



IN THIS ISSUE

View Point:

2

Power Dynamics in Mediation
- Part 1

Article:

6

International Arbitration and
Its Interim Relief's in India

News & Events:

14

EDITOR'S NOTE

Many people are entering into the new profession of mediators. Helping people to come to terms on an agreement and move forward is very rewarding feeling. We have seen at many times that a conflict which starts over something so small, escalates very quickly into a fight. What makes it go so wrong? First thing to keep in mind is limiting the number of people we expose to our conflict. It might be wise to bring the issue up for discussion to a professional mediator who can facilitate a productive discussion that will allow them to resume a healthy relationship. Do you have the passion and patience to take up this profession?

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POWER DYNAMICS IN MEDIATION - PART 1

NANDINI M. NAMBIAR



The article mainly deals with the role of mediator and how he can make a difference in the entire process of dispute resolution. According to the author, the mediator wields a lot of power by virtue of the position he holds and as such, the role that he plays in settling disputes has a huge impact on the final outcome of a dispute. Further the parties themselves may have issues of power imbalances, which puts all the more pressure on the mediator to perform his role well. The article attempts to explore these facets of the mediation process, focusing on the practice in the United Kingdom, with some references to the practices in the United States. In the second Part, the author examines the mediation practice in India - how far has it been successful and what are the factors curtailing its development.

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INTRODUCTION

So what exactly is 'mediation'? In their article, J. Folberg and A. Taylor have expressed the view that mediation is a "process by which the participants, together with the assistance of a neutral person(s), isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs."¹ Another definition which explains the role of a mediator has been stated by Dwight Golann as "a process involving a neutral third party in a purely facilitative role, who makes no substantive contribution to the parties' struggle with the dispute."²

The role of a mediator can be better understood by differentiating it from the role of an arbitrator. The arbitrator plays a more active role; he conducts hearings of the parties and their issues, receives evidence and finally gives a binding decision. The parties enter the process with the knowledge that the final outcome shall be determined by the third party, and that they would be compelled to accept his decision.

In contrast, the mediator is a 'process person',³ playing a more passive role. He is portrayed as one who facilitates the entire process by enabling communication between the parties, defining their agenda, facilitating

(Footnotes)

¹ Nancy T. Gardner - Review of J Folberg and A Taylor, 'Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation' (1984), <<http://www.jstor.org.gate2.library.lse.ac.uk/stable/pdfplus/1288874.pdf>>

² Susan Nauss Exon, 'The Effect that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation' (2007), <http://works.bepress.com/susan_exon/1>

³ Christopher Honeyman and Nita Yawanarajah, 'Mediation' (2003), <<http://www.beyondintractability.org/essay/mediation/>>

the exchange of information so as to guide the parties towards a settlement.⁴ The mediator has no right to impose his views on others. In most cases, he will not even be allowed to make suggestions to the parties. Hence the accepted notion of mediation being a voluntary process, and the mediator being a neutral and an impartial entity.

As the core issue in this article pertains to the power of mediators, this aspect will be dealt with at the beginning so as to lay a foundation for the rest of the discussion.

POWER

The Concise Oxford Dictionary⁵ defines power as the "capacity to influence the behaviour of others; a right or authority given or delegated." In the context of dispute resolution, the word 'power' has been defined as "the capability of a person or group to modify the outcome of a situation – that is, the benefits received by another and the costs inflicted, in the context of a relationship. The capacity to influence the outcome for another party depends on the exercise of various means of pressure or persuasion that either discourage or encourage the possibility of various options."⁶

In the arena of mediation, it is of utmost importance to understand the mediator's source of power. Mediation is a voluntary process and as such, if the parties approach the mediator to resolve their dispute, he is empowered to assist them. This is also abundantly clear from the fact that a mediator can be deprived of this right according to the wishes of the parties. The mediator also derives powers from his knowledge, training and experience. For instance, a mediator who has a legal background would be in a better position to inform the parties, on their request, as to what the outcome would be, if the parties choose to proceed with the dispute in a court of law.

