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# THE indian arbitrator

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## IN THIS ISSUE:



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Address:
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www.arbitrationindia.org
Tel: +91 484 4017731 / 6570101


## EDITOR'S NOTE

*With the pronouncement of judgment by the Chennai High Court allowing foreign lawyers to participate in arbitration proceedings in India, it is supposed that it will help open up international arbitrations in India. In this edition different dimensions of this new possibility is explored. IIAM is also conducting an International Master Conference and Workshop at Bangalore on the 31st of May and 1st of June 2012, analyzing the Global perception of Arbitration and Mediation in India – making India more User-friendly. The discussion outcome will form the recommendatory note for making India ADR friendly. Hope to see you at Bangalore.*



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# Is India a preferred destination for Arbitration?

: ARPINDER SINGH & YOGEN VAIDYA

*With the new liberal policies and continuous efforts made by the Government, India has opened doors to foreign investments leading to a spurt in the number of commercial disputes. In spite of amending the Arbitration Act, there are still few challenges which need to be addressed with respect to preferences for selection of arbitration institutes, Indian regulations, interference by the courts, enforcement of foreign arbitral award, cost and time efficiency, selection of the arbitrator and involvement of experts in the arbitration proceedings. The author analyses the key challenges faced in establishing arbitration as an alternate dispute resolution method in India.*

India has shown noticeable progress in the area of arbitration, particularly after the enactment of "The Arbitration and Conciliation Act, 1996." Challenges of the existing litigation system and pressure from global companies to enforce Arbitration clauses present in their contracts with Indian entities has led to arbitration gaining rapid importance in India. With the new liberal policies and continuous efforts made by the Government, India has opened doors to foreign investments leading to a spurt in the number of commercial disputes.

In the current scenario, the need for arbitration arises mainly because of dynamic business relations and transactions, geographical and cultural differences, increased complexities in technology and misinterpretation of regulations or contract clauses. Lack of clarity on the defined roles and responsibilities as well as terms and conditions in the contract, differences in revenue sharing and cost calculations, change in ownership or management control and regulatory changes enforced by the Government have further aggravated the matter. Due to such rapid changes in the arbitration environment in India, the role and involvement of law firms and domain experts has increased significantly.

Arbitration as a concept is not new to India. In the past, this concept was followed by various means of arbitration or mediation in different forms. There typically used to be a king intervening between a dispute of two people or an official Panchayat intervening and giving their decisions. The Alternate Dispute Resolution (ADR) picked up pace in the country, with the inception of the Bengal Resolution Act, 1772 and 1781, which provided parties an option to submit the dispute to an arbitrator, appointed after mutual agreement and whose verdict would be binding on both the parties. ADR gained further importance in India, post the implementation of the Arbitration Act, 1940, and the Arbitration and Conciliation Act, 1996.

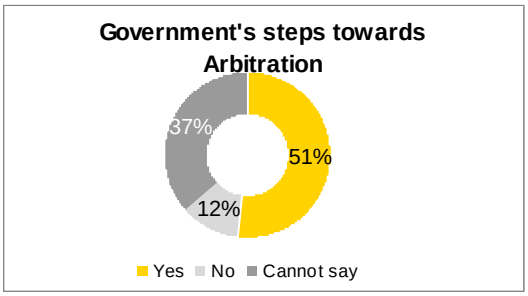
In 1985, The United Nations Commission for International Trade Law promulgated the UNCITRAL Model Law (amended as recently as 2006) which has been the source for International Arbitration and many countries like India have also based their legislations on the rules of the UNCITRAL Model Law.

Some assistance in forming a base for arbitration and formalizing the process came from various conventions around the world. An important International Convention on Arbitration, which has enhanced the Indian mechanism, is the New York Convention of 1958 on the Recognition and Enforcement of the Foreign Arbitral Award. Today India is a party to the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. It became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961.There are no bilateral Conventions between India and any other country concerning arbitration.

In the last five years, it is observed that there is a considerable increase in the number of disputes taking place in India. During 2004–2007, the Supreme Court decided 349 arbitration cases[1] and the Delhi High Court's mediation and conciliation center decided 668 out of 868 cases[2]. This indicates the growing importance of arbitration as an alternate dispute resolution mechanism in India.

