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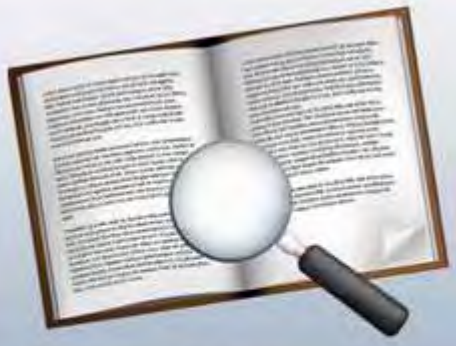

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EDITOR'S NOTE

Someone told me about a fantastic sentence written on Japanese Bus Stops – "Only buses will stop here – Not your time, so keep walking towards your goal". This is also applicable when you face problems or conflicts. Worrying about it or fighting on it will not only help you to find a solution to it, but will also ruin your precious time to do something positive. As an ADR Practitioner, I think we should always welcome the problems, because problems give us dual advice. First, we learn how to solve it and second, we know how to avoid it in future. So happy problems!

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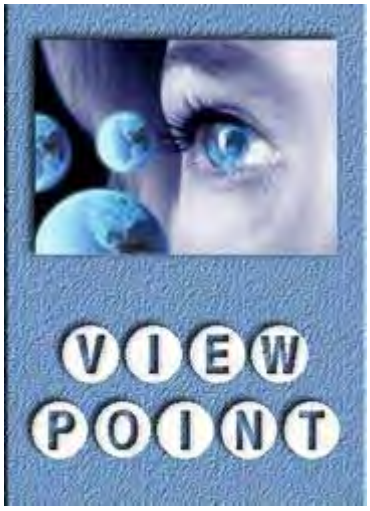
MEDIATION MATTERS: TRAINING MUSLIM MEDIATORS IN AFGHANISTAN

TONY WHATLING



This is a personal perspective from the author about a mediation training that he had conducted for a muslim community in Afghanistan, which had established dispute resolution teams with volunteer-trained mediators who are available to deal with disputes referred from within their particular local faith community group. According to him these people, who had lived through centuries of peaceful conflict resolution faith teachings combined with a tradition of voluntary service to their community, looks at the urgent need to connect faith traditions with contemporary dispute resolution practice.

AUTHOR: TONY WHATLING IS A MEDIATION CONSULTANT AND TRAINER IN THE UNITED KINGDOM

KABUL REVISITED

The flight from Dubai to Afghanistan had taken us over the breathtaking panorama of the majestic snow-capped peaks and deep dark valleys of the Central Highland mountain range, which cover over 160,000 square miles.

It was late October 2011 and as we touched down at Kabul airport I reflected on my last training visit in 2004 and wondered what changes had taken place over that time. The excitement of my return to this wonderful country had been overshadowed by the news that, on that same morning, on the outskirts of Kabul a suicide bomber had taken the lives of thirteen NATO-led International Security Assistance Force (ISAF) troops and eight civilians.

Within three weeks of that dreadful event, many more innocent citizens – men, women and children – were slaughtered by more bombs as they celebrated the joy and excitement of the festival Eid Mubarak, in central Kabul.

Compared to 2004, it was sad to see that Kabul had become a city under siege. Every building of any importance was now hidden from sight and fortified with 20-foot high concrete walls, topped with razor wire. Getting into the hotel from the road took around 10-20 minutes every day as each steel barrier, followed by massive steel gates, allowed only one car at a time to pass through and be examined. They checked underneath the car, the boot and the engine bay. Once out of the car, bags were searched and checked by

sniffer dogs before being put through airport-style scanners. All hotel uniformed guards carried machine guns at the ready with – rather concerningly – twitching fingers. Only main roads were surfaced, but all were inches deep in dust. There were many more cars than last time and driving was all based on a 'he who dares, wins' game of bluff and counter-bluff, with a terrifying lack of regard for the risks involved or for the lives of pedestrians attempting to cross the road.

