DISPUTE RESOLUTIONS

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Message to the Readers

Arbitration 2020: Surviving the Covid storm

When the COVID-19 storm hit the world during 2019, the legal fraternity was left wondering whether the arbitration institutions around the world would be able to survive the Covid -19 storm. Quite surprisingly, the reports put out by most of the arbitration institutions around the world for the year 2020 show a very encouraging upward trend.

The caseload of various arbitration institutions and other relevant data such as the total amount in dispute, the number of emergency or expedited procedure applications, arbitrator challenges, and data on diversity, are analysed to understand the direction in which the arbitration regime is headed. It is observed that despite COVID-19, the field of arbitration has continued to grow throughout 2020. In fact, there has been an overall increase of 16% in caseloads of various arbitration institutions compared to previous years. This is the surprising data published by each of the institutions in their annual reports and posted in their respective websites. The interesting analysis that is highlighted below has been put together by advocate Rishi Kumar Duggar of the Madras High Court from the annual reports put out by these institutions.

A number of arbitral institutions registered an all-time high of new cases: London Court of International Arbitration ("**LCIA**"), Hong Kong International Arbitration Centre ("**HKIAC**"), China International Economic and Trade Arbitration Commission ("**CIETAC**"), International Centre for Settlement of Investment Disputes ("**ICSID**"), Singapore International Arbitration Centre ("**SIAC**") and the Permanent Court of Arbitration ("**PCA**"). Interestingly, the SIAC doubled its case numbers compared to those in the previous year and also crossed the magical threshold of 1,000 new cases in a year.

Generally, the annual record of 'amount in dispute' reflects the financial health of an arbitration institution. Leading the group by far, the average amount in dispute of cases filed with the International Court of Arbitration, International Chamber of Commerce ("**ICC**") during 2020 was USD 54 million.

In 8.5% percent of their new cases, the amount in dispute was more than USD 100 million. In general, the total amount in dispute for 2020 increased for most institutions. Noteworthy among these are the Arbitration Institute of the Stockholm Chamber of Commerce ("**SCC**") with an increase by a third compared to 2019 figures and the HKIAC which doubled the end-of-year amount.

There was however no significant change in proportions of international cases to domestic cases in various institutions. The SIAC, LCIA and Swiss Chambers' Arbitration Institution ("**SCAI**")have the lead. Following closely behind, the HKIACand ICC registered a slight proportional drop in international cases.

In light of COVID-19, the number of emergency arbitrations unsurprisingly increased in almost every institution. There were however no significant changes in percentage of challenges made against arbitration awards.

When we observe the progress made in arbitrators' diversityduring the past three years, it is observed that there has not been much progress made in this regard. The percentage of female arbitrators in ICC cases increased only by about 2% every year, with almost every fourth arbitrator being female now. The LCIA however had recorded a significant rise in female arbitrators since 2018: every year, the number of female arbitrators increased by 5% and now sits at a leading 33%. Every third arbitrator is female in SCCand Vienna International Arbitration Centre(VIAC). Both these institutions also registered a major jump in numbers, after a decrease in 2019.Similarly, 30% of the arbitrators in SCAI cases are female. Of all appointments made by the Court, a remarkable 71% were female arbitrators.

Review of the Indian arbitration scenario for 2020

Despite the COVID-19 pandemic, 2020 has been an eventful year forIndian arbitration, as institutional arbitration continued making progress in India.Landmark judgments were delivered by courts across India and government also continued to amend arbitration laws to project India as one of the pro arbitration centres in the world.

For instance,India's home-grown institution, the Mumbai Centre for International Arbitration ("**MCIA**") in its Annual Report for 2020 has reported having registered more than 150% growth in the total number of cases being administered by it. The recent references by the Supreme Court and the Bombay High Court with regard to functioning of MCIA have boosted the morale of the Indian arbitration centres for the recognition given to the centre.

Conclusion

Though the upward trend in development of arbitration institutions under extremely difficult conditions is quite promising, it must be noted that the journey has just began and we still have a long and difficult path ahead of us to improve the face of arbitration institutions. We have to wait and see where 2021 has taken us.

