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THE indian arbitrator

THE INDIAN ARBITRATOR

News Magazine of the Indian Institute of Arbitration & Mediation

In this Issue.....

Editor's Note

Wishing all of you a peaceful and exciting 2016!

2016 promises to be an eventful year for ADR.

The year has started with the government of India publishing the gazette notification on 1st January, promulgating the Arbitration & Conciliation (Amendment) Act, 2015 and the Commercial Courts Act, 2015. Both these legislations are made with the object to improve the efficiency of arbitration in India. The year will also witness the Global Pound Conference series which would happen in 36 locations in 26 countries in the world, where like-minded and passionate individuals and stakeholders will participate to discuss the future of dispute resolution and access to justice.

2016 seems to be history in the making!

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TIME TO THINK ABOUT RESTORATIVE JUSTICE

ANIL XAVIER

Time to think about Restorative Justice: Integrating Mediation in Criminal Justice System!

Can the question of applicability of mediation and settlements in criminal cases be left to be ambiguous and determined by the personal philosophy of the decision maker? Shouldn't the criminal justice system engrain human right concept within itself to make it more methodical and the outcome more foretelling, so as to have uniform application and standards? The author looks into the current trends in administering mediation in criminal law and the need to integrate mediation to uphold Restorative justice.

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Some of the recent events and judgments of some High Courts and the Supreme Court of India on the question of settlement in some heinous crimes and inflicting strict sentences in some others have created a furore among the legal fraternity and civil society.

The execution of Mumbai blasts convict Yakub Memon has sparked a debate over death penalty, some calling for a ban based on human rights ground and some in favour of retaining it as a deterrent against ghastly crimes.

Even though the United Nations General Assembly had adopted in 2007, 2008, 2010, 2012 and 2014, non-binding resolutions calling for a global moratorium on executions, with a view to eventual abolition of death penalty, the four most populous countries in the world, where over 60% of the world's population live, such as India, China, the United States and Indonesia continues to apply the death penalty.

Civil rights organizations have started to place increasing emphasis on the concept of human rights of offenders and an abolition of the death penalty.

When we complain about human rights of offenders and about putting their fate on the individualistic approach of the concerned judges, who award death penalty, we also hear objections when attempts are made by judges to settle matters between the offender and the victim in criminal cases. I am reminded about the 12thcentury Jewish legal scholar, Moses Maimonides, who said that executing an

accused criminal on anything less than absolute certainty would lead to a slippery slope of decreasing burdens of proof, until we would be convicting merely "according to the judge's caprice". Maimonides' concern was maintaining popular respect for law, and he saw errors of commission as much more threatening than errors of omission. How do we bring in consistency to these decisions without leaving it to the discretion of individual judges?

On 24th June 2015, an order came from the Madras High Court, where the Judge while hearing a bail appeal of a man convicted of raping a young girl, agreed to the bail request on condition that the man try "mediation" with the victim. The judge observed, "The case before us is a fit case for attempting compromise between the parties...he [the rapist] should be enabled to participate in the deliberations as a free man and vent his feelings, open his mind and moorings". The logic behind this "reference to mediation" seems to be that an unwed mother and her child are "lepers" in Indian society and they are better off enjoying the "respectable" status of a married woman, even if the husband is her rapist. The Judge further added that in another similar case "mediation was proceeding towards a happy conclusion". In other words, wedding bells were ringing. This order provoked widespread protests mainly on the ground that there cannot be a compromise or settlement as it would be against the honour of the victim which matters the most.

On 1st July 2015, a judgment came from the Supreme Court of India in an appeal relating to a rape case involving a minor in Madhya Pradesh, where the court held that mediation should not be encouraged in cases of rape or attempted rape. The court held, "Dignity of a woman is a part of her non-perishable and immortal self and no one should ever think of painting it in clay. There cannot be a compromise or settlement as it would be against her honour which matters the most".The Court ruled that courts should not fall for the subterfuge of a rapist to corner the traumatised victim into a compromise, or even worse, enter into wedlock with him.

Based on the judgment of the Supreme Court, the Judge of the Madras High Court recalled the order of mediation on 11th July 2015 and cancelled the interim bail granted to the convict.

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.

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On 21st July 2015, the Delhi High Court passed another judgment, while dealing with a Revision Petition against the order of discharge passed by a Sessions Judge in a case where the accused was charge-sheeted for an offence of rape and sexual assault under the Protection of Children from Sexual Offences Act 2012. The Judge of the High Court set the accused free of all the offences alleged, holding that the victim was married to the accused and voluntarily consented to the sexual intercourse.

The Madras and Delhi High Courts considered the option of mediation or compromise in a non-compoundable criminal offence like rape and the Supreme Court on the other hand clearly closed the option of mediation in such a case.

