DISPUTE RESOLUTIONS

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Message to the Readers

The Central Government on the basis of experience gathered from working of the Arbitration and Conciliation Act 1996 has proposed to amend it further. A succinct note produced by the PRS legislative group highlights the main changes to be brought about as follows:

- **Arbitration Council of India:** The Bill seeks to establish an independent body called the Arbitration Council of India (ACI) for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms. Its functions include: (i) framing policies for grading arbitral institutions and accrediting arbitrators, (ii) making policies for the establishment, operation and maintenance of uniform professional standards for all alternate dispute redressal matters, and (iii) maintaining a depository of arbitral awards (judgments) made in India and abroad.
- **Composition of the ACI:** The ACI will consist of a Chairperson who is either: (i) a Judge of the Supreme Court; or (ii) a Judge of a High Court; or (iii) Chief Justice of a High Court; or (iv) an eminent person with expert knowledge in conduct of arbitration. Other members will include an eminent arbitration practitioner, an academician with experience in arbitration, and government appointees.
- **Appointment of arbitrators:** Under the 1996 Act, parties were free to appoint arbitrators. In case of disagreement on an appointment, the parties could request the Supreme Court, or the concerned High Court, or any person or institution designated by such Court, to appoint an arbitrator.
- Under the Bill, the Supreme Court and High Courts may now designate arbitral institutions, which parties can approach for the appointment of arbitrators. For international commercial arbitration, appointments will be made by the institution designated by the Supreme Court. For domestic arbitration, appointments will be made by the institution designated by the concerned High Court. In case there are no arbitral institutions available, the Chief Justice of the concerned High Court may maintain a panel of arbitrators to perform the functions of the arbitral institutions. An application for appointment of an arbitrator is required to be disposed of within 30 days.
- **Relaxation of time limits:** Under the 1996 Act, arbitral tribunals are required to make their award within a period of 12 months for all arbitration proceedings. The Bill proposed to remove this time restriction for international commercial arbitrations.
- **Completion of written submissions:** Currently, there is no time limit to file written submissions before an arbitral tribunal. The Bill requires that the written claim and the defence to the claim in an arbitration proceeding should be completed within 6 months of the appointment of the arbitrators.
- **Confidentiality of proceedings:** The Bill provides that all details of arbitration proceedings will be kept confidential except for the details of the arbitral award in certain circumstances. Disclosure of the arbitral award will only be made where it is necessary for implementing or enforcing the award.
- **Applicability of Arbitration and Conciliation Act, 2015:** The Bill clarifies that the 2015 Act shall only apply to arbitral proceedings which started on or after October 23, 2015.

These are the main amendments proposed. The Arbitration and Conciliation (Amendment) Bill 2018, was introduced in the Lok Sabha by the Ministry of Law and Justice Mr. P.P. Chaudhary on July 18th 2018. It seeks to amend the Arbitration and Conciliation Act 1996. However, since it was not passed in Parliament, the Act has lapsed. One would hope that it will be reintroduced in parliament and become binding law soon. However, the challenge would be to its proper implementation especially with regard to the establishment and functions of the Arbitration Council of India. Let us hope for the best.

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TWO-TIER ARBITRATIONS: A BRIEF SURVEY OF INSTITUTIONAL RULES

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Indian law allows parties to resolve their disputes through two-tier arbitrations. That was the Supreme Court's clear holding in ***M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*** ("***Centrotrade***"). (For clarity, this article uses "**two-tier arbitrations**"[1] to refer to a dispute resolution procedure in which one arbitral tribunal resolves the parties' dispute, and then, either by one party's election or as a matter of contractual requirement, a second tribunal hears the same dispute again, and the second tribunal's decision constitutes a final binding award.)

Beyond the threshold question of whether Indian law permits two-tier arbitrations, the *Centrotrade* Court left open important questions about the actual procedure and conduct of such arbitrations. For example, what does the second tier of arbitration look like? Should the second arbitral tribunal rehear the case de novo, or should it review the case only on limited grounds?

In addition, although many have written since *Centrotrade* about the Court's endorsement of the novel mechanism of two-tier arbitrations,[2] little attention has been paid to whether two-tier commercial arbitrations actually occur with substantial frequency.

This article attempts to answer both questions what a two-tier arbitration can look like and how frequent such arbitrations are through a brief survey of the institutional rules of prominent international arbitration institutions. As explained below, relatively few rules provide rules for two-tier arbitrations. However, those that do provide such rules can serve as helpful guides for parties interested in two-tier arbitrations.

A BRIEF SURVEY

Based on a survey of fourteen institutional rules of arbitration, only four currently contain two-tier arbitration procedures, and even those say relatively little about them.[3] By contrast, two-tier arbitration appears to be common in the arbitration rules of commodity trading associations,[4] but commodity arbitration is beyond the scope of this article.

