

INDIAN LEGAL IMPETUS

Newsletter

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Manoj K. Singh

Dear readers,

We are pleased to present the March 2023 Special Edition of our monthly newsletter “Indian Legal Impetus.” As we celebrated International Women’s Day this month, we take the honor to acknowledge the work of women and their contribution to the legal profession and society as a whole. As we reflect on the progress made by women in the legal field, it is important to admit that there is still so much to do to achieve true gender equality.

This special edition, in addition to fiery legal issues, also features an interview with Ms. Daizy Chawla (Managing Partner) who is a prominent name in the legal profession, sharing their insights as a visionary leader in the industry.

We hope that this edition will inspire and empower our readers, especially women to continue breaking barriers and shattering stereotypes. We also hope that it will serve as a reminder that the fight for gender equality is far from over and that we must continue working together to create a more equitable world.

We are optimistic that this issue of Indian Legal Impetus will be interesting, enlightening, and engaging for our readers.

Our first article discusses the width of jurisdiction or the limitations with reference to an appeal to define the scope of interference/extent of modification permitted by the courts.

The second article aims to understand the applicability of the doctrine of res-judicata in Domestic Arbitration Proceedings as well as International Arbitration Proceedings. As the principle of res judicata hangs between substantive and procedural laws, the article makes a thought-provoking observation on the application of the doctrine in the ever-evolving space that is arbitration.

Our third article analyses the negative change of scope in Hybrid Annuity Project Model (HAM) disputes to answer whether such detour can be taken from contractual stipulations by the Authority based on the jurisprudence on the issue of negative COS.

Our fourth article provides in-depth insights and knowledge walk on the project viability in highways sectors PPP projects. The articles not only discuss the procedure for PPP projects but sheds light on the feasibility and assessments required to generate the greatest economic returns balancing private sector interest and public acceptance.

Our fifth article analyses the recent judgment passed by the ***Hon’ble Delhi High Court in Mahanagar Telephone Nigam Limited v. Canara Bank and Anrs.*** opening the door to understanding what construes a ‘Prima Facie’ case of fraud and Corruption for an unconditional stay of an arbitral award under Section 36(3) of the Arbitration and Conciliation Act, 1996.

Our sixth article clears the air on the scope of application of Section 32 and Section 56 of the Indian Contract Act considering the new adjusted realities of the contemporary world after Covid-19.

Our seventh article adds another piece to the puzzle of the intersection of artificial intelligence and arbitration.

Our eighth article provides insights into the ever-increasing backlog of arbitration cases in India.

We expect that the edition will enable readers to understand and interpret the recent legal developments. We welcome all kinds of suggestions, opinions, queries, or comments from all our readers. You can also send in your valuable insights and thoughts at newsletter@sandalawoffices.com.

Thank you.

Thank you.



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Table Of Contents

1. In conversation with Ms. Daizy Chawla, Managing Partner	04
2. Scope Of Section 37 Of the Arbitration and Conciliation Act, 1996: Delhi High Court Clarifies	05
3. Res Judicata in Domestic and International Arbitration Proceedings	10
4. Detouring From Contractual Contours – An Analysis of Negative Change of Scope Disputes in Ham Projects	15
5. Project Viability in Highways Sector PPP Projects	19
6. Interpretation Of ‘Prima Facie’ Case of Fraud and Corruption For an Unconditional Stay of an Arbitral Award Under Section 36(3) of The Arbitration And Conciliation Act, 1996	25
7. The Interplay Between Section 32 And Section 56 Of The Indian Contract Act, 1872	29
8. Artificial Intelligence and Arbitration	33
9. Clearing The Way: Tackling the Growing Problem Of Arbitration Case Backlogs	41

Managing Editor
Manoj K. Singh

Editor
**Swekcha
&
Madhvi Vangani**

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In Conversation with Ms. Daizy Chawla, Managing Partner

1. What do you see as the most important qualities of a successful law firm leader, and how do you cultivate those qualities in yourself and others?

Response: The most important qualities of a successful law firm leader include effective communication, empathy, strategic thinking, and adaptability. I cultivate these qualities in myself and others by fostering a culture of open communication, providing constructive feedback, and actively investing in skill development for both myself and my team.

2. S&A Law offices has overcome the gender pay disparity that exists within the legal profession. What can other leaders do to reduce the gender pay gap?

Response: Yes, at S&A we believe in equal opportunity for all, the biggest testament of which are two women managing the Firm. All organizations should promote a culture of diversity and inclusion, which emphasizes the importance of equal opportunities and treatment for all employees.

3. What is one advice you live by as a lawyer?

Response: The advice I live by as a lawyer is to always be prepared and to never underestimate the importance of thorough research especially for the facts and cases which are against you. Being well-prepared allows me to better serve my clients and excel in my profession.

4. What do you think needs to be done to increase the representation of women in leadership roles within the legal profession, and what steps can law firms take to support women lawyers in advancing their careers?

Response: To increase the representation of women in leadership roles, organizations can create mentorship programs, provide professional development opportunities, and implement family-friendly policies. Additionally, they should ensure that promotion and partnership decisions are based on merit, without bias or discrimination.

SCOPE OF SECTION 37 OF THE ARBITRATION AND CONCILIATION ACT, 1996: DELHI HIGH COURT CLARIFIES

- *Rajdutt Shekhar Singh and Srishti Pandey*

Introduction

It is trite law that the appellate jurisdiction of an authority can be limited or regulated by the legislature and its extent has to be decided with reference to the language employed by the statute conferring the appellate jurisdiction.¹ In this regard, the width of jurisdiction or the limitations with reference to an appeal depends entirely on the statute conferring the right of appeal. Where the statute does not place any limitations or restrictions regarding the scope and width of the appeal, it is construed that the appeal provides a right of rehearing on the law as well as facts.²

The arbitral tribunal has been vested with the power of granting interim relief under section 2(1)(h) read with section 17 of the Arbitration and Conciliation Act, 1996 ('**1996 Act**').

Although the general position of law remains that a court is precluded from modifying an arbitral award when challenged under section 34 of the 1996 Act, the court can modify the interim order passed under section 17 of the 1996 Act while exercising its appellate jurisdiction under section 37 of the 1996 Act.³

However, such a power does not give a *carte blanche* to courts, and it has to be exercised keeping in mind the principles of minimal judicial interference espoused by the 1996 Act.

The Hon'ble High Court of Delhi recently clarified the scope of interference by the courts in a recent judgment rendered in the case of *Asia Hotels (North) Ltd. v. Sital Dass Sons & Anr.*⁴

Brief facts

Disputes between the parties relating to the revocation of the license agreement of the Respondents by the Appellant. The license was revoked by the appellant for the reason that the shopping arcade in which the licensed premises were situated, was in urgent need of total repair, as the internal fittings and wiring of the arcade required replacement for their safe operation.

The Respondents did not respond to the revocation letters of the Appellants and instead instituted suits before the Hon'ble High Court of Delhi challenging the revocation of the license agreement. During the pendency of the suits instituted by the Respondent, it was agreed between the parties that the appellant shall not demolish the licensed premises as an interim arrangement.

¹ *James Joseph v.. State of Kerala*, 2010 SCC OnLine SC 956

² *Ibid.*

³ *Ibid*

⁴ *Asia Hotels (North) Ltd. v. Sital Dass Sons & Anr.* 2022/DHC/005842

Subsequently, the suit instituted by the Respondent came to be dismissed vide order of the Hon'ble High Court dated 21.07.2020 holding that the parties are required to avail the remedy of arbitration.⁵

The Respondents preferred applications under section 9 and 11 of the 1996 Act. However, the applications filed by the Respondent under section 9 as well as section 11 were disposed of by the Hon'ble High Court vide order dated 06.08.2021, whereby the court appointed the sole arbitrator for the settlement of disputes through arbitration. It was held that the application of the Respondents under section 9 of the Act be read as an application under Section 17 of the Act. In terms of the said order of the Hon'ble High Court, the terms of the interim arrangement between the parties as per which the appellant would not take any action against the Respondents, was to continue until the learned arbitral tribunal entered reference i.e., until 02.09.2021.

After reference, the Respondents pursued their respective applications under section 17 of the 1996 Act seeking *inter alia* de-sealing of the licensed premises, with a further prayer for the restoration of access to the Respondents to carry on the business during the pendency of the arbitral proceedings, and maintenance of status quo by the Appellant during such period.

The Appellant also filed an application under section 17 of the 1996 Act seeking *inter alia* an injunction from the learned arbitral tribunal restraining the respondents therein from interfering with the peaceful possession and useful enjoyment of the licensed premises by the appellant during the pendency of the arbitral proceedings. It was further prayed by the appellant that since the premises required urgent repairs, irreparable harm would be caused to the appellant if its applications were not allowed.

The learned arbitral tribunal disposed of all the applications under section 17 of the Act filed on behalf of the appellant and the respondents by way of a common impugned order dated 23.04.2022. The arbitral tribunal on one hand refused to stay the operation of the notice revoking the license of the respondents during the arbitral proceedings on the ground that it may defeat the very purpose and cause of arbitration between the parties. The Respondents chose not to challenge the decision of the arbitral tribunal to not grant the stay of the revocation notice. Hence, the said finding had attained finality.

On the other hand, the arbitral tribunal did not permit the appellants to carry out the repairs and renovations. Accordingly, an appeal was filed under section 37 of the 1996 Act with respect to this aspect.

⁵ CS (COMM) 214/2020 and CS (COMM) 191/2020

Submissions of the parties

The Appellant argued that the learned Arbitral Tribunal has failed to carry out the necessary exercise of considering the *prima facie* rights of the parties prior to exercising its discretion under Section 17 of the 1996 Act. That, the tribunal has failed to appreciate that throughout the subsistence of the agreements, the parties had proceeded on the basis that the license was revocable, and the renewal of the license agreements was necessary for the Respondents to continue to occupy the licensed premises. It was further, the case of the appellant that the Respondents occupied the licensed premises only as permissive licensees and the license agreement did not constitute an agreement to sell. Thus, the Respondents were neither in part possession of the licensed premises nor exercised any interest in the licensed premises, beyond those granted through the license agreements. The Appellant further submitted that; the Respondents failed to make out any *prima facie* case in their favour. Thus, the Respondents could not in any manner disturb the Appellant's possession and, the agreements being unregistered instruments, cannot be considered to be instruments of transfer of a right or interest in immovable property.⁶

The Respondents while placing reliance upon the judgment in the case of *World Window Infrastructure Pvt. Ltd. vs. Central Warehousing Corporation*, 2021 SCC Online Del 5099 contended that the scope of interference in an appeal against orders passed by Arbitrators under section 17 of the 1996 Act is limited.

⁶ Section 107 of the Transfer of Property Act read with Sections 17 and 49 of the Registration Act 1908.

Judgments relied upon by the court

The Hon'ble Delhi High Court, in the case of *Edelweiss Asset Reconstruction Company Ltd. vs. GTL Infrastructure Ltd. and Anr.*⁷,

*"136. Once the legislature has consciously conferred appellate powers, to the High Court, against orders of Arbitral Tribunals, rendered under Section 17 of the 1996 Act, I see no reason, absent any statutory or precedential proscription to the contrary, for not allowing such appellate jurisdiction its full play and effect. No doubt, while exercising jurisdiction, even as an appellate court under Section 37, the High Court would be required to maintain the discipline of the 1996 Act, which requires minimal interference with the decision of the learned Arbitral Tribunal. Where, however, the directions contained in the impugned Order of the learned Arbitral Tribunal are found to be unsustainable on account of the prior rights of the appellant before this Court, to which the attention of the learned Arbitral Tribunal was never invited, interference, in order to protect the legitimate interests of the appellant, is justified. Once a case for interference is found to exist, the appellate jurisdiction of the Court, under Section 37 would, in my view, also extend to modifying the order of the learned Arbitral Tribunal, in view of the inalienable indicia of appellate jurisdiction, as identified and delineated in *Tirupati Balaji Developers (P) Ltd.*, (2004) 5 SCC 1."*

⁷ *Edelweiss Asset Reconstruction Company Ltd. Vs. GTL Infrastructure Ltd. and Anr.* 2020 SCC Online Del 2081.

