E - NEWSLETTER

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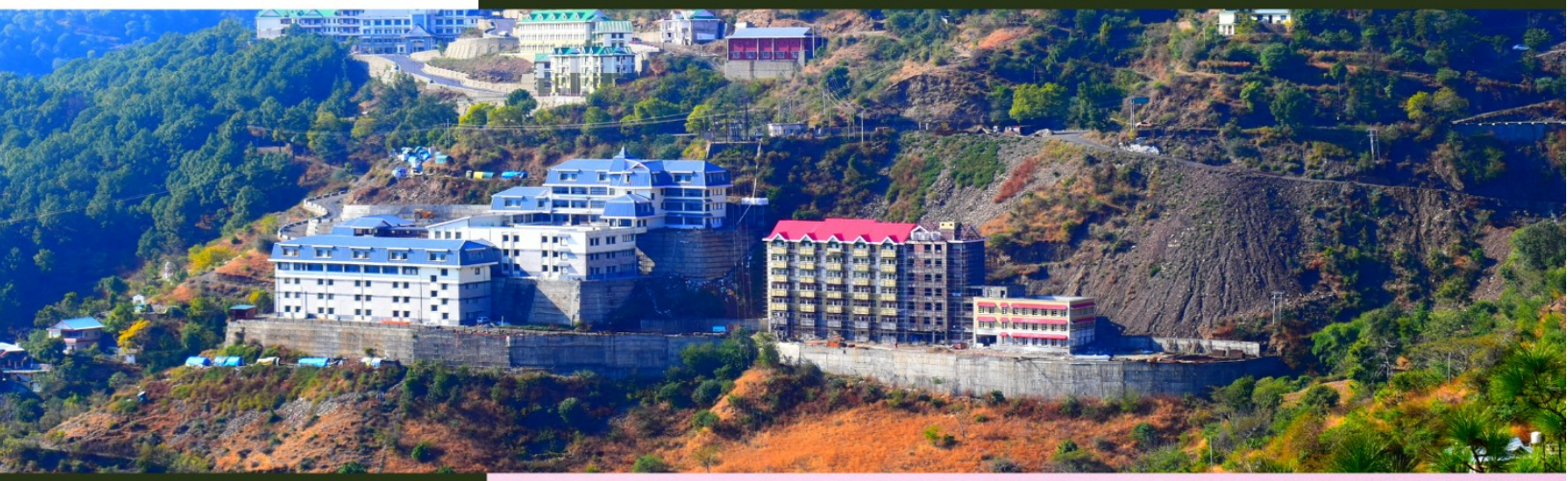


CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION AND PROFESSIONAL SKILLS

Himachal Pradesh National Law University, Shimla

INSIDE THE ISSUE

Of late

Section - 1

INTERNATIONAL UPDATE

1. ICC INTERNATIONAL COURT OF ARBITRATION ELECTS FIRST WOMAN PRESIDENT.

Claudia Salomon has been elected as the next president of the International Chamber of Commerce's (ICC's) International Court of Arbitration. The independent arbitrator and former Latham & Watkins and DLA Piper partner was elected by the ICC's world council this week, making her the first woman president of the ICC court in its almost 100 year history. **read more.**

2. ICSID RELEASES REVISED PROPOSED MEDIATION RULES.

On June 15 2021, the International Centre for the Settlement of Investment Disputes released its latest working paper as part of its Rules Amendment Project. In addition to proposing changes to the ICSID Convention and ICSID Additional Facility arbitration and conciliation, Working Paper 5 also refines the proposed new rules for ICSID fact-finding and mediation. **read more.**

3. MINISTRY OF JUSTICE PUBLISHES REVISED DRAFT PRC ARBITRATION LAW.

On July 30 2021, the Ministry of Justice (MoJ) of the PRC released proposed revisions to the PRC Arbitration Law for public consultation. The MoJ also published explanatory notes to the Revised Draft. The PRC Arbitration Law was promulgated in 1994 and has been in force for 26 years without substantial amendment. With the rapid economic expansion over the past decades in Mainland China, the Arbitration Law has, in many respects, become disconnected from both economic reality and international practice. In 2018, the MoJ started the revision process, which led to the publication of the Revised Draft on 30 July. **read more.**

4. LAUNCH OF ASIAN INTERNATIONAL ARBITRATION CENTRE ARBITRATION RULES 2021

The Asian International Arbitration Centre has launched the latest revisions to its Arbitration Rules, following their last update in 2018. Upon coming into effect on August 1 2021, the AIAC Arbitration Rules 2021 will apply to all AIAC arbitrations commenced after this date, unless parties agree otherwise. The 2021 revisions come following an extensive study by an international External Advisory Committee for the Revision of the AIAC Arbitration Rules (including Peter Godwin, Partner, HSF Kuala Lumpur) and a public consultation of the draft rules. **read more.**

5. ECUADOR INTRODUCES REGULATIONS TO ITS ARBITRATION AND MEDIATION ACT.

After rejoining the ICSID Convention in June 2021, Ecuador has made a further contribution to the growth of international arbitration within its borders. On August 18, 2021, President Guillermo Lasso issued Executive Decree, introducing the Regulations to the Arbitration and Mediation Act. **read more**.

6. IRAQ RATIFIES MAURITIUS CONVENTION ON TRANSPARENCY IN INVESTOR STATE ARBITRATION.

Iraq has become the latest state to ratify the *Mauritius Convention on Transparency in Treaty-based Investor State Arbitration* (the *Mauritius Convention*), having deposited its instruments of ratification at the UN Headquarters in New York and having previously signed the Mauritius Convention on February 13 2017. The Mauritius Convention will come into force for Iraq on February 20 2022. **read more.**

7. BRAZILIAN SUPERIOR COURT CONFIRMS 90-DAY LIMITATION PERIOD TO REQUEST ANNULMENT OF AN ARBITRAL AWARD.

On August 9 2021, the Brazilian Superior Court of Justice published an interesting decision on the time limit to request the annulment of arbitral awards with a seat in Brazil. Under Art. 33, paragraph 2 of the Brazilian Arbitration Act, a party has a 90 day term to bring a judicial lawsuit to set aside an arbitral award. Such term shall be counted from the date such party is notified of the arbitral award. If there is a request for clarification, correction or interpretation of the arbitral award, the deadline shall count from the notification of decision of such request. **read more.**

8. SWISS SUPREME COURT CONFIRMS THAT AN ARBITRAL TRIBUNAL MAY UNDER CERTAIN CIRCUMSTANCES REFUSE TO RESCHEDULE A HEARING WITHOUT VIOLATING ONE PARTY'S RIGHT TO BE HEARD.

