DISPUTE RESOLUTIONS

The Bi-Monthly Newsletter of the Nani Palkhivala Arbitration Centre

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Message to the Readers

Time barred Section 11 applications can be dismissed by courts

Just because an agreement contains an arbitration clause, must obviously time barred claims be sent to the arbitral tribunal for adjudication? Is the court not empowered to dismiss the proceedings at the threshold when the claims are so very obviously barred by limitation?

In a recent case i.e., ***Dr.Renuka Olivervs. Arulmudi Maheswari Raj Charitable Foundation Trust 2022(2) CTC 284,*** the Madras High Court has held that such pointless proceedings before the arbitral tribunal are quite unnecessary and the court before which a Section 11 application is filed can itself dispose the proceedings.

The court found that the petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking for appointment of an arbitrator under a Memorandum of Understanding dated 17.08.2012 entered into between the petitioner and the respondents. The petitioner's case was that, under the aforementioned Memorandum of Understanding, she has to be paid a share out of the profits earned by the school run by them and that she has not been paid the same and under those circumstances, she had raised the dispute. The said Memorandum of Understanding contained an arbitration clause

The court observed that the petitioner has herself admitted in her letter dated 21.07.2019 that right from the inception of the Memorandum of Understanding dated 17.08.2012, she has not received any payment from the first respondent Trust which will clearly indicate that the claim of the petitioner is hopelessly barred by law of limitation as the petition was filed under Section 11 of the Arbitration and Conciliation Act only in the year 2020, after a lapse of almost 8 years.

In support of their submissions, respondents 1 & 2 relied upon the decision of the Hon'ble Supreme Court in the case of ***Vidya Drolia vs. Durga Trading Corporation reported in (2021) 2 SCC1*** and submitted that the question of limitation can also be considered by the court while dealing with an application under section 11 of the Arbitration and Conciliation Act for appointment of an arbitrator. This argument was accepted by the court.

The court also found that in the case of ***BSNL vs. Nortel Networks (India) (P) Ltd., reported in (2021) 5 SCC 738,*** the Hon'ble Supreme Court had held that ex facie time barred substantive claims are not to be referred to arbitration.

The court held that, having admitted that the petitioner has not received any remuneration right from the inception of the Memorandum of Understanding, the present petition which has been filed only in the year 2020 seeking for appointment of an arbitrator as per the arbitration agreement contained under the Memorandum of Understanding is hopelessly barred by the law of limitation.

Interestingly, the court also went into the second argument of the respondents that the very agreement namely Memorandum of Understanding dated 17.08.2012 violates the provisions of section 11 and 13 of the Income Tax Act, 1961.

A Trust registered under section 12AA of the Income Tax Act must necessarily utilise 85% of the income derived by it for charitable purposes and under section 13(2) of the Income Tax Act, it cannot apply its income for the purpose of benefit of its managerial persons or the trustees. The subject Trust namely the first respondent herein being admittedly registered under Section 12AA of the Income Tax Act,the court held that the Memorandum of Understanding dated 17.08.2012 violates the provisions of section 13(2) of the Income Tax Act as the terms and conditions for sharing of profits mentioned therein is in violation of the said provision under the Income Tax Act. The court further held that Section 23 of the Indian Contract Act, 1872 makes it clear that when the consideration and objects of the contract are unlawful, the contract is void. The court held that in the instant case, the objects and consideration of the very contract where there is an arbitration agreement (namely Memorandum of Understanding dated 17.08.2012)were unlawful and in view of the reasons stated supra, the said contract itself is void ab initio and cannot be acted upon.

N.L. Rajah
Senior Advocate, Madras High Court
Director, NPAC

LEGAL UPDATES

❖ **Delhi High Court: The use of word 'Arbitration' in agreement clause heading would not infer existence of Agreement between parties to resolve disputes through Arbitration**