It was all a stark reminder that, whether the disputes were between warring spouses, angry neighbours, work colleagues or nations, such conflicts would never be resolved by violence. Referring to a much-respected retired general, Britain's former Ambassador to Afghanistan wrote: 'Like most Afghans, he knew that the only answer was reconciliation between all the parties to the conflict. There had to be a new political settlement in which the Taliban, and the tribes and views they represented, were included, not excluded. Trying to defeat the Taliban by military force would never produce lasting peace.'

MEDIATION FOR THE PEOPLE BY THE PEOPLE

Over the past ten years, I have had the great pleasure and privilege of delivering a total of twenty programmes of family and community mediation training in eleven different countries, including Pakistan, India, Syria, Kenya, Portugal, the USA, UK, Canada, Uganda, Tanzania, and Afghanistan.

The training programmes are arranged by one particular Muslim group, which has faith communities in some 23 different countries worldwide. Most of those communities have now established dispute resolution teams, staffed by volunteer-trained mediators who are available to deal with disputes referred from within their particular local faith community group.

And so it was that I was returning to Kabul to train the latest group of carefully selected, newly appointed volunteer mediators from various districts in Afghanistan where this particular faith group has long-established communities.

For many of the 50 or so trainees, the learning challenges they faced were compounded by the physical discomfort of some 3-4 days walking, apart from the occasional luxury of a donkey ride to get to the training venue in Kabul. Much of their route – for example, from the northern mountainous Hindu Kush regions of Badakhshan – consists of little more than rough tracks. Some told of how the path had become closed behind them by ice and snow. Their safe return to loved ones and businesses was, as they put it with a resigned shrug of the shoulders, 'now in the hands of Allah'.

For these people, who had lived through centuries of peaceful conflict resolution faith teachings combined with a tradition of voluntary service to their community, the personal risks involved were far outweighed by an awareness of the urgent need to connect faith traditions with contemporary dispute resolution practice.

NEW LEARNING INEVITABLY GENERATES COMPLEX AND CHALLENGING QUESTIONS

One of the great pleasures of training such groups is the strong level of commitment, attention, and the high value which they attribute to any form of education and training. As a result, their acquisition of knowledge and skills tends to be much accelerated in comparison to their Western counterparts. This is all the more surprising since every sentence has to be translated, in this instance into Farsi.

Sadly, male trainees still outnumber women – one consequence of which is that men have to assume the role of women in role-play. This is always a source of great amusement within a group. In what other circumstances would you find a high-ranking officer from the department of counter-terrorism, a former mayor, a serving army general, judges and farmers, sitting cross-legged on the floor, acting out the role of a distressed divorcing wife?

The influence of the trainer in empowering trainees to stretch their boundaries never ceases to amaze me. To their credit, during the role-play debrief, these men frequently comment about the eye-opening insights they gained from this gender shift experience. Here in Afghanistan, the training and learning challenges are complex, as participants struggle to make sense not only of the knowledge and skills they are gaining, but of the application of these to their non-Western culture and faith traditions.

It is very apparent that they are convinced by, excited about and wanting to apply these new ideas and practices. Yet at the same time there is an inevitable uncertainty and insecurity about the extent to which such practices will be acceptable within their more remote regional communities.

Evidence of this internal struggle becomes clear from the nature of the questions from – and often heated debates between – members of the group. Constant requests for help and advice are made about how to deal with the anticipated resistance to such ‘new ways’ being imported from the West.

This has been a common experience and preoccupation in the training of other groups for example in India, Pakistan, East Africa, Syria and, more recently with a group from Iran, where long-standing cultural traditions of dispute resolution are far more akin to arbitration.

In the more remote regions of these countries, disputes are traditionally referred to wise community leaders and/or groups of respected elders, who have the absolute authority to hear the case and determine the settlement. Regardless of the opinions of the winners or losers of this informal justice system, the judgement will be accepted and respected by all concerned. Consequently, introducing contemporary and non-authoritarian dispute resolution, by party empowerment and negotiation, challenges the authority of the tradition and risks a lack of respect for the authority, and therefore the status of mediators, regardless of Western contemporary beliefs in its efficacy.