In the current scenario where arbitration is gaining importance, it is still considered to be in its nascent stages. In spite of amending the Arbitration Act in India sixteen years ago, there are still few challenges which need to be addressed with respect to preferences for selection of arbitration institutes, Indian regulations, interference by the courts, enforcement of foreign arbitral award, cost and time efficiency, selection of the arbitrator and involvement of experts in the arbitration proceedings.

In India, ad hoc arbitration is predominant whereas international arbitration has still not been able to root itself. Even though ad hoc arbitration is leading in India, it is deficient as it does not have predefined rules, infrastructure facilities, experienced institutions and provision of arbitrators by the institution. Due to this, Indian companies still prefer international institutional arbitration. According to our recent study[3] on Arbitration in India, 60% of the respondents preferred SIAC under institutional arbitration entities outside India, indicating dependency of companies on the institutional arbitration.




**(Footnotes)**

[1] "Development and practice of arbitration in India — Has it evolved as an effective legal institution?," Center on Democracy, Development and The Rule of Law, October 2009, pg.29

[2] Annual Report-High Court," Ch.20. Alternative dispute resolution & legal services, 2007-08, Pg.73

Source for survey findings:

[3] A study by Ernst & Young's forensic team on Arbitration – "Changing the face of arbitration in India". This study is based on a survey with responses from general counsels at large companies, attorneys of various organizations in India and senior partners of domestic and international law firm

## *Interested to contribute Articles?*

*We would like to have your contributions. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, G-209, Main Avenue, Panampilly Nagar, Cochin - 682 036 or editor@arbitrationindia.com.*

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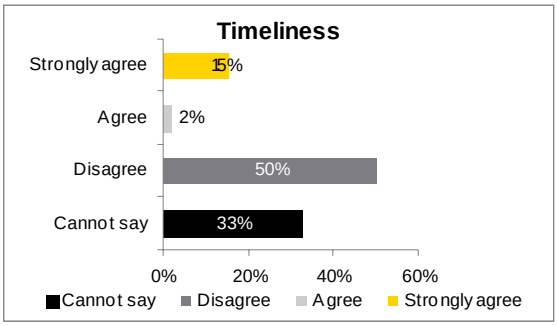
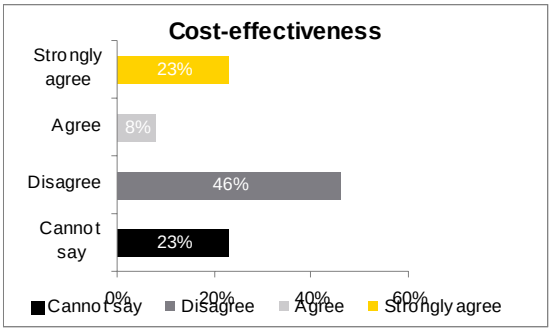
Another hindrance in utilizing arbitration in India is the regulatory set up. Every award is challenged in the Indian courts. Difficulties are encountered while enforcing the awards too. There exists a lot of interference by the courts in the overall proceedings. The effectiveness of arbitration as a legal institution depends upon efficiency and efficacy of its award enforcement regime. If obtaining an arbitral award at any of the international institutions takes six to eight months; the enforcement of the foreign arbitral award in India may take an alarming six to eight years. However, the recent judgments and ministry's recent steps towards amendment of the Arbitration and Conciliation Act, 1996, has indicated an arbitration-friendly approach by Indian regulators. As per our survey, more than half of the respondents believed that the ministry's recent steps to develop arbitration as a dispute resolution mechanism in India are in the right direction.

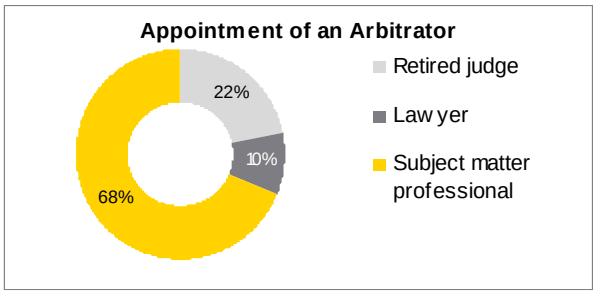



Cost and time efficiency are the key challenges to establish arbitration as an alternate dispute resolution method. In India, Arbitration is considered as an expensive mechanism for the settlement of disputes. Expenses such as the arbitrator's fees, rent for arbitration venues, administrative expenses and professional fees paid to the representatives of the parties, etc makes the entire process costly. However, Arbitration is cheaper when it is compared to the adhoc process followed in court.




