ISSUE 1 | Volume 1| MARCH 2021

e-Newsletter

Centre for Alternate Dispute Resolutions & Professional Skills

Himachal Pradesh National Law University, Shimla

ABOUT THE CENTRE

The Centre for Alternative Dispute Resolution and Professional Skills (CADR&PS) is established by HPNLU, Shimla, with the goal of fostering research and imparting knowledge about Alternate Dispute Resolution (ADR). In order to improve awareness about the ADR and strengthen the current situation in India and abroad, the Centre will carry out various activities such as research and training, diploma and certificate courses, conferences, lectures, workshops, journals publication etc. The core purpose of the Centre is to encourage research into the field of ADR in order to find out the concerns in ADR, it is also necessary to analyze the existing structure and reasons for not being able to cater to the needs of emerging diversified disputes among persons and institutions.

ABOUT THE NEWSLETTER

In support of the Center's objectives and goals, the Centre agreed to initiate a quarterly e-Newsletter aimed primarily at catalysing awareness on ADR and fostering ADR culture through student's engagement in research avenues. The e-Newsletter intends to have five-sections which will include both national and international ADR news in the first section, interview of personalities/ expert in the second section, articles/ essays and case commentaries in third section. Various national and international opportunities for law students in the field of ADR will be mentioned in the fourth section and achievement by students of HPNLU will be provided in the last section.

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MESSAGE FROM THE VICE Chancellor

Prof. Dr. Nishtha Jaswal
Vice– Chancellor
HPNLU, Shimla

Alternative Dispute Redressal mechanism is witnessing a surge throughout the globe and India is also adapting to this mode of dispute redressal including changes in the institutional arrangements. However, to fully tap the resources and make the outreach of such mechanisms available to the last person of the society two-fold goals must be achieved. First, the need for increasing awareness about ADR among the population and second, extensive academic research to ensure that the institutionalized arrangements adopt the best practices from across the world for the effectiveness of ADR practices in India.

HPNLU, Shimla is working extensively to become a Centre for academic research excellence. In order to foster and contribute to the overall growth of ADR in the country, the University has established the Centre for Alternative Dispute Redressal and Professional Skills (CADR&PS) to train the students in this area. The aim of the Centre is to provide a platform for interaction between professionals in the field and the students.

The Covid-19 pandemic has also ushered, albeit unfortunately, the path for ADR and in light of the shifts we are witnessing today ADR, can prove to be a significant tool in the hands of the disputants. The first edition of the Newsletter of the CADR & PS encompasses the highlights of work done by the Centre. We look forward to your suggestions and association with the Centre to make it a more comprehensive and effective endeavour.

Prof. Dr. S.S. Jaswal
Registrar
HPNLU, Shimla

MESSAGE FROM THE DIRECTOR'S DESK

It is a matter of great satisfaction and pride that the team of Centre for Alternative Dispute Resolutions and Professional Skills (CADR), HPNLU, Shimla, is bringing its first e-newsletter. The newly established Centre is trying its best to achieve academic and professional excellence in the field of ADR. Though the ADR is new in our judicial system, it is becoming popular among the masses. Considering the importance of the Centre will always be a learner-centric institute, dedicated to the success of learners and committed to excellent teaching, innovative research and responsible community services. My heartfelt Congratulations to the CADR team for bringing this e-newsletter. I am hopeful that the newsletter will act as an important catalyst to spread awareness among all the stakeholders. I wish this e-newsletter would be a successful imitative to fulfil the objectives of CADR.

Mr. Santosh Kr. Sharma
Director of CADR & PS

Message FROM THE DIRECTOR'S DESK

It is a matter of great pleasure to launch the maiden issue of e-newsletter from the Centre of Alternative Dispute Resolution & Professional Skills (CADR), HPNLU, Shimla. The e-newsletter is conceptualized to catalyze the awareness about Alternative Dispute Resolution and to foster ADR culture with the participation of students in research avenues. These efforts will not only generate greater interest in field of ADR but also create and disseminate new knowledge. On behalf of the Centre, I express my sincere gratitude to the Hon'ble Vice-Chancellor, Prof. (Dr.) Nishtha Jaswal and worthy Registrar, Prof. (Dr.) S.S.Jaswal for giving me opportunity to work as Director of the Centre and my appreciation to all the team members for their relentless efforts. I express my gratitude to all the members of Centre for Alternative Dispute Resolution and Professional Skills, and also good wishes for future endeavours.


Of late
Section - 1

INTERNATIONAL UPDATE

1. NEW INTERNATIONAL CHAMBER OF COMMERCE (ICC) RULES 2021 AND NEW ICC NOTE TO PARTIES AND ARBITRAL TRIBUNAL COME INTO FORCE

The revised ICC Arbitration Rules, 2021 along with the revised Note to Parties and Arbitral Tribunals shall be applicable to all ICC arbitrations commenced on or after January 1, 2021. The key amendments are made to the consolidation provision and to the joinder provisions, which allow joinder after the confirmation or appointment of a tribunal in certain limited circumstances. It also provides the provision for virtual hearings and joinder after the confirmation or appointment of a tribunal in certain limited circumstances. read more.

2. THE DUBAI INTERNATIONAL FINANCIAL CENTRE-LONDON COURT OF INTERNATIONAL ARBITRATION [DIFC-LCIA] ARBITRATION RULES 2021 HAS BEEN ENACTED.

The updated DIFC-LCIA Arbitration Rules 2021 started enforcement from January 1, 2021. The new changes have been made to promote the expeditious, efficient and fair conduct of arbitrations. In this update, the key features are: Broadening of the powers of the LCIA Court and Tribunal to order consolidation and the concurrent conduct of arbitrations. Expedited proceedings and emphasis on case management Electronic communications and virtual hearings. read more.

3. IN WITH THE NEW: THE AMENDED LONDON COURT OF INTERNATIONAL ARBITRATION RULES

There has been a recent amendment to the Arbitration Rules and Mediation Rules by the London Court of International Arbitration that was to be in effect from October 1, 2020. This amendment focuses on the recent trends in application of technology to the practice of international arbitration in the wake of COVID-19 pandemic. For instance, the increase is virtual hearings has been increased. read more.

4. HONG KONG AND MAINLAND CHINA ENTER SUPPLEMENTAL ARRANGEMENT CONCERNING MUTUAL ENFORCEMENT OF ARBITRAL AWARDS

A Supplemental Arrangement was signed between the Hong Kong Department of Justice and the Chinese Supreme People's Court on November 27, 2020. The Supplement Arrangement concerns arbitral awards enforcement mutually between the Hong Kong Special Administrative Region and the Mainland. This brought in modifications to the previously existing Arrangement that was brought into action on February 1, 2000, after gaining the assent on June 21, 1999. read more.

5. SINGAPORE INTERNATIONAL ARBITRATION CENTRE OPENS IN NEW YORK

Reflecting on the popularity that the Singapore International Arbitration Centre has gained among the United States parties base, the Centre has now opened an office in New York. The current overseas offices include India, China and South Korea etc. Adirana Uson a former Singapore-based associate at Norton Rose Fulbright has been appointed the head for the American branch. read more.

6. SINGAPORE CONVENTION ON MEDIATED SETTLEMENT AGREEMENTS COMES INTO FORCE ON SEPTEMBER 12, 2020

The Singapore Mediation Convention came into force on September 12, 2020. This marked important day in the journey of dispute resolution. The signing ceremony for the same was held in August 7, 2019. The United Nations Commission on International Trade Law working Group II's aim to implement an international regime for the enforcement of mediated settlements broadly akin to the 1958 New York Convention for the enforcement of arbitral awards, to provide dispute resolution with a tool that tackles speed, cost and efficiency. read more.

7. NEW ACT TO ENHANCE SINGAPORE'S STATUS AS AN INTERNATIONAL ARBITRATION HUB

Singapore Parliament passed the International Arbitration [Amendment] Act on October 6, 2020. In the year 2012, the last amendment made to the International Arbitration Act significantly changed the arbitration scenario. The multi-party arbitrations in Singapore have witnessed a sharp growth in number. However, these proceedings may be stalled in case the parties fail to reach the meeting of mind in regard to the appointment of tribunal. This happened as the International Arbitration Act did not talk about the mechanism to appoint the arbitrators in a multi-party scenario. read more.

8. SINGAPORE INTERNATIONAL COMMERCIAL COURT UPHOLDS ARBITRAL AWARDS DESPITE TRIBUNAL ERRORS AND FOREIGN ILLEGALITY

The Singapore International Commercial Court in a recent judgment of *CBX & Another* v. *CBZ & Others,* [2020] SGHC (I) 17 denied the acceptance of an application intended to set aside various arbitral awards issued in Singapore. This was done even after the court had accepted the argument that there were errors of law and contravention of Thai mandatory law by the tribunals. read more.

9. THE RUSSIAN ARBITRATION CENTRE TAKES INTO CONSIDERATION THE MATTER OF DISCLOSING INFORMATION, IN TERMS OF CONFIDENTIALITY v. IMPARTIALITY

As a general rule the arbitrator needs to disclose all the information which could lead to conflict of interest of the parties but still International Bar Association [IBA] guidelines are silent on this issue. The Russian arbitration centre takes the mater into consideration i.e. whether there is an arbitrator's duty to disclose the information leading to a conflict of interest exceeding the confidentiality obligations with reference to the IBA guidelines, arbitration rules and case laws. read more.

10. STATE-OF-THE-ART HEARING FACILITY IN TOKYO OFFICIALLY LAUNCHES

The official launch of the new Tokyo hearing facility of the Japan International Dispute Resolution Centre [JIDRC] was held on October 12, 2020. The opening ceremony was joined by the participants virtually from all over the globe. This is definitely going to be a milestone in Japan's journey to become a popular seat for disposal of international arbitration proceedings. read more.

11. AUSTRALIAN COURT ENFORCES FOREIGN ARBITRAL AWARD IN PEOPLE'S REPUBLIC OF CHINA

The Federal Court of Australia [FCA] in a recent case of *Tianjin Jishengtai Investment Consulting Partnership Enterprise* v. *Huang* [2020] FCA 767, reserved the decision enforcing an award made by the China International and Trade Arbitration Commission in Australia. The award had been granted in the People's Republic of China on September 03, 2018. Particularly the court held that order for enforcement would be a declaration in accordance with the section 8(3) of the International Arbitration Act 1974 (Cth) (IAA) order for enforcement would be a declaration pursuant to section 8(3) of the International Arbitration Act 1974 (Cth) (IAA). read more.

12. UNITED STATES SUPREME COURT PAVES THE WAY FOR NON-SIGNATORIES TO ENFORCE ARBITRATION AGREEMENTS UNDER DOMESTIC EQUITABLE ESTOPPEL PRINCIPLES

The New York convention does not in any way preclude non-signatories from enforcing arbitration agreements that is based on the application of domestic equitable estoppel doctrines. This was unanimously held by the United States Supreme Court on June 1, 2020 when it was looking into *GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC U.S.* Supreme Court Case No. 18–1048, Slip. Op. 590 U. S. (June 1, 2020). read more.

13. EXERT PANEL REVISES SOUTH AFRICA ARBITRATION RULES TO BOOST REGIONAL STATUS.

The Arbitration Foundation of South Africa [AFSA] recently launched a brand-new set of rules. One of the most famous set of Arbitration rules of South Africa was given a makeover by a committee comprising the leading African and experts from around the globe. This update was brought about to catch up with the prevailing international trends in the field. There are changes multi-party contract proceedings rules (including joinder and consolidation), which are significant for construction claims, and new rules on confidentiality and third-party funding read more.

14. INTERNATIONAL CHAMBER OF COMMERCE SELECTS NEW BELT AND ROAD COMMISSION CO-CHAIRS

Susan Munro, the managing partner of the Beijing and newly opened Hong Kong offices of Steptoe and Johnson, and Robert Pé, of Hong Kong's Arbitration Chambers, are to succeed Justin D'Agostino as chair of the International Court of Arbitration's Belt and Road Commission. read more.

15. MALAYSIAN HIGH COURT GRANTS FIRST ANTI-ARBITRATION INJUNCTION ON THE GROUNDS OF SOVEREIGN IMMUNITY

Malaysian High Court for the first time ever agreed to grant an anti-arbitration injunction in the case of *Government of Malaysia* v. *Nurhima Kiram Fornan & Ors*, which involved a territorial claim by the current heirs of the historic Sultan of Sulu over Sabah (formerly known as North Borneo), as well as the decision of the High Court itself. The injunction was to restrain any foreign arbitration proceedings on the basis of sovereign immunity. read more.

16. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW RELEASE DRAFT CODE OF CONDUCT FOR INVESTOR-STATE DISPUTE SETTLEMENT ADJUDICATORS

The United Nations Commission on International Trade Law and the International Centre for Settlement of Investment Disputes jointly presented the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement on May 1, 2020. The main purpose behind preparing such code is to address the various ethical issues in the Investor-State Dispute Settlement. read more.

17. LAUNCH OF THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION

The Hague Rules on Business and Human Rights Arbitration after a five-year long project were launched at the Peace Palace in the Hague on December 12, 2019. The rules concern the possible effect of various business activities on the Human Rights and dispute between them. The rules are broadly based on the United Nations Commission on International Trade Law Arbitration Rules that was adopted in the year 2013. read more.

18. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES [ICSID] RELEASES FOURTH WORKING PAPER ON ICSID RULES REVISION: INCREASING CONSENSUS, BUT NOTABLE DEVELOPMENTS

The International Centre for Settlement of Investment Disputes Secretariat through its Working Paper numbered four proposed for amendment for Investor-State Dispute Settlement on February 28, 2020. The Proposals for Amendment of the ICSID Rules was formulated on the findings of the Working Paper. The main issues in the dispute settlement related to confidentiality, costs and transparency. read more.

19. ISTANBUL ARBITRATION CENTRE [ISTAC] INTRODUCES MEDIATION-ARBITRATION RULES

After introducing the Arbitration and Mediation Rules on October 26, 2015, the ISTAC introduced the Mediation-Arbitration Rules on November 15, 2019. The mediation-arbitration model, known as Med-Arb, is an alternative dispute resolution method where parties attempt to resolve a dispute through mediation, and if mediation fails, the parties resort to arbitration. read more.

20. INTERNATIONAL COURT OF ARBITRATION PREPARES FOR NEW PRESIDENT IN 2021

The president of International Court of Arbitration, Alexis Mourre has declared on March 27, 2020 over a video conference that after completion of the two terms, he shall not run for re-election to the post. The video conference replace the International Commission on Arbitration and ADR's spring meeting, which has been rescheduled to July. He was elected to the post in the year 2015 after John Beechey. Later he was re-elected in the year 2018. Mourre's second term will end in the mid-2021. read more.

21. SWISS FEDERAL SUPREME COURT [SFSC] UPHOLDS BROAD INTERPRETATION OF OBJECTIVE SCOPE OF ARBITRATION AGREEMENT

The SFSC, in its decision dated January 6, 2020 (Case No. 4A 342/2019 (in German)), held that an arbitration clause in an agreement regulates the assurance of quality in all contractual disputes between the parties if the agreement's wording and the circumstances support such broad interpretation. The SFSC reiterated in its decision the principles of the objective scope of an arbitration agreement under Swiss law i.e. "the decisive element of an arbitration agreement is the parties' expression of their will to have certain disputes decided by an arbitral tribunal". read more.

22. APPLICATION TO REJECT AWARD BASED ON PUBLIC-POLICY DEFENCE UNDER THE NEW YORK CONVENTION FAILS

In the case of *Sladjana Cvoro* v. *Carnival Corp.*, [941 F.3d 487], the United States Court of Appeals for the 11th Circuit held that the test whether a court can refuse the enforcement of an foreign arbitral award is based on public policy not on whether the statutory rights under U.S. law provided to the claimant during arbitration. Rather, the public-policy defense "applies only when confirmation of enforcement of a foreign arbitration award would violate the forum state's most basic notions of morality and justice". read more.

23. NEW SIGNATORIES AND LATEST ACCESSION TO THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ("THE NEW YORK CONVENTION") IN 2020

The SEYCHELLES accedes and become 162nd state party to New York Convention 1958. Shortly thereafter PALAU, an island nation located in the Western Pacific Ocean accedes and become 163rd state party to New York Convention 1958. Thereafter, TONGA has become the 164th state to join the Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention). Further on August 24, 2020 ETHIOPIA accedes and become 165th party to the convention. Lastly, On October 28, 2020 SIERRA LEONE become the 166th state party to the New York Convention, 1958. read more.

24. CHINA'S TOP COURT PUBLISHES ITS FIRST ANNUAL REPORT ON JUDICIAL REVIEW OF ARBITRATION-RELATED CASES

On December 23, 2020, the Supreme People's Court (SPC) of China delivered its bilingual 2019 Annual Report on Judicial Review of Arbitration Cases in China. It is the absolute first report given by the SPC summing up the courts' methodology for judicial review of arbitration related cases. According to the SPC, the Report also addresses recent development in arbitration practice, such as the formation of Belt and Road Mechanism for Resolution of International Commercial Disputes and China Pilot Free Trade Zone Arbitration Mechanism. read more.

25. GERMAN FEDERAL COURT OF JUSTICE APPLIES CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS TO THE VALIDITY OF THE ARBITRATION AGREEMENT

The matter is whether the Contracts for the International Sale of Goods can govern the arbitration agreement? What law governs the arbitration agreement if the parties have not explicitly chosen a law for the arbitration agreement? The agreement of arbitration and substantive agreement is different [the doctrine of separability]. Thus, the arbitration agreement can be represented by an alternate law from a substantive arrangement. read more.

26. CENTER FOR ARBITRATION AND MEDIATION OF THE CHAMBER OF COMMERCE BRAZIL-CANADA ESTABLISHED EMERGENCY ARBITRATOR AND EXPEDITED PROCEDURE

The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, which is the biggest Brazilian arbitration organization, has as of late ordered two resolutions executing huge turns of events: Resolution 44/2020 on crisis mediators and Resolution 46/2021 on the expedited procedure. CAM-CCBC is following the trend of international institutions, to foster the use of emergency arbitrators and to establish simpler and cheaper procedures for lower value arbitrations. read more.

27. SINGAPORE INTERNATIONAL ARBITRATION CENTRE SIGNS MOU WITH SUZHOU INDUSTRIAL PARK ADMINISTRATIVE COMMITTEE

The Singapore International Arbitration Centre (SIAC) has entered into a Memorandum of Understanding (MOU) with the Suzhou Industrial Park Administrative Committee (SIP) to promote international arbitration as a preferred method of dispute resolution for resolving international disputes. Under the MOU, SIAC and SIP will work together to jointly promote international arbitration to companies, businesses and investors in Suzhou for the resolution of their cross-border disputes. read more.

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NATIONAL UPDATE

1. SUPREME COURT FORMS COMMITTEE TO DRAFT MEDIATION LAW, WILL SEND TO GOVERNMENT

A panel has been set up by Supreme Court of India to draft legislation for the Supreme Court to give legal sanctity to disputes settled through mediation, which would then be sent to the government as a suggestion. The panel, to be headed by mediator Niranjan Bhat met in Hyderabad on January 12, 2021 and will recommend a code of conduct for mediators. read more.

2. INDIA'S ARBITRATION AND CONCILIATION (AMENDMENT) ACT 2019 COMES INTO FORCE

On August 9, 2019, the Arbitration and Conciliation (Amendment) Act 2019 came into force in India. The legislative amendment seeks to promote institutional arbitration and expedite the resolution of commercial disputes by arbitration with a view to making India a hub for domestic and international arbitration. The Amendment Act introduces the changes so as to make the arbitral process cost effective, speedy and with minimal court intervention. read more.

3. SUPREME COURT: PLACE OF ARBITRATION IS NOT NECESSARILY THE SEAT OF ARBITRATION

The Supreme Court of India in *Mankastu Impex Private Limited* v. *Air Visual Limited*, observed that mere expression "place of arbitration" cannot be the basis to determine the 'seat of arbitration'. The bench of Justices R. Banumathi, AS Bopanna and Hrishikesh Roy Observed that the "seat" should be determined by the intention of the parties from other clauses in the agreement and the conduct of the parties. read more.

4. REMOTE NEGOTIATIONS PAVE WAY FOR JIO- FACEBOOK DEAL

Jio and Facebook underwent a series of remote Merger & acquisition dialogue and agreement negotiations to sign a deal between both. Reportedly, Facebook is likely to invest $5.7 million in the reliance group of industries. The deal is considered to be one of the greatest endeavour in the times of pandemic. The overall business leadership team of Facebook was mostly involved in discussions at the back-end with various top stakeholders of Reliance Industries group. read more.

5. HIGH COURT CANNOT SUO MOTU APPOINT AN ARBITRATOR IGNORING THE PROCEDURE PRESCRIBED IN THE AGREEMENT BETWEEN PARTIES

The Supreme Court has noticed that an arbitrator cannot be appointed by the High Court by ignoring the procedure prescribed under the agreement between parties for appointment of an arbitrator. In this case, there was an agreement between Jindal Steel and Power Limited (JSPL) and Tata Trading Corporation of India, clause 19 of it sets out the mechanism for resolution of disputes under favour of Indian Council Arbitration and Rules. read more.

6. DELHI HIGH COURT LAUNCHES SAMADHAN ONLINE MEDIATION PROJECT

On June 26, 2020 Delhi High Court has launched SAMADHAN , an online mediation project which provides to hold the mediation proceedings via video conferencing for parties. It aims to provide the services in both the pending as well as fresh cases. This is designed to cater to the needs of dispute resolution at the times of pandemic where physical meets are difficult. read more.

7. SPECIAL LEAVE TO APPEAL AGAINST HC JUDGEMENT RECOGNIZING AND ENFORCING A FOREIGN AWARD WOULD LIE ONLY ON 'EXTREMELY NARROW GROUND': SUPREME COURT

An appeal against a High Court under Article 136 of the Indian Constitution, that enforces any foreign award would only lie on a narrow ground. This was observed by the Supreme Court. The court further observed that 'blatant disregard of Section 48 in very exceptional cases' is not to be used indiscriminately by the courts. read more.

8. ARBITRATION PANEL CITES PRIME MINISTER OF INDIA, MINISTER'S ASSERTION ON RETRO TAX TO OVERTURN CARIN TAX DEMAND

Permanent Court of Arbitration in The Hague ordered return of the value of shares that has been sold by the Income Tax Department. It also ordered the return of dividend the department has seized along with the tax refunds withheld to recover tax demand. The 2012 amendment to the Income Tax Act empowered the authorities to seek taxes on past deals as well. It cited various statements by the Prime Minister Narendra Modi and other ministers who pledged not to use retrospective taxation. read more.

9. ITALIAN MARINES CASE: GOVERNMENT TO ACCEPT INTERNATIONAL ARBITRATION TRIBUNAL

The international arbitration tribunal award that ruled that Italy would try the Italian marines involved in the *Enrica Lexie* case and not India. The central government told the Supreme Court that it has decided to abide by this award. However, the deaths caused off the Kerala Coast incident could be compensated. New Delhi is allowed to seek this compensation. It held that the actions of the Italian military officers and, consequently, Italy breached India's freedom of navigation under UNCLOS Article 87(1)(a) and 90. read more.

10. SUPREME COURT: WRIT AGAINST DISMISSAL OF ARBITRATION APPLICATION BY ARBITRATOR CAN BE ALLOWED ONLY ON THE GROUND OF LACK OF INHERIT JURISDICTION

If the patent lack of inherent jurisdiction is made out, only then writ jurisdiction against the dismissal of an arbitration application by an arbitrator can be made viable. This was held by Supreme Court in the petition in which the parties are seeking remedy under Article 227 of the Constitution. It was observed that protocol as stated under Section 16 of the Arbitration Act was not followed and that the plea was filed after the finality of the order was given by the Arbitral Tribunal. read more.

11. MERE SUBMISSION TO THE EXCLUSIVE JURISDICTION OF THE FOREIGN COURT DOES NOT RESULT IN THE OUSTER OF INDIAN COURTS U/S 9 OF THE ARBITRATION ACT: DELHI HIGH COURT

Under the S. 9 of the Arbitration and Conciliation Act, 1996, any interim measure can be granted to secure the corpus of arbitration. This was held by a single judge bench in the case of *Big Charter Private Limited* v. *Ezen Aviation Pvt. Ltd.* The jurisdiction of Indian Courts is not barred under the S. 9 of the act by the conferment of exclusive jurisdiction on Singaporean Courts. read more.

12. INDIA TO CHALLENGE THE VODAFONE ARBITRAL AWARD

India has challenged an international tribunal's verdict in favour of British telecom giant Vodafone Group on the advice of the solicitor general for India, Tushar Mehta. He reasoned that the power of any arbitral tribunal to declare parliamentary legislation passed by a sovereign country to be ineffective has to be challenged. The case involves a Rs. 20,000 crore demands. read more.

13. CONFEDERATION OF ALL INDIA TRADERS [CAIT] SAYS AMAZON'S ARBITRARY POLICIES TO DOMINATE INDIA'S RETAIL TRADE SHOULD END

The CAIT said Amazon's "manipulative, coercive, arbitrary and dictatorial policies" dominates India's retail trade. This according to CAIT should come to end. The court refused to order an injunction to restrain Amazon from writing to the competition commission, SEBI and other authorities regarding the SIAC Arbitral award in the Rs. 24,713 crore deals with reliance retail read more.

14. THE COURT IS NOT REQUIRED TO EXAMINE THE MERITS OF THE INTERPRETATION PROVIDED IN THE AWARD: SUPREME COURT

The Supreme Court of India in *Oil India Ltd* v. *South East Asia Marine Engineering and Constructions Ltd.*, observed the scope of court's jurisdiction under Section 34 of arbitration act that a court can set aside the award only on the grounds provided in the arbitration act. It was held that unless they were of the view that such an interpretation was reasonably not possible, courts may not examine the merits of the interpretation provided in the award by the arbitrator. read more.

