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DESIGNING A PARALLEL INVESTMENT DISPUTE SETTLEMENT SYSTEM IN INDIA: INSIGHTS FROM A COMPARITIVE INSTITUTIONAL DESIGN ANALYSIS

By Tushar Behl*

ABSTRACT

The purpose of this article is to discuss, on a preliminary basis, how a strategic, tailor made "dispute systems design" coexisting with other forms of dispute resolution can aid the investment treaty regime in India amidst the backdrop of backlash against bilateral investment treaties and the scepticism towards investor-state dispute settlement.

It is an undisputed reality that Courts in India have been uneasily restraining investment arbitrations through anti-arbitration injunctions, where India is a Respondent and have fundamentally disagreed on the applicability of the Arbitration and Conciliation Act, 1996 to Investment treaty arbitrations. Crucially, India is not a party to the ICSID Convention and consequently not obligated to enforce any investment arbitral award like judgements of its own courts. India has also availed a commercial reservation under Article I (3) of the New York Convention that enables India to restrict its application to only foreign awards considered commercial in nature under Indian law which is likely to exclude investment arbitral awards from its

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scope. Given that some foreign investors have already obtained investment arbitral awards against India, and many others have large pending claims, the likelihood of the Indian Courts to deal with this issue and simultaneously attract foreign investment is extremely high.

This article shall therefore delve into the approach taken by India towards international investment law, the relevant provisions of the Arbitration and Conciliation Act, 1996 and its interpretation by the Indian Judiciary to understand the complications for the enforcement of investment arbitral awards against India. Gaining potential insights from disputes systems design, this article shall finally look for a more balanced legal regime by assessing the under-explored utility of dispute resolution options along the dispute resolution continuum, carry a comparative assessment of design features across different jurisdictions and conclude by suggesting that a greater thought needs to be given to disputes system design to diagnose accurately the needs of India's investment treaty regime and the institutional design features needed to safeguard legal certainty and promoting coherence in investment treaty arbitration.

INTRODUCTION

Over the recent years, the significance of foreign investment and the role of international investment law has experienced a tremendous growth.[1] International investment agreements ("IIAs") in effect have continued to expand, and there has been an absolute burst of foreign investment disputes being resolved through international arbitration.[2] Investor-State Dispute Settlement ("ISDS") has therefore turned out to be an outlining feature of international

[1] Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law 1, 2nd ed. Oxford University Press Inc (2012).
[2] W Michael Reisman, Foreign Investment Disputes 1, James Richard Crawford, et al. (eds), Foreign Investment Disputes: Cases, Materials and Commentary, 2nd ed. Kluwer Law International 2 (2014).

investment law.

The business nature of a foreign investment is like, taking a long-term risk. A foreign investor willing to sink significant resources into a venture at the outset of the investment will also bear the commercial risks integral in probable variations in the market of the project. The potential to earn an equitable return and the ability to shield the corpus of the investment are the most important considerations for a foreign investor and this is where bilateral investment treaties ("BITs") come into picture. The BITs executed by two countries encourage and engage in the reciprocal promotion and protection of investments made by investors of both countries. In essence, BITs substantively and procedurally shield the investments made by foreign investors from exercises of arbitrary state power and regulatory behaviour of the host states and prevent the undue interference with their rights.[3] The widespread "treatification" of investment protection has witnessed over 3,000 BITs and several hundred free trade agreements ("FTAs") that exist globally.[4] Most of these agreements provide a recourse to the ISDS mechanism,[5] which qualifies an injured foreign investor to circumvent local courts and bring a case against the host state for compensation/reparation under the applicable BIT via international arbitration.[6]

Over the recent years, there has been upward drift amid foreign investors to challenge all kinds of regulatory actions/policies of the host states as prospective BIT violations.[7] With these unwanted consequences and the presence of a 'regulatory chill' owing to the possibility of having to pay damages worth millions of dollars to foreign investors, states have gone to the extent of terminating their BITs to escape from the ill-system and the apprehension of the 'pro-

[3] Dolzer, *supra* note 1, at p.13.
[4] *World Investment Report 2015: Reforming International Investment Governance*, UNCTAD 106 (2015), available at: https://unctad.org/system/files/official-document/wir2015_en.pdf.
[5] Jason Webb Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, 33 Brooklyn Journal of International Law, 405 (2007).
[6] Jeswald W. Salacuse, The Law of Investment Treaties 359, 2nd ed. Oxford University Press Inc.(2015).
[7] *ID*, p.4.

investor' bias held by the arbitral tribunals.[8] India is no exception to this wonder, having terminated 69 out of 84 BITs since 2016[9] and having undergone a drastic restructuring of its BIT program with the adoption of the 2016 Model-BIT[10] post the abrupt awakening by the White Industries award in the year 2011.[11]

India's decision to terminate the majority of its BITs and revamping the BIT program instead of wasting time in the re-negotiation process depicts two scenarios, either India has totally rejected the ISDS system or it still retains confidence in the ISDS system but has become more cautious and started to review its BIT practice by drafting more specific provisions.[12] However, the 2016 Model BIT has been characterised as very "pro-state". The exclusion of the Most- Favoured-Nation clause ("MFN") and taxation measures, a narrow Fair and Equitable Standard ("FET") clause, a narrow definition of investment, ambiguity in the expropriation and Non-Precluded Measures ("NPM") measures and a complicated and sequential ISDS system are some of the criticisms of the newly adopted Model BIT which shows that India has not been able to strike a balance between investor protection and the host state's right to regulate.[13]

The report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India also raises this issue whether India should reconsider completely moving away from the ISDS system.[14] Amongst the current challenges that India is facing in the investment arbitration landscape, the issue of

[8] M. Sornarajah, On Fighting for Global Justice: The Role of a Third World International Lawyer, Third World Quarterly, Vol. 37 Issue 11 (2016).
[9] For current statistics, see Indian Department of Economic Affairs, Bilateral Investment Treaties (BITs)/Agreements, available at: https://www.dea.gov.in/bipa.
[10] Prabhash Ranjan & Pushkar Anand, The 2016 Model Bilateral Investment Treaty: A Critical Deconstruction, Vol. 38 Issue 1, Northwestern Journal of International Law & Business 18 (2017).
[11] White Industries Australia Limited v. The Republic of India, UNCITRAL, Award of Nov. 30, 2011, Final Award, Available at https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.
[12] Ranjan *supra* note 10, at 5.
[13] Ranjan *supra* note 10, at 52.
[14] Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (Jul. 30, 2017) pp. 106-107.

enforcement should not go unexplained and will be discussed in detail, in the later part of the article. The Indian experience is certainly not a singular experience but has transpired alongside a global backlash against international investment law and the ISDS machinery in particular.[15] With India's desire to increase inbound FDI, improve its rank in the World Bank's ease of doing business and regain investor confidence, there is a dire need to reform the entire system.

This article will therefore address the challenges that India is facing in the investment arbitration landscape, following which it will explore, on a preliminary basis, how "dispute systems design" could legitimately aid the dispute resolution process in investment treaties by gathering potential insights from options explored by various nations along the dispute resolution gamut and finally draw on a comparative institutional design analysis by exploring dispute settlement design features across different international dispute settlement systems. The paper concludes by suggesting that a larger consideration of the dispute systems design is desirable in order to identify correctly, what the system in India requires and generate a set of guiding principles to advance an effective and efficient parallel investment dispute settlement system in India.

INDIA'S APPROACH TOWARDS INTERNATIONAL INVESTMENT LAW

Generally, India is a very strong actor in Foreign Direct Investment ("FDI"). As of 2021, placed sixth at the World Economic League[16] and amongst the top 10 for inbound FDI and the top 20 for outbound FDI nations,[17] the Indian FDI landscape, particularly in the

[15] Martin Söderman, India's 2016 Model Bilateral Investment Treaty – A backlash to the Calvo doctrine and legal Nationalism? 58, Stockholm University, Faculty of Law, Department of Law (2020).
[16] *World Economic League Table 2021*, Centre for Economics and Business Research, available at: https://cebr.com/wp-content/uploads/2020/12/WELT-2021-final-23.12.pdf.
[17] Kshama A. Loya & Moazzam Khan, *Investment Arbitration & India – 2019 Year in Review* (Jan. 13, 2020),

year 2020 saw a miraculous 13% increase in FDI influx[18] and traversed the USD 500 billion FDI flow trend.[19] Until recent times, India has been a party Respondent in 25 long-standing investment arbitrations, out of which 11 arbitration proceedings are pending.[20]

During the early days of India's BIT program from 1994-2010, as Dr. Prabhash Ranjan describes, India emerged as an ambivalent 'rule taker', succumbing to widespread treaty-based investment protection with no apprehension about the possible consequences.[21] At this time, the tensions between investor protection and the host state's right to regulate were real but due to India's peripheral connection with investor-state arbitrations, India's BIT program did not catch much attention and was open to claims directly against it in international arbitration proceedings without prior exhaustion of local remedies.[22]

The Convention on the Settlement of Investment Disputes ("ICSID Convention") formulated under the auspices of the World Bank, entered into force on October 14, 1966. It is a multilateral treaty which aims to create an impartial and independent forum for resolution of international investment disputes between States and foreign investors by way of conciliation or arbitration procedures. This convention gives foreign investors, an individual right to bring disputes against host states and initiate investment arbitrations generally before institutions such as the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of

available at: https://www.nishithdesai.com/information/news-storage/news-details/article/investment-arbitration-india-2019-year-in-review.html.

[18] Joe C Mathew, *India bucks global decline in FDI; grows 13% against world's 42% fall in 2020*, Business Today (Jan. 25, 2021), available at: https://www.businesstoday.in/current/economy-politics/india-bucks-global-decline-in-fdi-grows-13-against-world-42-fall-in-2020/story/428959.html.

[19] *FDI equity inflows into India cross $500 billion milestone*, The Economic Times (Dec. 06, 2020), available at: https://economictimes.indiatimes.com/markets/stocks/news/fdi-equity-inflows-into-india-cross-500-billion-milestone/articleshow/79589698.cms.

[20] *Investment Dispute Settlement Navigator*, Investment Policy Hub, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india.

[21] Prabhash Ranjan, India and Bilateral Investment Treaties – A Changing Landscape 429, Vol. 29 Issue 2 ICSID Review- Foreign Investment Law Journal, Oxford University Press (2014).

[22] *ID*, p. 438.

Arbitration (PCA), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) or *ad hoc* arbitrations governed by the UNCITRAL Arbitration Rules.

The dispute resolution mechanism provided by The ICSID Convention is no doubt, a unique contribution to the ISDS system. The Convention has made a radical departure from its earlier position that only States alone, are subjects of International Law, and explicitly recognizes that individuals too have a course to international legal remedies.[23] The Convention not only provides that the investment arbitral awards to be binding on the parties,[24] but shall also not be appealable or subject to any external remedy other than those provided by the Convention.[25] A key feature of the ICSID enforcement mechanism is the restriction imposed on parties who wish to seek annulment of an arbitral award before national courts. Instead, an ICSID award is to be construed as a final Judgment of the court of that contracting state and it cannot be exposed to any appeal or subject to any outdoor remedy other than those offered by the Convention.[26] These differentiating features have made the Convention, an attractive affair for the foreign investors, creating a powerful and self-executing for enforcement of investment arbitral awards.[27]

Indeed, with such a delocalized[28] and self-executing[29] regime for enforcement of investment arbitral awards, no one can ever doubt about the finality of the result, for it would definitely lead to a smooth finality.[30] However, India is not a party to the ICSID Convention. Right from the ICSID Convention negotiations, India had multiple

[23] Krista Nadakavukaren Schefer (2010), Social Regulation in the WTO: Trade Policy and International Legal Development 133-134 (Gloucestershire: Edward Elgar Publishing, 2010).
[24] The ICSID Convention, art. 54.
[25] *Id*. art. 53(1)
[26] The ICSID Convention, art. 53(1).
[27] Edward Baldwin, Mark Kantor and Michael Nolan, "Limits to Enforcement of ICSID Awards, Journal of International Arbitration", Volume 23, Issue 1.
[28] Christoph Schreur, ICSID Convention: A Commentary 1103, Cambridge University Press, (2009).
[29] Baldwin ET AL *supra* note 27, at p.1.
[30] *ID.*

reservations.[31] Firstly, India was of the view that by setting individuals at par with states was a fundamental departure from international law.[32] Secondly, India believed that the foreign investors were being given leverage in the form of additional and special rights by the Convention with no countervailing obligations.[33] Thirdly, India had reservations to the Convention with respect to public policy and the automatic enforcement of ICSID awards in the sense that there would not be any scope for review of the award by an Indian Court if it violates the public policy of India.[34] Fourthly, India had a reservation as regards the jurisdiction of the centre, first, that a dispute should only be submitted to the centre with the express consent of the state and secondly, each nation should have the right to determine and notify the class of disputes which it would like to refer to the jurisdiction of the centre.[35] Amongst all of these, India was also concerned that the Convention's rules were skewed in favour of and favoured only developed nations. India decided not to join the Convention because of these reservations.

With a tremendous participation of Foreign Direct Investment (FDI) from across the world, the enforcement of investment arbitral awards in the non-ICSID States like India becomes one critical issue considering that investment disputes could also increase simultaneously.[36] This is evident from the three recent investor-state cases that produced significant hurdles and brought India to public eye. It all started in 2011 with the White Industries award which found India to be in breach of the effective means standard and made India pay USD 4 million to White Industries.[37] The second was in

[31] ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 476.
[32] ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. 2.1.
[33] *ID*, p. 476.
[34] *ID*, p. 470.
[35] Legal Committee on Settlement of Investment Disputes, Working Group IV (Nov. 30, 1964).
[36] R. Doak Bishop, James Crawford and William Michael Reisman, Foreign Investment Disputes: Cases, Materials and Commentary, The Netherlands, Kluwer Law International.
[37] White Industries Australia Limited v. The Republic of India, UNCITRAL, Award of Nov. 30, 2011, Final Award, Available at https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

September 2020, when the tribunal found India to be in breach of the FET standard under the India – Netherlands BIT and made India pay INR 850 million to Vodafone.[38] The third one is the Cairn award in 2021, where the tribunal found India to be in breach of the FET and expropriation standard and ordered India to desist from seeking tax and return the value of the shares India had sold, seized dividends and withheld tax returns that amounted to USD 1.4 Billion to Cairn Energy PLC.[39]

THE NON-APPLICABILITY OF INVESTMENT ARBITRATION AWARDS IN INDIA

The International Arbitration Community takes immense pride in making extraordinary use of the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention"). This comes as no surprise, given the significance of International Arbitration in order to resolve international disputes.