In a decision published on June 15 2021, the Swiss Federal Supreme Court ("SFSC") dismissed a challenge to set aside an arbitral award because in its view, the request to reschedule the hearing was merely intended to delay the arbitral proceedings, an intention which is not protected by the right to be heard (case no. 4A_530/2020 (in French)). **read more.**

9. UK SUPREME COURT UNANIMOUSLY DISMISSES APPEAL IN KABAB-JI SAL (LEBANON) VS. KOUT FOOD GROUP (KUWAIT)

The UK Supreme Court has handed down its much-anticipated decision in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) *[2021] UKSC 48*, unanimously dismissing Kabab-Ji SAL (Lebanon) (KJS)'s appeal. The decision to dismiss the appeal means that KJS cannot enforce a Paris-seated award granted in its favour by an arbitral tribunal against Kout Food Group Kuwait (KFG) in England and Wales. **read more.**

10. ECUADOR IS NOW OFFICIALLY A CONTRACTING STATE OF THE ICSID CONVENTION.

On June 30, 2021, Ecuador's Constitutional Court held that President Guillermo Lasso had the power to ratify the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) without the approval of Ecuador's National Assembly. The Court also held that the ratification of the ICSID Convention does not imply that Ecuador has assigned inherent domestic powers to international jurisdiction nor that the ratification of the treaty automatically binds Ecuador to investor-state arbitration. **read more.**

11. MALAYSIAN FEDERAL COURT PROVIDES GUIDANCE ON IDENTIFYING PLACE OF ARBITRATION IN MALAYSIA FOR THE PURPOSE OF DETERMINING THE SUPERVISORY COURT OF THE ARBITRATION.

In *Masenang Sdn Bhd v. Sabanilam Enterprise Sdn Bhd*, the Federal Court held that the courts of first instance of the place specified as the seat of arbitration in Malaysia has exclusive supervisory jurisdiction over arbitrations seated in that place, including any award arising from such proceedings. In this respect, a court of a state in Malaysia which is not the court of the place specified as seat of arbitration will have no supervisory jurisdiction over that arbitration or its award. **read more.**

12. UNCITRAL PUBLISHES EXPEDITED ARBITRATION RULES

UNCITRAL adopted the expedited arbitration provisions (the EAPs) in July 2021. The EAPs entered into force on September 19, 2021. Expedited arbitration procedures have become increasingly popular and many leading arbitral institutions have now established relevant. The International Chamber of Commerce, for example, introduced their expedited arbitration rules in response to a significant proportion of their caseload involving disputed sums below US$5 million in 2016. As the UNCITRAL Arbitration Rules are widely used in *ad hoc* arbitrations, the EAPs will facilitate the adoption of expedited procedures for *ad hoc* arbitrations. **read more.**

12. BRAZIL JUDICIARY REGULATES ARBITRAL LETTERS FOR COMMUNICATIONS BETWEEN ARBITRATORS AND JUDICIAL COURTS.

The Brazilian Justice Counsel published on September 29, 2021 a decision regulating arbitral letters, which are the instruments foreseen in Brazilian Arbitration Act and in the Brazilian Code of Civil Procedure for communications between arbitral tribunals and judicial courts. Although arbitrators are equivalent to judges, they do not have powers to issue certain coercive orders, such as to freeze bank accounts, seize assets or compel a witness to appear in a hearing. For such coercive measures, the arbitrator will have to request judicial court assistance, which is effected through the remittance of such "arbitral letter" from the arbitrators to the judge. **read more.**

NATIONAL UPDATE

1. CONSIDER ARBITRATION LAWYERS FOR SENIOR POSITIONS AN APPOINTMENT AS JUDGES: Indian Arbitration Forum (IAF) TO THE CHIEF JUSTICE OF INDIA.

Convenors of the IAF wrote a letter to CJI NV Ramana, stating that arbitration practitioners should be placed on the same footing as litigation lawyers as regards their promotion as Senior Advocates and elevation as Judges. The Forum acknowledged the lack of requisite criteria to make such appointments, but suggest adopting criteria such as redacted versions of arbitral awards. **Read more.**

2. ARBITRAL AWARD BASED ON ABSENCE OR IGNORANCE OF VITA EVIDENCE FALLS UNDER THE AMBIT OF PATENT ILLEGALITY: SUPREME COURT.

In *PSA SICAL Terminals (P) Ltd. v. V. O. Chidambranar Port Trust*, the Supreme Court opined that an arbitral award that rewrites a contract or ignores vital evidence would be set aside on grounds of patent illegality, under Section 34 of the Arbitration and Conciliation Act, 1996. The court observed that a finding based on no evidence at all or an award that ignores vital evidence in arriving at its decision would be perverse. **Read more.**

3. COURTS CANNOT MODIFY ARBITRAL AWARDS UNDER SECTION 34 OF THE A&CACT: SUPREME COURT.

In *NHAI v. Hakeem*, the Apex Court held that Section 34 of the Arbitration and Conciliation Act, 1996 does not give any power to Courts to modify arbitral awards. The bench comprising Justices RF Nariman and BR Gavai dismissed all previous appeals concerning the issue and observed that "*If one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha.*" **Read more.**

4. ARBITRAL TRIBUNAL CAN'T PASS EX-PARTE AD-INTERIM ORDER; ARBITRATION ACT MANDATES ADVANCE NOTICE : BOMBAY HIGH COURT.

An arbitration tribunal cannot pass an ex-parte order on the mere filing of an interim application as the Arbitration and Conciliation Act of 1996 mandates sufficient advance notice for any hearing, the Bombay High Court has held. Justice GS Kulkarni observed that a combined reading of Sections 18,19 and 24 (2) of the Act requires all parties to be treated fairly at all stages. Also, the tribunal should give them adequate/ sufficient opportunity to present their case, including a chance to be heard at the time of ad-interim orders. **read more.**

5. UNILATERAL APPOINTMENT OF ARBITRATOR, VALID OR NOT?

The Delhi High Court in *Sital Dass Jewellers v. Asian Hotels (North) Ltd*. rejected the plea of petitioners to appoint a sole arbitrator unilaterally. The HC stated that such an appointment would defeat the purpose of unbiased adjudication between the parties. The High Court further appointed the arbitrator for the adjudication of the dispute. **Read more.**

6. THE TUSSLE BETWEEN SEAT AND VENUE CONTINUES.

Jammu & Kashmir and Ladakh High Court were presented with the question of excluding the jurisdiction of other courts in the matter of *Supinder Kour v. MDN Edify Education Pvt. Ltd*. Petitioner argued that cause of action would determine the jurisdiction as per Section 9 of the Arbitration Act when parties have agreed to the venue but not the seat. The HC dismissed the petition based on Supreme Court's Judgement in *Brahmani River Pellets Ltd. v. Kamachi Industries Ltd*. **Read more.**