In the Madras case, while the mediation option was put forward by the accused/offender, the Judge did not seek the consent or even the opinion of the victim for such a process. The Judge decided that it was for her "benefit" that she participates in mediation. In fact when the press approached the girl, she expressed incredulity and dismay. It is reported that she said, "It is unfair of the judge to do this to me. How can he do this without seeking my opinion? The rapist only wants to get out of jail, which is why he agreed to mediation. Can the judge guarantee my safety if he is in this area, or my daughter's safety? I am being forced to suffer again".

In fact the Judge has said that the accused should be enabled to participate in the deliberations as a free man and vent his feelings, open his mind and moorings and therefore enlarged him on bail to participate in the mediation process. This is an important observation, but unfortunately used in the opposite proposition. This option of venting one's feelings, opening one's mind and moorings has to be afforded to the victim first and not to the offender.

There were severe criticisms on the orders of the Madras and Delhi High Courts stating that the human rights of the victims were not considered. There were also disapprovals when the Supreme Court held that any kind of liberal approach or a thought of mediation in a crime like this thoroughly and completely sans legal permissibility. The same uproar came when the death sentence was awarded to the accused in the Mumbai blasts, stating that it is a human right violation.

Can the question of human rights and fate of persons based on human rights be left so ambiguous and determined by the personal philosophy of the decision maker? Shouldn't the criminal justice system engrain human right concept within itself to make it more methodical and the outcome more foretelling?

We need to understand that a crime is not just the violation of the law, but also the violation of people and relationships. This violation creates an obligation rather than a guilt and justice, in its true sense. This could be resolved ideally only when there is involvement of all the stakeholders of a crime, i.e., the victims, the offenders and the community members, in an effort to put things right. The central focus is, not on the offenders getting what they deserve, but on attending to the needs of the victim and offender, for repairing the injury caused in the best possible manner.

In our criminal justice delivery system, do we consider the feelings, fate or opinion of the victim?

Justice is a nebulous concept. Aristotle divided justice into two main parts: distributive justice – the sharing of social benefits and burdens – and corrective justice – the rectification of injustice. Jeremy Bentham, the British philosopher and jurist also dichotomised justice, considering procedural justice –

fairness in processes – and substantive justice – fairness in rights and obligations. Taking these approaches together, we need to have a legal system which allows parties to fairness in process and rectification of injustice. We need to consider related emotions of the parties like hurt feelings, trauma, dignity, social reputation etc.

Our traditional criminal justice system is a system of retributive justice – a system of institutionalized vengeance. The system is based on the belief that justice is accomplished by assigning blame and administering pain, where it is believed that "justice equals punishment". But in the recent years, a relevant question is being asked – "justice for whom?" In many cases we find that the punishment often leaves the victim unsatisfied and also fails to address the other important needs of the victim, such as, consolation for their loss, easing their trauma or mending their wounds. Restorative justice programs are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences. Restorative justice gives as much importance to the process as to the outcome.

Restorative justice is the new way of looking at criminal justice that focuses on repairing the harm done to people and relationships rather than punishing offenders. Restorative justice is about the idea that "because crime hurts, justice should heal". These programs can also be used to reduce the burden on the criminal justice system, to divert cases out of the system and to provide the system with a range of constructive sanctions.

The efficacy of mediation in resolving civil, family and commercial disputes and its acceptability world-wide had encouraged our Parliament and Judiciary to embrace mediation for resolving pending court cases and courts all over India has supported mediation programs in civil cases and started referring matters to mediation for early resolution and also for bringing down court dockets and pendency. The overwhelming effect of this may have prompted some of our courts to refer criminal cases also to mediation.

We need to understand that mediation in civil, family and commercial disputes are basically issues where only the rights of the parties involved in the disputes are affected. The society is not concerned with the outcome of such disputes. Settlement of non-compoundable criminal cases, especially in heinous crimes and sexual offences, settlement is a controversial topic. Victim-offender mediation programs are among the earliest restorative justice initiatives. But this cannot be left to the discretion of individual judges' social philosophies and to the calibre of mediators who are trained to resolve just civil or family matters. There are a number of crucial steps that contribute to the effective implementation and sustainability of restorative justice initiatives. They include a formal legislation, scheduled leadership and organization. Victim-sensitive training should also be offered to mediators and criminal justice and other practitioners involved in restorative justice programs, to handle sensitive and complex cases.

A developed or culturally matured society should have this option for resolving criminal offences through restorative justice programs. Right now we find that when parties settle criminal matters outside court, the law compels them to tell lies or file false statements in court to wriggle out of criminal trials. We have seen in umpteen numbers of criminal cases where the victims or de-facto complainants turn hostile and speak against the prosecution case. They are left with no choice of telling the truth because that would upset the settlement and again wreck the relationship. The index of a developed community should necessarily have laws that would encourage people to speak truth without fear and uphold their dignity and integrity and not compelling them to speak falsehood to attain justice. Similarly in the absence of statutory requirements, it may be difficult for a restorative justice program to insert itself into the daily routine of the criminal justice system. Legislation may be useful in providing the impetus for a more frequent use of the restorative justice process. It can also be used to promote predictability and certainty in the use of the restorative process as well as to establish all of the necessary legal safeguards.

