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EDITORIAL:

EDITOR: Anil Xavier | ASSOCIATE EDITORS: Dominic Karunesudas, Iram Majid, Pallavi Dehari

EDITORIAL BOARD: Justice B.K. Somasekhara, Geetha Ravindra (USA), Rajiv Chelani (UK)

PUBLISHER: Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin 682 036, India

www.arbitrationindia.org | Tel: +91 484 4017731 / 4865101

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Editor's Note



SORRY! There has been a small break in the publication sequence of our magazine. But we are back! Incidentally August 2018 is the 15th Anniversary of “The Indian Arbitrator”. The magazine was officially launched by Mr. Justice M.N. Venkatachaliah, former Chief Justice of India on 15th August 2003, which is the Independence Day of India.

It is not that IIAM was inactive during the break. We were constantly on the move with various activities. The most important one being the launch of People’s Mediation Centres and the adoption of Time Banking concept, which is being mentioned elaborately in the View-Point Section. IIAM was also actively involved in the Flood relief activities for the victims of the massive floods that happened in Kerala, India recently. We place on record the help and support given to IIAM by our members, mediators and arbitrators from India and abroad.

Enjoy reading!

Anil Xavier

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Connecting Time For Creating Mediation Culture

ANIL XAVIER



For the growth of mediation, it has to be integrated into the culture of the people. But, mediation cannot be pushed as a culture, unless it is closely intertwined with other activities of life. The author analyses the option of using Time Banking Service to involve people from various walks of life to contribute and exchange different services to each other, forming a different kind of local economy based on caring and kindness, so as to get familiarised with mediation and thereby making mediation a part of culture.

Time for Time

"Time flies. It's up to you to be the navigator" – ROBERT ORBEN

It is said that Time is limited and priceless and no one can buy it or sell it. It is true that once you have lost it, you can never get it back.

If someone says, "I don't have time" or "I am too busy", it is only an excuse. Lack of time is a myth. You will make time for what is important. We need to give time to think about how we manage our time!

Live your Life

"In this life we cannot do great things. We can only do small things with great love"

– MOTHER TERESA

We may be able to do many things now, which we may not be able to do tomorrow even if we have the desire to do it. May be our health will not allow us to do it or the circumstances will not permit us to do it.

Life is too short to live! Life teaches us to make good use of time, while Time teaches us the value of life!

Resolve to Resolve

“We must teach our children to resolve their conflicts with words, not weapons”

– WILLIAM J. CLINTON

Disputes should be resolved early so as to stop the negative factor from growing and widening its fangs which may not be conducive to any of the parties to the dispute.

Mediation is considered as a dispute resolution mechanism which resolves disputes quickly and the process being voluntary, consensual and confidential. Even though it has gained prominence as a dispute resolution mechanism in the recent years with some factions of the society, it is still considered as a “legal process” and is confined mostly with the court system.

It seems the position of Mediation and Religion has many similarities – Skeptics scoff at it; Lawyers (Atheists) denounce it; Litigants (Agnostics) question it; Judges (Scientists) debunk it; Academicians (Priests) debates it and Mediators (Faithful) value it.

If mediation is confined within the four walls of law as a “semi-judicial” process of dispute resolution, it will not set its roots with the people as a primary method of consensual resolution culture. Yes, mediation has to be integrated into the culture of the people.

Creating a Culture of Resolution

“A nation’s culture resides in the hearts and in the soul of its people” – MAHATMA GANDHI

The IIAM Community Mediation Service¹ (CMS) was launched in 2009, with the objective of bringing justice to the doorsteps of the people by providing an opportunity for them to participate in the prevention and early intervention of conflicts. The aim was also to bring in a broad-based social movement to restore civic virtue and civic participation. But the attempt of IIAM in promoting mediation through CMS did not achieve the perceived results. It was clear that mediation was still considered as something connected with law!

It is said that cultural evolution requires neurological instructions. The choice of a person or group of persons can ultimately influence the society or create the neurological instruction that is needed to bring about the cultural evolution. Richard Dawkins in this book *“The Selfish Gene”* (1976) proposed the concept of “meme”, which is analogous to that of the gene. A meme is an idea-replicator that can reproduce itself, by jumping from mind to mind. Thus an idea, behavior or style spreads from person to person within a culture – often with the aim of conveying a particular phenomenon, theme, or meaning. Memes are a viral phenomenon that may evolve by natural selection in a manner analogous to that of biological evolution.

(Footnotes)

¹ <http://www.communitymediation.in/>

But who could be that person or group of persons?

Being Part of the Movement

“The world will live in peace, only when the individuals composing it make up their minds to do so”
– MAHATMA GANDHI


According to the ancient Greek system, any given society consists of 3 kinds of people. The first group are called the Idiots. Idiot is not perceived as mentally deficient, but he is a totally private person or a totally self-centred person. He has no public philosophy or no skill to contribute to the welfare of a flourishing society. The second group of people are called the tribes. These are people who cannot think beyond their own small tribe or group. The third category of people was called the Citizens. A citizen is a person who has the skill and knowledge to lead a public life, who is able to lead a life a civility. A citizen recognizes that he or she is a part of the community and thus strives for the common good. A citizen not only knows his rights in the society, but also understands his responsibility towards the society. It is the citizens that make up a civilized society.

These 3 distinctions are even now important. We need to find those “citizens” who can promote the “meme” of mediation, so that it can influence the society to inherit the habit of mediation culture to resolve conflicts, so that a culture of self empowerment is developed and every dispute is viewed as an opportunity for transformation through dialogue and problem solving.

It is based on this idea that IIAM has started the concept of People’s Mediation Centres (PMC) under the IIAM Community Mediation Service. People who believe that mediation would promote peaceful co-existence and harmony in the community and help to make the society just, equal and fair, would sign a “*Pledge to Mediate*”², by which they would consider mediation as the first option to resolve their disputes, recognizing that the empowerment to resolve disputes amicably and voluntarily is an expression of civil maturity. These people can sow the seeds of a mediation culture within the society.