7. DELHI HIGH COURT ISSUES NOTICE TO AFGHAN EMBASSY OVER 2018 ARBITRAL AWARD.

The Delhi High Court issued a notice directing the embassy of Afghanistan to attach movable and immovable assets in response to a plea moved by KLA Const Technologies Pvt Ltd. towards satisfaction of a Rs. 1.8 crore arbitral award in the case of *KLA Const Technologies Pvt. Ltd. v. The Embassy of Islamic Republic of Afghanistan*. The Hon'ble High Court directed Kotak Mahindra Bank to maintain a minimum balance of Rs. 1.8 crores in accounts belonging to the embassy in order to safeguard the interests of the decree-holder. **Read more.**

8. THE SUPREME COURT OF INDIA UPHOLDS THE VALIDITY OF EMERGENCY ARBITRAL AWARDS.

In *Amazon.com NV Holdings LLC v. Future Retail Ltd*. Supreme Court re-emphasized the principle of party autonomy and ruled that parties are free to agree on the procedure to be followed by an Arbitral Tribunal according to Section 2 read with Section 21 of the Arbitration Act. Further, the SC declared that no appeals lie against an order of enforcement of an emergency arbitrator's orders. **Read more.**

9. ARBITRATION REFERENCE CAN BE DECLINED IF DISPUTE IN QUESTION DOES NOT CORRELATE TO ARBITRATION AGREEMENT.

The Supreme Court observed that prayer for reference to Arbitration under Section 11 of the Arbitration and Conciliation Act can be declined if the dispute in question does not correlate to the arbitration agreement. The bench of Chief Justice of India NV Ramana and Justice Surya Kant observed that it is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator. **Read more.**

10. COURT CANNOT SUBSTITUTE ARBITRAL TRIBUNAL'S VIEW BY SUPPLANTING ITS OWN.

A Division Bench of the Madras High Court recently expressed disapproval over "wanton tinkering with arbitral awards" by courts while reiterating that arbitration courts are expected to show restraint before interfering with arbitral awards (*M/S. ENEXIO Power Cooling Solutions v. Gita Power & Infrastructure Pvt. Ltd & Anr*). **Read more.**

11. WHEN DOES BAR UNDER SECTION 9(3) ARBITRATION ACT AGAINST PLEA FOR INTERIM RELIEF OPERATE?

Section 9(1) of Arbitration and Conciliation Act enables the parties to an arbitration agreement to approach the appropriate court for interim measures before the commencement of arbitral proceedings, during arbitral proceedings or at any time after the making of an arbitral award but before it is enforced, the Supreme Court held (*Arcelor Mittal Nippon Steel v. Essar Bulk*). **Read more.**

12. SECTION 11 (6A) OF ARBITRATION ACT DOES NOT PREVENT COURTS FROM DECLINING REFERENCE TO ARBITRAL TRIBUNAL EVEN IF ARBITRATION AGREEMENT EXISTS.

Section 11 (6A) of the Arbitration and Conciliation Act, 1996 (omitted in 2019) would not prevent the Court to decline a prayer for reference of dispute to arbitral tribunal even if an arbitration agreement exists, if the dispute in question does not correlate to the said agreement, the Supreme Court ruled (DLF Home Developers Ltd. Rajapura Homes Private Ltd). **Read more.**

13. MADRAS HIGH COURT SLAPS ₹1 LAKH COSTS FOR "WORTHLESS" APPEAL, WARNS AGAINST IMPLEADING ARBITRATORS.

Terming it a complete waste of time, the Madras High Court on Wednesday imposed ₹1 lakh as costs on an appellant who had challenged an order passed by an arbitration court which dismissing a challenge to an arbitral award (*Kothari Industrial Corporation Ltd. v. M/S Southern Petrochemicals Industries and anr*). **Read more.**

14. SUPREME COURT OF INDIA CONFIRMS ENFORCEABILITY OF INDIA-SEATED EMERGENCY ARBITRATION AWARDS.

The Supreme Court of India (the "Court") has recently handed down a significant judgment in *Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. & Ors.* confirming that an award rendered by an emergency arbitrator (EA) in an arbitration seated in India is enforceable in the Indian courts. The Court's judgment provides welcome clarity for parties seeking urgent interim relief in India-seated arbitrations. The judgment, however, does not address the enforceability of foreign-seated EA awards in the Indian courts. **read more.**

Section-2

tête-à-tête

TETE-A-TETE WITH INBAVIJAYAN VEERAGHAVAN

MR. INBAVIJAYAN VEERAGHAVAN

B.A.B.L., FICA, F A Arb, FAI-ADR, FPIArb, PAP-KFCRI, FCIArb (UK)

Veeraraghavan Inbavijayan took up litigation practice at High Court of Madras (1997). His enthusiasm towards ADR made him to pursue whole time arbitration practice since 2001.

His areas of practice includes international commercial arbitration, maritime arbitration, international trade & contracts, IPR, construction disputes, finance & banking disputes, securities market, JVs, L/Cs, ADR, sale of goods, domain name disputes and investment disputes.

He has been accredited as an arbitrator in HKIAC (Hong Kong), CIETAC, BAC & SHIAC (China), AIAC (Malaysia), DIAC & EMAC (Dubai), CRCICA (Egypt), ICADR & ICA (India), CIDRA & NYIAC (USA) and various other regional & national arbitration institutions. To add up, he is a co-founder and former Secretary of an arbitration institution, CNICA and inducted as member of ICCA.

He is a Regional Pathway Leader for International & Domestic Arbitration, Construction Adjudication & Mediation Courses, Course Director and fully Approved Tutor of Chartered Institute of Arbitrators, UK and had been listed in the 2008 edition of International Who's Who of Commercial Arbitrators.

In this interview we speak to him about:

- Evolution of ADR
- Making India a domestic and international hub for arbitration.
- The recent amendments.
- Judicial intervention in arbitration.
- Experience and Perspective toward ADR.
- Message to the young readers and students.

Q1. Sir, you are widely experienced in national as well as international dispute resolution. How would you describe the evolution of Arbitration in India over time and its growing trend in National Law Schools?

Arbitration as an effective mode of dispute resolution from the very adoption of the model law has seen the constructive and acceptable ADR mechanism. The amendments during 2015 and 2019 has further facilitated, wider scope and opportunity for the arbitral process which has become a normal and trending process. Regarding, the National Law Schools the development of centers of excellence, organizing ADR events and competitions and more particularly hosting of national and international moots or evident and create an academic pathway for aspirant lawyers in the field of ADR.

Q2. In order to realize the dream of a $5 trillion Indian economy, it is likely that international players will never take the recourse of Indian Municipal Courts for their dispute resolution. How do you see Indian Arbitration's potential to become an International Arbitration Hub? Do you feel the need to encourage Institutional Arbitration?

