Volume 8 Issue 2
October 2024

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

Table of Contents:

1. *Should Arbitrator's reimburse their fees if award is set aside ?*

.... Page No. 02

2. *Adducing evidence in appeals under Section 34 of the Arbitration and Conciliation Act, 1996: Insights from the Hon'ble Supreme Court*

.... Page No.05

3. *The Arbitrability of Intellectual Property Disputes: Trends and Challenges*

.... Page No. 09

4. *Kompetenz-Kompetenz – A Principle of True Autonomy*

.... Page No.12

5. *International Arbitration: Striking a balance between Confidentiality and Public Interest*

.... Page No.16

6. *Non-Signatories and the binding nature of arbitration: Supreme Court's altered stance*

…. Page No. 24

7. *Establishment of an Alternative Dispute Resolution Centre under India's International Financial Services Centre Authority*

.... Page No.27

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IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

SHOULD ARBITRATOR'S REIMBURSE THEIR FEES IF AWARD IS SET ASIDE?[1]

By Rishi Kumar Dugar
Advocate, Madras High Court

Amendments are often carried out when it is better to change the law. The 2015 and 2019 Amendments to the Arbitration and Conciliation Act, 1996 ('1996, Act') brought some key amendments vis-à-vis arbitrators.

Now under the 1996, Act, guidance for independence or impartiality of arbitrators is provided in the Fifth Schedule; for determination of fees of arbitrators the Fourth Schedule; Eighth Schedule provides for qualifications and experience of an arbitrator and a specific section provides a safety net to arbitrators, protecting them from legal proceedings for anything done in good faith or under the 1996, Act.

While these amendments are indeed necessary and important; what about the duty and accountability of arbitrator to render an enforceable award? Wouldn't it enhance attractiveness of arbitration in the eyes of the users if, there was a specific provision that made the arbitrator accountable? While this may sound radical in India, this radical change has been attempted by Hungary in the Hungarian Arbitration Act of 2017 ('2017 Act').

Sec. 57(2) of the 2017 Act, as it was introduced in Hungary, provided that in the event an award is set aside, arbitrators shall

[1] This article was published on October 21, 2019 in Bar&Bench.

have to reimburse their fees, irrespective of the reason for setting aside.

The obvious reasons behind the Hungarian Legislators introducing this new section were that, change in law would try to increase accountability of arbitrators. It also meant that arbitrators shall have to reimburse their fees if the award does not stand up to scrutiny by courts. Most importantly, this rule might encourage arbitrators to render enforceable awards.

Historically, in Hungarian arbitration practice, the idea that parties should not be required to bear costs of the second proceedings, if award is set aside, has long been part of the Hungarian Arbitration Act of 1994 ('1994 Act').

The 1994 Act however, did not contain rules on proceedings to be conducted following the setting aside of an award. So, taking a cue from the 2011 Rules of Arbitration of the Permanent Arbitration Court ('HCCI Court') attached to the Hungarian Chamber of Commerce and Industry ('HCCI'), which provided for such disputes to be resubmitted to the same arbitral tribunal, without any fees for the second proceedings. The Hungarian Legislators codified these Rules into the 2017, Act.

Contrary to Hungary's 1994 Act, the 2017 Act allowed parties a choice between resubmitting their dispute to the original arbitral tribunal or to a different tribunal. The new amendment further provided that arbitrators who sat on first tribunal must reimburse their fees. This change in law was made applicable to all arbitration proceedings seated in Hungary.

The 2017, Act as introduced, was criticised as a 'populist measure' in Hungary. The main criticism against introduction of Sec. 57(2) of the 2017 Act was:

- that in addition to reimbursement of its fees, a party could claim it is entitled to the amount granted in the annulled award;

- obligation to reimburse fees will create tensions among arbitrators (Tribunal); leading to more and more liability actions being initiated amongst arbitrators. Similarly, number of dissenting opinions could increase in an attempt for arbitrators to distance themselves from the content of an award that could be successfully set aside and
- arbitrators may refuse accepting appointment to tribunals seated in Hungary.

Unfortunately, even before this new amendment could be tested in practice, in response to these criticisms, the Hungarian Legislators made a further amendment to the 2017 Act. The revised Sec. 57(2) no longer requires arbitrators who rendered the annulled award to reimburse their fees. However, it did not depart from its earlier position under which parties were not required pay arbitrator fees twice to obtain a single enforceable award.

The Hungarian Legislators did not stop there; they also found a solution to fund the costs and arbitrator fees of the second arbitration. In the revised provisions, they tasked the Presidium of the HCCI Court to establish a separate reserve fund from which arbitrator fees for the second proceedings were to be drawn and in case of insufficiency, the funds were to be provided by HCCI. This revised provision was however made applicable only for arbitrations conducted under the auspices of the HCCI Court and not to *ad hoc* and foreign institutional proceedings seated in Hungary.

In India there are over three crore cases pending, across the Supreme Court, the High Courts, and the subordinate courts. A majority of these pending cases include petitions under Sec.34 (Application for setting aside an award) of the 1996, Act. There must be something fundamentally wrong in those awards, which is why all these petitions under Sec.34 were entertained in the first place.

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Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated

Parties choose arbitration to avoid the long litigious court process and for a speedy and effective remedy. However, if award passed by arbitrators does not stand up to scrutiny by the courts, then the whole exercise becomes a futile attempt due to the carelessness of the arbitrator.

