DISPUTE RESOLUTIONS

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Message to the Readers

Is the Arbitration and Conciliation Act, 1996 a completely self-contained code?

One of the abiding rules of arbitration law is the principle that the Arbitration and Conciliation Act,1996 is a self-contained code.Two judgements which have expressed this principle without equivocation are ***SBP & Co. vs. Patel Engineering Ltd. & Another, (2005) 8 SCC 618*** and ***Fuerst Day Lawson Limited vs. Jindal Exports Limited, (2011) 8 SCC 333***. The ratio in these two judgments have then been applied relentlessly by all courts in India.

However, as is often stated, there rarely is a rule or statement in law that is without exceptions. A recent judgement of the Supreme Court in *Government of India vs. Vedanta Limited & others* ***2020 SCC Online SC 749*** has highlighted an exception to this rule.

In the above-mentioned case, the Supreme Court rejected the Government of India's ("**GOI**") challenge to the enforcement of a foreign arbitral award rendered in favour of Vedanta Limited, Ravva Oil (Singapore) Ltd and Videocon Industries Limited (referred to herein collectively as "**Companies**"). An interesting question that came up for consideration is, and we will address only this question in the said case amongst the many others that were argued, whether the challenge to the award was barred by the provisions of the Limitation Act, 1963. Though the Arbitration and Conciliation Act, 1996 is considered to be a self-contained code, it had no provision that dealt with the question of limitation period for enforcing arbitration awards. The Supreme Court had to perforce reach out of the bag to find an answer in the provisions of the Limitation Act, 1963.

The facts relating to the matter were as follows. The Companies had secured an award in 2011 from a Kuala Lumpur seated tribunal. The award which was in their favour empowered them to recover development costs of around US$278million from the GOI, arising out of a production sharing contract ("**PSC**") for the development of the Ravva oil and gas fields situated offshore in the Bay of Bengal.

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A challenge to the award before the Malaysian courts was dismissed. Thereafter the Companies obtained an order from the Delhi High Court directing the enforcement of the award.

In an appeal before the Supreme Court of India, one of the questions raised was that enforcement action before the Delhi High Court was barred by limitation under the Limitation Act, 1963.

The Supreme Court noted that various High Courts had taken conflicting views on the question of limitation period for enforcing a foreign award. The provisions of the Arbitration and Conciliation Act, 1996 do not set out a limitation period for enforcement of a foreign award. The issue before the Supreme Court therefore was whether the limitation period was: (i) twelve years under Article 136 of the Schedule to the Limitation Act which applied to the "*execution of any decree…or order of any civil court*"; or (ii) three years under Article 137 of the Schedule to the Limitation Act which applied to "*any other application for which no period of limitation is provided elsewhere in this division*".

The Supreme Court agreed with the GOI's submission that Article 136 applied only to domestic awards and not to foreign awards. It consequently held that Article 137 applied and so the limitation period was three years.

On facts applicable, the court found that the Companies' application was within such limitation period. The court held that this was so since their right to apply for enforcement only accrued in July 2014, when the GOI issued a notice to the Companies demanding US$77 million as its share of petroleum sold to third parties. The court also held that there were sufficient grounds to condone the delay given the lack of clarity on the applicable limitation period.

This judgement at last infuses clarity on the issue of the limitation provision applicable for enforcement of a foreign award and lays to rest controversies arising on account of differing judgements of various High Courts on the said issue.

It also validates the belief that there could be exceptions to the rule that the Arbitration and Conciliation Act, 1996 is a self-contained code.

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Senior Advocate, Madras High Court
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LEGAL UPDATES

❖ **International arbitration award and patent illegality, compound interest in arbitral awards**

- In the recent case of ***SAIL vs. Jaldhi Overseas PTE Ltd,*** the Delhi High Court held that *"since the impugned order is culmination of an international commercial arbitration within the meaning of Section 2(1)(f), it can be challenged only on the grounds as set out under Section 34(2) of the A&C Act…An Arbitral award can beset aside only if it is found that it violates the fundamental policy of Indian law."*
- The Court further held that an award of compound interest cannot be held to be falling foul of the fundamental policy of Indian law and noted that various legislations in fact provided for payment of compound interest.
  https://www.scconline.com/blog/post/2021/05/29/arbitration-and-conciliation-act-2/

❖ **Arbitration clause does not debar the Court from entertaining the writ petition**