The existing arbitration laws, rules and regulations clearly focus India to be an Arbitration Hub. The aspect of becoming an International Arbitration Hub depends solely on creation of two different legislation, one focusing domestic element of arbitration and another dealing with foreign element. The expectation is that institutional arbitration with a consolidated case management system or procedure has to be established along with the grading of arbitration institutions by Arbitration Council of India (ACI).

Q3. The recent amendment to the Arbitration and Conciliation Act, 1996 removed the qualification schedule from the Act. The regulation for the qualification of an arbitrator is yet to be notified. According to you, how should a qualified Arbitrator be envisioned?

Arbitrators qualifications cannot be envisaged by fixing years of experience or qualifications etc. A qualified arbitrator has to be within the purview of a person who can absorb and digest the uniqueness of the arbitral process and who is likely to provide an outcome with minimal court intervention. There shouldn’t be structured qualification and restrictions based on age, gender and legal qualification.

Q4. You have an 11 years long working experience with the Chartered Institute of Arbitrators. What, in your opinion, are the competencies that most of the current generation of Arbitrators have yet to master?

A simple approach what the arbitrators have to take is that they have to master the procedure laid down by the law and the institutional rules, and create a platform for amicable settlement of the arbitrable disputes.

Q5. Do you believe judicial intervention in arbitration has now changed to judicial support?

No, the reason amendments is turning back from the expedient judicial support to judicial intervention.

Q6 Litigants frequently complain of the existence of lacuna in the mechanism of Arbitration in India. Their contention majorly pertains to how an arbitral award by a retired Supreme Court Judge is placed for consideration before a District Court Judge. What are your thoughts on the subject?

Arbitration being a private adjudication process makes a clear picture that the litigants shouldn't be remediless after an award is passed. Henceforth, the aspect of challenge is provided. The simple thought that award would always be published by retired Supreme Court Judge is a myth and the development of arbitral jurisprudence giving scope for any person of any nationality to be an arbitrator and also publishing arbitral award has rapidly evolved. An arbitrator's award, whether he is retired judicial authority or not is an output of a private neutral individual which has to be scrutinized as per the prevailing legal provisions by the competent courts.

Q7. Recently, we heard many statements and speculations about a new mediation law to be enacted in India. How do you see this and what is your perspective towards the change in the legal process of the country?

On 29.10.2021 the draft Mediation Bill, 2021 has been published for consultation. This, which is an expected development as India has signed the UNISA (The Singapore Protocol on Mediation) during August 2019 has now taking steps to rectify it. Overall, now India is likely to adopt all major ADR mechanisms with legal binding more specific mandatory pre-litigation ADR.

Q8. HPNLU, Shimla organized its Maiden National Mediation competition successfully. How do you perceive the idea of attending ADR competitions, both national and international, in law school? How can the budding lawyers be provided with more exposure in the field?

All interested students have to attend such ADR competitions which would nourish their career. Further, they have to be involved in organizing such events and also Judge the preliminary rounds.

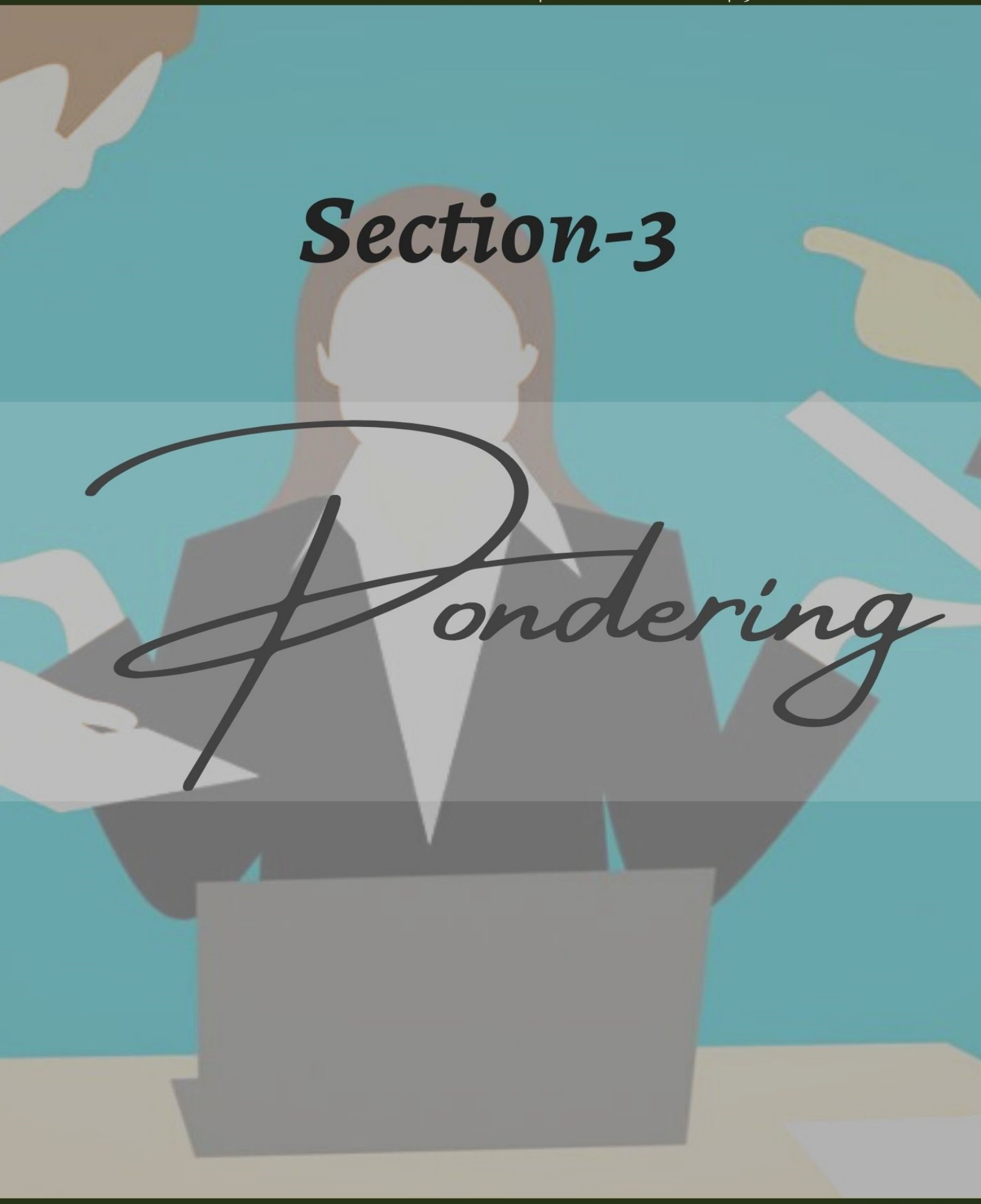
Q9. Many law students like to earn a huge amount of money in their fresher years. Could ADR be accounted as a career which helps pay bills easily? What is your experience and perspective of this profession specially ADR from the financial or monetary aspect?

