



# THE *india* arbitrator

## THE INDIAN ARBITRATOR



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## VIEW POINT



## Divorce Mediation: A More Spiritual Approach to Divorce

: REBECCA NELSON

*Despite the chosen path to divorce, the resolution remains one of the more anxiety provoking events anyone can go through.*

*Entering a Divorce Mediation Process as an alternative to the traditional divorce litigation process can help to ease the stress of this difficult life event. Considering the process of divorce mediation, the author examines as to whether it can be considered a more spiritual and therefore more healthy alternative to traditional litigated divorces.*

**M**aking a decision to end a marriage is one of the most difficult and stressful decisions anyone can make in their lifetime. Entering a Divorce Mediation Process as an alternative to the traditional divorce litigation process can help to ease the stress of this difficult life event. The notion of mental health professionals facilitating Divorce Mediation adds a humanistic balance to this already difficult process. Taking this appreciation one step further, processing a divorce with the services of a mental health professional may also unravel a spiritual component (if done correctly) thus making this difficult process more spiritual with a less destructive emotional outcome.

Divorce mediation services are growing in popularity as a more equitable, less adversarial and lower cost alternative to the traditional litigated divorce process. Many put off the process, choosing to live as “separated” for a long period of time or, worse, stay together for the “sake of the children” but being miserable inside. Despite the chosen path to divorce, the resolution remains one of the more anxiety provoking events anyone can go through. The Life Events Scale (also known as the Holmes & Rahe Social Readjustment Rating Scale, 1967) ranks 43 life events that can contribute to illness. Life events are ranked in order from the most stressful (death of spouse) to the least stressful (minor violations of the law). Divorce and Marital Separation are the second and third most stressful situations listed on this scale. Clearly this is a situation provoking anger, resentment, depression, and anxiety, threatening one’s physical, mental and spiritual health.

Mental health professionals are constantly bombarded with the notion of spirituality. A young or new therapist may not fully understand its importance in the world of mental and physical health. A number of studies have found that a sense of spiritual health is so important to one’s overall health that most insurance companies require that one’s notion of spirituality be assessed



at the time of intake. Even many seasoned clinicians will answer this section of their client's intake by noting whether or not their client attends church. One's religious practices can be a large piece of their spirituality. However, this is not necessarily all that this entails. According to Wikipedia.org "spirituality can refer to an ultimate or immaterial reality; an innerpath enabling a person to discover the essence of their being; or the "deepest values and meanings by which people live. Spiritual practices are intended to develop an individual's inner life; such practices often lead to an experience of connectedness with a larger reality, yielding a more comprehensive self; with other individuals or the humancommunity; with nature or the cosmos; or with the divine realm. Spirituality is often experienced as a source of inspiration or orientation in life."

Considering the process of divorce mediation, or more specifically as conducted by a mental health professional, can it be considered a more spiritual (and therefore more healthy) alternative to traditional litigated divorces? In litigated divorces processes, the spouses are generally told not to have any direct communication with one another because the lawyers are paid to represent their party. In a mediated process, the parties are encouraged to communicate with one another with the aid of the mediator to ascertain a fair and equitable resolution. Spouses do not have to like one another, but they must be able to conduct themselves civilly. Additionally, if one attorney is stronger than another on opposed side, this could give the stronger party somewhat of an edge, thus creating an imbalanced process. Thirdly, in a traditional divorce final decisions are reached with the recommendations of lawyers but with a final determination by the presiding judge. The mediation process leaves the spouses in charge of these major life decisions, thereby giving the locus of control to the couple.

Mental health professionals are trained to be empathetic and compassionate listeners and ultimately to help their clients find and rely on their strengths to improve and fulfill their lives. It is therefore the job of the mental health professional to help clients find their inner path that ultimately helps them uncover their deepest values and how to best apply them to their own life. The process of a divorce is far from spiritual in itself. Clearly the notion of coming to a mutual and equitable agreement in a non-confrontational setting with the aid of a licensed mental health professional offers a more spiritual resolution. It would seem to be the more nourishing means to an end that would encourage improved spiritual, mental and physical health over a traditional litigated divorce process.

