News magazine of the Indian Institute of Arbitration & Mediation

THE Indian arbitrator

THE INDIAN ARBITRATOR

Volume 1 Issue 1
February 2009

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Publisher:
Indian Institute of Arbitration & Mediation

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EDITOR'S NOTE

We are happy to announce that our news magazine, "The Indian Arbitrator" is now changed to e-magazine. We have also made it free. All you need is to send the online subscription form, so that the e-magazine reaches you. We have removed the subscription charges and made it online, so that it could reach many within India and outside. Many of our valued subscribers had requested to make this news-magazine online.

The e-magazine would continue to give its members information about different forms of dispute resolution methods and news and views about ADR happening in India and different parts of the world.

IIAM proudly announce the launch of its DPM Services, which include the IIAM Community Mediation Service and the International Certification of Legal Audit. The interest of IIAM is to provide a program for preventive procedures that substantially reduce, if not wholly eliminate, potential litigation. Be part of the IIAM DPM Service, which is intended to resolve conflicts, promote social and communal harmony. Partner with us to create a loving and caring world.

We have made all attempts to make this magazine useful to our members, arbitrators and persons dealing with arbitration and mediation. We look forward for your valuable opinions and suggestions to improve the quality and usefulness of the magazine, so as to serve you better.

Looking ahead.....

A MISSION; A RESPONSIBILITY

Towards creating a loving and caring world

: ANIL XAVIER

Paswan from West Bengal, India, was not fortunate enough to see the murderers of his son tried for their acts. Paswan, a prime witness in his son's case died on 29 July 2004, one day after the 'Special Bench' of the Kolkota High Court ruled that the case against the perpetrators in the murder of his son could proceed on the finding that "*government permission is not required to prosecute Singh, now a Deputy Inspector General, as kidnapping was not among his official duties as a police officer*". It took the Indian judiciary ten years to decide a matter that any informed person would have resolved in a few minutes. There are also instances where adjudication of matters of management of minor's estate became infructuous because the child became a major before the matter could be heard and instances where the civil right of a person was decided after his death. According to Mr. Justice M.N. Venkatachaliah, former Chief Justice of India, a matter came up before him when he was sitting as the Chief Justice, which he himself had drafted in his early years as a lawyer about 27 years back.

According to recent statistics, in India, the judge population ratio is 12 - 13 judges per million. This is the lowest in the world, as compared to 135 to 150 per 10 lakh people in advanced countries. A study conducted by the Ministry of Finance reveals that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts. "California's population was almost touching 38 million. In India, that's the number of cases pending in courts across the country". Providing this peculiar comparison was none other than the Chief Justice of India, Mr. Justice K.G. Balakrishnan.

"Blessed are the peacemakers: for they shall be called the children of God", the words may not be the same, but a similar philosophy exists in all religions. Reconciliation, love and peace have enormous moral, spiritual and ethical value.

The denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system of the country. The legal system is simply not equipped to handle the number of cases filed. It is often said that litigation is an unwelcome houseguest that stays for years or decades together. This has led to instances of people settling scores on their own, resulting in a growing number of criminal syndicates and mob justice at least in some parts of the country reflecting the frustration of the people in the long wait for justice they are compelled for, by our legal system.

A recent study also concluded that 70 percent of the "winners" in litigation were unhappy in the end. One can safely assume that close to 100 percent of the "losers" in litigation were also unhappy. To make rule of law a reality, the arrears will have to be reduced. Speedy justice is an assurance extended to a citizen under the right to life guaranteed by the Constitution. Right to speedy trial is an important right in the UK and US.

India has huge potential to become an economic superpower. Its population stands at over a billion, making it the second largest population in the world. The middle class alone is greater than the population of the United States or the European Union. India is also the fourth largest economy in the world and has the second largest GDP of developing countries. But in spite of all this, India has failed to live up to expectations, and foreign investment has not been as high as expected. No amount of prosperity or development is either possible or worthwhile, if it is not accompanied by social infrastructure, one of which

is a good legal system and an efficient dispute redressal mechanism, which provide the citizenry the assurance that they live under the protection of an efficient legal regime.

Conflict and Resolution

Conflict is a part of life. Everyone has differing points of view, and we all need to figure out how to live with each other. No matter how trivial the conflict, it causes serious stress for everyone involved. Matrimonial disputes can shake the entire social fabric of existing families. They have such an effect upon the society and impact the whole society as such. Sometimes there may not even be a clear legal remedy for the problem. Conflict often results in a breakdown of communication, hurt feelings and defensiveness among individuals. Longer the conflicts persist, worse the problems seem to get. Sometimes victims of crime need answers and apologies more than they need to know perpetrators are being punished; and sometimes offenders need to find out just who they've hurt to realize what they've done is wrong. There is no conflict without emotion. There can be no resolution of violent conflict without addressing the underlying emotions that gave rise to it and sustained it. Behind almost every human conflict someone feels dismissed, discounted, disenfranchised, or disrespected.

"Blessed are the peacemakers: for they shall be called the children of God", the words may not be the same, but a similar philosophy exists in all religions. Reconciliation, love and peace have enormous moral, spiritual and ethical value.

Peacekeeping is a profession and can be a vocation. It is a belief, a value and a way of life. We have many people in our community who believe in peace and practice peace making.

