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THE EDITORIAL

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WORDS FROM THE CHIEF EDITOR

It is my pleasure to inform that the "ADR Ambassador" program has been active now. We received several interests and we have already made appointment from India, China, USA, Europe and Egypt. These ambassador may bring double help to us as they can represent their home country as well as the country where they are working or studying now. In the next coming months and years we are hoping to receive more nominations. In this regards, we are thankful to YMI for coming forward in supporting and spreading this program. We are also thankful to Joao to nominate some good candidates who will take this program several steps forward.This issue of *ADR World* is an example of what our ADR Ambassador could do in the future. This issue has been largely managed by the student editorial Board

We also welcome our new editorial board member, Ms. Seungmin Lee, Partner, Shin and Kim. She is replacing our founding editorial board member Mr. Benjamin Hughes. We take this opportunity to thank Ben for his all help and we expect that he will be available to help us in the future as and when we need.

Our promise to obtain ISSN number for *ADR Magazine* is still in the pipeline. We will work towards it and hopefully the new issue will come with the ISSN number.

On behalf of the editorial board, we wish you *A Very Happy, Healthy and Prosperous New Year-2018*.

IN THIS ISSUE

Articles

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ARBITRABILITY OF FRAUD DISPUTES IN INDIA: A CHANGE IN THE JUDICIAL TREND

Introduction

The Arbitration and Conciliation (Amendment) Act, 2015[1] marked a significant step in reforming the process of alternate dispute resolution in India. However, there are certain provisions on which the court has taken contradictory positions in different cases. Since arbitration is a relatively nascent forum for adjudication of disputes, the powers of the arbitral tribunal and courts have clashed at times, which has led to this demarcation becoming blurry. While the essence of arbitration is to lessen the pendency in courts and help in amicable resolution of disputes, the courts at times have attempted to impose their authority over such tribunals and in the interests of justice. However, in the recent past, courts have welcomed certain arbitration practices. While there are a number of issues of conflict, this paper seeks to highlight a situation where courts have acknowledged the efficacy of arbitral tribunals and have in fact encouraged it.

This paper focuses, in particular, on Section 11(6A)[2] through a series of chronological case law, to portray the pro-arbitration stance adopted by High Courts and the Supreme Court. It shows how courts were earlier a bit hesitant to divest themselves of this power. But recently, the Supreme Court has carefully balanced the power to be given to arbitral tribunals on one hand, and the power to adjudicate upon certain matters itself on the other .

The Initial Position

In *N. Radhakrishnan v Maestro Engineers & Ors.* [3] the Supreme Court of India heard a matter in appeal from the High Court. In this case, the appellant and the respondent had entered into a partnership agreement for the functioning of the firm, named 'Maestro Engineers'. Disputes arose and a notice was sent to the respondent regarding their conduct in business.

Though it is not clear whether a malpractice always amounts to fraud, parties can argue it to be a vitiating factor in an agreement. Here, malpractice and collusion was contended by the appellants. In the case, inaccurate figures with regard to the amount of capital invested were mentioned. Averments of collusion were also present, which included account-forging, and driving out clients from the firm. The case, though, was germane because of the battle regarding which forum was capable of deciding this matter. The suit filed by the appellant was dismissed by the District Court and the Madras High Court. They had rejected the arguments made the appellant and had opined that issues related to fraud cannot be decided by the arbitrator and must be done by the courts itself. The apex court too, agreeing with para 17 of *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak & Anr.*,[4] which read "There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement, which had been entered into in this case, to be filed and not to make the reference.....".[5] (However, the leeway provided by this judgment was deemed to be excessive and was said to be cut down by Section 8 the Amendment Act[6] [7], in the SC judgment of 2016 mentioned later on). Relying on other judgements cited as well, the court held that allegations as serious as those in the present case could not be resolved by an arbitrator and that court intervention was needed. It also said that Section 8(2) of the statute[8], referring to an arbitration agreement, had not been complied with and accordingly upheld the judgment by the lower courts. The position, up until the following decision, was for adjudication of fraud disputes to take place in a court of law and to be an issue not to be decided by an arbitral tribunal.

A Shift in the Court's Position

In 2014 however, the Supreme Court of India in *Swiss Timings Co. v. Commonwealth Games Organizing Committee*[9] took a complete U-turn (from its position of fraud disputes being of non-arbitrable nature) and stated that even disputes pertaining to fraud are arbitrable.[10] For the purposes of this paper, it is germane to look at the *ratio decidendi* of the apex court. A petition under Section 11(4) and 11(6) was the Act[11] was filed. The Respondent wanted a nominee arbitrator to be appointed and wanted the arbitral tribunal to be headed by that presiding arbitrator. While Justice S.S. Nijjhar did hold that proceedings of fraud would be arbitrable, the court also stressed on certain other points of extreme significance.

It opined that when the main contract is *void ab initio*, it would be impossible for the court not to exercise jurisdiction under Section 11 of the Act.[12] He also said that the N. Radhakrishnan judgment[13] ran contrary to the *Hindustan Petroleum Corporation Ltd.* v. *Pinkcity Midway Petroleums*[14] wherein it was held that if an arbitration clause is present in the agreement, then the civil court was bound to refer the matter for arbitration. It thus held the the N. Radhakrishnan judgment[15] to be without due regard to the law or facts. The reason why this judgment is so important is because the court examined the reasons for the arbitral tribunal to decide matters related to arbitrability of fraud and said that the matter ought to be referred to arbitration. It also gave a certain authority to courts to deal with matters of this kind, which they were, in my view, a bit hesitant on, due to the lack of clarity in the law.[16]

The Delhi High Court continued with this approach adopted by the apex court, in *Picasso Digital Media Pvt. Ltd. v Pick-A-Cent Consultancy Service Pvt. Ltd.*[17] Here, the petitioner (Picasso) and the respondent (Pick-A-Cent) agreed to a Memorandum of Understanding (MoU) on July 1 2009, according to which the petitioner agreed to transfer a franchisee of 'Picasso Animation College' at Bangalore. A clause in the agreement explicitly stated that any disputes arising out of this mutual agreement, shall be referred to a sole arbitrator. Moreover, this claim was not denied by the Respondent. But, the respondent alleged misrepresentation by the petitioner on the transfer of ownership of intellectual property between the parties. There was also a dispute regarding the appointment of a sole arbitrator.