The institutional rules that provide for two-tier arbitration are the Optional Appellate Arbitration Rules of both the American Arbitration Association and the International Centre for Dispute Resolution (the "**AAA**" and the "**AAA Rules**"), the International Institute for Conflict Prevention & Resolution's Appellate Arbitration Procedure (the "**CPR**" and the "**CPR Rules**"), the Guidelines for the Optional Appellate Arbitration Procedure of the Shenzhen Court of International Arbitration (the "**SCIA**" and the "**Shenzhen Rules**"), and the Rules of the International Arbitration Chamber of Paris (the "**IACP**" and the "**Paris Rules**"). Procedures related to 'two-tier arbitration proceedings' are part of the main Paris Rules,[5] whereas comparable procedures in the AAA, CPR and Shenzhen Rules are listed in separate optional protocols.[6]

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[1] *M/s Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.* ("*Centrotrade*"), 2006 SCC 245, paras. 5, 46.

[2] *See, e.g.*, Shivansh Jolly, *Supreme Court of India Upholds Validity of Appellate Arbitration Clauses*, Kluwer Arbitration Blog, 16 February 2017.

[3] The following rules do not provide for two-tier arbitrations: the DIAC Arbitration Rules (Dubai), the DIS Arbitration Rules (Berlin), the HKIAC Administered Arbitration Rules (Hong Kong), the ICC Arbitration Rules (Paris), the LCIA Arbitration Rules (London), the MCIA Rules (Mumbai), the SHIAC Rules (Shanghai), the SIAC Rules (Singapore), the SCC Arbitration Rules (Stockholm), and the VIAC Rules of Arbitration and Mediation (Vienna). The leading *ad hoc* arbitration rules, the UNCITRAL Arbitration Rules, also do not contain provisions for two-tier arbitrations.

[4] Indeed, the *Centrotrade* Court referred to the two-tier procedure provided for in the arbitration rules of the Grain and Feed Trade Organization. 2006 SCC 245, para. 35. *See also* Federation of Oils, Seeds & Fats Association Arbitration Rules.

[5] Paris Rules, Section II.

[6] These optional protocols refer to "appellate" rather than "two-tier arbitrations," but for purposes of this article that distinction is semantic.

THE TWO-TIER ARBITRATION RULES

Each of the sets of institutional rules on two-tier arbitrations is discussed below.

The AAA Rules

The AAA Rules contain the most extensive and substantive set of rules on two-tier arbitrations. To minimize delay and cost, the AAA Rules restrict the issues that can be raised in a second-tier arbitration, and also set a relatively aggressive timetable to complete a second-tier arbitration.

Where parties agree to the application of the AAA Rules, any party may initiate the second-tier of arbitration by filing a notice of appeal with the AAA within 30 days of an award rendered by the first tribunal.[7] Unless the parties agree on an alternative procedure for the appointment of the second-tier tribunal, the AAA uses a list procedure as follows.[8] The AAA sends the parties a list of ten names from its Appellate Panel, and the parties have 14 days to strike any names and present their order of preference from the list. If the parties cannot agree on a tribunal from the names on the list,[9] the AAA reserves the right to appoint any other members of its Appellate Panel, without further consultation with the parties (or further delay).[10] The AAA also appoints the chair from the three-member tribunal ultimately convened.[11]

The AAA Rules allow recourse to a second-tier tribunal only on two bases: that the award by the first tribunal *"is based upon"* either *"an error of law that is material or prejudicial"* or *"determinations of fact that are clearly erroneous."*[12] As a result of the narrowness of the grounds for initiating a second-tier arbitration, the AAA Rules also contemplate a swift briefing schedule (21 days for opening briefs and 10 days for responses) with strict page limitations (30 pages for opening briefs and 10 pages for responses), as well as a strong presumption against any oral argument or presentation.[13] Any party seeking oral argument must make a request to the second-tier tribunal within 30 days of the notice of appeal, and even then the tribunal may deny the request in its discretion.[14] The second-tier tribunal must render its final binding award on the parties within 30 days of receiving the last brief (subject to an extension for "*good cause*").[15]

The CPR Rules

The CPR Rules are less detailed than the AAA Rules. Like the AAA Rules, they restrict the issues that can be raised in a second-tier arbitration, but do not provide a specific procedural timetable for resolution of the dispute.

Where parties agree to the application of the CPR Rules, any party may initiate the second-tier of arbitration by written notice to the other parties and the CPR within 30 days of the first tribunal's award.[16] The CPR, like the AAA, uses a list procedure for appointment of the second-tier tribunal as follows.[17] The CPR sends the parties a list of at least seven names from its Panel, and the parties have 10 days to reach complete agreement on the tribunal from the list.[18] If the parties cannot agree on a tribunal within 10 days, they have 5 more days to submit a ranked list of the names they cannot agree on, based on which the CPR completes appointment of the tribunal.[19] Once convened, the tribunal selects the chair.[20]

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[7] AAA Rules, Rule A-3.
[8] AAA Rules, Rule A-5.
[9] AAA Rules, Rule A-5.
[10] AAA Rules, Rule A-5.
[11] AAA Rules, Rule A-5.
[12] AAA Rules, Rule A-10.
[13] AAA Rules, Rules A-15, A-17.
[14] AAA Rules, Rule A-15.
[15] AAA Rules, Rule A-19.
[16] CPR Rules, Rule 2.1.
[17] CPR Rules, Rule 4.2.
[18] CPR Rules, Rule 4.2.
[19] CPR Rules, Rule 4.2.
[20] CPR Rules, Rule 4.3.