These powers possessed by the mediator can be exercised by him in different ways – but with the sole intention of facilitating a settlement. He may gather information from the parties, facilitate communication, gain their trust, lay down rules for the conduct of the mediation, assist them to identify the areas of conflict, guide them towards possible solutions, and even arrive at a solution suitable to both the parties.⁷

(Footnotes)

⁴ Ruth F. Necheles-Jansyn, *The Mediator Revisited* (IMLR and Scarecrow Press Inc., 1990)

⁵ Oxford University Press (2001)

⁶ Arghavan Gerami, 'Bridging the Theory-and-Practice Gap: Mediator Power in Practice', *Conflict Resolution Quarterly*, Wiley Periodicals Inc. (Vol.26, No.4), <www3.interscience.wiley.com/journal/122479771/>

⁷ Bernard Mayer, 'The Dynamics of Power in Mediation and Negotiation', *Conflict Resolution Quarterly*, Wiley Periodicals Inc. (1987, Issue 16), <<http://www3.interscience.wiley.com/journal/121413356/>>; Walter A. Maggiolo, *Techniques of Mediation* (Oceana Publications Inc., 1985)



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Despite the fact that the mediator possesses such powers, they are not absolute. They are subject to certain limitations, which not only ensures that the mediator does not act beyond the scope of his duties, but also that he conducts the process in a free and fair manner. Such limitations could be inherent in the role of the mediator or in the mediation agreement or the procedural constraints agreed to by the parties. One additional factor that could act as an effective check on the abuse of power by the mediator is the fear that he can be removed at any time if the parties are not satisfied with his efforts.

IMPARTIALITY AND NEUTRALITY

The mediator is required to possess two basic qualities, namely – impartiality and neutrality. Though in common parlance the two words are used interchangeably, in the context of mediation, each word holds a different meaning. ‘Neutrality’ can be defined in the context of the mediator’s past relationship with either of the parties, his prior knowledge of or his personal interest in the dispute. On the other hand, ‘impartiality’ implies the need for the mediator to conduct the proceedings in a fair manner, without prejudice to either party.⁸ Basically, neutrality refers to a party’s “*disinterest in the outcome of the dispute*” and impartiality is the “*absence of bias or the existence of preference in favour of one party over the other.*”⁹

It is noteworthy that the common opinion seems to be that although impartiality is an inseparable part of mediation, neutrality almost always ceases to exist in a mediation process. Simon Roberts, in his book ‘*Dispute Processes: ADR and the Primary Forms of Decision Making*’, also refers to Peter Gulliver’s opinion regarding the rarity of a ‘*truly disinterested, impartial mediator*’.¹⁰ This is because it is almost close to impossible for a mediator not to have an opinion pertaining a dispute that he is required to mediate on. This is especially true in the context of a mediator who is selected by the parties based on his area of specialization. For example, in a commercial mediation the disputant parties, in their best interests, would want to appoint a mediator who has some knowledge about businesses and the way they operate. However, such a mediator is bound to have an opinion regarding the matter, as he would have an idea of how such a matter would proceed in the commercial world. This could affect his neutrality. There could be other reasons why the mediator finds it difficult to maintain his status as a ‘neutral’ party. His judgment could be affected by his past experiences, his knowledge, or his desire to secure a settlement and increase the number of his ‘wins’, irrespective of the fact that it may not be the best solution for the disputant parties. And from there stems the common perception that ‘neutrality’ is indeed difficult to attain in a mediation process.