Moreover, this claim was not denied by the Respondent. But, the respondent alleged misrepresentation by the petitioner on the transfer of ownership of intellectual property between the parties. There was also a dispute regarding the appointment of a sole arbitrator. The counsel for the Respondent placed strong reliance on N. Radhakrishnan[18] to stress that when there are allegations of fraud involved, the forum to go to is the court and not the arbitral tribunal. However, Justice Muralidhar of the Delhi High Court categorically rejected that contention and stated that the case relied on by the respondents was one before the 2015 Amendments to the Act.[19] The Court said that Section 11(6A) of the amended Act[20] requires the court, while deciding such issues, to confine it the existence of the arbitration agreement of the dispute. In other words, the court welcomed the provision that chose arbitral tribunal over a court in such matters. It decided that despite it being a case of fraud, the sole arbitrator will decide the matter[21] [22]

But the most important contribution of this judgment has been its acknowledgement and consequent application of the principle of *competence-competence*, whereby arbitral tribunals should be allowed to decide their own jurisdiction, in line with the UNCITRAL Model Law.[23] [24] This gives the tribunal to decide its own jurisdiction and if there is any error in this decision, the courts can intervene. The important caveat to this law is that courts are well within their powers to intervene if it is a pure issue of law.[25]

This approach was in operation for some time, until the fear of moving back to the Radhakrishnan[26] era sprung due to the *RRB Energy Limited v. Vestas Wind Systems*[27] as the Delhi High Court imposed an anti-arbitration injunction on the ground that the issue was non-arbitrable.[28] There was also a doubt with regard to what constitutes a fraud and whether or not it is serious enough in certain cases or not, which the court may misinterpret. This dilemma has been faced by courts since fraud is a concept which is very subjective and no definitive criteria can be set up to adjudicate it. In other words, it has to be looked at from a case to case basis.

The Final Intervention

On October 4, 2016 the Supreme Court of India , in *A. Ayyasamy v. A. Paramasivam & Ors.*[29] settled the issue and held that a dispute must be referred to arbitration unless the fraud is of a serious and complicated nature, such as those involving financial malpractices or criminal wrongdoings. The division bench comprising of Justice A.K. Sikri and Justice D.Y. Chandrachud also held that a mere allegation of *fraud simplicitor*, like cases of tricking or duping someone else, would not be sufficient in ousting the jurisdiction of an arbitral tribunal. Thus, the court has gone one step further in advocating this pro-arbitration approach and adding lucidity in the law. The facts of this case were: a partnership firm running a hotel business was run by five brothers after the death of their father, and they were also partners in the firm. A dispute arose as one of the brothers, by way of a check, transferred money to his son's account rather than in the account of all the partners.

The other partners filed a declaratory suit in the local civil court, and prayed for the court to hold that they had a right to participate in hotel administration and asked for a permanent injunction against the partner. In response, the appellant raised the contention that the dispute ought to be referred to arbitration under Section 8 of the Act[30] due to the presence of an arbitration clause in the agreement. The respondents pleaded that an issue of fraud could be decided by the court as well. But the District court dismissed the petitioner's contentions. The High Court too concurred with the findings of the District Court, and the matter came before the apex court by way of a special leave petition. The court held that that there was no provision declaring certain issues to be non-arbitrable as such in the statute. It was also stated that it would ordinarily not intervene in the presence of an arbitration agreement and that a certain amount of trust ought to be placed on the tribunal.

"The judgment in *Booz Allen*[31] and the 246th Law Commission Report[32] were referred to by Justice Sikri on behalf of the Division Bench while discussing whether the present dispute was capable of adjudication and settlement by arbitration. The latter had propagated the need for fraud-related issues being made arbitrable, except on certain specified grounds.

The order in *Booz Allen*[33] held that only where the subject matter of the dispute fell exclusively within the domain of courts, could the dispute said to be non-arbitrable. In general, a right *in rem* (on issues of ownership or possession available against the world at large) would not be arbitrable but a right *in personam* (on issues like debt recovery and defamation involving a person or class of persons) would be capable of adjudication in private fora."[34]
However, the court did lay down a list of non-arbitrable disputes[35]:

•disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
•matrimonial disputes;
•guardianship matters;
•insolvency and winding up;
•testamentary matters;
•eviction or tenancy matters; and
•disputes *inter se* between trust, trustees, and beneficiaries.

The Supreme Court[36] has held that a court can proceed on the merits of a case and disregard claims made under Section 8[37], when -

i. when there is a serious allegation of fraud which makes it a criminal offence, or
ii. when the allegation of fraud becomes so complicated that it becomes necessary to consider complex issues wherein extensive evidence is required to be produced by the parties for the determination of the offence by the court, or
iii. where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the arbitration agreement, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself.[38]

The bench opined that only in very serious cases of fraud which require the intervention by the court would it adjudicate upon it. This would include, for instance – criminal acts in the case being discussed. It said that frivolous allegations of fraud ought to be avoided. Another important observation made by the court was on the doctrine of separability, wherein it held that the fact whether the arbitrator had powers to decide upon the matter, is distinct from the main contract in dispute. The Court also suggested that parties could mention non-arbitrability of that particular dispute to arbitration, which would make the issue much easier for the courts as to the intention of the parties. Otherwise, the approach of minimal court interference was enunciated except if the arbitration agreement itself was invalid. However, there is no straitjacket formula for constituting fraud and the courts evidently prefer to leave it open-ended.

Analysis of The Judicial Timeline of Arbitrability Of Fraud

It is argued that the legislature ought to have made it clearer as to what constitutes an issue of fraud and has missed a golden chance to do so. However, to have a statute expressly stating the grounds may have proven to be counter-productive as such issues cannot be put in a set of conditions. What constitutes a fraud needs to be looked at from a case to case basis. Thus, the court has left it partially open-ended but at the same time, has cleared the controversy with regard to arbitrability of fraud disputes. This is a beneficial aberration as usually, courts want to preserve their supremacy and have been seemingly threatened by the rise of myriad arbitration fora. They also doubt the competency of arbitral tribunals in matters of such a complicated nature. However, courts have themselves seen that such issues are better dealt with when referred to arbitration. This is because alongside respecting the decision of the parties, certain issues can be easily referred to arbitration. Another significant advantage is the prevention of dilatory tactics that were used by parties through this complaint. It is only in certain situations will the courts look at the question of fraud in an otherwise valid agreement. The argument here is that although courts should have the power to determine whether tribunals are a competent forum or not, the approach should not be rigid. The danger is that though court is limiting the power and questioning the competence of tribunals to arbitrate on these serious issues, and in a way undermining their authority. The court ought to have taken this opportunity to expand the ambit of arbitral tribunals and their awards.[39] Another problem that surfaces is that civil courts are forced to decide on the arbitrability of disputes as there are no guidelines to aid them in deciding if the fraud is of a nature that necessitates court intervention or not. Judicial overreach is thus another portended flipside of this interpretation.[40]

Conclusion

The bone of contention, regarding the application of Section 8, has revolved around the court referring the matter to arbitration. The amended provision seeks to put party autonomy on a higher pedestal and says that despite any court order, parties have a right to pursue arbitration. Only in cases where *prima* facie no arbitration agreements exists can the court proceed with the matter. But all in all, the Act and its interpretation of this section, has laid open the doors for arbitration in India in another major way, by paving the way and introducing clarity on the issue. Arbitral tribunals, particularly investment arbitrations, involve these allegations. Till date, it is not absolutely clear how tribunals are supposed to adjudicate on such claims. Usually, these claims are not paid heed to at the jurisdictional phase. This is because there is no point considering these allegations if the court lacks jurisdiction. They are decided upon when the court looks at the merits of the cases. But it is safe to say that by striking a balance and accepting the universal principles of arbitration, the courts are acting as a protector and not a hindrance in the emergence of arbitral competency.