Even though the Basic Principles on the Use of Restorative Justice Programs in Criminal Matters was adopted in 2002 by the United Nations Economic and Social Council, whereby encouraging Member States to adopt and standardize restorative justice measures in the context of their legal systems, we have not taken any steps toward this concept. Report of Justice V.S. Malimath Committee on Reforms of Criminal Justice System submitted in 2003 also hoped that that victims must be protected and justice must be done to them and eventually the system will have to lean towards more restorative justice. The Committee stated that an important object of the Criminal Justice System is to ensure justice to the victims. The considered view of the Committee was that criminal justice administration will assume a new direction towards better and quicker justice once the rights of victims are recognized by law and restitution for loss of life, limb and property are provided for in the system. But nothing has been done so far.

I think we should use the on-going discussions about human rights of offenders, mediations in criminal cases like rape cases or other heinous crimes, as an opportunity to have a larger debate on reforms in the criminal justice system of the country, making a better system to address the needs of the victims.

Brain Teaser (Answer): The stumbling block is the number of artisans. One hundred is just too many to handle. But it can be found. Take one toy from A, two from B... hundred from the last artisan. The total weight should have been (1 + 2 + 3 .... 100) x 10 grams. If one gram is short, the first artisan is the culprit. If fifty grams are short, the fiftieth artisan is the thief. Now you know the culprit.

INTERNATIONAL ARBITRATION BETWEEN PARTIES INCORPORATED IN INDIA

SHASHANK PATHAK & ARJIT OSWAL

International Arbitration between Parties Incorporated in India: Exigency of Pedantic Approach in Law

Can two Indian parties agree to submit themselves to be governed by the laws of any other jurisdiction? Whether the fact that both the companies which are parties to the arbitration agreement, if incorporated in India, is conclusive that the arbitration between them is domestic arbitration and cannot be an international arbitration under any circumstances? The authors discuss this moot point, which is key to have an impact on the transaction between a purely domestic company, incorporated under the Indian laws and a subsidiary of a foreign parent company, incorporated in India.

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Recently, Delhi High Court in the case of *Delhi Airport Metro Express Pvt. Ltd.* v. *CAF India Pvt. Ltd. & Anr.*[1] was called upon to rule on the above proposition.

Reliance Industries Limited ("Reliance") and Construcciones Y Auxiliar De Ferrocarriles, SA (CYADF SA) formed a consortium to bid for a tender issued by the Delhi Metro Rail Corporation ("DMRC") for the purposes of operating the Delhi Airport Metro Express Line ("The Project"). The consortium was ultimately successful in the bidding process and was awarded the project on 21 January, 2008. Thereafter, as per the bidding rules, Delhi Airport Metro Express Pvt. Ltd. ("DAMEPL") was incorporated with Reliance holding 95% and CYADF SA holding remaining 5% as a Special Purpose Vehicle.

Agreements between Parties

Pursuant to the award of Project, following agreements were entered into by and between the parties. It is important to note the respective parties to the agreements entered.

Concession Agreement

On 25th August, 2008, a Concession Agreement was signed between the DAMEPL and DMRC for implementing the Project.

Rolling Stock Supply Contract

(Footnotes)

[1] *Delhi Airport Metro Express Pvt. Ltd. v. CAF India Pvt. Ltd.* I.A. No. 10776/2014 in CS (OS) 1678/2014,(Decided On: 14.08.2014)

Pursuant to the Concession Agreement, DAMEPL and CYADF SA (i.e. an Indian Party and a foreign party) entered into Rolling Stock Supply Contract on 30 June, 2008 ("Supply Contract") for the supply of rolling stock for the Project.

Maintenance Services Agreement

DAMEPL and CYADF SA further entered into a Maintenance Services Agreement on 30 June, 2008 for maintenance of rolling stock.

Assignment Agreement

DAMEPL claimed that *vide* Assignment Agreement, CAF, which was a wholly owned subsidiary of CYADF SA, replaced it for its obligations under the Maintenance Agreement.

It is important to note that CAF was incorporated in India and therefore as per DAMEPL's case, Maintenance Agreement after the Assignment Agreement was between two Indian parties i.e. CAF and DAMELP.

Arbitration Agreement

The Maintenance Agreement contained an arbitration clause, wherein, DAMEPL and CYADF SA had agreed to first try and resolve their disputes at senior level failing which the disputes were to be resolved by way of arbitration under the rules of International Chamber of Commerce ("ICC"). It was agreed that the arbitration shall take place in London and the language of the arbitration shall be English. Further, parties expressly excluded the application of Part-I of the *Indian Arbitration and Conciliation Act 1996*. The governing law of the contract was agreed to be Indian.