15. SUPREME COURT REFERS TWO CASES TO MUMBAI CENTRE FOR INTERNATIONAL ARBITRATION

Two cases were referred to the Mumbai Centre for International Arbitration [MCIA] by the Supreme Court. One of the cases had Ranjan Gogoi, the former Chief Justice of India (CJI), as the sole arbitrator. The orders were passed by a bench of Justices Ajay Rastogi and Indu Malhotra. The cases were *MCM Service Private Limited* v. *Ithalia Thai Development Public Company Limited* and *Grasim Industries Ltd.* v. *Visa Resources PTE Ltd.* read more.

16. BANGLADESH-INDIA MEDIATORS FORUM HAS BEEN SET UP

Bangladesh India Mediators Forum [BIMF] has be set to in order to promote the mediation in resolving the dispute with GVV Victor as the first chairman of the board. The Forum was inaugurated in the presence of Justice Imman Ali, the senior most Judge, Appellate Division, Supreme Court of Bangladesh. BIMF seeks to promote bilateral working environment between the two neighbouring countries with the aim to advance local and regional learning of strategic conflict management and dispute resolution through mediation process. read more

17. ORDER TERMINATING ARBITRATION PROCEEDINGS UNDER SECTION 32(2)(c) ARBITRATION ACT NOT AN AWARD

In response to the plea filed in the case of *PCL Suncon* v. *National Highway Authority of India*, a single judge bench held that an order terminating arbitration proceedings under the section 32(2)(c) of the Arbitration and Conciliation Act, 1996 can be challenged under the section 14 (2) as it is not an award. The case had been filed in the Delhi High Court. read more.

18. HIGH COURT OF GUJARAT FINDS THAT TWO INDIAN PARTIES CAN CHOOSE A FOREIGN SEAT OF ARBITRATION BUT CANNOT OBTAIN INTERIM RELIEF IN INDIAN COURTS

The Gujarat High Court as of late gave over a huge decision in *GE Power Conversion India Private Limited* v. *PASL Wind Solutions Private Limited* [Arbitration Petition No. 131 and 134 of 2019], affirming that two Indian parties are allowed to pick an unfamiliar seat of arbitration and that the award from such arbitration may then be implemented in India as a foreign award. read more.

19. WHAT IS APPROPRIATE LIMITATION PERIOD APPLICABLE TO APPEALS FILED UNDER SECTION 37 OF ARBITRATION AND CONCILIATION ACT? SUPREME COURT TO DECIDE

For this situation, the appeal filed by the Union of India under Section 13 of the Commercial Courts Act read with Section 37 of the Arbitration and Conciliation was excused by the division bench of the Delhi High Court on the ground of deferral. The High Court followed the Supreme Court judgment in *Consolidated Engineering Enterprises* v. *Principal Secretary, Irrigation Department* [(2008) 7 SCC 169], wherein it was held that relevant time of limit is represented by Article 116 of the Schedule to the Limitation Act, 1963, which recommends 90 days' for appeals to the High Court under the CPC. read more.

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THE ARBITRATION AND CONCILIATION [AMENDMENT] ORDINANCE, 2020

The ordinance intended to amend the Arbitration and Conciliation Act, 1966 was promulgated by the President Mr. Ram Nath Kovind on the 4th of November, 2020. The ordinance was brought when the Parliament was not in the session under Article 123 of the Constitution. This was initiated by the Legislative Department in the Ministry of Law and Justice, Government of India. The principal Act was enforced to deal with the arbitration and conciliation proceedings at both domestic and international levels. It discusses the definition of different terms concerning arbitration and conciliation. This ordinance follows the Arbitration and Conciliation [Amendment] Act, 2019. The various sectors of stakeholders raised their concerns after the amendment made in the year 2019. The main contention addressed in the ordinance pertains to the stay of the arbitral award.

The key highlights of the provision of the amendment Ordinance are:

1. Automatic Stay on Awards:

The arbitral award refers to the order given during the proceeding of arbitration. The principal Act [1996] had provisions through which the parties to an arbitration proceeding could apply for setting aside of the award. Later, the courts inferred that under this provision, the moment the party approached the court by applying to set aside an arbitral award implied an automatic stay on it. The amendment brought about in the year 2015, cleared that an arbitral award could not be set aside simply because an application for the same has been filed with the court.

Additionally, this Ordinance amends section 36 of the Act. A clause has been inserted in subsection (3) after the proviso. Hence, laying forth the rule that an arbitral award can still stay even at the times when the application to set aside is pending before the court. However, few conditions have to be looked into before granting such a stay. The court has been assigned this duty. The conditions are as follows:

A. the relevant arbitration agreement or contract

B. whether there was fraud or corruption involved in the making of the award

C. The changes brought about would be effective from October 23, 2015.

2. Qualification of Arbitrators:

A separate schedule had been employed to specify the accreditation, experience, and qualifications of the arbitrators. The requirements among others include:

A. An advocate with an experience of 10 years under the Advocates Act, 1961

B. An officer of the Indian Legal Service

Besides this, the other generally followed norms involve being thorough with the Constitution of India and others. Section 43J of the Act therefore stands amended. The Ordinance states that these matters including accreditation, experience, and qualification of the arbitrators shall be specified by regulations. However, the Act does not provide for the said regulations that would govern the qualifications of the arbitrator.

3. Omission of 8th Schedule

There is an omission of the Schedule prescribed in the Ordinance. The Eight Schedule in the Act [The Principal Act, 1961] has been omitted by the provisions of the Ordinance. This has been included after receiving huge criticism as it was alleged that this prevented India from engaging foreign arbitrators.

The amendments brought about by the Ordinance are in a way a good start towards helping in the corruption and fraud arbitration cases. However, the question of the hour is how are the courts prepared to interpret proving a "prima facie" of such incidence. The burden of proof is still ambiguous. The ordinance will also be able to eliminate the unnecessary applications made under Section 36 just to stall the arbitration and the award operation.

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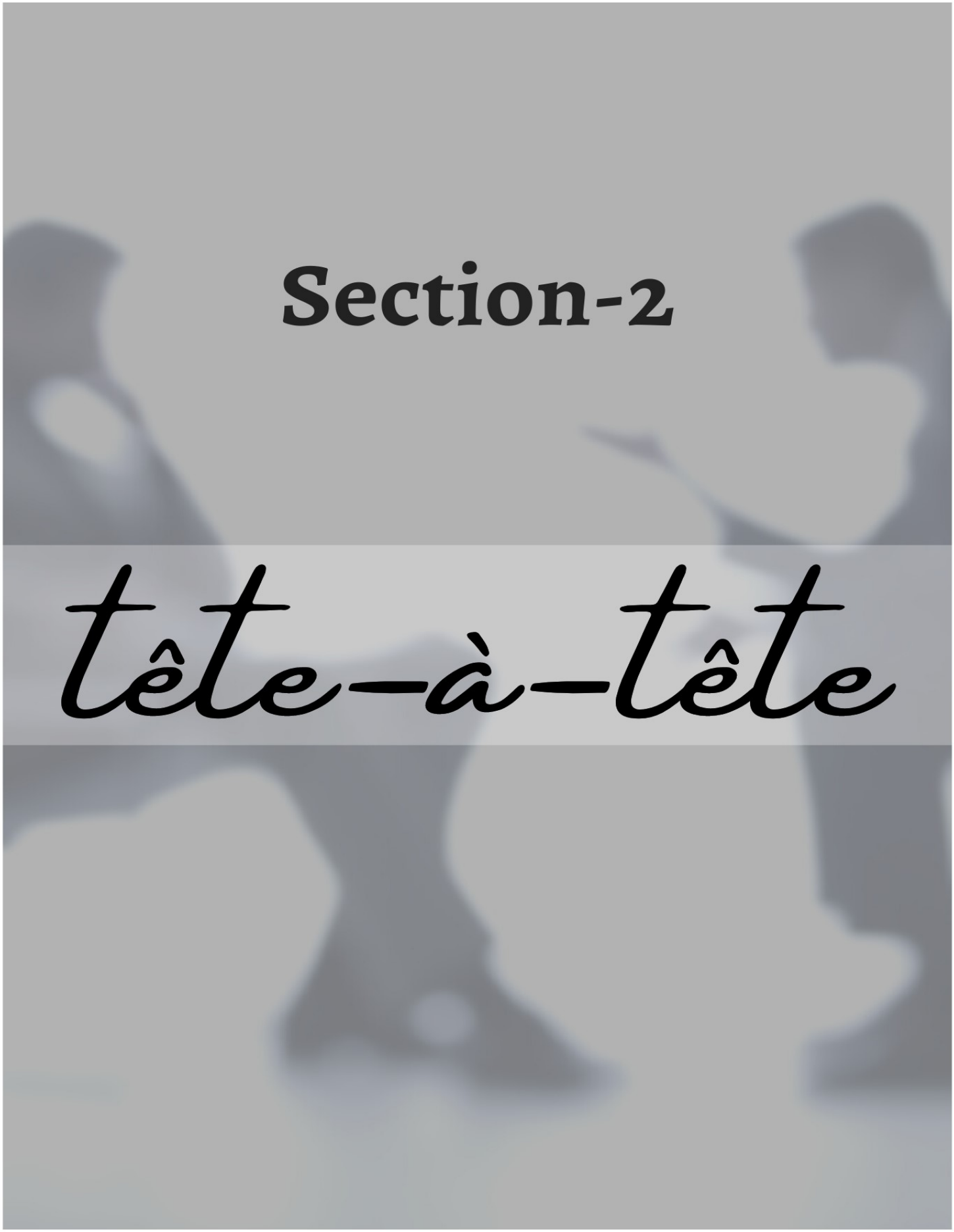

Section-2

tête-à-tête

TETE-A-TETE WITH IRAM MAJID

MS. IRAM MAJID
Director,
Indian Institute of Arbitration and Mediation

In this interview we speak to her about:

- Her journey from being a law student to a successful Mediator.
- Skills required to become an Arbitrator and a Mediator.
- Her view on different legal education system.
- Importance of extracurricular activities in law student's life.
- Significance of moots and their preparation.

Ms. Iram Majid is a legal professional with experience of 16+ years in handling a wide range of criminal, matrimonial, civil, commercial, banking and finance matters inside the court as Advocate and outside the court as Mediator. She is an IMI Certified Mediator. She has undergone training in mediation and cross culture mediation from Pepperdine University, Straus Institute of Dispute Resolution, USA and Advance Mediation training from Harvard Law School, USA. She is also a qualified mediator, enlisted on the panel of Delhi High Court Mediation Centre. She is also the Regional Director of BIMS Bangladesh International Mediation society in India. She is certified for International Business Negotiation and as Accredited Mediator from IIAM India.

Iram is the Co-founder and Secretary General of the International Federation of Mediators in France and a faculty of IIAM. She has won BIAMAC top 10 mediators in Asia-Pacific Awards 2019. She is a Member of CIARB UK, Thailand Arbitration Centre, International Federation of Mediators, HKIAC, and CIArb UK. She is also the Ambassador in International Brazil Arbitration and Mediation Centre (IBRAMAC). She has judged in ICC Mediation Moot Competition in Paris and Vis East Moot for Arbitration in Hong Kong and Vienna.

Iram is the co-author of the book "Definition of Mediation" published by BLT and has compiled a book "Landmark judgments on Mediation and Arbitration. She has participated in various seminars as a delegate and speaker, like Hong Kong, South Korea, Indonesia, Bangladesh, UAE, France, United States of America, United Kingdom, Tanzania, Morocco, etc.

1. **ADR is developing and has changed from the date you started your practice till today. How has your journey been from being a graduate to an expert in the field of ADR and your perception to the changes in the field?**

Well yes ADR has changed and will be changing in future as well. So, let me share with you my journey. I pursued my BA, LLB degree from Aligarh Muslim University and thereafter, LLM. Was very apprehensive during my college days being the first Gen Lawyer that how will I Create my name. At the beginning of my career, I started with the Delhi High Court. I was a litigating lawyer who used to handle cases relating to civil, commercial, matrimonial, government matters and matters pertaining to writ.

My hard work was recognised by Judges and within three years of practice, I was appointed as the Sole Arbitrator in a matter and I consider this as the beginning of my journey of ADR. Gradually, I started getting assignments from the courts, for example, appointment as a local commissioner and Arbitrator. Since then, there has been no looking back and I believe that I have not chosen ADR but it has chosen me. Only after being appointed as an arbitrator, I realized that ADR is a speedy process of administering justice to the aggrieved parties when compared to litigation. It is not only party-centric but very effective as well.

I consider myself extremely lucky to have been empanelled with the Mediation Centre in the Delhi High Court, where I realized how efficiently access to justice can be sought through the Mediation process.

I would like to elucidate upon a case I handled, which changed my perception about ADR completely – It was a matrimonial dispute wherein the couple were struggling for 25 years, the husband was on the deathbed and his last wish was to conclude the matter as fast as possible and through the mechanism of mediation, the matter could be settled in just five dates. After the settlement, the husband died in a month or so. When the couple got separated, they had two children, aged five years and three years, respectively. This matter intrigued me since, in spite of all the laws and procedure being in place, access to justice is very arduous. Hence, I believe that an alternative mechanism through Mediation and Arbitration to deliver justice in the real sense is the need of the hour. The matters settled though these alternative mechanisms do not aid in the administration of justice merely in a clerical way but in a manner, which reflects in the society and also benefits people at large. According to me, if justice is not given timely, it is no justice at all.