POWER IMBALANCES

Power imbalance refers not just to the inequality of powers between parties, but also to the fact that one party is in a position to overpower the other party. This is a major impediment in the process of mediation as the stronger party will not be willing to settle the matter, being aware of its stronger position which could lead to a settlement in its favour, rather than to mediate for a ‘win-win’ situation. The weaker party, on the other hand, may be compelled to accept the stronger party’s proposal. In such a situation the mediator needs to play a more active role by ensuring that he facilitates the mediation in such a manner as to bring the weaker party at par with the stronger party. Once the parties seem to be on equal footing, the mediation process can progress. It is however pertinent to note that when the mediator intervenes in such a manner, he is most likely to lose his quality of impartiality, as he will have to invariably favour the weaker party over the stronger party to assist it to rise to an equivalent level. But it has been suggested¹¹

(Footnotes)

⁸ Laurence Boulle and Miryana Nestic, *Mediation: Principles, Process, Practice* (Butterworths, 2001)

⁹ Bobette Wolski, ‘Mediator Settlement Strategies: Winning Friends and Influencing People’ (Bond Dispute Resolution Process), <<http://www.austlii.edu.au/au/journals/bonddrn/2002/6.pdf>>

¹⁰ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press, 2008). Reference to the opinion of Mr. Peter Gulliver as set out in *Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, 1979)

¹¹ Susan Nauss Exon, ‘The Effect that Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation’ (2007), <http://works.bepress.com/susan_exon/1>

that such a situation can be remedied if the mediator diverts his full attention towards the sole purpose of aiding the disputant parties to settle their differences rather than for any other purpose.

In addition, such power-related issues can arise in the context of the mediator as well. A mediator wields a lot of power as described above. But with such power he also becomes duty-bound to the parties, to exercise it in their best interests and assist them in arriving at a mutually beneficial settlement. At this juncture, one would benefit by understanding the various roles that a mediator can play when he handles a dispute.

ROLE OF A MEDIATOR

Dr. Clark has used the appropriate words to describe the role of a mediator when he said:

"I believe that a mediator's role is to help the parties make informed decisions. My mediation style combines art and science. The art consists of gaining trust with the parties, being attuned to emotional nuances and being flexible and creative. The science comes from having an excellent understanding of negotiation theory and practice and having the skills to help parties identify and quantify the decisions they need to make in mediation."¹²

The two broad classifications of the role of a mediator in settling disputes are - Facilitative and Evaluative. This classification is made on the basis of a mediator's contribution to the mediation process. A mediator may adopt the facilitative or the evaluative approach or a combination of both, depending on the progress of the dispute resolution process, the desired outcome and the party's interests.

Facilitative Approach: This is the more passive of the two approaches, where the mediator performs the basic function of facilitating the mediation process. He merely assists the disputant parties to come together to attempt to resolve their disputes. With the intention of doing so, he creates a suitable environment for communication and ensures the smooth conduct of the mediation process. Further, he may also be the medium of exchange of information between the parties when the parties are in caucuses or when the parties do not wish to communicate directly with each other. According to Georg Simmel, the mediator provides the '*linkage*' between the parties.¹³

Evaluative Approach: This approach requires a more proactive role on the part of the mediator. He will not only perform the functions of a facilitator, but may also make recommendations and suggestions to the parties regarding the option that would best suit them. From this point of view it would seem incorrect to classify facilitative and evaluative mediation as two separate approaches, as clearly, one is merely an extension of the other.

In the next part, we will be looking as to how we could reconcile the two approaches and about the mediation process in India.

(Footnotes)

¹² Opinion of Dr. John Clark, Registered Mediator - Centre for Effective Dispute Resolution, <<http://www.mediation-negotiation.com/services/mediator/>>

¹³ Referred to by Simon Roberts and Michael Palmer in *Dispute Processes: ADR and the Primary Forms of Decision-Making* (Cambridge University Press, 2008)

Only trust someone who can see these three things in you:

The sorrow behind your smile;
The love behind your anger; and
The reason behind your silence.

INTERNATIONAL ARBITRATION AND ITS INTERIM RELIEF'S IN INDIA

ITI SINGH



In this article, the author considers the question of interim reliefs granted by the Courts to ensure natural justice, especially in the area of international arbitration in India, resulting in the internal remonstrance encountered as well as created – either by judicial intervention in granting interim measures or the limited powers bestowed upon arbitral tribunals for granting the same. The author analyses the stumbling blocks and impediments that had gridlocked India from becoming a destination for international arbitration. The article further evaluates the future of arbitration in India, based on the latest case law, changing the face of arbitration in India.

