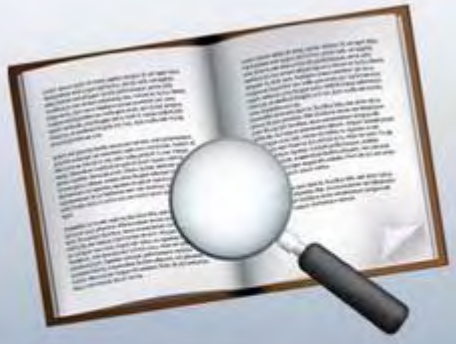
Volume 5, Issue 2, February 2013

THE Indian arbitrator
THE INDIAN ARBITRATOR

NEWS MAGAZINE OF THE INDIAN INSTITUTE OF ARBITRATION & MEDIATION



IN THIS ISSUE .....

EDITOR'S NOTE

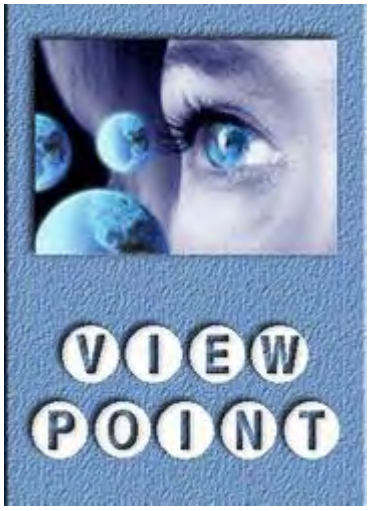
According to a recent report by the Supreme Court supported National Court Management System (NCMS), in India with a population of 1.22 Billion and 19,000 judges, there is a pendency of 3 crore cases, resulting in a civil case lasting for nearly 15 years. As per their "most conservative estimate" even with an increase of judge strength to 75,000 by 2040, the pendency will be 15 crores by then. When the study report by the Ministry of Law, Govt. of India reveals that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts, things doesn't look bright. Any further reason required to support and advice ADR?

PUBLISHER: Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin 682 036, India
www.arbitrationindia.org | Tel: +91 484 4017731 / 6570101

For previous editions of The Indian Arbitrator, log on to http://www.arbitrationindia.com/htm/publications.htm

REPLY FROM SANTA CLAUS TO THE MEDIATOR

PAUL RANDOLF



Santa Claus responds to Professor Joel Lee's letter, published in the previous edition, advocating that a far better gift to bestow would be one of an understanding amongst Government Ministers that some Government intervention is required to turn the tide of litigants from the courts and direct them towards mediation.

AUTHOR: MR. PAUL RANDOLPH IS A BARRISTER, EXPERIENCED MEDIATOR, AND COURSE LEADER ON A MEDIATION TRAINING COURSE AT REGENT'S COLLEGE LONDON UK. HE HAS ALSO CO WRITTEN A BOOK ON THE PSYCHOLOGICAL ASPECTS OF MEDIATION.

Dear Joel,

Thank you so much for your kind letter and good wishes. They are much appreciated up here in the cold.

You have asked me for three gifts:

- The gift of perspective and understanding, so that parties will be better able to put themselves in the other party's shoes and see it from their point of view,

- The gift of empathy and connection, so that they will be able to reconnect as human beings to solve their mutual problem, and

- The gift of forgiveness and healing, so that they can move on with their lives.

I'm afraid I have to tell you that I have already given out all these gifts many times in the past. The trouble is that when parties are in conflict, these gifts just fly out of the window, and parties behave quite differently.

I have seen senior executives and CEO's of major corporations, who normally exhibit great perspective and understanding in their daily commercial transactions, behave totally un-commercially and illogically when in dispute with others. I have watched whilst you lawyers tell them that they have a weak case and they should drop the claim: what do they reply? "I don't care; I want to sue the bastards!" And when you tell them: "But even if you win, they will just go into liquidation, and you won't get your money", they say: "I don't care; I want to sue the bastards!"

You see, Joel, the problem is emotions. You are amongst an emotional species that are not programmed to compromise or forgive; you are programmed to win—and in winning you want to see blood on the walls! You have an innate aggression which serves you well as a survival mechanism, but when you are in dispute, you have no wish to 'connect'; you do not have the slightest desire to empathise, and you are obsessed with looking backwards at what happened in the past. You no longer act rationally or think commercially; instead you are driven by an emotional craving to triumph over and utterly crush your opponent.