Similarly, in the case of *Augmont Gold Pvt. Ltd vs. One 97 Communication Limited*¹, while holding that Court has the authority to modify the decision of Arbitral Tribunal in an appeal under Section 37 of the Act, the Delhi High Court held as follows:-

"74. The scope of jurisdiction which embraces its governing considerations is restricted, as already observed hereinabove. While remaining within those constraints, however, the Court, in its appellate avatar, can modify the award; something which is outside the reach of the Section 34 Court. Expressed otherwise, and more simply, having examined the award/order under challenge within the limited scope of Section 34 or 37, if the Court finds that the interests of justice could be met by modifying the decision of the Arbitral Tribunal, it can do so under Section 37, but it cannot do so, under Section 34. This, in my opinion, is one of the inevitable sequelae of the legislative dispensation in conferring, on Courts, appellate jurisdiction over orders passed under Section 17 by the Arbitral Tribunal, granting or refusing to grant interim protection."

Observations of the court

Upon analyzing the relevant provisions and corresponding dicta on the subject matter, the court observed that the learned arbitrator had to consider the applications of the parties under section 17 of the 1996 Act independently and not simply follow the pre-arbitral protection orders as passed by the court.

Pertinently, when the pre-arbitral orders were passed by the Hon'ble Delhi High Court, the licensees of the Respondents had already stood revoked and possession was taken back by the Appellant. Thus, the plain intent of the orders passed by the High Court was clearly to permit the learned Arbitrator to adjudicate the issues raised before him in the applications under section 17 of the 1996 Act.

Further, while noting that the scope of interference in an appeal against orders passed by Arbitrators under Section 17 of the 1996 Act is limited, the Court held that *"in appropriate cases, the Court can exercise its jurisdiction under section 37 of the Act to protect the legitimate interest of the appellant, which includes modifying the order of the arbitral tribunal."* And, at the stage of considering the grant of interim relief, the Court has to see if a party has been able to establish the three essential elements of a prima facie case, the balance of convenience and irreparable harm and injury.

The appellant has satisfied the said conditions and there is no legal impediment in granting permission to the appellant to carry out the requisite repairs and renovation in the premises in question as an interim relief.



⁶ Section 107 of the Transfer of Property Act read with Sections 17 and 49 of the Registration Act 1908.

Analysis

The Delhi High Court on previous occasions¹ has emphasized that the power of the court to modify interim orders must be exercised sparingly keeping in mind the objective of the 1996 Act, (i.e., minimal judicial interference). The present decision of the Hon'ble Delhi High Court has also emphasized minimal interference with the decision of the arbitral tribunals. However, it is keenly felt that the precise contours which define the scope of interference/extent of modification permitted by the courts have not been identified yet.

RES JUDICATA IN DOMESTIC AND INTERNATIONAL ARBITRATION PROCEEDINGS

- Akshay Kumar Singh and Rajendra Sakarwar

The article aims to understand the applicability of the doctrine of res-judicata in domestic as well as international arbitration proceedings

1. Introduction

Arbitration has evolved over the last few decades and has emerged as an effective means for dispute resolution all over the world. However, as per the Frances Kellor in her book *“American Arbitration: Its History, Functions and Achievements”* has highlighted that the process of arbitration has been relied on for centuries. *“Of all mankind’s adventures in search of peace and justice, arbitration is amongst the earliest. Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes.”*

The doctrine of Res-judicata is derived from the Latin of *“a matter judged”* and is made to prohibit parties from litigating the same claim or argument which was already been settled. the doctrine becomes important in achieving finality to a judgement, avoid repetition and to ensure the judicial proceedings are not misused. The basic elements of the doctrine of res-judicata are:

1. Same cause of action
2. Same parties
3. Re-litigation.

2. Res judicata in International Arbitration Proceedings

2.1 The basic principle of res judicata relevant for the international arbitration provides that a right or fact specifically put in issue and determined by a court or tribunal of competent jurisdiction cannot later be put back in question as between the same parties.¹ Conflict of jurisdiction is a pertinent issue owing to the prevalence of numerous arbitral tribunals and international courts which may lead to an undesirable result of recurring disputes and conflicting judgments.²

2.2 The principle of ‘res judicata’ is integral to the international legal framework and is relevant in a very similar sense in the International Arbitration as it is to the criminal and civil procedure of national legal systems.³

¹5 ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY AND CONSTANTINE PARTASIDES, REDFERN, AND HUNTER ON INTERNATIONAL ARBITRATION 561 (Oxford) 2009.

²Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 53 (July 13).

³Enid Campbell, Res Judicata and Decisions of Foreign Tribunals, 16 Sydney L. Rev. 311 (1994).

The U.S. Supreme Court in the 1917 case of *Hart Steel Co. v. Railroad Supply Co.*⁴ deemed the principle of res judicata to be a “rule of fundamental and substantial justice”, furthermore, the applicability of the concept of ‘res judicata’ in different jurisdictions is not a matter of contention although the requirements of ‘res judicata’ in Civil and Common Law jurisdictions does affect an international tribunal’s adjudication of res judicata claims.⁵

2.3 Only few published awards directly deal with the res judicata effects of a prior judgment or award and thus the applicability of ‘res judicata’ in the international arbitration set up is uncertain and the same is filled with inconsistencies. The principle of res judicata is considered by some scholars to be a customary international law and by some to be a general principle of law.⁶

2.4 One of the foremost references to the applicability of ‘res judicata’ in an international arbitration framework was brought forward in the *Pious Fund Arbitration (United States v. Mexico)*⁷ wherein ‘the Hague’ in its 1902 arbitral award considered a prior 1875 national award to be ‘res judicata’ to the arbitral proceedings.

Similarly, the relevant principle of ‘estoppel’ and ‘abuse of rights’ formed a significant part of the contemporaneous jurisprudence pertaining to applicability of ‘res judicata’ in the international framework.⁸

2.5 The primary contention for the international arbitral tribunal is whether a decision of the national courts would necessarily act as res judicata, and whether it acts as a stringent pre-requisite. In the case of *Amco Asia Corp. et al. v. Republic of Indonesia*⁹ the ICSID tribunal determined that it would not be bound by the Indonesian national court’s decision, as otherwise the international arbitration proceedings would be meaningless. The ICSID tribunal in the *Amco Asia Case* held that “An international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that parties—rightly or wrongly—feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal, such a procedure could be rendered meaningless. Accordingly, no matter how the legal position of a party is described in a national judgment, an International Arbitral Tribunal has the right to evaluate and examine this position without accepting any res judicata effect of a national court.

⁴ *Hart Steel Co. v. Railroad Supply Co*, 244 U.S. 294, 299 (1917).

⁵ *Barcelona Traction, Light & Power Co., Ltd. Belgium v. Spain*, 1970 I.C.J. 3.

⁶ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 390 (Cambridge Univ. Press 1953).

⁷ Weber Francis J, *The United States Versus Mexico: The Final Settlement of the Pious Fund of the Californias*. 51 *Southern California Quarterly*, (1969): 97–152.

⁸ *Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.)*, Judgment, 1960 I.C.J. 192, 209, 213 (Nov. 18); *Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, Merits, 1962 I.C.J. 6, 23, 31, 32 (June 15)

⁹ *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID ARB/81/1.

In its evaluation, therefore, the judgments of a national court can be accepted as one of the many factors which have to be considered by the arbitral tribunal.”¹⁰

2.6 In the ICSID case of ***Inceysa Vallisoletana v. El Salvador***¹¹, the Tribunal commented on the direct applicability of judgments of national courts to act as res judicata. The tribunal did agree with the reasoning of the ICSID tribunal in the *Amco Case* and noted “that the State through the courts would redefine the scope and content of its own consent to the jurisdiction of the arbitral tribunal unilaterally at its own discretion.” The ICSID tribunal in the case of World ***Duty Free Co. Ltd. v. Republic of Kenya*** highlighted for a judgment of the national court to act as res judicata the basic requisites should be met such as the ‘identity of the parties’ and the ‘identity of the claims’.¹²

2.7 The question pertaining to the applicable law to adjudge the question of res judicata is not clear, in certain cases the law of the seat of Arbitration is favoured¹³ and in certain cases the tribunal noted that the domestic law would only act as a source of inspiration owing to the autonomous nature of international arbitration and would not be binding.¹⁴

In ICC Case No. 3383 of 1979, the tribunal noted that that prior awards must be considered final and binding in subsequent arbitral proceedings, unless successfully challenged before the competent domestic courts.¹⁵ In certain cases the tribunals decided the res judicata claims on the basic principles (the triple identity test) rather than agreeing to a specific jurisdiction.¹⁶

3. Res-judicata in Domestic Arbitration Proceedings

3.1 The question whether the doctrine of res-judicata and applicability on arbitration proceedings has been adjudicated before the Courts.

3.2 The Delhi High Court in a landmark case of *Union of India v. Videocon Industries Limited*¹⁷ held that re-initiation of proceedings before the London Courts was unfair and abuse of the process of law and is in violation of the doctrine of res judicata and issue estoppel provided under Section 11 of the Code of Civil Procedure.

3.3 The Supreme Court of India in the matter of *United India Insurance Co. Ltd. v. Antique Art Exports Pvt Ltd*¹⁸ had held that a full and final settlement arrived between the parties would bar future arbitration proceedings under the agreement. In the instant case, the parties reached a full and final settlement.

¹⁰ Ibid.

¹¹ *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID ARB/03/26.

¹² *Duty Free Co. Ltd. v. Republic of Kenya*, ICSID Case No. ARB/00/7.

¹³ ICC Case No. 5901, Award (1989).

¹⁴ ICC Case No. 13509, Award (2006).

¹⁵ ICC Case No. 3383, Award (1979).

¹⁶ ICC Case No. 6363, Award (1991).

¹⁷ *Union of India v. Videocon Industries Limited*, CS (OS) 3314/2011.

¹⁸ *United India Insurance Co. Ltd. v. Antique Art Exports Pvt Ltd*, (2019) 5 SCC 362.

However, after 11 weeks, the respondent approached the High Court for appointment of Arbitrator on the grounds that he was forced into a settlement. The Apex Court held that, no dispute existed between the parties after the discharge voucher was signed by the parties without complaint. The Apex Court held that as per Section 11(6A) the courts perform a judicial function and not just an administrative function.

3.4 The judgement of *United India Insurance Co. v. Antique Art Exports Pvt Ltd.* was overruled by the three-judge bench in the matter *M/s. Mayavathi Trading Pvt Ltd v. Pradyut Deb Burman*¹⁹. The three-judge bench after considering the law commission reports and other judgements came to a conclusion that “*it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11(6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment Duro Felguera, S.A. (supra) – see paras 48 & 59.*”

3.5 Most recent, the High Court of Kerala in *Bativala and Karani v. KI Johnny*²⁰ has held that the doctrine of res judicata would not apply to following arbitral proceedings when the first award was set aside by cause of inadequate constitution of the arbitral tribunal and not on merits.

3 Conclusion

From this brief analysis it can be construed that there is no specific established practice for the adjudication of res judicata in international arbitration, as the tribunals do not have a specific choice of law. The tribunals do not have a specific set of requirements on the basis of which the res judicata arguments are to be adjudged. Furthermore, the tribunals do not agree on the specific applicability of a judgment or a prior award. Therefore, no specific set of rules can be interpreted from the current nature and practice of international arbitration.

There has been accelerated increase in the reference of disputes to arbitration over the last decade or so. With this the concept of dispute resolution has also changed and adapted with the changes in the society to ensure equity and justice. The doctrine of res judicata is somewhere in between substantive and procedural laws.

¹⁹ *M/s. Mayavathi Trading Pvt Ltd v. Pradyut Deb Burman*, 2019 (8) SCC 714.

²⁰ *Bativala and Karani v. KI Johnny*, ARB.A NO. 34 OF 2011

The principle of res judicata is to prevent law from being abused. However, placing the doctrine in a right or wrong column is not possible with the ever-evolving space that is arbitration. It will be the responsibility of the specific tribunal, to determine after taking into consideration all relevant factors to that particular dispute, including the arbitration agreement and earlier decision.