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# Article



## Unilateral Appointment of Arbitrators

: POOJA BURMAN ROY

*Appointment of Arbitrators is a major hurdle in ad-hoc arbitrations. The mode of appointment of arbitrators by public sector corporations and government companies have invited severe criticism in India. Improper and unilateral method of appointment of arbitrators looms large as a great threat to erode the confidence of people in the arbitral system. The author looks at some of the Indian Supreme Court and High Court judgments covering the topic.*

### INTRODUCTION

*“It is the spirit and not the form of law that keeps the justice alive” - LJ Earl Warren*

This article covers the case commentary on ***Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd.***<sup>1</sup> wherein Sections 2, 3, 8, 8(2), 9, 20, 14, 14(2), 14(4), 14(5), 17 and 30 of Indian Arbitration Act, 1940; Limitation Act, 1963 - Article 119; Indian Arbitration Rules - Rule 1 were discussed by the Supreme Court of India. The relevant sections herein are section 8 and section 20, which has been discussed in the case commentary.

In this particular case, the appellant, a charitable institution entered into a works contract with the respondent company for a construction of a building. As the dispute arose between the parties, the respondent without the consent of the appellant appointed an arbitrator. The unilateral arbitrator granted award to which the appellant had objections and thus, the case was filed.

As this case entirely deals with Section 8 of the Act, the case revolves with the appointment of the arbitrator. As the arbitrator was not appointed properly, due to the lack of consent from the appellant's side, the court decided that even the award given by the sole arbitrator was not correct.

There are references being made of the decisions of the Apex court as well as of the decisions of various High Courts. The court in the present case followed the earlier decisions and gave the judgment in favour of the appellant.

### FACTS OF THE CASE:

- o The appellant-Dharma Prathishthaham is a charitable institution. The respondent is a builder engaged in

### (Footnote)

<sup>1</sup> 2005 (9) SCC 686





construction activity. In the year 1985, the appellant proposed to have a building constructed for which purpose it entered into a works contract with the respondent for the construction as per the drawings and specifications given by the appellant.

- o We are not concerned with the correctness or otherwise of the allegations and counter allegations made by the parties which relate to the question who committed breach of the agreement. Suffice it for our purpose to say that disputes arose between the parties.
- o Clause 35 of the agreement which is the arbitration clause reads as under: "Settlement of disputes shall be through arbitration as per the Indian Arbitration Act." (Obviously and admittedly the reference was to the Arbitration Act, 1940.)
- o On 12<sup>th</sup> June, 1989 the respondent appointed one Shri Swami Dayal as the Sole Arbitrator. The respondent gave a notice to the appellant of such appointment having been made by the respondent but the appellant failed to respond.
- o The respondent made a reference of the disputes to the Arbitrator and the Arbitrator Shri Swami Dayal entered upon the reference. The notice under Section 14(2) of the Act was published in the Statesman, a daily English have neither been produced before the High court nor before Supreme Court.
- o However, it is not disputed that the appellant did not participate in the proceedings before the Arbitrator. On 14<sup>th</sup> April, 1990 the Sole Arbitrator gave an award of Rs. 14,42,130.78 with interest at the rate of 12 per cent per annum from 14<sup>th</sup> April, 1990 till realization in favour of the respondent against the appellant.
- o The respondent filed an application in the Court under Sections 14 and 17 of the Act for making the Award a Rule of the Court.
- o Newspaper in its edition dated 6<sup>th</sup> December, 1991 filed a notice.
- o The appellant appeared in the Court on the appointed date i.e. 20<sup>th</sup> February, 1992. According to the appellant it gathered only on that date a copy of the Award dated 14<sup>th</sup> April, 1990. From 14<sup>th</sup> March, 1992 to 20<sup>th</sup> March, 1992 the Court remained closed.
- o On 21<sup>st</sup> March, 1992 the appellant filed objections to the Award, The objections have been dismissed without any adjudication on merits and only on the ground that the objection petition was filed beyond a period of 30 days from 6<sup>th</sup> February, 1991 i.e. the date of publication of notice in the Statesman.
- o Having lost before the learned Single Judge of the High Court of Delhi (Original Side) as also in intra-court appeal preferred before the Division Bench, the aggrieved appellant filed this appeal by special leave.