Disputes

Certain disputes arose between the parties as a result of which DAMEPL terminated the Concession Agreement and handed over the Project to DMRC. Certain disputes also arose under the Maintenance Agreement and the Supply Agreement.

Arguments

Pursuant to the disputes under Maintenance and Supply Agreements, CAF along with CYADF SA invoked arbitration under ICC by filing their request for arbitration under applicable ICC Rules. The said invocation of arbitration was challenged by DAMEPL by way of an anti-arbitration suit in India, wherein, DAMEPL challenged the validity of the arbitration agreement and sought permanent injunction against the on-going arbitration before the ICC.

DAMEPL challenged the arbitration agreement, *inter alia*, on the following grounds that:

- After the novation of Maintenance Agreement between CAF and CYADF SA, the obligation under the Maintenance Agreement was between two Indian parties and therefore, the arbitration was a domestic arbitration.

- Two Indian parties (DAMEPL and CAF) cannot opt out of Indian laws and therefore, could not agree to a foreign seated arbitration.

- Indian parties cannot exclude Part-I of the Arbitration and Conciliation Act, 1996.

- The arbitration clause under the Maintenance Agreement was not enforceable and in fact was opposed to public policy of India.

- Arbitration Agreement was unlawful as per Section 23 of the Indian Contract Act[2] and was also violative of Section 28 of the Indian Contract Act.[3]

On the contrary, the CAF and CYADF SA contended that:

- The Suit was barred as per Section 5 of the Arbitration and Conciliation Act, 1996[4] and also on account of the presence of a binding and valid arbitration clause.

(Footnotes)

[2] *Section 23, Indian Contract Act, 1872.*

23. What considerations and objects are lawful and what not.-
The consideration or object of an agreement is lawful, unless-
it is forbidden by law; or
is of such a nature that, if permitted, it would defeat the provisions of any law; or
is fraudulent ; or
involves or implies injury to the person or property of another or ;
the Court regards it as immoral, or opposed to public policy.
In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[3] *Section 28, Indian Contract Act, 1872.*

28. Agreements in restrain of legal proceedings, void -
1. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to the extent.
Exception 1: Saving of contract to refer to arbitration dispute that may arise. This section shall not render illegal contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subject shall be referred to arbitration, and that only and amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.
Exception 2: Saving of contract to refer question that have already arisen – Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration.

[4] *Section 5, Indian Arbitration and Conciliation Act 1996.*

5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

- Arbitration Agreement between two Indian parties having seat outside India was valid and not opposed to the Public Policy of India.

- The suit was barred under Section 14 (2) of the Specific Relief Act, 1963[5].

- Arbitration Agreement was not barred by Section 28 of the Indian Contract Act and falls within the exception appended to the said Section.

- Apart for the legal submissions, Assignment Agreement was only supplementary in nature and was to operate under the scope of the Maintenance Agreement. The Assignment did not dilute the responsibility of CYADF SA under the Maintenance Agreement and that there was no novation of Maintenance Agreement due to the Assignment Agreement.

- In the petition under Section 9 moved by CYADF SA, DAMEPL submitted to arbitration by averring in its Counter Affidavit that no intervention under Section 9 ought to be made since the arbitral tribunal was seized of the matter.

Decision

The High Court in order to answer the issues raised by the parties narrowed down the controversy and restricted itself to the issue of change in the scope of Maintenance Agreement after execution of the Assignment Agreement. The Court subjected its answer to the question, whether two Indian parties can agree to a foreign seated arbitration and formulated:

(Footnotes)

[5] *Section 14 (2) of the Specific Relief Act, 1963.*

(2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

> *"…whether pursuant to the assignment agreement dated 17th May, 2010, the rights and obligations of the defendant No. 2 which is a Spanish Company are completely discharged under the maintenance agreement and other agreements between the parties so as to say that it has no role to play in the rights and obligations of the parties under agreement and had exit completely from the agreement. If the answer to the said question is in affirmative, then only the case of the plaintiff and grounds stated therein merits further consideration and on the other hand if the answer is in negative, then the case of the plaintiff is not even required to be further considered as the entire premise of the suit may fail."*[6]

Upon examination of the relevant clauses of the Maintenance Agreement and Assignment Agreement, the Court concluded that rights and obligations of CYADF SA were not yet completely discharged under the Maintenance Agreement and it continued to remain one of the participants having obligations to perform under the Maintenance Agreement. The Court therefore concluded that there was no novation of contract due to Assignment Agreement and it cannot be said that after execution of Assignment Agreement, the Maintenance Agreement was between two Indian parties i.e. DAMEPL and CAF. Since CYADF SA continued to be liable or accountable under the Maintenance Agreement, the arbitration agreement thereunder remained to be between a body corporate incorporated outside India and an Indian company i.e., CYADF SA and DAMEPL respectively and therefore, was an international commercial agreement.

