THE indian arbitrator

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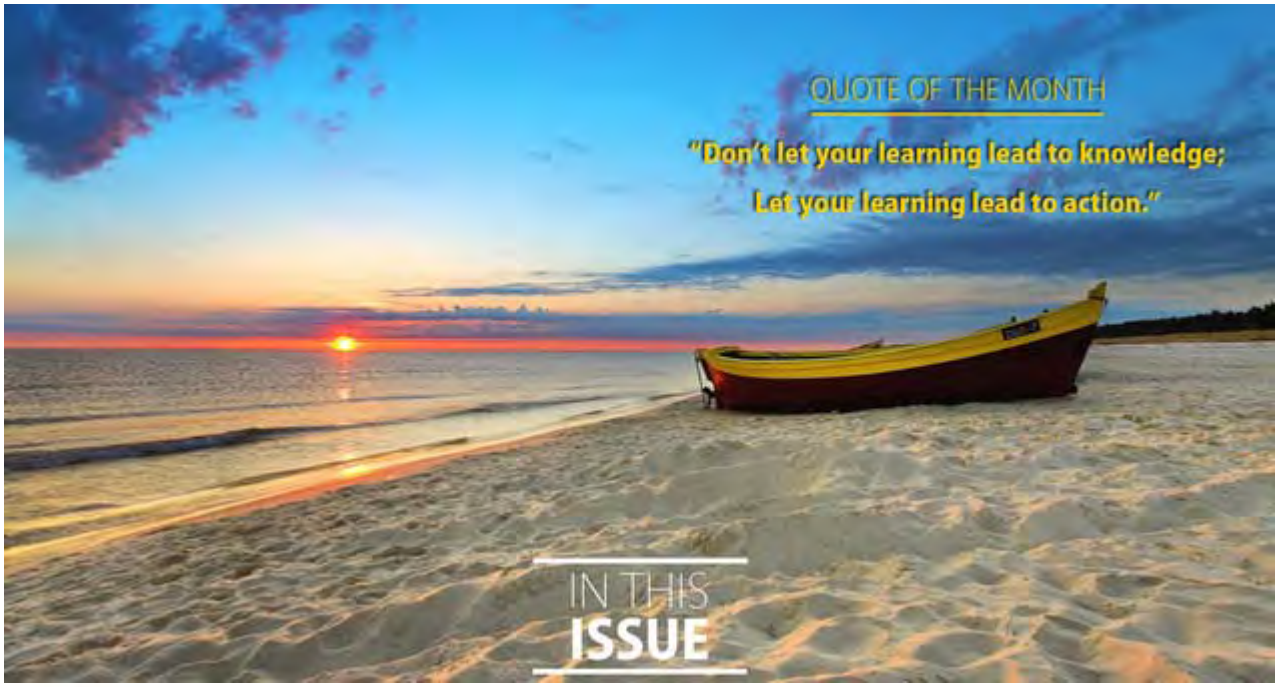

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Editor's Note

New Year is always a good time to think about something exciting and make some resolutions. These resolutions are all (at least potentially) inspiring and mind expanding. But even with this enthusiasm most of us think that the world's problems are so big that we can do little to help. So our resolutions also will not be that big. On our own, we cannot end wars or wipe out injustice, but the cumulative impact of thousands of small acts of goodness can be bigger than we imagine. As ADR professionals, we can make these small acts which could make a global impact. The Global Pound Conference is such an act and let us do our part to make that BIG change in shaping the future of dispute resolution and improving access to justice.

Looking forward to a wonderful 2017!

Anil Xavier

VIEW POINT

PEACING THINGS TOGETHER

JOEL LEE

What can we do to wage peace? A key part of Peacing is promoting understanding and acceptance. To be clear, this is more than just tolerance. The next step would be acceptance of the differences that exist and that it is ok to be different. Another a key part to Peacing must be the ability to start and continue to have dialogue with all stakeholders. According to the author, even though we try to do this in bringing parties to a settlement in mediation, perhaps this can be done in a wider space. Let's see what we can do by Peaceing Things Together.

As 2016 ends, I can't help but reflect upon the events over the last 11 months. 2016 has not been a good year, at least in my opinion. Way too many lights in the world have passed on, natural disasters abound and with the political upsets around the world (and some continue to happen), it would appear that the world is barreling towards chaos. And perhaps that is the natural order (or disorder) of the universe.

And if the world is going to end due to circumstances *outside* our control, then so be it. And perhaps that is the point. If the world might end due to circumstances *within* our control, what could we be doing about it?

I remember a saying I heard in my youth which went "Peace is not the absence of war, we must wage peace as fervently as others would wage war". I do not remember the source of this but it impacted me deeply. (For completion, I must add that in the internet age, a search attributes the first part of the saying to Einstein or Spinoza. The second part seems to be a phrase used by various people but the source of it is unclear.)

What can we do to wage peace? What is peace anyway? Most definitions (official or otherwise) seem to reference peace as a non-warring state or a state free from war. But that's not very helpful. It is trite that the human brain cannot easily process a negative (including that sentence). Don't take my word for it, let's engage in a thought experiment.

"Clear your mind. Now, I don't want you to think of a pink elephant. Whatever you do, don't think of a pink elephant."

What are you thinking of? Unless you are semantically trained, you are probably thinking of a pink elephant. You can't help it. There is no easy way for your cognitive processes to "not think of something". This is why road signs that prohibit an action will depict the action and then cross it out.

Parents with children know that telling them "Don't run" or "Don't touch" very often invokes the prohibited behaviour. In Singapore, we have large LED signs on our expressways that can be used to alert motorists to hazards. For a period of time, those signs flashed the message "Don't Speed". While I do not have any evidence to prove that this didn't work, I suspect there might have been an increased incidence of speeding.