Enforcement of foreign awards is well assisted by the Arbitration and Conciliation Act, 1996 ("1996 Act"), the national law in India governing alternative dispute resolution and it is a well-known fact that the New York Convention relies fully upon the state parties for a smooth enforcement. In other words, national legislative framework of the Convention enables the contracting states to design and structure their national legislations to give effect to the New York Convention. The role of judiciary and the national legislation therefore, play a crucial role.

[38] Vodafone International Holdings BV v. The Republic of India, Case No. 2016-35, Award, ¶ 363 (PCA Sept. 25, 2020).
[39] Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, Case No. 2016-7, Award, (PCA Dec. 21, 2020).

1. Delineations of section 44: foreign award

The 1996 Act, within the meaning of Section 44 which is a partial replica of Section 2 of the Foreign Awards (Recognition and Enforcement) Act, 1961 lays down the conditions for calling a particular arbitral award, a foreign award. These are:

1. There must be a 'legal' and 'commercial' relationship between the parties;

2. The arbitral award must be made in pursuance of a written arbitration agreement;

3. The arbitral award must be made in a pro-convention state.

Out of all the conditions, a 'commercial' relationship is critical. This includes all relationships resulting in constitution of a 'consulting' as well as a 'commercial representation or agency'.[40] A commercial relationship comes out from the word 'commerce' and takes into account all possible relationships arising between parties in lieu of commerce and business dealings pertaining to international trade.[41] While understanding 'commercial intercourse',[42] the narrow and restricted object of the Act is to be kept in mind since the Act is designed specifically to facilitate international trade as a whole and the fact that a foreign award will always be understood in terms of coinage since commerce and trade ultimately denote exchange of money.[43]

[40] R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co., 1994(1) Arb LR 282: AIR 1994 SC 1136: (1994) 4 SCC 541.
[41] Indian Organic Chemicals Ltd. v. Chemtex Fibres Inc., AIR 1978 Bom 106.
[42] Welton v. Missouri, (1875) 91 US 275; Atiabari Tea Co. Ltd. v. State of Assam, 1961 (1) SCR 809.
[43] Orient Middle East Lines Ltd. v. Brace Transport Corporation of Monrovia, 1988 (1) 27 Guj LR 77.

2. The approach taken by Indian Courts vis-à-vis BIT Arbitration

One of the tenacious issues confronting both domestic legal systems and the international legal system, particularly international investment law is the interaction of domestic courts and international investment arbitral tribunals.[44] As the cases against India increase, so would the interactions between domestic courts and BIT arbitration.[45] The following three cases briefly discuss the approach taken by Indian courts interfering with arbitrations under investment treaties.

India's first brush with Investment Treaty Arbitration was witnessed in *The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures* ("*Port of Kolkata v. LDA*") wherein, the Calcutta High Court allowed an application for grant of an anti-arbitration injunction sought against LDA under the 1997 India-France BIT.[46] Interestingly, the court presumed that it had the jurisdiction over IIAs under the 1996 Act without delving into the question whether the Act allowed for judicial intervention in case of BIT arbitration. The Court found that LDA cannot proceed with BIT arbitration against the Port of Kolkata on the ground that Port Trust was not a contracting party to the France-India BIT by restrictively interpreting the BIT and recognizing the actions of Port of Kolkata to India as one of the organs of the state.[47]

The *Union of India v Vodafone Group Plc and Anr,* (*"India v. Vodafone"*) involved a challenge to the retrospective tax amendment

[44] A Sarvanan A and SR Subramanian, 'Role of Domestic Courts in Investor-State Dispute Settlement Process: The Case of South Asian BITs' (2017) 20(2) International Arbitration Law Review 42-54.
[45] Prabhash Ranjan & Pushkar Anand, Indian Courts and bilateral Investment treaty arbitration 201, Indian Law Review 4:2, DOI: 10.1080/24730580.2020.1732693.
[46] The Board of Trustees of the Port of Kolkata v Louis Dreyfus Armatures, G.A. 1997 of 2014 & C.S. No 220 of 2014 (Calcutta High Court, 29 September 2014).
[47] Bhushan Satish & Shreyas Jayasimha, *Indian Courts' First Brush with Investment Treaty Arbitration: Taking Some Lessons from the Calcutta High Court*, Kluwer Arbitration Blog (Mar. 16, 2015), available at: http://arbitrationblog.kluwerarbitration.com/2015/03/16/indian-courts-first-brush-with-investment-treaty-arbitration-taking-some-lessons-from-the-calcutta-high-court/.

by UPA government to the Income Tax Act, 1961 towards taxing "indirect transfers", effectively nullifying the 2012 order to not collect any tax by the Supreme Court in *Vodafone International Holdings B.V. V. Union of India* which lead to a huge tax demand against Vodafone BLV.[48] The BIT between India and Netherlands was invoked and while the said proceedings were pending, the parent Company of *Vodafone* (*Vodafone Plc*) initiated arbitration by virtue of the India and United Kingdom BIT, this made India move to the Delhi High Court to seek an anti-arbitration injunction against the parent Company.[49] This also meant that India was restraining the ongoing parallel arbitration proceedings. The court restrained Vodafone group from pursuing arbitration under the India-UK BIT and issued a clarification allowing the counsels to appoint a presiding arbitrator under the India-UK BIT.[50] This order was further challenged by the Government of India before the Apex Court and the order passed by the High Court was affirmed.[51] The Delhi High court finally dismissed the application of Indian Government seeking an anti-arbitration injunction against Vodafone from proceedings under the India-UK BIT in 2018.

Finally, after a series of proceedings and dialogue, with the amendment effectively overruling the Supreme Court's judgment and restoring the tax liability of Vodafone, took India to an International Arbitration claiming a violation of the FET standard within the meaning of Article 4(1) of the India-Netherlands BIT on the imposition of an asserted tax liability demanding refund of tax collected and legal costs.[52] The PCA found UPA's retrospective tax amendment

[48] Rohan Shah, *Vodafone Arbitration Award: Opportunity to Enhance India's Investment Credibility*, Bloomberg Quint Opinion (Sept. 29, 2020), available at: https://www.bloombergquint.com/opinion/vodafone-arbitration-award-opportunity-to-enhance-indias-investment-credibility.
[49] Union of India v Vodafone Group Plc United Kingdom & Anr, CS (OS) 383/2017 & I.A. No 9460/2017 (Delhi High Court, 7 May 2018).
[50] Union of India v Vodafone Group Plc United Kingdom and Anr, CS (OS) 383/2017 (Delhi High Court, 26 October 2017).
[51] Union of India v Vodafone Group Plc & Anr, SLP (Civil) No.33885/2017 (Supreme Court, 14 December 2017).
[52] Pushkar Anand, *Vodafone v. India- End of a Saga?* , THE WIRE (Sept. 26, 2020), available at: https://thewire.in/business/vodafone-india-end-of-a-saga-investment-treaty-arbitration.

and the 2012 Supreme Court order to be in contravention of Article 4(1) of the India-Netherlands BIT and ruled in favour of *Vodafone Group Plc* in its decade long case against the INR 22,100 Cr. Income Tax Department's tax liability demand.[53]

In *Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors, Khaitan Holdings (Mauritius)* issued a notice of arbitration to India under the India-Mauritius BIT claiming compensation on loss suffered due to the cancellation of 2G telecom spectrum licenses by the 2012 Supreme Court judgement in *Centre for Public Interest Litigation v. Union of India*.[54] Union of India vide its anti-arbitration application, sought to restrain the defendant from continuing the proceedings under Mauritius-India BIT. The decision was quite clear when the court placed reliance on the Vodafone case and by doing so, it enunciated that "*only 'compelling circumstances' may allow the court to grant anti-arbitration injunction and allow interference".*[55] That BIT arbitrations are totally different from the commercial ones and hence, not governed by the 1996 Act. The Delhi High Court refused to grant an anti-arbitration injunction in the case.

All the three cases discussed above dealt with an interaction of the Indian courts vis-à-vis International Investment Law and come up with a couple of key issues. First, whether Indian Courts have the jurisdiction to adjudicate BIT arbitrations, and second, whether the 1996 Act applies to BIT arbitrations.

The first issue was not dealt in *Port of Kolkata v. LDA* because the court presumed its jurisdiction, however the said issue was dealt in the case of *Khaitan Holdings* and *India v. Vodafone*. The Delhi High court clarified that the Indian courts have 'inherent jurisdiction' over

[53] V. Venkatesan, *Interview: 'The Vodafone Setback at The Hague is a Serious Loss of Face for India*, THE WIRE (Sept. 28, 2020), available at: https://thewire.in/law/interview-surajit-mazumdar-vodafone-india-tax-liability-hague-arbitration.
[54] Centre for Public Interest Litigation v. Union of India (2012) 3 SCC 1.
[55] Union of India v. Khaitan Holdings (Mauritius) Ltd. & Ors. CS (OS) 46/2019 AS 1238/2019, 29 January 2019.

BIT arbitrations under the Code of Civil Procedure, 1908.[56]

Owing to a lack of precedent ousting the jurisdiction of the Indian courts and also an absence of statutory bar under Article 253 of the Indian Constitution, the Delhi High Court in *India v. Vodafone* applied the 'doctrine of single economic entity' and clarified that there is no inherent lack of jurisdiction to adjudicate upon investor-state arbitrations since India has not ratified the ICSID Convention which totally refutes the role of national courts and that the domestic courts will have no power to execute an Investment arbitration award against the state if a foreign investor approaches the court for an execution of the award.[57] The Delhi High court in *Khaitan Holdings* case categorically held that it the inherent jurisdiction since the case dealt with the economic activities carried out by a company incorporated in India and owned by an Indian resident. However, the courts turned down the decision in *McDonald India v. Vikram Bakshi* in which the Delhi High Court itself enunciated that the courts have power to grant anti- arbitration injunctions so far as International Arbitration is concerned. [58] If this supervisory and presumed jurisdiction is exercised by the courts, it will necessarily pass through the 1996 Act where domestic courts will be conferred wide ranging powers so far as BIT arbitration is concerned when clearly, the 1996 Act does not apply to BIT arbitrations. Moreover, the presumption of jurisdiction, as it was done in *Port of Kolkata v. LDA*, would mean that Part I of the 1996 Act applies to BIT arbitrations seated in India and Part II for outside India. However, due to the restriction imposed by the Act itself on the power of the domestic courts, this reasoning could be a trouble.[59] Also, if such an approach has to be followed, it would mean that arbitrations seated in India will have to be taken as domestic arbitrations under Part I and disputes, such as the one in Vodafone v. India, cannot be dealt by domestic courts because the

[56] Ranjan *supra* note 45, at p. 207.
[57] *Supra* note 49, at p.78.
[58] McDonald India v. Vikram Bakshi, FAO (OS) 9/2015 & CM No. 326/2015 (Delhi High Court, 21 July 2016).
[59] Ranjan *supra* note 45, at p. 215.

subject area involves a question of Public International Law.[60]

As regards to the applicability of the 1996 Act, In *Port of Kolkata v. LDA*, the court presumed the applicability of the Act on investor-state arbitration as discussed previously and never went into detail. The same was noted by the Delhi High Court in *Union of India v. Vodafone* and held that Section 45 of the Act, which was relied on by the Calcutta High Court in *Port of Kolkata v. LDA* while granting an anti-arbitration injunction did not apply to investor-state arbitrations. The court laid emphasis on the word 'commercial' and held that investor-state arbitrations are not of commercial nature and existed out of a BIT. The same reasoning was affirmed by the Delhi High court again, in the *Khaitan Holdings* case.

It can be concluded that India currently has entered into a protectionist phase after terminating the majority of its BITs and is now in a State-Centric phase of uncertainty and backlash.[61] The scepticism shown by not ratifying the ICSID Convention and the impact of India's commercial reservation to the New York Convention is highly critical since investment arbitration awards cannot be enforced in India.[62]

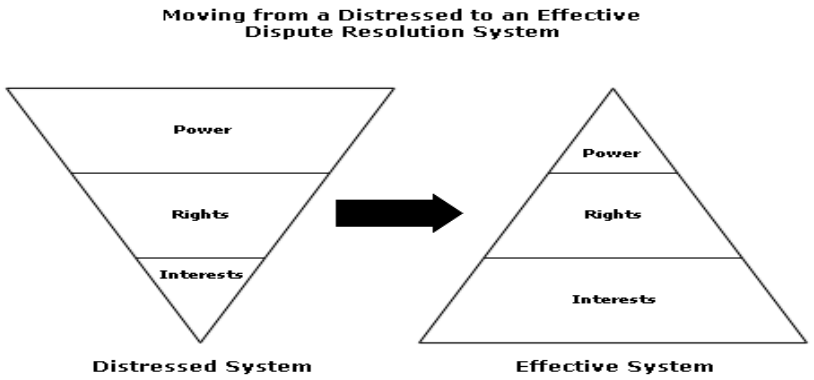
DISPUTES SYSTEMS DESIGN AND INVESTMENT TREATIES

Using disputes system design ("DSD") to diagnose and evaluate India's current system's needs may be one way to initiate this process. DSD can be understood as the deliberate and thoughtful design of additional processes for controlling a stream of disputes having similar nature.[63] A part of using this process is to

[60] *ID*.
[61] Simon Weber, *What Happened to Investment Arbitration in India?* Kluwer Arbitration Blog (Mar. 27, 2021), available at: http://arbitrationblog.kluwerarbitration.com/2021/03/27/what-happened-to-investment-arbitration-in-india/.
[62] *ID*.
[63] Frank Sander, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Perspectives on Justice in the Future, Apr. 07–9, (1976).

carefully comprehend the diverse approaches to dispute resolution. Ury, Brett and Goldberg, in their pioneering work on DSD identified three essential approaches parties can follow to resolve disputes.[64]

- Reconciling interests to underlie people's positions and devising creative solutions.
- Determining who is right with perceived legitimacy or fairness.
- Using power (acts of aggression or suppressing the benefits derived from a relationship) to impose a solution.