Any response to such challenging questions must demonstrate a good level of understanding on the part of the trainer, together with all due respect for cultural and sub-cultural differences and traditions.

Whilst the questions may relate to the anticipated resistance in potential mediation clients, the underlying or ‘meta’ questions are also a reminder that the trainee, too, is a product of that same cultural environment.

The response of a trainer to the trainee's uncertainty and doubts can be seen as a mirror image that reflects the doubts and uncertainties that clients may well bring to them as mediators. Trainers and mediators alike, on perceiving such doubts, must have the professional maturity to be able to steer into such confusion. Instead of trying to avoid it, they should share responsibility for their part in such uncertainty, rather than regarding it as the client's problem. In other words, expressed or perceived doubts from trainees or clients should be encouraged, heard, understood and respected as normal at times of uncertainty and disequilibrium.

IS MEDIATION AN 'IDEA WHOSE TIME HAS COME' FOR AFGHANISTAN?

Having referred earlier to the wise words of the former British Ambassador, I woke today to the news that, on the occasion of President Karzai's meeting with Britain's Prime Minister in London, it was announced that talks had now officially started between mediators and representatives of the Taliban.

My work in Afghanistan is related to one small Muslim faith community that is located within many larger and more complex historical faith, cultural and political systems. The work is a very minor contribution compared to the wider picture in this war-torn country. Nevertheless, there seems little doubt now that mediation and negotiated peace settlements are the only viable alternative, as for example we have witnessed in countries like South Africa. In such entrenched conflicts, we are dealing with highly complex and long-standing disputes involving deeply held values and principles.

WHY THE RIGHTEOUS SUFFER?

Rabbi Dov Ber, known as the Magid of Mezritch, explains with the following parable, why righteous people may at times experience suffering and the wicked may prosper:

A father who wishes to teach his child to walk, in the beginning will walk together with the child and hold his hand. Then he will move away from the child, leaving the child on his own. The child will then take a step toward his father and the father will retreat a bit further so that the child will take a few more steps on his own. The father will repeat this process in order to get the child to walk greater and greater distances.

To the child it may seem that the father is moving away and ignoring him, yet the father does this out of love and care for he knows that the child's growth and development depends on this.

The same is with the righteous people.

At times it may seem that God is ignoring them, yet, in truth as they come closer to God, He will move away so that the righteous person will continuously move closer to Him. Through this process, the righteous person ascends higher and higher spiritually. This is what the Torah means with, "just as a man reproaches his son so the Lord your God chastises you." Deu. 5:8

A person will seldom reprimand someone else's child. The reason and purpose a father chastises his child is out of love for the child for the sake of setting him on the right path and for his spiritual growth.

So too, the tests which God gives us should be taken as proof that He cares for us and considers us His children and His responsibility.

When compared to disputes over substantive issues such as regional boundaries, electoral systems, or numbers of weapons, negotiated settlements will never be achieved by one side changing its position or values. Whilst we may all change and adapt our values as we go through life, we tend not to do that when in dispute. That is a time to stand up for them at all costs, regardless of risk to life and limb. The only way to achieve a resolution to such values disputes is when each side eventually comes to recognise the right of the other side to exist as fellow human beings – albeit having entirely different cultural and faith traditions, values and beliefs. Once that position is established, the respective factions can come together to negotiate practical measures by which they can learn to live side-by-side, regardless of their value differences – as is now happening with the Northern Ireland peace agreement.

Such major international conflicts will not be concluded easily or swiftly, just because peace agreements are signed. In the cases of South Africa and Northern Ireland we may be facing decades of transition and yet, it would seem that once the tipping point is reached, despite attempts by minority groups to disrupt the accord, it is unlikely to revert to former states of all-out warfare.

Despite the marked differences between the advances of one minority Muslim group that I have had the privilege of working with, compared to the enormity of conflict in Afghanistan as a whole, the good news is that the skills and techniques that mediators bring are precisely the same.