This is why in training and education, we advise that when giving feedback, we should avoid telling people what not to do but to provide specific feedback about a positive action. Telling people what not to do does not give the brain a direction to move towards. Going to back to those LED signs on Singapore expressways, someone must have caught on. The signs no longer flash "Don't Speed". They now say "Drive Safely". More recently, they have also begun to say "Think of your loved ones and get home to them safely" (for that extra motivation I suppose).

And this is why I went on this detour. A definition of peace which references an absence of war does not give us, as a species, a direction to move towards. (I note with some irony that the definition of war suffers from no such problem. It is generally positively defined as a state of armed conflict. One wonders what might happen if we defined war as a non-peaceful state. But I digress.)

So, if Peace = Not War, then when war doesn't exist, what do we do? I would like to suggest that the state of "Not War" is really just a starting point. "Not War" is not Peace but only the first step towards a state of peace. How do we move from this state of "Not War" to a state of Peace?

Grammatically, the word "Peace" is an abstract noun (also known as a nominalization). Abstract nouns do not exist as things. A pen, a building, a cat are all concrete nouns. They exist in the world as physical objects. Words like Peace or Love or Relationship or Conflict or Mediation are all verbs which have been frozen as a static noun. This has the effect of making the abstract noun seem immovable and permanent. It also has the effect of disempowering us from the actions we can take to change the circumstances.

By way of example, consider the difference between these two sentences.

"I'm afraid our relationship isn't working out"
"I'm afraid the way we are relating isn't working out"

Most people would experience the first sentence as final and immovable. The second however, is often experienced as a statement of how things are right now but with the possibility of movement. This is due to the use of verb form of the word “relationship”.

So, what is the verb form of “Peace”? “Peacing” is obviously incorrect, although it does express the concept sufficiently. How does one engage in “Peacing”? This is where I invite the readers to share in the comments what they feel would be positive acts of Peacing. After all, we Mediators are often referred to as Peacemakers and there must surely be lessons and ideas we can draw from our training, work and practice that can help.

On my part, I want to offer 3 ideas.

First, I think a key part of Peacing is promoting understanding and acceptance. To be clear, this is more than just tolerance. To tolerate something has a bit of a negative connotation. As if you didn’t like it but you are forcing yourself not to react and to behave in a certain way. Understanding and acceptance is something entirely different. Understanding requires empathy and the ability to step into the other person’s shoes and see the world through their eyes. This would already be a very good start. Sadly, there seems to be precious little of this today. We cling on to our notions of separateness and think that “the problems of the other person are not my problem”.

The next step would be acceptance of the differences that exist and that it is ok to be different. This doesn’t necessarily mean that we agree with their lifestyle but that we accept that they have a different lifestyle. This is often difficult to do because we see a different lifestyle as a threat to our lifestyle. Our “either-or” paradigms (win-lose, us-them, right-wrong) must evolve into a space where we can say things can be “this *and* that”. We try to do this in bringing parties to a settlement in mediation. Perhaps this can be done in a wider space.

Secondly, a key part to Peacing must be the ability to start and continue to have dialogue with all stakeholders. Just as we facilitate communication in mediation and that communication is key to helping parties find common ground, ways must be found for groups (whether communities, races, countries, etc) to have honest, productive communication about our fears, emotions, assumptions and concerns. The space and process must be managed such that there is responsible freedom of expression without judgment. The process must manage how, who and when one speaks and also take into account how to manage strong emotions.

It is important for the freedom of expression to be responsibly exercised. One should not be able to get away with deliberately saying inflammatory things or saying things in an inflammatory manner. It may mean that facilitators have to reframe or that might even have to be coaching in communication as a precursor to the dialogue. Judgment cannot exist either so that people don't feel afraid to speak, albeit responsibly. An excellent demonstration of what not to do can be easily found on social media where flame wars abound and trolls flourish. It is easy to say something on social media without thinking too hard about the consequences of what one says. Responsible action in social media is so rare it often seems like an oxymoron.

This leads us to the third point. How often do we walk our talk? I have been in the presence of people who meditate (not mediate) speaking about mindfulness and the no-ego state and in the next moment losing it when a car cuts in front of them. Maybe the reason why people don't handle conflict well is because they don't know any other way? Think about it for a moment. We learn how to handle what life throws us from our families, friends and frankly the media. Our family and friends, while often well-meaning, don't often encourage us to understand and accept the other person (whom we have perceived to have wronged us or are unacceptably different) and to engage in productive dialogue. Instead, they often feel it is their role to side with us and make us feel that we are justified in our actions. As for the media, we are bombarded with bad news and TV shows and movies that glorify war and show us that shouting the other person down or physically hitting them is an acceptable way to deal with conflict. And honestly, I get it. A news service that only shares good news will go out of business. And no one will tune in to a TV show or pay to watch a movie where the protagonist goes about his/her way dealing with conflict in a positive, affirming and empowering manner. It is after all a form of escapism. The problem is that viewers sometimes forget that it is a form of escapism and they unconsciously take on those behaviours as appropriate ones to use in the world. And this toxifies the environment.

As mediators, we are role models. When resolving disputes between parties, how we do it also informs and educates parties on how to speak, how to address emotions and how to solve problems. But outside our formal roles as mediators, we need to also walk our talk. How do we handle conflict in our daily lives with our loved ones? How do we communicate with those we are in conflict with? How do we handle difference or challenges?