(Footnotes)

² http://www.arbitrationindia.org/pmc_join.html



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Integrating Mediation with Life

“In the end, it's not the years in your life that count. It's the life in your years”

– ABRAHAM LINCOLN

But, mediation cannot be pushed as a culture, unless it is closely intertwined with other activities of life.

This is where IIAM has adopted the “Time Banking Account³” in its PMC's. The PMC Time Banking is a reciprocity-based service system in which hours are credited in the Time Account of the holder. The Account holder can choose whatever services they would like to offer through the PMC and can earn “Time Credits” for the service they provide.

For eg., if you are a teacher, musician, health professional, or mediator or for that matter any person, you can offer your services free and the time that you spend for giving those services will be credited in your Time Account. This time will also carry interest @12% per annum. You can redeem your time credit to avail any of these services in return free. It can even be passed on to your children or nominees! And the services will be kept on adding! PMC Time Banking values the contributions of individuals who offer their time to do various services for the benefit of the community.

Time Banking helps to involve people in various walks of life to contribute and exchange different services to each other, forming a different kind of local economy based on caring and kindness. This will also give them an opportunity to use mediation for resolution of all their disputes, so as to increase our individual and community well-being. We feel only by integrating mediation with other essential services and making it a pattern of the culture of the society will, mediation become firmly rooted as a primary dispute resolution mechanism.

PMC not only allows us to empower ourselves and take charge of our capacity to resolve our disputes, it also rekindles the age-old pattern of give and take to reweave the healthy families and communities that everything else depends on. Once you have a fixed number of people in the locality signing the Pledge and opening the Time Bank Account, a Mediation Centre is opened in their locality, which would provide people the space for resolving their conflicts. The mediators are selected from the community. Thus it becomes a genuine people movement, changing the future, changing the culture!

Going back to the first statement, “Time is limited and priceless and once you have lost it, you can never get it back”, PMC Time Banking gives an answer to it. You can store your time and gain it back in the future. As Steve Jobs has said, “My favorite things in life don't cost any money. It's really clear that the most precious resource we all have is time”.

(Footnotes)

³ http://www.arbitrationindia.org/pmc_time.html



AUTHOR:

Anil Xavier is the President of Indian Institute of Arbitration & Mediation (IIAM) and the Vice-President of the India International ADR Association (IIADRA). He is a lawyer, arbitrator and an IMI certified mediator. He can be contacted at anilxavier@arbitrationindia.com

End of Unilateral Appointments of Sole Arbitrators in India?

ANA VERRON & ALIFYA VORA

By a recent judgment, the Supreme Court of India considered the legality of unilateral appointment of a sole arbitrator by one party and declared the same as invalid. The authors analyse the judgment and its impact in the future of arbitration in India.

Introduction

The success of arbitration largely depends on the confidence of the parties in the process, and thus on their confidence in the arbitrator. It is indeed essential that each party believes that the arbitrator is neutral. But such confidence is defeated when, despite the qualifications of the arbitrator, one party does not believe in the neutrality of the arbitrator appointed unilaterally by the other party. This is because often parties are primarily interested in appointing a favorable tribunal. Statistics of the International Chamber of Commerce reveal that, in a majority of dissenting opinions in ICC awards, the dissenting arbitrator had been appointed by the losing party. This comes unsurprisingly as in selecting an arbitrator, parties generally look for someone who will likely be sympathetic to their point of view.¹

The issue of unilateral appointment of arbitrators becomes all the more acute when the arbitral tribunal is composed of a sole arbitrator. In fact, the risk of lack of independence from and impartiality to the nominating party is increased while the opposite party's confidence in the arbitration process is at its lowest.

In India, Government and PSU contracts regularly provide for the appointment of a sole arbitrator by the government entity. Similar clauses are also found in contracts where the bargaining power lies in

(Footnotes)

¹ Alan Redfern, The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly, (2004) Vol 20- No.3, ARBITRATION INTERNATIONAL, 223, 234.

the hand of only one of the parties. Until recently, such clauses had been unanimously upheld by Indian courts on the ground of freedom of contract. But in its latest judgment on the subject, *TRF Ltd. v. Energo Engineering Projects Limited*,² the Supreme Court has revisited its position in light of the 2015 Amendment to the Arbitration and Conciliation Act, 1996 by invalidating the unilateral appointment of a sole arbitrator.

Background of the case

In the present case, the arbitration proceedings were initiated by the Appellant for resolving a dispute relating to the encashment of a bank guarantee under a purchase order (hereinafter the “PO”). In fact, the Appellant invoked clause 33 of the General Terms & Conditions of the PO, which read as follows:

“33. Resolution of dispute/arbitration

- a. In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.
- b. If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.
- c. All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation Act, 1996 as amended.
- d. Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language.
- e. The award of the tribunal shall be final and binding on both; buyer and seller.”³

The Appellant had objected to the procedure for appointment of arbitrator provided under the PO and suggested that an arbitrator be appointed de hors the specific terms of the PO which was rejected by the Respondent on the ground that the terms of clause 33 were binding. The Respondent then went on to appoint a former Supreme Court Judge as sole arbitrator.

Accordingly, the Appellant filed a petition in the Delhi High Court under section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter the “Act”) for the appointment of an arbitrator and contended that under section 12(5) of the Act, the Managing Director of the Respondent company had become ineligible to act as an arbitrator and consequently he had no power to nominate. The Delhi High Court rejected the Appellant’s plea finding that the amended Act did not take away the right of a party to a dispute to appoint a sole arbitrator. The applicant hence filed the present application before the Supreme Court where it considered, inter alia, whether once a person who is required to arbitrate upon the disputes under the terms and conditions of the contract becomes ineligible by the operation of law, he would be ineligible to nominate a person as an arbitrator as well.

(Footnotes)

² Civil Appeal No. 5306 of 2017, decided on 3rd July 2017.

³ Ibid [8].