People with problems, suffers from mental trauma and obviously yearns relief as quickly as possible preferably in an inexpensive way. It is in this context that the Indian Institute of Arbitration & Mediation (IIAM) brought out the concept of establishing Community Mediation Clinics as an inexpensive option with the motto; "**Resolving conflicts; promoting harmony**". It is a way to bring peace to people without litigation. Time has come for the people to acknowledge our ancestral wisdom which used mediation as a method to generate dialogue and discussion rather than intimidation and aggression.

The concept of IIAM Community Mediation Service (IIAM CMS) was launched throughout India by the Chief Justice of India, Mr. Justice K.G. Balakrishnan on 17th January 2009 at New Delhi.

Community Mediation Clinics enhance access by helping to bring justice to the society. It helps preserve relationships by avoiding the embarrassment of being hauled into court, and by giving people the opportunity to air concerns that a court would rightly ignore when evaluating a legal claim. The process also allows people the freedom to solve their problems in a way that best fits their situation, increasing the likelihood that they will abide by their agreements and feel good about the resolution. Mediation Clinics has the potential to change society and empowers the community to resolve disputes. Mediation may be able to plow beneath the surface of frequently vexatious litigations by addressing the underlying conflicts. The mediator acts as a bridge to iron the wrinkles of differences affecting the parties.

We have to keep in mind that the legal system is not the place to deal with hurt feelings. Mediation is a process for individuals to resolve disputes during which they themselves provide solutions and make the decisions rather than fight it out through litigation. It is also a process that can mould a more peaceful society. Conflict prevention is one of the keys to the success and harmony in their society. Community mediation also helps in restorative justice through its variety approaches and restoring the offender in community by giving correctional practice thereby giving everyone a second chance.

Community Mediations helps to maintain peace and solidarity among the members by facilitating settlements among conflicting parties. Community mediation means neighbours helping neighbours to solve problems and resolve disputes. In this concept, mediation is provided by trained community mediators who represent the community. They are viewed as an opportunity for citizens to participate in the prevention and early intervention of conflicts as an alternative to institutional mechanisms. The theme is, "Talk it out; Not fight it out".

IIAM CMS provides an important service to the community. The program could contribute to the happiness and harmony of the community. People would get a platform near home to settle their cases hastily and harmoniously, without the trappings of a court. Through a system that resolves disputes before it requires adjudication, it is hoped the legal system will be freed up to deal with more serious cases.

IIAM CMS is intended to divert cases from court, build bridges between communities and transform society into a more tolerant, understanding people. The mission of

IIAM CMS is to utilize law as a modality for healing and helping, and not just technically resolving problems; to focus on the future and reconciling relationships, rather than simply looking to the past and punishing transgressions and to believe in peace-making. Setting up of IIAM Community Mediation Clinics in all districts of each state with a view to mediate all disputes will bring about a profound change in the Indian Legal system. Conflict management programs with the formation of such clinics will serve to defray tensions in societies and prevent them from erupting into violence.

These Mediation Clinics would function with an efficient team of mediators who are selected from the local community itself. The people so selected would be trained by IIAM, and a certificate of recognition would be issued. The mediators so selected will be persons who shall be having a good repute in the local area to whom people shall have faith and shall include educated youth, ladies and elders. Peacekeeping is a profession and can be a vocation. It is a belief, a value and a way of life. We have many people in our community who believe in peace and practice peace making.

IIAM CMS has also been endorsed by the International Mediation Institute (IMI) at the Hague, Netherlands, which is formed to generate confidence in the usage of mediation and for certifying high competency standards for mediators throughout the world.

Community mediation services were first established in Britain in the 1980's and expanded rapidly. Community mediation programs now flourish throughout the United States. In San Diego (California) having the third largest number of trial courts in the USA, 97% of the civil cases are settled through mediation. Records from US programs on community mediation throughout the country demonstrate that 85% of mediations result in agreements between the disputants. Similarly, studies show that disputants uphold these agreements 90% of the time.

Promoting harmony

IIAM CMS has the potential to shape powerful conflict transformation partnerships. Such approaches often have the power to heal even profound social wounds, so that the system can become a vehicle for creating a loving and caring world.

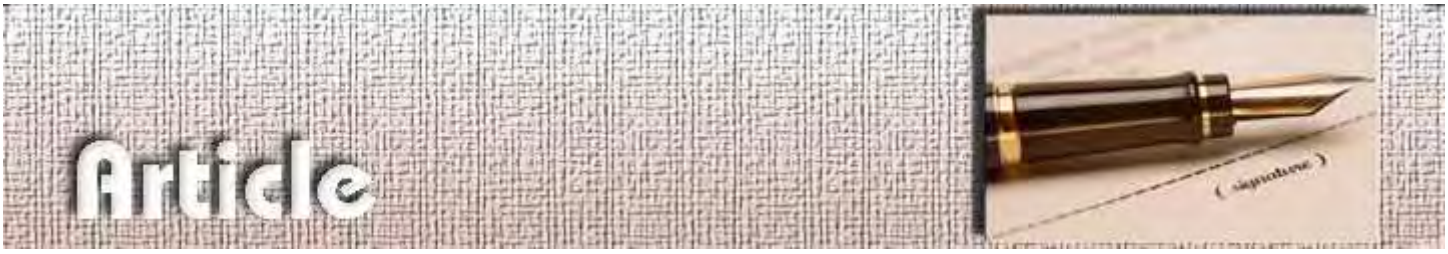
But as the former President of India, Mr. A.P.J. Abdul Kalam has said, "If nation is to have ethics; society has to promote ethics and value system." To promote the concept of IIAM CMS, organizations that promote peace building or conflict resolution has to partner in an effort to support peace and harmony. To make our world a safe, sustainable, peaceful and prosperous place to live, corporate houses can make an important contribution by adopting such Community Mediation Clinics. As a business opportunity and simultaneously to fulfill their Corporate Social Responsibility (CSR), Corporates can adopt a long term approach in partnering with IIAM for a long term process of positive social transition.