- In the case of ***Foomill Pvt. Ltd. vs. Affle (India) Ltd*, Justice Mukta Gupta** dealt with a plea seeking appointment of an arbitrator for resolving disputes arising out of a Master Service Agreement executed between the parties in relation to software development.
- Clause 11 of the said Agreement read as 'Jurisdiction, Arbitration & Dispute Resolution'. It stated that the "*agreement or any dispute or claim relating to it, its enforceability or its termination shall be governed and interpreted according to the laws of India subject to Clause 11 and that the Courts at Delhi shall have exclusive jurisdiction over any disputes under the Agreement*".
- The Delhi Court observed, "*…it is clear that mere use of the word 'Arbitration' in the heading in the Clause 11 of the Agreement between the parties in the present proceedings would not lead to the inference that there exists an agreement between the parties seeking resolution of disputes through arbitration*". Therefore, finding no ground to appoint an arbitrator to adjudicate the disputes between parties, the Court dismissed the plea.
  https://lawtrend.in/wp-content/uploads/2022/03/mug25032022aa3252022184140-413137.pdf

❖ **Arbitration best-suited dispute resolution mechanism for globalised world.**

- Chief Justice N V Ramana, who spoke at the fourth edition of the international conference on "arbitration in the era of globalisation" in Dubai, said a prerequisite for achieving globalisation in true sense is ensuring universal respect for the rule of law and also stated that Arbitration is the best-suited dispute resolution mechanism for the globalised world and a time-bound process structured to deliver immediate relief.
- "*Trust in the globalised world can only be built by creating institutions with a strong emphasis on the rule of law. Rule of law and arbitration are not in conflict with one another. Both arbitration and judicial adjudication aim to serve the same goal - the pursuit of justice. Indian courts are known for their pro-arbitration stance. Courts in India assist and support arbitration, and leave the substantive part of adjudication to the arbitral tribunal itself*," he said.
  https://economictimes.indiatimes.com/news/india/arbitration-best-suited-dispute-resolution-mechanism-for-globalised-world-cji-n-v-ramana/articleshow/90323625.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

❖ **Patna High Court: Order XXIII Rule 1(4) CPC not applicable to application challenging arbitral award U/S 34 Arbitration & Conciliation Act**

- Justice Anil Kumar Sinha held that an application filed under Section 34 of the Arbitration and Conciliation Act, 1996 challenging an arbitral award is not a suit and therefore the provisions of Order XXIII Rule 1(4) of the Civil Procedure Code, 1908 pertaining to withdrawal of suit shall not apply.
  https://lawtrend.in/whether-order-xxiii-rule-14-cpc-applies-to-application-u-s-34-of-arbitration-act-answers-patna-hc/

❖ **Supreme Court: Application seeking appointment of arbitrator cannot be moved before a high court if no part of cause of action arose within its territorial jurisdiction**

- In the recent case of ***Ravi Ranjan Developers Pvt. Ltd. vs. Aditya Kumar Chatterjee***, court was considering a special leave petition against an order of the Calcutta High Court, allowing an Arbitration Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator. In this case, there was a Development Agreement pertaining to development of property located in Muzaffarpur, which agreement was executed and registered outside the jurisdiction of the High Court of Calcutta. The appellant had its registered office in Patna and neither had any establishment nor carried on any business within the jurisdiction of the Calcutta High Court.
- The bench comprising Justices Indira Banerjee and AS Bopanna held, *"An application under Section 11(6) of the A&C Act for appointment of an Arbitrator/Arbitral Tribunal cannot be moved in any High Court in India, irrespective of its territorial jurisdiction. Section 11(6) of the A&C Act has to be harmoniously read with Section 2(1)(e) of the A&C Act and construed to mean, a High Court which exercises superintendence/supervisory jurisdiction over a Court within the meaning of Section 2(1)(e) of the A&C Act."*The Court further held, *"It was not the intention of the parties that Kolkata should be the seat of arbitration. Kolkata was only intended to be the venue for arbitration sittings."*
https://www.livelaw.in/top-stories/supreme-court-application-arbitrator-appointment-cause-of-action-territorial-jurisdiction-ravi-ranjan-developers-pvt-ltd-vs-aditya-kumar-chatterjee-2022-livelaw-sc-329-195424

❖ **The Supreme Court is considering issues related to fixing arbitration fees**

- The bench of Justices DY Chandrachud, Sanjiv Khanna and Surya Kant are considering an arbitration petition filed by the Oil and Natural Gas Corporation (ONGC) on the issue related to the mandatory nature of the 'model' fee scale for arbitrators prescribed under the Fourth Schedule of the Arbitration and Conciliation Act 1996.
- During the hearing, the bench pondered on solutions such as - (a) parties indicating to the arbitrator the estimated number of sittings before the commencement of proceedings and fixing the fees accordingly; (b) allowing the arbitrator to increase the fees beyond the agreed scale to a certain percentage (say 10%) of the sittings exceed the estimate; (c) allowing the arbitrator to approach the Court for increasing fee beyond the allowable percentage; (d) stopping the practice of splitting a day into different hearings and applying Fourth Schedule scale day wise.
https://www.livelaw.in/top-stories/can-arbitrator-fix-their-fee-without-parties-consent-is-4th-schedule-the-standard-fee-scale-supreme-court-considers-194937