Arguments from both sides

It was argued on behalf of the Appellant that the dispute resolution clause of the PO had become void in view of section 12(5) of the Act read with Schedules Fifth and Seventh as the Managing Director, being statutorily ineligible and therefore disqualified to be an arbitrator, his nominee would also be ineligible. To support his arguments, the Appellant relied on the maxim *qui facit per alium facit per se*, i.e. what one does through another is done by oneself.⁴

On the other hand, the Respondent argued that the disqualification stated in Section 12(5) of the Amending Act only applies to the Arbitrator and not the nominating authority. The Respondent further argued that the grounds and circumstances laid down in the Fifth and Seventh Schedules should be decided vis-à-vis the arbitrator and not as a general principle. Hence, the Respondent argued that the ineligibility could not extend to a nominee if he is not from the Respondent Company, especially when appropriate disclosure has been made.⁵

Decision of the Supreme Court

Referring to various Supreme Court judgments, the Court effectively found that once an arbitrator has become ineligible by virtue of section 12(5) of the Act, he/she cannot nominate another person as arbitrator. The Supreme Court accepted the Appellant's argument and considered that it is inconceivable in law that a person who is statutorily ineligible can nominate an arbitrator. At the offset, the Court insisted on statutory ineligibility rather than on the independence and impartiality or the individual respectability of the arbitrator with which the Court emphasized it was not concerned.

The Supreme Court further clarified that this ruling only applies in case of appointment of a sole arbitrator and not in the event of a multi-member arbitral tribunal where the appointment of one arbitrator by each party carries different implications.

(Footnotes)

⁴ Ibid [6].

⁵ Ibid [7].

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Takeaway from the case

The TRF case brings about a long-awaited halt to the unilateral appointment of sole arbitrators, i.e. the appointment of a sole arbitrator by one party only, without consulting the opposite party. However, because the Supreme Court failed to expressly declare such unilateral appointments invalid, this case should be analyzed carefully.

It is interesting that the Supreme Court had already dealt with the issue of unilateral appointment of sole arbitrators although principally from the perspective of whether arbitration clauses that provide for unilateral appointments of a sole arbitrator are valid and enforceable contract clauses. In the case of *Indian Oil Corporation v. Raja Transport*,⁶ the Supreme Court had upheld the validity of an arbitration clause providing for the appointment of an employee of a party as arbitrator on the ground that the challenging party had entered into the contract with full knowledge of its terms and conditions and hence it could not claim the benefit of arbitration under the arbitration clause while ignoring the appointment procedure provided therein. In the earlier case of *Ace Pipeline Contracts Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*,⁷ the Supreme Court had similarly held that the non-nominating party was bound by the terms of the arbitration clause providing that appointment of the arbitrator be made by the opposite party. The Court had noted that the non-nominating party, if it felt the arbitrator so appointed had not acted independently and impartially, could then avail the remedy under section 34 of the Act. Also validating unilateral appointments of a sole arbitrator but on a different ground, the Bombay High Court, in *The Loot (India) Pvt. Ltd. v. Reliance Capital Ltd.*,⁸ had held that the challenge of an ex-parte award, made under a loan agreement empowering the Respondent to appoint the arbitrator, on the ground of bias can only be successful where bias is alleged with respect to the award and not with respect to the appointment.

In the TRF case, the Supreme Court did not invalidate the arbitration clause at hand in light of contract law principles thereby unfortunately missing the opportunity to overturn its previous decisions. Instead, the Court debated the validity of unilateral appointment of sole arbitrators in light of the 2015 Amendment to the Arbitration and Conciliation Act, 1996. The newly inserted section 12(5) of the Act which lays down statutory ineligibility of arbitrators whose relationship with the parties, counsel of subject matter is listed in Schedule VII of the Act is drawn from the IBA Guidelines.⁹ Points 1 (arbitrator is an employee or has past/present business relationship with a party), 5 (arbitrator is part of the management or has controlling influence in an affiliate of a party, if said affiliate is involved in the dispute) and 12 (arbitrator is part of the management in a party) of Schedule VII, expressly relied upon by the Supreme Court, ensure that those who are so closely connected with a party or one of its affiliate cannot be appointed as arbitrator. The statutory declaration required to be made under Schedule VI further ensures that such connections be disclosed to the other party at the time of appointment. But the 2015 Amendment failed to address the issue of unilateral appointment by confining to the grounds of statutory ineligibility applicable only to arbitrators. The Supreme Court, in the TRF, expanded the interpretation of the grounds under Schedule VII to the nominating authority as well, thereby ensuring an independent and impartial nomination process.

(Footnotes)

⁶ *Indian Oil Corp. Ltd. & Ors vs M/S Raja Transport (P) Ltd.*, (2009)8SCC520.

⁷ *Ace Pipeline Contracts Pvt Ltd. v. Bharat Petroleum Corporation Ltd.*, (2007)5SCC304.

⁸ *The Loot (India) Pvt. Ltd. v. Reliance Capital Ltd* 2013(3)ArbLR397(Bom).

⁹ Guidelines on Conflict of Interest in International Arbitration, IBA, (2014), https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

The mutual appointment of sole arbitrators is undeniably essential to build trust in arbitration as a means of resolving dispute in a fair and efficient manner. This is so, because when an arbitrator is jointly appointed by the parties or by a neutral arbitral institution, the arbitrator will then enjoy an equal measure of confidence and an equal claim to moral authority.¹⁰ But this is not the case when a sole arbitrator is appointed unilaterally by one of the parties because of the tendency of the nominating party to make the appointment with the objective, in the back of its mind, of obtaining a favorable outcome.

On a liberal reading of the Supreme Court's ruling in the TRF case, the unilateral appointment of a sole arbitrator is invalid under section 12(5) read with Schedule VII of the Act and sole arbitrators may only be appointed either by the parties jointly or by a neutral nominating authority independent and impartial from the parties.

Conclusion

The ruling of the Supreme Court in *TRF v. Energo Engineering Projects* has been welcomed in the arbitration community and it arguably constitutes a stepping stone towards the end of unilateral appointments of sole arbitrators in India. This case will contribute to making the Indian arbitration regime more trusted and ensure the appointment of neutral arbitrator through a mutual decision of the parties or by an independent and impartial appointing authority.