The biological explanation for such behaviour is the Amygdala, a small part of your brain that controls your “automatic” emotional responses, and your “ûght or ûight” reûex. When you are in dispute with another, the Amygdala reacts to the threat of attack by initiating a reaction within the brain which overrides the neo-cortex (the “rational” thinking part) and physically prevents you from applying analysis or reason or logic. It is often called an “Amygdala Hijack” because of the way in which it seems completely to take over the brain. In present day terms of course, for your clients, the attack is not necessarily a physical attack, but rather a personal attack upon their values and integrity. I can see that for your clients, as a lawyer, an allegation of negligence or breach of contract against a client is deeply penetrating and wounding, and can readily precipitate an Amygdala Hijack.

So Joel, I would propose to bestow a different gift, and I would like to bestow it upon Government Ministers: it is one of understanding that an element of compulsion is necessary in order to make parties mediate. It seems clear to me that without such compulsion, parties will always prefer the litigation route. Litigation provides them with an opportunity to secure the three elements that they desire most:

- Complete victory and vindication – proof that they were right,
- Public humiliation of their enemy, when they are shown up to be in totally the wrong, and
- Damages – i.e. money and lots of it!

Mediation cannot compete with this, so it is not a level playing field. I would like to do something Joel, to level it out a little.

In the current economic environment it is a commercial imperative for government to ensure that no sector squanders its much- needed funds on unnecessary destructive litigation.

The best gift I could give, therefore, is one of some robust government intervention, making it virtually impossible to litigate without first considering mediation. In this way you would be able to see mediation taking its rightful place, alongside the courts, as the first choice for conflict resolution – and you as a mediator would be overwhelmed with work on mediation cases!

How does that grab you, Joel? If you agree, I can get the elves immediately to load up Rudolph with this gift, and start delivering it to as many Government Ministers as possible.

With all best wishes for a prosperous mediation-filled New Year!

Santa.

INTERESTED TO CONTRIBUTE ARTICLES ?

We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

Publication of the Article will be the discretion of IIAM and submissions made indicates that the author consents, in the event of publication, to automatically transfer this one time use to publish the copyrighted material to the publisher of the IIAM Journal.

CHALLENGES TO THE JURISDICTION OF ARBITRAL TRIBUNAL - II

AMIT KUMAR PATHAK

Section 16(1) of the Arbitration & Conciliation Act dealing with the power of the Arbitral Tribunal in deciding its own jurisdiction integrates the doctrines of separability and kompetenz-2, which reinforce the autonomy of the arbitral process. The exercise of court-like powers by the arbitral tribunal discourages dilatory tactics. The author analyses the provision wherein the legislature has tried to protect and preserve the jurisdictional authority of tribunal and party autonomy. may also overweigh the losses of keeping mediators liable in civil suit. Part 2 of the article.

AUTHOR: AMIT KUMAR PATHAK IS A FIRST YEAR LL.M STUDENT OF DR. RAM MANOHAR LOHIYA NATIONAL LAW UNIVERSITY, LUCKNOW, INDIA

Challenge to Jurisdiction

Section 12 of the Act provides guidelines for the arbitrator as well as grounds for the challenge of arbitrator, it reads as follows:

"Grounds for challenge – (1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if –

(a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

Thus it is not a dead letter for the purpose of rescue of the party at loss. This is made clear by recent judgment of the Supreme Court in *Vijay Kumar Sharma @ Manju v. Raghunandan Sharma @ Baburam & Ors.*[1] The fact of this case clearly shows that during the proceedings, when

(Footnotes)
[1] (2010) 2 SCC486

the allegation of bias was made Mr. Bhandari the arbitrator withdrew himself from the arbitrator. Where at the same time sec. 12(2) the duty of the arbitrator to disclose material facts to the parties in writing any circumstances which are likely to create justifiable doubts as to the integrity and impartiality of the arbitrator.

1. On Ground of Bias of Arbitrator

Once proved that the arbitrator is biased the court will hold the award void but the violation of natural justice depends upon the facts and circumstances of each case, it depends upon the subject-matter of dispute, nature of enquiry etc.[2] Though it will be wrong to say that the issue is tilted towards one direction and no protection is granted in the Act of 1996 to the person who is likely to suffer from 'bias'.

In the case of *PT Reasuransi Umum Indonesia v. Evanston Insurance Co.*[3] the court held that "partiality will be found where 'a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration'. Generally partiality requires a personal interest on the part of the arbitrator which might cause him to be biased.[4]

The genesis of 'interested 'person' that leads to automatic disqualification on the basis of pecuniary and personal interests is the landmark decision of Supreme court in *A. K. Kraipak v. Union of India*[5]. The central government constituted a special selection board for selecting persons in the senior scale as well as the junior scale from those serving in the Forest Department of the State of J & K. This board included a person one Mr. A, who was also one of the candidates seeking to be selected to the All India Forest Service. Although he did not sit in the selection Board at the time when his name was considered for selection, yet he did sit and participate in the deliberations of the board when the names of his rival candidates for the same post were considered for selection. The Supreme Court struck down the selection with the observations that under the circumstances it was improper to include Mr. A as a member of the board because he was one of the persons to be considered for selection[6].