International arbitral institutions like International Chamber of Commerce ('ICC'), have also taken steps to make arbitrators accountable. ICC introduced negative incentives for arbitrators like reduction of fees, if award is not rendered within a stipulated time. When the next round of amendments to the 1996, Act is proposed, Government of India should consider making arbitrators accountable, so that they are more careful and render an enforceable award.

ADDUCING EVIDENCE IN APPEALS UNDER SECTION 34 OF THE ARBITRATION AND CONCILIATION ACT: INSIGHTS FROM THE HON'BLE SUPREME COURT.

By Vrishab Puranik

In the case of ***Alpine Housing Development Corporation Pvt. Ltd. vs. Ashok S. Dhariwal & Others (Civil Appeal No. 73 of 2023)***[2], the Hon'ble Supreme Court has addressed quite a controversial issue regarding the ability to adduce evidence in proceedings under Section 34 of the Arbitration and Conciliation Act, 1996. This judgment, which was delivered on 19th January 2023, enlightens us on whether a party can introduce new evidence to challenge Arbitral Awards, specifically when invoking the public policy ground as stipulated under Section 34 (2) [b] {ii} of the Act.

[2] Alpine Housing Development Corporation Pvt. Ltd. v. Ashok S. Dhariwal & Others, 2023 SCC OnLine SC 55.

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Factual Background

The case originated from an ex-parte Arbitral Award passed in 1998, in which Alpine Housing Development Corporation Pvt. Ltd., the appellant herein, was granted an award in their favour, regarding the specific performance of a contractual obligation. The respondents, Ashok S. Dhariwal and others, who had not participated in the arbitration, subsequently filed an application under Section 34 to set aside the award. One of the critical issues was whether they could adduce new evidence during these proceedings. The trial Court had initially rejected their application to adduce additional evidence, but the Respondents approached the Hon'ble High Court of Karnataka and the Hon'ble Court reversed the decision of the trial Court, permitting the Respondents to adduce new evidence which led to the present appeal being filed before the Hon'ble Supreme Court.

Legal Issue: Adducing Evidence in Section 34 Proceedings

The key issue before the Hon'ble Supreme Court was whether a party could introduce fresh evidence under Section 34(2) of the Arbitration and Conciliation Act, which allows an Arbitral Award to be set aside on limited grounds, including a conflict with public policy. The question arose in light of amendments made by Act 33 of 2019 to Section 34 (2) (a) of the Act, which replaced the term "**furnish proof**" with the phrase "**establish on the basis of the record of the arbitral tribunal**." The appellant argued that the introduction of additional evidence would defeat the purpose of the amendments, which

sought to streamline arbitration proceedings and limit the judicial intervention. The Appellant contended that any challenge to the Arbitral Award should be based solely on the existing record of the arbitration tribunal.

Hon'ble Supreme Court's Ruling

The Hon'ble Supreme Court has dismissed the appeal, upholding the High Court's decision to allow the Respondents to adduce new evidence in support of their Section 34 application. The Hon'ble Court highlighted that since the arbitration proceedings and the award were made prior to the 2019 amendments to Section 34 (2) (a), the provisions before the amendment was made, would apply. Thus, the phrase "**furnish proof**" in the pre-amendment provision allowed for the introduction of additional evidence to challenge the award.

Relying on earlier judgements, including ***Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited (2009)***[3] and ***Emkay Global Financial Services Limited v. Girdhar Sondhi (2018)***[4]**,** the Hon'ble Supreme Court clarified that while Section 34 proceedings are generally summary in nature, there may be exceptional cases where adducing new evidence is necessary. The Court noted that in the present case, where the Respondents sought to prove that the Arbitral Award was un-enforceable due to the subsequent events i.e. the refusal of the relevant authority to amalgamate certain plots, in this case, fell within the ambit of **"exceptional cases"** category.

Legal Principles reiterated

This verdict reiterates several important principles with regard to arbitration law:

1. Applicability of Amendments:

The Hon'ble Court held that the amendments made to Section 34 (2) (a) by Act 33 of 2019 do not apply retrospectively to the arbitration

[2] Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited, (2009) 17 SCC 796.

[4] Emkay Global Financial Services Limited v. Girdhar Sondhi, (2018) 9 SCC 49.

proceedings which commenced prior to the amendment, unless the parties agree otherwise. This basically means that for older cases, the broader requirement of **"furnish proof"** still applies, which would be allowing parties to adduce new / additional evidence.

2. **Adducing Evidence in Exceptional Circumstances:**

Even in post-amendment cases, the Hon'ble Court has acknowledged that there might be many situations wherein new evidence could be introduced in Section 34 proceedings. This would be permissible when the evidence is crucial to determining whether an Arbitral Award violates public policy or is otherwise unenforceable or erroneous.

3. **Public Policy - Grounds for Challenge:**

The Hon'ble Court emphasized that any challenge to an Arbitral Award on the ground of public policy must be carefully studied. In this particular case, the Respondents had argued that the Arbitral Award was unenforceable due to its conflict with public policy, as it required compliance with Land Laws that could not be fulfilled. The Court ruled that this was a valid ground for introducing new evidence.

Implications of the Judgment

This judgment has extremely significant implications for the parties involved in Arbitration. While the Arbitration and Conciliation Act, 1996, aims to minimize judicial interference in arbitral proceedings, this particular judgement illustrates that the Courts may allow adducing new evidence only in exceptional circumstances, especially when the challenge is based on public policy grounds. This flexibility, however, is limited

to cases where the arbitration occurred before the 2019 amendments.

