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ARBITRATION

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ABOUT THE JOURNAL

The CADR Journal of Dispute Resolution (CJDR) is the official publication of Centre for ADR, National Law University Delhi and is dedicated to recognize and foster academic research and scholarship in ADR methods. This biannual Journal intends to examine the latest developments in the field of ADR and its interface with commercial law, particularly in light of comparative international perspectives. While it is a primarily legal journal, it also addresses analysis on allied areas, such as sociological and psychological research on ADR.

CJDR aims to publish truly interdisciplinary research on issues related to dispute resolution and provides a platform for sharing up-to-date, high-quality and original research papers alongside contemporary and insightful reviews. It is an open-access, student-reviewed journal and aims to provide a platform for the discussion of national as well as international developments in the field of dispute resolution.

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EDITORIAL NOTE

We are delighted to introduce Centre for ADR's new Journal of Dispute Resolution (CJDR). CJDR is the first online Journal of the CADR and it aims to publish truly interdisciplinary research on issues related to dispute resolution and settlement. In 2017, ADR Society of NLU, Delhi has been reorganized as the Centre for ADR. CADR has been working towards promoting ADR methods through training students and undertaking other activities.

Disputes are inevitable part of human relations and methods of its efficient resolution is continuously evolving. Across the world people are involved in research as to how disputes can be resolved effectively and thereby relationships can be improved. CJDR is a humble attempt on part of CADR to contribute towards this larger global agenda. CJDR will provide a platform for sharing up-to-date, high-quality and original research papers alongside contemporary and insightful reviews. This is a biannual online Journal. In the coming editions all types of papers will be subject to the journal's double-blind review process. However, the pieces in this edition are only by invitation.

In this Issue of the Journal, we present to you articles on various issues of contemporary relevance like issues regarding pre-arbitral steps, online Mediation in India, appointment of arbitrators, conflict of interest of arbitrators, attributability of wrongful conduct in Investment Arbitration and fundamental concepts in arbitration and issues of non-signatories. We hope this Issue of the Journal will be able to excite your mind to explore the realm of ADR further.

We invite you to be a part of our journey to take the research in this area a notch higher by submitting your papers, case comments, book reviews, either individually or collaboratively. We thank you in advance for your contribution to the Centre for ADR Journal of Dispute Resolution.

- ***Editor-in-Chief***

FOREWORD

WHY ADR, AND WHY NOW?

- ***John G. Shulman****

Let's say you have a dispute, and you believe you need a lawyer to help you "win" the dispute. Perhaps your dispute is over land. Or maybe it involves an important environmental or human rights issue. Or it could be a business dispute, or a family dispute. Fair enough, sounds like you need a lawyer.

But before we dive into the legal issues that may help determine the outcome of your dispute in the legal system, there are some questions you may want to consider…

For example, do you have a lot of extra money to spare? The legal system is costly, and you will most likely be asked to do your part to pay for your exposure to the legal system.

Also, are you ready to ride waves of emotions, like frustration, outrage and anger? If you think you are angry now, just wait to see what the legal system can do to turn your dispute (and your already bad relationship with the other party) even worse.

You will have plenty of time to absorb these negative emotions since you will most likely have to wait a decade or more to get a "final" decision from the legal system that purports to resolve your dispute – the judicial decision may help you remember what the original dispute was about so many years ago.

Perhaps you will be satisfied by the decision and call it—as the legal system does—"justice."

But as likely, after paying all that money, and waiting all that time, you may lose your case. And the legal system will also call your loss, "justice."

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So you gambled a lot of money and got a lot older while your case was pending. But regardless of what the legal system decides with regard to your dispute, will you really be any wiser?

These questions may seem provocative, and even cynical or impertinent, especially coming from a lawyer. But I have been around long enough and seen enough in a career as a human rights lawyer to believe that we as a profession had better start considering these questions and yes, start answering them. If we do not, we will render ourselves obsolete when people decide how best to resolve their disputes.

Before we go further, I will be the first to say we do need lawyers and a functioning legal system. In fact, for the most vulnerable among us, for those courageous enough to challenge the abuses by those with power, the legal system may be our only and best chance for meaningful justice.

Yet the courts should not, indeed cannot, be our only avenue for seeking justice and resolving disputes. We as lawyers must become advisers who help our clients solve problems in innovative, timely, effective ways. For example, rather than take a business dispute to court, why not try to negotiate a resolution first? Or if a family has conflict over land, why not bring in community elders or a mediator to help family members talk and listen to each other? While some forward-thinking lawyers are indeed already doing these things, more of us should begin to think this way.

Simply put, a lawyer's skills should extend beyond writing briefs, arguing in court and reassuring our clients that justice will be done if only they are patient and believe…We as a profession should develop and promote the skills required for resolving conflict, and promoting social justice and human rights.

And before you object that a lawyer's pecuniary and professional interests will be harmed by helping clients solve difficult problems in innovative, timely and effective ways, I can show you scores of lawyers who are making a good living, and more important "living good," employing these skills.

If we are truly to address the conflicts, disputes and injustices – big and small – that plague and bedevil us individually and as societies, then we must find new (and rediscover some old) ways

to listen and understand each other, explore creative solutions, and understand the risks (and opportunities) associated with conflict.

While courts will undoubtedly play a role, it will still take legions of empowered advocates using wide ranging processes of negotiation and informal conflict resolution to address global climate change, social and economic inequality and injustice, racism, sexism and the manifold other conflicts and pressing issues of our time.

In sum, we as lawyers must develop and share the skills required of us *and our clients* to become proficient negotiators and problem solvers. We must partner with and empower our clients to become full participants in the resolution of their conflicts and disputes. Only in the legal profession, do we describe such skills as "alternative" dispute resolution.

The rest of the world calls it "*life*."

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The Centre for ADR would like to thank the contributors to this edition for submitting their articles, to our CADR team for working through a difficult year towards our common goal, and specially to Hardik Baid and Livie Jain for setting up our website and to Hardik Baid for desigining our cover.

Thanks are due to our Editorial team and our volunteers – Prof. (Dr.) Ruhi Paul, our Editor-in-Chief, to our Managing Editors, Abhinav Hansaraman and Hardik Baid, and our Editors – Akanksha Mathur, Abhishek Jain, and Sanchita Bhat.

ALTERNATIVE DISPUTE RESOLUTION AS PRE-ARBITRAL STEP

- *Harshad Pathak*[*] *& Shivam Pandey*[ר]

ABSTRACT

In both domestic and international commerce, parties now routinely structure a multi-tiered dispute resolution process, which amalgamates arbitration with alternative dispute resolution (ADR) mechanisms. In such clauses, the parties' agreement to arbitrate is preceded by certain pre-arbitral steps, including that the parties first attempt to resolve their dispute amicably. This poses myriad issues before Indian courts regarding the effect of the parties' pre-arbitral steps on their intent to arbitrate. It is no longer a question of upholding the sanctity of a seemingly sacred arbitration agreement against a recalcitrant party insistent on litigating before municipal courts. Rather, the parties' intention to arbitrate is placed at loggerheads with a competing, and equally sacred, intent to resolve their dispute through ADR mechanisms. The article explores these questions by reference to the inconsistent judicial pronouncements by courts in India on this issue, with a view to identify where should the balance lie.

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The contents of this article reflect the personal views of the authors alone, and not of any organisation they may be affiliated with. The authors reserve their right to depart from these views in future. The authors thank Ms Sanchita Bhat, student at the National Law University, Delhi, and other members of the Editorial team of the CADR Journal for their invaluable assistance in finalising the article.

1. INTRODUCTION

In theory, arbitration is characterised as a mode of alternative dispute resolution ("ADR"); its name often invoked in the same breath as mediation and conciliation. Indeed, Section 89 of the Code of Civil Procedure, 1908 ("CPC"), which requires courts to encourage settlement of disputes through ADR, treats arbitration, conciliation, and mediation alike.[1]

However, this is an uncomfortable proposition. Although all ADR mechanisms, including arbitration, share a common trait – i.e. they facilitate resolution of disputes outside the municipal courts framework - this is where the commonality ends. Specifically, the arbitral process differs from mediation or conciliation in at least two material ways.

Firstly, in essence, both mediation and conciliation denote a negotiation process by which a neutral third-person assists the disputing parties to arrive at an amicable resolution. Ultimately, it is for the parties to resolve their dispute, without any adjudication *per se*. To the contrary, an arbitration requires an arbitral tribunal to adjudicate the dispute between the parties in the same manner as a court would; except with greater procedural flexibility.[2] The tribunal will render its final decision in the form of an award,[3] which shall be final and binding on the parties and persons claiming under them respectively.[4]

Secondly, unlike arbitration, a mediation or conciliation need not result in any enforceable outcome. It is common for the parties to not reach an amicable resolution at all. However, this is not the case with arbitration. If validly commenced, an arbitration must culminate in an award, which decides all issues raised before the tribunal.[5] In fact, an arbitral tribunal is empowered, by law, to continue with the proceedings even if a respondent fails to communicate its statement of defence,[6] or if a party fails to appear at an oral hearing or to produce documentary evidence[7].

[1] Code of Civil Procedure 1908, s 89.

[2] Arbitration and Conciliation Act 1996, s 24(1) (Arbitration Act).

[3] ibid s 31(1).

[4] ibid s 35.

[5] ibid s 29A(1).

[6] ibid s 25(b).

[7] ibid s 25(c).

The parties' agreement with the contents of the award is neither necessary nor capable of diminishing its finality or binding nature.

Therefore, despite Section 89 of the CPC, it is not entirely correct to characterise arbitration as an ADR mechanism. In fact, conceptually, arbitration is closer to adjudication before municipal courts than to either mediation or conciliation.

This does not mean that the domain of arbitration does not interact with ADR mechanisms. In recent years, the inadequacies of arbitration - such as increasing costs, concerns about lack of independence and impartiality, and delays in making an award – have led transacting parties to look for other novel solutions for resolution of their commercial disputes. These parties are now inclined to structure a multi-tiered dispute resolution process, which amalgamates the remedy of arbitration with ADR mechanisms. In other words, the parties' agreement to arbitrate is routinely preceded by certain pre-arbitral steps, including the requirement that the parties first attempt to resolve their dispute amicably through ADR mechanisms.

In the above context, Indian courts are now frequently asked to determine issues regarding the effect of the parties' contractually stipulated pre-arbitral steps on their arbitration agreement. These include deciphering whether a pre-arbitral step is of mandatory nature, such that a party's consent to arbitration is contingent upon the fulfilment of such step. And these questions pose a novel dilemma. It is no longer a simple question of upholding the sanctity of a seemingly sacred arbitration agreement against a recalcitrant party insistent on litigating before municipal courts.[8] Rather, the parties' intent to arbitrate is now at loggerheads with a competing, and equally sacred, intent to resolve their dispute through ADR mechanisms. Indeed, while it is easier for a court to deny jurisdiction and refer the parties to arbitration, can it reach the same conclusion with equal conviction when the alternative is to mediate or conciliate? The authors endeavour to answer this question by mapping the inconsistent judicial response of Indian courts.

As context for further discussion, Part 2 deciphers the types of pre-arbitral steps commonly noticed in commercial contracts. In this light, Part 3 explores whether non-compliance with pre-arbitral steps can serve as a jurisdictional bar for an arbitral tribunal. Thereafter, Part 4 examines

[8] Arbitration Act, s 8(1), 45(1).

the extent to which pre-arbitral steps involving ADR mechanisms need to be complied with under Indian law. Part 5 concludes.

2. CLASSIFYING PRE-ARBITRAL STEPS

Jane Austen famously wrote that "there are as many forms of love as there are moments in time"[9]. This also holds true for pre-arbitral steps in multi-tiered dispute resolution clauses. Other than the traditional limitations in contract law[10], there are no fetters on the parties' autonomy to precede their arbitration agreement with any requirement that they consider appropriate. After all, party autonomy is the bedrock of arbitration, and the parties are free to express their arbitral intent in any legally permissible manner.

That being said, a scrutiny of judicial pronouncements by Indian courts on the issue allows one to infer the types of pre-arbitral steps commonly noticed in commercial contracts. Broadly, these can be classified as follows: (i) negotiations and consultations for amicable settlement; (ii) ADR mechanisms – Mediation and Conciliation; (iii) pre-arbitral adjudication; and finally, (iv) miscellaneous requirements.

2.1 Negotiations / Discussions for Amicable Settlement

It is common for transacting parties to agree that before commencing arbitration, they will attempt to resolve the dispute amicably by engaging in negotiations / discussions. Even without referring to any specific ADR mechanism, the parties agree to arbitrate only if they are unable to reach an amicable settlement in relation to their dispute.

The parties can agree to incorporate such pre-arbitral step in myriad ways. For instance, in *Haldiram Manufacturing Company Pvt. Ltd. v DLF Commercial Complexes Ltd.*[11], the arbitration clause stipulated as under:

> "All or any disputes arising out or touching upon or in relation to the terms of this application and / or Commercial Space Buyers' Agreement, including the

[9] Jane Austen, Mansfield Park.

[10] Indian Contract Act 1872, s 24 (Indian Contract Act).

[11] *Haldiram Manufacturing Company Pvt Ltd v DLF Commercial Complexes Ltd* 2012 SCC OnLine Del 2139.

> interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicable by mutual discussion, failing which the same shall be settled through arbitration…"[12] (emphasis added)

Likewise, in *Quickheal Technologies Ltd. v NCS Computech Private Ltd.*[13], the parties' arbitration clause provided that:

> "All disputes under this Agreement shall be amicably discussed for resolution by the designated personnel of each party, and if such dispute/s cannot be resolved within 30 days, the same may be referred to arbitration…"[14] (emphasis added)

In the above instances, the parties had used definitive terms, such as "shall", to articulate their pre-arbitral step. However, they may also couch their requirement in less definitive terms. In *Siemens Limited v Jindal India Thermal Power Ltd.*[15], for instance, the arbitration agreement merely provided that "[t]o the best of their ability, the parties hereto shall endeavour to resolve amicably between themselves all disputes"; failing which either party may refer the dispute for settlement by arbitration.[16]

2.2 Mediation and Conciliation

Unlike the above instances, the parties can equally manifest their emphasis on attempting an amicable resolution by reference to a specific ADR mechanism. In other words, instead of merely providing for negotiations or discussions, they can include a pre-arbitral step that requires them to engage in mediation or conciliation process, before commencing arbitration if required.

For instance, in *Tulip Hotels Private Limited v Trade Wings Limited*, the arbitration clause stated as under:

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[12] *Haldiram* (n 11) 17; see also *Ravindra Kumar Verma v M/s BPTP Ltd* 2014 SCC OnLine Del 6602, 4; *Sarvesh Security Services v Managing Director DSIIDC* 2018 SCC OnLine Del 7996, 13.

[13] *Quickheal Technologies Ltd v NCS Computech Private Ltd* 2020 SCC OnLine Bom 687.

[14] ibid 5.

[15] *Siemens Limited v Jindal India Thermal Power Ltd* 2018 SCC OnLine Del 7158.

[16] ibid 10; *JK Technosoft Limited v Ramesh Sambamoorthy* 2017 SCC OnLine Del 10813, 5.

"All dispute and differences between the parties hereto in respect of any matters and except those relating to the fundamental matters in respect of which the parties have been given affirmative vote, stated in this Agreement shall first be tried to be resolved through the intervention of a conciliator appointed by the parties to the dispute, who shall initiate through conciliation to resolve the dispute. If, however, the dispute is not resolved within one month after the matter of dispute is referred to the conciliator for conciliation, the same shall be referred for arbitration…"[17] (emphasis added)

Finally, the parties also routinely incorporate settlement negotiations and conciliation as two distinct pre-arbitral steps, as was the case in *Rajiv Vyas v. Johnwin*:

"14.1 Settlement of Disputes through Good Faith Negotiations

a) The parties shall endeavour, in the first instance, to resolve any dispute, disagreement or difference arising out of or in connection with this Agreement, including any question regarding its performance, existence, validity, termination and the rights and liabilities of the parties to this Agreement (a "Dispute") through good faith negotiations;

If a settlement is not reached within thirty (30) days after the date of receipt of the Dispute Notice by the non-initiating Party, such Dispute shall be referred for conciliation to one Conciliator in accordance with the provisions of Arbitration & Conciliation Act, 1996.

14.2 Arbitration

a) If good faith negotiations and conciliation have not been able to resolve a Dispute, such Dispute shall be referred to and be finally resolved by Arbitration in accordance with the Arbitration & Conciliation Act, 1996 and the rules made thereunder…"[18] (emphasis added)

[17] *Tulip Hotels Private Limited v Trade Wings Limited*, Application for Appointment of Arbitrator No 4 of 2007, Judgment (19 March 2008), 3; *Union of India v M/s Baga Brothers &* Anr 2017 SCC OnLine Del 8989.

[18] *Rajiv Vyas v Johnwin* 2010 (6) MhLJ 483, 3.

I refer to these two categories of pre-arbitral steps as "ADR based pre-arbitral steps".

1.3 Pre-Arbitral Adjudication

Though a common presence in commercial contracts, ADR mechanisms are not the only kind of pre-arbitral steps that the parties incorporate as part of their arbitration agreement. In certain contracts, particularly in the construction sector, the parties often require the parties to submit to a pre-arbitration adjudication mechanism before commencing arbitration, if necessary.

In *Nirman Sindia v Indal Electro-melts Ltd.*[19], the parties had entered into an agreement for the execution of certain construction works. As part of their dispute resolution mechanism, they had agreed to a three-step mechanism, as per which the parties will refer their dispute to an Engineer. If the contractor believed that the Engineer's decision "was either outside the authority given to the Engineer by the contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision."[20] It was only at this juncture that either party could "refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision."[21]

Likewise, in *JIL Aquafil (JV) v. Rajasthan Urban Infrastructure*[22], the parties had agreed to refer a defined category of disputes for a decision by the Project Manager, which the parties could later "revise in an amicable settlement".[23] It is only at this stage that a party may commence arbitration either if it is "dissatisfied with any decision of the Project Manager, of if the Project Manager fails to give notice of his decision on or before 28 (twenty eight) days after the day on which he received the reference".[24]

Another example of a similar dispute resolution framework is noticed in *National Highways Authority of India v. PATI-BEL (JV).*[25] The parties therein had agreed that any dispute between

[19] *Nirman Sindia v Indal Electro-melts Ltd* 1999 SCC OnLine Ker 149.

[20] ibid 3.

[21] ibid.

[22] *JIL Aquafil (JV) v Rajasthan Urban Infrastructure* 2016 SCC OnLine Raj 3814.

[23] ibid 14.

[24] ibid.

[25] *National Highways Authority of India v PATI-BEL (JV)* 2019 SCC OnLine Del 6793.

them will be "in the first instance", referred to a Dispute Review Board for its "recommendations".[26] Thereafter, in "case a recommendation is made, the aggrieved party has the power to trigger the arbitration agreement" within a defined period.[27] "The Arbitral Tribunal has been given powers under the [arbitration] clause to open up, review and revise any […] recommendation of the" Dispute Review Board.[28] Indeed, as observed by the High Court of Delhi, this "is a typical multi-tier clause, which is found in many domestic and international arbitration agreements."[29]

1.4 Miscellaneous Requirements

Lastly, the parties have the autonomy to incorporate any legally permissible pre-arbitral step as part of their arbitration agreement. This may range from observing a cooling off period during which a party may not commence arbitration even after the notification of a dispute or requiring the payment of a security deposit prior to the constitution of the arbitral tribunal. The latter was indeed the case in *Municipal Corporation, Jabalpur and others v Rajesh Construction Co.*[30], wherein the parties had agreed that "[w]here the party invoking arbitration is the contractor no reference for arbitration shall be maintainable, unless the contractor furnishes a security deposit of a sum" to be determined in accordance with the contract.[31]

The above classification, in addition to highlighting the types of pre-arbitral steps, also assists in determining their effect on the parties' arbitration agreement. This is for two reasons. *Firstly*, the parties' choice of words in drafting a pre-arbitral step is crucial for deciphering their mutual intent; and *secondly*, whether non-compliance with a pre-arbitral step can act as a bar to arbitral jurisdiction will also, in part, depend on the type of pre-arbitral step agreed by the parties.

[26] *NHAI* (n 25), 10(i)-(v).

[27] ibid, 10 (v)(a).