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The Dilemma: Can Two Indian Parties Choose a Foreign Seat of Arbitration?

Introduction

In an Arbitration proceeding, there are generally three branches of law that apply. First, the substantive law, that governs the contract between the parties. Second is the procedural law, that guides the procedure of arbitration. Third is the law which governs with the arbitration agreement. Even though the procedural law and the law governing the arbitration agreement stem from the same legislation i.e. The Arbitration and Conciliation Act, 1996, it is important to divide them into categories for a better analysis of this unsettled issue. Almost every country has their own set of rules for arbitration. It is well settled law under Article 20 of the UNCITRAL model law that the curial law or the procedural law shall apply of that nation where the place (seat) of arbitration lies. It is also settled that if it is a case of international commercial arbitration then it is for the parties to choose the seat of their choice. But it is not settled due to certain conflicting decisions of the court that, whether two Indian parties could choose a foreign seat of arbitration or not. A recent controversy came into light when Supreme Court in a case called *Sasan Power Limited v. North American Coal Corporation India Pvt.* Ltd[1] when asked the question that whether two Indian parties could be allowed to choose a foreign seat of arbitration, refused to comment upon the question stating that it was not the issue in the present case and the same had found its way into the written submissions by oversight.[2] The decision has been criticized by various scholars who say that it was a good opportunity for the Supreme Court to settle the issue and put it to bed but the court failed to do so.

I shall now discuss what the position of Indian courts is regarding this issue and base my discussion on two judgements one of the Bombay High Court[3] and the other of Madhya Pradesh High Court.[4] I shall analyze the two judgements and then present my comments on the issue.

Bombay High Court

The Bombay High Court in *Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd.*[5] held that two Indian parties could not choose a foreign seat of arbitration. The arbitration clause read "Arbitration in India or Singapore and English law to be (sic) apply." The court while arriving at its decision relied heavily on the decision of *TDM Infrastructure Pvt Ltd v. UE Development India Ltd*[6] which said that if two Indian parties choose a foreign seat of arbitration it would go against public policy and therefore the parties should not be allowed to do the same. One can infer from the decision that the court while stating that because the agreement was void due to it going against public policy. One has to note that Section 23 of the Indian Contract Act prohibits any contract which goes against the public policy.[7] Therefore one can infer that the court tried to state that Arbitration agreements are subject to the Indian Contract Act, 1872, however one will need more explicit ruling by the court to assert this proposition.

The basic flaw with relying on the decision of *TDM Infrastructure* is that the issue raised in this case was an issue related to Section 11 of the Arbitration and Conciliation Act 1996 and it has been clearly held by the Supreme Court in *State of West Bengal v Associated Contractors*[8] that any decisions made with regards to Section 11 of the act would have no precedential value as it would not be a decision by a court of record.[9] Also India follows the tradition of precedents i.e. the decisions have to be read in the context of questions raised before it. The issue in *TDM Infrastructure* was never whether two Indian parties could choose a foreign seat or not, the issue was only regarding the appointment of an arbitrator. Hence the dicta in *TDM Infrastructure* regarding the seat of arbitration is not ratio but only obiter and hence not binding. Another reason why *TDM Infrastructure* could not be followed is because the decision in that Reliance Industries v. Union of India, (2014) 7 SCC 603e laid emphasis on Section 28 of the Arbitration Act. However, it has been made clear in the *BALCO*[10] judgement that Section 28 deals with the substantive aspect of the contract and has no relation to the seat of arbitration.

Madhya Pradesh High Court

As recently in September 2015, In *Sasan Power v. North American Coal Company*,[11] the issue came up before the Madhya Pradesh High Court that weather two Indian parties could choose a foreign seat of arbitration..

The court in this case held that the two Indian parties could choose a foreign seat of arbitration. The court here said that the Indian Arbitration Act follows a seat-centric approach rather than a party-centric approach. The court said in a party centric approach the nationality of the party matters but in a seat centric approach it is the choice of the seat which matters and the nationality of the parties whether Indian or not does not matter.

While arriving at its decision the court firstly pointed out the reasons why *TDM Infrastructure* could not be followed. The reasons given by the court were same as discussed in the previous Section. Further the court relied on *Atlas Exports v. Kotak Company*[12] where both the parties were Indian and the arbitrator was situated in London. The court in the case gave importance to the principle of freedom of contract and held that if the parties had made the decision regarding the arbitration agreement without coercion then the agreement would be valid enough. The court in this case said, "Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement"[13]. But there is also an anomaly with this decision. This was a decision made in accordance with the 1940 Act and there have been substantial changes in the 1996 Act if compared to the 1940 Act. However, in *Fuerst Day Lawson Ltd. v Jindal Exports*[14], it has been held that cases decided in the context of the 1940 Act can be used for the purpose of interpreting the 1996 Act. On the free will of parties I would like to list another decision here i.e. *Chatterjee International v Haldia Petrochemicals*[15] where the court held that the court should always try to give importance to the free will of the parties. The subject matter in our case might be very much different but as regards to free will is concerned, it is a common law principle which the courts should try to stick to.

But there is a serious concern with the applicability of *Sasan Power* decision as it was this decision only which was challenged in the Supreme Court and the refused to answer this question stating that this issue never arose in the first place. The Supreme Court has defended the doctrine of merger in a number of cases where it has said that when a decision from a lower court is challenged in the higher court, the verdict of the higher court is to be taken as the only verdict in the case. So when we apply doctrine of merger to the present Madhya Pradesh High Court case i.e. *Sasan Power*, the case holds no precedential value.

The Reliance Judgement

It is important to bring at this point the judgement in *Reliance Industries v. Union Of India*[16]. The agreement was actually a tripartite agreement with one of the three parties being foreign. The contract provided for the seat to be London and the substantive law to govern the contract to be Indian.

A dispute arose between the Union of India and Reliance Industries. It was contended that, with both the parties being Indian an arbitration agreement allowing London seated arbitration for two Indian parties would go against the public policy of India and hence should be void. It was contended that, with both the parties being Indian an arbitration agreement allowing London seated arbitration for two Indian parties would go against the public policy of India and hence should be void. The court in this case once again gave primacy to the principle of freedom of contract and held that even though the parties were Indian arbitration would take place according to English Laws because the seat of arbitration is in London. It is important to note that in this case the court also held the substantive law to be Indian and said that the London court will have to apply the Indian Substantive law.[17] With regards to enforcement the court went on to state and rejected the conclusion of the High Court that since the Indian substantive law has to be applied, Part I of the Act will apply therefore giving the Indian Courts enforcement jurisdiction. The court stated that that an application regarding enforcement would be made in the jurisdiction where the seat is located. The same award could be then enforced in India as a foreign award. Therefore the enforcement jurisdiction lies where the seat of the arbitration is located or in other words according to the law governing the arbitration agreement.