SATYA HEGDE ESSAY COMPETITION PRIZE WINNING ESSAYS OF 2022

Below are abridged versions of the three prize winning essay submissions for the Satya Hegde Essay Competition2022, as provided by the respective authors.

*This edition was on the topic '**An analysis of the Supreme Court judgment in the Vidya Drolia Case in the context of arbitrability and non arbitrabilty of disputes and the scope of Sections 8 And 11 of the Arbitration and Conciliation Act, 1996**'.*

I PRIZE: Mr. Rohan Gulati, Symbiosis Law School, Hyderabad

The heart and soul of the judgment in ***Vidya Drolia vs. Durga Trading Corp***.[1] **("Vidya Drolia")** are found in the two tests that have been enunciated *viz.*, (i) the four-fold test to determine the arbitrability of disputes and (ii) the *prima facie* test under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 to weed out frivolous and vexatious claims at the pre-arbitral stage.

In word and deed, the judgment is laudable as it encourages the pro-arbitration stance, however, on a meticulous reading, the judgment possesses small loose ends that lead to an ocean of questions. *Firstly*, the determination of arbitrability at the pre-arbitral stage is indirectly robbing the arbitral tribunal of its powers and bound to cast a negative influence on the doctrine of *kompetenz- kompetenz*. *Secondly,* since the judicial determination on the inadequacy of the *primafacie* test can be applied and interpreted in more ways than one, and due to the absence of guiding principles, it is all smoke and mirrors.

Whilst there has been a modest attempt to succinctly discuss recent developments that invariably have been an off-shoot of the judgment in ***Vidya Drolia***, there are now more questions than answers. In summary, the tests propounded in ***Vidya Drolia*** must be cautiously applied to avoid pitfalls and it can only be hoped that the ship of arbitration steers carefully into uncharted waters.

II Prize - Ms. Hanah Varghese, DES Shri NavalmalFirodia Law College, Pune University

In an era of renewed faith towards alternate dispute mechanisms in India, the controversial ***Vidya Drolia case***[2] clarifies certain important questions about the arbitrability of disputes. The Arbitration and Conciliation Act, 1996[3] did not provide for a clear distinction of disputes based on rights *in rem* and rights *in personam*, leading to differing judgments produced over time causing a decade-old confusion.

In this paper, the author analyses the *Vidya Drolia* solution for the arbitrability of disputes. This includes the 4-fold test of arbitrability introduced by the Supreme Court which overruled the ratio of ***Himangni***.[4] This test is to be applied in determining the subject matter of a dispute non arbitrable. However, the Court expressly laid down that if a special act exists as observed by the Court in tenancy matters, such matters cannot be delegated to arbitration. In matters of fraud, a dispute can only be declared non- arbitrable if a prior arbitral agreement did not exist or the case requires a public inquiry owing to its *mala fide* conduct.

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[1](2021) 2 SCC 1.
[2]Vidya Drolia vs Durga Trading Corporation 10 SCC 706
[3]The Arbitration and Conciliation Act, 1996.

The 2nd part of the paper focuses on the *prima facie* scope of Sections 8[5]& 11.[6] The Supreme Court laid down that a *prima facie* investigation can only be conducted if an arbitral agreement exists. Further, at different stages of the proceeding, the Court can conduct an inquiry thereby introducing a new dimension to arbitral proceedings. This judgment has had an instrumental impact in streamlining the process of arbitration in India. The ***Vidya Drolia*** precedent will chart the course of arbitration to new and exciting heights.