Also the timeliness of arbitration is extended by the number of hearings taken for the disposal of cases. This hampers the essence of dispute resolution over the period of time. Almost half of the respondents revealed that arbitration in India is expensive and does not provide timely resolutions.

Indian courts have repeatedly highlighted the need to have clear arbitration clauses by way of several case laws in the past, the survey also highlighted the same thing with three fourth of the respondents confirming that the arbitration clause is an essential part of their legal contracts.




India follows the trend to appoint retired judges of the Supreme Court or High Court as arbitrators which often lead to difficulty in understanding the technical matters that the arbitrators may not possess. It is advisable for people to consider selection of relevant technical experts as arbitrators, so that the arbitration process is smooth and hassle free.

68% of the respondents believe that subject matter experts should be arbitrators, as against 22% who believe that retired judges should play this role.

As far as arbitration is concerned, the current documentation scenario makes it difficult to retrieve and analyze a large number of information, which is stored in various mediums. This calls for specialized tools and techniques to identify and separate relevant information so that it is easy to present it in a meaningful pattern. A subject matter expert such as surveyor, finance analyst, IT expert and engineers to forensic accountants should be considered for the specialized work. More than half of the survey respondents said that they have used expert services and they believe that experts advice make difference in their arbitration process.

At present, Arbitration is being rationalized as sector-specific expertise, for instance, Construction Industry Arbitration Council (CIAC), Bombay Stock Exchange (BSE) and set up of Indian Olympic Association (IOA), have developed specific arbitration cells, which provide relevant technical expertise. Earlier arbitration usage of arbitration was more in sectors such as construction, maritime activities and international trade.

However, today it is conquering new terrains and advancing in other sectors/ areas in India such as sports, competition and consumer laws, pharmaceuticals, mergers & acquisitions as well as the financial services sector.

With the growing need for arbitration, the Ministry has also taken a few steps in Arbitration in the last one year. They have set up the Arbitration Court in Kerala and the International Arbitration Center in Goa. They also set up LCIA in India and proposed amendments to the Arbitration Act on the basis of consultation paper released in 2009. The proposed recommended changes are:

- A clearer definition of "public policy" as a ground for refusing enforcement of a foreign arbitral award. This will be a welcome change as an earlier Supreme Court decision had been viewed as authorizing greater judicial interference in foreign awards
- Stricter timelines in arbitration
- Mandatory institutional arbitration in disputes of over Rs 5 Crore (US$1.11 million) unless expressly excluded by the parties in writing
- Enforcement of foreign awards
- Replacing "Chief Justice" with "High Court" or "Supreme Court" as the case may be, and seeks to provide for expeditious disposal of applications made for appointment of arbitrators and 'endeavour' to dispose of the matter within 60 days from the date of service of notice on the opposite party
- Proposed to constitute Arbitration Divisions in the High Courts to deal exclusively with Arbitration cases. E.g. Delhi High Court Arbitration Center

Indian companies are looking for much more organized and speedier resolution method. India can clearly emerge as a hub of international arbitration by managing cost and time efficiently, quick enforcement of arbitral award, improvised regulations and involvement of technical experts in the arbitration process.

If key factors such as entry of global Institutes, strengthening of regulatory environment and building up of expertise in technical aspects are addressed effectively, then in spite of several challenges, the consolidated efforts by all stakeholders and the ministry in this direction can result in a robust arbitration mechanism in India and that will attract more faith from the global companies as well.

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*(Authors: Arpinder Singh is the Partner & National Director and Yogen Vaidya is the Associate Director of Fraud Investigation and Dispute Services, Ernst & Young India)*

**Think ... Life**

Every day somewhere in Africa a gazelle wakes up.
It knows it must run faster than the fastest lion around, lest it be eaten

Every day somewhere in Africa a lion wakes up.
It knows it must run faster than the slowest gazelle around, lest it starve to death

Every day it does not matter, whether you are a lion or a gazelle, because you must run faster.

Than the chores of life!

