DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

Volume 2 Issue 1 February 2019

Message to the Readers

As NPAC tracks the development of the law in the Arbitration regime it finds two recent judgments of the Supreme Court on the subject noteworthy. These two cases referred below, raise some important questions relating to arbitrability of disputes under the arbitration regime.

In ***M/s Emaar MGF Land Limited vs Aftab Singh 2018(6) Arb LR313 (SC)***, the Supreme Court has held that notwithstanding the presence of an arbitration clause in the agreement, a consumer dispute is still maintainable before a consumer forum. The dispute related to the delivery of possession by Emaar group, a developer to a consumer. Emaar pleaded that on account of the arbitration clause in the agreement between the parties, the jurisdiction of the consumer fora was excluded. To negative this argument, the Supreme Court relied on Sec 2(3) of the Arbitration and Conciliation Act, 1996 which inter alia provides that the Arbitration Act, "*shall not affect any other law for the time being in force, by virtue of which certain dispute may not be submitted to arbitration*".

The Supreme Court also relied on its earlier decisions in ***Fair Air Engineering Pvt. Ltd vs N.K. Modi (1996) 6 SCC 385***, ***National Seeds Corporation Limited vs Madhusudha Reddy & Another (2012) 2 SC 506*** and others to hold that the jurisdictions of consumer forum were not excluded notwithstanding the presence of an arbitration clause. Undoubtedly, while this judgment is a shot in the arm for the proponents of consumer protection, it still does raise a few questions. That is because this judgment also says that this judgment shall not be a general bar for consumer disputes being referred to arbitrations. One wonders how the lines of distinction are to be drawn?

In the other case i.e. ***United India Insurance Co. Ltd vs Hyundai Engineering Construction Co. Ltd AIR 2018 SC 3932***, the Supreme Court has distinguished/ clarified (some say overruled) its earlier order in ***Duro Felguera SA vs Gangavaram Port Limited (2017) 9 SC 729*** on the impact and import of Sec. 11(6A) of the Arbitration and Conciliation Act 1996. In *Duro Felguera*, the Supreme Court held that when any party invokes Sec 11, the scope of the enquiry shall be restricted to examining whether an arbitration agreement exists. However, in *United India Insurance* case, the Supreme Court prescribes an enquiry into the scope and applicability of the arbitration clause. Such an interpretation is likely once again to open the pandora's box and provide scope for exploitation by those who seek to delay the commencement and progress of the arbitration proceedings. Besides that, this was precisely the loophole that the parliament attempted to plug by enacting Sec. 11 (6A) in 2015. The provisions contemplated an enquiry merely into the existence of an arbitration clause and not its scope. One does hope that the Supreme Court would revisit its judgment in *United India Insurance case* and restore Sec 11(6A) to its intent and purpose.

N.L.RAJAH
Senior Advocate and Director NPAC
Nlrajah.advocate@gmail.com

Legal Updates

❖ **NSE, SGX may sign offshore trading pact**

- India's largest stock exchange is expected to sign an agreement with SGX that will allow all of NSE's Indiarelated products offered on SGX including Nifty futures to be executed through the NSE International Exchange.
- NSE and SGX have submitted a joint proposal to the Securities and Exchange Board of India (Sebi) seeking permission to allow such an arrangement.
  https://economictimes.indiatimes.com/markets/stocks/news/nse-sgx-may-sign-offshore-trading-pact/articleshow/67783643.cms

❖ **Institutionalization of arbitration in country is need of hour: Justice Deepak Gupta**

- While speaking at a Conference on Strengthening Arbitration in India in New Delhi on 2nd February, 2019, Supreme Court Judge, Justice, Deepak Gupta said that institutionalization of arbitration in the country is the need of the hour and it should be a full-time career-oriented activity.
- Talking about the long-pending legal cases, Justice Gupta said, in country like India where legal process is very slow, inclusion of arbitration into legal system is very much essential. He said, lack of infrastructure and judges is the main reason behind delay in justice.
  https://www.apnnews.com/institutionalization-of-arbitration-in-country-is-need-of-hour-justice-deepak-gupta/