My apologies if it seems to some readers that some of what I have said is naive or that I have suggested nothing new. Some may even say, what can we as private individuals do? Well, I am happy to accept that greater minds than mine have thought about this. I am also willing to accept some of these ideas have been tried and have not worked. I do not see these as reasons to not keep thinking about how

to wage peace or that we should stop challenging ourselves to make the ideas work. As for the enormity of the enterprise, I take a leaf from the environmental movement. “Think Global, Act Local”. We do want we can in the context of our own spheres of influence and we will hopefully hit a threshold, a bifurcation point from which a greater order will emerge from the chaos. Let’s see what we can do by Peaceing Things Together.

[*This article appeared first on Kluwer Mediation Blog]

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Patience & Silence Are Powerful Energies
Patience Makes You Mentally Strong
Silence Makes You Emotionally Strong

Article

CONFIDENTIALITY DILEMMA IN INTERNATIONAL COMMERCIAL ARBITRATION

MAYANK SAMUEL

There is a widening gap between the traditional approach which considers confidentiality as an integral part of arbitration and the modern understanding where certain domestic courts have rejected any implied duty of confidentiality. One of the main reasons for parties' choice to arbitrate is the privacy and confidentiality of proceedings. This paper provides suggestions on working around the confidentiality conundrum to protect the commercial dealings and trade secrets of parties to arbitration. It seeks to propose general uniform rule, giving arbitral tribunal greater powers on protecting parties' confidentiality from potential misuse.

CONFIDENTIALITY IN ARBITRATION PROCEEDINGS: AN INTRODUCTION

The terms 'Privacy' and 'Confidentiality' had been used in arbitration interchangeably until the latter half of 20th century.[1] While 'Privacy' means that no third party can attend arbitral conferences and hearings, 'Confidentiality' refers to non-disclosure of particular information in public.[2] Private hearings would not necessarily attach confidentiality obligations to the parties to arbitration. The general assumption had been that arbitration proceedings are both private and confidential, though the latter stands corrected in the 21st century.

Arbitrations owe their application to a private agreement, which is different from litigation. The underlying assumption that confidentiality is a part and parcel of arbitration proceedings flows from the traditional

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(Footnotes)

[1] M. Collins QC, *Privacy and Confidentiality in Arbitration Proceedings*, 11 Arbitration International 321-336 (1995).

[2] Gary B Born, International Commercial Arbitration, 2251-2252(1sted. 2014).

understanding of arbitration. This has, however, undergone change in the last decade of 20th century with Australian and Swedish courts rejecting any implied duty of maintaining confidentiality in arbitration.[3] Judicial opinion therein caused confusion and irregularities in the application of confidentiality principle to arbitrations around the world. To clarify this, multiple jurisdictions came out with new arbitration laws and internationally recognized arbitral institutions amended their rules.

While some nations and arbitral bodies notified that implied confidentiality cannot be assumed in arbitration proceedings, others have followed the traditional approach to include the same as a duty imposed either upon the arbitrators, or parties or both[4]. The nature of arbitration proceedings and extent of applicability of confidentiality is dependent upon two factors:-

(i) The seat of Arbitration
(ii) The Rules applicable to the Arbitration

However, the confidentiality issue is complicated due to involvement of multiple actors (witnesses, translators, officials of the arbitral institution etc.) in arbitration who – unlike the arbitrator(s) and parties – are not governed by the arbitral rules or arbitration agreement even though they have access to confidential information. There is no uniformity on scope of application of confidentiality principle amongst countries and international arbitral institutions.

CONFLICTING CONFIDENTIALITY STANDARDS IN COUNTRIES

Under the French Civil Code, confidentiality is limited to arbitrators' deliberations; however French judiciary has opined that there is a limited general duty of confidentiality. The French court ruling in

(Footnotes)

[3] Richard Smellie, *Is arbitration confidential?,* Lexology-Fenwick Elliott Solicitors, http://www.lexology.com/library/detail.aspx?g=fe578ed6-03ca-4f77-b4f8-61094f6b901b (Last updated: March 12 2013).

[4] The countries and arbitral institutions following the traditional understanding have been discussed in detail in the next chapter.

PROMOTING STUDENT AUTHORS

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

Aita[5] – where party violating the confidentiality obligations was penalized – seems to provide rigorous protection to the confidentiality of arbitral proceedings and award. Across the Channel, the London Court of International Arbitration (LCIA) is one of the world's leading arbitral institutions for commercial dispute resolution.[6] Though the UK governing law – the 1996 Arbitration Act – is silent on confidentiality, there are three applicable rules[7] –

(i) Arbitration proceedings are to be held in private, unless agreed otherwise
(ii) There is an implied confidentiality in every arbitration
(iii) Such confidentiality is subject to certain exceptions, namely court order, parties' consent, public interest and reasonable necessity.

Arbitration is the preferred mode for companies for resolution of their disputes since it allows them to keep the settlement terms and trade secrets confidential. The England & Wales HC in *Emmott*[8] upheld the existence of parties' implied duty of confidentiality in arbitration proceedings. The judgment did two things, namely –

(i) It divided all confidential information into two parts –

a. Firstly, information which is inherently confidential (trade secrets); and
b. Secondly, information protected by implied duty of confidentiality such that the same finds application only in arbitration.

(ii) It recognized four exceptions (court order, parties' consent, public interest and reasonable necessity) to the implied duty of confidentiality.

These principles later found application in *Milsom v. Ablyazov*[9] where the Court observed that such implied duty isn't absolute. For instance, this duty won't extend to a party's own documents even though the same were produced in arbitral proceedings, since they were inherently non-confidential.

ARBITRAL SEATS IN ASIA

Asia is increasingly becoming the center for international commercial arbitration since its emergence as the economic powerhouse.

