



ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS



ARBITRATION IN INDIA

CURATED VIEWS

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PREFACE

The jurisprudence on arbitration in India is changing with each passing day. In two decades since the Arbitration and Conciliation Act, 1996 taking shape, despite popular belief and an overwhelming call for improvement there was absolutely no change brought about in the law. In fact, there were two failed attempts to bring about transformation in the law in keeping with the pace of change in the international arena. Finally, the Arbitration and Conciliation (Amendment) Act, 2015 ushered in the much awaited change and since then the jurisprudence has developed at a scorching pace. As is the nature of the beast, every change in law is followed by interpretation thereof by the courts. In our last edition, we brought to you an analysis of the judicial developments in India following the Amendment Act of 2015.

When the law is tested in courts one realizes that there are yet inconsistencies and lacunae which need to be addressed. Over the years, some interesting questions of law have repeatedly arisen in Indian courts and yet continue to remain a grey area. In this edition, we have studied some of these issues and reflected upon the road ahead for India -

- We start with the concept of seat. First, we consider the notion, its importance and its implications. Later, we mull on whether two Indian parties to an arbitration agreement can choose a foreign seat of arbitration.
- Thereafter, we study the treatment of unilateral *arbitration* clauses, i.e. clauses that give only one party the right to refer disputes to arbitration, and the treatment of unilateral *dispute resolution* clauses, i.e. clauses that give only one party the right to refer disputes to their preferred mode of dispute resolution.
- We also tackle a thorny issue that leads to a flurry of litigation – the impleadment of non-signatories.
- We then round off our current edition with a burning topic that, ironically, has been around since more than a century! Third Party Litigation Funding has re-ignited interest in the wake of judicial developments and due to its calming effect on the burgeoning stress faced by the infrastructure sector that is plagued by unresolved claims.

We do hope this makes for some interesting reading and we look forward to your feedback.

Regards

ELP Arbitration Team



01

THE CONCEPT OF THE 'SEAT' OF ARBITRATION, AND ITS EFFECTS

Overview

The seat of arbitration is perhaps the most pivotal aspect of any international commercial arbitration. As for the domestic sphere, the importance of this aspect is clearly reflected in certain decisions of the apex court. In this chapter, we analyze the evolution of the concept of 'seat' in Indian jurisprudence through precedents, the contrasts between 'venue' and 'seat', along with a brief discussion on the subject in different jurisdictions.

Introduction

Parties to an arbitration agreement may choose a 'seat' for their arbitration, subject to certain restrictions¹. The law of such seat has profound practical implications as it determines the laws which apply to arbitrations seated there and affects the validity of an award which is tested in terms of the fundamental policy of law of the country where the award is made. In any arbitration, parties may seek the assistance of a court towards securing an interim relief, constitution of an arbitral tribunal, directions from courts in taking evidence and may ultimately approach a court for challenging an arbitral award. The seat necessarily determines the law which governs the arbitration and also the courts which exercise supervisory jurisdiction over an arbitration proceeding.

The Geneva Protocol on Arbitration Clauses, 1923 (**Geneva Protocol**), demonstrated very early on a global inclination towards equating the law of the juridical seat to the law governing an arbitration. Article 2 of the Geneva Protocol provided that: *"The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place"*. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (**New York Convention**) also recognised the nexus between the place of arbitration and the rules governing arbitration in using the phrase *"law of the country where the arbitration took place"* and the *"law of the country where the award is made"* in relation to the laws that regulate an arbitration and the courts which exercise supervisory jurisdiction over the arbitration, respectively.

The UNCITRAL Model Law of International Commercial Arbitration, 1985 (**UNCITRAL Model Law**) similarly provided that a majority of its provisions are applicable *"only if the place of arbitration is in the territory of this State"*².

Most national laws, such as India's, have incorporated the above concept. Rules of few arbitral institutions, for instance, the rules³ of Singapore International Arbitration Centre (**SIAC**) have also adopted the above concept in relation to emergency interim relief, in the absence of any selected seat.⁴

Evolution of the concept of 'seat' in India

We must necessarily begin by saying that the heading of this section is technically a misnomer. The term 'seat' is nowhere to be found in the Arbitration and Conciliation Act, 1996 ("**1996 Act**") or in the UNCITRAL Model Law from where the 1996 Act was adopted. The term preferred across these statutes is 'place' of arbitration. Nevertheless, the terms 'seat' or 'place' of arbitration can be used interchangeably in the domestic as well as international sphere, as we will discuss later on in this chapter.

Section 20 of the 1996 Act inter alia provides that parties are free to choose the place of arbitration. Judicial precedents in India have clarified that while section 20 sub-sections (1) and (2) allow parties and (in the absence of an agreement between the parties) the arbitrator(s) to decide the place or seat

¹ One example of such restrictions is discussed in-depth in Chapter II – 'Can two Indian parties to an arbitration agreement choose a foreign seat of arbitration?'

² Article 1(2), UNCITRAL Model Law.

³ SIAC Rules 2016.

⁴ Entry 4, Schedule 1 of SIAC Rules 2016.

of arbitration within India. Sub-section (3) of the said section takes care of the designation of the most convenient venue.⁵

Section 2(2) provides that Part I of the 1996 Act would mandatorily be applicable where the place of arbitration is in India.

Dichotomy of 'venue' and 'seat'

A recurring bone of contention is if parties merely mention a 'venue' where the arbitration is to be held without expressly providing for a seat or place of arbitration in the agreement, whether the place mentioned is the seat of arbitration or the venue of arbitration?

In *Roger Shashoua*⁶, the Supreme Court ruled that "*venue cannot be equated with the seat/place of arbitration*", but when only a prescription for venue exists in the agreement, the court would be required to analyse the facts on a case-to-case basis to determine the juridical seat. In this case, the arbitration agreement provided that the "*venue of the arbitration shall be London*" and that "*arbitration proceedings shall be in accordance with [ICC Rules]*". The Supreme Court expressed its agreement with the decision of the English Courts that such a factual scenario would imply that London had, in fact, been selected as the seat of arbitration.

The judgment in *Roger Shashoua*⁷ was followed in *Hardy Exploration*⁸, where a three-judge bench of the apex court was called upon to address the question that when the arbitration agreement provides the 'venue' of the arbitral proceedings but does not specify the 'seat' of arbitration, on what basis shall the 'seat' of arbitration be determined? In the present case, while the agreement provided for Kuala Lumpur as the venue and UNCITRAL Model Law was to govern the arbitral proceedings, neither had the parties chosen, nor had the arbitral tribunal determined the place of arbitration. In answering this reference, the Supreme Court has clarified that while on a plain reading 'place' of arbitration (in the absence of any conditions in relation to the 'place') can be equated to electing a 'seat' of arbitration, whether 'venue' can be considered as a 'seat' would necessarily have to be examined on a case-to-case basis, depending on the conditions appended to the chosen 'venue'.

The law of the seat is the law of arbitration

It is settled position in India that the law of arbitration, i.e. (i) law of arbitration agreement and (ii) law for arbitration is regulated by the law of juridical seat, in the absence of a contract to the contrary.

In *Dozco India*⁹ the apex court was called upon to decide an application for appointment of an arbitrator in relation to an arbitration clause which provided that any dispute arising under the agreement shall be settled by "*arbitration in Seoul, Korea (or such other place as the parties may agree in writing)*" pursuant to the ICC Rules. The agreement also provided that it will be governed by and construed in accordance with the laws of the Republic of Korea. After considering the agreement of the parties in light of international jurisprudence and judicial precedents, the apex court held that the parties intended Seoul to be the seat of arbitration; the parenthesised portion in the clause was for convenience in case the parties held the arbitration elsewhere.

⁵ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

⁶ *Roger Shashoua v. Mukesh Sharma*, (2017) 14 SCC 722.

⁷ *Roger Shashoua v. Mukesh Sharma*, (2017) 14 SCC 722.

⁸ *Union of India v. Hardy Exploration and Production (India) Inc.*, 2018 SCC Online SC 1640.

⁹ *Dozco India Private Ltd. v. Doosan Infracore Co. Ltd.*, (2011) 6 SCC 179.

The court having observed that the seat of arbitration was Seoul, noted as extremely important an extract from the *Mustill and Boyd: the Law and Practice of Commercial Arbitration in England*, 2nd Edition which read as follows:

“...in the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the seat of arbitration i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings.”

In *Imax Corporation*¹⁰ the Supreme Court decided the maintainability of a challenge petition filed under section 34 of the 1996 Act against an award made in London. The disputes between the parties had arisen in a contract where parties had chosen the law of Singapore as the governing law of the contract and ICC Rules for conducting the arbitration proceedings; the agreement remained silent on the law governing the arbitration agreement and the seat. After a tribunal was constituted under the ICC Rules of Arbitration, the tribunal determined London as the seat of arbitration. The apex court in India in deciding the petition noted, that the general principle in absence of a contrary indication, is that the proper law of the contract law as well as the law governing the arbitration agreement are the same as the law of the country in which arbitration is agreed to be held. The court held that since the agreement contemplates an award made in pursuance of the ICC Rules without expressly providing for the law governing the arbitration agreement, the law where the arbitration is held would have primacy for governing the same, i.e. the arbitration agreement. Hence, the validity of the award was to be determined as per the law of the seat.

Supervisory jurisdiction of courts

The Arbitration Act, 1940

In order to truly appreciate the progression of the law of arbitration in India, let us first take a look at the Arbitration Act, 1940 (**1940 Act**). The 1940 Act did not contain a provision equivalent to Section 20 of the 1996 Act.

With regard to the applicability of the 1940 Act, the Supreme Court of India held in the case of *Hakam Singh*¹¹ that the Code of Civil Procedure, 1908 (**CPC**) was applicable in its entirety to proceedings being governed by the 1940 Act. Therefore, where two or more courts had territorial jurisdiction over a dispute between parties, it was possible for parties to have mutually agreed to confer jurisdiction upon one of such courts, to the exclusion of the other(s).

The Law Commission of India in its Seventy-Sixth Report in 1978 noted that, in theory, the objective of the 1940 Act was to vest one, and only one court with the jurisdiction to determine all questions relating to the validity of the award¹².

The 1940 Act was based on the English Arbitration Act, 1934. While, the English Arbitration Act, 1934 was replaced by the English Arbitration Act, 1950 (**English Act 1950**), which was amended in 1975 and 1975, the 1940 Act of India remained unchanged. Thus, there were growing concerns that the 1940 Act was outdated in a globalised world. It was felt that India's economic reforms may not become fully

¹⁰ *Imax Corporation v. E-City Entertainment (India) Private Ltd.*, (2017) 5 SCC 331.

¹¹ *Hakam Singh v. M/s Gammon (India) Ltd.*, (1971) 1 SCC 286.

¹² Paragraph 8.23, 76th Report of the Law Commission of India (1978).

effective if the law dealing with domestic and international commercial disputes remained out of sync with the reforms¹³. Hence, the 1996 Act was introduced, based on the UNCITRAL Model Law.

Arbitration and Conciliation Act, 1996

With the introduction of the 1996 Act, the jurisdiction of courts could no longer be decided exclusively under the CPC. Section 2(2) of the 1996 Act provides that Part I of the Act would mandatorily be applicable where the place of arbitration is in India. Exceptions to this rule have been introduced by reason of various judicial precedents and by the Arbitration and Conciliation (Amendment) Act, 2015 (**Amendment Act**), which have been discussed later in this chapter. Further, Section 2(1)(e) of the 1996 Act, which falls under Part I, defines the 'Court' which would have jurisdiction over the subject matter of the arbitration. Such Court, in context of domestic arbitrations is either the principal civil court of original jurisdiction in a district, e.g. Pune district courts, or the High Court in exercise of its original ordinary civil jurisdiction, e.g. Bombay High Court. In the context of international commercial arbitration, such Court is either a High Court in exercise of its ordinary original civil jurisdiction or the High Court which has the jurisdiction to hear appeals from the decrees of subordinate courts. The seat of arbitration, which is akin to an exclusive jurisdiction clause, can be a neutral venue, i.e. the jurisdiction need not be derived because either it is a place where the cause of action arose or it is a place in accordance with sections 16 to 21 of the CPC.¹⁴

Applicability to foreign seated arbitrations

While section 2(2) of the 1996 Act mandates its applicability to arbitrations seated in India, there existed a lacuna in the 1996 Act to the extent that there were no provisions which allowed parties to seek interim reliefs in India in case of a foreign-seated arbitration. Nevertheless, parties to foreign seated arbitrations seeking interim relief against properties and assets in India continued to approach Indian courts for the same. The Supreme Court finally decided this issue in *Bhatia International*¹⁵ where the arbitration clause provided that the arbitration would be governed by ICC Rules and parties agreed that arbitration would be held in Paris. While invoking arbitration proceedings through the ICC, the Respondent concurrently filed an application under Section 9 of the 1996 Act before the Indian court, seeking an injunction against the Appellant to prevent it from alienating its properties or assets. When the district court and the high court (in appeal) ruled that they have jurisdiction over the issue, despite the 'place' of arbitration being outside India, the matter went in appeal before the Supreme Court. It was contended that a plain reading of section 2(2) of the 1996 Act precluded Part I from being applied to an international commercial arbitrations, where 'place' was not in India. In dealing with this contention, the SC observed that the word 'only' had not been included in section 2(2), even though it was present in the UNCITRAL Model Law. On this basis, the SC ruled that no matter where an international commercial arbitration was being conducted, if an Indian party was involved, Indian courts would have the right to exercise powers under Part I of the 1996 Act. While it can be understood that the Supreme Court had the right intent of providing parties with a way to secure assets located in India, this judgment was criticised for judicial overreach by going beyond the territorial limitation imbued to the 1996 Act in keeping with the UNCITRAL Model Law.

¹³ See the Statement of Objects and Reasons of the Arbitration and Conciliation Act, 1996.

¹⁴ *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd. & Ors.*, AIR 2017 SC 2105 at paragraph 19.

¹⁵ *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105.

Part I of the 1996 Act held not applicable to foreign-seated arbitrations

The Supreme Court soon revisited the above said position through its seminal judgment in *Bharat Aluminium*¹⁶. A Constitution Bench of the Supreme Court overruled its judgment in *Bhatia International* and clarified the position that Part I of the 1996 Act is only applicable where the seat is India.¹⁷ It lent much-needed clarification to the 1996 Act by holding that the term ‘place’ as found in sub-sections (1) and (2) of section 20 would imply ‘seat’, whereas the term ‘place’ as used in sub-section (3) of Section 20 would imply ‘venue’. Therefore, upon reading section 2(2) with section 20, the Supreme Court determined that Part I of the 1996 Act could not be applied where the seat of arbitration was outside India. The Court noted that the definition of ‘Court’ in section 2(1) (e) of the 1996 Act is a reference to the courts having supervisory jurisdiction over the arbitration, which would essentially refer to the courts of the seat of arbitration. It further took the view that under the 1996 Act, jurisdiction had been conferred upon two courts: the court having jurisdiction over the cause of action, and the court where the arbitration takes place. Therefore, when parties opted for a foreign-seated arbitration, the jurisdiction of Indian courts under Part I of the 1996 Act would be implicitly excluded. The Supreme Court was aware that by adopting such an interpretation, it would take away from parties the remedy for securing assets located in India. However, it opined that keeping the jurisdiction of the courts in India for such a remedy would amount to judicial overreach, and thus, the matter was best left to be rectified by the legislature.

Arbitration and Conciliation (Amendment) Act, 2015

The legislature did, in fact, take note of some lacunae in the 1996 Act, pointed out not only through the *Bharat Aluminium*¹⁸ case, but also by the 246th Report of the Law Commission of India, released in 2014. These lacunae were sought to be addressed through the Amendment Act (the 1996 Act as amended by the Amendment Act is hereinafter referred to as the **amended 1996 Act**).

Although the Amendment Act did not replace the word “place” with “seat” or “venue” (as appropriate) as recommended by the Law Commission, it did amend Section 2(2) to provide that, subject to an agreement to the contrary between parties, the provisions of Sections 9, 27, 37(1)(a), and 37(3) would apply to foreign-seated arbitrations.

The nature of the “agreement to the contrary” as required by the amended Section 2(2) remains unclear, as to whether it must be an express agreement or an implied one would suffice. However, it would appear from two judgments of the Bombay High Court that the Indian courts may be inclined to interpret the requirement as an express agreement (in line with the Law Commission’s recommendations).

Securing assets located in India pending enforcement of award

In *Heligo Charters*¹⁹, the Bombay High Court, allowed a foreign party to secure the Indian award-debtor’s assets, pending enforcement of the foreign award in India, and held that “operation of provisions of Section 9 cannot be excluded in absence of a specific agreement to the contrary”.

¹⁶ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

¹⁷ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552, at paragraph 92.

¹⁸ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

¹⁹ *Heligo Charters Private Limited v. Aircon Beibars FZE*, 2018 SCC Online Bom 1388.

In *Trammo DMCC*²⁰, the award-holder of certain foreign awards against an Indian party approached the Bombay High Court for interim protection of the assets located within its territorial jurisdiction. The award-debtor contended that the application under Section 9 of the amended 1996 Act ought to have been filed before the Andhra Pradesh High Court, in accordance with the definition of “Court” under Section 2(1)(e). The Bombay High Court nevertheless assumed jurisdiction in this case, *inter alia* on the basis that since it would be the court which would be approached for enforcement of the award – as the assets were located within its jurisdiction – it must naturally also be capable of granting interim relief to the applicant in respect of the same assets.

Applicability to domestic arbitration

Exclusive jurisdiction of the courts of the seat

Through its judgment in *Indus Mobile*²¹, the Supreme Court sought to transpose the international concept of ‘juridical seat’, as held in *Bharat Aluminium*, to domestic arbitrations in India. It ruled that in cases where the arbitration clause specified a particular seat of arbitration, it would be akin to an exclusive jurisdiction clause for courts of that location. In this case, Mumbai had been designated as the seat, and therefore the Supreme Court held that Mumbai courts would be vested with exclusive supervisory jurisdiction over the arbitral proceedings between the parties.

The parties in *Devyani International*²² had designated Delhi as the seat of arbitration, while simultaneously vesting the courts of Mumbai with exclusive jurisdiction. Despite the exclusive jurisdiction clause as well as the cause of action having arisen in Mumbai, the Delhi High Court solely adverted to the reasoning in *Indus Mobile*²³, and held that since the seat of arbitration is Delhi, the courts in Delhi would have exclusive jurisdiction to adjudicate the dispute between the parties.

The Delhi High Court took a converse view in *Antrix Corporation*²⁴, where the seat of arbitration had been specified as Delhi, but the cause of action had arisen in Bangalore. The Delhi High Court distinguished *Indus Mobile* on the basis that in that case, not only had Mumbai been chosen as the seat of arbitration but, concurrently, the courts there had also been granted exclusive jurisdiction under the agreement. On the other hand, in *Antrix Corporation*²⁵, this was not the case, and hence the Delhi High Court held that the courts at Bangalore as well as Delhi would be courts of available jurisdiction.