Ury, Brett and Goldberg observed that where there is use of power at the first instance, the dispute systems are often distressed, but when they focus on underlying rights and interests, they turn out to be more effective and efficient.[65] It was also observed by Costantino and Merchant that the early dispute resolution systems focused on using power first, later they focused on judicialization and rights-based adjudication and finally resorted to an interest-based system.[66] The evolution of the ISDS system was a lot similar to this observation. Early stages saw states relying on "gunboat diplomacy"

[64] William L. Ury, Jeanne M. Brett & Stephen B. Goldberg, Getting Disputes Resolved – Designing Systems to Cut the Costs of Conflict, 1st ed. United Kingdom: Wiley (1988).
[65] *ID*.
[66] Costantino, C.A., and Merchant, C.S., Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations 49-54, San Francisco (1996).

to resolve investment disputes.[67] Later the approach shifted on rights based approach to encourage foreign investment and promulgation of treaties that accorded substantive obligations.[68] This was seen when the "Treaties of Friendship, Commerce and Navigation" were entered into, and then transformed into BITs and other multilateral agreements such as the Energy Charter Treaty ("ECT") and the North American Free Trade Agreement ("NAFTA").[69] Finally, the shift was made to power dynamics and a rights-based dispute resolution, according substantive rights to the foreign investors and allowing them to enforce them directly before an international arbitral tribunal.[70]

Generally, in investor-state framework, BITs advocate for the "amicable resolution" of disputes and provide arbitration as the ultimate resort to resolve treaty-based claims. Moreover, BITs provide for a "cooling off" period of three or six months after submitting the notice and before filing an official request for arbitration. This is intended to make use of other dispute resolution mechanisms such as negotiation, mediation or conciliation.[71] This can be also witnessed in multilateral treaties such as NAFTA which requires parties to a dispute to first attempt to settle a claim through negotiation or consultation.[72]

In the absence of reliance placed on other forms of alternative dispute resolution ("ADR") mechanisms, arbitration has been historically presumed as the best mechanism in the ISDS system. However, in the case of India, where the use of arbitration to resolve investment-treaty disputes is not workable, a systematic

[67] Susan Franck, Challenges Facing Investment Disputes: Reconsidering Dispute Resolution in International Investment Agreements 149 (2008) Contribution to Books. 152.
[68] Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice, 7-22 Kluwer (1992).
[69] M. Sornarajah, International Law on Foreign Investment, 231-237 (Cambridge University Press: 1994).
[70] Susan Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions 1541-1545, 73 Fordham Law Review 1521 (2005).
[71] Noah Rubins, Comments to Jack C. Coe, Jr.'s Article on Conciliation, Vol. 21 Issue 4 Mealy's International Arbitration Report. 21 (2006).
[72] The North American Free Trade Agreement, art. 1118: A Guide to Customs Procedures. Washington, DC: Dept. Of the Treasury, U.S. Customs Service: (Supt. of Docs., U.S. G.P.O., distributor), 1994.

consideration of different options for resolving these disputes can be given a thought to make an informed choice of the appropriate design.

1. Mediation, Conciliation and Negotiation

Use of mediation to resolve commercial and investment disputes and its inclusion in the 2016 Model BIT has already been proposed by the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India. Use of mediation for ISDS has also been discussed by the UNCITRAL working group III as a possible option, while the ICSID has already proposed the first institutional mediation rules in addition to the IBA Rules on Investor-State mediation, 2012. The ICSID has also established a conciliation process, constituting the Conciliation Commission and defined the roles and duties of Conciliators.

Looking at the current arbitration landscape where India is not in favour of enforcing investment arbitration awards, resorting to mediation and/or conciliation seems the go to for it does not infringe or appear to infringe upon state sovereignty unlike arbitral awards.[73] Moreover, mediation and/or conciliation can be very useful for India in these high stake disputes where shared interests can be identified through encouraged communication and the development of consensual relations can take place. [74] Investor-State mediations/conciliations deserve their establishment in the Model BIT and the ISDS mechanism.

In the context of disputes being resolved directly through negotiations between foreign investor with the host state, there lies anecdotal evidence. The ICSID database gives a picture of several cases being settled and concluded through negotiation. [75] If the

[73] Gracious Timothy, *Investor-State Mediations/Conciliation in India*, Mediate.com India (Nov. 2015), available at: https://www.mediate.com/articles/TimothyG3.cfm.
[74] *ID*.
[75] ICSID list of concluded cases, available at: https://icsid.worldbank.org/cases/concluded.

challenges of public nature of the rights, securing consent to negotiate and the enforceability of the agreement can be taken care off, this consensual mechanism can used as a resort even after the award is passed. There have been instances where cases have discontinued following a settlement agreement and negotiated settlements in *ad hoc* arbitrations.[76]

2. Exploring Ombudspersons

Ombudspersons serve as impartial and independent watchdogs appointed either by the Legislature, Judiciary or Executive to handle complaints against administrative and judicial action and resolve those using ADR mechanisms. They usually address the issues of corruption, misgovernance and handle complaints against administrative and judicial action.

In case of investor-state disputes in India, exploring ombudspersons can be beneficial in early intervention and management of conflicts informally before reaching a formal conflict resolution. Exploring ombudspersons in investment treaty arbitrations would enhance the level of built-in-acceptance and confidence since they are accustomed with the practice of multi-cultural tradition while exercising impartiality, accessibility, independence, expertise and legitimacy. Unlike a foreign investor's unilateral right to bring claims under a BIT, claims can be directly brought up before ombudspersons in the form of formal complaints against the action of the host state. In other words, rather than initiating a formal process, foreign investors can be allowed to informally address their issues without involving multiple agencies.

Exploring ombudspersons would only require the Government to determine in advance as to who would have the institutional responsibility, whether the Indian ombudsman, i.e. the Lokpal and Lokayukta or someone else to resolve the investment-based

[76] Ethyl Corporation v. The Government of Canada, UNCITRAL, pp. 29-30, ITA Awards (2006).

disputes. Ombudspersons would be a good way to help governments make more informed and rational choices so far as regulatory actions are concerned. With a direct form of communication and redressal available to foreign investors, conflicts can be managed more effectively and the information vacuum can be minimized, thereby strengthening institutional legitimacy as a whole.

3. Fact-Finding

The use of a neutral expert or a superior master to engage in simple fact-finding in an investment dispute and resolving fundamental and contested issues just like expert determination instead of a formal adjudication of substantive rights.[77] There is presence of fact-finding in the 1978 provisions for Additional Facility Fact-Finding and luckily, ICSID's fact-finding rules do not require even a single party to be an ICSID member.[78] India can make use of the fact-finding proceedings and receive an impartial assessment of its disputes if both the parties agree. This process is under-explored and if used, can lead to a quick resolution of many contested issues such as asset valuation, damages and possibly the whole dispute while saving time and costs.

4. Proposed National Legislation and Setting up of Investment Courts

In addition to the 1996 Act, a separate legislation to safeguard the rights of foreign investors and promote and attract capital can go a long way. Reports suggest that India has been considering this option to enact a domestic law for the protection of foreign investments in India.[79] The Ministry of Finance has recommended a robust dispute resolution mechanism along with explicit investment protection guarantees offered to investors and the establishment of

[77] J.G. Merrills, International Dispute Settlement 45-48, 4th ed. Cambridge University Press (2005).
[78] Supra Note 67, at p. 180.
[79] Aditi Shah & Aftab Ahmed, *India plans new law to protect foreign investment*, REUTERS (Jan. 15, 2020), available at: https://www.reuters.com/article/us-india-investment-law-exclusive-idUKKBN1ZE151.

special fast-track courts to resolve investor-state disputes and the use of mediation to supplement the process.[80] A thought has also been given to vesting jurisdiction with the National Law Company Tribunal ("NCLT") to resolve these disputes.[81] If this proposal falls in place, this can be a starting point to supplement the existing ADR landscape.

MOVING BEYOND INVESTMENT TREATY "ARBITRATION": INSIGHTS ACROSS THE GLOBE

Looking at India's current BIT program and its scepticism towards the ISDS mechanism, the focus cannot be on arbitration as an all-purpose paradigm. Using these underutilized forms of ADR can actually improve the system. Recently, many states have started recalibrating their investment treaties. The Pan-African Investment Code ("PAIC") a model instrument adopted by the African Union in 2015 is a classic example of a new level of integration with respect to the regulation of foreign investments in Africa.[82] It is a known fact that African states were fairly dissatisfied with the rules of investment arbitration.[83] With issues such as representation at the international level, state sovereignty,[84] transparency[85] and non-inclusion of non-party stakeholders,[86] a Continent-wide criticism was witnessed for

[80] *ID*.
[81] Jay Manoj Sanklecha, *It's time for govt to rethink the investor-state dispute regime*, THE ECONOMIC TIMES (Jan. 19, 2020), available at: https://economictimes.indiatimes.com/news/economy/policy/view-its-time-for-govt-to-rethink-the-investor-state-dispute-regime/articleshow/73393435.cms.
[82] Makane Mbengue, Special issue: Africa and the reform of the international investment regime – an introduction, Journal of World Investment and Trade, 2017, 18(3), 371-378.
[83] John Sabet, *Investor-State Arbitration Meets Mediation: Is Mediation the Future of Investor-State Dispute Settlement in Africa?* Kluwer Arbitration Blog (Oct. 02, 2020), available at: http://arbitrationblog.kluwerarbitration.com/2020/10/02/investor-state-arbitration-meets-mediation-is-mediation-the-future-of-investor-state-dispute-settlement-in-africa/.
[84] Tom Mortimer & Chrispas Nyombi, Rebalancing International Investment Agreements in Favour of Host States, Wildy, Simmonds & Hill Publishing, (2018).
[85] Chrispas Nyombi, A Case for a Regional Investment Court for Africa, North Carolina Journal of International Law 66-109, vol. 43, no. 3, Spring (2018).
[86] Fola Adeleke, International Investment Law and Policy in Africa: Exploring a Human Rights Based Approach to Investment Regulation and Dispute Settlement, Routledge, 2017, London, England.

the ISDS system. The PAIC introduced mandatory use of ADR in resolving investor-state disputes. Article 42 of the PAIC provides that "*pursuant to this Code, the investor and the Member State should initially seek to resolve the dispute within six months at the latest, through consultations and negotiations, which may include the use of non-binding third-party mediation or other mechanisms."*[87] The use of mediation supplementing arbitration to resolve investor-state disputes is a welcome step.

The People's Republic of China ("PRC"), a party to 127 BITs and further 22 treaties with investment protections introduced the "Belt and Road Initiative" ("BRI") in 2013.[88] The BRI is an ambitious infrastructure building strategy connecting PRC to the major economies across the Silk Road Economic Belt and the 21st Century Maritime Silk Road.[89] This initiative has involved more than 70 nations, fostering inbound FDI with an increasing number of non-Chinese investors.[90] In addition to the significant investment opportunities, new courts and institutions have been set up to better resolve the BRI disputes.[91] The contracting states under the BRI commit very certain standards of protection to the investors with the right to bring a case directly against the contracting state in case the investment gets affected.[92] Due to the presence of a flexible method (provision for arbitration in case mediation fails) of resolving BRI disputes and an encouragement to the use of mediation and mediation clauses in BRI agreements, this initiative by PRC is reaching great heights backed by the ICC.

[87] Pan-African Investment Code, art. 42(b), available at: https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.
[88] Bird & Bird & One Belt One Road and Investment Treaty Disputes – Investment Treaty Arbitration for Disputes on the Silk Road, Report, available at: https://www.twobirds.com/~/media/pdfs/one-belt-one-road-and-investment-treaty-disputes.pdf?la=en&hash=41BE06F0D2208FFC9401F5A817F9D52DF3D42B4D.
[89] *ID*.
[90] Mingchao Fan, Briana Young & Anita Phillips, *Belt and Road: Supporting the Resolution of Disputes*, Kluwer Arbitration Blog (Apr. 16, 2018), available at: http://arbitrationblog.kluwerarbitration.com/2018/04/16/belt-road-supporting-resolution-disputes/.
[91] *ID*.
[92] Supra Note 87.

Investment Treaty Arbitrations are relatively uncharted territories of international law in the milieu of the non-ICSID states like India. The behaviour of BIT arbitration would not work well in India in case the existing mechanisms for international commercial arbitration are applied hitherto. The only challenge is to broaden one's notion of conflict resolution, re-think about the system's inadequacies and provide guiding principles to diagnose the difficulties and to design an effective and efficient dispute resolution system.