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INTERNATIONAL ARBITRATION AND INTERIM RELIEFS PROVIDED IN INDIA

“**A**rbitation”, as defined by McIlwraith, “is a process by which parties agree to the binding resolution of their disputes by adjudicators, known as arbitrators, who are selected by the parties, either directly or indirectly via a mechanism chosen by the parties”.¹

The phenomenon of globalisation incites a compelling increase in the role of international trade which has led to a pervasive increase in the number of commercial disputes. As a result, multi-national corporations have actualised the demand for alternative dispute resolution mechanisms, including arbitration which has now become crucial for businesses operating in India as well.

Arbitration in India was well conceived with the Indian Arbitration Act 1940 (the “1940 Act”), under which judicial intervention was required in all three stages of arbitration: before referring the dispute to the arbitral tribunal, during the proceedings, and after the award was passed. The judicial court was required to determine whether a dispute existed and whether it could be resolved through arbitration. Further, before the arbitral award could be enforced, it was required to be made the rule of court.²

The 1940 Act was determinately stepped up with the introduction of Arbitration and Conciliation Act, 1996 (the

(Footnotes)

¹ Michael McIlwraith in *International Arbitration and Mediation: A Practical Guide*

² Krishna, Sarma et al., *Development and Practice of Arbitration in India—Has it Evolved as an Effective Legal Institution* (Stanford Ctr. on Democracy, Dev., and the Rule of Law, Working Paper No. 103, 2009)

“1996 Act”) by the Indian legislature. The 1996 Act is modelled after the UNCITRAL Model Law. The intention of this Act is twofold in nature: Part I of the Act administers domestic and international commercial arbitration that takes place in India whereas Part II dictates foreign arbitration that is conducted outside India.³

The 1996 Act primarily encouraged arbitration as a cost effective and quick mechanism for the settlement of commercial disputes and section 5, emulates Article 5 of the UNCITRAL Model law which expressly refuses judicial intervention in arbitration proceeding, poles apart from the 1940 Act.

Now as I progress to explain international arbitration proceedings in India, it is essential to note that a vicissitude in the conduct of the parties often arises wherein they whisk to courts for provisional remedies or other interim measures of reliefs considering arbitral proceedings, substantially, in India are no less adversarial than litigation in public courts. When a dispute arises, most certainly, the aggrieved party is always concerned with protecting its interest either in movable or immovable properties. Thus, Section 9 of the 1996 Act gives parties adequate power to approach courts for seeking interim relief.

The Power of Courts to grant Interim Reliefs

As I shed some light on the problem of judicial intervention dealt with in arbitration practices in India, it is only appropriate to say that interim measures approach against the elemental doctrine of arbitration by allowing court's intervention, but for many apprehensions exposed, such judicial interventions are rather fateful.

(Footnotes)

³ Fali S. Nariman, *India and International Arbitration*, 41 Geo. Wash. Int'l. L. Rev. 372 (2009).



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If you are depressed, you are living in the past;
If you are anxious, you are living in the future;
If you are at peace, you are living in the present.

Amid the pendency of an arbitral proceeding, the court may grant such interim measures as permitted under the procedural rules governing the powers of the court or those that it may derive through its inherent powers.

The dictum governing the grant of interim relief is habitually by use of judicial discretion of the court while taking into consideration questions pertaining to balance of convenience, the applicant's ability to make out a prima facie case and first and foremost the irreparable detriment that would be caused in the event the relief is not granted.

These interim measures, as usually seen in an inclusive conglomeration of case law, are consistently granted during the pendency of adjudication of a dispute in the form of injunctions, specific performance, pre-award attachments etc.

By definition, 'interim reliefs' are temporary or 'interim' in nature that is granted in advance of the final adjudication of the dispute by the arbitral tribunal.

Under the 1996 Act, the courts not only have the power to grant interim measures, but this power, in most cases, is wider than that of the arbitral tribunal as conferred in greater stipulation by me in this paper.

What are the Types of Interim Reliefs granted by Courts?