Article

# Anti Arbitration Injunctions under International Commercial Arbitration - An Analysis

: AMIT KUMAR PATHAK

*Arbitration is a fundamental feature of international commerce, and provides many advantages over traditional transnational litigation to the parties involved in international disputes. Anti-suit injunctions are a remedy employed especially by common law courts to prevent parallel proceedings that are considered vexatious or oppressive, and that present a threat to the jurisdiction of the enjoining court. Supporters of international arbitration fiercely criticize the issuance of anti-arbitration injunctions. The author looks at the basis and legal principles for issuing anti-suit injunctions.*

## INTRODUCTION:

An anti-suit injunction can be defined as "an order of the court requiring the injunction defendant not to commence, or to cease to pursue, or not to advance particular claims within, or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country."[1]

George Bermann listed the following instances where issuance of anti-suit injunctions is warranted by U.S. law:

(i) when the foreign court is highly inconvenient, vexatious or oppressive;

(ii) when the foreign suit was filed in violation of a prior and independent obligation not to sue (e.g. when there is a forum selection clause or an arbitration agreement); and

(iii) when there exists a threat to the enjoining court's own jurisdiction or otherwise violates public policy.[2]

Another convincing argument against the issuance of international anti-suit injunctions is that such remedy affronts the long established procedural principle of *Kompetenz-Kompetenz*, according to which the court entertaining the action is the judge of its own competence. Since "jurisdiction is something that is declared, not something that can be ordered,"[3] no domestic court appreciates a foreign court telling it what to do in regard to a specific lawsuit, especially under a

**(Footnotes)**

[1] George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 594(1990)

[2] Emmanuel Gaillard, *Anti-suit Injunctions Issued by Arbitrators*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 235, 235 (Albert Jan Van Den Berg 2008).

[3] Laurent Lévy, *Anti-Suit Injunctions Issued by Arbitrators*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTISUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 115, 128 (E.Gaillard ed., 2005).

threat of contempt of court, imposition of heavy fines or other coercing measures to the recalcitrant party, who is normally a national of the country where the court sits.

As regards to international commercial arbitration, there are basically two types of anti-suit injunctions: (i) anti-suit injunctions to prevent arbitration, and (ii) anti-suit injunctions to favor arbitration.

Supporters of international arbitration fiercely criticize the issuance of anti-arbitration injunctions. The former judge and president of the ICC, Stephen Schwebel, contends that anti arbitration injunctions issued by state courts violate the New York Convention and general principles of international law.[4] It is also argued that courts should exercise self-restraint when seized with a matter that is subject to arbitration, given that the negative effect of the principle of *Kompetenz- Kompetenz* grants arbitrators the "power of first determination" of their jurisdiction, whereas courts have the final word on whether the award should be enforced or set aside.[5]

As far as anti-suit injunctions are concerned, court cooperation with arbitration can manifest at two stages:

(i) During the arbitration proceedings, when the recalcitrant party seeks an action at another court to disrupt the ongoing arbitration proceeding and to avoid that an award is made;

(ii) After the award is made, the losing party tries to institute court proceedings to avoid enforcement of the arbitral award or to recover what was paid in connection with the enforcement of an award[6].

## LEGAL FRAMEWORK

In the UK, the legal basis for such injunctions is contained in the Supreme Court Act 1981, which gives the High Court the right to grant anti-suit injunctions when foreign proceedings have been brought in breach of arbitration agreements. This principle is also supported by the New York Convention on the recognition and enforcement of foreign arbitral awards 1958 (the New York Convention) and the European Council (EC) Regulation 44/2001 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), which specifically excludes arbitration from its scope. The New York Convention states that, when seized with an arbitrable dispute that the parties have agreed should be submitted to arbitration, the courts shall refer the parties to arbitration. The Brussels Regulation supports the autonomy of commercial parties and provides that, in the interest of the harmonious administration of justice throughout the EU, there should be no parallel and conflicting proceedings throughout member states.[7]

**(Footnotes)**

[4] Stephen M. Schwebel, *Anti- Suit Injunctions in International Arbitration - An Overview*, *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 2, ANTISUIT INJUNCTIONS IN INTERNATIONAL ARBITRATION 5, 10-11 (E.Gaillard ed., 2005)).