The TRF case is also a step towards making Indian arbitration on a par with pro-arbitration regimes. In France for instance, equality of the parties in the appointment of arbitrators is a principle of public policy that can only be departed from after the dispute has arisen.¹¹ Under the English Arbitration Act, 1996 sole arbitrators are, as a general rule, appointed jointly by the parties and, only in the event of default of the opposite party to concur in the appointment proposed can the claimant unilaterally appoint a sole arbitrator.¹²

Now, sole arbitrators appointed under the Indian Arbitration and Conciliation Act, 1996 must be jointly appointed by the disputants or by a neutral institution at the risk of the appointment or the award being effectively challenged. Hence, existing arbitration clauses with one-sided appointment mechanisms should soon be amended to avoid unnecessary litigation.

(Footnotes)

¹⁰ Jan Paulsson, Are Unilateral Appointments Defensible?, KLUWER ARBITRATION BLOG, (April 2, 2009) <http://kluwarbitrationblog.com/2009/04/02/are-unilateral-appointments-defensible/>.

¹¹ Dutco case, Cass. Civ.1ère 7 janvier 1992, n°89-18708 (French Cour de cassation).

¹² Section 17, English Arbitration Act, 1996.



AUTHORS:

Ana Verron is a Counsel at Reddy & Reddy Law Firm, Pune, India and Alifya Vora is a fourth year student of law at Symbiosis Law School, Pune



Can or Should Parties Waive their Right to Set Aside an Award?

SUGYATA CHOUDHARY

Whether an express waiver of the right to set aside an award is tenable, has been a common ground of conflict in legal thought and opinion across various countries. The answer may depend on a number of factors, but largely the effect of such an agreement would depend on whether the concerned jurisdiction in which it is invoked upholds such an agreement. The author looks at the position in various jurisdictions and opines that there is need an International Policy to bring more clarity and uniformity in International Commercial Arbitrations.

Setting aside of an arbitral award finds its origin in Article 34 of the UNCITRAL Model law. Article 34(2) sets out the grounds for making an application to set aside an award. This provision has been adopted by most major jurisdictions over the world, albeit with appropriate modifications. Article V (I) of the New York Convention on recognition and enforcement of arbitral awards, 1958 (“New York Convention”) provides various grounds on which the courts can refuse the enforcement of an award. One of the grounds available for refusal to enforce an award is that the award has been set aside by the country where it was made. This gave rise to the settled legal position that an award can only be set aside in the jurisdiction where it is made. Therefore, setting aside, and hence any waiver to set aside an award has largely been subjected to domestic jurisprudence attracting a catena of conflicting decisions from various jurisdictions across the globe.

Waiver of the right to set aside an arbitral award can be of two kinds. Express and Implied. Implied waiver of the right to set aside an award mainly consists of waiver by lapse of time. Usually, every country provides for a time period within which an award shall be challenged, on the lapse of which, the aggrieved party is deemed to have waived his right to challenge/set aside the award. In the publication titled “EUROPEAN PUBLIC POLICY AFTER ECO SWISS¹ (American review of International Arbitration 1999) the author, with regard to waiver of the right to set aside significantly notes -

(Footnotes)

¹ 10 Am. Rev. Int'l Arb. 81 *88

“The question may arise whether the Member States can allow the parties to waive their right to set aside an award. First of all, it is very common that national law provides for a time limit to file such an action². From the perspective of safeguarding the application of Community law, there is no relevant difference between a waiver of the action to set aside an award and the lapse of the right to institute such an action because no filing was made in time. In Eco Swiss³, the ECJ clearly upheld national procedural laws which impose such time limits. Secondly and more importantly, Community law does not provide for comprehensive control of or respect for Community law. Apart from investigations by competent authorities, e.g. in the area of competition law, control depends mainly on the willingness of parties to file an action in court and to pursue it. For these reasons, it can be argued that a national law of a Member State allowing such a waiver is not in contradiction with Community law.”

However, whether an express waiver of the right to set aside an award is tenable, has been a common ground of conflict in legal thought and opinion across various countries. The jurisdictions dealing with the law on express waivers can be largely divided into three broad categories – i) those supporting waiver ii) those against waiver and iii) neutral. Most jurisdictions including the USA, UK, Russia, China, Japan and India have taken a strong view against an express waiver of the statutory right to set aside an award. Some jurisdictions like France, Switzerland, Belgium, Sweden and Turkey have upheld waiver agreements albeit on limited conditions, while others like Singapore and Spain maintain a neutral position.

In *Centrotrade Minerals and Metal Inc. vs. Hindustan Copper Limited*⁴ the Indian Supreme Court while dealing with ‘contracting out’ of rights under the statute observed:

“5. But Indian statute, i.e., the 1996 Act does not provide such “contracting out” provision so that parties can fix / determine, by their terms of agreement, the procedure of appeal after the award is made.

6. Such a contractual arrangement, having regard to the provisions contained in Section 23 of the Indian Contract Act shall be void being opposed to public policy. The parties, it is trite, cannot by contract or otherwise confer jurisdiction on a forum which is prohibited by law in force in India. The law in force in India does not permit to limit or avoid the operation of the statutory provisions.”

In *Methanex Motonui Ltd v Joseph Spellman and Ors.*⁵, a New Zealand court concluded that there was “no contemplation that parties to arbitral proceedings could seek to limit further the rights of review contemplated by Article 34”. In the view of the New Zealand court, Article 34 of the Model Law was of fundamental importance and therefore parties could not exclude this provision.

In another leading authority on the subject, *Hall Street Associates, L.L.C. v MatteInc*⁶, the U.S. Supreme Court held that the grounds provided under the Federal Arbitration Act (FAA) for vacating or modifying

(Footnotes)

² See e.g. Section 596(2) Austrian Civil Procedure Code; Section 1503 French New Civil Procedure Code; Section 1059(3) German Civil Procedure Code; Section 70(2) Arbitration Act 1996 for England, Wales and Northern Ireland; see also: International Handbook on Commercial Arbitration (Pieter Sanders & Albert Jan van den Berg eds., 1999); National Arbitration Laws (Hans Smit & Vratislav Pechota eds., 1999).