These reliefs routinely provided by courts diverge according to facts of each case, for instance, granting an interim injunction, appointing a receiver, making of an attachment order or any other interim order for securing the amount or interest in dispute or for the preservation, custody or sale of the property in dispute.

Interim reliefs may be broadly classified into the following categories⁴ –

- (a) Reliefs which are procedural in nature being inspection of property in possession with third parties or compelling the attendance of a witness.
- (b) Reliefs which are evidentiary in nature and are required to protect any document or property as evidence for the arbitration; and
- (c) Reliefs which are interim or conservatory in nature and are required to preserve the subject matter of the dispute or the rights of a party thereto or to maintain the status quo and to prevent one party from doing a particular act or from bringing about a change in circumstance pending final determination of the dispute by the arbitrators.

Why do Parties in Commercial Disputes approach the Court for Interim Reliefs?

Generally, applicant parties, desirous of taking prompt and timely action against each other to protect their rights and interests in properties and funds, seek interim reliefs from the court.

This gives power to an applicant party to forbid other parties to operate with any sort of *mala fide* intention of tampering with properties or siphoning off funds. However, the applicant party, pre-eminently, has to make good or establish the following factors while applying for interim reliefs in a commercial dispute –

- (a) There is an "urgent need" for the interim measure;

(Footnotes)

⁴ Supra Note 2

- (b) Irreparable harm will result if the measure is not granted;
- (c) The potential harm if the interim measure is not granted substantially outweighs the harm that will result to the party opposing the measure if the measure is granted;
- (d) There is a substantial possibility that the applicant will ultimately prevail in the dispute.⁵

As these conditions are satisfied, the court doesn't hesitate in exercising its inherent powers to grants interim measures to parties to protect their rights.

Can Parties approach the Court even before the Commencement of Arbitral Proceeding?

The point of time when an application could be made to a court for granting interim relief has been a subject matter of altercation. This was enduringly settled by the Supreme Court in its landmark judgment of "Sunderam Finance vs. NEPC".⁶ In this instant case, when the matter was heard by the Madras High Court, it was ruled by the court while interpreting the power of courts under Section 9, at least a notice for commencement of arbitration was necessary.

(Footnotes)

⁵ Lira Goswami, Interim Relief under the Arbitration Act, 1996.(Goswami) Speech at New Delhi: 2000

⁶ AIR 1999 SC 565



A woman goes to the doctor, beaten black and Blue.

Doctor: "What happened?"

Woman: "Doctor, I don't know what to do. Every time my husband comes home drunk he beats me to a pulp."

Doctor: "I have a real good medicine for that. When your husband comes home drunk, just take a glass of sweet tea and start swishing it in your mouth. Just swish and swish but don't swallow until he goes to bed and is asleep."

Two weeks later the woman comes back to the doctor looking fresh and reborn.

Woman: "Doctor, that was a brilliant idea! Every time my husband came home drunk, I swished with sweet tea. I swished and swished, and he didn't touch me!"

Doctor: "You see how much keeping your mouth shut helps?"

Relationships don't thrive because the guilty are punished;
But because the wounded are merciful.

The Supreme Court however begged to differ and overruled the judgment of the High Court. It held that an application under Section 9, which is the power given to an applicant party to approach courts for interim reliefs, could be made even prior to sending notice for commencement of the arbitration to the other party. Holding otherwise, according to the Supreme Court, would be rendering the meaning of the words “*before...the arbitral proceeding*” otiose. The Supreme Court, keeping in view Article 9 of the UNCITRAL Model Law, was of the opinion that Article 9 clarifies that the mere request to a court by a party to an arbitration agreement for an interim measure “before or during arbitral proceedings” would not be incompatible with the arbitration agreement, meaning thereby that the arbitration proceedings could commence after a party had approached the court for an order for interim protection.⁷

Momentarily as I proceed to ventilate the prevalent scenario in arbitration proceedings held in India, it was singularly ascertained after this judgment in early 2000, that the power of the court under Section 9 arises both before and during arbitral proceedings and even thereafter. As mentioned before, the power of courts to grant interim reliefs is beyond a shadow of doubt, wider than the power of arbitral tribunals when it comes to granting interim measures.