The Court went a step ahead and observed that arbitration clause would not come to an end merely because there was exchange of the performances or obligations from one hand to another. The Court therefore, clarified that the parties should continue with the ICC arbitration invoked by CAF and CYADF SA.

Analysis

The present case becomes pertinent because of the intimation of grey area in the law it hints at. The Judgement provides that rights and obligations of CYADF SA were not completely discharged under the Maintenance Agreement and arbitration remained to be international in nature. The Court by relying on the express provisions under the Maintenance Agreement[7] relating to the obligations of parties did not find it difficult to conclude that CYADF SA was not completely ousted of its obligations under the Supply Agreement.

However, in cases where the transaction is between a company which is purely a domestic company, incorporated under the Indian laws and a subsidiary of a foreign parent company, also incorporated in India, the absence of express provisions and precedents, as in the instant case, could give rise to further questions like:

1. Whether the fact that both the companies which are parties to the arbitration agreement, if incorporated in India, is conclusive that the arbitration between them is domestic arbitration and cannot be an international arbitration under any circumstances?

(Footnotes)

[6] *Delhi Airport Metro Express Pvt. Ltd. v. CAF India Pvt. Ltd.* I.A. No. 10776/2014 in CS (OS) 1678/2014, Para 35.

[7] Article 2, Article 6 and Article 8 of the Maintenance Agreement, dated 3rd June, 2008 between Construcciones Y Auxiliar De Ferrocarriles SA (CAF) and Delhi Metro Express Limited (DMEL).

2. Whether factors like control, day to day involvement and common management should be taken into consideration while adjudicating nature of arbitration between a purely domestic party and a subsidiary of a foreign parent company incorporated under laws of India? Or to put it simply should the veil be lifted to determine the nationality of parties?

3. If question 2 is answered in affirmative, what should be the test to determine the extent of control or management which shall be required to bring the dispute in the realm of international commercial arbitration?

Answers to above questions, either which way, are likely to have an impact on the transaction between a purely domestic company, incorporated under the Indian laws and a subsidiary of a foreign parent company, incorporated in India.

If the first question is answered in affirmative, by holding that the bare fact of the dispute between two companies incorporated in India will always be a domestic arbitration, as has been observed in the *TDM Infrastructure Private Limited v. UE Development India Private Limited*[8], would compel the subsidiaries of the foreign parent companies, incorporated in India to either approach Indian courts and/or to have their disputes resolved by recourse to domestic arbitration in India. They would not be allowed to choose a neutral venue for adjudication of their disputes with a purely Indian company, since the same may be opposed to public policy of India. The sequitur would be that the seat of arbitration between two companies incorporated in India always has to be India and such parties cannot agree to a foreign seated arbitration.

(Footnotes)

[8] *TDM Infrastructure Private Limited v. UE Development India Private Limited,* (2008)14 SCC 271(Decided On:14.05.2008).

"15. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration."

On the contrary if the first question is answered in negative and international arbitration is allowed between domestically incorporated parties, it would put the concept of party on a higher pedestal than the concept of public policy of India. The acceptance of parties' choice to choose laws of other jurisdiction is essentially an endorsement of the principle of party autonomy wherein, parties are given the freedom to choose an arguably faster and lesser expensive mode of dispute resolution. However, in such cases parties run a risk of enforcement and seeking interim measures. In such a situation if by probable means like, showing transaction with foreign company, arbitration is labelled as 'international commercial arbitration' then according to the recommendations of *Justice Shah Committee Report,* Section 9 would be applicable to such scenarios, though it is, as of now only a recommendation, yet to become law[9]. Committee has done so for resolving the conflict of jurisdiction that would arise in cases where interim measures are sought in India in case of arbitrations seated outside India.[10]

The law in India seems to be that only if an Indian company is in a transaction with a foreign company, can it opt out of Indian laws. In other words, two Indian companies cannot opt out the laws of India that will continue to govern them. Any agreement to exclude the applicability of Indian laws shall be opposed to public policy. In this regard, the Supreme Court has recently reflected over the scope and applicability of ground of 'public policy' and laid down that such defence shall be construed narrowly in international arbitrations and more importantly, at the stage when enforcement of arbitral award is sought.[11] On the other hand, the acceptance of party autonomy over public policy argument in other jurisdiction may be viewed as a compromise of Courts' jurisdiction and dominion over its nationals.

If the second question is answered in affirmative, which implies that the first question is answered in negative, than in such a case, the Court may be required to do a lot of fact finding and see through the actual nature of transactions. Also it may allow path for the provision to be misused. For example, it may so happen that in a transaction between domestic companies, incorporated in India and a subsidiary of a foreign parent company, incorporated in India, the latter in order to bypass the otherwise mandatory laws of India may contend that it is actually controlled by the Parent Company. Such an argument may not only make the matter complicated but will also be time consuming to determine the proper mode of adjudication of dispute.