[28] ibid, 11.

[29] ibid, 35.

[30] *Municipal Corporation, Jabalpur and others v Rajesh Construction Co.*, (2007) 5 SCC 344.

[31] ibid, 6.

As the subsequent section details, courts in India have adopted these two broad parameters to decipher – with many inconsistencies – the circumstances in which non-compliance with a pre-arbitral step can affect the jurisdiction of an arbitral tribunal.

3. PRE-ARBITRAL STEPS AS A BAR TO ARBITRAL JURISDICTION?

It often transpires that a party attempts to commence arbitration with necessarily complying with the contractually stipulated pre-arbitral steps. And while the reasons for this tendency vary depending on the circumstances of each dispute, this tendency nonetheless poses a question – is the failure to comply with pre-arbitral steps fatal to the jurisdiction of an arbitral tribunal?

The answer to this question depends not only on the specific pre-arbitral step contained in a contract, but also the forum where it is raised. Courts in India have answered this same question differently, often taking diametrically opposite approaches.

On the one hand, unless the wording of the contractual stipulation indicates to the contrary, some Indian courts consider compliance with pre-arbitral steps mandatory. Consequently, unless the agreed steps are fulfilled, a party cannot validly commence arbitration. However, on the other hand, some courts consider pre-arbitral steps to be directory in nature, such that a party's failure to comply with them does not deprive an arbitral tribunal of its jurisdiction. As far as ADR based pre-arbitral steps are concerned, the absence of a definitive pronouncement by the Supreme Court of India has allowed the High Courts in India to reach conflicting conclusions in this regard.

3.1 The Mandatory Nature of Pre-Arbitral Steps

A number of courts in India consider the parties' contractually agreed pre-arbitral steps to be mandatory in nature. Despite the odd exception[32], this appears to be the consistent position with respect to pre-arbitral steps that do not make reference to ADR mechanisms, including settlement negotiations or discussions.

[32] *JIL Aquafil* (n 22) 24

For instance, in *Municipal Corporation, Jabalpur and others v Rajesh Construction Co*.[33], where the constitution of the tribunal was preceded by the payment of a security deposit, the Supreme Court of India found the pre-arbitral step to be mandatory.[34] The court explained that "the obligation of the Corporation to constitute an Arbitration Board to resolve disputes between the parties could not arise because of failure of the respondent to furnish security as envisaged in clause 29(d) of the contract."[35] On such premise, the court directed the respondent therein to furnish the requisite security amount if it desired the constitution of an arbitral tribunal.[36]

Likewise, in *Nirman Sindia v Indal Electro-melts Ltd*., where the parties had agreed to refer their disputes to an Engineer and then an Adjudicator before commencing arbitration, the Kerala High Court construed this pre-arbitral step mandatory.[37]

The High Court of Delhi, in *National Highways Authority of India v. PATI-BEL (JV),* reached the same conclusion while interpreting a pre-arbitral step that required the parties to first refer their dispute to a Dispute Review Board.[38] It explained that "the outcomes reached by DRB are given due weight in the final adjudication proceedings"; thereby, implying that the pre-arbitral step "is mandatory in nature and that the parties cannot opt out from this preliminary step and not have their grievance examined by the [Dispute Review Board] in the first instance."[39]

Consistent with the above understanding, some High Courts in India have reached a similar conclusion while interpreting ADR based pre-arbitral steps. In principle, they regard the parties' intent to arbitrate to be conditional, which fructifies only if the parties successfully comply with the pre-arbitral step. There are a number of decisions supporting this understanding.

In 2008, in *Tulip Hotels Private Limited v Trade Wings Limited*, the High Court of Bombay affirmed, prominently for the first time, the mandatory nature of an ADR based pre-arbitral step. Refusing to appoint an arbitrator for non-compliance with a pre-arbitral step, the Court remarked

[33] *Rajesh Construction* (n 30).

[34] Ibid, 21.

[35] *Rajesh Construction* (n 30) 21.

[36] ibid 23.

[37] *Nirman Sindia* (n 19) 12.

[38] *NHAI* (n 25) 32-39.

[39] ibid 34.

that "the reference of the matter for conciliation is the prerequisite for the appointment of the arbitrator for the adjudication of dispute by way of arbitration [and that] it is essential for the applicants to plead and establish that the said pre-requisite has been duly complied with…"[40]

In 2012, the High Court of Delhi arrived at an identical conclusion in *Haldiram Manufacturing Company Pvt. Ltd. v DLF Commercial Complexes Ltd.*, while interpreting a pre-arbitral step requiring the parties to first engage in mutual discussion for amicable settlement:

> "…It would be manifest on perusal of the [...] arbitration clause that the disputes arising between the parties at the first instance were to be mandatorily settled amicably by mutual discussion as the word used is shall in the clause and it is only on the failure of any settlement arrived at between the parties after the mutual discussion, the other alternative was the settlement of the disputes through arbitration. Hence, clearly the first step stipulated in the said clause is the settlement of disputes through mutual discussion and second step is the settlement through arbitration. The Forum of Arbitration was, therefore, made dependent on the outcome of the first step that is of mutual settlement."[41]
>
> (emphasis added)

Therefore, since no mutual discussions had taken place between the parties[42], the Court did not make a reference to arbitration on the ground that the "conduct of the defendant clearly [was] contrary to the mandate of the [arbitration] clause"[43].

A few months later, this was promptly followed by the High Court of Rajasthan's judgment in *Simpark Infrastructure Pvt. Ltd. v Jaipur Municipal Corporation*[44], where the Court noted that since "the agreed arbitral procedure [of attempting amicable settlement] has not been followed

[40] *Tulip Hotels* (n 17) 8.

[41] *Haldiram* (n 11) 20.

[42] ibid 21.

[43] ibid 22.

[44] *Simpark Infrastructure Pvt Ltd v Jaipur Municipal Corporation*, 2013(3) RLW 2133 (Raj).

by the Applicant, […] the arbitration application [for appointment of an arbitrator] is premature."[45]

As recently as June 2020, in *Quickheal Technologies Ltd. V NCS Computech Pvt Ltd. & Anr.*, the High Court of Bombay clarified its understanding of the position of law on this issue. Taking note of the parties' conscious use of the word "shall", the Court affirmed the mandatory nature of the pre-arbitral step in question:

> "… it is clear beyond any doubt that Clause 17 of the Agreement is a Clause which is drafted with proper application of mind. Under sub-clause (a) of Clause 17, the parties have first agreed that all disputes under the Agreement **"shall"** be amicably discussed for resolution by the designated personnel of each party, thereby making it mandatory to refer all disputes to designated personnel for resolution/settlement by amicable discussion. It is thereafter agreed in Sub-Clause (a) of Clause 17 itself, that if such dispute/s cannot be resolved by the designated personnel within 30 days, the same **"may"** be referred to Arbitration, thereby clearly making it optional to refer the disputes to Arbitration, in contrast to the earlier mandatory agreement to refer the disputes for amicable settlement to the designated personnel of each party…"[46]
>
> (emphasis original)

Consequently, where the parties have incorporated an ADR based pre-arbitral step by using definitive terms such as "shall", it denotes their intention to treat such step as mandatory. In such cases, a failure to comply with the agreed pre-arbitral step will render any attempt to commence arbitration premature.

3.2 Non-Compliance with Pre-Arbitral Steps not a Jurisdictional Bar

The aforementioned decisions, which regard ADR based pre-arbitral steps as mandatory, are both reasonable and justifiable. Indeed, in each decision, the concerned court is guided by the parties' consciously-drafted contractual provisions to infer their mutual intent. Further, the courts

[45] ibid 20.

[46] *Quickheal* (n 13) 51.

also appear to implicitly uphold the utility of ADR mechanisms in resolving commercial disputes. At the very least, they proceed on the premise that a party cannot easily discard its self-assumed obligation to attempt to reach an amicable resolution.

Yet, this approach did not find favour with many other Indian courts, or rather, individual judges belonging to a same court.

In 2010, a little more than two years after the judgment in *Tulip Hotels*, a separate judge of the High Court of Bombay was faced with a similar question. In *Rajiv Vyas v. Johnwin*, the High Court of Bombay was again requested to appoint an arbitrator despite the fact that the parties had not complied with the agreed pre-arbitral step of conciliation.[47] However, despite an objection to this effect, the High Court did not deem the non-compliance with the pre-arbitral step as limiting its power to appoint an arbitrator. Instead, adopting a proverbial middle-ground, it reasoned that a court can pass an order appointing an arbitrator but make it "subject to the party first complying with the condition precedent, which in this case is referring the matter to a conciliator"[48]. It added that the "judgment in *Tulip Hotels* does not hold otherwise",[49] before concluding that:

> "In my opinion, the correct procedure which would meet the ends of justice would be to make an order [to appoint an arbitrator] but subject to the parties complying with any conditions precedent thereto including first referring the disputes to a conciliator as provided in the agreement. This course would satisfy all the terms and conditions of the arbitration agreement…"[50]

Unfortunately, the High Court's reasoning is wanting on several grounds.

Firstly, the court's attempt to distinguish the judgment in *Tulip Hotels* is at best, evasive, and at its worst, ignorant. Indeed, the Court therein had categorically refused to appoint an arbitrator on the ground that there was no "proper compliance" of the pre-arbitral step of conciliation "prior to

[47] *Rajiv Vyas* (n 18) 4.

[48] ibid 7.

[49] ibid.

[50] ibid.

approaching the Court for appointment of an arbitrator,[51] which in turn rendered the request premature and "liable to be rejected".[52] Accordingly, as a matter of law, the Court held the non-compliance with a mandatory pre-arbitral as a clear bar to even the appointment of an arbitrator. Further, its conclusion was based on an interpretation of the parties' contract, and not on the fact that the applicant did not belatedly express an intention to abide by the pre-arbitral step. Thus, contrary to the insistence in *Rajiv Vyas*, the High Court in *Tulip Hotels* did hold otherwise.

Secondly, the judgment in *Rajiv Vyas* also suffers from an inherent contradiction. On the one hand, the court acknowledged that prior conciliation is a "condition precedent" to the arbitration agreement.[53] This implies that the arbitration agreement, which is an independent agreement[54], is akin to a contingent contract[55], which cannot be enforced by law unless the contingent event has happened[56]. In other words, the non-fulfilment of an admitted condition precedent, as a principle of contract law, precludes the arbitration agreement from becoming enforceable, and thus, should serve as a bar to commencement of arbitration.

However, on the other hand, the court proceeded to appoint an arbitrator despite noting that the condition precedent was not fulfilled on the date on which the request to appoint an arbitrator was made. In doing so, the court overlooked that the act of appointing an arbitrator can only be consequent to a valid commencement of arbitration, which as a matter of law, takes place when a respondent receives a request to refer disputes to arbitration.[57] Thus, to appoint an arbitrator in a circumstance where the very commencement of arbitration is contrary to the parties' arbitration agreement is equivalent to placing the cart before the horse.

Thirdly, ostensibly aware of the wobbly legal foundations of its conclusion, the High Court in *Rajiv Vyas* does not base its decision on any identifiable legal principle. It also does not take

[51] *Tulip Hotels* (n 17) 12.

[52] ibid 14.

[53] *Rajiv Vyas* (n 18) 7.

[54] Arbitration Act, s 16(1)(a).

[55] Indian Contract Act, s 31.

[56] Indian Contract Act, s 32.

[57] Arbitration Act, s 21.

notice of the following observations made in *Tulip Hotels*, citing the Supreme Court of India's judgment in *SBP & Co. v. Patel Engineering Ltd.*[58]:

> "… while considering the application [seeking appointment of an arbitrator], it is also necessary to look into the question as to whether the claim is a dead one or even is barred-one as well as "whether the parties have concluded the transactions by recording satisfaction of their mutual rights and obligations." The decision of the Apex Court [in *Patel Engineering Ltd.*] would disclose that when the parties agree that the arbitration proceedings shall be preceded by conciliation proceedings, it would be necessary for the Court [in proceedings for appointment of an arbitrator] to ascertain as to whether in such conciliation proceedings the parties have recorded satisfaction of their mutual rights and obligations pursuant to the efforts made by the conciliator. In case of such satisfaction having been recorded, the question entertaining the application [for appointment of an arbitrator] would not arise."[59]

Instead of addressing these considerations, the court chose to rely on the ambiguous notion of "ends of justice", and its unsubstantiated perception that referring the parties to conciliation at this stage will be a "cumbersome procedure".[60] Indeed, the correctness of the judgment in *Rajiv Vyas* is cast further into doubt by the fact that in 2020, the High Court of Bombay itself refused to follow the approach laid down therein.[61]

Nonetheless, despite the proposition of law endorsed by the High Court of Bombay, in recent years, the High Court of Delhi has preferred a contrary view. In 2014, a single judge of the High Court of Delhi, in *Ravindra Kumar Verma v. M/s BPTP Ltd* , was asked to decide whether the parties could be referred to arbitration even if they had not complied with a pre-arbitral step requiring them to first engage in mutual discussions.[62] At this time, another single judge of the High Court, in *Haldiram Manufacturing*, had already addressed this issue in 2012. Yet, instead

[58] *SBP & Co v Patel Engineering Ltd* (2005) 8 SCC 618.

[59] *Tulip Hotels* (n 17) 9.

[60] *Rajiv Vyas* (n 18) 7.

[61] *Quickheal* (n 13) 51.

[62] *Ravindra Kumar Verma v M/s BPTP Ltd* 2014 SCC OnLine Del 6602.

of following the judgment of its coordinate bench in *Haldiram Manufacturing*, the Court questioned "whether the proposition of law laid down in [that] case […] is correct or that the same goes against the earlier judgments of different Single Judges of this Court."[63]

Thereafter, relying on an earlier judgment rendered in the context of the revoked Arbitration Act, 1940,[64] the Court observed that "the prior requirement as stated for invoking arbitration even if not complied with, the same cannot prevent reference to arbitration, because, the procedure / pre-condition has to be only taken as a directory and not a mandatory requirement."[65] In support, it added that the judgment in *Haldiram Manufacturing* "does not refer to the binding provision of Section 77 of the [A&C] Act which provides that existence of conciliation proceedings would not be a bar for filing of proceedings to preserve rights."[66]

For the reasons discussed above, the judgment in *Ravindra Kumar Verma* is vulnerable to both criticism and correction by an appellate court in the future. That being said, the Court's reliance on Section 77 of the A&C Act is particularly problematic for being inconsistent with the very text of the statutory provision. Section 77 provides that:

> "**77. Resort to arbitral or judicial proceedings.—**The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights."[67]

Evidently, as per Section 77 of the A&C Act, the default rule is that a party "shall not initiate" any arbitral or judicial proceedings during the pendency of a conciliation proceeding. The only exceptional circumstance in which a parallel arbitral or judicial proceeding is permitted is when such proceedings "are necessary for preserving [her] rights". Accordingly, it does not, in any way, support an absolute proposition that the parties' pre-arbitral step of conciliation, even if

[63] ibid 6.

[64] ibid 7, (citing Saraswati Construction Co v Cooperative Group Housing Society Ltd, 1995 (57) DLT 343)

[65] *Ravindra Kumar Verma* (n 62) 8(i).

[66] *Ravindra Kumar Verma* (n 62) 10.

[67] Arbitration Act, s 77.

drafted in obligatory terms, is "a directory and not a mandatory requirement" in all circumstance. Rather, by giving legitimacy to conciliation proceedings as a default rule, it supports a conclusion to the contrary.

Undeterred, the High Court in *Ravindra Kumar Verma* alluded that the judgment rendered by the co-ordinate bench of the High Court in *Haldiram Manufacturing* may be *per incuriam*.[68] It did so despite the settled position of law that a court remains bound by an earlier decision issued by a co-ordinate bench; and that in case of a disagreement, it cannot arrive at a contrary conclusion, but only make a reference to a larger bench.[69] It is probably for this reason that the Court stopped short of making a definitive finding, and instead attempted to resolve the perceived conflict "by taking the middle path approach".[70] It ultimately held that:

> "… since in many contracts there is an effective need of conciliation etc. in terms of the agreed procedure provided by the contract, the best course of action to be adopted is that existence of conciliation or mutual discussion procedure or similar other procedure though should not be held as a bar for dismissing of a petition which is filed under Sections 11 or 8 of the [A&C] Act or for any legal proceeding required to be filed for preserving rights of the parties, however before formally starting effective arbitration proceedings parties should be directed to take up the agreed procedure for conciliation as provided in the agreed clause for mutual discussion/conciliation in a time bound reasonable period, and which if they fail the parties can thereafter be held entitled to proceed with the arbitration proceedings…"[71] (emphasis added)

Despite taking a "middle path approach", subsequent judgments of the High Court of Delhi have effectively considered the judgment in *Haldiram Manufacturing* as overruled. Since 2014, the High Court of Delhi has consistently followed the judgment in *Ravindra Kumar Verma*, to re-affirm that a pre-arbitral step requiring the parties to attempt to reach an amicable resolution is

[68] *Ravindra Kumar Verma* (n 62) 10.

[69] *State of Punjab v Devans Modern Breweries Ltd* (2004) 11 SCC 26; *Central Board of Dawoodi Bohra Community v State of Maharashtra* (2005) 2 SCC 673; *S Kasi v State* 2020 SCC OnLine SC 529.

[70] *Ravindra Kumar Verma* (n 62) 10.

[71] *Ravindra Kumar Verma* (n 62) 11.

directory in nature.[72] And even in case of non-compliance, "no fault can be found in the act of […] invoking the arbitration clause"[73].

In view of the above, if one were to inquire whether non-compliance with an ADR based pre-arbitral step can act as a bar to arbitral jurisdiction, the answer will invariably vary. On the one hand, some High Courts consider such pre-arbitral steps to be mandatory in nature, and therefore need to be complied with. On the other hand, other High Courts, particularly the High Court of Delhi, consistently endorse a contrary view.

4. OF WAIVER AND SUBSTANTIAL COMPLIANCE

In the absence of a definitive pronouncement by the Supreme Court of India on this issue, the inconsistent decisions of High Courts in India have created a legal quagmire. But even in this storm of inconsistency, one can find an Albatross of hope.

It often transpires that prior to commencing arbitration, the parties engage in an extended dialogue for resolving their dispute. As such, despite not strictly engaging in formal negotiations or mediation / conciliation proceedings in a manner contemplated by their arbitration agreement, they nonetheless attempt to reach an amicable resolution. In such circumstance, the question of whether a pre-arbitral step is mandatory or directory is supplanted by a pragmatic question as to whether the parties have, in fact, already complied with their contractual requirement.

Different courts in India have answered this question in a consistent manner, albeit through different routes. In a nutshell, their response has been guided by the following three principles.

Firstly, irrespective of whether they are mandatory or not, a party can, by conduct, waive its right to seek compliance with the pre-arbitral step contained in the arbitration agreement. This will be the case where the party opposing the commencement of arbitration on the basis that the pre-arbitral step has not been complied with has itself contributed to the alleged non-compliance.

[72] *JK Technosoft* (n 16) 13-15; *Baga Brothers* (n 17) 7-8; *Siemens* (n 15)19; *Sarvesh Security* (n 12)26-28.

[73] *Sarvesh Security* (n 12)28.

In *M K Shah Engineers and Contractors v. State of MP*[74], the Supreme Court of India confirmed the above principle in a situation where the State of MP had itself frustrated compliance with the agreed pre-arbitral step:

> "No one can be permitted to take advantage of one's own wrong […] the fault for non-compliance lies with the respondent-State of M.P. through its officials. The plea of bar, if any, created by the earlier part of Clause 3.3.29 cannot be permitted to be set up by a party which itself has been responsible for frustrating the operation thereof. It will be travesty of justice if the appellants for the fault of the respondents are denied right to have recourse to the remedy of arbitration. A closer scrutiny of Clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all questions and disputes arising between them through arbitrator and there-by excluding the jurisdiction of ordinary civil courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into operation of the arbitration clause though essential are capable of being waived and if one party has by its own conduct or the conduct of its officials disabled such preceding steps being taken, it will be deemed that the procedural pre-requisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of pre-requisite obligation so as to exclude the applicability and operation of the arbitration clause."[75] (emphasis added)

Additionally, the Supreme Court noted that "[t]he subsequent conduct of the respondents in voluntarily agreeing to the appointment of the arbitrators […] and not pursuing their objections under Section 33 of the Arbitration Act [1940] amounts to waiver on their part of the plea of non-compliance [and the respondent] has acquiesced in the appointment of arbitrators"[76].

