LEGISNATIONS INTERNATIONAL CENTRE FOR ARBITRATION, MEDIATION AND RESEARCH

INT'L REVIEW OF DISPUTE RESOLUTION

ISSUE 1, VOLUME 1, OCTOBER, 2020

LegisNations

GREATER KNOWLEDGE.HUMAN WISDOM

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Legisnations is a social platform where writers integrate their efforts to write on the various economic, social, political, and legal issues happening all around the world. We are a group of "Highly Functioning" professionals indulged in research and reporting of legal conundrums and news. An issue happening around the world is magnified by the complexities in the way it is presented and it is crucial to decipher and break it down to the above four aspects. This platform aims to do so with effectiveness and efficiency.

INTRODUCTION

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ABOUT LICAMR

Legisnations International Centre for Arbitration, Mediation, and Research (LICAMR) seeks to serve as a think-tank to generate awareness about arbitration law in theory and in practice and also carry out high-quality research in the field to assist policy-formulation by the Government. The Centre also intends to serve as a platform for imparting professional training to the stakeholders in the field of arbitration and cater to all areas of Arbitration, Mediation, and Conciliation especially the niche areas

FOREWORD

MR. WASIM BEG

Wasim Beg, is the Partner at Luthra & Luthra Partners, and has also served as Former Additional Advocate General of Jammu & Kashmir. He possesses a deep interest in legal writing.

FROM THE PEN OF PATRON

It is a sheer pleasure to be writing a foreword for the International Review of Dispute Resolution Journal. In an information driven world, an endeavor like this goes a long way in keeping the legal fraternity (in particular) alive and kicking. As we are aware, most of the laws and judgments are often open to various interpretations and analysis - a platform like this goes a long way in initiating stimulating ideas and discussions. A platform such as this offers an opportunity to the law students, academicians and legal professionals to come together to share ideas, discuss ideas, offer interpretations, raise questions and set the ball rolling. Reading, writing and sharing ideas is such an integral part of the legal profession and any endeavor that looks to support such virtues deserves our appreciation and unflinching support.

The bi-monthly journal (International Review of Dispute Resolution) calls for legal articles dealing with applicatipn of law in varied areas, or with the related professional and policy aspects. Articles may address legal educational issues, doctrinal, theoretical or other forms of legal scholarship. or deal with empirical and social-legal investigations within a built environment context. I request the students in particular, to make maximum use of such opportunities.- pick up their paper, pen, and ink and get cracking.

Many congratulations to Kumar Rishabh Parth, Arush agarwal, Bhavya Gupta, and team for coming out with this excellent platform. Wish you all the very best.

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FOREWORD

MR. RAFAEL CARLOS DEL ROSAL CARMONA

Rafael Carlos del Rosal Carmona is the Director at International Centre for Dispute Resolution, New York. He is also the Patron for International Review of Dispute Resolution. He has been a research assistant for Professor Franco Ferrari at New York University,

FROM THE PEN OF PATRON

In recent years, we have seen in many countries a pushback against globalization. We have all heard about trade wars and growing nationalism, with its consequences affecting the international legal order. Against this background, it could seem that efforts to promote alternative dispute resolution (ADR) internationally could be in vain. Fortunately, international arbitration and mediation have proved to be resilient and reliable in these times in which other pillars of the international legal order are being questioned. For instance, last year the Singapore Convention on Mediation entered into force, representing an important step to ensure enforcement of international settlements resulting from mediation. In addition, this year the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards entered into force in the Seychelles, Palau and Ethiopia, raising the number of contracting states to 165.

Therefore, as it can be expected that international arbitration and mediation will remain relevant despite the more complex international context, it will also be necessary to maintain an appropriate level of scholarly writings and analysis on several issues raised by these types of proceedings. While some of these questions can be new, such as matters of cybersecurity or data protection, many others are old debates in which there is no majority position, such as which law should govern an arbitration agreement. This journal is an attempt to promote ADR internationally and to foster the development of further deliberations and new ideas on these relevant issues, with contributions both from established practitioners and from young lawyers and students. This journal might not be able to fully settle any of these questions, some of which have been discussed for decades, but if it sparks a new idea and it encourages someone to write a new article on international ADR, it will already be meetings its goal.

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FOREWORD

MR. SUVIGYA AWASTHY

Suvigya Awasty, is the Associate Partner at PSL Advocates & Solicitors. An alumnus of National University of Singapore, as he completed his masters in International Arbitration and Dispute Resolution.

FROM THE PEN OF PATRON

I am delighted to celebrate the launch of International Review for Dispute Resolution (IRDR), a bi-monthly open-access, peer-reviewed academic journal that publishes original research chronicling major developments in the fields of domestic and international arbitration and alternative dispute resolution.

Research is an enduring field where persistent and focused efforts lead to positive outcomes. The aim of IRDR, a venture of Legisnations International Centre for Arbitration, Mediation, and Research (LICAMR), will be to promote empirical or scholarly research and provide a platform to address critical issues in the ADR field, exchange new ideas and disseminate latest developments.

This maiden instalment of the IRDR features an extraordinary array of professional articles from outstanding academics, distinguished practitioners and pioneering student researchers.

Arbitrators, mediators, counsel, judges, scholars and government officials will find the journal enhances their understanding of a broad range of topics in ADR. I thank all of our submitting authors who have worked tirelessly to develop their work and have made IRDR. Their journal of choice.

We look forward to the IRDR continuing to provide an academic forum and a medium for debate for this young, burgeoning field of ADR that will drive us forward, both professionally and educationally, to steady progress. On behalf of the Patrons and the Editorial Board, I trust you will enjoy Volume 1 Issue 1 of the International Review for Dispute Resolution.

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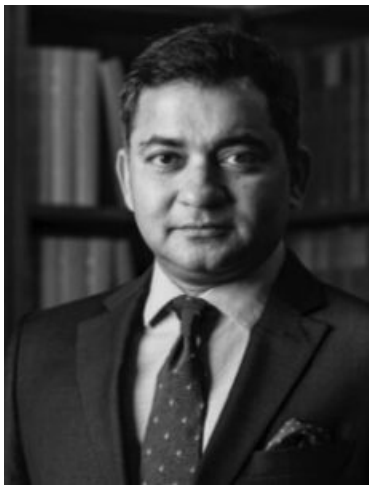

MR. THAYANANTHAN BASKARAN

Thayananthan Baskaran is a partner with Baskaran, Kuala Lumpur, and an associate member of Crown Office Chambers, London. Mr Baskaran is the author of Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act published by Kluwer Law International in 2019. Mr Baskaran was the Chair of the Chartered Institute of Arbitrators Malaysia Branch (2017-2019) and President of the Society of Construction Law Malaysia (2016-2017). Mr Baskaran was educated at St John's Institution, Kuala Lumpur, read law at King's College, London, and was called to the Bar by Gray's Inn

FOREWORD

FROM THE PEN OF EDITOR-IN-CHIEF

We are launching this review of dispute resolution in the midst of the worst pandemic in a hundred years. You may well wonder why we are doing so. We believe that the pandemic, as Arundhati Roy has now famously said, is indeed a portal. The question is where will it lead us?

The articles in this inaugural issue of the review seek to answer this question from various angles. At one end, virtual proceedings, which have become familiar as a result of the pandemic, have made international dispute resolution more accessible. This has brought us closer to what was initially intended to be achieved by commercial arbitration, justice, delivered quickly, shorn of its formal trappings. On the other hand, there are concerns that virtual proceedings may result in breaches of natural justice. These are legitimate concerns, that have been addressed by guidelines and protocols.

These are new problems and new solutions must be found.

We hope that by engaging with you on these issues as they arise, through this review, that those solutions may be debated, refined and applied to achieve effective dispute resolution. We hope you enjoy reading the Review.

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MR. KUMAR RISHABH PARTH & MR. ARUSH AGARWAL

Kumar Rishabh Parth and Arush Agarwal are the penultimate year law students at University of Petroleum and Energy Studies, and the founders of Legisnations.

FOREWORD

FROM THE PEN OF MANAGING EDITORS

Welcome to the inaugural issue of the International Review of Dispute Resolution (IRDR): A dispute resolution centric multidisciplinary journal in the field of law. In this issue readers will find a diverse group of manuscripts. The features of the articles in this volume touch upon developments related to the field of dispute resolution. The aim of launching this journal is to spread knowledge to students and professionals at no cost. We have received an overwhelming number of responses in terms of research papers. Out of all the submissions eleven are selected by the esteemed editorial board to be published.

The vision of this journal is to provide quality research, key developments, and thought-provoking arguments. The expert essays and articles published in this issue are indications of the intellectual stimulation out of which the Review grows. It seems plain that the new ventures this Review has undertaken have direct links to the trajectory of the field's development.

With its maiden the issue of International Review of Dispute Resolution, the Legisnations International Centre for Arbitration, Mediation and Research launches a venture in expanding the opportunities for communication among interested students, professionals and academicians of Alternative Dispute Resolution Sector.

In a nutshell, those of us involved in its inception and initial development hope that the International Review of Dispute Resolution will become a vehicle for holistic development and the best research and scholarship of students in the Alternative Dispute Resolution sector. In addition, the journal will contain other features of broad professional and intellectual interest to its readership.

We would like to thank the editorial team and the patrons for extending the support in order to make this journal successful and extending their support at any given time. It is our hope and expectation that this journal will provide an effective learning experience and referenced resource for all students, professionals, and academicians.

LEGISNATIONS INTERNATIONAL CENTRE FOR ARBITRATION, MEDIATION AND RESEARCH

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MR. BHAVYA GUPTA & MS. SUNISHI TIWARI

Bhavya Gupta and Sunishi Tiwari are the penultimate year law students at University of Petroleum and Energy Studies, Bhavya Gupta is the Student Editor of IRDR and aslo serves as Communications Associate at Legisnations. Sunishi Tiwari is an avid reader and the Student Editor of IRDR and LICAMR.

FOREWORD

FROM THE PEN OF STUDENT EDITORS

As per the request of our Editors, we are honoured to write the foreword for the inaugural Issue of the International Review for Dispute Resolution(IRDR). The International Review for Dispute Resolution(IRDR)is a recently launched international, open access, peer review academic journal which comprises the outstanding achievements of the world's leading researchers in the ADR Field. By publishing high-quality and novel articles on a wide range of topics concerning arbitration, this journal is dedicated to expanding and evolving the knowledge of Alternate Dispute Resolution. The Mission of the International Review for Dispute Resolution is to provide the Legal Community with a reliable source of information relevant to the current developments in the International Commercial Arbitration. The journal acts as a forum for exchanging interdisciplinary knowledge of Alternate Dispute Resolution from a professional and an educational point of view.

The International Review of Dispute Resolution under the aegis of Legisnations International Centre for Arbitration, Mediation and Research emphasizes on the importance of the worldwide collaboration and cooperation in various dispute resolution research fields. The topics covered in this journal includes the clinical and professional knowledge relevant to the ADR mechanisms like Mediation, Arbitration, and Negotiation.

As student editors of this promising journal we are grateful to all the authors for their excellent work and remarkable contributions.

DISCLAIMER

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THE STATE'S RIGHT TO REGULATE:
AS INTERPRETED IN RECENT INVESTOR-STATE AWARDS

By: Thayananthan Baskaran[1]

Introduction

1. The question is to what extent the State has the right to regulate without being obliged to compensate investors for expropriation that arises out of such regulation.

2. The starting point should be a presumption that the State is not liable to compensate for the exercise of regulatory powers. *See* M Sornarajah, *The International Law on Foreign Investment* (4th edn Cambridge University Press, 2017) at page 469.

3. This presumption against compensation is strengthened where:

   (1) the regulation is in areas of environmental protection;

   (2) the regulation is in relation to cultural preservation;

   (3) more generally, where the public interests are so dominant as to overwhelm individual interest.

4. On the other hand, the presumption against compensation, is weakened where:

   (1) there is discrimination that cannot be explained in a legitimate manner; and

   (2) the exercise is not accompanied by due process and other procedural safeguards that amount to a denial of natural justice in terms of international law.

[1] Partner, Baskaran, Kuala-Lumpur, Malaysia (*Editor-in- Chief, IRDR).*

Marfin Investment Group Holdings SA & Ors v. Republic of Cyprus [ICSID Case No ARB/13/27 (Award, 26 July 2018)]

Facts

1. The dispute arises from the BIT between Cyprus and Greece.
2. Article 4 of the Cyprus Greece BIT provides:

   Investments by investors of either Contracting Party shall not be expropriated, nationalised, or subjected to any other measure which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except under the following conditions:

   (a) the measures are taken in the public interest and under due process of law,

   (b) the measures are clear and non-discriminatory,

   (c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall be equivalent to the market value of the investment affected immediately before the date on which the measures, mentioned in this paragraph, were taken or made publicly known.

   Compensation shall be paid immediately after the completion of legal procedure for expropriation and shall be transferred in freely convertible currency. If the Contracting Party delays payment of compensation, it is liable to pay interest calculated on the basis of the 6-month London Interbank Offered Rate for the relevant currency. The extent or compensation is subject to review under due process of law.

3. The dispute concerns the failure of the second largest bank in Cyprus, Marfin Popular Bank Public Co Ltd, during the Cypriot financial crisis.

4. The Claimants, which include shareholders of Marfin Popular Bank, claimed that the Respondent had expropriated their investment by:[2]

   (1) the Respondent's response to Private Sector Involvement Plus (PSI+);

   (2) the removal of the Chief Executive Officer of Marfin Popular Bank; and

   (3) the dilution of the Claimants' shareholding following Marfin Popular Bank's recapitalization.

Decision

5. The arbitral tribunal considered that the economic harm, consequent to State regulations do not constitute a public taking provided that the regulatory measure:[3]
   (1) was non-discriminatory and generally applicable;
   (2) was taken in good faith, in particular, if such measure was adopted in order to protect the public welfare;
   (3) complied with due process; and
   (4) was proportionate to the aim sought to be achieved.

6. The arbitral tribunal recognized that Article 4 of the Cyprus Greek BIT is drafted in broad terms and does not include any exception for the exercise of the State's regulatory powers. However, the arbitral tribunal decided that the provisions of the BIT must be interpreted in accordance with customary international law, based on Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties. Under customary international law, a State is not liable to compensate a foreign investor for the normal exercise of the State's regulatory powers, where the 4 conditions above are satisfied.[4]

[2] *See Marfin Investment supra* at paragraph 825.
[3] S*ee Marfin Investment supra* at paragraph 826, 828, 829.
[4] *See Marfin Investment supra* at paragraphs 827 and 828.

7. The arbitral tribunal found that the Respondent's measures did not constitute a compensable taking.[5]
8. In particular, with respect to the Respondent's response to PSI+, the arbitral tribunal decided that it was not up to an arbitral tribunal constituted under an investment treaty to sit in judgment over difficult political and policy decisions made by the State, particularly where those decisions involved an assessment and weighing of multiple conflicting interests and were made based on continuously developing threats to the safety and soundness of the financial system. Unless the measure at issue is shown to be arbitrary, and unrelated to a rational policy, or manifestly lacking even-handedness, an arbitral tribunal should not intervene.[6]

9. As to the removal of the Chief Executive Officer from the management of Marfin Popular Bank, the arbitral tribunal adopted the position in *Saluka* that a banking regulator's decision to place a bank in forced administration was entitled to some deference. 'In the absence of clear and compelling evidence' that the bank regulator had 'erred or acted otherwise improperly in reaching its decision', an arbitral tribunal must accept the reasons given by the bank regulator for its decision. Therefore, it could not be for the arbitral tribunal to determine whether the Respondent's independent bank regulator's decision to remove the Chief Executive Officer of Marfin Popular Bank was correct or otherwise.[7]

10. The arbitral tribunal found that they should be mindful of the fact that a central bank acts as a regulator of a highly technical and sophisticated economic sector, that it has intimate knowledge of the underlying data, and is best placed to assess whether one course of action is preferrable to another. It is not up to the arbitral tribunal to substitute its judgment on the advisability of the measures taken by the Respondent's independent bank regulator, so a certain level of deference to the judgment of the bank regulator must indeed exist.[8]

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[5] *See Marfin Investment supra* at paragraph 830.
[6] *See Marfin Investment supra* at paragraph 870, endorsing the view in *SD Myers Inc v. The Government of Canada*, UNCITRAL (First Partial Award, 13 November 2000) at paragraph 261.
[7] *See Marfin Investment supra* at paragraph 898, endorsing the view in *Saluka Investments BV v. Czech Republic, UNCITRAL* (Partial Award, 17 March 2006) at paragraphs 272 and 273.
[8] *See Marfin Investment supra* at paragraph 899.

11. Nevertheless, the arbitral tribunal considered that such deference must not impede its task to verify whether international law was complied with. If there was any evidence that a decision taken by a regulator was abusive, did not afford due process, or was a pretense of form designed to conceal improper ends, the arbitral tribunal must find a breach of international law.

12. The arbitral tribunal found that the removal of the Chief Executive Officer of Marfin Popular Bank was an exercise of regulatory powers:[9]
    (1) taken in order to protect the public welfare;
    (2) proportionate;
    (3) non-discriminatory; and
    (4) taken in good faith.

13. Specifically, on whether the measures were proportionate, the arbitral tribunal decided that, in order to determine whether the removal of management was a legitimate exercise of the State's regulatory powers, the arbitral tribunal must weigh the competing interests at stake; on the one hand, the State's legitimate interest to protect the public welfare and, on the other hand, the investor's legitimate interest to continue managing its investment.[10]

14. In this case, the competing interests at stake were:[11]
    (1) the Respondent's interest in protecting the safety and soundness of its banking sector, the interests of depositors and taxpayers at large against the risk that Marfin Popular Bank, one of the two systemic banks in Cyprus, would be unable to meet its financial commitments and would become bankrupt; and
    (2) the Claimants' interest to continue to manage Marfin Popular Bank.

[9] *See Marfin Investment supra* at paragraph 901.
[10] *See Marfin Investment supra* at paragraph 983.
[11] *See Marfin Investment supra* at paragraph 984.

15. The arbitral tribunal found that the removal of the management of Marfin Popular Bank satisfies the condition of proportionality and the Claimants were not made to bear an excessive burden.

Magyar Farming Company Ltd & Ors v. Hungary [ICSID Case No ARB/17/27 (Award, 13 November 2019)]

Facts

1. The dispute arises from the BIT between Hungary and the United Kingdom.
2. Article 6 of the Hungary UK BIT provides:

    1. Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Contracting Party in its territory unless the following conditions are complied with:

    (a) the expropriation is for a public purpose related to the internal needs of that Party and is subject to due process of law;
    (b) the expropriation is non-discriminatory; and
    (c) the expropriation is followed by the payment of prompt, adequate and effective compensation.

    Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. The investor shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

2. Where a Contracting Party expropriates the assets of a company which is constituted or incorporated under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph 1 of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares.
3. The dispute arises out of the Respondent's measures regulating possession and disposal of State-owned agricultural land, which, according to the Claimants, resulted in the expropriation of their leasehold rights to 760 hectares of State-owned land.
4. The Claimants contend that:

(1) by a Lease Agreement, Inicia Zrt, who is one of the Claimants, had a contractual and a statutory pre-lease right to the Land granted by the Respondent;

(2) the Claimants' pre-lease right meant that, if the Respondent intended to lease the Land to a third party upon the expiration of the Lease Agreement in July 2014, the Respondent should inform Inicia of any offer from a third party that the Respondent intended to accept. Inicia was then entitled to 'step in and assume the offer from the third party' and thereby enter into a renewed lease agreement upon the terms of that offer;

(3) in 2011, the Respondent amended their land law, and precluded lessees of State-owned agricultural land plots from exercising their statutory pre-lease rights in cases where the National Land Agency (the NLA) leased the land out by way of a tender;

(4) the Respondent then orchestrated a rigged tender process. Despite the Claimants' superior bids, the leases were purportedly won by third parties in January 2014;

(5) as a result, the Respondent evicted the Claimants from the Land in disregard of the Claimants' pre-lease rights; and

(6) the Respondent's measures constitute an unlawful expropriation of the Claimants' leasehold rights to the Land contrary to Article 6 of the Hungary UK BIT.[12]

[12] *See Magyar Farming supra* at paragraphs 5 to 8.

Decision

- Vested Rights

5. The arbitral tribunal decided that the term expropriation used in Article 6 of the Hungary UK BIT should be interpreted, in the light of the doctrine of acquired or vested rights, as mandated by Article 31(3)(c) of the 1969 Vienna Convention.[13]

6. Based on this doctrine, while the State may change general statutes based on its policy decisions, where the statute provided for a possibility of acquiring rights with economic value, and a private party availed itself of this possibility, subsequent regulatory changes must respect that vested right.[14]

7. The arbitral tribunal considered that a distinction should be drawn between a statute conferring mere privileges or powers on a private party and such party's subsequent exercise of these powers by acquiring what can be regarded as a vested right.[15]

8. The 1994 Hungarian Arable Land Act gave any party the power to enter into a lease agreement and thereby acquire a statutory pre-lease right. This power is not itself a vested right or an asset, and therefore the State could in principle change it without compensation. In turn, once a party availed itself of this power and entered into a lease agreement, such party will hold a vested right.[16]

9. The Respondent was at liberty to change its laws and remove provisions allowing a party to enter into a lease agreement and acquire a statutory pre-lease right. However, where a party had previously availed themselves of this power

[13] *See Magyar Farming supra* at paragraph 344.
[14] *See Magyar Farming supra* at paragraph 344.
[15] *See Magyar Farming supra* at paragraph 348.
[16] *See Magyar Farming supra* at paragraph 349.

by entering into specific lease agreements, such parties had vested rights that ought to have been respected.[17]

- Police Powers

10. The arbitral tribunal found that a bona fide exercise of a State's right to regulate is exempt from the duty to provide compensation. However, creating an unqualified exception from the duty of compensation for all regulatory measures would be incompatible with non-expropriation provisions in BITs. *See Magyar Farming supra* at paragraph 364.

11. The arbitral tribunal recognized that there is no comprehensive test to distinguish regulatory expropriation, for which compensation is required, from an exercise of police or regulatory powers, for which no compensation is required.