In view of the judgment in *Chloro Control India Pvt. Ltd. v. Severn Trent Water Purification Inc.*[12] the Supreme Court has*, inter alia*, held that in an international commercial arbitration, parties which are claiming "through and under" the party signatory to arbitration agreement, can be referred to arbitration even if they have not signed and/or are not a party to the arbitration agreement. Therefore, it will be

(Footnotes)

[9] The Law Commission Report was subsequently accepted and the Arbitration & Conciliation (Amendment) Act, 2015 has come into effect w.e.f 24 October 2015 (Inserted by the Editor)

[10] Report 246, Justice Shah Report on Arbitration, P. 38

Recommended Amendment to Section 2

"In the case of an international commercial arbitration, the High Court exercising jurisdiction over the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Court of a grade inferior to such High Court, or in cases involving grant of interim measures in respect of arbitrations outside India, the High Court exercising jurisdiction over the court having jurisdiction to grant such measures as per the laws of India, and includes the High Court in exercise of its ordinary original civil jurisdiction."

[11] Shri Lal Mahal Ltd. Vs Progetto Grano Spa. Civil Appeal No. 5085 of 2013.

[12] *Chloro Control India Pvt. Ltd. v. Severn Trent Water Purification Inc.* (2013) 1 SCC 641.

"143. May be all the parties to the lis are not signatory to all the agreements in question, but still they would be covered under the expression "claiming through or under" the parties to the agreement. The interests of these companies are not adverse to the interest of the principal company and/or the joint venture company. On the contrary, they derive their basic interest and enforceability from the mother agreement and performance of all the other agreements by respective parties had to fall in line with the contents of the principal agreement. In view of the settled position of law that we have indicated above, we will have no hesitation in holding that these companies claim their interest and invoke the terms of the agreement or defend the action in the capacity of a "party claiming through or under" the parties to the agreement."

open for the Indian subsidiary of a foreign company to plead nexus with the foreign company in order to give the dispute an international flavour.

So far as domestic arbitrations are concerned, the law as laid down in *Sukanya Holding* judgment[13] still holds good as the same has not been overruled yet.[14] Therefore, in cases where there are multiple parties involved in a given transaction and not all of them are signatories to the dispute resolution clause, only a suit shall lie and no other dispute resolution clause will be enforced. What, however, will be interesting to note is the situation where one of such parties, is a foreign company. Whether the involvement of such foreign party will make it an international arbitration leading to an arbitration as per the *Chloro Control* judgement or, it will be an arbitration only if such a foreign party is signatory to the arbitration agreement at the initial stages and if not, the parties would be called upon to file suits to resolve the disputes.

(Footnotes)

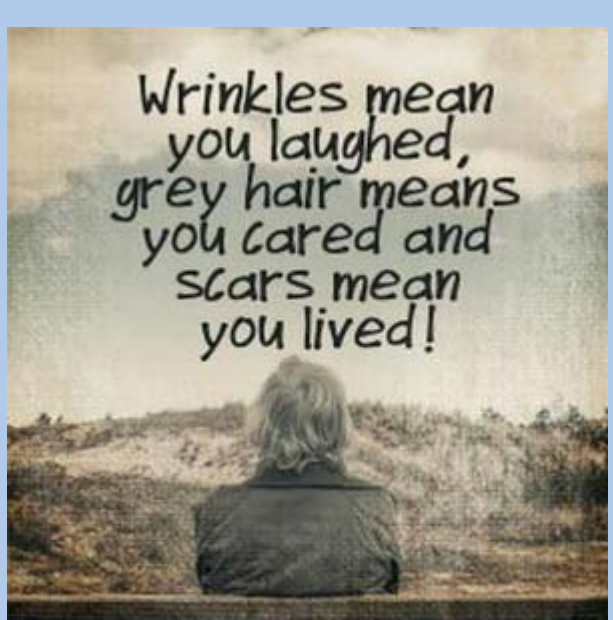
[13] *Sukanya Holdings Pvt. Ltd.v. Jayesh H. Pandya and Anr* (2003) 5 SCC 531.

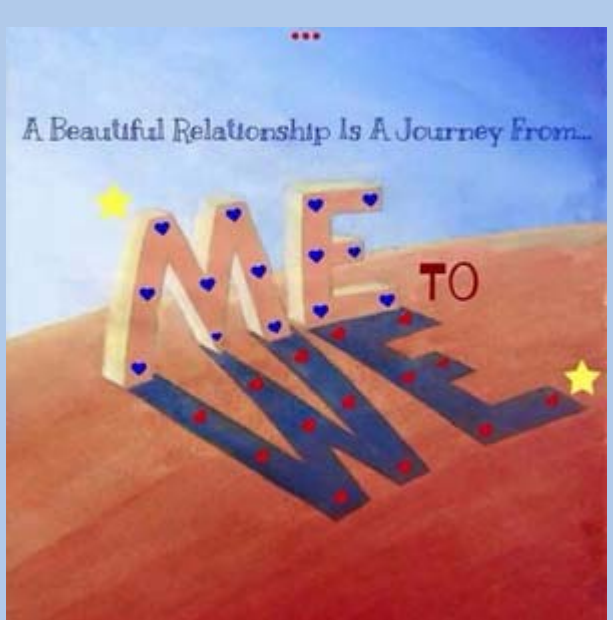
> "13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators."
>
> "14. Thirdly, there is no provision - as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application."