N.L. Rajah
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LEGAL UPDATES

❖ **Delhi High Court: The practice of handwritten clauses in settlement agreements needs to be discontinued**

- The Delhi High Court referred to the decisions in ***Rajat Gupta vs. Rupali Gupta***, 2018 SCC OnLine Del 9005, Cont. CAS(C) 772/2013 and ***BVG India Ltd vs. Navin Saini***, CM (M) 1311 of 2019, and observed: *"The practice of handwritten clauses needs to be discontinued forthwith, unless it is countersigned or initialled by the Mediator/Counsellor in the presence of the parties as well as by the parties… it becomes the duty of the Mediator/Counsellor to ensure that the settlement agreement is recorded specifically in terms of the dicta of this court in Rajat Gupta (supra). The learned Family Court too shall ensure that whenever a settlement agreement is recorded…"*
https://www.barandbench.com/news/litigation/practice-of-handwritten-clauses-in-settlement-agreements-needs-to-be-discontinued-delhi-high-court
https://www.livelaw.in/pdf_upload/meenakshi-order-403701.pdf

❖ **Kerala High Court: Dispute agreed to be resolved by authority other than arbitrator becomes arbitrable if such authority fails to take a decision**

- The Division Bench of the Kerala High Court comprising Justice P.B. Suresh Kumar and Justice C.S Sudha elaborately examined the scope of 'excepted matters' and held that if a dispute is to be adjudicated upon by an authority other than the arbitrator as per the agreement and if the parties have agreed to accept the decision of that authority as final and binding, the same would be an excepted matter and will not be arbitrable. However, in the absence of a decision by the said authority, the dispute would become arbitrable.
https://www.livelaw.in/news-updates/kerala-high-court-arbitration-dispute-unresolved-by-authority-arbitrable-187109?infinitescroll=1

❖ **Supreme Court: If conciliation is not successful, arbitration proceedings must be resorted to**

- In the case of ***JharkhandUrja Vikas Nigam Limited vs. The State of Rajasthan and Ors***., a bench of Justice Indira Banerjee and Justice Subhash Reddy held: *"From a reading of Section 18(2) and 18(3) of the MSMED Act it is clear that the Council is obliged to conduct conciliation for which the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 would apply, as if the conciliation was initiated under Part III of the said Act. Under Section 18(3), when conciliation fails and stands terminated, the dispute between the parties can be resolved by arbitration. The Council is empowered either to take up arbitration on its own or to refer the arbitration proceedings to any institution as specified in the said Section. It is open to the Council to arbitrate and pass an award, after following the procedure under the relevant provisions of the Arbitration and Conciliation Act, 1996, particularly Sections 20, 23, 24, 25"*
https://www.livelaw.in/top-stories/supreme-court-msmed-act-section-183-conciliation-arbitration-dispute-resolution-187960

❖ **Delhi High Court:Mutuality is an essential feature of an arbitration agreements;splitting of claims arising from the same legal relationship is not permitted**

- In the case of ***Tata Capital Finance Limited vs. Shri Chand Construction and Apartment Pvt. Ltd.*** FAO(OS) 40/2020, the Delhi High Court held: *"In view of the above judgments, we are of the view that the clause 12.18, in question, cannot amount to a valid arbitration agreement since the clause lacks an essential element of an arbitration agreement-"mutuality." In as much as, the clause only gives one party i.e., the appellant the right to walk out of arbitration, and the same right is not conferred on the respondent."*
- On another issue, the court held that a valid arbitration clause cannot provide for arbitration of claims of one party and provide for the remedy of the Court or any other fora for the claim of the other party. The Court interpreted Section 7 of the Arbitration and Conciliation Act, 1996 and stated: *"A bare perusal of the section clearly shows that while "some or all disputes" can be referred to the arbitration, the parties are not at the liberty to split the claims which arise out of the same defined legal relationship…" "…This would not only be permitting splitting up of claims and causes of action, but also result in multiplicity of proceedings and a possibility of conflicting judgments on the same issues."*
  Https://indiankanoon.org/doc/106202759/

❖ **Supreme Court**: **A party cannot approach an arbitral tribunal under a special statute for an issue already decided by Court appointed arbitrator**