12. The arbitral tribunal found that State measures annulling rights of an investor may be exempt from a duty of compensation only in a narrow set of circumstances. These circumstances can be categorized in two broad groups:

(1) first, the exemption from compensation may apply to generally accepted measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings, such as criminal, tax and administrative sanctions, or revocation of licenses and concessions; and

(2) second, regulatory measures aimed at abating threats that the investor's activities may pose to public health, the environment or public order. This line of case law relates to measures such as the prohibition of harmful substances, tobacco plain packaging, or the imposition of emergency measures in times of political or economic crises.[18]

[17] *See Magyar Farming supra* at paragraph 350.
[18] *See Magyar Farming supra* at paragraph 366.

13. The arbitral tribunal found that the Respondent's change of its agricultural land holding policy was not within either of these two categories. While the Respondent was fully entitled to change its policies, in doing so it was required to respect vested rights. In other words, it is not immediately apparent why this policy change, which purportedly benefited Hungarian society as a whole, should have been carried out at the expense of the Claimants' vested rights.[19]

Conclusion

14. In conclusion, the arbitral tribunals, in *Marfin Investment* and *Magyar Farming supra*, recognize the State's right to regulate without being liable to compensate investors provided that such regulations satisfy the four conditions of good faith, non-discrimination, due process and proportionality.

15. The arbitral tribunals, in *Marfin Investment* and *Magyar Farming supra*, do not expressly adopt an analysis that begins with a presumption that the State is entitled to regulate without being liable to compensate investors.

16. However, this presumption may be discerned from the arbitral tribunal's finding, in *Marfin Investment supra*, that an arbitral tribunal would need to give deference to a banking regulator's decision on complex issues on which such regulator would have the relevant data, as this should equally apply to most State regulations.

17. Similarly, the arbitral tribunal, in *Magyar Farming supra*, recognizes that the State was free to change its laws and policies.

18. As mentioned at beginning, the starting point should be a presumption that the State is entitled to regulate without being liable to compensate investors. This presumption may be rebutted when one of the four conditions is proved.

[19] *See Magyar Farming supra* at paragraph 367.

19. The analysis should not be done in the reverse. That is, that a State is liable to compensate investors unless the four conditions are strictly proved.

THE IMPORTANCE OF THE APPLICABLE LAW ON THE ARBITRAL TRIBUNALS' JURISDICTION

By: Rafael Carlos del Rosal Carmona[1]

1. Introduction

International arbitration, although a very successful alternative dispute resolution (ADR) method, presents additional complications compared to domestic arbitration. One of them is that, given that several countries and nationalities can be involved in the dispute, the determination of the applicable law can become more complex. Regarding the substantive applicable law, arbitrators should apply the law agreed by the parties, but absent any such agreement they are normally granted broad discretion.[2] This means that questions of applicable substantive law do not often create problems with the enforcement of arbitral awards.[3] However, enforcement problems arise more frequently when choice of law issues relate to the arbitration agreement and the determination of who are parties to it.

Despite efforts to promote uniformity among arbitration laws, there is still considerable divergence on how courts in different jurisdictions identify which law should govern an arbitration agreement. Moreover, the range of possible approaches is even more varied when it comes to situations in which non-signatories could be bound by an arbitration agreement. Consequently, although sometimes the possible applicable laws could coincide, in many occasions they will lead to different results. This is clearly illustrated, for example, by the fact that not all jurisdictions recognize the group of companies doctrine,[4] a theory on non-signatories that is frequently raised in arbitration. This brief contribution analyzes a recent example of the importance that the law applicable to these matters can have in the enforcement of arbitral awards and offers some guidance on how to better analyze these problems to conform to the parties' expectations.

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[1] Rafael Carlos del Rosal Carmona, Director at International Centre for Dispute Resolution (ICDR), a division of the American Arbitration Association, Inc. (AAA). The views expressed in this chapter are the author's personal views and do not necessarily represent the views of the ICDR/AAA or any of its employees.
[2] *See, e.g.*, ICDR International Arbitration Rules, art. 31, version effective 1 June 2014.
[3] *See* Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 257 (Franco Ferrari & Stefan Kröll eds., 2010).
[4] *See, e.g.*, Peterson Farms Inc. v. C&M Farming Ltd. [2003] EWHC 2298 (Comm).

2. Law of the contract or law of the seat?

Consistent with party autonomy being a cornerstone of arbitration, it is logical that the analysis of what law governs an arbitration clause starts with the parties' agreement. Consequently, it is commonly accepted that if the parties have chosen a specific law to govern their arbitration agreement, that law should apply. This approach is enshrined in the New York Convention and the UNCITRAL Model Law in connection with the validity of the arbitration agreement.[5] Absent parties' agreement, the New York Convention and the UNCITRAL Model Law establish that the law of the seat of the arbitration applies.[6] As parties rarely make a specific selection of the law applicable to their arbitration agreement, it could initially seem that the law of the seat would almost always apply. However, an additional issue complicates the analysis: the possibility that the parties could have implicitly agreed on the law applicable to the arbitration agreement.

Thus, many jurisdictions recognize that the inclusion of a choice of law clause in a contract with an arbitration agreement could also be indicative of the parties' intention to have the entire contract, including the arbitration agreement, governed by the same law. Although this might seem to contradict the principle of separability of the arbitration agreement, the principle is not absolute, as its correct interpretation is that the arbitration agreement is separable, but not entirely separated from the main contract for all purposes. In other words, the legal fiction of separability should not prevail over the parties' expectations and agreements (even if implicit) on the law applicable to the arbitration agreement. Unfortunately, this framework has created uncertainty in several cases as to whether the law of the arbitration agreement or the law of the main contract governs the arbitration clause.

The latest example of this uncertainty arises from two parallel court proceedings in England and France.[7] The underlying dispute relates to a franchise agreements between a Kuwaiti and a Lebanese company. The contract contained 1) a governing law clause providing that the laws of England governed the contract, 2) an arbitration clause with Paris as the seat of arbitration, and 3) a couple of no oral modification clauses (an entire agreement clause and clause requiring

[5] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 Jun. 1958, 330 U.N.T.S. 38, art. V(1)(a) [hereinafter "New York Convention"]; UNCITRAL Model Law on International Commercial Arbitration, Art. 36(1)(a)(i) [hereinafter "UNCITRAL Model Law"].
[6] *See* New York Convention, art. V(1)(a); UNCITRAL Model Law, Art. 36(1)(a)(i).
[7] However, note that the English decision has been appealed to the U.K. Supreme Court.

agreement in writing to waive any terms or conditions). Due to a corporate restructuring, the Kuwaiti company became a subsidiary of another Kuwaiti holding company. Although the new holding company paid some invoices arising from the contract, it never formally signed the contract or any side agreement. When a dispute arose, the Lebanese company initiated arbitration proceedings against the non-signatory holding company, but not the subsidiary. A majority of the arbitral tribunal applied French law and found that the holding company was bound by the arbitration agreement.

Enforcement proceedings followed in England, while annulment was sought in France. In the English proceedings, the England and Wales Court of Appeal found that English law governed the question as to whether the holding company had become a party to the arbitration agreement.[8] The court relied on the fact that the choice of law clause applied to the "Agreement", which had been defined in the contract as including "all the terms of agreement[.]"[9] The court then concluded that the holding company was not bound by the arbitration agreement under English law and therefore it denied enforcement of the award. Nonetheless, in the Paris Court of Appeals the outcome was the opposite, as the court determined that French law, being the law of the seat of arbitration, should apply; and under French law the holding company had become a party to the arbitration agreement, which resulted in the award being upheld.[10]

3. An analysis based on the parties' actual expectations

Although the uncertainty surrounding which law should govern an arbitration agreement is unlikely to disappear any time soon, a better understanding of the parties' expectations would contribute to mitigate this problem. It is true that sometimes parties intend their entire agreement, including any arbitration provision, to be governed by the same law, and in particular the one selected in a choice of law clause. This can be the case especially in situations with unsophisticated parties, who might overlook the legal relevance of the arbitral seat or of the separability principle.

[8] *See* Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2020] EWCA Civ 6.
[9] *Id.*, at ¶ 62.
[10] *See* CA Paris, 1e ch., 23 Jun. 2020, 17/22943.

For example, the lack of any selection of an arbitral seat in the arbitration clause could be indicative of this lack of sophistication.

However, jumping to complex ex post analyses in search of an implicit agreement from the parties on the law applicable to the arbitration agreement might end up deviating from the parties' actual intent. Thus, although we might be tempted to believe that parties carefully think about all contractual clauses, in reality many of these clauses are not carefully studied. Considerations about what type of dispute resolution clause to include can often be minimal and relegated to last-minute decisions, which is consistent with the idea that most parties expect that their transactions will not generate disputes. As a result, the possibility that the parties did not reach any agreement can be precisely the one that most closely matches the parties' approach during the contractual negotiation, which also appears better aligned with a plain reading of the New York Convention and the UNCITRAL Model Law.

In addition, there are good reasons to believe that parties would in many occasions expect the law of the seat to apply. This is because, except in scenarios where unsophisticated parties simply view the arbitral seat as a mutually convenient venue for an in-person hearing, to the extent that parties give any thought at all to which law should govern the arbitration agreement, they will probably express so by choosing an arbitration-friendly seat.[11] Moreover, although rare in practice, sophisticated parties could easily draft agreements specifying which law should govern the arbitration agreement. This would not even require changing the arbitration clause itself, but could be achieved by specifically establishing that the choice of law clause applies to all the clauses in the contract, including the arbitration agreement.

Furthermore, there is little support in terms of both the parties' intention and the legal framework to advocate for the general application of a validation principle.[12] Pursuant to this supposed validation principle, in order to give effect to the parties' intention to arbitrate, an arbitration agreement should be deemed valid as long as it is valid under any of the possible applicable laws. However, this approach disregards the idea that parties intend to be bound by agreements only to the extent that they are valid under the applicable law. Otherwise, the logical conclusion would be that parties waive any potential invalidity argument simply by signing the contract. Following this

11 *See, e.g.*, Jeff Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 500 (2012).
12 *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 495 (2nd ed. 2014).

approach, if it should be inferred that by including a clause in a contract the parties intended it to be valid at all cost, why limit the analysis to the possible applicable laws? Why not extend it to include soft law instruments like the UNIDROIT Principles, or *lex mercatoria*, or a theoretical set of rules the parties might have thought of in their heads? In practice, this would exclude the possibility of any contract invalidity, therefore contradicting laws from multiple jurisdictions on this matter.

However, this does not mean that a validation principle could not apply in some cases. Although the number of cases where the parties contractually agree to this validation principle will be scarce to none, parties could be bound by it if the applicable arbitration law specifically provides for it. For instance, the validation principle will apply to arbitration agreements governed by Swiss or Spanish law, as both of these laws establish that an international arbitration agreement is valid if it conforms to the law chosen by the parties, the law of the main contract, or Swiss or Spanish law respectively.[13]

Finally, it is worth mentioning that the case discussed in the previous section actually presented a simplified version of the applicable law issues faced in other situations involving non-signatories. Thus, in this case all the parties, including the holding company that argued that it should not be bound by the arbitration clause, agreed that the matter should be decided under the law of the arbitration agreement (be it English or French law). If the parties had not agreed on this point, applying the law of the arbitration agreement would have required the existence of some connecting factors between the holding company and the arbitration agreement.[14] Otherwise, the signatories could theoretically agree on an arbitration clause governed by a law with expansive theories on non-signatories and use it to bind a company with no connection to that law and that arbitration agreement, which is clearly an undesired outcome.[15]

[13] *See* Loi fédérale sur le droit international privé [LDIP] [Law on private international law] 18 Dec. 1987, RO 1776, art. 178(2) (Switz.); Arbitration Law, art. 9(6) (B.O.E. 2003, 60) (Spain).
[14] *See* Rafael Carlos del Rosal Carmona, *The Law Applicable to Extension of the Arbitration Agreement: Protecting Non-Signatories while Providing Flexibility*, TRANSNAT'L DISP. MGMT, Jun. 2016.
[15] For some decisions considering this issue, *see* Bundesgerichtshof [BGH] [Federal court of Justice] 8 May 2014, III ZR 371/12 ¶ 87; *Jasmin Solar Pty Ltd v Trina Solar Australia Pty Ltd* [2015] FCA 1453, affirmed by *Trina Solar (US), Inc v Jasmin Solar Pty Ltd* [2017] FCAFC 6 ¶ 130.

4. Conclusion

Establishing which law applies to an arbitration agreement might not be possible without a case-by-case analysis, but due to the importance of party autonomy in arbitration, the guiding principle should be the parties' agreement and intention. As much as we, as lawyers, like to think of the importance of legal provisions, parties may frequently pay little attention to their arbitration agreement. They may sometimes expect the law of the seat to apply, with that expectation being the reason why they selected an arbitration-friendly seat. Sometimes they may not understand the legal significance of the seat and of the separability principle and would expect the law of the main contract to apply. Other times parties might have simply reached no agreement at all.

The correct approach to determine whether there was an implicit agreement or not should be to focus on the parties' circumstances and their expectations during the negotiating process. Ex post findings of implicit agreements based on minor details of the contract's wording whose implications the parties never considered does not contribute to achieve this goal. Neither does assuming that parties do not care about the potential invalidity of the arbitration agreement as long as it is valid under some law. Finally, this idea of protecting the parties' expectations should also include non-signatories to the arbitration agreement, who should not be surprised by the application of an unexpected law to which they had no connection. Consequently, for the law of the arbitration agreement to be applied to a non-signatory, the non-signatory should agree with that approach or, absent agreement, there should be some factors connecting him to the arbitration agreement.

ARBITRATION FOUNDED ON AN INCONSPICUOUS CLAUSE: BUILDING TALL WALLS ON WEAK FOUNDATIONS

By: Abhishek Goyal[1]

"If there be no "meeting of minds" no contract may result[2]*."*

The foundation of any contract lies, *inter alia*, in the meeting of the minds or *consensus ad idem* of the contracting parties. It is trite law[3] that common consent/ *consensus* is necessary for the genesis and sustenance of a binding contract and that such consent must be on each aspect, thereof. A manifestation of this principle may be observed under Section 13 of the Indian Contract Act, 1872 ("**Contract Act**"), which defines consent as, *"[t]wo or more persons are said to consent when they agree upon the same thing in the same sense."* Further, Section 10 of the Contract Act stipulates 'free consent[4]' as one of essential ingredients of a valid contract. At the same time, Section 20 of the Contract Act provides, *"[w]here both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."* Therefore, it is quite understandable that where the binding obligations result on an execution of a contract, such terms must be acquiesced by contracting parties only after being completely aware of the same and, *inter alia*, with free will. However, there may be instances where due to reasons of haste, fraud/ misconduct, nature of contract[5], etc., all the terms of an agreement may not be reasonably brought to the notice of one or more of the signatories to a contract at the time of its execution. Under such circumstances, a contracting party may not only be wrongly encumbered with unwarranted contractual obligations, rather, may have also unwittingly agreed upon a dispute resolution mechanism through arbitration. Unfortunately, in a majority of these cases, a party may become aware of its obligations only after a considerable delay, which may lead to feeling of treachery, frustration and loss.

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[2] ***Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co., AIR 1966 SC 543***
[3] ***Rolta India Ltd v. Maharashtra Industrial Development Corporation, 2014 SCC OnLine Bom 1138***
[4] Refer to Section 14 of the Indian Contract Act, 1872
[5] Eg. Standard Form Contract containing general terms and conditions

Section 7(1) of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") defines an arbitration agreement as *"an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."* Significantly, though, Section 7(3) of the Arbitration Act stipulates that an arbitration agreement must be in writing[6], however, no particular form of such an agreement is prescribed under law. In fact, as per Section 7(2) of the Arbitration Act, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In this regard, the Hon'ble Supreme Court in ***Rukmanibai Gupta v. Collector***[7] has observed, *"Arbitration agreement is not required to be in any particular form. What is required to be ascertained is whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement."* Further, the Hon'ble Apex Court in ***Giriraj Garg v. Coal India Ltd.***[8] has clarified that an arbitration agreement, *"need not necessarily be in the form of a clause in the substantive contract itself. It could be an independent agreement; or it could be incorporated by reference either from a parent agreement, or by reference to a standard form contract"*. Accordingly, it is settled law[9] that for an agreement/ dispute resolution clause to be termed as an arbitration agreement/ arbitration clause, *"(a) The agreement should be in writing; (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal; (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it; and (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them."*

Clearly, in order to establish the existence of an arbitral clause under an agreement the intention of the parties to settle their disputes through arbitration is of paramount consideration. In fact, the significance of parties' intention to refer their contractual disputes to arbitration is such that it has

[6] Section 7(4) of the Arbitration and Conciliation Act, 1996 *"An arbitration agreement is in writing if it is contained in-(a) a document signed by the parties; (b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means] which provide a record of the agreement; or (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."*

[7] ***(1980) 4 SCC 556***

[8] ***(2019) 5 SCC 192***

[9] ***Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719***

been considered as a determining factor regarding the existence of an arbitral clause/ agreement, in cases of ambiguity under a contract. Therefore, it is quite understandable that in a case where dispute handling clause under an agreement offers an option to the parties to refer their disputes to an arbitration body for arbitration or the Court, the Hon'ble Apex Court[10], upheld the validity of such a clause as an arbitral agreement, considering the intention of the contracting parties. In fact, the Hon'ble Apex Court, while relying upon one of its previous judgments[11], held, *"there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator…."* Pertinently[12], such intention of the parties may be inferred from the terms of the contract, conduct of the parties and correspondence exchanged, to ascertain the existence of a valid and binding arbitral agreement. Consequently, where it can be demonstrated, basis the documents placed on record that the parties were *ad idem* and had actually reached an agreement for arbitration, then it would be construed to be a binding contract/ obligation.

Understandably, for a consensus to reach and a for parties to form an intention to arbitrate, the factum of existence of such clause under an agreement/ proposal must be within the knowledge of the contracting parties at the time of execution of an agreement. As a corollary, where the existence of an arbitral clause is neither within the knowledge of one of the parties to a contract at the time of its execution nor is there any manifestation of any intention on the part of such parties to take recourse to arbitration at any point in time on or after such execution, no binding arbitration agreement may be perceived under such a case. Therefore, in the cases where a 'so called' arbitral clause is reproduced inconspicuously in a document, which, though may be signed by the receiving party/ other party, however, being not aware of the existence of such a clause or expressing an intention to concede to such a term at any point in time, no arbitral agreement may deem to exist under such a case. Quite recently, the Hon'ble High Court of Delhi[13] was posed with a similar question wherein arbitration was invoked based on the 'so called' arbitral clause existing under the invoice(s). In the instant case, besides the fact that two distinct 'so called' arbitral clauses existed under the invoices, the said clauses were reproduced in small font at the bottom of the said

[10] ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components, (2018) 9 SCC 774***
[11] ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd., (2008) 10 SCC 308***
[12] ***Mahanagar Telephone Nigam Ltd. v. Canara Bank & Ors., 2019 SCC OnLine SC 995***
[13] ***Parmeet Singh Chatwal and Ors. v. Ashwani Sahani, MANU/DE/0442/2020***

invoice(s). Further, the intention of the parties to mutually agree to such a term was not manifest from the conduct thereof. Accordingly, under such circumstances the Hon'ble Court held, *"[t]he so called Arbitration Clause is reproduced in a small font at the bottom of the invoice. It is doubtful if the petitioner even noticed that he was signing a document which has an Arbitration Clause. It is not possible to conclude that the parties were ad idem."*

Previously, in another instance[14], where the 'so called' arbitral clause was reproduced on the reverse side of an invoice/ document, with no indication of its existence on the front/ face of the document or any evidence to demonstrate the factum of parties mutually agreeing to the said clause, arbitral agreement was held not to exist under such a case. In fact, as per the Hon'ble High Court, *"[t]he mere printing of condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the respondent to the petitioner. Unless the said offer was accepted by the petitioner, it could not result in a binding and enforceable contract. The inclusion of terms and conditions at the back of the invoice, unilaterally issued by the respondent while affecting delivery of the goods in terms of the petitioner's purchase order, would not bind the petitioner."* The Hon'ble Court further clarified that an "arbitration agreement" is a species of the genus, that is, "Agreement" and reiterated that for the existence of an agreement there has to be "*consensus ad idem*" between the parties, i.e., they should agree to the same thing in the same sense. However, it is trite law[15] that there is no strait-jacket formula to say whether a invoices/ terms of invoices can or cannot amount to binding arbitration clauses. In fact, in order to determine the existence of a valid arbitral agreement/ clause it is necessary to consider the conduct and intention of the parties to arbitrate, as evident from the record.

Consequently, where the terms of the contract are brought to the notice of the parties to an agreement at the time of entering into a contract, including an arbitral clause existing on the reverse side of said agreement. Further, where the parties act in terms of such an agreement, as manifest from their conduct, it would be inconsequential for determining the existence of an arbitral clause/ agreement, whether or not such an agreement is signed. Recently, the Hon'ble Supreme Court in ***Caravel Shipping Services (P) Ltd. v. Premier Sea Foods Exim (P) Ltd.***[16] was posed with a

[14] ***Taipack Limited v. Ram Kishore Nagar Mal, 2007 SCC OnLine Del 804 : (2007) 143 DLT 123***
[15] Refer to ***Scholar Publishing House Pvt. Ltd. v. Khanna Traders, 2013 SCC OnLine Del 2708***
[16] ***(2019) 11 SCC 461***

question; whether the arbitral clause existing on the reverse of an unsigned bill of lading would constitute a binding/ valid arbitral agreement/ clause? In this case, at the outset, it was noted by the Hon'ble Apex Court that the very opening clause of the said bill of lading[17] made it clear that it was expressly agreed between parties to the instant case to be bound by all the terms, conditions, clauses and exceptions on both sides of the bill of lading whether typed, printed or otherwise. Accordingly, the Hon'ble Court held, *"the respondent has expressly agreed to be bound by the arbitration clause despite the fact that it is a printed condition annexed to the bill of lading….respondent, therefore, cannot blow hot and cold and argue that for the purpose of its suit, it will rely upon the bill of lading (though unsigned) but for the purpose of arbitration, the requirement of the Arbitration Act is that the arbitration clause should be signed."* Pertinently, the Hon'ble Supreme Court, besides considering the fact that the terms of such unsigned bill of lading were relied upon by the objecting/ contesting party, while referring to one of its previous judgments[18], held, *"Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."*

Significantly, where arbitration is sought to invoked on the basis of reference, it is settled law[19] that a conscious acceptance of such arbitration clause found in another/ previous document is necessary for the purpose of incorporating it into the (latter) contract. Accordingly, mere a general reference to such an arbitral clause in previous contract would not suffice for incorporation by reference. In fact, an arbitration clause in another document, would get incorporated into a contract by reference, only where, "*(1) the contract should contain a clear reference to the documents containing arbitration clause, (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, and (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract."* Pertinently, an exception[20] to the said rule

[17] *"In accepting this bill of lading the merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the bill of lading whether typed, printed or otherwise."* (Refer to Para 1 of ***Shipping Services (P) Ltd. v. Premier Sea Foods Exim (P) Ltd., (2019) 11 SCC 461***)
[18] ***Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812***
[19] ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696***
[20] Refer to ***Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519***

is, *"a reference to a standard form of contract by a trade association or a professional institution in which case a general reference would be sufficient for incorporation of an arbitration clause."* However, in case of standard form contracts, experiences have shown that such agreements are entered without any negotiations and hardly leaving an option to one of the contracting parties to do anything except to accede to the terms mentioned therein. Therefore, under such circumstances, it not difficult to comprehend that a party may be forced upon with an arbitral clause/ agreement through such standard from contracts, which may not in all circumstances be feasible or would have been accepted by the party in unequal bargaining position, except for a such lack of option.