Obviously very different procedural steps are needed when we compare spousal disputes with workplace, or commercial contexts with complex multinational conflicts. Nevertheless, the skills and processes of mediation are largely universal. So too are the essential principals that underpin the practice, such as voluntary participation, demonstrable impartiality as to outcome, joint party empowerment, confidentiality and fairness etc. – all of which are explored in more detail in my recently published book, Mediation Skills and Strategies a Practical Guide Jessica Kingsley Publishers.

Political leaders, community elected representatives and diplomats will inevitably take centre stage in such negotiations. Nevertheless we can only hope that they have the wisdom to ensure that highly-skilled, trained and respected mediators are ‘embedded’ at every stage of the process. They must be regarded as integral to the process throughout. Their values, skills and strategies are substantially different from the key stakeholders – and should be respected as such.

My personal view, from experience over the past decade, is that, in terms of cultural credibility, such mediators should ideally be recruited from within the Afghan community and culture rather than imported from the West. It is likely that training will need to be imported initially but it must to be seen to be culturally sensitive to substantial differences between Western Individualist and non-Western Communitarian and Collectivist cultural attitudes to conflict and dispute resolution.

(Originally published in the College of Mediators (UK) Newsletter Issue 10 January 2013)

“Coin Always Makes Sound
But The Currency Notes Are Always Silent.
So When Your Value Increases
Keep Yourself Calm and Silent”

~ Shakespeare ~

THE INDEPENDENCE OF THE ARBITRATION CLAUSE – A JUDICIAL INTERPRETATION

TANYA NAYYAR & SAUMITRA CHATURVEDI

The article analyses the gradually changed outlook on the autonomy and relationship of the arbitration clause with the other terms of the agreement as well as the judicial power exercised by the Chief Justice in appointing the arbitrator. The authors focus on the chronological development of the scope of the arbitration clause and the powers of the Chief Justice by exploring the various judicial decisions of the Supreme Court of India.

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INTRODUCTION

It has been rightly said that, *'It is the spirit and not the form of law that keeps the justice alive'*[1]**.**

Arbitration is a private, informal process by which the parties to a contract agree, in writing, to submit their disputes to one or more impartial persons who will adjudicate and resolve the controversy by rendering a final and binding award. An Arbitration clause is the "gateway" to arbitration, and must be worded very carefully.[2] The authors will be looking at the gradually changed outlook on the autonomy and relationship of the arbitration clause with the other terms of the agreement, as well as the judicial power exercised by the Chief Justice in appointing the arbitrator, through a very recent Supreme Court decision. This decision demonstrates that, where an arbitration clause is incorporated into an agreement, the Courts will strive to uphold the intention of the parties and will make a commercial presumption that the parties wish to have their issues heard altogether in one forum i.e. the arbitral tribunal. Furthermore, it ensures that the Chief Justice or the designated Judge only examines those preliminary issues required for the fruitful appointment of an arbitrator.

Through this comment, it is contended that if any agreement entered into by the parties, is rescinded, terminated or breached and subsequently, the agreement is deemed null and void, the arbitration clause existing in the agreement will survive despite the termination of the underlying agreement. It is argued that this arbitration clause is independent of the main agreement and must be treated as separate agreement collateral to the main agreement. Thus, any

(Footnotes)

[1] Earl Warren, US jurist and politician (1891-1974)

[2] Jagdeep Dhankar, Senior Advocate, Supreme Court of India, *"Party Autonomy and Arbitration Agreement"* available at: http://www.icaindia.co.in/icanet/quaterly-2007/AprilJune2007.pdf (Last accessed on: 25th May, 2013)

infirmity in the agreement will not *ipso facto* invalidate the arbitration clause. Though, this concept is widely known as the doctrine of separability or severability in International Commercial Arbitration, the Indian law regime on domestic arbitration on this concept is highly debated.