Propagation and establishment of Mediation Clinics definitely enhances the social capital that is vitally needed for the society. As Mr. David Putnam has put it, it would work as a Social capital, which would be networks of cooperation in which people invest and from which they may ultimately derive benefits. Putnam looked at social capital primarily in terms of its benefits to society rather than the individual. Research has shown how powerfully social capital, or its absence, affects the well being of individuals, organizations, and nations.

Clinics, established in each district will be known as "Partner's Name Mediation Clinic" in association with IIAM Community Mediation Service. Disputes can be registered with the Clinic by one of the parties or through referrals from courts, police, community organizations, civic groups, religious institutions, government agencies, community leaders or from any of the party's friends or family members.

Legal compliance and Peace building processes could be greatly strengthened if organisations, people and society cooperate. Establishing Mediation Clinics not only help settlement of cases pending before courts but also help in preventing diputes reach courts. Community mediation can be thus helpful not only for public for avoiding lengthy litigation process but also it gives a relief for Courts from meddling with trivial issues and thereby concentrate and devote more time and energy on other important matters which calls for its attention. IIAM intents to establish at least 100 mediation clinics by 2010 and ultimately have mediation clinics in each district of India by 2015. IIAM Community Mediation Service has the potential for transforming our conflictual society into a collaborative, problem-solving one. Be part of the IIAM Community Mediation Service, which is intended to resolve conflicts, and promote social and communal harmony.

(Author is the President of the Indian Institute of Arbitration & Mediation and also a Member of the Independent Standards Commission of the International Mediation Institute at the Hague, Netherlands. More details on IIAM CMS can be obtained from the author anilxavier@arbitrationindia.com or from the website www.arbitrationindia.org)



International Commercial Arbitration & the Indian Judicial Approach – A CATCH 22 SITUATION

: Akanksha Bapna and Harshita Verma

The last five years, in particular the year 2008, has been the vantage point in India in the coliseum of international commercial arbitration with at least five retrogressive judicial pronouncements bringing the already conservative arbitration culture in India to a cul-de-sac. This paper is an attempt to expostulate the recent judicial overtures in India which goes against the international trends and the legislative purport.

INTRODUCTION

With the scourge of sub prime crisis vexing the confidence of Indian financial markets, robust growth of foreign investment inflows becomes imperative. As 2009 would be soon rolling in, India's competitive advantage of growth rates comparatively higher than the major developed economies of the world (as projected by IMF Report of April 2008)[1] would shore up its attractiveness as a lucrative investment destination. Effectiveness of dispute resolution mechanisms of the target country, particularly the exit strategies, becomes a decisive element while entering into a foreign investment contract. Success in any dispute resolution mechanism, be it litigation or arbitration depends on the enforcement of the judgment or award.[2] In fact, in majority of the investment contracts, international arbitration becomes the preferred mechanism for resolving cross – border disputes owing to the easier enforcement of arbitral awards accorded by the New York Convention.[3] Indian Judicial system has always been viewed with distrust world over particularly as regards the judicialization of the arbitral process. Therefore, time has come to discontinue this judicial hostility to assure ourselves that India remains a fancied choice for the global investors.

A BIRD'S EYE VIEW OF INTERNATIONAL COMMERCIAL ARBITRATION

International arbitration is a specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.[4] Due to the influence of national law on international commercial arbitration, the definitions of 'commercial' and 'international' is country specific.[5] The UNCITRAL's[6] Model Law on international commercial arbitration and the New York Convention[7] are two of the most prominent international

(Footnotes)

1 As enumerated in World Economic Outlook; a survey by the staff of International Monetary fund-Washington DC, April 2008.
2 J. Stewart McClendon, "Enforcement of Foreign Arbitral Awards in the Unites States", 4 Northwestern Journal of International Law & Business, Spring 1982, at 58, 59.
3 Global Arbitration Review., p. 1-2 available at http://www.herbertsmith.com/NR/rdonlyres/96D39318-B1CE-44A7-B4FD-13B6E906484C/7388/IndiaGlobalArbitrationReview0508.pdf
4 Julian D.M. Lew et al., "Comparative International Commercial Arbitration", Kluwer Law International, para1-1, p. 1(2003)
5 Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development (Cambridge, UK, Cambridge University Press, 1st edn., 2001) p. 158
6 Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN Doc A/40/17.
7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

instruments in promoting and regulating international commercial arbitration[1] and their implementation by almost all major nations in the world[2] has given it a remarkable stature.