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THE INTRODUCTION OF FRAMEWORK IN ALTERNATIVE DISPUTE RESOLUTION (ADR) TO ENHANCE THE METHOD USAGE WITHIN CONSTRUCTION INDUSTRY IN MALAYSIA

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ABSTRACT

Alternative Dispute Resolution ("ADR") in Malaysia has been a favoured method among the industry practitioners as a mean of settling disputes due to its features that more expeditious and less costly. However, the rate of ADR implementation as an alternative method in dispute resolution, particularly in the civil process, is still low due to the lack of understanding in the execution of each method under ADR. Therefore, in order to facilitate ADR's implementation, a few enhancement mechanisms have been recognized to benefit the construction industry. One of those is through execution of framework of guideline. This research aims to streamline the understanding of construction industry players on the merit of each method under ADR according to sound practices. Data were obtained through semi-structured interviews with the experts in

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construction disputes settlement, which was analysed using Descriptive statistics and Content analysis. The result from the study has been validated and is portrayed in a newly developed ADR's framework of guideline which incorporates all available ADR in Malaysian Construction Industry.

Keywords: Alternative Dispute Resolution (ADR), construction disputes resolution, construction industry

INTRODUCTION

This paper reveals about how a framework of guideline which is one of the enhancement mechanisms of Alternative Dispute Resolution (ADR) could be as a preferred tool by stakeholders within the construction industry to be implemented to resolve dispute without intervention of traditional litigation. ADR, with its advantages of promoting feasible resolution for construction disputes through its features of usually being faster, cheaper and flexible has pushed it further to be widely used particularly in developed countries, such as the United Kingdom, Singapore, Hong Kong and Australia (Ngee, 2014).

Owing to increased consciousness about ADR's advantages and its potential relevance to all civil actions, construction companies in Malaysia have recently started to implement ADR as an alternative method to resolve disputes in their projects. Figure 1 shows the growing interest in most states in Malaysia towards ADR implementation within four consecutive years as based on CIPAA Conference 2018 by the Asian International Arbitration Centre [AIAC] (2018a).

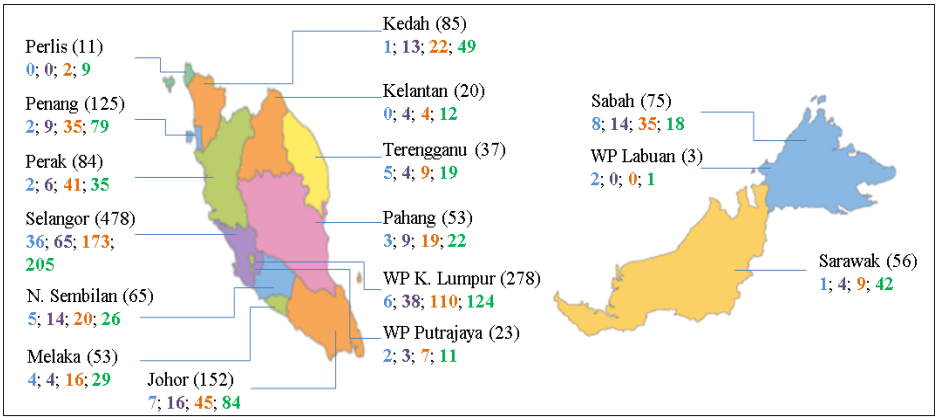


Figure 1. Site locations by states in Malaysia based on the fiscal year 2018 (Total matters from 15/4/14 - 15/4/18).

ADR IMPLEMENTATION IN MALAYSIA

The year 2020 marks the waiting of Vision 2020 and the Eleventh ("11th") Malaysia Plan to take the plunge. In the 11th Malaysia Plan, a 16% increase of development expenditure from the previous plan certainly brought great hope for the growth trajectory of the construction industry (Ratings, 2016). Despite the projection of slower growth for the construction industry in 2019 (Bernama, 2018), Malaysia is moving forward while preparing for post-2020. A total of RM45 billion was expected to have been spent by the Malaysian Government in 2019 on development projects to ensure sustained economic growth. The formulation has been set for a nation-wide development (Yusof, 2019). Since the construction industry in Malaysia is expected to continue growing, increasing disputes are also expected to occur. Therefore, the country needs to head towards reforming the applicable dispute resolutions and exploring feasible ways to provide justice within a shorter period, with fewer expenses and without the need for court intervention.

The courts in Malaysia started to acknowledge the existence of ADR and its contribution about a decade ago, particularly in the mediation

of parties in disputes. Evidence of this acknowledgement could be seen through several efforts made by courts to promote mediation in the Malaysian legal system. A local newspaper on 14 February 2010, published a statement by the Chief of Justice, Tun Zaki bin Tun Azmi. It stated that the judiciary and the Bar Council have cooperated in drafting a Practice Direction to encourage disputing parties to opt for mediation instead of going to trial. It is also believed that mediation would eventually be the "preferred" way to resolve disputes in Malaysian courts (Koshy, 2010). As a result of this increased efforts, the fifth ("5th") Practice Direction of 2010 (Practice Direction on Mediation) came into force on 16 August 2010.

Furthermore, the Malaysian Bar Council has made an effort to request for support from the judiciary as well as lawyers, to put Malaysia as an international hub for mediation and arbitration (Ravendran, 2011). Moreover, apart from the establishment of the Malaysian Mediation Centre (MMC) by the Malaysian Bar in 1999, to encourage the utilisation of mediation as a means of alternative dispute resolution (Bukhari, 2011), based on a Mediation Rule by Kuala Lumpur Regional Centre for Arbitration (KLRCA) (2014), the parliament has also introduced the Mediation Act 2012. This act is to "facilitate the settlement of disputes in a fair, speedy and cost-effective manner". Following this, the 2012 Malaysian Mediation Act has been seen as a proposed channel to provide for a court-mandated mediation system that would help to clear the backlog cases in courts (Ali Mohamed, 2018).

Meanwhile, in the form of adjudication, the Construction Industry Payment and Adjudication Act 2012 (CIPAA), which came into force on 15 April 2014 is also seen as an innovative measure for Malaysia (Zuhairah *et al*., 2010). According to Ameer Ali (2006) and Fong (2012), provisions placed under CIPAA are comprehensive in facilitating payment procedure, resolving cash flow issues and expediting dispute resolution. In addition, Abraham (2012) and Majid (2013) also highlighted Clause 13, Part II of CIPAA that allows for disputing parties to refer to other dispute resolutions, providing

flexibility.

Regarding arbitration, a series of revisions have been made by the Government and international organisations to improve this system in Malaysia. According to Lim (2009), the revisions include amendments to the Arbitration Act 2005 ("the 2005 Act") and an upgrade in the role of the KLRCA. In 2011, the Arbitration (Amendment) Act 2011 ("the 2011 Act") replaced the 2005 Act (AGC, 2011), and the revision continues in 2018 with the imposition of the Arbitration (Amendment) (No. 2) Act, 2018 (the "Amendment Act") to replace the previous Act (AIAC, 2018b). In addition, the initiative by AIAC to replace the previous KLRCA Arbitration Rule with the AIAC Arbitration Rules effective from 9 March 2018 (AIAC, 2018c), is also another extensive commitment to the promotion of arbitration in Malaysia. The adoption of AIAC Arbitration Rules allows a great deal of flexibility and ensures a high level of efficiency in the conduct of arbitration proceedings concerning the choice of arbitrators and applicability of procedural rules (Celniker *et al*., 2018).

To initially encourage the implementation of ADR, it is key to first understand the nature of the disputes within the context of the industry. Hence, Shamsuddin, Ismail & Mohd Zafian (2019) suggest that professional experts should play a role as the prime service providers to resolve disputes in the construction industry. Recently, Expert Determination (ED) was introduced by the Malaysian Institute of Architects in the Agreement and Conditions of PAM Contract (2018). This initiative is to avoid construction disputes and claims to become full-fledged litigations. Thus, this approach is a good initiative, as true expertise in technical issues is required to reach a decision (Freedman & Farrell, 2015). Therefore, Hussin & Ismail (2015) believed that being proactive by identifying initiative ways to put ADR into practice is essential, as this could indirectly improve the utilisation of ADR in Malaysia.

Figure 2 below summarises the enhancement mechanisms which have been carried out within Malaysia to increase the effectiveness

of ADR and subsequently encourage disputing parties to opt for ADR as their preferred method.

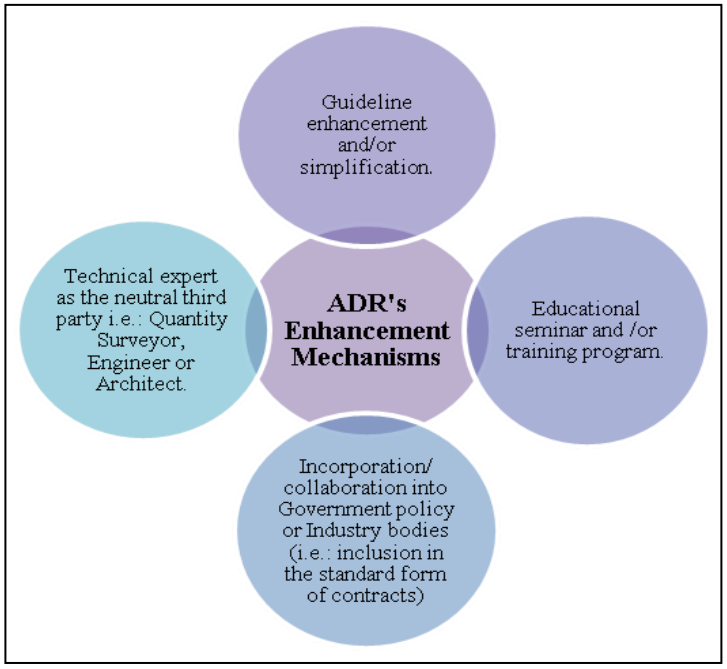


Figure 2. Enhancement mechanisms of ADR.

PROBLEM STATEMENT

Despite continuous efforts by many parties including the Government in promoting ADR as the preferred way to resolve construction disputes and the long list of perks of implementing ADR as a dispute resolver mechanism, the feedback seems unappealing. The evidence could be seen through reported data at the High Court by Construction Industry Development Board Malaysia [CIDB] (2018) that the registered cases for litigation have raised by 92.57% in comparison to 377 registered cases only in previous year.

Furthermore, in accordance with Zariski (2011), resistance among lawyers has also been one of the reasons why ADR utilisation

remains low in Malaysia. A few studies have also concluded that ADR implementation in the Malaysian construction industry is considerably low and yet to be widely accepted (Ameer Ali, 2010; Lee; 2017; Oii; 2017). The local news also reported that one report found that ADR may not be as attractive since it visualises the 'language of legality' which usually difficult to comprehend (Parker, 2017).

Besides that, there are also inter-related key variables that could act as barriers to ADR's successful implementation in Malaysian construction industry as displays in Table 1. The percentage shown could contribute to building a negative perception towards ADR hence causing disputing parties to not opt for ADR.

Table 1.
Barriers to implementation of ADR

No	Statement	Percentage
1	No amount was settled at all with the impartial third party' decision.	58.70%
2	Referral of the previously adjudicated dispute to the higher level to have the dispute finally decided.	54.34%
3	Delivery of the adjudication decision after the time limit set forth.	97.83%

Source: AIAC (2018a)

Among others, Item 3 which is, 'Delivery of the adjudication decision after the time limit set forth" shows the highest percentage (97.83%) followed by Item 1 (58.70%) and 2 (54.34%) respectively. As a result of this set of circumstances, this study intends to promote a newly developed framework that can increase preference on ADR among the stakeholders within the construction industry as the means of resolving construction disputes and benefiting the industry through its feasible resolution. It is deemed reliable because it is based on responses of targeted experts that have extensive knowledge and vast experience in the construction disputes settlement.

METHODOLOGY

An expert sampling method that comprises the lawyers, arbitrators, adjudicators and mediators who registered with Asian International Arbitration Centre (AIAC) and came from the population of Selangor and Klang Valley, Malaysia, was used for the selection of respondents. For this research, 15 respondents had participated as the minimum acceptable purposive sample size in qualitative research based on Guest *et al*. (2006) and Marshall *et al*. (2013) is 15. The collection of data that includes the specific and general qualitative information was done through a semi-structured interview with the targeted population within the time frame from February to March, 2020. The interviewed questions cover on the process of ADR as the method of disputes resolution in construction industry. For this study, the development of questions was utilizing both open-ended and closed-ended questions.

The data that derived from the interview session were reported and analyzed by using the Descriptive statistics and Content analysis. The Descriptive analysis which could be shown in graphic or picture was used to obtain basic information about the variables in a dataset and to emphasize the potential relationships between the variables (Kaur *et al*., 2018). In the other hand, the Content analysis is also

been used to systematically transform a large amount of text into an organized summary of key results by tabulating, classifying and summarizing the gathered data (Creswell, 2013). Based on Erlingsson and Brysiewicz (2017), it is a procedure of analyzing a set of raw data from verbatim transcribed interviews into categories.

Finally, the research was concluded with the validation of the entire findings of the study which the accomplishment was obtained through the semi-structured interview conducted with five (5) experts in construction disputes settlement. The validation by these experts focused on the findings obtained through semi-structured interviews and a development of new framework of guideline which combines all available ADR in Malaysian Construction Industry. In accordance to Creswell and Creswell (2017), it is necessary for the findings to be validated to make certain to the quality of the research as well as to ensure the interpretation of collected data is precise and accurate.

RESULTS AND DISCUSSION

The purposes of approaching the qualitative research were to reaffirm the findings obtained from the reviewed literatures on the process of ADR. The representatives of the identified experts who participated in the interview had different professional backgrounds in terms of their exposure on industry and construction disputes working experience, level of qualification and also job positions. Descriptive analysis was used to analyze the distribution of the respondents' background. The summary of the background information of the respondents is shown in Table 2.

Table 2.
Frequency distribution of respondents' demographic characteristics.