DETOURING FROM CONTRACTUAL CONTOURS – AN ANALYSIS OF NEGATIVE CHANGE OF SCOPE DISPUTES IN HAM PROJECTS

- Shivam Gour and Jagrati Maru

Introduction

Change of Scope (hereinafter, **COS**) is a common term used in infrastructure contracts to refer to any modification or alteration made to the original scope of work defined in the contract. It occurs when the employer or the contractor proposes changes to the original project plan, such as additional work or revised specifications, that were not included in the original contract.

Change of Scope is a common occurrence in infrastructure contracts, as projects can be affected by external factors such as changes in regulations, design modifications, or unforeseen site conditions. However, it is important to manage COS in construction works carefully, as it has a significant impact on the project timeline, cost, and quality.

Managing COS is critical to ensuring the success of infrastructure projects. By following a structured change management process, clients and contractors can ensure that changes are carefully evaluated and managed and that the project remains on track to meet its objectives.

In this article, the authors will be reflecting on common disputes surrounding negative COS in the context of highway construction, operation, and maintenance under the Hybrid Annuity Project Model of the Government of India.

Provision of cos under the model concession agreement for hybrid annuity project

The Model Concession Agreement for Hybrid Annuity Model¹ typically stipulates provisions on COS under Article 16. COS is defined as the additional works and services which are not included in the scope of the project as contemplated in the Concession Agreement. It is pertinent to note that COS can be determined both by the National Highways Authority of India (hereinafter, *Authority*) and the Concessionaire; the costs incurred are initially borne by the Concessionaire and then reimbursed by the Authority.

Under the Model Concession Agreement, a formal process is outlined to reach an agreement to such Change as per the below-mentioned procedure,

1. Issuance of the COS Notice by the Authority to the Concessionaire.
2. After receipt of the COS Notice, the Concessionaire has to provide information as to the impact that such COS is likely to have on the Project Completion Schedule, the options for implementing the proposed COS, the cost and time thereof, a detailed breakdown of work classifications, material and labour costs as per the applicable Schedule of Rates (hereinafter, *SOR*).

¹ Model Concession Agreement,
https://morth.nic.in/sites/default/files/HAM-MCA%20Document_0.pdf last visited 01.03.2023.

3. The parties are to make good-faith negotiations to agree upon the time and costs of the implementation.
4. A Change of Scope Order is issued by the Authority requiring the Concessionaire to proceed with the performance².

Negative cos/reduction in scope of the project

The COS is termed as Negative COS where the employer chooses to reduce the original scope and as a consequence thereof, the value of the contract reduces as compared to the amount as agreed previously while execution of the contract³.

The Authority can determine the total cost of reduced scope in the event that the Concessionaire fails to complete any construction works on account of Force Majeure or reasons attributable to the Authority or when the Authority is unable to provide the remaining site of the project highway as per Clause 10.3.4 of the Model Concession Agreement for Hybrid Annuity Model i.e. Right of Way in respect to all land included in the Appendix. This cost of reduced scope is worked out by the Independent Engineer by first assessing the civil cost of the reduced scope as per the SOR applicable on Bid Due Date. In the next step, the civil cost would then be multiplied by 1.15 which is calculated as the estimated project cost divided by the civil construction cost by the Authority, to arrive at the estimated cost of reduced scope. This cost is then multiplied by the ratio of the Bid Project Cost to the Estimated Project Cost to arrive at the total cost of reduced scope.

² *ibid*, Clause 16.2.

³ Manoj Kumar Singh, *Infrastructure Arbitration – a perspective* (LexisNexis, 2020).

DISPUTES

The common causation triggering disputes between parties is when in the next payment milestone, the Authority reduces the Bid Project Cost by the total cost of reduced scope and all the payments made to the Concessionaire are adjusted and recoveries are made from the payment to be released on that milestone following such a reduction in scope. The disputes generally pertain to the cost of a reduction in scope. It is also seen that on many occasions, the Authority deducts such reduction from the next due milestone payments of Concessionaires which tends to be the bone of contention between the parties.

It is an interesting legal question as to whether such a detour can be taken from contractual stipulations by the Authority and the jurisprudence on the issue of negative COS.

Judicial dicta

In *Soma Isolux Kishangarh Beawar Tollway Pvt. Ltd. v. National Highways Authority of India*⁴, it was contended by the Authority that the Petitioner had failed to fully utilize the money advanced to it and there was negative CoS to the extent of around Rs. 35 crores. The Authority sought a Bank Guarantee for the said sum to protect its interests.

The Delhi High Court in this case directed NHAI not to insist the Petitioner for signing the Supplementary Agreement or furnishing a Bank Guarantee for the negative COS as a precondition for issuance of the Provisional Completion Certificate or the Completion Certificate.

⁴ *Soma Isolux Kishangarh Beawar Tollway Pvt. Ltd. v. National Highways Authority of India* 2015 SCC OnLine Del 7678.

The Hon'ble Delhi High Court has settled down a very good position of law in this case with regard to cases wherein there is a 'Change of Scope' dispute between the parties. The Court has held that such disputes must be settled through the dispute resolution mechanism provided in the contract and that there cannot be any conditions that can be imposed by the Authority without such adjudication. This is also in line with the trite law that in case there is a disputed fact between the parties, only after adjudication of such dispute can the Authority impose damages on the Concessionaire. As such, in Negative scope disputes between the Concessionaire and the Authority, the Authority must not be allowed to take any adverse action or impose any additional condition until the final adjudication of disputes takes place between the parties by the dispute resolution mechanism provided in the Agreement.

Further substantiating this submission, the authors would also note the decision of the Hon'ble Supreme Court in ***State of Madhya Pradesh v. M/s Sew Construction Ltd. and Ors***⁵ wherein it has been observed that a contractual right originates and subsists by virtue of the contract itself. As per the apex Court the Authority does not have any discretion to admit or deny any claim of escalation after the conditions specified in a contract are satisfied⁶.

The Hon'ble Apex Court has further observed that where a party to the contract is a governmental authority, there is no room for any element of discretion vested in the officers administering the contract.

In the words of the Apex Court, "Discretion, a principle within the province of administrative law, has no place in contractual matters unless, of course, the parties have expressly incorporated it as a part of the contract. It is the bounden duty of the court while interpreting the terms of the contracts, to reject the exercise of any such discretion that is entirely outside the realm of the contract⁷."

Therefore, the Authority being a government entity has no privilege in the matter of execution and enforcement of the contract and no fresh condition can be imposed on the Contractors/Concessionaires during the course of the work at the site.

The aforesaid decisions duly highlight that the Authority cannot deviate from the contractual provisions as per its discretion.

Conclusion

Variation orders issued during various phases of construction projects negatively affect both the completion time and costs of projects. Variation does not only affect labour productivity but also leads to dispute, time, and cost overrun. Consequently, it affects the project's performance⁸.

The authors opine that in contractual disputes, the terms of the contract are supreme, and the parties shall adhere to the letter and spirit of the same.

⁵ *State of Madhya Pradesh v. M/s Sew Construction Ltd. and Ors* SLP (C) No. 907 of 2020.

⁶ *ibid*, para 22.

⁷ *ibid*, para 23.

⁸ *Manoj Kumar Singh, Infrastructure Arbitration – a perspective (LexisNexis,2020).*

The Authority, as a matter of right, cannot impose fresh conditions on Concessionaires during the course of the work at the site. A detour from contractual contours cannot take place as it is the terms and conditions of the contract which shall prevail.

The parties should aim at conclusive and expeditious decisions on COS claims as they lead to the escalation of project costs which not only adversely affects both parties but also opens floodgates for potential disputes. As such, it should be ensured that the contract between the parties stipulates an exhaustive and identifiable list of variations that could be encountered during the course of the project. The COS Notice and approval thereof should be made in a timely manner.

PROJECT VIABILITY IN HIGHWAYS SECTOR PPP PROJECTS

- Divya Kashyap & Moonmoon Nanda

Introduction

The term “Public-Private Partnership” or “PPP” has undergone a significant shift in recent years owing to the recent global financial and economic changes. Typically, a PPP is a contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility.¹ PPP is an arrangement between a Government or statutory entity or Government owned entity, on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is a well-defined allocation of risk between the private sector and the public entity and the private entity who is chosen on the basis of open competitive bidding, receives performance-linked payments that conform (or are benchmarked) to specified and pre-determined performance standards, measurable by the public entity or its representative² or earns revenues out of the operation of the asset so constructed.

PPPs are a mechanism for the government to procure and implement public infrastructure and/or services using the resources and expertise of the private sector. Where governments are facing aging or lack of infrastructure and require more efficient services, a partnership with the private sector helps foster new solutions and bring finance. PPPs combine the skills and resources of both the public and private sectors through sharing of risks and responsibilities. This enables governments to benefit from the expertise of the private sector and allows them to focus on policy, planning, and regulation by delegating day-to-day operations.³ The advantage of a PPP is that the management skills and financial acumen of private businesses create better value for money for taxpayers when proper cooperative arrangements between the public and private sectors are used.⁴

Effective PPPs recognize that the public and the private sectors each have certain advantages, relative to the other, in performing specific tasks. The interests of the public entity and the private sector in a PPP are different. While the public entity looks for a better economy rate of return (benefits to society) and value proposition whereas the private sector looks for financial viability and a financial internal rate of return for the project.⁵

¹ <https://ppp.worldbank.org/public-private-partnership/about-us/about-public-private-partnerships>

² <https://www.pppinindia.gov.in/faqs>

³ *Supra*, note 1.

⁴ <https://www.icao.int/sustainability/pages/im-ppp.aspx>

⁵ *The PPP Guide for Practitioners*, April 2016; Department of Economic Affairs, Ministry of Finance, Government of India

Therefore, it is of paramount importance that the feasibility studies are undertaken by the public sector before floating the tender and by the private sector before submission of the bid. The key inputs from the technical feasibility study are the cost estimates (capital and O&M costs) and revenue estimates which determine the financial and economic viability of the project. The inputs have a significant impact on the implementation structure decided for the project.⁶

Evolution of PPP Models in the Highways Sector

After realising the need to involve the private sector in the development of roads, in 1992, the GoI amended the National Highways Act 1956 to empower GoI to levy fees for services or benefits rendered in relation to the use of sections of NH, in addition to the existing provisions for the use of ferries, temporary bridges, and tunnels. To attract private investment, the GoI initiated measures in 1994-95 like the declaration of the road sector as an industry to facilitate borrowing on easy terms and permission for floating of bonds, relaxation in Monopolies, and Restrictive Trade Practices to enable large firms to enter the highway sector and reduction in the custom duties of construction equipment.⁷



⁶ Ibid.

⁷ *Economic Surveys. (1994-95) available at https://www.indiabudget.gov.in/budget_archive/es1994-95/8%20Infrastructure.pdf*

In 1995, the GoI amended the National Highways Act 1956 to empower itself to enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a NH and entitled the person to collect and retain fees for services rendered regarding expenditure involved in building, maintenance, management and operation of the whole or part of such NH, interest on the capital invested and reasonable return.⁸

Evolution of Public Private Partnership Approval Committee

After identifying the lack of standard framework for the BOT mode of project execution, the Planning Commission received and scrutinized several sets of framework and model agreements for the Highways Sector between 1998-2004. Thereafter, a Committee on Infrastructure (“CoI”) was constituted in 2004, which insisted on a Model Concession Agreement (“MCA”) for road projects to ensure an appropriate balance of risks and obligations between parties. Thereafter, an inter-ministerial group was constituted in January 2005 to examine and evolve the MCA for (i) Build, Operate and Transfer (BOT) (Toll basis), (ii) Build, Operate, and Transfer (BOT) (Annuity basis) and (iii) Operation, Maintenance, and Tolling (OMT) projects. The Planning Commission submitted a draft MCA, which was recommended by the inter-ministerial group and was approved by the CoI as a model framework for road projects.⁹

⁸ Section 8A, National Highways Act, 1956

⁹ Ramakrishnan. T. S, Raghuram. G; *Evolution of Model Concession Agreement for National Highways in India*, July 2012

Pursuant to this decision, a Public Private Partnership Approval Committee (“**PPPAC**”) was set up under the Chairmanship of the Secretary, DEA, Secretary, PC, Secretary, Expenditure, Secretary, Legal Affairs and Secretary of the Department sponsoring a project. The Department of Economic Affairs, Ministry of Finance *vide* its notification dated 29.11.2005 had communicated the setting up of PPPAC.¹⁰ Thereafter, the DEA issued a notification on 12.01.2006 setting forth the detailed guidelines for formulation, appraisal, and approval procedure for approval of PPP Projects.¹¹ The scope of the projects and their mode of implementation are decided by MoRT&H based on the viability of the projects as per the outcome of the Detailed Project Report (“**DPR**”) or Feasibility Report (“**FR**”).