❖ **Indian power plant dispute settles after asset freeze**

- An Indian conglomerate has agreed to settle a US$100 million SIAC case over the construction of a power plant after the Korean-owned claimant obtained attachment orders from the courts of New York against its assets.
  https://globalarbitrationreview.com/article/1179846/indian-power-plant-dispute-settles-after-asset-freeze

❖ **Cairn says final drafting of arbitration award against retro tax in process**

- An international arbitration tribunal is in the process of drafting a final award in British oil firm Cairn Energy's challenge to the Indian government using retrospective legislation to seek Rs. 10,247 crore in taxes.
- In an operational update, Cairn said it is seeking monetary compensation of USD 1.4 billion from the Indian government in the arbitration proceedings.
  https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-says-final-drafting-of-arbitration-award-against-retro-tax-in-process/articleshow/67639109.cms

❖ **Delhi High Court to examine Center's plea on Agusta Westland arbitration**

- The Delhi High Court agreed to examine a plea by the Centre seeking to restrain Agusta Westland from continuing with the arbitration process initiated by it in the wake of scrapping of contracts for supply of 12 VVIP choppers to the Indian Air Force (IAF). AgustaWestland had invoked the arbitration clause in the contract after the deal was scrapped in 2014.
- "*The mandate of the Arbitral Tribunal, constituted under the agreement dated February 8, 2010, in the present case, does not stand terminated*," Justice Pratibha Singh said while hearing a plea by the Centre seeking permanent injunction on the arbitral proceedings initiated for the cancellation of the contract.

- The arbitration is pending before a tribunal comprising Prof. William W Park, Justice (retd) B N Srikrishna and Justice (retd) B P Jeevan Reddy. The matter would now be heard on 28th February, 2019.
  https://www.hindustantimes.com/india-news/delhi-high-court-to-examine-center-s-plea-on-agustawestland-arbitration/story-ceL7dkxZJJYvjgmfqxHlSK.html
  https://www.livelaw.in/news-updates/delhi-hc-notice-agusta-westland-govts-plea-arbitration-proceedings--141994

❖ **ONGC unit wins arbitration against Daelim Industrial Company**

- An international arbitral tribunal in Singapore, ruled in favour of ONGC Petro Additions Ltd. (OPAL), a petrochemical company owned by Oil & Natural Gas Corporation, in a case against South Korea's Daelim Industrial Company Ltd, as Daelim had breached its contractual obligations by withdrawing from the project. The compensation amount due to OPAL is likely to be determined at the next hearing in the case.
- OPAL will claim compensation for loss of net present value with interest thereon. The compensation in the agreement was capped at 20% of the contract cost of Rs 1,500 crore.
- OPAL awarded the contract to Daelim on January 6, 2011, for constructing a high-density polyethylene plant as part of the Dahej petrochemical complex being set up at a cost of Rs 20,000 crore ($2.8 billion). Daelim unconditionally accepted the contract worth Rs 1,200 crore but abandoned it, leading to the project cost escalating to Rs 35,000 crore.
  https://economictimes.indiatimes.com/industry/energy/oil-gas/ongc-unit-wins-arbitration-against-daelim-industrial-company/articleshow/67477790.cms

❖ **Third party funding in arbitration to be permitted in Hong Kong**

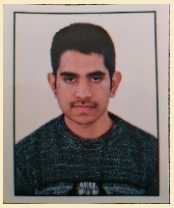
- Amendments to the Arbitration Ordinance in Hong Kong, expressly permitting third party funding for arbitration, and introducing related measures, came into effect on 1st February 2019.
- An advisory body will monitor compliance by funders with a Code of Practice.
  https://globalarbitrationnews.com/the-year-ahead-regional-developments-what-are-the-key-developments-across-the-regions/

