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EDITOR'S NOTE

When a new breed of ADR professionals is growing all over the world, a new dispute is now emerging in India as to whether mediation can be done outside the court system – or in other words, can there be private mediation outside the court-annexed mediation system. When the fundamental aspect of mediation is party autonomy and finer feature of mediation is that it is non-imposing, I wonder how this doubt could arise at all? If two parties can settle by themselves, without intervention of court, why can't a mediator assist them for settlement? Moreover mediation is the only dispute resolution method which not only resolves disputes, but adds value. So please don't undermine the eminence of mediation by shackling it with court procedures.

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ONLINE INTERNATIONAL COMMERCIAL ARBITRATION: TRACING THE CONTOURS

PANKTI VORA



Online dispute resolution provides great frontiers for the expanding commerce being conducted over online forums. Such electronic commercial arbitration is in consonance with the robust growth of e-commerce in the past few decades and offers an array of advantages in terms of expediency, efficiency and time-bound dispute resolution. However owing to its peculiar nature of being conducted in a virtual medium, it faces major legal obstacles under the existing framework for international commercial arbitration. The author examines the contours of online commercial arbitration.

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INTRODUCTION

The internet, since its inception, has emerged as a global phenomena propelling the new era into globalization and internationalization. Commercial disputes are no exception to colossal growth of the internet; and this has resulted in a number of contracts being concluded electronically.¹ This advent of the internet on international commerce has consequently created opportunities for dispute resolution in an online mechanism. This paper aims at assessing the legal issues that are posed by carrying out arbitration electronically- by online dispute resolution ('ODR').

ODR refers to *'the use of the internet technology, wholly or partially, as a medium to conduct proceedings in order to resolve commercial disputes by arbitration.'*² The author asserts that where as there are multifarious advantages of such a mechanism³, there are also varied legal obstacles that arise in resolving disputes online in light of the peculiarities of the internet. Some of the legal hurdles that online arbitration faces are: formal validity of arbitration agreement; questions relating to arbitrability of the dispute; the procedural framework in terms of due process; confidentiality and privacy; the

(Footnotes)

¹ Eddie Hurter, Dispute Resolution in Cyber Space: *A Futuristic View of the Possibility of Online Intellectual Property and E-Commerce Arbitration*, 12 S. AFR. MERCANTILE L.J. 199 (2000)

² Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOTIATION L. REV. 327 (2008)

³ For a detailed discussion on the benefits of online international commercial arbitration, See Chinthaka Liyanage, *Online Arbitration compared to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature*, 22 SRI LANKA J. INT'L LAW 173 (2010)

quandary regarding seat of arbitration; problems relating to enforcement of the arbitral award, etc. The article aims to investigate the legal implications of online commercial arbitration relating to the two cornerstones of arbitration – the arbitration agreement and the seat of arbitration. Determination of these questions is primary and integral to any arbitration, and will be the focus of this paper.

FORMAL VALIDITY OF THE ARBITRATION AGREEMENT

An arbitration agreement between parties is the foundation stone of international commercial arbitration.⁴ An essential norm of formal validity of this agreement is that it must be ‘in writing’ and ‘signed by the parties’. With online dispute resolution, a fundamental question to be addressed is whether an electronic agreement is sufficient to invoke its existence and validity within the current arbitration framework.

A. AGREEMENT ‘IN WRITING’

The principle of a written arbitration agreement is considered to be a uniform rule, prevailing over municipal law and international instruments.⁵ This principle is reflected in Article-II of the New York Convention⁶ (‘NYC’) which mandates an ‘arbitration agreement in writing’ and further clarifies that: “*an agreement in writing shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams*”.⁷ Article-7 of the UNCITRAL Model Law, 1985⁸ (‘Model Law’)⁹ stipulates a similar requirement; however adopting a broader notion of the concept of ‘writing’.¹⁰ Let us now examine whether such a requirement can be reconciled with the peculiarities of an agreement concluded online.

(Footnotes)

⁴ ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 5-6 (2004)

⁵ A.J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 173 (1980)

⁶ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. 3

⁷ Article II (2) of the New York Convention, 1958

⁸ UNCITRAL Model Law on International Commercial Arbitration, Report of the U.N. Commission on International Trade Law on the Work of its Eighteenth Session, 40 U.N. GAOR, Supp. No. 17, U.N. Doc. A/40/17, Ann. 1 (21 June, 1985)

⁹ It must be noted here that even though the Model Law on International Commercial Arbitration has been amended by the United Nations Commission on International Trade Law on 7 July, 2006; this article will primarily focus on the original 1985 Model Law since most domestic legislations are structured upon and follow this instrument, and most countries have not yet adopted the amendments made to the Model Laws in 2006

¹⁰ Here, an agreement in writing is to be “*contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement*”



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The rationale for 'written form' requirement

In order to analyze whether electronic communications would satisfy formal requirements, a preliminary inquiry into the very purpose of such requirement is necessary. The main rationale is the need for authentication from the parties of an intention to consent to arbitration.¹¹ Hence, the arbitration agreement is a fundamental expression of justice¹² and proof of legitimacy of initial consent of parties¹³. The author contends that electronic agreements as well are capable of illustrating consent and intention of parties as an arbitration offer is included in a virtual adhesion contract and the user's acceptance of this contract is expressed by clicking on an 'icon' for such (in the case of click-wrap contracts) or by communication of such over e-mails.¹⁴ Hence, the author asserts that with the emergence of technology, modern means of communication are as capable of evidencing consent as written documents.