In the Indian setting, the legal framework was undeniably not conducive to transnational trade and foreign investment especially after opening of its economy in 1990. To accommodate the exigencies of a more timely and certain arbitral process, with minimum cost and judicial interference, the present Arbitration and Conciliation Act ((hereinafter referred to as Act), 1996 was enacted. A common objective that runs throughout the Act is speedy arbitration and minimal court intervention.[3]. Section 5 states –"Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (Part I), no judicial authority shall intervene except where so provided in this Part." This provision finds place in UNCITRAL and the arbitration laws of almost all the signatory countries. However, the judicial approach seems to impede this very purport of the legislature and the spirit of UNCITRAL by espousing a rather strained approach in respect of certain provisions in the Act.

DELVING INTO THE JUDICIAL MINDSET

As said earlier, judicial approach has been examined under three heads –

1. 'Internationality' in an International Commercial Arbitration.

For the term international, a global consensus has never existed on the definition.[4] . The Indian lawmaker's approach departs from the Model law[5] and the law prevalent in other jurisdictions.[6] Section 2(1)(f) of the Act defines internationality as to connote a situation where at least one of the parties is cl. (i) a national or habitually resident in a foreign country, or cl. (ii) body corporate incorporated outside India, or cl. (iii) a company or an association of individuals whose central management or control is exercised outside India. Interestingly, the Supreme Court went too far while interpreting the term international, in the recent case of TDM Infrastructure Private Limited v. UE Development India Private Limited[7] wherein it held that internationality is determined by the place of incorporation of the party irrespective of where the central management and control is located. Therefore cl. (iii) will apply only in cases where cl. (ii) is inapplicable. It appears that the Supreme Court read the word 'or' as 'and', thereby holding the word 'or' to be conjunctive. Thus, irrespective of the seat of arbitration, two companies which are incorporated in India and have been domiciled in India (including subsidiaries of foreign companies incorporated abroad) cannot opt out of the Act of 1996, even by agreement because such arbitration becomes a domestic arbitration. In such cases, parties are deprived of the benefit of forum-shopping and choice of law.[8] Such an interpretation is not only against the legislative intent but also largely inconsistent with the principle of party autonomy.

Arbitration agreement between Indian company and foreign company with its subsidiary in India. – In such a case the dealings may be international, yet the parties are compelled to enter into a domestic arbitration agreement. Parties may wish to resolve disputes through international commercial arbitration for multifarious reasons, like to take advantage of the laws of a foreign land. Emplacement of the subject – matter of the dispute in a foreign country may have such implications making international arbitration indispensable. Even in most of the Bilateral Investment treaties to which India is a party, incorporation is not the exclusive test to ascertain nationality.[9]

2. Enforcement of Foreign Arbitral Awards: A Whole New Ballgame

Enforceability of arbitral awards under the New York convention has granted arbitration a preferred status in cross – border transactions.[10]

(Footnotes)

1 Winnie (Jo-Mei) Ma, "Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia" (A Ph.D. thesis, Bond University, Australia, December 2005) (on file with Bond University)

2 More than 52 countries have based their national legislations on UNCITRAL. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. At present1 142 member states are have ratified and adopted the New York Convention. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

3 See s. 4, 5,12, 14(4), 16(5), 19(1), 25 of the Act

4 Tao Jingzhou, "Arbitration Law and Practice in China",2003, Kluwer Law International, p.21.

5 In defining the term International, Article 1 (3) of the Model Law stresses on the place of business of the parties, performance of the contract, arbitration or the subject matter.

6 The Model Law has been adopted in principle in various jurisdictions like France, Singapore, Switzerland, Netherlands et al. For instance, Singapore International Arbitration Act, 1994 under S. 3(1) read with Article 1(3) of the Model Law provides for the same. On the other hand, s. 2(1) (f) of the Indian Act stresses upon on the parties' residence or nationality.

7 2008 (2) ARB L R. 439(SC)

8 The substantive law shall necessarily be the Indian law. See s. 28 (1) (a) of the Act.

9 Supra Note 3 above, at 1-2. Under these treaties, dispute resolution mechanisms are available only to an investor. An Indian company controlled by foreign investors could be described as an investor under these treaties.

10 Supra Note 11 above, at 4

A. Public Policy

According to the Indian statute book, public policy is one of the grounds for challenging an award under section 34 and for challenging enforcement of foreign award under section 48 of the Act. Public policy can be a 'double-edged sword' in international commercial arbitration – 'helpful as a tool, dangerous as a weapon'.[1] This precarious weapon, which has often been referred to as an unruly horse[2], has by far been the most debatable issue in legal circles. To read public policy defense as a parochial device protective of national political interests would seriously undermine the New York Convention's utility.[3]

The broader the term is construed, the more is the possibility of litigation. In Gherulal Parakh v. Mahadeodas Maiya[4], Supreme Court said that any attempt to discover new heads under public policy should be disfavored. In the subsequent decisions, court tilted its approach towards a broader view.[5] Further, in Renusagar Power Co Ltd v. General Electric Co[6], it was held that an award could not be set aside on the ground of violation of the public policy of India merely because the Award was shown to be suffering from error of law. It interpreted public policy to mean anything opposed to fundamental policy of the law, interests of India, justice or morality.