Singapore

Singapore is home to Singapore International Arbitration Centre (SIAC) – the local arbitration laws explicitly provide for confidentiality in court proceedings emanating from arbitration, on parties' request.[10] The general obligation of confidentiality in arbitral proceedings is impliedly read into the arbitration agreement. The Singapore HC in *Kristle Trading*[11] observed that the confidentiality level applicable to

(Footnotes)
[5] Aita v. Ojjeh, (1986) Revue de L'arbitrage 583.
[6] LCIA, *Introduction*, http://www.lcia.org/LCIA/introduction.aspx (Last accessed: November 30, 2016).
[7] John Forster Emmott v. Michael Wilson & Partners Limited, (2008) EWCA Civ 184.
[8] *Ibid*.
[9] Milsom & Ors v. Ablyazov, (2011) EWHC 1846 (Ch).
[10] International Arbitration Act, Act No. 23 of 1994, Chapter 143A (2002)§§ 22, 23.
[11] International Coal Pvt Ltd v. Kristle Trading Ltd and Another and Another Suit, (2009) 1 SLR 945

a specific arbitration is required to be evaluated on a case-to-case basis. For instance, an arbitration award registered as a court judgment would be available in public domain as compared to deliberations of the arbitral tribunal and documents produced which are required to be kept confidential in totality.[12]

Analysis – Singaporean law departs from the English position on one count. The Singapore HC in *Win Win Nu*[13] held that court's leave wasn't required for disclosure of information reasonably necessary to protect a party's legitimate interests. This is in contrast to the English position where such leave is required. The local laws however provide for court's subsequent adjudication upon the reasonable necessity of such disclosure, though arguably by then the damage is already done.

Singapore International Arbitration Act (SIAA) provides for arbitration-related proceedings to not be heard in open court where a party makes an application to that effect.[14] Even in closed-court proceedings, the court exercises control over publication of information;[15] only where all parties agree upon such publication or the court feels that the same would not reveal any confidential information, is it permissible.[16] In *AAY & others v. AAZ*[17], the HC opined that non-disclosure of parties' identity amounted to protection of confidentiality of arbitral proceedings.

(Footnotes)

[12] *Ibid*
[13] Myanma Yaung Chi Oo Co Ltd v. Win Win Nu and another, (2003) SGHC 124.
[14] International Arbitration Act, Act No. 23 of 1994, Chapter 143A (2002)§ 22.
[15] *Ibid,* § 23(2).
[16] *Ibid,* § 23(3).
[17] AAY and others v. AAZ, (2009) SGHC 142.

Hong Kong

The Hong Kong Arbitration Ordinance (HKAO) expressly imposed confidentiality in arbitration proceedings from 2011, mandating parties to deter from disclosing any information pertaining to arbitral proceedings or the final award.[18] Where parties haven't contracted to keep their information confidential, statutory restriction will come into play. The Hong Kong International Arbitration Centre (HKIAC) prohibits any communication of information in relation to arbitral proceedings or award. Mandatory disclosures under law, disclosure necessary for enforcement of a legal right and disclosure in course of challenging the arbitral award are the three exceptions to the general rule.[19]

Analysis – Where a party(s) challenges the arbitral award, closed-court proceedings (just like Singapore) happen, unless the party applies for open-court.[20] Hong Kong courts' control over publication of information is also similar to Singapore. Though the Ordinance is silent on legal consequences arising out of breach of confidentiality in arbitration, HK courts pass injunction orders to prohibit unwarranted disclosure.

JURISDICTIONS REJECTING IMPLIED CONFIDENTIALITY

United States of America (US)

Though the US Court of Appeals for the Second and Fifth Circuit have affirmed that any question on the applicability of confidentiality in arbitration is a question on the very nature of the process, it is erroneous to presume that all information tendered during arbitration would remain confidential.[21] The American Arbitration Association (AAA) and American Bar Association (ABA) have regulations defining arbitrator's obligations to maintain confidentiality.[22] However, it is silent on the parties' obligations. The underlying logic is that parties have the autonomy to decide if they wish to disclose the details of arbitration and award. However, this is the real issue as confidentiality is frequently violated by parties and witnesses in US.

Sweden

The Swedish Supreme Court in 2000 in *AI Trade Finance*[23] held that no implied duty of confidentiality existed in private arbitrations neither under the UN-ECE rules nor under the Swedish law. The judgment left express contractual provisions in the arbitration agreement as one of the two possible alternatives.

(Footnotes)

[18] Hong Kong Arbitration Ordinance, L.N. 38 of 2011,§ 18(1).

[19] *Ibid,* § 18(2).

[20] *Ibid,* § 17.

[21] Laura A. Kaster, *Confidentiality in U.S. Arbitration*, Mediate.com, https://www.mediate.com/mediator/attachments/26226/Confidentiality%20in%20Arbitration%20DRSNewsSpr12.pdf (Last accessed: November 30, 2016).

[22] Canon VI- An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office *The Code of Ethics for Arbitrators in Commercial Disputes*, American Arbitration Association, www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 (Last accessed: November 30, 2016).
Also, *Statement of Ethical Principles for the American Arbitration Association,* an ADR Provider Organization, American Arbitration Association, https://www.adr.org/aaa/faces/s/about/mission/ethical principles?_afrLoop=987748010824047&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D987748010824047% 26_afrWindowMode%3D0%26_adf.ctrl-state%3Dws5c7lhnu_4 (Last accessed: November 30, 2016).

[23] Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc., Case No. T 1881-99 (1999).