Conclusion

It appears that currently there is no answer to this question. One concrete case which held that the two parties could choose a foreign seat if arbitration was *Sasan Power* (High Court) but the same holds no precedential due to the application of doctrine of merger. One cannot be sure of the application of the *Reliance* judgement because the agreement was a tripartite agreement even though the dispute was between two Indian parties. On the other side various decisions in *Addhar, TDM Infrastructure* have many concrete flaws in their application. In my view when there is no clarity on an issue such as this one should resort to the starting point. The starting point of the present legal structure is the common law. So when an answer is not found in case laws, as Dworkin said in his book "Law's Empire"[18] the answer to these question lies in general common law principles. To tackle this particular question one should give importance to the common law principle of freedom of contract. So it should be free for the parties which procedural law they want to follow. Also the point of the seat-centric scheme of the act mentioned in the *Sasan Power* holds relevance while looking at the overall framework of the act. Also it is important to notice the pessimistic and lethargic approach of the Supreme Court which refused to answer the question and lost an opportunity to settle the matter once and for all. The uncertainty regarding this point of law leaves hanging the faith of numerous contracts which have been entered by Indian parties while they have chosen the seat to be outside India to settle any dispute.

The *Reliance* judgement tried to settle the matter to an extent by explicitly allowing the foreign seated arbitration. But as discussed above that also leaves scope for ambiguity as the agreement was a tripartite one in which one of the parties was a foreign entity which could have had a major impact on the way the Supreme Court approached the issue. An authoritative ruling on the same issue is awaited.

In my opinion the court should not repeat what it did in the case *Sasan Power* (Supreme Court) i.e. lose out on an opportunity to settle the matter when the High Court had shown the way for the same. Considering the ethos of the law of arbitration which is freedom of parties I think the court will allow Indian parties to choose a foreign seat of arbitration. As arbitration is contract based dispute settlement mechanism, the concept of freedom of contract should be given utmost importance and the parties should be free to choose the seat of arbitration.

But as time has progressed there have been various changes in the Indian law. The object of the 2015 amendment was to make India an arbitration favorable jurisdiction. The reason why Indian parties wanted to choose a foreign seat of arbitration was due to the inefficiency the old act possessed but with substantial amendments with the 2015 amendments, the legislature has tried to make India an arbitration friendly jurisdiction and we can hope that in the future Indian would not want to choose any other place as the seat of arbitration. One must understand that choosing a foreign seats of arbitration has its own logistical costs attached to it which the parties might not want to incur if an arbitration friendly environment can be available in India.

Endnotes –

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3. Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd, (2015) SCC OnLine Bom 7752
4. Sasan Power v. North American Coal Corporation India Pvt. Ltd, (2015) SCC OnLine MP 7417
5. Addhar Mercantile Pvt. Ltd. v Shree Jagdamba Agrico Exports Private Ltd, (2015) SCC OnLine Bom 7752
6. TDM Infrastructure Pvt Ltd v. UE Development India Ltd, (2008) 14 SCC 271
7. TDM Infrastructure Pvt Ltd v. UE Development India Ltd, (2008) 14 SCC 271, 279
8. State of West Bengal v Associated Contractors, (2015) 1 SCC 32
9. State of West Bengal v Associated Contractors, (2015) 1 SCC 32, 43
10. Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc. etc. (2012) 9 SCC 552
11. Sasan Power v. North American Coal Company, (2015) SCC OnLine MP 7417
12. Atlas Exports v. Kotak Company, (1999) 7 SCC 61
13. Ibid.
14. Fuerst Day Lawson Ltd. v Jindal Exports, (2001) 6 SCC 356
15. Chatterjee International v Haldia Petrochemicals, (2014) 14 SCC 574
16. Reliance Industries v. Union Of India, (2014) 7 SCC 603
17. Reliance Industries v. Union Of India, (2014) 7 SCC 603, 639
18. Ronald Dworkin, Law's Empire (1988).

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INTERNATIONAL INSTITUTIONAL MEDIATION IN INDIA : ARE INDIAN INSTITUTIONS EQUIPPED TO ADMINISTER INTERNATIONAL COMMERCIAL MEDIATION?

Alternate Dispute Resolution ("**ADR") mechanisms are being increasingly resorted to by parties in India** due to prolonged and time consuming proceedings before the judiciary in India. Accordingly, recourse to arbitration and mediation is progressively finding a place in cross border contracts between parties, especially Indian entities.

The Civil Procedure Code, 1908 ("**CPC") provides courts with the power to refer parties to a dispute to** arbitration, conciliation, mediation, judicial settlement or settlement through Lok Adalats.[1] Due to the various advantages of mediation, including control over the process, easy withdrawal, confidentiality, etc., parties have the liberty to focus on restoration of their relationship rather than delving into an adversarial process, promoting a mutually beneficial situation for both parties. [2]

While mediation offers numerous benefits, there exist certain lacunae in the process as several mediation proceedings are unsuccessful and are transferred to courts for adjudication. One of the reasons regularly identified by the Hon'ble Supreme Court of India ("**Supreme Court") is the lack of an institutional** mechanism for mediation in India.[3]

This article seeks to address whether Indian parties/ institutions are ready for adjudication of disputes, in particular, international commercial disputes, through adequately equipped institutional mediation centres. This article attempts to address (i) the lacunae in the contemporaneous state of institutional mediation; and (ii) lessons which could be learnt from the growth of the institutional arbitration paradigm in India, and the potential for institutional mediation in India.

CHAPTER 1: THE EXISTING MEDIATION CULTURE IN INDIA

Statutory provisions providing for mediation

By virtue of the Code of Civil Procedure (Amendment) Act, 1999, Section 89 of the CPC was reinstated in the CPC in 2002. Section 89 of the CPC provides for various avenues for out of court settlement in accordance with the recommendations of the Law Commission of India and Justice Malimath Committee [4] [5]. In furtherance of the above amendment, various High Courts had established their mediation centres, which include the Delhi Mediation Centre (established in 2005) ("**DMC"), the** Bangalore Mediation Centre (established in 2007) ("**BMC") etc. Additionally, private institutions,** including Indian Institute of Arbitration and Mediation ("**IIAM"), Bangalore International Mediation,** Arbitration and Conciliation Centre ("**BIMACC"), International Centre for Alternative Dispute** Resolution ("**ICADR") (established in 1995), etc. have also been established, which provide an alternate** set up for the resolution of disputes through mediation. However, such institutions have seldom been utilized since their incorporation.

Other statutory provisions, include (i) Section 30 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act") which provides that an arbitral tribunal may encourage settlement of the dispute** through mechanisms including mediation; (ii) Section 4 of the Industrial Disputes Act, 1947 which provides for appointment of conciliation officers for mediating the dispute; and (iii) Section 442 of the Companies Act, 2013 which provides for constitution of a Mediation and Conciliation Panel for reference of disputes under the aforesaid Act. The aforementioned statutory provisions provide for statutory reference of disputes to mediation, however, do not stipulate or even suggest the standardization of such procedures, to promote more efficient resolution of disputes through mediation.