ONGC v. Saw Pipes in 2002 held that an award can also be challenged on the ground that it contravenes the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract.[7] It expanded the scope of judicial review by supplementing public policy with another impediment – 'error of law'

Analysis of ONGC v. Saw Pipes: Firstly, it amounts to affixing a new ground under section 48 and 34 particularly in view of the words "only if" used in those sections, which have now become redundant.[8]It can be contrasted with the stand of the US Supreme Court in the recent landmark case of Hall Street Associates, L.L.C. v. Mattel, Inc. (2008)[9], where the Court held that the purview of judicial review under the Federal Arbitration Act, 1925 is exhaustive and an erroneous interpretation of law by arbitrators is not subject, in the federal courts, to judicial review[10].

Secondly, the Arbitration and Conciliation Bill, 2003 makes the legislative intent very clear while adopting the meaning of public policy as enumerated in Renu Sagar's case[11].

Thirdly, Indian courts have underscored several indicators by virtue of which the courts may discern public policy viz., Preamble, Fundamental Rights, Directive Principles etc. Feasibility of employing these in an international context involving foreign parties is quite dubious as they are peculiar to the Indian context.

Fourthly, courts across jurisdictions provide for a strict circumscription of the term public policy in the enforcement of foreign awards.[12] In Parsons and Whittemore Overseas Inc. v. RAKTA[13] the United States Court of Appeals for the second circuit held that the "state's most basic notions of morality and justice" constitute public policy. English courts are also reluctant in turning down the enforcement of a foreign award on the grounds of public policy.[14] Therefore, international trend accentuates a narrow interpretation of the term 'public policy'.

(Footnotes)

1 Loukas Mistelis, "Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards" (2000)2 International Law Forum Du Droit International 248, 248.

2 Richardson v.Mellish (1824) 2 Bing 229, 252) described public policy as 'a very unruly horse', and when once you get astride it you never know where at will carry out.

3 Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier RAKTA and Bank of America, 508 F. 2d 969 (2nd Cir., 1974).

4 Supp (2) SCR 406 at 440.

5 See Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156; Rattan Chand Hira Chand v. Askar Nawaz Jung, (1991) 3 SCC 67.

6 (1994) Suppl (1) SCC 644.

7 2003 (5) S.C.C. 705, at 744 -745

8 In the instant case, such restrictive definition was only used for domestic awards .The implication of the judgment in the international context can be discerned from the controversial judgment of Venture Global v. Satyam Engineering which will be discussed later.

9 Hall Street Associates L.L.C. v. Mattel Inc., 128 S. Ct. 1396 (2008), 1403-1404

10 See Progressive Data Systems, Inc. v. Jefferson Randolph Corp., 275 Ga. 420, 568 S.E.2d 474 (2002)which shows that judicial deference to an arbitral award may allow any challenge to arbitration award, even where the arbitrator clearly ignores the law.

11 Supra Note 26 above

12 In Oberlandesgericht of Hamburg, 3 April 1975, YCA, Vol. 2 (1977), the German Court held that infraction of public policy in 'extreme cases only'.

13 Supra Note 23 above.

14 See Westacre Investments Inc. v. Jugoimport - SPDR Holding Co Ltd [1999] 3 All ER 864, 886, Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd [1999] 2 Lloyd's Rep 222.

B. No Separate Legislation on Domestic Arbitration and International Commercial Arbitration.

In the scheme of the Act, Part I deals with domestic arbitration and Part II deals with international commercial arbitration. In Bhatia International v. Bulk Trading S.A.[1], the SC emphatically obliterating all differences between applicability of Part I and II of the Act[2] held that Part I (which also grants the courts the power to issue interim measures[3]) would necessarily apply to all international arbitrations taking place in India and for those which are held out of India, Part I would apply unless excluded by the parties by express or implied agreement.[4] An award made in an international commercial arbitration held in a non-convention country is also considered to be a domestic award.[5] The benefit of direct enforcement of an award rendered in a country that has[6] not acceded to the New York Convention of 1958 would make the reciprocity reservation made by India ineffective.[7]

The recent landmark case of Venture Global Engineering v. Satyam Computer Services Ltd. went way ahead when it said that an Indian Court is competent to entertain any challenge against a foreign arbitral award on any ground (including error of law or patent illegality) under section 34of the Act irrespective of the substantive law of the contract.

Analysis of Venture Global v. Satyam Engineering: Firstly, Venture Global is per incuriam as it is in complete disregard of ONGC case and Renu Sagar's case. In the former it was expressly said that the novel interpretation of the term public policy by them would not apply to international arbitration[8].

Secondly, it's tantamount to allowing two sets of legislations to apply to one subject matter, i.e. international commercial arbitration. Applying Part I to international commercial arbitration when we specifically have Part II seems to be a ludicrous proposition.

Thirdly, it is a principle recognized world over that an action to set aside a foreign award would lie to the competent authority of the country in which, or under the law of which, that award was made[9].

Fourthly, allowing challenge to a foreign award under section 34 would amount to allowing two rounds of litigation to the same party on the same ground, which the legislature could not have intended.

Fifthly, this means that Indian courts can review any foreign award on merits, irrespective of whether the seat of arbitration is in India or outside India, is in a convention country or a non – convention country, when either the parties or assets are located in India. The inevitable consequence is that parties would be reluctant to choose the seat of arbitration in India.