[74] *M K Shah Engineers and Contractors v State of MP* (1999) 2 SCC 594.

[75] *M K Shah* (n 74) 17.

[76] ibid 18.

Subsequent judgments, such as the High Court of Delhi's judgment in *Hyderabad Pollution Controls Ltd. v. Indure Pvt. Ltd.*, has relied on the Supreme Court's above observations to conclude that a respondent has, only "by its conduct of appointment of the arbitrator, in any case waived the agreed amicable settlement procedure preceding the arbitration."[77]

However, this is neither a fair reading of the Supreme Court's observations nor consistent with the provisions of the A&C Act 1996, which has replaced the Arbitration Act, 1940 that was interpreted in the *M. K. Shah* judgment. Section 16(2) of the A&C Act now clarifies that "a party shall not be precluded from raising such a plea [of lack of jurisdiction [merely because that he has appointed, or participated in the appointment of, an arbitrator."[78] In the same vein, Section 4 of the A&C Act, which codifies the principle of waiver, provides that a party shall be deemed to have waived its right to raise an objection regarding non-compliance of a requirement under the arbitration agreement only if it fails to raise its objection within the "time limit […] provided for stating that objection."[79] In this regard, Section 16(2) allows a party to raise its objection before an arbitral tribunal either at the time of or before the submission of its statement of defence.[80] Thus, until the stage of Section 16(2) is crossed, it is difficult to infer a general principle that by merely appointing an arbitrator, a party has waived its right to raise a jurisdictional objection premised on the non-compliance with a pre-arbitral step.

Secondly, it is sufficient for the parties to "substantially comply" with their ADR based pre-arbitral step, even if not strictly in the same manner as indicated in the arbitration agreement. In other words, where the parties have genuinely attempted (even if unsuccessfully) to arrive at an amicable resolution, such that there is no longer any scope for such a resolution, they would be deemed to have complied with the pre-arbitral stated in their arbitration agreement. In such case, no purpose will be served by referring the parties to any negotiations / discussions / mediation / conciliation process specifically envisaged by their agreement.

This principle is upheld by several Indian courts, including the Supreme Court of India.

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[77] *Hyderabad Pollution Controls Ltd v Indure Pvt Ltd* 2009 SCC OnLine Del 2839, 8.

[78] Arbitration Act, s 16(2).

[79] Arbitration Act, s 4(b).

[80] Arbitration Act, s 16(2).

In 2008, in *Visa International Ltd. v. Continental Resources (USA) Ltd.*, the Supreme Court of India rejected an objection based on a non-compliance with an ADR based pre-arbitral step, and explained as under:

> "It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties […] it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other […] The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke arbitration clause."[81]
>
> (emphasis added)

In 2014, in *Swiss Timing Ltd. v Commonwealth Games 2010 Organising Committee*, the Supreme Court of India again rejected an identical objection, noting that "the correspondence placed on the record […] clearly shows that not only the petitioner but even the ambassadors of the various Governments had made considerable efforts to resolve the issue […] It is only when all these efforts failed, that the petitioner communicated to the respondent its intention to commence arbitration".[82]

In 2014, in *Demerara Distilleries Private Ltd. & Anr v. Demerara Distilleries Ltd.*, the Supreme Court of India reached the same conclusion even when the parties had not yet complied with the pre-arbitral step of mediation.[83] The Court reasoned that this objection "would not merit any serious consideration" in as much as the "elaborate correspondence […] between the parties […] would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality."[84]

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[81] *Visa International Ltd v Continental Resources (USA) Ltd* (2009) 2 SCC 5, 38.

[82] *Swiss Timing Ltd v Commonwealth Games 2010 Organising Committee* 2014 SCC OnLine SC 480, 14.

[83] *Demerara Distilleries Private Ltd & Anr v Demerara Distilleries Ltd* 2014 SCC OnLine SC 953, 8-10.

[84] ibid 5.

In 2018, the High Court of Delhi in *Siemens Limited v. Jindal India Thermal Power Ltd.* affirmed that "the petitioners have complied with the" pre-arbitral step[85] because "even prior to invocation of arbitration clause […] attempts were not made to resolve the disputes between the parties."[86] This was consistent with the High Court of Delhi's conclusion in *JK Technosoft Limited v. Ramesh Sambamoorthy*, where the court proceeded to appoint an arbitrator since it was "clear that attempts to settle by consultation was a non-starter."[87]

Finally, in 2020, the High Court of Bombay in *Quickheal Technologies Ltd. V NCS Computech Pvt Ltd. & another* likewise reviewed the correspondence exchanged between the parties to note the ADR based pre-arbitral step "is in a realistic sense, exhausted"[88]. On the same basis, the court also concluded that "there was no scope for an amicable settlement"[89].

Therefore, notwithstanding the nature of the ADR based pre-arbitral step, the core purpose of the jurisdictional inquiry is to effectively determine two aspects: one, did the parties attempt to reach an amicable resolution in any manner; and if yes, two, is there no longer any scope for amicable settlement? If both of these questions are answered in the affirmative, then the parties would be deemed to have complied with the agreed pre-arbitral step.

Thirdly, notwithstanding the above, it is equally trite that the parties cannot allege that there is no scope for amicable settlement as a matter of routine. Rather, it is for the party opposing the commencement of arbitration to demonstrate this aspect. This was clarified by the High Court of Bombay in *Tulip Hotels Private Limited v Trade Wings Limited*:

> "The contention that the reference of the matter for conciliation at this stage, particularly in view of filing of the suit, is an empty formality, is devoid of substance. Merely because the parties have filed the suit that would not lead to a conclusion that the conciliation proceeding would be an exercise in futility. If the contention is accepted, it would virtually amount to pronouncing section 89

[85] *Siemens* (n 15) 20.

[86] ibid 22.

[87] *JK Technosoft* (n 16) 10.

[88] *Quickheal* (n 13) 47.

[89] ibid.

> of the C.P.C. to be redundant. Section 89 of C.P.C. clearly provides that even after filing the suit, it is the duty of the Court to try to encourage settlement of the matter by adopting one of the procedure enumerated thereunder and such procedure includes the conciliation proceedings as well as mediation. Being so, merely because the respondents have filed the suit that itself would not lead to a conclusion that conciliation proceedings in the matter, which are required to be undertaken in view of the arbitration clause in the agreement between the parties, would be of no use or would be without any effective solution. It is too pre-mature to make any comment in that regard."[90]
>
> (emphasis added)

Accordingly, despite their disagreements as to the nature of ADR based pre-arbitral steps, most courts in India agree on the flexible manner in which these steps can be complied with. This not only allows courts to balance the parties' intent to arbitrate with the need to encourage ADR mechanisms, but critically, to also sidestep the divisive issue of ascertaining if a pre-arbitral step is mandatory or not.

5. CONCLUSION

The aforementioned discussion allows one to derive several conclusions; two of which, are of utmost relevance.

Firstly, on the issue of whether non-compliance with ADR based pre-arbitral steps may bar arbitral jurisdiction, the position of law in India is akin to Schrödinger's cat. Just like Schrödinger's cat may simultaneously be considered as both dead and alive, Indian courts deem a pre-arbitral step to be both mandatory and directory at the same time. As unfortunate as it may seem, a more precise answer to this question will ultimately depend on the forum before which it is raised.

Secondly, despite the above variance, courts in India interpret ADR based pre-arbitral steps with a dose of pragmatism, in line with the parties' eventual objective behind incorporating such a requirement. Where there is no scope for an amicable resolution, the courts deem a pre-arbitral

[90] *Tulip Hotels* (n 17) 13.

step to have been complied with, which then allows the aggrieved party to commence arbitration without further delay.

Ultimately, consistent with Section 89 of the CPC, the existence of an arbitration agreement does not diminish the emphasis on encouraging the parties to resolve their disputes amicably. In this entire exercise, one must ultimately pay respect to both the text and spirit of Section 30(1) of the A&C Act, which provides that "[i]t is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement."[91]

[91] Aribitration Act, s 30(1).

ONLINE MEDIATION IN INDIA

- *Sahil Kanuga & Aparimita Pratap*[*]

ABSTRACT

Online Dispute Resolution ("**ODR**") has been the disruptive technology of the decade that has gained even more prominence with the world going into lockdown due to the COVID 19 pandemic. The year 2020 experienced an international exodus from the traditional forms of dispute resolution to ODR on virtual platforms. India too realized the need to strengthen ODR in order to make dispute resolution accessible to all and to reduce the burden on courts. The Niti Aayog Expert Committee on ODR released its draft report "Designing the Future of Dispute Resolution: The ODR Policy Plan for India" ("**Niti Aayog Draft Report**"), in October 2020 for further discussions.[1] The Niti Aayog Draft Report is reflective of the future changes that the judiciary and the government may bring to further the development of ODR in India. This article focuses on understanding the changing landscape of dispute resolution to online platforms,[2] ODR and specifically online mediation ("**Online Mediation**").

This article also aims to understand Online Mediation, its development and contemporary usage, probable benefits, drawbacks and solutions for the problems determined. In the absence of a central legislation governing mediation, concerns have been raised regarding the future of practices like Online Mediation. The ambiguity should be resolved and the central legislation on mediation that is currently being drafted, should incorporate structural changes required to accommodate Online Mediation.

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[1] Niti Aayog Expert Committee on ODR, *Designing the Future of Dispute Resolution: The ODR Policy Plan for India* (2020)

[2] Shreya Tripathy and Tarika Jain, 'Caseload During COVID-19 (April 2020): A Look at the Numbers' (*Vidhi Centre for Legal Policy*, 20 July 2020) <https://vidhilegalpolicy.in/research/supreme-courts-caseload-during-covid-19-april-2020-a-look-at-the-numbers/> accessed 5 April 2021

1. INTRODUCTION TO ODR AND ONLINE MEDIATION

ODR is the use of information and communication technologies ("**ICT**") as a primary platform to enable parties to resolve their dispute.[3] ICTs include audio-visual tools such as *telephones, smart phones, LED screens, spread sheets, e-mail and messaging applications* that *collect, store, use and send data electronically*.[4] ICTs used in ODR are required to be of a standard that can conduct the dispute resolution process without requiring the parties to meet physically.[5] However, the Niti Aayog Draft Report has observed that in the context of India, virtual courts do not come under the ambit of ODR as ODR is a process that is used before a dispute is taken to court for adjudication.[6] It was also observed that ODR does not have one formalized process and any of the Alternative Dispute Resolution ("**ADR**") mechanisms outside of courts can be considered to be ODR if they are conducted with the use of ICTs.

Mediation is a popular form of ADR that is once again gaining popularity around the globe. There is no one definition of mediation that is globally accepted; it is often defined using the basic tenets of how it is practiced. Mediation is a confidential interest-based private process of resolving disputes through a neutral third party that facilitates discussions between the parties in conflict, to reach an amicable settlement. A mediator is often compared to a facilitative tour guide, who holds the map of the place, but the decision on what places to visit is self-determined by the tourists.[7] The distinctive trait of the process of mediation is that parties usually choose this process voluntarily, i.e., if at any point either of the parties wants to discontinue the process, they will be allowed to do so without prejudice. Further, the role of the mediator is not adjudicatory and therefore, a settlement can only be reached by the parties themselves.

[3] UNCITRAL, *Technical Notes on Online Dispute Resolution* (April 2017) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf> accessed on 31 March 2021

[4] cf Niti Aayog Draft Report (n 1) 4

[5] cf Niti Aayog Draft Report (n 1) 6

[6] cf Niti Aayog Draft Report (n 1) 10

[7] Thomas H. Smith, 'Do the Experts Mean What Their Metaphors Say? An Exploration of Metaphor in Mediation Literature' (2003) First International Biennale on Negotiation, Paris.

Online Mediation is a form of ODR and is not a novel concept internationally.[8] It dates back to July 1996, when a web-page was created by a local in the state of Kansas, USA, who published news by copying it verbatim from the radio, television, newspapers. The editor of a local media house accused him of copyright infringement. The Massachusetts Information Technology and Dispute Resolution Center acted as a mediator in this dispute and facilitated the parties in resolving their dispute through only electronic means like e-mail, Skype, etc.[9] Since the advent of Online Mediation, it is widely practiced across the world and is developing expeditiously.[10]

Part **II** of this article expounds on the definition of ODR and its distinctiveness from ADR basis the primal role played by technology in ODR processes. Part **III** traces the development of ODR and Online Mediation internationally as well as in the Indian context and provides an understanding of the functioning of various ODR and Online Mediation platforms. Part **IV** expands on an overview of the legislative framework surrounding mediation in India. Part **V** discusses the probable benefits of Online Mediation including cost and time efficiency, elimination of bias etc. Part **VI** discusses the drawbacks and challenges faced by Online Mediation, including the enforceability of private mediation settlement agreements, protection of data security and low accessibility and digital literacy. Part **VII** presents a conclusion on the topic with some policy recommendations that can be implemented.

2. ADR VIS-A-VIS ODR

ADR is commonly understood as a process of resolving disputes outside of traditional court room litigation.[11] It includes arbitration, conciliation, negotiation, mediation and other formal or informal mechanisms such as through an ombudsman.[12] Therefore, ODR is comprehended to be

[8] Noam Ebner, 'e-Mediation' in Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy, *Online Dispute Resolution: Theory And Practice - A Treatise On Technology And Dispute Resolution* (1st edn., Eleven International, 2011) 369, 370, 397

[9] Irakli Kandashvili, 'Mediation and Online Dispute Resolution (ODR) as an Innovative Form of Dispute Resolution' (2018) J Law 94; Christopher N. Candlin, Vijay K. Bhatia, *Discourse and Practice in International Commercial Arbitration: Issue, Challenges and Prospects* (1st edn., Routledge, 2016) 213

[10] ibid

[11] Cornell University, 'Alternative Dispute Resolution' <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed 5 April 2021

[12] ibid

an ADR process that is primarily conducted using ICT platforms.[13] The level of involvement and dependency on the ICTs demarcate e-ADR and ODR as documented in the Niti Aayog Draft Report.[14] The role of ICTs should be such that without their aggregate usage, the dispute resolution process cannot be conducted.[15] Ancillary use of ICTs, such as a few hearings or meetings conducted online, exchange of emails in support of the primary form of physically conducted dispute resolution, etc., would not ideally qualify as ODR.

Legal scholars such as E. Katsh and J. Rifkin have referred to technology as a "*fourth party*" in the ODR process, following the two dispute holders and one facilitator.[16] This school of thought propounds that technology performs an exclusive and distinct role in ODR processes, therefore are *not just used* but in fact *function independently*.[17] A similar school of thought asserts that mainstream technologies such as email or Skype and more sophisticated technologies/platforms created specifically for ODR processes should be treated differently, with only the latter falling under the ambit of ODR.[18] The reason behind the same is that unlike traditional ICTs, ICTs created to cater to the specific needs arising in ODR processes would generate added value to the ODR process. There are technologies such as The Mediation Room, that are friendlier for ODR processes and provide services such as breakout rooms for private caucuses, artificial intelligence moderated software to assess proposals, etc.[19]

However, in the Indian context, it is important to understand the constraints caused due to low accessibility of ICT infrastructure and abysmally low statistics on digital literacy. Due to these, a strict understanding of ODR may not be entirely applicable in India and a hybrid system that

[13] cf UNCITRAL (n 3) 4 "*ODR requires a technology-based intermediary' i.e. an 'ODR platform'*"; Colin Rule, 'Is ODR ADR' (2016) 3 IJODR <http://www.colinrule.com/writing/ijodr.pdf> accessed 1 April 2021

[14] cf Niti Aayog Draft Report (n 1) 10

[15] Victor Terekhov, 'Online Mediation: A Game Changer or Much Abo about Nothing' (2019) 2019 Access to Just E Eur 33; L Zissis, 'Disputes in the Digital Era: The Evolution of Dispute Resolution and the Model ODR System' (2015) Universite de Toulouse 153.

[16] cf Terekhov (n 14) 37; E Katsh, J Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001) 9

[17] ibid Terekhov (n 14) 37

[18] cf Terekhov (n 14) 37

[19] The Resolver <https://www.theresolver.com/video> accessed 5 April 2021

assesses aggregated usage of ICTs in an ODR process would have to be accommodated while delineating ODR and e-ADR.[20]

3. DEVELOPMENT OF ODR AND ONLINE MEDIATION

ODR was popularized when the e-commerce industry developed a dispute resolution model that preferred ODR, most commonly Online Mediation.[21] The disputes in the e-commerce industry range from sales, purchases and other services and include both *business-to-business* and *business-to-consumer* transactions.[22] The adoption of ODR by the e-commerce industry can be attributed to 1) the multi-jurisdictional consumers and business partners; 2) technological knowledge possessed by e-commerce websites; and 3) level playing field created between the consumer and the e-commerce business, as there is no face-to-face interaction, thus, eliminating chances of intimidation.[23] Consequently, some estimation projected thirty-percent savings of time and money in Online Mediation.[24]

One of the earliest programmes on Online Mediation was founded by the University of Massachusetts.[25] The programme generated conference rooms for parties online where they could communicate virtually in the presence of a neutral third-party ombudsperson.[26] Due to the widespread success of the programme, eBay partnered with the University of Massachusetts to develop a pilot program that would provide a mechanism for resolving disputes related to online auctions.[27] The pilot project successfully managed two hundred disputes in two weeks and by

[20] cf Niti Aayog Draft Report (n 1) 65

[21] Dafna Lavi, 'Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes' (2016) 37 U Pa J Int'l L 871

[22] A S Shetty, R R Pathrabe et al, 'Legal Issues in e-Commerce' <https://www.academia.edu/8148042/LegalIssues inE-Commerce/> accessed on March 31, 2021

[23] cf Lavi (n 20) 875-877

[24] cf Terekhov (n 14) 41

[25] Joseph A. Zavaletta, 'Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal' (2002) 7 J. Tech : & Pol'y 2 13

[26] cf Zavaletta (n 24)

[27] Katsh, Rifkin (n 15) 10

2010, eBay was managing over sixty million disputes per year.[28] Subsequently, programmes such as SquareTrade, Cybersettle, Smartsettle and the Mediation Room were developed to realize the potential of the ODR market.[29]

Programmes for Online Mediation may use a computer program entirely as the mediator.[30] One of the examples is Cybersettle, a programme that uses a double blind-bidding format for mediation. Parties are required to file their claim online and provide confidential offers for settlement. The programme then sends an email to the opposite party notifying them of the claim and allowing them to file confidential counter offers. Thereafter, the programme evaluates the offers put forth by both the parties and in the event both the offers and counter offers are in the range of a mutually-acceptable settlement, the program offers a settlement that is average of the two offers which the parties may then choose to accept or reject.[31] It is estimated that New York City saved over 11 million USD in a single year by using Cybersettle to reduce their backlog of cases, especially personal injury claims.[32] It also reduced settlement time by eighty-five percent.[33]

The Supreme Court of India's flagship eCourts Mission Mode Project ("**e-Courts Project**") was instituted under 'National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary'.[34] The e-Courts Project aims to establish uniform ICTs throughout the country and across all levels of the judiciary. It has successfully

[28] Ethan Katsh, Janet Rifkin et. al. 'Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law', (2000) Ohio SJ DR 705 <https://pdfs.semanticscholar.org/952e/c0a7b70bb553ddb2cb15d8a28b977f9a6fcd.pdf> accessed on 30 March 2021

[29] John Chopyk, 'Serving Justice Online: Online Dispute Resolution as an Alternative to Traditional Litigation' (9 November 2018) <https://lawless.tech/serving-justice-online-online-dispute-resolution-as-an-alternative-to-traditional-litigation/> accessed on 5 April 2021

[30] Llewellyn Joseph Gibbons et al., 'Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message' (2002) 32 N.M. L. Rev. 27-28

[31] Cybersettle <http://www.cybersettle.com/> accessed on 1 April 2021

[32] University of Missouri, 'Online Dispute Resolution: Other ODR Software' <https://libraryguides.missouri.edu/c.php?g=557240&p=3832248> accessed on 1 April 2021

[33] Daniel Hays, 'New York City Settling Claims via the Web' (10 March 2020) <https://www.propertycasualty360.com/2004/03/10/new-york-city-settling-claims-via-the-web/?ref=navbar-next> accessed on 1 April 2021

[34] E-Committee Supreme Court of India, *National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary* (2005) <https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf> accessed on 1 April 2021

installed proper ICT infrastructure in District Courts,[35] set up the e-Courts websites, created the National Judicial Data Grid and a unified Case Information System.[36] The e-Courts Project has also solidified ADR mechanisms such as Lok Adalats by conducting them on a large scale.[37] The successful ventures of the e-Courts Project blaze a trail for the development of ODR in India.