Variables	Item	Frequency	Percentage%
Job position	Mediator	1	06.7
	Adjudicator	12	80.0
	Arbitrator	1	06.7
	Lawyer	1	06.7
Industry working experience	Less than 5 years	1	06.7
	Between 5-10 years	1	06.7
	More than 10 years	13	86.7
Construction disputes working experience	Between 1-2 years	1	06.7
	Between 3-5 years	2	13.3
	More than 5 years	12	80.0
Degrees qualification	BSc	15	100.0
Highest level of qualification	MSc	6	40.0
	PhD	1	06.7
	Others	6	40.0

Table 2 above shows the summary of the respondents' background. The result shows the highest numbers of respondents to be the adjudicators with 80.0%. Whilst the other group of respondents who were the mediator, arbitrator and lawyer having the same percentage with only 6.7% each. Due to the expert sampling came from those who have registered with AIAC, it is also found that most of the experts who have experience related in construction disputes, are more familiar in adjudication compared to other roles.

In the meantime, the result of respondents' industry working experience shows that 86.7% of respondents have been working in the industry for more than 10 years hence most of the respondents are genuinely having vast experience in construction industry. As reported, the respondents who have spent between 5-10 years and less than 5 years in the industry only remarked at 6.7% each.

Moreover, 80.0% of the respondents have more than 5 years of working experience in construction disputes. Meanwhile, the respondents with between 3-5 years and 1-2 years working experience involving construction disputes only have the percentage of 13.3% and 6.7% respectively.

Finally, the level of education of respondents shows that they are qualified to be part of the survey as 100.0% of respondents have Bachelor degree, 40.0% have Master's degree and 6.7% of them have the highest degree which is Doctor of Philosophy in their respective professions. In addition, 40.0% of the respondents also have obtained professional qualification related to construction field such as Professional Engineer and Surveyor that grants them the title of 'Ir' and 'Sr' respectively.

From the results of respondents' demographic characteristic, it shows that this targeted group of respondents is all qualified under expert sampling to respond to the semi-structures interview questions.

A newly developed ADR's framework as in Figure 3 is a guideline

that combines negotiation, mediation, adjudication and arbitration methods in a single model of ADR for public viewing and reference. The development of the framework made through the content analysis by recording the frequency of individual words or phrases and the appearance of determined codes in the texts.

Notably, there is a wide variety of processes and techniques that fall within the definition of dispute resolution. Methods under ADR specifically, have many in common which often cause confusion among the parties in dispute about which process to apply in their situation. Hence, this framework of guideline helps to simplify, clarify and improve the understanding of the construction industry players on the process and impact of all available ADR's methods in Malaysian construction industry.

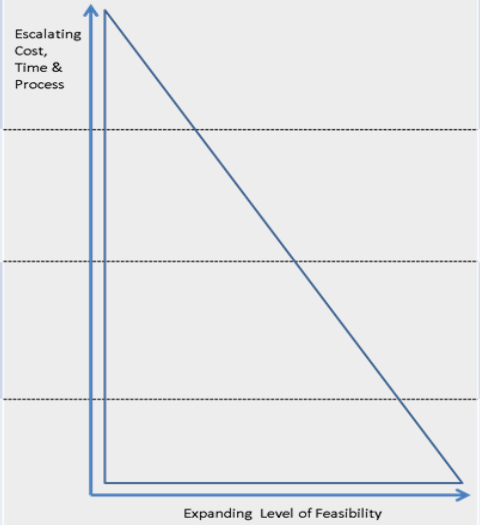
ADR's Method	Diagram	Available Under	Malaysia' Act	Consequences
Arbitration (Final Stage)		• PAM Contract; • PWD Form 203A; • CIDB Form for Building Works.	• Arbitration (Amendment) (No. 2) Act 2018.	• Bound until challenged in higher process i.e.: Litigation
Adjudication (Stage 3)		• PAM Contract; • All Contracts to resolve payment-related construction disputes under CIPAA.	• Construction Industry Payment & Adjudication Act 2012 (CIPAA) .	• Bound until the Practical Completion.
Mediation (Stage 2)		• PAM Contract • CIDB Form for Building Works.	• None.	• Not binding.
Negotiation (Stage 1)		• All Contracts.	• None.	• Not binding.

Figure 3. ADR's framework of guideline which combines all available ADR in Malaysian Construction industry.

The developed framework of guideline consists of four (4) stages which are (i) Negotiation, (ii) Mediation, (iii) Adjudication and (iv) Arbitration. The first stage which is the negotiation explains that this method of ADR has the lowest impact on cost, time and process but its implementation has the highest level of feasibility. Negotiation should be at the first stage of implementation prior to other methods because, it is the simplest means for redressal of disputes without interference from any third party and the decision made is not binding.

The second stage is the mediation which this method of ADR has the second lowest impact on cost, time and process whilst its implementation has the second highest level of feasibility. Mediation has a quite similar consequence as the negotiation due the decisions made is not binding but it involves a neutral third party known as the mediator, to assist the parties in dispute for dispute settlement. Mediation clause in Malaysia can be found under PAM Contract and CIDB Form for Building Works.

The third stage is the adjudication and this method of ADR has the second highest impact on cost, time and process whilst its implementation has the second lowest level of feasibility. Adjudication is almost similar to arbitration but the process is much simpler. It requires the neutral and independent third party, who acts as an adjudicator, to deal with the dispute and to determine the rights and/or obligations of respective parties. If objection to the decisions occurred, it is only bounded until the project obtained the Certificate of Practical Completion (CPC). In Malaysia, since payment problems in the construction industry is inevitable, statutory adjudication which is known as Construction Industry Payment and Adjudication Act 2012 (CIPAA) is introduced to improve the cash flow and remedy the payment defaults. Besides CIPAA, adjudication clause in Malaysia can also be found under PAM Contract.

Finally, the fourth stage of this ADR's framework is arbitration which this method of ADR has the highest impact on cost, time and process

whilst its implementation falls the lowest level of feasibility. Arbitration has been always chosen as the final form to resolve the construction disputes amongst the methods in ADR because the process is comparatively lower than litigation. Under arbitration, an independent person who hears both sides of a dispute before coming to a decision is known as an arbitrator. The decision made by the arbitrator is final and binding until the case is brought to the court. Arbitration clause in Malaysia, particularly related to construction industry, can be found under Arbitration (Amendment) (No.2) Act 2018, PAM Contract, PWD Form 203A (Malaysia, 2007) and CIDB Form for Building Works (CIDB, 2000).

For the purpose to validate the research, five (5) experts randomly picked from the expert sampling whom all registered with AIAC, had participated. The process of research's validation was done via online video call and consisted of two (2) parts. The first part is to obtain the validation on research process and findings while the second part is to validate the newly developed ADR's framework of guideline. The result of the research validation is shown in Table 3.

Table 3.
Result of the research validation.

No	Description	Strongly Disagree	Disagree	Neutral	Agree	Strongly Agree
Research's process and findings						
1	Sampling design	0%	0%	0%	60%	40%
2	Method of data collection	0%	0%	0%	80%	20%
3	Method of data analysis	0%	0%	20%	80%	0%

4	Results of the study	0%	0%	0%	60%	40%

ADR's framework of guideline

1	Practicality of the framework	0%	0%	0%	100%	0%
2	Concisely of the framework	0%	0%	0%	20%	80%
3	Comprehensible of the framework	0%	0%	0%	60%	40%
4	Contribution of the framework to the industry	0%	0%	0%	20%	80%

CONCLUSIONS

ADR offers flexibility ranging from the methods that have the least impact on those with the most impact on cost, time, process and level of feasibility in order to fit the disputants' preference. It is vital to all stakeholders within the construction industry to embrace the viability that ADR could offer and understand the methods available in ADR to ensure successful resolution of their disputes which leads to the restoration of relationships among the disputing parties. Besides "guideline enhancement and/or simplification", which is seen as the best enhancement mechanism to improve the preference on ADR, it is suggested that other listed enhancement mechanisms can also be considered for execution as they can also help to expand ADR as the feasible means of resolution for construction disputes. As a conclusion, governmental agencies and private developers need to play bigger roles to uphold the use of ADR as the means of settling construction disputes in Malaysia through a more proposal and execution of ADR's enhancement mechanism as it could offer the optimization of ADR's feasible features which indirectly helps to increase the disputant parties to opt for ADR. The newly developed framework is expected to streamline the understanding of construction industry players on the merit of each method under ADR according to sound practices.

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INTERNATIONAL COMMERCIAL ARBITRATION- THE OPPORTUNITIES AND CHALLENGES BEFORE INDIA TO EMERGE AS GLOBAL HUB FOR SETTLING BUSINESS AND COMMERCIAL DISPUTES

By Hemant Garg

ABSTRACT

In the year 2016, India was the country having the most number of investor-state disputes against it even after the dispute resolution friendly stint of the ruling government to make India an arbitration hub via amendments of 2015 in Arbitration & Conciliation Act, 1996 and introduction of Commercial Courts Act, 2015 [Surtani, D. (2017)][1]. Contrary to the prevalent beliefs, this year has seen vehemently huge amounts of claims against India in the shape of Cairn Energy and Vodafone Inc. Nevertheless, in the midst of the prevailing challenges, some hidden opportunities for India are reshaping the framework of dispute resolution in India.

The aim of this paper is to understand the journey of India in International Commercial Arbitration and its efforts to inculcate international best practices by amending its substantive act i.e. Arbitration and Conciliation Act, 1996 and setting judicial precedents. We identified that India is currently facing issues such as delay in enforcement of awards, lack of awareness about institutional arbitration and vague amendments by the Lok Sabha. But even after these challenges, several opportunities are arising. The judicial

[1] Surtani, D. (2017), *Arbitration in India: Dispute Resolution in world's largest democracy* [Online] Available at: https://www.herbertsmithfreehills.com/latest-thinking/arbitration-in-india-dispute-resolution-in-the-worlds-largest-democracy (Accessed: 19 August, 2021).

interpretations show that Judiciary is maintaining a pro-arbitration stance and adopting international standards. Ultimately, it can be squarely opined that India has a lot of potential to become a global leader in International Commercial Arbitration and the future is nearer than we assumed.

PART I

INTRODUCTION

1. Legal framework of commercial dispute resolution in India

Broadly, the commercial dispute resolution framework in India can be divided in two categories. Firstly, the judicial framework under the Commercial Courts, Commercial Division, Commercial Appellate Division of the High Courts Act, 2015 ("the Commercial Courts Act"). Secondly, Alternative Dispute Resolution Mechanisms (ADR). Latest in the structure, the Commercial Courts Act laid the foundation for introduction and establishment of the commercial courts at district level and the Commercial Division and Commercial Appellate Division at High Courts by their respective Honourable Chief Justices [*The Commercial Courts Act, 2015* (c. II)].[2] To make it more effective, the original specified value of dispute of One Crore was changed to Three Lakhs to cover small businesses and MSME's as well [*The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts Amendment Act, 2018* (s. 4)].[3] Based on this pecuniary jurisdiction, matters of International Commercial Arbitration fall within the ambit of High Courts.

Another popular medium in dispute resolution in India is Arbitration which has existed since 1899 but is now gaining importance due to several amendments made in the original A&C Act on the verge of

[2] *The Commercial Courts Act, 2015* (c. II) New Delhi: Universal Publications.

[3] *The Commercial Courts, Commercial Division and Commercial Appellant Division of High Courts Amendment Act, 2018* (s. 4) New Delhi: Universal Publications.

international standards to facilitate ease of doing business in India. But as is commonly known that arbitrations cannot take place totally out of courts and reliefs such as interim measures, appointment of arbitrators, challenge of award and enforcement are facilitated by domestic courts only. The above-mentioned commercial courts structure then comes into the picture. The procedural law for arbitration in India is A&C Act and applied as stated above based on the seat of arbitration.

2. Rules for International Commercial Arbitration in India

The UNCITRAL Model Law on International Commercial Arbitration, 1985 (UNCITRAL Model Law) had created a level playing field for the arbitration practitioners all over the world since its inception because till date more than 85 states in over 118 jurisdictions have adopted this and framed their domestic legislations accordingly [UNCITRAL (2021) *Status*].[4] The structure of A&C Act is divided into two parts: Part I is applicable to arbitrations seated in India (can be an International Commercial Arbitration) and Part II is applicable to arbitrations seated outside India (enforcement of certain foreign awards) [A&C Act, 1996].[5]

For clarity, one can appreciate that while choosing arbitration as a dispute resolution method for resolving international business disputes and drafting the arbitration clause, the parties should be mindful of the seat of the arbitration. A dispute including Indian parties will be governed by the Part I of the act if the seat of arbitration chosen is India. Otherwise, it will be governed by Part II for the enforcement purpose.

[4] UNCITRAL (2021) *Status: UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in 2006* [Online] Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (Accessed: 19 August, 2021).
[5] *Arbitration and Conciliation Act, 1996* (Part I and Part II) New Delhi: Universal Publications.

PART II

CHALLENGES IN DISPUTE RESOLUTION THROUGH ARBITRATION IN INDIA

1. Judicial intervention and delays in enforcement

The Indian Judiciary is well knowingly burdened with huge piles of pending cases which add up to the delay in the court proceedings. Although the A&C Act, 1996 identifies the principle of Kompetenz-Kompetenz under which the Arbitral Tribunal has jurisdiction to give an award on its jurisdiction but still there are several areas where one has to approach the municipal courts of the seat of the arbitration. The prime example of the delay in procedures due to judicial intervention is the Investment Arbitration case of "White Industries" [*White Industries Australia Ltd. v The Republic of India* (2011)].[6] Here, the White Industries Australia Ltd. after a dispute with their Indian counterpart pursued a Paris Seated ICC Arbitration in 2002 and won an award amounting AUD 4 million. Thereafter, they unsuccessfully applied for enforcement from High Court of Delhi and Calcutta to Supreme Court.

Even after almost eight years of struggle they were not able to enforce their award which was India's obligation under the New York Convention, 1958. Ultimately, they had to resort to the other remedy given under Bilateral Investment Treaty of India. They invoked the Most Favoured Nation (MFN) clause of the treaty and claimed that India failed to provide them effective means of asserting claims and enforcing rights. The claim was accordingly upheld as India's liability under the MFN clause was established and there was denial of justice. The case may be pertaining to Investment Arbitration but the background which is delay and denial of timely disposal of court proceedings, is an absolute roadblock for the International

[6] *White Industries Australia Ltd. v The Republic of India* (2011) [Online] Available at: https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf (Accessed at: 19 August, 2021).