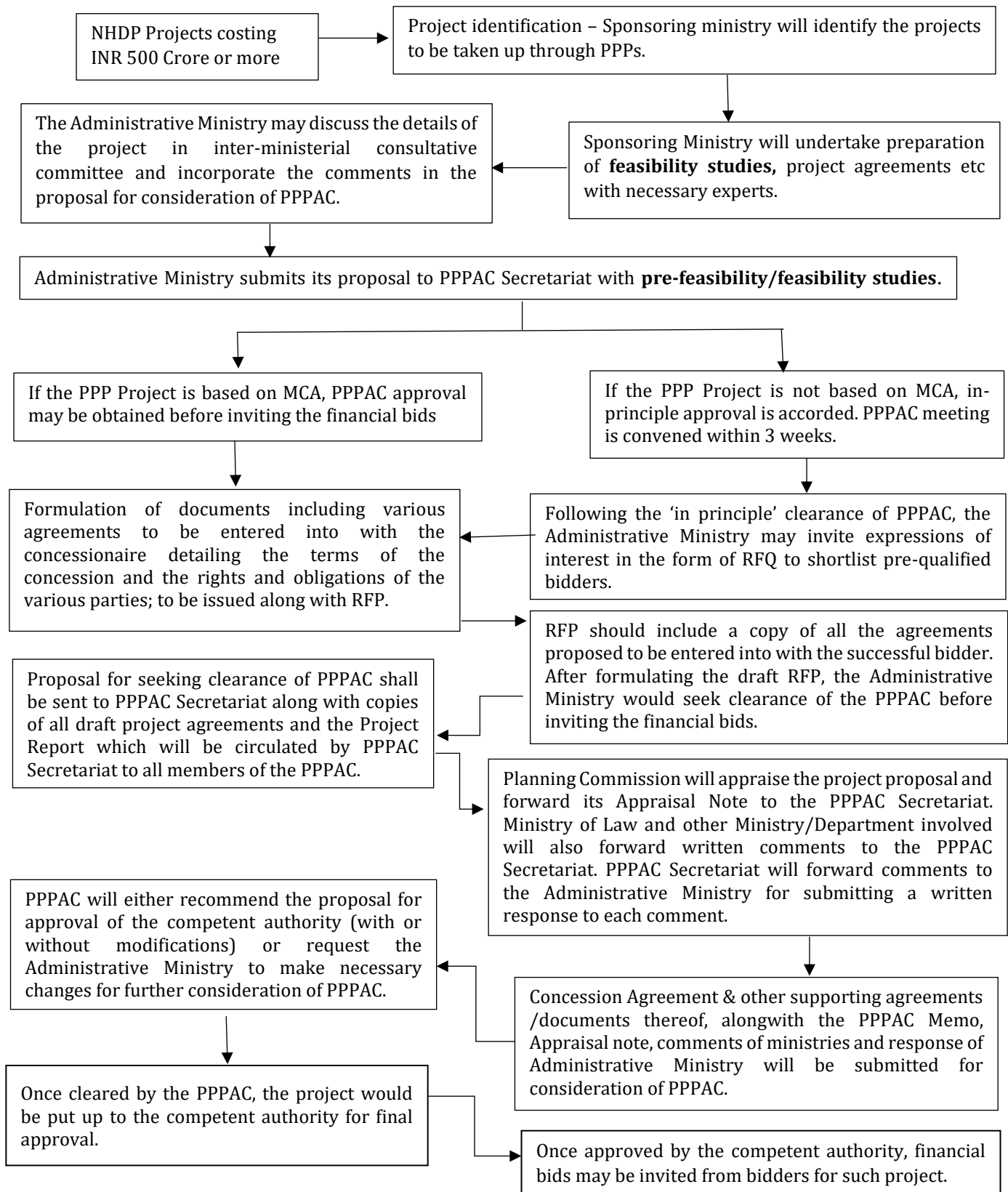


¹⁰ Circular No. F.No.2/10/2004-INF dated 29.11.2005 issued by Government of India, Ministry of Finance, Department of Economic Affairs available at [notification-EC.doc \(pppinindia.gov.in\)](https://www.pppinindia.gov.in/notification-EC.doc)

¹¹ Circular No. F.No.1/5/2005-PPP dated 12.01.2006 issued by Government of India, Ministry of Finance, Department of Economic Affairs available at [3ee22646-ca94-478f-9cae-695a3479d83c \(pppinindia.gov.in\)](https://www.pppinindia.gov.in/3ee22646-ca94-478f-9cae-695a3479d83c)

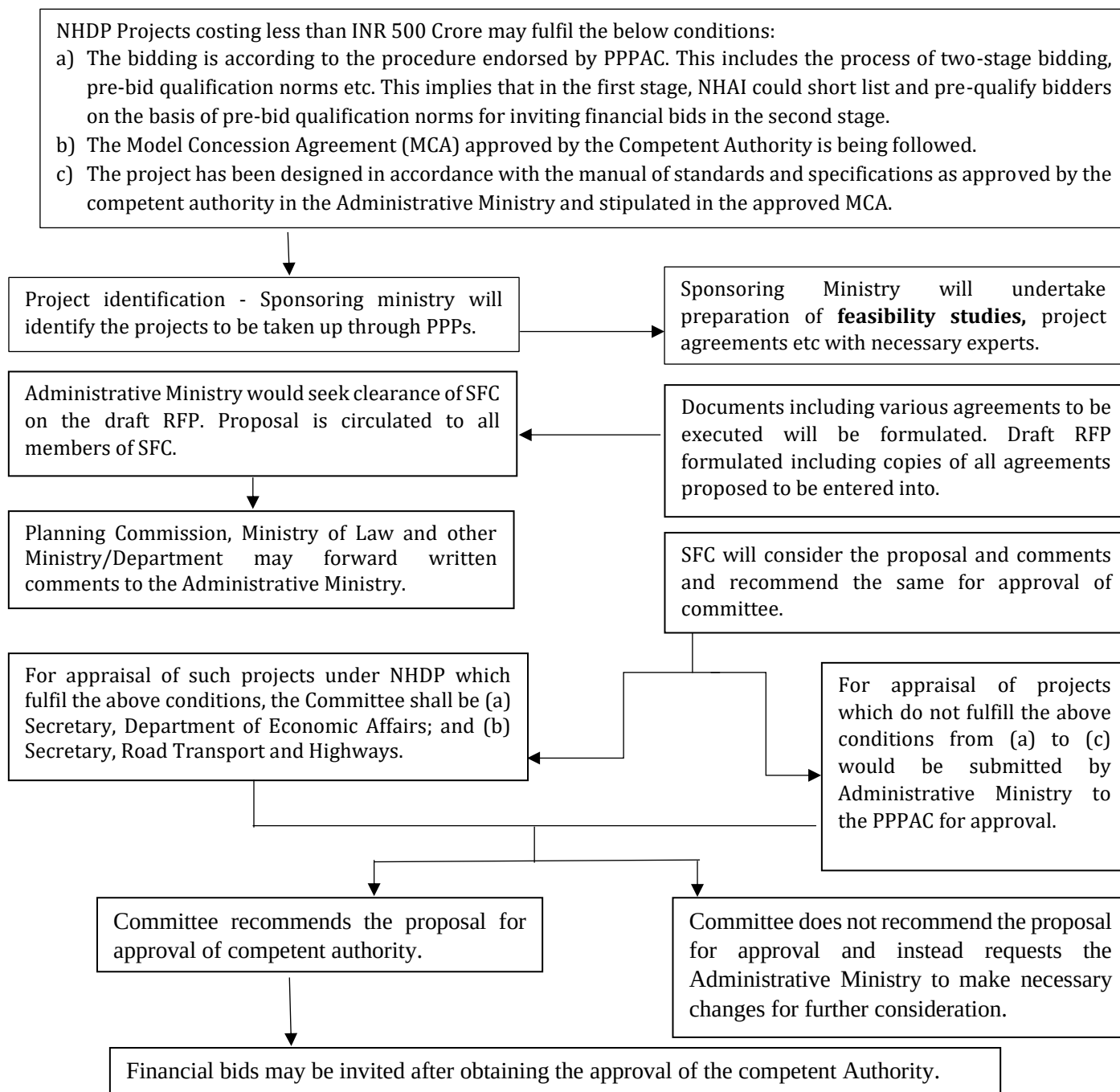
Procedure for PPPAC approval of PPP Projects under NHDP¹²

1. NHDP Projects costing INR 500 Crore or more



¹² Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects 2013.

2. NHDP Projects costing less than INR 500 Crore



Framework of PPP Models encapsulated in the MCA

At the time of setting up of the PPPAC, the prevalent MCA formulated in 2005 was used for the PPP Projects approved at the time. Thereafter, discussions between the Planning Commission and NHAI from 2006 to 2009 led to further evolution and strengthening of the framework for BOT projects. Following the discussions, the Planning Commission published the improved versions of the MCA namely; PPPs in National Highways (2009), National Highways (six laning) (2009), State Highways (2009), and Operation & Maintenance of Highways (2009).

In addition to this, the Planning Commission also published the Model Request for Qualification (RFQ) for PPP Projects, Model Request for Proposal (RFP) for PPP Projects, Model RFP for Selection of Technical Consultants, Model RFP for Selection of Legal Advisers, and Model RFP for Selection of Financial Consultants & Transaction Advisers during 2009-2010 for further strengthening of the PPP framework.¹³

For sustaining investor interest in the upgradation and maintenance of highways on a Design, Built, Finance, Operate, and Transfer (“DBFOT”) basis, a precise policy and regulatory framework was spelled out in the MCA. The framework addressed the issues which were typically important for limited recourse financing of infrastructure projects, such as mitigation and unbundling of risks; allocation of risks and rewards; symmetry of obligations between the principal parties; precision and predictability of costs and obligations; reduction of transaction costs; force majeure; and termination. The MCA also elaborated on the basis for commercialising highways in a planned and phased manner through optimal utilisation of resources on the one hand and adoption of international best practices on the other hand.¹⁴

Need for Assessment of Project Viability

The National Highways Act, 1956 under Section 8A provides for the power of the Central Government to enter into agreements for the development and maintenance of national highways.

¹³ *Compendium PPP Projects in Infrastructure*, March 2014; Published by PPP & Infrastructure Division Planning Commission, Government of India available at http://www.gajendrahaldea.in/download/Compendium_PPP_Project_In_Infrastructure.pdf

¹⁴ *Model Concession Agreement issued by the Planning Commission, Government of India*, second ed:2009

Section 8A(2) of the National Highways Act, 1956 states that the fee rates are fixed having regard to the expenditure involved in building, maintenance, management, and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement.¹⁵ Therefore, it is clear that private sector participation in infrastructure development requires a framework that can enable the private investor to secure a reasonable return at manageable levels of risk, assure the user of adequate service quality at an affordable cost, and facilitate the Government in procuring value for public money.¹⁶

The four critical elements that determine the financial viability of a highway project are traffic volumes, user fees, concession period, and capital costs. As the existing highways have dedicated traffic and the Government has prescribed the user fee for uniform application across India, revenue streams for a Project Highway can be assessed with a fair degree of accuracy. The concession period, on the other hand, can be extended only marginally for improving project viability, as the growth of traffic would not permit very long concession periods.