Quite recently, the Supreme Court of Canada[21] has struck down a mandatory clause existing in standard form contract between driver and multinational corporation, requiring that disputes be submitted to arbitration in the Netherlands and imposing substantial up-front costs for arbitration proceedings, as unconscionable. While rendering the decision, though, it was acknowledged by the Hon'ble Court, *"We do not mean to suggest that a standard form contract, by itself, establishes an inequality of bargaining power… Standard form contracts are in many instances both necessary and useful"*, however, in the facts of the instant case it was observed that not only was such an agreement/ clause in form of a standard form, rather, the respondent (Mr. Heller) was powerless to negotiate any of its terms. It was further noted by the Hon'ble Court that there was a significant gulf in sophistication between the Respondent and the Appellant (Uber) and that the arbitration agreement contained no information about the costs of mediation and arbitration in the instance case. Lastly, the Hon'ble Court noted that a person in Respondent's/ Mr. Heller's position *"could not be expected to appreciate the financial and legal implications of agreeing to arbitrate under ICC Rules or under Dutch law."* Significantly, while further acknowledging the severability of an arbitral clause from the main agreement and its importance as a cost-effective and efficient method of resolving disputes, it was observed by the Hon'ble Court, *"[w]hen arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all."* Therefore, clearly, where the arbitral clause/ agreement itself imposes unrealistic and unconscionable terms, forced upon a party though standard from contract, the same requires to be struck down and

[21] ***Uber Technologies Inc. v. Heller, 2020 SCC 16***- dated 26.06.2020- Supreme Court of Canada (https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do)

negated. Indian Courts[22] as well, though in a different context, have consistently struck down unfair and unreasonable contracts, or unfair and unreasonable clauses in a contract(s), entered into between parties who are not equal in bargaining power. Undoubtedly, where the circumstances demonstrate, on the face of it, injustice and improvidence in the standard form contracts, equity and justice demand their negation, notwithstanding the other advantages which arbitration which offer. As the Hon'ble Supreme Court of Canada in the aforesaid case noted, *"Parties cannot expect courts to enforce improvident bargains formed in situations of inequality of bargaining power; a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation."*

Conclusively, though there are several advantages to arbitration in comparison to Court proceedings, however, the foundation of such proceedings cannot be permitted to be laid on fraud, deception, inequality, injustice, etc. In fact, all the cases where such unjust modes are sought to be devised to invoke arbitral machinery, Courts have been vigilant to nip such injustice in the bud. As a saying goes, *"[t]hings built on a weak foundation will eventually crumble[23]."* Undoubtedly, same holds good for an arbitration sought to be invoked on inconspicuous and unjust 'so called' arbitral clauses. These proceeding, too, fall and crumble like a house of cards, come one blow.

[22] ***Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156***
[23] Vincentian Proverb

EXTRACTING THE ARTHURIAN SWORD: CHALLENGES TO COUNTERCLAIMS IN INVESTMENT TREATY ARBITRATION

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Authors' note: The views and opinions expressed in this article are those of the authors and do not necessarily reflect the views of the law firms or universities with which they are associated. The authors would like to thank LegisNations for the invitation to write this guest article. The authors may be reached at godwin.tan@cantab.net and awlc3@cantab.ac.uk.

Introduction

In Arthurian legend, there once existed a sword that was magically embedded in an anvil atop a stone. The inscription on the sword stated that only the rightful King would be able to retrieve the sword. Many nobles attempted to pull the sword out of the anvil but, despite their grand efforts, they all failed. Eventually, only King Arthur succeeded in this feat.

Raising a counterclaim in investment treaty arbitration is much like retrieving the Arthurian sword from its stone. A counterclaim functions like a sword (as opposed to a shield). Counterclaims are raised by a respondent in the same proceedings against a primary claim brought by a claimant and, crucially, they enable the respondent to seek affirmative relief from the claimant. As the International Court of Justice noted in the *Bosnian Genocide Convention* case: 'the thrust of a counter-claim is … to widen the original subject-matter of the dispute by pursuing objectives other than the mere dismissal of the claim of the Applicant in the main proceedings … for example that a finding be made against the Applicant'.[3] Furthermore, much like the noble efforts of many to extract the elusive sword, it has been difficult to successfully raise counterclaims in investment treaty arbitration, despite the efforts of many. The prospect of a successfully raised counterclaim will turn on the circumstances of each case, particularly the wording of the relevant investment instrument.

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Order of 17 December 1997) [1997] ICJ Rep 243 [27].

This article considers the persisting difficulties with raising counterclaims in investment treaty arbitration (specifically under the International Centre for Settlement of Investment Disputes (**ICSID**)), as well as developments that may make it easier to raise such counterclaims in the future.[4]

Challenges to Raising Counterclaims

First, one of the key aims of the investment treaty regime is to promote foreign investment and protect such investment from arbitrary State intervention. Given that the regime aims to address asymmetries that might arise from unchecked sovereign authority, investment treaties seek to impose obligations on the host State to protect the investor's economic interests and access to justice.[5] Since most investment treaties only directly impose obligations on States (rather than on the foreign investor), it can be difficult to substantiate a counterclaim in investment treaty arbitration.[6]

Where there is a lack of investor obligations in treaties, investment treaty tribunals have on occasion held that substantive investor obligations may still exist, but these findings are not without difficulties. For instance, a tribunal may find that an investor is required to comply with its environmental obligations under the host State's domestic law. That being said, even where domestic law is deemed applicable, there remains the challenge of establishing which aspects of domestic law are applicable, the relationship between such law and international law, the content of such law and the manner in which such content must be proven.[7] Alternatively, a tribunal may, in principle, find that the investor is required to comply with obligations found under international law. Such obligations may be relevant because of article 42(1) of the ICSID

[4] For a more detailed analysis, see Godwin Tan and Andrea Chong, 'The Future of Environmental Counterclaims in ICSID arbitration: Challenges, Treaties and Interpretations' *Cambridge International Law Journal* (Forthcoming, 2020).
[5] See eg Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis & Clark Law Review* 461, 462-463 ('Procedurally, treaty arbitration is commenced when an investor submits a claim against a host state … the process must be commenced by the investor itself. Substantively, most international investment agreements (IIAs) impose obligations on states, but do not impose them on investors').
[6] See James Crawford 'Treaty and Contract in Investment Arbitration' (2008) 24(3) *Arbitration International* 351, 364 ('The core problem with counterclaims in BIT arbitration is that the treaty commitments of the host state towards the investor are unilateral, and anyway the investor is not a party to the BIT.').
[7] See Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP, Oxford 2017) 2.

Convention, a provision in the treaty requiring the application of international law, or article 31(3)(c) of the Vienna Convention on the Law of Treaties (the **VCLT**). The method used to incorporate or interpose the relevant investor obligation may come with its own set of difficulties. Taking article 31(3)(c) of the VCLT, for instance, commentators have contended that the use of article 31(3)(c) ought to be limited as the article is only meant to assist with the interpretation of existing treaty provisions.[8] In other words, 'the point of departure for the application of [this article] must always be a provision of the treaty to be interpreted' and, accordingly, article 31(3)(c) of the VCLT cannot be used to introduce investor obligations into an investment treaty where the relevant treaty does not already contain an 'anchor' provision indicating that the parties wanted to create substantive obligations for investors.[9]

Secondly, in many investment treaties, the scope of the parties' consent may not be sufficiently broad to permit a State from raising counterclaims under article 46 of the ICSID Convention. ICSID tribunals adjudicating counterclaims have diverged on their approach to determining whether the counterclaims fall 'within the scope of the consent of the parties', as required under article 46 of the ICSID Convention.[10] On the one hand, there are cases suggesting that whether or not counterclaims fall 'within the scope of the consent of the parties' will depend on the dispute resolution provision in the relevant investment treaty. If the provision is narrow, counterclaims will not be permitted. One such example can be found in *Roussalis v Romania*, where the dispute resolution provision in the 1997 Romania-Greece BIT states:

> 'Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under the Agreement in relation to an investment of the former, shall, if possible, be settled … If such dispute cannot be settled … the investor concerned may submit the dispute … to international arbitration'.[11]

The tribunal in *Roussalis v Romania* found that this clause limited jurisdiction to claims brought only by investors covering the obligations of the host State, and not vice versa.

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[8] See Patrick Abel, 'Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration: Fallacies and Potentials of the 2016 ICSID *Urbaser v Argentina* Award' (2018) 1(1) *Brill Open Law* 61, 75; Elliot Luke, 'Environment and Human Rights in an Investment Law Frame' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar, Cheltenham 2019) 150, 168.
[9] See Abel (n 6) 75. For other difficulties with using article 31(3)(c) of the VCLT, see Tan and Chong, (n 2).
[10] See Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) *ICSID Review – Foreign Investment Law Journal* 232, 256; Jeswald Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010) 382.
[11] *Spyridon Roussalis v Romania* (Award) ICSID Case No ARB/06/1 (7 December 2011) [868].

Conversely, if the provision is broad, counterclaims will be permitted. In *Urbaser v Argentina*, the tribunal found that the dispute resolution clause was drafted broadly enough to cover claims brought by both the investor and the host State. The dispute resolution clause states the following:

> 'Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties … Where there is no settlement and in certain circumstances, the dispute may be submitted to an international arbitral tribunal 'at the request of either party to the dispute'.[12]

The divergence in the language and phrasing of various dispute resolution provisions in the different investment treaties mean that a tribunal may, in certain circumstances, find that it has no jurisdiction to hear a counterclaim raised by the host State.

Thirdly, there is the difficulty of satisfying the requirement of article 46 of the ICSID Convention that the counterclaims arise 'directly out of the subject-matter of the dispute'.[13] Typically, in contractual disputes involving counterclaims, the claimant and the respondent are bringing their claims and counterclaims under the same contract and, accordingly, it would be clear that the dispute arises out of the same subject-matter. However, in investment treaty disputes, the host State may need to rely on other instruments, agreements or laws (not the treaty under which the investor's claim were brought) to show that the investor owed obligations to the State and that the investor breached them. In such cases, it may be difficult for the State to show that the counterclaims it is attempting to bring arise 'directly out of the subject-matter of the dispute'.[14]

Notable Developments and New Challenges

Despite these challenges, there are notable developments that suggest it will be easier to raise counterclaims in investment treaty arbitration in the future. These developments include

[12] *Urbaser SA v The Argentine Republic* (Award) ICSID Case No ARB/07/26 (8 December 2016) [1143].
[13] See Tan and Chong (n 2).
[14] See Tan and Chong (n 2).

environmental language in treaty provisions and hints of tribunal receptiveness to consider a State's interest in protecting the environment.

First, the inclusion of treaty provisions that seek to directly impose environmental, human rights or corporate social responsibility obligations on the investor is a key development. A notable example of such a treaty is the 2016 Morocco-Nigeria BIT. The treaty includes the following provision that seeks to directly impose obligations on investors to contribute to sustainable development:

> 'In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of [the] investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, *investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices*' (emphasis added).[15]

The Morocco-Nigeria BIT also states that '[i]nvestors and investments shall uphold human rights in the host [S]tate'.[16] This BIT is not alone. The Iran-Slovakia BIT, for instance, states that '[i]nvestors and investments should apply national, and internationally accepted, standards of corporate governance for the sector involved, in particular for transparency and accounting practices'.[17] On the other hand, the 2016 Argentina-Qatar BIT, which states that 'investors … should make efforts to voluntarily incorporate internationally recognized standards of corporate social responsibility into their business policies and practices' (reflecting more qualified language).[18]

[15] Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco-Nigeria BIT) (signed 3 December 2016) art 24(1). Article 14 also requires compliance with environmental assessment screening and assessment processes (applying the precautionary principle) as well as conducting of a social impact assessment.
[16] Morocco-Nigeria BIT (n 13) art 18(2).
[17] Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Iran-Slovakia BIT) (signed 19 January 2016, entered into force 30 August 2017) art 10(3).
[18] The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (signed 6 November 2016) art 12.

That being said, these provisions have not yet been tested, so it remains to be seen how they will be interpreted and what standards or obligations can be derived from them. It also remains to be seen how such provisions will interact with other traditional treaty provisions such as the Most-Favoured-Nation provision. [19] It is arguable that such investor obligations may be sidestepped through an MFN provision. For example, an investor may argue that the environmental provision in the basic treaty means that it is granted 'less favourable' conditions to investors of a third State. An investor may also argue that the broad dispute resolution provision places it in a 'less favourable' position as it has to defend against potential environmental counterclaims and instead seek a narrower provision which excludes counterclaims from the proceedings. Unsurprisingly, such arguments come with their own controversies and difficulties.[20]

Secondly, there is evidence that tribunals are now more willing to consider the various States' interests in preserving and protecting the environment when adjudicating investor claims, especially in cases where the treaty language expressly refers to environmental concerns.[21] Some tribunals have also taken steps to include *obiter dicta* justifying their decision from an environmental perspective.[22]

We see this in *Perenco v Ecuador*, where the tribunal addressing the environmental counterclaim raised by Ecuador recognised the importance of State regulatory measures that address environmental risks:

> 'Proper environmental stewardship has assumed great importance in today's world … [A] State has wide latitude under international law to prescribe and adjust its environmental laws, standards and policies in response to changing views and a deeper

[19] For an example of an MFN clause in a new generation treaty see Morocco-Nigeria BIT (n 13) art 6(4).
[20] On the use of an MFN provision to remove environmental provisions, see United Nations Conference on Trade and Development (UNCTAD) Series on Issues in International Investment Agreements II, 'Most-Favoured Nation Treatment' (New York and Geneva, 2010) 62–63, noting that the decision in *CMS Gas Transmission Company v The Republic of Argentina* (Award) ICSID Case No ARB/01/8 (25 April 2005) suggests that 'the absence of a provision in a third treaty cannot be the basis for excluding a provision contained in the basic treaty by invoking an MFN provision.' On the use of an MFN provision to alter the scope of the dispute resolution provision, see Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) *Journal of International Dispute Settlement* 97, 98.
[21] See Jorge E Viñuales, 'Foreign investment and the Environment in International Law: Current Trends' in Kate Miles (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar, Cheltenham 2019) 29-37. Also see Tan and Chong (n 2).
[22] Ibid.

> understanding of the risks posed by various activities, including those of extractive industries such as oilfields. All of this is beyond any serious dispute and the Tribunal enters into this phase of the proceeding mindful of the fundamental imperatives of the protection of the environment in Ecuador'.[23]

Another example is *Al Tamimi v Sultanate of Oman*,[24] where the tribunal dismissed the treaty claims of a mining investor. In dismissing the investor's claims, the tribunal drew guidance from a separate chapter in the relevant Free Trade Agreement, titled 'Environment', which states that '[n]either Party shall fail to effectively enforce its environmental laws … in a manner affecting trade between the Parties'.[25] It observed the following:

> 'The very existence of [the chapter on 'Environment'] exemplifies the importance attached by the US and Oman to the enforcement of their respective environmental laws. It is clear that the State Parties intended to reserve a significant margin of discretion to themselves in the application and enforcement of their respective environmental laws … . [T]he Tribunal must be guided by the forceful defence of environmental regulation and protection provided in the express language of the Treaty.'.[26]

In light of investment arbitration tribunals' increasing receptiveness towards environmental considerations and the greater prominence of environmental concerns in the language of new-generation treaties, it is likely that future tribunals will similarly be more receptive towards States that seek to raise environmental counterclaims against investors.

Conclusion

From recent developments, it is clear that parties and tribunals are alive to the possibility of relying on counterclaims to address a broader range of issues in a single arbitration. While there are limitations to raising counterclaims in investment treaty arbitration, it is indeed

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[23] *Perenco Ecuador Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)* (Interim Decision on the Environmental Counterclaim) ICSID Case No ARB/08/6 (11 August 2015) (*Perenco v Ecuador*) [34] and [35].

[24] *Adel A Hamadi Al Tamimi v Sultanate of Oman* (Award) ICSID Case No ARB/11/33 (3 November 2015) (*Tamimi v Oman*). See Viñuales, 'Foreign investment and the Environment in International Law: Current Trends' (n 19) 34.

[25] *Tamimi v Oman* (n 22) [388].

[26] *Tamimi v Oman* (n 22) [389].

possible to retrieve this sword from its stone. Of course, any optimism must be tempered by the reminder that only rightful claims (on both jurisdiction and merits) will succeed.

TWO-TIER ARBITRATION PROCESS: IS IT OPPOSED TO THE DOCTRINE OF PUBLIC POLICY IN INDIA?

By: Swarnendu Chatterjee[1] & Surbhi Gupta(Assisted)[2]

"International Arbitration may be defined as the substitution of many burning questions for a smoldering one" – Ambrose Bierce (United States)"

An Arbitration Agreement with a *'two-tier arbitration clause'* provides for an appellate review of an arbitral award by a subsequent arbitration. It empowers the parties with flexibility and autonomy to resolve a dispute by going into an appeal against the original arbitral award. In India, this two-tier arbitration system was not explicitly recognized under the Arbitration Act previously.

The Hon'ble Supreme Court in its recent decision of *Centrotrade Minerals and Metals Inc. v. Hindustan Copper Ltd.*[3] by stating that "*party autonomy is virtually the backbone of arbitrations*" has however upheld the validity of the two-tier arbitration process in India. The Court further observed that a foreign arbitral award can now be executed in India under a two-tier arbitration process, thereby taking a step forward towards making India a pro-arbitration nation.

In this article, I assisted by my researcher, Surbhi, propose to do a comparative analysis of the Indian Legal System and the acceptability of the awards passed in Foreign Shores following a two-tier arbitration process and whether the same is not opposed to the doctrine of public policy.

Doctrine of Public Policy vis-à-vis Arbitration and Conciliation Act, 1996

The Indian arbitration law follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law. On June 2nd 2020, the Hon'ble Supreme Court in its landmark decision in *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd*. has recently upheld a two-tier arbitration clause that provides for an appellate review of the original arbitral award by a subsequent arbitration, which is not explicitly prohibited in India.

Section 48 of Arbitration and Conciliation Act, 1996 lays down the circumstances under which a foreign arbitral award can be prevented from being enforced by the Indian Courts. One such ground for refusal to execute such an award was that "its enforcement would be against public policy". In the landmark case of *Renusagar*[4], by the virtue of Section 7(1)(b)(ii) of Foreign Awards (Recognition & Enforcement) Act, 1961, the term 'public policy' was interpreted by the Supreme Court in a much narrower sense in order to maintain a balance between the broadly worded provision and the legislative intent of minimal judicial interference.[5] The Supreme Court further held that the term 'public policy' is confined to:

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[3] 2020 SCC OnLine SC 479.
[4] Renusagar Power Co. Ltd. v. General Electric Co. 1994 Supp (1) SCC 644.
[5] https://www.lexology.com/library/detail.aspx?g=ee1fbf07-288e-4c74-8fa1-88e4c2f7d679.

i) The fundamental policy of Indian law,

ii) Justice or morality,

iii) National interests.

The Apex Court later on firmed this stance of 'minimal judicial interference' in an arbitral award while interpreting Section 48(2)(b) of Arbitration and Conciliation Act, 1996 in the case of *Shri Mahal Ltd. v. Progetto Grano Spa*[6] and by overruling the previous judgment of *Phulchand Exports v. Ooo Patriot*[7] in which it was held that the term 'public policy' holds the same meaning under both Section 34 and Section 48 of Arbitration and Conciliation Act, 1996.

The need for an amendment in Arbitration and Conciliation Act, 1996 arose in order to resolve the dilemma surrounding Section 48 that whether it will be governed by the *Renusagar* judgment or by the *ONGC* judgment. The Apex Court in the case of *ONGC Ltd. v. Western Geco International Ltd.*[8] observed that for the purpose of the Section 34, the term 'public policy' is to be widely interpreted and also "patent illegality" to be a ground for an arbitral award to be set aside by the Indian courts. Hence, Wednesbury principles of reasonableness were included within the term "fundamental policy of Indian Law" while interpreting the term public policy as u/s 34.

Inspired by the *Renusagar* judgment, the Parliament while enacting the 2015 Amendment to the Arbitration and Conciliation Act, 1996, followed a proactive approach, and amended Section 48 of the Arbitration and Conciliation Act, 1996 in order to define the scope of 'public policy' exception. By adding an explanation to Section 48(2), the 2015 Amendment Act explicitly stated that a foreign award will be treated against the 'public policy' only if:

i) It was induced by fraud or corruption;

ii) It's against the national interests;

iii) It's against the principles of morality and justice.