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- o The initial submission of the counsel for the appellant has been that in the facts and circumstances of the case, the delay in filing the objection petition ought to have been condoned and the objection petition ought to have been held to have been filed within the period of limitation calculated from the date on which copy of the award was made available to the appellant without which the appellant could not have exercised its right to file objections.

## ISSUES BEING RAISED:

### **Unilateral appointment of arbitrator by respondent without consent of appellant and reference to such arbitrator again without reference of disputes having being consented to by appellant.**

An arbitrator or an Arbitral Tribunal under the Scheme of the 1940 Act is not statutory. It is a forum chosen by the consent of the parties as an alternate to resolution of disputes by the ordinary forum of law courts. The essence of arbitration without assistance or intervention of the Court is settlement of the dispute by a Tribunal of the own choosing of the parties. Further, this was not a case where the arbitration clause authorized one of the parties to appoint an arbitrator without the consent of the other.

Two things are, therefore, of essence in cases like the present one: firstly, the choice of the Tribunal or the arbitrator; and secondly, the reference of the dispute to the arbitrator. Both should be based on consent given either at the time of choosing the Arbitrator and making reference or else at the time of entering into the contract between the parties in anticipation of an occasion for settlement of disputes arising in future. The Law of Arbitration does not make arbitration an adjudication by a statutory body but it only aids in implementation of the arbitration contract between the parties which remains a private adjudication by a forum consensually chosen by the parties and made on a consensual reference.

Arbitration Act, 1940 consolidates and amends the law relating to arbitration. According to Clause (a) of Section 2 of the Act, "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Under Section 3, "arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference. The First Schedule consists of 8 paragraphs incorporating implied conditions of arbitration agreements. Para 1 of the First Schedule which only is relevant for our purpose provides - "Unless otherwise expressly provided, the reference shall be to a sole arbitrator". The manner and method of choosing the sole arbitrator and making the reference to him is not provided. That is found to be dealt with in Sections 8, 9 and 20 of the Act.

The relevant parts of the provisions relevant in the context of a general clause merely providing for arbitration as in the present case could be seen in Section 8.<sup>2</sup> Section 9 is irrelevant for our purpose as its applicability is attracted to a case where an arbitration agreement provides for a reference to two arbitrators, one to be appointed by each party and procedure to be followed in such cases which is not a situation provided, in by the agreement with which we are dealing. Sections 8 and 9 are placed in Chapter II of the Act. Section 20<sup>3</sup> finds place in Chapter III.

#### (Footnotes)

<sup>2</sup> Section 8: Power of Court to appoint arbitrator or umpire - (1) In any of the following cases:

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen; concur in the appointment or appointments; or

(b) xxx                      xxx                      xxx

(c) xxx                      xxx                      xxx

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

<sup>3</sup> Section 20: Application to file in Court arbitration agreement - (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under



In the background of the above said provisions, the question which arises for consideration is whether, in the light of a general provision as in Clause 35, the respondent could have unilaterally appointed an arbitrator without the consent of the appellant and could have made a reference to such arbitrator again without the reference of disputes having been consented to by the appellant.

## JUDGMENT:

On a plain reading of the several provisions referred to hereinabove, the opinion drawn was that the procedure followed and the methodology adopted by the respondent is wholly unknown to law and the appointment of the sole arbitrator Shri Swami Dayal, the reference of disputes to such arbitrator and the ex parte proceedings and award given by the arbitrator are all void *ab initio* and hence nullity, liable to be ignored.

