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EDITOR'S NOTE

Resolving disputes by which the parties are assisted by a third person are referred to by expressions such as conciliation, mediation, neutral evaluation, mini-trial or similar terms. Different countries and different cultures adapt different modes and styles of mediation. With the rise in transnational deals and disputes the requirement for interaction between mediation professionals, experts and users is the need of the hour. This has been a major reflection during the interaction in the recently concluded Asian-Pacific Mediation Conference 2012 at Hong Kong. Some initiatives are being taken up.

I shall update you on the development.

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Should Mediators have an Absolute Immunity by Law?

: DR. CHANDANA JAYALATH

Some argue that client to a mediator should have access to legal redress for harmful conduct of mediators. However, the benefits of granting absolute immunity may also overweigh the losses of keeping mediators liable in civil suit. While citing the arguments both for and against, the author suggests what is primarily intended in mediation is a key to this debate pending interpretation and contends that mediators should have absolute immunity, if the parties to truly reach a solution free from coercion.

Mediation is aiming to assist disputants in reaching a natural, practical and lasting consensus. It is a structured process in which the mediator does not determine outcome. Unlike a judge or arbitrator, the mediator does not decide who is right or wrong, neither imposes a solution. However, a frequent ha-ho is that for example, a mediator failed to attend at an agreed time for mediation, or that mediator's incompetence itself was what caused the sessions to end. Another allegation is that a party relied on incorrect advice given by a mediator, or the mediator failed to prevent the parties making an illegal, unfair or unworkable agreement or failed to disclose to a party that harm was threatened to them in circumstances where it would be reasonable to expect disclosure. Also, the mediator made an unnecessary interference, applied duress or misled a party in some material way and therefore, the mediator must be taken to courts.

As mediation is designed in part to encourage parties to settle their differences without reference to a court, the question is whether is it desirable to have a situation where the mediator is taken to court by challenging the conduct of mediation or otherwise? Some argue quasi-immunity would suffice the purpose. However, an absolute immunity only enables fully avoid trial of a claim made against mediator so that he is not required to defend a claim by showing that he acted in good faith and without malice. For example, judges retain immunity for their independence in line with the policy to protect the citizen. Not only judges, it usually extend to many of those engaged in the administration of justice; witnesses, counsel, court clerks, the jury as well as court appointed mediators. Another argument in legal circles is that absolute immunity would have been possible to anyone whose duty is only integral with the judicial process and so are considered to be figurative arms of the judge, for instance court employees. If the administration of justice is the primary policy rationale behind conferring immunity on court appointed mediators, why can not the same rationale be extended to mediators operating away from the court? Although the role of mediator is different to

that of a judge to a great extent, the debate on immunity cannot be denied upfront in terms of the model itself. Whatever model of mediation takes place; it may be significant to have absolute protection from civil suits leaving no room for anyone to contest the mediation outcome in courts where the mediator subsequently becomes a witness in a lawsuit. Also, if absolute immunity is granted for court functions only, then the tendency would be some connection to court. Apparently, it will limit mediation within the court premises. Further, an action against a mediator will require a court to inquire into what happened and what was said during the mediation session – something against the caveat of without prejudice – in turn may prevent the full and open discussions that are such an important feature of mediation.

Some argue mediator should have recognized and corrected erroneous information. Mediator is no longer an expert who operates in a strict advisory capacity. The mediator uses that information to develop an agreement and not to counsel the parties on how to proceed. The mediator does not simply dispense information to the parties rather he uses it in a manner to fashion an accord, which is per se situational.