¹⁵Section 8A National Highways Act, 1956: (1) Notwithstanding anything contained in this Act, the Central Government may enter into an agreement with any person in relation to the development and maintenance of the whole or any part of a national highway. (2) Notwithstanding anything contained in section 7, the person referred to in sub-section (1) is entitled to collect and retain fees at such rate, for services or benefits rendered by him as the Central Government may, by notification in the Official Gazette, specify having regard to the expenditure involved in building, maintenance, management and operation of the whole or part of such national highway, interest on the capital invested, reasonable return, the volume of traffic and the period of such agreement.

¹⁶ *Supra* Note 12.

Furthermore, it is submitted that the framework also provides for a balanced and precise mechanism for determination of user fees for the entire concession period since this would be of fundamental importance in estimating the revenue streams of the project and, therefore, its viability.¹⁷

Key Financial Viability Indicators and Interpretation

The key financial viability indicators that are most commonly used are Project Net Present Value (PNPV), Equity Net Present Value (ENPV), Project Internal Rate of Return (PIRR) and Equity Internal Rate of Return (EIRR). A positive NPV for a project when discounted at weighted average cost of capital (WACC) would mean that project returns are higher than WACC. The equation for the calculation of Project NPV is as under:¹⁸

$$\text{Project NPV} = -C_0 + \sum_{i=1}^T \frac{C_i}{(1+r)^i}$$

C_0 = Initial Investment for the Project C = Project Cash Flow in a particular year i = Time in years r = Discount Rate
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A financially viable project should meet all debt service requirements. PIRR is the value of the discount rate (r) in the above formulae at which the PNPV is zero. Similarly, if the project investments and project cash flows are replaced by equity investments and equity cash flows, the equation would give ENPV and EIRR.¹⁹

The financial analysis is represented in terms of the cash flow statement, profit and loss statement and balance sheet.

A project could be termed financially viable (or bankable) if (i) it meets debt service obligations, (ii) the Project NPV and Equity NPV are positive, (iii) the estimated Equity IRR is more than the cost of equity. If the project is not viable on a standalone basis, the estimated support required from the Government needs to be assessed. If the support is within the acceptable range of existing Government support such as the Viability Gap Funding or other budgetary support, the project could be taken up with Government support.²⁰

Conclusion

Therefore, in a typical PPP contract, the project viability/feasibility studies have to be carried out by the government/implementing authority in connection with the project accurately. Any inadequacy in such assessment on the part of the government/implementing authority becomes a huge pre-construction risk of the private party which can also lead to delays in implementation and heavy costs and cost overruns which would ultimately adversely affect all the stakeholders of the project.

Financial viability should be analysed in present value terms, which means that the costs and revenues over the life of the project are expressed in terms of today's money. This is essential for making meaningful comparisons of benefits and costs that occur at different times and for comparing different projects.²¹ In India, the PPP framework ensures that selected projects are aligned with the government's development strategy, generate the greatest economic returns for society as a whole, and do not expose the government to excessive fiscal risks. This generates greater private sector interest and public acceptance of PPP programs.

¹⁷ *Ibid.*

¹⁸ *Supra* Note 5

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ PPP Toolkit; available at

<https://www.pppinindia.gov.in/toolkit/ports/module2-ffaapddfvapdd.php?links=ffaapdd1g#:~:text=Financial%20viability%20should%20be%20analysed,and%20for%20comparing%20different%20projects>

INTERPRETATION OF 'PRIMA FACIE' CASE OF FRAUD AND CORRUPTION FOR AN UNCONDITIONAL STAY OF ARBITRAL AWARD UNDER SECTION 36(3) OF THE ARBITRATION AND CONCILIATION ACT, 1996

-Ankur Mishra

Introduction

The sub-section (2) of Section 36 of the Arbitration and Conciliation Act, 1996 ("Act") provides that the filing of an application seeking to set aside the arbitral award shall not by itself render the award unenforceable. Rather, the Court is empowered to grant a stay of the operation of the arbitral award upon the filing of an application for the same under Section 36(2) of the Act. This interplay of Section 34 and Section 36 of the Act provides the Court with the power to make interim order during the pendency of the disposal of the objections under Section 34 of the Act. This is especially significant given that the term "Court" occurring in Section 36 is not meant to be the Court as defined within the meaning of Section 2(1)(e) of the Act.¹ There is however one exception to the general rule towards the grant of stay of operation of an arbitral award under Sub-section (2) of Section 36 of the Act. Proviso to Section 36(3) of the Act provides that Court shall stay the award unconditionally pending disposal of the challenge under Section 34 of the Act if a prima facie case is made out that the arbitration agreement or contract which is the basis of the award or the making of the award was induced or effected by fraud or corruption.

However, the contours of what constitutes a 'Prima facie case' are not made clear by the wording of the proviso to Sub-section (3) of Section 36 of the Act.

In a recent judgment passed by Hon'ble Delhi High Court in *Mahanagar Telephone Nigam Limited v. Canara Bank and Anrs*,² ("MTNL v. Canara Bank"), the Court was confronted with an allegation made by Petitioner of fraud induced by the Respondent in the contract agreement. The said allegations were made by relying on the observations made by multiple Commissions/Committee appointed by Statutory bodies such as RBI (Reserve Bank of India). Hon'ble Court ruled that MTNL has not been able to demonstrate prima facie that the contract, which is the basis of the award, was induced by fraud or corruption. The Court ruled that contemporaneous correspondence does not establish a case of fraud or that MTNL was not aware of the nature of the transactions.

This Article analyzes the approach adopted by the Hon'ble Court in determining whether a prima facie case of fraud or corruption is made out for a grant of unconditional stay under Section 36 of the Act. Part I of the Article briefly summarizes the factual background, while Part II deals with the analysis of the ruling laid down by the Court.

¹ *Daelim Industrial Co. Ltd v Numaligarh Refinery Ltd*, 2009 SCC OnLine Del 511.

² *Mahanagar Telephone Nigam Limited v. Canara Bank and Anr*, O.M.P. (COMM) 312/2022 dated 28.02.2023, 2023 SCC OnLine Del 1172

Factual Background

The parties to the dispute i.e., MTNL (“**Petitioner**”) and CanBank Financial Services Ltd (Canfina, hereinafter referred to “**Respondent No.2**”) entered into a Memorandum of Understanding under which Letters of Allotment were to be issued and Respondent No.2 was to subscribe to bonds issued by Petitioner. The proceeds of the bond were to be invested with Respondent No.2. Accordingly, LOAs to the tune of Rs 200 Crores were issued by Petitioner to Respondent No.2. Subsequently, Petitioner took a separate loan of Rs 200 Crore from the Industrial Development Bank of India (“**IDBI**”) which was assigned to Respondent No.2 to be paid directly from the proceeds invested with Respondent No.2 by Petitioner. However, it was the case of the Petitioner that the transaction was affected by a “wide-ranging securities scam” in the stock market during April-May 1992.

Subsequently, Canara Bank (“**Respondent No.1**”) which was the holding company of Respondent No.2, took a transfer to the LOAs from Respondent No.2 and sought registration of the bonds and payment of interest by MTNL. The same was disputed by the Petitioner. Petitioner cancelled the LoAs and the parties were referred to arbitration by order of the Court under writ jurisdiction. The arbitral award dated 03.03.2022 (“**Impugned award**”) allowed the claims of the Bank and granted a declaration that the cancellation of the bonds by MTNL was illegal. MTNL was consequently directed to refund a sum of Rs 160 Crore to the Bank with interest @ 6% per annum from 20.10.1993 until realization. The Petitioner filed an application for the stay of the impugned award.

Ruling of the Hon’ble Court

The proviso to Sub-section (3) of Section 36 of the Act provides that the Court is required to be satisfied with a Prima Facie case that either the arbitration agreement or the contract which is the basis of the award was induced or effected by fraud or corruption or that the making of the award was induced or effected by fraud or corruption. A prima facie case is said to be established if the evidence which is led in support of the same were believed. The test of whether a prima facie case has been established is whether on the basis of the evidence led it was possible to arrive at the conclusion in question. However, mere allegations regarding inducement are not sufficient but such inducement must be based on some fraud practised or corruption made.³ As sub-section (3) of 36 of the Act refers to only a prima facie case, it is not required on the part of the petitioner to provide his case to the hilt.⁴

In *MTNL v. Canara Bank*, the Petitioner had relied on observations made by the Jankiraman Committee, R.Nanjappa Committee, and the Joint Parliamentary Committee all of which had enquired into the circumstances and allegations of a scam in the Financial Market. Petitioner had submitted that no request was made to the Respondent No.2 to invest in the market securities on behalf of Petitioner. Petitioner relied on aforementioned committee reports to allege that the details of open contracts in Government loans and PSU bonds did not appear to be available in the records of Respondent No.2 and that it was difficult to verify the existence of these open contracts.

³ *State of Maharashtra v. Jaykumar Fulchand Ajmera*, MANU/MH/2223/2021.

⁴ *Martin Burn Ltd. v. R.N. Banerjee*, AIR 1958 SC 79: 1958 SCR 514: (1958) 1 LLJ 247

Petitioner also relied on JPC Reports which observed that the transactions involving PSU bonds were “off Balance-sheet transactions.” It was brought to the notice of the Court that the Joint Parliamentary Committee had observed that Respondent No.2 had been violating RBI guidelines with regard to Portfolio Management Services.

Respondent had on the other hand relied on the bank statement of Respondent No.2 to submit that there were indeed cross-transactions of Rs. 200 Crores each on the same day recorded in the books to support the conclusion that the subscription to the bonds and investment through portfolio Management Services were two separate transactions. Respondent also submitted contemporaneous correspondence to show that intention of the parties was for securities to be held by Respondent No.2 on behalf of Petitioner.

It must be noted that the Learned Arbitrator in his impugned award had decided that Respondent No.1 and Respondent No.2 had not been indicted for fraud vis-à-vis subscription to the bond and that the securities were held by Respondent No.2 on behalf of Petitioner.

The Hon’ble Court had restricted itself from examining the question of fraud or corruption in the subject transaction in detail. This is because the Court under Section 36 of the Act is only called upon to take a prima facie view. Resultantly, any determination, adverse or otherwise, does not foreclose the right of the parties to raise objections under Section 34 of the Act for the setting aside of the award.

In view of the abovesaid, Hon’ble Court had ruled against a finding of a prima facie case of fraud or corruption in the contract which formed the basis of the award. Consequently, the Hon’ble Court ruled against the grant of unconditional stay of the award. The Hon’ble Court ruled that despite the existence of observations that point out the irregularities in the transactions made by Respondent No.2, the contemporaneous correspondence does not establish a case of fraud. In arriving at this decision, the Court was guided by the correspondence relied upon by Learned Arbitrator to decide that the transactions were not vitiated by fraud.

Once the Court had determined that no prima facie case of fraud and/or corruption exists for a stay of operation of the arbitral award, the Hon’ble Court directed that the enforcement of the impugned award will be stayed subject to MTNL depositing Rs. 160 Crores and interest thereupon at the awarded rate of 6% per annum from 20.10.1993 until 31.03.2023.



Conclusion

The ruling of the Hon'ble Delhi High Court in MTNL vs. Canara Bank provides much-needed clarity on the ambit of interference by the Court contemplated under proviso to Section 36(3) of the Act insofar as determination of prima facie case of fraud or corruption is concerned. The Hon'ble Court refused to interfere with the impugned award insofar as the impugned award distinguished the subscription of bond from the investment with the Portfolio Management Services of Respondent No.2. The observations of the Government Appointed Committees though relevant as far as compliance with Portfolio Management Services of Respondent No.2 was not found to be the basis for prima facie case of fraud or corruption insofar as subscription of the bond between Respondent No.1 and the Petitioner. The Court had also relied on contemporaneous correspondence on record in ruling against the finding of prima facie case under Section 36 of the Act. A finding of a prima facie case of fraud and corruption contemplates a drastic step of unconditional stay of award until disposal of objections under Section 34 of the Act.