- In the case of ***M.P. Housing and Infrastructure Development Board vs. K.P. Dwivedi***, the question before the Supreme Court was whether the respondent contractor could file a reference before M.P. Arbitration Tribunal with respect to the very claims which were the subject matter of arbitration before the Housing Commissioner, M.P. Housing Board, who was appointed as an arbitrator by the High Court.
- The Court held that the doctrine of 'Issue Estoppel' would apply and prevent a party from bringing same claims before an arbitral tribunal established under a special statute, after voluntary participation in and conclusion of arbitral proceedings before a court-appointed arbitrator.
  https://drive.google.com/file/d/11k9Wj0amXhRiBKyiI7AIFaOCHo3coEq0/view

❖ **Delhi High Court: Prior agreements do not limit the court's powers in awarding costs**

- In the case of ***Union of India vs. Om Vajrakaya Construction Company*** O.M.P. (COMM) 299/2021, the Delhi High Court held: *"Unlike the power of the Arbitral Tribunal to award interest under Section 31 (7)(a) of the A&C Act, which is subject to the contract between the parties, there are no such fetters on the discretion of the Arbitral Tribunal to award costs under Section 31A of the A&C Act. The only exception being any agreement between the parties regarding costs which is entered into after the disputes have arisen."*
  Https://drive.google.com/file/d/1ivOG7rDry2siyMzM2UC1-gNRXLs_MvS5/view

THIRD PARTIES TO ARBITRATION UNDER INDIAN LAW

By Shreyas Jayasimha and Bhavya Chengappa

I. INTRODUCTION

1. Arbitration, in an ideal andclassical sense, is a mechanism where the parties have reduced to writing their consent to participate in a dispute resolutionprocess adjudicated by a creature of their contract (the arbitrator) and conducted in a manner which ensures that party autonomy reigns supreme.Section 7 of the Arbitration and Conciliation Act, 1996 ("**Act**") and Article II (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**") specify the requisites of an 'arbitration agreement'.For practical considerations, a deviation from this ideal became necessary and resulted in an anomaly of sorts: the joinder of third parties / non-signatories to arbitral proceedings.

2. Expectedly, a non-signatory to an arbitration agreement is not likely to participate in proceedings without some resistance whether it is the party creating (by objecting to its joinder) or meeting (as a party attempting, for whatever reason, to invoke an arbitration agreement that it is not privy to) such resistance. The former of the two scenarios being far more probable is therefore more common.

II. BINDING NON-SIGNATORIES TO AN ARBITRATION: NECESSITY AND PROCEDURAL REQUIREMENTS

3. Oftentimes, a non-signatory is dragged into arbitral proceedings for being directly involved in the dispute: for instance, when disputes have arisen between several parties relating to the same transaction and not all of them are signatories to the arbitration agreement. It is also possible for a party to be impleaded because it has acted in some manner or capacity that exercised influence over the dispute like playing a significant role in the negotiations, conclusion, performance or termination of the contract.

4. A cursory study of case law reveals that reasons to bind a non-signatory to arbitration are aplenty: the composite nature of transactions,[1] that the contracts are linked, ancillary to or form an integral part of the principal agreement,[2] the intention of parties, that the parties[3] (signatory and non-signatory) exist within a tight group/ structure with strong organizational and financial links, so as to constitute a 'single economic unit', or 'single economic reality'[4]. These also double up as defences to preliminary objections raised by the third party.

5. Upon being impleaded, a third party responds by raising a preliminary objection to the tribunal's jurisdiction, or rather the lack of it insofar as that party is concerned. At the risk of stating the obvious, the first and foremost amongst the grounds urged is that the party was not a signatory to the arbitration agreement and therefore never consented to a reference to arbitration. It could also be argued that the inclusion of a third-partydilutes from one of the core principles of arbitration - the signatory's autonomy as a proper party to the proceedings. Other familiar concerns include confidentiality and the absence of privity of contract.

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[1] *Chloro Controls (I) Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.,* (2013) 1 SCC 641, 68.
[2] *Ameet Lalchand Shah and Ors. vs. Rishabh Enterprises and Ors.,* (2018) 15 SCC 678, 23
[3] *Cheran Properties Ltd. vs. Kasuri and Sons Ltd. & Ors.,* (2018) 16 SCC 413, 17, 25.
[4] *Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Ors.,* 2019 SCC OnLine SC 995, 10.5.