III Prize - Ms.Samyuktha Banusekar, SASTRA Deemed University, Thanjavur

The ***Vidya Drolia case*** was a landmark judgment of the Supreme Court of India that delved into the matter of subject-matter arbitrability and the scope and ambit of the Court's jurisdiction when dealing with an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 ("**Act**"). The case widens the existing perspective on subject-matter arbitrability, stating that the fourfold test complements the rights test brilliantly. The term "arbitrability" in itself was interpreted by the Court, considering its different understandings across the world, and later concluded that the phrase cannot be interpreted on a case-to-case basis, and that some matters simply cannot be arbitrated. The Court analysed when the question of arbitrability can be brought up, and this led to a consideration of the scope and powers under Sections 8 and 11 of the Act.

Although significant in the arbitration world as well-received by arbitration professionals, the judgment left room for mischief. The problem firstly lies in its ruling on DRTs, which is a matter of concern, which ignores the concerns of banks and NBFCs, and secondly, on its ruling on non-arbitrability of all intra-company disputes, which ignores the subset of intra-company disputes that do not require the NCLT's specific powers for resolution. Lastly, the appealability of orders issued under Sections 8 and 11 of the Act is cause for concern as the gap maybe misused by persons, which could lead to deviation from the purpose of the Act. In conclusion, the case is a watershed moment in the assessment of dispute arbitrability and the anomalies that remain must be duly rectified.

'The complete Articles are available at
https://drive.google.com/drive/folders/1MdU2mr9jK9NFEUbEwnSdIFedPXhLHruY?usp=sharing

[4]Himangni Enterprises v. Kamaljeet Singh Ahluwalia 2017 10SCC 706
[5]The Arbitration and Conciliation Act, 1996 § 8.
[6]The Arbitration and Conciliation Act, 1996 § 11.

Enforcing arbitral awards against a State in England under the Arbitration Act 1996: Recent decisions of the English courts

By Arish Bharucha, Shelley Drenth and Rosie Morris.

Part of the success of arbitration as a dispute resolution mechanism is surely down to the relative ease of enforcing arbitral awards internationally.

At the heart of the enforcement regime is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which requires all 168 parties to recognise foreign awards as binding and enforce them.

Pursuant to Part III of the (English) Arbitration Act 1996 (the "**Act**"), a successful party can apply to the court (without notice) for recognition or enforcement of an award. The court will then grant an enforcement order which must be served on the respondent, who then has a certain amount of time to try to set aside the order.

Whilst there are limited grounds (set out in section 103 of the Act) on which recognition or enforcement can be refused (such as incapacity, invalidity and serious procedural irregularity), enforcement remains (in general) straightforward. However, matters are considerably more difficult when seeking to enforce an award against a sovereign state.

The State Immunity Act 1978

Under the State Immunity Act 1978 (the "**SIA**"), the basic position is that a state is immune from the jurisdiction of the courts of the United Kingdom (jurisdictional immunity). This is caveated by section 9(1), which says that, if a state has agreed in writing to submit a dispute to arbitration, then the state is not immune in respect of those arbitration proceedings. However, the SIA goes on, at sections 13(2) and 13(4), to note that any property of the state cannot be subject to the process of enforcement of a judgment or arbitration award (enforcement immunity) unless the property is to be used for commercial purposes.

In effect, this leaves parties seeking to enforce against states with an uphill struggle, not least as it can be difficult to distinguish between assets held purely for a 'commercial purpose' and those which are linked to a sovereign goal. Moreover, pursuant to section 13(5) of the SIA, the head of the state's diplomatic mission in the UK can issue a certificate stating that property is not intended for a commercial purpose. That certificate will be accepted as sufficient evidence of the non-commercial purposes, unless the contrary is proven (effectively, reversing the burden of proof on the enforcing party).

General Dynamics United Kingdom Ltd v State of Libya

A further challenge for enforcing parties arose out of the recent Supreme Court decision of ***General Dynamics United Kingdom Ltd vs. State of Libya*** **[2021] UKSC 22**. The case related to the enforcement of a £16 million award in General Dynamics' favour by an ICC arbitral tribunal in Geneva, following a contractual dispute relating to the supply of communications systems.

The award remained unsatisfied and General Dynamics applied to the High Court for an enforcement order, which Teare J duly made. Section 12(1) of the SIA requires that *"any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State".*

However, Teare J relied on CPR 6.16 and the exceptional circumstances existing in Libya (which was in the midst of a civil war at the time, making it virtually impossible to reach the Ministry of Foreign Affairs) to grant General Dynamics permission to dispense with service of the arbitration claim form, the enforcement order and any other associated documents. Rather, the order required only that General Dynamics must courier the documents to three addresses connected with Libya. Libya was given a two-month window in which to apply to set aside the order.