Are the Powers of an Arbitral Tribunal limited while granting Interim Measures?

One may argue and certainly feel the need to strengthen the role of arbitral tribunal under whom the arbitration proceedings are pending, by giving them the power equivalent to that of the Indian courts so as to minimise the role of judicial intervention in commercial disputes but, alas, the powers of the tribunal are rather handicapped because of various difficulties in granting these measures. The contractual nature of arbitration gives rise to several unique difficulties such as non-enforceable nature of interim measures granted by arbitral tribunals, lack of jurisdiction of the tribunal when dispute arises with a third party who is not party to the arbitration proceedings and against whom no order of tribunal shall withstand. Another common matter of contention recognised is seeking urgent protective interim orders against a party at early stages, that is, even before an arbitral tribunal is constituted or proceedings are commenced. Lastly, it is often observed that the tribunal's powers or jurisdiction is limited by the governing law of Arbitration⁸.

The Supreme Court in *Sunderam Finance* further held that once the mandate of the arbitral tribunal terminates, Section 17, granting powers to the Arbitral tribunal for interim reliefs cannot be pressed.

Section 9 is available even before the commencement of the arbitration and need not be preceded by the issuing of notice invoking the arbitration clause.⁹ This is in contradistinction to the power given to the arbitrators or the arbitral tribunal who can exercise the power under section 17 only during the currency of the Tribunal or during the pendency of the proceedings before the Tribunal.

After carefully analysing the impairment in the 1996 Act, the Law Commission in its 176th report has observed the demeanour of parties using insidious means to destroy or tamper with evidence, concoct witnesses which they perceived could go against them during the arbitral proceedings. Ergo, stand the immediate need to change the provisions of the existing section, so that the Arbitral Tribunal could get more powers to deal with such situations.

The Dominant Impediments seen in Arbitration in India

(a) Judicial Intervention and Interim Measures: The Law Commission of India in its 176th report published in 2001¹⁰ noted a number of loopholes in the provisions for interim relief in the 1996 Act which were exploited by

(Footnotes)

⁷ Supra Note 4

⁸ David St. John Sutton, John Kendall, Judith Gill, Russell on Arbitration, 21st ed., Sweet and Maxwell, (Russell,) pp. 386-387.

⁹ Supra Note 4

¹⁰ 176th Report of the Law Commission of India available at <www.lawcommission.nic.in/lawcommission_176th_report.pdf>

the parties after the Act came into force. Provisions contained in Section 9 regarding the availability of interim relief even before the arbitration proceedings commenced had a rather tarnished history of being thoroughly misused by parties. It so happened that after obtaining an interim order from the court, parties did not take initiative to have an arbitral tribunal constituted. This allowed them to reap the benefits of the interim order without any time limit which only goes onto frustrate the very foundation of an Arbitration forum.

- (b) Time consumed due to Judicial Intervention:** The 1996 Act clearly states that the role of the courts in arbitral proceedings is that of a supervisor for the review of arbitral awards envisaged by courts in cases of fraud or bias by arbitrators, violation of natural justice, etc.¹¹ but judicial intervention in arbitral proceedings in India has been fashioned to drag one's feet pre-eminently because Indian courts frequently allow adjournments, award interim reliefs, during the proceedings and this very nature of an elongated process deter parties from using arbitration in India.

Admitting that the 1996 Act has tackled the point in departure of judicial intervention and irrespective of the many miscarried pursuits of improving and strengthening the arbitration practices in India by basal judicial interruption, it is rather axiomatic that its existence continues metrically even today as courts use their power under Section 9, to grant interim measures in both domestic and foreign arbitration in India.