The CPR Rules allow a second-tier tribunal to modify or set aside the first tribunal's award only on 3 grounds: the award *"contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis,"* the award *"is based upon factual findings clearly unsupported by the record,"* or the award *"is subject to one or more of the grounds ... for vacating an award"* listed in the U.S. Federal Arbitration Act.[21] The CPR Rules also contemplate only two rounds of briefing, but do not provide any page limits or time limits for the submissions.[22] Oral argument is held if requested by a party or the tribunal.[23] The second-tier tribunal's award is binding on the parties.[24]

Although the CPR Rules do not provide a specific procedural timetable, they require that *"[t]he parties and the Tribunal ... use their best efforts to avoid delay and to assure that the Appeal will be concluded within six months of its commencement."*[25]

The Shenzhen Rules

The Shenzhen Rules are relatively terse compared to the AAA and CPR Rules. They do not limit the scope of the issues that can be raised in the second-tier arbitration, nor provide any guidance on timing of submissions or the final award by the second-tier tribunal.

Where parties agree to the application of the Shenzhen Rules, any party may initiate the second-tier proceeding by filing an application for appeal within 15 days of an award rendered by the first tribunal.[26] An application for appeal must contain *"the facts and grounds on which the request for appeal is based,"* but the Shenzhen Rules do not otherwise limit the kinds of grounds that parties may invoke.[27]

The President of the SCIA appoints a three-member second-tier tribunal from the SCIA's panel of arbitrators.[28] The second-tier tribunal's award is final and binding on the parties.[29]

The Paris Rules

The Paris Rules are more akin to the Shenzhen Rules than the AAA and CPR Rules.

The Paris Rules provide that where the parties have agreed on a two-tier arbitration procedure, the award rendered by the first tribunal is a "provisional award,"[30] and that any party *"may request a second examination of the case (i.e. by a Second Degree Arbitral Tribunal)"* within 15 days of the provisional award.[31] The Chairman of the IACP appoints the three-member second-tier tribunal, but each party has *"the right to obtain the replacement of one of the Arbitrators thus appointed within 8 days."*[32] The second-tier tribunal's award is final and binding on the parties, and renders the provisional award void.[33]

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[21] CPR Rules, Rule 8.2.
[22] CPR Rules, Rule 7.2.
[23] CPR Rules, Rule 7.4.
[24] CPR Rules, Rule 1.1.
[25] CPR Rules, Rule 9.
[26] Shenzhen Rules, Art. 3.
[27] Shenzhen Rules, Art. 4.
[28] Shenzhen Rules, Art. 5.
[29] Shenzhen Rules, Art. 7.
[30] Paris Rules, Art. 44.
[31] Paris Rules, Arts. 45, 46.
[32] Paris Rules, Art. 46.
[33] Paris Rules, Art. 48.

LIMITED FREQUENCY OF TWO-TIER ARBITRATIONS

The presence or absence of rules on two-tier arbitrations does not in itself definitively answer the empirical question of whether such arbitrations are, or are becoming, a popular dispute resolution mechanism. Yet, the relative dearth of institutional rules strongly suggests that this form of arbitration is not particularly frequent, at least among the disputes arbitrated under sets of rules surveyed.

Leading arbitration institutions strive to outdo each other in adopting rules and procedures for novel issues that actually occur with some frequency in international arbitrations. Emergency arbitration procedures, for example, have become commonplace in many leading arbitration institution's rules.[34] Two-tier arbitrations, however, have clearly not.

Indirect empirical evidence further supports the conclusion that two-tier arbitrations are likely not common. In Queen Mary University of London's 2018 International Arbitration Survey of arbitration practitioners, only 14% of respondents said that the lack of an appeal on the merits was a problem with international arbitration practice (by contrast, 67% said cost was a problem).[35] These responses confirmed the findings of the same survey in 2015, which asked more pointed questions about appellate arbitration. In that survey, only 23% of respondents said that there should be any appeal on the merits in commercial arbitration, and 26% said that such an appeal should be heard by another arbitral tribunal (as opposed to a court or another body).[36]

Two-tier arbitration's limited popularity is not altogether surprising. The very concept of two-tier arbitration undercuts foundational principles that animate parties' preference for arbitration: finality, speed, and lower cost.

At the same time, however, two-tier arbitrations can be an attractive option for parties who value the confidentiality of the arbitration process, but seek review of an award beyond the limited grounds usually available for modifying or setting aside a final arbitration award.[37] They may be particularly attractive to parties arbitrating complex or technical disputes.[38]

To appeal to more parties, therefore, two-tier arbitrations will likely have to provide robust possibilities for review while also minimizing the scope for any additional delay and cost. As discussed above, of the institutional rules surveyed here, only the AAA Rules and CPR Rules contain comprehensive provisions that respond to these concerns.

CONCLUSION

While *Centrotrade* held that Indian law allows two-tier arbitrations, the survey of institutional arbitration rules in this article suggests that such arbitrations occur with limited frequency. This is likely because such arbitrations undermine important reasons parties choose to arbitrate. However, parties interested in broader possibilities for review of an arbitration award may find two-tier arbitrations attractive. The arbitration rules discussed above, particularly the AAA Rules and CPR Rules, provide useful guidance for devising such two-tier procedures that limit delay and costs while also providing for substantive review of an arbitration award

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[34] *See, e.g.*, SIAC Rules, SCC Rules, LCIA Rules, HKIAC Rules.
[35] Queen Mary International Arbitration Survey 2018, p. 8.
[36] Queen Mary International Arbitration Survey 2015, pp. 8-9.
[37] *See also* M. Carreterio, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. Int'l Arb. 185, 197 (2016).
[38] However, at present the WIPO Rules (for IP disputes) and the PRIME Rules (for financial services disputes) do not contain procedures for two-tier arbitrations.