2. As being the director of the Indian Institute of Arbitration & Mediation, what is your take on India's footing in ADR on International Level? And what changes can be introduced for the development of India in the field of ADR?

Being the director of the Indian Institute of Arbitration and Mediation, I would like to mention that India is at the adult stage as far as mediation is concerned. The different community stakeholders have already accepted the need and use of Arbitration and Mediation. Society lacks awareness about mediation as a method of dispute resolution, but India is at a process stage, wherein it strives to get the benefits of Mediation to reach as many people as possible.

At the International Level, after the enactment of the Singapore Convention, the scope, usage and application of Mediation as a dispute resolution process has increased manifold. I believe that India should bring reforms in the system by enacting a legislation on Mediation that will lead to the efficient functioning of the process. Further, only if there is proper legislation on Mediation, will India be able to adopt the practices of Mediation efficiently and imbibe its fruits completely.

A comparison to the Arbitration and Conciliation Act, 1996 may be made in this regard. Since we have properly enacted legislation as far as arbitration is concerned, we can enforce the international awards under Part II of the Act. We could not have per se enforced the New York Convention in the absence of the above-mentioned Act.

I believe India lacks mechanisms to enforce the international settlements under the Singapore Convention and hence, my suggestion is that India should enact proper legislation on Mediation for such enforcement.

In the light of the same, India should organize awareness camps about Mediation, Bar Council of India should make it mandatory for students of law to study the subject of ADR in the second year itself and not in the later years and furthermore, Indian Universities should offer diploma courses and masters in Mediation and Arbitration. The country should invest in Research and Development programmes in the furtherance of ADR. Hence, colleges and courts play a pivotal role in raising awareness about ADR. The institutions such as the Indian Institute of Arbitration and Mediation (IIAM), the American Arbitration Association (AAA), New York and the International Centre for Alternative Dispute Resolution are already providing platforms for settlement of cases amicably and outside the court and will continue to provide their support. Another observation is that we generally focus on mediators and not lawyers who become mediation lawyers and there exists such a need for growth in the field of mediation advocacy. Thus, we must attempt to spread awareness about ADR so that the business communities and other stakeholders can understand and avail the benefits of the same.

3. What challenges have you faced in pursuing Mediation as a career? Being a first-generation lawyer what would be your advice to law students to set up a career in ADR? Is there any certain set of skills to be an arbitrator and mediator?

I would attempt to dissect this question into three parts for better understanding.

Firstly, I would like to shed some light on the challenges that I have faced in pursuing Mediation as a career. When I initially started my career as a mediation lawyer, people always used to tell me that mediation is not a profitable career option. They believed that irrespective of the number of years of practice, mediation will never yield a fruitful outcome and it is a failed endeavour. In spite of this, I decided to contribute towards this field as I believed people will recognize it only if they get a satisfying outcome. I believe that mediation is not only a dispute resolution mechanism but also a healing process and has the potential to heal society in numerous ways. Pursing my passion, I went to Harvard to pursue the following courses- Program on Negotiation and Diplomatic Mediation. Thereafter, to further upgrade myself, I have pursued Investor-State Mediation from CEDR, London.

People initially did not have trust in mediation and they did not accept the same, as there is no enforcement mechanism. People had the perception that the parties might not execute the agreements entered into during the mediation process, being unaware that enforcement is possible through conciliation awards.

Another major challenge I faced was the lack of trained mediation lawyers as mediation advocacy had low acceptability in India. According to me, mediation is teamwork wherein a mediator cannot solely handle everything but there is also a need for trained lawyers. Due to the absence of the same, the parties remained stuck in the adversarial mode. This is one main reason why mediation as a dispute resolution mechanism was not very successful in the early days. I sincerely believe that mediation lawyers are as equally important as mediators.

Secondly, I would like to highlight my advice to the younger lawyers who wish to set up their career in ADR. I understand this because I was also a first-generation lawyer in my family. Initially, when I started my practice, I was completely clueless about everything. I had shifted to Delhi from a very small town to make my career in law. It was a challenge to survive every day. I believe that though I was very determined and focused, I initially let my shortcomings become a hurdle in my success. Today, I believe that these drawbacks have become my strengths as I have converted every challenge into an opportunity to proceed further in life. My advice to the next generation of lawyers is that “do not make ‘first-generation lawyers’ an excuse but rather look at it as an opportunity to succeed.” I do not disagree that people with a strong law background have an added advantage, but I believe that if one follows their passion in a focused manner, success is inevitable.

To put it short, my advice is that if you want to make a name for yourselves and contribute efficiently to the field of law, then hard work is the only key. There is absolutely no substitute for handwork.

Lastly, I would like to mention the skills required to be an arbitrator and mediator. I believe that every individual should find a 'why' and then connect with it. It is extremely important to find a purpose and then follow one's passion. I believe that law is an extremely dynamic field and offers various options wherein one only needs to identify their area of interest to proceed further Consistency, perseverance, hard work, smart work shall all contribute equally to success. Another aspect which I would like to mention is the importance of networking. Networking helps in the creation of opportunities and helps an individual to seek guidance. After these general skill sets, there also exist certain specific skills for Mediation and Arbitration. Arbitration demands good communication and writing skills. One needs to have good knowledge of soft laws and have a stronghold on the facts of the case. Since Arbitration is technical, one needs to be well versed in the nuances of the same. Meditation, on the other hand, requires one to be a good listener and needs to have an empathetic understanding of the problem.

4. With the perusal of one of your interviews, stating the examples of Lord Krishna and Guru Nanak Dev ji for the long history of mediation practice. What are your views on the challenges you think they would have faced in today's mediation sphere and how this practice has developed?

Mediation is considered to be a conflict resolution process in which trained intermediaries assist the parties to arrive at a mutually beneficial solution. I believe that Gita opens in a manner that is similar to that of traditional Mediation. In Gita, Krishna was considered to be the original mediator. He attempted to bring about a settlement between Pandavas and Kauravas without having to resort to war. He came up with multiple solutions to resolve the dispute such as appeal to the higher authority and land concessions. Krishna even transported the letters back and forth between the two camps. Krishna attempted to get personally involved in the matter by offering to be an advisor on one side and administering his armies to the other side. But in the end, we see that Kauravas were confident about their strength and power and wanted to fight the battle. Ultimately in the war, Pandavas won the battle at the cost of their entire army.

Hence, the observation is that there was no expert who could advice the Kauravas about the benefits of mediation and the power of peacefully resolving the conflicts. Gita highlights self-conquest and teaches us that the mind must be made one-pointed throughout the practice of Mediation. Krishna mentions that one must conduct a mediation in a place which is clean and comfortable. Gita mentions that mediators must adopt the middle path and must allow the parties to express their views.

Hence, it can be concluded that mediation which aids mutual settlement between the parties is not only considered beneficial now but for ages.

The birth of Guru Nanak Ji has been a blessing to the world. We can infer through his teachings that he has propagated peace and eternal truth. I believe that ADR is a mechanism which not only aids the parties to arrive at a mutually beneficial solution but also places them in a win-win situation. Mediation helps in a peaceful resolution of the conflict arisen.

As I have mentioned, mediation is a practice that has been prevalent for ages. Previously, there was a lack of trained professional mediators and there was a lack of acceptability but today, I feel that we have adequate tools and knowledge to overcome these challenges; only an effort in the right direction is required.

5. You did your mediation training in the USA and then went to Dubai before coming back to India. What according to your observations are the key differences between the law education system of India and that of abroad?

First of all, I would like to thank the Centre for ADR and professional studies for asking me this question. I believe there is a significant difference between the education system of abroad and India. In India, it is generally seen that we focus on the theoretical aspects of law and give very little importance to the practical application of it. However, in abroad, the general practice is that the students are aided to practically examine various aspects of law and thereafter, the emphasis is laid on theory.

In the light of the same, I would like to highlight a real-life example- When I was in Harvard, our professor to make us understand a particular concept used to give us real -time situations and thereafter ask us to examine the same. This was done without teaching us the theoretical aspects. Dealing with the practical aspects first, enabled us to generate the theory on our own. I have witnessed that in countries like the USA and Dubai, people have faith and confidence in ADR as they have a proper enforcement mechanism. Hence, in countries like these, it is easier to train the young minds and imbibe in them the culture of mediation and arbitration. It is general practice that in India, ADR is taught during the final years of college and students are taught to lead arguments whereas abroad, the students are taught ADR right from their initial years. When the young minds are trained right from the beginning, they are raised with a collaborative mindset.

In India, we lack a proper enforcement mechanism with respect to Mediation, hence it is not widely accepted. My suggestion to the Bar Council would be to introduce the subject right in the second year so that students understand its importance.

Since the archaic mindset of the public at large needs to be altered, it is not enough to just ask for change but rather we need to take responsibility as an individual as well as a community at large to become the change.

6. With your experience and observation of young minds in the field of ADR, what can be the early signs that help a fresh mind to do exceptionally well in the field?

I believe that an effective education system can bring about a change in the field of ADR. In colleges, there is a need for trained teachers in the said field Different programmes should be organized by the colleges to train the teachers and aid them to specialize as well as help them to become an expert at it. I believe students look up to their teachers and get influenced by them. If the teacher themselves have a collaborative mindset, it becomes easier to inculcate the same in students.

ADR centres should be established in colleges, this will not only involve students but help them get the first-hand experience in the said field. These ADR centres should cater to full-fledged practice and should be involved in actual filings and pleadings. When students involve themselves in these ADR centres, they must not only learn the theoretical aspects but also, the practical application.

The colleges should provide a platform to the students to volunteer in the community based programmes in ADR as well as peacebuilding programmes. These volunteer programmes have the potential to leave an ever-lasting impact on the impressionable minds of the students. These programmes will also enable the students to find their area of interest as well as connect with their passion.

7. "Justice hurried is justice buried" plays a vital role in the legal industry, what are your views on its role in respect to ADR?

Law and Order exist in society for the purpose of administering justice. If justice is delayed, it is denied and then, there is justice hurried which is justice buried. Hence, I believe that justice should be delivered at the right time. To repeat myself, if justice is not administered to the aggrieved parties timely, then it is no justice at all in my eyes.

There are two types of justice- Institutional Justice and Fundamental Justice. Institutional Justice is referred to as 'Niti' whereas Fundamental Justice is referred to as 'Nyaya'.

Niti is concerned with the rules and institutions while Nyaya deals with the realization of the same. In ADR, we focus upon Fundamental justice and emphasize the timely delivery of justice.

I would like to share an example of the US Court wherein a small boy had stolen a loaf of bread worth $10. When the boy was asked, 'why' he stole the bread, he said that it was for his sister who was dying of hunger. The court imposed a penalty on all the thirty people present in the court of $10 each, the total would amount to $300. The court gave the reasoning that every person has a sense of responsibility towards society, this incident would not have occurred if every individual would have duly discharged his duty towards society.

However, the court said that the boy should be penalized for committing theft and imposed a penalty of $10 upon him as well. Hence, the court focused upon the maximization of public welfare. The penalty of the rest $300 would be used for the welfare of the child and his family. This is an example of Fundamental Justice wherein we not only focus upon the 'what is the incident' aspect but also the 'why did it happen' aspect.

I believe that ADR helps in administering Fundamental Justice which is also timely in nature. The duty rests upon the courts to encourage parties to settle their matters through the Alternative Dispute Resolution mechanism. It will not only help in achieving timely justice but also reduce the burden of the courts and improve the disposal rate of the cases.

8. Have you ever worked or planned to use the mode of operation of Electronic Dispute Resolution? And what are your views on Sustainability and Diversity in the newly Virtual World of International Arbitration especially during this COVID-19 period?

With the onset of the COVID-19 pandemic, 'online dispute resolution' has become the new normal. Various arbitration and mediation operations were conducted in a virtual setting. Amidst the pandemic, I received a lot of matters pertaining to Mediation. I am proud to say that a lot of them were concluded successfully. An observation from my side is that India was not ready to shift to the virtual mode, as it did not have the proper mechanisms.

We lacked training and rules in this aspect. In order to cater to the same, different institutions made rules and provided training to the arbitrators and mediators. But we still lacked a dedicated platform for conducting the same. Online platforms like Zoom, Skype and Google Meet aided in the conference but is not a dedicated platform for conducting the mediation, where confidentiality is the core aspect. I believe that India will need time to develop specifically designed platforms for conducting online Mediation and Arbitration. Indian Institute of Arbitration and Mediation has developed an online dedicated platform Peace Gate the link is www.peacegate.in we need this platform to take care in cases, where doubts arise in minds of the parties with respect to equal treatment and impartiality of the mediators.

Online platforms make it difficult to reassure to them regarding the same. Needless to mention that technical glitches act as a great hurdle in the smooth functioning of the process. At times, it becomes difficult to establish effective communication between the parties as well as the mediators. During the pandemic, I have conducted mediations in various areas – matrimonial disputes, employment-related matters, and rent arrear related matters. When people could not go to court to seek justice, they relied on mediation to resolve the same. The pandemic has proven to a blessing in terms of boosting the confidence of the public at large on the ADR mechanism. However, with the increasing acceptability regarding the same, proper legislation and the need for the development of dedicated platforms becomes more significant.