(Footnotes)
[2] K.L Tripathi v. State Bank of India (1984) 1 SCC 43.
[3] (1993) 8 In
[4] Supra 3.
[5] AIR 1970 SC 150.
[6] Supra 3 at p. 703.

BEST COMPLIMENTS

Compliments help. We are all human flesh. They help to keep you encouraged. Anyone who says differently isn't really being honest with themselves. There is the danger of excessive pride from excessive compliments, but they do help keep you encouraged.

The vast majority of compliments we forget. They brighten your spirit for an instant then fade. But the honest compliments will be remembered forever.

If you have something nice to say to someone, say it. Say it now. Say it while both of you are on this earth. You never know what effect your kind words will have, and you may not get a chance to have your words spoken once you leave.

We all need encouragement, all of us. Words that you speak and actions that you perform often live on long after you have left this earth.

Bihar State Mineral Development, Corp. v. Encon Builders (I) Pvt. Ltd[7]*,* while referring to Russell on Arbitration, stated: "A distinction is made between actual bias and apparent bias. Actual bias is rarely established but clearly provides grounds for removal. Moreover, there is a suspicion of bias, which has been variously described as apparent or unconscious or imputed bias. In such majority of cases it is often emphasized that the challenger does not go so far as to suggest the arbitrator is actually biased, rather some form of some objective apprehension of bias exists"*.*

According to the Law Commission of India 176th report[8] on the Act of 1996: "It has also been pointed out that where the arbitrator rejects objections relating pleas of bias or disqualification under Sec. 13 or objections as to jurisdiction under Sec.16 by way of interim decision, no immediate right of appeal is provided as in Art.13 or Art.16 of the Model Law and parties have to go ahead with the arbitration proceedings till the award is made. This may involve them in waste of money by way of fees to arbitrators and lawyers. This again is a deviation from the Model Law. Even after the award, the objection relating to rejection of a plea of bias or jurisdiction is not included in the list of grounds specified under Sec. 34." It is pertinent to mention here that in case of *Progressive carrier Academy Pvt. Ltd. & Anr. V. FIITJEE Ltd & Others*[9]*,* the court transferred the matter to the larger bench and observed: "On the applicability of Section 14 under the circumstances where bias is alleged against the Arbitrator and the Arbitrator refuses to recuse himself holding that he was not biased, there is conflicting opinion of the different benches of this Court. In *Newton Engineering and Chemicals Ltd. v. Indian Oil Corporation Ltd. & Ors.* 136 (2007) DLT 73 (decided by Reva Khetrapal, J. on 8.11.2006) this Court held that a conjoint reading of Sections 11, 12, 13, 14, 15 & 16 of Arbitration & Conciliation Act, 1996 implies that Section 13 of the Act visualizes a 'Challenge Procedure' where the mandate of the Arbitrator is challenged by one of the parties to the arbitration whereas Section 14 of the Act deals with failure or impossibility of the Arbitrator to act on account of other circumstances such as his inability to perform its functions on account of death, resignation etc. The Court observed that unless the Arbitrator withdraws himself from the office under Section 13(3) of the Arbitration & Conciliation Act, 1996 the Court cannot entertain a petition under Section 14 and terminate the mandate of the Arbitrator and appoint another Arbitrator.

The view has been given by another bench in *National Highways Authority of India v. K.K.Sarin & Ors.*[10] wherein Court observed that a party alleging bias is required to first follow the procedure in Section 12 and 13 and if unsuccessful, has choice of either waiting till stage of Section 34 or he feels that the bias can be summarily established or shown to the Court, can approach the Court immediately under Section 14, seeking removal of the Arbitrator. Considering the conflicting views in the above judgments and in some more judgments, I consider that the matter should be referred to a larger bench of this Court for setting at rest the legal controversy. The matter be placed before Hon'ble the Chief Justice by the Registry for referring it to a larger bench."

This clearly shows that in such cases even the court is not clear as to the application of the Act.

Doctrine of Competence – competence ("kompetenz–kompetenz-")

In German, it is referred to as the concept of "kompetenz–kompetenz". It is called "competence sur la competence" in French. Kompetenz-kompetenz means an arbitral tribunal is allowed to make a decision on whether it has jurisdiction over an issue that needs to be settled and whether an arbitration agreement is valid. In line with the principle of kompetenz-kompetenz, validity or expiry of an agreement that includes an arbitration clause does not necessarily mean that an arbitration agreement is invalid or has expired[11].