Moreover, the ruling emphasizes the importance of adhering to the record before the arbitral tribunal in most cases, aligning with the objective of speedy dispute resolution. The Hon'ble Court has also made it clear that the parties cannot unduly delay the arbitration process under the guise of introducing new evidence that could have actually been presented during the arbitral proceedings itself, unless exceptional circumstances are established.

Conclusion

The Hon'ble Supreme Court's decision in ***Alpine Housing (supra)*** strengthens the subtle balance between respecting the finality of Arbitral Awards and allowing limited judicial scrutiny under Section 34. While the amendments to the Arbitration and Conciliation Act, 1996, aim to curb delays and reduce court interference, the judgment demonstrates that Courts retain their discretion to allow new evidence whenever they deem fit in the interest of justice and to ensure the rights of the parties aren't violated. This case serves as a reminder that while arbitration seeks to provide an efficient and final resolution to disputes, there remains scope always for judicial intervention in the interests of fairness and justice, particularly on grounds of public policy.

THE ARBITRABILITY OF INTELLECUTAL PROPERTY DISPUTES: TRENDS AND CHALLENGES

By Tanishq Kashyap

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News Bulletin- Published and circulated

Introduction

Intellectual property (IP) rights are increasingly vital to business success, particularly in sectors like technology, pharmaceuticals, and life sciences. These rights protect innovations and often represent a company's most valuable assets. Traditionally, IP disputes were resolved through litigation, but there is a growing shift toward alternative dispute resolution (ADR) methods, including arbitration. Organizations such as the WIPO Arbitration and Mediation Center have seen a notable rise in IP-related arbitration cases, with figures increasing from 71 cases in 2014 to 679 in 2023.

At first glance, arbitration may seem ill-suited for IP disputes, especially for issues like infringement and validity. IP rights grant exclusivity and protection "erga omnes" (against the world), while arbitration binds only the parties to the arbitration agreement ("inter partes"). Additionally, certain IP rights, like patents and trademarks, are granted and revoked by state authorities, introducing public law elements that complicate arbitrability. Despite these concerns, many of them are now considered outdated, and arbitration is increasingly viewed as a viable method for resolving IP disputes.

The Shift Towards Arbitrability

The arbitrability of IP disputes largely depends on the type of right in question, the jurisdiction, and the nature of the claim. Disputes arising from contracts, such as royalty agreements or ownership rights governed contractually, are generally arbitrable. Tort-based claims, like passing off or breach of confidential information, are also typically considered arbitrable.

Claims relating to infringement, which primarily involve the parties directly affected, are often resolved through arbitration, though the awards are limited to having "inter partes" effect. Even disputes involving unregistered IP rights, such as

copyright, are increasingly recognized as arbitrable.

However, issues regarding the ownership and validity of IP rights raise public policy concerns. IP rights, such as patents, are granted by state bodies, and their nullification has broader public consequences. These types of disputes, especially regarding patent validity, are subject to differing approaches across jurisdictions.

Jurisdictional Perspectives on Arbitrability

Different countries take varying stances on the arbitrability of IP validity disputes. Arbitration-friendly jurisdictions like Switzerland and Belgium allow for arbitrators to decide on IP validity, with awards capable of having "erga omnes" effect. In Switzerland, the Federal Institute on IP can update the patent register based on an arbitration award, and Belgium allows patent invalidation awards to be registered with the patent office.

In contrast, many common law countries, such as the UK, Canada, and Singapore, take a more cautious approach. They permit arbitration of validity claims but limit the awards' effect to the parties involved. Other countries, such as South Africa, expressly prohibit arbitration for patent disputes but allow it for other IP disputes, like trademarks or copyright.

Germany's stance on arbitrability remains uncertain, with a bifurcated system separating patent revocation and infringement actions between different courts. While some regional courts are moving toward recognizing arbitrability for patent disputes, the Federal Patent Court remains more reserved.

The Role of Arbitration in IP Disputes

Despite the challenges surrounding arbitrability, arbitration offers several advantages in IP disputes. First, arbitration is confidential, which is crucial in protecting sensitive business information. Second, arbitration allows for more flexibility and

control over the dispute resolution process. Third, arbitration provides enforceability of awards across multiple jurisdictions, which can be especially important in cross-border IP disputes.

Moreover, in many cases, parties may not be concerned with whether a resolution affects third parties, as long as their specific dispute is resolved. In cases involving patent validity, tribunals may order parties to take specific actions, such as requesting amendments to IP registers, providing a form of specific performance.

Conclusion

The trend towards arbitrating IP disputes reflects the flexibility and benefits that arbitration offers. While concerns over the arbitrability of validity claims remain in certain jurisdictions, most IP disputes, including contractual and infringement claims, are now widely considered arbitrable. The ongoing evolution of arbitration frameworks in various countries may further shape the landscape of IP dispute resolution, especially as more nations consider adopting broader interpretations of arbitrability. As arbitration continues to grow as a preferred method for resolving IP disputes, businesses can benefit from its confidentiality, efficiency, and cross-border enforceability.