Another question is why the mediator did not take affirmative steps to prevent a catastrophe when he was in a position to do so? When the parties contemplate in engaging illegal conduct or in breach of a memorandum of understanding, then why the mediator could not prevent? The mediation process does not require a formal determination that ascribes blame for past conduct as a condition precedent to shaping the future. Similarly, the mediation process is not compatible with imposing a legal duty on the mediator to reveal a party's improper past conduct or threats of future harm. Let us consider the mediator who intervenes to stop a clash between villagers and military troops stationed close by. Assume that at least one party has engaged in improper conduct or threatens further misconduct. If the mediator is denied access to that information because the party refuses to reveal it to him for fear of being reported, then his efforts will be lost. If one believes there is still a value in trying to resolve such situations without relying on the use of force, then permitting a mediator to operate without exposure to legal liability is imperative. Arguments against immunity also include denial of access to compensation or other remedies to rectify harm. If a person suffers loss on negligence of a decision maker, then that injured party should be compensated unless there are clear policy arguments to the contrary. There are other legal provisions that can be invoked to provide protection for parties to mediation, for example designated procedures, disclosure requirements, code of conduct and the requirement to hold minimum qualifications. If the real obstacle to civil action is the difficulty to establish the causal link between the outcome and the responsibility of the mediator, then it is not a matter of immunity.

The Lighter Side

A Sunday school teacher of pre-schoolers was concerned that his students might be a little confused about Jesus Christ. He wanted to make sure they understood that the birth of Jesus occurred a long time ago, that he grew up, etc. So he asked his class, "Where is Jesus today?" Steven raised his hand and said, "He's in heaven!"

Mary was called on and answered, "He's in my heart!"

Little Johnny, waving his hand furiously, blurted out, "I know! I know! He's in our bathroom!"

The whole class got very quiet, looked at the teacher, and waited for a response. The teacher was completely at a loss for a few very long seconds. He finally gathered his wits and asked Little Johnny how he knew this.

Little Johnny replied, "Well, every morning my father gets up, bangs on the bathroom door, and yells: 'Jesus Christ, are you still in there?"

Undeniably, parties dissatisfied with the court outcome may not sue the judge but they can appeal the decision. Candidates apply reassessment of results rather than challenging the basis of marks-giving in exams. However, there is no equivalent process for mediation because there is no determination to appeal. For privately arranged mediation, the parties are presumably free to ignore mediation efforts and pursue any other remedies. The prospect of civil liability might also deter people from carrying out this social service, so that a perfect legislative coverage is important. Therefore, as with judges, mediators are required to act impartially and independently, without fear or favour. Lack of independence makes the surrounding not sensible enough to mediate a case. Hence, mediators should be free to conduct mediations as they think appropriate and should not have fear of being sued for an error of result or future harassment. Mediators, unless otherwise may be too rigid and legalistic in their approach. With the mediator's non-determinative role, the disputants are given choice whether to remain at the mediation and whether to enter into agreement. In theory, a mediator as a neutral cannot influence the outcome of the mediation and therefore there is no basis for mediator liability. The fact that the parties are assumed to have freely reached agreement so that the mediator is not responsible for the outcome of mediation is fundamental why they should not be liable for any actions based on the terms of any agreement entered into at the mediation. On this basis, it can be safer to establish that mediators should have absolutely freehold immune from any civil action arising from the substantive outcomes of the mediation for example, unfavorable bargains or loss of opportunity.

Precluding suit against mediators avoids time consuming attempts to reopen mediated matters at courts if the parties' best interest is to avoid going to court in the first place. The premise is that mediators are not responsible for the substantive outcome of the mediation. Any agreements reached will have been freely entered into by the parties. Mediator's immunity will also prevent parties attacking the mediator's conduct as a backdoor way to unsettle a mediation agreement. Meanwhile, parties who are unhappy with the mediation outcome can refer to courts. Some argue that no mediator should be held liable if parties agree to settlement terms that do not optimize their interests or fully capitalize on their rights. For example, a mediator cannot be held liable for allowing a party to accept a financial proposal that is less favorable to the other party when compared to some other standard. Also, parties sometimes feel less confident about granting immunity to a mediator who permits a power imbalance amongst the negotiated parties. Mediator has no duty or capacity to realign or redistribute such imbalances from very practical point of view. Simply the mediator's job is not to redress any power imbalance. In nutshell, referring mediated cases back in courts would be of no use, so that an off-the-court action such as withdrawal of accreditation, license or professional membership would be more appropriate than a court action for mediator's misconduct, lack of care and incompetence. The availability of absolute immunity would make mediation as a dispute settlement more attractive.