Sixthly, it would asking too much of an Indian District Court to review an arbitral award according to an alien legal system.

3. Appointment of arbitrators - Another Instance of Judicial Legislation

Under section 11 (6) of the Act, if the parties fail to agree on a procedure for appointing arbitrators, the Chief Justice of India or any person or institution designated by him is empowered to do so upon request of the party. In yet another impediment to the arbitral process, the

(Footnotes)

1 (2002) 4 SCC 105

2 In the scheme of the Indian Arbitration and Conciliation Act,1996, Part I deals with domestic arbitration, Part II deals with international commercial arbitration, S. 48 falls under Part II.

3 It is pertinent to mention that there is no provision for interim measures under Part II of the Act. S. 9 talks of grant of interim measures by Court. S. 17 talks of grant of interim measures by the arbitral tribunal.

4 (2002) 4 SCC 105, at 119

5 The Court reasoned that in the absence of any express provision for the enforcement of awards made in a non-convention country, such an award can be enforced only if it is considered as domestic award to which Part I would apply.

6 Contrast this with the US SC's decision in Hall Street Associates L.L.C. v. Mattel Inc. (see supra note 29 above). Also see ONGC v. Saw Pipes, see supra note 25 above.

7 S.K.Dholakia, "Bhatia International v. Bulk Trading S.A.", Eastern Book Company., (2003) 5 SCC (Jour) 22 8SC in ONGC's case had distinguished itself from the Renu Sagar case (which was delivered by a larger bench) on the ground that the ratio would not apply to an international arbitration.

9 See Article 34 of UNCITRAL, Article V (1) (e) of the New York Convention. Same principle has been adopted by the US courts in the following case-laws - International Standard Electric Corp. v.Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F.supp.172, M & C Corporation v. ERWIN BEHR GmbH & Co., KG, a foreign corporation, 87 F.3d 844 ,Yusuf Ahmed Alghanim & Sons vs. Toys R US. INC. Thr. (HK) Ltd. 126 F.3d 15

In yet another impediment to the arbitral process, the Supreme Court in S.B.P. and Company v. Patel Engineering Ltd.[1] that decision of the Chief Justice of India as on procedure for appointment of arbitrators under section 11(6) is final. This function is a judicial function and not an administrative one. Further, in express disregard of the Act, it held that the Chief Justice of India shall not delegate it to a subordinate judge or to any institute but only to a judge of the Supreme Court. While discharging this function, a judge shall be bound to rule upon the jurisdictional matters raised before it like existence of a valid arbitration agreement. This amounts to attenuating the well acknowledged principle of Kompetenz – Kompetenz, which is explicitly mandated under Section 16 of the Indian Act. An arbitrator's power to determine his own competence including validity of the agreement is subject to the aforesaid judge's decision. Thus, this judgment effectuated a notably retrogressive change in the prevailing law of the land.

CONCLUSION

Degree of judicial interventionism in the arbitral process is the paramount canon in determining the place of arbitration. As a general proposition, an arbitrator's ruling is, for all practical purposes, virtually unreviewable on merits[2]. Disregarding this cardinal principal would make enforcement of arbitral awards arduous. In this context, Lord Mustill remarked – "The gray areas in enforcement of arbitration awards should be removed as India is going to become the hub of international arbitration, geographically and strategically as the country witnesses a boom in economic activities"[3]

The question arises – Do we really need to clamor for an inward – looking judicial approach when India has bright prospects for becoming an international hub of arbitration, particularly owing to the advantage of lower cost associated with it? From the above ratiocination, it can be discerned that the Indian SC is striving to augment the scope of domestic arbitration by subsuming those disputes within it which can otherwise be categorized under international commercial arbitration, thereby circumscribing the former's scope.[4] The result is that any international arbitration where seat of arbitration is in India becomes a domestic arbitration. One reason for restrictive attitude of the Hon'ble Supreme Court could be the increased possibility of the pronouncement of awards infected with errors, both of law and fact, by amateur arbitrators. However, international commercial arbitration stands on a different footing where competent, conscientious and fair arbitrators belonging to legal as well as business community are appointed.

In the authors' viewpoint, the Indian Courts should espouse a liberal interpretation in the international sphere and a constricted one in the domestic sphere. Therefore, India needs two separate pieces of legislations on domestic and international commercial arbitration.

(Authors are fourth year students of BA.LLB (Hons.) of National Law Institute University, Bhopal, India)

(Footnotes)