KOMPETENZ-KOMPETENZ – A PRINCIPLE OF TRUE AUTONOMY

By Suhas MS

Introduction

Arbitration, being one of the methods of dispute resolution, focuses on reducing the load on judiciary and expediting the disposal

of disputes, inter alia. Among several other features of arbitration, one of the most significant and multifaceted feature of arbitration is autonomy. The enactment of the Arbitration and Conciliation Act, 1996 (*"Act"*) with progressive autonomy hinges on the UNCITRAL Model Law on International Commercial Arbitration (*"UNCITRAL Model Law"*), adopted in the year 1985. The Act has been a pathbreaking legislative measure to bring to life the principles of autonomy, amicability, independence and expeditiousness. These features form the bedrock of arbitration. This Article discusses the importance of principle of autonomy under Section of the Act.[5]

Section 16 of the Arbitration and Conciliation Act, 1996

Section 16 of the Act bestows jurisdiction to an Arbitrator/Arbitral Tribunal to rule on its jurisdiction. Popularly known as principle of Kompetenz-Kompetenz / Competence De La Recognised, the provision represents two facets of competence, namely competence of an arbitral tribunal to rule on its own competence to adjudicate disputes referred to it.

One may wonder if this principle flies in the face of doctrine of *Nemo Judex in Causa Sua* propounded by Sir Edward Coke, which negates the possibility of a person's competence to judge his cause. To answer this question, it may be relevant to trace back to the objective of arbitration namely autonomy and independence.

Further, it is also pertinent to discuss the doctrine of severability highlighted under Section 16(1)(a) of the Act. The correlation between the doctrine of autonomy and severability, signifies that an arbitral tribunal, which has been constituted under an arbitration clause will not be deprived of its jurisdiction even if the main agreement is void.

[5] M/s Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field, (2020) 2 SCC 455.

Apart from the doctrine of severability, an arbitral tribunal is specifically empowered to rule on its own jurisdiction in order to minimize judicial interference. A series of judicial observations chronicled hereunder crystalizes the haze.

Judicial Observations

The following are landmark judgements and relevant excerpts are extracted hereinbelow for convenient traversal –

1. ***Uttarakhand Purv Sainik Kalyan Nigan Limited v. Northern Coal Field Limited*[6].**

"7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties."

2. ***N N Global Mercantile Private Limited v. Indo Unique Flame Limited and Others*[7]**

The Seven Judge Bench of the Hon'ble Supreme Court, observed a balance of positive and negative aspects of the Competence-Competence Rule, in the reference made to it by the Five Judge Bench. The following is the relevant excerpt of its observation.

"139. The international arbitration law as well as domestic law prioritize the Arbitral Tribunal by permitting them to initially decide challenges to their authority instead of the Courts. The policy consideration behind this approach is two-fold : first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and

[6] (2020) 2 Supreme Court Cases 455.

[7] 2023 SCC OnLine SC 1666, See also – (2023) 7 SCC 1, and (2021) 4 Supreme Court Cases 379.

obligations arising out of contract; and second, to prevent parties from initiating parallel proceedings before courts and delaying the arbitral process. This is the positive aspect of the doctrine of competence-competence.

140. The negative aspect, in contrast, speaks to the national courts. It instructs the Courts to limit their interference at the referral stage by deferring to the jurisdiction of the Arbitral Tribunal in issues pertaining to the existence and validity of an arbitration agreement. Thus, the negative aspect of the doctrine of competence-competence suggests that the Courts should refrain from entertaining challenge to the jurisdiction of the Arbitral Tribunal before the arbitrators themselves have had an opportunity to do so…."

3. *Cox and Kings Limited v. SAP India Private Limited.*[8]

The Five Judge Bench of the Hon'ble Supreme Court has also categorically observed that the intent of the provision of Section 16 of the Arbitration and Conciliation Act, 1996 is to minimize judicial interference and signify arbitral autonomy.

Conclusion

The object of one of the alternative dispute resolution methods namely, arbitration is now the most preferred method of dispute resolution both in domestic and international disputes. The objective underlying the UNCITRAL Model Law, and subsequent enactment of Arbitration and Conciliation Act, 1996 in line with the UNICTRAL Model Law, suggests the grave need for minimizing judicial interference and expedite the arbitral process. In view of the object of the Act, and the practical necessity to minimize judicial interference brings to us a balanced principle of Kompetenz-Kompetenz.

[8] (2024) 4 Supreme Court Cases 1.

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INTERNATIONAL ARBITRATION: STRIKING A BALANCE BETWEEN CONFIDENTIALITY AND PUBLIC INTEREST

By Daeinn A Poovaiah

International arbitration relies on confidentiality, but the "public interest exception" can override it. This exception prioritizes transparency when issues affect public safety, health, environment, integrity, accountability, precedent-setting legal matters, public investment, or human rights. Arbitral tribunals balance confidentiality and public interest based on factors like risk and confidentiality agreements, with institutional rules and jurisdictions applying the exception differently. When drafting arbitration agreements and participating in proceedings, parties must carefully consider the implications of secrecy and public interest.[9]

International Regulations and Frameworks:

- UNCITRAL Model Law on International Commercial Arbitration: This model law provides a comprehensive framework for international arbitration and emphasizes confidentiality. However, it permits disclosure of arbitral verdicts when necessary to preserve a party's legitimate rights or serve the public interest.

- The New York Convention on the Recognition and Enforcement of Foreign

[9] See Jerzy Jakubowski, Reflections on the Philosophy of International Commercial Arbitration and Conciliation, in The Art of Arbitration: Essays in International Arbitration, Liber Amicorum Pieter Sanders 175, 177 (Jan C. Schultsz & Albert Jan van den Berg eds., 1982); François Dessemontet, Arbitration and Confidentiality, 7 Am. Rev. Int'l Arb. 299 at 313–14 (1996)

Arbitral Rulings: Although it doesn't specifically address the public interest exception, courts interpreting the Convention recognize that enforcement may be withheld if it contradicts public policy, which includes public interest considerations.