The Indian Arbitration and Conciliation Act, 1996 has been drafted on the basis of the UNICTRAL Model Law[3]. The relevant articles of the Model Law dealing with the separability of the arbitration clause are:

> Article 7(1): *"… An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."*
>
> Further, Article 16(1) states: *"The Arbitral Tribunal may rule on its own jurisdiction, including any objections with respect to the existence of validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

Separability being a fundamental principle of the Model Law has been similarly modeled in the Indian Statute. The relevant sections are as follows:

> Section 7(2) reads: *"An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."*
>
> Section 16(1) reads: *"The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose: (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

With this brief case comment, the authors intent to focus on the chronological development of the scope of the arbitration clause incorporated in an agreement and the powers of the Chief Justice under Section 11(6), through judicial decisions. The authors will address the judicial implementation of the position of law, incorporated in the statute, in this regard, through a 2013 landmark Supreme Court judgment of *M/s. Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust & Anr.*[4]

(Footnotes)

[3] UNICTRAL Model Law on International Commercial Arbitration, United Nations, 1994, available at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (Last accessed on: 22nd May, 2013)

[4] 2013 (5) TMI 381

BACKGROUND OF THE CASE

The Ludhiana Improvement Trust ("Trust"), constituted for the planned development of the city of Ludhiana, invited bids with the intention of entering into a Joint-Venture with developers in the private sector. After the evaluation of the bids, M/s. Today Homes and Infrastructure Pvt. Ltd. ("Company") was held to be the highest bidder and a Letter of Intent was issued on 18.05.2005. The Company deposited the Performance Security, and the property was handed over by way of a Concession Agreement. A tripartite agreement was signed between the Trust, Company and HDFC Bank relating to the proportion of deposit in the Joint Escrow Account of the Company and the Trust with the HDFC Bank.

On 12.09.2006, a dispute arose regarding the deposit made into the Escrow Account. The Company negated all allegations put forth by the Trust and stated that all their accounts could be scrutinized and if that did not provide a satisfactory answer, the Trust could refer the dispute to Arbitration. Thereafter, on 14.09.2006, the Trust sent in a letter indicating that it would be appointing an Arbitrator within two days. The Company, immediately, on 15.09.2006, filed an application before the Chief Justice of the Punjab and Haryana High Court under Section 11(6) of the Arbitration & Conciliation Act, 1996. The Trust filed its response to the above Application, stating that the Agreement was void. Such plea was raised two years after the agreement was entered into and after allowing a substantial portion of the construction of the City Centre, Ludhiana, to be completed, without any protest. The Company sent in a letter to the Trust invoking the contractual terms for the appointment of the Arbitrator. Since no response was received from the Trust, the Company appointed its Arbitrator. The Trust objected to this action since the matter was *subjudice* before the Chief Justice of the High Court and no arbitrator could be appointed.

The application filed, initially, by the Company was withdrawn to apply for a fresh one (No. 76 of 2007). Thereafter, the Chief Justice appointed an arbitrator and on 22.04.2008, the proceedings were held. Before, the next date for the proceedings, the SLP filed by the Trust challenging the appointment of Arbitrator under Application No. 76 of 2007 came up for consideration. In accordance with the judgment of *SBP & Co. v. Patel Engineering Ltd. and Another*[5], the Court set aside the order of the Chief Justice and ordered for a fresh decision. The appointment of the Arbitrator by the Chief Justice was challenged on the ground that the agreement itself was void. It had been contended that since the main agreement, which contained the arbitration agreement, was itself void, the arbitration agreement could not survive independent of the main agreement. This contention was not accepted by the Court and the matter was remanded to the Chief Justice of the Court for a fresh decision. The Chief Justice held that the agreement entered into on 24.05.2005 was not legal and valid and thus, the disputes could not be referred to an arbitrator. This has been challenged in the present appeal.

DECISION

The Hon'ble Supreme Court held that the High Court was not required to look into the merits and de-merits of the case as if he were deciding a suit. The learned Judge was only required to decide such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator.

The issue regarding the continued existence of the arbitration agreement, notwithstanding the main agreement itself being declared void, was considered by the 7-Judge Bench in SBP & Co. and it was held that an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void.