The sanctity of written requirements is further heightened in the fact that an agreement to arbitrate is a waiver of the fundamental right to national courts and judicial remedies.¹⁵ Hence, written proof is necessary to show the severity of the waiver by parties. This argument is defeated in light of contemporary practice where arbitration is extremely common mode of dispute-resolution and is no longer considered to be any such exceptional waiver.¹⁶ In these circumstances the author calls for the requirements of formal validity to cope with the developing commercial practice¹⁷ and recognize online arbitration agreements.

An Argument of Functional Equivalence

Many scholars¹⁸ have opined that an exchange of e-mails could be equated with an exchange of telegrams or telex for the purposes of its relevance in international commercial arbitration. The main function of a documentary agreement is to provide record – a tangible form of evidence of the agreement. Adopting proper operating procedures and technical means (such as back-up methods and recorded compact disks), an e-mail can provide as reliable a record as any physical letters.¹⁹ Hence, in our global information society with frequent use of technology to conduct businesses and communication, the essential features of electronic documents are functionally equivalent to paper documents.²⁰ The only differences between documentary evidence and electronic agreements are technical²¹ and a functional interpretation of the writing requirement will lead to acceptance of electronically concluded agreements.²²

A case for purposive interpretation of 'writing' provision

In light of the above developments we see that although domestic statutes and international conventions stipulate a strict formal requirement of 'writing', the purpose of such a mandate is equally fulfilled by electronic agreements. Hence, scholars have called for interpreting Article-II of the NYC keeping in mind the purpose of that provision, the state of technology at the time, and the contemporary developments of electronic telecommunication.²³ It must be taken into account that at time of drafting the NYC or Model Laws, one could not foresee the possibility of electronic arbitration agreements. Hence, scholars have encouraged a teleological interpretation of these provisions such

(Footnotes)

¹¹ Hong- Lin Yu & Motassem Nasir, *Can Online Arbitration Exist Within the Traditional Arbitration Framework?* 20(5) J. INT'L ARB. 455 (2003) at p. 457

¹² Mohamed Wahab, *The Global Information Society and Online Dispute resolution: A New Dawn for Dispute Resolution*, 21(2) J. INT'L ARB. 143 (2004) at p. 154

¹³ Toby Landau, *The Requirement of a Written Form for an Arbitration Agreement when "Written" means "Oral"* in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 19 (Abert Jan van den Berg Ed., 2008); Gabriëla Kubicova, *Electronic Form of Arbitration Agreement* (2009). Available online at: www.etd.ceu.hu/2009/kubicova_gabriela.pdf (Last Visited on 9th September, 2012)

¹⁴ Sami Kallel, *Online Arbitration*, 25(3) J. INT'L ARB. 345 (2008)

¹⁵ For example See, ILC, *Draft on Arbitral Procedure Prepared by the International Law Commission at its Fourth Session, 1952*, UN Doc. A/CN.4/59, II Y.B. I.L.C. 60, Art. 1, comment 2 (1952); See, e.g., *Judgment of 7 February 1984, Tradax Export SA v. Amoco Iran Oil Co.*, XI Y.B. Comm. Arb. 532, 535 (Swiss Federal Tribunal) (1986).

¹⁶ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 585 (2009)

¹⁷ See generally Neil Kaplan Q.C., *Is the Need for Writing as expressed in the New York Convention and the Model Law out of step with Commercial Practice*, 5 ASIA PAC. L. REV. 1 (1996-1997)

¹⁸ Jasna Arsic, *International Commercial Arbitration on the Internet: Has the Future Come Too Early?* 14(3) J. INT'L ARB. 209-221 (1997); Richard Hill, *On-line Arbitration: Issues and Solutions*, 15(2) J. INT'L ARB. 199-207 (1997)

¹⁹ Richard Alan Horning, *'Has HAL Signed a Contract: The Statute of Frauds in Cyberspace'* 12 SANTA CLARA COMP. & HIGH TECH. L. J. 290 (1996)

²⁰ Mohamed Wahab, *supra* note 12.

²¹ Richard Hill, *supra* note 18

²² Arnold Vahrenwald, *Out-of-Court Dispute Settlement Systems for E-Commerce, Report on Legal Issues: Part III—Types of Out-of-Court Dispute Settlement* 17 (2000), Available at www.vahrenwald.com/doc/part3.pdf (Last Visited on 30 August, 2012)

²³ Jasna Arsic, *supra* note 18

that telex, fax and electronic means to be included within 'telegram' since they are functionally equivalent.²⁴ In fact, such interpretation has found widespread support²⁵ and is even reflected in the Model Law on Electronic Commerce.