[14] *Supra* note 12.

> "133. The ambit and scope of Section 45 of the 1996 Act, we shall be discussing shortly but at this stage itself, we would make it clear that it is not necessary for us to examine the correctness or otherwise of the judgment in the case of Sukanya (supra). This we say for varied reasons. Firstly, Sukanya was a judgment of this Court in a case arising under Section 8 Part I of the 1996 Act while the present case relates to Section 45 Part II of the Act. As such that case may have no application to the present case. Secondly, in that case the Court was concerned with the disputes of a partnership concern. A suit had been filed for dissolution of partnership firm and accounts also challenging the conveyance deed executed by the partnership firm in favour of one of the parties to the suit. The Court noticing the facts of the case emphasized that where the subject matter of the suit includes subject matter for arbitration agreement as well as other disputes, the Court did not refer the matter to arbitration in terms of Section 8 of the Act. In the case in hand, there is a mother agreement and there are other ancillary agreements to the mother agreement. It is a case of composite transaction between the same parties or the parties claiming through or under them falling under Section 45 of the Act. Thus, the dictum stated in para 13 of the judgment of Sukanya would not apply to the present case. Thirdly, on facts, the judgment in Sukanya's case, has no application to the case in hand."

Quotes of the month.....





The answer to the last question, though briefly discussed in the *TDM* case which authoritatively declares that *"When both the companies are incorporated in India, and have been domiciled in India, the arbitration agreement entered into by and between them would not be an international commercial arbitration agreement",* the scope and range of the judgement is yet to be conclusively determined. With respect to 'control and management' the Court in *TDM* referred the definition given by Patanjali Sastri J. in *Subbayya Chettiar v. IT Commissioner*[15] as:

> *"'Control and management' signifies, in the present context, the controlling and directive power, `the head and brain' as it is sometimes called, and `situated' implies the functioning of such power at a particular place with some degree of permanence, while `wholly' would seem to recognize the possibility of the seat of such power being divided between two distinct and separated places."*

It is pertinent to note that while the matter in issue in the *TDM case* was the appointment of arbitrators under Section 11, in the instant matter it was for invalidating the arbitration clause itself under Section 9. The parties in TDM were incorporated in India but one of them had its Board of Directors in Malaysia and the Court prioritised 'incorporation' over 'central management and control' to determine the jurisdiction of Indian courts. In the instant case the issue was about invalidating the arbitration agreement itself, in which the Delhi High Court had rendered the decision not on the basis of incorporation but on the basis of management and contractual obligations of the original parties to the contract.[16]

Conclusion

A Pedantic stance on the circumstances discussed above and a new approach to deal with the same to remove such ambiguities and clarifying the law on the issues is expected from the legislators and the judiciary before India can truly be considered an arbitration friendly jurisdiction. The *amendments to the present law and changes thereafter can* inspire hope that a new and promising era has begun for arbitration in India. It will be interesting to track how the Indian Courts now manoeuvre to keep up the pro arbitration trend.

(Footnotes)

[15] *Subbayya Chettiar v. IT Commissioner*, Madras [1951] 19 ITR 168 (SC).

[16] *Supra* note 9.

> *"13. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning. International Commercial Arbitration" and "Domestic Arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although Clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company. Sub-section (6) of Section 2 of the 1996 Act leaves the parties free to determine certain issues. That freedom shall include the right of the parties to authorize any person including an institution, to determine the same. Thus, in a case of this nature, the court shall not interpret the words in such a manner which would be opposed to the intention of the parties."*

STUDENT AUTHOR OF THE INDIAN ARBITRATOR 2015

The Best Young Author certificate for the year 2015 goes to Mr. Sonal Srivastava and Ms. Purnima Srivastava, Law students of the National Law University, Odisha (NLUO), India for the article, "Public Policy – Creation of Legislature or Judiciary". IIAM Editorial Board congratulate both of them and wish them all the very best for their future.

OUT OF THE BOX

THINK About It

The kind of Love we all want!

It was about 8:30 AM on a busy morning when an elderly gentleman in his 80s arrived in the hospital to have stitches removed from his thumb. He stated that he was in a hurry as he had an appointment at 9:00.

The nurse took his vital signs and had him to take a seat, knowing it would be over an hour before someone would to able to see him. She saw him looking at his watch and decided since she was not busy with another patient, she went on to evaluate his wound. After examining
him, she could see the wound was well healed, so she talked to one of the doctors, got the needed supplies to remove his stitches, and redressed his wound.