Ad hoc mediation and Institutional Mediation

Disputing parties have usually adhered to *ad hoc mediation, wherein the mediator is chosen by* agreement, often being conducted by independent professionals or retired judges.[6] In an *ad hoc* mediation, the parties have the freedom to decide various aspects governing the

mediation, including venue, cost, procedure for the appointment of mediator, mediator's fees etc. An 'Institutional Mediation', on the other hand, smoothens the procedure of dispute resolution, as the rules of the institution aid in the entire resolution process. The importance of institutional mediation has been underlined by the Supreme Court in various cases, wherein it was observed that the settlement discussions between the parties could not fructify due to absence of an intervention through an institutional mechanism.[7]

Cases fit for mediation

In *Afcons Infrastructure Ltd. v Cherian Varkey Constructions Pvt. Ltd.*[8], *the Supreme Court had laid* down the guidelines on the kind of cases that are suitable for a reference to ADR Mechanisms including mediation. Such cases pertain to, *inter alia, trade, commerce or contracts, matrimonial disputes, family* law disputes, etc. Therefore, a wide gamut of cases were stated to be suitable for resolution ADR mechanisms including mediation.

Utilisation of Current Mediation Centers

To scrutinise the functioning of the aforementioned institutes, regard must be had to the quantum and the type of cases referred to them. Of all the new cases filed with the High Court at Delhi, in the period from 2011-2015, only 2.66% of cases were referred for mediation to the DMC. [9] Similarly, only 4.29% of all new cases filed with the High Court at Karnataka, in the period from 2011-2015, were referred for mediation to BMC.[10] Further, the statistics of the BMC demonstrate that it has only dealt with cases which were referred to it by the High Court and it has not dealt with any other case.[11] The kind of cases which are referred to mediation by the High Courts are limited to matrimonial cases (those pertaining to divorce and restitution of conjugal rights), domestic violence[12], partitions[13] etc. In spite of the aforementioned ruling in *Afcons*, the gamut of cases dealt with by these institutions have been very limited.

Further, the success rate at these institutes have been far from satisfactory. Around 66% of the cases referred to it were settled by the BMC.[14] Similarly, the DMC has settled around 56% of the cases which were referred to it.[15] In spite of being established in the mid- 1990s, ICADR has only received a handful of cases for arbitration and conciliation.[16]

In light of the above data and analysis, it may be summarized that (i) a reluctance among the judiciary to refer the cases to mediation is likely; (ii) a number of cases get transferred back to the courts due to the failure of discussion between the parties[17]; and (iii) commercial cases are rarely referred to these institutes and their scope is limited to cases pertaining to matrimonial dispute, domestic violence, restitution of conjugal rights, partition, etc.

Therefore, a robust institutional mechanism for resolution of commercial disputes is lacking in India as (i) the existing court annexed institutions' scope has been restricted by the courts; (ii) existence of autonomous mediation institutes is not widely known; and (iii) institutes failed to amend their rules to keep pace with international developments.

CHAPTER 2: LESSONS FROM ARBITRATION IN CONTEXT OF MEDIATION

While Arbitration and mediation are different forms of ADR, they are resorted to more often as against traditional litigation before courts. The latter is time consuming and expensive due to the mandatory procedures. The former are speedier mechanisms are such elongated procedures are not followed. In India, arbitrations were mostly *ad hoc arbitrations*[18] *(similar to ad hoc mediations explained in Chapter* 1). However, due to the various problems faced in *ad hoc arbitrations, a shift was noticed towards* institutional arbitration.

Dispute resolution through any mechanism is resorted to by a party to recover their alleged dues from the other party. However, the rationale behind the whole process is undermined when the cost incurred in litigation/arbitration/mediation exceeds the cost sought to be recovered.

Ad hoc arbitration and institutional arbitration

Usually, retired judges are appointed as arbitrators in *ad hoc arbitrations in India. Such retired judges lay* importance on following the procedure as prescribed under different laws. Further, *ad hoc arbitration is* expensive as the parties are unable to negotiate on the price charged by such arbitrators.[19] Though retired judges bring in their experience, it is a time consuming and an expensive affair for the parties. An institutional mechanism is a cost efficient option as parties have visibility on the costs, including, *inter alia, cost of the process of arbitration, arbitrators fees etc. which will be incurred in the arbitration.*[20]

Transition from ad hoc arbitration to institutional arbitration

The recent shift to institutional arbitration was mainly on account of the delay, excessive costs and lack of experience inherent in *ad hoc arbitration. Even while arbitrations conducted under various institutions* (such as Singapore International Arbitration Centre **("SIAC"))** are expensive[21], several Indian parties refer their disputes to such institutions[22] for the reason that the institute provides quality services and ensures transparency and neutrality of arbitrators with a time bound resolution.

Therefore, due to the similarities between arbitration and mediation, as outlined above, similar concerns are affecting mediation, in terms of costs, time and experience, which can be effectively addressed by an institutional mechanism, as has aided arbitration. An Arb-Med-Arb Protocol has been established by SIAC in conjunction with SIMC to provide a hybrid model of resolution of the dispute by SIMC (i.e. mediation) before it is referred to arbitration under SIAC Rules. It is being increasingly resorted to by the parties to an international contract. Under such clauses, a reference to arbitration by the parties is first referred to mediation. A mediation settlement under such an Arb-Med-Arb process may be recorded as a consent award and thereby, it is enforced as an arbitral award under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Award, 1958 ("**New York Convention").**

Analysis of *ad hoc and institutional mediation*

Generally, the parameters which are taken into account by a party to a commercial dispute, while choosing the manner in which the dispute may be resolved, include considerations with respect to (i) timelines of the entire process; (ii) costs involved; (iii) competence (including experience of the mediator and experience of the institution in administering the mediation process); and (iv) enforceability of any eventual settlement agreement. Since there are no pre-agreed procedures in place with respect to ad hoc mediation, time is spent on deciding, *inter alia, the procedure for appointment of mediator, conduct of proceedings, fees of the* mediator etc. Further, the lack of standards also results in the elongation of the mediation process itself. On the other hand, an institutional mediation is speedier as the rules of the institute govern the mediation process and prescribe procedures for the administration of the same. Though the costs associated with institutional mediation may be higher than ad hoc mediation, the benefits and comfort of the institutionalization of the process may outweigh such higher costs.

For instance, a dispute pertaining to a technical contract, such as an offshore refinery construction contract, between two parties, A and B, incorporated in United Kingdom and India respectively, may be referred to resolution through mediation as per agreement between parties. In the event that the parties opt for ad hoc mediation, they would ideally have to decide the procedure for appointment of a mediator or a panel of mediators. Next steps would include looking for a person who has had an experience in offshore refinery contract and who is willing to play the role of a mediator, fees of the mediator/mediators etc. The above process may take considerable time and coordination between two disputing parties, which may even frustrate the entire dispute resolution process. On the other hand, if the parties were to approach an institution such as the Singapore International Mediation Centre, all of the aspects of mediation would be covered by the SIMC Rules.

Even while the SIMC Rules have a predetermined cost associated with the mediation process, the same is accompanied with ease of process allowing for parties to focus on the dispute itself rather than the administration of it.