- **ICSID Convention[10]:** Establishes a specific dispute resolution procedure for investment disputes, allowing for disclosure of awards and documents if necessary for the proper administration of justice.

- **International Arbitral Institutions' Arbitration Rules And Public Policy Considerations and National Arbitration Laws:** Organizations like ICC, LCIA, and ICDR have rules addressing secrecy and disclosure in the public interest, balancing confidentiality with transparency and accountability. Countries have enacted laws governing domestic and international arbitration, often guaranteeing secrecy but permitting disclosure in exceptional circumstances.

Countries Have Differing Approaches To Confidentiality In Arbitration Proceedings.

- **England's Approach:** England's Arbitration Act of 1996[11] prioritizes confidentiality, with limited exceptions for public interest, enforcement, and potential criminal activity. *The VTB Capital plc v R* (2019)[12] case highlights the strong presumption of confidentiality, even when national security concerns are involved.

[10] Arbitrators working with the International Centre for Settlement of Investment Disputes (ICSID) have reportedly acknowledged that because of duties imposed by domestic laws, a company could find itself "under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value." See Margrete Stevens, Confidentiality Revisited, 17 News from ICSID 2 (No. 1, 2000), available at ICSID Rules and Regulations | ICSID (worldbank.org)

[11] This is due to the fact that under English law it seems that the concept of privacy and confidentiality have not been separated. Thus, for English courts which believe, quite correctly, that arbitration proceedings are private, it would indeed be strenuous to admit a public interest exception.

[12] [2019] EWHC 302 (QB)

Notably, the English High Court has ruled that public interest can outweigh confidentiality in arbitration, granting access to documents related to an arbitration for use in disciplinary proceedings[13]. This highlights the importance of considering public interest when confidentiality is at stake.

- **India's Approach:** India's Arbitration and Conciliation Act 1996 also emphasizes confidentiality, but the public interest exemption is less defined, leading to confusion. This ambiguity is particularly evident in cases involving public enterprises or national importance issues. In India, the Arbitration and Conciliation Act, 1996, emphasizes confidentiality, but Indian courts have acknowledged exceptions where public interest is involved, such as cases of fraud, corruption, or fundamental rights abuses.

- **Australia's Approach:** Australia's International Arbitration Act of 2010 balances secrecy with broader public interest considerations like public health and safety. The *FG Hemisphere Ltd v Glencore Australia Investments* (2012)[14] case demonstrates the court's willingness to prioritize public interest over confidentiality in certain cases.

- **US Approach:** The US Federal Arbitration Act maintains secrecy while allowing larger exclusions for public policy concerns, fraud, and consumer protection. The *Halliburton Co. v. Chubb Bermuda Ltd. (2014)*[15] case illustrates the potential

[13] The London Court of International Arbitration (LCIA) has introduced express confidentiality provisions in its rules in art. 30(1) Similarly, the American Association of Arbitrators International Arbitration Rules provide for privacy and confidentiality in arts. 20(4), 27(4), 34. The Swiss Arbitration Association has enacted new Rules in 2004, which contain a provision on confidentiality in Section 6, arts. 43 and 44

[14] FG Hemisphere Ltd v Glencore Australia Investments [2014] FCAFC 34

[15] Halliburton Company (Appellant) v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) (Respondent) [2020] UKSC 48

public interest in environmental measures, even in confidential arbitration processes.

These divergent approaches underscore the complexity of balancing confidentiality and public interest in international arbitration.

Public Interest Across Different International Jurisdiction

Confidentiality and public interest are two fundamental concepts that often intersect in international arbitration, creating tension between parties' private interests and broader societal concerns. International arbitration is a vital mechanism for resolving cross-border disputes outside traditional court systems, and confidentiality is essential in fostering trust and open communication between parties. The importance of confidentiality cannot be overstated, as it protects sensitive business information and maintains the integrity of the arbitral process. However, the public interest exception recognizes that certain issues transcend private interests, necessitating disclosure to serve larger social goals. This exception balances confidentiality with transparency, accountability, and the rule of law.

Different countries approach confidentiality and public interest distinctly, influenced by policy considerations, legal traditions, and cultural norms. In the United States, the Federal Arbitration Act emphasizes confidentiality with public interest exceptions for grave wrongdoing or matters of public policy, as demonstrated in the landmark case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. (1985)*[16].

In the United Kingdom, the Arbitration Act 1996 upholds confidentiality, with exceptions for significant irregularities, as clarified in *Fiona Trust & Holding Corp. v. Privalov (2007).*[17] France prioritizes confidentiality, permitting annulment for global public policy violations, as seen in *Société Hilmarton Ltd v. OTV et Société*

[16] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)

[17] Fiona Trust & Holding Corp. v. Privalov, [2007] EWCA Civ 20

Lyonnaise des Eaux (2000).[18] Switzerland supports confidentiality, setting aside awards against public policy, with strict interpretation by Swiss courts, as in A v. B (2007).

Singapore balances party autonomy and efficiency with public interest exceptions, emphasizing strict interpretation of public policy, as ruled in *PT Prima International Development v. Kempinski Hotels SA (2012)*[19]. These jurisdictional approaches reflect the complex interplay between privacy, transparency, and access to justice.