THE INTERPLAY BETWEEN SECTION 32 AND SECTION 56 OF THE INDIAN CONTRACT ACT, 1872

- *Prakriti Syngal & Pranav Kaushik*

Background:

1. The disruption in the supply chain caused due to Covid-19 has had a long-reaching impact on the contractual obligations of commercial entities. Commercial entities are resorting to taking refuge of the Doctrine of Frustration to mitigate their contractual burden. Section 32 and Section 56 of the Indian Contract Act, 1872 encompass the Indian Law on Frustration of Contract. However, the scope of application of Section 32 and Section 56 of the Indian Contract Act is distinctive with respect to the discharge of obligations of parties. Therefore, considering the new adjusted realities of the contemporary world after covid-19, the applicability of Section 32 and Section 56 of the Indian Contract Act, 1872 has acquired the central stage of legal discussions. This article aims to provide clarity on the scope and application of Section 32 and Section 56 of the Indian Contract Act, 1872.

Section 56 of the Indian Contract Act, 1872

2. Section 56 of the Indian Contract Act deals with the doctrine of frustration. Section 56 has three limbs, under the first limb, it declares an agreement to do an act impossible in itself as void.

Under the second limb, it renders the contract void on account of a subsequent event that the promisor could not prevent, thereby rendering the performance of the contract either impossible or unlawful. Under the third limb, the promisor is fastened with the liability of payment of compensation to the promisee for the loss suffered by him, if the promisor knew or with reasonable diligence, he might have known which the promisee does not know, that performance of the contract would be impossible or unlawful.

Section 32 of the Indian Contract Act, 1872

3. Section 32 deals with the frustration of contingent contracts. Before proceeding further, it is necessary to take cue about the contingent contract as defined under Section 31 of the Indian Contract Act. As per Section 31 of the Indian Contract Act, Contingent contracts are contracts that are dependent upon the happening or non-happening of the uncertain future event. In other words, the right created under Contingent Contracts may be one which parties agree shall be enforceable only on the happening of some future event, as to which neither of the parties makes any promise and which is, therefore collateral to the contract, its import being merely to mark the moment at which a right created by the contract becomes enforceable.

The interplay between Section 32 and Section 56 of the Indian Contract Act

4. The applicability of Section 32 or Section 56 of the Indian Contract Act, 1872, hinges upon the fact as to whether the parties have contemplated the liabilities arising out of the occurrence of the supervening event or not. The liabilities accruing on the occurrence of the supervening event are usually dealt with in the force majeure clauses of the contract. The Black's Law Dictionary defines the force majeure clause¹ as-

"a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled."

5. The law regarding the application of Section 56 and Section 32 of the Indian Contract Act was discussed by the Hon'ble Supreme Court in the case of *Satyabrata Ghose v. Mugneeram Bangur & Co.*² wherein the Court had held that where the contract itself either impliedly or expressly contains a term, according to which performance would stand discharged under certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be dealt with under Section 32 of the Act. If, however, frustration is to take place *de hors* the contract, it will be governed by Section 56.

The finding of the Apex Court in *Satyabrata Ghose v. Mugneeram Bangur & Co. (Supra)* was affirmed by the Supreme Court in *Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.*³:

"32. "Force majeure" is governed by the Indian Contract Act, 1872. In so far as it is relatable to an express or implied Clause in a contract, such as the PPAs before us, it is governed by Chapter III dealing with the contingent contracts, and more particularly, Section 32 thereof. In so far as a force majeure event occurs de hors the contract, it is dealt with by a Rule of positive law Under Section 56 of the Contract. "

6. Therefore, if the parties have contemplated the consequences that will ensue on the happening of the supervening event, then the parties will be bound by the consequences agreed in the contract. Such types of contracts would amount to contingent contracts under Section 31 of the Indian Contract Act and consequences arising out of such contingent contracts will be enforceable under Section 32 of the Indian Contract Act.
7. However, if the performance of the contract is rendered impossible by an event not contemplated by the parties in the contract, then such contracts will be void under Section 56 of the Indian Contract Act. The law in this regard was laid down by the Hon'ble Supreme Court in the case of *National Agricultural Co-operative Marketing Federation of India v. Alimenta S.A.*⁴.

¹ Black's Law Dictionary, Ninth Edition, Page 718.

² *Satyabrata Ghose v. Mugneeram Bangur & Co.*, MANU/SC/0131/1953.

³ *Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.* MANU/SC/0408/2017.

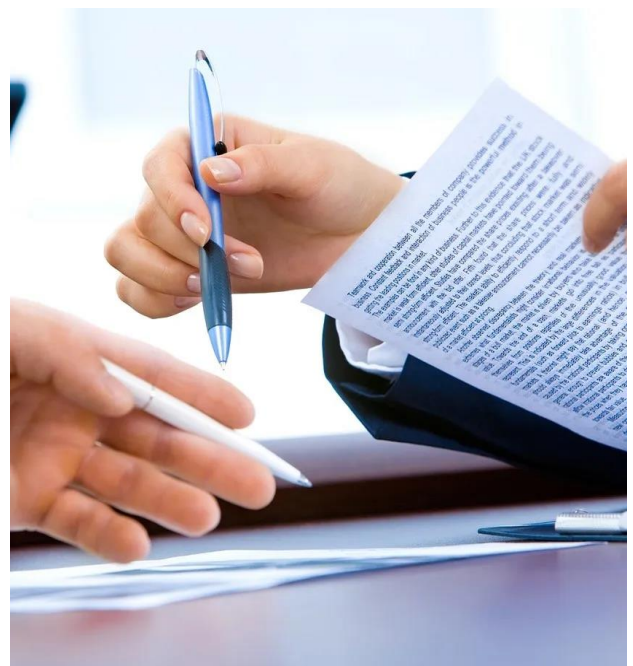
⁴ *National Agricultural Co-operative Marketing Federation of India v. Alimenta S.A.*, MANU/SC/0382/2020.

The relevant extract of the judgment is reproduced hereinbelow for reference:

“47. Section 32 of the Contract Act applies in case the agreement itself provides for contingencies upon happening of which contract cannot be carried out and provide the consequences. In this case, provisions of Section 32 of the Contract Act are attracted and not Section 56. In case an act becomes impossible at a future date, and that exigency is not provided in the agreement on the happening of which exigency, is impossible or unlawful, the promisor had no control which he could not have prevented, the contract becomes void as provided in Section 56. However, Section 56 also provides liability for a cause where the promisor has agreed to do something which he knew or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful. Such a promisor must make compensation to such a promise and is liable to pay damages. The latter part of Section 56 is applicable when the promisee did not know the act to be impossible or unlawful and that it was not known to the promisor; the action was impossible or unlawful or with reasonable diligence might have known.”

8. Further, the Hon'ble High Court of Delhi in the case of *NTPC Limited v. Voith Hydro Joint venture*⁵ extrapolated on the applicability of Section 32 and Section 56 of the Indian Contract Act. The dispute between the parties arose relating to the frustration of the Contract.

It was contended on behalf of the Petitioner that it was bound only to restitute the Respondent under Section 65 of the Indian Contract Act and not pay any damages as the contract was frustrated under Section 56 of the Indian Contract Act. The Court while dismissing the contention of the petitioner observed that if the contract expressly provides for the consequences in case its performance has been rendered impossible on account of any supervening eventuality, the contract is not rendered void in its entirety. The parties would be bound by already contemplated consequences of the supervening event according to the provisions of the contract. The court took note of the force majeure clause in the agreement and stated that the provision of the contract (force majeure) will prevail over Section 56 of the Indian Contract Act.



⁴ *National Agricultural Co-operative Marketing Federation of India v. Alimenta S.A*, MANU/SC/0382/2020.

⁵ *NTPC Limited v. Voith Hydro Joint Venture*, MANU/DE/2103/2019.

Conclusion: Implication of Section 32 and Section 56 of the Indian Contract Act

9. The aforementioned judgments demonstrate that if the parties have allocated the liabilities on the occurrence of an uncertain event, then the same will be binding upon them. The law laid down assumes significant importance as remedies ensuing out of the frustrated contracts will vary. If the contract is frustrated under Section 56 of the Indian Contract Act, the same will be treated as void and parties will be entitled to restore the benefit availed under Section 65 of the Indian Contract Act. On the other hand, if the parties have agreed regarding the allocation of liabilities on the occurrence of an uncertain future event, the parties will be bound by the provisions of the contract, and they cannot resort to Section 65 or any other provision of the Indian Contract Act.

ARTIFICIAL INTELLIGENCE AND ARBITRATION.

- *Widaphi Lyngdoh*

In scientific terms, Artificial Intelligence is the mechanical simulation system of collecting knowledge and information and processing intelligence of the universe: (collating and interpreting) and disseminating it to the eligible in the form of actionable intelligence.¹

The term was coined in 1956 by John McCarthy, a computer scientist. He defined AI as "*making a machine behave in ways that would be called intelligent if a human were so behaving*".²

Artificial intelligence (AI) is rapidly transforming many industries and professions, and arbitration is no exception. What holds good for [Human Intelligence], also applies to AI³. Despite traditional resistance caused by lawyers' conservativeness to embrace new technologies, technology is slowly creeping into legal practice and even international arbitration.⁴

In recent years, there has been a growing interest in the potential of AI to streamline and improve the arbitration process. This article explores the intersection of artificial intelligence and arbitration, looking at how AI is being used in this field and what the future may hold.

How is AI being used in arbitration?

There are several ways in which AI is being used in arbitration, including:

1. Document review and analysis

One of the most time-consuming and expensive parts of the arbitration process is document review and analysis. AI can be used to automate much of this process, allowing for faster and more efficient reviews of large volumes of documents. AI systems can be trained to recognize key terms, identify patterns, and flag relevant documents for review, saving time and reducing costs.

2. Predictive analytics

AI can be used to analyze data from past arbitration cases to identify patterns and make predictions about the outcome of future cases. This can be particularly useful in determining settlement offers and negotiating strategies.



¹ Prof Dalvinder Singh Grewal, PhD Dean R & D Desh Bhagat University, Mandi Gobindgarh, *A Critical Conceptual Analysis of Definitions of Artificial Intelligence as Applicable to Computer Engineering*, India IOSR Journal of Computer Engineering (IOSR-JCE) e-ISSN: 2278-0661, p- ISSN: 2278-8727 Volume 16, Issue 2, Ver. I (Mar-Apr. 2014), PP 09-13 www.iosrjournals.org

² Professor John McCarthy, 'What is AI/ Basic Questions', (<http://jmc.stanford.edu/artificial-intelligence/whatis-ai/index.html>).

³ See H.J. Snijders, *Arbitrage en AI: Van arbitrage naar robotarage en van menselijke arbiter naar robotarbitrator?*, Tijdschrift voor Arbitrage 3 (2019).

⁴ Gabrielle Kaufmann-Kohler, Thomas Schultz, 'Online Dispute Resolution: Challenges for Contemporary Justice' (Kluwer Law International, 2004) p. 27.

3. Decision-making

AI can also be used to assist arbitrators in making decisions. For example, AI systems can be used to analyze evidence and provide recommendations to arbitrators based on patterns and trends in the data.

4. Language processing

AI can be used to analyze the language used in arbitration documents, such as contracts and agreements, to identify potential issues and ensure that the documents are clear and concise.

Framework for Legislation

Although the government has been promoting artificial intelligence and its subsequent applications, there are currently no particular laws in India that address big data, machine learning, or artificial intelligence, however, the process of developing laws, rules, and policies with a focus on governing and overseeing AI is already underway.

Even, the framework for online dispute resolution has undergone some significant adjustments thanks to the judiciary's leadership. The eCourts Mission Mode Project has been the catalyst for several initiatives. The Lok Adalat has evolved into the e-Lok Adalat, which is available online. The illustrious Supreme Court has taken advantage of AI's potential by developing the SUVAS (Supreme Court Vidhik Anuvaad Software), which converts judicial papers from English into nine regional languages.

The Niti Aayog committee, in its report,¹ acknowledged the advantages of online dispute resolution and the contribution of AI to its success. The Report acknowledged the value of AI in the creation of India's online dispute resolution system. The use of AI in the creation of such a system can have a variety of advantages, such as the removal of human bias from the dispute settlement process. According to the report, ODR's objective is to replace the current model of dispute settlement, not to completely replace it. An illustration is the ODDRP (Online Dispute Diversification Resolution Platform) model from Zhejiang, which incorporates numerous ICT (Information Communication Technology) tools, such as cloud computing and artificial intelligence. In this case, AI has been used in tandem with an effective offline docking system to facilitate lawsuits and dispute resolution.