In the Indian context, ODR is a recent development that has emerged in the past decade. The Internet Corporation for Assigned Names and Numbers ("**ICANN**") formulated a Domain Name Dispute Resolution Policy that provided for online administrative proceedings as the first mode of dispute resolution.[38] Similarly adopting ODR, the National Internet Exchange of India instituted the .IN Domain Name Dispute Resolution Policy in 2006 that prescribes for online arbitration based on written submissions only.[39] The Department of Consumer Affairs launched an online platform in 2016 called the Integrated Consumer Grievance Redressal Mechanism wherein companies volunteered to partner with the National Consumer Helpline and provide a direct interface for the consumers to raise their complaints and grievances with the companies.[40] In 2017, the Ministry of Law and Justice issued a statement asking government bodies to implement the use of ODR for resolving disputes.[41] This prompted the Ministry of Micro Small and Medium Enterprises to launch their online portal called SAMADHAAN in 2018, for

[35] Ministry of Law and Justice <https://pib.gov.in/PressReleasePage.aspx?PRID=1679933> accessed on 5 April 2021

[36] E-Committee Supreme Court of India, *Objectives Accomplishment Report as per Policy Action Plan Document Phase II* (2019) <https://ecourts.gov.in/ecourts_home/static/manuals/Objective%20Accomplishment%20Report-2019.pdf> accessed on 1 April 2021

[37] E-Committee Supreme Court of India (n 35)

[38] ICANN, 'Uniform Domain Name Dispute Resolution Policy' (26 August 1999) <https://www.icann.org/resources/pages/policy-2012-02-25-en> accessed on 5 April 2021

[39] NIXI, 'IN Domain Name Dispute Resolution Policy (INDRP)' (16 September 2020) <https://www.registry.in/IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20%28INDRP%29> accessed on 5 April 2021

[40] National Consumer Helpline, 'Integrated Grievance Redressal Mechanism' accessed on 5 April 2021

[41] Department of Justice, *Online Dispute Resolution through Mediation, Arbitration and Negotiation* (2017) <https://doj.gov.in/sites/default/files/firm%20details.pdf> accessed on 1 April 2021

addressing delay of payment disputes.[42] In 2020, the Government of India launched the 'Vivad se Vishwas Scheme' for resolution of tax disputes through ODR.[43]

The Indian ODR topography has seen the emergence of various independent ODR start-ups in the recent past. SAMA, formerly known as ODRways, is one such start-up that is recognized as an ODR service provider by the Department of Justice.[44] It won the E-ADR Challenge organised by a non-profit organisation Agami in collaboration with ICICI Bank and is working for the pilot ODR platform of ICICI Bank that is projected to resolve over 10,000 disputes in its first phase.[45] SAMA provides their own in-house platform for conducting various ODR processes such as arbitration, conciliation and mediation. Post the pandemic, the State Legal Services Authorities ("**SLSA**") have been conducting e-Lok Adalats under the e-Courts Project. SAMA has collaborated with the SLSA of Delhi,[46] Rajasthan,[47] Gujarat,[48] and Bihar[49] to provide technical support in holding online Lok Adalats and has assisted in resolving over 50,000 disputes with settlement value crossing over INR 400 Crores.[50] Although start-ups like SAMA offer Online Mediation services as well, they focus more on conciliation because the Indian law does not expressly provide for the enforceability of settlement agreements entered into through private mediations.

[42] Press Information Bureau Delhi, 'Major policy initiatives and achievements of the Micro, Small & Medium Enterprises (MSME) in 2017' (21 December 2017) <https://pib.gov.in/PressReleseDetail.aspx?PRID=1513711> accessed on 1 April 2021

[43] cf Niti Aayog Draft Report (n 1) 84

[44] Department of Justice (n 40)

[45] Agami, 'Creating Online Dispute Resolution (ODR) solutions to resolve millions of disputes outside the courts' <https://agami.in/odr/> accessed on 1 April 2021

[46] Delhi Legal Service Authority, 'E-Lok Adalat - 8th August Report' <https://drive.google.com/file/d/1ZaffZv2Y0SJxdJuIIUVNWdxzcrFId24K/view> accessed on 5 April 2021

[47] Rajasthan Legal Service Authority, 'E-Lok Adalat – 22nd August Report' https://www.sama.live/media/Rajasthan-Lok-Adalat-Report.pdf> accessed on 5 April 2021

[48] Gujarat Legal Service Authority, 'Pre-Litigation Online Lok Adalat For Gujarat' <https://www.sama.live/media/Gujraat-Lok-Adalat-Report.pdf> accessed on 5 April 2021

[49] Bihar Legal Service Authority, 'Online Lok Adalat For Bihar' <https://www.sama.live/media/Bihar-Final-Report.pdf> accessed on 5 April 2021

[50] SAMA, 'Online Lok Adalat' <https://www.sama.live/lokadalat.php> accessed on 5 April 2021

4. LEGISLATIVE FRAMEWORK OF MEDIATION IN INDIA

The United Nations Commission on International Trade Law ("**UNCITRAL**") granted international recognition to mediation as a legitimate alternative dispute resolution mechanism and developed the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 ("**Model Law on Mediation**").[51] The Model Law on Mediation along with the Convention on International Settlement Agreements Resulting from Mediation ("**Singapore Convention**") were approved by UNCITRAL on June 26, 2018. Subsequently, the United Nations General Assembly adopted the Singapore Convention on December 20, 2018[52] and opened it for signature on August 7, 2019. As of March 31, 2021, fifty-three countries, including India,[53] have signed the Singapore Convention and six countries have ratified it.[54]

Even though India has signed the Singapore Convention, it has not adopted the Model Law on Mediation.[55] The Supreme Court, in *M. R. Krishna Murthi v. The New India Assurance Company,* recognized the dire need to formulate a central legislation on mediation and recommended the Central Government to do so.[56] In January 2020, the Supreme Court, through its Mediation and Conciliation Project Committee, set up a panel ("**Mediation Panel**") to draft a central legislation on mediation providing legal recognition to mediation settlement agreements. The Mediation Panel is currently being headed by Mr. Niranjan Bhatt.[57]

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[51] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018

[52] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)

[53] United Nations Treaty Collection, Status <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed on 31 March 2021; India signed the Singapore Convention on 7 August 2019

[54] ibid

[55] ibid, India has not yet ratified the Singapore Convention.

[56] *M. R. Krishna Murthi v The New India Assurance Company* Ltd. AIR 2019 SC 5625. In *Salem Bar Association v. Union of India* (2003) 1 SCC 49, the Supreme Court had requested the Law Commission to prepare draft model rules for ADR and Mediation.

[57] Economic Times, 'Supreme Court forms committee to draft mediation law, will send to government' (19 January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr> accessed on 26 March 2021; Niranjan J. Bhatt is a senior advocate in Ahmedabad, the founder/Managing Trustee of the Institute for Arbitration Mediation Legal Education and Development and a Convener of the Ahmedabad Mediation Centre.

Under the current framework in India, mediation can be divided into court-mandated mediations, statutory mediations and private mediations. By an amendment to the Code of Civil Procedure, 1908 ("**CPC**"), Section 89 was enacted to provide for the court to refer a dispute to mediation where the parties seem to be amenable to a settlement.[58] High Courts, such as Delhi,[59] Allahabad,[60] Hyderabad,[61] etc. have formulated their own mediation rules to govern Court mandated mediations under the CPC. Sub-section 2 (d) of the Section 89 gives legal enforceability to settlements arrived upon by parties through mediation. As practice, the Court enforces the settlement agreement by issuing it as a final and binding decree.

Statutory mediation refers to mediation that is mandated under statutes.[62] The Indian Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 ("**Commercial Courts Act**") was amended in 2018 which introduced Section 12A that makes it mandatory for a party to exhaust the remedy of mediation before initiating court proceedings under the Commercial Courts Act.[63] Sub-section (5) of Section 12A accords the mediation settlement agreement the same status as an arbitral award by consent under Sub-section (4) of Section 30 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**").[64] Various other statutes such as the Industrial Disputes Act, 1947,[65] the Companies Act, 2013,[66] and the Consumer Protection Act, 2019,[67] also provide for mediation.

Private mediation is a process that has not been referred or mandated by a court or statute and the services are offered by independent mediators or institutional mediation centres. The absence of a regime recognizing private mediation settlement agreements is disconcerting to the use of

[58] Code of Civil Procedure 1908, s 89

[59] Mediation and Conciliation Rules 2004

[60] Uttar Pradesh Civil Procedure Alternative Dispute Resolution Rules 2009

[61] Alternative Dispute Resolution and Mediation Rules 2017

[62] Shweta Sahu & Nikita Pattajoshi, 'Mediation: The New Trump Card In Commercial Dispute Resolution?' (2021) 1 NUJS JODR 1.

[63] Indian Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, s 12A

[64] Arbitration and Conciliation Act 1996, s 30(4)

[65] Industrial Disputes Act 1947, s 4(1)

[66] Companies Act 2013, s 442

[67] Consumer Protection Act 2019, s 37 (2)

Online Mediation. Online Mediation also does not find any place in any of the existing rules regarding Court-mandated or Statutory mediation. It would be vital that the central legislation being drafted on mediation accommodates the quintessential features of an Online Mediation that vary distinctly from traditional forms of mediation as discussed in the below sections.

5. PROBABLE BENEFITS OF ONLINE MEDIATION

Unlike traditional mediation, Online Mediation must focus on technology and its benefits and drawbacks to the mediation process in order to ensure effectiveness and fairness. To make this assessment, it is imperative to discuss the recognized benefits of Online Mediation. First, the combination of technology and mediation make it possible for parties to save on costs related to travelling[68] for dispute resolution and for hiring legal advisors.[69] This is especially beneficial in international disputes wherein parties may be residing or working in different countries, in particular, disputes arising from the use of internet wherein users from across the world can utilize common online services.

Second, parties also save time that is generally spent in the court process including travelling to appear for hearings. In 2019, the India Justice Report was published which stated that on an average, cases in district courts took 5 years or more for even a simple resolution because of long pendency of cases.[70] This can, *inter alia*, be attributed to unwarranted adjournments due to the absence of parties and numerous staff vacancies in the judicial and administrative departments.[71] In the process of Online Mediation, the presence of the parties can easily be secured as the scope of excuses to seek adjournments is limited. Further, since it is usually a private form of dispute

[68] Padmini Baruah, 'Paths to Justice: Surveying Judicial and Non-judicial Dispute Resolution in India' (Daksh 2017) <https://dakshindia.org/Daksh_Justice_in_India/12_chapter_02.xhtml> accessed on 5 April 2021

[69] Joseph W. Goodman, 'The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites' (2003) 2 Duke Law & Technology Review <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr> accessed on 1 April 2021

[70] Subrat Das and Others, 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid' (Tata Trust 2019) <https://www.tatatrusts.org/upload/pdf/overall-report-single.pdf> accessed on 1 April 2021

[71] Dushyant Mahadik, 'Analysis of Causes for Pendency in High Courts and Subordinate Courts in Maharashtra' (Administrative Staff College of India 2018)

<https://doj.gov.in/sites/default/files/ASCI%20Final%20Report%20Page%20641%20to%20822.pdf> accessed on 1 April 2021

resolution, the load of cases on the mediators is not as burdensome and they are able to prioritize and focus on each mediation process leading to speedier resolution.

Third, it serves as a neutral platform that provides an equal level playing field to all the parties.[72] The result of a mediation process is affected if parties are anxious to communicate with other participants belonging to different communities.[73] Online Mediation reduces the possibility of mediator and participant prejudice based on protected attributes such as race, age, gender, disability, etc. and allows the parties to concentrate on the pivotal points of the dispute rather than such biases.

Fourth, Online Mediation provides a more comfortable platform as it is voluntary, informal and confidential. Mediation focuses on the parties as opposed to their legal counsels, if any, and these parties are usually untrained individuals. Since the process of Online Mediation is conducted virtually, parties may take their time to think about their proposals without the fear of being judged basis their body language and accordingly, may indulge in more thorough and logical discussions. E-commerce online mediation platforms reduce the power imbalance between the company and its consumer by eliminating the use of lawyers and face-to-face conversations which may be intimidating for an individual who is going up against a company with ample resources in their favour.

Fifth, Online Mediation is considered to be a step towards increasing 'ease of business'[74] and may be especially beneficial for businesses that can market themselves as consumer friendly. Sixth, Online Mediation may be the most preferable form of dispute resolution in cases where there is lacunae or ambiguity in law around the subject of the dispute. For example, online gaming has not legally developed in many jurisdictions and disputes may arise over in-game artefacts.[75] Since such artefacts are not real property under law but are valuable to an online

[72] P Young, 'Online Mediation: Its Uses And Limitations' <https://www.mediate.com/articles/young4.cfm> accessed on 1 April 2021

[73] Carol Izumi, 'Implicit Bias and Prejudice in Mediation' 70 SMU Law Review 681 <https://scholar.smu.edu/cgi/viewcontent.cgi?article=4696&context=smulr> accessed on 1 April 2021

[74] NITI Aayog, 'Unlocking Online Dispute Resolution to Enhance the Ease of Doing Business' (8 August 2020) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1644465> accessed on 1 April 2021

[75] cf Terekhov (n 14) 44; Christina Sterbenz, 'One of the most downloaded gaming apps is being sued for denying lives' (Business Insider, 12 March 2015) <https://www.businessinsider.in/One-of-the-most-downloaded-gaming-apps-is-being-sued-for-denying-lives/articleshow/46533953.cms> accessed on 1 April 2021

gamer, Online Mediation may be best suited to resolve such disputes as it would provide an informal non-legal interface to the consumer and the company to discuss the issue.

6. DRAWBACKS AND CHALLENGES WITH ONLINE MEDIATION

Traditional mediation is heavily reliant on interpersonal skills of the mediator to gain the trust of the parties. It is often said that a mediation is only as good as the mediator. The mediator ensures that a comfortable environment is created for the parties to communicate freely. It can be argued that a virtual interface makes it difficult for mediators to carry out their responsibilities effectively and build a trust channel with the parties. Parties may not cooperate or correspond regarding sensitive data thereby reducing the quality of the process.[76]

Traditional Mediation also relies upon strategies that facilitate both parties to '*humanize*' each other and understand differing point of views. The online interface may act as a barrier for the parties to '*humanize*' the issues and resolve the dispute speedily and more effectively.[77] The use of Online Mediation is still being assessed for certain types of disputes such as family, matrimonial, child custody, etc. where there is a substantial interplay of emotions.[78]

Mediators also lack effective control of the mediation process in Online Mediation. In Traditional Mediation, when heated discussions ensue during a mediation process, it is the responsibility of the mediator to maintain civility. This is done by either calling private caucuses or imposing cooling down periods on the parties. However, in Online Mediation there may be situations where the primary mode of communication is not under the control of the mediator. For example, an online mediation being conducted over email turned sour when parties started corresponding with offensive and insulting emails that aggravated the conflict and the mediator could not ensure compliance.[79]

[76] Rachel I. Turner, 'Alternative Dispute Resolution in Cyberspace: There is More On the Line, Than Just Getting "Online,"' (2000) 7 ILSA J. Int'l & Comp. L. 133, 147- 148

[77] cf Terekhov (n 14) 45

[78] ibid

[79] S S Raines, 'Can Online Mediation Be Transformative? Tales from the Front' (2005) 22(4) Conflict Resolution Quarterly 449.

Further, confidentiality is the most important and lucrative feature of a mediation process. Parties in disputes that involve the exchange of highly sensitive and confidential data may be apprehensive of Online Mediation due to the digital trails left post each mediation session, especially for data that is submitted in a written format and may be stored on the web server.[80] With a dramatic increase in cyber-attacks, the ambit of confidentiality should be widened and ethical responsibility to prevent such attacks have to be taken by the mediators.[81] Practices have started incorporated mechanisms such as multi-layered authentication, encryption of textual data, use of virtual private network, etc. to protect confidential information exchanged during Online Mediation.[82]

Structural imbalance and challenges such as inaccessibility of ICT services by the common public need to be tackled for Online Mediation to be a successful ODR mechanism. With ODR being a proponent of access to justice, it is not commonly accessible to the public due to 1) lack of ICT infrastructure and 2) lack of digital literacy. The majority of the population does not have the means to afford the proper ICT infrastructure required or possess the basic digital literacy of the participants for an effective ODR process. In the Indian backdrop, the digital divide is affected by factors such as gender, class, caste, age, ethnicity and geographical location.[83] Currently, digital literacy and access to ICT infrastructure is increasing rampantly in the urban areas and, contrastingly, is stagnant in the rural areas. The Internet India Report 2019 is reflective of the gender divide in digital literacy with women constituting only 1/3rd of internet users and women in rural areas constituting only twenty-eight percent of the internet users.[84] It also observed that the population above 40 years of age constitute only fifteen percent of the internet users, use of desktop and laptops is ten percent in an urban setting whereas it is three

[80] cf Terekhov (n 14) 46

[81] A. Foote, 'Hackers are Passing Around a Megaleak of 2.2 Billion Records' accessed on 1 April 2021

[82] Julian Granka Ferguson, 'Navigating Cybersecurity in ADR' (December 2020) <https://www.mediate.com/articles/ferguson-cybersecurity.cfm> accessed on 1 April 2021

[83] Charlotte Austin, 'Online dispute resolution – An introduction to online dispute resolution (ODR), and its benefits and drawbacks' (2017) 18 <https://www.mbie.govt.nz/assets/00ddebf604/online-dispute-resolution-report-2018.pdf> accessed on 1 April 2021

[84] IAMAI, 'India Internet 2019'(2019) <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf> accessed on 1 April 2021

percent in rural areas and ninety-nine percent of the internet users access it through their mobile phones.[85]

Additionally, there is no legislative clarity on the enforceability of settlement agreements under Online Mediation in India. This situation is further complicated when parties are spread across multiple jurisdictions and the enforceability of such settlement agreements is at the behest of the jurisdiction where enforceability is sought. This is precisely the gap in law that the Singapore Convention aims to address. The international framework on mediation is at its nascent stages and does not provide a compact legal backing making the parties apprehensive towards the process. Further, the international consensuses on disputes arising out of the use of internet are not comprehensive and parties with multi-jurisdictional online disputes may face even more complex legal issues.

7. WAY FORWARD

The primary step to legitimizing Online Mediation would be the enactment of a central legislation on mediation that also accommodates the features of Online Mediation. There should be an express recognition of Online Mediation settlement agreements and a framework governing the enforceability of such agreements.

Further, as the success of mediation as an effective tool to resolve disputes lies in the hands of a mediator, mediators should also be required to get some level of accreditation including mediation training along with training on the use ICTs. The ODR platforms, especially the ones that use computer softwares as mediators, should espouse the same standards as expected from professional mediators. This would, amongst other things, also assure that principles critical to parties such as those of neutrality and confidentiality are upheld even by the ODR platforms, making them more lucrative.

The policy governing Online Mediation should focus on increasing the access to ICTs, digital literacy and providing adequate training to the mediators.[86] While one can always argue as to whose responsibility it is to make ICTs readily accessible to the public at low cost, a possible

[85] ibid

[86] Sarah Rudolph Cole and Kristen M Blankley, 'Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be' (2006) 38 U Tol L Rev 193

solution is for the government to partner with service providers to subsidize internet and other ICT requirements for parties using ODR platforms for dispute resolution. The government has already undertaken projects such as 'Digital India',[87] the BharatNet Project and the National Broadband Mission,[88] which aim to digitize public services and provide optic fibre connectivity to rural areas.[89] Further, the government has also instituted initiatives such as the Pradhan Mantri Gramin Digital Saksharta Abhiyan for increasing digital literacy.[90] The efficacious execution of these initiatives along with the eCourts Project will be beneficial for the development of ODR and Online Mediation in India.[91]

The future of ODR will also be shaped by the rapid development of Artificial Intelligence ("**AI**") and its integration in dispute resolution processes. Programmes are being developed that deploy smart mediators to curate specific responses to individuals based on situations.[92] The Supreme Court is working on developing the Supreme Court Vidhik Anuvaad Software that would be powered by AI and have the capability to translate judicial documents from English to nine vernacular language scripts and vice versa.[93] If the results are fruitful, AI might increase its hold on the judicial process, in particular ODR, and would have to be regulated accordingly.