Recent developments indicate a shift toward greater accountability and transparency, driven by changing cultural expectations, evolving legal standards, and technological advancements. The trajectory of confidentiality and public interest in international arbitration will likely continue to evolve, shaped by ongoing efforts to uphold arbitral process integrity, increase accountability, support transparency, and honour legitimate party interests. As international arbitration continues to navigate the tension between confidentiality and public interest, understanding jurisdictional differences and ongoing developments is crucial for practitioners, policymakers, and stakeholders. Embracing ongoing dialogue, monitoring jurisdictional developments, fostering transparency and accountability, and balancing party autonomy with public interest considerations are essential recommendations for effective dispute resolution.

Ultimately, international arbitration's delicate balance between confidentiality and public interest reflects the intricate relationships between privacy, transparency, and access to justice. By recognizing the importance of confidentiality and public interest, international arbitration can ensure a fair and

[18] Société Hilmarton Ltd v. OTV et Société Lyonnaise des Eaux, Cass. civ. 1re, [2000] 2 C.M.L.R. 29

[19] PT Prima International Development v. Kempinski Hotels SA, [2012] SGCA 50

efficient dispute resolution process that serves both private and public interests.

Confidentiality and Public Interest in Indian Arbitration: Striking a Balance

India's arbitration landscape has reached a critical juncture, grappling with the intricate balance between confidentiality and public interest. Confidentiality, a cornerstone of arbitration, enables parties to resolve disputes efficiently and discreetly, protecting sensitive business information and reputations. However, the increasing recognition of public interest exceptions has introduced a nuanced complexity, necessitating a reassessment of the traditional confidentiality paradigm. The Arbitration and Conciliation Act, 1996, while emphasizing confidentiality, has been interpreted by Indian courts to accommodate exceptions where public interest is involved, such as cases of fraud, corruption, or fundamental rights abuses. As India's stature as a hub for international arbitration grows, navigating this delicate balance between secrecy and transparency has become imperative, requiring a thoughtful examination of legislative frameworks, judicial precedents, and stakeholder interests.

Tension Between Secrecy and Public Interest:

India's arbitration landscape is at a crossroads, striving to balance confidentiality and public interest. Confidentiality is crucial for building trust and encouraging efficient dispute resolution, but it must be weighed against the larger goals of justice and accountability.

The Arbitration and Conciliation Act, 1996, emphasizes confidentiality, but Indian courts have acknowledged exceptions where public interest is involved, such as cases of fraud, corruption, or fundamental rights abuses. However, finding the ideal balance between secrecy and transparency, particularly in cases involving government contracts, public-private partnerships, and investment disputes, remains a key challenge.

Recent rulings demonstrate Indian courts' willingness to protect privacy while acknowledging public interest. For instance, the Delhi High Court maintained confidentiality in ***Ranbaxy Laboratories Ltd v. Daichii Sankyo Company Ltd (2011)***[20] while emphasizing openness in matters affecting public policy. Other notable cases include ***Oriental Insurance Company Limited v. Narbheram Power and Steel Pvt. Ltd. (2020)***[21], where confidentiality may be violated in cases involving accusations of fraud and forgery, and ***Reliance Industries Ltd. v. Union of India (2014)***[22], which maintained confidentiality in arbitration proceedings involving government and private parties.

The case of ***North American Coal Corporation India Pvt. Ltd. v. Sasan Power Ltd. (2016)***[23] further highlights the importance of balancing confidentiality and public interest. Here, the Delhi High Court ruled that confidentiality provisions must give way to public interest in cases involving accusations of fraud or corruption. These judgments demonstrate the courts' growing recognition of the need to strike a balance between secrecy and transparency.

Despite this progress, determining the extent and application of the public interest exception remains a challenge, particularly where conflicting interests are involved. To address this, legislative reforms and clearer judicial direction are necessary to provide consistency and confidence in handling confidentiality and public interest.

Promoting education and awareness about the value of accountability and openness in arbitration proceedings among arbitrators, parties, and legal professionals is also crucial. By doing so, India can foster a more hospitable atmosphere for resolving conflicts

[20] Ranbaxy Laboratories Ltd v. Daichii Sankyo Company Ltd, [2011] EWHC 183 (Pat)
[21] Oriental Insurance Co. Ltd. v. Narbheram Power & Steel Pvt. Ltd., (2020) 9 SCC 103
[22] Reliance Industries Ltd. v. Union of India, (2014) 7 SCC 603.
[23] North American Coal Corporation India Pvt. Ltd. v. Sasan Power Ltd., (2016) 6 SCC 813.

and cement its rising stature as a centre for international arbitration.

Ultimately, striking a balance between confidentiality and public interest is essential for ensuring justice, honesty, and openness in arbitration procedures. India's arbitration framework must evolve to address these complexities, and stakeholders, including legislators, arbitrators, and practitioners, must work together to achieve this goal. India's dedication to fostering foreign investment and economic growth makes resolving these issues critical. With careful consideration and collaborative effort, India can navigate the tension between confidentiality and public interest, ensuring a fair and efficient dispute resolution process that serves both private and public interests.

Conclusion

International arbitration's delicate balance between confidentiality and public interest is crucial for ensuring fair and efficient dispute resolution. While confidentiality protects sensitive business information and maintains the integrity of the arbitral process, the public interest exception recognizes that certain issues transcend private interests and require transparency to serve larger social goals. This exception balances confidentiality with transparency, accountability, and the rule of law, considering factors like the nature and importance of public interest, potential risks, and confidentiality agreements.