EVOLUTION OF SECTION 11: PRE-KONKAN RAILWAY TO 2018 AMENDMENTS*

(Below is an abridged version of the submission that won the 3rd prize at the Satya Hegde Essay Competition, 2018, as provided by the author Ms. Archa Rajeevi)

The dominance of arbitration in the field of commercial disputes is due to the priority given to thumb rule of party autonomy in deciding who gets to judge their dispute. The significance of Section 11 of the Arbitration Act, 1996 ("**Act**") in this context is colossal. In addition to the parties being given an option to choose their own arbitrator(s), Section 11 provides comprehensive machinery for the appointment of arbitrator(s) through judicial intervention. From the 1940s through 2018, Section 11 has managed to solidify its place in legal history through many judicial precedents. However, throughout its evolution, it has been caught up in many conundrums and has evolved into a section dramatically different from what it started out as.

Prior to the promulgation of the 1996 Arbitration Act in India, there existed Arbitration Act, 1940. When the Supreme Court realized it had become outdated, there was an imminent need to adopt the model law by UNCITRAL. Once the Chief Justice's or designates' power to appoint was settled under the model law, one of the primary conundrums that Section 11 tangled in, was whether such power of appointment vested in the Chief Justices or designates was an administrative or judicial power. While in the ***Ador Samia case*** (1999), it was ruled as administrative, the judicial decisions after 2000, differed drastically.

Prominent seeds of departure from the earlier stance and the Model law, which also decided it was an administrative power, were seen in the 176th law commission report. Subsequently, in the ***Patel Engineering case*** in 2005, it was held that the power exercised by the Chief Justice is a judicial power. It was further held that the Chief Justice would have the right to decide preliminary aspects and that an appeal against such a judicial order can only be under Article 136 of the Indian constitution. This was a ground-breaking judgment for it overturned a number of precedents including the ***Ador Samia case*** *and the* ***Konkan Railways case***.

The next part of the puzzle was the problem with regard to the scope of the proceedings under Article 11. In the ***Patel Engineering case***, the Supreme Court opined that before the exercise of jurisdiction under section 11, the Chief Justice must be satisfied as to the existence of certain preliminary conditions or jurisdictional facts. It was further noted that the decision of the Chief Justice on such issues are binding upon the parties and that an arbitral tribunal shall not be competent to re-examine such issues. These findings were subsequently reiterated in ***Boghara Polyfab case,*** where the court classified matters that the Chief Justice '*must*' consider, '*may*' consider and '*should*' not consider. In 2013, this classification was cited in ***Chloro Controls case*** where it was noted that the classification was in conformity with the judgment in ***Patel Engineering case***. Subsequently, ***Arameta Captive Power case*** appositely approved the classifications. A scrutiny of the motive behind such a classification seems to be the obstinate belief that the highest judicial authority cannot perform a mere administrative function and that, the exercise of its power may eventually be rendered futile if an arbitral tribunal subsequently finds that there does not exist a valid arbitration agreement. This enthusiastic expansion of the Chief Justice's jurisdiction has created several concerns that were not addressed in the ***Patel Engineering case***.

In 2015, the ideas enunciated in the 176th law commission report were given effect to in the Amendment Act of 2015. The Amendment Act has entirely altered the scheme of Section 11 as an attempt to minimize judicial intervention at the pre-arbitration stage. The power to appoint arbitrators has been transferred from the Chief Justices in case of international and domestic arbitrations to the Supreme and High Courts respectively. This change was due to the insertion of Section 11(6A) and 11(6B) which states that while the Chief Justices see any matter with regard to appointment of arbitrators, they should restrict themselves to the existence of an arbitration agreement and any designation for this purpose should not be seen as a judicial delegation of power by the courts, respectively.

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The application of this amendment *"to apply notwithstanding any judgment, decree or order of any court"* indicates a legislative intent to overrule the expansive interpretation in the ***Patel Engineering case*** by the Supreme Court. The recent amendments appear to focus on limiting the scope of judicial intervention rather than the administrative-judicial debate. This is in line with 246th law commission recommendations, where it was noted that the judicial or administrative debate obfuscates the real issue underlying the description. Another alternation by the amendment pertains to Section 11(7) of the act. The previous position of this section was that a decision on a matter in Sections 11(4), 11(5), 11(6) by the Chief Justice or designate is final. The amended provision also expressly states that no appeal including letters patent appeal shall lie against such decision. This arrangement now allows the courts to review its earlier orders. It also ensures that any other person not being the courts, cannot do so due to the administrative nature of the delegated task. Nonetheless, this section allows the courts an opportunity to attach a more rigid sense of finality to a section 11 order.