Libya (having been notified of the proceedings) then applied to have the service dispensation order set aside. Its application was successful at first instance, with Males LJ holding that the court had no power to dispense with service through the proper channels in such a case as section 12 of the SIA is a mandatory provision of legislation that could not be overridden by CPR 6.16.

General Dynamics successfully appealed to the Court of Appeal, which held that service did not have to take place through the Foreign Commonwealth and Development Office ("**FCDO**") because the document instituting the proceedings (the arbitration claim form) did not have to be served at all, and the document which did have to be served (the enforcement order) was not the document "instituting proceedings" and therefore did not fall within the ambit of section 12. The Court of Appeal aptly explained that there are opposing policy considerations; one such important policy is that arbitration awards should be honoured and there should be limited obstacles to enforcement (especially when the state has participated in the proceedings). There is some force in the argument that, where a foreign state has fully participated in (or deliberately declined to participate in) proceedings in litigation or arbitration, it does not obviously need the protection of enforcement proceedings being transmitted through the FCDO.

Libya then appealed to the Supreme Court. By a majority of 3:2, the court allowed the appeal and held that:

1. In cases where proceedings are instituted to enforce an award against a defendant state, and where no order has been made for the service of the arbitration claim form, the enforcement order itself should be considered the "*document required to be served for instituting proceedings against a State*" and SIA section 12(1) therefore requires that service be effected through the FCDO. In such circumstances, service through the FCDO is *"mandatory and exclusive"*.

2. Assuming that the enforcement order was a document "*required to be served*", the court did not have the power to use CPR 6.16 to dispense with service, even in "*exceptional circumstances*". As a procedural court rule, CPR 6.16 could not override primary legislation (including SIA s12(1)).

3. Contrary to General Dynamics' submissions, its right to a fair trial under Article 6 of the European Convention on Human Rights was not infringed by the court's interpretation and application of the SIA. Service through diplomatic channels is a well-established procedure for service on states, and as the only permitted method of service under the European Convention on State Immunity, compliance with it could not be a violation of Article 6.

The dissenting judges (Lord Stephens and Lord Briggs) were concerned with issues of access to justice and felt strongly that SIA section 12(1) should not be used to *"bolster state immunity"*. Indeed, they considered that it was a *"complete subversion of the purpose of section 12(1) SIA 1978 to treat the requirement for diplomatic service as enabling a State which is not (or arguably not) immune nonetheless to obtain it de facto by being obstructive about service."* Like the Court of Appeal, the minority would have decided in Libya's favour in relation to issue (1) above.

It should be noted that since the Supreme Court decision, Libya unsuccessfully applied to the Commercial Court to set aside the enforcement order under section 101 of the Act. Libya alleged that General Dynamics failed to comply with its duty of full and frank disclosure because it did not inform the court (who was hearing an application made without notice) that Libya had adjudicative and enforcement immunities under the SIA. Dismissing the application, Butcher J held that immunity from enforcement was not relevant to an application under section 101 of the Act and fell to be dealt with at the execution stage. Accordingly, any non-disclosure before Teare J was not "of great significance" and could not justify setting aside the order made under section 101 of the Act.

***London Steam-Ship Owners' Mutual Insurance Association Ltd* and commercial transactions**

The SIA was, once again, back in focus in the case of ***London Steam-Ship Owners' Mutual Insurance Association Ltd vs. French State; London Steam-Ship Owners' Mutual Insurance Association Ltd vs. the Kingdom of Spain [2021] EWCA Civ 1589***. This time,a key question for the Court of Appealwas whether or not the proceedings related to a 'commercial transaction' for the purposes of section 3 of the SIA.

In 2002, an oil tanker split in two and sank off the coasts of France and Spain (the "**States**"), causing much devastation to the region and the people who lived there. Criminal proceedings were advanced against the ship master and crew. In addition, the States brought civil proceedings in the Spanish court against the shipowners and their liability insurer (known as the "**Club**") under Spanish law (which allows civil claims to be brought against parties found guilty in criminal proceedings and provides for direct civil liability of insurers). In March 2019, the Spanish court awarded the States damages in the sum of €856million from the Club (the "**Spanish Judgment**"). Spain obtained an order for registration of that judgment in the English court to enforce against the Club's assets in England (although this has been appealed and we await the decision).