Initially, it is not so. The trial advocacy has to be the initial focus and ADR as a career would evolve only after reasonable level of experience is gained. The different roles namely ADR counsel, Consultant, Expert, Arbitrator/Mediator, etc. has its benefits specific to the financial or monetary aspect.

Q10. How can a budding lawyer leave a mark in the ADR field and what would you advise to young professionals to delve into it as a career option?

Well focused and research capabilities would make the budding lawyers a reasonable mark in ADR field and taking up whole time exclusive career in ADR is advised. Networking and rapport building is most essential within the permissible level.

**** This interview is recorded through questionnaire format over email by Ms. Saloni Paliwal and Ms. Prachi Thakur, Students of HPNLU, Shimla.***



Section-3

Pondering

Research Essay

Mediating Intellectual Property Disputes in India — A Study of SAMADHAN Stories (Delhi High Court Mediation and Conciliation Centre)

~ Muskan Bansal

I. INTRODUCTION

To begin with, Section 89 of the C.P.C.[1] was introduced with the primary motive of amicable, peaceful and mutual settlement between the parties without the intervention of the court. Coming to evaluate the performance of courts system in cases, it becomes rather significant to highlight the important decision in the case of *Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwal* [2] wherein the Hon'ble Supreme Court held that the matters relating to Intellectual Property disputes should be decided by Trial Court instead of merely granting or refusing to grant an injunction. Because in such matter suit goes on for years and is hardly decided, which is not proper. And therefore, in such matters, the provision to Order XVII Rule 1(2) C.P.C.,[3] should be strictly complied with by Courts and there should be speedy disposal of cases. Following this, in *Bajaj Auto Ltd. Case*[4] the Court held that experience says such suits in India stay pending for many years and litigation is mainly fought between the parties over the temporary injunction. And therefore, repeating the judgement of Shree Vardhman Rice be carried out by all the courts and tribunals in order to serve justice punctually and faithfully. Hence, it is noticeable that the parties involved are opting for ADR mechanisms to expand Intellectual Property rights in India because of an unjustified delay in the disposition of cases and costly proceedings, which could prolong the protection provided for the work instead of supporting the progress of intellectually protected work. In addition, this approach is necessitated by the commercial essence of transactions concerned in the majority of the disputes. Needless to say, the advantages of ADR have been increasingly recognized.

II. WHY MEDIATION?

Methods for ADR are much less time-consuming, effective and offers additional freedom to the right holder. It should be noted that the option of ADR has now proven to be a consensus over the traditional litigation methods in almost all business transactions. Contracts relating to Intellectual Property transfers currently primarily features the "arbitration-mediation" provision.

* ***Muskan Bansal***, 3rd Year Law Student at Kirit P. Mehta School of Law, NMIMS (Deemed to be University) Mumbai.

Talking about Arbitration, it is often viewed that Arbitration also plays no good role in Intellectual Property Disputes, since the matter is too intricate and should best be handled by the parties in presence of a neutral person. Also, without an institution to keep an eye on its timeframe, arbitrators are likely to dominate themselves, resulting in no meaningful solution.[5]

The landmark case of *Salem Advocate Bar Association v. Union of India*,[6] gave the meaning and extent of mediation. It also led to the formulation of the Model Civil Procedure Mediation Rules and such rules were to be framed by the High Courts. Later in another landmark judgment of *Afcons Infrastructure*,[7] the Court clarified the concept of mediation in detail.

Mediation has achieved a significant rise in recent years. The mediators are expected to function as neutrals while both sides shall sit on the mediation table prior to arbitration or litigation being conducted. In numerous instances, the Hon'ble Supreme Court has underlined the notion that there is a vast number of cases to be handled and that they must only be addressed following the exhaustion of all other possibilities. Now one of the best advantages of mediation is that given the parties are coming face to face, finding an agreeable settlement appears a realistic outcome. And in between if the parties feel a need to express anything privately, they could always just turn to a caucus and this is the explanation why mediation may be regarded as a non-stereotypical as well as progressive technique.

Further understanding the use of mediation in Intellectual Property disputes, widely this area consists of disputes mainly of technical nature and this is the reason why it has taken time for mediation to reach here. It should be emphasized that mediation can play a central role in many undiscovered ways, for example, the integrated securitization and administration of various sorts of Intellectual Property assets.

Therefore, it is evident to say that mediation as an alternative has evolved and gained interest in the field of Intellectual Property Rights. The Controller General of Patent Designs and Trade Marks joined forces with the Delhi Legal Services Authority (DLSA), through mediation, to settle the questions related to a rising backlog and its resolution in the research area of the Intellectual Property Rights to refer at about 500 pending rectifications and oppositions to mediation and conciliation via public notice to the Trade Marks Registry (TMR), Delhi.[8] In addition, DLSA also issued on 13 May 2016, a Standard Operational Protocol to introduce uniformity in TMR Delhi, for similar mediation proceedings. Additionally, Section 12A of the Commercial Courts Act, 2015[9] has been inserted in Chapter IIIA of the Commercial Courts, Commercial Division and the Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018 which has made

obligatory the idea of pre-institutional mediation and settlement in cases where it is necessary to resolve Intellectual Property disputes and no relief has been granted. (The 'commercial disputes' are inclusive of the conflicts concerning intellectual property rights, as referred to in Section 2(c) of the Act).[10] This would encourage the parties to choose mediation.

The introduction of Pre-Institution Mediation and Settlement (here referred to as PIMS) can be observed as a step closer towards popularizing the usage of mediation. And therefore, PIMS was made mandatory for all kinds of commercial disputes which amounted to Rs 3 Lakhs or more and where there is no urgent interim relief sought by the petitioner. Therefore, mediation in Intellectual Property disputes may become an advantage, particularly because of the technological aspects and complexity of legislation being taken into account. The parties might adopt the mediation process as there is always room for flexibility and adjustment in the procedures midway. For instance, Patent disputes involve various technical issues like infringement, conception, inventorship, the doctrine of equivalents, etc. and these are righteously capable of being mediated where parties themselves can arrive at a solution because they are in a better position of discussing the technical and complex nature of the issue involved, rather than in a courtroom litigation method.