CHANGING SCENARIO OF ARBITRATION IN INDIA POST THE OVERRULING OF BHATIA JUDGMENT BY BALCO CASE

Compendious Analysis of Supreme Court judgment in Bhatia International

The apex court held that Part I of the Act applied even to arbitrations seated outside of India, unless the parties had expressly or impliedly agreed to exclude Part I of the Act per the decision in *Bhatia International v. Bulk Trading Co.*¹² which was an alive and kicking shot to deal with a fair gap of powers conferred to Indian courts to order interim relief in arbitration proceedings found under Section 9 in Part I of the Act. It was a trite law that Part I of the 1996 Act would apply to all arbitrations, including international commercial arbitrations held outside India, unless the parties by express or implied agreement excluded all or any of its provisions.

(Footnotes)

¹¹ Indian Council of Arbitration Journal Vol. XLIII/ No 3 Oct – Dec 2010

¹² AIR 2005 Chh 21, 2006 (1) MPHT 18 CG

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However, a paradoxical dilemma rose as parties relied on *Bhatia International* to invite the Indian courts to apply other provisions of Part I to arbitrations commenced and awards rendered in foreign seated arbitrations. In such an event, cogent ramifications followed, where Part I of the Act was not excluded, Indian courts swiftly intervened in awarding interim reliefs, appointing arbitrators in appropriate circumstances and was matter of fact even capable of setting aside arbitral awards.

As far as the position of the Indian law was concerned, this decision gave more scope to Indian courts to grant interim relief in international commercial arbitrations and weakened the scope of India being a preferred centre for arbitration, thereby undermining the credence of foreign investors or corporations in the Indian market as it etched an apprehension on the impact of such an overarching interpretation.

Aftermath of the Supreme Court judgment of *Bharat Aluminium v. Kaiser Aluminium*

Illuminating the inconsonant conjectures on the correctness of the decision in *Bhatia International*, a panel of five judges of the Supreme Court sat for reconsideration in the case of *Bharat Aluminium v Kaiser Aluminium*¹³ and overruled the decision in the *Bhatia International* case on 6th September 2012 systemising a rather improved under-structure in arbitral jurisprudence in India with respect to awarding interim reliefs.

Indian courts are no longer empowered to order interim relief in foreign seated arbitrations, regardless of any contrary intention or purported agreement of the parties and by no means would a civil suit for grant of interim reliefs thereafter stand a chance to be maintainable. Right away, it is also clear that Indian courts are not empowered to order interim relief independently where the matter is one over which they do not have jurisdiction to grant final relief.

The Court also noted that any perceived lacuna in this area was one for the legislature to correct and not one the court could fill. Ostensibly, here forward, if the seat of arbitration is not in India, the holding of hearings in India for convenience would, in itself, be insufficient to attract Part I of the Act.

The decision of the Supreme Court breaks through with a promising notion to put an end to the intervention of Indian courts. For all international arbitration agreements signed after 6th September 2012, the parties will no longer be permitted to approach the Indian courts for interim reliefs.

The sheer basis to choose Indian law or that the dispute has connections with India (either because of the residence of one of the parties or because the subject matter is inside India) will no longer create jurisdiction by itself for Indian courts to exercise supervisory jurisdiction over arbitration proceedings.

CONCLUSION

The decision of the Supreme Court in *Bharat Aluminium* appears to perk up the approach taken by Indian courts in relation to their supervisory role in international arbitration and has reacquired its disorientation. However, the decision in *Bharat Aluminium* is only part of the landscape for arbitration in India and the journey travelled by the Indian legislature is only partially covered. The Supreme Court's unequivocal and unambiguous analysis has left parties with a stark choice between arbitrating inside India and thereby having access to the Indian courts to apply for interim relief, and arbitrating outside India but having no such access.

(Footnotes)

¹ (2002) 4 SCC 105

The cheerful loser is the winner.
~Elbert Hubbard~

This progressive gradation post 2012 should willingly prompt business opportunities in India and alliances with Indian parties to opt for an international commercial arbitration with a seat outside India or even choose India as the seat of arbitration, if they wish to avail of the protection of interim measures against the parties whose assets are situated in India.