❖ **Charging Exorbitant Fee Can Lead To Termination Of Arbitrator's Mandate : Rajasthan HC**

- The Rajasthan High Court terminated the mandate of an arbitrator for charging exorbitant fee beyond the prescribed limit per Schedule IV of the Arbitration & Conciliation Act. The High Court as per notification issued on March 23, 2017, had notified the fee slab, which was given effect from October 23, 2015.
- "*..this Court is of the considered view that the learned arbitrator has been rendered de jure/de facto unable to perform his functions effectively warranting his mandate to be terminated under Section 14(1)(a) of the Act*", observed Justice Arun Bhansali while allowing the petition.
- Noting that that the concept of dejure and de facto inability has not been defined under the Act, the Court further observed that, "*in the opinion of this Court in case the events during the conduct of proceedings before the arbitrator leads to a doubt in the mind of a party regarding prejudice against it and qua the impartial conduct of proceedings before the arbitral tribunal, the said situation would fall within de facto inability of the arbitrator to perform his functions.*"
  https://www.livelaw.in/news-updates/exorbitant-fee-rajasthan-hc-terminates-mandate-of-arbitrator-for-charging-exorbitant-fee-beyond-prescribed-limit-read-judgment-141875

EVOLUTION OF SECTION 11: PRE KONKAN RAILWAY TO 2018 AMENDMENTS

By Debarajan Goswami, National Law University , Delhi, and 1st prize winner of the Satya Hegde Essay Competition (abridged version of the winning article).



Section 11 of the Indian Arbitration Act, 1995 has been the subject matter of immense litigation and controversy. It has undergone extensive amendments with the idea of changing the nature and scope of judicial scrutiny. However, I argue that the amendments need to be seen in light of established judicial principles and case laws. Conferring the power on the Court as opposed to a private individual or institution means that the function to be undertaken by the Courts continues to be inherently judicial in nature. Limiting the scope of enquiry to the examination of the existence of the arbitration agreement does not change the nature of the judicial obligation. Thus the Court is under a duty to determine the preliminary jurisdictional issues to ensure that condition precedent to the initiation of the arbitration proceedings exist while deciding a section 11 proceeding. Meaning thereby, contrary to the current understanding of the Supreme Court the entirety of the appointing function vested on the Courts cannot be delegated to a non judicial entity.

It is my opinion that the amendments in 2015 mostly adopt the judgement in *SBP*[1] albeit with some modifications.[2] The power under section 11 has now been conferred to the *Court* and is thus undoubtedly judicial in nature.[3] However, the scope of such scrutiny has now been narrowed to the existence of an arbitration agreement. Therefore, the amendments must not be interpreted out of context but in light of a harmonious reading of *SBP* and *BogharaPolyfab*.[4]

The basic reason for envisioning such a scrutiny is premised on the understanding that when the function under the amendment has been held to be *judicial* in nature the Court while exercising a judicial function cannot confine itself to the mere existence of the arbitration agreement. The function being inherently judicial in nature can be gathered from the reading of Section 11(6B) and 11(13) of the Act.[5] A judicial function entails judicial application of mind and thus a prima facie decision on jurisdictional issues. The deliberate act of the Legislature of vesting the power to appoint on the Court, and not any private authority, has to be given due importance.[6]

---

[1] *SBP and Co v Patel Engineering Limited (2005) 8 SCC 618*

[2] The amendment states that the power under section 11 is not exercised by the Chief Justice or any person or institution designated by him but rather by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.

[3] Borrowing from the jurisprudence in the case of SBP holding when a statute confers a power or imposes a duty on the highest judicial authority in the State or in the country, that authority, unless shown otherwise, has to act judicially and has necessarily to consider whether his power has been rightly invoked or the conditions for the performance of his duty are shown to exist.