Analysis of Centrotrade Judgment vis-à-vis law on the doctrine of Public Policy

On June 2nd 2020, the Supreme Court upheld the enforceability of a 'foreign arbitral award' rendered in accordance with a two-tier arbitration agreement.[9] The Court held that a two-tier arbitration process would not be against the principle of public policy in India. The decision is notable as it demands a clarification on the interpretation of the public policy exception post Arbitration and Conciliation (Amendment) Act, 2015.[10]

Briefly, the facts of the instant case are that HCL and Centrotrade entered into a contract of sale of which clause 14 mentioned a two-tier arbitration clause in case of dispute. The first tier mentioned the dispute to be settled in India. Under second tier, the aggrieved party could appeal before the International Chamber of Commerce (ICC) in London. When dispute arose, Centrotrade commenced arbitration against HCL invoking the arbitration clause 14. As a result, the Indian

[6] (2014) 2 SCC 433.
[7] (2011) 10 SCC 300.
[8] (2014) 9 SCC 263.
[9] Centrotrade Minerals & Metals, Inc. v. Hindustan Copper Limited Ltd., *Civil Appeal No. 2562 of 2006 (Sup. Ct. India).*
[10] https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/centrotrade-decision-two-edged-sword.

Council of Arbitration (ICA) passed a NIL award in the matter. Centrotrade being aggrieved from the decision of ICA invoked the second tier of the arbitration agreement before the ICC London, which delivered an award in favor of Centrotrade. At the same time, HCL approached the Supreme Court of India (ISC) claiming that the two-tier arbitration process is in violation with the Indian public policy.

The Apex Court by adapting a pro-arbitration approach, rejected the HCL's defense of two-tier arbitration clause being in violation with Indian public policy. Hence, the same does not contravene the fundamental principles of Indian laws as the court denied to 'misconstrue' the arbitration act in such a way that it makes two-tier arbitration system against its 'fundamental principles'. The three-judge bench further held that HCL had first hand knowledge and intentionally did not participate in arbitration proceedings at ICC London, thereby rejecting its contentions flavored with being violative of Indian policy and natural law. In this welcoming judgment, the court further while defining the 'scope of public policy' chose to ignore the words of the statute by stating that the primary intention behind the statute is not to "throttle the autonomy of the parties or preclude them from adopting an appellate arbitration". Therefore, the finality of the first award as protected by the statue does not prevent an aggrieved party from claiming a second award by going into an appeal. Hence, the Supreme Court also took a proactive approach and affirmed the two-tier arbitration process and broadened the meaning of Public Policy under the Arbitration and Conciliation Act, 1996, as not doing so would have rendered the entire process undertaken by Centrotrade infructuous.

Conclusion

In our opinion, after analysing the law and the judgment of the Supreme Court in Centrotrade matter, it can be said that, by choosing to ignore the words of the statute while defining the scope of the doctrine of public policy and putting party autonomy at a greater pedestal, the Supreme Court has rightly affirmed the validity of two-tier arbitration system in India.

Moreover, by adapting the minimal judicial intervention approach, the very basic purpose of the Arbitration and Conciliation Act has been fulfilled. Overall, this judgment has plugged the loopholes that previously existed which will allow India to become an arbitration-friendly nation in future, whereby foreign companies would feel more secured and confident for protecting their rights under Arbitration Law as practiced and enforced in India.

Rightly, the Supreme Court has upheld and applied the law in a proactive manner which will ultimately benefit the Indian Legal Fraternity as well as the Courts while interpreting foreign arbitral awards which follows the two-tier process in foreign shores. India is currently looking forward to be the global arbitration hub and genuinely such interpretations and judgments by the Supreme Court of the biggest democracy in the world shall not only help but shall pave the way for the future of India by coming a global leader and investment friendly nation with robust and friendly arbitration process abreast with the laws in foreign jurisdictions.

4 QUESTIONS ON
THE IMPACT OF COVID 19 ON CONTRACTS & ARBITRATION

BY: Thayananthan Baskaran[1]

(1) Whether Covid 19 and the consequent action taken by States amounts to frustration of a contract?

1. The question of whether a contract is frustrated in Malaysia is governed by section 57 of the Malaysian Contracts Act 1950, which is identical to section 56 of the Indian Contract Act 1872.
2. Essentially, section 57 provides that an agreement to do an act that is impossible, or which becomes impossible, is void.
3. Section 57 has been interpreted in Malaysia in accordance with the common law doctrine of frustration. The principles of frustration applicable in Hong Kong and Singapore, which are also common law jurisdictions, are similar.
4. In Malaysia, a contract will be frustrated if the following conditions are satisfied:[2]

   (1) first, the event upon which the promissor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them;

   (2) second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective; and

   (3) third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise.

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[2] *See Guan Aik Moh (KL) Sdn Bhd & Anor v. Selangor Properties Bhd* [2007] 4 MLJ 201, CA.

5. A party will need to examine the terms of the contract to see if the first condition is satisfied. Some contracts may include a force majeure clause that expressly provides for a pandemic. In this situation, the parties should act in accordance with the force majeure clause. We will consider this in more detail later. In the absence of such a clause, this condition is likely to be satisfied, as the parties would not have provided for Covid 19 in their contract.
6. The second condition is likely to be satisfied, as neither party to the contract would be responsible for Covid 19.
7. The third condition is the one likely to give rise to the most disputes. The question is whether Covid 19 renders performance of the contract radically different from what was originally envisaged?
8. The focus here will not only be on Covid 19, but perhaps more significantly on the action taken by States to deal with the pandemic. Such action varies from a complete lockdown, as in India, Malaysia and now Singapore, or simply advisory guidelines. The more stringent such action the more likely the contract may be frustrated.
9. For example, a State Government in Malaysia's complete ban of the rearing and sale of pigs due to the outbreak of the Japanese Encephalitis disease in 1998-99, was found to have frustrated an agreement to tap into the sewerage system of a pig farm.[3]
10. The other focus will be the nature of the contract itself. A short term transactional contract is more likely to become impossible to perform, as compared to a long terms relationship contract.
11. For example, a two year tenancy agreement was found not to have been frustrated by the Hong Kong Department of Health's order that the tenanted premises be isolated for 10 days due to the outbreak of Severe Acute Respiratory Syndrome (SARS) in 2003. The court found that the isolation period of 10 days was quite insignificant in terms of the overall use of the premises. The court also found that the isolation order did not significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.[4]

[3] *See Yew Siew Hoo & Ors v Nikmat Maju Development Sdn Bhd and another appeal* [2014] 4 MLJ 413 at paragraphs 3 and 15, CA.
[4] *See Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353 at paragraph 11, HK District Court.

(2) Whether Covid 19 and consequent action taken by States amounts to force majeure?

12. The question of whether any particular event amounts to force majeure depends on the terms of the contract, as force majeure, at least in common law jurisdictions, is a creature of contract.

13. A force majeure clause is usually drafted in two parts. First, there are provisions that set out the general conditions for a force majeure event, for example, that the event is beyond the control of the parties, could not have been foreseen, and is not attributable to either party. Second, the force majeure clause usually sets out a non-exhaustive list of specific force majeure events. By way of example, we may look at clause 18.1 of the International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction (the Red Book) (2nd edn, FIDIC 2017).

14. If the second part of the clause provides specifically for a pandemic as a force majeure event, this will of course apply to Covid 19. In the absence of such an express provision, reliance may need to be placed on other specific events, like State action, which may arguably cover the consequences of Covid 19.

15. If there is no specific event that applies to Covid 19, reliance will need to be placed on the first part of the majeure clause, which sets out the general conditions for a force majeure event. These conditions are likely to be satisfied by Covid 19 and subsequent action taken by States, as they are beyond the parties' control, could not have been foreseen and are not attributable to either party.

16. The force majeure clause in a contract will also provide for notice and other procedural requirements. The parties must strictly comply with these requirements, as some contracts may bar any form of relief if such procedure is not complied with. In this context, by way of example, reference may be made to clause 18.2 of the Red Book, which requires notice 14 days after the affected party became aware or should have become aware of an event. If notice is given later, the affected party will only be excused from performance from the date notice is received by the other party.

17. It should also be borne in mind that the relief provided by a force majeure event, will differ according to the terms of a contract. Generally, short term transactional contracts may

provide for the complete discharge of a contract, as a result of a force majeure event. On the other hand, long term contracts, may only provide for an extension of time for a force majeure event, with the option of termination, if the force majeure event is prolonged. Again, reference may be made to clauses 18.4 and 18.5 of the Red Book.

(3) Assuming the contract is discharged by frustration and/or force majeure, would the arbitration clause in the contract survive?

18. The arbitration clause, which is regarded in law as an agreement independent of the underlying contract, will survive.

19. This is expressly provided for in Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration. Article 16(1) provides that

> …an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

20. This provision has been adopted in most Model Law jurisdictions, including India, Hong Kong, Malaysia and Singapore. *See* the Indian Arbitration and Conciliation Act, section 16(1); the Malaysian Arbitration Act 2005, section 18(1); the Hong Kong Arbitration Ordinance, section 34; and the Singapore International Arbitration Act, section 3.

21. The independence of the arbitration agreement, which survives the discharge of the underlying contract by force majeure or frustration is recognized by the courts in Malaysia and Singapore.[5]

(4) If the arbitration agreement survives, how will it be performed?

[5] . *See Standard Chartered Bank Malaysia Berhad v City Properties Sdn Bhd and Anor* [2007] MLJU 581, HC; and *China Resources (s) Pte Ltd v Magenta Resources (s) Pte Ltd* [1997] 1 SLR 707, CA Singapore.

22. As a result of the Covid 19 outbreak, many States have ordered some form of physical distancing regulations, including a lockdown in India, Malaysia and Singapore.
23. This gives rise to two challenges in relation to arbitral proceedings, first, in relation to the service of documents, second, in relation to hearing of evidence and legal submissions.
24. The first of these challenges can be met by electronic communication, primarily email. Arbitration legislation in many jurisdictions expressly allows for effective communication by way of email, for example, section 10 of the Hong Kong Arbitration Ordinance, and section 6 of the Malaysian Arbitration Act 2005.
25. Apart from legislation, most rules also allow for effective service by electronic means. For example, Article 2 of the 2018 AIAC Arbitration Rules, Articles 2.15, 2.16 and 3 of the 2018 HKIAC Administered Arbitration Rules, and Rule 2 of the 2016 SIAC Arbitration Rules.
26. This means that all notices, pleadings, bundles of documents, and submissions may be served by email, avoiding any limitation imposed by social distancing regulations.
27. The second challenge is posed by the hearing of evidence and legal submissions. The hearing of legal submissions may be dispensed with, as is commonly done. Legal submissions in writing may be served by email on the arbitral tribunal and the parties.
28. Can the hearing of evidence be similarly dispensed with? In terms of procedure, the parties may agree to a documents-only arbitration which would effectively dispense with a hearing for the evidence.
29. The rules of arbitration of several institutions allow for document-only proceedings for expedited arbitration. For example, Rule 16 of the 2018 AIAC Fast Track Arbitration Rules, Article 42.2(e) of the 2018 HKIAC Administered Arbitration Rules, and Rule 5.2(c) of the 2016 SIAC Arbitration Rules.
30. These documents-only proceedings are intended for lower value disputes under these rules, for example, for disputes under USD75,000.00 under the 2018 AIAC Fast Track Arbitration Rules and HKD25 million, which is over USD3 million, under the 2018 HKIAC Administered Arbitration Rules.
31. However, there is no reason the parties may not agree to adopt a documents-only procedure for higher value disputes, where the facts are substantially not in dispute.

32. In this context, parties in Malaysia and Singapore are increasingly comfortable with a documents-only procedure with the advent of statutory adjudication to resolve construction disputes. Most of these adjudications are determined solely based on documents without a hearing and with the parties seldom even meeting.

33. In the event a hearing is required, a virtual hearing may be held. The AIAC, HKIAC and SIAC all provide virtual hearing facilities, which parties are free to use.

34. Arbitration centres now offer comprehensive virtual solutions. These include dedicated operators participating remotely to manage the video link. This ensures that technology glitches are addressed promptly and efficiently.

35. The arbitration centre's remote operators may also project documents from electronic bundles of documents on screen. This can make the documents on which the witness is being examined or to which Counsel is referring available to the participants in the hearing more efficiently than the traditional process of asking everyone to thumb through the bundles.

36. Along with the display of the documents in the electronic bundle on the screen, real-time transcripts may also be displayed on the screen to aid comprehension.

37. Rotating cameras may also assist in assessing the physical environment in which the witness is located. All this is a significant advance on conventional video conferencing.

38. Further, applications, such as Zoom and BlueJeans are improving the functionality of virtual hearings. These applications permit up to 25 or 49 participants to be displayed in a grid of images with options for expanding the image of individual participants, like the speakers. This facilitates a key feature of an in-person hearing with many participants – the opportunity to scan the room, and to observe several participants in rapid succession.

39. In conclusion, with the technology we have today, a virtual hearing, if it is necessary, can be as effective as an in-person hearing.

THE REDRESSAL MECHANISM UNDER THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT 2016: AN EVICTION OF THE ARBITRATION TRIBUNAL

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Abstract:

The Real Estate (regulation and development) Act 2016 was introduced by the Parliament of India for the regulation of the sector of real estate. This act helps in the protection of the innocent buyers as well as providing them with a speeding redressal mechanism. This act helps in providing a break to the irritated buyers who were till now in the pity of the dishonest builders and the litigation. This act even helps in seeking compensation to the consumers which they used to receive from the consumer forums. If we have a close look to the new provisions of this act and the procedure which is used for the filing of complaints then we will observe that because of the formation of two different forums for the enforcement as well as the compensation is leading to the formation of a strange position of law which is further leading to the diversity of the complaints about the same action, due to the unnecessary willpower of the jurisdiction, there is a possibility of having conflicts in the views. This paper will argue in favour of the jurisdiction of the arbitration tribunals so that there can be speedy redressal of the disputes arising in the real estate sector.

Keywords: *Regulation, Buyers, Compensation, Forums, Jurisdiction.*

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Introduction:

The new act which is passes recently known as the Real Estate (Regulation and Development) Act[3] 2016 also referred to as REA was much appreciated and welcomed with open hands by the consumers who were highly irritated because of the money which was stuck in the projects of the real estate sector for many years. These consumers didn't even have the idea that when will the projects get completed and when the consumers will get possession. As compared to the other countries[4] the real estate sector of India is highly unregulated[5] because of which the constructors, contractors as well as builders were taking huge advantage of the consumers[6]. Since a lot of time there are reports about the cases where fraud is taking place because the land is not owned by the builders, there are incidents of misrepresentation related to the licenses for the authorities, etc[7]. Due to such incidents there was a huge amount of frustration in the buyers and lots of arguments took place in respect to the builders, there was a huge delay in the delivery of the possession of the property and a delay in providing litigation in the stages of purchasing a property.

Before there was an enactment of REA the buyers had received a break from the forums formed for the consumers which were formed under the Consumer Protection Act 1986 (COPRA)[8]. Even the existence of this act the builders were delaying the process of litigation for many years. To avoid this scenario the builders had started to include the clause of arbitration in the contracts or agreements due to which the buyers had no alternative left for seeking remedy because of the cost of arbitration or because there were buyers who did not know the concept of arbitration[9].

The Government of India was noticing the dishonest extortion which the buyers were suffering which was passed by the REA because of three primary reasons:

- For the promotion and the regulation of the real estate sector.

[3] The Real Estate (Regulation and Development) Act, 2016, India.

[4] Axel derogate, Housing Market Regulations and Housing Market Performance in the United States, Germany and Japan in Social Protection versus economic Flexibility: Is there a trade off? NBER Chapters, National Bureau of Economic Research, Inc, 119, 119-156 (2008).

[5] The Maharashtra Housing (Regulation and Development) Act, 2012, India

[6] The Real Estate (Regulation and Development) Act, §2(zk), "promoter" 2016, India

[7] Sanjeev Sinha, Top 6 Real Estate Scams and How Home Buyers Can Avoid Them, The Economic Times, (Last visited on April 15, 2015), available at http://economictimes.indiatimes.com/wealth/personal-finance-news/top- 6-real-estate-scams-and-how-home-buyers-can-avoid-them/articleshow/46930255.cms.

[8] Manash Pratim Gohain, Homebuyers Can Now Move NCDRC Directly Against a Builder, E.T. Realty (Last visited on October 13, 2016), available athttp://realty.economictimes.indiatimes.com/news/regulatory/homebuyers-can-now-move-ncdrc-directly-against-a-builder/54823235.

[9] Ben Giaretta, Changing the Arbitration Law in India, Ashurst, (Last visited on February 14, 2017) available at https:// www.ashurst.com/en/news-and-insights/legal-updates/changing-the-arbitration-law-in-in- dia/.

- So that the interest of the consumer could be protected in the real estate sector.
- For the formation of an adjudicating mechanism so that there can be speedy dispute redressal.[10]

For the fulfilment of these objectives the REA had developed two forums which were:

- The real estate regulation authority (RERA)
- The adjudicating officer (AO)

The agreements made for real estate contain the clauses for the arbitration so that if any dispute arises then it will be referred to arbitration. Because of the presence of such clauses in an agreement, there is a clash taking place usually against the method which needs to be followed for the dispute resolution. Usually, the choice is given between the REA and the arbitration and Conciliation Act 1996 which is also known as the Arbitration Act. Under section 71 of the REA, the act mentions the compensation which is needed to be paid to the buyer which in turn gets decided by the AO. The act of REA is applied to the projects which are still under construction which even examines the authenticity and the validity of the clauses of arbitration present in the builder- buyer agreements.[11]

Protecting buyers:

The new act of REA is developed for the protection of innocent buyers who spend all of their life savings in the real estate sector[12]. Before this act came into force the buyers and builder's relationship were managed and regulated under the sole basis of the agreement, they signed therefore any person who had no experience or had no proof of their finance used to enter into the real estate projects and used to execute them[13]. Further, there were no qualifications mentioned which were needed to become a builder. The builders used to take advantage of the

[10] The Real Estate (Regulation and Development) Act, 2016, India.

[11] Sunil Tyagi, Compensation Clause in Builder-Buyer Agreement is Unfair, One-Sided, Hindustan Times, (Last Visited on July 18, 2015), available at http://zeus.firm.in/wp-content/uploads/Compensation-clause-in-builder-buyer-agreement-is-unfair-one-sided.pdf (https://zeus.firm.in/)

[12] Kailash Babar, Tasmayee Laha Roy, Ravi Teja Sharma ,Consumer Activism: Buoyed by Social Media and Pro-Consumer Courts, Homebuyers Take on Errant Builders, The Economic Times, (Last visited on February 14, 2017), available at http://econom- ictimes.indiatimes.com/wealth/personal-finance-news/consumer-activism-buoyed-by-social- media-and-pro-consumer-courts-homebuyers-take-on-errant-builders/articleshow/44903267. CMS.

[13] Malathi Iyengar, Real Estate (Regulation and Development) Bill – What's in it for Home Buyers?, Emicalculator.net, (Last visited on February 14, 2017), available at http://emicalculator.net/real-estate-regulation-and-devel- opment-bill-what's-in-it-for-home-buyers/

same and used to exploit the buyers.[14] The builders used to deceive the consumers by actually forming new schemes through which they could get the hard-earned money of the buyers and didn't have to comply with the agreed terms. After this, the builders did not complete the projects on time and they used the money of the buyers in the existing projects.

For the protection of the buyers, the REA had made several new provisions were formed which were quite stringent and had further helped the buyers to increase their bargaining powers. Now there is a rule that there is a need for the builders to register their project under the RERA act from the time of their marketing except for the projects in which the land area is not exceeding the 500 sq. Meters or is eight apartments[15]. The projects which are already started to build but have still not received a certificate of occupancy, such projects also need to get themselves registered under the RERA act.

When the builder gets the registration done under the REA at that time the builder is required to submit the provision of the performers of the agreement and additionally there is a need to file an affidavit wherein it is mentioned that how much time the builder requires to complete the project. The affidavit even states the amount which the builder receives from the buyers, the seventy percent of that amount needs to be deposited in a separate bank account. Through this, there will be a surety that the cost which is required for the building of land will be covered through that amount.

Further, the REA provides the statutory recognition to the class action suit through which the recognition is provided to the locus standi of any association of the buyers which is further registered under any law. This is now recognized by the national consumer redressal commission for solving the disputes arising in consumers under the COPRA[16]. Before the introduction of this act, the consumers had to file separate complaints about their grievances such as the delay in possession or the quality of the construction, etc.[17]

[14] Lalit Wadhwani, Passage of Real Estate Bill: Blessing for Both, Home Buyers & Developers, The Free press journal, (March 29, 2016), available at http://www.freepressjournal.in/mumbai/

[15] Id., §3(2).

[16] Ambrish Kumar Shukla v. Ferrous Infrastructure (P) Ltd., 2016 SCC Online NCDRC 1117.

[17] Raheja Vedanta, Invite All Flat Buyers to Join the Case Through Public Notices – Consumer Forum, thelogicalbuyer, (Last visited on February 14, 2017), available at http://www.thelogicalbuyer.com/blog/invite-all-flat-buy- ers-to-join-the-case-through-public-notices-consumer-forum/

The REA has even introduced new compliances and has reported the requirements. There is a requirement that the REA needs to have the new updates and regular intervals and then all those updates need to get published on the site of RERA.[18] The agents of the real estate which are also known as the brokers are needed to register themselves under the act of RERA before they can start the sale or purchase of any property.[19] Further, there is a need that they always show their registration numbers before even they do any transactions. There is a need according to the rules of REA that the brokers have proper accounts prepared as well as the documents ready failing which will amount to the unfair trade practices.

REA provides the buyers with a right that they can seek compensation by the builders or they can even withdraw the entire investment and can even ask for interest if they find out that the builder is guilty of misrepresentation concerning the prospectus. The builders cannot even claim for more than 10 percent of the amount of the apartment or any plot or building at the moment they have entered into the contract of sale.

Under the REA there is a legal obligation on the builder for the formation of the project of real estate according to the blueprints set and the specifications which are approved by the concerned authorities. The builder has to execute the sale deed which is in the favour of the buyer within three months from the date of receiving the certificate of occupancy[20].