(Footnotes)

[7] MANU/SC/0611/2003 available at www.manupatra.com

[8] Available at http://lawcommissionofindia.nic.in/arb.pdf last visited on 30th April 2010.

[9] See MANU/DE/3049/2009 available at www.manupatra.com

[10] 159 (2009) DLT 314

[11] http://socyberty.com/law/doctrine-of-competence-competence-of-international-commercial-arbitration/

This is the principle that an arbitral tribunal has the jurisdiction to determine its own jurisdiction. It is generally accepted in modern international arbitration practice. It is a method of overcoming the latent problem that would have occurred where a tribunal decides preliminary that the arbitration agreement for example is invalid. The resultant effect would have been that the arbitral tribunal itself lacks the authority to make that finding. The principle gives the tribunal the legal standing to set proceedings in motion when faced with an objection raised by an uncooperative respondent.[12]

There is the knotty issue as to whether it is the court that should have the primary role of deciding the existence of an arbitration agreement or whether the question should be left to the tribunal. The common approach however is that the arbitral tribunal should be given the first say subject to possible court review. Competence-competence principle has been incorporated into the laws of many countries and international arbitral institutions. Article 36(6) of the Statute of International Court of Justice confers on the ICJ powers to rule on its own jurisdiction. The ICSID Convention, UNCITRAL Model Law, the English Arbitration Act and the ICC Arbitration rules also contain similar provisions. The ICC rules however provide for a two-stage approach. First, the ICC Arbitration Court must first prima facie satisfy itself of the existence of the arbitration agreement. If satisfied, it would refer the matter to the arbitral tribunal which would at the second stage, determine the issue of its jurisdiction.[13]

The power of the doctrine of competence/competence however is limited by the jurisdiction of the concerned national court which is vested the supreme authority to determine jurisdictional questions. If certain party/ies oppose the jurisdiction of the arbitral tribunal, it is necessary to declare its formal objection immediately. The Arbitration Rules specifically states that such objections “be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.” This rule may suggest that the right to object is no longer available after this particular phase in the trial procedures but its implications on whether right has been waived will rely on the relevant national law. In such cases when a party fully knows that the Arbitration Rules have not been observed strictly and still fails to oppose immediately to the non-compliance, is considered to have relinquish its right to oppose.[14]

(Footnotes)

[12] Ibid

[13] Ibid

[14] http://socyberty.com/law/doctrine-of-competence-competence-of-international-commercial-arbitration/ last visit 27 Feb 2011

Doctrine of Separability

The separability doctrine is another way of giving effect to the arbitral process. It is said that "while competence-competence empowers the arbitration tribunal to decide its own jurisdiction, separability affects the outcome of this decision." The principle traditionally gives the arbitral tribunal power to separate the arbitration agreement from the main contract where it is contained. This is to enable the tribunal determine a case where one of the parties is challenging its jurisdiction on grounds of invalidity or termination of the arbitration agreement. Other grounds of objection may be that there was no agreement or that parties never concluded the terms of the main contract. An arbitral tribunal faced with such a problem would notionally sever the arbitration agreement from the entire contract and determine the issue notwithstanding the fact that the arbitration agreement is the subject of challenge. Like many arbitration laws, the UNCITRAL Model Law adopted in 1985 expressly provides that an arbitral tribunal shall have the power to determine its own jurisdiction and any objection relating to the existence or validity of the arbitration agreement.[15]

Procedure for Determination of the Arbitrators' Jurisdiction - Art 16(2)

Although arbitrators have authority to rule on their jurisdiction, they cannot do it on their own initiative. A plea as to the lack of jurisdiction has to be submitted by the respondent in due time—under Art.16 (2) not later than the statement of defence. Belated objections regularly cannot be taken into account, as the lack of objection has to be construed as the waiver of the right to object and conclusion of a valid arbitration agreement. Still, the arbitrators have the right to admit the plea if the delay in their submission is considered justified. Under one reported case, it seems that the court held that the plea has to be sufficiently substantiated: an allegation that arbitration agreement does not exist because the party was not successor to the main contract was held to be a substantive defence that precluded later procedural objections as to the jurisdiction.[16]