Next came the proposed Amendment Bill of 2018. The Bill proposes to bring out refreshing changes such as the Arbitration Council of India ("**ACI**"). With regard to the appointment of arbitrators, the parties could appoint an arbitrator on their free will or through judicial intervention under the Act. Whereas, under the Bill, arbitral institutions may now be designated by the High Court and Supreme Court in case of domestic and international commercial arbitrations, respectively. Appointments will be made by these institutions. In case no arbitral institutions are available, the Chief Justice of the High Court may also maintain a panel of arbitrators to perform the functions of the arbitral institutions, while in international arbitrations, the Supreme Court would be the appointing authority. Further, any application for the appointment of an arbitrator should be disposed of within a period of 30 days. The appointment of arbitrators by designated arbitral institutions will ensure speedy constitution of the arbitral tribunal and reduce the burden of the courts. This step is in consonance with the minimal court intervention approach, which is fundamental to the sanctity of the arbitral process. The 2018 Bill fills the lacunae created by the 2015 amendments to some extent. If this amendment is brought in to effect, it will essentially codify the law laid down by the division bench of the Delhi High court in ***Ardee Infrastructure case***. However, the effectiveness of it is still debatable as there a few loopholes present, such as the fate of smaller un-established institutions, the lack of clarity on whether the power of the Chief Justice of the High Court to review the panel of arbitrators also extends to reviewing a panel of arbitrators maintained by an institution. If it does so extend, this would have a considerable impact on the autonomy of such institutions. Further, with the establishment of an institution like ACI, there is always a pertinent question, whether Section 11 will become redundant. There is also no clarity on the course of action to be adopted when the party is objecting the validity of the arbitration agreement itself.

One might think that the conundrum ends here, but it seems to go on forever. A sting in the tale, was when in the ***UIIC case***, the Supreme Court practically restored the law as it stood prior to the amendment of Section 11 of the Act, by overturning the appointment of an arbitrator by the Madras High Court after determining the existence of an arbitration agreement. This judgment creates a spiral of problems including the requirement to examine the discharge of a contract, the power of the courts to go into the matter of limitations and finally the determination of arbitrability itself. The amendment of 2015 was proper. Once a decision by the courts on the matter of the existence of the arbitration agreement is reached, everything else is transferred to the tribunal. Here a proper balance is drawn between the power to appoint an arbitrator(s) and power of the appointed arbitrator(s) to decide the rest. Therefore, a proper course for the courts to take in such a situation would be to just determine issues as under Section 11(6A), leaving open the question of arbitrability to the tribunal. Such a step would be in tune with the idea of limiting judicial intervention.

An ideal path in the ***UIIC case*** would have been to strike down Section 11(6A) or to let it be as it is and end all sorts of conundrums. The judgment in the ***UIIC case*** starts with *"the conundrum in this appeal"*, however, the decision in this judgment has only added further conundrums to this never-ending saga of judicial interpretation which will result in huge delays in the appointment of arbitrators in the days ahead. There is no doubt that the 2018 Bill is yet another progressive step to make India a destination for arbitration. The proposals in the Bill would definitely strengthen the institutions such as NPAC, which are already being strong foundations for arbitrations. It also shows the serious attitude of the government to plug the gaps in the Amendment Act of 2015. This is one step forward in making India an international hub for arbitration, at par with prevailing international standards. Section 11 has indeed managed to improvise its position as it evolved, such that the 1940 Section 11 would hardly recognize itself. Despite all the conundrums, Section 11 has been the life support to the field of arbitration in India.

TRAINING FOR SENIOR ADMINISTRATIVE SERVICE OFFICIALS OF THE GOVERNMENT OF INDIA AT THE LAL BAHADUR SHASTRI NATIONAL ACADEMY OF ADMINISTRATION IN MUSSOORIE ON THE 6TH AND 7TH OF JUNE, 2019

As per Ministry of Law and Justice, there are more than 3 crore cases pending in various courts of the country and 46% of these involve Government Departments or Government bodies. In order to reduce the litigations of the Government and discourage them from going to courts for their disputes, the Department of Justice has suggested Government departments/organisations to explore alternate methods of settlement of their disputes. This step of speedier settlement will enhance India's performance in the World Bank's Ease of Doing Business Index.

Recent years have seen a spurt in commercial disputes which have taken the Arbitration route. It has become imperative for government machinery to recognize and acknowledge this fact. In view of the foregoing, Government officials need to be equipped to handle disputes more effectively thus saving on time, energy and finance.

This exercise marks a key point in thought-process of government functionaries who realize the unprecedented international significance that Arbitration is gaining in order to resolve international bilateral and cross-border disputes, besides national cases.

In this scenario, Nani Palkhivala Arbitration Centre (NPAC) conducted a two-day program at the Lal Bahadur Shastri National Academy of Administration in Mussoorie on 6th & 7th of June, 2019 in which Joint Secretaries and Indian Government officers with higher ranks participated. This training is a great step in educating key officials about advantages of Institutional Arbitration.

The first session was handled by Mr. Rajah, Director of NPAC, who before covering the subject on administrative law gave an overview of the two day training.

The training sessions captured many insightful topics, including 'Drafting & Interpretation of Contracts: Interplay between Arbitration, Commercial Courts and IBC', by Director, Ms. Payal Chawla. The member of the Advisory Council of NPAC, Dr. Amit George, Advocate and Independent Counsel, lead a session on how judicial systems can be regularized. Another Director Mr. V.S. Jayakumar, spoke about areas where the government frequently lands into trouble before the courts. He further enacted the arbitration proceedings along with other faculties, by also involving the participants. This was well received and resulted in a very lively session.