Commercial Arbitration scenario as well.

2. Lack of Institutional Framework

No doubt that for businesses in India arbitration has become first choice to resolve their conflicts due to the promise of flexibility, party autonomy, cost-effectiveness and speed. Still majority of arbitrations happening right now are ad-hoc as suggested by the report of PWC forensic services (47%) [Rajrao, V. and Patel, D. (2013)][7] and by the survey of Jindal Global Law School and the ICADR at a conference in 2015 (whopping 95%) [Business Standard (2015)].[8] Also, parties preferring arbitral institutions choose foreign seats over Indian. The 2020 Annual Report of SIAC disclosed that India continues to be their top foreign user with the increase of case load from 485 in 2019 to 690 in 2020 [SIAC (2020)].[9]

These values are sufficient to understand that even Indian parties do not wish to handover their matters to Indian Arbitration Institutions, leave out the foreign entities that have really great options available outside. To name a few institutions that are prominent in India are Nani Palkhivala Arbitration Centre, Mumbai Centre for International Arbitration (MCIA), International Centre for Alternative Dispute Resolution (ICADR) and Indian Council of Arbitration (ICA), Delhi International Arbitration Centre (DIAC).

3. Disputed 2021 amendments

India in its zest to become an attractive arbitration destination for international parties has amended the A&C Act several times in past 6 years. The amendment of 2015 which disallowed automatic stay of

[7] Rajrao, V. and Patel, D. (2013) *Corporate Attitudes and Practices towards Arbitration in India* [Online] Available at: https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf (Accessed: 19 August, 2021).

[8] Business Standard (2015) *95 percent Arbitration in India is ad-hoc* [Online] Available at: https://www.business-standard.com/article/news-ians/95-percent-arbitration-in-india-is-ad-hoc-115092500961_1.html (Accessed: 19 August, 2021).

[9] SIAC (2020) *Singapore International Arbitration Centre Annual Report 2020* [Online] Available at: https://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf (Accessed: 19 August, 2021).

enforcement of awards, as we will discuss below, had brought new hopes for the country for prospering international practice and standards but the recent 2021 amendment has faded it a bit and it has a retrospective effect. A new proviso has been added under Section 36(3) [A&C Act, 1996][10] to stay any award unconditionally in which the arbitration agreement or contract which is the basis of the award was induced or affected by fraud or corruption on a prima facie satisfaction of the competent court.

The Bill was criticized because the terms fraud and corruption are not defined and any losing party may use them to get a blanket stay on enforcement of the award. This would definitely take a toll on the ease of doing business ranking of India due to prospective delays and reopening of old cases on this new ground. The reason provided was that it will prevent the collusive attempts of parties to seek the benefit of an award involving corruption. But whatever the reason may be, the delays and increase in challenge petitions are bound to happen [Mishra,S.P. (2021)].[11]

PART III

EMERGING OPPORTUNITIES FOR INDIA

The recent past years have brought tremendous changes in the arbitration regime of India. While discussing these improvements we will keep them confined to from the point of view of what is fruitful for International Commercial Arbitration only.

1. Amendments of 2015:

The new amendment added Section 29A and provided that any

[10] *Arbitration and Conciliation Act, 1996* (s. 36(3)) New Delhi: Universal Publications.
[11] Mishra,S.P. (2021) *Impact of the Arbitration and Conciliation (Amendment) Act, 2021 on India's Pro-Arbitration outlook* [Online] Available at: https://www.barandbench.com/apprentice-lawyer/impact-of-the-arbitration-and-conciliation-amendment-act-2021-on-indias-pro-arbitration-outlook (Accessed: 19 August, 2021).

arbitration proceedings must be completed within 12 months of the notice of appointment to the arbitral tribunal i.e. entering upon reference and a further extension of 6 months can be granted if parties agree so [*Arbitration and Conciliation (Amendment) Act, 2015* (s. 29A)].[12] Secondly, earlier while filing a challenge application against an arbitral award, the enforcement proceedings were used to stay automatically. After the amendment, the challenging party must apply a separate application for the stay of enforcement proceedings in the competent court. Additionally, reasons must be recorded while allowing stay and due to its treatment as a money decree, the respondent shall have to deposit full or partial amount of sum awarded [A&C Amendment Act].[13]

Further, the ambit of "Public Policy" was restrained under three points stating fraud and corruption, against fundamental public policy of India and conflict with morality and justice as the parameters for setting it aside. The ground of "Patent Illegality" was now applicable on Domestic arbitrations only. The arbitral tribunals were given the same powers to pass interim awards under section 17 as was available to courts under section 9. These orders became enforceable as a court order and courts were barred to entertain any application u/s 9 if an arbitral tribunal is already constituted.

Lastly, the amended proviso of Section 2(2) removed the practical lacunae in the conduct of arbitration proceedings by extending the scope of Section 9 (interim measures), Section 27 (taking of evidence), Section 37(1)(a) and 37(1)(3) of Part I to the International Commercial Arbitrations seated outside India as well subject to an agreement between the parties for contrary [A&C Amendment Act, 2015].[14]

[12] *Arbitration and Conciliation (Amendment) Act, 2015* (s. 29A) New Delhi: Universal Publications.
[13] *Arbitration and Conciliation (Amendment) Act, 2015* (s. 36(3)) New Delhi: Universal Publications.
[14] *Ibid* (proviso of S. 2(2)).

2. Favorable Supreme Court Judgments:

1. Amazon - Future Retail Judgment:

The Supreme Court of India has recently adjudicated on two issues which brought great hopes for the Indian Arbitration regime. First was whether an award passed under the SIAC Rules by an Emergency Arbitrator would fall under Section 17(1) of the A&C Act and Second was whether an award passed under section 17(2) by the High Court enforcing Emergency Award is appealable or not. Accordingly, the questions were answered in affirmative and negative respectively. The Apex Court reinstated that party autonomy is the pillar of arbitration and the emergency arbitration is not specifically prohibited in any of the provisions of the act.

The definition of the term 'arbitral proceedings' is not limited and would include proceedings before an Emergency Arbitrator. It was held that an arbitral award will be enforced by the courts as per the provisions of Civil Code of Procedure, 1908 and the courts act similarly under Section 17(2) as it acts under Section 9(1) i.e. to enforce awards of arbitral tribunal. Lastly, it was stated that Section 37 is a complete code and enforcement proceedings are not covered by the appeal provision. A legal fiction is created by Section 17 which is limited for the purpose of enforcement as a decree of court. It cannot encompass appeals from such orders and go beyond the intention of the legislature [*Amazon Investment Holdings v Future Retail Ltd.* (2021)].[15]

The country is just cherishing this decision as being most progressive and fast-forward in time. This will definitely open doors for fast resolution of disputes and further incorporation of Emergency Arbitration Rules in Indian Arbitration Institutions.

[15] *Amazon Investment Holdings v Future Retail Ltd.* (2021) Available at: https://main.sci.gov.in/supremecourt/2021/3947/3947_2021_32_1501_29084_Judgement_06-Aug-2021.pdf (Accessed: 19 August, 2021).

2. Vijay Karia vs Prysmian Cavi E Sistemi SRL and Ors.:

This was another judgment which clarified the Pro-Enforcement stance of India towards International Commercial Arbitration awards. In this, the scope of challenging a foreign award was limited by extinguishing the plea of 'due process' where parties plead that they were not able to represent their case before an arbitral tribunal. It was also held that an arbitration award inconsistent with the terms of Foreign Exchange Management Act, 1999 (FEMA) is enforceable and is not against the 'Public Policy of India'. The Apex Court provided that Section 50 of the A&C Act did not provide for appeals against order directing enforcement of foreign award after it has already rejected objections to such enforcement unlike Section 37 of Part I.

It was emphasized that the New York Convention on Enforcement of Foreign Arbitral Award, 1958 was entered into with intent of pro-enforcement bias by adding only limited number of grounds for challenge. Also, a discretionary power of court was identified to enforce awards even in the cases where some of the grounds will be made out. The use of word 'may' in Section 48 was interpreted to mean use of discretion to enforce awards except the Public Policy of India and jurisdictional grounds [*Vijay Karia v Prysmian Cavi E Sistemi* (2020)].[16]

Therefore, this was a great attempt on part of judiciary to portrait the pro-enforcement stance of India and actually, the journey of Indian arbitration is paved by the judicial precedents like mentioned above.

3. **Speedy resolution of Business and Commercial disputes under Commercial Courts Act:**

The USP of the Commercial Courts Act is that it ensures timely disposal of disputes by providing timelines through an amendment in

[16] *Vijay Karia v Prysmian Cavi E Sistemi* (2020) Available at: https://main.sci.gov.in/supremecourt/2019/11180/11180_2019_4_1502_20493_Judgement_13-Feb-2020.pdf (Accessed: 19 August, 2021).

the Civil Procedure Code, 1908 and introducing Case Management Hearing (CMH). It states that the Written Statement should be filed within thirty days from the date of the receipt of summons with a maximum extension of 120 days as per the leave of the court. Thereafter within 30 days, inspection of documents by both the parties with a further extension of 30 days and Admission/Denial in next 15 days must be completed. Most importantly, the trial and arguments of the parties must be completed within six months of the first CMH and a judgment must be pronounced within 90 days subsequently [*Civil Procedure Code (Amendment 5 0f 1908 in First Schedule), 1908*].[17] The Delhi High Court in 'Oku Tech Private Limited vs Sangeeta Agarwal and Ors.' affirmed this stand of speedy resolution of disputes by reiterating the fact that "....in view of the amendments brought under the CPC, court's discretion to extend timeline for filing written submission no longer survives….." [*Oku Tech Private Ltd. v Sangeet Agarwal* (2016)].[18]

Another efficacious remedy added in the Act is Section 12A which provides for pre-institution Mediation through the authorities constituted under the Legal Services Authorities Act, 1987, for the disputes where urgent or interim relief is not required. The settlement arrived at gets the status of a deemed arbitral award and can be enforced accordingly [*The Commercial Courts Act, 2015*].[19] With all these developments, it was for the first time ever that India jumped 30 positions and ranked 100th in the World Bank's Ease of Doing Business report of 2018.

4. Third Party Funding in Arbitration in India

Third Party funding in litigations were not openly welcomed in India due to involvement of the trait of betting and as being contrary to public policy of India. But the truth is that law relating to Champerty

[17] *Civil Procedure Code (Amendment 5 0f 1908 in First Schedule), 1908* (First Schedule) New Delhi: Universal Publications.
[18] *Oku Tech Private Ltd. v Sangeet Agarwal* (2016) p.12 [Online] Available at: https://indiankanoon.org/doc/162153158/ (Accessed: 19 August, 2021).
[19] *The Commercial Courts Act, 2015* (s. 12A) New Delhi: Universal Publications.

and Maintenance had been settled long ago in the case of "Ram Coomar Coondoo v Chunder Kanto Mukerjee" wherein it was held that there is no specific law in India which bars a third party from lending financial help to a person having no property for pursuing a genuine litigation [*Ram Coomar Coondoo v Chunder Kanto Mukerjee* (1876)].[20]

Even after this, there is no concrete structure in India which supports the litigation funding activities. Also, the enforcement of such awards is doubted on the ground of public policy under section 23 of the Indian Contract Act, 1872. But despite of all these issues, India is heading forward regularizing the Third Party Funding structure and awareness about the same among Indian litigants. A group of international and national law firms, arbitration practioners and Litigation Financing Companies has endeavored and launched Indian Association for Litigation Financing which aims to promote and self-regulate Litigation Finance in India [B.W. Online Bureau (2021)].[21]

5. Improving Arbitration Institution Infrastructure in the country

As previously discussed, India has a dearth of Arbitration Institutes of international standards for conducting International Commercial Arbitration. In absence of this, delayed and inefficient conduct of arbitration proceedings are inevitable. The current regime was demanding some action towards this and it seems like Indian policymakers have understood the same. A High Level Committee was created by the Indian Government in the year 2016 to review and reform the institutionalization of arbitration in India. This committee was headed by Justice (Retd.) B.N. Srikrishna (The

[20] *Ram Coomar Coondoo v Chunder Kanto Mukerjee* (1876) L.R. 4 I.A. 23.
[21] B.W. Online Bureau (2021) *Global and Indian Companies Form Indian Association for Litigation Finance to promote and self-regulate Litigation Finance in India* [Online] Available at: http://bwlegalworld.businessworld.in/article/Global-and-Indian-Companies-form-Indian-Association-of-Litigation-Finance-to-Promote-and-Self-Regulate-Litigation-Finance-in-India/17-02-2021-378664/ (Accessed: 19 August. 2021).

Srikrishna Committee). There were six chief recommendations of this committee [Justice (Retd.) B.N. Srikrishna Committee (2017)].[22]

Firstly, the functions of APCI were defined which will be to grade arbitral institutions and accredit the arbitrators. It was clarified that APCI should not be a Government run body and the accreditation must not be a criteria for recognition and enforcement of awards administered by that arbitral institution to prevent monopolization. Secondly, it was put forward that there should be a separate bar and bench for arbitration where arbitrators will be trained with periodic refresher courses and special arbitration benches will oversee the arbitration matters before courts.