- In a recent dispute between ***Uttar Pradesh Power Transmission Corporation Ltd. (UPPTCL) and CG Power and Industrial Solutions Limited,*** the Supreme Court held that the *"availability of an alternative remedy does not prohibit the High Court from entertaining a writ petition in an appropriate case"*. It explained that the Court may entertain a writ petition when it seeks enforcement of a fundamental right; there is a failure of principles of natural justice or where the impugned orders or proceedings are without jurisdiction, or the vires of an Act is under challenge.
- The court also further added that *"It is now well settled by a plethora of decisions of this Court that relief under Article 226 of the Constitution of India may be granted in a case arising out of contract. However, writ jurisdiction under Article 226, being discretionary, the High Courts usually refrain from entertaining a writ petition which involves adjudication of disputed questions of fact which may require analysis of evidence of witnesses. Monetary relief can also be granted in a writ petition"*.
  https://www.livelaw.in/top-stories/arbitration-clause-writ-petition-contractual-matter-supreme-court-174096?from-login=562694

❖ **No interference with arbitral award due to disagreement over inference of evidence**

- In the case of ***Megha Enterprises and Ors vs. Haldiram Snacks Pvt Ltd,*** the Delhi High Court ruled that the Court cannot intervene with arbitral awards merely because it disagrees with the arbitral tribunal's inference from the evidence presented before it and stated that *"the evaluation of evidence by the Arbitral Tribunal may be erroneous and perhaps the Court may have taken a different view, but that is not the scope of examination under Section 34 of the A&C Act..."* The judgment further added that the tribunal cannot be said to have 'grossly erred' in accepting electronic evidence without an affidavit.
  https://www.barandbench.com/news/litigation/cannot-interfere-arbitral-award-on-disagreement-inference-drawn-evidence-delhi-high-court

❖ **Arbitral holder's claim extinguished on approval of award debtor's resolution plan under IBC**

- The Calcutta High Court, in its recent judgment of ***Sirput Paper Mills vs. I.K. Merchants Pvt Ltd,*** settled a debate involving the Arbitration and Conciliation Act, 1996("**Arbitration Act**") and the Insolvency and Bankruptcy Code, 2016 ("**IBC**").
- The Court held that the approval of the award debtor's resolution plan under IBC would extinguish the claims of the award holder under the Arbitration Act and stated, *"...In essence, an operational creditor who fails to lodge a claim in the CIRP literally missed boarding the claims-bus for chasing the fruits of an Award even where a challenge to the Award is pending in a Civil Court.*"
- The Court inter alia referred to the Supreme Court judgments in ***Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta*** and ***Ghanshyam Mishra and Sons Private Limited vs. Edelweiss Asset Reconstruction Company Limited***, to arrive at its decision.
  https://www.livelaw.in/news-updates/arbitration-act-claim-of-award-holder-extinguished-approval-resolution-plan-ibc-calcutta-high-court-173872

❖ **Detailed analysis on question of novation of contract is outside scope of Section 11 of the Arbitration Act**

- In the case of ***Sanjiv Prakash vs. Seema Kukreja and Ors***, the Supreme Court held thata decision on whether the impugned contract had been novated required a detailed consideration of the relevant agreements, surrounding circumstances and applicable laws on the subject and that this could not be done in the present case I view of the limited jurisdiction of a court under Section 11 of the Arbitration and Consociation Act, 1996. The Court also referred to the observations in ***Vidya Drolia vs. Durga Trading Corporation, (2021) 2 SCC 1***ona similar point.
- The Court further held that, *"...a Section 11court would refer the matter when contentions relating to non-arbitrabilityare plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal."*

❖ In the case of ***Panipat Jalandhar NH-1 Tollway Pvt Ltd vs. National Highways Authority of India***, the Supreme Court held that*"it was inappropriate for the Division Bench in the facts of the present case to take up the application under Section 9 and to dispose it of in its entirety without the appellant having been given an opportunity to urge all facets before the Single Judge"* and the application under Section 9 of the Arbitration and Conciliation Act,1996 was restored to the file of the Single Judge to be heard and disposed of expeditiously.

EXPERTS IN ARBITRATION

by Gaurav Gulati

Introduction

As arbitration has become the preferred mechanism for dispute resolution in most commercial contracts, the entire ecosystem around arbitration is rapidly evolving in developing economies, while it is already quite robust in more mature economies. The new Arbitration and Conciliation (Amendment) Act, 2021, has given a boost to arbitration as the preferred choice of dispute resolution for Indian corporates, the government and public sector undertakings as well as for multi-national corporations operating in India.