The fact remains that in a country like India where we have numerous disputes of all kinds, ODR has the potential to alter the dispute resolution landscape in many ways.

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[87] Government of India, 'About Digital India' <https://digitalindia.gov.in/content/about-digital-india> accessed on 1 April 2021

[88] Department of Telecommunications, Ministry of Communications, Government of India, 'National Broadband Mission' <https://dot.gov.in/sites/default/files/National%20Broadband%20Mission%20-%20Booklet_0.pdf?download=1> accessed on 1 April 2021

[89] Press Trust of India, 'All villages to be connected with optical fibre in 1,000 days: PM Modi' (The Hindu, 15 August 2020) <https://www.thehindu.com/news/national/all-villages-to-be-connected-with-optical-fibre-in-1000-days-pm-modi/article32361806.ece> accessed on 1 April 2021

[90] Pradhan Mantri Gramin Digital Saksharta Abhigyan <https://www.pmgdisha.in/> accessed on 1 April 2021

[91] cf Niti Aayog Draft Report (n 1) 86

[92] Melanie Lefkowitz, 'AI as mediator: 'Smart' replies might help humans communicate' <https://news.cornell.edu/stories/2020/03/ai-mediator-smart-replies-might-help-humans-communicate> accessed on 1 April 2021

[93] Supreme Court of India, Press Release (25 November 2019) <https://main.sci.gov.in/pdf/Press/press%20release%20for%20law%20day%20celebratoin.pdf> accessed on 1 April 2021; Ajmer Singh, 'Supreme Court develops software to make all its 17 benches paperless' (Economic Times, 26 May 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-develops-software-to-make-all-its-17-benches paperless/ > accessed on 1 April 2021

THE RISE AND FALL OF THE POWER OF APPOINTMENT UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996

- *Anuradha Agnihotri, Lavanya B Ananth & Tanvi Pillai*[*]

ABSTRACT

The power of courts for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 has been the subject of judicial scrutiny for quite some time. This has led to a lengthy debate on what issues a court must determine while appointing an arbitrator and what issues must be left to the arbitrator. This article traces the history of judgments of the Supreme Court of India and their approach towards appointment of arbitrators. It highlights the changes brought in by the amendments to the Arbitration and Conciliation Act, 1996 in relation to Section 11. It also analyses the Supreme Court's recent judgment in *Vidya Drolia* v. *Durga Trading Corporation*, where while discussing whether landlord-tenant disputes governed by the Transfer of Property Act, 1882 are arbitrable, the Supreme Court also discussed the scope of inquiry by courts in determining questions of arbitrability at the stage of appointment of an arbitrator under Section 11 of the 1996 Act. This is followed by the study of the recent judgments relating to appointment of arbitrators and an analysis of some issues that remain unresolved despite these judgments. The article analyses the need (rather the lack of it) to delve into various issues at the stage of appointment and explores how best to balance the various interests that are relevant at such a stage.

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I. INTRODUCTION

The power of the Chief Justice or designate for appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (**"1996 Act"**) has been the subject of judicial scrutiny for more than two decades. Though one of the first of the many burning issues scrutinized by courts under the 1996 Act, the issue surrounding this power remains continually unsettled. The see-saw in judicial and legislative approach towards the power to appoint an arbitrator continues even today and we are yet to see the position at rest.

This article examines the evolution of the law regarding the power to appoint an arbitrator over the years. In particular, the article explores the recent developments including the Supreme Court's landmark decision in *Vidya Drolia* v. *Durga Trading Corporation*[1] and the impending amendments to the 1996 Act.

II. POWERS OF APPOINTMENT OF AN ARBITRATOR UNDER THE ARBITRATION ACT 1940 AND THE 1996 ACT

Prior to the 1996 Act, domestic arbitration proceedings were governed by the Arbitration Act, 1940 (**"1940 Act"**). The 1996 Act was ushered in to move India to an updated regime of arbitration in line with the corresponding global shift. The 1996 Act was based on the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration, 1985 which prioritized party autonomy and limited intervention of courts in the arbitral process. The 1996 Act was thus adopted to make the arbitral process expeditious with a view to encourage foreign investment, trade and commerce. The 1996 Act consciously departed from the earlier approach towards arbitration so much so that courts subsequently held that referring to the 1940 Act while interpreting the 1996 Act would amount to a misconstruction[2].

The intent behind the 1996 Act was not only to make arbitration faster, but to provide for a self-contained code[3] to keep arbitration independent of courts, except where court intervention was

[1] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1

[2] *Sundaram Finance Ltd.* v. *NEPC India Ltd.*, (1999) 2 SCC 479, ¶ 9.

[3] *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2011) 8 SCC 333**,** ¶ 81, 89; *Deep Industries Ltd.* v. *ONGC*, (2020) 15 SCC 706, ¶ 23.

seen as essential to maintain the integrity of the regime[4]. This move towards a self-contained and independent code is reflected in several provisions of the 1996 Act. The 1996 Act provides expressly in Section 5 that no judicial authority shall intervene with respect to matters governed by Part I of the 1996 Act except where so provided[5]. The provisions seen previously in the 1940 Act, such as Sections 14 (award to be filed before court and the court after hearing pronounce its opinion which shall form part of the award), 15 (power of court to modify the award), 16 (power of court to remit the award for reconsideration), 17 (power of court to pronounce judgment according to the award), 19 (power of court to supersede arbitration where award becomes void or is set aside), 20 (power of court to direct filing of arbitration agreement, referring disputes and appointing arbitrator), 36 (power of court to order that a provision making an award a condition precedent to an action shall not apply to a difference between parties), and 43 (power of court to issue processes to appear before the arbitrator) providing for intervention of courts were no longer part of the scheme. Court intervention was limited to very specific and narrow grounds such as for grant of interim measures of protection (Section 9), appointment of an arbitrator (Section 11), termination of the mandate of an arbitrator due to inability to perform functions or due to failure to act without undue delay (Section 14), setting aside of an arbitral award (Section 34), enforcement of an arbitral award (Section 36), and appeal against orders (Section 37). Interestingly, even where the 1996 Act permitted court intervention by way of an appeal it did so selectively. Illustratively, in relation to orders on jurisdictional challenges, the 1996 Act permits appeals only where the arbitral tribunal *upholds* a jurisdictional challenge. In cases where the arbitral tribunal holds that it has jurisdiction, there is no appeal remedy[6]. The 1996 Act requires the losing party in such a case to accept the mandate of the arbitrator, go through the arbitration process and raise this issue, if relevant, at the post-award stage[7].

The power for appointment of arbitrators under the 1940 Act and 1996 Act is also at variance. Looking at the provisions of the 1940 Act, the point of view broadly is one of reference - i.e.

[4] *P. Anand Gajapathi Raju* v. *P.V.G. Raju*, (2000) 4 SCC 539.

[5] **Section 5 of the 1996 Act – Extent of judicial intervention. –** Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

[6] Section 16(5) read with Section 37(2) of the 1996 Act.

[7] Section 16(5) read with Section 16(6) of the 1996 Act.

where the court *refers* a matter to the arbitral tribunal[8]. As against that, in the 1996 Act, there is no such reference. All arbitrations are considered arbitrations without intervention of courts. Even under Sections 8 and 45 of the 1996 Act, the judicial authority does not refer any matter to arbitration. In contradistinction, Section 89 of the Code of Civil Procedure, 1908 provides for such power *albeit* with the consent of the parties. Under Section 8 and 45 of the 1996 Act, the authority merely refrains from entertaining a matter, where the matter is covered by an arbitration clause and refer *parties* to arbitration in view of an applicable arbitration agreement.

The language used in Section 11 of the 1996 Act is in line with this approach. The Chief Justice or designate under Section 11 merely appoints an arbitrator where the contractual mechanism for appointment has failed to result in constitution of an arbitral tribunal. Section 11 does not require the Chief Justice or designate to look into the dispute or otherwise comment on the dispute. The aim of Section 11 is only to constitute the arbitral tribunal and kickstart the arbitral process. The court has no supervisory role with respect to the arbitration or over what ultimately is referred to arbitration. Once the arbitral tribunal is constituted, all remedies lie before the arbitral tribunal. Illustratively, where the arbitrator is biased, a party may file an application before the arbitral tribunal (Section 13). Similarly, where the subject matter of dispute is beyond the jurisdiction of the arbitral tribunal, a party may file an application before the arbitral tribunal (Section 16). After constitution of the arbitral tribunal and until the making of an award, court intervention is only envisaged for interim reliefs (that too only when an application before the arbitral tribunal is not efficacious), for assistance in taking evidence and for appeals in certain specific cases. In all other cases, the parties must accept the mandate of the arbitral tribunal.

Despite the clear scheme of the 1996 Act, judicial decisions indicate that courts have found it difficult to neatly categorize and delineate the powers of appointment. Since the power of the Chief Justice or designate is exercised by a judge or a bench exercising other regular judicial functions, it appears that it has been difficult to keep at bay the judicial function of deciding issues in the process of appointment. The decisions also indicate that an important consideration in the judicial mind has been to prevent abuse of arbitration. The courts have been concerned that a party should not be prejudiced by having to go through arbitration proceedings in cases where it has not consented for an arbitration or where the dispute is not amenable to arbitration.

[8] Refer Section 20(4) and Section 23 of the 1940 Act; *Banwari Lal Kotiya* v. *P.C. Aggarwal*, (1985) 3 SCC 255, ¶ 7.

III. JUDICIAL DECISIONS REGARDING THE POWERS OF APPOINTMENT

As early as the year 1999, a division bench of the Supreme Court in the judgment of *Sundaram Finance Ltd.* v. *NEPC India Ltd.*[9], while discussing the differences between the 1940 Act and the 1996 Act in the context of the powers of the court to grant interim reliefs under Section 9 opined that under Section 11 of the 1996 Act the Courts are not required to pass a "judicial order" to appoint arbitrators.

Soon after, the question was specifically considered by a three-judge bench of the Supreme Court in *Konkan Railway Corporation Ltd. and Another* v. *Mehul Construction Co. Ltd.*[10] (**"Mehul Construction"**). In this case, the Supreme Court was considering a reference stemming from the decision in *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*[11] where it was held that the power of the Chief Justice or designate was "administrative" in nature and therefore a special leave petition under Article 136 of the Constitution of India would not lie against such an order. In *Mehul Construction,* the Supreme Court agreed that the power was administrative and not one requiring application of judicial mind. In other words, the Chief Justice or designate is not required to "decide" any issue under Section 11, but merely carries out the administrative act of appointing an arbitrator. The Supreme Court further held that if the Chief Justice or designate fails to exercise such administrative power to appoint an arbitrator, the remedy lies in the High Court's or Supreme Court's writ jurisdiction compelling the authority to act. The Supreme Court came to this conclusion after analyzing in detail the intent behind the 1996 Act and the conscious departure from the previous regime. The Supreme Court noted that the power to appoint is provided to aid the constitution of the arbitral tribunal and kickstart the arbitration proceedings immediately. Further, it was also held that the legislature had consciously chosen to confer the power on the Chief Justice and not a court and therefore it was apparent that the order passed by the Chief Justice or designate was an administrative one.

This judgment in *Mehul Construction* was affirmed by a five-judge bench of the Supreme Court of India in *Konkan Railways Corporation* v. *Rani Construction Pvt. Ltd.* (**"Rani**

[9] *Sundaram Finance Ltd.* v. *NEPC India Ltd.*, (1999) 2 SCC 479.

[10] *Konkan Railway Corporation Ltd. and Another* v. *Mehul Construction Co. Ltd*., (2000) 7 SCC 201.

[11] *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*, (1999) 8 SCC 572.

Construction").[12] Apart from agreeing with *Mehul Construction* regarding the nature of power, the Supreme Court made two important findings. Firstly, it was held that no special leave petition could lie against an order under Section 11, since there was no adjudicatory function performed by the Chief Justice or designate while appointing an arbitrator. Secondly, this was a matter between the applicant and the Chief Justice or designate and therefore no notice was required to be given to the other party. The rationale was once again, the need for an expeditious dispute resolution mechanism.

The matter however was not settled for long and in 2005, the Supreme Court in a bench of no less than seven judges reconsidered the issue.

In *SBP & Co.* v. *Patel Engineering Ltd. and Another*[13] ("**Patel Engineering**"), the majority of a seven-judge bench of the Supreme Court of India held that the power of Chief Justice or their designate under Section 11 of the 1996 Act was judicial and not administrative and the judgment in *Rani Construction* was overruled[14]. The Supreme Court held that the 1996 Act vested the Chief Justice or designate with an authority which confers on it the power to adjudicate and make a decision regarding the appointment of an arbitrator. It was held that normally when any authority is conferred with a power to act under a statute and the statue makes a decision in this regard final, such authority has the jurisdiction to satisfy itself of fulfilment of the conditions for exercise of the power.[15] It was held that the Chief Justice or designate was bound to decide whether there is jurisdiction to entertain the request for appointment, whether there is a valid arbitration agreement in terms of Section 7 of the 1996 Act and whether the person before them with the request is a party to the arbitration agreement and whether there was a subsisting dispute capable of being arbitrated upon.[16] In addition, the Chief Justice or designate could also decide the question of whether the claim was a dead one or a long barred claim that was sought to be

[12] *Konkan Railways Corporation* v. *Rani Construction Pvt. Ltd.*, (2002) 2 SCC 388

[13] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618

[14] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 47(i) and (xii). However, in the minority opinion written by Justice C.K. Thakker, it was held that the decision in *Rani Construction* was the correct law and that the power of the Chief Justice or his designate was that of an administrative one and that it was neither judicial nor quasi-judicial in nature. However, Justice Thakker disagreed that no notice was required to be given to the counterparty and held that such notice was necessary in the interests of fairness.

[15] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 9

[16] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 25

resurrected and whether the parties have concluded the transaction by recording the satisfaction of their mutual rights and obligations or by receiving the final payment without objection.[17]

The decision in *Patel Engineering* opened the floodgates to raising a variety of defences by parties in an attempt to prevent the constitution of a tribunal for adjudication of disputes. In an attempt to delineate the power, following *Patel Engineering,* the Supreme Court in the case of *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*[18] (**"Boghara Polyfab"**) analysed the various categories of issues that could be considered at the appointment stage[19]:

(i) ***Category 1: Issues which the Chief Justice / his designate will have to decide.***

(a) Whether the party making the application has approached the appropriate High Court?

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the 1996 Act is a party to such an agreement?

(ii) ***Category 2: Issues which the Chief Justice / his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal).***

(a) Whether the claim is a dead (long-barred) claim or a live claim?

(b) Whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection?

(iii) ***Category 3: Issues which the Chief Justice / his designate should leave exclusively to the Arbitral Tribunal.***

(a) Whether a claim made falls within the arbitration clause?

[17] *SBP & Co.* v. *Patel Engineering Ltd. and Another*, (2005) 8 SCC 618, ¶ 39

[18] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267

[19] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267, ¶ 22.1, 22.2 and 22.3

(b) Merit or any claim involved in the arbitration.

It was also held that if the issues as mentioned in Category 2 are raised, then the Chief Justice or designate may decide them by taking evidence.[20]

By this time, the power to appoint had travelled far from the intent of the 1996 Act as discussed in *Mehul Construction* and *Rani Construction*. This transformation resulted in an extraordinary situation where the Chief Justice or designate could take evidence and decide questions of fact even before constitution of an arbitral tribunal meant for the very purpose of deciding such disputed questions of fact.

Whatever the philosophy may have been behind such expansion, the aim of expeditious resolution of disputes by arbitration was certainly impacted. Parties continued to raise frivolous challenges at the appointment stage to stall arbitration proceedings. As a result, decisions on appointments were delayed and a large pendency of Section 11 applications resulted.[21] Commencing arbitration itself became a challenge.

IV. ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015 AND PRECEDENTS THEREAFTER

The legislature sought to bring some resolution to the prevailing position by the Arbitration and Conciliation (Amendment) Act, 2015 (**"2015 Amendment"**).

The 2015 Amendment amended Section 11 to replace the term "Chief Justice or his designate" with "Supreme Court" (in the case of international commercial arbitration) and "High Court" (in the case of arbitrations other than international commercial arbitrations) (collectively referred to as **Courts**). Additionally, Section 11 (6A) and (6B)[22] were inserted. As per Section 11(6A) the

[20] *National Insurance Company Limited* v. *Boghara Polyfab Private Limited*, (2009) 1 SCC 267

[21] See Para 24 of the 246th Law Commission Report, dated August 2014

[22] **Section 11 (6A) and (6B) of the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 -**

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

Courts were to confine themselves to the examination of the existence of an arbitration agreement and as per Section 11(6B) any delegation of such power of appointment of an arbitrator of the Courts was not to be considered as a delegation of judicial powers. This balance struck by the 2015 Amendment is significant in three aspects: firstly, the move from the Chief Justice or designate implied that the power was a judicial one; secondly, an express limitation on this "judicial" power was placed; and thirdly, a delegation of such power was not to be considered delegation of judicial powers. Evidently, it was decided that the only question worthy of scrutiny at the appointment stage was the existence of an arbitration agreement. All other matters were left conclusively to the arbitral tribunal.

The 2015 Amendment thus legislatively overruled *Patel Engineering* and *Boghara Polyfab.* This was clarified in *Duro Felguera S.A.* v. *Gangavaram Port Ltd.*[23] (**"Duro Felguera"**) and confirmed in *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*[24] (**"Mayavati Trading"**). In *Mayavati Trading*, the Supreme Court overruled its own 2019 decision in *United India Insurance Company Ltd.* v. *Antique Art Exports Pvt. Ltd.*[25] (**"Antique Arts"**). In *Antique Arts*, the division bench of the Supreme Court while deciding an application under Section 11 of the 1996 Act went into the question of whether the claim had been settled with accord and satisfaction. This essentially referred to the position of law in *Patel Engineering* and *Boghara Polyfab.* Fortunately, a quick correction came through in *Mayavati Trading* confirming the law laid down in *Duro Felguera* and that the Courts are only required to confine itself to the examination of the existence of an arbitration agreement.

V. RECENT DEVELOPMENTS

Though the balance struck by the 2015 Amendments, as clarified in *Duro Felguera* and *Mayavati Trading* ought to have settled matters, the position has remained in flux as seen from certain recent developments.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

[23] *Duro Felguera S.A.* v. *Gangavaram Port Ltd*., 2017 (9) SCC 729.

[24] *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman,* (2019) 8 SCC 714

[25] *United India Insurance Company Ltd.* v. *Antique Art Exports Pvt. Ltd*., 2019 (5) SCC 362

4.1 Arbitration and Conciliation (Amendment) Act, 2019

The Arbitration and Conciliation (Amendment) Act, 2019 (**"2019 Amendment"**) was introduced on 9 August 2019. The 2015 Amendment had gone a long way in resolving many issues and the 2019 Amendment was more limited in scope and geared towards clarifying certain issues that had arisen from the 2015 Amendment. However, the 2019 Amendment did introduce one radical change - which is yet to be notified - the introduction of Arbitral Council of India (**"Arbitration Council"**), an institution to monitor and grade arbitral institutions and conferring the power of appointment on such arbitral institutions.

The 2019 Amendment also brought in amendments to the powers of appointment. Section 11 (6A) was omitted to make way for designation of a person or institution to make appointment of an arbitrator. Further, Section 11(6) was substituted[26] to provide that the appointment of an arbitrator under Section 11 of the 1996 Act shall be made on an application of the party to an arbitral institution designated by the Courts. The power to appoint an arbitrator has been moved away from the Courts altogether.

4.2 Judgment in Vidya Drolia

Pending the 2019 Amendment, it appears that the Supreme Court has departed from what seemed to be the settled position pursuant to the 2015 Amendment and the not-so-still waters have been stirred yet again. While the decision in *Vidya Drolia* is largely pro-arbitration and expresses agreement with the position of law laid down in *Duro Felguera* and *Mayavati Trading*[27], some of its observations have resulted in expansion of scope of review while appointing arbitrators.