Effective dispute resolution requires understanding the nuances of confidentiality and public interest in various legal systems. By recognizing the importance of confidentiality and public interest, international arbitration can promote accountability and transparency globally. Embracing ongoing dialogue, monitoring jurisdictional developments, and balancing party autonomy with public interest considerations are essential for effective dispute resolution. As international arbitration continues to evolve, stakeholders must work together to address complexities, uphold arbitral process integrity, and ensure a fair dispute resolution process that serves

both private and public interests. Ultimately, striking a balance between confidentiality and public interest is vital for maintaining trust, promoting openness, and fostering a hospitable atmosphere for resolving conflicts.

NON-SIGNATORIES AND THE BINDING NATURE OF ARBITRATION: SUPREME COURT'S ALTERED STANCE

By Vrishab Puranik

Arbitration, as an alternate dispute resolution mechanism and it is typically binding only on the parties who are signatories to the agreement in dispute. However, due to the recent developments in the jurisprudence of arbitration law, including the Hon'ble Supreme Court's ruling in ***Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.***[24]**,** the conventional understanding has slightly transformed. This case enlarges the scope of arbitration to non-signatory parties under certain conditions, affirming the dynamic nature of arbitration law in India.

Factual Background

The case stems from a family arrangement agreement (FAA) executed between the AMP and JRS groups concerning business holdings. The dispute arose when the AMP group filed an arbitration petition seeking the appointment of a sole arbitrator to resolve disputes between the parties. Importantly, the case involved the SRG group, which was a

[24] Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors., In the Supreme Court of India, Arbitration Petition No. 19 of 2024. 2024 INSC 710

non-signatory to the FAA but had played an integral role in the negotiations and ongoing transactions.

Key Legal Issue

The key issue before the Supreme Court was whether the SRG group, a non-signatory to the FAA, could be compelled to participate in an arbitration proceedings initiated by the AMP group. The Court had to assess the scope of Section 11 of the Arbitration and Conciliation Act, 1996, which deals with the appointment of arbitrators, and determine if non-signatory parties could be referred to arbitration.

Legal Principles Applied

1. ***Group of Companies Doctrine.***

   The Court applied the 'group of companies' doctrine, under which a non-signatory can be bound by an arbitration agreement if it is shown that the non-signatory has a clear intention to be part of the agreement. This is typically inferred from the conduct during negotiations, the commonality of subject matter, and the involvement of the non-signatory in the performance of the contract. ***Cox & Kings Ltd. v. SAP India Pvt. Ltd***[25]**.** was a pivotal reference, where the Court had held that non-signatories could be bound if their involvement in the contractual matrix was indispensable.

2. ***Prima Facie Standard of Referral.***

   The Court reiterated the principle from ***Duro Felguera S.A. v. Gangavaram Port Limited*** [26], where it held that, at the referral stage, courts should only examine the 'existence' of an arbitration agreement, leaving questions of arbitrability to the tribunal. In the current case, the SRG group's deep involvement in the negotiations, as seen through communications and the joint business interests, provided sufficient prima facie

[25] Cox & Kings Ltd. v. SAP India Pvt. Ltd. (2024) 4 SCC 1.

[26] Duro Felguera S.A. v. Gangavaram Port Limited (2017) 9 SCC 729.

grounds to refer the non-signatories to arbitration.

Court's Conclusion

The Supreme Court, while ruling in favor of the AMP group, concluded that the SRG group's involvement in the negotiation and execution of the FAA, coupled with the interrelation of the businesses, justified binding them to the arbitration agreement despite their non-signatory status. The Court emphasized that the arbitral tribunal could later decide the extent of the SRG group's obligations.

Analysis and Conclusion

This judgment broadens the scope of arbitration, potentially leading to more inclusivity in multi-party disputes. It is a significant step in advancing the flexibility of arbitration in India, ensuring that even non-signatories, who have substantial involvement in contract performance, cannot evade arbitration on a mere technicality.

This case also underlines the importance of carefully drafting arbitration clauses and considering the potential involvement of all relevant parties, signatory or otherwise, in commercial agreements. The ruling serves as a crucial reminder that the courts are increasingly willing to ensure that disputes involving complex, multi-party relationships are adjudicated through arbitration, in line with international standards. This decision marks another step towards achieving efficient and comprehensive dispute resolution mechanisms in India.

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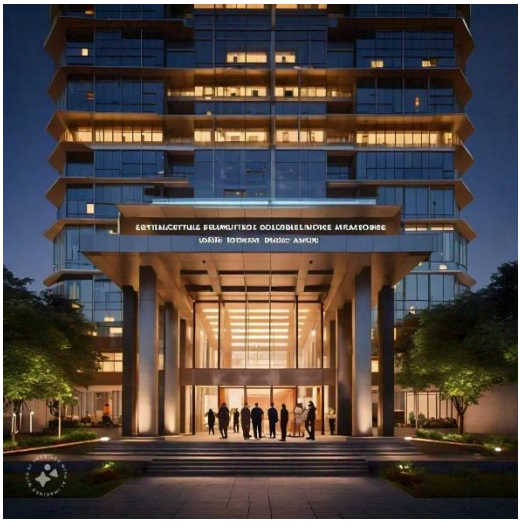
ESTABLISHMENT OF AN ALTERNATIVE DISPUTE RESOLUTION CENTRE UNDER INDIA'S INTERNATIONAL FINANCIAL SERVICES CENTRE AUTHORITY:

By Tanishq Kashyap



Introduction

India's alternative financial services sector, governed by the International Financial Services Centre Authority (IFSCA), is rapidly growing. The IFSCA oversees International Financial Services Centres (IFSCs), with Gujarat International Finance Tec-City (GIFT City) currently being the only operational IFSC. As of June 2024, GIFT City IFSC banking institutions reported assets of US$62.45 billion and business transactions amounting to US$89.54 billion. During the period from April to June 2024, capital market transactions in GIFT City reached US$98.86 billion, including the leasing of 137 aviation assets (source: IFSCA Bulletin April-June 2024).

