] Kenneth Beale and Nelson Goh, 'Due Process Challenges in Asia: An Emerging High Bar' (2017) Asian International Arbitration Journal.

[20] Cukurova Holding AS v. Sonera Holding BV [2015] 1 ALL ER (Comm) 1087 (Privy Council).

The Singapore High Court's reasoning in a recent due process case, ***Triulzi Cesare SRL v Xinyi Group Co Ltd***,[21] is instructive: the right to be heard does not mean that a tribunal has to *"sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party ...* [22]*[nor that a tribunal is duty-bound to ensure that] a party [takes] the best advantage of the opportunity to which he is entitled"*.[23]

Conclusion

The "essential rules" I have mentioned highlight particular aspects of international arbitration which counsel should pay attention to so as to be able to guide their clients through the life cycle of the process. Equally, I have in the discussion of these "essential rules" highlighted some of the perceived excesses in international arbitration which we would do well to combat.

The flexibility afforded in the private consensual arena of international commercial arbitration should not be used as a means for clients or counsel to take steps they would not take in an open court setting.

But I end by hoping that Government will think again about the proposed new amendments to the Arbitration law. Do not set back the progress which has already been made by some ill thought out requirements. Efficient and fair arbitration promotes the rule of law, and encourages commercial parties to have trust that their disputes can be resolved meaningful in their forum of choice.

One can do no better than to repeat the words of Holtzmann and Neuhaus:

> "The autonomy principle is critical to an effective system of commercial arbitration for international cases because in such cases there is a special need to be free of unfamiliar local standards…*it expresses a profound confidence in the ability of parties and arbitrators to conduct the arbitration in a fair and orderly manners so as to arrive at a just resolution of a dispute.*" [24](emphasis added)

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[21]Triulzi Cesare SRL v Xinyi Group Co Ltd [2015] 1 SLR 114 ("Triulzi v Xinyi").

[22]Triulzi v Xinyi, [151], quoting from Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (Kluwer Law, 1989) pg. 551.

[23] Triulzi v Xinyi, [152], quoting Sugar Australia Pty Ltd v Mackay Sugar Ltd [2012] QSC 38 at [33].

[24] Holtzmann and Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (Kluwer Law, 1989), pg. 564.

Mr. Arvind P Datar presenting a bouquet to Lord Goldsmith.

Lord Goldsmith, QC, delivering the Inaugural and Keynote Address.

(Left to Right).Ms.Payal Chawla, Mr. M.S. Krishnan, Mr. N.L. Rajah, Mr. Arvind P Datar, Hon'ble Mr. Justice G.M. Akbarali, Hon'ble Mr.Justice Madan B Lokur, Lord Goldsmith, QC, Mr. Murari Raghavan, Mr. V.S. Jayakumar, Mr. R. Anand, Mr. K. Balaji and Mr. Gaurav Pachnanda.

Ms. Niti Dixit, Mr. Sanjeev Kapoor, Mr. Steven Finizio, Ms. Sapna Jhangiani and Mr. Rohit Singhal.

NPAC Team with Lord Goldsmith, QC.

Mr. Shardul S. Shroff, Mr. Mahesh Rai, Mr. David Wolfson and Mr. V. Niranjan.

Mr. Jonathan Ellis, Ms. Michelle La Mar, Mr. Shashank Garg and Mr. Shourav Lahiri.

Ms. Renu Gupta, Mr. Moazzam Khan, Mr. Montek Mayal, Mr. Manish Bishnoi, Mr. Sourav Roy and Dr. Amit George

XXXIV PALKHIVALA FOUNDATION MEMORIAL LECTURE ON DECODING THE RBI-GOI RELATIONSHIP, DELIVERED BY PROF. INDIRA RAJARAMAN

[Below is a brief summary of the lecture prepared by K. Malavika, a 1st year law student of Shri Shankarlal Sundarbai Shasun Jain College for Women, Chennai.]