[26]**Section 3(iv) of the Arbitration and Conciliation (Amendment) Act, 2019 -** in sub-section (6), in the long line, for the portion beginning with ‘‘party may request” and ending with ‘‘designated by such Court”, the following shall be substituted, namely:—

“the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be”

[27] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1, ¶ 144, 147.9

The Supreme Court in *Vidya Drolia*[28] while discussing whether landlord-tenant disputes governed by the Transfer of Property Act, 1882 are arbitrable, also discussed the scope of inquiry by courts in determining questions of arbitrability at the "pre-arbitration" / "reference" stage under Sections 8 and 11 of the 1996 Act, by interestingly, dividing the issues to be determined in the judgment into two subsets - (i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and (ii) the conundrum – "who decides" – whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.[29]

The Supreme Court noted that the issue of non-arbitrability could be raised at three stages. First, before the Courts on an application for reference under Section 11 of the 1996 Act or for stay of pending judicial proceedings and reference under Section 8 of the 1996 Act; secondly, before the arbitral tribunal during the course of the arbitration proceedings; or thirdly, before the court at the stage of the challenge to the award under Section 34 of the 1996 Act or its enforcement. Therefore, the question that arises is – '*Who decides non- arbitrability?*' and, in particular, what would be the jurisdiction of the Court at the referral stage?[30] In this context, the Supreme Court examined the contours of powers of Courts under Section 11 of the 1996 Act.

(i) **Ruling on Section 11 of the 1996 Act**

(a) *Prima Facie Test*

The Supreme Court noted that the Law Commission's 246th Report (**"Law Commission Report"**) which had given reasons for the amendment to Section 8 and 11 of the 1996 Act, including insertion of sub-section (6A) to Section 11; was of the view that the test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the 1996 Act – since the scope and nature of judicial intervention should not change based on whether a party (intending to defeat the arbitration agreement)

[28] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1

[29] ibid ¶ 2.2

[30] ibid, ¶ 82

refuses to appoint an arbitrator in terms of the arbitration agreement or moves a proceeding before a judicial authority in the face of such an arbitration agreement.[31]

The Supreme Court observed that Courts at the referral stage do not perform ministerial functions, but exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the 1996 Act.[32] Section 8 empowers the courts to refer the parties to arbitration, if the action brought before it is the subject of an arbitration agreement, unless it finds that *prima facie* no valid arbitration agreement exists.[33] In the context of Section 11, the Supreme Court noted that Courts can exercise judicial discretion to conduct an intense yet summary *prima facie* review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal.[34] It also noted the alternative - that if the court becomes too reluctant to intervene, it may undermine the effectiveness of both the arbitration and the Courts, and hence in some cases the *prima facie* examination may require a deeper consideration.[35] Only when it appears that *prima facie* review would be inconclusive, or on consideration inadequate as it requires detailed examination, should the matter be left for final determination by the arbitral tribunal selected by the parties by consent.[36] The rationale, the Supreme Court noted, was not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct.[37]

The Supreme Court observed that *Mayavati Trading* had rightly held that *Patel Engineering* had been legislatively overruled and hence would not apply even post omission of sub-section (6A) to Section 11 of the 1996 Act.[38] The Court noted that the omission of sub-section (6A) by the 2019 Amendment was done with the object that the High Court and the Supreme Court shall have the power to designate the arbitral institutions which have been graded by an Arbitration Council under Section 43-I. Where a graded arbitral institution is not available, the concerned

[31] ibid, ¶ 124

[32] ibid ¶ 132

[33] ibid ¶ 132

[34] ibid ¶ 139

[35] ibid ¶ 139

[36] ibid ¶ 140

[37] ibid

[38] ibid ¶ 144

High Court shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the arbitral tribunal.[39] In this context, the Supreme Court noted that it would be wrong to accept that post omission of sub-section (6A) to Section 11, the ratio in *Patel Engineering* would become applicable.

(b) *Meaning of 'existence' in the context of Section 11 of the Act*

The Supreme Court noted that a reasonable and just interpretation of 'existence' required understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement.[40] As per the Supreme Court, an agreement evidenced in writing has no meaning unless the parties can be compelled to adhere to and abide by the terms, and therefore, a party cannot sue and claim rights based on an unenforceable document.[41] Therefore, the existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the 1996 Act and the Contract Act and when it is enforceable in law.[42]

(c) *Court's power under Section 11*

The Supreme Court discussed three approaches that could be adopted by Courts while interpreting an arbitration agreement - pro-arbitration, restrictive, and the intention of the parties by considering the strict language and circumstance of the case in hand. [43]

While concluding that the decision in *Patel Engineering* was no longer applicable, the Supreme Court summarised the following points that the Courts must take into consideration while determining an application under Section 8 or Section 11 of the 1996 Act:

(i) The general rule and principle, in view of the legislative mandate is clear from the 2019 Amendment and the principle of severability and competence-competence is that the arbitral tribunal is the *preferred* first authority to determine and decide all questions of

[39] ibid ¶ 145

[40] ibid ¶ 146

[41] ibid

[42] ibid

[43] ibid ¶ 151

non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of Section 34 of the 1996 Act.[44]

(ii) Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny.[45] The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable'.[46] The Courts by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; and when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings.[47] The Supreme Court noted that proceedings in relation to applications under Section 8 or Section 11 was not the stage for the Courts to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the arbitral tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.[48]

4.3 Position after the recent developments

While *Vidya Drolia* is largely a pro-arbitration decision, the observation that arbitrability may be decided at the stage of appointment seems to have taken the scope of review beyond the question of existence of an arbitration agreement.

However, in recent judgments, the Supreme Court has continued to apply the principles laid down in *Vidya Drolia* in a pro-arbitration manner. For instance, in *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited*[49], while discussing the limitation period to file

[44] ibid, at ¶ 154.3

[45] ibid, at ¶ 154.4

[46] ibid

[47] ibid

[48] ibid

[49] *Bharat Sanchar Nigam Limited v. Nortel Networks India Private Limited,* Civil Appeal No. 833-844 of 2021

an application under Section 11 of the 1996 Act, the Supreme Court also referred to the judgment in *Vidya Drolia.* The Supreme Court concluded that a court may interfere 'only' when it is 'manifest' that the claims are *ex facie* time barred and dead, or there is no subsisting dispute[50]. The Court clarified that Courts should refuse to refer a dispute to arbitration under Section 11 only in very limited category of cases - where there is not even a vestige of doubt that the claim is *ex facie* time-barred, or that the dispute is non-arbitrable[51]. A similar such observation was also made in *Sanjiv Prakash v. Seema Kukreja and Others*[52].

However, the issues discussed in *Vidya Drolia* are also not at rest. A three-judge bench of the Supreme Court in *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others*[53] (**"N.N. Global"**), has referred the findings in *Vidya Drolia* (which affirmed the decision of the division bench of the Supreme Court in *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Eng. Ltd.*[54]) with regard to the meaning of the terms "existence" and "validity" of an arbitration agreement to a larger bench

VI. ANALYSIS

Evidently, the power to appoint arbitrator through the court process has been fraught with more questions than answers. An analysis of the power to appoint indicates that such debate was not necessary and that *Rani Construction* correctly and purposively interpreted the law.

(a) Section 11 of the 1996 Act: Reference of a dispute to arbitration or appointment of an arbitrator?

The decisions reflect some confusion between the concept of reference of a matter or a dispute to arbitration[55] (as more prevalent under the 1940 Act) and the mere appointment of an arbitrator. Section 11 of the 1996 Act, like Section 8 of the 1940 Act, only bestows the power to the Courts

[50] ibid, ¶ 36

[51] ibid

[52] *Sanjiv Prakash v. Seema Kukreja and Others,* Civil Appeal No. 975 of 2021 ibid, ¶ 9

[53] *N.N. Global Mercantile Private Limited v. Indo Unique Flame Ltd. and Others,* 2021 (1) CTC 868

[54] *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Eng. Ltd.*, 2019 (9) SCC 209

[55] *Vidya Drolia* v. *Durga Trading Corporation*, (2021) 2 SCC 1, ¶ 82, *National Insurance Company Limited v. Boghara Polyfab Private Limited* ¶ 28

to make an appointment of the arbitrator and does not refer to any powers of the Courts to make a reference of the disputes between parties. It is implicit in Section 11 of the 1996 Act that the parties by entering into an arbitration agreement have already referred disputes to arbitration. Therefore, the scope of powers of the Courts under Section 11 of the 1996 is merely restricted to appointing an arbitrator and as observed in *Mehul Construction*, to kickstart the arbitration process without delay. Of course, where there is obviously no such agreement borne out by the record, then the question of appointing an arbitrator may not arise.

(b) Is a second look required if the courts view their powers under Section 11 merely for appointment of an arbitrator and not for reference of a dispute to arbitration?

One question that deserved to be looked into more deeply, was whether a "second look" was necessary to answer the question regarding appointment of an arbitrator. For instance questions such as (i) an issue of a barred claim; (ii) whether the parties have concluded the contract / transaction by recording satisfaction of their mutual rights and obligations; (iii) whether a claim made falls within the arbitration clause; (iv) merits or any claim involved in the arbitration, etc. are all issues which need not be decided by the Courts at the time when it is considering the question of appointment of an arbitrator. The Courts have no duty to weed out bad claims from being adjudicated upon by the arbitral tribunal under the 1996 Act and certainly not at the appointment stage. If such a duty existed, it would be putting an unfair burden on the Courts. Valid and invalid claims must go through the process of arbitration once parties have agreed on the arbitration mechanism. It is for this very reason that the 1996 Act under Section 16 provides the arbitral tribunal with the power to rule on its own jurisdiction including the existence of and validity of an arbitration agreement. All issues beyond *prima facie* existence of an arbitration agreement can be determined and disposed of by an arbitral tribunal keeping all defences of the objecting party open. Appropriate appeal remedies have also been provided.

(c) How much Courts should be concerned with protecting a party from wrongful invocation of arbitration?

Does any party really have a right to stop an arbitration before it starts? If a right to prevent an arbitration does not exist, can a party seek to do so by raising objections to appointment of an arbitrator? If the invocation of arbitration is manifestly wrongful, it is open to parties to file an

anti-arbitration injunction suit and demonstrate that the standards required for anti-arbitration injunction are met. Of course, this is a high threshold[56], rarely met, and errant parties prefer the easier option - to misuse the powers of appointment.

The second question is what harm is really caused to a party by having to go through an arbitration? It is common practice (certainly in international commercial arbitration) to divide the arbitration into stages to make the process efficient. Therefore, where there are serious questions as to jurisdiction and / or binding nature of an agreement, the proceedings may be bifurcated and an award on jurisdiction may obviate further proceedings. The 1996 Act also recognizes the power to issue interim awards and it is entirely consistent with Indian civil procedure to frame and decide certain issues as preliminary issues. Sufficient tools are available to minimize a lengthy and inefficient arbitration. One solution could be that of awarding actual costs incurred by the successful party to it. Such a mechanism will act as a deterrent to and will protect parties from wrongful invocation of arbitration agreements.

(d) Do the provisions of Section 34 of the 1996 Act provide the necessary comfort to enable parties and Courts to limit the power of appointment to just that - the power to appoint?

Where an arbitral tribunal has decided questions not within jurisdiction of the tribunal, or issues that are non-arbitrable or there are other infirmities in the award, parties can seek to set aside the award under Section 34 of the 1996 Act. For instance, Section 34(2)(a)(ii) of the 1996 Act allows for a challenge to the award passed by an arbitral tribunal if the arbitration agreement is invalid. Section 34(2)(a)(iii) allows for a challenge to the award passed by an arbitral tribunal if a party was not given proper notice of appointment of an arbitrator or of the arbitral proceedings. Section 34(2)(a)(iv) allows a challenge to the award passed by an arbitral tribunal where the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, i.e. a dispute that is not arbitrable by the arbitral tribunal.[57] Thus, it is evident that

[56] *National Aluminum Company Ltd v. Subhash Infra Engineering Pvt. Ltd* 2019 (5) Arb.LR 254 (SC), *Chatterjee Petrochem Co. and Ors. v. Haldia Petrochemicals Ltd. and Ors.* 2013 (4) Arb.LR 456 (SC), *Himachal Sorang Power Private Limited and Ors. v. NCC Infrastructure Holdings Limited,* CS (COMM) 12/2019

[57] **Section 34 (2) of the 1996 Act**: An arbitral award may be set aside by the Court only if — (a) the party making the application furnishes proof that —

the 1996 Act itself provides a recourse to parties to deal with the various issues that parties tend to raise at the stage of appointment of an arbitrator.

(e) Would a robust costs regime help?

If the Supreme Court's primary concern through the years has been to protect a party from being unnecessarily dragged through arbitration, perhaps the key remedy to this is a robust costs regime, where the winning party gets real costs of the endeavour. Though a rigorous costs regime is common in foreign arbitrations, we are yet to see a movement towards such a regime in India. A rigorous costs regime that largely (even if not fully) provides compensation to the winning party significantly lightens the burden of arbitration. If, in addition to real costs in arbitration, the losing party in a Section 11 proceeding is made to pay real costs of the proceeding, perhaps we would see transformed party behaviour. Very frequently, the purpose of raising objections in a Section 11 proceeding is not a genuine concern as to jurisdiction or arbitrability, but a strategy to delay and disrupt arbitration proceedings. A robust costs regime would strongly disincentivise such parties and also continue to uphold the principles of party autonomy and minimal intervention of courts.

VII. CONCLUSION

The sheer amount of judicial and legislative attention given to the question of appointment of arbitrators reflects - rightly or wrongly - that this is no longer a simple issue. While on the one

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(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that — (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or (ii) the arbitral award is in conflict with the public policy of India.

hand the mere appointment of an arbitrator should be non-controversial, requesting the Courts to do so has certainly brought in a fair amount of controversy. The power has travelled from being administrative to judicial; then to judicial only for the purpose of ascertaining a *prima facie* existence of an arbitration agreement; and to now ready to be moved away from the Courts to arbitral institutions.

However, it remains to be seen whether the Courts will be freed from this dilemma which has been alive from the year 1999; rather if the Courts will stay away from exercising power of judicial review despite the constitution of arbitral institutions.

If conduct of parties is any metric to go by, the likely scenario will be a spate of writ petitions being filed before the High Courts and Supreme Court seeking intervention in the exercise of (non-judicial) power by the arbitsral institution. At that stage, the need of the hour will be for the Courts to come down heavily on such parties, insist that all parties go through the arbitration process and accept the mandate of the arbitrator, to be challenged only as provided in the 1996 Act and at the right stage.

HALLIBURTON V. CHUBB: AN ENGLISH LAW TREATISE ON ARBITRAL BIAS AND THE INDIAN PERSPECTIVE

- ***Payel Chatterjee, Alipak Banerjee & Shweta Sahu****

ABSTRACT

The cardinal principle of an arbitral proceeding is the impartiality and fairness of the arbitrator while adjudicating the arbitral dispute before it. Issues have arisen in the past pertaining to arbitrator conflicts and apparent bias in several instances, necessitating a critical guidance for arbitrators, practitioners and arbitral institutions. The UK Supreme Court in the judgement, *Halliburton Company v. Chubb Bermuda Insurance Ltd.,* has clarified and set precedent for issues relating to the apparent basis and extent of an arbitrator's duty to disclose material circumstances which may raise questions of bias in arbitrations. London is considered as one of the principal global hubs for arbitration and frequently selected as a seat of arbitration in commercial contracts. Thus, the Supreme Court's decision setting out the importance of fair disclosures, independence and impartiality in English-seated arbitration will act as a ready reference going forward for examining these issues across the globe. . The case brief examines the critical issues and delves on the detailed observations of the Supreme Court's decision on issues relating to multiple arbitral appointments on overlapping subject matters, involving a common party giving rise to justifiable doubts and arbitrator's duty to disclose the same. It further analyzes the impact of the decision on international commercial arbitration and discusses the Indian perspective on the subject matter in light of provision of Indian Arbitration and Conciliation Act, 1996.

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"*While it is trite that a judge or arbitrator must be just and impartial, he must also not give the appearance of bias: justice must be seen to be done.*[1]"

I. INTRODUCTION

Recently, in *Halliburton Company* ("**Halliburton/Appellant**") *v Chubb Bermuda Insurance Ltd* ("**Chubb/Respondent**")[2], the Supreme Court of the United Kingdom ("**UK Supreme Court**") rendered a landmark ruling on arbitrator conflicts and apparent bias. The judgment considers (i) repeat arbitral appointments and (ii) disclosures required in a dispute concerning the same or overlapping subject-matter and involving a common party. While the UK Supreme Court ultimately dismissed the challenge to the arbitral appointment, the judgment sets out the importance of fair disclosures, independence and impartiality in international arbitration and will act as a ready reference going forward.

II. FACTUAL BACKGROUND

Appeals were filed before the UK Supreme Court in connection with the arbitration proceeding arising under a liability insurance policy. Pursuant to an explosion and fire on the Deep-Water Horizon Rig, there was extensive damage and loss of life. Transocean LLC owned the Rig and provided crew and drilling team to BP Exploration and Production Inc **("BP")** (lessee of the rig). The Appellant provided cementing and well-monitoring services to BP and had obtained a Bermuda Form liability policy from the Respondent. Transocean was also insured with Chubb by a similar policy. The rig disaster resulted in numerous claims.

Following a US court ruling ("**Apportionment Judgment**") apportioning blame - Halliburton and Transocean settled the claims against them by paying USD 1.1 billion and USD 212 million respectively. Subsequently, they initiated claim against Chubb under their liability policies. Chubb disputed such claims, contending that the settlements were not reasonable.

[1] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

[2] ibid.

Halliburton commenced arbitration under the insurance policy **("Policy")**.[3] Halliburton and Chubb nominated their arbitrators but were unable to agree on the appointment of the presiding arbitrator. After a contested hearing in the High Court, Mr. Rokison, proposed by Chubb, was appointed as the presiding arbitrator to adjudicate the dispute ("**Reference 1**"). Although Halliburton had objected to Mr Rokison's candidature on the premise that: (a) the Policy was governed by law of New York while Mr Rokinson was a English lawyer; and (b) insurers had a practice of repeatedly appointing retired judges or QCs known to them, such as Mr Rokinson, as party-appointed arbitrators, nonetheless, did not appeal against the appointment order.

Prior to accepting his appointment, Mr Rokinson disclosed to Halliburton and the court about (i) his previous appointments in which Chubb was a party, including as party appointed arbitrator nominated by Chubb, and (ii) his current appointment as arbitrator in two pending references in which Chubb was involved. The High Court did not consider these appointments as an impediment. Subsequently and without Halliburton's knowledge, during the pendency of Reference 1, Mr. Rokison accepted appointment as an arbitrator in two separate references, also related to the rig disaster. The first appointment was made by Chubb and related to Transocean's claim against Chubb ("**Reference 2**"). The second appointment was a joint nomination by the parties involved in a claim initiated by Transocean against another insurer ("**Reference 3**"). Mr. Rokison made necessary disclosures prior to his appointments in Reference 1 and 2 but failed to disclose to Halliburton his proposed appointment by Chubb in References 2 and 3.

On discovering Mr. Rokison's appointment in the subsequent references, Halliburton applied[4] for his removal as an arbitrator on grounds that circumstances existed that gave rise to justifiable doubts as to his impartiality before the High Court. The High Court dismissed Halliburton's application on the basis that: (a) it was common for arbitrators with the relevant expertise to sit in different arbitrations arising out of the same factual circumstances or subject matter; (b) arbitrator under English law was required to decide the case by reference to material available to the parties to the particular reference; (c) rejected the submission that the chairman of the

[3] The Policy was governed by the law of New York. The Policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third by the two arbitrators so chosen. If the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London was to make the appointment.

[4] See Arbitration Act 1996 (England), s 24.

tribunal had an enhanced duty to maintain demonstrable impartiality as the ultimate guarantor of fairness and impartiality.

An appeal was filed before the Court of Appeal, where Halliburton assailed the High Court's application of the principles of disclosure to the facts of the case in assessing whether there was a real possibility that the tribunal was biased, regard should be had to the risk of unconscious bias.