Australia and New Zealand

The Australian High Court in *Plowman*[24] distinguished privacy from confidentiality, observing that the latter isn't an essential attribute of arbitration. New Zealand, in order to negate the ramifications of the Australian judgment, codified the confidentiality obligation of the parties.[25]

INTERNATIONAL ARBITRAL BODIES AND THEIR GUIDELINES

Though most of these guidelines require the arbitrator(s) to maintain confidentiality regarding arbitral proceedings, most fail to impose a similar obligation on parties. The UNCITRAL and Stockholm Chamber of Commerce (SCC) Rules have a limited role: they merely provide for private hearings and confidentiality of awards.[26]

The ICC rules provide for private hearings and confidential functioning of the ICC Court. It also gives the Tribunal power to pass confidentiality-based orders on a party's application, which is relevant for protecting trade secrets and confidential information. The Rules per se don't provide for the confidentiality of awards, materials and Tribunal's deliberations, unless requested for by the party.

Article 30 of the LCIA rules obligates parties to keep the (i) award, (ii) all materials and documents presented and, (iii) the Tribunal's deliberations confidential. There are three exceptions to this general rule.[27] A prior consent of all parties and the arbitral tribunal is required for publication of award.[28] Article 41 of Dubai International Arbitration Centre (DIAC) Rules provide for confidentiality protection on same lines as LCIA with one difference.[29] The former doesn't envisage a situation concerning publication of the arbitral award.

(Footnotes)

[24] Esso Australia Resources Ltd v Plowman, 128 ALR 391 (1995).
[25] New Zealand Arbitration Act 1996,No 99 of 1996, § 14.
[26] UNCITRAL Arbitration Rules 2013, UNCITRAL, §§ 6 and 7, http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (Last accessed: November 30, 2016).
Arbitration Rules 2010, § 46, Arbitration Institute of the Stockholm Chamber of Commerce, http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf (Last accessed: November 30, 2016).
[27] These exceptions are: (a) Party is required to disclose in furtherance of a legal duty (b) Enforcement of a legal right (c) Enforcement/challenge to the arbitral award
[28] LCIA Arbitration Rules 2014, § 30.3,The London Court of International Arbitration, http://www.lcia.org/dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article 30 (Last accessed: November 30, 2016).
[29] DIAC Arbitration Rules 2007,§ (41), Dubai International Arbitration Centre, http://www.diac.ae/idias/rules/Arb.Rules%202007/6MISCELLANEOUS/ (Last accessed: November 30, 2016).

Article 38 of China International Economic and Trade Arbitration Commission (CIETAC) rules prohibit all persons involved in arbitration (parties, arbitrators, witnesses, interpreters, experts and any other relevant person) from disclosing substantive or procedural matters to a third-party.[30] WIPO arbitration rules have a strict confidentiality protection regime since focus is on protecting intellectual property and trade secrets.[31]

MAINTAINING CONFIDENTIALITY IN INTERNATIONAL ARBITRATIONS

There is no universally accepted approach to maintaining confidentiality in international commercial arbitrations. However, parties have the autonomy to decide the degree of confidentiality they want in their arbitral proceedings. Privacy in arbitration proceedings would not necessarily guarantee confidentiality; hence special care is required to be observed while drafting the arbitration clause to ensure that parties' dealings and interests remain confidential. Common and civil law courts have given contradicting opinions on a range of confidentiality issues such as[32] –

(i) Does the duty of confidentiality extend only to commercially sensitive information and arbitral award or to all information relating to proceedings? Does it include the very existence of arbitration?
(ii) Are witnesses obligated to maintain confidentiality?
(iii) Whether confidentiality is required to be maintained during court proceedings arising out of arbitration?

Though the institutional rules are inclined towards protecting confidentiality in arbitral proceedings, bodies like ICC don't provide for the same per se, leaving it at the Tribunal's discretion to do so.

The foremost thing to be considered by parties is the nature of arbitration clause – whether an express provision is required envisaging specific situations or adoption of institutional rules providing for confidentiality would suffice. The ideal approach herein is to have specific confidentiality provisions in arbitration agreement to complement the laws of arbitral seat/arbitration rules. Practical suggestions on incorporation of certain crucial provisions in arbitration clause are provided hereunder. Parties have to provide for the duty of confidentiality in arbitration agreement since arbitral laws fail to provide foolproof protection.

(i) Confidentiality requirements for documents – The arbitration clause should contain confidentiality requirements for all documents exchanged between the parties and steps to avoid disclosure.[33] This is important to ensure that business secrets aren't divulged by a vindictive party. Parties can impose higher standards of confidentiality protection with respect to trade secrets and identify the same to the other party under the agreement. Where malafide

(Footnotes)
[30] China International Economic and Trade Arbitration Commission, *CIETAC Arbitration Rules*, China International Economic and Trade Arbitration Commission, http://www.cietac.org/index.php?m=Page&a=index&id =106&l=en (Last accessed: November 30, 2016).
[31] WIPO Arbitration Rules, §§ 75-78, World Intellectual Property Organization, http://www.wipo.int/amc/en/arbitration/rules/#conf2(Last accessed: November 30, 2016).
[32] Robert Cutler, Timothy Webb and Anastacia Totoeva, *How confidential will your international arbitration really be?*, Lexology, http://www.lexology.com/library/detail.aspx?g=5731344d-7e47-4730-944f-7d028acaa225 (Last accessed: November 30, 2016).
[33] *Supra* n.23.

disclosure happens, the defaulting party would be liable to compensate the 'victim' party in terms as the Tribunal may decide.

(ii) Confidentiality obligations of third-parties – The material submitted in arbitration, witness' statements, tribunal's deliberations and the final award should be maintained as confidential by not only the arbitrator(s) and parties, but also the witnesses, experts and administrative personnel. The tribunal and the parties have to make sure that all appearing witnesses sign the confidentiality undertaking. However while drafting, parties should keep in mind the mandatory disclosures under law and financial reporting requirements.

(iii) Choice of governing arbitral law – A legal regime seeking to prevent breach of confidentiality rights is preferable. The law should provide for the same either statutorily (as in, Hong Kong) or impliedly (as in, England and Singapore).