Here, the author would like to draw attention to Article-31 of United Nations Convention on Law of Treaties, which codifies the 'general rule on interpretation' to be in accordance with object and purpose of the treaty.²⁶ Article-31(3) stipulates interpretation of treaties in light of context, along with '*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.*' Hence, in light of subsequent provisions of Model Law, UNCITRAL Model Law on Electronic Commerce²⁷, European Convention on International Commercial Arbitration²⁸ and later developments in technology, purposive interpretation must be given so that online agreements satisfy formal validity. This method on interpretation of the formal requirements coded in contemporary conventions can extend the scope of validity to agreements concluded online.

International Practice and Later Developments in the Law

Various recent statutes, case laws as well as international developments have evidenced attenuation in the strict requirement of writing of arbitration agreement. While it would be exhaustive to analyze the progress of each jurisdiction, the author will explicate certain examples of states admitting alternative forms of writing.²⁹ The U.K Arbitration Act in Section-5 gives an expanded meaning of agreement in writing so as to embrace electronic agreements. Further, the German Arbitration Act, 1998 includes in the definition of agreement in writing "*exchange of letters, telexes, telegrams or other means of telecommunication which provide a record of the agreement*". Other

(Footnotes)

²⁴ Alejandro Lopez Ortiz, *Arbitration and IT*, 21(3) ARB. INT'L 343-360 (2005)

²⁵ Michael E. Schneider & Christopher Kuner, *Dispute resolution in International Electronic Commerce*, 14(3) J. INT'L ARB. 5-37 (1997); R.P. Alford, '*The Virtual World and the Arbitration World*' in 18(4) J. INT'L ARB. 449 (2001).

²⁶ Article 31(1) of the Convention: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. ...*"

²⁷ G.A. Res. 51/162, 51 U.N. GAOR, Supp. No. 49, Ann., at 336, U.N. Doc. A/51/49 (Vol. I) (December 16, 1996, as amended in 1998). Art. 6(1) states, "*Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.*"

²⁸ Entered into force, January 1, 1964

²⁹ Haitham A. Haloush, *The Authenticity of Online Alternative Dispute Resolution Proceedings*, 25(3) ARB. INT'L 355 (2008) at p. 358

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I'm not upset that you lied to me,
I'm upset that from now on I can't believe you.
~Friedrich Nietzsche~

states with liberalized formal requirements in their statutes include Spain³⁰, Denmark³¹, Norway³² etc. In fact, enforcement of the E-Commerce Directive³³ throughout the European Union obligates Member States to afford legal recognition to e-contracts.³⁴ Moreover a large number of judicial decisions in various jurisdictions have upheld any exchange of communications that form a record as valid agreements.³⁵

At the international level, various instruments have embodied alternative forms of the formal requirements. The UNCITRAL Model Law on Electronic Commerce, 1996 requires the written format, however expands the requirement to include “*data message if the information contained is accessible to be usable for subsequent reference*”.³⁶ Hence, although there is a stipulation for formal requirement, the underlying principle is the intention of parties to arbitrate and any record of such would serve such a purpose.³⁷ The 2006 Revisions of the UNCITRAL Model Law are significant in this respect. Article-7 provides national arbitrators with two options – Option 1 is largely based on the requirement of writing as expressed in Model Law on Electronic Commerce. However, Option 2 is revolutionary as it completely ‘resigns’ from the form requirements, and poses a model for radical shifts in arbitration agreements for the future. Hence we see that international practice acceptance of agreements by electronic transmission as long as they are substantively valid.

B. UNCERTAINTY REGARDING ENFORCEMENT

We see above that an expansive interpretation of formal requirements in light of developments in electronic commerce is logical, necessary and has in fact garnered international consensus. However, it is imperative to note that enforcement of an online agreement to arbitrate is greatly dependant on the attitude of a particular state towards interpretation of the ‘requirement of writing’³⁸. For example, there are still certain ill-considered national court decisions that conclude arbitration clauses contained in e-mails to be invalid³⁹ and certain jurisdictions that still adhere to strict written requirements in their national laws.⁴⁰ Since the validity of electronic agreements is based upon liberal interpretation rather than it being codified within the treaty itself, one cannot ignore the possibility that courts may strike the agreement down as invalid. On the basis of this discrepancy and uncertainty as to validity of the agreement and consequent obstacles in enforcement of the arbitral award, some scholars have proposed the NYC to be adapted to accommodate electronic communications.⁴¹

SEAT OF ARBITRATION

ODR, by its nature only has a ‘virtual’ presence⁴², as most (and sometimes all) proceedings are conducted by electronic means. The agreement to arbitrate may be concluded by e-mails, the arbitrators may hear proceedings and admit evidence online and also the award of the arbitration can be made electronically. An obvious impediment as to determination of the ‘*situs*’ of arbitration arises.

(Footnotes)

³⁰ The Spanish Arbitration Act of 2003 presents a modern legislative approach as it explicitly incorporates the conclusion of arbitration agreements by electronic means.

³¹ Chapter 2 of the Danish Arbitration Act, 2005 (Act No. 553 of 24 June, 2005) does away with the requirement of writing completely.

³² Section 9-10 of the Norwegian Arbitration Act of 2004 (14 May, 2004) omits any formal requirements and hence does not exclude arbitration agreements concluded by electronic transmission.