The ecosystem for arbitration would typically include institutional arbitration forums, experienced legal professionals, experienced arbitrators, subject matter experts and of course the required physical and secretarial infrastructure.

During the arbitration process, the arbitrator/tribunal or the disputing parties may choose to appoint an expert to provide assistance in topics related to the dispute. These may cover areas that are complex, require specific technical know-how or certain specialised skill sets. In this article, I will try to explain the role, responsibilities and the underlying framework regarding the appointment of an expert more specifically that of a financial expert.

Who is an expert?

In matters related to disputes and arbitration, an expert is an experienced professional with technical expertise in specific subject matters such as engineering, construction, finance, architecture, or taxation. The primary role of an expert is to provide assistance to the tribunal in reaching a conclusion using their insight, knowledge and experience to breakdown complex technical matters that are beyond the common knowledge and relevant expertise of the arbitrators.

In most commercial disputes,a significant bone of contention is around financial matters including but not limited to claims/financials/valuations/earn-outs/damages. In matters with large amounts at stake, assistance from a financial expert is often sought for the assessment of damages and/or their calculation. A financial expert is thus expected to possess the requisite understanding of business accounting, corporate finance, valuation methodologies, etc., to accurately assess and appropriately assist the arbitrator in arriving at the 'quantum' of damage/losses suffered by a party in a dispute.

An expert can be a 'shadow' expert, party-appointed independent expert or a tribunal-appointed expert. A 'shadow expert' is primarily engaged in assisting the legal counsel in drafting the claim, defence or counter-claim wherein technical expertise and subject matter knowledge is necessary. Such experts mostly act as an extension of the parties with very limited involvement and visibility in the arbitration procedure, and their role is not necessarily independent. By contrast, a 'party-appointedindependent expert' is appointed by the party to the arbitration to provide evidence to the tribunal in the form of an expert report followed by providing testimony at the hearing. Lastly, a 'tribunal-appointed expert' is an expert appointed by the tribunal itself either in isolation or in addition to the party-appointed experts. In a scenario where both parties already have their own experts, a tribunal-appointed expert may assist the tribunal in reconciling the differences in the approaches of the two experts.

Further, in a situation where both the opposing parties appoint their own experts, a popular mechanism to assist the tribunal in arriving at the decision is 'hot-tubbing'. This is a method of admitting evidence through joint representation of expert witness testimony. The process of hot-tubbing typically involves experts of opposing parties being sworn in together and producing their opinions simultaneously giving the tribunal an opportunity to hear the opinions of both the expert witnesses on the same subject together, resulting in a confrontational dialogue.

Roles and responsibilities of an expert

The role and responsibilities of an expert are summarised in a very old pronouncement, which states:

> *..it is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.*

The primary role of an expert, including that of a financial expert, is to support the arbitrator in the eventual decision-making process, i.e. granting the award. Hence it is of utmost importance for the expert to ensure that his/her assessment is free from any bias, assessed based on his/her expertise and experience, is relevant, credible, simply articulated and easily understood.

Listed below are the key considerations for an expert:

a) The expert must support the arbitrator (an independent expert is not bound by the party that appoints or pays them);
b) The expert must limit the assessment to his/her area of expertise and not deviate into matters of law;
c) The expert's report should highlight limitations to its assessment, if any, and state the are as that fall outside his/her expertise;
d) The expert must identify the sources of information, basis of assessment and rationale for arriving at Any conclusions;
e) At times, the expert's services may be required to rebut the claims/assessment made by the other side's expert. If doing so, the expert must limit his/her comments to the technical aspects, criticising assumptions and methodologies and at all times refraining from commenting directly on the expert.

Importance and independence of an expert

In India, at various moments, parties rely on their own in-house technical experts and accountants to provide their analysis/estimates of damage and losses suffered. However, this brings in the issue of bias, more often than not, as the parties may wish to maximise their claim for damages using variables at their disposal when internally assessing the damage. This is one of the main reasons why the role and requirement of independent experts is gaining traction, as arbitrators feel more comfortable relying on the assessments of independent third-party experts rather than on the assessments made by the disputing parties themselves.

As discussed above, the litmus test for the relevance of an appointment of a financial expert is generally his/her independence; therefore, when it comes to party-appointed experts, it is the duty of both the legal counsel as well as the expert to ensure that the independence of the party-appointed expert is not compromised. The International Bar Association (IBA) and the Chartered Institute of Arbitrators (CIArb)

have laid out several guidelines regarding the engagement of party-appointed experts to outline the role of an expert and to ensure that the expert opinion remains impartial and uninfluenced. The guidelines require the expert to disclose their prior or current relationship with any of the parties to the dispute as well as to the arbitral tribunal. As a standard industry practice, expert reports also generally include a declaration stating that the opinions expressed are of their own and are unbiased and objective.