The courts had an opportunity to evaluate the effect of lack of objections as to the jurisdiction of the tribunal in the arbitral proceedings on subsequent setting aside proceedings. A German court held that a party regularly loses its right to raise the lack or invalidity of the arbitration agreement in the setting aside proceedings if there was no objection to jurisdiction in the arbitral proceedings. As stated by the same court, failure to raise this objection amounts to conclusion of the new arbitration agreement by passive behaviour of the party. This seems to be a generally accepted position, both under MAL Rules and under some national arbitration laws.[17] It seems that there were no controversies regarding the recognition of arbitrators' discretionary powers to decide whether they would rule on jurisdiction in a separate ruling, or in the final award. As to the consequences of such decision, one court held that decision to postpone the ruling on jurisdiction until the final award cannot be attacked, but that in such a case only setting aside proceedings could review whether the arbitrators erred in finding that they are competent to decide.[18]

Conclusion

The arbitration tribunal shall decide any challenge to the very existence or validity of the arbitration agreement in question or decide any objection taken on the ground of lack of its jurisdiction. Any party, including even those who have participated in the appointment of the arbitrator, can take such objection or challenge latest with his defence statement.

(Footnotes)

[15] Park, W., The Arbitrator's Jurisdiction to Determine Jurisdiction, TDM Vol. 6, Issue 1, March 2009 at www.transnational-dispute-management.com p.93.last visit 27 feb 2011

[16] Jurisdiction of the arbitral tribunal: Current Jurisprudence and Problem areas under the UNCITRAL Model Law By Prof. DR. ALAN UZELAC available at http://alanuzelac.from.hr/pubs/B23ALR_jurisdiction_fin.pdf

[17] Supra note 23

[18] Ibid

Any objection that the arbitral tribunal is exceeding its authority must be taken at once during the arbitration proceedings. However, the arbitral tribunal can consider any of the aforesaid preliminary objections, even if delayed, for good reasons. In case such preliminary objection is overruled, the arbitral tribunal shall continue with arbitration and make the award. The aggrieved party can now apply to the court for setting aside the award re agitating the said preliminary objection amongst other grounds of challenge to the award.

PROMOTING STUDENT AUTHORS

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.

A man noticed a woman in the grocery store with a three-year-old girl in her cart.

As they passed the cookie section, the little girl asked for cookies and her mother told her no.

The little girl immediately began to have a conniption fit, and the mother said quietly, "Now Missy, we just have half of the aisles left to go through, don't be upset. It won't be long."

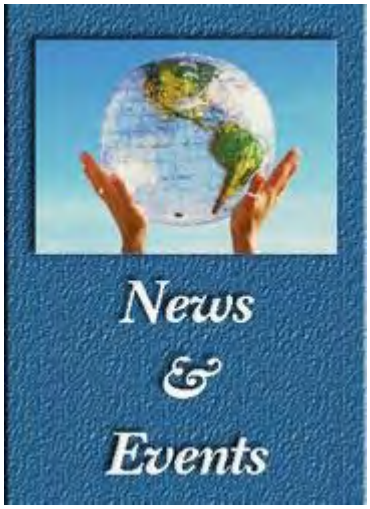
In the candy aisle, the little girl began to shout for treats. When mom said she couldn't have any, she began to kick her mother and scream. The mother said softly, "There, there,
Missy, don't cry, only two more aisles to go and then we'll be checking out."

When they got to the checkout stand, the little brat immediately began to reach for the gum and freaked out when her mom said she couldn't have any. The mother patiently said, "Missy, we'll be through this checkout stand in five minutes and then you can go home and have a bottle and a nice snooze."

The man followed them out to the parking lot and stopped the woman to compliment her. "I couldn't help noticing how patient you were with little Missy," he said.

The mother sighed and replied, "Oh, no, my little girl's name is Francine, I'm Missy".

NEWS & EVENTS



IIAM FORMING INTERNATIONAL NEUTRAL PANEL FOR TRANSNATIONAL DEALS & DISPUTES

With the increase in the volume of transnational trade, investment and business between India and countries in the Asia Pacific and other region and consequential rise in the volume of business disputes, dispute resolutions and enforcement, IIAM is intending to provide international mediation and arbitration service for business groups from India doing trade, business or investment abroad or multinational business groups doing trade, business or investment in India, by creating a panel of professional mediators and arbitrators representing various countries with respective language and cultural background. IIAM International Mediation Services include deal mediations for making efficient business deals and dispute management systems or dispute mediations for amicable and effective dispute resolutions.

With ASEAN extending the free trade pact to include services and investment and the recent inclusion of China and Hong Kong in the list of countries under the New York Convention, it is expected that the use of mediation and arbitration will increase in transnational business.

For more details and empanelment contact dir@arbitrationindia.com

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

CDM is a 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 more details on CDM, mail to training@arbitrationindia.com