9. As an outsider, we see very few women in the field of arbitration today. In your practice, did you find the field to be dominated by men or encounter any other challenges by virtue of your gender?

It is often said that the reason there are fewer women in a particular field, is maybe because that field has a dominating male culture or that females encounter multiple challenges due to their gender. However, in my practice, I have never experienced any domination done by men or any undue advantage given to them because of their gender. Surely, in my field, more men are working rather than women but that is not due to any gender-biased challenges present.

I believe that the reason we have fewer females in my field is not because of the presence of the other gender but because we do not have adequate awareness regarding ADR being a successful field. We still lack the coaching, training and awareness of ADR in our country.

I believe that to have a significant number of females in this field, we should seek to provide knowledge, skill, training and awareness about the same and make people realise the benefits and the wide scope of this field. Along with this, we should over time, also include provisions in our ADR Acts regarding women and their compulsory presence required in this field. A field can only develop to its full ability if it provides equal opportunities to all and gets equal support from all. Many organisations are coming up to support women and running campaigns and groups in the name of **Arbitral Women**.

I, therefore, believe that the barrier of entry for women into the legal field is not because of any discrimination or the unfriendly environment in the field, but rather because of one's hesitation and mindset that prevents them from entering.

10. The Himachal Pradesh National Law University, Shimla has established this Research Centre on ADR and Professional Skills, how do you see this as an asset for changing the fate of Arbitration and Mediation in India?

I believe that decision of the Himachal Pradesh National Law University to establish a Research Centre on ADR and Professional Skills is a very progressive one. This will help in inculcating a collaborative mindset in the students. I also believe that these young minds are the future of tomorrow. If we train them right from the beginning, the fate of Arbitration and Mediation will be very bright.

The Centre on ADR and Professional Studies established by Himachal Pradesh National Law University sends a message nationally as well as internationally that ADR is efficient as well as an effective dispute resolution mechanism. These centres not only undertake research activities but prepare a database in a systematic manner which helps in broadening the scope of ADR. They help in conducting training programmes for the various stakeholders involved in the ADR process.

This centre on ADR established by your esteemed institution will provide a platform to conduct workshops, competitions and undertake research activities for young minds. The diploma courses and other certificate programmes on ADR will help in raising awareness. Hence, I would take this opportunity to congratulate Himachal Pradesh National Law University for this new endeavour and I would consider it as my honour to contribute to its success in whatever little way I can.

11. Any message for students and readers who want to develop their future in the field of Alternate Dispute Resolution?

Mediation is a global Profession so prepare yourself for International practice. One of the best advice that can be given to a student pursuing law is that they must be involved in the department and all the activities as much as possible. This will help them to learn the skills required to be a great lawyer in the future. Some of the activities in which they can participate include moot courts, writing articles and doing pro bono work.

A law student can start with participating in moot court and learn skills such as research and writing or arguing, which are some of the real-life skills used by lawyers every day. The student should be ready to dive into the assignment. Also, they should learn how to say 'yes' to every difficulty that comes in their way and to every assignment. Knowing yourself is the beginning of all wisdom.

Another piece of advice which can be given is that success is not always about a career. A career is not everything. One should focus on succeeding in life and not only in their career. There are many types of success. Many people are unaware of the difference between success in life and success in a career. Success in career has become a synonym for success in life. The difference in both these terms is significant and is worth knowing. We should focus on maintaining a balance and succeeding in life. One should decide what kind of life they want and work hard and persevere to achieve that life and that will be known as success.

Success is different for every individual. One should not let himself or herself down by failure. Failure is a part of success. Even during difficult times, we should continue moving forward and try to get a life that we have always dreamt of. We should know what makes us happy and what feels great and work hard to have that kind of life. Also, we should not be afraid to ask for help or to be afraid to take responsibility for our actions. We should be confident in our life. Finally, one should act like there is no tomorrow because if we think that we have immortal existence, we will not be able to live a fulfilled life.

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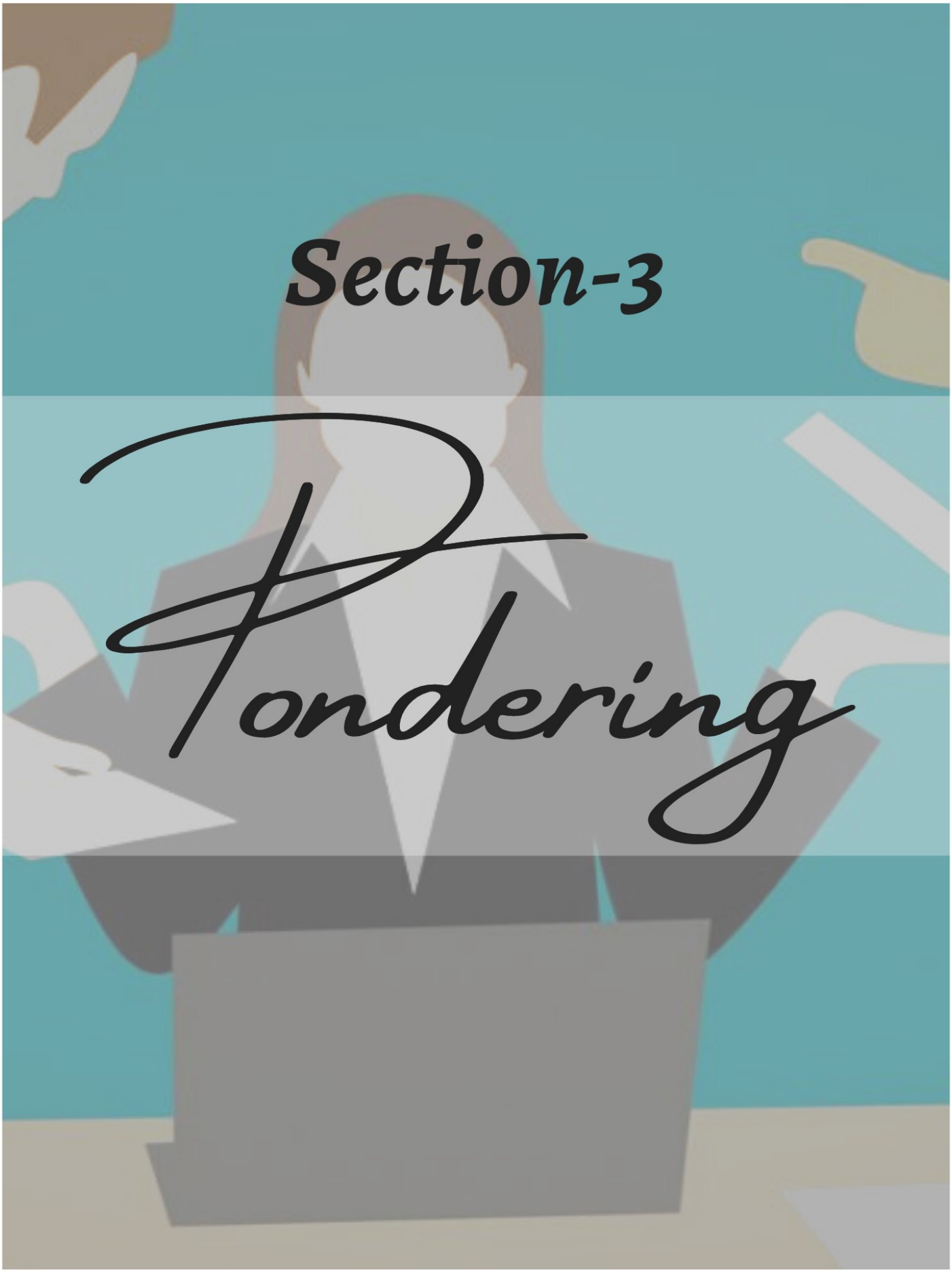
** Background Photographer: Sanjali Kathuria, student of HPNLU, Shimla



Section-3

Pondering

RESEARCH ESSAY

'Binding Non-Signatories to Arbitral Proceedings: International and Indian Perspectives'

~ *Parth Upadhyay**

I. INTRODUCTION

As international commercial transactions become more and more complex and multinational corporations become engorged in cross-jurisdictional activities, one of the most current and significant issue in the field of international commercial arbitration is the treatment and joinder of Non-signatories (to the arbitration agreement or clause in principal contract) to an arbitration proceeding. The law dealing with this is mostly dealt by the judicial authority which has seized an action to refer parties to arbitration and thus it has developed in very interesting ways in different jurisdictions.

Keeping all this in mind this paper seeks to examine the New York Convention and the treatment of third- party non-signatories under it and the ensuing developments regarding it in the international scenario. Once doing this the paper will basically focus on the Indian position in this regard and the widely used "group of Companies" doctrine which is the most popular judicial tool in India regarding this at the moment. The paper will then track and assess the judicial development of this doctrine in India and where we appear to be headed in this regard in the future as the issue of non-signatories becomes more and more important.

II. CONCEPT OF NON-SIGNATORIES AND THE NEW YORK CONVENTION

A. Background

An arbitration process is a mutually agreed mechanism by which parties agree to give up some of their primary rights of approaching courts in favor of an alternative remedy.[1] Therefore, the basic tenet of arbitration is an agreement between the parties meaning they must have necessarily consented to it. Additionally, since it is a duly executed contract itself, the concept of privity of contract comes into play which requires that only parties to the agreement should be allowed to arbitrate.[2] However such a strict and pedantic approach would be too stifling in the modern context of ever evolving international commercial relationships. Despite consent and privity being the basic fundamental principles of arbitration, there arise circumstances where certain third parties which have not expressly consented to the agreement must be bound to the arbitral proceedings nevertheless.

***Fifth Year B.A. LL.B. (Hons.) student at National Law School of India University, Bangalore.**

In such special circumstances not joining such parties would decrease the effectiveness of the arbitral proceeding notwithstanding absence of explicit consent to the arbitration agreement. Such special circumstances of binding 'non-signatories' are generally governed by domestic doctrines of different municipal laws differently. The most common and widely accepted ones include agency, assumption, incorporation by reference, assignment, succession, veil piercing and alter ego which are more tried and tested principles of contractual and company law and the Group of Companies Doctrine which is the most novel and less developed doctrine.[3]

The term non-signatories basically refers to so called 'less than obvious parties to an arbitration agreement that do not put 'pen to paper' but should nevertheless be allowed to or compelled to join an arbitration proceeding.[4] The very fundamental complexity in grasping this concept stems from the use of the terms non-signatory itself. The nuanced difference between the common usage of the term signatory/non-signatory to an arbitration agreement and participant/non-participant to an arbitral proceeding must be thoroughly appreciated. *Professor William W Park* puts this nuance as a "taxonomical issue" which can be "potentially misleading".[5]

This is so because it gives the impression that signing of an agreement is absolutely necessary in order to be a participant in the arbitration proceeding. However, this is not the entire picture today as many legal systems have come to recognize other forms of executing arbitration agreements and most developed jurisdictions recognize unsigned arbitration documents as well.[6] Thus signatures on an arbitration agreement today are not the sole metric by which a party can be joined to an arbitration proceeding.

B. Non-signatories under the New York Convention

As discussed above there might be situations where non-signatories are to be joined to an arbitral proceeding regardless whether they have signed the agreement. Herein lies the problem relating to the New York Convention which is the seminal international legal instrument dealing with international commercial arbitration recognized by almost all countries of the world today like India, UK, USA etc. Thus this part of the paper examines the treatment of non-signatories under the New York Convention which would clarify the need of relying on municipal laws that courts generally do in such cases.

At the very outset it must be noted that the New York Convention does not make any direct reference to non-signatories or the issue of their joinder to an arbitral proceeding. Due to this the issue of non-signatories has been read into Article II of the Convention which deals with Arbitration Agreements. The provision under Article II (3) of the convention says that domestic

courts have the power to refer parties to arbitration but they can only do so "at the request of one of the parties" but it does not elaborate as to who these parties are.[7] Thus, the logical next step that is to look towards Article II (2) of the convention that talks about how a valid arbitration agreement is executed. This provision stipulates two main requirements firstly, that there has to be a written agreement to this effect and second that such agreement shall be signed by the parties to the arbitration.[8] This is the main reason the whole debate behind binding of non-signatories as prima facie it appears as if the convention seems to disfavor joinder of such parties. The question thus has been raised time and again whether this understanding of the Convention's language is correct and that it sought to discourage joinder of non signatories or whether the convention is basically silent about it as it had not contemplated or provided for such scenarios that require joinder of non-signatories today. Most academics, courts and even the United Nation today have hinted towards the second assertion.

The first place to look regarding this issue is the *Travaux Preparatoires* of the convention. The New York Convention Guide itself observes that the *Traveux* to Article II(3) are silent about the nature and scope of the obligation of courts.[9] Thus it might have been done as to leave the issues such as non-signatories to the discretion of the judicial authorities of the contracting states where the matter is seized. The main reason for the inclusion of the term 'at the request of one of the parties' is to limit suo motu reference to arbitration by courts rather than restricting joinder of non-signatories. This means that courts should not refer the parties to arbitration of its own motion unless a party invokes the arbitration agreement.[10] The main consideration for this during the time of the convention was that parties' consent is foremost and if they themselves do not bring a motion to invoke arbitration then it can be assumed that they relent the right and prefer the court's remedy.[11] Thus the *Traveux* to Article II (3) show that the question of non-signatories was not really in contemplation at the time of formation of this provision.