Other implications of ‘seat’ of arbitration

The Supreme Court, in *Vedanta Ltd.*²⁶, was faced with a factual matrix where, in an international commercial arbitration seated in India, the tribunal awarded an increase in the rate of interest for the post award period if the award debtor failed to make payment of the award amount within a period of 120 days from the making of the award. The issue which arose for consideration before the Supreme Court was whether such an escalation in the rate of interest for the post-award period was maintainable. The Supreme Court opined that in an international commercial arbitration, the rate of interest is governed by the law of the seat of arbitration, unless parties agree otherwise. Since this

²⁰ *Trammo DMCC v. Nagarjuna Fertilizers and Chemicals Ltd.*, (2018) 1 AIR Bom R 1.

²¹ *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd. & Ors.*, AIR 2017 SC 2105.

²² *Devyani International Ltd. v. Siddhivinayak Builders and Developers*, 2017 SCC Online Del 11156.

²³ *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd. & Ors.*, AIR 2017 SC 2105.

²⁴ *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*, 2018 SCC Online Del 9338.

²⁵ *Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd.*, 2018 SCC Online Del 9338.

²⁶ *Vedanta Ltd. v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, 2018 SCC Online SC 1922.

case concerned an international commercial arbitration seated in India, the rate of interest must be awarded in accordance with the provisions of the amended 1996 Act. The Supreme Court adverted to Sections 31(7)(a) and 31(7)(b) of the amended 1996 Act to state that while the arbitral tribunal has discretion to award interest in the post award period, the same must be “exercised reasonably”. Further, looking at a potential conflict with Section 34(3), it struck down the applicability of a penal rate of interest upon the failure to make payment of the award amount in a stipulated time-period.

English position



The English Arbitration Act, 1996 (**English Act 1996**) defines the ‘seat of arbitration’ as a juridical seat of arbitration agreed by the parties or arbitral tribunal. It further requires the award to state the seat of arbitration, unless otherwise agreed by the parties. The English Act 1996 is also seat centric Act and certain provisions of the English Act 1996 only apply if the seat of arbitration was England, Wales or Northern Ireland.

The English position follows the traditional view, as outlined above, that laws of the country, which is designated as the seat of the arbitration, will govern the law of the arbitration. Where the seat of arbitration is England, the English Act 1996 governs aspects including but not limited to the appointment of arbitrators by parties or by courts, restrictions on the authority of arbitrators, the law to be applied by arbitrators, whether the arbitrators are to act on equity and good conscience or as neutral mediators, the procedure for conduct of arbitration, and the powers of the courts to intervene in and supervise the arbitration proceedings.

Law governing contract cannot displace laws of the seat in governing the arbitration

One example of this approach is found in the case of *C v. D*²⁷. C had obtained an insurance policy from D, which was to be governed by the laws of the State of New York. The arbitration agreement in the policy, on the other hand, provided that the arbitration will be resolved under the English Act 1950 as amended (and therefore under the English Act 1996) and London was the seat of arbitration. Ultimately, D’s refusal to pay certain sums under the policy led to C initiating arbitration proceedings in London, which culminated in an award being passed in C’s favour. D declared its intention to file a suit in the US to have the award vacated, on the basis that in passing the award, the arbitral tribunal had manifestly disregarded the laws of the State of New York. C approached the English High Court for an anti-suit injunction, which was granted. Hearing D’s appeal, the English Court of Appeal held that since the arbitration agreement expressly selected London as the seat of arbitration, this was akin to assigning exclusive jurisdiction to the Courts of England to exercise supervisory jurisdiction over the arbitration. Furthermore, once the English Act 1996 had been chosen as the governing law of the arbitration, the choice of New York State law as the law of the contract could not supplant the mandatory provisions of the former. If the governing law of the agreement to arbitrate was English law, and the supervisory jurisdiction lay with English courts, then it was an implied term of the arbitration agreement that the parties agreed to perform the award, unless set aside by the English courts.

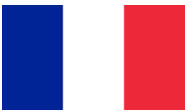
²⁷ *C v. D*, [2007] EWHC 1541 (Comm).

Drawing comparisons with the Indian position

The English courts have upheld the seat as being analogous to the exclusive jurisdiction clause.²⁸ As we have noted above, the Supreme Court of India in *Bharat Aluminium*²⁹ and *Indus Mobile*³⁰ has also similarly opined that a choice of seat is akin to an exclusive jurisdiction clause.

Thus, the Indian and English positions on the concept of seat do not sit far apart. However, one *prima facie* difference between the Indian 1996 Act and the English Act 1996 is that the latter specifically defines the “seat of the arbitration”. Indeed, the absence of a clear definition of ‘seat’ in the Indian 1996 Act has been widely recognised (including by the Law Commission) as a source of much confusion in dispute resolution in India.

Alternative theory to ‘juridical seat’ – lessons from France



Theory of delocalisation

Although most nations have adopted the position that ‘juridical seat’ determines the law governing the arbitration, the same is not an uncontested principle. Certain scholars advocate a more transnational approach towards international commercial arbitration, wherein the arbitration process can be separated from the strict control of national laws, and instead regulated by the parties’ agreement and a universal law governing the arbitration which would not depend on the seat of arbitration. This is commonly known as the ‘delocalisation theory’. Although this theory calls for delinking international commercial arbitrations from municipal laws of the country where the award is rendered, (thus leading to a popular name: “floating arbitration”), it does recognise the necessity of yielding control to the country where the award is to be enforced or recognised.

The proponents of delocalisation theory contend that such awards should be enforceable even in the absence of any specific legal system serving as their foundation.

Award passed under other procedural law, though from arbitration seated in France, could not be challenged before French Courts

France is one of the countries where the delocalisation theory is afforded a certain degree of respect. This is reflected in the oft-cited decision of *Libyan General*³¹ case. In this case, the Respondent (a Swedish company) had manufactured three oil tankers for the Appellant. The arbitration clause in the contract provided for arbitration under the aegis of the International Chamber of Commerce (“ICC”) in Paris. A dispute arose when the Appellant refused to take delivery of the tankers on the ground that certain components thereof had been manufactured in Israel, in violation of Libyan boycott law. The Respondent referred the dispute to arbitration and an award was rendered in its favour on 5 April 1978. The Appellant sought to challenge the award before the French courts, on the basis that the New York Convention provides for the applicability of the arbitration law of the seat of the arbitration,

²⁸ *A v. B (No. 2)*, [2007] 1 Ll. Rep. 358.

²⁹ *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.

³⁰ *Indus Mobile Distribution Private Ltd. v. Datawind Private Ltd. & Ors.*, AIR 2017 SC 2105.

³¹ *Libyan General National Maritime Transport Co. v. AB Gotaverken*, France, Cour d’appel de Paris, Case No. F 9224, 21 February 1980, summary available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=111

and that the award violated the public policy of France, as it did not respect Libyan boycott law. However, the Paris Court of Appeal refused to hear the challenge; it reasoned that the award could not be considered French, as it was rendered following a procedure other than that of French law, which was unconnected in any manner with the French legal system.

Possible to enforce award which has been set aside in its country of origin

Another interesting example emanating from France is the Cour de Cassation's³² decision in *Société Hilmarton*³³. The Respondent (a French company) had engaged the Appellant (an English company) to advise on and secure a government contract from the Algerian government for the Respondent. Since the Respondent only paid half the amount due under the contract, the Appellant instituted arbitration proceedings under the ICC Rules of Arbitration in Switzerland, as the contract between the parties was to be wholly governed by the laws of Switzerland. The sole arbitrator passed his award against the Appellant. While the Appellant sought to have the award set aside before the Swiss courts, the Respondent sought to have it enforced through the Tribunal de Grande Instance de Paris³⁴. While the former court set aside the award, the latter court enforced the award in February 1990. Thus, the Appellant brought this peculiar scenario to the Paris Court of Appeal, by way of an appeal. The Paris Court of Appeal affirmed the enforcement of the award in France, noting *inter alia* that: (i) Article 1502 of the New Code of Civil Procedure did not provide for refusal to enforce an award on the basis that it had been set aside in its country of origin; and (ii) the recognition and enforcement of an award which had been set aside in its country of origin would not contravene the principles of French international public policy. The Cour de Cassation ultimately went on to affirm the judgment of the Paris Court of Appeal.

Conclusion

Indian arbitration jurisprudence has clearly come a long way since the enactment of the 1940 Act. The 1996 Act brought the concept of restriction of jurisdiction of courts – whether across countries in an international commercial arbitration or across two courts within India for a domestic arbitration. It also brought some degree of certainty to the concept of 'seat', albeit indirectly, by calling it the 'place' of arbitration. The Amendment Act addressed a large number of lacunae which still existed in the 1996 Act, including granting parties the option to seek interim protection in India even in foreign-seated arbitrations where Part I of the Act would not be applicable in its entirety.

Taking a broader look around the globe further demonstrates that while there may be different approaches available to determine the law governing the arbitration (as in the case of France), India has nevertheless taken a highly progressive approach to the same, consistent with other common law jurisdictions.

³² The French Supreme Court.

³³ *Société Hilmarton Ltd. v. Société Omnium de Traitement et de Valorisation*, France, Cour de Cassation, Case No. 92-15.137, 23 March 1994, summary available at http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140 and http://newyorkconvention1958.org/index.php?lvl=notice_display&id=134&opac_view=6

³⁴ High Court of Paris.



02

CAN TWO INDIAN PARTIES TO AN ARBITRATION AGREEMENT CHOOSE A FOREIGN SEAT OF ARBITRATION?

Overview

This question has interested not only domestic but foreign entities too, who may have contracted with Indian parties through their Indian subsidiary. The courts have at times taken the view that domestic parties should not be permitted to contract out of Indian laws. However, there are divergent views as well and in this chapter we analyze the decisions which continue to fuel the debate.

Introduction

Picture this – two Indian parties towards the end of an arduously negotiated contract are asked to agree on a seat of arbitration. Exhausted, they attempt to agree on a neutral location when one party's representative lightheartedly suggests Zurich. The proposition seems appetizing. The question is posed to the in-house counsel who attempts to digest this last query. This innocuous request that begins as a flippancy suggestion turns into a different animal. This story aside, a foreign seat chosen by two Indian parties is a headache that still has no real cure.

In the absence of a conclusive ruling by the Supreme Court, and considering that the Arbitration and Conciliation Act, 1996 (**1996 Act**), as amended in 2015, is silent on the issue, Indian parties must proceed with caution while choosing a seat of arbitration outside India. In this chapter, we provide an overall view of how the jurisprudence has developed in India on this issue.

Reflecting on the jurisprudence

Enforcement of an arbitration agreement where two Indian parties chose a foreign seat and foreign law is not opposed to the public policy of India

Under the Arbitration Act, 1940 (**1940 Act**) in *Atlas Exports*³⁵, the seller, the broker (two Indian parties) and the buyer (a foreign party) entered into a tripartite agreement which incorporated the arbitration clause from the terms of Grain and Food Trade Association Ltd., London (**GAFTA**) standard contract. In terms thereof, any disputes between the parties were to be settled by arbitration in London in accordance with the Arbitration Rules of GAFTA. Notably in this case, though there was a tripartite agreement in which the third party was a company incorporated in Hong Kong, the arbitration proceedings were initiated between the two Indian parties only as disputes existed only between them.

The award-creditor succeeded in an application seeking enforcement of the award, before the Bombay High Court, under the Foreign Awards (Recognition and Enforcement) Act, 1961 (**Foreign Awards Act**). Aggrieved by this decision, the award-debtor filed a letters patent appeal against the judgment before the Bombay High Court, and the appeal was dismissed. The award-debtor thereafter filed a special leave petition before the apex court, where for the very first time, the award-debtor challenged the enforcement of the award on the basis that the arbitration agreement between the parties was opposed to public policy under sections 23 and 28 of the Indian Contract Act, 1872³⁶ (**Contract Act**).

The Supreme Court observed in this case that the right of the parties to have recourse to legal action was not excluded by the agreement and that the agreement, being an agreement to arbitrate, was clearly within the purview of the first exception to section 28 of the Contract Act. The Court further held that when two parties willingly entered into an agreement, such agreement cannot be rendered a nullity merely because the arbitrators are situated in a foreign country. Lastly, the Court observed that the award-debtor failed to raise such a plea in the proceedings before the arbitral tribunal, in the enforcement proceedings before the Bombay High Court or in the letters patent appeal and could therefore not be permitted to raise the plea before the apex court for the first time. In the

³⁵ *Atlas Exports Industries v. Kotak & Company*, (1999) 7 SCC 61.

³⁶ Section 23, Contract Act (the consideration or object of the agreement is unlawful if it is opposed to public policy) and section 28, Contract Act (agreements in restraint of legal proceedings are void).

circumstances, the apex court dismissed the appeal and upheld the judgment enforcing the foreign award.

Supporters of the view that two domestic parties are free to choose a seat outside India argue that the Supreme Court in this case examined the conduct of the parties in the arbitration proceedings, recognized the principles of party autonomy, and clarified that an arbitration agreement where parties have chosen a seat of arbitration outside India and a foreign governing law is not opposed to public policy.

On the other end of the spectrum, it is countered that this case is distinguishable on its facts as one of the parties to the agreement (though not a party to the dispute) was not Indian, and hence it was permissible for parties to elect a foreign seat and governing law. It could also be argued that the decision is under the 1940 Act and there have been numerous decisions which have repeatedly emphasized that courts must exercise caution in applying decisions under the 1940 Act to matters under the 1996 Act. In our view, the latter proposition is not strong inasmuch as, the facts remaining the same, the ratio of the decision ought to have equal application, whether under the 1940 Act or the 1996 Act. This view is supported by the fact that at least in one decision under the 1996 Act, the ruling in *Atlas Exports* has been relied upon.

In context of an application filed before the wrong forum for the appointment of an arbitrator, the apex court observed that Indian parties should not be permitted to derogate from Indian law

In *TDM Infrastructure*³⁷, disputes arose between two Indian companies which were incorporated in India. Given that the central management and control of the applicant company was exercised in Malaysia, the applicant contending that the arbitration was an international commercial arbitration, filed an application under section 11 of the 1996 Act before the Supreme Court, seeking the appointment of an arbitrator to resolve the disputes. Challenging the maintainability of the application, the respondent contended that the Supreme Court was not the correct forum for the appointment of an arbitrator as the arbitration was not an international commercial arbitration. Therefore, the issue which arose for consideration before the Supreme Court was whether the arbitration qualified as an international commercial arbitration under section 2(1)(f), thereby triggering the jurisdiction of the Supreme Court to appoint an arbitrator under section 11 of the 1996 Act.

While the applicant contended that the central management of both parties was situated outside India and therefore the arbitration was an international commercial arbitration, the Supreme Court held that a company incorporated in India is an Indian national. Since both companies were incorporated and domiciled in India, the Supreme Court concluded that the arbitration agreement between them would not be an international commercial arbitration³⁸ and therefore, the Supreme Court could not entertain the application for appointment of an arbitrator.

The Supreme Court also referred to section 28³⁹ of the 1996 Act which provides for the rules applicable to the substance of a dispute and noted that “*the intention of the legislature appears to be clear that*

³⁷ *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271.

³⁸ A view that has been affirmed by the Law Commission of India in its 246th Report and which has been given effect through the amendments introduced by the Arbitration and Conciliation (Amendment) Act, 2015

³⁹ *Section 28 of the un-amended 1996 Act:*

“28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,—

Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.”

The observations of the court with respect to section 28 of the 1996 Act were clearly *obiter dictum* since they were made in the context of an application for appointment of an arbitrator and not while addressing the issue of whether two Indian parties can choose a foreign seat or foreign law. In fact, the apex court issued a corrigendum to its judgment to clarify that its findings were limited to determining whether the court had jurisdiction to appoint an arbitrator under section 11 of the 1996 Act⁴⁰.

Referring to the observations of the Supreme Court in *TDM Infrastructure*, the Bombay High Court disregarded the validity of an arbitration clause wherein two Indian parties opted for a foreign place of arbitration

In *Sah Petroleum Ltd.*⁴¹, the arbitration agreement between the two Indian parties provided the place of arbitration as London or New York. In a suit filed before the Bombay High Court by the Plaintiff, the defendant sought reference of disputes to arbitration under section 45 of the 1996 Act. At the outset, the court found that parties had not chosen between the two seats and there was nothing on record to show that there was an agreement to arbitrate in London in accordance with English laws.

In addition, the court followed the Supreme Court’s decision in *TDM Infrastructure*, and noted that (i) when both the companies are incorporated in India, the arbitration cannot be regarded as an “international commercial arbitration” as defined under section 2(1) (f) of the 1996 Act and therefore a reference to arbitration would not lie under section 45 of the 1996 Act and (ii) pursuant to section 28 of the 1996 Act and the public policy of the country, Indian parties should not be permitted to derogate from Indian law.

The Bombay High Court held that the prerequisite to refer a dispute to arbitration under the 1996 Act is that the arbitration agreement must be a legal agreement. The Bombay High Court went on to clarify that even assuming there was a valid arbitration agreement between the parties, the arbitration would not qualify as an “international commercial arbitration” and as such not valid in law. In the

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration, —

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under sub-clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.”

⁴⁰ Ed.: Para 36 added in *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271. vide Official Corrigendum No. F.3/Ed.B.J./49/2008 dated 14th July 2008; “36.It is, however, made clear that any findings/observations made hereinbefore were only for the purpose of determining the jurisdiction of this Court as envisaged under Section 11 of the 1996 Act and not for any other purpose.”

⁴¹ *Seven Islands Shipping Ltd. v. Sah Petroleums Ltd.*, 2012 SCC OnLine Bom 910

circumstances, the Bombay High Court rejected the defendant's prayer under section 45 of the 1996 Act for reference of the dispute to arbitration.

Referring to the observations of the Supreme Court in TDM Infrastructure, the Bombay High Court disregarded the arbitration clause which provided for Singapore as the seat of arbitration and English law as the governing law

In *Addhar Mercantile*⁴², the arbitration agreement between two Indian parties provided "*Arbitration in India or Singapore and English law to be apply (sic)*". Disputes arose between the parties and the applicant filed an application under section 11 of the 1996 Act before the Bombay High Court, seeking appointment of an arbitrator. Relying upon the latter part of the arbitration clause, the respondent contended that the court was devoid of jurisdiction to entertain the application since the seat of arbitration was Singapore and parties agreed to apply English law.

Referring to *TDM Infrastructure*⁴³, the Bombay High Court concurred that two Indian nationals should not be permitted to derogate from Indian law and held that the arbitration shall therefore be conducted in India in terms of the first part of the clause. Pursuant to its finding that the arbitration shall be conducted in India, the court also held that the tribunal shall determine the disputes in accordance with the substantive law in force in India as set out under section 28 of the 1996 Act.