"Government shouldn't treat the reserve Bank of India on par with its other departments" is what was comprehended from the lecture delivered by ***Prof. Indira Rajaraman***, Member of the 13th Finance Commission and former independent director of the Reserve Bank of India ("**RBI**"), **at the *34th Palkhivala Foundation Memorial Lecture* at Rani Seethai Hall (Chennai) on 23rd March 2019.**

Prof. Indira Rajaraman

Speaking of the outbreak of hostilities between the Government of India ("**GOI**") and the RBI during September-October 2018, she mentioned that the two events that led to it were (1) the government invoking ***Section 7 of the RBI Act***, which empowers it to consult and issue directives; and (2) the government questioning the very governance of the RBI.

Addressing the topic,"**Decoding the RBI-GOI Relationship**" in 6 segements, she provided thought-provoking insights into the Central Bank's overall functioning.

I SEGMENT -Relationship between Central Board of RBI and the Governor of RBI

She said that ***Clause 2 of Section 7*** entrusts the functioning of the RBI to the Central Board. She added that people think of the Governor of RBI as a person with unquestionable authority. She also mentioned that the governor has been built up too much in public minds. While voting by the Board is permissible, it should not be the basis for all the decisions of the RBI. She emphasised that the governor represents the professional body of opinion of the RBI.

II SEGMENT -Statutory relationship between the GOI and the RBI

Speaking about the statutory relationship between the two parties, she said that the government has sovereign power and added that there should be a sense of ***mutuality*** between the GOI and the RBI. Both the parties should be free to question and criticise each other. While the GOI questions the monetary policy of the RBI, the RBI should also be able to question the fiscal policy and the measurement of inflation.

III SEGMENT -Financial Relationship between the GOI and the RBI

She took everyone by surprise by mentioning the fact that the RBI was once a private bank. It was nationalised post-independence.

On the government's demand for transferring dividends, Prof. Rajaraman remarked that ***92% of dividends*** received from all the Public Sector Banks (PSBs) and financial institutions owned by the government comes from the RBI.

This makes the GOI dependent on RBI for revenue, which is not a good thing.
Concluding the segment, she said that the RBI should be

a) Free to hire as many people and
b) Free to pay them any amount

She cited the example of the Central Bank of China,which sends its employees to get their Ph.Ds in foreign universities.

IV SEGMENT -Functions of the RBI

Delving into the first and foremost function of ***issuing currency***, she said that just printing currency is not its only job. The RBI has to face the problems of fake currency and other security issues.
The task of keeping currency stable by formulating ***monetary policy*** is also another key function of RBI.

To help out a financial institution if it goes bankrupt, RBI serves as the ***lender of the last resort.***
RBI also serves as a ***banker to all the banks*** in the country.

Of all the key functions, Prof.Rajaraman considers the function of **'Guardian of Financial Stability'** as the most important function, as it saves the public from financial instability arising out of bankruptcy and consequent domino effect or ***'financial contagion'***.

The RBI and other Central Banks has to publish a ***financial stability report*** every ***June and December*** as decided by the G20 after the global crisis of 2008.

The RBI also has the corollary function of '***banking regulation and supervision'.***

Prof. Rajaraman also mentioned the following functions which are specific to India:-

- Issuer of public debt for Central and State government.
- Ensuring a smooth foreign trade market-FEMA.
- Developing rural credit.
- Providing data on BoP, exports, etc.
- State finances-information, publications, etc.
- Ensuring cyber security of its data.

It is pleasing to know that RBI has **a triple A** rating in the international finance market.

V SEGMENT -Functioning of the Central Board

Prof. Rajaraman stated that the Central Board is required to meet***6 times a year*** to discuss the most important issues. It also has varioussub-committees like the Board for Financial Supervision (BFS) and the Board for Payment and Settlement Systems which meet regularly on a quarterly basis.

VI SEGMENT -Economic Research Literature on Central Bank

In the last segment of her lecture, she spoke on topics like the Basel rules and Alex Cukierman. She said that financial stability is as important as price stability and that RBI should be free to function without fiscal pressures. She concluded that the government should treatRBI as an autonomous organization and not as one of its departments.

The event came to a conclusion with an interactive Q&A session.

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