[5] Supra note 4

[6] Supra note 1

[7] A report by Professors Hess, Pfeiffer and Schlosser entitled 'Report on the Application of Regulation Brussels I in the Member States', report for the Institute of Private International Law at the University of Heidelberg, Study JLS/C4/ 2005/03.

## THE ARBITRAL TRIBUNAL'S JURISDICTION TO ISSUE ANTI-SUIT INJUNCTIONS

Well-established principles of international arbitration law unquestionably provide the basis for the arbitrators' jurisdiction to issue anti-suit injunctions. These are the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award.

### *1. The Legal Bases of the Arbitral Tribunal's Jurisdiction to Issue Anti-suit Injunctions*

The notion that, in issuing anti-suit injunctions, arbitrators would make use of powers exclusively vested in State courts, echoes past debates over the power of the arbitrators to award punitive damages6 or *"astreintes"*. Such power is deeply rooted in well recognized principles of international arbitration law, namely the arbitrators' jurisdiction to sanction all breaches of the arbitration agreement and the arbitrators' power to take any appropriate measures either to avoid the aggravation of the dispute or to ensure the effectiveness of their future award[8].

### *2. Jurisdiction to sanction, by equivalent or in kind, violations of the arbitration agreement*

The agreement by which two or more parties undertake to submit to international arbitration the disputes which may arise in relation to their contract unquestionably grants arbitrators the power to decide all questions related to the merits of the dispute brought before them.

However, the jurisdiction thus conferred to the arbitral tribunal by the arbitration agreement is not confined to the resolution of the merits of the dispute. The two main effects of the arbitration agreement are to oblige the parties to submit all disputes covered by the arbitration agreement to arbitration, and to confer jurisdiction on the arbitral tribunal to hear all disputes covered by the arbitration agreement. It is thus a fundamental principle of arbitration law that arbitrators have the power to rule on their own jurisdiction, a principle that is the corollary of the principle of the autonomy of the arbitration agreement.

The fundamental principles of international arbitration law thus allow any disputes related to the arbitration agreement to be decided by the arbitrators themselves, something that has been widely recognized in case law and in domestic arbitration statutes or international arbitration rules[9]. They provide solid grounds to the arbitrators to decide such matters notwithstanding the parties' attempts to frustrate the arbitral process by escaping their contractual undertaking to arbitrate their dispute.

Arbitral case law shows that arbitral tribunals have repeatedly recognized their power to award damages for the breach by a party of its undertaking to arbitrate its dispute, taking into account the costs incurred by the other party in domestic proceedings notwithstanding the arbitration agreement.[10]

### *3. Tower to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the award*

In deciding the dispute before them and assessing the question of whether or not they may order anti-suit injunctions, the arbitrators often refer to the principle according to which the parties must refrain from any conduct that may aggravate their dispute.

Submission of the matters covered by an arbitration agreement to the domestic courts, or even the risk of such submission, constitutes a factor that may aggravate the dispute between the parties, and that may

**(Footnotes)**

[8] Laurent LEVY, *"Les astreintes et 1'arbitrage international en Suisse",* 19 ASA Bull. (2001, no. 1) p.21. 2004, reported by Denis BENSAUDE, *"S.A. Otor Participations v. S.A.R.L. Carlyle (Luxembourg) Holdings 1:* Interim Awards on Provisional Measures in International Arbitration", 22 J. Int'l Arb. (2005, no. 4) p. 357

[9] Julian LEW, Loukas A. MISTELIS, Stefan KROLL, *Comparative International Commercial Arbitration* (Kluwer Law International 2001) pp. 390

[10] ICC Award No. S946 (1990), 1CCA *yearbook Commercial Arbitration* XVI (1991) p. 9

justify the issuance of an order addressed to the parties prohibiting such conduct.[11] Depending on the facts of each case, it is within the arbitrators' power, as recognized in international arbitration law, to decide whether a decision in the form of an anti-suit injunction directed to one or more parties is the appropriate measure designed to prohibit conduct which may aggravate the dispute.[12]

## SHOULD NATIONAL COURTS GRANT ANTI-ARBITRATION INJUNCTIONS?

There will hardly ever be a justification for a national court to grant an anti-arbitration injunction of the kind discussed. The following observations can be made in support of this position.