The judgment and its eventuality is a consequential escalation towards instituting India as an arbitration-friendly jurisdiction. Only if India could redress the escape clauses in the provisions of interim reliefs, grievances regarding cost effectiveness and timely resolutions in the arbitration proceedings, then she will in the not too distant a future, be in the position to importune that Arbitration proceedings must surface in its homeland.



JUDGING OTHERS?

A teacher was telling a story to their students, "A cruise ship met with an incident at sea, on the ship was a pair of couple, after having made their way to the lifeboat, they realized that there was only space for one person left. At this moment, the man pushed the woman behind him and jumped onto the lifeboat himself. The lady stood on the sinking ship and shouted one sentence to her husband".

The teacher stopped and asked, "What do you think she shouted?". Most of the students excitedly answered, "I hate you! I was blind!"

Now, the teacher noticed a boy who was silent throughout, she got him to answer and he replied, "Teacher, I believe she would have shouted - Take care of our child!"

The teacher was surprised, asking "Have you heard this story before?"

The boy shook his head, "Nope, but that was what my mum told my dad before she died to disease".

The teacher lamented, "The answer is right". "The cruise sunk, the man went home and brought up their daughter single-handedly. Many years later after the death of the man, their daughter found his diary while tidying his belongings. It turns out that when parents went onto the cruise ship, the mother was already diagnosed with a terminal illness. At the critical moment, the father rushed to the only chance of survival. He wrote in his diary - How I wished to sink to the bottom of the ocean with you, but for the sake of our daughter, I can only let you lie forever below the sea alone.

The story is finished, the class was silent.

We need to know that of the good and the evil in the world, there are many complications behind them which are hard to understand. Which is why we should never only focus on the surface and judge others without understanding them first.

NEWS & EVENTS



DIPLOMA IN INTERNATIONAL COMMERCIAL ARBITRATION

Chartered Institute of Arbitrators (Australia) is conducting the 'Diploma in International Commercial Arbitration' in Sydney from 18-26 April 2015, which is a pre-eminent tertiary international course offering a prestigious globally recognised qualification. During an intensive 9 day program, students will be taught the practice of international commercial arbitration, covering major forms of arbitration and arbitration institutions such as ACICA, ICC and CIETAC, and will gain the ability to appear in or act as an arbitrator or counsel in different contexts. IIAM is the supporting organization for the course. Details can be found at <http://www.arbitrationindia.org/htm/events.html> and <http://www.ciarb.net.au/sites/www.ciarb.net.au/files/files/ciarbdiplomacourse2015flyer.pdf>.

TRAINING COURSE ON CROSS BORDER CONTRACTS & ARBITRATION

Marcus Evans Pan Asia is organizing a 2 day training course on Cross Border Contracts and Arbitration, on 25 | 26 May 2015, at Kuala Lumpur, Malaysia. This Cross Border Contracts & Arbitration intensive training is focusing on cross border contract challenges and solutions by determining the accurate arbitration clause that needed to be included. IIAM is an endorser of this training course and IIAM Members, Arbitrators and Mediators are entitled for discount of 200 USD on the fee. For more information of the event, log on to <http://www.arbitrationindia.org/htm/events.html>

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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.

Upcoming Training Programs from

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

COMMERCIAL MEDIATION TRAINING PROGRAM

Are you interested to become a Commercial Mediator or a specialist Dispute Resolution Practitioner or Advocate? Effective conflict resolution skills is the key to prevent destructive conflict, enabling lawyers and consultants to better assist their clients in business deals and disputes. Mediation has become a truly global profession, earning international recognition.

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. The training offers the opportunity to become an effective negotiator, skillful mediator and a talented mediation representative. As per IIAM Mediator Accreditation System, a candidate having successfully completed Mediation Training Program is categorised as Grade B Mediator.

The program will be for 40 hours conducted in 5 days, during May 4-8, 2015 (Monday to Friday) at Cochin, Kerala, India.

For further details log on to <http://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 more details mail to training@arbitrationindia.com

A moment of Patience in the moment of Anger,
Saves hundreds of moments of Regret