[4] *National Insurance Co. Ltd. v BogharaPolyfab Pvt. Ltd.,* (2009) 1 SCC 267

[5] The Act states under 11(6B) that delegation of the function to any other entity will not be construed as a delegation of judicial power. Meaning thereby, the function while exercised by the Court is inherently judicial in nature. Furthermore, Section 11(13) indicates that notice needs to be served on the opposite party giving it a colour of judicial proceeding. Crucially, in Konkan(II) the Supreme Court while characterising the function under Section 11 to be purely ad ministerial held that a notice need not be served to the opposite party in a section 11 proceeding.

[6] In *JagdishChandervs Ramesh Chander&Ors*(2007) 5 SCC 719, the Supreme Court had interpreted 'existence of an arbitration' in light of section 7 and held that an unambiguous intention to arbitrate is enough to satisfy the requirement. However, the judgements*in SBP and Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532, have held that when the when a Court has to verify the existence of an arbitration it must proceed with more judicial rigour. Thus limiting the scope of the judicial scrutiny through amendments cannot change the nature of judicial obligation bestowed on Courts in discharging their duty.

It is suggested that examination of the existence of an arbitration agreement cannot be reduced to a mechanical act. It must necessarily involve a decision on preliminary jurisdictional issues to verify the existence of condition precedent for initiating arbitration. Based on such an understanding I conclude that under a section 11 proceeding apart from the three grounds that are common to the grounds already mentioned in *BogharaPolyfab* the Court must also decide whether the dispute is covered within the scope of the arbitration agreement.[7] This enquiry must necessarily proceed on a prima facie basis thus leaving it open to the Arbitral Tribunal to revisit the issue. This appears to be a pragmatic and balanced approach.

The Court can now delegate the act of arbitrator appointment to a non-judicial institution. However, it is crucial to understand the procedure for such a process. Section 11 in its present form involves a tiered approach. The first stage consists of consideration of preliminary facts and taking decision as to whether an arbitrator can be appointed. It is inherently a judicial function and not subject to any modification. The second stage involves the nomination of an arbitrator. This being in essence a purely ministerial act can be delegated to a non-judicial institution after determination of the first issue.Delegation of the complete power under section 11 to private entity, for instance, an arbitral institution shall lead to an absurdity in law. The private institution will be tasked with the performance of a purely judicial function of verifying the *existence of an arbitration agreement*.

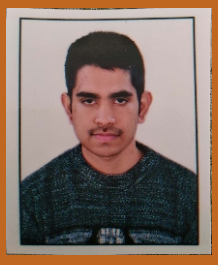
---

[7] *United India Insurance Co Ltd v Hyundai Engineering and Construction Co Ltd2018 (10) SCALE 7, Oriental Insurance Company Limited Vs. NarbheramPower and Steel Private Limited (2018) 6 SCC 534*

2018 SATYA HEGDE ESSAY COMPETITION - PRIZE WINNERS

Topic: "EVOLUTION OF SECTION 11: PRE KONKAN RAILWAY TO 2018 AMENDMENTS"

I Prize



Debaranjan Goswami
National Law University,
Delhi

II Prize

Archa Rajeevi
VIT School of Law

III Prize

Moksh Dilip Ranawat
Symbiosis Law School - Pune

AN OVERVIEW OF HYBRID PROCESSES OF DISPUTE RESOLUTION

by Ms. Uma Ramanathan, Managing Trustee, Foundation for Comprehensive Dispute Resolution

Disruptions, disagreements and reactions are often manifestations of beliefs and perceptions which lead to positioning. Every interaction, be it personal or commercial, has at its core an understanding of facts and projections of goals. Inability to acknowledge the need of the other or possibility in the situation coupled with lack of reciprocity, at times authority; the instinct to get attached to blame or shame and the comfort of a righteous demand provides the platform for conflict to get entrenched. Expectations and perception of justice frames the communication. This conflict frame restricts resolution to an adversarial process seeking adjudication within the frame of the contractual obligations or the judicial process that is available. At times direct negotiation is also resorted to. In these situations, perspectives become the fulcrum of every exchange.