Now secondly, the quite known advantage of mediation is that the process can turn to be cost-efficient. Now, this would work well in cases where the mediator possesses specialized knowledge as a pre-requisite. Let us say there is a patent dispute case that involves with it numerous claims, a mediator having required knowledge may help by narrowing down the issues and also reducing the number of sessions normally required, like here, a patentee may decide to go for litigation in only one of the claims after a session of mediation.

Another major addition to why mediation is that in such cases the confidential nature of the dispute is respected enough and is not risked like in litigation. As parties can opt for caucus sessions in the middle of the mediation process, and the information shared between one party and the mediator is kept confidential. Therefore, the explained answer to why mediation in Intellectual Property disputes is that it is a global solution to the needs of the parties involved, which is explained above keeping in view the importance of three elements – nature of disputes, the interest of the parties and the expedition in dispute resolution.

III. SAMADHAN (Delhi High Court Mediation and Conciliation Centre)

Samadhan was established in May 2006. This was the outcome of a combined endeavour by the Bench and the Bar of Delhi High Court who has undertaken mediation as a suitable way of resolving alternate disputes

When mediation has just started to pick pace in India, there was a trademark dispute before the aforesaid Centre, herein to reach out to an amicable solution three-four sessions of mediation were held. The dispute was that both the parties were carrying out their business in the same territory and not only this they were selling almost the same products and with that, but both the parties were also doing well in their respective businesses. The party who was alleged for infringing the trademark and copyright showed reluctance in bringing about any change to their products, therefore private sessions took place where the mediator explained the consequences of not arriving at a settlement and was followed by lengthy discussions where possible changes were discussed. Also, as a result of arriving at an acceptable settlement, the plaintiff did not insist upon monetary compensation. [11]

Further, there was a dispute between the two brothers. The facts of this case are such that brother 'A' was living abroad and he started a business in India which was looked after brother 'B' and his sons who were living in India. Now consequent to this 'B' started a business of his own by the same name and style for his benefit. Following this 'A' filed a suit against 'B' living in India for an injunction and for claiming damages for Rs. 1 crore through his attorney. The matter was referred to Samadhan by the Delhi High Court. The fact that both the brothers were living in different countries and therefore to establish a proper communication channel was challenging throughout the process. Brother 'A' initially appeared to be non-cooperative and wanted to take the matter to the Court. The Mediator here played a very important role and even held long calls over the telephone between the two brothers, but the absence of face-to-face conversation many times led to the parties telling the mediator to end the process and refer it back to the Court. Somehow through the direct communication channel mediator was able to get hold of the mediation proceedings and proceed to the stage of settlement. And finally, the matter got settled and 'B' agreed to pay Rs. 65 lakhs to 'A' (in instalments), and with this, it was also agreed that 'A' will perhaps give a new identity to his own business. As a result, both the parties also agreed to withdraw pending litigations between them.[12] Here, additionally, the moral standard of the mediator incorporates the meditation's professional skills. A mediator must use the instruments of mediation and hone his abilities to make the parties more open to

to each other in order to explore all viable approaches with the greatest possible flexibility. [13]

There was a case where a suit was filed for permanent injunction by a well-known company against another company stating that the latter one was using the trademark for the purpose of exporting the garments to countries abroad. The issue involved was that the later company was using the trademark of the former company and while doing do was earning huge revenue and showcasing it as their own.

The defendants argued that the word used as a trademark was conjoint, and an interim injunction was granted by the court following which the suit was put on trial. Meanwhile, the suit got referred for mediation. It was seen that in the beginning parties stood stubborn but gradually softened up as the process progressed. Both the parties discussed their viewpoints in the presence of the mediator and decided that the former company would not object to the use of the concerned word by the later company only on the condition that it be used only for the export of garments, and should not be directly or indirectly used for the sale in the Indian market. Another interesting point to note here was that the former company also gave its claims for damages against the later one. The parties also accepted that they were willing to protect and respect the rights of each other and the freedom to carry out their business without harming the other. [14]

Recently, GrabOn a Hyderabad based startup filed a suit for trademark infringement against GrabOnRent a Bengaluru startup before the Delhi High Court. The matter was referred to Samadhan. Both being an online marketplace, GrabOn offered coupons and deals and GrabOnRent offered furniture on rent. The issue involved was that the latter was misusing the goodwill of the former's business and also the degree of similarity between the names of the two ventures created confusion for the consumers. So now though the customers were providing negative reviews to GrabOnRent, consumers at large started associating the same reviews with GrabOn. After discussing the matter between the parties through the mediation process, terms of the settlement were reached. The agreed terms were that GrabOnRent will explicitly mention on all his platforms that they have no affiliation with GrabOn and will also destroy all previous documents holding a similar mark to GrabOn.[15] Similarly in the case of *The British Broadcasting Corporation*,[16] the issue over trademark infringement was resolved by a settlement reached out through mediation.

IV. OBSERVATIONS AND RECOMMENDATIONS

As advantageous Mediation as an alternative, it also has certain limitations. Meaning mediation may not be a suitable tool in solving each and every Intellectual Property dispute. Firstly, it is impossible to establish a public legal precedent through a mediation process. In addition, even after various mediation sessions have been held the parties could still be unable to arrive at a settlement and find out they have a better solution through litigation. Further, there is a lack of procedural and constitutional protection given to the parties. Lastly, parties are only supposed to rely on each other's good faith because there are no criteria for discovery. After all, no party can be compelled for disclosure of information. [17]

It is therefore recommended that Judicial supervision is required to ensure that mediators comply with mediation ethics. A mediation Centre for many courts remains necessary, till date and should be established. There should also be an Intellectual Property disputes Centre or panel where mediators can be trained as per the skills and knowledge required in dealing with these matters. Patent infringements and Intellectual Property in general entail, for example, unprofessional behaviour, problems of voluntary infringement, legality and injunctive relief. The parties will not proceed towards mediation unless their strength and vulnerabilities are best equipped.

Coming to PIMS, mainly two limitations have been identified. Starting with, mediation could be a non-starter. Meaning, parties have made no attempt to resolve their dispute through mediation even after the application has been submitted for the PIMS process. This particularly can be troublesome. Moving forward, the enforceability of a successful settlement outcome, this is because settlement arrived at through PIMS has been granted a status of an arbitral award, and as a result, since there is no material difference as to execution, but there is no element of finality in PIMS process, but exists in a court-referred mediation.

Recommendations as to PIMS could be, that there should be some sort of penalty imposed on the refusal or non-participants, which should generally be higher than the fees which are payable at the commencement of mediation, which will ensure a greater number of participations. And amendments should be made to the status of PIMS settlement because the process has tremendous potential if exercised properly in India.