³³ Directive of the European Parliament and Council 2000/31/EC, Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178).

³⁴ Article 9(1) of the Directive dictates such- “*Member states shall ensure that their legal system allows contracts to be concluded by electronic means. Member states shall in particular ensure that the legal requirements applicable to contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of being made by electronic means*”

³⁵ For example, *Judgment of 4 September 2003*, XXX Y.B. Comm. Arb. 528 (Oberlandesgericht Celle) (2005); *Judgment of 12 December 2002*, XXIX Y.B. Comm. Arb. 761 (Bavarian Oberstes Landesgericht) (2004); *Judgment of 30 July 1998*, XXV Y.B. Comm. Arb. 714 (Hanseatisches Oberlandesgericht Hamburg) (2000); *Judgment of 12 January 1989*, XV Y.B. Comm. Arb. 509 (Swiss Federal Tribunal) (1990); *Judgment of 5 November 1985*, *Tracomina SA v. Sudan Oil Seeds Co.*, XII Y.B. Comm. Arb. 511 (Swiss Federal Tribunal) (1987); *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd*, 109 F.Supp.2d 1236 (S.D. Cal. 2000) as cited in GARY B. BORN, *supra* note 16

³⁶ Article 6 (1) of the UNCITRAL Model Law on Electronic Commerce, 1996

³⁷ Slamovir Halla, *Arbitration Going Online- New Challenges in 21st century*, 5 MASARYK U. J.L. & TECH. 215 (2011) at p. 223

³⁸ Jana Herboczkova, *Certain Aspects of Online Arbitration*, *SBORNÍK KONFERENCE DNY PRÁVA (2008)*. Available Online At: <http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/herboczkova.pdf> (Last Visited on 8th September, 2012)

³⁹ *Judgment of 16 August 1999*, XXVII Y.B. Comm. Arb. 519, 521 (Hålogaland Court of Appeal) (2002) as discussed in GARY B. BORN, *supra* note 16 at p. 596

⁴⁰ Such as Romania and Libya as discussed in Gabriela Kubicova, *supra* note 13

⁴¹ M. H. M. Schellekens, *Online Arbitration and E-Commerce*, 9 ELEC. COMM’N L. REV. 113(2002) at p. 121

⁴² Tiffany Lanier, *Where on Earth does Cyber-Arbitration Occur?: International Review of Arbitral Awards Rendered Online*, 7 ILSA J INT’L & COMP L. 1 (2000)

A. LEGAL SIGNIFICANCE OF 'SEAT' OF ARBITRATION

To examine the legal problems associated with seat, it is important to understand the legal implications of 'seat of arbitration'. The *situs* of arbitration is simply where the arbitration takes place – In legal significance its 'juridical domicile'.⁴³ While it is well-settled by convention that all arbitration agreements have a seat, the legal implications of such are considerably complicated as contemporary international conventions do not explicate its significance.⁴⁴ However, by inference from conventions and writings by scholars the author finds multifarious purpose for the seat.

The place of arbitration is the geographic link that defines its subjection to a particular jurisdiction.⁴⁵ The most pivotal and crucial role of 'place' is to determine which courts shall have jurisdiction to intervene in the arbitration proceedings and to set aside the arbitration award. Hence the 'place' determines the extent of support and intervention by state courts.⁴⁶ Further, in many cases fail to agree as to law applicable to the arbitral procedure. In such cases, the seat determines the supplementary procedural rules that are to be followed, it stipulates the '*lex loci arbitri*'. Hence, it is often remarked that the role of place is vital in supporting the arbitration and can in fact change '*the very outcome of the case*'.⁴⁷

B. PROBLEM OF 'SEAT' IN ONLINE ARBITRATION

The problems that arise regarding the seat of arbitration in ODR are twofold in the opinion of the author. The first concern raised by some citing the *Hiscox Case*^{48,49} is that ODR may face problems as the proceedings may not occur in geographic territory of the seat.⁵⁰ However, this concern does not hold water since practice shows that the place of arbitration in geographic sense (where the stages of arbitration actually take place) is to be differentiated from the legal notion of seat (the place that legally establishes a link between the arbitration and national law system).⁵¹ It is well-established that *situs* of arbitration is a mere legal fiction.⁵²

(Footnotes)

⁴³ GARY B. BORN, *supra* note 16 at p. 1250

⁴⁴ Adam Samuel, *The Effect of the Place of Arbitration on the Enforcement of the Agreement to Arbitrate*, 8(3) ARB. INT'L 257 (1992)

⁴⁵ Alejandro Lopez Ortiz, *supra* note 24

⁴⁶ Slamovir Halla, *supra* note 37

⁴⁷ Tiffany Lanier, *supra* note 42

⁴⁸ *Hiscox V. Outhwaite* [1991] 3 W.L.R. 297

⁴⁹ In this primarily the court held that the seat of arbitration was at the place where the award is signed which determines where the award is 'made'. For a criticism of this verdict see Fraiser P. Davidson, *Where is An Arbitral Award Made?: Hiscox V. Outhwaite* 14(3) I.C.L.Q 637 (1992)