GIFT City aspires to become a global hub for financial and technological services, offering tax incentives that rival other prominent IFSCs such as those in Singapore, Dubai, and London. Within its special economic zone, GIFT City IFSC supports a variety of services, including banking, capital markets, insurance, bullion trading, and aircraft leasing. Additionally, it hosts foreign university campuses and is quickly emerging as a new metropolis near Ahmedabad in Gujarat.

However, one essential component missing in GIFT City IFSC is a dedicated dispute

resolution system. Currently, disputes within the IFSC are resolved through the general court system. To elevate GIFT City to international standards, a specialized arbitration mechanism, akin to Dubai's DIFC courts and DIAC arbitration center, is needed. Establishing an efficient dispute resolution center is crucial for fully integrating the IFSC system.

The IFSCA Committee

The Indian government, in its 2022-2023 Union Budget, proposed the creation of an International Arbitration Centre (IAC) at GIFT City. To this end, the IFSCA set up a committee in May 2023 (the IFSCA Committee) tasked with developing an arbitration center for all IFSCs. The committee, comprising legal, financial, and administrative experts, was instructed to draft a roadmap for the GIFT International Arbitration Centre (GIFT IAC). After consulting both domestic and international stakeholders, the IFSCA Committee submitted its report in July 2024, estimating the global alternative dispute resolution (ADR) market to be worth US$14.50 billion.

The committee proposed a multifaceted dispute resolution approach, incorporating various tools alongside arbitration. This led to the recommendation of an IFSCA-wide Alternative Dispute Resolution Centre (ADRC), outlined in the publicly available IFSCA Committee report. The committee's vision includes making amendments to existing Indian legislation, such as the International Financial Services Centre Authority Act of 2019, the Arbitration and Conciliation Act of 1996, the Mediation Act of 2023, and the Special Economic Zones Act of 2005, to create a carveout for IFSCs.

Key Recommendations

The IFSCA Committee's report suggested that the ADRC operate as an offshore jurisdiction, separate from the proposed Arbitration Council of India (ACI) and the Mediation Council of India (MCI), both of which are yet to be enforced under the Arbitration and Conciliation Act of 1996.

The committee recommended granting the IFSCA authority to regulate ADRC-related issues in line with existing statutes applicable to IFSCs.

The report also conducted a comprehensive review of best practices from leading arbitration institutions worldwide, focusing on factors such as cost, efficiency, impartiality, confidentiality, and procedural flexibility. It embraced the idea that parties should have the autonomy to choose the governing law for contracts and disputes. Additionally, it recognized the growing trend of third-party funding for arbitration and the importance of predictable case management akin to international standards.

One of the committee's innovative proposals is the creation of a High Court specifically for Indian IFSCs, referred to as the IFSC International Court. Initially, the Gujarat High Court would handle IFSC-related disputes through a dedicated bench, followed by the establishment of the IFSC International Court in subsequent phases. The court would eventually feature international judges, pending a constitutional amendment. Although this court would hold High Court status, it would not have jurisdiction over writs or criminal cases. The IFSC International Court is intended to serve as a hub for international arbitration, extending beyond IFSC-related disputes, signaling India's commitment to enhancing international dispute resolution.

Party autonomy will be central to the ADRC, allowing both Indian and foreign parties to select the governing law for their arbitration when using the IFSC as the seat of arbitration. The ADRC will handle international commercial arbitrations under the Arbitration and Conciliation Act of 1996.

The ADRC will also introduce procedural reforms, such as specific time frames for various steps. For instance, a challenge to an arbitration award must be filed within 21 days, and the court must resolve it within 90 days. The center will permit third-party funding, and while the committee was largely

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against regulating ADR professionals, it proposed a draft code of ethics for those involved in dispute resolution.

Furthermore, the report recommended simplifying visa and work permit processes for foreign lawyers, enabling them to represent clients in arbitrations and related court proceedings. It also highlighted the importance of bilateral and multilateral agreements for cross-border judgment enforcement.

Conclusion

The success of the proposed ADRC will depend on how swiftly it is established and the extent of support it receives from the government, businesses, legal practitioners, and the judiciary. A stable and predictable regulatory environment is crucial for effective dispute resolution. If implemented, the ADRC has the potential to position India as a competitive and attractive destination for international arbitration.

Organizing Committee:

ARBITRATION
Mr. Gautam T. Mehta
Mr. Bhavesh V. Panjuani
Mr. Janak Dwarkadas
Mr. Anant Shende
Mr. Prashant Popat
Mr. Rakesh B. Mandavkar
Mr. Kirti G. Munshi
Mr. Raj Panchmatia
Mr. Naushad Engineer
Mr. Shikhil Suri
Mr. Satyan Israni
Mr. Vyom D. Shah
Ms. Sneha Phene
Mr. Rishi Kumar Dugar

(*Please send in your entries to legal@imcnet.org.*)

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Note from the editorial: Credits to all the members for encouraging and offering suggestions for this bulletin. Thank you for making this possible. Though the issue is being circulated in October 2024, we have covered recent developments from previous months.

Committee Members for Bulletin:

Mr. Prashant Popat

Ms.Sneha Phene

Mr.Rishi Kumar Dugar