³ Case C-126/97, Eco Swiss China Time Ltd. v. Benetton International NV, reprinted in 14(6) Int'l Arb. Rep., B-1 (June 1999); 1999 Rev. Arb. 631.

⁴ Civil Appeal No. 2562 of 2006 [Arising out of S.L.P. (C) No. 18611 of 2004] and Civil Appeal No. 2564 of 2006 [Arising out of S.L.P. (C) No. 21340 of 2004]

⁵ CA 171/03 of 17 June 2004

⁶ 552 U.S. 576, 581–84 (2008),

arbitration awards are exclusive and may not be supplemented by an agreement of the parties. This decision has by far established that, in the U.S., parties could not deprive the federal courts of their statutory and common law authority to review both the substance of the awards and the arbitral process for compliance with FAA § 10.

The Republic of Singapore, in the year 2011 while considering draft amendments to the International Arbitration Act, in its consultation paper⁷ considered including the possibility of waiver by parties to set aside the award. However, in the latest amendment to the Act, the provision was not included.

Pertinently, although the UNCITRAL Model Law is silent on express waivers, the UNCITRAL Arbitration Rules, in its Annexure, mentions the inclusion of a possible waiver statement in its guidelines on drafting model arbitration clauses for contracts. The guidelines provide as follows:

“Possible waiver statement

Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.”

Most jurisdictions allowing exclusion agreements, do so on the condition that the exclusion clause is clear and unambiguous. Hence, much attention shall be given while drafting waiver clauses in the agreements.

(Footnotes)

⁷ <https://www.mlaw.gov.sg/content/dam/minlaw/corp/assets/documents/linkclickf651.pdf>



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With a view to promote and support students in developing the qualities of legal research and presentation, IIAM is providing opportunity to law students to publish original, innovative and thought provoking articles on arbitration, mediation, conciliation, dispute resolution and similar topics and critiques on judgments relating to the same topics. Selected articles will be published in the “Indian Arbitrator”. From amongst the submitted articles, every year one student author will receive the “Best Young Author” certificate from IIAM.

Looking at institutional arbitration, Article 35(6) of the ICC Rules (2017) provides that: “[...] By submitting the dispute to arbitration under the Rules, the parties [...] shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” Article 26(8) of the LCIA Rules, 2014 contains such a waiver for “appeal, review or recourse” so far it is not prohibited under any applicable law. Further, Article 32.11 of the SIAC Rules provide that – “The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.” Whether a general reference to LCIA, SIAC or ICC rules could be sufficient for an ‘express waiver’ clause, is something still unclear.

Most European Countries have included express provisions in their statutes recognising the rights of non-domiciled parties to set aside an award. Article 1718 of the 2013 Belgian Judicial Code, Article 1522 of the 2011 French Civil Code of Procedure; Article 192 of the 1987 Swiss Private International Law Act and various other countries⁸ expressly provide that parties to an arbitration can waive their right to set aside, or take any recourse, against an arbitral award. Section 69 of the UK Arbitration Act provides that parties can waive their right to appeal against an award on merits. However, a question that still remains unclear is whether parties can, by such an agreement, exclude judicial review of an award on the basis of public policy.

In *State of Croatia vs. MOL Hungarian Oil and Gas Plc.*⁹, the Swiss Supreme Court, while interpreting Article 192(1) of the PILA, held that the parties had validly waived their right to challenge an international arbitral tribunal's award in their arbitration agreement. Specifically, the Swiss Supreme Court held that the arbitration clause's provision that “[t]here shall be no appeal to any court from awards rendered hereunder” constituted a valid waiver of the right to seek set-aside of the award. The Court rejected Croatia's argument that the waiver was limited to full-blown appeals, rather than actions to set aside or annul an arbitral award.

The application of Article 192(1) PILA (Arbitration Act of Switzerland) in sports matters has been criticized, in particular because it discriminates between Swiss and foreign athletes and because professional athletes often have to subscribe such exclusion agreements as a precondition for participating in their sport¹⁰.

In a recent decision of *Tabbane vs. Switzerland*¹¹, the European Court of Human Rights (ECtHR) confirmed for the first time that such provisions, which allow parties to waive their right to challenge an international arbitral award, are not, as such, incompatible with Article 6 (1) of the European Convention on Human Rights. This decision has provided much needed clarity on the validity of express waivers in the European Union. Interestingly, what still remains to be unclear is whether there can be a waiver to set aside an interim award.

While the Canadian jurisprudence has been rather dynamic on the subject, with the decision of *Popack v. Lipszyc*¹², the Ontario Court had held that parties cannot waive their right to set aside an award distinguishing its earlier decision in *Noble China Inc. v. Lei*¹³.

(Footnotes)

⁸ Article 36 of the 2006 Panama Legislative Decree; Article 63(8) of the Peruvian 2008 Legislative Arbitration Decree; Article 51 of the 1999 Swedish Arbitration Act; article 78(6) of the 1993 Tunisian Arbitration Code

⁹ ICSID Case No. ARB/13/32

¹⁰ Kaufmann-Kohler and Rigozzi (n 42) no 766, 319

¹¹ *Tabbane vs. Switzerland* Application No. 41069/12

¹² 2015 CarswellOnt 8001, 2015 ONSC 3460

¹³ (1998), 42 O.R. (3d) 69 (Ont. Gen. Div. [Commercial List])

However, more recently, in the decision of *Newfoundland and Labrador v ExxonMobil Canada Properties*¹⁴ the Supreme Court of Newfoundland and Labrador held that the parties had legally contracted out of the act, narrowing the circumstances in which a court could set aside an arbitral award. The decision emphasises party autonomy and confirms that *sophisticated* parties can craft a dispute resolution process that deviates from the strictures of provincial and federal legislation, as long as the agreed process does not unduly infringe on the courts' inherent jurisdiction and provides for a process that protects the principles of fundamental justice. What is meant by the term 'sophisticated' may give rise to further debate.

It is a common observation that in all cases/ statutes permitting express waiver of the right of parties to set aside an award, the exclusion agreements in question have been entered into prior to commencement of arbitration or as part of the arbitration agreement itself. A question that arises is whether the parties can waive their right to set aside an award post the commencement of the arbitration and before the delivery of the award, and if so till what stage.