The potential for integrating technology into the legal system is still enormous. For instance, blockchain-driven arbitration procedures could be created for the creation of smart contracts. Computer-coded smart contracts have the potential to automate enforceability through the transfer of rights and duties, facilitating the management of disputes based on blockchain arbitration. The main legal frameworks that support blockchain contracts are the UNCITRAL Electronic Model Law on Electronic Commerce from 1996 and the UNCITRAL Convention on Electronic Communications in International Contracts from 2007.

⁵ NITI Aayog, "Designing the Future of Dispute Resolution (the ODR Policy Plan for India), 2021" The NITI Aayog Expert Committee on ODR accessed in <https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf>

By providing for electronic data records and electronic transactions during the arbitration process, articles 6 and 18 of the 2007 Convention provide clarification on on-chain arbitration. In general, issues with justice and data security arise during the implementation of this framework.

Legal issues:

The use of artificial intelligence (AI) in arbitration even though is rapidly evolving in the area of law, also raises complex legal and ethical issues. While AI has the potential to improve the efficiency and accuracy of the arbitration process, it also raises concerns about several legal and ethical issues inclusive of confidentiality, bias, and decision-making that must be addressed to ensure that it is used responsibly and fairly. Even dealing with default cases, can be a delicate and complex matter: many technical legal issues may arise, especially in an international setting, hence, cases require particular attention from a judge or arbitrator, sometimes even sua sponte. This is because in default cases, a judge or arbitrator must carefully consider the legal issues involved and ensure that the party seeking the default judgment has met all the legal requirements. This requires a human judge or arbitrator with legal training and experience who can evaluate the evidence and apply the law correctly. While artificial intelligence (AI) technology can help process large amounts of data and identify patterns, it cannot replace the judgment of a human judge or arbitrator. AI systems are programmed to analyze data and make predictions based on statistical models, but they cannot interpret legal rules and principles or exercise discretion.

Moreover, AI systems are only as good as the data they are trained on and may produce biased or flawed results if the training data is incomplete or inaccurate. This can lead to errors and inconsistencies in legal decisions, which can have serious consequences for the parties involved. Therefore, even in simple cases, a human judge or arbitrator is essential to ensure that the legal requirements are met and that the parties receive a fair and just outcome. While AI technology can assist judges and arbitrators in processing and organizing data, it cannot replace the legal expertise and judgment of a human decision-maker.

This article underlines that a judge or arbitrator cannot be replaced by a robot, not even in simple cases.⁶

1. Confidentiality and Data Privacy

One of the key legal issues surrounding the use of AI in arbitration is confidentiality and data privacy. AI systems rely on large amounts of data to learn and make predictions. This data may include sensitive information, such as personal or financial data, that must be protected to ensure confidentiality and privacy. Parties to an arbitration may need to take steps to ensure that any data used by AI systems is anonymized or otherwise protected to prevent unauthorized access.

⁶ Henk Snijders, 'Arbitration and AI, from Arbitration to 'Robotration' and from Human Arbitrator to Robot', (2021), 87, *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Issue 2, pp. 223-242, <https://kluwerlawonline.com/journalarticle/Arbitration:+The+International+Journal+of+Arbitration,+Mediation+and+Dispute+Management/87.2/AMDM2021017>

As noted by The Brookings Institution's Artificial Intelligence and Emerging Technology in its report, "As artificial intelligence evolves, it magnifies the ability to use personal information in ways that can intrude on privacy interests by raising analysis of personal information to new levels of power and speed."⁷

One example of conflict between AI and privacy law would be the European Union's General Data Protection Regulation (GDPR) which is a comprehensive data privacy law that sets out rules for how the personal data of EU citizens can be collected, processed, and stored. The law aims to protect individuals' privacy and give them greater control over their personal data. However, AI systems often rely on vast amounts of data to function effectively, which can conflict with GDPR's data privacy requirements. AI models may need to collect, store, and process personal data to learn and improve, which can create privacy concerns for individuals. Hence we must emphasize the importance of ensuring that AI systems used in arbitration comply with data protection laws and regulations like data protection laws, such as the European Union's General Data Protection Regulation (GDPR), which impose strict requirements on the processing of personal data.

Another potential conflict is the collection and processing of sensitive personal data. Data protection laws typically require explicit consent from individuals to collect and process sensitive personal data, such as health information or racial or ethnic data.

AI algorithms can require this type of data to train effectively, which can create difficulties for organizations looking to comply with data protection laws.

The right to access and rectify personal data might also be a point of concern. Data protection laws generally give individuals the right to access their personal data, request rectification or erasure, and object to its processing. However, AI algorithms can make decisions based on complex data sets, making it challenging for individuals to understand how their personal data is being used.

Finally, there is a conflict between data protection laws and AI when it comes to data security. Data protection laws require organizations to take measures to protect personal data from unauthorized access, disclosure, and destruction. However, AI algorithms rely on large data sets, making it difficult to keep them secure.

Hence, Parties to arbitration must ensure that any AI systems used in the process are compliant with these laws and regulations to protect the privacy and confidentiality of individuals involved in the process.



⁷ Cameron F. Kerry, 'Protecting Privacy in an AI Driven world', (2020): Report of the The Brookings Institution's Artificial Intelligence and Emerging Technology

2. Bias in AI Systems

Another legal issue surrounding the use of AI in arbitration is the potential for bias in AI systems. The difficulty that arises is that AI systems can be trained on biased data or algorithms, which may lead to unfair or unjust decisions in the arbitration process. Niti Aayog in its 2020 report noted “While individual human decisions are not without bias, AI systems are of particular interest due to their potential to amplify its bias across a larger population due to large-scale deployment.”⁸

Bias in training can interfere with machine learning in two different ways, First, if the training data is biased, the algorithm will simply reflect the existing bias by encoding and reproducing it.⁹ An oft-cited, real-life example involves Amazon, a U.S. tech giant, Amazon’s recruiting algorithm showed bias against women when it taught itself that male candidates were preferable and penalized women applicants because most resumes submitted to the company came from men, reflecting the tech industry’s current male dominance.¹⁰

⁸ NITI Aayog, ‘Approach Document for India Part 1 – Principles for Responsible AI’, (2020): accessed at <https://www.niti.gov.in/sites/default/files/2021-02/Responsible-AI-22022021.pdf>

⁹ E.g., Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 812 (2020); Bob Lambrechts, *May It Please the Algorithm*, 89 J. KAN. B. ASS’N, Jan 2020, at 36, 41; Cofone, *supra* note 88, at 1404; Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. Pa. L. Rev. 633, 680 (2017); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671, 680–81 (2016).

¹⁰ Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women*, REUTERS, <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G> (Oct. 9, 2018).

Data, therefore, can simply reflect current societal or historical imbalances stemming from race, gender, and ideology producing outcomes that do not reflect true merit.¹¹

Hence, it is important to implement appropriate measures to ensure that AI systems are free from bias or discrimination, such as using algorithms that are designed to eliminate or reduce bias. It is important to ensure that any decisions made by AI systems are transparent and explainable. Transparency and explainability are essential to ensure that the arbitration process is fair and impartial. Parties to an arbitration may need to implement appropriate measures to ensure that any decisions made by AI systems are subject to review and challenge by human arbitrators and that the decision-making process is transparent and understandable.

3. Decision-Making in AI Systems

A third legal issue surrounding the use of AI in arbitration is the role of decision-making in AI systems. AI systems can be used to assist arbitrators in making decisions, but they cannot replace the judgment and expertise of human arbitrators. Parties to arbitration must ensure that any decisions made by AI systems are subject to review and oversight by human arbitrators, to ensure that the decisions are consistent with the applicable legal standards and principles.

¹¹ Gizem Halis Kasap, *Can Artificial Intelligence (“AI”) Replace Human Arbitrators? Technological Concerns and Legal Implications*, 2021 J. Disp. Resol. (2021) Available at: <https://scholarship.law.missouri.edu/jdr/vol2021/iss2/5>

It is important to ensure that AI systems used in arbitration are designed to complement, rather than replace, human decision-making.¹² AI systems should be used to assist human decision-makers, rather than replace them entirely. Parties to arbitration must ensure that any AI systems used in the process are designed and implemented responsibly and ethically, to ensure that human judgment and expertise remain at the center of the process.

3. Licensing and Bar Requirements

The legal profession is one of the oldest and most respected professions in the world. Lawyers are trained to provide legal advice and representation to individuals, businesses, and government agencies. However, the practice of law is highly regulated, and in most countries, a license is required to practice law. A law license is a permit that authorizes a lawyer to practice law in a specific jurisdiction.

The primary reason for requiring a license to practice law is to protect the public. Legal matters can be complex and confusing, and lawyers are trained to help individuals navigate the legal system. In addition to protecting the public, requiring a license to practice law also helps to maintain the integrity of the legal profession and also because practicing law requires specialized knowledge and training in legal principles and procedures, and is subject to ethical standards and professional obligations.

When it comes to AI, there are concerns that the lack of licensing and bar requirements may result in unqualified individuals or entities providing legal advice or representation using AI technology. This can have serious consequences for individuals or organizations that rely on this advice, as it may be inaccurate or misleading.

Additionally, AI technology is subject to biases and limitations that may affect its ability to provide accurate legal advice. For example, an AI system may not be able to account for the nuances of a particular legal case or the specific needs of a client.

Furthermore, the use of AI in legal practice raises questions about accountability and responsibility. If an AI system provides inaccurate or misleading legal advice, who is responsible for the consequences? Should the developer of the AI system be held liable, or the user who relied on the advice?

The case of DoNotPay:

Recently, DoNotPay, a US-based provider of legal services, which developed the chatbot, is currently being sued for allegedly giving the plaintiff "substandard" and "poor legal advice" on several occasions, including when drafting demand letters, independent contractor agreements, and small claims court filings. Jonathon Faridian, the plaintiff, thought he was purchasing legal documents and services that would be "fit for use from a lawyer that was competent to provide them". The robot's actions, he says, were "illegal," and he is suing for compensation.

¹² Harry Surden, 'Machine Learning and Law' (2014) 89 Washington Law Review 87, 105.

To the dismay of its clients, DoNotPay is neither a robot nor a lawyer nor a law company. Per court papers, DoNotPay lacks a law degree, is not barred in any jurisdiction, and is not managed by a lawyer. DoNotPay is simply a website with a collection of, regrettably, subpar legal documents that, at best, fill in the blanks of a legal ad-lib using data entered by customers.

From a legal perspective, this issue raises several interesting questions about the definition of "practicing law" and whether or not an artificial intelligence (AI) program can be considered a legal practitioner.

From an Indian legal background perspective, this issue raises several interesting questions about the use of technology in the legal profession and the regulations governing the practice of law in India. In India, the Advocates Act, 1961 regulates the legal profession and sets out the requirements for practicing law. The Act defines an advocate as a person who is enrolled with a State Bar Council and is entitled to practice law within the territory of India. It is a criminal offence for a person to practice law without being enrolled as an advocate under the Act.

The question of whether DoNotPay is practicing law without a license in India will depend on whether it meets the definition of practicing law under the Advocates Act, 1961. If the program is providing legal advice or services to users in India, it could potentially be considered practicing law without a license. However, it is important to note that the use of technology in the legal profession is not explicitly regulated by the Advocates Act, 1961.

In the United States, the practice of law is generally defined as providing legal advice or services to others. The specific definition of what constitutes the practice of law varies by state but typically includes activities such as representing clients in court, drafting legal documents, and providing legal opinions

Hence, the question then arises as to whether a robot lawyer like DoNotPay, which is designed to provide legal advice and assistance to users, falls within the definition of practicing law. The answer to this question will likely depend on the specific facts of the case and the state in which the lawsuit is being brought

Another important consideration is the role of legal ethics in the use of technology in the legal profession. In India, advocates are required to adhere to a strict code of ethics, which includes duties to clients, the court, and the profession. As technology continues to play an increasing role in the legal profession, it will be important to ensure that these ethical obligations are upheld, even in the context of AI-powered programs.