Thirdly, Section 11 of the A&C Act, 1996 of post 2015 amendment was recommended to be changed. It provided that the appointment of arbitrators shall be done by the institutions designated by Supreme Court/High Court and not by their Chief Justices respectively. The fourth recommendation was to promote arbitration in government contracts under National Litigation Policy. Other recommendations were to make to ICADR a globally competitive institution by marketing itself to potential parties and to allow foreign lawyers to represent their clients in India in Indian seated arbitrations [Godha, M., Katikey, M. (2018)].[23]

6. Reversal of the Ghost of the Retrospective Taxation:

In the year 2012, the Government of India had brought a retrospective amendment through the Finance Act, 2012 in the taxation regime of the country by including transactions which undertook “Indirect transfer of an Indian Asset or Sale of shares of a foreign company if it derived value from an asset in India”. After this blunder, the Income Tax Department raised claims in 17 different

[22] Justice (Retd.) B.N. Srikrishna Committee (2017) *High Level Committee to review the institutionalization of arbitration mechanism in India* [Online] Available at: https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf (Accessed: 19 August, 2021) New Delhi: High Level Committee.

[23] Godha, M., Katikey, M. (2018) *The New found emphasis on Institutional Arbitration in India* [Online] Available at: http://arbitrationblog.kluwerarbitration.com/2018/01/07/uncitral-technical-notes-online-dispute-resolution-paper-tiger-game-changer/ (Accessed: 19 August, 2021).

cases [Bloomberg Quint (2021)].[24] Resultantly, today the country is slapped with huge amounts of claims in two cases namely Vodafone Case and Cairn Case. In both the cases, the appellants had restructured their Holding Companies of India based Subsidiary Companies outside India in a bid to avoid enormous taxes. Thereafter, the Holding Company's ownership was acquired by them in which ultimately they acquired shares in the Indian subsidiary.

Undoubtedly, India was losing its charm as an attractive place for investment due to these ever increasing claims and disputes. But contrary to everyone's shock, the Government of India proved its pro-arbitration stance by repealing this provision of retrospective taxation. As per the proposed amendment, no further tax demand shall be made in future under this provision. Second proposition is that any demands made prior to 28th May, 2012 shall be nullified on withdrawal or furnishing of undertaking for withdrawing any pending litigation without claiming costs and damages [*The Taxation Laws (Amendment) Bill, 2021*].[25]

PART IV

CONCLUSION

Going through this journey, we saw the highs and lows faced by India with respect to changing policies and amendments and the perspective of judiciary towards the same. Concluding, we can say that this year has seen the biggest positive changes for international arbitration regime in India. Further in this direction, a ground level study may be conducted after a while when we will see the results of above endeavors to understand how much progress we have exactly made. This will give an idea of where the gap is and what is to be

[24] Bloomberg Quint (2021) *Bye, Bye Retro Tax: Why, How and When* [Online] Available at: https://www.bloombergquint.com/business/why-the-finance-ministry-wants-to-amend-indias-infamous-retrospective-tax-on-indirect-transfers (Accessed: 19 August, 2021).
[25] *The Taxation Laws (Amendment) Bill, 2021* (c. III) New Delhi: Universal Publications.

filled.

A more pragmatic study is required than just comparing the preferability of parties in choosing seat and analyzing provisions of relevant statutes to get the big picture. In this direction, the coming time is utmost important. One can look much deeper into the institutional framework of Arbitration Institutions in India as they are the key to attract more foreign and national parties to conduct their arbitration proceedings in India. Therefore, on a current comparison we arrive at this conclusion that atmosphere India for International Commercial Arbitration is evolving and will bring enormous changes in future.

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CONFIDENTIALITY OBLIGATION FOR NON-PARTIES TO ARBITRATION: AN INSIGHT INTO MALAYSIAN CASES

By Lim Sin Ern* and Teng Ai Wen**

ABSTRACT

Confidentiality is one of the key factors of choosing arbitration to resolve disputes. Confidentiality refers to the non-disclosure of certain information to the general public throughout the arbitral proceedings. This paper gives insight into the role and importance of confidentiality in arbitration. Though confidentiality plays a significant role in arbitration, it is not absolute and is subject to some exceptions. The position of the Malaysian Court on whether non-parties to arbitration are bound by confidentiality is examined and discussed through decisions of three noteworthy Malaysian cases: Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors [2014] 1 CLJ 919, Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] MLJU 405 and Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & 2 Ors [2019] 5 MLJ 1. Upon the analysis of the issues, comments and recommendations are elaborated.

INTRODUCTION

Confidentiality is one of the primary reasons for arbitration being the preferred option for dispute resolution. The Oxford English Dictionary defines 'confidentiality' as a situation in which you expect somebody to keep information secret. In arbitration, 'confidentiality' means non-disclosure of specific information in public. The principle of

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confidentiality is one of the key reasons for arbitration being chosen to resolve disputes. This can be supported by the 2019 International Arbitration Survey where about 52% of the respondents prefer arbitration over court due to the reason of confidentiality and privacy in international construction arbitration.[1] Furthermore, it also can be supported with one of the surveys entitled "How important is confidentiality in international commercial arbitration?" from the 2018 International Arbitration Survey.[2] The survey results show that 40% of the respondents found that confidentiality in international commercial arbitration is very important, followed by 33% of the respondents who found it quite important.

Defining "confidentiality" is deemed a major problem because there are only so few definitions of the principle being attempted with no complete success. [3] The principle of confidentiality is closely connected to the private nature of the arbitration. [4] However, arbitration being private does not equivalent to being confidential.[5] Francisco Blavi in his paper propounded that confidentiality is much wider than privacy where confidentiality addresses that all the information from the arbitration cannot divulge to third parties while the privacy refers to the idea that the hearings and the tribunals' deliberations are conducted behind closed doors.[6]
In international arbitration, confidentiality refers to non-disclosure of

[1] "2019 International Arbitration Survey: International Construction Disputes", <https://www.camsantiago.cl/minisites/informativo-online/2019/NOV/docs/international-arbitration-survey-november-2019.pdf> accessed 15 January 2021.
[2] "2018 International Arbitration Survey", <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> accessed 8 November 2020.
[3] Michael Hwang and Katie Chung, 'Defining the Indefinable: Practical Problems of Confidentiality in Arbitration' (2009) 26 J Int'l Arb 609.
[4] Diana-Loredana Hogas, 'What Does Confidentiality Inside the Arbitration Mean?' [2014] 6(1) Romanian Journal for Multidimensional Education 29-38.
[5] Bernardo M Cremades and Rodrigo Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (2013) 23 J Arb Stud 25.
[6] Francisco Blavi, 'A Case in Favour of Publicly Available Awards in International Commercial Arbitration: Transparency v. Confidentiality' (2016) 2016 Int'l Bus LJ 83; Maxi Scherer, Remy Gerbay and Lisa Richman, *Arbitrating under the 2014 LCIA Rules: A User's Guide* (Alphen aan den Rijn, Netherlands: Wolters Kluwer 2015) 362.

certain information to the general public by virtue of arbitration rules or arbitration agreement. [7] Confidentiality is the fundamental characteristic of international arbitration which relates to disclosure of certain documents, information, or evidence to third parties which relates to the arbitral proceeding.[8] The duty of confidentiality also can be related in awards, pleadings, written submission, notes and transcripts of evidence given in the arbitration. [9] Furthermore, Francisco Blavi in his paper defined confidentiality in international commercial arbitration as the existence of the proceeding, the issues, the evidence, and hearings and the awards may not be divulged to third parties. In confidentiality principle, hearings are held in camera and publication of award is prohibited without parties' consent.

Furthermore, the necessity of confidentiality is applied in certain fields of law such as competition law, intellectual property law, and commercial secrets rules. For instance, in Fujitsu arbitration, intellectual property information is protected by the principle of confidentiality.[10] Hence, confidentiality is applied to avoid intellectual property, industrial secrets, or any other valuable or sensitive commercial information become public.

Confidentiality is one of the main factors why people in business choose arbitration as a forum to resolve international commercial disputes. Confidentiality is one of the attractive factors to the dispute parties in arbitration. [11] Undoubtedly, confidentiality brings advantages in arbitration. It encourages truthfulness, comprehensive

[7] Vijayamalar Arumugam, 'The Balance Between Confidentiality and Transparency in International Commercial Arbitration in Malaysia' (2020) CLJ Law; Yijia Lu, 'From Courts to Arbitration: Arbitration's Confidentiality Advantage' (2019) NYU Law and Economics Research Paper No.20-09 < https://ssrn.com/abstract=3442171> accessed on 11 January 2021.
[8] Bazil Oglinda, 'The Principle of Confidentiality in Arbitration - Application and Limitations of the Principle' (2015) 4 Persp Bus LJ 57.
[9] Sundra Rajoo, 'Privacy, Confidentiality and Disclosure of Information Relating to Arbitral Proceedings' (2021) 1 MLJ xiv.
[10] Oglinda, 'The Principle of Confidentiality in Arbitration - Application and Limitations of the Principle' (n 8).
[11] Cremades and Cortes, 'The Principle of Confidentiality in Arbitration: A Necessary Crisis' (n 5).

study of the issues and helps parties to reach an agreement. Furthermore, confidentiality also allows the parties to make their arguments in a private forum. Besides, confidentiality can safeguard business relations; even its purpose is to keep sensitive information from potential business partners. The importance can be further proved in Avinash Poorooye's paper where confidentiality avoids the damage of business relationships, avoid setting unfavourable judicial precedents. The parties are free to present their arguments in a private forum and can keep their disputes away from the attraction of the out sighters.[12] Additionally, Francisco Blavi recognised the significance of confidentiality in protecting the fairness of the arbitral process[13] and decreasing the risk of provoking limits to collateral damage and smoothen the process on an amicable business-oriented resolution of their dispute.[14] However, the confidentiality principle is not absolute as it subjects to several exceptions, namely consent by the parties, an order or leave of the court, reasonably necessary" for the protection of the legitimate interests of an arbitrating party, the interests of justice or public interest require it.

THE MALAYSIAN POSITION ON CONFIDENTIALITY IN ARBITRATION

Before the introduction of Section 41A to the Arbitration Act 2005, the Arbitration Act 2005 was silent on the obligations and matters of confidentiality in arbitration. Prior to the Arbitration (Amendment) (No. 2) Act 2018, the Malaysian Court followed the common law position where implied confidentiality is imposed in the arbitration. In Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc,[15] the Malaysian High Court had referred to an English landmark

[12] Avinash Poorooye and Ronan Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (2017) 22 Harv Negot L Rev 275.
[13] Shore et al., "The Arbitrator and the Arbitration Procedure-The Public Interest in Private Dispute Resolution" Austrian Yearbook on International Arbitration (2009) 172.
[14] Born, International Arbitration: Law and Practice (2012) 15.
[15] Malaysian Newsprint Industries Sdn Bhd v Bechtel International, Inc [2008] 5 MLJ 254.

case, Dolling-Baker v Merrett[16] where the English Court held that an implied obligation of confidentiality arises from the arbitration's private nature and is binding to the parties. In other words, suppose there is an absence of express consensus in the arbitration agreement on confidentiality; implied confidentiality would be presumed considering the nature of the arbitral process. However, the disclosure of documents, transcripts, and notes of evidence relating to arbitration is allowed when the parties consent to it or under the court's order or necessary for an equitable disposition of the action.[17]

Section 41A of the Arbitration Act 2005 prohibits disclosure of information relating to arbitral proceedings and awards. Section 41A was based on Section 18 of Hong Kong's Arbitration Ordinance and Section 14 of the New Zealand Arbitration Act. New Zealand amended its Act in 2007 by clearly stated the confidentiality rule is applicable to the listed parties in the arbitral proceedings only. Section 14B of the New Zealand Arbitration Act laid out the parties and the arbitral tribunal are not allowed to disclose confidential information in the arbitral proceedings. Malaysia followed its amendment by including a similar provision, Section 41A in the amended version of the Arbitration Act 2005.

By virtue of Section 41A (1), any publication, disclosure or publication of any information concerning the arbitral proceedings under the arbitration agreement or an award made thereof is prohibited unless agreed by the parties. Exceptions to the explicit confidential obligations are stated under Section 41A (2), namely: for the sake of legal interests of the party; to enforce or challenge the award, obliged by law or disclosure to professionals or experts appointed by any of the parties. Therefore, the parties' obligation of confidentiality expressed under Section 41A (1) is exempted if the circumstances

[16] Dolling-Baker v Merrett [1990] 1 WLR 1205.
[17] Poorooye and Feehily, 'Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance' (n 12).

or scenario of the parties fall under any of the exceptions provided under Section 41A (2) of the Arbitration Act 2005. Malaysia initially followed the English law of implied duty of confidentiality in arbitral proceedings that extended to parties' privy to arbitration and third parties. Following the amendment in 2018, confidentiality in commercial arbitration is clearly expressed in line with UNICITRAL Model Laws.[18] It is important to highlight that the insertion of Section 41A in the 2018 amendment has enhanced party autonomy by respecting the decision and consensus between the parties to contract out of or expand the scope of the provision through the express terms of the arbitration agreement.[19]

While in AIAC Arbitration Rules 2018, a similar scope of confidentiality as in the Arbitration Act 2005 is provided. Under Rule 16 of the AIAC Arbitration Rules 2018:

"The arbitral tribunal, the parties, all experts, all witnesses and the AIAC shall keep confidential all matters relating to the arbitral proceedings (existence of proceedings, pleadings, evidence, documents, award) unless the disclosure is necessary for implementation and enforcement of the award or to the extent that disclosure may be required of a Party by a legal duty, to protect or pursue a legal right or to challenge an award in bona fide legal proceedings before a court or other judicial authority."

In other words, the AIAC Arbitration Rules 2018 extend the obligation to the arbitral tribunal, parties, experts and witnesses. However, in the Arbitration Act 2005, the obligation of confidentiality is only applied to parties to the arbitration.

[18] Peter Binder, "International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions." Kluwer Law International BV, 2019.

[19] Rajoo, 'Privacy, Confidentiality and Disclosure of Information Relating to Arbitral Proceedings' (n 9).