In case of arbitration without the intervention of the Court, the parties must rigorously stick to the agreement entered into between the two. If the arbitration clause names an arbitrator as the one already agreed upon, the appointment of an arbitrator poses no difficulty. If the arbitration clause does not name an arbitrator but provides for the manner in which the arbitrator is to be chosen and appointed, then the parties are bound to act accordingly. If the parties do not agree then arises the complication which has to be resolved by reference to the provisions of the Act. One party cannot usurp the jurisdiction of the Court and proceed to act unilaterally.

### (Footnotes continued from P.6)

Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.”

After noticing all the parties and affording them an opportunity of being heard, under Sub-sections (4) and (5) - (4) where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter, the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.



### The Lighter Side

One day while climbing towards a high cliff a man slipped and fell over the edge.

Frantic - he grabbed at a branch jutting out from a tree and yelled out, "Oh, God, help me."

He looked down while holding on tight and saw only jagged rocks.

Clutching even tighter to the branch he cried out again, "God... Please help me."

Suddenly he felt God's presence and heard God ask, "My son, what can I do for you?"

The man, somewhat relieved, answered, "Please God, help me. Save me."

God said quietly, "Do you love me? Do you trust me? Do you believe in me?"

"Yes, yes, I love you. I trust you and I believe in you," the man shouted.

"Well, if indeed you love me, trust me, and believe in me, LET GO."

With some hesitation and another look below at the jagged rocks, the man asked, "Is there anybody else up there I can talk to?"



A unilateral appointment and a unilateral reference - both will be illegal. It may make a difference if in respect of a unilateral appointment and reference the other party submits to the jurisdiction of the arbitrator and waives its rights which it has under the agreement, then the arbitrator may proceed with the reference and the party submitting to his jurisdiction and participating in the proceedings before him may later on be precluded and stopped from raising any objection in that regard.

*“An Arbitrator is neither more nor less than a private judge of a private court (called an arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him;.....”*

He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants' agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of these powers must not be contrary to the proper law of the contract or the public policy of England, bearing in mind that the paramount public policy is that freedom of contract is not lightly to be interfered with.”<sup>4</sup>

A reference to a few decided cases would be apposite.

In ***Thawardas Pherumal and Anr. v. Union of India***<sup>5</sup>, a question arose in the context that no specific question of law was referred to, either by agreement or by compulsion, for decision of the Arbitrator and yet the same was decided howsoever assuming it to be within his jurisdiction and essentially for him to decide the same incidentally. It was held that a reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the court under Section 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4), In the absence of either, agreement by both sides about the terms of reference, or an order of the Court under Section 20(4) compelling a reference, the arbitrator is not vested with the necessary exclusive jurisdiction.

A Constitution Bench held in ***Waverly Jute Mills Co. Ltd. v. Raymond and Co. (India) Pvt. Ltd.***<sup>6</sup>, that an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.

Again a Three-Judges Bench held in ***Union of India v. A.L. Rallia Ram***<sup>7</sup>, that it is from the terms of the arbitration agreement that the arbitrator derives his authority to arbitrate and in absence thereof the proceedings of the arbitrator would be unauthorized.

In ***Union of India v. Prafulla Kumar Sanyal***<sup>8</sup>, Apex Court observed that an order of reference can be either to an arbitrator appointed by the parties whether in the agreement or otherwise or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. If no such arbitrator had been appointed and where the parties cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator itself. Clearly one party cannot force his choice of arbitrator upon the other party to which the latter does not consent. The only solution in such a case is to seek an appointment from the Court.