The Bombay High Court in this case seems to have solely relied on *TDM Infrastructure*⁴⁴ to conclude that the seat of arbitration in this case had to be India. The judgment in this case seems to be *per incuriam* since it did not consider *Bharat Aluminium*⁴⁵, wherein the Supreme Court held that section 28 of the 1996 Act only provides for the substantive law of the dispute and is not applicable when parties have chosen a seat of arbitration outside India.

Party autonomy prevails: Challenge to the award would lie in the place of the juridical seat even when the law of the seat is different from the substantive law of the contract

In an application filed under section 34 of the 1996 Act to set aside a foreign award, the Supreme Court in *Reliance Industries & Anr.*⁴⁶ determined whether Part-I of the 1996 Act would be applicable to the arbitration agreement between parties where the juridical seat of arbitration was London, England, the arbitration agreement was governed by the laws of England, and the substantive law governing the contract was Indian law.

Separating the substantive law from the law governing of the arbitration agreement, the Supreme Court reiterated that agreement to arbitrate is a separate contract distinct from the substantive contract which contains the arbitration agreement and this principle of severability is embedded in the 1996 Act itself. The Supreme Court noted that the principle of severability permits the parties to agree that the law of one country would govern the substantive contract and the law of another country would apply to the arbitration agreement. The Supreme Court held that the contractual obligations under the contract would continue to be governed by the laws in India and the arbitration agreement would be governed by the laws of England. In the circumstances, the Supreme Court noted

⁴² *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, 2015 SCC OnLine Bom 7752

⁴³ *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271.

⁴⁴ *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271.

⁴⁵ *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc and Ors.*, (2012) 9 SCC 552.

⁴⁶ *Reliance Industries Limited and Anr. v. Union of India*, (2014) 7 SCC 603.

that the parties had, by express agreement, excluded the applicability of Part-I of the 1996 Act to the arbitration proceedings.

Further, the Supreme Court observed that the seat of arbitration is akin to the exclusive jurisdiction clause. Therefore, once the parties chose the seat of arbitration as London, the arbitration agreement would be governed by the laws of England and the parties were therefore excluded from the provisions of Part-I of the 1996 Act.

Based on the foregoing observations, the Supreme Court concluded that the remedy to challenge such an award would lie in the place of the juridical seat, i.e., England, under the Arbitration Act, 1996 of England and Wales (**English Act 1996**) and not in an application under section 34 of the 1996 Act in India. The Supreme Court also clarified that if the arbitrability of the dispute is challenged before the courts in England, the courts there shall apply Indian law to determine the issue since the substantive law governing the contract was Indian law. Therefore, the application to set aside the award was not maintainable in India since the parties had expressly agreed for the seat of arbitration to be England.

Though this case has been subsequently relied upon by courts to hold that two Indian parties can choose a foreign seat, it is pertinent to note that one of the parties in this case, i.e., the second appellant was BG Exploration and Production India Ltd., which is a company incorporated under the laws of the Cayman Islands. Thus, there was a foreign element involved in the case, and therefore, this was not a *simpliciter* case of two Indian parties electing a foreign seat.

Sasan Power Saga: While the Madhya Pradesh High Court held that two Indian parties can opt for a foreign seat, the Supreme Court, on appeal, did not deal with the issue and modified the High Court's order on the ground that there was a foreign party to the arbitration agreement

In the famed *Sasan Power*⁴⁷ case, the issue which arose for consideration before the Supreme Court was whether two Indian companies can enter into an agreement which provides that the contract shall be “*governed by, construed and interpreted in accordance with the laws of the United Kingdom*”. Before delving into the findings of the apex court, it would be prudent to consider the observations of the Madhya Pradesh High Court from whose decision the appeal arose.

An arbitration agreement in a contract between Sasan Power Limited (**Sasan**), an Indian company, and North American Coal Corporation (**NAC America**), an American company (**First Agreement**) provided for the arbitration to be administered by the ICC Court in London, England. The governing law clause provided that the contract shall be governed by, construed and interpreted in accordance with the laws of the United Kingdom. Subsequently, NAC America assigned the contract (**Second Agreement**) to North American Coal Corporation India Private Limited (**NAC India**), its Indian subsidiary.

Disputes arose between the parties and NAC India invoked arbitration against Sasan. While Sasan challenged the validity of the arbitration agreement before the district court in Madhya Pradesh and sought an injunction against NAC India from continuing with the arbitration, NAC India filed an application under section 45 of the 1996 Act for reference of disputes to arbitration. NAC India succeeded before the district court and Sasan filed an appeal before the Madhya Pradesh High Court.

After setting out the arguments put forth by both parties, the Madhya Pradesh High Court held that since the parties had chosen a foreign seat, the arbitration was an international commercial arbitration and hence, section 45 of the 1996 Act was applicable to the present case. The Court's

⁴⁷ *Sasan Power Limited v. North American Coal Corporation India Private Limited*, (2016) 10 SCC 813.

reasoning was two-pronged – first, the Court relied on the case of *Atlas Exports*⁴⁸ to hold that it was permissible for two Indian parties to choose a foreign seat; second, the Court opined that, on a perusal of the provisions of the 1996 Act, it emerged that an arbitration may be classified as an international commercial arbitration or a domestic arbitration based on the seat of arbitration or the nationality of the parties. The Court therefore concluded that if two Indian parties choose a foreign seat, as in the instant case, the arbitration may be classified as an international commercial arbitration and Part-II of the 1996 Act would be applicable to the arbitral proceedings.

Aggrieved by the judgment, Sasan filed an appeal before the Supreme Court.

In its assessment of the transactions between the parties, the Supreme Court concluded that the Second Agreement could not be construed as an assignment agreement since Sasan gave qualified consent to the assignment in terms of the contract. The Supreme Court held that the First Agreement was bipartite between Sasan and NAC, whereas, the Second Agreement qualified as a tripartite agreement between Sasan, NAC America and NAC India. In light of the foreign element identified by the Supreme Court in the arbitration agreement, the question of whether two Indian companies can choose to be governed by a foreign law no longer arose for consideration as the arbitration now fell within the ambit of an international commercial arbitration. The Supreme Court accordingly modified the order of the Madhya Pradesh High Court and referred parties to arbitration. On the issue of the ability of two Indian parties to arbitrate outside India, the court left the issue open to be addressed in a more appropriate matter.

This case was an ideal opportunity for the Supreme Court to finally lay to rest the issue of Indian parties electing a foreign seat. However, on the facts of the case, the Court deemed it unnecessary to go into the issue.

Delhi High Court rules: Part II would be applicable to an arbitration between two Indian parties where the seat of arbitration is outside India

In *GMR Energy*⁴⁹, the Delhi High Court examined the foregoing judicial precedents and upheld the arbitration clause in which two Indian parties had opted for Singapore as the seat of arbitration. GMR Chhattisgarh Energy Limited (**GCEL**) entered into three agreements with Doosan Power Systems India Private Limited (**Doosan**). GCEL and GMR Infrastructure Limited ("**GIL**") executed a corporate guarantee in favour of Doosan as well. Besides the said agreements, GMR Energy Limited (**GMR Energy**) and Doosan also executed two Memorandums of Understanding. The three agreements and corporate guarantee contained arbitration clauses wherein the law of the contract was Indian law, and the arbitration was to be conducted in Singapore as per the rules of the Singapore International Arbitration Center (**SIAC Rules**).

Disputes arose between the GMR companies and Doosan, and Doosan invoked arbitration against all three GMR group companies under SIAC Rules⁵⁰. While GMR Energy objected to being impleaded in the arbitration since it was not party to the agreements or the corporate guarantee containing the arbitration agreement, Doosan pleaded that GMR Energy was liable *inter alia* on the ground that it was the alter ego for GCEL and GIL. Since the Singapore International Arbitration Centre was proceeding to appoint an arbitrator on behalf of GMR Energy, GMR Energy filed a civil suit before the Delhi High Court to restrain Doosan from proceeding with the arbitration. The Delhi High Court

⁴⁸ *Atlas Exports Industries v. Kotak & Company*, (1999) 7 SCC 61.

⁴⁹ *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.*, 2017 SCC Online Del 11625.

⁵⁰ *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.*, 2017 SCC Online Del 11625.

granted an *ex parte* ad-interim stay against the appointment of the arbitrator till the next date of hearing.

In the meanwhile, Doosan India filed an application under the Code of Civil Procedure, 1908 (CPC) to vacate the order (which granted an ad-interim stay) and an application under section 45 of the 1996 Act requesting the Delhi High Court to refer parties to arbitration. GMR Energy challenged the applicability of Part-II of the 1996 Act and therefore, the maintainability of the application filed under section 45 of the 1996 Act on the basis that: (i) the arbitration would not qualify as an international commercial arbitration under section 2(1)(f) of the amended 1996 Act and therefore, Part-I of the 1996 Act would be applicable; (ii) two Indian parties cannot opt out of Indian law and since the 1996 Act is the substantive law, exclusion of Part-I of the Act would be contrary to section 28 of the Contract Act; and (iii) since Singapore was not the seat of the arbitration, but only the venue, Part-II of the 1996 Act would not come into play merely because the venue of arbitration is outside India.

In the circumstances, the issue which arose for consideration before the Delhi High Court was whether the arbitration would be governed by Part-I or Part-II of the 1996 Act. Testing the judicial precedents and statutory provisions in the present circumstances, the Delhi High Court found as follows:

- An arbitration agreement is an independent self-contained agreement and is not dependent on the substantive agreement. Whilst drawing a distinction between the substantive law of the contract, and the law governing the arbitration agreement, the court held that “irrespective of the contractual rights and obligations parties can opt for an international arbitration”;
- Relying upon *Atlas Exports*⁵¹, the Delhi High Court concurred that there is no bar against two Indian parties choosing a foreign seat of arbitration;
- The Delhi High Court distinguished *Addhar Mercantile*⁵² stating that it was per incuriam and did not consider the findings of the Supreme Court in *Atlas Exports*⁵³;
- Distinguishing *TDM Infrastructure*⁵⁴, the Delhi High Court observed that the decision of the court in TDM Infrastructure was limited to the purpose of determining the jurisdiction of the court under Section 11 of the 1996 Act, and not to determine the applicability of Part-I or Part-II of the Act;
- Placing reliance on *Bharat Aluminum*⁵⁵ and *Reliance Industries*⁵⁶, the Delhi High Court concurred that Part-I of the 1996 Act would not be applicable to foreign seated arbitrations.
- In view of the above, the Delhi High Court held that since the seat of arbitration is Singapore, the dispute would be governed by Part-II of the 1996 Act.

The Delhi High Court accordingly upheld the validity of the arbitration agreement and held that such an agreement is not in contravention of section 28 of the Contract Act.

⁵¹ *Atlas Exports Industries v. Kotak & Company*, (1999) 7 SCC 61.

⁵² *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, 2015 SCC OnLine Bom 7752.

⁵³ *Atlas Exports Industries v. Kotak & Company*, (1999) 7 SCC 61.

⁵⁴ *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271.

⁵⁵ *Bharat Aluminum Company and Ors. v. Kaiser Aluminium Technical Service Inc and Ors.*, (2012) 9 SCC 552.

⁵⁶ *Reliance Industries Limited v. Union of India*, (2014) 7 SCC 603.

Further, the findings of the court on the issue of whether GMR Energy ought to be impleaded in the arbitration has been discussed in the chapter titled '*Impleadment of third parties in arbitration*'.

In determining whether Part-II of the 1996 Act would be applicable to the arbitration, the Delhi High Court relied on *Bharat Aluminum*⁵⁷ and *Reliance Industries*⁵⁸ wherein the courts excluded the applicability of Part-I of the 1996 Act to foreign seated arbitrations and held that Part-II of the 1996 Act would apply. While this finding has previously been an *obiter dicta* by high courts in *Sasan Power*⁵⁹, *Reliance Industries & Anr.*⁶⁰, it was a categorical finding in the present case. Further, by distinguishing *TDM Infrastructure*⁶¹ and *Addhar Mercantile*⁶², the Delhi High Court set straight the true import of these two decisions.

Conclusion and analysis

The tenor of the courts, notwithstanding the two decisions of the Bombay High Court, on the issue of whether two Indian parties can choose a foreign seat appears to be inclined to uphold and enforce arbitration agreements where two Indian parties have opted for a foreign seat of arbitration. However, the uncertainty on the law in India will continue till the legislature amends the 1996 Act, or the Supreme Court makes a definitive pronouncement on the issue. Key considerations for the Supreme Court would include (i) whether curial law of another country can be resorted to by Indian parties on the basis of the implications of resorting to such curial law, (ii) whether a reading of the non-derogable section 28 of the 1996 Act which governs substantive law can be extended to curial law as well, (iii) what are the parameters for assessing whether an arbitration is international or domestic, (iv) the effect of a foreign seat, (v) whether selecting a foreign curial law would render the agreement void under section 28 of the Contract Act, (vi) an assessment of territoriality and transnational theories, (vii) the difference of treatment of what constitute foreign awards under the New York Convention and the Geneva Convention⁶³, (viii) extent of party autonomy, (ix) judicial sovereignty of Indian courts with respect to arbitrations which involve only Indian parties, (x) public policy concerns, etc.

In the meanwhile, Indian parties opting for an arbitration seat outside India should consider the risks involved. The recalcitrant party can always plead that the exclusion of the 1996 Act in a domestic arbitration between Indian parties is impermissible and is opposed to the public policy of India. This would mean that parties are still susceptible to proceedings being filed for an anti-arbitration injunction as in the case of *Sasan Power*⁶⁴, and *GMR Energy*⁶⁵, and in the absence of any definitive ruling on the issue, there is a possibility of an Indian court issuing an anti-arbitration

⁵⁷ *Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service Inc and Ors.*, (2012) 9 SCC 552.

⁵⁸ *Reliance Industries Limited & Anr. v. Union of India*, (2014) 7 SCC 603.

⁵⁹ *Sasan Power Limited v. North American Coal Corporation India Private Limited*, (2016) 10 SCC 813.

⁶⁰ *Reliance Industries Limited v. Union of India*, (2014) 7 SCC 603.

⁶¹ *TDM Infrastructure Private Limited v. UE Development India Private Limited*, (2008) 14 SCC 271.

⁶² *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.*, 2015 SCC OnLine Bom 7752.

⁶³ Section 53 of the 1996 Act (Geneva Convention), as opposed to section 44 (New York Convention), lists one additional requirement for an award to be treated as a foreign award under the Geneva Convention – one of the parties to the arbitration should be subject to the jurisdiction of a country to which the Geneva Convention applies.

⁶⁴ *Sasan Power Limited v. North American Coal Corporation India Private Limited*, (2016) 10 SCC 813.

⁶⁵ *GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.*, 2017 SCC Online Del 11625.

injunction to restrain parties from continuing, initiating or proceeding with the arbitration. Furthermore, an award debtor could invoke the jurisdiction of Indian courts and challenge the validity of the award under section 34 of the 1996 Act for the same reasons.

The award-debtor may also oppose enforcement of the foreign award in India on the basis that the award is opposed to public policy contending that two Indian parties are barred from choosing a foreign seat of arbitration. To alleviate the risk, parties can try and identify the assets of the other party situated outside India, which could later be used to satisfy the award, so as to minimize the probability of having to pursue enforcement proceedings in India. Furthermore, if parties require some form of court intervention or assistance from Indian courts, the risk of choosing a foreign seat is palpable. These risks will subsist until the controversy is laid to rest and until then it may be prudent to restructure such contracts to reflect the legal position as it now exists.



03

UNILATERAL RIGHT OF REFERENCE - REFLECTING UPON THE POSITION OF COURTS IN FOREIGN JURISDICTIONS AND THE ROAD AHEAD FOR INDIA

Overview

A striking feature in a number of agreements executed in India, where one of the parties is either a lender or a public sector undertaking, are clauses which vest only one party with the right to invoke arbitration or a particular mode of dispute resolution. When the validity and enforceability of such clauses has been tested before the various high courts in India, the high courts have taken different approaches in reaching their conclusions. In this backdrop, we discuss the views of the courts in India and in other jurisdictions on such clauses.

To complement transnational business initiatives and economic globalization, adapting as an arbitration friendly jurisdiction has become key to attract and improve business in developing countries. Keeping commercial imperatives in mind, the outlook of the courts towards arbitration clauses which are unilateral and asymmetrical in nature has evolved globally.

The unilateral nature of a clause surfaces from the language of the clause and therefore clauses which are construed as 'unilateral' come in different compositions and forms. In this chapter, we have assessed some clauses which provide a unilateral right of reference:

- unilateral arbitration clauses i.e. clauses which vest only one party with the right to invoke arbitration (**unilateral arbitration clauses**)
- unilateral dispute resolution clause i.e. clauses which vest only one party with the right to opt for the mode of dispute resolution once the dispute arises (**unilateral dispute resolution clause**)

In our efforts to assess the road ahead for India *vis-à-vis* unilateral arbitration clauses and unilateral dispute resolution clauses, we have delved into the issues of admissibility and enforceability of certain unilateral arbitration and dispute resolution clauses in international jurisdictions, particularly England, Singapore, and Hong Kong.

Vesting one party with the right to invoke arbitration⁶⁶

As the term 'unilateral' suggests, unilateral arbitration clauses vest the right to opt for arbitration with only one party to the agreement. Therefore, at one end of the spectrum, enforceability of such clauses is resisted since the foundation of a valid arbitration agreement, i.e. party autonomy and equitable treatment, is not nurtured. However, the contrasting view is that party autonomy crystalizes at the time of entering into the contract as parties have in fact consented to such clauses pursuant to commercial sensibilities.

Vesting one party with the right to opt for the mode of dispute resolution once the dispute arises, i.e. arbitration or court litigation⁶⁷

Next, we examine unilateral dispute resolution clauses which expressly vest only one party with the right to opt for either litigation in court or for reference of disputes to arbitration. In such cases, opposing parties have contended that the arbitration agreement does not exist till the beneficiary party invokes arbitration and therefore the clause is otiose for want of certainty. However, the contrary view is that such clauses are a useful hedge to parties as the nature of the probable dispute is often unknown and therefore, the costs, time, and mode of dispute resolution which the subject dispute would warrant can be considered once the dispute crystalizes.

Legal minds have differed in opinion when it comes to the suitability of unilateral and asymmetrical arbitration clauses. Therefore, on examining the features of different types of unilateral arbitration agreements, readers will observe that more often than being a product of poor drafting, such clauses do have a rationale and commercial intent behind them. Testing the judicial precedents in international jurisdictions *vis-à-vis* differently constructed unilateral clauses, we bring to you the relevant developments.

⁶⁶ Refer to the sections on England, India in this chapter

⁶⁷ Refer to the section on England in this Chapter (Law Debentures, NB Three Shipping), Singapore (Dyna Jet) Hong Kong (China Merchants)

English courts – Reflecting on the developments



The perspective of the English Courts on unilateral arbitration clauses has evolved over the years. Earlier, the English courts followed the principle that arbitration agreements must bestow the right to refer disputes to arbitration to both parties, i.e. bilateral rights of reference. However, in present day jurisprudence, courts have recognized that the unilateral arrangement benefits both parties and therefore the intent of the parties to the agreement must be preserved. Further, in juxtaposing arbitration agreements with commercial sensibilities, the English courts today have embraced unilateral agreements so long as parties gave their prior consent to such agreements.