According to the provisions of REA, there will be a return of investment within a particular period[21]. The buyer has the full right to claim for the return along with the interest after providing the reason for the withdrawal of the project.[22] The buyer even has the right that they can claim for interest every month till the time they have handed over the possession within the forty-five days from the due date of the refund or the interest.[23]

Therefore, REA has added many legal obligations on the builders and has even provided the rights to the buyers which were previously not given statutory recognition and were in turn exploited by the sellers.[24]

[18] The Real Estate (Regulation and Development) Act, 2016, §11(1), India
[19] Id., §2(zm), The Real Estate (Regulation and Development) Act, 2016, India.
[20] Id., §17 (§2(zf), The Real Estate (Regulation and Development) Act, 2016, India
[21] Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 16, India
[22] The Real Estate (Regulation and Development) Act, 2016, §§12, 18(1), India
[23] Id., §18(1); Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 15, India.
[24] Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 16, India

Redressal:

The main objective of REA is to provide speedy dispute redressal by the formation of a specialized body for the same[25]. This is due to the consumer forums which are sensitive about the rights of the consumers but still, they are not able to provide speedy litigation therefore are causing delays in the litigation in India[26]. The builders take advantage and try to adopt a policy that will tire out the buyer and will thus lead them to have a meager settlement or even such policies sometimes frustrate the customer so much that it can lead to them withdrawing the legal action taken[27]. The consumers will have to do a lengthy task to get their legal action enforced like first they will have to go to the district forum then they will have to go to the state forum and then finally to the national forum which in turns becomes a lengthy as well as expensive for the buyers[28]. The builders to avoid the litigation process add the clause of arbitration and then hire a top-class legal counsel so that they can stay safe from the process of the litigation[29].

To provide the remedy to the consumers the REA has introduced a body for resolving the disputes in the real estate sector known as the RERA[30]. The REA also has the same guidelines of providing the period for the disposal of the appeals which is Sixty Days so that the appellate tribunal[31] can dispose of the appeals so that the consumers do not have to face any delay for their justice as provided by the consumer forums. The RERA does not only provide adjudication rather they even include the regulation, promotion as well as the monitoring of the real estate sector. [32]

According to the act of REA under Section 12, 14, 18, and 19[33] it is providing with the AO for the adjudging of the compensations. Therefore, the Rea is providing two forums which are RERA which can be used for filing a complaint against any violation taking place in the REA and the AO which can help in providing compensation.[34]

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[25] The Real Estate (Regulation and Development) Act, 2016, India
[26] Supra note 5
[27] Harish Narasappa, The Long, Expensive Road to Justice, India Today, (Last visited on February 14, 2017), available at http://india- today.intoday.in/story/judicial-system-judiciary-cji-law-cases-the-long-expensive-road-to-justice/1/652784.html.
[28] Consumer Protection Act, 1986, §§11, 15, 17, 19, 21, 23, India
[29] Do Not Fall Prey to One-Sided Builder Agreements, The Chambers of Law, (Last visited on January 13, 2017). , available at http://www.tcl-india.net/node/19.
[30] The Real Estate (Regulation and Development) Act, 2016, India
[31] Id., §44(5)
[32] Id., §11
[33] Id., §71(1)
[34] Id., §31(1)

If a person gives a reading to Section 31(1) of the REA then it will be clear that they provide the independence and the separation of the proceedings of both the forums. This can even be clear from the Chandigarh Real Estate (regulation and development) Rules 2016. It is not clear that what is the reason for the legislature to create two separate forums for the redressal particularly when in Section 72 of the REA explains clearly the factors which are required for the adjudication compensation[35]. The main objective of the legislation is to provide speedy justice and will be forming various forums so that the rights can be enforced properly and will further defeat the whole purpose of the law[36].

Another fundamental aspect of the redressal mechanism as mentioned under REA is that it does not expel the jurisdictions of the consumer forums. Section 71 of the REA states that the buyer will have to right to pull out the litigation which is pending under a consumer forum and will have the right to file a complaint under the AO for seeking compensation[37] for the benefit of buyers that they do not have to withdraw their proceedings the complaints can get transferred to the AO so that they get speedy redressal.

The multiple forums which are formed for the adjudication do not facilitate in the speedy redressal. The legislature has the right to stop the jurisdictions of other courts which include the consumer forums and can form another forum known as RERA in which only one officer will decide the amount of compensation to be provided to a person as per Section 72 of the REA. This act will facilitate the disposal of the complaints in a speedy manner and more efficiently without a further multiplicity of the claims. Due to this act, there are aforesaid remedies as well as arbitration.

Arbitration of disputes:

The Arbitration Act does not specify the specific terms in which kinds the disputes can be amended to arbitration. The arbitration bar is mentioned under Section 34(2)(b) and Section 48(2) of the arbitration act which states that an award can get easily challenged if the topic on which the dispute is taking place is not arbitrable[38]. In a general sense any dispute which is

[35] Id., §72
[36] Id., §4(2)(l)(C).
[37] Id., Proviso to §71(1)
[38] Booz Allen and Hamilton, Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532, ¶35

arising and is of a nature of either Civil or Commercial and arises due to a contract or anything else then the principle of arbitration will apply.[39]

The Test of the Nature of Rights:

This is the most essential test which needs to take place which helps in determining that a particular test will fall under the capability of being adjudicated or can be resolved by the help of a tribunal. In the Case of Booz Allen, the supreme court had explained about the differentiation between the rights in rem as well as the rights in personam. The court had further added that the rights in personam could be considered as the arbitrable rights and the rights in rem are not arbitrable rights. The rights in rem are available against the world and the rights to personnam are only available to the person[40]. The court further added that this differentiation is not rigid rather it can get changed according to the situation but the subordinate rights of personnam which are arising out of the rights in rem are arbitrable[41].

The court had expressed their view[42] that some categories about the proceedings which are kept aside for the public forums for the public policy and the parts which are not kept aside can get excluded from the purview of the private forums. For instance, if there is a suit related to the mortgage and is decided by the court as a provision of the transfer of property act 1882 and the order 34 of the code of civil procedure 1908 can be barred from adjudication by the tribunals.[43]

In the Case of Haryana telecom ltd vs Sterlite industries ltd[44] the supreme court had decided that the winding up of the petition is not done for the money and the power of the ordering of the winding up of the company can be emanated by the companies act. Therefore, it can be inferred that the winding up of the company cannot be related to the arbitration. And further, the granting of the probation is the judgment of in rem which is not within the jurisdiction of the tribunal.

On the other hand, the supreme court had said that the matters which are related to the particular performance of the sale is within the contractual rights and the order which is related to the

[39] Id.,29.
[40] P.J. Fitzgerald, Salmond on Jurisprudence, 235, (12th ed., 2009)
[41] Id., 21
[42] Booz Allen and Hamilton, Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532, ¶41
[43] Id., ¶48
[44] Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 SCC 688.

litigation in the courts then the performance of the contractor which is related to the immovable property cannot be considered under the test of the arbitrability under the arbitration act[45].

The Test of the Relief Sought:

Under the case of Bombay high court, Rakesh Malhotra vs Rajinder Kumar Malhotra[46], the court had held that the arbitration is not capable of granting the relief of the affairs of the company therefore it cannot be considered as the subject of arbitration. In the same way in the case of the Eros, international media ltd vs Telemax links India ltd[47] the Bombay high court had said that the rights of the contract which is related to the copyrights fall within the subject matter of the arbitration. Therefore, it can be inferred that the Bombay high court has formed the test of arbitration on the sole basis of the relief by the parties and not by the distinction caused in the parties' legal rights[48].

But if the Booz Allen test is applied to the arbitrability of the disputes related to the affairs of the company then it will fall within the subject matter of the rights in personam and therefore it will be considered to be arbitrable. But if the test of relief is applied then the dispute would be considered to be un-arbitrable[49]. Therefore, we can say that no test is capable of being conclusive in determining the arbitrability of the disputes.

The Test of Social objectives and Public policy:

The most Landmark Judgment on the disputes relating to arbitration is the Natraj studios ltd vs Navrang studios[50]. In this case, it was held that if the statutory remedy is present and the law has established a particular body then the parties should be provided with the permission to form a contract that is out of the statute. The Supreme court of the three-judge bench had decided that the dispute which had taken place between the landlord and the tenant was controlled by the Bombay rent act therefore it would not be considered to be arbitrable rather it will fall within the

[45] Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651; Keventer Agro Ltd. v. Seegram Co. Ltd., APO No. 499 of 1997 and CS No. 592 of 1997, decided on 27-1-1998.
[46] Rakesh Malhotra v. Rajinder Kumar Malhotra, 2014 SCC Online Bom 1146
[47] Eros International Media Ltd. v. Telemax Links India (P) Ltd., 2016 SCC Online Bom 2179
[48] Arthad Kurlekar, A False Start – Uncertainty in the Determination of Arbitrability in India, Kluwer Arbitration Blog, (Last visited on January 13, 2017), available at http://kluwerarbitrationblog.com/2016/06/16/a-false-start-uncer- tainty-in-the-determination-of-arbitrability-in-india/?_ga=1.183326437.2138946090.1480056 927
[49] Id¶46
[50] Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523: (1981) 2 SCR 466.

ambit of the small clauses court at Mumbai. The legislature had further conferred the jurisdictions on the certain courts for the achieving of various small objectives[51]. Further, the court had held that there is a need for the parties to be disallowed to enter into a contract that is formed out of a statute or is mandatory for the specific legislature. Thus, it can be inferred that if the civil court jurisdiction is not taken into consideration and the exclusive jurisdictions are provided with specific courts or the tribunals on the topic about public policy then such dispute would not be considered to be the topic of arbitration[52].

The Supreme court has viewed the clause of arbitration which will further not bar the jurisdiction of the COPRA[53]. This is true because the remedy is provided in addition to any other law and is considered to be optional.

In the case of HDFC bank ltd vs Satpal Singh Bakshi[54], it was held by the full bench of the Delhi high court that the parties should be provided with the chance to freely select the forums they want as per the situations for the dispute resolution despite the formation of the specialized tribunals. It can be said that such reasons were not provided to form a conclusion that is favouring arbitration rather it was given so that an alternative type of dispute resolution could be taken into consideration. The court had further added that the matters which are still not decided in the civil courts can even be referred to the Lok Adalats, Mediation, Conciliation, etc. Therefore, even after the formation of the specialized tribunals, the parties have the chance to choose their disputes to arbitration[55].

The Application of the Tests to the Disputes under the REA:

If the judgment provided by the supreme court in the case of Booz Allen is taken into consideration then it would be inferred that the violations of the provisions as provided in the REA then the rights of the rem will be seen as the violation of the builder is affecting all the buyers and not only an individual. Furthermore, the violation will be considered to be within the

[51] Id., ¶21
[52] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386: (2016) 5 Arb LR 326 (SC), ¶32.
[53] Consumer Protection Act, 1986, §3, India
[54] Skypak Couriers Ltd. v. Tata Chemicals Ltd., (2000) 5 SCC 294; National Seeds Corpn. Ltd.v. M. Madhusudhan Reddy, (2012) 2 SCC 506
[55] Id. ("While courts are State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been evolved over a period of time. One of the oldest among these is the arbitration.").

realm of the regulation and the real estate sector therefore it will be affecting the entire public. On the contrary, Sections 12, 14, 18, 19 which can be read with section 71 of the REA is related to the claim of compensation will fall within the ambit of the rights in personnam. Therefore, it can be inferred that if there is a violation in the REA then there will be no arbitration and if there is a compensation claim then there will be arbitration.

If the case of Bombay High court is taken into consideration then it will be inferred that the outcome will be almost the same as the relief which was claimed for the violations of the REA therefore it cannot be arbitrable. On the contrary, the claim for the compensation would be arbitrable because it is a private dispute among the buyer and the constructor.

It can be said that there are various dangers in this view because in the case of the Booz Allen test there is always been a confusion that according to the nature of rights it involves the right in rem or right in personam. Just like there is a delay in possession then there is a Violation of Sections 61, 18, and 19 of the REA. Just in the same way, some people try to seek reliefs which do not fall within the scope of the arbitration.

Thus, the test of the nature of rights the relief gained cannot be conclusive because it is difficult to determine that the disputes which are arising under REA can be referred to in arbitration. The main aim of the formation of REA was to enact the addressing of the delay in the litigation process and so that speedy redressal could be provided. And providing the jurisdiction of the RERA and AO in the favour of the tribunal which will in turn dismiss the sole purpose of REA. The purpose of this is that the process of arbitration is really expensive for the buyers and they would not even be provided with the protection under the REA related to the refund of money, interest, and any other kinds of protection as specified under the act. The main objective of the regulation and monitoring of the real estate sector will also get weak because the complaints and the grievances are not even reaching or registering under the RERA but are in turn just transferred to the tribunals.

The Results of the Arbitration and Conciliation Act 2015:

The Establishment of the Validity of the arbitration clauses concerning REA is one of the essential considerations because there is a need to take consent from the parties before taking

their dispute to the tribunal[56]. After all, for the arbitration, there is a need for consent. There are situations where the contract formed between the builder and buyer contains the terms which are mostly formed for the favouring of the builder[57]. These agreements are formed in a way that only the buyer will have to sign the document without giving them the chance to properly read the agreement or take the papers to a lawyer for legal advice[58].

The decisions related to the arbitrability was passed before the act of arbitration[59] was enacted. After the amendment took place the section 8(1) states that "despite any decision, decree or any order of the supreme court or any other court" the judicial body has to take the parties for arbitration unless a situation arises which is Prima Facie that there is no agreement which is valid for arbitration[60]. But under Section 8 of the Act, it clearly states that the court must refer the parties for arbitration[61]. Therefore, it can be said that the law after the amendment should be considered to be final and the parties should be referred to arbitration[62].

In the case of Ayyasamy vs A Paramasivam[63], the supreme court had held that the section 8 of the UNCITRAL model law facilitates that court to cancel the reference of arbitration and had said that the section of the act uses the word judicial authorities rather than using the word court. Therefore, the presence of the clause of arbitration in the agreement would make it necessary for Section 8 of the arbitration act for the parties to go to the tribunals[64]. But there is no clear indication that what all can be referred to as arbitrable and there is a need to form new laws which will turn make it clear that what all matters are arbitrable and what matters are not.

The ouster of the arbitration and tribunals:

Section 88 of the REA states that REA should always be a supplement to and should not be a derogate for any other law. If this provision is read by someone the conclusion which is mostly

[56] Alan redfern, Nigel Blackaby, Constantine Partasides and martin J. Hunter, Law and Practice of international commercial arbitration (4th ed. 2004).
[57] LIC v. Consumer Education and Research Centre, (1995) 5 SCC 482.
[58] Superintendence Co. of India (P) Ltd. v. Krishan Murgai, (1981) 2 SCC 246: (1980) 3 SCR 1278.
[59] The Arbitration and Conciliation Act, 1996, India
[60] Id., §8(1)
[61] P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539.
[62] Sundaram Finance Ltd. v. T. Thankam, (2015) 14 SCC 444: AIR 2015 SC 1303; Magma Leasing & Finance Ltd. v. Potluri Madhavilata, (2009) 10 SCC 103.
[63] A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386: (2016) 5 Arb LR 326 (SC).
[64] Id.,56

drawn is that arbitration is an alternative and is an option for the parties[65]. But the section 89 of the REA act states that, the provisions of this act should be properly enforced despite anything inconsistent in any law for the time when it is in force, accordingly, it can be presumed that Section 89 of the REA has an additional impact and not detract. Therefore, if there is a proper reading of both the sections then it can be clear that the provisions of REA will prevail in the arbitration act. But if the interpretation is done then Section 8(1) of the arbitration act makes it necessary for the reference of every case or dispute to the tribunal even when there is an arbitration clause. Therefore, there is a conflict between the two acts of REA and the Arbitration act that will be prevalent in the real estate sector. When any such dilemma arises then the only way to solve the problem is by using the principles of statutory interpretation.

- The REA is considered to be a social welfare law and will in turn help in the protection of the consumers. Therefore, according to the case of Natraj studios[66], the jurisdiction is provided to the RERA and AO and because of which the jurisdiction of the tribunals is excluded because they are the matter of the public policy[67]. Even after applying the principles of literal interpretation the Section 89 of the REA shows that the REA act will supplement all other legislations and the arbitration act will be applied[68].
- It has been said from a very long time that the conflict which is arising between the two statues that the specific legislation will be overriding the general legislations. This phrase is derived from the Latin Maxim i.e. Generalia Specialibus Non-Derogant which is perceived as the common law yields to a specific law, as they should excise in the same domain and on the general subject[69]. REA has been introduced for the regulation of the real estate sector and so that the consumers receive speedy justice therefore the clauses which are related to the arbitration should be considered to be invalid.
- The cost of having arbitration is very expensive and the process is quite confusing because of which various consumers do not understand the concept. The REA has the main objective of providing speedy redressal and enabling the consumers to use any

[65] Skypak Couriers Ltd. v. Tata Chemicals Ltd., (2000) 5 SCC 294; National Seeds Corpn. Ltd. M. Madhusudhan Reddy, (2012) 2 SCC 506.
[66] Natraj Studios (P) Ltd. v. Navrang Studios, (1981) 1 SCC 523: (1981) 2 SCR 466.
[67] Hindustan Lever Ltd. v. Ashok Vishnu Kate, (1995) 6 SCC 326.
[68] Govt. of A.P. v. Road Rollers Owners Welfare Assn., (2004) 6 SCC 210
[69] CTO v. Binani Cement Ltd., (2014) 8 SCC 319: (2014) 3 SCR 1.

redressal mechanism they wish too as stated in the case of HDFC bank[70]. According to the REA,[71] the cost of seeking redressal is low and the buyers will be able to appear before the authorities.[72]

- The REA enables for providing of the strict timelines for the refund of money like it provides only forty-five days[73] and even seeks an interest which is more than the rate of the bank[74]. The relief which the REA provides to the consumers cannot be received through tribunals because a standard will apply to all consumers and will always depend upon the facts of the case and the choice of the tribunals that they want to provide those reliefs or not.

Conclusion:

There is an immense need for the Enactment of REA and will help in the Protection of the interest of the buyers. This act will protect the buyers from the loop sided agreements and the long process of litigations just for seeking the enforcement of their rights. Through REA transparency can be introduced which will help in cutting down the number of frauds which are taking place in the real estate sector and will help in providing of the statutory recognition to the rights of the buyers which were not provided before as the buyers didn't receive the rights of negotiating freely with the builders for the agreements.

It is necessary to do the registration by the builders and the brokers because it will help in the addition of the credibility of the builders and the consumers will be capable to purchase the property with certainty. Through the introduction of RERA and AO, the buyers who used to invest so much in the real estate sector will be able to receive a huge relief because before they had to run so much for gaining possession or taking a refund of their money. Through the verification of the titles, blocking of the seventy-five percent of the money has helped the buyers because now there is timely completion of the projects. Through this act the builders will not start the projects without the required capital and if they cannot even complete those projects.

[70] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC Online Del 4815.
[71] Fair Air Engineers (P) Ltd. v. N.K. Modi, (1996) 6 SCC 385: AIR 1997 SC 533.
[72] Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rules 34, 35), India.
[73] Chandigarh Real Estate (Regulation and Development) (General) Rules, 2016, Rule 16, India
[74] Id., Rule 15

There is a conflict taking place between the REA and the arbitration clause because the REA even applies to the projects which still not have received the certificate of occupancy. Therefore, the arbitration clause which exists in the builder- buyer agreement creates a conflict among the redressal mechanism of the two acts.

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MEDIATION AND ITS SCOPE FOR SOCIETAL DEVELOPMENT

By: Balabavithra M[1] & Rangarajan R[2]

ABSTRACT

When the Alternative dispute resolution opens new vistas, the system gave birth to mediation. Mediation is the Brainchild of the dispute resolution where new techniques and modern forms of negotiation are ablied under the influence of an impartial third party. Mediation allows the voices of each party to be heard, keeping in mind the fair motive. Mediation is considered the most realistic form of dispute resolution in the modern era. This article provides a wide discussion by envisaging the ways in which Mediation as a mechanism has developed and contributed towards the societal development at a large.

The Article provides a comparison of the mediation mechanism between India and the rest of the world underlining the growth throughout the history of the world and India. The article also makes a vast clarity on the laws governing mediation in International standards and in the Indian standards. Furthermore, the article walks through the advantages and the disadvantages and provides the ideas that could be used to rectify them. To enhance the better understanding very important cases have been analyzed to increase the proximity of the reader's grasp.

Keywords: Mediation, procedure, Mediation Laws, Indian laws, Societal Development, Advantages, Disadvantages, Remedy

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Mediation, a type of ADR that can be defined as the interference; conciliation, or the act of a third person, interfering between two parties, contingent to disputes to reconcile them or persuade them to mutual adjustment or settlement. Under International Law, the concept of Mediation indicates a friendly interference of any state in the disputation of others which may lead to a dispute, to maintain the peace in the society[3].

It is a flexible and an informal, confidential way of proceeding among the parties to a disagreement, where the intervention a third party is applied, a Mediator, whose job include to negotiate the conflict of the opinion of the parties and to help them achieve a settlement or agreement on their own. Although the agreement achieved through the mediation is binding, the mediator has no right to make any binding resolutions[4].

Mediation is an informal way, unconventional to litigation, where the parties to a dispute meet with a neutral mediator to settle their differences and disputes. The mediators are individuals trained in negotiations, who attempts to work on a settlement or agreement, mutually agreed by both the parties to the dispute. Arbitration is more formal than Mediation and resembles a simplified version of a trial involving limited discovery and simplified rules of evidence[5].

Through this article, the authors will drive the readers to focus on the process of Mediation and its scope in the societal development by discussing the history, the practice, and the advantages and disadvantages of Mediation with the world and India scenario.

History

Law is a system of rules enforced, which exists across the nation. It can be commonly regarded as the guardian angel, which provides a source of protection against illegal and unjustness. It is difficult to define what law is, as there is no one definition, universally accepted. The legal system varies between countries. Each country has its own civil and criminal law, private and public law. The commonly followed legal proceeding is litigation. It can be described as a process of engaging in a lawsuit before a Court of law. However, due to the overburdening of the

[3] Black's Law Dictionary, https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionery.pdf
[4] CPR International Institute for Conflict Prevention & Resolution, https://www.cpradr.org/resource-center/rules/mediation/cpr-mediation-procedure
[5] *Ibid*

Court, there seems to be a delay in justice. A substitute way of lessening the burden of the Court and to avail justice is through Alternative Dispute Resolution (ADR).