Apart from those directly connected with NPAC, Mr. Amar Gupta of J.S.A and Ms. Padmapriya, Advocate, were gracious enough to handle some of the sessions. While Mr. Amar Gupta elaborated on the 'Enforcement of Arbitral Awards', Ms. Padmapriya dealt with the 'Advantages of Institutional Arbitration'.

At the end of the two day training, the participants, being very senior bureaucrats, evinced interest about NPAC. Many, especially from Punjab and Haryana, wanted to replicate the training in their state. They also desired to partner with NPAC on all Arbitration related matters.

The training was a grand success and one and all praised NPAC. Mr. Arunjit Miglani, Government of Punjab commented that it was *"Excellent Programme"*. *"A very well designed training program"* was the observation made by Mr. Anand Kumar, Chief Electoral officer, Rajasthan. Mr. Rahul Tewari, Secretary - Employment Generation and Training, Government of Punjab, said *"This was one of the best courses I have attended in the academy with flawless arrangements"*.

Participants with the NPAC faculty and the officials of the Lal Bahadur Shastri National Academy of Administration.

Left to Right: **Mr. Amar Gupta**, JSA; **Mr. V.S. Jayakumar**, Advocate and Director of NPAC; **Ms. Payal Chawla**, Advocate and Director of NPAC; and **Ms. Padmapriya**, Advocate.

Participant addressing the gathering.

Our Director Mr. V.S. Jayakumar, addressing the gathering.

Our Director Mr. N.L. Rajah, at the inaugural session.

Our Director Ms. Payal Chawla, with the participants.

Mr. Amar Gupta from JSA, addressing the gathering.

Mr. Amit George, Advocate, addressing the gathering.

NPAC ORGNAIZED A WORKSHOP ON DAMAGES IN CONSTRUCTION ARBITRATION

A workshop on Damages in Construction Arbitration was organized by the Nani Palkhivala Arbitration Centre on 6th June, 2019 at India International Centre, New Delhi.

The workshop aimed to draw upon the multiple perspectives and key issues pertaining to damages in International Arbitration. It was well attended including by young lawyers, professionals and arbitration experts who actively participated in the discussions. Hon'ble Mr. Justice Dipak Misra, Former Chief Justice of India, delivered the opening remarks and talked about the Indian perspective on damages in construction contracts. He focused on the need for courts to grant reasonable damages and to base the assessment on a number of factors such as the genuineness of estimation, technical aspects and surrounding circumstances. Justice Misra stressed upon the assessment being common-sensical and reasonable. He advised the lawyers present in the room to argue based on rational principles and not on hyperboles. He concluded by emphasizing the significance of the interpretation of the contract in the assessment of damages and how there should be *"no windfall in the adjudication process"*.

Hon'ble Mr. Justice Misra's opening remarks were followed by a presentation by Professors Doug Jones and Janet Walker. Professor Doug Jones is a leading independent international commercial and investor-state arbitrator. Professor Janet Walker is among the leading international dispute resolution specialists in Canada. The presentation broadly dealt with the important aspects of damages awarded in construction arbitrations. One of these aspects was the bifurcation of the proceeding into a question of merits and liabilities first and damages later. The speakers pointed out that there is a *strong seductive influence* for the arbitrators and parties to leave the question of damages to the end and hope that it never comes up. They observed that in arbitrations, unlike in courts, this practice of bifurcating the proceeding in such a manner might not work and can leave the dispute/claim '*hanging in balance'*.

The next aspect discussed in the presentation was that of experts. Regarding experts, the important principles expounded were that they should answer the same questions (that are ultimately decided by the tribunal) and that they should work from a common data set in order to lead up to a proactive case management and work in tandem with the arbitral tribunal to lend greater credence to their findings.

Thereafter, the speakers briefly discussed the different categories of damages compensatory and non-compensatory. They raised an important point that, while compensatory damages can be enforced under the contract itself, non-compensatory damages such as specific performance, cannot be enforced by the arbitral tribunal as orders of specific performance require some oversight and supervision and an arbitral tribunal has no powers of contempt. Hence the parties will have to turn to the courts for the enforcement of these orders. It was also stated that the damages in construction contract will be under general law relating to damages in contracts unless there is a specific clause to the contrary. It was discussed how parties can provide for excepting clauses and limitations to be imposed on the damages that can be recovered in the event of immense liability.

The speakers further touched upon the other categories of damages such as nominal, punitive/exemplary and moral damages and how the tribunal must also be mindful of what the parties are asking for. Further, they referred to industry specific issues, the speakers opined that arbitrator in the Energy and Natural Resources industry must keep in mind the key valuation issues for calculation of damages such as the size and nature of reserves (whether proven developed or proven undeveloped), future supply and demand etc.

There are various approaches to such valuation including the income approach, discounted cash flow approach (most commonly used) and the stock-market capitalization approach. It was further observed that price adjustment disputes in this industry are very different from the calculation of damages and must be distinguished.The speakers expressed the need to appoint quantum experts in transactions involving numbers specially mergers and acquisitions where price adjustment issues are at the very heart of the transaction.