The answer to the question whether can or should the parties waive their right to set aside an award may depend on a number of factors. But the larger question would be, that what would be the effect of such an agreement, even it is upheld by the concerned jurisdiction in which it is invoked. So, say for example, two non-domiciled parties enter into an agreement to waive their right to set aside an award made in Switzerland; this agreement may well be upheld in a country like Switzerland; However, had the enforcement to take place in a country like the U.S or India, the U.S or Indian Court might be well within their power, under the New York Convention, to refuse the enforcement of the award under their respective statutes.

(Footnotes)

¹⁴ Newfoundland and Labrador v ExxonMobil Canada Properties, 2017 CanLII 56724 (NL SCTD)



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Albert Jan van den Berg, in the Article “Should the Setting Aside of the Arbitral Award be Abolished” ICSID Review Advance Access published on April 14, 2014¹⁵ rightly observes-

“Setting aside originates as a mirror action to the enforcement of an award; it is a ground for refusal of enforcement of foreign awards; and the grounds are fairly similar. However, it is not as simple as it seems. Complications have arisen because of the field of application of the New York Convention.”

If the award has not been set aside in the country of origin, it can still be denied enforcement in other countries and lead to conflicting decisions. This has also been illustrated in the case of *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan*¹⁶, which involved a double review.

One may also consider the misuse of such agreements by fraudulent parties. The possibility of exclusion agreements opening the floodgates for collusive proceedings, corruption and coordinated fraud cannot be overlooked.

In the authors' view a waiver of the right to set aside an award would be effective and advisable to parties only in case a) the parties are fairly confident that the Arbitral Tribunal would come to a fair and unbiased decision and will not be swayed by unethical means; b) the award is made in the jurisdictions that uphold such waiver as discussed above; c) the waiver is clear and unambiguous and d) the local law of the countries where the award is likely to be enforced give due regard to award having become final by way of the remedy for setting aside having been exhausted and provide for grounds for enforcement that are liberal. Only on the communion of these three conditions is it viable for parties to enter into any exclusion agreement.

In light of the discussion above, there is perhaps an urgent need for robust International Policy to bring more clarity and uniformity in International Commercial Arbitrations.

(Footnotes)

¹⁵ ICSID Review, (2014), pp. 1–26 doi:10.1093/icsidreview/sit053

¹⁶ *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

AUTHOR:

Sugyata Choudhary is an Advocate & Solicitor practicing at the High Court of Bombay, India.



Wrong is Wrong
Even if everyone is doing it
Right is Right
Even if no one is doing it

Out of the Box



THINK ABOUT IT...

Once upon a time a boy was watching his grandmother writing a letter. At one point, he asked, "Are you writing a story about what we have done? Is it a story about me?" His grandmother stopped writing her letter and said to her grandson, "I am writing about you actually, but more important than the words is the pencil that I am using. I hope you will be like this pencil when you grow up." Intrigued, the boy looked at the pencil. It didn't seem special.

"But it's like any other pencil I've seen," he said. "That depends on how you look at things," the grandmother replied. "This pencil has five qualities which, if you manage to hang on to them, will make you a person who is always at peace with the world.

First quality: You are capable of great things, but you must never forget that there is a hand guiding your steps. We call that hand - God. God always guides us according to His will.

Second quality: Now and then, I have to stop writing and use a sharpener. That makes the pencil suffer a little, but afterwards, it's much sharper. So you, too, must learn to bear certain pains and sorrows, because they will make you a better person.

Third quality: The pencil always allows us to use an eraser to rub out mistakes. This means that correcting something that we did is not necessarily a bad thing; it helps to keep us on the road to justice.

Fourth quality: What really matters in a pencil is not its wooden exterior, but the graphite inside. So always pay attention to what is happening inside you.

Fifth quality: It always leaves a mark. In just the same way, you should know that everything you do in life will leave a mark, so try to be conscious of that in your every action...



A woman comes home from shopping, changes her dress and enters the bedroom. There she finds her husband hanging motionless. Looking at the lifeless husband, she hysterically bursts into tears, rushes to the phone, calls on the doctor and a police officer and goes with them for late night movie show.

What's happening?

**Brain
Teasers**

[Answer at Page 25]

Once upon a time there was a king who wanted to go fishing. He called the royal weather forecaster and inquired as to the weather forecast for the next few hours. The weatherman assured him that there was no chance of rain in the coming days.



So the king went fishing with his wife, the queen.

On the way he met a farmer on his donkey. Upon seeing the king the farmer said, "Your Majesty, you should return to the palace at once because in just a short time I expect a huge amount of rain to fall in this area".

The king was polite and considerate, he replied: "I hold the palace meteorologist in high regard. He is an extensively educated and experienced professional, and I pay him very high wages. He gave me a very different forecast. I trust him and I will continue on my way." So they did.

However, a short time later torrential rain fell from the sky. The King and Queen were totally soaked and their entourage chuckled upon seeing them in such a pitiful condition.

Furious, the king returned to the palace and gave the order to fire the weatherman at once! Then he summoned the farmer and offered him the prestigious and high paying role of royal forecaster.

The farmer said, "Your Majesty, I do not know anything about forecasting. I get my information from my donkey. If I see my donkey's ears drooping, it means with certainty that it will rain." So instead, the King hired the donkey on the spot.

And thus began the ancient-old practice of hiring asses to work in the government and occupy its highest and most influential positions...

Importance of ADR in National Construction Industry

ABHISHEK RAY

In construction industry disputes are growing proportionately with the extended scopes of job & complex engineering. Importance of ADR personals at construction project site and awareness of ADR to management during contractual agreement in construction industry is mandatory because all these disputes can be mitigated.

Foreword

At present in national construction industry disputes are growing proportionately with the extended scopes of job & complex engineering. Reasons behind this crisis are respectively Modification of Corporate business strategy and lagging in risk management in terms of Contract administration, Supply Chain & Quality Management. Besides, today in construction world stand alone wings & departments are available with few companies for ADR but none of them are directly connected to live operation within the process. Even managements of almost all the construction giants take dispute as “Cure is better than prevention”.