1 2005 (8) SCC 618

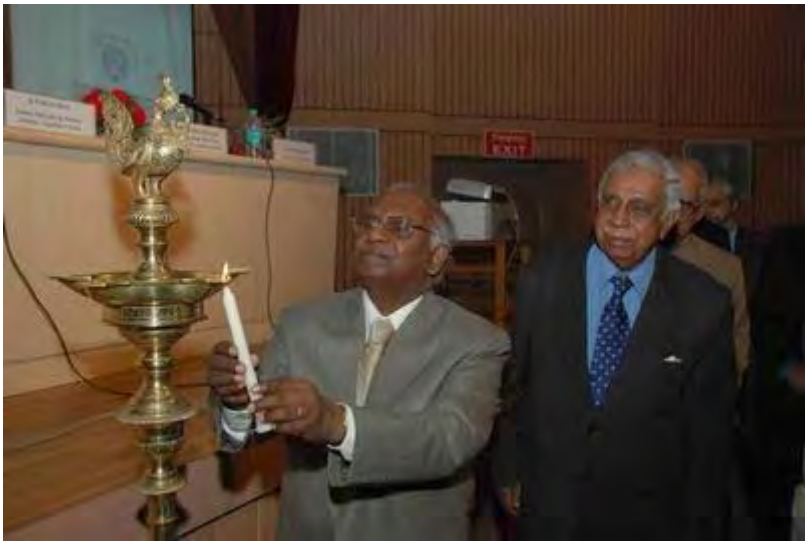
2 Lawrence R. Moelmann & John T. Harris, The Law of Performance Bonds (Tort and Insurance Practice, American Bar Association, (1999), p. 252

3 India Inc global hub but first, get arbitration, Financial Express, March 28, 2006.

4 See analysis on Bhatia International v. Bulk Trading S.A and Venture Global v. Satyam Engineering above.

IIAM DPM Service launched by CJI

IIAM Dispute Prevention & Management (DPM) services (Community Mediation Services & International Certification of Legal Audit) was launched nationally by Hon'ble Mr. Justice K.G. Balakrishnan, Chief Justice of India on January 17, 2009 at New Delhi. On the occasion, IIAM Delhi Chapter was inaugurated by Hon'ble Mr. Justice M.N. Venkatachaliah, Former Chief Justice of India.



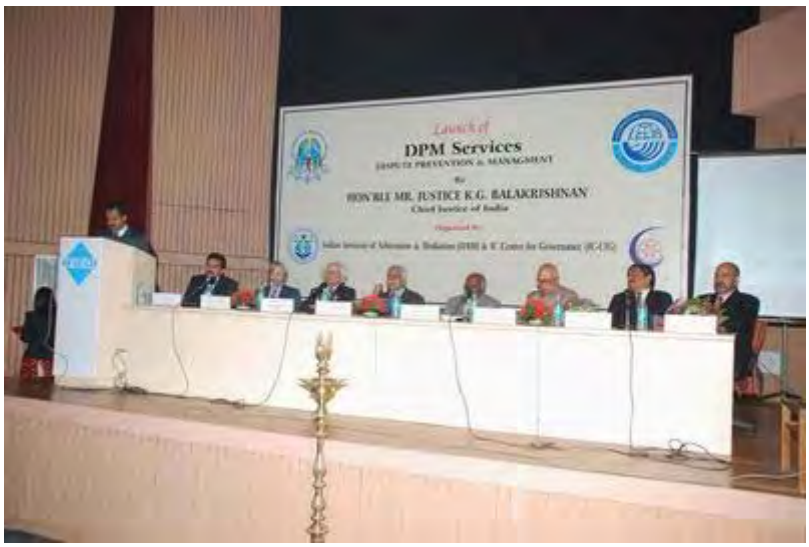
Hon'ble Mr. Justice K.G. Balakrishnan, Chief Justice of India inaugurating the launch of IIAM DPM Services.

Hon'ble Mr. Justice M.N. Venkatachaliah, Former Chief Justice of India, Mr. Parasaran, Senior Advocate & Former Attorney General of India, Hon'ble Mr. Justice Madan Lokur, Judge High Court of Delhi are also seen.

Mr. Anil Xavier, President IIAM gave a presentation on the concept of Legal Audit and IIAM Community Mediation Service. Mr. K. Parasaran, Senior Advocate & Former Attorney General of India, Hon'ble Mr. Justice Madan B. Lokur, Judge, High Court of Delhi and Dr. Abid Hussain, Former Ambassador to the United States spoke on the ocassion. Mr. Prabhat Kumar, President IC-CfG and Former Cabinet Secretary welcomed the gathering and Mr. Joseph Varghese, Secretary General IIAM proposed the vote of thanks. Prominent people who attended the program included Judges of the Supreme Court and High Court, eminent jurists like Mr. Fali S. Nariman, Mr. Ram Jethmalani, Senior lawyers, Retired Judges, Senior Bureaucrats, Bankers, Business people, social workers etc. The program was jointly conducted by the Indian Institute of Arbitration & Mediation (IIAM) and IC Centre for Governance (IC-CfG).

Mr. C.P. Sharma, Director IIAM Delhi Chapter introducing the guests.

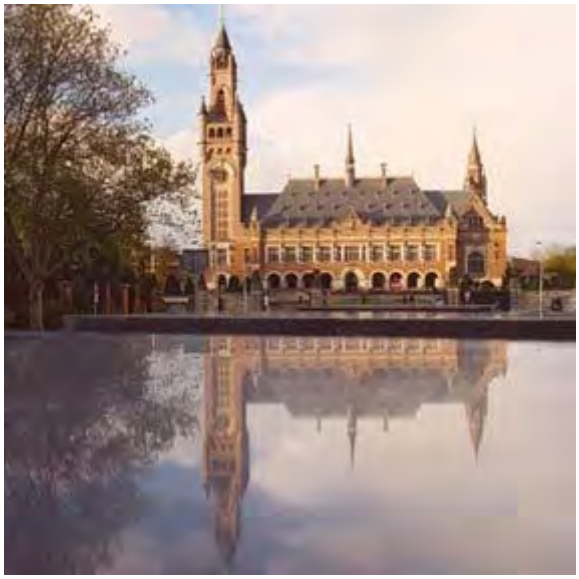
Seen in the dais from left: Mr. Anil Xavier, President IIAM, Mr. Justice Madan Lokur, Judge High Court of Delhi, Dr. Abid Hussain, Former Ambassador to the US, Mr. Justice M.N. Venkatachaliah, Former Chief Justice of India, Mr. Justice K.G. Balakrishnan, Chief Justice of India, Mr. Parasaran, Former Attorney general of India, Mr. Prabhat Kumar, Former Cabinet Secretary & Mr. Joseph Varghese, Secretary General IIAM