First, the principles of competence-competence, separability, and party autonomy all point to the overarching principle that a decision as to whether an arbitration should continue should be left first and foremost to the arbitration tribunal.[13]

Second, a plain reading of Article 5 of the UNCITRAL Model Law and an assessment of its underlying intention suggest the preclusion of anti-arbitration injunctions. Article 5 states simply: "In matters governed by this Law, no court shall intervene except where so provided in this Law."[14]

Third, only the court of the seat of arbitration has jurisdiction with respect to arbitration and should exercise this only in very limited circumstances. There can be little justification for a court at the seat of an arbitration preventing challenge of an award by injunction.[15] Recognition and enforcement must be the preserve of the enforcing court. No court other than the court at the seat of arbitration has a right to interfere.

Fourth, in light of the above, there can be no basis for any court to grant an injunction on grounds of comity, balance of convenience, or even whether arbitration appears to be vexatious or oppressive. Instead, the only concern of the court must be the validity of the arbitration agreement itself.[16]

Fifth, although it is argued that anti-arbitration injunctions do sometimes serve just ends, this may often be a lengthy and costly process leading to parallel litigation in various fora. This can be illustrated by the case of *General Electric Co. v. Deutz AG*,[17] where a U.S. court granted an anti-arbitration injunction to stop arbitration abroad.

## CONCLUSION

Arbitration is a fundamental feature of international commerce, and provides many advantages over traditional transnational litigation to the parties involved in international disputes. Anti-suit injunctions are a remedy employed especially by common law courts to prevent parallel proceedings that are considered vexatious or oppressive, and that present a threat to the jurisdiction of the enjoining court.

**(Footnotes)**

[11] *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order dated 6 September 200S, para. 45 (published on the ICSID website)

[12] id

[13] Jonnette Watson Hamilton, *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*, 51 MCGILL L.J. 693, 702-03 (2006)

[14] U.N. COMM'N ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION at annex 1, U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2008), *available at* http://www.uncitral.org/pdf/english

[15] Id

[16] Julian D M Lew QC, *Control of Jurisdiction by Injunctions Issued by National Courts*, *in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 185, 201 (Albert Jan van den Berg ed., 2007)

[17] General Elec. Co. v. Deutz AG, 129 F. Supp. 2d 776 (W.D. Pa. 2000), *rev'd in part*, 270 F.3d 144 (3d Cir. 2001).

Expecting life to treat you well because you are a good person
is like expecting an angry bull not to charge
because you are a vegetarian.

In relation to the question of whether national court involvement undermines the arbitral process, the answer is that it depends on the nature and circumstances of the involvement. In this respect, it must be remembered that national courts operate in different legal and cultural contexts: there are common law and civil law jurisdictions; developing and developed countries; legal systems with or without political or religious influences. The way that each national court views its relationship to international arbitration is inevitably colored by these factors.[18]

The conclusion is straightforward: first, arbitrators should not take the risk of ordering a judge or other arbitrators how to behave. They are the arbitrators' equals and have no orders to receive. Second, jurisdiction is something that is declared, not something that can be ordered. Hence, arbitrators should only decide on their own jurisdiction and may not order performance of an arbitration agreement in kind. Third, anti-suit injunctions are only appropriate where it appears necessary to protect the arbitral proceedings, namely where a party is fraudulently attempting to undermine the arbitral tribunal's jurisdiction. Finally, arbitrators should always exercise utmost care before issuing anti-suit injunctions, as the effect of these anti-suit injunctions may be more harmful than the problem they are seeking to resolve[19].

**(Footnotes)**

[18] Dependable Highway Express, Inc. v. Navigators Ins. Co., 498 F.3d 1059 (9th Cir. 2007).

[19] Laurent Lévy, Anti-Suit Injunctions Issued by Arbitrators, pgs 115-129, 2005 ??Juris Publishing, Inc. www.jurispub.com

*(Author: Amit Kumar Pathak is a 5th year law student of Dr. RML National Law University, Lucknow, India.)*

## The Lighter Side

Bubba applied for an engineering position. Jim applied for the same job. Both applicants, having the same qualifications, were asked to take a test by the manager. Upon completion of the test, both men only missed one of the questions.

The manager went to Bubba and said: "Thanks for your interest, but we've decided to give the Jim the job."

Bubba asked: "And why are you giving him the job? We both got nine questions correct!"