Another interesting observation made by the speakers was that the parties often are not familiar with the governing law of arbitration or of contract in international commercial arbitration, as a consequence of which they face challenges in presenting their case before the arbitral tribunal. Under the law of India, liquidated damages always need to be established and principles in this regard have been laid down by the Indian Supreme Court in ***M/s Kailash Nath Associates vs. Delhi Development Authority***. The speakers emphasized that parties should endeavor to fully understand the legal consequences of adopting the law of a particular country.

The speakers further discussed how termination of contract will have impact on damages. In the event of termination of a contract, it has to be first determined whether the termination was valid or invalid. In case of a valid termination under the contract, the damages are provided for in the contract itself and in case of wrongful termination of contract, the claims will be different, for instance, non-defaulting party shall ask for specific performance from the defaulting party. The determination of damages for termination has to be based on a careful interpretation of provisions of the contract.

The jurisprudence around damages is constantly evolving as has been stated by the learned speakers referring to the recent decisions of the UK Supreme Court and Australian High Court in the area of liquidated damages. There are now various approaches to calculation and assessment of damages in construction arbitrations, and the particular approach adopted will impact the time and costing of the proceeding. Therefore it is necessary to iron out the important issues with respect to the procedure in the beginning of the arbitration itself.

The Workshop was a great learning opportunity. The speakers quite efficiently encapsulated the vast topic of 'Damages in Construction Contracts' into a user-friendly concept. The speakers answered the queries of the participants to their satisfaction and undoubtedly, all the participants left with a better understanding of the topic.

Left to Right: **Hon'ble Mr. Justice Dipak Misra**, former Chief Justice of India; **Professor Doug Jones**; and **Professor Janet Walker**

A section of the audience at the event.

DISCUSSION ORGANIZED BY NPAC, DELHI ON INDIA'S GROWING ROLE AND CONTRIBUTION TO THE GLOBAL ARBITRATION ECOSPHERE

At a discussion organized by the Nani Palkhivala Arbitration Centre in Delhi on **26th April 2019**, leading American attorney Mr. Mark Bravin, elaborated on India's growing role and contribution to the global arbitration ecosphere.

Mr. Bravin discussed various aspects of International arbitration and India's role in becoming one of the leaders in the Arbitration ecosystem. Some of India's prominent arbitration practitioners, including Mr. Gaurav Pachnanda, Mr. Sasi Prabhu, Ms. Payal Chawla, and Mr. Shashank Garg, also participated in the discussion. He discussed the famous case of ***Hardy Exploration & Production (India), Inc. v. Government of India, Ministry Of Petroleum And Natural Gas***, which was filed in the US District Court of Columbia, which ruled in favour of the Government of India refusing to recognise an Arbitral Award on grounds of public policy.

We also had the opportunity to speak to Mr. Bravin, who gave us insights into restricting foreign arbitrators from practicing in India. He felt this will put India behind the curve of global arbitration practices and can make arbitration even more difficult for the lawyers based out of India, he added.

The meeting highlighted the relevance and need of third-party funding in any arbitration case. Mr. Bravin said "*Third party funding should be encouraged as it empowers parties who can't afford the procedures but have a right to justice. Third-party funders are also very careful in assessing the probability of winning the arbitration case and therefore it's a win-win for everyone. It is a common practice in countries like the United States, United Kingdom and France, and is rapidly expanding*".

Parties in India are increasingly turning to arbitration, and the Indian judicial system has witnessed a considerable rise in parties seeking institutional arbitration. According to a recent EY report, in the last three years, India has seen a growth of nearly 200% in the number of disputes that have been referred to arbitration. The entry of institutes like NPAC has brought in an efficient structure and world-class resources to facilitate establishment of India as a hub of arbitration.

About Nani Palkhivala Arbitration Centre (NPAC)

Founded in 2005, NPAC is the only Arbitration forum in South India to have been formally recognized by the Madras High Court. With the inauguration of its branch in Delhi last year, it also became the first Indian Arbitration Institute to have two centres in the country. NPAC is modeled on the lines of International Arbitration Centres, and aims at providing world class arbitration facilities by facilitating Ad hoc and Institutional Arbitration in both the public as well as private domain. For further information please visit http://www.nparbitration.com/

Left to Right: **Mr. Gaurav Pachnanda**, Senior Advocate and Director of NPAC; **Mr. Mark Bravin**, American Attorney; and **Mr. Shahshank Garg**, Advocate and member of NPAC Advisory Committee.

A section of the audience at the event

NANI PALKHIVALA (1920-2002)

The Palkhivala Foundation, Chennai *was started in 2003 in memory of Sri Nani Palkhivala, eminent jurist, economist, author, diplomat, orator and statesman. The Foundation arranges lectures, grants scholarship to poor and deserving students and sponsors research. It also conducts leadership camps for students. The Palkhivala Foundation also instituted the Nani Palkhivala Arbitration Centre, in Chennai.*

Nani Palkhivala was born in 1920 in Bombay to middle-class Parsi parents. His family name derives from the profession of his forefathers (a common practice among Parsis), who had been manufacturers of palanquins (*'palkhis'*).

He was educated at St. Xavier's College, in Bombay. He was a dedicated scholar and excelled even though he was hampered by a bad stammer. At college, he earned a master's degree in English literature. He overcame his speech impediment by sheer perseverance to later become one of greatest orators India has ever known.