⁵⁰ Richard Hill, *The Internet, Electronic Commerce and Dispute Resolution: Comments*, 14(4) J. INT'L ARB. 103 (1997)

⁵¹ Phillip De Ly, *The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 NW J. IN'L L. & Bus. 48 (1991-1992) at p. 54

⁵² Jasna Arsic, *supra* note 18

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The more fundamental and obvious problem in relation to seat is that even given that it may be a legal fiction, it is extremely difficult to lay down a rational basis to determine seat given the nature of internet. The concept of seat, analogous to the entire arbitration process, is hinged on party autonomy and hence parties are free to choose the place of arbitration.⁵³ However in case of failure of parties to do so, the arbitrators are supposed to decide such keeping in mind various legal concerns.⁵⁴ An elemental predicament arises here as the nature of the internet is such that data travels across countries and jurisdictions, and hence there is no singular identifiable seat. The arbitration is essentially virtual and not constricted to a particular physical location. Hence there is ambiguity as to the very basis for selection of the 'seat' by arbitral tribunal.

C. POSSIBLE MECHANISMS TO DETERMINE SEAT

In light of the ambiguity highlighted above, scholars have suggested that 'traditional' standards must be utilized for determining seats in order to reduce risk of courts rejecting the seat that is chosen.⁵⁵

One of the traditional solutions is *lex loci arbitri*, i.e. to determine the seat in accordance with the location of the arbitrator.⁵⁶ However, this solution is fraught with vagueness as the arbitrator may be present at different locations during different stages of the proceedings. Further, in many cases there may be more than one arbitrator; hence espousal of this solution is limited to few instances. Some scholars suggest that place of arbitration must be determined by the geographic location of the server through which the arbitration is taking place.⁵⁷ This mechanism also falls foul on occasions since sometimes motile servers may be used for a single arbitration proceeding. Furthermore, different parts of different servers may be utilized, even if the "network provider" is common. Therefore, there are established drawbacks of this method.⁵⁸ A reliable solution could be found in establishing the place where e-mails of the arbitrators are sent or collected.⁵⁹

The author asserts here that application of any of these methods undermines the principle of legal certainty as the Internet is technically completely independent of geographical constraints. The Internet has peculiar characteristics and determination of the way data travels on the internet is indecisive and subject to change. Hence, author is in skepticism of determination of the place based on the traditional rules as it could lead to arbitrary results. Legal rules cannot be based on uncertainties and consequently there exists no support of the law to ascertain the *situs* of arbitration in the event of failure of parties to do so.

D. THE THEORY OF DELOCALIZATION

Our discussion above regarding the method of determination of seat proceeds on one fundamental assumption – that every arbitration proceeding must have a *situs* or a juridical seat. Hence, the underlying principle is that international arbitration is inexorably linked to a particular national law.⁶⁰ This is essentially the 'territorial' or 'jurisdiction' theory that proposes that a national framework of law has necessary legal significance over international arbitration, and therefore the procedural laws of that State are inevitably binding on the arbitration.⁶¹

The theory of delocalization of arbitration challenges the very foundations of the theory of territoriality – it disregards the restrictions placed on arbitration by the mandatory procedural norms of the forum, hence propelling the arbitration to 'float' such that it is detached from the country of origin.⁶² The past few decades have witnessed vigorous international debates for and against delocalization. However, what is relevant for our purpose here is the legal implications of this theory against a background of electronic means of arbitration.

(Footnotes)

⁵³ ALAN REDFERN & MARTIN HUNTER, *supra* note 4

⁵⁴ The arbitral tribunal decides the 'seat' with regard to concerns such as conflict of laws, neutrality, convenience, and after hearing the arguments of the parties.

⁵⁵ M. H. M. Schellekens, *supra* note 41 at p. 123

⁵⁶ Jasna Arsic, *supra* note 18

⁵⁷ M. H. M. Schellekens, *supra* note 41 at p. 122

⁵⁸ Jasna Arsic, *supra* note 18

⁵⁹ Arnold Vahrenwald, *Out-of-Court Dispute Settlement Systems for E-Commerce, Report on Legal Issues: Part IV—Arbitration, Out-of-Court Dispute Settlement Systems for E-Commerce* (2000) Available online at: <www.vahrenwald.com/doc/part4.pdf> Last Visited on 26th August, 2012

⁶⁰ William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 I.C.L.Q. 2 (1983)

⁶¹ One of the first proponents of this theory is F.A.Mann. See F.A. Mann, *England Rejects 'Delocalized' Contracts and Arbitration*, 33 I.C.L.Q. 193 (1984).