(Footnotes)

[5] (2005) 8 SCC 618

The same reasoning has been adopted by Justice S.S. Nijjar in *Reva Electric Car Company Private Limited v. Green Mobil*[6] wherein it was held that the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(a) of the 1996 Act, it is presumed that a valid arbitration clause exists and that the same is to be treated as an agreement independent of the other terms of the contract. Further, by virtue of Section 16(1)(b), the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void. Thus, the *ratio decidendi* of the case read as: *Even on the termination of the Agreement/contract, the Arbitration Clause would still survive.*

The Court set aside the impugned judgment and the order of the designated Judge once again and directed the matter to be considered again, *de novo* in the light of the observations and the various decisions cited.

ANALYSIS

The analysis of this case has been divided into two parts. Part I deals with the power of the Chief Justice as exercised in the present case and its validity. Part II analyses the development of the doctrine of separability in the Indian arena through judicial decisions. The present position has been settled by the Legislature in the 1996 Act and the same has been reiterated and upheld by the Indian judiciary.

(Footnotes)
[6] (2012) 2 SCC 93

There was this robbery in Bank.. The robber shouted to everyone: “All don’t move, money belongs to the state, life belongs to you”. Everyone in the bank laid down quietly. This is called “Mind Changing Concept —> Changing the conventional way of thinking”.

When the robbers got back, the younger robber (MBA trained) told the older robber (who is only primary school educated), “Big bro, let’s count how much we got”, the older robber rebutted and said, “You very stupid, so much money, how to count?? Tonight TV will tell us how much we robbed from the bank!” This is called “Experience —> nowadays experience is more important than paper qualifications!”

After the robbers left, the bank manager told the bank supervisor to call the police quickly. The supervisor says “Wait, wait wait, let’s put the 5 million we embezzled into the amount the robbers robbed”. This is called “Swim with the tide —> converting an unfavourable situation to your advantage!”

The supervisor says “It will be good if there is a robbery every month”. This is called “Killing Boredom -> Happiness is most important.”

The next day, TV news reported that 100 million was taken from the bank. The robbers counted and counted and counted, but they could only count 20 million. The robbers were very angry and complained “We risked our lives and only took 20 million, the bank manager took 80 million with a snap of his fingers. It looks like it is better to be educated to be a thief!” This is called “Knowledge is worth as much as gold!”

PART I

In the present matter, the facts displayed that the Chief Justice had duly appointed an Arbitrator on 04.04.2008. The Appellant contended that the designate Judge treated the matter as if he was deciding a suit, but without adducing evidence. The Hon'ble Court considered the submissions and were of the view that the designated Judge exceeded the bounds of his jurisdiction. It was held that the designated Judge was not required to undertake a detailed scrutiny of the merits and demerits of the case, almost as if he was deciding a suit. The learned Judge was only required to decide on such preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not, for the purpose of appointment of an arbitrator.[7] In fact, the designated Judge had decided much more than what was expected of him under Section 11(6) of the 1996 Act and had thus, exceeded his jurisdiction.

The Hon'ble Bench has relied on the 2006 judgment, *S.B.P and Co. v. Patel Engineering Ltd. and Anr.*[8] to adjudicate upon the present issue. The question that arose before the Bench was whether the Chief Justice exercises judicial power or administrative power. By a majority of 6:1, it was ruled that the Chief Justice exercises judicial power as under Section 11(6), whereby the designated Judge will have the right to decide only the preliminary aspects. These will include his jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence of a live claim, etc. This case overruled the *Konkan Railway Corporation v. Rani Construction (P.) Ltd.*[9] decision wherein the Chief Justice or designated Judge's power was held to be administrative in nature.

Thus, the present case reiterated SBP and Co. decision and settled the point that the Chief Justice is only meant to look into the aspects necessary for the appointment of the Arbitrator.

PART II

The ratio laid down in the present case has settled the position of arbitration law in India. The authors present a chronological analysis of the judicial decisions on this controversial point of law settled in the present case.