In January 2012, the Club commenced an arbitration before Alistair Schaff QC against the States on the basis that the insurance contract between the Club and the shipowner contained an arbitration clause and by pursuing a claim under the insurance contract, the States were bound to arbitrate in London, being the seat of the arbitration. The Club obtained an arbitral award pursuant to English Law (known as the "**Schaff Award**"), declaring that the States were bound to arbitrate the dispute and that the Club had no liability until the shipowners actually paid on the claim. The latter position was determined by English law and pursuant to the Club's rules, which the shipowner had agreed to. To enforce the Schaff Award, the Club also secured a judgment in England in the terms of the Schaff Award, pursuant to section 66 of the Act (the "**Hamblen Judgment**").

The Club then issued the following sets of claims, essentially seeking to nullify any liability resulting from the Spanish Judgment and to recover its costs of the Spanish proceedings, with an additional claim for an anti-suit injunction against the States:

1. The Arbitration Claim (in arbitration): seeking a declaration that the pursuit of the Spanish Judgment was in breach of the obligation to arbitrate, an anti-suit injunction restraining the pursuit of the Spanish Judgment, and damages;
2. The Award Claim (in the Commercial Court): the Club sought damages or compensation for breach of obligation to honour the Schaff Award;
3. The Judgment Claim (in the Commercial Court): the Club sought damages or compensation from the States for breach of obligation to abide by the Hamblen Judgment.

In relation to the Arbitration Claim, orders were made in the Commercial Court for service of an arbitration claim form seeking the appointment of an arbitrator pursuant to section 18 of the Act (the "**section 18 Application**"). Contrary to the States' contention otherwise, the Commercial Court held that Spain was not entitled to state immunity and Mr Justice Henshaw appointed an arbitrator. Similarly, in the Award and Judgment Claims, the States were not entitled to state immunity. The Commercial Court also held that the English court had jurisdiction over the Award Claim, but not the Judgment Claim.

The States appealed on the grounds that the Commercial Court was wrong to find they did not have immunity and the Club appealed on the grounds that the court did have jurisdiction over the Judgment Claim. The Court of Appeal held as follows.

State immunity

Under section 3 of the SIA, a state will not have immunity in respect of proceedings relating to a commercial transaction. The Court of Appeal held that the pursuit of the Spanish proceedings by the States related to a "*commercial transaction*" within the definition in section of the SIA. The States' activity of seeking monetary compensation in the Spanish proceedings by virtue of a commercial contract (being the shipowner's insurance contract with the Club) in the context of a "commercial misadventure" was *"plainly commercial in character"*.

The court rejected the States' argument that, because the Award and Judgment claims were juridical in nature, they did not amount to a "*commercial transaction*". It was held that the commercial activity of pursuing the Spanish proceedings and registering the Spanish Judgment was essential to the Award and Judgment Claims and central to the underlying cause of action in seeking recourse under the insurance contract.

As to the Arbitration Claim, the court again held that it was clearly related to a commercial activity and the application to appoint an arbitrator similarly related to the commercial activity on which the dispute that arose was based. The court, similarly, rejected Spain's argument that the section 18 Application related to the question of arbitrability and did not have a commercial purpose. It held that: *"if the claims which the applicant is seeking to have arbitrated are related to commercial activity, an application to the curial court to enable the arbitration of those claims to take place is a proceeding relating to the same commercial activity"*.

The court also considered (in *obiter*) the impact on the section 18 Application of section 9 of the SIA, which provides that if a state submits a dispute to arbitration in writing, the state is not immune in respect of proceedings which relate to the arbitration.The court clarified that third parties (such as the States) to a contract containing an arbitration clause, who claims a right under such contract, take that right subject to the arbitration clause (and the resulting consequences). This is consistent with the well-established principle that a party who obtains the benefit of a right must also bear the attached burden. The States in this instance, claimed a right (which they were entitled to as a result of Spanish law) to a direct pay out from the insurer pursuant to the insurance contract between the shipowner and the Club which also contained an arbitration clause. Therefore, when asserting the States' claims and rights in the Spanish proceedings pursuant to the insurance contract, the States had implicitly agreed to be bound by the obligation to arbitrate the Club's claim. Therefore, rightly in the authors' view, it was held that section 9 of the SIA removed the States' immunity in the section 18 Application.