Upon graduating, Palkhivala applied for a position as lecturer at Bombay University, but was not awarded the post. He tried to obtain admission to institutions of higher learning to further his academic career. It being late in the term, most courses were closed, and he enrolled at Government Law College, Bombay, where he discovered that he had a gift for unravelling the intricacies of jurisprudence.

Palkhivala The Jurist

Nani Palkhivala was called to the Bar in 1944 and served in the chambers of the legendary Sir Jamshedji Behramji Kanga in Bombay. He quickly gained a reputation as an eloquent and articulate barrister, and was often the center of attention in court, where students of law and younger members of the bar association would flock to watch him. His excellent court craft and an extraordinary ability to recall barely known facts rendered him an irresistible force.
Palkhivala's initial forté was commercial and tax law. Together with Sir Jamshedji, he authored what was then and still is today an authoritative work: *The Law and Practice of Income Tax*.

By 1954 however, barely 10 years after his admission to the bar, Palkhivala was arguing before the Supreme Court. It was in this, his first, case before that court (concerning the interpretation of Article 29(2) and Article 30 of the Indian Constitution, which regulate the rights of religious minorities) that he first articulated his famous statements on the inviolate nature of the constitution.

Palkhivala had a deep respect, indeed reverence, for both the Constitution, and for the cardinal principles he saw embedded in it: *"The Constitution was meant to impart such a momentum to the living spirit of the rule of law that democracy and civil liberty may survive in India beyond our own times and in the days when our place will know us no more."*

The culmination of Palkhivala's success before the Supreme Court came in the famous ***Kesavananda Bharati vs. The State of Kerala*** case that he argued for over 30 days. In the now famous ruling, on April 24, 1973, a Special Bench comprising 13 Judges of the Supreme Court of India ruled by a majority of 7-6, that Article 368 of the Constitution *"does not enable Parliament to alter the basic structure or framework of the Constitution."*

The court propounded what has come to be known as ***'the basic structure'*** doctrine, which rules that any part of the Constitution may be amended by following the procedure prescribed in Article 368, but no part may be so amended as to *"alter the basic structure"* of the Constitution.

He was a strong proponent of the rights of freedom of expression and freedom of the press. In an attempt to stifle dissenting opinion, the central government imposed import controls on newsprint in 1972. In the case before the Supreme Court Palkhivala argued that newsprint was more than just a general commodity: *"Newsprint does not stand on the same footing as steel. Steel will yield products of steel. Newsprint will manifest whatever is thought of by man."*

NANI PALKHIVALA CENTENARY CELEBRATIONS

The Palkhivala Foundation is pleased to invite you all to a discussion between **Mr. Somasekhar Sundaresan**, Advocate and **Mr. Anil Singhvi**, Chairman, ICAN Advisors, on the topic **'Corporate Failures Where Does The Buck Stop?'** as a part of the Nani Palkhivala Centenary Celebrations. The session will be moderated by **Mr. Raghuvir Srinivasan**, Associate Editor, The Hindu.

Date and Day: 27th July, 2019; Saturday

Time: 10.00 am (Please be in your seats by 9.45 a.m.)

Venue: Rani Seethai Hall 603, 1st Floor, Raja Sir Annamalai Chettiar Memorial Trust Anna Salai, Chennai 600 002 (Near Anna Flyover)

You can also view the event via **live streaming**. For further details, please mail us at palkhivalafoundation2002@gmail.com.

ONE DAY SEMINAR ON INSOLVENCY AND BANKRUPTCY CODE, 2016

Nani Palkhivala Arbitration Centre, in association with the Chartered Accountants Study Circle (CASC), is jointly organizing a one day seminar on **Insolvency and Bankruptcy Code, 2016**

The seminar seeks to provide a holistic view of the Code and the keynote address is proposed to be delivered by the award winning business journalist **Ms. Sucheta Dalal**, a Padmashri Awardee, who would provide the initial thrust with the business's expectation of the Code and the challenges it poses.

Mr. Anant Merathia, Advocate, will present the Code and the practical issues associated in its administration. With experience as the Council Member involved at the time of the introduction of the Code, **Ms. Sripriya Kumar**, Chartered Accountant would discuss capacity building and the challenges present.

The impressions of the bench are vital for the success of the Code and the organizers are proposing to invite Hon'ble Member of NCLT **Mr. Prakash Kumar** to address this issue. As banks are among the largest stakeholders in relation to the Code, the organizers also propose to solicit the views on the relationship between the Code and bankers.

Further, there would be a panel discussion between **Mr. P.H. Arvind Pandian**, Senior Advocate, **Mr. B. Ramanakumar**, Chartered Accountant & Insolvency Professional, **Mr. V. Mahesh**, Chartered Accountant & Insolvency Professional, on the Code, its challenges and the way forward, which discussion would be moderated by **Mr. Anant Merathia**.

Date and Day: 13th July, 2019; Saturday

Time: 9:30 am to 5:00 pm

Venue: Welcom Hotel Chennai (Fortune Chola), No. 10, Cathedral Road, Chennai 600 086

Fee: Cheque of Rs. 2,500/- only, favouring 'The Chartered Accountants Study Circle' to be sent to CASC address. Please note that only 150 registrations shall be accepted.

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