Bilateral Right of Reference is mandatory

One of the landmark rulings in this regard in English law is *Baron*⁶⁸, where *Davies L.J.* and two other members of the Court of Appeal concluded that in an arbitration agreement⁶⁹, each party must agree to refer disputes to arbitration and the clause must give “*bilateral rights of reference*”. However, this finding was subjected to criticism in both *Russel on Arbitration, 20th edn. (1982)* and *Mustill & Boyd, Commercial Arbitration (1982)*.

In *Tote Bookmakers*⁷⁰, the rent-review clause⁷¹ contained in a lease deed provided that any hike in rent by the lessor would be subject to the right of the lessee to review the increase in rent, such that the lessee could have the escalation reviewed by an independent surveyor by invoking arbitration in terms of the Arbitration Act, 1950 (**English Act 1950**). The lessor notified the lessee of the increase in rent and disputes arose between the parties regarding the escalated rent. While the lessee filed an application to a master in chambers under section 27⁷² of the English Act 1950 for an extension of time to serve a notice of arbitration, the court dismissed the said application for want of a valid arbitration agreement.

Bound by the ruling in *Baron*⁷³, the Chancery Division held that the bilateral right of each party to refer disputes to arbitration was an essential ingredient and in the absence of the right of the lessor to refer disputes to arbitration, the arbitration agreement was rendered unenforceable.

⁶⁸ *Baron v. Sunderland Corporation* 1966 2 QB 56, 64.

⁶⁹ “Section V of the Burnham report established a joint committee of reference who were to determine any question relating to the interpretation of the provisions of this report brought forward by a local education authority acting through the authorities’ panel or by any association of teachers acting through the teachers’ panel or by consent of the Chairman of the Burnham Committee.”

⁷⁰ *Tote Bookmakers Ltd v. Development & Property Holding Co Ltd* [1985] 2 WLR 603.

⁷¹ “...at the election of the lessee by counter-notice in writing to the lessor not later than three months after the lessor’s said notice (time to be of the essence hereof) by an independent surveyor...and every such determination shall be made in accordance with the Arbitration Act 1950.”

⁷² Section 27, English Arbitration Act, 1950: “Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper.”

⁷³ *Baron v. Sunderland Corporation* 1966 2 QB 56,64.

Prior consent to a so-called 'unilateral' arbitration clause constitutes a bilateral agreement

In *Pittalis*⁷⁴, the issue before the Court of Appeal was whether a rent-review clause⁷⁵ similar to that in *Tote Bookmakers*⁷⁶ was an arbitration clause at all, given that the clause contemplated that only the lessee could refer the matter to arbitration. Since the lessor notified the lessee of the increase in rent and the lessee failed to challenge the increased rent by arbitration, in view of the factual circumstances, the lessor sued the lessee for possession.

In context of an application under section 27 of the English Act 1950, *Fox L.J.* of the Court of Appeal observed that there was a bilateral agreement between the parties which constituted a contract to refer disputes to arbitration, and the fact that only one of the parties could opt for arbitration is irrelevant since the arrangement benefited both parties. Hence, the Court of Appeal upheld the arbitration agreement and clarified that since both sides had accepted the arrangement, there was no question of any lack of mutuality. The Court of Appeal attempted to interpret the decision in *Baron* and held that the phraseology used by *Davies L.J.* therein only intended to make it clear that there could be no arbitration unless both parties agreed to arbitration. The Court of Appeal then observed that it is not correct to say that the clause must give bilateral rights of reference and that all that is necessary is that there shall be a contract which gives a right of reference (whether unilateral or bilateral). The Court of Appeal thereafter overruled the decision in *Tote Bookmakers*.

Dispute resolution clauses designed to grant 'better' rights to one party are valid

In *NB Three Shipping*⁷⁷, the dispute resolution clause⁷⁸ in a charter-party vested the owner with the right to opt for arbitration or litigation, but vested the charterer only with the right to approach the courts in case of any disputes. Disputes arose and the charterer commenced litigation proceedings against the owner. Within two days, the owner invoked arbitration under the charter-party. In the circumstances, the issue before the Queen's Bench Division (Commercial Court) was whether the litigation proceedings were maintainable or ought to be stayed in view of section 9⁷⁹ of the Arbitration Act, 1996 (**English Act 1996**). While observing that the dispute resolution clause was designed to grant "better" rights to the owner, the court held that section 9 of the English Act 1996 would apply to the present case once the owner selects his option to refer disputes to arbitration. Accordingly, the proceedings initiated by the charterer against the owner were stayed and the unilateral arbitration clause was upheld and enforced.

⁷⁴ *Pittalis and Others v. Sherefettin* [1986] 1 QB 868.

⁷⁵ "(2) ... (ii) at the election of the lessee by notice in writing to the lessor not later than three months after the lessors' notification in writing mentioned in sub clause (i) above (time in respect to be deemed to be of the essence hereof) it shall be determined (in accordance so far as not inconsistent herewith the provisions of the Arbitration Act 1950..."

⁷⁶ *Tote Bookmakers Ltd v. Development & Property Holding Co Ltd* [1985] 2 WLR 603.

⁷⁷ *NB Three Shipping Ltd v. Harebell Shipping Ltd* [2005] 1 Lloyd's Rep.509.

⁷⁸ "47.02 The courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the Owner shall have the option of bringing any dispute hereunder to arbitration."

⁷⁹ Section 9, English Act 1996 (Stay of legal proceedings)

Party can choose to opt for litigation or arbitration once the dispute has crystallized - once he opts for litigation, disputes fall outside the scope of arbitration

In *Law Debentures*⁸⁰, the dispute resolution clause⁸¹ in a bond-related trust deed vested the right to invoke arbitration with both, the trustee and a bond holder, but in addition, the right to initiate litigation proceedings was given exclusively to the trustee. While the trustee accepted the arbitration invoked by the opposite party for the first set of disputes, it opted for litigation for its own claims in the next set of disputes. The bond holder sought a stay on the proceedings in view of the arbitration agreement. The court gave a finding that the trustee cannot be compelled to arbitrate if he opts for litigation. In the facts of the case, the court clarified that the once the trustee opted for litigation, the disputes then fell outside the scope of arbitration.

Hong Kong: Views of the Courts



The dispute settlement clause⁸² in a construction contract between a contractor and a corporation was peculiar to the extent that it allowed only the corporation to notify the differences as ‘disputes’ whereas the right to refer such notified disputes to arbitration was vested with the contractor. Differences arose between the parties for recovery of outstanding dues and the contractor filed court proceedings for recovery of monies. The corporation sought a stay on the proceedings in view of the arbitration agreement between the parties⁸³.

The Court of Appeal held that an agreement conferring a right on one party to refer a dispute to arbitration does not become “*inoperative*” merely because such party chooses not to exercise such right, and therefore the contractor was barred from initiating any proceedings other than arbitration against the corporation. In the circumstances, not only did the Court of Appeal uphold the clause but it also granted a stay on the court proceedings already initiated by the contractor. The reason for the Court of Appeal to arrive at its conclusion is not far to see - seemingly, the clause did not give the contractor a right to elect between litigation and arbitration.

⁸⁰ *Law Debenture Trust Corp Plc v. Elektrim Finance BV* [2005] EWCA Civ 1354.

⁸¹ “29.2 Any dispute arising out of or in connection with these presents...may be submitted by any party to arbitration for final settlement under... (the UNCITRAL Arbitration Rules), which rules are deemed to be incorporated by reference into this Clause 29.2.”

“29.7 Notwithstanding Clause 29.2, for the exclusive benefit of the Trustee and each of the Bondholders, [EFBV] and [ESA] hereby agree that the Trustee and each of the Bondholders shall have the exclusive right, at their option, to apply to the courts of England, who shall have non – exclusive jurisdiction to settle any disputes which may arise out of or in connection with these presents...”

⁸² “If any dispute or difference of any kind shall arise between JGC and the contractor in connection with or arising out of the contract or the carrying out of the Works which cannot be settled by mutual agreement, JGC shall state its decision in writing and give notice of same to contractor.

....

Without prejudice in any way to the foregoing, if, within fifteen (15) calendar days after the date of the above decision in writing made by JGC, the contractor shall by written notice to JGC so request, specifying such dispute or question, then the matter shall be referred to a single arbitrator to be agreed upon by the parties, or....”

⁸³ *China Merchants Heavy Industry Company Limited v. JGC Corp.*, [2001] 3 HKC 580.

Singapore: Views of the Courts



The unilateral dispute resolution clause which gave one party the choice to elect between litigation and arbitration is valid - once such party opts for litigation, the disputes fall outside the scope of arbitration

In 2016, the Singapore High Court determined the validity of a unilateral dispute resolution clause⁸⁴ in *Dyna-Jet*⁸⁵. As the dispute resolution agreement between the parties gave one party, i.e. Dyna-Jet, the right to elect between arbitration and court litigation, Dyna-Jet initiated litigation proceedings before the Singapore High Court and in effect elected not to opt for arbitration. The opposite party applied for a permanent stay of court proceedings under section 6⁸⁶ of the International Arbitration Act, 2002 (**Singapore Act**), to compel Dyna-Jet to exercise its option to refer the dispute to arbitration instead.

The court relied upon *Tomolugen Holdings*⁸⁷, wherein it laid down the following three tests to satisfy the court for stay of court proceedings in breach of an arbitration agreement under section 6 of the Singapore Act:

- *First, that there is a valid arbitration agreement between the parties to the court proceedings*
- *Second, that the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement*
- *Third, that the arbitration agreement is not null and void, inoperative, or incapable of being performed*

Testing the above principles in the present facts, the Singapore High Court found that with respect to the first requirement, considering “*the overwhelming weight*” of modern Commonwealth authority, the subject clause was valid since mutuality of the right to elect to arbitrate is not a requirement for the purposes of concluding an “*arbitration agreement*” within the meaning of the Singapore Act, and the only material requirement is the mutual consent of the parties at the point when they entered into a dispute resolution agreement, even if that agreement was unilateral or “one-sided” in nature.

With respect to the second requirement, i.e. whether the dispute fell within the scope of the arbitration agreement, the Singapore High Court disagreed with the lower court and found that even on a *prima facie* standard of review, at the time the stay application was filed, the dispute could not possibly be said to fall within the scope of the arbitration agreement that was contained in the clause.

⁸⁴ “...If no amicable settlement is reached through discussions, at the election of Dyna- Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore.”

⁸⁵ *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd.*, [2017] SGCA 32

⁸⁶ Section 6, Singapore Act (Enforcement of international arbitration agreement).

⁸⁷ *Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals*, [2016] 1 SLR 373.

Distinguishing the clauses in England's *Pittalis*⁸⁸ and Hong Kong's *China Merchants*⁸⁹, the Singapore High Court observed that while in the present case the opposite party was seeking to invoke the right vested in Dyna-Jet to have the disputes referred to arbitration, "*the nature of the right of election conferred on the Respondent under the Clause was not between commencing proceedings and not commencing proceedings, as it was in Pittalis and China Merchants, but rather between commencing litigation and commencing arbitration.*"

Therefore, since Dyna-Jet had clearly chosen to refer the dispute to litigation by commencing a suit, it was clear that the dispute never fell within the scope of the subject arbitration clause, and therefore it did qualify as a "*matter which is the subject of the agreement*". In the circumstances, the application to stay the court proceedings was rejected.

Despite Singapore being one of the world's most arbitration friendly jurisdictions, whilst determining whether an ongoing litigation proceeding ought to be stayed in view of the arbitration agreement between the parties, the court allowed the litigation proceedings to continue and clarified that since the party vested with the right to elect opted to refer its disputes to litigation, the dispute was *ultra vires* the arbitration agreement itself. In the circumstances, the court did not find it necessary to rule on whether the arbitration agreement was void or inoperative but restricted itself to the intent of the parties.

The position in India



The High Courts in India have taken different views and approaches while determining the validity and enforceability of unilateral arbitration clauses. We have delved into these views in this chapter. For further ease of reading, we have summarily tabulated and mapped the position of the Indian courts in context of Indian law.

Relevant cases in India: An overview			
Court	Case Law	Validity of unilateral arbitration clause	Findings of the Court
In context of the Arbitration Act, 1940, clauses which vest one party with the right to opt for arbitration are valid, and the other party is bound by such 'election'			
Calcutta High Court	<i>Kedarnath Atmaram</i> ⁹⁰	✓	The court observed that " <i>The fact that the agreement provides an option to either the buyer or the seller to refer the matter to arbitration does not affect the validity of the arbitration agreement.</i> "

⁸⁸ *Pittalis and Others v. Sherefettin* [1986] 1 QB 868.

⁸⁹ *China Merchants Heavy Industry Company Limited v. JGC Corp.*, [2001] 3 HKC 580.

⁹⁰ *Kedarnath Atmaram v. Kesoram Cotton Mills Ltd.*, ILR (1950) 1 Calcutta 550 (13).

			The court concluded that “ <i>the other party has agreed to abide by that option</i> ”, and “ <i>once the option is exercised and the election is made</i> ” both parties shall be bound by such election to arbitrate.
Delhi High Court	<i>Bharat Engineering</i> ⁹¹	✓	The court held that the arbitration agreement was a contract of option and “ <i>the moment the contractor invokes the clause (thereby exercising his option) an arbitration agreement exists in respect of the disputes specified by him. From then onward the principle of mutuality applies. Either party can now make the reference...</i> ”
Unilateral arbitration clause held valid but in the facts of the case, the litigation was allowed to subsist on other grounds			
Madras High Court	<i>Castrol India</i> ⁹²	✓	The court recognized validity of unilateral arbitration agreements but allowed litigation to subsist on other grounds and held that the “ <i>said proceedings ought to continue despite the general international practice referred to by the appellant-company permitting the unilateral option</i> ” ⁹³ .
‘Mutuality’ kicks in upon the invocation of the arbitration clause and exercise of the contract of option			
Delhi High Court	<i>Bharat Engineering</i> ⁹⁴	✓	The arbitration agreement was a contract of option and in the contract of option mutuality kicked in after the election for arbitration was made. The court held that “ <i>the moment the contractor invokes the clause (thereby exercising his option) an arbitration agreement exists in respect of the disputes specified by him. From then onward the principle of mutuality applies. Either party can now make the reference...</i> ”
Unilateral right to make reference flows from the advance consent of the other party to the agreed terms in the contract			
Calcutta High Court	<i>New India Assurance</i> ⁹⁵	✓	The court held that “ <i>the unilateral right to make the reference flows from the agreed terms in the contract</i> ”. The court observed that the privileged party can refer the disputes to arbitration only on the basis of the advance consent given by the other party (at the time of entering into the arbitration agreement) that the right to reference would be vested in the privileged party.
‘Mutuality’ is mandatory for a valid arbitration agreement -			

⁹¹ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

⁹² *Castrol India Ltd. v. Apex Tooling Solutions*, (2015) 1 LW 961 (DB).

⁹³ *Castrol India Ltd. v. Apex Tooling Solutions*, (2015) 1 LW 961 (DB).

⁹⁴ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

⁹⁵ *New India Assurance Co. Ltd. v. Central Bank of India and Ors.*, AIR 1985 Cal 76; *A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd.*, 1992 (2) Arb.L.R. 8.

Delhi High Court	<i>Bhartia Cutler</i> ⁹⁶	X	The court held that “In the case in hand the right to invoke the arbitration is restricted only to the defendant. This to my mind, would not amount to bilateral arbitration clause nor the pre-consent can validate such clause.” The court held that “Prior giving of consent for such a clause would not make it bilateral”.
Delhi High Court	<i>Lucent Technology</i> ⁹⁷	X	The court noted that “...Therefore, assuming that the clause relied upon constituted an arbitration agreement, in the light of the binding principles noticed above, it has to be held that the same is also not enforceable in law for lack of mutuality as well as uncertainty.”
Unilateral arbitration clauses are in contravention with section 28 of the Indian Contract Act, 1872			
Delhi High Court	<i>Emmsons International</i> ⁹⁸	X	The subject clause was held void and not capable of enforcement in India in light of section 28 of the Contract Act. The court held that the subject clause “being in the nature of a unilateral covenant depriving the plaintiff to enforce its right under the contract either through the ordinary tribunals set up by the State or through alternate dispute resolution mechanism is void and cannot be enforced in India. ”
Delhi High Court	<i>Lucent Technology</i> ⁹⁹	X	The court held that “it follows that such a unilateral right as is conferred on the ... is void also for the reason that it is contrary to section 28 of the Contract Act.”
Clause declared unenforceable void for want of certainty			
Delhi High Court	<i>Lucent Technology</i> ¹⁰⁰	X	The court noted that “...Therefore, assuming that the clause relied upon constituted an arbitration agreement, in the light of the binding principles noticed above, it has to be held that the same is also not enforceable in law for lack of mutuality as well as uncertainty.”

As illustrated above, the Madras High Court¹⁰¹ has imported the principles of English jurisprudence and upheld unilateral arbitration clauses but considering the facts of the case, the matter was not eventually referred to arbitration and the court litigation continued to subsist.

The Delhi High Court¹⁰² and the Calcutta High Court¹⁰³ have recognized unilateral arbitration clauses as contracts of option and concluded that once the option is exercised and the election is made, both parties shall be bound by such election to arbitrate.

⁹⁶ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

⁹⁷ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

⁹⁸ *Emmsons International Ltd. v. Metal Distributors*, 2005 (80) DRJ 256.

⁹⁹ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹⁰⁰ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹⁰¹ *Castrol India Ltd. v. Apex Tooling Solutions* (2015) 1 LW 961 (DB).

¹⁰² *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹⁰³ *Kedarnath Atmaram v. Kesoram Cotton Mills Ltd.*, ILR (1950) 1 Calcutta 550 (13).

Further, the Calcutta High Court¹⁰⁴ has held that since both parties had extended their advance consent to a unilateral arbitration agreement, the unilateral right to make the reference flows from the agreed terms while entering into the contract.

In a new line of reasoning adopted by the Delhi High Court in present day jurisprudence, the court has found that unilateral arbitration clauses are void for want of mutuality¹⁰⁵ and/or and certainty¹⁰⁶ and/or are in contravention to section 28 of the Indian Contract Act, 1872^{107 108} (**Contract Act**).

In context of the Arbitration Act, 1940, the Calcutta High Court and the Delhi High Court concluded that clauses which vest one party with the right to opt for arbitration is valid, and the other party is bound by such election

In *Kedarnath Atmaram*¹⁰⁹, the Calcutta High Court determined the validity of a clause where the disputes “shall at the option of the Mills, be referred to the arbitration of the Indian Chamber of Commerce”¹¹⁰. Disputes arose between the parties and the mill exercised its option and referred the disputes to arbitration. Subsequently, the buyer filed a suit before the Calcutta High Court and the mill filed an application before the court seeking a stay on the suit in view of the arbitration agreement.