The decision of the House of Lords in *Heyman v. Darwine Ltd.*[10] laid down an interesting aspect of the scope of the arbitration clause. The arbitration clause provided that any dispute between the parties in respect of the agreement or any of the provisions contained therein or anything arising there out should be refereed to arbitration. The House of Lords held that the dispute was one within the arbitration clause. Viscount Simon L.C. observed at p. 343 as follows: *"An arbitration clause is a written submission, agreed to by the parties to the contract, and, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void."*

This view was adopted in the Indian scenario. Till the 1990s, the judicial stand laid down in *Union of India v. Kishorilal Gupta and Bros*.[11] was considered good law. Justice Subba Rao, in his opinion, laid down certain remarks on this point. He statd: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may

(Footnotes)
[7] Para 13
[8] AIR 2006 SC 450
[9] (2000) 8 SCC 159
[10] [1942] 1 All E.R. 337
[11] AIR 1959 SC 1362

be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be *non est* in the sense that it never came legally into existence or it was void *ab initio*; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it.[12]

This precedent was accepted in *Indian Drugs & Pharmaceuticals Ltd. v. M/s. Indo Swiss Synthetics Gem Manufacturing Co. Ltd. and others*[13], wherein the question which arose before the Bench was "whether the arbitration clause remained in existence by 1988 when the arbitrator was appointed on the face of termination of the agreement by the appellant with effect from 1.4.1984?" The appellant referred to the Kishorilal case which was still considered good law. The two-Judge Bench decision of *Damodar Valley Corporation v. K.K. Kar*[14] was also relied upon, which on pages 243-244 read: *"As the contract is an outcome of the agreement between the parties it is equally open to the parties thereto to agree to bring it to an end or to treat it as if it never existed. It may also be open to the parties to terminate the previous contract and substitute in its place a new contract or alter the original contract in such a way that it cannot subsist. In all these cases, since the entire contract is put an end to, the arbitration clause, which is a part of it, also perishes along with it."*

The Kishorilal judgment created confusion in the Arbitration arena. However, the new 1996 Arbitration and Conciliation Act, modeled on the UNICTRAL Model Law changed the position of the separability of the arbitration clause. The new 1996 Act came into force on 22.8.1996 and is deemed to have come into force on 25.1.96 vide *M/s Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.*[15]

The Supreme Court case of *Firm Ashok Traders and another v. Gurumukh Das Saluja and others*[16], supplemented the above case and categorically upheld that in the scheme of the new Act, the arbitration clause is separable from other clauses of a deed (a partnership deed, in this case) and it constitutes an agreement by itself.

(Footnotes)
[12] Para 23
[13] AIR 1996 SC 543
[14] [1974]2SCR240
[15] 2001 (3) SCALE 708
[16] AIR 2004 SC 1433

Similarly, in 2006, the case of *S.B.P and Co. v. Patel Engineering Ltd. and Anr.*[17] looked into this point of law and held, on the same lines as the previous case, that *"an arbitration agreement could stand independent of the main agreement and did not necessarily become otiose, even if the main agreement, of which it is a part, is declared void."*

Further, in a recent decision of the Supreme Court in *P. Manohar Reddy and Bros.v. Maharashtra Krishna Valley Development Corporation and others*[18], the Court observed in paragraphs 27 & 28 as under: *"27. An arbitration clause, as is well known, is a part of the contract. It being a collateral term need not, in all situations, perish with coming to an end of the contract. It may survive. This concept of separability of the arbitration clause is now widely accepted. In line with this thinking, the UNCITRAL Model Law on International Commercial Arbitration incorporates the doctrine of separability in Article 16(1). The Indian law - The Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law, also explicitly adopts this approach in Section 16 (1)(b)."*

In the highly criticized case of *SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd.*[19], the Apex Court clearly stated that *"When a contract contains an arbitration agreement, it is a collateral term, unrelated to the performance of the contract. It is as if two contracts — one in regard to the substantive terms of the main contract and the other relating to resolution of disputes — had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract."*

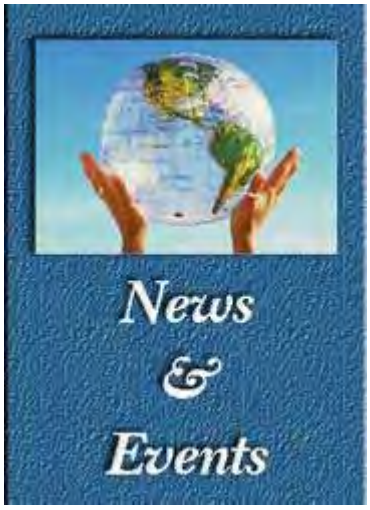
In 2012, the Supreme Court, in *Reva Electric Car Company Private Limited v. Green Mobil*[20], reiterated the very same point of law. Justice Nijjar held that legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. Thus, if the Agreement is terminated, the Arbitration clause continues to exist, independent of the agreement.