V. CONCLUSION

Foremost, Mediation is not only viewed as an alternative to litigation but also as an expansion of access to justice. Mediation can also be very valuable to establish early legal certainty on a global scale and take all legal and economic interests of the parties into due account. In the case of Intellectual Property disputes, they are complex and expensive because of the intangibility factor and the emergence of new technologies regularly makes it hard for people at large to maintain a track. For instance, trademarks are used daily either for advertising products or services, so an infringement or injunction may lead to having material impacts on the financial position of the company. Mediation is a better option because it has been observed that comparatively in such cases mediation takes less time and it also helps the parties in arriving at an innovative solution, and the information is also kept confidential.

The key advantages of mediation that have been discussed above are – the process maintains confidentiality, is consent-based (mutual), is time effective and efficient, finality, and court fees can be refunded if the parties want in cases of settlement. Though it has been observed that not all cases can be best resolved through mediation and the process encounters certain limitations, the possible recommendations might help in the future. To conclude, mediation with several advantages continues to evolve as a powerful alternative to be used by the parties as well as lawyers.

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Case Comment

Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund & Ors. (MANU/SC/0231/2021)

~ Abhishek Malhotra**

I. Introduction

Because of their differences, the link between insolvency and arbitration has been a topic of contention in the legal sphere. Both offer avenues for those who have been wronged to obtain their money back, albeit in different ways. While arbitration is a long-standing traditional method of settling conflicts before resorting to litigation, the Insolvency and Bankruptcy Code, 2016 (the Code) functions more like an inflexible solution. The arbitrability of insolvency disputes is a typical question that revolves around the aforementioned topics.

The Supreme Court resolved the abovementioned question by the judgment of *Indus Biotech Private Limited v. Kotak India Venture Fund* while holding that an arbitration petition can only be considered after an insolvency application under Section 7 of the Insolvency and Bankruptcy Code, 2016 has been rejected by the Adjudicating Authority. The Supreme Court's decision might be viewed as a watershed moment since it clarifies whether the IB Code [1] has an overriding influence on the arbitration process.

II. Facts of the Case

The first respondent is a firm situated in Mauritius and the other respondents are the sister ventures of Respondent number 1. They all bought the Petitioner Company's equity shares and Optionally Convertible Redeemable Preference Shares.

The Petitioner Company opted to conduct a Qualified Initial Public Offering within that time period but it was barred in view of sub-regulation 2 of Regulation 5 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018[2]. Therefore, Respondents No. 1 to 4 had to convert their Preference shares into equity shares for the completion of the requirement as provided. The petitioner company made a proposal to Respondents no. 1 to 4 for converting their OCPRS into equity shares.

During the said arrangement, a dispute arose between the parties regarding the formula and calculations, which is to be used for the conversion of shares.

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According to the Respondents, they would be entitled to 30% of the entire paid-up share capital as per the formula applied by them whereas the Petitioners contended that they were entitled to only 10% of the total paid-up share capital. Having regard to the said issue, the Petitioner contended to resolve it through Arbitration. On the other hand, the Respondents contended that Corporate Insolvency Resolution Process (CIRP) should be initiated as the Petitioner is in default for non-payment of amount due against redemption of OCPRS. Respondent number 1 filed a petition in NCLT for the appointment of a Resolution Professional under Section 7 of the IB law. The Petitioner Company in this case filed a Miscellaneous Application No.3597/2019 under Section 8 of the Act [3] of 1996, requesting an order to submit the parties to the arbitration. The petitioner's plea under Section 8 of the Arbitration and Conciliation Act, 1996 was approved by the NCLT's Mumbai Bench.

Aggrieved by this, Respondent no. 2 filed a connected SLP before the Hon'ble Supreme Court of India.

III. The Issue Before the Court

Whether Application under Section 8 of Arbitration and Conciliation Act, 1996 can be taken into consideration after the filing of an application for arbitration under Section 7 of Insolvency and Bankruptcy Code, 2016?

IV. Ratio and Judgment of the Hon'ble Court

The court cited the case of *Innoventive Industries Limited v. ICICI Band and Another*[4] to determine how the IB code [5] works and noted that there must be four pre-requisites in order to initiate the process as mentioned under Section 7 of Insolvency and Bankruptcy Code namely, (i) presence of a 'debt', (ii) a 'default' should have been taken place, (iii) the said debt should have been occurred due to 'financial debtor', (iv) the 'default' as required should be due to 'financial creditor'. Also, it was held that the duty to check for the fulfilment of these requirements would be on the Adjudicating Authority based on the pieces of evidence presented and the records furnished by the party filing the said application.

Therefore, the first step which is to be taken by the Authority is the determination of a debt.

It is pertinent to mention that learned counsel for the Respondents contended that the proceedings under Section 7[6] is an action in rem and therefore, non-arbitrable in light of the judgments of *Booz Allen and Hamilton INC. v. SBI Home Finance Limited and Others* [7] and *Swiss Ribbons Private Limited and Another v. Union of India and Others* [8]. In this regard, the Court

referred to the judgment of *Vidya Drolia and Ors. v. Durga Trading Corporation* [9] where a four-part test was developed to determine whether the subject matter of a dispute in an arbitration agreement is arbitrable or not. The tests being that the subject matter of the dispute being an action in rem, having an erga omnes effect, relating to a sovereign function or public interest, and expressly non-arbitrable by a statute are not to be resolved by arbitration as such.

Having regard to the same, it was held in the present case that after the filing of application and presentation of records, the corporate debtor is also given a fair chance to contend that the default has not occurred. Only after this, the Adjudicating Authority concludes as to whether a default has occurred or not. It is only when the Adjudicating Authority holds that a default has been occurred and admits the application as filed by the Corporate Creditor, it becomes an action in rem creating third party right and thereafter the matter becomes non-arbitrable or that the subject matter starts to have erga omnes effect.

The objective assessment of the whole situation is to be done before admitting the petition as without it, every petition under Section 7[10] would be admitted initiating CIRP against even those companies, which are able to run its administration effectively without any default. This would certainly lead to a biased approach on the part of the authorities dealing with the dispute.

The court reiterated Section 238 of the IB code [11], which provides it with overriding power on other laws to hold that an application under Section 7 of Insolvency and Bankruptcy Code will have to be dealt with in the first instance irrespective of the filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996. If the other way is allowed, filing of the Arbitration application will become a way to delay the process of insolvency proceedings.

After dealing with the application under Section 7 [12], if the Adjudicating Authority concludes that a default has been committed as required under the code, then the Corporate Insolvency Resolution Process commences against the corporate debtor and no arbitration proceedings can be allowed to be conducted as the subject matter in dispute becomes an action in rem. Whereas, if the Adjudicating Authority holds that no default has been committed by the corporate Debtor rejecting the application under subsection 5(b) to Section 7 [13], then it would open a way for the parties to appoint an arbitral tribunal.