⁶² Jan Paulsson, *Delocalization of International Commercial Arbitration: When and Why it Matters*, 32 I.C.L.Q. 53- 61 (1983)

The model of delocalization that the author is in support of is where the parties have *'the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration.'*⁶³ Hence, essentially the proceedings of the arbitration are detached from the seat or *situs* of arbitration. However, the award passed out of such arbitration is open to scrutiny and subject to the laws of the courts where the award is to be enforced.⁶⁴ This mechanism of arbitration does not completely exclude the municipal law – it merely reduces the interference of courts of seat of arbitration while grating supervision and power to deny recognition in the country where enforcement of the award is made.⁶⁵

Here, the author argues that this model of delocalization is the panacea to the legal obstacles posed by online arbitration. Since the *seat* of arbitration has no major legal consequences, the grave hurdle of determination of this seat given the peculiarities of online transactions is overcome. At the same time, the vital interests of *situs* are safeguarded, as the courts enforcing the award have the authority to refuse recognition and enforcement if the arbitration violates integral principles of procedural fairness or contravenes public policy.⁶⁶ In the opinion of the author, in light of the expanding bulk of commerce on the internet, universal adoption of such delocalization shall boost effectual dispute resolution.

CONCLUSION

The law, in consonance with dynamic and ever-changing society, must cater to and cope with the developments taking place in the contemporary scenario. However, one sees how even though national courts and the international community reflect acceptance of alternative modes of writing, there still exist discrepancies and uncertainty with regard to arbitration agreements as the NYC (which is binding on member-states) has codified strict requirements for writing. Similarly, even though delocalization poses an effectual solution to problem of seat for international arbitration, its application is a predicament as it doesn't fit within the framework of the NYC. Hence, we see that there exists still a cloud of uncertainty around the adoption of online international commercial arbitration. This, in the context of colossal increase in commerce over the internet and consequential increasing cases of adoption of online dispute resolution. Given the high stakes involved, and the potential of the virtual medium to foster new commercial opportunities, there is a need for an effectual and adequate framework of law to actively support online dispute resolution.

It is important to note here that several institutions including the ICC, WIPO, etc have taken initiative to launch projects for online dispute resolution in areas like intellectual property and consumer contracts. In fact, the ICANN system for resolving disputes involving domain names developed under the auspices is worthy of note in this regard as it manifests sophistication.

While the UNCITRAL Model Laws as amended in 2006 could be termed as revolutionary in diluting formal requirements so as to embrace commercial agreements concluded by electronic transmission, the NYC still in its original draft of 1958 is severely lacking. The author poses a revision to the NYC or atleast a clarification amendment so as to ensure certainty regarding enforcement of awards made for online arbitration agreements. The framework of law regarding online arbitrations poses significant impact in the upcoming era of technology and modernization.

(Footnotes)

⁶³ As proposed in Jan Paulsson, *Arbitration Unbound: An Award Detached from the Law of the Country of Origin*, 30 I.C.L.Q. 358 (1981)

⁶⁴ Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium*, 10 AM. REV. INT'L ARB. 177 (1999) at p. 186

⁶⁵ W. MICHAEL REISMAN ET AL, INTERNATIONAL COMMERCIAL ARBITRATION 159 (2007)

⁶⁶ Pippa Read, *supra* note 64

You feel the problem with your body.
What you don't feel is the potential.
Stop focusing on the problem
...and focus on the potential!

~Nathaniel Bronner Jr.~

LAW OF LIQUIDATED DAMAGES IN CONTRACTS: SOME FUNDAMENTAL ASPECTS

NIRMAL GOEL



Delay in execution of contracts ends up in invoking the provisions for damages from the defaulting party. This could be liquidated damages or non-liquidated damages. The language and content of the terms of the contract would distinguish compensation from penalty.

For executing such damages which would withstand the scrutiny of the court, the terms have to be specific and reasonable.

The Author analyses the legal provisions by which such clauses could be sustained.

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Delay is a common feature in execution of construction contracts. Government contracts invariably incorporate some provision for handling this aspect. Such provisions tend to make contractor liable to pay liquidated damages (LD) for delay attributable to him. Usually a formula is included in tender documents for calculating the amount of liquid damages based on quantum of delay. In government contracts, an upper limit is usually put on the quantum of such damages recoverable from the contractors. These provisions aim to serve two functions i) to have a deterrent effect on contractor and to make him work diligently as per contract schedule; and ii) to recover monetary losses suffered by the employer for delay attributable to the contractor. However it is utmost necessary that the contract provisions and actual action for recovering liquidated damages from the contractor are in tune with the law of the land.

The relevant laws relating to liability to pay damages for breach of contract are primarily covered in section 55, 73 and 74 of the Indian contract Act (ICA). Before a discussion on these laws is attempted, it is necessary to distinguish liquidated damages from non-liquidated

damages. The term Liquidated damages refers to pre-estimated damages or a sum named in the contract as damages, as distinct from non-liquidated damages which are not pre-specified in the contract and are ascertained in each case upon happening of the event considered as the breach of contract. Thus Liquidated damage is a pre-agreed sum of money payable as damage by the party who breaches the contract to the party who suffered such damage as a consequence of such breach. Section 74 deals with liquidated damages while section 73 (discussed later) deals with non-liquidated damages. Section 55 deals with effect of failure to perform contractual obligation, notice requirement and extension of time for performance.