It is after this decision, that the Judiciary has got a chance with the *M/s Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust & Anr.* to establish the separability doctrine in the Indian statute. The intention of the Legislature has been laid down in Section 16(1), where it has been made clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the arbitral tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void.

This case has added clarity to the interpretation of arbitration clauses within contracts and the role of the designated Judge appointing arbitrators and offers reassurance that the courts will enforce arbitral agreements. The authors uphold the view of the Judiciary in implementing the legislation in its true spirit.

(Footnotes)
[2] AIR 2006 SC 450
[3] (2009) 2 SCC 494
[4] 2011 (7) SCALE 747
[5] (2012) 2 SCC 93

NEWS & EVENTS



ARBITRATION BECOMING POPULAR IN THE UAE

As Middle Eastern companies and investment funds become more active in the global marketplace, international firms are increasingly investing in the region or entering into joint ventures with Middle Eastern partners. Islamic finance is also becoming more prominent in the Middle East and elsewhere, in particular in Europe and parts of Asia. Ultimately, this has resulted in increased international business either in the Middle East or with a Middle Eastern element, and many of the contracts used provide for disputes to be resolved by arbitration.

PAKISTAN SUPREME COURT DECLARES A CONTRACT – AND THE ARBITRATION CLAUSE WITHIN THAT CONTRACT – VOID ON PUBLIC POLICY GROUNDS

The Pakistan Supreme Court has declared that a joint venture agreement between a local development authority and BHP for the exploration of minerals was void on a number of public policy grounds. The Court also held that the arbitration clause in the agreement was also void, notwithstanding previous overtures from the Pakistani Courts that it recognises the separability of an arbitration agreement.

HONG KONG COURT EMPHASIZES SANCTITY OF ARBITRAL AWARDS

Hong Kong's highest Court has confirmed that parties who unsuccessfully challenge arbitral awards will generally be ordered to pay costs on an indemnity basis. By this judgment the Court emphasizes the requirement to give finality on arbitral awards and to discourage frivolous challenges to the award.

Upcoming Training Programs from

INDIAN INSTITUTE OF ARBITRATION & MEDIATION
institution for dispute resolution & management

COMMERCIAL MEDIATION TRAINING PROGRAM

IIAM will be conducting a Commercial Mediation Training Program at Kochi, India from 18-22 November 2013. The program is designed for 5 days – 40 hours. The training program combines the theory of ADR 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 ADR processes and to serve as ADR practitioners and neutrals. Through discussion, simulations, exercises and role-plays, the program will focus on the structure and goals of the mediation process and the skills and techniques mediators use to aid parties in overcoming barriers to dispute resolution. The training also gives emphasis on the code and ethical standards of mediation. As per IIAM Mediator Accreditation System, based on the International Mediation Institute, The Hague (IMI) standards, a candidate having successfully completed Mediation Training Program will be categorized as Grade B Mediator and eligible for empanelment with IIAM.

CERTIFICATE IN ARBITRATION LAW (CAL)

IIAM will be conducting a Certificate Program in Arbitration Law at Kochi, India during January 2014. The program is designed for 2 days – 15 hours. The program offers the participants to know the underlying theory of arbitration law and practice, with emphasis of the Indian law, drafting of arbitration clauses and agreements, procedure of arbitration, important case laws and institutional arbitration methods. The program will provide a solid foundation in the ADR process of arbitration and to serve as an arbitrator or arbitration counsel.

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 more details mail to training@arbitrationindia.com

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Direction?
Love or hatred must constantly increase between two persons who are always together; every moment fresh reasons are found for loving or hating better.