Now ,the below mentioned cases are too uncomplicated to get resolved effortlessly for the fraternity of lawyers & ADR Professionals but trust for mishandling of these issues number of projects are getting closed in a half-done state in a unsettled way which I personally feel as a national waste.

Contract Administration

Starting from tender document followed by LOI, work order, purchase order in each & every contract with number of parties should conclude with a distinct ADR clause which can guide stakeholder either the way towards ‘Mediation’.

Sudden reduction in project scope after tender award. In the field of Civil engineering & Construction projects, resource mobilization is almost 30% value minimum to a project cost. So almost all the cases

contractors are very calculative on resource mobilization. Practically for this scenario we are running in shortage of ADR protocol agreed by both the party in many cases.

Let me quote a very common scenario for few disputes with the same symptom.

Example 1 - Customer had awarded a residential project of G+12 /10 numbers of towers to the principal contractor. Project team along with necessary setup of machineries & equipment is on board from principal contractor's end. Now after three month from the date of Project kick off meeting due to shortage of cash flow from customer, scope had been reduced to G+8/ 6 numbers.

Quality Management

Airports, Stadiums, Buildings & Factories are having number of defective cases on quality issues which lead towards dispute. Activities like waterproofing, flooring, structural repairs & failures are nowadays covered under the protection of Bank Guaranty or Performance Bank Guaranty. Several cases observed, starting from Customer followed by Principal Contractor till to Applicator among these, three parties one of them is left out from the coverage ensured by BG or PBG.

Example 2 - On a completed project after one year of defect liability period during monsoon it is observed that waterproofing had not been done properly at basement or roof. Water dripping & spillage has taken place. Principal contractor had a performance bank guaranty with applicator but BG protection of Customer from Principal contractor is non-existent .Whereas 5 years of technical warranty document is available with customer duly signed off by the engineer in charge of Principal Contractor.



Pledge to Mediate

Recognizing that the empowerment to resolve disputes amicably and voluntarily is an expression of civil maturity, IIAM along with India International ADR Association has formulated "Pledge to Mediate" among companies and organisations as part of promoting best governance and speedy justice. By becoming signatory of the Pledge, you make a public, policy statement indicating your commitment to the promotion of amicable settlement of disputes. The pledge is cost-free and not legally binding. Organisations stand to benefit from various vital outcomes, including Expression of Corporate Governance, Goodwill Generation, etc.



Become a signatory to the "Pledge to Mediate" –For details log on to www.arbitrationindia.org/pledge.html or contact IIAM Director at dir@arbitrationindia.com for details.

Now against any failure of project delivery, instead of defining root cause of failure almost all the big construction companies try to impose the same penalty to their sub-contractor / vendors .Just to ensure their profit margins. Now acceptance of this two parties on debit notes become a conflict in initial & dispute finally.

Example 3 – Project delivery had been delayed for 5 months. Out of which 2 months for natural calamities (Like – Heavy monsoon, flood) as per agreed contractual term between customer & principal contractor, penalty had been imposed to principal contractor for Rs. 5,000,000. During contract finalization principal contractor had not considered natural hindrances and agreed with the terms of customer for delay of every 30 days on project delivery LD amount will be Rs. 1,000,000. Moreover principal contractor had not established any distinct delay protocol with its subcontractors /sub vendors on delay of material delivery or /service. Instead of that same penalty had been imposed to all the sub vendors & subcontractors. Amount had been debited from their final bills. As all these sub vendors & Subcontractors are having valid points to substantiate their two months delay with weather reports so entire scenario lead into a dispute for the non-acceptance of sub vendors/ sub-contractors on debit notes.

Conclusion

Importance of ADR personals at construction project site and awareness of ADR to management during contractual agreement in construction industry is mandatory because all these disputes can be mitigated at root level with the help of proper documentation & communication in a professional way considering calculated strategic risks. Things are changing slowly now, we can expect better shape & importance of ADR in upcoming days on national construction industry.



AUTHOR:
Abhishek Ray is the Asst. Manager (QA/QC) of Exyte Group, India.



PEOPLE'S MEDIATION CENTRES ESTABLISHED BY THE INDIAN INSTITUTE OF ARBITRATION & MEDIATION

People's Mediation Centres (PMC) were officially launched on 14 July 2018, by Mr. Justice Madan B. Lokur, Judge, Supreme Court of India. The function was presided over by Mr. Justice Hrishikesh Roy, Acting Chief Justice, High Court of Kerala. 5 PMCs have started functioning from 17 July 2018 – the "International Justice Day".



(Lighting of the lamp by Mr. Justice Madan B.Lokur, Judge, Supreme Court of India. seen from right: Mr. G. Shrikumar, President IIADRA, Mr. Justice Hrishikesh Roy, Acting Chief Justice, High Court of Kerala, Mr. Anil Xavier, President IIAM, Prof (Dr) N.R. Madhava Menon, Former Director, National Judicial Academy, Mr. K. Jayan, Director IIAM.)

As per the concept, people who believe that mediation would promote peaceful co-existence and harmony in the community and help to make the society just, equal and fair, would sign a “*Pledge to Mediate*”, by which they would consider mediation as the first option to resolve their disputes. Once a fixed number of people in the locality sign the Pledge, a PMC is opened in their locality, which would provide people the space for resolving their conflicts. The mediators are also selected from the community.



On the occasion of launching the PMCs, “*Pledge to Mediate*” was signed by Mr. Justice Madan Lokur, Mr. Justice Hrishikesh Roy, Prof (Dr.) N.R. Madhava Menon and Mr. Justice M.R. Hariharan Nair. More than 25000 people have signed the Pledge.

TIME BANKING ACCOUNT COMMENCED BY I IAM THROUGH PMCS

IIAM has incorporated the concept of Time Banking in its services through the PMCs. The PMC Time Banking is a reciprocity-based service system in which hours are credited in the Time Account of the holder.