This leaves us with the question of the signature requirement under Article II(2). Although this article provides two conditions of either signed agreement or exchange through letters or telegram, courts of different states have taken different positions while enforcing it. Many courts have expanded the requirement to include other forms of correspondence. This expansion is in line with the United Nation itself that recognized in respect of this provision that "recognizing that the circumstances therein are not exhaustive" keeping in line with the present day practices (electronic communication, modern trade practices etc).[12] This was done by way of a recommendation of the UNCITRAL which was duly passed by the General Assembly in 2006

regarding liberal interpretation of Article II(2) to bring it in line with present day practices. Thus it can be observed from all this that firstly, the convention is largely silent towards non-signatories and secondly the requirement of being a signatory is not etched in stone and is not an exhaustive requirement.

Keeping in line with this observation most developed judicial systems have held that joinder of non-signatories is not really dealt with properly by the Convention and thus it falls to the domain of their municipal laws to fill in this lacuna which the Convention is silent about. The most recent but momentous judgment regarding this has come by the US Supreme Court which observed that "the Convention is simply Silent about the Issue of non-signatory enforcement" and that silence itself cannot mean that domestic doctrines are ruled out as there is nothing in the convention showing to the contrary[13]. The case involved a non-signatory which wanted to invoke and join arbitration along with the signatories that had agreed to international commercial arbitration. [14]

A similar observation has been made by most jurisdictions following the New York Convention including UK, Canada, France, Singapore and India itself. While most jurisdictions depend on more established principles to bind non-signatories like agency, veil piercing, alter ego etc, the Indian courts have read in the Group of Companies doctrine which is very rarely applied by most developed Common law jurisdictions as it is very nascent and does not have the same level of safeguards as other more developed principles of contractual and commercial law.

III. THE GROUP OF COMPANIES DOCTRINE

A. The International Scenario

The origin of this doctrine can be said to be in the ICC case of *Dow Chemicals* v. *Isover Saint Gobain*[15] It is important to note that the non-signatory in this case itself wanted to be impleaded as a party rather than the signatories wanting to force the non-signatory to join the arbitral proceeding. *Professor Park* refers to such parties as consenting non-signatories and says that the standard for joinder of such party can be lesser as compared to when the non-signatory is actively resisting joining the proceedings.[16] This is so because the non-signatory wanting to join a proceeding itself points towards the intention element. Notwithstanding this, the doctrine has been widely used in case of non-consenting non-signatories as well.

The tribunal basically held that the parties sought to be joined to the arbitral proceeding must form a part of "one and the same economic reality" and must have some role in the

conclusion, performance or termination of the contract that shows mutual intention on the part of such parties to be bound by such agreement and hence become a part of the arbitral process. However, this twin standard of intention and interconnectedness was left open ended to be determined based on the facts of a case. Thus, this doctrine has developed very differently in different jurisdictions and applied in a somewhat haphazard way by international tribunals as well as different domestic courts. It is interesting to note that barring India the doctrine has not found favor with most of the other major common law systems.

The UK courts have held that this doctrine has no application there. The case of *Peterson Farms Inc* v. *C&M Farming Limited* [17] the commercial court held that the group of companies doctrine "forms no part of English Law". Similarly in the United States as well the doctrine has mostly been not favored. The case of *Thomson-CSF S.A* v. *American Arbitration Association* [18] recognized various principles such agency estoppels, alter ego, veil piercing etc. but left out group of companies specifically as being recognized under US law. However, there have been certain exceptional circumstances where the doctrine has been sparingly used. The main reason why this doctrine has been rejected by these jurisdictions is because the doctrine being very nascent, it has found little favor with these courts that want to maintain the sanctity of the requirement of consent for arbitration which should only be contradicted in rare occasions by other more tried and tested principles of law.

This is in sharp contrast with India where the Supreme Court and other courts have wholeheartedly favored this doctrine presently.

B. <u>The Indian Scenario</u>

Initially Indian courts followed a restrictive approach towards non-signatories. In fact the Supreme Court in *Indowind Energy Ltd.* v. *Wescare Limited & Anr* [19] held that the non-signatory could not be made a party to the arbitration even though it shared common shareholders, common directors and similar address for incorporation. The case of *Sukanya Holdings Pvt. Ltd.* V. *Jayesh H Panda & Ors* [20] also held on similar vein that when there are certain causes of actions which are arbitrable and certain similar causes of actions against other parties which are not arbitrable then a bifurcation of such causes cannot happen. Thus the Indian position did not favor binding non-signatories to a large extent.

This changed with the case of *Chloro Controls Pvt Ltd* v. *Severn Trent & Ors* [21] where the Group of Companies was incorporated into India. The Supreme Court basically distinguished the case of international arbitration form the *Sukanya Holdings* case which it says dealt with

domestic arbitrations under Part I of the A&C Act. In order to bind non-signatories in international arbitrations under Part II, it basically relied on the phrase "at the request of one of the parties or any person claiming through or under him".[22] It is pertinent to note here that this phrase is not used in the New York Convention at all and is something that the Indian Parliament added to it. Thus it was observed by the court that this must have been done to bind other necessary parties that may have not formally signed the agreement.

After this case there was a catena of judgments where the decision was followed to bind non signatories such as *Purple Medical Solution* v. *MIV Therapeutics Inc.* [23] while there were also cases which still followed the Indowind approach like *Sudhir Gopi* v. *Indira Gandhi National Open University & Ors.* [24] that had a contrary decision even though the facts were similar to the Purple Medical case.

As far as domestic arbitrations were concerned *Sukanya Holdings* was still good law as Section 8 didn't have the phrase "claiming through or under him". However this changed with the 2015 amendment which introduced this phrase on the lines of the 246th law commission report and the ensuing decision of *Ameet Lalchand Shah & Ors* v. *Rishab Enterprises* [26] confirmed the doctrine from Chloro Controls to domestic arbitrations as well.

After this point the floodgates opened as far as this doctrine is concerned. Courts have expanded this doctrine to bring various kinds of parties under the ambit of the arbitral proceedings. The two very recent and significant cases are firstly, *Reckitt Benckiser (India) Pvt Ltd* v. *Reynders Label Printing India & Ors.*[27] which established the importance of the intention requirement to this doctrine but does not set any established standard as to examine intention and leaves it to merits of a case. Secondly, the case of *MTNL* v. *Canara Bank* [28] where the interconnectedness of the parties is elaborated as direct relationship between signatory and non-signatory, direct commonality of subject matter and composite nature of transaction. It must be noted that these three are very broad metric and can be used to expand the scope too much in the hands of a very overzealous court. Even the subsequent explanation of the term composite nature is given as "inter-linked" or requiring the "aid, execution and performance" of other agreements which is quite vague and does not add much certainty to the original three requirements.

This open ended approach has caused a meandering body of law in application of this doctrine as courts mould it into whichever direction they please for particular case. This is the basic trouble with applying a relatively less developed and nascent doctrine of law with such zeal. Thus this approach of the Indian courts has been called "a tale of Caution and Adventure".[29]

IV. CONCLUSION

Based on this research paper the first conclusion to be drawn is that the New York Convention seems to be largely silent towards treatment of non-signatories and holding otherwise would be too stifling towards the modern day economic realities that non-signatories sometime do need to be included. Therefore, various international bodies, tribunals and domestic courts have developed one way or the other to address this issue. This brings us to the next observation based on the treatment meted out by domestic courts particularly India. The Indian scenario seems to be a little too overeager to show our legal prowess in the field of international commercial arbitration. The inclusion of a special qualifier in Sections 8 and 45 by the parliament which was not present in the convention and the court's subsequent expansion of it by applying the Group of Companies doctrine shows an attitude of throwing caution to the wind. This has not been so with other developed jurisdictions like the UK and USA. Thus it can be concluded that the judiciary should be more careful while applying and developing a new doctrine like the group of companies so that the purpose of making Indian regime more arbitration friendly does not backfire.

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RESEARCH ESSAY

'Tryst with Alternate Dispute Resolution'

~ *Reetika Verma**

I. Introduction

Mahatma Gandhi writes in his autobiography, "I had learnt the practice of law. I had learnt to find out the better side of human nature, and to enter men's hearts. I realized that the true function of a lawyer was to unite parties driven asunder."[1] The veracity of this observation lies in Alternate Dispute Resolutions. Alternate Dispute Resolution (ADR) is an alternative to litigation. It is not a new concept in India as institutions like Lok Adalat (which has been given statutory status now) existed in India even before the introduction of the formalized system of courts. It also finds backing in our Constitution; Article 51 (c) encourages settlement of international disputes by arbitration, Article 39A provides for free legal aid for the poor, weaker sections of the society and ensures justice for all. Alternate dispute resolution is in consonance with articles 14, 21 and 22(1) of the constitution which deal with equality before law, right to life and personal liberty and promotion of justice on the basis of equal opportunity for all, respectively.

The future of any provision lies in its capabilities of offering what is not present and introducing changes which ought to modify the status quo for the better. The capabilities of alternate dispute resolution which pose it as an advantageous provision lie in the fact that it is:

- less time consuming and confidential in nature.
- a cost effective method as compared to litigation.
- free from the technicalities of the courts and thus, 'less formal'.
- more flexible. Is more likely to lead to a result which will be complied by both the parties, considering that the parties are themselves involved in the process of the creation of such result.
- less likely to aggravate the already existing tensions between the parties.

These capabilities of alternate dispute resolution are exercised through various mechanisms like arbitration, conciliation, mediation, settlements by Lok Adalats, plea bargaining, etc. which have been given statutory status by various acts like the Arbitration and Conciliation Act, 1996[2], the Legal Services Authorities Act, 1987[3] and several sections of various codes like 265A to 265L of Code for Criminal Procedure and Section 89 of Code for Civil Procedure. In order to understand the importance of alternate dispute resolution as a whole, it is necessary for us to first understand the workings of its different mechanisms or forms.

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II. Arbitration and Conciliation

Arbitration and Conciliation Act of 1996 contains the rules regarding arbitration and conciliation in India. Apart from this, the act has also incorporated various international guidelines on arbitration and conciliation. Parties to a contract may choose to opt for arbitration by entering into an arbitration agreement either at the time when the dispute arises or at the time of the making of the contract itself; by adding this clause in the contract, they agree to solve the disputes which may arise in future by arbitration. The arbitrator who presides over the proceedings may or may not be a judge and is appointed by the parties to the contract themselves. The order pronounced by such an arbitrator is called an arbitral award and is binding on the parties as a decree of court would be if they had chosen to go to a court instead. Conciliation, as a mechanism of ADR, is even more flexible. There is no provision for a conciliation agreement beforehand .i.e. before any dispute has arisen. The aim here, is to settle and not to decide. Therefore, the settlement that is reached through conciliation is not binding on the parties. Arbitration has been seen very effective for solving commercial disputes whereas, conciliation has been seen to be very useful in solving industrial disputes. Both the alternates to traditional form of dispute resolution can thus be said to be valuable methods which have proven their fruitfulness in the past and continue to do so.

III. Mediation

Mediation, as an ADR mechanism is usually court enforced and is considered to be quite effective in solving the 'pendency issue' of courts. Every court has mediation cells which have their own trained mediators. A court of law can refer the case to these mediation cells if it believes that the case can be better resolved by such cells. As the aim of the mediators (similar to that of conciliators) is to settle and not to decide, the cases having the scope for some sort of settlement are usually the preferred cases referred to mediation by the courts. Mediation does not affect the court proceedings .i.e. if mediation is not able to settle the case, the court proceedings can still continue and the substance which arises or is discussed in the process of mediation cannot be used as argument or evidence in such proceedings. The power to refer a case to mediation by the courts has been made possible because of an amendment done to CPC in the year 1999 which inserted section 89 in the code. Apart from mediation, by virtue of this section, courts can also refer their pending cases to Arbitration or Conciliation when it appears to them that there exist elements of settlement which may be acceptable to the parties. Once the parties have been referred to arbitration or conciliation, the rules of the Arbitration and Conciliation Act applies to them.

The setting up of Lok Adalats is nothing but an extension to mediation. It is also in accordance with section 89 which gives the power to the courts to refer a case to Lok Adalats for judicial settlement.

III. Lok Adalats

A Lok Adalat is the People's Court is a form of ADR which settles disputes between parties at the panchayat level. It has been given statutory status by the Legal Services Authority Act, 1987.[4] As per the act, the decisions of the Lok Adalats are binding in nature. There is no scope for appeal; therefore, if the parties do not agree with the decision so arrived at, they may initiate the litigation proceedings. As mentioned above, it may be called an extension to the cause of court referred mediation, thus, a Lok Adalat can either accept cases pending in courts or accept new cases that fall under its jurisdiction. The members presiding over a Lok Adalat act as statutory conciliators; making the process for the parties less formal and hence, the result more acceptable. There is no court fee charged by Lok Adalats; making it a very suitable option for resolving disputes where there is scope for a settlement. This is in conformity with Article 39A of the constitution[5] which talks about free legal aid. Lok Adalats are highly sought after resort for cases involving financial matters, matrimonial matters, family matters and compoundable criminal cases.