(Author: Dr. Chandana Jayalath is a CEDR Accredited Mediator)

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We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-254, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.

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Article

Bharat Aluminium Co. versus Kaiser Aluminium Technical Services Inc. – A Critique

: SANDEEP SURESH

The Supreme Court of India by its recent judgement, "Bharat Aluminium Co. v Kaiser Aluminium" has created a new turning point in the arbitration law jurisprudence in India. By this judgment the court overruled two decisions which allowed jurisdiction for the Indian courts over arbitrations seated outside the territory of India. The author analyses the effect of this judgment basically on the aspect of prospective overruling and the practical effects, whereby two regimes, one governed by the ratio in Bhatia case and the other newly established by Bharat Aluminium, go hand in hand.

The judgment of the Supreme Court in *Bharat Aluminium Co.* v *Kaiser Aluminium Technical Services Inc*[1] (*Bharat Aluminium*) delivered on September 6th, 2012 by a constitution bench has created a new turning point in the arbitration law jurisprudence in India. This judgment overruled the ratio laid down in *Bhatia International v Bulk Trading SA & Anr*[2] and *Venture Global Engineering* v *Satyam Computer Services Ltd. & Anr*[3] wherein the Supreme Court allowed jurisdiction for the Indian courts over arbitrations seated outside the territory of India. Even though *Bharat Aluminium* has created a new epoch in the field of arbitration law, there are a few grey areas that have to be still cleared.

Based on a logical and schematic construction of the Arbitration & Conciliation Act, 1996, the Supreme Court in *Bharat Aluminium* contrary to the *Bhatia* case held that Indian courts do not have the power to grant interim measures under section 9 of the 1996 Act when the seat of arbitration is outside India. This will leave many parties remediless completely if the property in dispute is in India as this judgment doesn't allow the parties to approach civil courts even via the Code of Civil Procedure, 1908. I think it is imperative to consider the fact that the 1996 Act was formulated on the lines of the UNCITRAL Model Law on International Commercial Arbitration, 1985. This fact is clear from section 2(2) of the 1996 Act which has recognised the territoriality principle envisaged under the UNCITRAL Law. Section 9 of the 1996 Act has been articulated in consonance with article 9 of the UNCITRAL Law. However, there exists a difference between these two provisions that are *pari materia*. Under the UNCITRAL Law, article 9 has been made an exception so as to make it applicable to international arbitrations that happen

(Footnotes)

[1] Civil Appeal No.7019 of 2005

[2] (2002) 4 SCC 105

[3] 2008 (1) SCALE 214

outside the territory of the concerned State. But section 9 of the 1996 Act has not been given such a characteristic under section 2(2) of the 1996 Act which follows the territoriality principle strictly. So the pertinent question is whether India has completely adopted the UNCTIRAL Law? If the answer is in the affirmative, section 9 has to be amended so as to give it the same colour of article 9 of the UNCITRAL Law. It can be argued that the 1996 Act is largely based on the UNCITRAL Law. Globalisation and increased global relations between nations resulted in arbitration being provided as the dispute settlement method in all international contracts. In that light, the UN General Assembly in 1985 recommended that all nations should ideally give due consideration to the UNCITRAL Law while formulating their own respective domestic arbitration laws for the sake of uniformity in arbitration proceedings all over the world. Therefore, it can be reasonably assumed that India along with other countries like Australia, Singapore, Malaysia, New Zealand, Philippines etc., have adopted the UNCITRAL LAW unvaryingly into their domestic laws for the benefit of consistency. But unlike other countries[4], India has not provided for an exception to section 9 in section 2(2) of the 1996 Act unlike the UNCTIRAL Law. Thus, it is necessary for India to amend the 1996 Act accordingly. The Supreme Court in *Bharat Aluminium* ought to have looked into this issue and cleared the confusion. But it has to be kept in mind that the judiciary has its own limitations to usurp the powers of the legislature. When there is nothing in the 1996 Act that makes section 9 applicable to International arbitrations also, the courts cannot read or add anything into the existing provisions. If any amendment is to be made, it is for the parliament to make the move. The Supreme Court in *Bharat Aluminium* has defended its judgment on the lines of separation of powers strongly. In 2010, the Ministry of Law and Justice had released a consultation paper[5] proposing major amendments to the 1996 Act. One of the crucial proposals was to make section 9 an exception in section 2(2) under Part1 of the 1996 Act so as to make it applicable to even International arbitrations seated outside India. This proposal was necessitated by practical complications that would arise if parties were made remediless in cases where the assets or properties of a party are in India. But this proposal has not seen any further push from the Government.