Host country agreement with PCA ratified by GOI

The Government of India has paved the way for the country's emergence as a prestigious hub for out-of-court settlement of international commercial disputes between various governments and non-government parties. It has decided to set up in New Delhi a regional bench of the Hague-based Permanent Court of Arbitration (PCA). A similar facility in the region is available only in Singapore. In its meeting, chaired by Prime Minister Manmohan Singh, the Cabinet also decided to ratify the Host Country Agreement signed with PCA to establish a regional facility of PCA in New Delhi.

The Cabinet also decided to issue a notification to grant various United Nations-endorsed privileges and immunities to the officials from the countries who would be working for the New Delhi-based PCA regional chapter. It is hoped that the New Delhi-based regional facility of PCA would provide a forum for international arbitrations in India for disputes arising in India and in the region, both among various countries and between a country a non-State entity, such as foreign companies which have made investments in the region, said an official press release. Since the costs of international arbitration in India



would be considerably reduced which would also encourage various parties to take more frequent recourse to arbitration in India as a means of settling disputes.

IIAM approved by the International Mediation Institute

Indian Institute of Arbitration & Mediation has been approved by the International Mediation Institute (IMI) at The Hague, Netherlands, as the authorised institution for determining Experience Qualification Path for Mediators in India.

Accredited Mediators of IIAM will be eligible for empanelment with IMI. IMI is formed for the purpose of certifying international standards for mediators and for implementing the Global Mediator Competency Certification.

On 1 January 2009, the International Mediation Institute (IMI) has launched its global mediator competency certification scheme. This is an online scheme for enabling businesses and their advisers to find the world's most competent mediators (including IIAM Mediators) by using an advanced search engine on the IMI web portal.

IMI has also endorsed the IIAM Community Mediation Service and the Chairman of the Advisory Board of IMI, Mr. Michael McIlwrath is deputed as Member of the DPM Advisory Board of IIAM.

Interested to start ADR Centre?

Indian Institute of Arbitration & Mediation is looking for parties interested to start IIAM Chapters in various states and cities.

If you have a passion for dispute resolution and you are interested to start a Dispute Resolution Centre, please mail your details to: dir@arbitrationindia.com

For details of IIAM activities visit website

Upcoming courses & training programs from IIAM

Certified Legal Auditor (CLA) Training Program

Knowledge of legal issues affecting business is increasingly important in today's environment. Law is probably the most important external factor affecting business operations. Ever-larger numbers of business decisions are influenced by government rules, regulations, and policies. The Certified Legal Auditor (CLA) Training program is a customized training program conducted by IIAM, which enables the auditor to be a professional who understands the standards and principles of auditing and the auditing techniques of examining, questioning, evaluating and reporting to determine a quality system's adequacy and deficiencies. It gives auditors in depth training on legal audit principles, iCLA audit procedure and techniques, to prioritize and focus on matters of significance, to familiarize with iCLA Legal audit software, current legal issues and trends affecting business, organizations, contracts and property, dispute prevention and management options and ADR techniques.

The Auditors have to be basically law graduates, chartered accountants or company secretaries qualified from recognized institutions. The training is designed to have a clear view of the legal environment of business, enhance their abilities to think and communicate effectively, conduct interviews, make presentations effectively and develop effective strategies for managing legal risks. It will also provide basic instruction in legal research and critical reasoning skills.Professionals who successfully complete the CLA training program will be certified by IIAM and empanelled for iCLA audit. The names of CLA's empanelled with IIAM shall be placed on the website.

Community Mediator Training Program

The Mediation Clinics established under the IIAM CMS would function with an efficient team of mediators who are selected from the local community itself. People from a wide variety of backgrounds can make good mediators. The mediators so selected will be persons who shall be having a good repute in the local area to whom people shall have faith and shall include educated youth, ladies and elders. The people so selected would be given an orientation program by IIAM, and a certificate of recognition would be issued. The selected community mediators will be empanelled with the clinic.

With the skill of an excellent mediator and the willingness of each of us to communicate, we have resolved conflicts and that resolution is as strong today as it was years ago. But it takes courage and patience to take up the responsibility of becoming a mediator. Apart from the acceptance and honour given by the community, it also gives absolute satisfaction of becoming peace builders in our community. Are you willing to become one? If so, we are looking for people who are interested in becoming community mediators for our clinics. IIAM offers free training for mediators.

Certificate in Dispute Management (CDM)

CDM is a distance learning course 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 details on courses and training programs; mail to: training@arbitrationindia.com