IV. Plea Bargaining

Plea Bargaining can be explained by this Latin expression, 'Nolo Contendere' which means 'No Contest'. Simply put, it is an ADR mechanism which can be exercised by the accused where he/ she agrees to plead guilty for the offence so committed in exchange for some concession in punishment. The concept of plea bargaining is one of the many creative ideas that has come out of the uncommon mind of United States of America.

Plea bargaining in India is only allowed for offences which are liable to punishment of less than seven years. The provisions for plea bargaining are contained in sections 265A to 265L of the CrPC. These were inserted by the Criminal Law Amendment act of 2006.[6] After receiving great amount of criticism in the beginning from various judges, lawyers, legal intellectuals; the concept of plea bargaining started getting acceptance since the need for it was realized by the 154th Law Commission and the said amendment was made to the CrPC. These were inserted by the Criminal Law Amendment act of 2006 (Act 2).

A division bench of Gujarat High Court in *State of Gujarat* v. *Natwar Harchanji Thakor* [7] in 2005 gave a green flag to plea bargaining by observing that nothing can be and must not be static or

as *Einstein* put it, 'We have to learn to think in a new way'[8]. Pendency of cases which causes a delay in granting justice is a problem that requires to be solved immediately or else people will soon lose their already dismantling trust in judiciary. Plea bargaining is a new outlook and a new opportunity in that cause. Now that we have gotten an outline of what ADR is, what its mechanisms are, how they work and have a brief understanding of its scope, it is for us to move on to a detailed discussion on the enormous amount of advantages that it offers.

The general advantages of ADR have been pointed out in the introductory part of this article. Benefits which can be derived from specific forms of ADR, which are available in India as of now, have also been touched upon briefly. A detailed discussion on the advantages, therefore, must be taken as supplemental information to the case which the author has tried to establish throughout this article. In litigation, oftentimes, both the parties come across as losers, particularly for commercial disputes, as it sabotages the relationship that exists between the parties. ADR(s) prevent that from happening and thus, are preferred dispute resolution mechanisms for corporate houses not just in India but around the globe. In India, Section 15 of CPC[9] makes it mandatory for all matters to be initially filed in the lowest courts of competent jurisdiction. This hinders the working of corporate houses, especially the big ones, as trial courts take it forever to solve the disputes because of being overburdened. In monetary claims and commercial litigation, the trial courts do not usually grant any sort of interim relief and hence, augment the hindering.

This is another reason for the growing popularity of ADR mechanisms among the big businesses. Apart from the corporates, it is highly sought after alternative to litigation for solving other civil disputes and is arising as a successful choice of dispute resolution even for criminal cases. This has already been stressed upon in the aforementioned sections of this article. Having said that, it cannot be denied that ADR like any other concept has its drawbacks and loopholes but ultimately, it is the job of the legal luminaries to mold these weaknesses in a manner which utilizes what it has got to offer in the best way possible.

The Honorable Supreme Court of India, dissatisfied with the excessive involvement of courts in Arbitration proceedings, commented in 1981 about the failure of the Arbitration Act of 1940 [10] in achieving what was expected out of it. To put in the words of the honorable court, '(it has)….Made the lawyers laugh and the legal philosophers weep'[11]. As a result, in the year 1996 a new law was enacted, namely; the Arbitration and Conciliation Act of 1996, which was in accordance with the UNICITRAL model law[12], making the unruly interruption in the

arbitration proceedings by the courts unlawful. This shows that criticism of any concept or provision or act is to come sooner or later and that it has its own importance as it leads only to the betterment of such a concept, provision or act.

Most importantly, ADR offers choices to the disputants. If they consider that arbitration is not likely to solve their dispute, they may choose mediation or conciliation, etc. The scope of Alternate dispute resolution is gigantic and in a way, never ending as new mechanisms of ADR can be created to meet the needs of the ever changing society. The introduction of Online Dispute Resolution (ODR) can be taken as an example of it. ODR has been introduced to curb the problem of the compulsory physical presence of both, the parties and the arbitrator/conciliator/mediator in the premises where their case is being heard. This is even less time consuming than alternate dispute resolution. ODR or the creation of other mechanisms of ADR, however, can be a topic of discussion for some other article. For the purpose of this piece, the author rests her pen.

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CASE COMMENT

Sanjiv Prakash v. *Seema Kukreja & Ors.* [2020 VIAD (Delhi) 478.]

'Arbitration Clause vis-à-vis Novation of Contract'

~ *Devansh Garg**

Abstract

On October 22, 2020, the Delhi High Court pronounced a path breaking judgement where it explained the effect of novation of a contract between the parties on the arbitration agreement contained therein. This article is an attempt to discuss and analyse this landmark judgement in detail. The article follows a conventional approach, i.e. after the facts, issues, and the findings of the court are duly discussed, the author has analysed the judgement in light of the well settled principles of contract and arbitration law accompanied with legal provisions and judicial precedents.

I. Introduction

In arbitration law, an arbitration agreement is treated as an island in itself, i.e. it's akin to a self-contained contract, inasmuch as its legal existence isn't affected when the validity of substantive contract is challenged. This is based upon the doctrine of separability which creates legal fiction to deem the arbitration agreement in a contract separate and independent from the underlying contract between the parties. In simple words, an arbitration agreement continues to survive for resolution of disputes between the parties even when the contractual obligations of the parties are suspended either by way of breach, frustration, or rescission of contract[1]. The Arbitration and Conciliation Act, 1996 (hereinafter the "Act") operates on the same principles [2] in line with the UNCITRAL Model law on Arbitration [3].

The courts have time and again reiterated this position, i.e. an arbitration clause survives the repudiation of a substantive contract between the parties, but the legal status of an arbitration agreement in case of novation of substantive contract was still not clear and to a large extent was unsettled.

Recently, a Single Judge Bench of the Delhi High Court, in *Sanjiv Prakash* v. *Seema Kukreja and Ors.*, [4] presided over by V. Kameshwar Rao, J., deliberated upon this issue to clarify this position under the Act by giving special reference to certain provisions of the Indian Contract Act, 1872 (hereinafter the "Contract Act").

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II. BRIEF FACTS OF THE CASE

In 1971, Respondent No. 3 incorporated a company; Asian Films Laboratories Pvt. Ltd., which was consequently renamed as ANI Media Pvt. Ltd. in 1997 (hereinafter "Company"). Along with the Respondent No. 3 who was the Managing Director of the Company, his family members were the shareholders of the said Company, i.e. his son (hereinafter "Petitioner") and his daughter and wife (hereinafter "Respondent No. 1" and "Respondent No. 2" respectively) (Petitioner and Respondents together hereinafter referred to as the "Family").

In 1996, Thomson Reuters Corporation Pte. Ltd. (hereinafter "Reuters") approached the Petitioner for a long-term equity investment in the Company on the condition that the Petitioner would play an active role in the management of the Company.

After acquiring 49% shares of the Company in 1996, Reuters entered into a Share Purchase Agreement (hereinafter "SPA") and a Shareholders Agreement (hereinafter "SHA") with the parties. Clause 16 of the SHA provided for resolution of disputes through *inter alia arbitration seated in London and governed in accordance with the rules of London Court of International Arbitration. Further, Clause 28 of SHA said that "the SHA would supersede any or all prior agreements, understandings, arrangements, whether oral or in writing, explicit or implicit between the parties"[5].*

It is pertinent to mention here that the family entered into a Memorandum of Understanding (hereinafter "MoU") prior to entering under the SHA and the SPA, in 1996. Clause 12 of the MoU (arbitration clause), provided for appointment of a sole arbitrator for resolution of disputes, subject to the provisions of the Arbitration Act, 1940, or any other enactment or statutory modification thereof.

Thereafter, due to certain dispute related to shareholding in the company between the Petitioner and the Respondents, the Petitioner invoked the arbitration clause (Clause 12) under the MoU and issued a notice for invocation of arbitration to all the Respondents. The Petitioner filed an application for appointment of sole arbitrator under S.11 of the Act, 1996. This was challenged by Respondents who suggested that seat of arbitration is in London as per Clause 16 of SHA and thus, High Court doesn't have the power to appoint the arbitrator. They also contended that Clause 28 of the SHA had novated the MoU along with the arbitration clause.

III. ISSUE BEFORE THE COURT

The issue which arose before the Hon'ble High Court was whether the arbitration clause contained under the MoU got perished by the SHA.

IV. JUDGEMENT AND OBSERVATIONS OF THE COURT

After hearing the Petitioner and Respondents at length, the Court held that novation of an agreement would necessarily result in destruction of the arbitration clause contained therein and thus, held that the application filed by the Petitioner was not maintainable.

The Court expressly observed that:

"It is well settled that an arbitration agreement being a creation of an agreement, may be destroyed by agreement. That is to say, if the contract is superseded by another, the arbitration clause, being a component/part of the earlier contract, falls with it or if the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it."

The Court referred s. 62 of the Contract Act along with a catena of judgements to ascertain the maintainability of the former arbitration clause in the event of novation of the contract.[6] It went on to observe that when an arbitration agreement stood modified by a supplementary agreement so much so that it entirely changes the whole edifice of the principal arbitration agreement, there remains no claim of the parties against the former agreement.

The doctrine of novation is enshrined under the s. 62 of the Contract Act. S. 62 of the Contract Act reads *"If the parties to a contract agree to substitute a new contract for it, ….. the original contract need not be performed." Thus, as per this provision the contract of novation must fulfil the tripartite conditions mentioned as follows:*

1.there must be a substitution of a contract giving rise to a valid new contract,

2.the old contract must be terminated, and

3.the contract of novation must be based on the consensus ad idem of the parties.

The Court resorted to various judgements of the Indian Supreme Court, where it on various occasions had noted that mere alteration of the structure of the contract is insufficient and doesn't amount to novation. Novation of contract in its true sense implies 'complete substitution' of a new contract in place of an old one.[7] The substituted contract must completely rescind the previous contract between the parties inasmuch as no obligation of performance exists thereunder.[8]

The modification should be such that it goes to the very roots of the original contract.[9] The Delhi High Court held that the requisite test for determining whether a contract has been substituted is the intention of parties to do so. It observed the judgement of the Apex Court where it had held that *"Novation is a bilateral process which requires the clear and unequivocal intention of the parties to terminate a contract and substitute it with a new one, hence the name 'novation'."*[10] *Novation of a contract can only take place with the mutual consent of the parties.*

V. ANALYSIS

S. 7(2) of the Act provides that an arbitration agreement may be in the form of an arbitration clause in a contract. The Supreme Court, while explaining s.7 of the Act, had on various occasions, for eg. in the case of ***M.R Engineers & Contractors Pvt. Ltd.* v. *Som Datt Builders Ltd.,***[11] *had observed that an arbitration clause though, an integral part of the contract, is an agreement within an agreement. The Court further went on to observe that, it is a collateral term of a contract independent of and distinct from its substantive terms* [12]*. This is referred to as the "separability", "severability" or "autonomy" of the arbitration clause. According to this principle, the invalidity of the underlying agreement will not have an impact upon the arbitration clause* [13]*.*

Party autonomy being the golden thread running through the institution of arbitration the parties are free to include any term in the agreement and they may agree to include an arbitration clause for easy resolution of disputes through arbitration. But, when a dispute so arises, the parties at the receiving end normally resort to dilatory practise of challenging the validity of the arbitration clause that since the underlying contract is void, the arbitration clause also becomes inoperative. In this context, the role of doctrine of separability holds importance.

In ***Enercon (India) Ltd. and Ors*. v. *Enercon Gmbh and Anr.***,[14] The Supreme Court remarked that the concept of separability of the arbitration clause from the underlying contract is important to ensure that the intention of the parties to resolve the disputes by arbitration doesn't evaporate into thin air with every challenge to the legality, validity and finality of the underlying contract.

The practical importance of the doctrine of separability lies in the fact that the arbitral proceedings may generally be continued even if, the underlying contract is found to be null and void, which helps to make the arbitral proceedings more effective.[15] Thus, this doctrine was recognized mainly in context of ensuring the jurisdiction of the Arbitral Tribunal so appointed to adjudicate upon the matter, irrespective of the challenges to the underlying contract and thus, this doctrine protects the institution of arbitration from unnecessary courtroom litigation.[16]

Now at first instance, the instant decision of the Delhi High Court may seem to be in contravention of the doctrine of separability as discussed above but upon careful scrutiny it will appear to be logical.

The basic premise upon which this judgement operates is that, the two situations viz. the breach or frustration of terms of the contract is different from the novation of contract where the entire principal contract is superseded by a new contract. In former cases, the contract rescinds either due to the non-performance of the obligations by one of the parties to the contract or due to some other reason, to the extent of future performance of the contractual obligations by the parties, however, the contract along with the arbitration clause still remains alive for the purpose of awarding the liquidated damages or for ascertaining the value of unliquidated damages. It must be noted that in these situations where the arbitration clause tends to fulfil all the requirements of an essential contract under S. 7 of the Act, it does not automatically stand abrogated as then it constitutes a separate contract founded on its own limbs, albeit a component of the principal contract. However, in the second case viz. novation of the contract, the legal position of arbitration agreement completely changes, as the very scheme of the principal contract stands superseded by a new contract between the parties.