Further, while usually retired judges are appointed as mediators in ad hoc mediations, the standard of adjudication is not monitored or regulated. The same may result in inefficiencies creeping into the mediation process itself. On the other hand, institutions often maintain a panel of mediators. Such mediators have to comply with the qualifications prescribed by the rules of the institute and are trained in mediation, which may include retired judges. Training is provided to such mediators by these institutions. In furtherance of the example highlighted above, of a dispute between two parties A and B in relation to an offshore refinery construction contract, the exercise of finding a mediator who would able to comprehend such complex agreements and technical projects may be difficult for parties, and reliance would have to be put on inaccurate data to make any decision. On the other hand, parties may approach an institution such as the SIMC, where trained mediators are empaneled and the obligation of ensuring the requisite expertise and competence of the mediators is on the institution itself. The above would demonstrate the ease and comfort supplied by institutional mediation as against ad hoc mediation.

A relevant and important consideration for most disputing parties, especially in the context of international commercial disputes, is the enforceability of any eventual settlement of a dispute in the respective jurisdictions of each disputing party. In this context, while the expertise of an ad hoc mediator cannot be commented upon, an institution is in a position to ensure that a format is available for encapsulating the settlement between parties. Further such form prescribed by an institute would be tested and would provide for the contingencies that may arise at the time of enforcement, and therefore, reduce the risk to which disputing parties may be exposed. Additionally, UNCITRAL's Working Group is working on bringing out an instrument, similar to the New York Convention for arbitration, for recognition and enforcement of settlement agreements resulting from international commercial conciliation or mediation. An institutional mediation center may be best placed to ensure that the rules and norms as required by such convention are ingrained in the mediation process itself, allowing for easier enforceability of eventual mediation settlements.

CONCLUSION

There are a plethora of cross-border transactions taking place in India. A robust, speedy and economic dispute resolution mechanism is a pre-requisite for India to become a preferred investment jurisdiction. As elucidated in Chapter 1, a robust international institutional mediation is missing in India. In other jurisdictions, including Singapore, UK etc, a robust international institutional mechanism exists due to the governmental support, judicial support and a pro mediation approach amongst the lawyers and the parties, i.e. a pro mediation approach from all the stakeholders.

Even while there is unfamiliarity amongst the Indian parties regarding mediation as an option of dispute resolution, similar issues were faced at the time of the transition from *ad hoc arbitration to institutional* arbitration.

While Indian institutes and the other court annexed institutes have tried to address the issues highlighted above, the same would need to be better equipped to address the inefficiencies present in the current set up. Based on the above analysis, a strong argument may be made to support the institutionalization of the mediation process in India, which would provide parties with efficient and enforceable alternative means for dispute resolution in the context of international commercial disputes.

Endnotes –

1. Section 89 of the CPC.
2. Vikram Bakshi v Sonia Khosla, (2014) 15 SCC 80; J. R.V. Raveendran, Mediation – Its Importance and Relevance, (2010) PL October 10
3. Suresh Narayan Kadam v Central Bank of India, AIR 2016 SC 714, ¶ 3.
4. Report No. 163 on the Code of Civil Procedure (Amendment) Bill, 1977, Law Commission of India, November 1998. Available at: http://lawcommissionofindia.nic.in/101-169/report163.pdf (Last accessed on November 6, 2017).
5. Note on Clauses to the Code of Civil Procedure (Amendment) Bill, 1977
6. Vishnu Konoorayar, *et al: Alternative Dispute Resolution in India - ADR: status/effectiveness study, New* Delhi, 2014. Available at: http://nbn-resolving.de/urn:nbn:de:0168-ssoar-410340 (Last accessed on November 6, 2017).
7. See generally: *Suresh Narayan, Supra note 4*. The Supreme Court had made the following observation at ¶ 3 of the judgement: *"The decision rendered by the High Court which is under challenge before us states that efforts were made to have the disputes between the contesting parties settled but it is clear that no institutional mechanism was invited to assist in the settlement process. The proceedings before us also indicate that several efforts were made to encourage the contesting parties to arrive at a settlement, and at one point of time the parties did reach an interim arrangement but that could not fructify into a final settlement only because of the absence of an intervention through an institutional mechanism. Appreciating this, this Court has consistently encouraged the settlement of disputes through an institutionalized alternative dispute resolution mechanism and there are at least three significant decisions rendered by this Court on the subject. They are: (i) Salem Advocate Bar Assn. (II) v. Union of India, (2005) 6 SCC 344 (ii) Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 (iii) K. Srinivas Rao v. D.A. Deepa, (2013) 5 SCC 226..... In spite of the encouragement given by this Court, for one reason or another, institutionalized mediation has yet to be recognized as an acceptable method of dispute resolution provoking Mr. Fali S. Nariman to comment in the same Foreword in the context of the Afcon's decision that "Mediation must stand on its own; its success judged on its own record, un-assisted by Judges."*
8. (2010) 8 SCC 24.
9. Strengthening Mediation in India: A Report on Court-Connected Mediations, Vidhi Centre for Public Policy, December 2016, p. 67. Available at: http://bit.ly/2yko4Ye (Last accessed on November 6, 2017).
10. *Vidhi Report, Supra note 10*
11. Bangalore Mediation Centre: General Statistics Report. Available at: http://nyayadegula.kar.nic.in/statistics.html (Last accessed on November 6, 2017)

Endnotes –

12. See generally: *Seemant Sinha v State, (Delhi High Court), W.P. (CRL) 1450 of 2014: A case was filed by* a woman against her husband alleging domestic violence at the hands of the latter. The case was later transferred to the Mediation Centre which aided the parties in reaching a settlement due to which the case was later withdrawn by the wife.
13. Strengthening Mediation In India Interim Report On Court Annexed Mediations, Vidhi Centre for Public Policy, Interim Report, July 2016, p. 49. Available at: http://bit.ly/2yLYvex (Last accessed on November 6, 2017).
14. *Vidhi Report, Supra note 14.*
15. *Vidhi Report, Supra note 14.*
16. Only 49 cases were received for arbitration and 4 for conciliation. Annual Report 2015-16, International Centre for Alternative Dispute Resolution. Available at: http://icadr.nic.in/file.php?123?12:1490865651 (Last accessed on November 6, 2017).
17. Around 26.55 % at BMC and around 49.90 % of cases at DMC. *Vidhi Report, Supra note 10.*
18. Corporate Attitudes & Practices towards Arbitration in India', Pricewaterhouse Coopers, 2013. Available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitratio n-in-india.pdf (Last accessed on November 6, 2017).
19. *Union of India v. M/s. Singh Builders Syndicate, Civil Appeal No. 3632 of 2007 (SC). The recently* enacted Arbitration and Conciliation (Amendment) Act, 2015 has tried to address this issue by providing the High Courts with the power to frame rules in this regard.
20. Id.
21. SIAC charges Singapore Dollar 3800 (around INR 1,80,000) as administrative fees for a dispute involving an amount of upto Singapore Dollar 50,000 (around INR 25,00,000), whereas Indian Institutes like ICADR charge INR 56,250 as their administrative fees.
22. Indian parties had made the highest number of filings from one jurisdiction with SIAC (around 66). Annual Report 2013, SIAC, p.8. Available at: http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf (Last accessed on November 6, 2017).