The Court of Appeal observed that in the context of international commercial arbitration it was a good practice to make disclosure where a party had concerns, and the degree of overlap between the arbitration references and the nature of other connections could be argued to give a basis for a reasonable apprehension of lack of impartiality.

However, the Court of Appeal agreed with the overall conclusion of the High Court that (a) the non-disclosed circumstances did not of itself justify an inference of apparent bias; (b) failure to disclose was accidental and not deliberate; (c) there was only a limited degree of overlap between the arbitration references; (d) mere oversight in such circumstances would not give rise to justifiable doubts as to impartiality.

III. PROCEEDINGS BEFORE UK SUPREME COURT:

Halliburton did not contend that Mr Rokinson was guilty of any deliberate wrongdoing or actual bias, and the challenge was confined to apparent unconscious bias. The challenge was broadly premised on the fact that Mr. Rokison accepted the benefit of a paid appointment on Chubb's nomination in Reference 2 while sitting on an arbitral tribunal in Reference 1. Mr. Rokison gave Chubb the unfair advantage of being a common party to two related arbitrations with a joint arbitrator, while Halliburton was ignorant of the proceedings in Reference 2, and thus, unaware whether and to what extent he would be influenced in Reference 1 by the arguments and evidence in Reference 2. Chubb would be able to communicate with him in Reference 2, for matters which might be relevant in Reference 1 and would know of his responses to such communications, while Halliburton would not even know that they had occurred. Lastly, the failure to disclose his appointment to Halliburton prevented it from forming its own view as to whether it might lead to unfairness.

The UK Supreme Court held as follows:

(i) The duty of impartiality of arbitrators:

The UK Supreme Court referred to impartiality as a cardinal duty of an arbitrator.[5] Under English law, the same high standards of fairness and impartiality are expected from a party-appointed arbitrator as the person chairing the tribunal. In this regard, whether any appointment constitutes an appearance of bias would be relevant to be determined if a "*fair-minded and informed observer*",[6] would conclude that there was a real possibility that the Tribunal was biased.[7] The fair-minded and informed observer would keep in mind the realities of international arbitration and the customs and practices of the relevant field of arbitration.

(ii) Whether an arbitrator is under a legal duty to disclose particular matters:

One way in which an arbitrator can avoid the appearance of bias is - by disclosing matters, which could arguably be said to give rise to a real possibility of bias. Such disclosure makes parties aware of matters which could give rise to justifiable doubts about his impartiality, and enables them to consider the disclosed circumstances, obtain necessary advice, and decide on – whether to seek removal of the arbitrator.

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[5] Arbitration Act 1996 (England), s 1:

The provisions of this Part are founded on the following principles, and shall be construed accordingly—

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense…

Arbitration Act 1996 (England), s 33:

(1) The tribunal shall -

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent…

[6] *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416:

The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53.

Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

[7] See, *Porter v Magill* [2001] UKHL 67.

Disclosure is a 'legal duty' under English law unless waived by the parties. Failure to disclose may demonstrate a lack of regard to the interests of the non-common party, which may amount to apparent bias in certain circumstances. Arbitral institutions such as International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and CIArb (interveners) had also argued in favour of the recognition of such a legal duty – which promotes transparency in arbitration and is consistent with best practices.

Referring to situations where an arbitrator may fail to disclose for reasons, such as forgetfulness, oversight, or a failure to assess the consequences – the UK Supreme Court referred to Prof Davidson's observation that *"[h]owever understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer".*[8]

Specifically referring to multiple arbitral appointments, the UK Supreme Court held that - acceptance of arbitral appointments in multiple references concerning the same or overlapping subject matter with only one common party may give rise to an appearance of bias, depending on the relevant customs and practices.[9]

The UK Supreme Court further held that inequality of knowledge between the common party and the other party or parties may confer an unfair advantage – depending on relevant circumstances and custom and practice in arbitrations in the relevant field.

(iii) Duty of privacy and confidentiality of an arbitrator v. duty of an arbitrator to disclose:

As per the practice in the UK-seated arbitrations - the duty of privacy and confidentiality would not prohibit all forms of disclosure of the existence of a related arbitration in the absence of express consent. Meanwhile, the duty of disclosure does not provide a free rein to an arbitrator to disclose everything necessary to persuade a party about his or her impartiality.

In the absence of a contract to the contrary or rules restricting/prohibiting disclosure, certain disclosures may be made without obtaining the express consent of the parties to the arbitration.

[8] F Davidson, Arbitration, 1st ed (2000).

[9] See IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines"), Orange List, para 3.1.

Consent may be inferred from the relevant circumstances. For instance, the consent of the common party can be inferred from its action to seek appointment of the arbitrator, and the consent of the other party is not required for limited disclosures.

Referring to the present case, the UK Supreme Court held that the disclosure ought to have included:

- the identity of the common party who was seeking the appointment of the arbitrator in Reference 2;
- whether the proposed appointment in Reference 2 by the common party was to be a party-appointment or a nomination for appointment by a court or a third party, and a statement that Reference 2 arose out of the same incident.

Other disclosures, if required, may be made after obtaining express consent of parties to arbitration about which a disclosure is being made. The UK Supreme Court further observed that a high-level statement as to whether similar issues were likely to arise would also involve no breach of the arbitrator's duty of privacy and confidentiality.

(iv) The time of assessment for such duty of disclosure:

The duty of disclosure is a continuing duty and circumstances may change before the disclosure. Those circumstances may aggravate an existing failure to disclose a matter or render it less potent. Therefore, the fair-minded and informed observer in assessing whether an arbitrator has failed in a duty to make disclosure must have regard to the facts and circumstances "*at and from the date when the duty arose and during the period in which the duty subsisted*".

(v) The time of the assessment of the possibility of bias:

The UK Supreme Court observed that the English Arbitration Act 1996 Act provides that an arbitrator may be removed if circumstances "exist" that give rise to justifiable doubts as to his impartiality.[10] The use of the present tense ("exist") indicates that – the fair-minded and informed observer assesses whether there is a real possibility that an arbitrator is biased by

[10] Arbitration Act 1996 (England), s. 24(1)(a).

reference to the facts and circumstances known "*at the date of the hearing to remove the arbitrator*".

Applying the above principles to the present case, the UK Supreme Court was of the view that the fair-minded and informed observer, looking at the facts and circumstances, which would be known to him or her in January 2017 (date of the hearing for removal of Mr. Rokison which was relevant for assessment of possibility of bias), would not conclude that there was a real possibility of bias or, that circumstances existed which gave rise to justifiable doubts about Mr. Rokison's impartiality.[11] The UK Supreme Court's reasoning was premised on the following:

(i) Lack of clarity/ certainty in English case laws as to whether there was a legal duty of disclosure and whether disclosure was needed;

(ii) References 2 and 3 followed Reference 1. Such time sequence of the three references may provide an explanation for Mr. Rokison's disclosure of Reference 1 to Transocean but not the need to inform Halliburton about Reference 2;

(iii) It was likely that there would not be any overlap in evidence or legal submissions between References 2 and 3 and Reference 1;

(iv) There was no question of Mr. Rokison having received any secret financial benefit in this case; if that objection were valid it would mean that every party-appointed arbitrator receives a disqualifying benefit;

(v) There was no basis for inferring unconscious bias in the form of subconscious ill-will, or any evidence that he bore any animus towards Halliburton.

IV. ANALYSIS:

The list of interveners in this case such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and many other arbitral institutions allude to the growing importance of arbitrator conflict and the requirement for fair and transparent disclosures during arbitral appointments. This judgment provides a balance between the duty to disclose and circumstances which may lead to inferring unconscious bias. The judgment has

[11] ibid.

been rendered keeping in mind the practical realities of international commercial arbitration and multiple arbitral references arising out of the same set of facts and circumstances. Applying the facts to the principle laid down in this case, the decision of the High Court was undisturbed primarily due to lack of certainty in English law on whether a disclosure was required to be made. However, going forward, a failure to disclose in similar circumstances may nullify an arbitral appointment because one can no longer plead lack of certainty in English law.

V. THE INDIAN PERSPECTIVE:

The IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**") provide general standards regarding impartiality, independence and disclosure in arbitral appointments. These guidelines are commonly used by arbitrators when making decisions about prospective appointments and disclosures; by parties and their counsel in assessing the impartiality and independence of arbitrators; and by arbitral institutions and courts in considering challenges to arbitrators.[12] While parties, courts and arbitral tribunals across the globe have placed reliance on the IBA Guidelines,[13] India is one of the few countries to have incorporated them in its domestic law, i.e., the Arbitration and Conciliation Act 1996 ("**Indian Arbitration Act**") as amended in 2015.

While the Fifth Schedule of the Indian Arbitration Act lists various instances giving rise to "*justifiable doubts as to the independence and impartiality*" of an arbitrator, the Seventh Schedule refers to instances which directly result in the "*ineligibility*" of a person from being appointed as an arbitrator.

Section 12 of the Indian Arbitration Act sets out that when a person is approached for an arbitral appointment, he shall disclose in writing circumstances, such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality.[14]

[12] See, IBA Guidelines.

[13] See, Judith Gill, 'The IBA Conflicts Guidelines – Who's Using Them and How?' (2007) 1 Dispute Resolution International 58.

[14] Arbitration and Conciliation 1996 (India), s 12(1).

Specifically, Entry 22 of the Fifth Schedule which has been contested provides that a justifiable doubt as to impartiality and independence may be inferred if "*The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties*." The Supreme Court clarified that application of Entry 22 triggers only upon a person having already been appointed as an arbitrator on two past occasions by a party, being then approached for a third appointment by the same party, all within a span of three years.[15] Further, Entry 24 of the Fifth Schedule refers to a situation where "*The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.*" Therefore, in such cases, disclosure is mandated in the form specified in the Sixth Schedule to the Indian Arbitration Act to ensure applications for removal of arbitrators are avoided at a later stage. Indian courts haven't witnessed too many rulings yet disputing such issues of mandatory disclosures as most arbitrators tend to be over-cautious while accepting appointments.

Needless to say, the safeguards in the IBA Guidelines that have been plugged in the Indian Arbitration Act coupled with the overall guidance provided by the UK Supreme Court – further strengthens the need for appropriate disclosures in arbitral appointments.

[15] *HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited* 2018 (12) SCC 471; *Kunwer Sachdev v. Hero Fincorp Limited* 2019 SCC OnLine Del 6694

NORD STREAM 2 V. THE EUROPEAN UNION – ATTRIBUTABILITY OF WRONGFUL CONDUCT IN INVESTMENT ARBITRATIONS

- ***Vishesh Sharma****

ABSTRACT

In most instances of investment arbitration, the Treaty in question (a BIT/MIT/FTA) clearly outlines the liability of the host state and it is the host state against which arbitration is commenced by investors and all conduct is attributed to the state. However, in cases where countries are part of supranational organisations, such as the European Union, where they cede authority and sovereignty to an organisation, this question is not as straightforward. This is because in these instances, the organisation in question enacts laws and regulations that are binding on member states. The European Union is one such organisation. These situations also have the potential to impact the rights that accrue to investors under various international treaties such as the Energy Charter Treaty, to which many countries and the EU are members. In such situations, it becomes essential to determine the standard for attributing wrongful conduct and dividing the liabilities between countries and the organization. Such a question had never been presented before any tribunal. However, such a challenge has been made recently in the case of Nord Stream 2 v. European Union where the European Union has attempted to evade its responsibility by creating procedural challenges, stating that the Respondent selected by the Claimant is inappropriate and the dispute should have been raised against Germany. While the decision in the matter is not out yet, this case note is an attempt to reflect on the applicable law and to provide a possible solution to the situation.

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I. INTRODUCTION

In September 2019, Nord Stream 2 initiated an investment arbitration claim against the European Union ("EU") under the Energy Charter Treaty ("ECT"). It alleged that the amendment to the EU Directive 2009/73/EC[1] ("Gas Directive") had adversely affected its investments. This is the first investment arbitration that has been formally initiated against the EU.[2] It raises pertinent questions as to the method of attribution of conduct between the EU and its Member in mixed treaties such as the ECT where both the EU and the EU Member States ("EU Members") are parties.

II. THE COMPLICATED RELATIONSHIP OF THE ARIO AND THE EU

The International Law Commission has drawn up Draft Articles on Attribution of Wrongful Conduct under International Law to International Organizations ("ARIO"). During the drafting of ARIO, it was considered that the rules provided therein may not be sufficient to govern the relationship between the EU and EU Members owing to the *sui generis* nature of EU.[3] Therefore, Article 64 was inserted in ARIO to provide for the rule of *lex specialis*.[4] Article 64 allows for attribution to be governed by special rules of international law. The EU has maintained that the rule of normative control is the *lex specialis* that governs the question of attribution of conduct between the EU and EU Members.[5]

The rule of normative control has two facets: transfer of competences to the EU and the obligation of EU Members to carry out binding decisions and policies adopted by the EU.[6] *First,*

[1] Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJEU L 211* (13 July, 2009) *p. 94–136*

[2] Report on *Operation of Regulation (EU) No 912/2014 on the financial responsibility linked to investor-to-state dispute settlement under international agreements to which the European Union is party*, COM(2019) 597 Final: European Commission (19 November, 2019).

[3] Judge G. Gaja, 'Fifth Report on the Responsibility of International Organizations', United Nations Special Rapporteur (2 May 2007) A/CN.4/583, p.4, ¶7.

[4] Judge G. Gaja, 'Seventh Report on the Responsibility of International Organisations', United Nations Special Rapporteur (27 May 2009) A/CN.4/610, p. 39-40.

[5] ILC, Responsibility of International Organisations: Comments and Observations Received from International Organisations (ARIO Comments), Doc. A/CN.4/545, 25 July 2004, p. 29, ¶ 3.

[6] Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', 21 EJIL (2010) 723, p. 742.

the Treaty on the Functioning of EU ("TFEU") provides for exclusive, shared and supporting competences of the EU and lists certain subject matters.[7] When the EU frames any law on these subject matters, it binds all EU Members. The areas of energy and environment, which form the basis of the Gas Directive in question in *Nord Stream 2*, fall under Article 4 of the TFEU. Therefore, the EU and EU Members share competences in these areas.

Second, the TFEU provides for methods through which the EU carries out its acts.[8] Regulations, directives and decisions are the methods that have some degree of binding value. Under the TFEU, EU Members are obliged to adopt all measures of national law, necessary to implement legally binding acts of the EU.[9] Further, Article 7 of the Treaty on European Union provides for an enforcement mechanism for these measures and lays out consequences for non-compliance with binding EU law. EU Members, therefore, have no option but to apply and implement binding EU law.

The rule of normative control prescribes that when the EU enacts a law pursuant to its competence which is binding on its Members, it exercises normative control over such conduct, which should be attributed to the EU and not to the EU Members.

(i) Attribution to EU in investment cases

In the investment context, for the EU to be held liable for actions against investors, the primary requirement is for the EU to be a party to the treaty that guarantees the protection of investors.[10] A majority of such treaties are 'mixed treaties' where EU Members and the EU are all party to the treaty. ECT is a prime example of this. Such treaties make it difficult to determine the question of attribution, especially when the they do not declare the competences of EU Members and the EU. There is also a possibility of joint liability being attributed to both EU Members and the EU.[11]

[7] Treaty on the Functioning of the European Union ("TFEU"), art. 3, 4 and 6.

[8] TFEU, art. 288.

[9] TFEU, art. 291.

[10] Hoffmeister, 'Litigating against the European Union and Its Member States: Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?', 21 EJIL (2010) 723, p. 724.

[11] Kuijper, 'International Responsibility for EU Mixed Agreements', in P. Koutrakos and C. Hillion (eds), *Mixed Agreements Revisited (2010)*, 208, p. 210; Case C–239/03, *Commission v. France* [2004] ECR I–9325, ¶¶ 26–30.

The tribunal in *Electrabel v. Hungary* was the first to interpret the rule of normative control in the context of ECT. The alleged violations in this case related to breaches of the ECT owing to the cancellation of Power Purchase Agreements ("PPAs") pursuant to a decision by the EU. The tribunal drew an analogy from Article 6 of Articles on the Responsibility of States for International Wrongful Acts ("ARSIWA") where the conduct of an organ of a state, when placed at the disposal of another state and acting in exercise of elements of the authority of that other state is considered an act of the latter state, at whose disposal such organ is placed.[12] The tribunal found that as the EU is a contracting party to the ECT, Article 6 of ARSIWA, by analogy, can be applied in this case if Hungary was merely implementing the final decision adopted by the EU.[13] The tribunal went on to identify that it was essential to identify what Hungary was mandated to do pursuant to the EU decision.[14] The tribunal concluded that Hungary had no option but to cancel the PPAs and it was the EU that decided the compensation for the same.[15] Consequently, the act could not be attributed to Hungary (even though the tribunal had already dismissed this claim on merits and the parties did not seek to implead the EU as a respondent) since it exercised no discretion.

While in *Electrabel* it was fairly simple to conclude that Hungary did not exercise any discretion in respect of the impugned act, this analysis is not always as direct. There are many EU directives that provide some level of discretion to EU Members during the implementation process.[16] In such cases, it would be difficult for potential claimants to determine the appropriate respondent in investment arbitration proceedings. *Nord Stream 2* is an instance of this complicated scenario.

[12] *Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 6.74.

[13] *Ibid.*, ¶ 6.76.

[14] *Ibid.*

[15] *Ibid.*, ¶¶ 6.86-6.87.

[16] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJEU L 304 (25 October 2011) p. 64–88*; Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJEU L 281 (24 October, 1995) p. 31–50*

III. THE ISSUES OF ATTRIBUTION IN QUESTION IN NORD STREAM 2

As stated above, *Nord Stream 2* involves questions pertaining to the modification of the Gas Directive by the EU. However, the EU has raised a jurisdictional challenge on the ground of lack of *ratione personae* jurisdiction of the tribunal based on two broad bases. *First*, it contends that the measure challenged by the Claimant did not impose any direct obligations on it and the measure was operationalized by Germany and not the EU.[17] *Second*, it contends that Germany had a broad margin of discretion while implementing the measure and therefore this allegedly wrongful conduct must be attributed to Germany.[18]

However, international law principles specifically provide that conduct can be attributed to an international organisation even if the impact of its measure is indirect. This is confirmed by the findings of the tribunal in *Electrabel*, with the relevant test being the presence of 'discretion' with a Member State while implementing an act.[19] The WTO practice also upholds this principle.[20] WTO Panels and the Appellate Body have found that even if certain WTO-inconsistent acts are undertaken by EU Members but pursuant to EU laws that have some binding value and in relation to the subject-matter for which the EU has assumed competence, those acts should be attributed to the EU.[21] This is because EU Members act as *de facto* organs/agents of the EU and therefore any internationally wrongful acts that they undertake are taken only pursuant to mandatory direction by the EU.[22] ARIO also recognizes this principle. It states that the conduct of any agent of an international organisation (which is very broadly defined in ARIO and includes any entity that is charged by an international organisation to carry out any of its functions and through which an international organisation acts) can be attributed to the international organisation. [23] The aggregate result of these authorities is the following: *since EU Members act as agents of the EU while implementing binding directions of the EU, their*

[17] *Nord Stream 2 AG v. The European Union*, PCA Case No. 2020-07, European Union Submissions on Jurisdiction and Request for Bifurcation, 15 September 2020, ¶ 153.

[18] *Ibid.*, ¶ 156.

[19] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, ¶ 6.76.

[20] The WTO practice is relevant in this context as the WTO Agreement, like the ECT, is a mixed agreement.

[21] European Communities Appellate Body Report, *Selected Customs Matters* (WT/DS315//AB/R), ¶¶ 218-227.

[22] European Communities Panel Report, *Geographic Indications* (WT/DS174/R), ¶ 7.725.

[23] ARIO, art. 6.

conduct can be attributed to the EU if they could exercise no discretion while implementing EU's directions.