It is important to give due considerations to all the views regarding this issue. It is inferred from the judgment in *Bharat Aluminium* that the presiding judges were majorly of the view that the application of the UNCITRAL Law was intended to be limited only to the territorial jurisdiction of the seat of arbitration *i.e.,* the territoriality principle. If that is the case, it is necessary to weigh the balance between legislative intent and practical necessities which prompted the proposal of amendments to section 2(2) of the 1996 Act. As the judiciary has performed its part in *Bharat Aluminium*, the ultimate onus is on the legislature to decide the fate of India's arbitration law jurisprudence.

Another aspect of the *Bharat Aluminium* judgment that needs scrutiny is the effect of prospective overruling on the working of judiciary hereafter. Justice Surinder Singh Nijjar on behalf of the constitution bench has categorically held that the law declared in *Bharat Aluminium* will be applied prospectively to only the arbitration agreements executed after September 6th, 2012. The effect of this ruling has to be analysed with a two pronged approach. Firstly, it is necessary to see if prospective overruling could have been applied lawfully in this particular case. As it is widely known, the doctrine of prospective overruling was first introduced in India in the case of *I. C. Golaknath & ors* v *State Of Punjab*[6]. Justice K. Subba Rao applied this doctrine without enunciating any specific guidelines for its application in the future cases. However, the Supreme Court had specifically laid down a proposition that prospective overruling could only be applied in matters arising under the Constitution of India. Even though the apex court in cases like *P. Rajendran* v *State of Madras & ors*[7] and *State of Kerala & ors* v *Alassery Mohammed & ors*[8] had applied the doctrine in non

(Footnotes)

[4] Singapore & Australia

[5] Proposed Amendments to The Arbitration & Conciliation Act, 1996, A Consultation Paper (2010), http://www.arbitrationindia.com/pdf/arbitration_amendment_2010.pdf

[6] 1967 AIR 1643

[7] 1968 AIR 1012. This case was decided by a constitution bench

[8] [1978] Crl.L.J. 925. This case was decided by a constitution bench

constitutional matters, the law laid down by a larger bench (11 judges) in *Golaknath* must be followed. Therefore, in the light of the ratio in *Golaknath*, the Supreme Court could not have made prospective overruling applicable in *Bharat* Aluminium as the case did not pertain to any issue under the Constitution. Secondly, the practical effects of this ruling need to be scrutinised. This judgment will permit two regimes, one governed by the ratio in *Bhatia* case and the other newly established by *Bharat Aluminium*, to go hand in hand. Such a situation is unwarranted and detrimental especially because both the regimes represent two distinct legal interpretations. There has already been *n* number of arbitration agreements executed before the 6th of September. So as per the prospective overruling mandated in *Bharat Aluminium,* all such agreements and litigations arising out of those agreements will be subjected to the law approved in *Bhatia*. This situation is likely to create a lot of confusion in the Indian courts while deciding arbitration cases for many more years in the future. I strongly feel that the Supreme Court ought to have given predominance to public interest while deciding to make *Bharat Aluminium* prospectively applicable. Even if the Supreme Court wanted to give prospective effect to this judgment, it should have ideally applied the ratio in *Bharat Aluminium* prospectively to all legal proceedings arising out of all the previously executed arbitration agreements rather than on arbitration agreements executed after the date of this judgment.