While taking care of his wound, they began to talk. The nurse asked if he had a doctor's appointment this morning as he was in such a hurry. He told her no, that he needed to go to the nursing home to eat breakfast with his wife.

She then inquired about her health. He told her that she had been there for a while and that she was a victim of Alzheimer's.

As they talked while dressing his wound, she asked if his wife would be worried if he was a bit late. He replied that she no longer knew who he was. He continued saying that she had not recognized him in five years now.

The nurse was surprised and questioned him, "And you are still going every morning, even though she doesn't know who you are?"

He smiled as he patted her hand and answered, "She doesn't know me, but I still know who SHE is."

True love is neither physical nor romantic. True love is an acceptance of all that is, has been, will be, and will not be.

A king wanted to present one gold toy of ten grams each, to every child in his kingdom. He employed 100 artisans. Per day each artisan produced ten toys and hands them over to the treasurer. After a month, the king knew that one of the artisans is cheating by swindling 1 gram of gold per toy. Next day he went to the treasury in the evening when the 100 artisans brought their manufactured toys. The king has a weighing machine and measuring stones. Using the machine ***only once***, he was able to find the culprit. How?

[Answer at Page 6]

Two men went bear hunting.

While one stayed in the cabin, the other went out looking for a bear.

He soon found a huge bear, shot at it but only wounded it.

The enraged bear charged toward him, he dropped his rifle and started running for the cabin as fast as he could. He ran pretty fast but the bear was just a little faster and gained on him with every step.

Just as he reached the open cabin door, he tripped and fell flat. Too close behind to stop, the bear tripped over him and went rolling into the cabin.

The man jumped up, closed the cabin door and yelled to his friend inside, “You skin this one while I go and get another one!”

The rain drop from the sky, if it is caught in hands is pure enough for drinking.
If it falls in gutter, it’s value drops so much that it can’t be used for washing the feet.
If it falls on hot surface, it perishes.
If it falls on lotus leaf, it shines like a pearl and
Finally, if it falls on oyster, it becomes a pearl.

The drop is same, but it’s existence & worth depends on with whom it associates!

NEWS & EVENTS

ALTERNATIVE DISPUTE RESOLUTION TO BECOME MORE EFFECTIVE IN INDIA

For improving the efficiency of arbitration, the Government of India has brought in two new legislations. The Arbitration and Conciliation (Amendment) Act, 2015 and the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. The Acts received the assent of the President of India on the 31st December, 2015. Both the Acts are deemed to have come into force on the 23rd October, 2015.

Apart from introducing many changes like giving more powers to the Arbitral Tribunal for interim measures, the highlight of the amended Arbitration Act is fixing time frame for arbitration and fee of arbitrators. The Act also brought in guidelines for independence and neutrality for arbitrators. The changes made in the Arbitration Act for speed and efficiency is further boosted by the Commercial Courts Act, which brings in Commercial Courts to deal with arbitration cases in Courts, making faster disposal of arbitration cases.

See the amended Arbitration & Conciliation Act at www.arbitrationindia.com/pdf/acact.pdf

THE GLOBAL POUND CONFERENCE SERIES

The Global Pound Conference (GPC) is the place for you to meet like-minded and passionate individuals and stakeholders to discuss the future of dispute resolution and access to justice.

Launching in Singapore in March 2016 and ending in London in 2017, the GPC series will convene all stakeholders in the field of dispute resolution around the world to expound upon key challenges in Appropriate Dispute Resolution (ADR) of interest and relevance to all. Whether you are a dispute resolution user, mediator, lawyer, judge, arbitrator, academic or student, you will not want to miss this golden opportunity!

The exciting 2-day inaugural GPC Singapore 2016 held at the Supreme Court of Singapore from 17 to 18 March 2016 will provoke debate on existing tools and techniques, stimulate new ideas and generate actionable data on the needs of corporate and individual dispute resolution users, both locally and globally. For details about GPC Singapore, visit http://singapore2016.globalpoundconference.org/

The GPC India is scheduled in January 2017. Watch this space for updated information.

ONLINE MEDIATION MAKES COURT DEBUT IN SHANGHAI

The first online pre-litigation mediation platform in Shanghai was put into use by a District Court on Tuesday, partly in response to a rising number of civil cases involving a foreign party. Foreign entities often find it hard to attend mediations, a process in which disputes can be settled outside of courtrooms.

Now, with mediations moving online, a plaintiff and defendant in a lawsuit no longer need to be physically present in a courtroom with a judge. Instead, they can all go online through video chat software to talk things over and reach an agreement.

Upcoming Training Programs from IIAM

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. IIAM Mediation Training Program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation. 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 February 8-12, 2016 (Monday to Friday) at Cochin, Kerala, India.

For further details log on to www.arbitrationindia.org/events.html

CERTIFICATE IN DISPUTE MANAGEMENT (CDM)

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

For further details log on to www.arbitrationindia.org/cdm.html