While the buyer resisted the application on the basis that “there is no mutuality in the arbitration clause and, therefore, it is void and not binding”, the division bench granted the stay on the suit and held that as long as the requirements of a valid arbitration agreement under section 2(a) of the Arbitration Act, 1940 (**1940 Act**) have been met, “the fact that the agreement provides an option to either the buyer or the seller to refer the matter to arbitration does not affect the validity of the arbitration agreement”. The Calcutta High Court concluded that “the other party has agreed to abide by that option”, and “once the option is exercised and the election is made” both parties shall be bound by such election to arbitrate.

In *Bharat Engineering*¹¹¹, the arbitration agreement¹¹² between the railway arm of the government and a contractor vested the right to invoke arbitration with the contractor. The claims raised by the

¹⁰⁴ *New India Assurance Co. Ltd. v. Central Bank of India and Ors.*, AIR 1985 Cal 76; *A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd*, 1992 (2) Arb.L.R. 8.

¹⁰⁵ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

¹⁰⁶ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹⁰⁷ *Emmons International Ltd. v. Metal Distributors*, 2005 (80) DRJ 256.

¹⁰⁸ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹⁰⁹ *Kedarnath Atmaram v. Kesoram Cotton Mills Ltd.*, ILR (1950) 1 Calcutta 550 (13).

¹¹⁰ “All matters, questions, disputes, differences and/or claims arising in connection with and/or claim or claims arising out of and/or concerning and/or in connection, with and/or in consequence of or relating to this contract, whether or not the obligation of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or varied or purported to be terminated or varied shall, at the option of the Mills, be referred to the arbitration of the Indian Chamber of Commerce, under the rules of its Tribunal of Arbitration for the time being in force.”

¹¹¹ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹¹² “In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties, on any matter in question, dispute or difference on any account, or so to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the excepted matters referred to in clause 63 of these conditions, the Contractor, after 90 days of his presenting his final claim on disputed matters, may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference, and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration”.

contractor were referred to arbitration. However, when the railway administration sought its counterclaims to be referred to arbitration, the question that arose before the division bench of the Delhi High Court was whether the clause which reserved the right of reference to arbitration with only one party was valid.

At the outset, the court concluded that the clause constituted a contract of option. The Delhi High Court held that, once the contractor invoked the arbitration clause, he exercised his option, and therefore an arbitration agreement existed in respect of the disputes specified by him as disputes which could be referred to arbitration.

On the point of requirement of mutuality, the Delhi High Court agreed with *Baron*¹¹³ that mutuality is an essential ingredient for an arbitration agreement. The court held that in the clause under review, once the contractor exercised his option to refer disputes to arbitration, from this time onward, the principle of mutuality applied. Further, from this time onward, either party, i.e. the contractor and/or the railway, could refer disputes to arbitration. If, after electing for arbitration, the contractor refrains from making a reference, the railway may do so.

However, while dealing with whether the railway's counterclaims could be referred to arbitration, the court held that the reference is restricted to only those disputes specified by the contractor. Since, the contractor had not consented to a reference of the counter-claims of the railway to arbitration, there existed no arbitration agreement under which the counter-claims were arbitrable. This was supported by the construction of the arbitration agreement which the court noted that (i) while the contractor "may demand" a reference to arbitration, nothing was mentioned about the railway making such demand for reference to arbitration; (ii) the demand made by the contractor must specify disputes which are within the scope of reference to arbitration and reference shall be permissible only if they fall within such scope. Therefore, no reference to arbitration would lie for disputes which are not within the scope and therefore not arbitrable.

Unilateral right to make reference flows from the advance consent of the other party in the agreed terms in the contract

Thereafter, in *New India Assurance*¹¹⁴, the court upheld the validity of an arbitration agreement between an insurance company, a bank, and the insured, which only allowed the insurance company to refer disputes, in relation to the liability of the insurance company under the policy, to arbitration¹¹⁵. As the insurance company did not settle the claims, the bank invoked arbitration and called upon the insurance company to appoint its own arbitrator. While the insurance company appointed its arbitrator, it submitted that the reference to arbitration by the bank was invalid. Relying

¹¹³ *Baron v. Sunderland Corporation*, All England Report 1966 (1) 349 (351).

¹¹⁴ *New India Assurance Co. Ltd. v. Central Bank of India and Ors.*, AIR 1985 Cal 76; *A.V.N. Tubes Ltd. v. Bhartia Cutler Hammer Ltd*, 1992 (2) Arb.L.R. 8.

¹¹⁵ "If any dispute shall arise as to whether the company is liable under this policy or as to the amount of its liability the matter shall, if required by the company be referred to the decision of two neutral persons as Arbitrators one of whom shall be named by each party or of an umpire who shall be appointed by the said Arbitrators before entering on the reference; and in case the Insured or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from the company so to do to name an Arbitrator the Arbitrator of the company may proceed alone and no action or proceeding shall be brought or prosecuted on the policy until the award of the Arbitrator, Arbitrators or umpire has been first obtained."

upon *Bharat Engineering*, the insurance company contested that only when the insurance company exercised its option to arbitrate would a valid arbitration agreement come into effect.

Juxtaposing the present case with *Bharat Engineering*, the Calcutta High Court culled out that (i) in both cases the parties by agreement conferred the unilateral right of reference on one party at its discretion; (ii) both parties had agreed that when future disputes would arise, only the privileged party would have the right to make the reference but the privileged party can also render the arbitration agreement infructuous by not exercising the option; (iii) such option does not vitiate the existence of the arbitration agreement but only limits its enforceability; (iv) the privileged party can refer the disputes to arbitration only on the basis of the advance consent given by the other party (at the time of entering into the arbitration agreement) that the right to reference would be vested in the privileged party; and most importantly, (v) “*the unilateral right to make the reference flows from the agreed terms in the contract*”.

On the facts of the case, the Calcutta High Court noted that the insurance company exercised its option by appointing its own arbitrator and *inter alia* held that arbitration agreement was valid. Furthermore, on the unique facts of the case, the Calcutta High Court permitted the disputes raised by the bank to be referred to arbitration through rights flowing under another clause in the contract.

Delhi High Court holds that prior consent to a unilateral arbitration agreement does not qualify as a bilateral agreement

In *Bhartia Cutler*¹¹⁶, the defendant moved an application challenging the maintainability of a suit for recovery of money before the Delhi High Court, in view of the arbitration agreement between the parties. Since the arbitration agreement¹¹⁷ vested the defendant with the exclusive right to refer its disputes to arbitration under the 1940 Act, the issue which arose for consideration before the Delhi High Court was whether such a clause is unilateral and unenforceable in law.

The Delhi High Court imported the principles of mutuality from the decision of the English Court of Appeal in *Baron*¹¹⁸ and nurtured the definition of an “*arbitration agreement*” as provided under section 2(a) of the 1940 Act. The Delhi High Court held that the right to invoke arbitration had been reserved by the defendant without any option to the plaintiff, and therefore, the arbitration agreement was not bilateral.

While it was brought to the Delhi High Court's notice that the parties had consented to such a clause before submitting to arbitration and therefore the bilateral clause could be acted upon, the Delhi High Court clarified that “*prior giving of consent for such a clause would not make it bilateral*” and therefore the subject agreement did not qualify as an arbitration agreement.

The judgment of the single judge in *Bhartia Cutler* was appealed and affirmed before the division bench of the same court. The division bench concluded that the right to go in for arbitration, raising of disputes, and the right to appoint the arbitrator was given only to one party which amounted to

¹¹⁶ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

¹¹⁷ “18. Arbitration

AVN Tubes Limited, reserves its right to go in for arbitration, if any dispute so arisen is not mutually settled within 3 months of such notice given by the Company to the Contractor. And, the award of the Arbitrator, to the appointed by the Company, M/s. AVN Tubes Limited, shall be final and binding on both the Company and the Contractor.””

¹¹⁸ *Baron v. Sunderland Corporation*, All England Report 1966 (1) 349 (351).

the same being a unilateral agreement. For this reason, it was held that such an agreement was not enforceable in law.

It seems that the Delhi High Court's own decision in *Bharat Engineering*¹¹⁹ was not brought to the notice of the court by the parties, wherein the division bench of the Delhi High Court had held that such a unilateral arbitration agreement was a contract of option and that in a contract of option mutuality kicks in after the election for arbitration is made.

Therefore, while both *Bhartia Cutler*¹²⁰ and *Bharat Engineering*¹²¹ referred to the decision of the English Court of Appeal in *Baron*¹²² to conclude that mutuality is necessary, the concept of 'mutuality' was interpreted and applied differently by the court in *Bhartia Cutler*¹²³ and *Bharat Engineering*¹²⁴ respectively.

In *Bharat Engineering*¹²⁵, the Delhi High Court identified that the presence of mutuality kicked in only after the arbitration clause was invoked and the option was exercised by the contractor, whereas in *Bhartia Cutler*¹²⁶ the Delhi High Court held that the arbitration agreement did not qualify as a bilateral agreement as the right to invoke arbitration was solely vested with one party.

Delhi High Court strikes down unilateral arbitration clauses as contravening section 28 of the Indian Contract Act, 1872

Thereafter, in *Emmsons International*¹²⁷ the validity of the arbitration clause¹²⁸ in a supply contract was challenged before the Delhi High Court on grounds including the unilateral nature of the clause. The clause exclusively vested the seller with the right to refer disputes arising out of the contract to arbitration and remained silent on the rights of the buyer. The issue which arose for consideration before the Delhi High Court was whether such a condition in the contract is enforceable in Indian courts or whether it is against the public policy of India and/or hit by section 28 of the Contract Act, which provides that agreements in restraint of legal proceedings are void. The Delhi High Court observed that the subject clause was void and not capable of enforcement in India, as it deprived one party of its right to take the recourse of legal proceedings to enforce its rights under the contract either through ordinary tribunals set up by the State or through alternate dispute resolution mechanisms. Although *Emmsons International* relied upon *Bhartia Cutler*, it would seem that once again the Delhi High Court's own decision in *Bharat Engineering*¹²⁹ was not brought to the notice of the court by the parties.

¹¹⁹ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹²⁰ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

¹²¹ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹²² *Baron v. Sunderland Corporation*, All England Report 1966 (1) 349 (351).

¹²³ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

¹²⁴ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹²⁵ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

¹²⁶ *Bhartia Cutler Hammer v. AVN Tubes*, 1995 (33) DRJ 672.

¹²⁷ *Emmsons International Ltd. v. Metal Distributors*, 2005 (80) DRJ 256.

¹²⁸ "...Sellers shall be entitled at their opinion, to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of the London Metal Exchange or to institute proceedings against buyers in any courts of competent jurisdiction."

¹²⁹ *Union of India v. Bharat Engineering Corporation*, First Appeal (OS) No. 51 of 1975, ILR (1977) 2 Del 57.

Delhi High Court declares clause unenforceable for want of certainty and mutuality

The see-saw on the position in Indian law on the issue of mutuality of reference and the validity of a 'contract of option' continued to flummox the courts. This becomes apparent when one considers the position taken by the Delhi High Court as recently as the year 2009, in *Lucent Technology*¹³⁰.

In *Lucent Technology*¹³¹, the Delhi High Court held a dispute resolution clause¹³² in a term sheet unenforceable for want of certainty and mutuality. By the said clause, a bank was vested the right to make a reference of disputes to any "alternate dispute resolution forum", and thus the bank opted to refer its disputes to arbitration before an arbitral tribunal of its choice. Since the clause remained silent on the forum which would qualify as an "alternate dispute resolution forum", there was no agreement between the parties regarding the method of dispute redressal or the mechanism of arbitration. Hence, the Delhi High Court ruled that the clause was watered down by uncertainty.

Placing reliance on the principles laid down in its earlier rulings in *Bhartia Cutler, Emmsons International*, and *Bharat Engineering*, the Delhi High Court held that if an arbitration clause with a unilateral right of reference is illegal, no effect is given, one party's right to legal proceedings would stand infringed. It would appear that the reliance on *Bharat Engineering* in this regard was misplaced as the court did not seemingly delve into the details thereof.

It is noteworthy to mention that while *Lucent Technology*¹³³ was in context of the 1996 Act, it relied upon the ratio emanating from the decisions of the Delhi High Court which were passed under the 1940 Act.

Madras High Court recognizes validity of unilateral arbitration agreements but allows litigation to subsist on other grounds

In *Castrol India*¹³⁴, disputes arose between parties to a distributorship agreement and the distributor filed a suit *inter alia* for compensation of monetary loss. The dispute resolution clause in the agreement provided that the "company alone shall have the right to exercise" the option to approach a court of competent jurisdiction or to refer disputes or differences to arbitration. In view thereof, the company filed an application under section 8 of the Arbitration and Conciliation Act, 1996 (1996 Act) seeking revocation of the leave granted to file a civil suit and stay of the proceedings in the suit. Referring to the judicial precedents in England and Australia, the court concurred that an arbitration clause need not necessarily have mutuality. However, since the company failed to express its intent to opt for arbitration at the beginning of the litigation and instead acquiesced to the jurisdiction of the court, the court rejected its plea to opt for arbitration as the distributor cannot be made to indefinitely wait to enforce its rights. The court held that the "said proceedings ought to continue despite the general international practice referred to by the appellant-company permitting the unilateral option"¹³⁵. It is interesting to note that the unilateral nature of the clause did not weigh on the court as much as the delay of the company in opting for arbitration.

¹³⁰ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹³¹ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹³² "Governing Law and Jurisdiction

...The Lenders reserve their right to approach any other alternate dispute resolution forum with it venue at Delhi, and the Borrower, the Sponsors and the Guarantor, as the case may be, shall submit to such forum."

¹³³ *Lucent Technology v. ICICI Bank*, 2009 SCC OnLine Del 3213.

¹³⁴ *Castrol India Ltd. v. Apex Tooling Solutions* (2015) 1 LW 961 (DB).

¹³⁵ *Castrol India Ltd. v. Apex Tooling Solutions* (2015) 1 LW 961 (DB).

Delhi High Court tests the validity of a unilateral arbitration clause in an enforcement proceeding of a foreign award by applying English Law

In the enforcement proceedings of a foreign award in India, the Delhi High Court considered a unilateral arbitration clause¹³⁶ under English Law and upheld its validity.¹³⁷

The petitioner contended that the arbitration clause lacked mutuality and was unilateral since it provided the buyer with the right to opt for court proceedings but not the right to invoke arbitration, and that the arbitration agreement was an agreement to enter into a future arbitration agreement and therefore, the same was not enforceable. The Delhi High Court held that the validity of arbitration agreement was to be tested by applying the proper law of the agreement, i.e. English Law and not the law of the country where the execution petition has been filed. Referring to the jurisprudence on this subject under English Law, the Delhi High Court observed that the courts have recognized arbitration agreements with a unilateral right to refer disputes to arbitration as binding. The Delhi High Court observed that (i) when there is a fully bilateral agreement which constitutes a contract to refer the disputes to arbitration, the fact that the option is exercisable by only one party is irrelevant; (ii) since both sides have accepted the arrangement, the issue of lack of mutuality of reference to arbitration does not arise; and (iii) parties are entitled, if they so choose, to confer a unilateral right to insist on arbitration.

Examining the construction of the dispute resolution clause, the Delhi High Court noted there was an irrevocable open offer by the petitioner to submit differences to arbitration, and the power of accepting such reference was vested in the respondent. Therefore, once the option was exercised and accepted, the arbitration mechanism in the present case became mandatory. In the circumstances, the Delhi High Court clarified that assuming English law did not apply, in view of the facts of the case, the submission that the arbitration agreement was not valid is untenable in law. In view of the foregoing, the Delhi High Court dismissed the applications challenging the award and based on its other findings it allowed the execution petition. While the respondent filed a special leave petition before the Supreme Court, the same was disposed of without any findings on the issue of validity of the arbitration agreement.

¹³⁶ “17(1). This Contract shall be in accordance with and governed by the laws of England and Wales. Save where a contrary intention is expressed in the Special Conditions set out overleaf, any dispute or difference arising between the parties to this Contract as to the meaning of the Contract or any matter or thing arising out of or connected with this Contract shall, at Buyer’s option and at any time after the dispute or difference has arisen, be determined either-

17(1)1. By the High Court of Justice in England; or

17(1)2. By reference to arbitration in accordance with Clause 17(2) hereof.”

¹³⁷ *Jindal Exports Ltd v. Fuerst Day Lawson Ltd.*, 2009 SCC Online Del 4061.

Conclusion and analysis

The courts in England and Singapore have been leaning towards adopting a pragmatic approach while interpreting unilateral arbitration clauses and unilateral dispute resolution clause. In the Indian context, when unilateral arbitration clauses have been tested before the courts, while the Calcutta High Court, the Madras High Court, and the Delhi High Court in *Bharat Engineering* have upheld their validity, the Delhi High Court has rendered the same otiose in some of its decisions. Therefore, the High Courts in India have taken different views on a similar issue. It remains to be seen whether the findings of the division bench of the Delhi High Court in *Bharat Engineering* will flow through when the issue eventually arises for determination before the Supreme Court.

In keeping with the view of the Delhi High Court in *Bharat Engineering*, we agree that *“The cause of the confusion, as always, is the failure to clearly distinguish between a contract of option and an arbitration agreement”*.

It may be noteworthy to add here that the Supreme Court in *Wellington Associates Ltd.*¹³⁸ while striking down a dispute resolution clause¹³⁹ did observe as under: *“It was pointed out that in some cases, the word ‘may’ was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the Calcutta case on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration was mandatory, once option was exercised. In England too such a view was expressed in Pittalis and Sheriffenttin [1986 (1) QB 868]. In the present case, we are not concerned with a clause which used the word ‘may’ while giving option to one party to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.”*

Clearly, the Supreme Court seemed inclined to uphold arbitration clauses where option is given to one party to seek arbitration. However, it remains to be seen whether the Supreme Court will identify that the unilateral right to make reference to arbitration in an arbitration clause flows from the advance consent at the time of entering into the contract, as held by the Calcutta High Court, or whether it will hold otherwise. Till then, when the issue of the validity of unilateral arbitration clauses and unilateral dispute resolution clauses respectively arises for further consideration before different courts in India, it may set the stage for further confusion in view of the varied line of reasoning followed by the different High Courts.

¹³⁸ *Wellington Associates Ltd. v. Kirit Mehta*, (2000) 4 SCC 272

¹³⁹ *“Clause 4: It is hereby agreed that, if any dispute arise in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.*

Clause 5: It is also agreed by and between the parties that any dispute or differences arising in connection with these presents may be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.”



04

IMPLEADMENT OF NON-SIGNATORIES IN ARBITRATION

Overview

Fundamentally, an arbitration agreement will only bind the signatory parties. However, there have been several situations under the Indian jurisprudence, where applicability of arbitration agreements has been extended to non-signatories as well and on certain occasions has been refused, owing, perhaps, to party autonomy. An important issue worldwide, in this chapter we study the Indian decisions, as well as certain international decisions on the subject, that have most certainly aided the jurisprudence on this issue across jurisdictions.