A person can sign the Pledge to Mediate and open the PMC Time Banking Account and mention the services that they would like to offer under this concept. They can redeem the time accumulated in their account for availing mediation or any other services offered through the PMCs free. Further details can be obtained from www.arbitrationindia.org/pmc_time.html



ARBITRATION COUNCIL TO BE SET UP IN INDIA

The government of India plans to set up an Arbitration Council of India which would frame policies governing the grading of arbitral institutions, recognise professional institutes providing accreditation of arbitrators, review the grading of arbitral institutions and arbitrators etc.

For the purpose of setting up the Council and also for making certain changes for improving the process of arbitration, the Arbitration and Conciliation (Amendment) Bill, 2018 was passed by the Parliament on 10 August 2018. The Bill is yet to come into force, as the same has not been published in the official gazette. This change is perceived to make a shift in the arbitration culture of India from ad-hoc to institutional.

PRE-LITIGATION MEDIATION IN COMMERCIAL DISPUTES MADE MANDATORY IN INDIA

In order to facilitate settlements of commercial disputes, the Commercial Courts Act, 2015 was amended on 21 August 2018 and a new Chapter has been inserted whereby no suits under the Act shall be instituted unless the party exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules. The settlement arrived at shall have the same status and effect as if it is an arbitral award on agreed terms under the Arbitration and Conciliation Act, 1996.

IIAM IN SUPPORT OF DISASTER RELIEF

State of Kerala in India was hit by a natural calamity of huge intensity. The calamity has caused immeasurable misery and devastation to a vast population. More than 3 lakhs homes have been destroyed, apart from the loss of more than 300 lives, 10,000 kms of roads, innumerable infrastructure and assets. More than 7.5 lakh people were displaced in relief camps. It is said that it will take 10 years to recover!

The IIAM PMCs in the affected areas were converted as Relief Coordination Centres and the mediators and volunteers associated with the Centres helped and coordinated rehabilitating the affected people back to their homes. IIAM Members, Mediators and Arbitrators all over India and abroad had come forward in contributing to the cause of disaster relief. IIAM had taken up the cause of providing books free to the Students under CBSE syllabus, who had lost it in the Flood affected areas.

Brain Teaser (Answer):

Her Husband died long back. She looked at her husband's photo hanging to the wall and wept. Later she rang up to her sister who is a doctor and her brother who is a police officer and went to the movie to overcome her sorrowful mood.

AMA CONFERENCE 2018 | 24-25 OCTOBER 2018, JAKARTA



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Asian Mediation Association (AMA) a regional organization established in 2007 by major mediation Centers in Asia, aiming to promote application of mediation and alternative dispute resolution and properly resolve business and commercial disputes, conducts biennial conferences attended by the Who's Who in mediation from around the globe. This is unique in that it represents an unprecedented grouping of mediation centres in Asia, combining the resources of a diverse blend of Asian cultures, which brings together the leading mediation centres in Asia – from Singapore, Malaysia, India, Hong Kong, China, Japan, Indonesia, Thailand, Philippines and Mongolia. The earlier conferences were held in Singapore (2009), Kuala Lumpur (2011), Hong Kong (2014) and China (2016).

The 5th AMA Conference is being held from 24-25 October 2018 at Jakarta, Indonesia. The conference offers the opportunity to knowing the latest trends in mediation and to expand your mediation network by meeting the experts in mediation. For more details log on to <https://asian-mediationassociation.org/ama/>. IIAM is an AMA member and if you wish to register for the AMA conference, send your query to conferences@arbitrationindia.com



COMMERCIAL MEDIATION TRAINING PROGRAM & CERTIFICATE IN INTERNATIONAL BUSINESS NEGOTIATION 8-12 OCTOBER 2018

Are you interested to become a Commercial Mediator or a specialist Dispute Resolution Practitioner? With the rise in the volume of business, dispute resolutions and enforcement have also increased. Mediation has become an undeniable part of the legal landscape. Domestic and international business community is increasingly incorporating mediation as the primary method of dispute resolution. The training program combines the art and science of mediation through highly interactive, skill-based

courses in negotiation and mediation. The program will enhance the understanding and ability to negotiate and resolve conflicts, as well as provide a solid foundation in the processes and to serve as a negotiator and mediator. The training will cover the basic foundations for effective deal-making negotiations, understanding the bargaining style, setting goals in negotiation, understanding shadow negotiation, nurturing relationships critical to negotiation success, and maximizing leverage to conclude a deal. The training will also explore underlying negotiation orientations and strategies and how they are confronted and employed by mediators.

The program provide participants with the opportunity to practice this structured dispute resolution process through a series of interactive presentations, role play simulations, real life case studies and discussion groups. This unique program offers you the flexibility of undertaking the training in 3 different options and getting 2 certificates!

As per IIAM Mediator Accreditation System, a participant having successfully completed Mediation Training Program is categorised as a Grade B Mediator and will be eligible for empanelment as IIAM Mediator. The program will be for 40 hours | 5 days, during 8-12 October, 2018 (Monday to Friday) at Cochin, Kerala, India. You can join for two days and opt for the Certificate in International Business Negotiation, during 8-9 October, 2018. For further details log on to www.arbitrationindia.org/events.html

PROFESSIONAL CERTIFICATE IN COMMERCIAL ARBITRATION - OCTOBER 2018

The course offers the participants to know the underlying theory of arbitration law and practice, with emphasis on drafting of arbitration clauses and agreements, awards, procedure of arbitration, important case laws, ethical issues and institutional arbitration methods. The program will also look at the art of drafting dispute resolution clauses appropriate to the parties' business needs and dispute resolution desires. The program will provide a solid foundation in ADR processes and to serve as ADR practitioners and neutrals. After successful completion, the participant will be eligible for empanelment as an IIAM Arbitrator, subject to the norms of enlistment. The program will be for 15 hours conducted in 2 days, during October 2018 at Cochin, Kerala, India. For further details log on to www.arbitrationindia.org/htm/events.html

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is an ongoing distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment. You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded.

For further details log on to www.arbitrationindia.org/cdm.html. For Testimonials of earlier participants visit www.arbitrationindia.com/testimonials.html