Section 74

Section 74 lays down that the party who breached the contract is liable to pay to the other party, reasonable compensation, not exceeding the sum named in the contract (liquidated damage or penalty) for such breach, whether or not actual damage or loss is proved to have been caused thereby. This section treats liquidated damages/penalty amount mentioned in the contract to be the upper limit of compensation payable in case of breach. Thus it restricts compensation amount to a reasonable figure only notwithstanding the higher amount which may be mentioned in the contract. An ordinary reading of this section, owing to the fact that it contains the phrase “whether or not actual damage or loss is proved to have been caused by the breach”, gives an impression that actual loss or damages are not required to be proved by suffering party in order to be eligible to receive reasonable compensation from the breaching party. But this is not true. The section, as interpreted in some landmark court decisions, does not obviate the need of proof of damages completely. The courts do not treat as justified the award of compensation, when in consequence of the breach, no legal injury at all has resulted. The award of compensation in such a case is held unreasonable/penal in nature and not upheld by courts. Therefore the phrase “whether or not actual damage or loss is proved to have been caused by the breach” used in section 74 should not be given excessive weight by employer/his engineer as this term has been qualified by courts in various rulings restricting its scope and intent. Therefore it is enjoined upon the government engineers and authorities deciding to impose liquidated damages on the contractor to put on record the details of loss or damages suffered due to delay attributable to the contractor along with the evidences of such loss/damage. Otherwise, the compensation may not be upheld as reasonable and may not be sustained by the court.

Another important point in this law is to distinguish compensation from penalty. Compensation is meant to put the sufferer in the same position as he had been if there was no breach of the contract by the other party. Compensation is not meant to make profit (or unjust enrichment) out of the fault of the other party. On the other hand, Penalty is meant to act as deterrent and can be a figure in terrorem much higher than the actual damage. In order to make sure that the liquidated damages mentioned in the contract do not take the form of penalty, it is required that they are the reasonable sums. The purpose of putting a moderate upper limit on amount of liquidated damage also serves to fulfill this test of reasonableness so that the compensation is upheld as reasonable sum in law.

There are two ways to live your life.
One is as though nothing is a miracle.
The other is as though everything is a miracle.
~Albert Einstein~



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Section 55

Another important provision in the law of contractual damage is section 55 of the Indian Contract Act. Section 55 permits, in case of delay in performance by one party, the remaining unperformed contract to become void at the option of the suffering party. However this is permissible only when the time is an essence of the contract.

The question arises then what is essence of the contract and what is its significance. In a contract, there are many provisions. But all provisions do not carry the same weight. Some stipulations are treated as heart and soul of the contract. These are treated as non-compromisable provisions without which the contract may not be permitted to subsist (at the option of suffering party). The violation of such provisions by one party entitles other party to repudiate/ cancel/ determine/ declare void the contract altogether. Time period of performance of the contract is mostly treated as one such provision in government contracts. The other provisions (say not so important provisions) are non-essential provisions, the violation of which, entitle a party to recover from the defaulting party, the damages occurred to him, as a result of such default. However violation of such provisions does not entitle a party to fully repudiate the contract

This section requires that in order to be eligible to receive damages, the party who suffers losses due to breach of contract, will give notice of his intention to claim compensation, to the party who is responsible for causing such damage at the earliest possible time when such damage is suffered or expected to be suffered. This section aims to alert the breaching party and give him an opportunity to contain or avoid such damage. It also affords an opportunity to breaching party to contest the claim of damage lodged by the party giving such a notice. This section is based on the principle of natural justice. It is therefore necessary that the notice is timely given to contractor, pinpointing in specific terms, the various acts/omission on his part which caused delay attributable to him. This responsibility for delay has to be imposed on the contractor in irrefutable manner and should be duly supported with sufficient evidences. If this is not done, it is very much possible that the contractor walks away scot free at the end without having to pay liquidated damage.

Extension of time (EOT) is a common feature in government contracts. When the contractor is not able to complete the given task within the scheduled completion time, EOT is granted to him on the basis of his request or sometimes suo-moto also. Often interim EOT is given without making a firm decision on the culpability of the contractor for delay. In such cases, EOT issuing officer must incorporate in the EOT granting letter, the following two conditions:

- (1) EOT granted is without prejudice to right of the Employer to recover liquidated damages from the contractor in terms of relevant clause (mentioning clause) of the contract; and
- (2) Notwithstanding the EOT so granted, the time is and shall remain the essence of the contract.

The above stipulations in the EOT letter are essential to protect the right of the employer vis-à-vis LD clauses and to meet requirement of sec 55 of the Indian Contract Act. The first condition is a mandatory notice under section 55 of ICA, of intention of employer to recover LD. The second condition is meant to retain time clause of the contract as essence of the contract which is also a requirement of the same section of ICA. However, it should be understood that the repeated extensions of time for long periods dilute the claim of the employer to treat time as essence of the contract.

Don't do something permanently stupid
Just because you are temporarily upset.