III. THE 'GROUP OF COMPANIES' DOCTRINE: EVOLUTION OF CASE LAW IN INDIA

6. This doctrine may be traced back to a 1984awardby the International Court of Arbitration, International Chamber of Commerce in ***Dow Chemical vs. Isover-Saint-Gobain***,[5] where the tribunal found it 'appropriate to assume jurisdiction' over claims after considering that it was an indisputable fact that the parent entity has and exercises absolute control over its subsidiaries *"having either signed the relevant contracts or, ... effectively and individually participated in their conclusion, their performance, and their termination"*. The tribunal further observed that *"the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, (...)."*

7. The doctrine takes root in Indian jurisprudence following a decision of the Supreme Court of India in 2013: ***Chloro Controls (I) Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.***[6] ("**Chloro Controls**").Over the years, the Indian Courts have broadened and clarified the scope of the doctrine. While the decisions may be differentiated from one another on facts peculiar to each of them, they have all served to cement the application of this doctrine in India.

8. The Supreme Court in ***Chloro Controls*** set out certain criteria to be examined by Courts when determining 'exceptional cases'where a non-signatory or third party may be subjected to arbitration without their prior consent:(i) the direct relationship to the party signatory to the arbitration agreement, (ii) direct commonality of the subject matter and (iii) the agreement between the parties being a composite transaction. The Supreme Court went on to clarify that a transaction would be deemed to be of a composite nature where performance of principal agreement would not be feasible without the *"aid, execution and performance of the supplementary or ancillary agreements"* to achieve a common object and collectively have a bearing on the dispute.

9. It would be pertinent to mention here that prior to ***Chloro Controls***, the Supreme Court in a 2005judgment in ***Sukanya Holdings vs. Jayesh H. Pandya***[7]("**Sukanya Holdings**") had refused a reference to arbitration on grounds that certain parties to the dispute were non-signatories to the arbitration agreement. The precedents set by and after ***Chloro Controls*** havepivoted from the restrictive approach adopted in ***Sukanya Holdings***. While ***Sukanya Holdings*** has not been overruled, it ought to be noted that it pertained to Section 8(1) of the Actas it stood prior to its Amendment in 2015 to insert the phrase "*or any person claiming through or under him*". Onthis, ***Sukanya Holdings*** may safely be distinguished from the cases that hold sway today.

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[5] *Dow Chemical vs. Isover-Saint-Gobain,* ICC Award No. 4131, YCA 1984, available at https://www.trans-lex.org/204131, last visited on 06 December 2021.

[6] *Chloro Controls (I) Pvt. Ltd. vs. Severn Trent Water Purification Inc. and Ors.,* (2013) 1 SCC 641.

[7] *Sukanya Holdings vs. Jayesh H. Pandya,* (2003) 5 SCC 531

10. 2018 saw several decisions[8] that diluted the ratio set down in ***Sukanya Holdings*** and reinforced the position set by ***Chloro Controls***. One of them was ***Cheran Properties Ltd. vs. Kasuri and Sons Ltd. & Ors.***[9] ("**Cheran Properties**")and is particularly noteworthy for placing non-signatories within the ambit of enforcement proceedings albeit in appropriate circumstances where the non-signatory qualifies as a 'person claiming under' a party.[10] The Supreme Court, echoing the ratio in ***Chloro Controls***, observed that the law has evolved to recognize that modern business transactions that are effectuated through multiple layers and agreements within a group of companies and in circumstances that may reflect an intention to bind both signatory and non-signatory entities within the same group.[11]

11. In 2019, the Supreme Court once again employed the principles from ***Chloro Controls*** and ***Cheran Properties***in ***Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited and Ors.***[12] ("**Reckitt Benckiser**") to refuse a reference of a non-signatory parent company to arbitration on grounds that the non-signatory's intention to be bound by the arbitration agreement could not be established.

12. Also of significance is a 2019 decision of the Supreme Court in ***Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Ors.***[13] ("**MTNL**"). The Court observed that a commercial document such as an arbitration agreement ought to be interpreted by adopting a 'common sense' approach to give effect rather than to invalidate it.[14] The Court, after examining the nature of the transactions, determined that the non-signatory was a 'necessary and proper' party to 'finally resolve the disputes' and that there was a clear intention of the parties to be bound in arbitration.