Introduction

An arbitration agreement between two consenting parties is the cornerstone of any arbitration proceeding. Section 7 of the Arbitration and Conciliation Act, 1996 (**1996 Act**) provides that an arbitration agreement is an agreement by the parties to submit disputes between them to arbitration, and such agreement must be in writing. The term ‘parties’ must be understood through section 2(h), which specifically defines a “party” as being a party to the arbitration agreement.

However, not all commercial transactions are as cut and dry. It is not uncommon to see the existence of both – parties to a contract and non-parties thereto – in commercial transactions. This can be best understood by referring to such actors in a commercial arrangement as ‘signatories to the contract’ and ‘non-signatories’. Though intrinsic to the transaction, the non-signatories are not party to the primary contract containing the arbitration agreement, albeit they may be party to an ancillary contract. *Prima facie*, the obvious fallout of such scenario is that when a dispute arises the party wronged has no recourse against the non-signatory through the mode of arbitration. Proceeding against the non-signatory in the appropriate court of law is the only available avenue. This is, evidently, not an ideal scenario as it may cause unnecessary delay in proceedings, lead to multiplicity of proceedings and last but not the least may lead to divergent views on the same transaction.

It is in this context that this chapter will explore the following interactions between arbitration and non-signatories:

- Whether a non-signatory can invoke arbitration proceedings
- Whether a non-signatory can be made party to arbitration proceedings
- Whether an arbitral award can be enforced against a non-signatory

Whether a non-signatory can invoke arbitration proceedings

The 1996 Act as it stood prior to the introduction of the Arbitration and Conciliation (Amendment) Act, 2015 (**Amendment Act**) was very clear inasmuch as only parties to the arbitration agreement could invoke arbitration. This changed significantly under the Amendment Act. Section 8(1)¹⁴⁰ was substituted to provide that when a dispute, subject to an arbitration agreement, is brought before a judicial authority, a party to the arbitration agreement or any person claiming through or under him may apply for disputes to be referred to arbitration.

The amended Section 8(1), therefore, allows non-signatories to an arbitration agreement to apply to a court to refer the matter to arbitration, in cases where the interest of such non-signatories is involved.

The change was necessitated to mirror the provisions of Section 45 of the 1996 Act. An interesting question that arises is with reference to the meaning to be assigned to the words “**any person claiming through or under him**”. Is it all encompassing and, therefore, also allows a third party, merely on account of being a beneficiary, to stake its claim in a dispute? Bearing in mind the fact that recourse to arbitration is purely based on a written agreement between parties it is arguable that the latter position is not true. This is also borne out by decisions of the Supreme Court which have been dealt

¹⁴⁰ Section 8(1), 1996 Act – “A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.”

with at appropriate places in this chapter. As explained in detail hereinafter, the amended provisions will be applicable to rope in non-signatories, provided parties are able to demonstrate mutual intention to bind signatories and non-signatories alike, a commonality of purpose, and the obligations and performance of the terms of contracts are exhibited to be inter-connected.

It remains a mystery if a non-signatory can invoke arbitration with the help of courts under Section 11(6) of the 1996 Act, as no equivalent amendment to this effect is found in Section 11. What seems as a perceptible answer to this dilemma is that if not allowed, this would lead to an anomalous situation where non-signatory is allowed recourse when court proceedings are moved by the opposite party, and not vice-versa. These are issues surely to crop up in appropriate matters and remain to be decided.

Whether a non-signatory can be made party to arbitration proceedings

'Group of companies' doctrine

One of the earliest judicial recognitions for allowing a non-signatory third party to be impleaded into arbitration proceedings came in the Supreme Court's seminal judgment in *Chloro Controls*¹⁴¹. The Supreme Court endorsed the 'group of companies' doctrine, and explained it thus: where an arbitration agreement has been entered into by one company, which forms part of a larger group of companies, it would be possible to bind its non-signatory sister companies if it could be demonstrated that there was a clear, mutual intention of the parties to bind the signatories as well as the non-signatory affiliates. This principle finds its roots in the 'group of companies' doctrine as espoused in *Dow Chemical Company v. ISOVER Saint Gobain*¹⁴², an award under ICC Rules, which was upheld by the Paris Court of Appeal. What needs to be borne in mind is that mere corporate ties within a group is not enough to rope in a non-signatory. Mutuality of intention, the manner of performance of the contract in question and the role of the non-signatory in such performance will form the backbone of any such exercise.

Utilization of the doctrine to secure assets of non-signatory

This doctrine also found application in the context of 'interim protection' under section 9 of the 1996 Act, through the Bombay High Court's judgment in *Rakesh S. Kathotia*¹⁴³, wherein a Joint Venture Agreement (JVA) had been entered into between the Subhkam Group¹⁴⁴ and the Vaghani Group¹⁴⁵. Subhkam Group filed a petition under section 9 of the 1996 Act before the Bombay High Court, which was dismissed on the ground that there was no specific 'identity' of the parties to the JVA or against whom the interim measures had been sought. However, in appeal, the Division Bench of the Bombay High Court held that the JVA had been executed between the Subhkam Group and Vaghani Group as defined therein, and the specific terminology used in a commercial document could not be ignored.

¹⁴¹ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁴² ICC Interim Award dated 23 September 1982, 1984 Rev. Arb. 137.

¹⁴³ *Rakesh S. Kathotia and Anr. v. Milton Global Ltd. and Ors.*, 2014 SCC Online Bom 1119.

¹⁴⁴ Defined in the JVA as "Mr. Rakesh S. Kathotia and such other entities controlled by him or his immediate relatives or his group companies directly or indirectly"; see paragraph 10 of the judgment.

¹⁴⁵ Defined in the JVA as "Milton Plastics Limited, Mr. Dineshkumar Ishwarlal Vaghani, Mr. Kanaiyalal Ishwarlal Vaghani, Mr. Chirnajiv Ishwarlal Vaghani, Mr. Nilesh Ishwarlal Vaghani and Mr Madhup Bansilal Vaghani and their immediate relatives taken together and such other entities controlled by them or their immediate relatives directly or indirectly."; see paragraph 10 of the judgment.

Thus, honouring the underlying intention of the parties, the Bombay High Court held that non-signatory group companies would also be bound by the JVA.

Piercing the corporate veil / Alter-ego

Although the Supreme Court in its *Chloro Controls*¹⁴⁶ judgment laid emphasis on the 'group of companies' doctrine based on implied consent and good faith, it simultaneously noted that it may be possible to subject third parties to an arbitration without any prior consent, and held as under:

*"A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter, and the agreement between the parties being a composite transaction."*¹⁴⁷ (emphasis supplied)

This would encompass piercing the veil / alter-ego doctrine, agent-principal relations, apparent authority, joint venture relations, succession and estoppel.

Arbitral Tribunal competent to pierce the corporate veil and determine alter-ego

The principle of piercing of veil or alter-ego was also examined in *GMR Energy*¹⁴⁸. This ruling of the Delhi High Court has been discussed in the chapter titled '*Can two Indian parties choose a foreign seat of arbitration?*'¹⁴⁹. For ease of reading, we have highlighted the facts relevant to the issue of impleadment of third parties in an arbitration here:

- GCEL, a group company of the GMR Group, had entered into three EPC agreements with Doosan. GIL, another group company of GMR Group, had entered into a corporate guarantee with Doosan. GMR Energy, a third group company of the GMR Group, had also entered into two MOUs with Doosan. While the three EPC agreements and the corporate guarantee contained arbitration clauses, the MOUs did not.
- When disputes arose between the GMR companies and Doosan, the latter invoked arbitration against all three group companies, before SIAC. Despite GMR Energy's protestations to being arrayed as a party, Singapore International Arbitration Center (**SIAC**) indicated it would be proceeding to appoint an arbitrator on behalf of GMR Energy.
- GMR Energy filed a suit before the Delhi High Court, seeking an injunction preventing it from being joined as a party to the arbitration. Doosan pleaded that GMR Energy was liable due to the two MoUs, common family governance, transfer of shareholding and as GMR Energy was the alter ego of GCEL and GIL.

The Delhi High Court observed that:

- GCEL was a joint venture of the GMR Group;

¹⁴⁶ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁴⁷ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641, at paragraph 73.

¹⁴⁸ *GMR Energy Limited v. Doosan Power Systems India Private Limited*, 2017 SCC Online Del 11625.

¹⁴⁹ Chapter II

- The group companies did not observe separate corporate formalities and comingled corporate funds; and
- By virtue of the two MoUs, GMR undertook to discharge liabilities, and also made part payment towards GCEL's liability.

Therefore, in the Delhi High Court's opinion, Doosan had made out a case for joining GMR Energy to the arbitration proceedings, but it was left to the arbitral tribunal to decide, on merits, whether GMR Energy was indeed the alter ego of GCEL and GIL. To this end, reliance was placed upon *Chloro Controls*¹⁵⁰ where the Supreme Court stated that determination of the nature of parties to the arbitration agreement would be different from ascertaining existence of a valid arbitration agreement, and the former would require going into the merits of the case.

Inter-connected contracts forming part of same commercial transaction

In *Ameet Lalchand*¹⁵¹, various agreements had been entered into between four parties (with two of them being sister concerns). When disputes arose between the parties, parties to all agreements were sought to be arrayed in arbitration proceedings. The defence taken up by the sister companies was that the primary agreement did not contain an arbitration clause, therefore the disputes could not be referred to arbitration. The Supreme Court held that though there were different agreements involving several parties, it was for a single commercial project. The commercial understanding had been effected through several agreements, which were integrally inter-connected. Having held thus, the Supreme Court, following its decision in *Chloro Controls*¹⁵², referred the parties to a composite arbitration.

While the *Chloro Controls*¹⁵³ decision had been passed in the context of a foreign-seated arbitration, the Supreme Court through its judgment in *Ameet Lalchand*¹⁵⁴ has unequivocally extended the applicability of the *Chloro Controls* principles to domestic arbitrations.

Enforcing an arbitral award against a third party

Can a party, who was neither party to the arbitration agreement nor to the arbitration proceedings, be bound by the award passed in such proceedings?

This was the unusual question which arose for the Supreme Court's consideration in *Cheran Properties*¹⁵⁵.

In this case, the Respondent (**KSL**) had received an arbitral award (**Award**) in its favour, which it sought to enforce against the Appellant (**Cheran**), which was neither a signatory to the agreement containing the arbitration clause (**Agreement**) nor a party to the arbitral proceedings. The National Company Law Tribunal (**NLCT**) and the National Company Law Appellate Tribunal (**NCLAT**) both rejected Cheran's contention that it was not bound by the Award as it was not a signatory to the Agreement. Thus, it filed the present appeal before the Supreme Court.

¹⁵⁰ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁵¹ *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr.*, 2018 SCC Online SC 487.

¹⁵² *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁵³ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁵⁴ *Ameet Lalchand Shah and Ors. v. Rishabh Enterprises and Anr.*, 2018 SCC Online SC 487.

¹⁵⁵ *Cheran Properties Limited v. Kasturi and Sons Limited and Ors.*, 2018 SCC Online SC 431.

The Supreme Court once again relied on its decision in *Chloro Controls*¹⁵⁶, explicitly averring to the “group of companies” doctrine discussed therein. The court stated that the law has evolved to recognise that modern business transactions are increasingly carried out through multiple agreements, and there may be intrinsically related transactions within a corporate group. In the matter at hand before it, the Supreme Court found that circumstances demonstrated the mutual intention of parties to bind both signatories and non-signatories.

The Supreme Court also relied on section 35 of the 1996 Act, which provides that an arbitral award “shall be final and binding on the parties and the persons claiming under them respectively”. It was noted that the authorised signatory of Cheran had made references to the Agreement and had directed KSL to transfer certain shares to some nominees in furtherance of the same. The Agreement had itself provided that the shares could be transferred to the nominees only on the express condition that such nominees would abide by the terms of the Agreement. Thus, Cheran was deemed to have clear knowledge and intention that it would be bound by the terms of the Agreement.

Foreign jurisprudence on impleadment of non-signatories



France

The Dow Chemical case

As touched upon hereinabove, the ‘group of companies’ doctrine owes its prominence to *Dow Chemical France, The Dow Chemical Company and others v. Isover Saint Gobain*¹⁵⁷. The award was delivered by a three-member tribunal constituted under the ICC Rules (**Arbitral Tribunal**) in an arbitration seated in Paris. The award was subsequently upheld by the Paris Court of Appeal.

This case involved two connected contracts, one being executed between Dow Chemical Europe SA (**Dow Europe**) and Isover-Saint-Gobain (**Isover**), and the other between Dow Chemical AG (**Dow AG**) and Isover. The contracts were for distribution services of the Dow Chemical Company’s (**Dow**) products, and provided that the delivery could be carried out by Dow Chemical France SA (**Dow France**) or Dow or any of its wholly owned subsidiaries.

When disputes arose, following the termination of the contracts, arbitration proceedings against Isover were initiated by the four Dow Group companies abovenamed, under the ICC Rules in an arbitration seated in Paris. Isover challenged the maintainability of the arbitration proceedings initiated by Dow and Dow France, who were not signatories to either of the contracts, which contained the arbitration clause.

Deciding an application for an interim award, the Arbitral Tribunal examined the intention of the parties from the execution, performance and termination of the contracts. It found that Dow France had been heavily involved in all three aspects of the contract, and therefore it reflected an intention to be a party to the contracts, and consequently to the arbitration agreement. Similar reasoning was applied to Dow, and it too was found to be a party to the arbitration agreement.

¹⁵⁶ *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors.*, (2013) 1 SCC 641.

¹⁵⁷ ICC Interim Award dated 23 September 1982, 1984 Rev. Arb. 137.

The Arbitral Tribunal also considered the customs of international trade to find that despite the existence of distinct legal identities of each of the companies, the 'group of companies' could also be considered as having a single "economic reality". Thus, entering into a contract by a group company could be binding on other group companies considering the role played by them in conclusion, performance or termination of the contract.

Isover challenged the interim award before the Paris Court of Appeal¹⁵⁸, which upheld the award based on the same principles relied upon by the Arbitral Tribunal.

Dallah Real Estate case

Another prominent example of French courts holding non-signatories bound by arbitration agreements, is found in the decision of the Paris Court of Appeal in *Dallah Real Estate*¹⁵⁹.

Dallah Real Estate and Tourism Holding Co. (**Dallah**) was a Saudi company. The Government of Pakistan, through its Ministry of Religious Affairs, undertook negotiations with Dallah for building and providing accommodation facilities for pilgrims travelling to Mecca. Dallah purchased substantial lands in Mecca in furtherance of the project. Dallah entered into a contract for the project with the Awami Hajj Trust, a body which the Government of Pakistan had established as a vehicle to undertake the project, by way of an Ordinance. However, soon after the execution of the contract, the Ordinance was allowed to lapse, and the Awami Hajj Trust ceased to exist.

When disputes arose on account of change in the Government, Dallah initiated arbitration against the Ministry of Religious Affairs of the Government of Pakistan, under ICC Rules. The Government of Pakistan contested the tribunal's jurisdiction on the ground that it was not party to the contract, nor had it consented to the arbitration agreement.

The tribunal observed that, in accordance with the French law prevailing at the time, in international commercial arbitrations the arbitration clause could also be binding on "*parties that did not actually sign the contract but were directly involved in the negotiation and performance of such contract...*"¹⁶⁰. On this basis, the tribunal concluded that the Government of Pakistan's involvement demonstrated that it had been a party to the contract with Dallah.

When the Government of Pakistan appealed against the award before the Paris Court of Appeal, the court refused to set aside the award.¹⁶¹ The Paris Court of Appeal gave recognition to the fact that the Government of Pakistan had been exclusively negotiating the terms of the contract with Dallah, right up to the day preceding the execution of the contract. Moreover, certain communications addressed by the Ministry of Religious Affairs to Dallah during the period of the contract as well as for termination, demonstrated that the Government of Pakistan was acting in a capacity akin to a party to the contract.

¹⁵⁸ *Société Isover-Saint-Gobain v. Sociétés Dow Chemical France*, 1984 Rev. Arb. 98.

¹⁵⁹ *Ministry of Religious Affairs, Government of Pakistan v. Dallah Real Estate and Tourism Holding Company*, Paris Court of Appeal, 17 February 2011, RG 09/28533.

¹⁶⁰ 2010 UKSC 46, at paragraph 36.

¹⁶¹ *Ministry of Religious Affairs, Government of Pakistan v. Dallah Real Estate and Tourism Holding Company*, Paris Court of Appeal, 17 February 2011, RG 09/28533.



England

Intriguingly, in execution proceedings for the arbitral award passed in the *Dallah Real Estate* case discussed above, the English courts also applied French law but reached a diametrically opposite conclusion to that of the Paris Court of Appeal.

Ultimately, the Supreme Court of the UK, in its judgment in *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*¹⁶², held that the Government of Pakistan had, in fact, demonstrated an explicit intention not to be bound by the contract. This was based on the reasoning that the Government of Pakistan specifically did not name itself as a party to the contract. The exclusivity of negotiations between Dallah and the Government of Pakistan was explained as being a natural consequence of the fact that the Awami Hajj Trust had not been in existence at the given time.

The Supreme Court of the UK found that the Government of Pakistan succeeded in showing that it was not party to the arbitration agreement, and therefore there could be no grounds for enforcing the award against it.



United States of America

The jurisprudence on impleadment of non-signatories into arbitrations in the US demonstrates an interesting parallel to India's position. The US courts have allowed for non-signatory third parties to be impleaded based on the following doctrines:

- Assumption and waiver
- Agency
- Alter ego
- Equitable estoppel
- Third party beneficiaries

Incorporation by Assumption and Waiver

This theory is based on the principle of implied consent, which may be demonstrated through the conduct of a party.¹⁶³ In *Data-Stream*¹⁶⁴, the non-signatory parent company of a signatory to arbitration agreement played a significant role in that arbitration. Indeed, the parent company even submitted claims based on the relevant contract. Such actions were held to constitute a waiver of that non-signatory's right to demand that it should not be a party to the arbitration.

¹⁶² 2010 UKSC 46.

¹⁶³ Steven L. Smith, Marcus Quintanilla, 'Chapter 9: Enforcing Agreements to Arbitrate', in Laurence Shore, Tai-Heng Cheng (eds), *INTERNATIONAL ARBITRATION IN THE UNITED STATES*, (Kluwer Law International 2017) 205, 206.

¹⁶⁴ *Data-Stream AS/RS Technologies LLC v. China International Marine Containers Inc.* 2003 WL 22519456, at *3 (S.D.N.Y. Nov. 6, 2003).

Contracts of Agency

The relationship between a non-signatory and one of the parties to an arbitration may be relevant in determining whether the former can also be bound to the arbitration (or can compel the same). One such relationship is that of agency.