Willingness to change, to take steps to resolve, to look at the possibilities or the larger picture, enables the disputants caught in this frame to consider, evaluate and choose. The shift in attitude and reasoning often needs persuasive skills and confidence in the confidentiality, neutrality and integrity of the process of resolution. Even to consider moving away from adjudicatory process, the disputant has to realise the potential in the conflict zone and be able to dispassionately consider the options. Every disputant is looking for a 'win' and in collaboration it is often said that there is a 'win-win' situation. The reality in a win-win situation is that the disputants understand the probables and make a considered decision. They do give up something to benefit and this understanding and acknowledgment is the reason for the win-win situation as there is ownership for the choice that leads to problem solving. While a decision may be a result of understanding of the data available and perceived loss/gain, problem solving is often the result of responsible evaluation of options, and exchange.

Justice dispensation has therefore now come to be understood as the process that enables the empowerment of the stakeholders and the space to entrust them with the responsibility of ethical decision making. Though the judicial processes in many jurisdictions and the inflexibility in finding solutions, coupled with the workload bursting at the seams on all sides in many courts is often quoted as a reason for resorting to other processes for resolution, it is necessary to keep in mind that the judicial process is necessary in many cases and cannot be discredited merely because of some systemic hurdles. The other systems have to evolve independently as appropriate support justice dispensation by providing the skills and framework to suit the needs of the particular conflict. As a corollary, there is a need for combining different processes or grafting certain techniques to evolve a process that enables effective resolution.

The hybrid process that is now available is Med-Arb or Arb-Med or Arb-Med-Arb. Privacy, confidentiality and flexibility of the process are the key elements in all these processes. UNCITRAL Model on International Commercial Arbitration provides for a consensual agreement being recorded as an Award on agreed terms, if the parties request and the arbitrator finds no reason to object. In fact, the Centre for Effective Dispute Resolution rules for facilitation of settlement in International Arbitral Proceedings provide for inserting a 'mediation window' or adjourning the proceedings to enable assisted negotiations for settlement in the form of facilitation or evaluation, by offering the space and motivating options and by suggesting offers and chairing settlement meetings.

Whether the arbitrator can be mediator in the same proceedings is debatable, but what is interesting and opens up possibilities is that the settlement window opens up diverse components for collaboration and for forging relationships. Above all, enabling self-determination brings in responsibility/guarantee for execution of the terms.

Understanding the need to enable and to benefit from self-determination has brought in 'mixed mode' clauses in contracts which is a positive step. The Singapore International Arbitration and Mediation Centre provides a tiered dispute resolution mechanism incorporating the Arb-Med-Arb process.

The ethical issue in the 'mixed-mode' resolution clause is the apparent conflict in the same person being the mediator and arbitrator in the issue and that of enforceability of the award. In the first issue, the challenge is neutrality and in the second, it is the possibility of illegal consent award surfacing. It is useful to remember that while an arbitrator conducts hearings and records evidence, the mediator is privy to privileged information and mediation as a process only probes for underlying issues and needs. Further, the confidentiality element in mediation bars the mediator from disclosing information unless he/she is specifically authorised to do so by the party who reveals the information. Also, what is disclosed to the mediator during the private session, when shared, cannot be used in litigation later, as the structure of the mediation process depends on confidentiality and sharing of information without prejudice.

Enforceability of award on consent terms is again a moot issue. In some jurisdictions, the discussion is on whether the arbitrator can record the settlement as an award on consent terms and in others whether the settlement reached before the commencement of arbitration can be recorded so. The UNCITRAL Model provides for recording the settlement only when it happens during arbitration proceedings. The Tribunal has therefore the responsibility to check on the legality applicable to the settlement entered into, whether it contravenes public policy and ultimately the validity. In the light of discussions on these issues, the main crux that would enable formulation of regulations is the impact and influence of 'confidentiality' in mediation and 'finality and executability' of arbitration.