ADR is an alternative way of settling disputes in a non-adversarial manner, it refers to any means of settling disputes outside of the courtroom. ADR typically includes early natural evaluation, negotiation, conciliation, mediation, and arbitration[6]. The most common forms of ADR are arbitration and mediation.

The process of solving disputes among the parties without involving a lawsuit has been an age-old practice and is deep-rooted. Even before the codification law, the process of ADR especially Mediation has been existing. Historians are of the view that the earliest case dates back to the Phoenician commerce[7]. Cases of Mediation traces back to Ancient Greece, where the village elders used to mediate disputes among the villagers[8].

In the Roman Era, the practice of Mediation was a prime source of dispute resolution and the mediators were called with various names such as *internuncius, medium, intercessor phlantropus, etc.*

Mediation has been used as a tool to sort out various disputes. In the UK, Mediation came into force in 1999. When sweeping reform "Woolf Reform", aimed at making the civil litigation quicker, simpler, and less adversarial effect[9]. It has been made compulsory for separating couples to go through the process of mediation in the UK and has seen a rise in Mediation preference to settle disputes after the Children and Families Act,2014[10].

In India, the process and practice of mediation have been rooted deeply and dates back to the earlier days where the Panchayat Raj system was predominantly p prevailed. The adoption of a developed concept of ADR mechanism was an outcome of a study made by the Institute for the

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[6] Legal Information Institute, Alternative Dispute Resolution, (August.18,2020), https://www.law.cornell.edu/wex/alternative_dispute_resolution

[7] Antonello Miranda, Academia, The Origins of Mediation and the A.D.R tools, (August.20,2020), https://www.academia.edu/9611797/The_Origins_of_Mediation_and_the_A_D_R_tools

[8] Disputes Mediation, History of Mediation & Overview of Mediation, (August.19, 2020), https://disputesmediation.com/history-of-mediation/

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[10] Disputes Mediation, History of Mediation & Overview of Mediation, (August.19, 2020), https://disputesmediation.com/history-of-mediation/

Study and Development of Legal Systems (ISDLS), the USA in the year 1966 due to Hon'ble Mr. Justice A.H. Ahmedi, in respect to the causes of delay in the civil jurisdiction in our country[11].

Recent Advances in the Field of Mediation:

The term 'mediator', is used to denote a neutral third person/party in a conflict. A mediator can be defined as a person, possessing the legal knowledge and skills, required to carry out a settlement of a dispute. The mediator, in other words, is a counselor, who helps the parties in dispute, to have their resolution. Mediator's job is only of assisting the parties and not to decide the outcome. A mediator's duty involves conducting a fair and neutral proceeding of negotiation. The mediator has to, in best of his interest, tend to put an end to the existing dispute among the parties and to show them a pathway to attain a mutually accepted solution. The duties of a mediator also involve maintaining the confidentiality and to have a rational inquiry. The mediator is said to be a mode of communication between the disputed parties, providing them with legal guidance to achieve a solution.

Disputes prevail in all corners of the world. Some of them are sorted out within a week and some take months and months when approached the settlement through a lawsuit. There are numerous pending cases before the Courts, which makes it nearly impossible for the jury to provide a judgment or to come up with a solution immediately or within a week's time. The recent addition of the pandemic, to the world's priorly existing troubles, has exacerbated the case backlogs. The restrictions on travels, which have reduced the workforce have given an upward push to the use of mediation through virtual procedures.

Mediation is a frequently use and most preferred mode of dispute resolving as it includes numerous advantages such as:

- **Cost-Efficient** – Mediation charges less fee for Litigation and other legal proceedings;
- **Fast and Flexible** – It is a quicker and flexible way to arrive at a mutually agreed solution;

[11] Delhi Mediation Centre, History, (August.19,2020), https://delhicourts.nic.in/dmc/history.htm

- **Confidentiality** – what is said during the mediation, stays among the parties to the dispute and the Mediator as it only includes the parties relevant to the disputed matter apart from the mediator, unlike the procedures involved in litigation.

Procedure for Seeking Mediation:

Mediation is one of the processes, adopted for the peaceful settlement of the International disputes, whereby a third party (a country or an individual or an organization) interferes between the disputed parties for resolving the conflict. The mediating party, on its own or at the request of the disputed parties, takes part in the parley among the two to advance a mutually agreed proposition[12]. The process of Mediation, includes the gathering of the disputed parties, separately for the negotiation to take place. The individual entity, acting as a mediator carries the offers and counter-offers, demands, and propositions among both parties to help them arrive at a mutual conclusion[13]. The conclusion, arrived through mediation is non-binding unless both the parties agree.

In India, section 89[14] of the Code of Civil Procedure (CPC) provides of Alternative Dispute Resolution methods to settle the disputes pending before the court. Under section 89 CPC, the

[12] International Law Mediation, https://law.jrank.org/pages/8519/Mediation-International-Law.html
[13] FINRA, Mediation Process, https://www.finra.org/arbitration-mediation/mediation-process
[14] Section 89. Settlement of disputes outside the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:--

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation.

(2) Were a dispute has been referred--

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

consent of parties referring to judicial settlement, Lok Adalat, or Mediation is not mandatory. The Judge possesses the power of compulsory reference[15]. As per Rule 5 of the Alternative Dispute Resolution and Mediation Rule,2003[16], the parties to a suit can opt for ADR procedure

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(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

[15] The Civil Procedure-Mediation Rules, 2003, contains provision for mandatory mediation under rule 5(f) (ii). As per this rule, if the parties are not ready for mediation or conciliation and if the court finds that there is an element of settlement and the relationship of the parties has to be preserved, the court may refer the case for mediation to see the chance for settlement.

[16] Rule 5: Procedure for reference by the Court to the different modes of settlement: (a) Where all parties to the suit decide to exercise their option and to agree for settlement by arbitration, they shall apply to the Court, within fifteen days of the direction of the Court under clause (b) of Rule 2 and the Court shall, within fifteen days of the said application, refer the matter to arbitration and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings were referred for settlement by way of arbitration under the provisions of that Act;

(b) Where all the parties to the suit decide to exercise their option and to agree for settlement by the Lok Adalat, they shall apply to the Court, within fifteen days of the direction under clause (b) of Rule 2 and the Court shall, within fifteen days of the application, transfer the matter to the Lok Adalat under sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and then all the other provisions of that Act shall apply as if the proceedings were referred for settlement by Lok Adalat under the provisions of that Act; (c) Where all the parties to the suit decide to exercise their option and to agree for judicial settlement, they shall apply to the Court within fifteen days of the direction under clause (b) of Rule 2 and then the Court shall, within fifteen days of the application, transfer the matter to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and then all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the proceedings were referred for settlement under the provision of that Act;

(d) Where all the parties are unable to opt or agree to refer the dispute to arbitration, or Lok Adalat, or the judicial settlement, within fifteen days of the direction of the Court under clause (b) of Rule 2, they shall consider if they could agree for reference to conciliation or mediation, within the same period.

(e) (i) Where all the parties opt and agree for conciliation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application refer the matter to conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceeding were referred for settlement by way of conciliation under the provisions of that Act;

(e) (ii) Where all the parties opt and agree for mediation, they shall apply to the Court, within fifteen days of the direction under Rule 2 and the Court shall, within fifteen days of the application, refer the matter to mediation and then the Mediation Rules, 2003 in Part II shall apply.

(f) Where under clause (d), all the parties are not able to opt and agree for conciliation or mediation, one or more parties may apply to the Court within fifteen days of the direction under clause (b) of Rule 2, seeking settlement through conciliation or mediation, as the case may be, and in that event, the Court shall, within a further period of fifteen days issue notice to the other parties to respond to the application, and

(i) in case all the parties agree, the Court shall refer the matter to conciliation or mediation, as the case may be, as stated in clause (e);

(ii) in case all the parties do not agree and where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties and that there is a relationship between the parties which has to be preserved, the Court shall refer the matter to conciliation or mediation, as the case may be.

(g) (i) Where none of the parties apply for reference either to arbitration, or Lok Adalat, or judicial settlement, or for conciliation or mediation, within fifteen days of the direction under clause (b) of Rule 2, the Court shall, within a further period of fifteen days, issue notices to the parties or their representatives fixing the matter for hearing on the question of making a reference either to conciliation or mediation.

to resolve their dispute, if all the parties to the suit, on an application made in regards to the opting of ADR methods, the court may refer the matter under respective law to such methods. If there is no mutual agreement for opting ADR methods, if one of the parties issue a notice for reference for mediation or conciliation, the court can refer the matter to the same. The mandatory reference of mediation or conciliation under rule 5(f) (ii), by the court, occurs only when the court after hearing to matter at dispute, is of the opinion that there exists an element of outside the court settlement, which may be accepted by both the parties, refers the matter for mediation or conciliation. Disputes arising out to marital relationships are made compulsory to opt mediation, before appearing in front of the Court.

Analysis – The Advantages and Disadvantages of Mediation:

The ADR mechanism has proven to be one of the most efficacious mechanisms to resolve disputes of national and international nature[17]. To reduce the backlog of cases pending in the courts, the Judiciary has encouraged the use of out-of-court settlements and for the effective implementation of the ADR mechanism, organizations such as the Indian Council of Arbitration (ICA), International centra for Alternate Dispute Resolution (ICADR) were established[18]. In 2003[19], a case was filed where issues related to the failed ADR mechanism were raised. The Apex court in the same case observed the inadequate capacity of the case management system, despite a subsist of ADR framework being available under CPC. In the "Salem II" case[20], based on the obiter dicta, the mediation came into focus.

The court enacted certain changes in the management of the cases, new rules were implemented, and court-connected mediation centers were established. This change expanded the role of court-connected mediation in the justice delivery system in India. Furthermore, In the case of **Afcons**

(ii) After hearing the parties or their representatives on the day so fixed, the Court shall, whether parties agree or not, and if there exist elements of the settlement which may be acceptable to the parties, refer the matter to:
(A) conciliation, if the Court considers that the matter is fit for conciliation and then the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply, as if the proceedings referred for settlement by way of conciliation under the provisions of that Act; or
(B) mediation, if the Court considers that the matter is fit for mediation and then the provisions of the Mediation Rules, 2003 in Part II shall apply.

[17] Vinay Vaish, Alternate Dispute Resolution (ADR) in India, Mondaq, https://www.mondaq.com/india/court-procedure/654324/alternate-dispute-resolution-adr-in-india

[18] *Ibid*

[19] Salem Advocate Bar Association vs Union of India, (2003) 1 SCC 49.

[20] Salem Advocate Bar Association vs Union of India, (2005) 6 SCC 344.

Infra Ltd vs M/S Cherian Varkey Constructions (2010)[21], the Supreme court of India held that all the cases related to the trade, commerce, contracts, consumer disputes, marital disputes, and even tortious liability should normally be mediated. In the case of the **Babri Masjid case** [22], the chief justice of India himself stepped into the position of a mediator to provide a mediation facility to the warring parties. In 2013[23], the family courts were directed to opt mediation to settle marital disputes with the consent of the parties, mostly for the matters concerning the maintenance, custody of the child, etc.

Mediation, being an informed way of dispute resolution, involves neutralizing communication skills and powerful bargaining strategies of facilitated negotiation, strengthens the capacity of the judiciary in delivering justice[24]. In 2011, the Apex Court of India declared that mediation proceedings are confidential, and only an executed settlement agreement or a statement that the mediation proceedings were unsuccessful, should provide to the court by the mediator[25]. Apart from being confidential, Mediation provides for additional advantages and disadvantages in the course of justice providing when compared with litigation.

The following are the major advantages of mediation on a grassroots study:

1. One of the reasons for the preference of Mediation, for dispute resolution, is the "not so lengthy litigation processes". The course of mediation can be for weeks or months to finish, at the same time it could take a maximum of a few days to arrive at a mutually agreed conclusion. It is preferred over litigation as it cut shorts the total amount of time, which involves in a lawsuit before a Court.
2. The second reason for preferring mediation over litigation is "the informal way". Mediation involves an informal way of negotiation, whereby the parties to the disputes addresses the issues to the mediator in the presence of either of the party or can also do it individually depending upon their preference. Thereby having full control over the resolution of disputes at the hands of the parties.

[21] 2010 (8) SCC 24
[22] Dr M. Ismail Frauqui and ors. vs Union of India and ors AIR 1995 SC 605
[23] B.S. Krishnamurthy vs B.S. Nagaraj S.L.P. Civil No(s). 2896 of 2010
[24] Hiram E. Chodosh, MEDIATING MEDIATION IN INDIA, http://lawcommissionofindia.nic.in/adr_conf/chodosh4.pdf
[25] Moti Ram (D) vs Ashok Kumar and Anr. [2010] 14 (ADDL.) SCR809

3. Mediation provides a "control over the outcome" of the dispute. The parties to the dispute can continue the proceedings till both the parties agree upon the same agreement which gives a win-win situation to both parties, unlike the litigation proceedings which is binding on both the parties even if they disagree.
4. "Low cost" involved in Mediation as compared to litigation. Mediation costs depend upon the hourly rate and on the experience of the mediator.
5. It is a "private and confidential" proceedings, where only the mediator and the parties involved are aware of the facts and issues of the case. Unlike the lawsuit filed in a court whereby individuals other than the involved parties to a dispute are present.
6. In Mediation, "shreds of evidence not limited by normal court rules". One can submit any evidence that would not be normally considered in the proceedings, even in between of the negotiation.

And the disadvantages of the mediation include the following:

1. As there are no rules as to the submission of evidence, it can at times be a disadvantage to the proceedings as either of the party many submit "irrelevant or false evidence" to the proceedings, for one's benefit.
2. There is "no guarantee in mediation" as the proceeding might breakthrough in the between as the whole of the negotiation proceeding depends upon the parties.
3. Privacy in Mediation can at times be a "hindrance in proving one's innocence". When an accused has been made publicly, mediation can't prove to be a significant solution provider.
4. "Resolutions aren't guaranteed in mediation". A revolution can't be considered as a solution unless both the parties agree. There's no guarantee of attaining a mutually accepted agreement among the parties to a dispute unless the matter involved is of financial dispute or is of a marital dispute.

On a more vivid study if we analyze the disadvantages of the mediation, we can find the reasons for the failure of mediation :

Mediation, though it has a lot of advantages and has been made vital for any disputes before proceeding with a lawsuit, is in constant failure. At times, it causes an impasse where the disputants are unable or aren't willing to communicate with each other or with the mediator, to reach a mutually agreed solution to their disputes. This impasse becomes an obstacle in the course of mediation which results in its failure to provide a medium to procure a solution outside the court. There are few other reasons for the failure, which are dealt with in detail below-

1. **Lack of communication**- As mentioned above, lack of communication with the mediator or with the opponent party Infront of the mediator can result in the failure. Effective mediation requires a proper divulgence of the issues to acquire the expected solution.
2. **Lack of unanimity on key issues**- A major role in a successive mediation is a unanimous understanding of the key issue. At times, the disputed parties may tend to have a difference of understanding of the issues at hand. A mediator has to make sure that the parties to the dispute are having a mutual understanding regarding the issues to be resolved.
3. **Limited amount of time** – The mediator has to grasp the issues, facts, evidence and have his own interpretation of the matter at hand, to provide a better, mutually agreed solution to the parties within the limited amount of time present for a mediation. At times it tends to be difficult for the mediator to have an understanding of the matter and to come up with an appropriate solution within the time frame.
4. **Too many parties involved** – At times, in a commercial dispute, where the number of disputed personas present is more than two, it becomes difficult at the end of the mediator to arrive at an issue, mutually being agreed by all of the parties and to give a solution.
5. **Lack of key information** – Why communicating the issues, the parties may, at times leave out essential information, which may be a game-changing point in arriving at the solution. The mediator being the third party to the dispute, may believe that the information received is, to his/her best knowledge to be whole of the information at may create an agreement on the basis on it, but later, after acquiring the rest of the key information, the whole of the agreement may change or not be adequate to solve the problem.

Steps For a Successful Mediation:

1. Always find the best time to resolve the dispute while mediating – Mediation can happen at any time of the dispute but choosing the right time to initiate this mediation process promotes an orderly resolution of the dispute at hand.
2. Have a good faith – The intention of the mediator and the parties should be to resolve the dispute.
3. Investigate – Ensure proper investigation of all spheres has been made when addressing the problem/dispute.
4. Look for a strong mediator – Make sure the mediator is strong, effective, and most importantly impartial. Select a mediator preferably the one, which both the parties are comfortable with.
5. Have a clear mediation brief – Your mediation brief should not only be succinct but also persuasive. A mediation brief should contain the cogent statement of facts and all the legal arguments
6. Make a pleasing presentation – Prepare a presentation that is effective enough to resolve the dispute, while verbally presenting the arguments or case that is to be resolved.
7. Communicate with the purpose – listen to understand not to reply with a counter. Make sure the communication with the mediator is utilized during the private sessions allowed.
8. Creative – Mediation demands a huge demand for the mediator's creative problem-solving skills.
9. Conclude – Make sure the mediation concludes with the settlement agreement.

Conclusion:

The expose written, very vividly explains that the role of the mediator is the key to all the mediation procedure and shows the development of mediation in the present society throughout history. The article has given a brief about the advantages and disadvantages of the mediation procedure. Thus, according to the authors, the scope for future development in mediation can be observed by rectifying the reasons that cause the failure of the mediation and by utilizing the suggestive measures given in this article. Thus, Mediation is the most effective method of

alternative dispute resolutions. Further, development in this field of mediation – ADR could be observed post-2020 considering the movement of the larger number mass to sort dispute resolution rather than sorting the remedy through the court of law.

RESTRUCTURING THE WORLD OF ARBITRATION

By: Siddhi Shubhangi[1]

ABSTRACT

The research paper titled "Restructuring the world of Arbitration" talks about two important aspects namely ADR and COVID-19. With the current outbreak of pandemic, each and every industry and sector has been gravely impacted. The paper talks about the general mechanism of ADR and the mechanism we have adopted or rather we can say "had to adopt" due to the coronavirus. The paper consists of reasons as to why there was a need of virtual platform. It talks about how virtual platform has made the system less tedious but at the same time complex. The paper talks about few provisions in law and rules which encourages virtual hearing and settlement of the matters in ADR. The paper further analyses the arbitration system in light of the loopholes intact with them. The paper includes the pros and cons of the virtual system of dispute resolution and puts forward both sides of the coin.

The paper includes suggestion in respect of what better measures can be taken for effective outcomes and improved management. It lays down ideas to adapt. The paper draws a conclusive statement after researching on the entire scenario of the pandemic. The entire research is genuine and information is taken from authentic sources. The paper is a complete study of dispute resolution and pandemic.

A. Research question

i) Why is a virtual platform needed for arbitration needed?
ii) What is the difference in situation seen in dispute resolution sector?
iii) Analysis of the new arbitration system in light of the loopholes intact with them.
iv) How can we approach in a better manner in this pandemic?

B. Research objective

The paper mainly aims to establish a comparative picture of alternative dispute resolution in respect of earlier process of ADR and the current process of ADR. The paper includes few case laws which are relevant at this point. The main objective of the research is to highlight

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the new methods that have emerged as a creative and faster means to settle disputes. The issues have also been addressed along with suggestive conclusion.

C. Chapterization

Chapter 1: Introduction

Chapter 2: The new arbitration

Chapter 3: Now and after

Chapter 4: Development of virtual system of arbitration

Chapter 5: Roadblocks for arbitration

Chapter 6: Suggestive way forward

Chapter 7: Institutional framework for virtual hearings: extracted and summarized

Chapter 8: Conclusion

D. Research methodology

The research methodology adopted is doctrinal legal research method. Various e-books and web sources have been referred and information has been taken from authentic websites and journals. The referred information has been duly acknowledged and mentioned.

1. Introduction

In an age where social isolation became the new norm and the survival doctrine, its resonance and impact can be seen in virtually every area of life. At this juncture, the greatest obstacle that one has to face is being equipped to deal with the difficulties that the current situation has to bring. Since the release of COVID-19, the world has come to a standstill and has constantly been struggling to find a way to bring the situation back to normal. The basic purpose of the agreement may be assumed to provide the parties to the conflict with a timely and efficient settlement without the rigours of the law[2]. As a result, the rules regulating arbitration have often been designed in such a manner as to preserve as much as possible the privacy of the parties as a priority. In addition, the majority of disputes which can be arbitrated are of a civil nature and therefore take into account[3] the settled principle of civil

[2] Dr. P.C. Markanda, Naresh Markanda & Rajesh Markanda, 'Law Relating to Arbitration & Conciliation' 35 8th ed. 2013 LexisNexis.
[3] ONGC Ltd. v. Oil Country Tubular Ltd., 2011 SCC OnLine Bom. 426.

law which balances the convenience of both parties. Hence, it shall be determined by mutual consensus of the parties before agreeing on the status of arbitration. In addition, the majority of disputes which can be arbitrated are of a civil nature and therefore take into account the settled principle of civil law which balances the convenience of both parties. It must, however, be determined by mutual consensus between the parties when agreeing on the status of arbitration.

It has been very correctly stated by Lord Chief Justice Hewart, "*Justice should not only be done but should manifestly and undoubtedly be seen to be done*"[4], which today, in most situations, are massively undermined by holding those coercive terms[5]."