Comment

Unfortunately, the Supreme Court's strict reading of the SIA in the *General Dynamics* case creates a significant obstacle in circumstances where the state cannot realistically be served by the FCDO. The decision makes it much easier for states to deliberately avoid enforcement action, including in situations such as those in *General Dynamics*, where, ironically, Libya had copies of all the relevant documents and engaged with the case but were unable to be effectively served.

In the ***London Steam Ship Owners*** case on the other hand, the Court of Appeal's decision prevented the States from relying on state immunity where the underlying nature of a dispute (which they had voluntarily participated in) was commercial. The court made it clear that, when considering the question of state immunity and whether a transaction is indeed "*commercial*", it will analyse and consider the underlying activity and transaction being pursued. Here, seeking compensation from the Club under an insurance contract fell firmly within the court's understanding of a "commercial transaction" andthe court held firm against any other interpretations.

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TRAINING ON THE THEORY AND PRACTICE OF DISPUTE RESOLUTION

Nani Palkhivala Arbitration Centre ("**NPAC**") conducted a training programme on the 'Theory and Practice of Dispute Resolution' from 28th February 2022 to 4th March 2022 at its Centre in Chennai. The five-day programme was conducted for senior officers of the Government of India including bureaucrats from various departments.

Mr. R. Sankaranarayanan, Senior Advocate and Additional Solicitor General, Madras High Court, presided over the inaugural session of the event. During his speech, he set the context for the training programme through practical examples and anecdotes identifying the problem and highlighting the need for a solution in the form of alternate dispute resolution mechanisms.

In his inaugural speech, Mr. Sankaranarayanan made the following observations:

- There was difficulty in balancing policy decisions and execution of the policy decisions, without disrupting peace and tranquillity.
- It is critical to provide reasoning when making administrative decisions. The nature of reasoning must be such that it shows that the decision was made without any bias and that it could stand the judicial test.For any administrative decision, there must be logical thinking, understanding of the problem and finding out whether the solution is useful for the society at large.
- Government of India and State Governments were the biggest litigants in the country.
- While making decisions is one thing, the decision making process is a different thing and courts are more concerned about the latter, to find out whether there was any breach of principles relating to natural justice.
- Even a very good decision may suffer for want of reasons or appropriate material; appropriate material is one which must be capable of being perceived not only by the person making the decision but also by any independent entity to come to the same conclusion.
- Law was not all about reading a particular rule or provision, in which ever language it may be. It is important to go beyond the plain reading of language for the purpose of rendering justice.
- When democracy goes corrupt, the best is submerged. For democracy to not become corrupt, administration of systems has to be done so well that there is very little chance for courts to interfere.

As a part of the Indian Government's endeavour to create awareness about alternate dispute resolution mechanisms, NPAC has been conducting training programmes for various Government organizations and officials. This 5-day training programme was designed by NPAC to impart the basic principles of contract law, administrative law and arbitration law, along with some of their practical aspects, that are relevant to government officers.

The programme also included various other aspects likescope of Article 226 and 32 of the Constitution of India, history and features of Arbitration and Conciliation Act 1996, institutional vs. adhoc arbitration, drafting of arbitration clauses, importance of institutional arbitration clauses in government contracts under the arbitration law, the interplay between the arbitration law and certain other special laws, applicability of certain statutes to arbitration, moot court and field visit to NPAC to witness arbitration proceedings.

The programme was well received by the faculty and participants alike and we look forward to many such interactions and events, which we believe will go a long way in equipping India to deal with disputes better and eventually become a global hub for arbitration.

Group photo post the inaugural session, featuring Mr. N.L. Rajah, Senior Advocate and Director of NPAC(5th from left); Mr. R. Sankaranarayanan, Senior Advocate and Additional Solicitor General, Madras High Court (6th from left); Mr. R. Anand, Chartered Accountant and Director of NPAC (7th from left); and senior bureaucrats from the Indian Government, who participated in the training programme.

Group photo post the valediction of the training programme, featuring Dr. J. Durgalakshmi, Registrar of NPAC (6th from left); Mr. R. Anand, Chartered Accountant and Director of NPAC (7th from left); and senior bureaucrats from the Indian Government, who participated in the training programme.

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