Moreover, as per various judicial decisions, doctrine of separability is not an absolute rule of law, and there can be circumstances in which the invalidity of the underlying contract would have repercussions on the arbitration clause.[17] Even the UNCITRAL Model Law does not provide that the non-existence, invalidity or illegality of the underlying contract never affects the associated arbitration clauses, it merely provides that the invalidity of the underlying contract does not lead to *ipso jure invalidity of the arbitration agreement.*

The issue as to whether the arbitration agreement survives or perishes along with the main contract would depend upon the nature of the controversy [18]. If the nature of the controversy is such that the main contract would itself be treated as *non est then in that case the arbitration agreement becomes void [19]. The facts for impeaching the arbitration agreement must be specific to both the main agreement and the arbitration agreement and not only specific to the main agreement as in the former case, the arbitration clause would perish with the main contract while in the latter case, it would not [20].*

It is pertinent to mention that the contractual relationship between the parties change, once the substantive contract between them gets novated and different terms are added to the new contract, and therefore, the subject matter of the dispute is also bound to change in such a situation.

Thus, it's submitted that the parties must be precluded from invoking the previous arbitration agreement for resolution of the disputes arising from the novated contract. Also, the common intention of the parties to resolve the disputes based on the terms of new contract doesn't remains the same after the previous contract gets novated, as their legal relation changes due to change in the terms of the contract by the parties.

Therefore, in the case of novation of contract, the arbitration clause forming the part of the underlying contract would perish with it, since the original contract gets completely annihilated and extinguished by the new contract between the parties with their mutual consent. A new contract along with a new arbitration clause comes into existence to govern the new relationship between the parties whereby they may possess different rights and liabilities.

After, analysing the effects of novation, it becomes very much clear that as a general matter of law, an arbitration clause by its very nature, survives the rescission, repudiation or frustration of contract, it even may survive when the substantive contract is held to be void. However, novation being an to this general rule and as per doctrine of novation in s. 62 of the Contract Act, if there is total substitution of the earlier contract and all the terms of the earlier contract with mutual consent of all the parties, then the contract including the arbitration clause will get perished by the novated contract.

VI. CONCLUSION

To conclude, unlike rescission, breach, or frustration of contract, novation of the contract puts a complete end to an arbitration clause contained therein, provided the conditions discussed above are duly fulfilled. This judgement of the Delhi High Court is praiseworthy, for it rightly crystallises the legal implications of novation of a contract on the arbitration clause contained in it.

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Section-4

Up-&-Coming

INTERNATIONAL EVENTS

INTERNATIONAL LAW SCHOOL MEDIATION TRAINING & TOURNAMENT [6-10 April, 2021]

Inter-National Academy of Dispute Resolutions is hosting virtual mediation trainings and tournaments worldwide. Participants can learn about the benefits of mediation and how to conduct a mediation online while maintaining safe social distance. This event will be a virtual tournament hosted by the University of Georgia, Tbilisi, Georgia. Registration information will be available beginning January 10. More About the Event...

NEGOTIATION BOOTCAMP & AD HOC NEGOTIATION COMPETITION [9 - 11 April, 2021]

This one-day bootcamp followed by a negotiation competition will be delivered in partnership with the European Institute for Conflict Resolution (EICR) and has been specially designed for law and business students. Event will help you in your negotiation skills and will help people in all industries resolve conflicts in their workplace, in their home and in their personal life. The ability to negotiate can change how you perceive conflict and how you deal with it. More About the Event...

INTERNATIONAL ONLINE MEDIATION COMPETITION [23 - 25 April, 2021]

A three-day International Online Mediation Competition will be delivered in partnership with the European Institute for Conflict Resolution (EICR) and has been especially designed for law and business students across the world. You can register as an individual/team or register as a judge. Event will be conducted Online via Zoom. The competition is for business & law students from all over the world. More About the Event…

THE MEDIATION AND NEGOTIATION COMPETITION BY IBA-VIAC [2021]

This Consensual Dispute Resolution Competition (CDRC) is your platform to build skills, experience and brilliance in this field and to exchange, learn and grow with the stars of the world of Consensual Dispute Resolution. The competition will be based upon 2021 Willem C. Vis International Commerical Arbitration Moot Problem and it will be conducted online More About the Event...

16TH ICC NEW YORK CONFERENCE ON INTERNATIONAL ARBITRATION

[September 2021]

Every year the ICC New York Conference on International Arbitration attracts over two hundred participants for thought-provoking discussion and insights into the latest North American arbitration trends. This conference features experts in the field as well as representatives from the ICC International Court of Arbitration, all on hand to engage with professionals wanting to keep pace with the latest developments.
More About the Event...

NATIONAL EVENTS

1st VIRTUAL INTERNATIONAL MEDIATION COMPETITION 2021 [26-28 March, 2021].

Mediate Guru is organizing its series of International Mediation Competition followed by 1st International Mediation Competition that is to be held on 26-27-28 March 2021, the International Mediation Competition is a unique opportunity for students to learn and practice mediation and negotiation skills through the role-playing of a mediation problem drafted by experienced mediators and practitioners. More About the Event...

3rd ADR COMPETITION @ ICFAI LAW SCHOOL, HYDERABAD [28-31 March, 2021]

ICFAI Law School Hyderabad is organising 3rd national ADR tournament as part of its annual law fest, LEXKNOT'19, from 28th to 31st of March. The ADR tournament is consisting of the following competitions: (1) Mediation and (2) Client Counseling. More About the Event...

NATIONAL SEMINAR ON APPROACH OF JUDICIARY IN IMPLEMENTATION OF ADR BY SCHOOL OF LAW, SHARDA UNIVERSITY [9-10 April, 2021]

Sharda University, School of Law is organizing a Two days Virtual National Seminar on "Approach of Judiciary in Implementation of Alternative Dispute Resolution" in Online mode on, 9th and 10th of April 2021. The seminar aims to highlight the various aspects and issues related to Alternative Dispute Resolution. More About the Event...

GMU-CIARB INTERNATIONAL MARITIME ARBITRATION COMPETITION

[9 - 11 April, 2021]

School of Maritime Law, Policy and Administration, Gujarat Maritime University is holding its annual flagship event, GMU-CIArb (India) International Maritime Arbitration Competition . The event is expected to have participation from about 50 Law Schools and Universities across India & abroad. Competition is aimed at nurturing and creating opportunities for the development of the skills of Arbitration in Maritime Law. More About the Event...

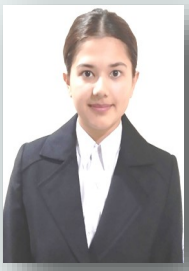
VII NLS NEGOTIATION MEDIATION AND CLIENT COUNSELLING COMPETITION

[28 April- 2 May, 2021]

The Competition is being organized by the Alternative Dispute Resolution Board, NLSIU and will take place virtually over videoconferencing platform, Zoom. There are four segments of the competition: Negotiation, Mediation (Client-Attorney), Mediation (Mediator) and Client Counselling. More About the Event...

Section-5

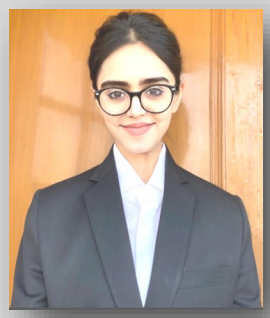
HPNLUites: The Achievers




A team comprising *Vanshika Thakur* and *Navisha Verma* from B.A. LL.B, 5th Semester awarded the 7th Best Negotiating Teams at ODRC 2.0 (*2nd International Online Dispute Resolution Competition*) conducted by The Pact in association with LexADR as a Knowledge Partner, on 8-11 May, 2020. The competition saw participation of 44 teams from different nations as well as from several domestic universities.



A team comprising *Sarvagya Jain, Ayushi Soni* and *Shreya Chourasia* from 3rd Semester participated in the *International Moot Court Competition,2020* organised by Indore Institute of Law and bagged *1st Position* along with Rs. 11,000/- cash prize. Sarvagya Jain was adjudged as the Best Speaker and he won a cash prize of Rs. 1100/-.



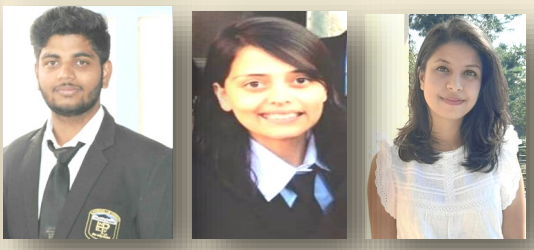
Ankita Sharma student of 3rd Semester attained *1st Position* in National Debate Competition, 2020 conducted by National Human Rights Commission. the debate was conducted on the issue of present day scenario, "Media Trial Vitiates Human Rights of the Individual".

She was also awarded as *Popular Speaker of India, 2020* by LAFZ - The Indian Speakers' Forum through India's largest Online speech competition which saw 500+ registrations from all across the globe covering more than 100 universities and 200 colleges.

Shikhar Bhardwaj student of 7th semester attained *1st position* in *1st Pocket Money Quiz Competition* organised by National Law University, Orissa in collaboration with Usha Khare Foundation along with cash prize of Rs.1800/-.

He also bagged *3rd position* in 1st National Research Paper Writing Competition on commercial arbitration pertaining to sports laws organised by ICFAI Law School, Dehradun in collaboration with a Atharva Legal Law Firm along with cash price of Rs. 1000/-.

The team comprising of *Vikram Nagpal. Eshita Jain and Ritik Dewedi* from 7th Semester won *Best Researcher's Award* & *Best Memorial's Award* with the cash prize of Rs. 3100/- & Rs. 5000/- respectively in 1st Justice Dipak Misra National Moot Court Competition, 2020" organised by The Advocates League in collaboration with Advani & Co.

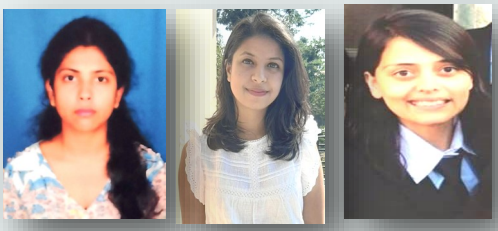


The team comprising *Prateek Sharma, Megha Shukla* and *Kritika Katoch* participated in the National Memorial Writing Competition, 2020 organised by The Legal Amigos and attained *1st Position* along with a cash prize of 1500/-.

A team comprising of *Vikram Nagpal* and *Eshita Jain* students of 7th semester attained *2nd position* in First National Research Paper Writing Competition on commercial arbitration pertaining to sports laws organised by ICFAI Law School, Dehradun in collaboration with a Atharva Legal Law Firm along with cash prize of Rs. 3000/-.

Kritika Katoch from B.B.A LL.B, 7th Semester secured 2nd Position in National Research Paper Writing Competition by Think India, HP with paper titled "Adaptation of Postal Rule in Digital Arena".

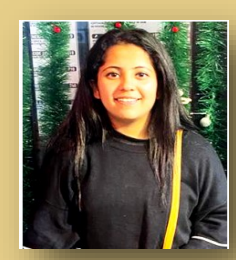
Ms. Purnima Sharma from B.A. LL.B 5th year, participated and presented a paper titled "A Policy Analysis of the Role and Application of the Panchayati Raj System, an Indian Sociocratic Dispute Resolution Model, and its Sustainable Utilization in Developing Nations to Enhance the Access to Justice under SDG-16" in the *14th International conference on Sustainable Development Toronto, Canada* jointly organized by Ontario International Development Agency (OIDA) and the International Centre for Interdisciplinary Research in Law (ICIRL).



A team comprising of *Megha Shukla, Bhavya Saini* and *Kritika Katoch* won *3rd Position* in Policy Drafting Competition which was organized by Think India and NITIE, Mumbai in collaboration with MyGov and Adhyaan Foundation. Their team were also awarded a cash prize of Rs. 30,000/-.

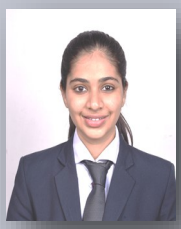
Megha Shukla from B.B.A LL.B, 7th Semester secured 3rd position at 8th National Research Paper Writing Competition organized by Think India, HP for an article named "Human Trafficking- The Modern Slavery".

A team comprising of *Shikhar Bhardwaj* and *Pratik Sharma* of B.B.A. LL.B 7th semester attend 2nd position in Lei Ipsum Online Quiz Competition on Law and Management organised by NMIMS Mumbai.



Khushbu Sood from 5th Semester, B.A LL.B declared 1st runner up in Extempore Competition at Himachal Pradesh University Institute of Legal Studies, Shimla.

She was also regarded as *High Commendation* in the Model United Nations, Oak Summit.



Aayushi Soni student of B.A. LL.B 3rd Semester took part in All India Static and Legal Quiz which consisted of three rounds. She cleared all the three rounds and won the position of 2nd runner up where she received a cash prize of Rs. 500/- and letter of Appreciation.

Arsh Chhajer student of B.B.A. LL.B 3rd Semester attained Highest Commendation in Rajya Sabha of 1st National E-Yourh Parliament organised by Dr. B. R. Ambedkar National Law University, Sonipat.