Section 73

Last but not the least, section 73 of the Indian Contract Act enables a party to claim damages suffered by it as a result of default by the other party even when no such provision exist in the agreement. These damages are general damages and not quantified as such in the contract (and are thus non-liquidated damages) but their sufferance has to be proved by the party claiming it. Contractors claim damages from their employers under section 73 of the contract though such damages (owing to the default of the employers) are not mentioned in the contract. Such damages, however, are limited to those damages which naturally arise in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Most of the time, such damages take the form of underutilized/idle labour, T&P and staff due to delays attributable to the employer. However in order to claim such damages, certain conditions needs to be fulfilled by the contractor like (i) Definite breach on the part of employer which caused loss to the contractor; (ii) Notice under sec 55 to the employer at the appropriate time about sufferance of loss or damage; (iii) Proof of sufferance of such damage and its quantum; (iv) Efforts made by the contractor to mitigate such losses; and (v) The loss arose naturally in the usual course of things from such breach or the party knew, when they made the contract, to be likely to result from the breach of it, meaning thereby that the losses are not indirect or remote.

A wife was making a breakfast, fried eggs for her husband.

Suddenly, her husband burst into the kitchen. "Careful," he said, "CAREFUL! Put in some more butter! Oh my gosh! You're cooking too many at once. TOO MANY! Turn them! TURN THEM NOW! We need more butter. Oh my gosh! WHERE are we going to get MORE BUTTER?"

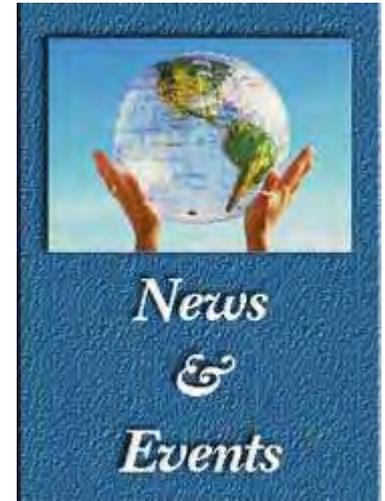
They're going to STICK! Careful. CAREFUL! I said be CAREFUL! You NEVER listen to me when you're cooking! Never! Turn them! Hurry up! Are you CRAZY? Have you LOST your mind? Don't forget to salt them. You know you always forget to salt them. Use the Salt. USE THE SALT! THE SALT!"

The wife stared at him. "What in the world is wrong with you? Do you think I don't know how to fry a couple of eggs?"

The husband calmly replied,
"I just wanted to show you how it feels when I'm driving."



NEWS & EVENTS



ARBITRATION - A PREFERRED ADR MECHANISM IN INDIA

Arbitration is emerging as a preferred dispute resolution mechanism in India and the country has become one of the top three seats for arbitration in the world along with Singapore and England, according to a PwC survey on Corporate Attitudes and Practices towards Arbitration in India. 95 per cent of the companies surveyed used arbitration in isolation or in combination with other dispute resolution mechanisms. Moreover, a clear majority of companies (91 per cent) in India which have a dispute resolution policy, use arbitration and not litigation for resolution of future disputes, while, 82 per cent of the companies with arbitration experience indicated they would continue to use arbitration future disputes as well.

IIADRA ADR TALKS

The India International ADR Association has conducted its first IIADRA ADR Talk on July 9th at Kochi. The guest for the day was Mr. Geoff Sharp, Barrister and Commercial Mediator based in New Zealand and Vice Chair of the Independent Standards Commission of IMI, The Hague. The talk was on the Global Trends of Mediation – Certification & ethics. The program was presided by Mr. Justice Siri jagan, Judge High Court of Kerala. Mr. G. Shrikumar, President IIADRA welcomed the gathering and Mr. Anil Xavier, Vice-President IIADRA proposed the vote of thanks. Judges, Mediators and Lawyers attended the function.

INTERNATIONAL BAR ASSOCIATION RELEASES THE IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION

The International Bar Association Council has approved the IBA Guidelines on Party Representation in International Arbitration. The Guidelines provide a framework for parties and their representatives to identify appropriate conduct and behaviour within the context of international arbitral proceedings.

IIAM COMMUNITY MEDIATION CLINIC OPENED AT CHERTHALA

Santhwanam Mediation Clinic, a Community Mediation Centre under the IIAM Community Mediation Service was inaugurated at Cherthala, Kerala State by Mr. Hormis Tharakan IPS, Former Director General of Police. This is the fifth Mediation Clinic in Kerala. Many eminent persons including lawyers, judicial officers, social and political workers, representatives from NGO's and social organisations attended the event. The Mediation Clinic has empanelled accredited community mediators, who could be approached for family, neighborhood, civil or commercial disputes. More details could be obtained from www.communitymediation.in

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



DO NOT JUDGE ME

Do not judge me...
Open the Cover and Read

Because I am thin, Do not think my life is perfect.
Stress may have caused the weight loss
...Notice the lines on my face.

Because I am overweight, Do not assume I drowned my sorrow with food.
My metabolism may challenge me.
...See beyond my exterior.

Because I am disfigured, Do not pity me
The lessons I have learned may surpass yours 1,000 fold.
...Share my insight.

Because I fit society's definition of beauty, Do not despise me
It may all have been paid for, to compensate for my internal insecurities.
...Observe the sorrow in my eyes.

Because I do not speak eloquently, Do not write me off as uneducated.
Work and family responsibility may have stolen my childhood education.
...Listen to what I am trying to say.

Do not judge me...
Open the cover and read.

~By Denise L. Wilson