In ***Banwari Lal Kotiya v. P.C. Aaarwal***<sup>9</sup>, the question of validity of a reference came up for the consideration of the Court in the context of the issue that was whether an arbitrator could enter upon a reference which was not consensual. The Court explained the law laid down by this Court in ***Thawardas Perumal's case***<sup>10</sup>

**(Footnotes)**

<sup>4</sup> Refer, Russell (Arbitration, 20<sup>th</sup> Edition, p.104)

<sup>5</sup> [1955]2SCR48

<sup>6</sup> [1963]3SCR209

<sup>7</sup> [1964]3SCR164

<sup>8</sup> (1979)3SCC631

<sup>9</sup> AIR1985SC1003

<sup>10</sup> Supra fn.5





that though the reference to arbitrator has to be accompanied by consent of the parties but such consent is not necessarily required to be expressed at the time of making the reference if it is already provided by the agreement or is sanctioned by statutory rules, regulations or bye-laws. The Court held that the expression “arbitration agreement” is wider as it combines within itself two concepts - (a) a bare agreement between the parties that disputes arising between them should be decided or resolved through arbitration and (b) an actual reference of a particular dispute or disputes for adjudication to a named arbitrator or arbitrators. When the arbitration agreement is of the former type, namely, a bare agreement, a separate reference to arbitration with fresh assent of both the parties will be necessary and in the absence of such consensual reference resorting to Section 20 of the Arbitration Act will be essential.

The Constitution Bench in ***Khardah Company Ltd. v. Raymond & Co. (India) Private Ltd.***<sup>11</sup>, decided the issue from the view point of jurisdictional competence and held that what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement and where there is no such agreement there is an initial want of jurisdiction which cannot be cured even by acquiescence. It is clearly spelled out from the law laid down by the Constitution Bench that the arbitrators shall derive their jurisdiction from the agreement and consent.

Thus, there is ample judicial opinion available for the proposition that the reference to a sole arbitrator as contemplated by paragraph 1 of the First Schedule has to be a consensual reference and not an unilateral reference by one party alone to which the other party does not consent.

Further, a few references can be given through the High Court cases as:

In ***India Hosiery Works v. Bharat Woollen Mills Ltd.***<sup>12</sup>, the Division Bench of the Calcutta High Court observed:

“an arbitration agreement neither specifying the number of arbitrators, nor specifying the mode of appointment, is perfectly effective and valid and the incidents of such an agreement are that it is to take effect as an agreement for reference to a sole arbitrator, to be appointed by consent of the parties or, where the parties do not concur in making an appointment, to be appointed by the Court, except where the operation of Rule 1 of the First Schedule is excluded.

Where, therefore, the agreement does not assign the right of appointment distributive to different parties in respect of different arbitrators, it is inherent in the agreement that the appointment of the arbitrator or of each of the several arbitrators must be by the consent of all parties. There may be an express provision to such effect, but even in the absence of any express provision, such a provision must be taken to be necessarily implied. It is for that reason that where the agreement does not specify the number of

**(Footnotes)**

<sup>11</sup> 1962 AIR(SC) 1810

<sup>12</sup> AIR1953Cal488

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arbitrators, nor specifies the mode of appointment, the Court first takes the agreement as providing for reference to a single arbitrator by reason of the provisions of Rule 1 of Schedule I, then takes the mode of appointment intended necessarily to be appointed by consent of the parties and next, if it finds that the parties cannot concur in the appointment of an arbitrator, it appoints from itself."

The view was reiterated by another Division Bench of the same High Court in ***Teamco Private Ltd. v. T.M.S. Mani***<sup>13</sup>.