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VOICES & VIEWS
ADR, As they see it....

Reflections on use of Mediation in Today's India-

Usually mediation is understood by lawyers and in the legal fraternity as an exclusively legal process that in some-way must be connected to and must encompass legal attitudes aptitudes and processes.

In reality mediation is a problem solving process of joint gains. It has much less to do with who is right or wrong and more to do with value-add it brings to disputants. In this piece, I will present how it adds value to not just disputants but can also create value in society and social institutions.

Recently, Honorable Supreme Court of India gave its verdict in the famously known Triple Talaq Case[1] illegalizing the Sharia practice of renunciation of marital obligations by oral pronouncement of the word 'Talaq' meaning divorce, thrice by the husband. Not only was this an important social boundary set upon by the Court- it is not overstating the facts to say that its impacts will be felt in every Muslim household in the country. By voiding this patriarchal practice the Courts of the Country have empowered Muslim women to raise their objections inside the family unit.

Recently pronounced verdicts including the reiteration of right to privacy as fundamental by the apex court[2] is likely to set-off more legal disputes as more minorities including women raise their voice for equal treatment and challenge the patriarchal status quo. In many such cases, a formal legal process may not even be required. State encouraged pre-emptive mediation must be considered so that these issues don't add to the already existing burden upon the legal system and more importantly don't threaten the precarious peace in the social fabric of the country.

Government can consider capacity building of social institutions such as the police force and create localized trained mediators as resource persons that can address many issues locally. Not only will this promote institutional recognition but also provide responsive solutions to social issues.

1. Shayara Bano v. Union of India & Ors. Available at http://www.thehindubusinessline.com/multimedia/archive/03194/Supreme_Court_judg_3194881a.pdf last accessed on October 1, 2017 at 4:35 PM
2. Justice K Puttaswamy & Anr. v. Union of India & Ors., available at http://supremecourtofindia.nic.in/pdf/LU/ALL%20WP(C)%20No.494%20of%202012%20Right%20to%20Privacy.pdf last accessed on October 1, 2017 at 4:40 PM

Who's Who

the iiadra interview

Marcus Lim
Executive Director, Singapore
Singapore International Mediation Institute

Q: What are the major introductions or changes in terms of policies and laws that have taken place around the world, in the field of consensual dispute resolution, that you feel should be adopted by other countries for the betterment of litigation burden?

A: I shall primarily answer these questions from the perspective of mediation and reforms in Singapore. I think one of the biggest things that I have observed over the past three years is that, several countries have been attempting to establish a mediation framework of resolution of disputes unique to them. These are the centers that shall provide for international mediation but also domestic mediation and I think that has arisen from the realization (along with being natural development, of course) that litigation, arbitration are no longer the only acceptable means of resolving disputes. So earlier there were several people who did not consider mediation to be a formal way of resolving disputes and that's beginning to change. This is very interesting because if we look back at the last ten years of law, it was very difficult to draw support from lawyers for mediation though now, they are major proponents of mediation. And I can share this quote that I heard from a professional who said that "lawyers have a lot to gain from mediations, and they're beginning to realize that they gain money from this process as well, because when mediation fails, the parties are even more inclined to sue because the other party was not cooperative with them." This view according to me is interesting and important, because lawyers often view mediation not as assisting their profession but rather being against it. India is gradually going to realize that this is the case as well. So yes, it is the framework that different countries are coming up with, to formalize or institutionalize the process of mediation, a major change in the recent times that other countries should try and adopt.

Q: Being from Singapore, in your opinion is there any major development or policy which India or other countries which do not have mediation in their mainstream legal system per se should adopt?

A: From a policy perspective, most recently the SIMI is a result of these policies. There was a working group study which was commissioned by the Ministry of Singapore, which closely relates to the working of SIMI and provides the outline for its functioning. SIMI itself is a policy introduction by the ministry. Previously, in Singapore, being even as small as we (SIMI) are, there was no central body coordinating mediation development in Singapore, and so a lot of mediation centers were functioning but not in an organized or coordinated manner. All of these centers had a different idea of mediation and presented themselves as a brand, with a panel, to the parties to a dispute. And this has been the scenario since 1997 which was the first wave of mediation in Singapore and as a result there was development but without a hub. SIMI was formed in order to fill this void. Theoretically, this makes sense because it assists in providing the country's mediation as a service. Even when we look at larger countries like India, USA, China, which have states, there may be a reason to establish state bodies which have the ability to provide a range of meditation services such as commercial mediation or family mediation, or pertaining to large claims or small claims.

Q: Would you term such an organization as a regulator by any chance?

A: You could call it a regulator and people do view SIMI as a regulator in Singapore, but it has not been formed by way of statute and as a result we can be classified as a soft touch regulator. So, the Ministry has decided that SIMI should persuade people to join rather than using a top down approach with mandatory requirements of registrations. So, the core idea to take away from this is that it is critical to have sub-coordination among the organizations within the broader central framework. Just like with any other profession in the industry, if we want work that is done to be taken seriously, we need to understand that, one branch of mediation or the functioning of a sub-unit affects another branch or sub-unit and thereby the whole framework. For instance, if there is lackluster performance in any one sector, it brings a bad name to the whole of the sector and it is very difficult to isolate such a connected unit which in turn leads to a broader impact. So, the role of SIMI is to bring together the various systems which have been developed by people over the years, and this requires a conciliatory approach to be taken up where compromises have to be made to effectively coordinate.

Q: As you said, there is currently a wave of ADR taking over the world and there is a special emphasis being laid on consensual dispute resolution. Realistically, where do you see CDR in the coming decade, given the background you provided us?

A: I would definitely like to see it being used more by the general public as a means of resolving disputes and I hope that it would be taken up in a manner where mediators are not merely reliant on lawyers to refer cases to them. It would be uplifting to see mediation being viewed as a separate profession in itself, even though the roles of mediators and lawyers can never be interchanged. However, we need to put some thought into how a world where mediation is an independent concept will look like, and it's something I look forward to.

Q: There is a special emphasis being laid on online dispute resolution as a means of resolution. What are the advantages and disadvantages of using an online mediation platform and do you think it can be effective?

A: I do think that online dispute resolution can be an effective tool. I think the issue now is knowledge that is required for its implementation. While in the physical world, we know the procedure regarding documents or meeting between parties, we need to envisage and construct how the same process will be facilitated through an online portal. In my opinion, it can be said to be the development of a whole new model of mediation. And we need to ask ourselves whether we need written statements, or more private sessions, and so it's a whole new system to think of, which needs to function effectively to succeed for mediation and this is the biggest challenge that is posed.

The system needs to constantly be improving and upgrading with the requirement of research, surveys, and skills and further, there is a need to solve the question of access. In many ways, internet is a great enabler such that remote areas can seek services that were exclusively provided in cities or urban developed areas, but in the context of mediation, we need to first assess what the impact is going to be of an online portal and how accessible can the same be made. This is so because a lot of people will be unable to afford the charges of a professional mediator. At the end of the day, an online mode will feed into the entire framework of mediation and give back to it. The tussle we have to resolve above all is the ease of access posed against the bad experience of mediation through such a portal which is accessible.