The cause for adapting a 'mixed mode' appears to be the attraction in mediation process and disengagement with arbitration as it is becoming inflexible and more like the litigative process. It is pertinent to remember that conciliation or evaluative mediation has a tendency to move the arbitration way and the workability of mediated agreement is often only by following the facilitative process. Professor Robert Baruch Bush even calls the evaluation method as an 'arbitration substitute'. While evaluative mediators point out possible outcomes in court, the strengths and weakness in the case and recommend proposals, facilitative mediators only enable better communication and provide clarification without suggesting options, and enable parties to share with the mediator confidential information. In both, the mediator retains control over the process. On the other hand a third mode, transformative mediation, decries the value in evaluation and facilitative and believes in giving parties the control over the process and the solution. Parties are allowed to state their narratives and to understand the pros and cons in the issue.

The judge mediator and lawyer mediator have different approaches. Often the judge mediator presents an aura of authority which lends itself automatically to evaluation. The lawyer mediator also has a judgemental attitude but is often able to change hats. The lawyer assisting in mediation is able to sense this attitude and is able to 'spin' the mediator by appearing inflexible to persuade the mediator to 'listen' to their side. There is a need for caution as the whole process is dependent on neutrality.

Med-Arb process is now seen as the way to counter the negative sides in arbitration and mediation. Flexibility, efficiency and finality are the factors that sustain solutions and their workability. This is seen in med-arb or arb-med. Lack of formal authority of the mediator to create a final and binding solution is addressed. Ethical behaviour is guaranteed by the efficiency and finality aspects. The market viability of arbitration is enhanced by the addition of mediation and the finality and self determination of mediation is enhanced by the 'authority' in the sidelines by adding arbitration. Though finality is a problem only in evaluative mediation, it has been a perturbing trend that the unethical choose to avoid enforceability. By having an award on consent terms, this grey area is taken care of. The actualization of these core principles of self-determination, confidentiality and consensus can happen only with training in mediation advocacy. The factor that could mar the benefits is supervision of the court over such awards and that opens up a wide array of questions regarding the core factors of mediation and arbitration.

The question of the same neutral who handles the Med-Arb or Arb-Med process challenges the value of candid and confidential exchange of information and influence of the neutral in the evaluation of options. How the neutral will use information received in failed mediation, in arbitration, or how the parties will accept the testimonies following and whether the process will be free of any bias is another question which looms large. Indirect effect of information received and its effect on neutrality in either process is another stumbling block. Suggestion of using Med-Arb by the neutral also poses questions of neutrality.

It is necessary therefore, to look at different neutrals for the process, be it Med-Arb or Arb-Med or Arb-Med-Arb to address all concerns in the integrity of the process. Informed consent being the fulcrum of mediation, parties must be educated on the process and given space to find solutions as opposed to making decisions. This informed consent must include 'participation consent' and 'outcome consent'. Willingness to disclose, comprehension, competence, voluntariness and consensus are the factors that structure informed consent. This ability which forms the platform for self-determination is often influenced by the lawyer who advises his client to take a certain stand. The benefits, limitations and risks in the process will have to be explained by the lawyer to his client and his preparation of the client provides the arena for negotiation and informed consent. The effect of waiver of certain rights also has to be made known before disputants venture to attempt the process.

Merely looking at limitations in resolution process is not only short sighted but in effect inhibits the use of formal and informal dispute resolution mechanisms and fails to recognize the potential, value and identity of these processes. There can be no doubt that Mediation and Arbitration are evolving as independent professions and it is time that we took stock of the need to face the challenges and to enhance the value in these processes either by use on their own, or as a hybrid process. What the disputant would be satisfied with is the essence of justice dispensation and these modes open up many avenues for satisfactory solutions.