***National Small Industries Corporation Ltd. v. National Metal Craft, Delhi and Ors.***<sup>14</sup>, is very close to the case at hand. An arbitration clause - longish one, in substance provided that on question, dispute or difference arising between the parties to the agreement, "either of the parties may give to the other notice in writing of such question dispute or difference and the same shall be referred to arbitration". One of the parties served a notice on the other appointing one 'K' as arbitrator to adjudicate upon the dispute. The notice ended by saying "you are hereby called upon to agree to the said reference in accordance with the arbitration agreement for the settlement of the said disputes." 'K' then commenced the arbitration proceedings. Following the Division Bench decision of the Calcutta High Court, the learned Single Judge of Delhi High Court held:

"If the agreement merely provides, as here, that the dispute shall be referred to arbitration, the reference shall be made to a single arbitrator. If the agreement does not provide for the number of arbitrators and the mode of their appointment, it will be assumed to be one for reference to a single arbitrator by reason of para I of the First Schedule, and the mode of appointment taken necessarily to be consent of parties, and if the parties do not concur in the appointment as is the case here, the court will make the appointment".

Appointment of 'K' as arbitrator was held to be invalid because it was unilateral and was made without any application to the Court either under Section 8 or Section 20 of the Act.

A Division Bench of the High Court of Allahabad held in ***Om Prakash v. Union of India***<sup>15</sup>, that a reference to arbitrator out of Court must be by both the parties together and cannot be by one party alone; failing the consent, the parties or either of them must approach the Court by making an application in writing.

Consent, of course, is of the very essence of arbitration said a Division Bench of Madras High Court in ***Union of India v. Mangaldas N. Varma, Bombay***<sup>16</sup>.

The view of the law taken by the several High Courts has appealed the Supreme Court to come to a decision with the agreement of above mentioned cases.

In the present case, we find that far from submitting to the jurisdiction of the Arbitrator and conceding to the appointment of and reference to the Arbitrator – Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the Award though the objection was belated.

The appeal was allowed. The impugned Award given by the Arbitrator along with the appointment of the Arbitrator and reference made to him are all set aside as void ab initio and nullity.

## CONCLUSION:

Three types of situations may emerge between the parties and then before the Court.

Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and

### (Footnotes)

<sup>13</sup> AIR1967Cal168

<sup>14</sup> AIR1981Delhi189

<sup>15</sup> AIR1963All242

<sup>16</sup> (1958)2MLJ16



unambiguous language - then the parties and the Court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act - then it will have to be held that there was no agreement between the parties in the eye of law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise.

Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been *ad idem* on the real identity of the arbitrator as appointed by them before hand; the consent is already spelled out and therefore binds the parties and the Court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the Court and seek an order of reference to the arbitrator appointed by the parties.

Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference - both shall be by the consent of the parties. Where the parties do not agree, the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that regard. The appellant not responding to respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the respondent is to invoke the jurisdiction of Court for appointment of an arbitrator and an order of reference of disputes to arbitration.

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## Think ... Love Island!

Once upon a time there was an island where all the feelings lived; happiness, sadness, knowledge, and all the others, including love. One day it was announced to all of the feelings that the island was going to sink to the bottom of the ocean. So all the feelings prepared their boats to leave. Love was the only one that stayed. She wanted to preserve the island paradise until the last possible moment. When the island was almost totally under, Love decided it was time to leave.

She began looking for someone to ask for help. Just then Richness was passing by in a grand boat. Love asked, "Richness, Can I come with you on your boat?" Richness answered, "I'm sorry, but there is a lot of silver and gold on my boat and there would be no room for you anywhere." Then Love decided to ask Vanity for help who was passing in a beautiful vessel. Love cried out, "Vanity, help me please." "I can't help you", Vanity said, "You are all wet and will damage my beautiful boat."

Next, Love saw Sadness passing by. Love said, "Sadness, please let me go with you." Sadness answered, "Love, I'm sorry, but, I just need to be alone now." Then, Love saw Happiness. Love cried out, "Happiness, please take me with you." But Happiness was so overjoyed that he didn't hear Love calling to him.

Love began to cry. Then, she heard a voice say, "Come Love, I will take you with me." It was an elder. Love felt so blessed and overjoyed that she forgot to ask the elder his name. When they arrived on land the elder went on his way. Love realized how much she owed the elder. Love then found Knowledge and asked, "Who was it that helped me?" "It was Time", Knowledge answered. "But why did Time help me when no one else would?", Love asked. Knowledge smiled and with deep wisdom and sincerity, answered, "Because only Time is capable of understanding how great Love is."