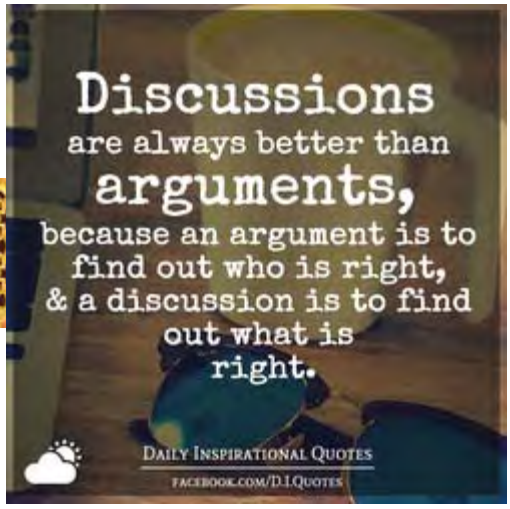
Parties under the misconception that arbitration is an inherently confidential process merely adopt one of the generic 'arbitration' clauses. The aforementioned provisions come into play where adopted arbitral rules fail to provide expected degree of confidentiality protection. Though parties entering into a commercial relationship consider an expansive arbitration clause detrimental to the deal, they should nevertheless be exhaustively negotiated in the beginning. Parties must also have a clear stand on the confidentiality protection they require in order to draft the arbitration clause more effectively.

SUGGESTION FOR A UNIFORM RULE

Since courts face the dilemma of balancing implied duty of confidentiality in arbitral proceedings to improve the ease of doing business with their duty to explore truth in judicial proceedings, they are unlikely to be able to come up with a solution.[34] At the same time, arbitral bodies around the world find it difficult to amend their confidentiality provisions in order to create a uniform standard since such differences are indicative of the competition in arbitration business. Considering that parties often opt for a generic arbitration clause to avoid focusing on contingent future disputes, uniform confidentiality protection mechanism is the need of the hour.

(Footnotes)

[34] Jeffrey W. Sarles, *Solving The Arbitral Confidentiality Conundrum in International Arbitration,* American Arbitration Association's Annual Volume, 18th edn. ADR & the Law, New York, https://international-arbitration-attorney.com/wp-content/uploads/arbitrationlawConfidentiality.pdf (Last accessed: November 30, 2016).



Proposal – When arbitration commences, the tribunal has to get the parties to agree on the scope of confidentiality. Where parties fail to reach a consensus, the arbitrator(s) will pass a protective order the terms of which will have deemed acceptance from the parties. Where a party alleges violation of either the confidentiality agreement or protective order in course of proceedings, the same must be resolved by the tribunal. Even if such violation happens after conclusion of arbitration proceedings, it has to be resolved by the same tribunal which can impose penalties on the defaulting party. The underlying reasoning here is that such tribunal will be better equipped than courts (or any other tribunal, for that matter) to tackle the above-mentioned violation, given their understanding of dispute and familiarity with the confidentiality agreement/protective order.

The arbitrator(s) can use pre-determined confidentiality clauses indicating various levels of confidentiality protection to get parties' agreement on the scope of confidentiality.[35] However, a protective order – when required to be passed – should incorporate certain exceptions, preferably on the lines of English law. The underlying logic is that even if parties have only incorporated a generic arbitration clause with no confidentiality protection, this rule will still be binding. Parties will also avoid going to the courts in case confidentiality provisions are breached – saving time, money and most importantly, their confidential information.

An arbitral tribunal however, cannot pass a protective order without the parties' consent. The tribunal constituted will explain the Proposal to parties in order to make them understand that maintaining confidentiality is in the best interests of both. Where the parties consent to application of protective order in case of failure to arrive on an agreement, the same cannot be withdrawn later. However, where no consent is given such protective order will have no value.

CONCLUSION

Judicial pronouncements by domestic courts in the last decade or two have caused a split in the understanding of confidentiality in arbitration proceedings. The level of confidentiality protection differs from state to state, body to body, which is something the arbitrating parties should be aware of. Arbitral institutions should seize the initiative in removing uncertainties that have crept in concerning confidentiality in international arbitrations. If disparities in the confidentiality standards are not bridged, parties would be skeptical to go for arbitration. The uniform rule proposed in the preceding section will ensure that trade secrets, sensitive financial dealings and other confidential information can be protected. Corporate parties seek privacy and confidentiality in arbitration – the same can be ensured by either incorporating the suggested provisions in arbitration clause or application of the proposed uniform rule.

(Footnotes)

[35] *Ibid.*

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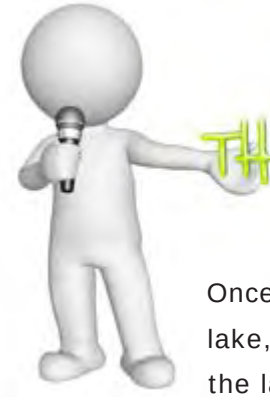
Out of the Box



Once Buddha was traveling with a few of his followers. While they were passing a lake, Buddha told one of his disciples, “I am thirsty. Do get me some water from the lake.”

The disciple walked up to the lake. At that moment, a bullock cart started crossing through the lake. As a result, the water became very muddy and turbid.

The disciple thought, “How can I give this muddy water to Buddha to drink?” So he came back and told Buddha, “The water in there is very muddy. I don’t think it is fit to drink.”

After about half an hour, again Buddha asked the same disciple to go back to the lake. The disciple went back, and found that the water was still muddy. He returned and informed Buddha about the same.

After sometime, again Buddha asked the same disciple to go back. This time, the disciple found the mud had settled down, and the water was clean and clear. So he collected some water in a pot and brought it to Buddha.