A non-signatory agent can be compelled to arbitrate based on the requesting party's agreement with the non-signatory's principal. Allowing the agents to avoid arbitration because they are non-signatories to the agreement would frustrate the purpose of the Federal Arbitration Act of the United States.¹⁶⁵

However, the alternative is not always true – a non-signatory party cannot usually be compelled to arbitrate by an agent based on an agreement the non-signatory may have had with the principal.¹⁶⁶ While agents were granted this power in the case of *Pritzker*¹⁶⁷, they were denied the same in *Westmoreland*¹⁶⁸, as “an overt indication that the parties intended to commit claims against the agent ‘as an individual’ is required in order to permit a non-signatory agent of a signatory to invoke an arbitration clause”.

Alter Ego doctrine

The second relationship to consider is that of a parent and subsidiary company, in a situation where they are sufficiently close to justify a piercing of the corporate veil¹⁶⁹, and requiring one party to be legally accountable for the actions of the other.¹⁷⁰ A non-comprehensive list of factors to consider for the application of the alter ego principle was provided in *Jon-T Chemicals*¹⁷¹ – such as common stock ownership and directors, and a lack of distinction between the daily operations of both corporations.

Incorporation by way of Equitable Estoppel

In the context of arbitration, the principle of estoppel has been applied so as to prevent parties from making claims based on a contract, while also seeking to avoid undertaking the burden of such contract (namely, the requirement to arbitrate).¹⁷² The application of the theory by a non-signatory has been traditionally observed in two circumstances, as was explained by the Eleventh Circuit in the case of *MS Dealer*¹⁷³ – first, when “the signatory to a written agreement must rely on the terms of the agreement in asserting her claims”, and second, when “the signatory alleges substantially interdependent and concerted misconduct between both the non-signatory and another of the signatories”.

¹⁶⁵ Donald R. Philbin, Jr., Audrey Lynn Maness, *Litigating Arbitration: A 2007 Texas Arbitration Review*, 60 BAYLOR L.R. 2 (2008), quoting *In re Vesta Group Inc.*, 192 S.W.3d 759, 761 (Tex. 2006).

¹⁶⁶ *Westmoreland v. Sadoux*, 299 F.3d 462, 466 (5th Cir. 2002).

¹⁶⁷ *Pritzker v. Merrill Lynch* 7 F.3d 1110 (1993).

¹⁶⁸ *Westmoreland v. Sadoux*, 299 F.3d 462, 466 (5th Cir. 2002).

¹⁶⁹ A level of strictness has been observed in the decisions of courts to pierce the corporate veil to compel arbitration against third parties. In *InterGen, N.V.*, the First Circuit held that a corporate overlap (including the performance of dual corporate functions by certain individuals) was insufficient to demonstrate a lack of separateness between the two companies, especially when the subsidiaries in question proved that the management functions performed by employees of the parent were under specific contractual arrangements.

¹⁷⁰ *Thomson-CSF, S.A. v. American Arbitration Association* 64 F.3d 773 (2nd Cir. 1995).

¹⁷¹ *United States of America v. Jon-T Chemicals, Inc.* 768 F.2d 686 (5th Cir 1985).

¹⁷² *R.J. Griffin & Co. v. Beach Club II Homeowners Association*, 384 F.3d 157, 160–61 (4th Cir. 2004).

¹⁷³ *MS Dealer v. Franklin*, 177 F.3d (May 28, 1999).

Arbitration Involving Third-Party Beneficiaries

It is possible for parties to a contract to decide that some third party will also receive certain rights under that contract. In such a situation, the third party is not automatically compelled to arbitrate by virtue of possessing those contractual benefits. However, in the event that the third party seeks to enforce any rights under the contract, and such contract includes an arbitration clause, such clause will bind the third party beneficiary.¹⁷⁴

In *JP Morgan Chase*¹⁷⁵, a nursing home resident was receiving services on the basis of an admission agreement signed by the resident's mother. Despite the contract being signed by the mother, there was a clear intention for the resident to be the beneficiary of the contract and was thus bound by the arbitration clause contained therein.

Conclusion

It is notable that though the arbitration laws in most countries are derived from the same international conventions, the application of those laws takes a certain distinctive colour in each country, based on its other laws and principles. As can be observed, Indian courts have been very open to adopting principles from other jurisdictions, scholarly writings, and opinions of jurists, which would best serve the ends of justice. Given the existing position of the law in India, parties can be rest assured that their contractual rights and rights devolved through arbitration agreements will be sufficiently safeguarded in India, as the courts will seek to effectuate a sense of business efficacy, and avoid frustration of such rights through mere technical impediments.

¹⁷⁴ *E.I. DuPont de Nemours v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187 (3rd Cir. 2001).

¹⁷⁵ *JP Morgan Chase & Co. v. Conegie Ex Rel. Lee*, 492 F.3d 596 (5th Cir. 2007).



05

THIRD PARTY LITIGATION FUNDING: A NEW DAWN

Overview

Arguably, third party funding has caused much hysteria among dispute resolution lawyers in India. While the same has stemmed from a remark in a recent Supreme Court decision and the funding of arbitrations being pursued by an infrastructure company, the debate is anything but new. Under this chapter, we have considered the future of TPLF in India and the need for legislative regulation in this regard such that it may be embraced without apprehension.

Introduction

Recently, in *A.K. Balaji*¹⁷⁶ the Supreme Court stated as under:

“35. In India, funding of litigation by advocates is not explicitly prohibited, but a conjoint reading of Rule 18 (fomenting litigation), Rule 20 (contingency fees), Rule 21 (share or interest in an actionable claim) and Rule 22 (participating in bids in execution, etc.) would strongly suggest that advocates in India cannot fund litigation on behalf of their clients. There appears to be no restriction on third parties (non-lawyers) funding the litigation and getting repaid after the outcome of the litigation...”

Although, we too shall indulge in the discussion that will inevitably ensue, we must alert the reader that this paragraph does not seem to be an expression of the opinion of the Supreme Court. Instead, it appears to be a reproduction of the arguments of one of the counsels who was highlighting the dissimilarities between the regulation of the legal profession in India as opposed to other jurisdictions. This paragraph has thus, unwittingly, re-ignited the debate on whether third-party litigation funding (TPLF) is permissible in India.

Third-party litigation funding: History

Third-party Litigation Funding or TPLF, as the term suggests, is the financing extended by a non-disputant to a disputant such that the disputant can litigate without having to pay for the whole or part of the costs of such litigation. Such third person, who is not a party to the dispute, in consideration for providing funding, acquires a share in the proceeds, if any, awarded to the disputant.

TPLF is not new. Its ancestry can be traced as far back as the Athenians and Romans, where if one habitually stirred up quarrels, one was honored with the epithet of a *sycophant*. This transformed into the medieval concept of maintenance which was considered an offence under common law as it was intermeddling in a suit in which the person has no interest.¹⁷⁷ An extension thereof, champerty, was considered to be an offence of greater atrocity, being a bargain to divide the land or other subject in dispute, on the condition of the dispute being carried on at the champertor's expense.¹⁷⁸ The treatment of the same as an offence stemmed from the concern that if such disputes were permitted to be funded by wealthy barons, who could with impunity push their ways through the corridors of justice, they could pave the way for voluminous frivolous litigation. Another connected concept is that of barratry which, simply put, is a serial maintaining of suits; in the event such serial maintainer is a lawyer, he is often termed, pejoratively, an 'ambulance chaser'. Champerty, maintenance and barratry were declared to be offences in England in 1275.¹⁷⁹ However, with time, maintenance and champerty drew criticism as the judiciary gained credibility as to its independence and its inherent powers to administer justice.

In the words of Bentham¹⁸⁰,

¹⁷⁶ *Bar Council of India v. A.K. Balaji and Ors.*, (2018) 5 SCC 379.

¹⁷⁷ BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND: BOOK 4 – PUBLIC WRONGS, at 134.

¹⁷⁸ BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND: BOOK 4 – PUBLIC WRONGS, at 135.

¹⁷⁹ Statute of Westminster (1275) (3 Edw. I, C 25, 28 and 33).

¹⁸⁰ J. Bentham, 'A Defence of Usury, Letter XII, Maintenance and Champerty', 3(1) THE WORKS OF JEREMY BENTHAM (Bowring ed., 1843) available at <https://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-3>

“A mischief, in those times it seems but too common, though a mischief not to be cured by such laws, was, that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands.”

Types of third-party litigation funding

Public Interest Litigation / Legal aid

In plain sight, but away from the blinkered understanding of TPLF, is the concept of Public Interest Litigation. The force behind such litigation may be a person or an organization that is attempting to vindicate the infringed rights of a set of impecunious litigants. While this may fall within the parameters of maintenance, it is judicially sanctioned, being a philanthropic service aimed to protect and deliver prompt social justice. Furthermore, it finds widespread public acceptance, being a not-for-profit enterprise. Nonetheless, courts do not permit frivolous litigations for pecuniary gains. Even legal aid *prima facie* falls afoul of the literal interpretation of maintenance, and yet it finds judicial¹⁸¹ and legislative approval¹⁸².

Conditional fee agreements

In these agreements, the advocate charges a standard fee during the course of the proceedings. If the result is favorable to the client, the advocate can charge a multiple of this standard fee. Strictly speaking, this model may be partly champertous as the lawyer may get paid for his services in part, but a balance of his payment is dependent upon / deferred pending the outcome of the case.

Damages based agreements / contingency fee agreements

These agreements tie the lawyer's fees to the sum receivable by his client which in turn is dependent upon the outcome of the litigation. Here, the advocate bears the risk of remaining unpaid in exchange for a percentage of the sums, if any, received by his client from the other party. Damages-based arrangements can be said to be directly champertous, as they involve the purchase of an interest in the outcome of the case and are profit driven.

Insurance

In several jurisdictions, insurance covers are provided to litigants to cover the costs incurred by them and/or the costs payable if the litigation is unsuccessful. After-the-Event insurance typically involves the insurer entering into some form of a damages-based agreement in order to recoup the premium, while taking on the risk of being out of pocket if the outcome is unsuccessful. While this can be said to be champertous, it finds judicial and legislative endorsement even in jurisdictions such as Ireland, where champerty is an offence.

¹⁸¹ *Alabaster v. Harness*, [1895] 1 QB 339 at 343; “Maintenance is permissible if given by a man on behalf of a poor man, who but for the aid of his rich helper could not assert his rights or would be oppressed and overborne in his endeavour to maintain them”.

¹⁸² The Legal Services Authorities Act, 1987.

Traditional third-party litigation funding

Traditional TPLF involves an impecunious litigant or one who does not wish to pay for the litigation, the lawyers, and a third-party funder that has no relation or connection with the dispute or the litigant. Here, the third party finances the costs of the litigation and, in consideration thereof, takes a measure of the winnings. This is plainly champertous, and may even envisage a large amount of control by the funder over the litigation. However, this enables otherwise disadvantaged persons to litigate their claims, and falls within the parameters of access to justice.

Third-party litigation funding across jurisdictions



England

It was not until 1967, through section 13 of the Criminal Law Act enacted that year, that English law finally abolished maintenance and champerty as offences. However, under English law, TPLF still needs to cross the threshold of public policy requirements.¹⁸³ Thus, funding arrangements that tend to 'undermine the ends of justice'¹⁸⁴ may be hit by maintenance and champerty. Following the judgments in *Arkin*¹⁸⁵, *Essar Oilfields*¹⁸⁶, and *Excalibur Ventures*¹⁸⁷, TPLF has received judicial sanction but to a circumscribed extent. Furthermore, the Court and Legal Services Act, 1990 permits conditional fee agreements¹⁸⁸ to be entered into between advocates and their clients, including a success fee capped, in certain class of cases, at 100% of the normal fees payable.¹⁸⁹ Damages based agreements are also recognised¹⁹⁰ with a cap of 50% of the sums ultimately recovered by the client.¹⁹¹ Although third-party litigation funding is recognised¹⁹², it is not yet fully regulated.



Ireland

The Irish have not chosen to follow their neighbors in embracing maintenance and champerty, which are still considered unlawful under their Statute of Conspiracy (Maintenance and Champerty). In *Persona Digital*¹⁹³ the Irish Supreme Court declared TPLF, by an entity having no independent interest in the underlying proceedings, illegal. However, the court has subsequently¹⁹⁴ urged the legislature to

¹⁸³ Section 14(2), Criminal Law Act, 1967.

¹⁸⁴ *R (on the application of Factortame and others) v. Secretary of State for Transport, Environment and the Regions*, [2002] EWCA Civ 932.

¹⁸⁵ *Arkin v. Borchard Lines Ltd & Ors.*, [2005] EWCA Civ 655.

¹⁸⁶ *Essar Oilfields Services Limited v. Norscott Rig Management*, [2016] EWHC 2361 (Comm).

¹⁸⁷ *Excalibur Ventures LLC v. Texas Keystone Inc & Ors.*, [2016] EWCA Civ 1144.

¹⁸⁸ Section 58, The Court and Legal Services Act, 1990.

¹⁸⁹ The Conditional Fee Agreements Order, 2013.

¹⁹⁰ Section 58AA, The Conditional Fee Agreements Order, 2013.

¹⁹¹ The Damages-Based Agreements Regulations, 2013.

¹⁹² Section 58B, The Court and Legal Services Act, 1990.

¹⁹³ *Persona Digital Telephone Ltd. and Sigma Wireless Networks Ltd. v. The Minister of Public Enterprise & Ors.*, [2017] IESC 27.

¹⁹⁴ *SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd & Ors.*, [2018] IESC 44.

reconsider the law to improve access to justice. Furthermore, 'After-the-Event' insurance has gained acceptance in *Greenclean*¹⁹⁵.



France

The French law does not *per se* bar payment of legal fees by a third party¹⁹⁶. Also, the equivalent rules of conduct for legal practitioners provide that a French attorney may accept funds from the agent of his client. However, settling a fee that would solely depend on the result of the case, is prohibited. Barring these few aspects, the French do not currently have any regulation permitting or disallowing TPLF.



New Zealand

In New Zealand, maintenance and champerty are considered to be torts. However, courts have become more permissive towards TPLF¹⁹⁷. Yet, the funding may be disallowed, if it can be shown that the claim is made to deceive the court or is fictitious, or if there is misuse of the court process towards an ulterior motive, or if the claim is vexatious, oppressive or groundless. Courts also require disclosure as to the identity of the funder and further mandate his/her amenability to their jurisdiction. Thus, each case of funding is assessed on its unique facts and circumstances. Conditional fee agreements entered into with lawyers are regulated by the Lawyers and Conveyancers Act, 2006.¹⁹⁸



Australia

Australia on the other hand does not, for the most part, treat maintenance and champerty as torts or crimes. Instead, it tests TPLF on the grounds of public policy. While there is no regulation in this regard, TPLF has found acceptance¹⁹⁹ on a widespread basis, with some funders even being listed companies. Lawyers in Australia are also permitted to use conditional billing arrangements. However, lawyers are not permitted to have a significant financial interest in the third-party funder.²⁰⁰

¹⁹⁵ *Greenclean Waste Management Ltd. v. Leahy*, [2014] IEHC 314.

¹⁹⁶ Article 1342-1, French Civil Code.

¹⁹⁷ *Saunders v. Houghton*, [2010] 3 NZLR 331; *Waterhouse v. Contractors Bonding Ltd*, [2014] 1 NZLR 91; *Strathboss Kiwifruit Ltd v. Attorney-General*, [2015] NZHC 1596.

¹⁹⁸ Sections 333 to 336, Lawyers and Conveyancers Act, 2006.

¹⁹⁹ *Campbells Cash and Carry Pty Ltd v. Fostif Pty Limited*, [2006] HCA 41.

²⁰⁰ *Bolitho v. Banksia Securities Ltd.*, [2014] VSC 582



Singapore

Singapore has developed a commercial approach to TPLF.

Champerty and maintenance were not considered as torts or crimes in Singapore.²⁰¹ However, contracts affected by the same continued to be contrary to public policy or otherwise illegal. In 2017, through amendments to the Civil Law Act, 1909, Singapore carved out an exception in this regard with respect to permitted categories, namely international arbitration proceedings, and all court, conciliation, mediation or insolvency proceedings connected therewith. This was a major legislative attempt to enhance Singapore's growing reputation as a preferred seat for international arbitrations. However, disclosure of any funding so obtained for an international arbitration proceeding, is mandatory.²⁰² Notably, Singapore amended the Legal Profession Act, 1967, to permit lawyers to introduce / refer third-party funders to their clients, provided no direct financial benefit is received by way of such introduction / referral. However, lawyers cannot purchase any interest in any suit or determine a fee contingent on success. Furthermore, lawyers cannot directly or indirectly hold any share or other ownership interest in a third-party funder, when the same is introduced / referred by them to their clients or when there exists a contract between the said third-party funder and their client.²⁰³

The position in India



Despite adopting Common Law principles to a large extent, champerty and maintenance in India have surprisingly not found the same treatment as in England.²⁰⁴ However, section 23 of the Indian Contract Act, 1872 (**Contract Act**) provides that the consideration or object of an agreement is unlawful, if:

- *it is forbidden by law; or*
- *it is of such nature that, if permitted, it would defeat the provisions of law; or*
- *is fraudulent; or*
- *involves or implies, injury to the person or property of another; or*
- *the Court regards it as immoral, or opposed to public policy*

²⁰¹ "Third Party Funding – Reinforcing Singapore as a Premier International Dispute Resolution Centre", A note from Indranee Rajah S.C., Senior Minister of State for Law, available at <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Civil%20Law%20Amendment.pdf>

²⁰² Rule 49 A, Legal Profession (Professional Conduct) Rules, 2015.

²⁰³ Rule 49 B, Legal Profession (Professional Conduct) Rules, 2015.

²⁰⁴ *Chedambara Chetty v. Renga Krishna Muthu Vira Purchaiya Naickar*, [1874] 1 Ind. App. 241.

Whether agreement is extortionate and unconscionable

Thus, while agreements which may be champertous are not directly opposed to public policy²⁰⁵, Indian courts have attempted to ascertain whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on for a corrupt or other improper motive.²⁰⁶ When found (i) to be extortionate and unconscionable, so as to be inequitable against the party; or (ii) to be made, not with the bona fide object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects – as for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits – so as to be contrary to public policy²⁰⁷, Indian courts have declined to give effect to such agreements²⁰⁸.

Indian courts, in determining whether the agreement is extortionate and unconscionable, have stated that though it is clearly not conclusive, the proportion to be retained by the claimant is an important factor to be considered when ascertaining the fairness of a bargain made at a time when the litigant is in a disadvantaged position. Indian courts have held that the uncertainties of litigation are proverbial; if the financier risks losing his money, he may well be allowed some chance of exceptional advantage.²⁰⁹ There are also rulings to the effect that upside demanded on a lumpsum basis would not be extortionate and unconscionable²¹⁰, and several cases that have held a return of up to 50% share in suit property valid.²¹¹

Contrastingly, in several cases where a third party sought recovery of sums lent plus interest, and further sought an upside which was disproportionate and hence opposed to public policy²¹², the court

²⁰⁵ *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, [1876] L.R. 2 AC (PC) 186, at 210; “A fair agreement to supply funds to carry on a suit in consideration of having a share of the property; if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of rights and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner”.