13. There are conflicting views on whether ***Chloro Controls*** and ***Cheran Properties*** opened the flood gates for Courts to implicate non-signatory parties in arbitration sans their consent by reading into the context the phrases "*claiming through or under*" appearing in Section 45 (***Chloro Controls***) and "*persons claiming under*" appearing in Section 35 (***Cheran Properties***) of the Act. The scope of the phrase is undoubtedly expansive, and discussion is best reserved for another time.

14. Considering the manner in which international business transactions have adapted to the convenience of multi-layered structures of corporate entities spanning across jurisdictions, it seems inevitable that the group of companies doctrine will be invoked more frequently.

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[8] *Ameet Lalchand Shah and Ors. vs. Rishabh Enterprises and Ors.,* (2018) 15 SCC 678; *Emaar MGF Land Limited vs. Aftab Singh,* 2018 SCC Online SC 2771;*Cheran Properties Ltd. vs. Kasuri and SonsLtd. & Ors.,* (2018) 16 SCC 413.

[9] *Cheran Properties Ltd. vs. Kasuri and Sons Ltd. & Ors.,* (2018) 16 SCC 413.

[10] Section 35, Arbitration and Conciliation Act, 1996.

[11] *Cheran Properties Ltd. vs. Kasuri and Sons Ltd. & Ors.,* (2018) 16 SCC 413, 23.

[12] *Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing India Private Limited and Ors.,* (2019) 7 SCC 62

[13] *Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Ors.,* 2019 SCC OnLine SC 995

[14] *Mahanagar Telephone Nigam Ltd. vs. Canara Bank and Ors.,* 2019 SCC OnLine SC 995, 9.4 to 9.7; relying on *Union of India vs.D.N. Revri & Co.* (1976) 4 SCC 147, *Khardah Co, Ltd. vs. Raymon & Co (India) (P) Ltd.,* (19 and *Enercon (India) Ltd. vs. Enercon GmbH*, (2014) 5 SCC 1: (2014) 3 SCC(Civ.) 59.

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40TH PALKHIVALA MEMORIAL LECTURE

On behalf of the Palkhivala Foundation, we are happy to invite you all for the 40th Palkhivala Memorial Lecture proposed to be delivered on the topic '***The Post-Pandemic World***', on **16th January, 2022**, at **8:00 pm IST**, by **Mr. Ruchir Sharma**.

The Foundation generally conducts the Memorial Lecture around the birth date of Nani Palkhivala (January 16). The last three lectures have been by (a) Prof. Indira Rajaraman on 'Decoding the RBI GOI Relationship'; (b) Ms. Nirmala Sitharaman on 'Road Map to 5 Trillion Dollar Economy'; and (c) Mr. Shaktikanta Das, Governor, Reserve Bank of India on 'Towards a Stable Financial System'. To mark Palkhivala's birth centenary, a book containing a selection of lectures delivered at Palkhivala Foundation from 2003 onwards was compiled and released by the Hon'ble Minister for Finance, Ms. Nirmala Sitaraman, in 2020.

Mr. Ruchir Sharma is a global investor and fund manager who has written widely on global economics and politics. Born in the Nilgiris, Tamil Nadu, he is rated as one of the top thinkers of the world. A long-time columnist for newspapers and magazinesaround the world, Sharma is the author of 'The 10 Rules of Successful Nations', 'The Rise and Fall of Nations: Forces of Change in a Post-Crisis World', 'Democracy on the Road: A 25 Year Journey Through India', and 'Breakout Nations'.

You are all invited to join us through: https://youtu.be/envHqK1_IPQ

We are accepting questions until end of day on 12th January, 2022 and request that the same be sent to Palkhivalafoundation2002@gmail.com

NPAC's Annual International Conference - Postponed on account of the pandemic

The 13th Annual International Conference of NPAC on the theme 'The Evolving Arbitration Framework in India - Challenges and Opportunities', which was scheduled to be held on 12th February, 2022 stands postponed to 2nd April, 2022 on account of the pandemic.

The upcoming issues of the Newsletter would contain further updates with respect to this.

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