And to think that it could bring in a whole new dimension not merely to mediation but all of dispute resolution might allow us to distinguish it as a separate mode in itself called ODR instead of a sub-set of mediation. This is because I'm not against the idea that sometimes when things develop, they develop into a family of their own, as long as it brings value to society and has a clear purpose which it serves. I hope from SIMI's perspective that mediation continues to be relevant even when ODR comes up.

Q: Asia has dynamic cultural differences. Can a Mediation mechanism work successfully in such an environment? What can practitioners and trainers do to come to a table and work together? How to retain shared culture and minimize biases?

A:To me, given the cultural differences, what else can you do apart from mediation? What other mode allows you to explore differences that are softer on the equation between parties in the dispute. Litigation works better on harder things like facts. But differences in personality, culture, and saving a relationship? Those are best saved in mediation.

A good analogy is one I picked up at an earlier conferences at a closed door seminar on International Law Conciliation under the UN. They said use of conciliation as international tool was highest in the Cold War era, but this has considerably reduced where the world is not in a Cold War period. Why use conciliation in where the world is not homogenous at all, where there are clear sides? Perhaps, because there is too much at stake. Similarly, with culture, a problem is perhaps that there is too little at stake and people are therefore not willing to talk.

Stakes are low so people don't want to participate. An interesting study would be to see if this affects mediation inter-State, or inter-city, intra-city.

Q: Understanding that mediation is confidential, to the degree you can disclose, discuss the most difficult conflict you have dealt with?

A: Some of the most difficult cases are ones where the parties keep changing their authority. As a mediator, this puts you in a tougher position where you need to decide if you can continue or if you should call the process off. It's just one thing to do the homework and agree to represent the right authority. But subsequently, if parties aren't sure that they can settle – that makes things tricky. If there is counsel around, then that is one way to verify but those have been very challenging for me.

In that situation, it helps to bring the party aside to see what they want from the mediation. Very often we view mediation as a singular process. I would argue it is actually a composite of many smaller mediations. For example, where you identify separate interests of parties in private sessions. Try helping parties answer Why they are unsure of mediating? Sometimes they aren't sure they can take the settlement to their superior. That leads to a mini-mediation between the party and his superior boss. Subsequent to which you apply his interest to the main mediation. Often enough, this works, and mediators should be aware that it is important to take a step back, rather than merely participating in the main process.

The Interviewee

The overall management and operation of SIMI comes under the care of Marcus Lim. Marcus graduated from the National University of Singapore's (NUS) double degree program in Law and Business with a Bachelor of Laws Second Class Honours (Upper) and a Bachelor in Business Administration.

He has held a keen interest in alternative dispute resolution since his first year at NUS and has represented NUS at numerous international competitions on mediation, negotiation, business cases and corporate social responsibility.

Marcus previously worked as a lawyer in the Competition and Technology, Media and Telecommunications Practice Group in Rajah & Tann LLP. He is also qualified as an Advocate and Solicitor in Singapore and an Associate Mediator of SMC.

Interviewer Name : Mr. Nisshant Laroia

The Happenings

CPR

DISPUTE RESOLUTION IN AN INCREASINGLY FRACTURED WORLD

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REGIONAL RESOLUTION GLOBAL SOLUTION

一带一路

CROSS BORDER INVESTMENTS AND ITS LEGAL CONSEQUENCES: ADR IN BELT AND ROAD

DATE
9 December 2017
TIME
9.00am – 5.00pm
VENUE
KLRCA Auditorium
Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
CONFERENCE FEE
RMB 1,000 / RM 680
(Inclusive of GST)

Alternative dispute resolution (ADR) especially arbitration, mediation and negotiation should be the primary means of dispute resolution, owing to the fact that the Belt and Road initiative covers more than 60 jurisdictions worldwide which have different legal systems. ADR plays a crucial role in resolving international disputes in speedy and discreet manners.

In light of ADR's advantages over litigation, as well as the substantial increase in contracts and businesses involving Chinese and Malaysian parties, a conference themed "Cross border investments and its legal consequences: ADR in Belt and Road" will be held on Saturday, 9th December 2017 at KLRCA. This conference is organized by Kuala Lumpur Regional Centre for Arbitration (KLRCA), and co-organized by China ASEAN Legal Cooperation Center (CALCC).

The conference is an opportune avenue to further establish cooperative relations between Chinese and Malaysian counterparts. Parties looking forward to finding international business opportunities shall consider this event an essential part of their agendas.

For more information, please contact:
Phone: +603 2271 1000
Email: events@klrca.org

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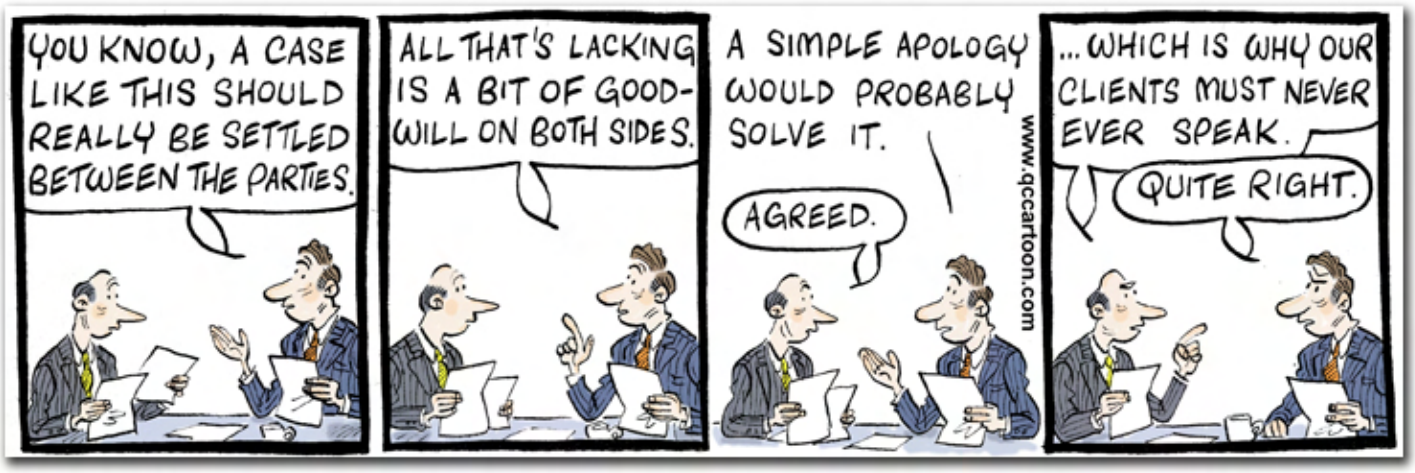

" Great leaders like Mahatma Gandhi and Abraham Lincoln, who were lawyers first, advocated and supported the culture of settlement. They advised people to settle instead of litigating. Everybody must believe in the culture of settlement"

- CJI Deepak Mishra, at the inauguration of the Alternative Dispute Resolution Centre, Mumbai

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