Therefore, even though *Bharat Aluminium* is sound in terms of its interpretation of the 1996 Act, it has not answered a few practical difficulties that may arise in the future. However, this judgment can be considered as the first step in the process of correcting the direction of India's arbitration law and practice.

(Author: Sandeep Suresh is a 3rd year LL.B student of National Law University, Jodhpur, India)

Think ... Weather Changes

The rain was pouring down. It was cold. It was the type of weather that most would call miserable. I was running. Cars were passing by looking at me, they could be asking themselves, "What is that fool doing running in the rain?"

I was the object of the imagined question. I was jogging in pouring rain in nearly freezing weather. There were two things they didn't realize. First, it wasn't raining when I started. Second, I was enjoying myself. When I started running it was cold but fairly dry. Only a light mist hung in the air. After 30 minutes, the bottom fell out of the clouds.

The weather is often nice when we start something. Weather changes.

When you start a business, it's nice. You are excited. You have money saved. You have big dreams. Then you don't make as much as you thought. Your money runs out. You had your business plans and they didn't include rain. Weather changes.

When you get married, it's nice. You are excited. You have money saved. You have big dreams. But having more bills than money wasn't in the plans. The mood swings and differences weren't on the plans. Weather changes.

"What is that fool doing running in the rain?" I was smiling. The rain and cold air felt good. The rain washed the sweat away. It kept me refreshed. It was like running in the shower. Plus, when the downpour started, I was two miles from home. There was nothing that I could do but keep running. I had no choice but to run, whether it was hot or cold, wet or dry, but the choice to smile and fully enjoy the weather, was mine.

If you've got to run, find the good in your weather and smile, even if people do think you are crazy, they don't know your situation or what you're made of inside. Weather changes!

Asian-Pacific Mediation Conference 2012 - Hong Kong

"Asia-Pacific Mediation Conference 2012: Mediation and its Impact on National Legal Systems" was conducted on 16 and 17 November 2012, organized and hosted by the City University of Hong Kong with the support of UNCITRAL. The conference was intended to promote the modernization and harmonization of the law and practice of mediation in the region and the expansion of the role of mediation and mediators both within Asia-Pacific and internationally. The conference presented an informative and stimulating program offering networking and learning opportunities to new and experienced mediators, judges, arbitrators, dispute managers, lawyers, scholars, jurists and students from various regions including Australia, Cambodia, Canada, China (Mainland), Hong Kong SAR, India, Indonesia, Japan, Korea, Macao SAR, Malaysia, New Zealand, Philippines, Singapore, Sri Lanka, Chinese Taipei, Thailand, United States, United Kingdom and Vietnam. Mr. Anil Xavier, President IIAM presented the topic, Impact of Mediation on Health & Social Welfare – Indian Context.

Mandatory ADR Information Sessions implemented in Romania

According to the latest development in the mediation legislation in Romania approved by the Romanian Parliament, w.e.f January 2013, in litigations, parties are bound to prove that they had participated in the information session with regard to mediation advantages, so that the object of mediation or other alternative form of conflict settlement are effectively promoted.

Mediation should be made integral part of Legal system – President of India

Efforts should be made that alternate dispute resolution should become an integral part of the legal system, President Pranab Mukherjee said in his inaugural address at the Seminar on Mediation organised by the Mediation and Conciliation Project Committee of the Supreme Court on November 10 at New Delhi. The President said that there is a high degree of public frustration over the complexity of laws, long delays and unproductive use of their resources in litigation. Many social conflicts have transformed into legal disputes, which accentuate the problem rather than resolve them. The President said that it was important to recognise that despite "robust, independent and impartial judicial system we have in our country, the unfortunate reality is that legal disputes can be both protracted and expensive". Exhorting that people should be encouraged to take course to mediation rather than litigation, Mukherjee pressed for the need to popularise mediation as a means of resolving disputes at grass-root level. At the very basic level, all that is required is an informal and confidential process and third party assistance that can help negotiate and amicably resolve matters in the common interest, he said.

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