Buddha looked at the water, and then he looked up at the disciple and said, “See what you did to make the water clean. You let it be, and the mud settled down on its own, and you have clear water. Your mind is like that too! When it is disturbed, just let it be. Give it a little time. It will settle down on its own. You don’t have to put in any effort to calm it down. It will happen. It is effortless.”

Having ‘Peace of Mind’ is not a strenuous job!

Brain Teasers

There are 3 triplet brothers looking identical. One is Sam, who always tells the truth. The second is Tom, who always tells a lie. The third is Jim, who either tells the truth or a lie. You go to visit them one day. All the three are sitting side by side. You don't know who is who. So you ask each person a question, first the one who was sitting on the extreme left: "Who is the guy sitting in the middle?" The answer is "He is Sam." You ask the one who in the middle: "What is your name?" The answer is "I am Tom" You ask the one sitting on the right: "Who is the guy sitting in the middle?" The answer is "He is Jim" You get really confused. But with little thinking can you find out who is who. How?

[Answer at Page 22]

A man is driving down the road and his car broke down near a monastery. He goes to the monastery, knocks on the door, and says, "My car broke down. Do you think I could stay the night?" The monks graciously accept him, feed him dinner, and even fix his car. As the man tries to fall asleep, he hears a strange sound. The next morning, he asks the monks what the sound was, but they say, "We can't tell you. You're not a monk."

The man is disappointed, but thank them and leaves from there. Some years later, the same man breaks down in front of the same monastery. The monks again accept him, feed him, and even fix his car. That night, he hears the same strange noise that he had heard years earlier. The next morning, he asks what it is, but the monks reply, "We can't tell you. You're not a monk."

The man says, "All right, all right. I'm dying to know. If the only way I can find out what that sound was, is to become a monk, how do I become a monk?"

The monks reply, "You must travel the Earth and tell us how many blades of grass there are and the exact number of sand pebbles. When you find these numbers, you will become a monk."

The man sets about his task. Some forty-five years later, he returns and knocks on the door of the monastery. He says, "I have traveled the earth and have found what you have asked for. There are 145,236,284,232 blades of grass and 231,281,219,999,129,382 sand pebbles on the earth. "The monks reply, "Congratulations. You are now a monk. We shall now show you the way to the sound."

The monks lead the man to a wooden door, where the head monk says, "The sound is right behind that door." The man reaches for the knob, but the door is locked. He says, "Real funny. May I have the key?" The monks give him the key, and he opens the door. Behind the wooden door is another door made of stone. The man demands the key to the stone door. The monks give him the key, and he opens it, only to find a door made of ruby. He demands another key from the monks, who provide it. Behind that door is another door, this one made of sapphire. So it went until the man had gone through doors of emerald, silver, topaz and amethyst.

Finally, the monks say, "This is the last key to the last door."

The man is relieved to no end. He unlocks the door, turns the knob, and behind that door he is amazed to find the source of that strange sound.

But I can't tell you what it is. You're not a monk!

GLOBAL POUND CONFERENCE INDIA MARCH 17-19, 2017 AT CHANDIGARH

GPC series India will be held at the Judicial Academy, Chandigarh, India during 17-19 March 2017. The goal of the GPC is to create a conversation about what can be done to improve access to justice and the quality of justice around the world in civil and commercial conflicts. It will convene all stakeholders in dispute resolution – commercial parties, chambers of commerce, lawyers, academics, judges, arbitrators, mediators, policy makers, government officials, and others – at conferences around the world. The GPC series was launched in March 2016 at Singapore and the last of the series will be held at London in July 2017. During the period the GPC series will be held in over 40 places organised in over 30 countries.

The conferences, "**Shaping the Future of Dispute Resolution and Improving Access to Justice**" will provoke debate on existing tools and techniques, stimulate new ideas and generate actionable data on what corporate and individual dispute resolution users actually need and want, both locally and globally. There will also be networking opportunities for the participants to interact with local and international stakeholders through panel discussions, interactive sessions and informal engagements. The event is targeted at dispute resolution users, advisors, providers and other stakeholders.

The Global Pound Conference is your opportunity to be part of history! Join in the conversation and make a real impact in helping shape the future of commercial dispute resolution! For details log on to www.arbitrationindia.org/gpc.html

NEW ARBITRATION & MEDIATION RULES FOR IIAM

Indian Institute of Arbitration & Mediation has brought out its new Arbitration Rules and Mediation Rules. The IIAM Mediation Rules, along with the Mediator Code of Conduct (adopted as per the guidelines of the International Mediation Institute (IMI), The Hague) has been updated. The new IIAM Arbitration Rules has adopted the UNCITRAL Rules with modifications and include provisions for

Emergency Arbitration, Fast Track Arbitration, Arb-Med-Arb Procedure etc. (UNCITRAL has endorsed the acceptance at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules_status.html).

The rules have been made at global standards, so that best practices could be adopted in both domestic and international mediation and arbitration. The new rules will be effective from 1st January 2017. For downloading the new rules and the new fee schedule, visit the IIAM website at www.arbitrationindia.com/rules.html.

Use the following QR code to download the Rules

IIAM Arbitration Rules

IIAM Mediation Rules

HIGH LEVEL COMMITTEE TO REVIEW INSTITUTIONALIZATION OF ARBITRATION

The Government of India has laid emphasis on making Arbitration a preferred mode for settlement of commercial disputes. In order to ensure speedy resolution of commercial disputes and to facilitate effective conduct of international and domestic arbitrations, to go into various factors to accelerate arbitration mechanism and strengthen the arbitration ecosystem in the country and to examine specific issues and roadmap required to make India a robust centre for international and domestic arbitration, the Government has decided to constitute a 10 member High Level Committee (HLC) in the Ministry of Law and Justice, with Mr. Justice B N Srikrishna, former Judge, Supreme Court of India as the Chairman.