WHETHER NON-PARTIES TO ARBITRATION ARE BOUND BY CONFIDENTIALITY: CASE REVIEWS

The new insertion on confidentiality via Section 41A of the Arbitration Act 2005 had resulted in controversial and disputable questions of law. In the recent case, Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd ("Rafiq"),[20] the issue that arose was whether duty of confidentiality in Section 41A broaden the scope of "party" to non-parties in an arbitration proceeding or third parties.[21] In this case, the plaintiff, Dato' Seri Timor Shah Rafiq was a director of the defendant company. The defendant, Nautilus Tug & Towage Sdn Bhd was a local private limited company in the business of owning, leasing, chartering and hiring various types of vessels. The defendant had agreed to sign a Harbour Tugs Services Agreement with Vale Malaysia Minerals Sdn Bhd. Tragically, a harbour tugboat chartered to Vale and managed by Azimuth Ship Management ("Azimuth") sank. The plaintiff decided to bring an action against one of the shareholders, Azimuth Ship Management, for tort of negligence by seeking leave of court pursuant to Section 347 and Section 348 of Companies Act 2016. In the application, the plaintiff sought to use an expert report and survey report to prove Azimuth Ship Management's negligence. Such decision had triggered conflict where the defendant opposed the use of such reports on the ground that the documents were initially prepared for the arbitral proceedings between three parties, namely the defendant company, Azimuth, and Nautical Supreme.

The defendant contended that no consent was given to the plaintiff for disclosure of the documents and the documents should not be

[20] Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] MLJU 405.
[21] Shanti Mogan, 'High court rules that non-parties to arbitration are not bound by confidentiality' (Lexology, 17 October) <https://www.lexology.com/commentary/arbitration-adr/malaysia/shearn-delamore-co/high-court-rules-that-non-parties-to-arbitration-are-not-bound-by-confidentiality#:~:text=The%20high%20court%20has%20now,to%20arbitral%20proceedings%20and%20awards.> accessed 15 July 2021.

used by the plaintiff and should be expunged from the proceeding. The defendant reckoned on Section 41A of the Arbitration Act 2005 where the confidentiality obligations apply to the plaintiff who was a non-party to arbitration. The defendant also cited the decision of High Court in Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors:[22]

"the principle of privacy precludes third parties from making use of documents generated in arbitration proceedings outside the arbitration without the consent of the party producing it or the leave of court."

Additionally, the defendant had also referred to the common law through the case of Dolling Baker v Merrett and others[23] where there is an implied obligation of the parties not to disclose the documents in arbitration without the consent of the party or the order of the court. However, the High Court dismissed the application of exclusion of reports by the defendant. The High Court held that the rule of confidentiality under Section 41A did not extend to non-parties to the arbitration and only applied to the parties to the arbitral proceedings only due to the lack of privity. The court found out that the plaintiff is not a party to the arbitration and therefore is not bound by the statutory duty of confidentiality in Section 41A. Since the plaintiff is a third party, the plaintiff is allowed to use the documents relating to the arbitration without asking for consent from the parties nor apply any exemption or exception under Section 41A (2). The court further stated that the insertion of Section 41A had superseded the common law principles of confidentiality of arbitrations.[24]

[22] Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors [2014] 1 CLJ 919.

[23] Dolling Baker v Merrett *[1991] 2 All ER 890 (n 16).*

[24] Peter Godwin and others, 'Malaysia's High Court rules that third parties are not prohibited from disclosing confidential documents produced in arbitration proceedings' (Herbert Smith Freehills, 15 July) <https://hsfnotes.com/arbitration/2019/07/15/malaysias-high-court-rules-that-third-parties-are-not-prohibited-from-disclosing-confidential-documents-produced-in-arbitration-proceedings/> accessed 15 July 2021.

Additionally, two weeks after the High Court judgement of the Rafiq case, the Federal Court, in the case of Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & 2 Ors,[25] had also made a noteworthy decision on the non-applicability of Arbitration Act 2005 to non-parties to an arbitration. The issue of the case was whether the non-party to an arbitration could apply for an anti-arbitration injunction to prevent the arbitration proceedings between the parties. In this case, Nautilus Tug & Towage Sdn Bhd is a joint venture company in conducting a project for the harbour tug services. There are two shareholders in this joint venture company, namely Nautical Supreme Sdn Bhd and Azimuth Marine Sdn Bhd. The Plaintiff, Jaya Sudhir Jayaram claimed that he had invested in the project premised on a collateral understanding with Nautical Supreme and Azimuth. However, Nautical Supreme denied such collateral understanding and commenced arbitration proceedings against Azimuth and Nautilus. Then, the Plaintiff brought the court action against Nautical Supreme, Azimuth, Nautilus and Nautilus's directors to enforce the collateral understanding. In the end, the Federal Court demonstrated the same principles as in the Rafiq case where the non-parties to the arbitration are not subject to the rights and prohibitions in the Arbitration Act 2005. Applying this decision to the provision relating to the obligation of confidentiality, it would imply that the duty of confidentiality in the Arbitration Act 2005 is therefore not applicable to non-party. As a result, the non-party is excluded from the provisions designed to protect the privacy and confidentiality of arbitration proceedings.

The decision of excluding the non-parties from confidentiality obligations of Section 41A in the Rafiq case is contrary to the decision in Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors [26]. The High Court made

[25] Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd & 2 Ors *[2019] 5 MLJ 1*

[26] Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors [2014] 1 CLJ 919 (n 22).

such a decision prior to the Arbitration (Amendment) (No. 2) Act 2018. At that time, the Malaysian court followed the UK position on the implied confidentiality in arbitration.

In this case, the plaintiffs brought an action against six defendants for fraudulent misrepresentation as they were induced to consent to a settlement agreement with the first defendant. The first defendant then started the arbitration proceedings in Singapore under ICC Rules ("International Chamber of Commerce"). The plaintiff filed the impugned document in response to the claimants pleading. While the outcome of the arbitration between the plaintiff and the first defendant was pending, the second to the fourth defendants who were not parties to the arbitration proceeding filed two separate applications to stay the proceedings. They claimed that the arbitration proceedings and civil action raised similar issues and were therefore overlapping. To support their claim, they showed the impugned document to illustrate the point without obtaining permission from the plaintiffs. Following the defendants' action, the plaintiff then applied for a court order to expunge the impugned document, claiming such impugned documents were related to arbitration and thereof confidential. Thus, the plaintiffs contended that the impugned documents could not be used by the defendants as third parties since the common law arbitration proceedings are private. The defendants who are not parties to the arbitration is not permitted to use the impugned document obtained unlawfully without the permission of the plaintiffs.

The High Court allowed the plaintiffs' claim and ruled that the impugned document was a pleading in the arbitration, which was inherently private. The judgment was in line with the English position, Dolling Baker v Merrett and others [27] and Ali Shipping Corp v. Shipyard Trogir,[28] in which arbitration is a private process between parties to an arbitration agreement to which third parties have no

[27] Dolling Baker v Merrett [1991] 2 All ER 890 (n 16).
[28] Ali Shipping Corp v. Shipyard Trogir [1998] 2 All ER 136.

access. In addition, the court had also cited the case of Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc & Anor[29] to further affirm that Malaysia follows the English principle on the implied duty of confidentiality in arbitration. Therefore, even if the impugned document is already in public domain, it is still subject to the rule of privacy. Third parties are not allowed to make use of the documents without the approval of the party or the court's order. The rules of confidentiality extended to third parties, meaning that the second to the fifth defendants who were non-parties to the arbitration proceedings had the responsibility of maintaining confidentiality in arbitration. The court also viewed that the advantage of a private arbitration will be undermined if the arbitration proceedings are made public via the divulgence of arbitration-related documents.

COMMENTS

Obviously, Malaysia is having a conflicting stand on similar issues of confidentiality obligation of third parties in arbitration before and after the 2018 amendment of the Arbitration Act 2005. Prior to the introduction of Section 41A in 2018, the Arbitration Act did not address confidentiality issues in arbitrations. The Malaysian Courts had widely relied on the common law principles, namely the implied obligation of confidentiality on both parties and non-parties to arbitration.[30]

After the said amendment, the decision in Rafiq case had its implications on the scope of the confidentiality rule under Section 41A. Following the High Court's judgment in the Rafiq case that only parties to the arbitration are subject to the confidentiality rule in Section 41A. The former common law position and rationale upheld in the Jacob case which prohibits third parties from using documents generated in arbitration proceedings outside the arbitration is no

[29] Malaysian Newsprint Industries Sdn Bhd v Bechtel International Inc & Anor [2008] 5 MLJ 254 (n 15).
[30] Vijayamalar Arumugam, 'The Balance Between Confidentiality and Transparency in International Commercial Arbitration in Malaysia' (n 7).

longer the law.[31] This could pose potential threats to confidentiality rights of party-in-arbitration if the third party is able to get their hands on the confidential information relating to the arbitration and use them without the permission of the parties to the arbitration. The decision of the High Court in the Rafiq case appears to have degraded the essential value of arbitration, namely confidentiality, by removing the restriction on third parties in publishing, revealing or disseminating information pertaining to arbitration proceedings.[32]

It is significant to highlight that the Arbitration Act 2005 contains statutory exceptions to confidentiality, including allowing the disclosure of confidential information by a party to the arbitration in legal proceedings before a court or other judicial authority. However, the provision does not explicitly express that non-parties are prohibited from relying on confidential information and therefore would impliedly enable non-party to abuse the confidential information when commencing legal proceedings against any party to the arbitration. To put it another way, the Arbitration Act 2005 has no express provision in permitting third or non-party to use and disclose confidential documents relating to the arbitration without asking for consent from the parties as held in the case of Rafiq. Appreciating the sanctity of arbitration as a private forum of dispute resolution, the Malaysian Courts should in the future consider the law in the case of Rafiq on a case-by-case basis instead of a general rule to protect the parties to the arbitration from unauthorized use or disclosure of confidential information by the non-parties.

Also, it would be anomalous for a party to an arbitration to be subjected under the prohibition in Section 41A (1) to enjoy an exception under Section 41A (2), but a third party that are not privy to the arbitration (and therefore not subject to Section 41A (1)) to be prohibited from using any information in the arbitration by Section

[31] Shanti Mogan, 'High court rules that non-parties to arbitration are not bound by confidentiality' (n 21).
[32] Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software GMBH & Co KG & Ors [2014] 1 CLJ 919 (n 22).; Esso Australia Resources Ltd v Plowman [1995] 128 ALR 391.

41A (1) or its common law counterpart, without enjoying any exception.[33]

On the other hand, by virtue of Section 8 of the Arbitration Act 2005, no court shall intervene in matters governed by this Act, except where so provided in the Act. Thus, the court may intervene in any matters that are not under the purview of the Arbitration Act 2005. The judgement of the Rafiq case is on par with the statutory provision. This is supported by the fact that the prohibition of third or non-party from using confidential information generated in arbitral proceedings is not specifically regulated by the strict wording of the Arbitration Act 2005.[34] The common law principle of implied confidentiality on third or non-party held in Jacob's case would be less persuasive when the court values interpretation of statutory arbitration framework over any Malaysian common law principles of confidentiality of arbitrations.

CONCLUSION AND RECOMMENDATION

Arbitration is a creature of consent, embracing the concept of party autonomy. Although arbitration inclines towards fulfilling the parties' wishes upon consent, such wishes would need to be drafted and included in written documents for the sake of certainty. Similarly, if the parties want to be sure that their arbitration will be confidential, confidentiality should be explicitly stated in their arbitration clause and arbitration agreement. However, such clause and agreement between the parties in arbitration are not binding on non-parties.

The decision illustrated in the Rafiq case is presumed that the Plaintiff as a third party had access to the document in its capacity as the director of the Defendant. This might create a problem where the non-parties would take unfair advantage to the confidential

[33] Shanti Mogan, 'High court rules that non-parties to arbitration are not bound by confidentiality' (n 21).
[34] Peter Godwin and others, 'Malaysia's High Court rules that third parties are not prohibited from disclosing confidential documents produced in arbitration proceedings' (*Herbert Smith Freehills*) (n 24).

information. To overcome the problem in the Rafiq's case and ensure that the non-parties will not misuse the confidential information for undesirable purposes, it is suggested that a contract for duty of confidentiality can be drafted and signed by the non-parties to the arbitration. Non-parties that are required to sign such contract include the secretary to the arbitral tribunal, fact witnesses, expert witnesses appointed by the parties or by the tribunal, translators and interpreters, court reporters and any other persons who have access to confidential information in arbitral proceedings like the non-party Plaintiff in the Rafiq case. Therefore, since the confidentiality obligation is essential for performance of the contract, the non-party can be sued for damages if he or she breaches the contractual obligation of confidentiality and cause damages to the contractual counterparty. A claim in tort will also be imposed against non-parties which caused harm by disclosing and using confidential information. The legislation could enact a law to counter the issue of unauthorized use or disclosure of confidential information by the non-parties. Exceptions are to be included for special circumstances. The recommended law is as follows:

(1) No non-parties may disclose or use any confidential information obtained from any arbitral proceedings.

(2) Nothing in subsection (1) shall prevent the publication, disclosure and use of information referred to in that subsection by a non-party—

a. if the disclosure or use is made with the consent of parties to the arbitral proceedings; and

b. if the disclosure or use is made to any government body, regulatory body, court or tribunal and the non-party is obliged by law to make the publication, disclosure or use.

With such law, the court will be able to order an injunction prohibiting non-parties in disclosing or using confidential information obtained from any arbitral proceedings unless the situation falls under the exception.

The unauthorized use or disclosure of confidential information by the non-parties generally happen when such confidential information is accessible by non-parties. Confidential information is basically hard to access due to the privacy and confidentiality of the proceedings. Presuming a high possibility of the confidential information being leaked to the non-parties due to the negligence of the arbitrating party, it is recommended that a specific clause shall be inserted in the agreement expressing the sanctions for the parties who violates the duty of confidentiality in leaking out the confidential information to non-parties. This would prevent the third party from securing and thus using the confidential information to their advantage.

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