²⁰⁶ *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, [1876] L.R. 2 AC (PC) 186, at 264.

²⁰⁷ *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, [1876] L.R. 2 AC (PC) 186, at 210.

²⁰⁸ See also *Kunwar Ram Lal v. Nil Kanth and Ors.*, [1893] L.R. 20 Ind. App. 112 at 115; *Lal Achal Ram v. Raja Kasin Husain Khan*, (1905) 32 I.A. 113; *Rajah Rai Bhagwat Dayal Singh v. Debi Dayal Sahu*, (1908) 35 IA 48; *Sri Rajah Vatsavaya Ventaka Subhadrayamma Jagapati Bahadur Garu v. Sri Poosapati Venkatapati Raju Garu*, (1924) 26 BomLR 786.

²⁰⁹ *Lala Ram Sarup v. The Court of Wards*, (1940) 42 BomLR 307.

²¹⁰ *Navaneethakrishnaswami Devasthanam v. Rukmani and Co.*, (1955) 2 Mad LJ 339; *Pandurangi Gopalram v. Chidamana Chinnayya*, AIR 1958 AP 630

²¹¹ 33% of net profits of suit in *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, [1876] L.R. 2 AC (PC) 186; 50% of suit property in *Lal Achal Ram v. Raja Kasin Husain Khan*, (1905) 32 I.A. 113; 18.75% of decretal property in *Lala Ram Sarup v. The Court of Wards*, (1940) 42 BomLR 307; 50% of the claim in *Unnao Commercial Bank Ltd. v. Kailash Nath and Ors.*, AIR 1955 All 393; 25% of the suit property in *Marina Viranna v. Valluri Ramanamma*, AIR 1928 Mad 437, upheld in appeal in (1931) 33 BomLR 960 (PC).

²¹² *Raja Mohkam Singh v. Raja Rup Singh*, ILR 15 All 352 (PC) where a quadruple return over investment was found to be unconscionable; 50% of decretal amount sought which equated to a return of 10x was held to be gambling in litigation in *Suganchand And Ors. v. Balchand and Anr.*, AIR 1957 Raj 89; 75% share in the decretal property as consideration was considered not to be a fair and reasonable bargain in *Nuthaki Venkataswami v. Katta Nagireddy and Ors.*, AIR 1962 AP 457; 100% share in the decretal property as consideration was considered not to be a fair and reasonable bargain in *Kamrunnisa v. Pramod Kumar Gupta*, AIR 1997 MP 106; 40% share in the decretal property as consideration was considered not to be a fair and reasonable bargain in *Sri Khaja Moinuddin Khan and Ors. v. S.P. Ranga Rao and Ors.*, AIR 2000 AP 344; See also *Harilal Nathalal Talati v. Bhailal Pranlal Shah*, AIR 1940 Bom 143; See also *Pannalal Gendalal and Anr. v. Thansing Appaji and Anr.*, AIR 1952 Nag

held that the contract was void under section 23 of the Contract Act. However, in spite of this, the court awarded to the financiers, in those cases, all legitimate expenses incurred by them with interest, after refusing to give effect to the agreements²¹³. This was presumably done in consideration of section 65 of the Contract Act, which mandates that any person who has received any advantage under a void contract is bound to restore the same or make compensation for it²¹⁴.

Statutory evidence of permissibility of TPLF

Order XXV of the Code of Civil Procedure, 1908 (CPC) empowers Indian courts to order security for costs. The same has been amended by various states in India such as Maharashtra, Gujarat and Madhya Pradesh. Rule 3 thereof, as inserted by Maharashtra, Gujarat and Madhya Pradesh is titled “Power to implead and demand security from third person financing litigation”. The amendment made by the state of Uttar Pradesh allows the court to demand security where the “plaintiff is being financed by another person”. It is thus evident that there is no outright legislative disapproval of TPLF.

Can advocates in India engage in TPLF?

As far back as 1874, the Calcutta High Court, in *Moung Htoon Oung*²¹⁵, condemned an advocate for having entered into a contract which was contrary to public policy: an agreement to receive professional fees in the form of a fixed share in the subject-matter of the suit. The full bench of the Calcutta High Court in another case²¹⁶, observed that it is professional misconduct for an advocate to agree with his client to accept as his fee a share of the property, fund or other matter in litigation for his services as advocate in such litigation upon the successful issue thereof.

However, the Legal Practitioners (Fees) Act, 1926, through section 3 thereof, provides that any legal practitioner who acts or agrees to act for any person may, by private agreement, settle with such person the terms of his engagement and the fee to be paid for his professional services. Courts have read such contracts to be fettered by public policy constraints as applicable to any ordinary contract. In *R an Advocate*²¹⁷, the advocate agreed to maintain the client and carry on the litigation, and to receive for his fees a certain share in the proceeds of the litigation. The Full Bench of the Madras High Court termed the agreement as ‘No cure, no pay’ and reprimanded the advocate for professional misconduct.

In *K.L. Gauba*²¹⁸ an advocate entered into a damages-based agreement wherein, apart from a fixed sum, he agreed to render legal services in consideration for 50% of the decretal amount. The Bombay High Court held such contract to be void under section 23 of the Contract Act. It suspended the concerned advocate while holding as under:

195, where the financiers being moneylenders and because the value of the property sought as recompense was disproportionately high, the court struck down such transaction.

²¹³ *Pandurangi Gopalam v. Chidamana Chinnayya*, AIR 1958 AP 630; *Kamrunnisa v. Pramod Kumar Gupta*, AIR 1997 MP 106.

²¹⁴ *Suganchand and Ors. v. Balchand and Anr.*, AIR 1957 Raj 89.

²¹⁵ *In the matter of Moung Htoon Oung*, 21 WR 297 (Cal).

²¹⁶ *In the matter of an Advocate*, 4 Cal LJ 259 (D); See also ‘*In the matter of a Pleader of the Chief Court of the Punjab*’, 69 Pun Re 1904 (F); *Ganga Ram v. Devi Das*, 61 Pun Re 1907 (PB) (G); Stipulating ‘Inam’ or success fee amounted to professional misconduct in *Advocate General v. Rustamji B. Sunawalla*, 14 Bom LR 691 (L); and in *Kathu Jairam Gujar v. Vishvanath Ganesh Javadekar*, (1925) 27 Bom LR 682.

²¹⁷ *R an Advocate, In re*, AIR 1939 Mad 772.

²¹⁸ *K.L. Gauba, In re*, 1954 Cri LJ 1954.

“An agreement which makes the payment of lawyer's fees conditional upon the success of the suit and which gives the lawyer an interest in the subject-matter of the suit itself would necessarily tend to undermine the status of the lawyer as a lawyer. It would not be difficult at all to imagine how in such a case a conflict between self-interest and duty would immediately arise. A search for shortcuts to secure the speedy termination of the litigation would in many cases be a necessary consequence of such an agreement. The amount of fees stipulated is in terms of a certain percentage of the realisation from the suit and the longer the litigation is protracted, the more irksome would it be for the lawyer who acts under such an agreement. A desire to compromise the cause may also overtake the lawyer in such cases. Temptation to adopt doubtful or devious means in order to win the case would be difficult to resist, because the lawyer becomes personally interested in the subject-matter of the suit and is no better than the litigant himself. In fact, a lawyer, who is in part a litigant in such cases, ceases to be a lawyer properly so called. A person arguing a case in such circumstances is in many respects a litigant masquerading as a lawyer in professional robes. In our opinion, there is no doubt whatever that such agreements are bound to affect the detachment of the lawyer and to impair his status as an officer of the Court to a very large extent. That is why an agreement between a lawyer and his client which creates in the lawyer a financial interest in the subject-matter of the cause, & that too on a successful determination of the suit, has always been condemned as unworthy of the legal profession.”

The Supreme Court similarly penalized the concerned advocate in “G” A Senior Advocate²¹⁹:

“However much these agreements may be open to other men what we have to decide is whether they are permissible under the rigid rules of conduct enjoyed by the members of a very close professional preserve so that their integrity, dignity and honour may be placed above the breath of scandal. That is part of the price one pays for the privilege of belonging to a kind of close and exclusive “club” and enjoying in it privileges and immunities denied to less fortunate persons who are outside its fold.”

Under the Bar Council of India Rules, 1975 (**BCI Rules**) – Part IV, Chapter II, Standards of Professional Conduct and Etiquette, various rules can be read to disallow lawyers to be part of any form of litigation funding:

- **Rule 9** – An advocate should not act or plead in any matter in which he is himself pecuniarily interested
- **Rule 18** – An advocate shall not, at any time, be a party to fomenting of litigation
- **Rule 19** – An advocate shall not act on the instructions of any person other than his client or his authorised agent
- **Rule 20** – An advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof
- **Rule 21** – An advocate shall not buy or traffic in or stipulate for or agree to receive any share or interest in any actionable claim

²¹⁹ “G” A Senior Advocate, In re, AIR 1954 SC 557.

- **Rule 32** – An advocate shall not lend money to his client for the purpose of any action or legal proceedings in which he is engaged by such client

Recently, in *B. Sunitha*²²⁰, the Supreme Court dismissed a cheque bouncing case filed by an advocate who was seeking to enforce a damages-based agreement for the recovery of 16% of the decretal amount in a motor accident claims case.

However, a recent decision of the Bombay High Court in *Jayaswal*²²¹ has thrown a new angle to this debate. In this case, a law graduate, who was a partner in a law firm, entered into a damages based agreement with a client for consultancy services in relation to arbitration proceedings. It would appear that the concerned individual was not a registered advocate under the Advocates Act, 1961 (**Advocates Act**). The outcome of the arbitration being favorable, the client did not pay the fee, which was expressed in terms of a percentage of the proceeds. The law firm partner succeeded in the lower court for recovery of the said success fee. In appeal before the Nagpur Bench of the Bombay High Court, the client sought to argue that the damages based agreement was void in view of the provisions of the Contract Act, the BCI Rules and the decisions in *"G" A Senior Advocate*²²² and *B. Sunitha*²²³. The law firm partner argued that (i) the contract was not void as champertous agreements were not afoul of section 23 of the Contract Act, (ii) that he was not a registered advocate and thus not barred under the Bar Council of India Rules from entering into a damages based agreement, and (iii) that the ground was only raised in oral arguments for the first time by the appellant. The court held that the law firm partner was only acting as a 'counsel' and did not represent his client as an advocate. Towards this end, the court delved into the definition of counsel, advocate, pleader, vakil, and attorney in legal dictionaries and the provisions of CPC. The court further held that representation before the arbitrator could not be said to be a representation before the court. Considering the *obiter dicta* in *"G" A Senior Advocate*²²⁴, the court held that there was nothing morally wrong, nothing to shock the conscience, nothing against public policy and public morals in a champertous transaction not involving a legal practitioner, and further opined that the fact that the concerned individual was a partner in a law firm was by itself not sufficient to render such an agreement void. It remains to be seen if this tightrope reasoning adopted by the Bombay High Court will find approval if and when brought before the Supreme Court of India.

The case for TPLF in India

It is thus abundantly clear that a member of the legal profession in India, unlike his English brethren, cannot enter into Conditional Fee Arrangements, Damages Based Arrangements, Third Party Litigation Funding Arrangements, or the like.

Examination of the agreements by courts

However, as discussed above, this does not bar persons other than members of the legal profession from entering into such arrangements. As maintenance and champerty are not considered as offences in India, such agreements are valid, albeit they must not be opposed to public policy grounds under

²²⁰ *B. Sunitha v. The State of Telangana and Anr.*, (2018) 1 SCC 638.

²²¹ *Jayaswal Ashoka Infrastructures Pvt. Ltd. v. Pansare Lawad Sallagar*, F.A. No. 106 of 2015, decided on 07 March 2019, Nagpur Bench, Bombay High Court

²²² *"G" A Senior Advocate, In re*, AIR 1954 SC 557.

²²³ *B. Sunitha v. The State of Telangana and Anr.*, (2018) 1 SCC 638.

²²⁴ *"G" A Senior Advocate, In re*, AIR 1954 SC 557.

section 23 of the Contract Act. The courts scrutinize such contracts closely, in order to determine if the same are opposed to public policy and examine if:

- the contracts amount to gambling in litigation; or
- the contracts are aimed at injuring or oppressing others by abetting and encouraging unrighteous suits; or
- the contracts are unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on for a corrupt or other improper motive; or
- the recompense is unconscionable or disproportionate to the expense incurred.

Factors to be considered by third-party funders

While entering into such agreements with a disputant, third party litigation funders may thus need to *inter alia* consider the following:

- Is the service resulting in access to justice of a righteous claim that otherwise would not have been litigated upon?
- Is the claim made to deceive the court; is it fictitious; is there a misuse of the court process for an ulterior motive; or is the claim vexatious, oppressive or groundless?
- Is the disputant being funded under terminable terms?
- The upside and/or the multiple of return over investment must be reasonable and not unconscionable so as to amount to gambling in litigation.
- The extent of control by the financier over the litigation must be minimal.
- The lawyers involved in the litigation must be excluded from such agreements.

Benefits of TPLF

In our opinion, TPLF in the Indian context can yield the following benefits:

- Access to justice;
- Fostering nascent class action claims;
- Reduction in litigation through early settlements or pruning of unmeritorious claims through exhaustive pre-litigation analysis;
- Social welfare.

Overcoming potential concerns

However, there are valid concerns as under:

- Fomenting of unmeritorious litigation may topple an already overburdened judicial system
- Over commercialisation may lead to increase in costs of litigation
- Ethical dilemmas for a dignified profession
- Unregulated funding may lead to racketeering
- The sanctity of the judicial system may be affected by speculative gambling in litigation
- No real access to justice as funding will only be made available to what is 'commercially viable'

To overcome these fears, the government may be well advised to regulate TPLF. Increasingly, we see that there is a need for the same. However, as the industry is in its embryonic stages, it might be judicious to begin with tiny steps. Possibly, the government could think of statutorily permitting and regulating TPLF with respect to arbitrations, and then extend the same, if successful, to litigation before the civil courts in India.

The rationale behind this suggestion begins with the general trepidation that arbitration is an expensive affair, and thus litigation funding would possibly be suited thereto. In *Singh Builders*²²⁵ the Supreme Court observed that it is necessary to find an urgent solution to this problem to save arbitration from the arbitration cost.²²⁶ It also bodes well that the Indian legislature through its recent amendments in 2015 to the Arbitration and Conciliation Act, 1996 (**1996 Act**) has encouraged shorter periods for completion of arbitral proceedings²²⁷ while enhancing costs provisions.²²⁸ This enables third party funders to have reasonable timelines within which the arbitral award will be rendered, and also permits actual costs to be recovered.

However, before the legislature follows the path taken by Singapore, it would be well advised to look at some of the issues that may crop up if third party litigation funding is permitted in arbitrations. These include:

- **Disclosure**

If a party to an arbitration is availing TPLF, the identity of the funder must be disclosed. This is crucial because, while the arbitrator(s) may be independent and impartial towards the parties, there may be conflict of interests with the third-party litigation funder under section 12 of the 1996 Act. Transparency norms are thus suggested in this regard to prevent conflicts of interest, with disclosure to be made at the inception of the proceedings or at the earliest feasible stage.

- **Confidentiality**

There are obvious confidentiality issues with respect to the involvement of a person not being a party to the dispute. It is therefore advisable that any prospective funder be made to sign a Non-Disclosure / Confidentiality Agreement.

- **Extent of Control and Transfer of Mere Right to Sue**

The legislature should also be mindful that the funder does not take over the litigation and step into the shoes of the party to the dispute as the same could amount to a transfer of a mere right to sue which is disallowed under section 6(e) of the Transfer of Property Act, 1882. Furthermore, the funder should not be permitted to conduct the litigation or give directions/commission to the lawyers which would be detrimental to the interests of the party being funded.

- **Costs and Security for Costs**

English courts suggest that the funder should be liable for the defendant's costs, if the claim fails. However, they limit the same to the extent of the funding provided.²²⁹ In our view, the legislature may look beyond such cap that English courts propose, and require the funder to be liable for the whole of the defendant's costs, as this would ensure proper vetting of the prospects of litigation. Although not explicit, section 31A of the amended 1996 Act read with

²²⁵ *Union of India v. Singh Builders Syndicate*, (2009) 4 SCC 523.

²²⁶ See also, *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and Ors.*, (2012) 1 SCC 455.

²²⁷ Section 29A of the 1996 Act.

²²⁸ Section 31A of the 1996 Act.

²²⁹ *Arkin v. Borchard*, [2005] EWCA Civ 655; however, see Stephen Innes, 'Are the Days of the Arkin Cap Numbered?', available at

<http://www.mondaq.com/uk/x/745898/trials+appeals+compensation/Are+The+Days+Of+The+Arkin+Cap+Numbered>

section 9 / section 17 thereof, permits the court / arbitral tribunal to order a party to furnish security for costs. With the involvement of a third-party funder, it is imperative to ascertain whether he can be ordered to furnish such security on behalf of the party that he is funding and to what extent. Guidance in this regard may be taken from the existing amendments made by the states of Maharashtra, Gujarat and Madhya Pradesh to Order XXV of the CPC.

▪ **Public Policy considerations**

Considering that the law in India permits third party funding but is still constrained by the public policy principle, the legislature may, albeit with some difficulty, define the parameters where such funding may not run afoul of section 23 of the Contract Act. The legislature may also lay down norms to prevent such funding from becoming a pure speculative trade.

▪ **Regulating the Third-Party Funder**

The legislature would also be well advised to structure and regulate funders, and address issues such as capital adequacy norms, internal and external governance, audits, risk assessment norms, code of conduct and ethics and the like.

Conclusion

Recently, in relation to stressed assets in the infrastructure sector in India, we have seen several opportunities for TPLF to play a beneficial role. A month ago, Hindustan Construction Co. Ltd. monetized a pool of arbitration claims and awards for an upfront cash payment to permit the company to meet its debt obligations.²³⁰ While it was also reported that Patel Engineering has entered into similar arrangements²³¹, we are informed that the said transaction is not strictly a TPLF arrangement.

As we see it, third party litigation funding has yet to find its feet in India, due to various legislative, judicial, socio-economical and public policy concerns surrounding it. Nonetheless, it is not impermissible, except in so far it involves members of the legal profession. Contrary to popular belief, there is third party litigation funding occurring in India, albeit executed discreetly until now. Legislative regulation in this regard may thus be the awaited dawn, one which pulls the activity from the shadows, and shapes and fashions it into a regulated system for greater access to justice.

²³⁰ "HCC raises Rs. 1,750 crore in litigation funding deal", LIVEMINT (27 March 2019), available at <https://www.livemint.com/companies/news/hcc-raises-rs-1-750-crore-in-litigation-funding-deal-1553651279600.html>.

²³¹ "Infrastructure companies eye litigation funding to settle claims", BUSINESS STANDARD (18 February 2019), available at https://www.business-standard.com/article/companies/infrastructure-companies-eye-litigation-funding-to-settle-claims-119021800035_1.html.



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