2. The New Arbitration:

Many arbitration arrangements are also considered to have a fixed seat and place. However, when we continue to consider an international case such as the current situation in the middle of COVID-19, the preliminary question arises as to how the parties can honour the position of arbitration as agreed by the parties when they enter into an agreement. It is also a sad fact that humorous companies resort to arbitral tribunals which tend to appoint such arbitral tribunals or to pick arbitral tribunals which, by definition, come with luxurious venues which improve the credibility of the business in a dispute.[6] In the current age of technical advancement, even then, it is also depressing to note that the existing legal structure of our country allows only the parties to enter into an arbitration agreement to send their pending or prospective disputes to arbitration via the exchange of e-mails, but the Act leaves a void by making no provision whatsoever for electronic arbitration or enabling them to do so.[7] However, in the modern era of technological growth, it is also saddening to note that the present legal framework of our country allows only the parties to enter into an arbitration agreement and bring their pending or prospective disputes to arbitration through the exchange of e-mails[8], the Act provides a loophole, however, by making no allowance whatsoever for conducting arbitral hearings

[4] R v. Sussex Justices, ex parte McCarthy, [1924] 1 KB 256.
[5] Dolphin Drilling Ltd. v. M/s. Oil and Natural Gas Corporation Ltd., (2010) 3 SCC 267.
[6] *Id*
[7] Shwetank Tripathi & Pallavi Verma, 'The effect of invalidity of underlying contract on the Arbitration Clause: A Critique on the Doctrine of separability in Arbitration' (August 29, 2020, 10:34PM) available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=22055.
[8] The Arbitration and Conciliation Act, 1996, § 7, No. 26, Acts of Parliament, 1996 (India).

remotely or enabling them to do so by the online institution of arbitral proceedings[9]. With the advent of COVID-19, arbitral bodies around the world have taken the lead and paved the way for an electronic tribunal to deal with the cases presented before them, meaning that the disputes are not indefinitely postponed for too long. In this respect , it is important to take notice of the joint declaration issued by the International Federation of Commercial Arbitration Institutions and other leading arbitral institutions, such as the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the London International Arbitration Court, etc., on 16 April 2020.[10] Most of the world's leading arbitral agencies, who were part of the Joint Declaration, unanimously decided to make virtual proceedings the standard for any conflicts pending with effective cyber protection controls, the parties were instructed to connect via e-mail and telephone and to cooperate with the time-frame and to make the awards accessible to them by issuing virtual copies[11].

These organisations have already paved the way for the introduction of fresh arbitration applications, as well as for the submission of emergency applications for the start of arbitral proceedings via e-mail[12], underlining the need for cooperation between the various inter-alia parties, the plaintiffs, the arbitrator, the arbitral body as the case may be, established techniques that could include simulated hearing facilities without the applicants moving to the venue, taking into consideration social distancing initiatives and enforcing travel restrictions.

3. Now and After:

Many of the world's main arbitral organisations have been alert to the present scenario and, as a result, have revised their laws to address the extraordinary pandemic circumstance. But, closer to home, India's arbitral agencies, such as the Indian Arbitration Council, the Delhi

[9] Atish Chakraborty, 'Online Arbitration Model: A Need of the Hour', 4 Cal. LT 14, 28 (2019).
[10] 'Arbitral institutions COVID-19 joint statement' International Chambers of Commerce, (August 10, 2020 09:56AM) available at https://iccwbo.org/publication/arbitral-institutions-joint-statement-in-the-wake-of-the-covid-19-outbreak/.
[11] Janet Walker, 'Virtual Hearings: An Arbitrator's Perspective, Int-Arb Arbitrators' (August 01, 2020,10:54 AM), https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf. (hereinafter "Janet Walker")
[12] *Id.*

International Arbitration Centre[13] and the Mumbai International Arbitration Centre[14], are yet to make any attempt to make arbitration a virtual reality.

The Arbitration & Conciliation Act of 1996 was amended in 2019, which led to the creation of the Arbitration Council of India with the intention of implementing legislation to promote arbitration in India[15]. However, until now, the Council has not been able to formulate a mechanism for the automated launch of proceedings, the conducting of trials remotely. If we now look at the arbitral hearings in arbitral tribunals in India, which are often constituted by the judge or by the parties, there are virtually no provisions for such courts in India for the execution of the arbitral proceedings. Consequently, these tribunals cannot be blamed for deriving their jurisdiction from the Arbitration & Conciliation Act of 1996.

Although the law on automatic trials remains vague, the courts have therefore tied their hands so that they cannot require the trial to be conducted remotely. In order to do that, that would mean that the court, by constituting such a tribunal, had moved beyond the reach of the statute and that such a decision by the court will thus be deemed to be poor in fact. It is time to enact changes to the Arbitration & Conciliation Act, 1996, to recognise the entities of virtual or digital arbitration proceeding, to set up internet hearings that establish an arbitral tribunal and, eventually, that set up a regulatory mechanism that will enable virtual or remote hearings of the arbitral proceedings and the award to take place in effect. The Indian Arbitration Council should use its powers to facilitate simulated hearings and enable arbitral agencies and arbitrators to conform to such arbitration procedure[16]. Finally, the Arbitral Institutions in India should amend their rules in such a way as to ease the obligation as to the status of arbitration and should take a pragmatic approach, recommending to the parties to carry out virtually all the existing proceedings, which will encourage the institutions to go a long way not only by keeping with the timetable, but also by speeding up the process, which is one of the main objectives of the arbitration and arbitration proceeding. These organisations should make provisions for emerging disputes with technological institutions and should formulate protocols for the effective management of those disputes.

[13] Delhi International Arbitration Centre, available at http://www.dacdelhi.org/.
[14] Mumbai International Arbitration Centre, available at https://mcia.org.in/.
[15] The Arbitration and Conciliation Act, 1996, § 43D (1), No. 26, Acts of Parliament, 1996 (India).
[16] Chakraborty Atish & Chakraborty Aurin, 'Rethinking the Practicalities of Arbitration in the Age of a Pandemic' (August 18, 2020 at 07:39PM) available at https://ssrn.com/abstract=3628923 or http://dx.doi.org/10.2139/ssrn.3628923.

In the international system, an organisation such as the American Arbitration Association-International Centre for Dispute Resolution grants for Virtual Hearing by Video Conference, as well as for legal practise education manuals for arbitrators and parties[17]. The HKIAC also offers a venue for electronic trials through its robust digital hearing facilities.[18]

The International Chamber of Commerce also prefers to use a video sharing network that is used for virtual hearings and approved to ensure the greatest possible privacy. The Guidance Note also points out the 'Suggested Provisions for Cyber-Protocols and Procedural Orders for the Conduct of Virtual Proceedings' with the necessary protection[19].

4. Development of Virtual System of Arbitration:

The 7th Asia Pacific ADR Meeting, held in Seoul , Korea, on 5-6 November 2018, was accompanied by a wide-ranging debate on the feasibility of using video conferences to perform arbitral hearings[20]. At the beginning, the Conference addressed some of the main obstacles that could be met by such virtual hearings. Taking a careful note of the major problems that might occur in the process, the Seoul Protocol (hereinafter referred to as the 'Protocol') was devised by a group of experts and professionals who gathered and outlined best practices for the preparation, monitoring and efficiency of video conferencing for international arbitration, and also taking account of the challenges that could occur as a result of this process, a dual framework for dealing with hacking and secrecy concerns has been established and provisions have been designed to ensure that the due process of law is upheld as far as possible.[21]

The key issues that were identified are as follows-

- *Possible hacking and issues of privacy*

[17] Covid19-flattening the curve, https://go.adr.org/covid19-flattening-the-curve.html (last visited May 10, 2020).
[18] Online Dispute Resolution: Now and the Future, https://www.hkiac.org/events/online-dispute-resolution-now-and-future (last visited Aug, 12, 2020).
[19]ICCA-IBA Joint Task Force on Data Protection in International Arbitration Proceedings, https://www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html (last visited May 12, 2020).
[20]The Seoul Protocol on Videoconferencing and the Coronavirus (COVID-19) Pandemic, https://www.jdsupra.com/legalnews/the-seoul-protocol-on-videoconferencing-89404/ (last visited May 10, 2020).
[21] Jiyoon Hong, *Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing*, (May 12, 2020, 9:40pm), http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/. (hereinafter "Hong")

It has also been observed that data security vulnerabilities appear to occur in such virtual hearings of international arbitral proceedings. For example, in the 2015 Philippines-China territorial dispute, hackers allegedly targeted the Philippines Department of Justice, a law firm representing the Philippines, and the website of the Permanent Court of Arbitration. Articles 2.1(c) and 2.2 of the Protocol explicitly discussed the risk of a violation of security and proposed that the connexion to a video conference be properly secured. They have made it their duty to the parties to do their best and to ensure the welfare of the video conferencing participants[22].

- *Ensuring the due process of law might be a problem*

Article 2.1(c) of the Protocol guarantees that the parties have an equal opportunity to discuss their case during the questioning of the claimant, as it specifies that the video conferencing site is situated in a neutral position granting the parties involved a fair , equitable and appropriate right of access. In particular, Article 4.1 of the Protocol ensures that the proceedings are open by requiring all related records to be clearly defined and published. Article 3.1 of the Protocol fixes the issue of jurors being abused by off-screen individuals, as it requires all parties to the video conferencing to be involved in the hearing and to be remembered at the start of the videoconferencing session.[23]

- *Witness Tutoring*

A main aspect that needs attention is that of a witness tutoring, which could be carried out in the form of a manual that may have been prepared prior to the trial or with instructions from a third party during the testimony. These features may be present or situated in a hearing room where the camera will not be focused. However, it is much easier to track the true character of a witness during an in-person hearing[24], while in virtual trials it is important to ensure that the plaintiffs are not engaged in actions that may damage the integrity of their testimony.[25]

5. Roadblocks for Arbitration:

[22] *Id.*
[23]Hong, *supra* note 20.
[24] Janet Walker, *supra* note 10.
[25] Vivek Joshi & Rohan Gulati, 'Steering Virtual Arbitration Hearings in the Right Direction', NLUJ Law Review Blog (Aug. 25, 2020, 10:10AM), http://www.nlujlawreview.in/steering-virtual-arbitration-hearings-in-the-right-direction/.

i) **Logistical Blocks:** There is a primary need to recognise such technical problems, including but not limited to the shortage of connectivity that might not be available to the parties. This can give rise to the primary issue of accuracy in both audio and video during virtual hearings. In addition, in the event that the problem of bandwidth is raised prior to the hearing, the parties may encounter snags with respect to the network or domain to which they are related for a virtual hearing. The number of institutions offering services similar to those of Maxwell Chambers or Arbitration Place Virtual continues to be relatively small in terms of e-hearing facilities. Consequently, not all participating in the arbitration process would actually have access to such sites that allow for virtual hearings.

ii) **Confidentiality vis-à-vis virtual hearing**: Any stakeholders may have questions about the protection of documents exchanged via virtual platforms. In other words, in the context of the proceedings, there may be a variety of papers which need to be exchanged or sent to the legal counsel, which are often posted electronically. Any stakeholders may have questions about the protection of documents exchanged via virtual platforms. In other words, in the context of the proceedings, there may be a variety of papers which need to be exchanged or sent to the legal counsel, which are often posted electronically.

iii) **Credibility of witness testimony**: It is necessary to discuss the question of the reliability of the testimony of witnesses in the process of the arbitral proceedings. Due to the absence of a witness at an in-person hearing, the court can find it difficult to determine and interpret the vocabulary of the voice, the facial expression and the sound of the witnesses' reaction[26]. The above plays an invaluable role in the discernment of the integrity of the witness and the claims made afterwards. It is generally easier to recognise those causes during an in-person hearing, but in the e-hearing phase the aforementioned downside can have a conflicting impact on the case as a whole. Another critical factor that deserves consideration is that of witness tutoring, which can be performed in the form of reading from a document that may have been written prior to the trial or taking directions by a third party during the testimony. These factors may be present or situated within the hearing room, where the camera is not centred or unable to identify. It is also

[26] Vries, Berend, 'Online Dispute Resolution: Challenges for Contemporary Justice' Information & Communications Technology Law, 15 (2006) available at https://www.researchgate.net/publication/263247362_Online_Dispute_Resolution_Challenges_for_Contemporary_Justice.

important to ensure that the witnesses are not engaged in actions which may weaken the legitimacy of their testimony.[27]

iv) **Adjusting official working hours**: The majority of international commercial arbitrations can have parties / arbitrators / case lawyers in various parts of the world. In the ordinary course of the trials, they will fly to the site of the arbitral trial, but at such extraordinary periods, as at the moment when fly limits have been placed, the aforesaid becomes invalid. Therefore, though in various areas of the world, another problem that can arise is that of worldwide time zones and daily working hours[28]. For example, a trial scheduled to begin at 1 p.m. in Singapore would mean that, in the event that the arbitrator is based in London, he will have to be ready at 6 a.m. as per London timings. There is also still a significant issue about the scheduling of timings.

6. Suggestive Way Forward:

A heavy focus is placed on the Seoul Protocol on Video Conferencing in International Arbitration (hereinafter referred to as the Protocol) in order to resolve the pitfalls that may exist during virtual hearings.

The primary goal behind the Protocol was originally established in 2018, which was to create functionality that would support the international arbitration community as a whole. As a result, the Protocol obtained a go-ahead in the wake of 2020 and was eventually implemented in Seoul. Recently, on 20 March 2020, the Protocol was adopted by COVID-19 to allow international arbitration.[29]

The Extracted and outlined the related aspects of the Protocol with a view to resolving disadvantages are as follows:

a) **Witness Examination Generally (Article 1)**: The article provides for an exhaustive process to be followed during the review of the claimant, along with a provision that the place of residence authorise a substantial portion of the interior of the room to be revealed

[27] Dev Sareen, 'Online Dispute Resolution- Application and Challenges', International Journal of Law Management & Humanities, Iss 5 Vol 1, 2581-5369 available at https://www.ijlmh.com/wp-content/uploads/2019/03/Online-Dispute-Resolution-Application-and-Challenges.pdf.
[28] Id.
[29] Bob Frisch & Cary Greene, 'What It Takes to Run a Great Virtual Meeting' Harvard Business Review, (Sept. 05, 2020 at 08:38 PM) available at https://hbr.org/2020/03/what-it-takes-to-run-a-great-virtual-meeting.

at a suitable distance from the claimant. In addition, the claimant shall be seated at a vacant desk and the expression shall be plainly visible.

b) **Video Conferencing Venue (Article 2)**: This guarantees that all practical preparations are made prior to the start of the video conference and that all technical support is given during the meeting in order to prevent any complications, etc.

c) **Technical Requirements (Article 5)**: The Protocol is highly sensitive to propagation rates and the devices to be used to ensure that the virtual hearing is smooth. Further, detailed technical specifications are set out in the Annex attached to the Protocol concerning video, audio, image, networks, bandwidth and bridging criteria, as well as the degree to which they are in themselves exhaustive.

Furthermore, concerns or drawbacks related to the confidentiality of information can be resolved by the ICCA-NYC Bar-CPR Cybersecurity Protocol for International Arbitration 2020 (hereinafter referred to as the Cyber Security Protocol). The Cybersecurity Protocol has been developed with special regard to the requirements of international commercial arbitration.

The aim of the Cyber Security Protocol is twofold: (i) to include adequate security mechanisms for arbitration and (ii) to increase awareness of security standards in international arbitration. The Cyber Security Protocol is thus, in itself, an all-important and formal protocol.

7. Institutional Framework for virtual hearings: Extracted & Summarized:

1. Model Law

- ***UNCITRAL Arbitration Rules, 2013***[30]
  - "Article 28 (Hearings): Arbitral Tribunal may examine witnesses by way of video conferencing."

2. Institutional Arbitration Bodies (International)

- ***Singapore International Arbitration Centre (SIAC)***[31]
  - "(Schedule 1 – Emergency Arbitrator)"

[30] UNCITRAL Arbitration Rules, 2013, available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf.
[31] SIAC available at https://www.siac.org.sg/.

- "Rule 7: The Emergency Arbitrator may utilize the video conferencing facility for hearing the disputing parties as an alternative to an in-person hearing."
- "Rule 8: Power of Emergency Arbitrator to order or award any interim relief via video conferencing."

- ***London Court of International Arbitration (LCIA)***
  - "Article 14.1 (Conduct of proceedings): Allows the parties and the Arbitral Tribunal to conduct the proceedings via video conferencing."
  - "Article 19.2 (Oral Hearings): Allows video conferencing as a mode of oral hearing."[32]

- ***International Chamber of Commerce (ICC)***
  - "Article 24(4) (Case Management Conference and Procedural Timetable): Case Management Conference may be conducted by video conferencing."[33]
  - "Appendix IV (Case Management Techniques): Encourages the use of video conference (for procedural or other hearings) where attendance in-person is not essential."
  - "Appendix V, Article 4(2) (Emergency Arbitrator Rules): Emergency Arbitrator may conduct hearing through video conference."
  - "Appendix VI, Article 3(5) (Place of the Emergency Arbitrator Proceedings): In case of expedited procedures, the Arbitral Tribunal may conduct hearings via video conference."

3. Institutional Arbitration Bodies (Domestic)

- ***Indian Institute of Arbitration & Mediation (IIAM)***
  - "Article 28 (Hearings): Arbitral Tribunal may examine witnesses by way of video conferencing."
- ***Indian Arbitration Forum (IAF)***
  - "Article 8 (Case Management Conference): Case Management Conference may be conducted by video conferencing."
  - "Article 28 (Examination of witnesses via video conferencing): In exceptional circumstances, video conferencing of witnesses may be allowed."[34]

[32] LCIA available at http://www.lcia-india.org/.
[33] ICC, available at https://iccwbo.org/.

8. Conclusion:

It is also reasonable to assume that the time is right for our nation to undertake a major reform of the arbitral system of our government. To this end, the newly formed Indian Arbitration Council can play a significant role by introducing an amendment in two parts.

Firstly, a substantive amendment must be made to the Arbitration and Mediation Act of 1996, which explicitly accepts the automatic operation of arbitral hearings which allows for electronic lawsuits which essentially assures that the arbitral processes are not unduly postponed and thus adheres to the schedule which thereby preserves the purpose of a prompt settlement of conflicts.

Secondly, the Council will take steps to ensure that all arbitral organisations improve a case management system, which includes not only virtual courts but also virtual trials and electronic awards, while bearing in mind the various precautions provided by the Seoul Protocol.

If these reforms can be made, it will not only go a long way to cope successfully with the current pandemic situation, but will also help to harmonise the arbitral system of our country with established and much sought-after global norms, rendering India a global arbitration centre in the near future a possibility.

[34] Indian Arbitation Forum, available at https://www.indianarbitrationforum.com/.

MAKING JUSTICE ACCESSIBLE AND AFFORDABLE.. THE FUTURE BELONGS TO ADR, ODR AND ONLINE COURTS

By: Gurkaran Singh[1] & Tannavi Sharma[2]

ABSTRACT

Covid-19 has changed the landscape of the entire world with each sector feeling the wrath of the pandemic. India is no stranger to effects of the pandemic with the country imposing the world's longest lockdown. The administrators of justice had no other choice but to close down the courts "physically". The paper throws light on the importance of 'Access to Justice' and the role played by the Judiciary in a healthy democracy. It further discusses the difficulties faced by the common litigants, advocates and the courts caused due to the pandemic. The paper highlights how some of the major problems faced by the judicial system in the country such as the pendency of cases, high litigation costs and no or little inclination towards technology are further aggravated by the advent of Covid-19. The paper then talks in detail about some possible solutions to these issues, which include ADR mechanism, ODR mechanisms and Online Courts. While recommending these solutions, the paper throws light on the jurisprudence of these mechanisms, their benefits over the conventional mode of litigation, the role and importance of these mechanisms in the Covid-19 era and the authors' perspective about the practical realities and what further needs to be done to promote and encourage the use of these mechanisms. The paper then concludes with hope and message that this time of crisis would eventually lead to better sense and a complete overhauling of the Justice Delivery System in the country. It is perhaps the best time to introspect and bring about the desired radical changes that our Justice Delivery System is longing for.

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1. Introduction

Judiciary is one of the three pillars under the Constitution of India, the other two being Legislature and Executive. The foundation of judiciary lies in the trust and confidence posed by the public in the courts to deliver impartial and prompt justice. The most important duty of the courts is to ensure that justice is properly administered so that the rights and liberties of individuals are not perished. The two essential ingredients of a justice delivery system are the rule of law and access to justice.

No society can exist without justice. The advancement of the society depends upon proper implementation of law to its needs and it is the responsibility of judicature to apply the laws to manage the rights and duties of people.[3] Delivery of justice by the courts ensures general public that their rights are secure. Therefore, the main functions of the courts include safeguarding the rights of individuals, delivering prompt justice and uploading the values embodied in the Constitution of India.

1.1 Access to Justice and Speedy Trial

The Preamble to the Constitution of India secures to all citizens social, economic and political justice. The fact that justice is placed before equality and fraternity in the Preamble shows the importance given to it by the constitution makers. 'Access to Justice' connotes not just a person's access to court but also identification of grievance, being provided with legal assistance, the adjudication of any such grievance and enforcement of the relief granted.[4]

Judiciary is called the centrepiece of administration of justice. For performing its constitutional duties, the judiciary must be accessible to people from all stratum of society. It has been held in numerous cases that timely access to justice forms a part of the right to life as guaranteed under Article 21[5] of the Constitution. In case of *Anita Kushwaha & Ors. Vs. Pushap Sudan and Ors.*[6], the Hon'ble Supreme Court recognised "access to justice" as an invaluable human right and held it to be a part and parcel of right to life. The court further emphasised that a person's

[3]Rule Of Law & Access To Justice, Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, Judge, Supreme Court of India. Lecture delivered at the Tamil Nadu Judicial Academy on the occasion of the Regional Judicial Conference (South Zone) from 31st January to 2nd February 2014.

[4]Supra n 1.

[5]Constitution of India

Article 21. Protection of life and personal liberty. No person shall be deprived of his life or personal liberty except according to procedure established by law

[6]AIR 2016 SC 3506

inability to access courts for the determination of his rights or obligations also results in violation of Article 14.[7]

Another most important component of justice is that it must not only be accessible but also speedy. It has been rightly said that 'Justice delayed is justice denied.' Even though the Constitution does not contain any specific provision regarding speedy trial, it has been held to a part of Right to life and personal liberty under Article 21 of the Constitution. The case of *Hussainara Khatoon v. State of Bihar*[8] is a landmark case in speedy trial jurisprudence. In this case, it was held by the Supreme Court that the right to have a speedy trial is implicit in the broad scope of Article 21. In *Sheela Barse v. Union of India*[9], the Supreme Court declared speedy trial to be an essential right under Article 21.