In my personal experience, the independence of party-appointed experts is a critical factor for a tribunal to be able to rely on the findings of the expert. As an independent expert, it is always on my mind to ensure no biases creep into my analyses and findings. Keeping in mind his/her responsibility to the tribunal and giving a clear and true picture of the matter at hand are the most important factors to consider for an independent and a credible expert.

Expert report and cross examination

The engagement of third-party experts traditionally entails the drafting of an expert report followed by testifying in front of the tribunal.

To safeguard the credibility of the expert and the expert report, certain practices are commonly undertaken. For example, an expert report requires having the name, address and curriculum vitae of the expert to provide the arbitral tribunal with a clear understanding of the expert's qualifications, educational background and past work experience. Additionally, the IBA guidelines require the following from an expert report:

a) Provide the list of instructions received from the respective legal counsel;
b) Provide the list of facts and all sources of information relied upon to reach the conclusions;
c) Provide a description of the methods used and the information used to arrive at the final conclusion.

It is imperative for an expert not to rely on unsubstantiated facts and opinions and maintain their independence and fairness throughout the expert report. Legal counsel must also ensure that the expert report is drafted clearly, provides the necessary answers, addresses the concerns wherever applicable and is written in a manner that is understandable without requiring prior subject knowledge. The level of involvement of the legal counsel should, however, be limited so that the expert report does not reflect the strong ideas and opinions of legal counsel.

Once the expert report is submitted as evidence to the arbitral tribunal, legal counsel should prepare their respective experts for cross-examination. The cross-examination of an expert witness is a critical part of arbitral proceedings wherein the opposing party not only tries to diminish and oppose the expert's views but also simultaneously advance their case. At no point in time should the expert actively advocate for their client;the expert must remain open-minded and objective throughout the cross-examination. The expert should also remain open to changing the quantum of damages if the underlying assumptions behind the calculations change a quality that exhibits transparency and fairness on the part of the independent expert.

In my opinion, givinga clear, unbiased and concise testimony is the most important ability of an independent expert. For agood expert,the idea should not be to defend one's report but to clarify and provide credible answers to the methodology and assessment provided in the report.

Expert engagement in India

In 2018, the London Court of International Arbitration (LCIA) published a note highlighting the growing importance of experts in international arbitration and how their involvement and use in arbitral proceedings can be improved to make the processes more efficient and effective. Of the 300 arbitration cases that are registered with the LCIA each year, the majority involve the use of an independent expert, making it an integral part of the arbitration process. A similar pattern can also be witnessed across other jurisdictions.In India, arbitral processes and procedures are still developing and are not quite at the same level as the practices adopted by some of their international counterparts.

The Indian Arbitration Forum (IAF), through its February 2020 publication, has laid out several guidelines to streamline the conduct of arbitration cases in India. The guidelines highlight, inter alia, the process around the appointment of experts, criteria for expert witnesses, the role of experts, guidelines for writing expert reports and performing expert cross-examinations. Such concerted efforts by the government and regulatory bodies are required to make India a more arbitration-friendly jurisdiction in the times to come.

As India's arbitration ecosystem matures, the role of experts is also becoming important. This can be seen with more and more global and Indian firms providing expert services looking at the Indian market. I have personally worked on both domestic and international arbitration cases where my report has been significant for the tribunal in deciding the quantum of damages.

In conclusion, with commercial disputes and arbitration cases becoming increasingly intricate in nature, experts, including financial experts, continue to play a pivotal role in the arbitration process. They not only aid legal counsel in streamlining their strategy based on the merits of their claims, but more importantly they support the arbitrator to arrive at a well-informed decision.

Whilst in more mature arbitration jurisdictions, the use of financial experts is the norm in almost all major commercial arbitrations, in India, the use of financial experts has been a recent phenomenon and I hope it continues to grow to aid tribunals and counsel with subject matter expertise.

Gaurav Gulati is a Chartered Accountant and has over 20 years of experience in advising Indian and multinational corporations. He is a partner with Accuracy. He has acted as an Independent Expert for numerous disputes and arbitrations in India and across other major jurisdictions. He specializes in matters relating to quantification of damages, construction quantum and post M&A disputes.