One argument in favour of the position that DoNotPay is practicing law is that the program is providing legal advice and assistance to users, which is one of the core functions of a licensed attorney. Additionally, some states have specific rules that prohibit non-lawyers from providing legal advice or assistance, which could potentially apply to DoNotPay.

On the other hand, there may be arguments that DoNotPay is not practicing law, but rather providing a form of legal information or self-help. Additionally, it may be argued that since DoNotPay is a computer program and not a human being, it cannot be considered a legal practitioner and is not subject to the same licensing requirements as human attorneys.

Ultimately, the outcome of this lawsuit will depend on the specific facts of the case and the legal arguments presented by both sides. It is an interesting issue that highlights the ongoing legal and ethical debates surrounding the use of artificial intelligence in the practice of law

This is the reason every state in the country regulates the profession of law. The majority of the time, people who seek legal assistance do not completely comprehend the law, its implications, or the legal documents or procedures they are asking DoNotPay for assistance with.

Therefore, it is important to establish licensing and bar requirements for individuals or entities that provide legal advice or representation using AI technology. Requiring a license to practice law is essential to protecting the public and maintaining the integrity of the legal profession. This can help ensure that individuals who rely on this advice receive accurate and reliable information and that legal professionals using AI technology are held to the same ethical standards and professional obligations as other legal practitioners.

Additionally, regulators and professional organizations may need to develop standards and guidelines for the use of AI in legal practice, to ensure that AI systems are developed and deployed responsibly and ethically.

Conclusion

The use of AI in arbitration is a rapidly evolving area of the law that raises complex legal and ethical issues. Parties to arbitration must take steps to ensure that any AI systems used in the process comply with data protection laws and regulations, are free from bias or discrimination, and are subject to review and oversight by human decision-makers. As noted by various authors, transparency, explainability, and human oversight are key to ensuring that the use of AI in arbitration is fair and impartial.

As AI technology continues to evolve, the legal and ethical issues surrounding its use in arbitration will likely continue to evolve as well. It is important for parties to an arbitration to stay up-to-date on the latest developments in this area of the law, and to take appropriate measures to ensure that any AI systems used in the process are designed and implemented responsibly and ethically.

Overall, the use of AI in arbitration has the potential to significantly improve the efficiency and accuracy of the arbitration process, while also raising important legal and ethical issues. By carefully considering these issues and implementing appropriate measures to address them, parties to an arbitration can help ensure that the use of AI in the process is fair, impartial, and in compliance with applicable laws and regulations

CLEARING THE WAY: TACKLING THE GROWING PROBLEM OF ARBITRATION CASE BACKLOGS

- *Anchit Baliyan and Anubhav Mishra*

Introduction

The backlog in India for Arbitration matters refers to the large number of pending arbitration cases that are yet to be resolved. India, like many other countries, has been grappling with the problem of a backlog of arbitration cases. Despite several attempts to streamline the arbitration process, the number of cases pending before various courts and tribunals has only continued to rise in recent years. The backlog has been a significant challenge for the Indian legal system, which has led to delays in the resolution of commercial disputes, increased costs, and a negative impact on the country's reputation as an investment destination. In this note, we will discuss the reasons for the backlog of arbitration cases in India and the initiative taken by the government and the judiciary to address the issue. Arbitration is always endeavoured towards reducing the burden over the traditional legal system of India. It is important and relevant to mention that the recent trend shows that mostly all Commercial Contract has an arbitration clause and Arbitrators and Counsels are engaged in more than a single Arbitration proceeding causing a delay in the disposal of the Award.

1. Causes of Backlog of Arbitration in India:

Indian Jurisdiction is swiftly moving towards the Institutional Arbitration regime, which will aid in the timely disposal of disputes between the parties. Presently, the main reasons for the backlog in Arbitration cases are as follows:

- a) **Delays in Appointing Arbitrators:** One of the primary reasons for the backlog is the delay in appointing arbitrators. The law provides for parties to appoint their arbitrators, but if they cannot agree, the courts must appoint them. This process often takes a long time, leading to delays in the resolution of disputes.
- b) **Lack of Adequate Infrastructure:** The lack of adequate infrastructure, such as arbitration centers and trained arbitrators, is also a significant cause of the backlog. The country has only a few arbitration centers, which are often overburdened with cases. The legislature is taking steps towards Institutional Arbitration in India¹ but the lack of adequate infrastructure will still be a hurdle in clearing the backlog.

¹Section 10, the Arbitration and Conciliation (Amendment) Act, 2019.

c) Protracted Legal Proceedings: The lengthy legal proceedings and the appeals process in India's courts can also lead to delays in the resolution of arbitration cases.

d) Inadequate Compliance with Awards: The lack of compliance with arbitration awards is also a significant cause of the backlog. Indian courts have been known to set aside or modify arbitration awards, which can lead to further litigation and delays. After the final award by the Arbitrator, and challenge under section 34 of the Arbitration Act, disputing parties have the opportunity to file an Appeal under section 37 (1)(b) of the Act. The Apex Court has categorically held that in case of delay in filing the Appeal the condonation of delay under section 5 of the Limitation Act, 1963 has to be seen in the context of the object of speedy disposal of disputes with the appropriate remedy.²

2. Juridical Pronouncements:

The Indian legal arena as well as the Legislature is taking all necessary measures in meeting International standards to make timely disposal of disputes. As a result, recently, the Hon'ble Apex Court of India in the matter of *M/S Shree Vishnu Construction v. The Engineer in Chief, Military Engineering Services & Ors.*³ The Arbitration Act allows parties either to appoint a sole Arbitrator or to appoint one arbitrator each and both arbitrators will appoint the presiding arbitrator.

It is evident that parties are failing to take steps towards mutually deciding the name of the Arbitrator causing an additional delay in the completion of the proceedings, as the parties are required to appoint mutually the Arbitrator when the agreement specifically reads for the appointment of sole Arbitrator.⁴ When the parties fail in nominating the Arbitrator, the power for appointment of an Arbitrator by the Chief Justice of the respective High Court or that of the Supreme Court of India is vested in them by virtue of the Act itself.⁵ In *SBP and Co. v. Patel Engg.*⁶ has settled the long-standing debate and held that the power vested under section 11(5) is judicial in nature not administrative and hence cannot be challenged under Article 136 of the Indian Constitution making it the first move towards the speedy appointment of an Arbitrator.

The Apex Court recently directed the various High Courts of States to make decisions on applications to appoint arbitrators that have been pending for more than a year within six months. Although the decision will aid in clearing a backlog, it emphasises the significance of choosing an arbitral institution to supervise the case and select the arbitrators to prevent the possibility of delays in commercial contracts involving India.

² Government of Maharashtra v. M/S Borse Brothers Engineers and Ors., (2021)6SCC460.

³ Shree Vishnu Construction v. The Engineer in Chief, Military Engineering Services & Ors., Special Leave to Appeal C No. 5306/2022.

⁴ Section 11(3), the Arbitration and Conciliation Act, 1996.

⁵ Section 11(5), the Arbitration and Conciliation Act, 1996.

⁶ SBP and Co. v. Patel Engg, (2009) 1 SCC 267.

3. Measures taken to address the backlog of arbitration in India:

The problem of backlog in arbitration cases can be attributed to several factors, including delays in the appointment of arbitrators, lack of infrastructure, and procedural complexities. The appointment of arbitrators, for instance, is often delayed due to a shortage of qualified professionals and the tendency of parties to challenge the appointment of arbitrators.

- a) **Amendments to the Arbitration and Conciliation Act, 1996:** In 2015 and 2019, the Indian government amended the Arbitration and Conciliation Act, 1996, to make the Alternate dispute mechanism a more efficient and cost-effective means of dispute resolution. The amendments provide for strict timelines for completing arbitration proceedings, limiting the scope of judicial intervention, and promoting the use of technology in arbitration.
- b) **Establishment of Arbitration Centers:** The Indian government has also set up several arbitration centers, such as the Delhi International Arbitration Centre, to provide infrastructure and facilities for arbitration proceedings.



- c) **Appointment of Dedicated Arbitration Judges:** The Indian judiciary has appointed dedicated arbitration judges to deal exclusively with arbitration-related matters, which has helped to expedite the resolution of disputes. The power vested with the Chief Justice of the Supreme Court or his designate also determines the validity of the arbitration agreement while dealing with section 11 Application for appointment of arbitration as expounded in *National Insurance Co. Ltd. v. Boghara Polyfab*.⁷

- d) **Promoting Institutional Arbitration:** There has been a push to promote institutional arbitration in India, which involves the use of specialized arbitration institutions to administer and oversee arbitration proceedings. This can help to reduce the burden on courts and expedite the resolution of disputes.

For several reasons, including the following, the initiatives were taken to lessen the backlog in arbitration in India have not been completely effective:

Firstly, although measures have been introduced to reduce the backlog, they are often not effectively implemented, particularly at the ground level. This could be due to a lack of training and capacity-building of officials or other logistical constraints.

⁷ *National Insurance Co. Ltd. v. Boghara Polyfab*, (2009) 1 SCC 267.

Secondly, there is a major lack of stakeholder participation. The success of measures to reduce the backlog in arbitration depends on the active participation of stakeholders such as parties, arbitrators, lawyers, and arbitration institutions. However, in some cases, these stakeholders have not been adequately engaged or involved in the process.

Thirdly, the limited awareness and education. Many parties in India still lack awareness of the benefits of arbitration and do not understand how the process works. This can lead to parties not opting for arbitration as a dispute resolution mechanism, resulting in continued backlog in courts. Some stakeholders may be resistant to change and reluctant to adopt new approaches, such as institutional arbitration or alternative dispute resolution methods. This can slow down the adoption of new measures to reduce backlog.

To address these challenges, there needs to be a sustained effort by all stakeholders to work together to reduce backlog in arbitration. This could include initiatives to raise awareness of the benefits of arbitration, capacity-building of officials and stakeholders, investment in infrastructure and resources, and the active involvement of stakeholders in the development and implementation of measures to reduce backlog.

4. Conclusion:

The lack of adequate infrastructure for arbitration is a significant challenge in India, which has led to delays and inefficiencies in the arbitration process. The backlog of arbitration in India is a significant challenge that needs to be addressed urgently. The measures taken by the government and the judiciary to address the issue are a step in the right direction, but more needs to be done to promote arbitration as a viable means of dispute resolution. The government should also focus on promoting arbitration as a means of resolving disputes, particularly for foreign investors, to improve India's reputation as an investment destination. The government's efforts to improve infrastructure, such as setting up dedicated arbitration centers and providing modern facilities, are a step in the right direction. However, more needs to be done to increase the pool of trained arbitrators and promote institutional arbitration in the country to reduce the backlog of arbitration cases. In conclusion, the backlog of arbitration cases in India is a serious problem that has significant implications for the Indian legal system and the economy. While several measures have been taken to address the problem, there is still a long way to go in terms of improving the arbitration process and reducing delays. It can be concluded that India is evolving and by the collective effects of the Judicial system and Indian legislature, the problem of backlog soon be reduced.

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india@sandalawoffices.com

OUR OFFICES

GURUGRAM

Plot Number 5, 6, 7, Udyog Vihar
Phase IV, Sector 18
Gurugram, Haryana-122015, INDIA
Phone: 91-124-4666400
Fax: 91-124-4666401

NEW DELHI

E-337, East of Kailash
New Delhi-110065, INDIA
Phone: 91-11-46667000
Fax: 91-11-46667001

BANGALORE

Awfis, S&A Law Offices
Renaissance Centra, 27 & 27/1
Mission Road, Rama Nagar
Bengaluru, Karnataka-560027,
INDIA

MUMBAI

Unit No-101, 10th Floor
Sakhar Bhawan, Plot No.230
Ram Nath Goenka Marg, Nariman
Point Mumbai-400021, INDIA
Phone: 91-22-66025000
Fax: 91-22-66025001

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MEDICINE OF THE BODY
POLITIC WHEN THE
BODY POLITIC GETS SICK,
MEDICINE MUST BE
ADMINISTERED”

ASIAN LEGAL BUSINESS

Chambers
AND PARTNERS

BW LEGAL
WORLD