The manager said: "We have made our decision not on the correct answers, but, rather, on the one question that you both missed."

Bubba then asked: "And just how would one incorrect answer be better than the other?"

The manager said: "Bubba, it's like this. On question No. 4 Jim put down; 'I don't know.' You put down, 'Neither do I.'"

Article

# India ready to host International Arbitrations?

: ANIL XAVIER

*The Chennai High Court by a recent decision has held that the need to make India as a preferred seat for International Commercial Arbitration would benefit the economy of the country and that if foreign law firms or lawyers are not allowed to take part in arbitrations, it will have a counter productive effect on the aim of the Government to make India a hub of International Arbitration. But does the decision by itself promote international arbitrations. What are the pros and cons of making India the venue of International arbitration? IIAM is conducting a master conference to address the issues.*

A recent judgment of the Chennai High Court[1] has clarified the Indian legal provisions relating to the scope of foreign lawyers practicing international arbitration in India. The Court held that having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration.

International arbitration is growing big time in India and in almost all the countries across the globe. India is a signatory to the World Trade Agreement, which has opened up the gates for many international business establishments based in different parts of the world to come and set up their respective businesses in India. Large number of Indian Companies have been reaching out to foreign destinations by mergers, acquisitions or direct investments. As per the data released by the Reserve Bank of India during 2009, the total out ward investment from India excluding that which was made by Banks, had increased 29.6% to U.S. Dollar 17.4 billion in 2007-08 and India is ranked third in global foreign direct investment. Overseas investments in joint ventures and wholly owned subsidiaries have been recognized as important avenues by Indian Entrepreneurs in terms of foreign exchange earning like dividend, loyalty, etc. India is the 7th largest, the second most populated country and the fourth largest economy in the world. Various economic reforms brought about have made India grow rapidly in the Asia-Pacific Region, and the Indian Private Sector has offered considerable scope for foreign direct investment, joint-venture and collaborations.

Therefore, when there is liberalization of economic policies, throwing the doors open to foreign investments, it cannot be denied that disputes and differences are bound to arise in such International contracts. When one of the contracting party is a foreign entity and there is a binding arbitration agreement

**(Footnotes)**

[1] A.K. Balaji Vs. Government of India & others - W.P. No.5614 of 2010

between the parties and India is chosen as the seat of arbitration, it is but natural that the foreign contracting party would seek the assistance of their own solicitors or lawyers to advice them on the impact of the laws of their country on the said contract, and they may accompany their clients to visit India for the purpose of the Arbitration. Therefore, if a party to an International Commercial Arbitration engages a foreign lawyer and if such lawyers come to India to advice their clients on the foreign law, there could be no prohibition for such foreign lawyers to advise their clients on foreign law in India in the course of a International Commercial transaction or an International Commercial Arbitration or matters akin thereto.

The arbitration law in India is modelled on the lines of the UNCITRAL Model Law of Arbitration and makes a few departures from the principles enshrined therein. The Arbitration and Conciliation Act 1996, provides for international commercial arbitration where at least one of the parties is not an Indian National or Body corporate incorporated in India, or a foreign Government. In the recent past, parties conducting International Commercial Arbitrations have chosen India as their destination.

These factors have weighed in the decision making process of the Court, The Court has observed, "to advocate a proposition that foreign lawyers or foreign law firms cannot come into India to advice their clients on foreign law would be a far fetched and dangerous proposition and in our opinion, would be to take a step backward, when India is becoming a preferred seat for arbitration in International Commercial Arbitrations. It cannot be denied that we have a comprehensive and progressive legal frame work to support International Arbitration and the 1996 Act, provides for maximum judicial support of arbitration and minimal intervention." The Court found that the need to make India as a preferred seat for International Commercial Arbitration would benefit the economy of the country and that if foreign law firms are not allowed to take part in negotiations, for settling up documents and conduct arbitrations in India, it will have a counter productive effect on the aim of the Government to make India a hub of International Arbitration and against the national interest.

But the real question is, just by clearing the ambiguity of the legal position of foreign lawyers' entry to conduct arbitrations in India and giving them a green signal will make India a hub of International Arbitrations? Are the ground realities favorable? What are the advantages and disadvantages of choosing India as a venue for international arbitrations?