In light of the facts of the case, the court determined that the NCLT's judgement was valid as firstly, it dealt with the Application under Section 7 [14] by holding that default has not arisen since the issue of allotment of equity shares against the OCPRS in light of the QIPO is still being contested, and no decision to define it as a default has been made, thereby rejecting the

application and further did nothing concerning the arbitration, leaving the same to be dealt specifically by the Apex Court.

V. Analysis

The Hon'ble Supreme Court of India has very well dealt with the issue of admission of Application under Section 7 of the Insolvency and Bankruptcy Code and its consequences. The scheme and working of the Code were examined using the case of *Innoventive Industries Limited v. ICICI Bank and Others* [15] as a model for fair and proper adjudication of the issue involved.

It gave paramount importance to the principles of natural justice while holding that the Adjudicating Authority dealing with the application under Section 7 [16] has a duty to come to a conclusion on the basis of the pieces of evidence and records furnished by the applicant and also, has to give a fair opportunity to the Corporate Debtor to rebut the presence of a default committed by it.

The consequence of the admission of an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 is that it creates a third party right, which converts the dispute being an action in personam into action in rem. The outcome so followed due to the abovementioned admission makes the dispute non-arbitrable. The parties can no longer rely on the arbitration clause as the insolvency process involves all the creditors of the Corporate Debtor, thus departing with the concept of party autonomy, which is the paradigm of any arbitration proceedings. The court relied on the case of *Vidya Drolia and Ors. v. Durga Trading Corporation* [17] to decide the matter in hand.

However, it was unusual, that the Supreme Court allowed the order of NCLT wherein it specifically considered both the applications alongside one another. Whereas, NCLT should have considered the application under Section 7 of the Insolvency and Bankruptcy Code in the first instance and the conclusion thereof would have determined the faith of admission of arbitration application.

On the other hand, we feel that the case of Indus Biotech [18] should be praised since it relieves the NCLTs' burden and offers a clearer framework for Section 7 [19] applications.

VI. Conclusion

The Application filed under Section 8 of the Arbitration and Conciliation Act, 1996 has to be considered only after the Adjudicating Authority has firstly dealt with the application under Section 7 of the Insolvency and Bankruptcy Code. The rejection of the application under Section 7 [20] on merits contemplates that the arbitration application can be moved ahead. The mere filing of an application under Section 7 [21] will not affect the pending application for consideration.

Furthermore, in the light of the judgment in *Alchemist Asset Reconstruction Company Ltd. v. M/s Hotel Gaudavan Pvt. Ltd. & Ors.*[22], even if the arbitration proceedings are pending before an arbitral tribunal and an application under Section 7 [23] is filed, a moratorium will be initiated on the arbitration proceedings and continue till Section 7 [24] application is finally disposed off [25].

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Section-4

Up-&-Coming

2nd Virtual International Mediation Competition 2022 by MediateGuru

The International Mediation Competition being organized by MediateGuru is a unique opportunity for students to learn and practice mediation and negotiation skills through the role-playing of a mediation problem drafted by experienced mediators and practitioners. Any student enrolled in any undergraduate course at institutions worldwide can participate in the competition. Last date for registration is March 13th 2022. Read more here.

FDI Mediation Moot 2022

The FDI Mediation Moot is a student competition that aims to improve understanding about international investment mediation and build relationships that will serve to develop its practice. The Competition is based on the FDI Moot Case, which concerns a hypothetical dispute between an investor and a foreign State hosting its investment. Last date for registration is 15th January 2022. Read more here.

2nd National Mediation Competition 2022, by LawInternships

National Mediation Competition 2022, Chapter 2 is an online competition organised by LawInternships (The Online law School) in association with JMVD Legal and supporting partner YCM. The competition will be conducted virtually allowing the students to hone their advocacy skills with respect to mediation. Last date for registration is 20th January 2022. Read more here.

NPAC 13th Annual International Conference on Arbitration

In the last few years, the importance of arbitration as a quick and cost-effective mode of resolution of disputes has been recognized. The Nani Palkhiwala Arbitration Centre is organizing their 14th Annual International Conference on the theme 'The Evloving Arbitration Framework in India – Challenges and Opportunities,' scheduled to be held on Saturday, 12th February 2022. Read more here.

International Virtual Workshop on Draft Mediation Bill, 2021

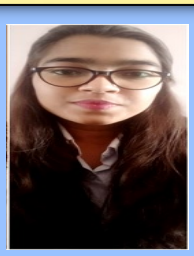
In an effort to promote and strengthen the position of mediation as an effective Alternative Dispute Resolution mechanism, the Ministry of Law and Justice on 5th November 2021, released the Draft Mediation Bill 2021 in public domain. School of Law, Satyabhama Institute of Science and Technology in Association with Kovise Foundation Conflict Resolution International is organizing an International Virtual Workshop on Draft Mediation Bill, 2021. Read more here.

Section-5

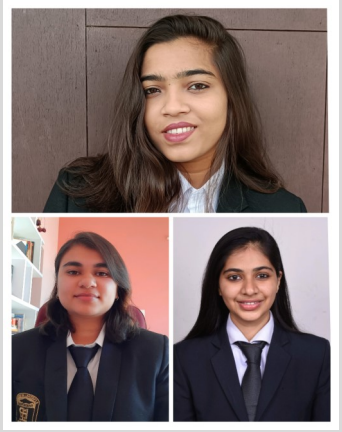
HPNLUites: The Achievers


The team consisting of ***Arshita Sharma*** (B.A.LL.B 3rd Semester) and ***Mahak Jain*** (B.B.A.LL.B 3rd Semester) have secured the **Second Position** in *Surana & Surana & RGNUL International Arbitral Award Writing Competition 2021*. We have been awarded a cash prize of ₹15,000 for the Second Position.

The team comprising of ***Kritika Arora***, ***Ankita*** and ***Pakhi Jain*** participated in the *1st VGU Ranka National Moot Court Competition* (Offline) organised by VGU, Jaipur. The team was adjudged the **Quarter Finalists** and Pakhi Jain also bagged the "***Best Researcher Award***".



Prachi Thakur of 5th Semester stood as the **2nd Runner-Up**, *National Quiz Competition on ADR, 2021*, by Centre of Excellence in Alternative Dispute Resolution Law (CEADRL), ICFAI Law School, ICFAI University, Dehradun.



The team comprising of ***Prachi Thakur, Shreiya Katoch*** and ***Ayushi Soni*** from 5th semester participated in the *XXth T. S. Venkateshwara Iyer Memorial Ever Rolling Trophy All India Moot Court Competition, 2021*. The team emerged as the **Winners** receiving "**Best Team**" award. The team also bagged the "**Best Memorial**" award. In addition to this, Prachi Thakur received the "**Best Student Advocate**" award.

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