TWO-TIER ARBITRATION PROCEDURE PERMISSIBLE UNDER INDIAN LAW

The Supreme Court of India held (Centrotrade Minerals and Metal Inc v. Hindustan Copper Ltd. – 15/12/2016) that the settlement of disputes or differences through a two-tier arbitration procedure (whereby a party can appeal the result of an arbitration to a second arbitration panel) is lawful under Indian law.

The court held that there was nothing in the Arbitration and Conciliation Act 1996 that precluded the parties from agreeing that an award could be referred to a second panel of arbitrators by way of an appeal, with the result of that appeal being subject to the challenge procedure provided by the 1996 Act. Furthermore, two-tier arbitration procedure did not violate Indian public policy.

SEZ RULES RELAXED TO ALLOW FOREIGN LAWYERS IN INDIA

In what can be seen as a baby step towards opening India's legal and accounting sector to foreign players, the Government of India has amended Special Economic Zone Rules, 2006 which could make Legal and accountancy services from foreign entities possible in the Special Economic Zones. The amendment to Special Economic Zones Rules, 2006, has been published in the Official Gazette.

THIRD PARTY FUNDING OF ARBITRATION AND MEDIATION

The Hong Kong government on 30 December 2016 gazetted the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016. The Bill closely follows the recommendations made by the Law Reform Commission in the Report on Third Party Funding for Arbitration dated 12 October 2016.

The Bill clarifies that the centuries-old doctrines of maintenance and champerty, which prohibit third party funding for litigation, do not apply to funding of arbitration and mediation.

MANDATORY TO SUGGEST MEDIATION UNDER NEW BILL IN IRELAND

Solicitors and barristers will be obliged to advise their clients to consider using mediation to resolve disputes under a new Bill to be published in 2017. The Minister for Justice and Equality will bring the Mediation Bill to Cabinet early this year.

It will introduce an obligation on solicitors and barristers to advise parties to disputes to consider using mediation as a means of resolving them. In addition, when court proceedings are launched, it will also oblige the parties to confirm to the court they have been advised about the mediation option, and have considered it.

ICC COURT AMENDS ITS RULES

The International Court of Arbitration of the International Chamber of Commerce (ICC Court) has announced important amendments to its Rules of Arbitration. The revised rules will apply from March 1, 2017 in an effort to increase the efficiency and transparency of ICC arbitration procedures.

The most important innovation related to the upcoming rules is the provision that "Expedited Procedure Rules" will automatically apply to all on-going arbitration procedures involving amounts in dispute below US$2 million, as well as cases involving higher amounts on an opt-in basis.

LAW TO BOOST FRAMEWORK FOR COMMERCIAL MEDIATION IN SINGAPORE

Commercial mediation work in Singapore has been given more legislative muscle, as Parliament passed the Mediation Bill, one of two bills tabled to strengthen the Republic's position as an international centre for dispute resolution.

The new Mediation Act, aimed at making settlements more enforceable, will allow parties who reach a settlement after mediation to agree to apply to have the settlement recorded as a court order, which can be enforced. It also stipulates that mediation communication cannot be disclosed to any third party, and cannot be admitted into evidence without permission as well.
The Act is the last of the recommendations made by the International Commercial Mediation Working Group to be implemented. The group was set up in 2013 by the Chief Justice and the Law Ministry.

ELECTION OF THE SECRETARY-GENERAL OF THE PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration (PCA) has announced the re-appointment of Mr. Hugo Hans Siblesz as Secretary-General of the PCA for the 2017-2022 term.

Mr. Siblesz was elected to a second term by a majority of the Member State delegations present and voting at the 196th meeting of the PCA Administrative Council held on 14 December 2016. This was the first contested election of the PCA Secretary-General in the PCA's 116-year history, reflecting the growing relevance of the institution.

FORMER ARBITRATOR JAILED SIX MONTHS FOR CHEATING

A former chartered arbitrator was convicted for cheating the director of the Kuala Lumpur Regional Centre for Arbitration (Malaysia) six years ago. The Sessions Court judge sentenced the arbitrator to six months in prison and a fine of RM20,000.

The allegation of cheating was to dishonestly inducing the Centre into believing that the arbitrator's statement of independence was true. All arbitrators are required to make a declaration of their independence, to ensure their impartiality in the case they would preside over. The arbitrator allegedly convinced the victim to appoint him as the arbitrator in the dispute.

Brain Teaser (Answer): Since Sam always tells the truth, you can first find him by false logic. If the person sitting on the left was Sam, he would not say (when asked who the guy in the middle was), "He is Sam" because Sam never lies. So the person sitting on the left cannot be Sam. If the one in the middle is Sam, he should say "I am Sam". But he said that he is Tom. So he cannot be Sam, the truth teller. Considering these two statements, it is clear that the person on the right is Sam. His statement is always true. Therefore the middle one is Jim. That leaves Tom on the left.

COMMERCIAL MEDIATION TRAINING PROGRAM FEB-MAR, 2017

Are you interested to become a Commercial Mediator or a specialist Dispute Resolution Practitioner? With the rise in the volume of business, dispute resolutions and enforcement have also increased. Mediation has become an undeniable part of the legal landscape. Domestic and international business community is increasingly incorporating mediation as the primary method of dispute resolution. A trained mediator / professional helps in assisting the parties in identifying and clarifying shared interests, shared needs, individual interests and individual needs. The mediator guides the parties toward solutions that are workable and longstanding. 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 IIAM Mediation Training Program combines the theory of ADR through highly interactive, skill-based courses in negotiation and mediation.

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 | 5 days, during 27 February to 3 March, 2017 (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