Therefore, in relation to the EU's arguments in *Nord Stream 2*, there is no legal basis for insisting on a requirement of EU law having a "direct impact" on the investor for it to be attributable to the EU. As stated, it is sufficient that EU Members, while undertaking any wrongful act, are acting pursuant to mandatorily applicable EU law. The German government, while implementing the Gas Directive, adopted the language of Article 49a of the Gas Directive, verbatim. The Claimant's primary concerns pertain to the cut-off date in Article 49a which prevents it from benefitting from the derogations that are permissible under Article 49a. Since directives of the EU are binding on EU Members as to the result to be achieved through the directive,[24] it is reasonable to argue that the ultimate result sought to be achieved by Article 49a is to prevent projects that were not completed before the cut-off date from being eligible for derogations under Article 49a. Hence, Article 49a of the Gas Directive was binding on Germany and while implementing the same, it was acting as an agent of the EU. Therefore, the fact that the Amendment to the Gas Directive did not have any direct impact on the Claimant is irrelevant and wrongful conduct may still be attributed to the EU. The EU's first argument should, therefore, fail.

As for its second contention pertaining to the existence of discretion with Germany, it is clear that the EU Gas Directive in question is a directive as per Article 288 of the TFEU. Therefore, it is binding as to the result to be achieved and only leaves to the EU Members the discretion as to the choice and form of its implementation to achieve the given objective. Germany exercises no discretion while making a decision on whether the Claimant is eligible for derogations from the Gas Directive since the Claimant's project falls outside the permitted cut-off date. No other provision in Gas Directive makes the Claimant eligible for any such derogations on the basis of the discretion of the German Authorities. The EU's second argument should, therefore, also fail. However, even if the EU is able to prove that other provisions of the Gas Directive accorded some discretion to Germany to pass on certain benefits to the Claimant, the mandatory nature of the cut-off date under Article 49a would still deprive the Claimant of derogations available

[24] TFEU, art. 288.

thereunder, making the EU at least partially liable and, therefore, presenting a possibility of joint liability of Germany and the EU.

IV. THE WAY FORWARD

The EU's challenge to the *ratione personae* jurisdiction of the tribunal in *Nord Stream 2* is the first such challenge to have been made on the grounds of attribution. To deal with the questions of attribution, the EU has implemented a regulation ("Financial Responsibility Regulation") to determine the allocation of financial liability in investment cases.[25] It also provides the method of determining the respondent in investment proceedings.[26] The EU can be made respondent in cases where it bears at least a part of the financial responsibility in relation to a dispute under Article 3 of the Regulation.[27] Article 3, *in turn*, provides that the EU bears financial responsibility arising from the treatment afforded by an EU Member where this treatment was required by EU Law.[28] However, it does not clarify what forms of EU Law "require" treatment to be mandatorily accorded by EU Members. Moreover, it does not recognize any possibility of joint liability attribution.

The Financial Responsibility Regulation should be amended to specifically outline what it considers to be EU Law Binding on EU Members. This can be done by specifically recognizing that EU Regulations, Directives and Decisions constitute EU law that is binding on EU Members in varying degrees. Furthermore, the regulation should also be appropriately amended to allow for the possibility of joint attribution to account for situations where the EU issues binding directions to EU Members while also granting certain discretion to them.

Once this Regulation is perfected by the EU, the EU should undertake the exercise of determination of the appropriate respondent in all proceedings once a claimant serves a notice to initiate investment arbitration proceedings. The EU has also issued a statement to this effect

[25] Regulation establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, Regulation (EU) No 912/2014 (23 July, 2014) ("Financial Responsibility Regulation").

[26] Financial Responsibility Regulation 2014, art. 9.

[27] Financial Responsibility Regulation 2014, art. 9(2)(a).

[28] Financial Responsibility Regulation 2014, art. 3(1)(c).

under Article 26(3)(b)(ii) of the ECT.[29] This process for the determination of the appropriate respondent by the EU should be regularised in order to minimise any procedural challenges that cause delays, such as the one made by the EU in *Nord Stream 2*.

In any case, it is currently incumbent upon the *Nord Stream 2* tribunal to clarify the principles of attribution of wrongful conduct to the EU which can act as the guiding force for EU lawmakers to amend the Financial Responsibility Regulation and bring it in conformity with the principles of international law. It is argued by the author that the tribunal should base its findings on principle of normative control as it applies to the relationship between the EU and EU Members. The tribunal should conclude that since the matter before it pertains to an EU Directive, which is binding on Germany as to the result to be achieved, and that the eventual impact on the investor in question stems from this end result which cannot be remedied in favour of the investor by Germany's discretion, this conduct should be attributed to the EU.

[29] Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities ST/7830/2019/INIT, *OJEU L 115, (2 May, 2019), p. 1–2*

'TO IMPLEAD OR NOT-TO-IMPLEAD' – NON-SIGNATORIES TO AN ARBITRATION AGREEMENT

- *Shashank Garg & Kanika Singh* [*]

ABSTRACT

Arbitration is premised on the fundamental principle of party autonomy and consent. This principle implies that only the parties to the arbitration agreement can be made a party in an arbitration proceeding. Consent of the parties is of paramount value in arbitration and is one of the foremost reasons for its popularity across the globe. However complications arise where the effective and proper adjudication of dispute cannot be undertaken by the Arbitral Tribunal or the Court without impleading necessary third-party to the case. This logic of adjudication locks horns with the principle of consensual nature of arbitration. Can a third party, which has not consented to the arbitration, be made a party to such arbitration by the Tribunal or Courts? Or in simpler words, can a non-signatory to the arbitration agreement be impleaded as a party to the arbitration in the absence of express consent? The article seeks to contemplate the position of Indian Arbitration Law on the said issue by analysing several doctrines adopted by the Courts such as 'implied consent theory', 'alter-ego doctrine' and 'group of companies doctrine' in various case laws. Furthermore, the article also reflects on the global trend around issue by understanding the positions of UK, Singapore and Germany Laws. While uncertainties still looms over the impleadment of non-signatories to the arbitration, the article attempts to provide much needed clarity on the subject-matter.

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"Like consummated romance, arbitration rests on consent"[1]

I. INTRODUCTION

Party autonomy and minimal intervention by the supervisory court are the fundamental factors for arbitration being a favoured mechanism of alternate dispute resolution for parties. This autonomy is derived from the consent of the parties which is paramount in any arbitration agreement. The consent expressed in an arbitration agreement binds the parties to the contract.

This principle of consent finds prominence as a *sine qua non* in virtually all conventions, model laws, and enactments on arbitration, be it Article II of the New York Convention, Section 7 of the UNCITRAL Model Law or closer to home, in India, Section 7 of the Arbitration & Conciliation Act, 1996 **['The Act'].**

Section 7 of the Act recognises the many forms which written consent can take – a clause in an agreement, a separate agreement, an exchange of letters or correspondence, an exchange of pleadings, even incorporation by reference to an arbitration clause contained in another contract.[2] With all these different expressions of consent, what remains essential is the element of conscious choice which ultimately binds a party to the arbitration agreement.

Given much fanfare around the concept of consent in arbitration, a lot of jurists, scholars and practitioners of arbitration law have elucidated the juxtaposition between the emphasis on consent and the more practical concerns of reconciling the concept of consent in complex disputes involving non-signatories to the arbitration agreement, where proper logical adjudication of disputes would require the impleading of non-signatories to an arbitration agreement.

From an arbitrator's perspective, motions to join non-signatories create a tension between two principles: (i) maintaining consensual nature of the process, and (ii) maximizing an award's

[1] William W. Park, *Non-signatories and International Contracts: An Arbitrator's Dilemma*, in Multiple Party Actions In International Arbitration 1 (2009).

[2] *See* Justice Indu Malhotra, Commentary on the Law of Arbitration, 2020 (Wolters Kluwer).

practical effectiveness by binding the necessary parties. Pushed to the limit of their logic, each goal points in the opposite direction.[3]

To resolve this tension, courts have enumerated several theories to allow impleading non-signatories to an arbitration agreement when necessary. However, these theories often overlap. Elements from more than one theory may be pressed into service by a Court while referring non-parties to arbitration. Some of these theories dealing with non-signatories to an arbitration agreement have been discussed below:

(i) Implied Consent Theory

The first theory is that of implied consent and it generally covers third party beneficiaries, guarantors, assignees and other transfer mechanisms of contractual rights where implied consent of the party being bound can be inferred. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle and has been held to apply to both private as well as public legal entities[4] and as the name suggests, is a consensual theory.

The theory of implied consent by its very nature is fact-specific and has a history of hits and misses when pressed into service by enterprising counsels before the Courts in India. In *S.N. Prasad v. Monnet Finance*[5], the Indian Supreme Court held that a co-guarantor who was not a party to the arbitration agreement could not be made a party to the arbitration merely because it had been impleaded as a party in the Section 11 petition. However, more recently in the judgment of *MTNL v. Canara Bank*[6], the Indian Supreme Court accepted the implied consent theory to implead a non-signatory to the arbitration as it participated in various proceedings as a party leading up to reference of disputes to arbitration.

(ii) Alter-ego Doctrine

This doctrine has its underpinnings on principal-agent relations, apparent authority, piercing of veil (also called the “alter-ego”), joint venture relations, succession, and estoppel. The doctrine

[3] *Id.*

[4] Paragraph 100 in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification In [*(2013) 1 SCC 641]

[5] (2011) 1 SCC 320

[6] (2019) 10 SCC 32

does not rely on the parties' intention but rather on the force of the applicable law and/or principles of equity and for this reason, has been described as a "non-consensual" doctrine.[7]

The essence of the alter-ego doctrine is that "one party so strongly dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms, and to treat them as a single entity".[8]

However, Courts and Tribunals have adopted a restrictive approach when it comes to applying this doctrine. Reasons for this, particularly in the context of arbitration agreements, are threefold:

i. *First*, as a general rule, only signatories are bound to arbitration agreements[9];

ii. *Second*, consent to arbitrate is not presumed[10]; and,

iii. *Third* and most importantly, because limited liability must retain the norm.[11]

An example of the restrictive approach is the judgment of the Indian Supreme Court in *Indowind Energy Limited v. Wescare (India) Limited*,**[12]** where the Court ruled that merely because two separate companies had common shareholders or a common Board of Directors would not make them a single entity and refused to refer a non-signatory to arbitration.

More recently, the Delhi High Court in *Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. & Anr.*,[13] was faced with the issue of compelling a non-signatory subsidiary to arbitration. While detailing the three doctrines used to compel a non-signatory to arbitrate, the Court relied upon the alter-ego doctrine since the subsidiary in question (Respondent No. 2) was found to be a wholly-owned subsidiary of Respondent No. 1 and was therefore deemed to be the

[7] *Supra* note 5

[8] Gary B. Born, International Commercial Arbitration at 1432 (2014).

[9] Paras 15 and 16, *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Ors*., (2003) 5 SCC 351

[10] Bernard Hanotiau, *Consent ot Arbitration: Do we Share a Common Vision?*, ARBITRATION INTERNATIONAL, Vol. 27(4), December 2011 at 539.

[11] Juan Marcos Otazu, *The Law Applicable to Veil Piercing in International Arbitration*, 5(2) Mcgill Journal Of Dispute Resolution 33, 37 (2018).

[12] (2010) 5 SCC 306

[13] Arb. P. 716/2019 delivered on April 07, 2021.

latter's alter-ego. The Court thereafter confirmed that Respondent No. 2, despite being a non-signatory to the arbitration agreement, would be compelled to arbitrate.

(iii) Group of Companies Doctrine

This doctrine has found gradual acceptance across both common law and civil law[14] jurisdictions and was first enunciated and recognized in the interim award in *Dow Chemical v. Isover Saint Gobain*[15]. This doctrine provides that an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. It was first recognised by the Indian Supreme Court in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*[16] wherein the Court clarified certain pre-conditions which were required to attract the said doctrine:

i. Direct relation to the party signatory to the arbitration agreement.

ii. The direct commonality of the subject matter.

iii. The transaction must be composite.

Most recent applications of this doctrine can be witnessed through the Indian Supreme Court judgements in *Ameet Lalchand Shah v. Rishabh Enterprises*[17] and *MTNL v. Canara Bank.*

The Delhi High Court in *Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. and Ors.*[18], invoked the group of companies doctrine to decide that 2 respondents which belonged to the same family as respondent no. 1 could be compelled to arbitrate despite not being signatories to the arbitration agreement.

With zeal to pinpoint the sanctity of this doctrine, the Courts have ruled in favour of extending references to all the non-signatories of an arbitration agreement contingent upon the '*Dow*

[14] *See* Kirstin Schwedt, *When does an arbitration agreement have a binding effect on non-signatories? The Group of Companies Doctrine vs. Conflict of Laws rules and public policy,* Kluwer Arbitration Blog, July 30, 2014.

[15] ICC Award No. 4131, YCA 1984, at 131 et seq.

[16] (2013) 1 SCC 641

[17] (2018) 15 SCC 678

[18] C.S. (Comm) 1290/2018 judgment delivered on May 21, 2020.

Chemical' thresholds being fulfilled. Moreover, extending the scope of principles laid down in *Chloro Controls* (supra) from international arbitrations to domestic arbitrations, the Courts have broadened their approach. Facts must be assessed on a case-to-case basis and thereafter the doctrine must be applied (not applied) since a contrary approach might bind non-signatories whom the concerned parties never intended to be bound by the agreement.

II. RESTRICTIVE APPROACH OF U.K. & SINGAPORE

(i) Position in the U.K.

The United Kingdom has always had a very strict and limited approach concerning implied consent warranting impleadment of non-signatories into arbitration. Initially, in *Arsanovia Ltd. & Ors v. Cruz City 1 Mauritius Holding*[19], the Court held that *"English law requires that an intention to enter into an arbitration clause must be clearly shown and is not readily inferred."* This position was cemented in the U.K. Supreme Court's decision in *Dallah Real Estate and Tourism Holding Co. v. Pakistan*[20] where the Court elevated the threshold required for impleadment to the 'test of common intention'[21] taking a cue from a 1990 decision of a French Court[22].

Any attempt to implead using the '*group of companies'* doctrines would fail since English Courts have rejected the group of companies doctrine by clearly stating that it does not form part of English Law. This position developed over time, beginning with the High Court of England & Wales' decision in the enforcement proceedings in *Peterson Farms Inc. v. C&M Farming Ltd.*[23].

Much recently, the Court of Appeal for England & Wales in *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait)*[24] delivered its judgment on 'no-oral modification' (NOM) clauses[25] and

[19] [2012] EWHC 3702 (Comm)

[20] [2010] UKSC 46 [10] (Eng.)

[21] *See Municipalité de Khoms El Mergeb v. Dalico* [1994] 1 Rev Arb 116

[22] [1992] JurFr 95

[23] [2004] 1 Lloyd's Rep 603

[24] [2020] EWCA Civ 6

[25] NOM Clauses are clauses in a contract which do not allow for the modification of that contract unless that modification is made in writing.

their impact on non-signatories to an arbitration agreement. The Court while restating the English position on non-enforceability of NOM clauses[26], reiterated that the non-signatories may be bound to a contract with NOM clauses only if they were estopped. This is a further reflection on England's narrow approach to impleadment of non-signatories.

(ii) Position in Singapore

The position in Singapore has been very similar to the English position, except it has preferred to leave the question of impleadment of non-signatories open to arbitral tribunals to decide in the facts of the case. Concerning the application of the 'alter-ego' doctrine, the Singapore High Court in *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd and another*[27] left it to the arbitral tribunal to decide whether a 'person is an alter ego of a company' deeming that 'such an issue can in an appropriate case be decided by arbitration.' This demonstrates Singapore's arbitration-friendly approach.

This decision was followed by the High Court's decision in *The Titan Unity (No. 2)*[28] where the Court confirmed that a non-signatory could be joined to arbitration only with the consent of all concerned parties and that the arbitral tribunal must decide.

When it comes to the position of law in Singapore concerning using the 'group of companies' doctrine to implead non-signatories to an arbitration agreement in an arbitration, the Singapore High Court laid down the law in *Manuchar Steel Hong Kong Ltd. v. Star Pacific Line Pvt. Ltd.*[29] relying on *Peterson Farms* (supra), holding that the 'group of companies' doctrine (similar to the 'single economic entity' doctrine[30]), had no place in common law jurisdictions of England and Singapore and hence, could not bind a non-party who did not consent to arbitration.

[26] *Rock Advertising v MWB Business Exchange*, [2018] UKSC 24

[27] [2006] 3 SLR(R) 174

[28] [2014] SGHCR 4

[29] [2014] SGHC 181

[30] Competition law doctrine which states that "irrespective of the legal status of two or more enterprises can be said to form a single entity for the purposes of competition law".

(iii) Position in Germany

The German Federal Supreme Court also dealt with the proposition of joining a non-signatory to arbitration in 2014.[31] The case involved a Danish Claimant and an Indian Respondent. The Claimant had invoked proceedings against the Respondent in the German lower court to which, the Respondent had objected stating that the matter before the court was subject of an arbitration agreement contained in a license contract between a Mauritius based company and the Respondent's legal predecessor. The Mauritius based company and the Danish Claimant company had the same Managing Director/sole shareholder. Hence, it was the case of the Respondent that even the Danish Claimant Company would be bound by that same arbitration agreement and the proceedings before the Court were not maintainable (Respondent asserted that the license contract empowered the Respondent's legal predecessor to use designs subject to the Managing Director's patent).

The German regional court however, dismissed the Respondent's objection. The Respondent thereafter approached the Higher Regional Court of Braunschweig, however, the appeal too was dismissed as the Claimant was deemed not to be bound by the arbitration agreement. The Court further held that the 'group of companies doctrine' violated the public policy of Germany and was not recognized as per the law of Denmark.

Respondent further appealed to the German Federal Supreme Court which took a different view. It remitted the case back to the lower court for a proper adjudication since in the view of the Federal Supreme Court, the lower court had not determined all facts necessary to render a final judgment. It directed the court to also determine the law applicable to the question whether a third party is bound by an arbitration agreement and whether such an interpretation would be against the German public policy?[32]

The Court did not follow principles of international law in answering the question but instead, resorted to determining the national law applicable and thereafter the conflict of laws rule. In

[31] Case Reference No. III ZR 371/12

[32] Kirstin Schwedt, *When does an arbitration agreement have a binding effect on non-signatories? The Group of Companies Doctrine vs. Conflict of Laws rules and public policy,* Kluwer Arbitration Blog, July 30, 2014. Accessible at: http://arbitrationblog.kluwerarbitration.com/2014/07/30/when-does-an-arbitration-agreement-have-a-binding-effect-on-non-signatories-the-group-of-companies-doctrine-vs-conflict-of-laws-rules-and-public-policy/

determining the law applicable to the arbitration agreement, it held that the law of the seat would be applicable (where there was nothing on the contrary) and hence, the Indian law would be the law governing the arbitration agreement. Hence, the question would be determined by the Indian law.

Thereafter, the Supreme Court indulged in the second part of the enquiry, i.e., whether invoking the 'group of companies' doctrine in the present case would be against the German public policy? On this, the Supreme Court held that the Higher Regional Court's ruling on this point did not take into account the special circumstances of the case, i.e., that the Managing Director was not only the assignor of the claim but was also involved in the conclusion of the arbitration agreement. The Supreme Court further clarified that although the German Civil Code (Article 6) provides that foreign laws are not applicable whose application leads to a result which is against the German public policy, the correct approach in such cases would be to first identify the applicable national law (foreign law) and apply it to the facts of the case and only if upon an application of the law to the facts the result is in violation of the public policy, should the foreign law be refused to be applied.[33]

III. CONCLUSION

Indian Courts have taken a capacious method of referring non-signatories to arbitration, unlike UK and Singapore. However, the German approach is practical and takes a true pro-arbitration approach as it treats such cases granularly, without larger restraints.

Despite India's expansive approach to this issue, a major issue remains unaddressed - Can arbitrators refer non-signatories to arbitration? Arguably, only courts may press these doctrines into service, as the Delhi High Court held in the Delhi High Court in *Sudhir Gopi v. IGNOU*[34]. It remains to be seen whether the Supreme Court extends this power to the arbitral tribunals or keeps it confined to the supervisory courts.

Thus, in the view of the author, while it is significant that Courts in India have impleaded non-signatories to arbitration intending to ensure effective adjudication of the dispute at hand by

[33] *See generally* supra note 24

[34] (2017) 2 KLJ (NOC 8) 11

placing reliance on several doctrines, what is of critical importance is that the approach of the court to let a non-signatory be added to an Arbitration must be kept limited to very special circumstances and more so in the case where such non-signatory does not consent/refuses to consent for arbitration, post the disputes have arisen.

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