The Indian Institute of Arbitration & Mediation (IIAM) is trying to find out the views and opinions of the various players in the field. IIAM is conducting a 2-day International Master Conference, titled, "New Frontiers in Dispute Management & Resolution in the Globalised World" on 31st May and 1st June 2012 at Bangalore, India. The Master Conference would have a workshop and debate on the "Global perception of Arbitration and Mediation in India – making India more User-friendly". The panels will include an outstanding group of leading General Counsel, Attorneys, International Arbitration and Mediation experts and top Academics from India and abroad. The panel will be chaired by Hon'ble Mr. Justice M.N. Venkatachaliah, former Chief Justice of India. The discussion outcome will form the recommendatory note for making India ADR friendly. The Panel will also offer their expertise on an array of relevant topics on conflict prevention, management and resolution techniques, and the future of ADR.

The panelists include Mr. Michael McIlwrath from GE Italy, Prof. Nadja Alexander from Hong Kong, Ms. Hannah Tumpel from ICC Paris, Ms. Irena Vanenkova from IMI The Hague, Mr. Loong Seng Onn from SMC Singapore, apart from high rated Indian ADR professionals and experts. The endorsers of the Master Conference includes International Centre for ADR – ICC – Paris, International Mediation Institute – The Hague – Netherlands, Singapore Mediation Centre – Singapore, Kuala Lumpur Regional Centre for Arbitration – Malaysia, Mediation World – UK, India International ADR Association etc.

The Conference will also provide executive-level networking, business development opportunity, highest quality thought leadership, and the most practical take-away learning in the field. Be part of the leadership movement in making India ADR friendly. For more details about the conference, log on to: http://www.arbitrationindia.com/htm/events.html

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*(Authot: Anil Xavier is a lawyer and an IMI Certified Mediator. He is a Member of the Independent Standards Commission of the International Mediation Institute at The Hague. He is also a Charter Member and the President of the Indian Institute of Arbitration & Mediation)*


# Best Young Author 2011

With a view to promote and support students in developing the qualities of legal research and presentation, IIAM had with effect from August 2010 provided 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. We had received a number of good original articles from which selected articles were published in the "Indian Arbitrator". The quality and novelty on the subject created a tight competition and selecting the Best Young Author was a difficult process. Two authors procured the same points and they are declared as joint "Best Young Authors".

- Miss. Ruhi Kalsotra - 5th year law student of New Law College, BVDU, Pune, India
  Article - Nationality of a Corporation in International Investment Disputes – Published in Volume 3, Issue 8, August 2011; and

- Miss. Pooja Burman Roy - Semester VIII law student of Hidayatullah National Law University, Raipur, India
  Article - Unilateral Appointment of Arbitrators – Published in Volume 3, Issue 7, July 2011

# Global 'Peace Thru Mediation' event at Istanbul

World's biggest peace offensive initiative in the form of an international brain-storming event took place on February 24-25, 2012, in Istanbul/Turkey, drawing peace promoter, diplomacy-builders, experts and academicians from all continents for collective input. This first ever Turkish initiative having support of the UN set a new diplomatic syllabus for resolution of disputes under "Enhancing Peace Through Mediation" raft, letting wider space to the NGOs, UN and Turkish vision of global mediation and alternatives.

# Humour helps in the mediation process

The study, funded by Monash University, RMIT University and the Australasian Institute of Judicial Administration, found that over two-thirds of mediators at the Victorian Civil and Administrative Tribunal (VCAT) used humour in mediation sessions. The research also found that a quarter of the mediators were on the watch for potential cultural issues before attempting humour.

# Certificate in Dispute Management (CDM)

CDM is a distance learning course of IIAM, valid for six months from the date of enrolment. You can enroll at any time of year and you study entirely at your own pace, submitting your assignments when you are ready. Your tutor will be available to mark your assignments and give feedback on your progress for a period of six months from the date of enrolment.

You will be sent four 'reading and study assignments' with your course materials, and these form an essential part of your distance learning course. They are designed to help you to work through the course manual and understand the concepts. The course will provide a good basic knowledge of ADR – Negotiation, Mediation & Arbitration – in theory and practice. On successfully completing the assignments included in the course a certificate will be awarded. For more details on CDM, mail to training@arbitrationindia.com