## News & Events



### India rejects ISDS Clause on International Trade Pact

Despite a demand by the European Union (EU), India is unlikely to allow a clause in a proposed trade pact with the bloc that permits an overseas investor to sue a host country at an international dispute settlement agency. EU wanted the inclusion of such a clause, known as an investor to state dispute settlement mechanism, in a draft investment chapter under the proposed trade and investment agreement, negotiations for which started in 2007.

The controversial clause, if agreed upon, would allow European businesses investing in India to take international legal action against the government for damages over policies such as banning of dangerous chemicals, domestic health policies such as tobacco control legislation and measures to reduce prices of essential medicines. While customary international law requires foreign investors to sue governments in domestic courts for any claims, or at the World Trade Organization dispute panel, such bilateral agreements on investment allow foreign investors to seek legal action at international arbitration bodies such as the United Nations Commission on International Trade Law or at the World Bank-affiliated International Centre for Settlement of Investment Dispute for alleged breaches of treaty obligations.

As such provisions could pose a national risk and may put public policymaking in jeopardy, the Australian government has announced that it will not include a clause that allows an overseas investor to sue the country at any global arbitration body in any of its future bilateral trade agreements.

### Supreme Court of India clarifies the role of Indian Courts in Foreign Arbitrations

The Supreme Court of India by its recent decision dated 11/05/2011 in “Videocon Industries Limited v Union of India” clarified that on a correct interpretation of the Arbitration and Conciliation Act, 1996 and relevant judgments, application of Part I of the Act would be held to have been excluded by the parties to an arbitration agreement who had agreed that the arbitration agreement will be governed by foreign law.

The Supreme Court had earlier in “Bhatia International v Bulk Trading” (2002) held that Part I would apply to all domestic arbitrations and also to international commercial arbitrations held outside India, unless the parties had by express or implied agreement excluded all or any of the provisions of Part I of the Act. In “Venture Global Engineering v Satyam Computers Services” (2008), the Supreme Court reiterated its decision in Bhatia International, where it held that Part I of the Act would be applicable to such award and hence the courts in India would have jurisdiction under Sections 9 and 34 of the Act and entertain a challenge to its validity.

By the present decision, the Supreme Court has reiterated the principle of minimal judicial interference in the arbitration arena. It restricts the scope of judicial interference under Part I of the Act in international commercial arbitrations after giving a purposive reading to the intent of the parties behind the choice of law governing arbitration agreements.

“A bend in the road is not the end of the road...  
unless you fail to make the turn.”





## Hong Kong Court clarifies Med-Arb

The Hong Kong High Court in “Gao Haiyan v Keeneye Holdings Ltd.” refused to enforce an arbitral award made in China, citing concerns about the potential appearance of bias. The Court decision has highlighted the difficult relationship between arbitration and mediation, as the court refused to enforce an arbitral award because of the real risk of bias by an arbitrator who acted as a mediator between the parties. For an arbitrator to adopt such a role is relatively common in China, but attitudes to what a tribunal can or should do to promote settlement between the parties vary widely across the globe. The court clarified that it was the way in which the attempted mediation had been approached that had tainted the award, not the concept of med-arb itself.

## Swiss Supreme Court rules on prior involvement of Arbitrators

The Swiss Supreme Court in “Mutu v Chelsea FC” has made its point clear: the independence and impartiality of arbitrators are paramount requirements of both judicial and arbitral justice. The court considered that the prior involvement of an arbitrator in related or successive proceedings was not, as such, sufficient to conclude unconditionally with regard to his or her partiality. Rather, in the court’s view, the risk of prevention should be assessed based on the concrete and specific circumstances of the case, including the nature and scope of the prior involvement and/or decisions of the arbitrator.

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