The excessive delays in delivering justice leads to a flagrant violation of rule of law. It adversely affects the quality of life of an individual and his access to justice. It also leads to weakening of the justice delivery system and imperils the rule of law.[10] Therefore, it is the obligation of the justice delivery system to deliver expeditious and economical justice.[11]

1.2 Impediment to Access to Justice and Speedy Trial Due To Covid-19

On 11th March, 2020, World Health Organisation (WHO) declared Covid-19 as a pandemic.[12] Even though Covid-19 is primarily a health emergency, yet its effect on other sectors cannot be disregarded. One of the major issues emerged due to Covid-19 is its impact on the justice delivery system. Our Judiciary has always been the nation's moral conscience, standing up for the poor and those at the bottom of the economic chain, settling disputes between the centre and the state and sometimes even saving the democracy. A common man looks towards the judiciary to safeguard his interests.

Due to Covid-19, courts are not able to function with full efficiency, which has resulted in increasing pendency of cases and further overburdening of the courts.[13]The right of persons to

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[7]Constitution of India
Article 14. Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[8]1980 1 SCC 81

[9]1988 4 SCC 226

[10]Imtiyaz Ahmad v. State of U.P, 2012 2 SCC 688 (SCC p. 699, paras 25)

[11]Manpreet Kaur, Constitutional Prespective of speedy Justice in India, International Journal of Law, Volume 5; Issue 3; May 2019; Page No. 115-120.

[12]WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, World Health Organisation, (11th March, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19 11-march-2020 (Last visited on 16th July, 2020)

[13]Advocate Anushka, Impact On Constitutional Rights In Response To Coronavirus Pandemic, Legal Service India, (2020), http://www.legalserviceindia.com/legal/article-2348-impact-on-constitutional-rights-in-response-to-coronavirus-pandemic.html. (Last visited on 16th July, 2020)

have access to justice and speedy trial is in a serious jeopardy. Most of the courts are hearing only "urgent matters" and that too, through the mode of video-conferencing. As a result, the courts and the subsequent justice delivered by them are no longer easily accessible to general public. What amounts to "urgent" is the sole prerogative of courts and litigants have no say in the same. In most cases, litigants/lawyers have no means to approach the court if the registry does not list their case for urgent hearing.[14] Such suspension of normal functioning of courts amounts to denying the people their right to access the justice.[15]

As a result of this pandemic, social distancing has become the need of the hour. Unfortunately, while following the new norm of social distancing, the constitutional right of people to access justice is being infringed consistently.[16]

2. Impact of COVID-19 On Legal Sector:

Legal sector is one of the worst affected sectors in the country. Delivery of expeditious justice goes to the very root of a democracy and the same is being hampered consistently due to the pandemic. The impact of Covid-19 on the legal sector can be understood under the following three heads:

2.1 Courts

Considering the health and safety of litigants, judges and advocates, the courts suspended the physical hearings with limited exceptions in order to prevent the overcrowding in the court premises. The unavoidable effect of such a step was the delay caused in settlement of the cases as the trials of most of cases had to be postponed as far as possible.[17] The Supreme Court, High Courts as well as subordinate courts are forced to function in a highly constrained manner.[18] Most of the courts are hearing only 'urgent' matters, which generally includes matters involving imminent threat to life or property. However, due to the lack of concrete guidelines

[14]M.P. Bharucha, By Scaling Down, India's Courts Have Become Party to an Undeclared Emergency, The Wire, (13th June, 2020), https://thewire.in/law/by-scaling-down-indias-courts-have-become-party-to-an-undeclared-emergency (Last visited on 16th July, 2020)

[15]Animesh Upadhyay & Shikhar Shukla, Right to Access to Justice Amidst Covid-19, Legal Service India, (2020), http://www.legalserviceindia.com/legal/article-2351-right-to-access-to-justice-amidst-covid-19.html(Last visited on 16th July, 2020)

[16]Supra n 12

[17]Sayra Kakkar, Global Court functioning and impact of Covid-19 on Arbitration, Jurist, (17th May, 2020, 03:04:55 AM), https://www.jurist.org/commentary/2020/05/sayra-kakkar-court-functioning-covid19/#(Last visited on 17th July, 2020)

[18] CD Staff, Judiciary in Times of COVID-19 Outbreak, Civilsdaily, (12th May, 2020), https://www.civilsdaily.com/burning-issue-judiciary-in-times-of-covid-19-outbreak/(Last visited on 17th July, 2020)

relating to what constitutes urgent, various High Courts are following their own procedure. For example, while the Gauhati High Court is hearing only 'urgent matters', it has made no reference to citizenship-related writ petitions, bail matters and habeas corpus petitions, which are urgent because they involve loss of liberty.[19]

2.2 Advocates

Every profession has been severely impacted due to Covid-19 and the advocates are no exception to the same. Contrary to the common belief, most of the advocates practising in the lower courts depend upon daily cases to earn their income. Sudha Ramalingam, a family law expert has pointed out that most of the advocates are almost daily-wage earners.[20] Due to the irregular functioning of courts owing to the pandemic, the economic situation of such lawyers has become precarious. The closure of the courts is directly affecting the livelihood of lawyers due to which their income has become extremely low or nil.[21]

The plight of the lawyers is further demonstrated by the fact that a lawyer in Chattisgarh was forced to take up the work of weaving bamboo baskets due to complete loss of earnings owing to Covid-19 crisis. On getting to know about the same, Justice PR Ramachandra Menon, the Hon'ble Chief Justice of Chattisgarh High Court, sent him a cheque of Rs. 10,000.[22]

Taking into account the problems faced by the lawyers, the Supreme Court Bar Association has proposed to provide a loan of Rs 25,000 to members to be repaid in two years.[23] The Telangana Government has released a sum of Rs 25 crores for the purpose of extending financial support to the indigent advocates and clerks during Covid-19 lockdown.[24] Also, the Bar Council of Delhi has proposed to extend financial assistance of Rs. 5,000 to each of the

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[19]Sandhya PR, Corona is a wake up call for Indian courts. They aren't equipped to function in a crisis, The Print, (27th March, 2020, 12:28 pm), https://theprint.in/opinion/corona-is-a-wake-up-call-for-indian-courts-they-arent-equipped-to-function-in-a-crisis/389224/(Last visited on 17th July, 2020)

[20]Sruthisagar Yamunan, India's coronavirus lockdown is revealing deep income disparities in the legal profession, Scroll, (10th April, 2020, 09:00 AM), https://scroll.in/article/958528/indias-coronavirus-lockdown-is-revealing-deep-income-disparities-in-the-legal-profession(Last visited on 17th July, 2020)

[21]Puneet Singh Bindra, COVID-19: Access to Justice and survival of stakeholders in the legal system, Bar and Bench, (22nd April, 2020, 10:22 AM), https://www.barandbench.com/columns/covid-19-access-to-justice-and-survival-of-stakeholders-in-the-legal-system(Last visited on 17th July, 2020)

[22]Nisreen Naaz, Chhattisgarh chief justice gifts cheque to Tamil Nadu lawyer who went back to weaving baskets amidst Covid-19 crisis, The Times of India, (14th July, 2020, 18:31 IST), https://timesofindia.indiatimes.com/city/raipur/chhattisgarh-chief-justice-gifts-cheque-to-tamil-nadu-lawyer-who-went-back-to-weaving-baskets-amidst-corona-crisis/articleshow/76961805.cms(Last visited on 17th July, 2020)

[23]Supra n 19

[24]Rintu Mariam Biju, The Telangana Government has sanctioned an amount of Rs 25 crores to the Law department to provide financial assistance to the needy advocates and advocates clerks amid COVID-19 Lockdown, Bar and Bench, (28th May, 2020, 08:08 PM), https://www.barandbench.com/news/telangana-govt-sanctions-rs-25-crores-aid-lawyers-covid-19-lockdown(Last visited on 17th July, 2020)

4,639 lawyers whose applications were found in order.[25] However, these are only minuscule measures taken to provide assistance to few lawyers. The financial future of the majority of lawyers is still uncertain.

2.3 Litigants

Litigants are the ultimate consumers of the justice delivered by the courts with the aid of lawyers. However, the Covid-19 has hit them the worst as their fundamental right to justice is being infringed. Owing to the fear of spreading Covid-19, entry to the courts has been restricted and, unless urgent, physical access to courts is practically forbidden for litigants.[26] I The courts are hearing urgent matters through the mode of video-conferencing. However, the virtual hearings are posing problems of their own. According to BCI, "Litigants are unable to get justice through the process of virtual courts...due to unsatisfactory Wi-Fi and other technical problems which are a common phenomenon. The public and advocates are in the dark as to what is really going on in the various courts of the country."[27] Under such circumstances, finding a viable solution becomes the top priority in the interest of the entire legal profession.

3. Challenges faced by Justice Delievery System Due to COVID-19:

3.1 Pendency of Cases

One of major issues with the Indian Judiciary has always been the pendency of cases. According the pre Covid-19 figures there were around 3.5 crore cases pending before the Indian Courts.[28] With the country entering the Unlock phase II, the courts of the country are only taking up "urgent"[29] matters in a video conferencing manner. Somewhere in the middle of May, the Delhi High Court also decided to take up only "urgent" matters in a video conferencing

[25]Delhi Bar Council to give Rs 5,000 to over 4,500 lawyers in need during lockdown, Business Insider India, (15th April, 2020, 22:16 IST), https://www.businessinsider.in/india/news/delhi-bar-council-to-give-rs-5000-to-over-4500-lawyers-in-need-during-lockdown/articleshow/75166513.cms(Last visited on 17th July, 2020)
[26]Supra n 18.
[27]Satya Prakash, Litigants unable to get justice through virtual courts: BCI, The Tribune, (21st May, 2020, 02:00 PM) https://www.tribuneindia.com/news/nation/litigants-unable-to-get-justice-through-virtual-courts-bci-87925(Last visited on 17th July, 2020)
[28] Sagar Kulkarni, DHNS, New Delhi, Deccan Herald, 16th Feb 2020, https://www.deccanherald.com/national/nearly-46-lakh-cases-pending-in-high-courts-319-crore-in-lower-courts-805320.html, Last visited on 18th July2020
[29] Digital Desk,Supreme Court To Take Up Only 'urgent Matters' Amid COVID-19 Pandemic, Republic News, 19th April 2020, https://www.republicworld.com/india-news/law-and-order/covid-19-supreme-court-to-take-up-short-hearings-and-urgent-matters.html Last Visted on 18th July 2020

mode.[30] Similarly, keeping in view the surge in Covid-19 cases in the national capital, all pending cases listed before National Company Law Tribunal, Principal Bench and other benches at New Delhi from July 20, 2020 to September 30, 2020 have been adjourned. As per a Notice dated July 17, these cases will be listed for hearing from August 5, 2020 onwards till October 16, 2020.[31] Similarly the current statistics of the Supreme Court are not also very encouraging as there are around 60,444 cases pending alone in the Supreme Court as on 1st July 2020.[32] This pendency is only going to exaggerate in the coming days as there would be major disputes especially in the area of commercial and civil matters once the courts starts to function to their full capacity. We should not be tricked by reduction in *number* of cases … what should also be kept in mind is the scale of burden on Indian Judiciary due to reduced disposal rate! In the entire month of April, 82,725 cases were filed in India's courts, while 35,169 cases were disposed of. Compared to 2019, when the average number of cases filed per month was around 14 lakh (total number of cases 1.70 crores), while the average number disposed cases per month was 13.25 lakh.[33] .

3.2 High Litigation Expenses… Do All Have a Fair Chance to Litigate

One obstacle which has always caught the eye of those involved in the judicial process is the high costs of litigation in the Indian courts.[34] Although the Legal Services Act of 1987[35] provides a mechanism to provide legal aid to weaker and downtrodden sections of the society to make justice affordable to all, yet what is often forgotten is that layer of the population which falls above the economic eligibility threshold for legal aid as provided under Section 12 of the Legal Services Act but do not possess the economic means to pursue a claim in the courts.[36] It is an ill conceived notion that litigation expenses include only the fees charged by the respective

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[30] All Benches Of Delhi High Court To Take Up Urgent Matters Via Video Conferencing From Friday, Bloomberg Quint, 21st May 2020,https://www.bloombergquint.com/law-and-policy/all-benches-of-delhi-hc-to-take-up-urgent-matters-via-video-conferencing-from-friday, Last visited on 18th July 2020

[31]Aditi Singh, [COVID19] Hearing in pending cases listed from July 20 - Sept 30 before Delhi Benches of NCLT pushed further; Only urgent hearing till Aug 5, Bar and the Bench, 17th July 2020, https://www.barandbench.com/news/litigation/covid19-hearing-in-pending-cases-listed-from-july-20-sept-30-before-delhi-benches-of-nclt-pushed-further-only-urgent-hearing-till-aug-5, Last visited on 18th July 2020

[32]https://main.sci.gov.in/statistics, Last Visited on 18th July 2020

[33] Manish Chibber, How lockdown has hit judiciary, in numbers — April cases fall to 82k from 14 lakh avg in 2019,The Print, 4th May, 2020, https://theprint.in/judiciary/how-lockdown-has-hit-judiciary-in-numbers-april-cases-fall-to-82k-from-14-lakh-avg-in-2019/413666/ Last visited on 18th July 2020

[34]Law Commission of India, One Hundredth- Twenty Eight Report on Cost of litigation,1988, Available at http://lawcommissionofindia.nic.in/101-169/Report128.pdf, Last Visited on 20th July 2020

[35] The legal Services Act 1987, available at https://maitri.mahaonline.gov.in/pdf/The_Legal_Services_Authority_Act,_1987.pdf (last visited on 20th July 2020)

[36] Legal Services Authorities Act, 1987, Section 12 of the Legal Services Authorities Act, Available at http://cgslsa.gov.in/Acts/Act.pdf, (Last Visited on 20th July 2020)

attorneys and the lawyers arguing the matter. The fee paid to an advocate is only one of the factors in considering the economic accessibility. Two other factors that are pertinent to be considered include the costs incurred in attending a hearing at court and the costs incurred due to loss of pay/business for attending a court hearing or in economic terms the opportunity cost. According the studies conducted by Daksh India Org, the average cost (other than fees of lawyers) incurred by a litigant is Rs1,039 per case per day and the average cost incurred due to loss of pay/business is Rs1,746 per case per day.[37] Similarly according the data compiled by ETIG from their annual reports, the legal expenses of listed Indian companies have increased from 14% to over Rs 38,660 crore ($5.6 billion) during FY19 as new laws and regulations on insolvency and debt restructuring, among others, came into force over the past five years.[38] There is a rapid surge in the expenses due to the sudden increase in regulations. The companies are left with no other alternative but to respect these regulations which in turn will lead to higher legal spending. Some of the sectors which are most affected by the increase in these regulations include the manufacturing sector, mining sector and the power sector.

After the imposition of the world's strictest lockdown, about 84% of Indian households saw their incomes fall last month under the strict shelter-at-home rules, and many will not survive much longer without assistance. [39] According to the research data provided by Centre for Monitoring Indian Economy (CMIE) survey, joblessness in urban areas climbed to 11.26% in the week ended 5 July from 10.69% recorded in the preceding week. [40] Because of the pandemic, there is an obvious delay in supply of construction materials, shortage of labour and this has also adversely hit the developers' cash flows and project delivery capabilities.[41] The Real estate sector has already suffered losses amounting to Rs 15.5 lakh crores because of the pandemic situation.[42] The startup sector, one of the visionary sectors of the current government,

[37]Shruti Naik, The Cost Of Litigation – What Alternatives Do We Have? dakshindia.org, 16th November 2016, https://dakshindia.org/cost-litigation-alternatives/ (Last visited on 20th July 2020)

[38]Maulik Vyas & Shailesh Kadam, India Inc spent 14% more on legal fees in FY19, Economic Times, 15th September 2019, https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-spent-14-more-on-legal-fees-in-fy19/articleshow/71121319.cms?from=mdr (Last Visited on 20th July 2020)

[39] Marianne Bertrand, Kaushik Krishnan, and Heather Schofield,HOW ARE INDIAN HOUSEHOLDS COPING UNDER THE COVID-19 LOCKDOWN? 8 KEY FINDINGS,Chicago Booth For Social Sector Innovation, , posted on 11th May 2020, https://www.chicagobooth.edu/research/rustandy/blog/2020/how-are-indian-households-coping-under-the-covid19-lockdown, (Last Visited on 20th July 2020)

[40] Prashant K Nanda, Live Mint, Urban job losses on the rise again,7th July 2020, https://www.livemint.com/industry/human-resource/urban-job-losses-on-the-rise-again-11594080860059.html, Last Visited on 20th July 2020

[41] Sunita Mishra, Housing.com, Impact of Coronavirus on Indian real estate 29th June 2020, https://housing.com/news/impact-of-coronavirus-on-indian-real-estate/ (Last Visited on 20th July 2020)

[42] PTI, Retail trade suffers Rs 15.5 lakh cr business loss due to COVID-19: CAIT,19TH July 2020,https://economictimes.indiatimes.com/industry/services/retail/retail-trade-suffers-rs-15-5-lakh-cr-business-loss-due-to-covid-19-

has also been badly hit in terms of the revenue loss. According to a report by S.B.I[43] swap, the Covid -19 outbreak has caused losses to the tune of Rs 30.3 lakh crore to the national economy, which is 50 per cent more than the Covid-19 relief package worth Rs 20 lakh crore announced by the central government.[44]

There are high chances of disputes arising due to the delays and non performance of contracts because of the imposition of the lockdown and its subsequent after effects. The policy makers need to dive deeper to find an alternative so that litigation costs can be reduced especially considering the fact that after the pandemic gets over the spending power of all the business houses as well as individuals would be reduced by great proportions. Developing a cost effective judicial system is the need of the hour.

3.3 Predicament of Online Courts

Covid-19 has compelled the judiciary to rely on technological platforms to secure the access to justice. In order to prevent contributing to the public health crisis caused by Covid-19, the Supreme Court barred physical entry in the Court premises and further ordered to hold all urgent hearings vide Video Conferencing.[45] By an order dated 6th April, 2020, the Supreme Court in *Re: Guidelines for Court Functioning through Video Conferencing during Covid-19 Pandemic*[46] issued guidelines to all the High Courts and District Courts to use the mode of video-conferencing to ensure delivery of justice to all people, while complying with the need of social distancing. Further, a 7-Judge Committee of the Supreme Court headed by Justice NV Ramana refused to resume physical hearings for now due to rising Covid-19 cases.[47] In such circumstances, the concept of online courts has become the focal point of discussion.

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cait/articleshow/77054210.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited on 20th July 2020)

[43] S.B.I-State Bank Of India

[44] Anuradha Shukla,COVID-19 caused economic loss of Rs 30.3 lakh crore; Maharashtra, Tamil Nadu worst-hit: Report Indian Express, , 26th May 2020, https://www.newindianexpress.com/business/2020/may/26/covid-19-caused-economic-loss-of-rs-303-lakh-crore-maharashtra-tamil-nadu-worst-hit-report-2148164.html, (Last Visited on 20th July 2020)

[45]S.S. Rana & Co. Advocates, The Functioning Of The Indian Judiciary Amidst Novel Coronavirus (COVID-19) Outbreak, Mondaq, (2nd April, 2020) https://www.mondaq.com/india/litigation-contracts-and-force-majeure/911432/the-functioning-of-the-indian-judiciary-amidst-novel-coronavirus-covid-19-outbreak (Last visited on 21st July, 2020)

[46] Suo Motu Writ (Civil) No.5/2020, The Supreme Court Of India, https://main.sci.gov.in/supremecourt/2020/10853/10853_2020_0_1_21588_Judgement_06-Apr-2020.pdf

[47]Debayan Roy, Bar and Bench, [COVID-19 crisis] 7 Judge Committee of Supreme Court turns down request to resume physical hearings FOR NOW, (25th July, 2020), https://www.barandbench.com/news/litigation/7-judge-committee-of-supreme-court-turns-down-request-to-resume-physical-hearings (Last visited on 27th July, 2020)

Though it was unanimously believed that virtual courts will be the future of justice delivery system in India under the e-Courts Project[48], yet it seems like Covid-19 has forced the judicial system to adopt the technology for which it is not prepared yet. Virtual courts are introduced in India as an emergency measure to ensure access to justice even during the pandemic. However, there are a lot of problems which have been left untouched. According to Senior advocate and President of the Supreme Court Bar Association, Dushyant Dave, the existing technological issues are a hindrance in accessibility to justice as the current judicial system is not equipped to undergo a computer revolution. Even the technology used by the Supreme Court is of poor quality.[49] It has been pointed out that the infrastructure is not adequate to actually hold virtual hearings. Many Advocate-on-records (AORs) have complained about facing technical issues such as being clueless about the status of their application for urgent hearing and difficulty in filing matters such as the size limits prescribed for the uploading the files, etc in the e-filing of Supreme Court.[50] Another important issue lies in the lack of an unified platform to conduct virtual hearings. Judiciary had to rely on various platforms such as VIDYO, Zoom, WhatsApp, etc to conduct virtual hearing which raises grave concerns for the security and confidentiality of the sensitive information.[51]

Moreover, the concept of virtual hearings is not well received by the lawyers. The Chairman of Bar Council of India (BCI), Mr. Manan Kumar Mishra wrote a letter to CJI voicing the concerns regarding virtual hearings. He adverted that 90% of Advocates and Judges in the country are themselves unaware and uncertain about technology and its implications. He further said, "People sitting on elevated chairs seem to be, probably, far away from the ground realities and that is why they are harbouring and advocating such thoughts."[52] The lack of proper training of the lawyers, especially those hailing from the remote areas and the shortage

[48]The e-Court Mission Mode Project (MMP) was conceptualized as a part of National e-Governance Plan, with a vision to transform the Indian judiciary by making use of technology.https://vikaspedia.in/e-governance/online-legal-services/how-do-i-do(Last visited on 21st July, 2020)

[49] Dharvi Vaid, How coronavirus is propelling the rise of online courts in India, DW, (11th June, 2020), https://www.dw.com/en/how-coronavirus-is-propelling-the-rise-of-online-courts-in-india/a-53774109(Last visited on 21st July, 2020)

[50]King, Stubb & Kasiva, COVID-19 Urges Courts In India To Go Online: Pros And Cons Of Court Hearings Via Video Conference, Mondaq, (21st May, 2020), https://www.mondaq.com/india/operational-impacts-and-strategy/938322/covid-19-urges-courts-in-india-to-go-online-pros-and-cons-of-court-hearings-via-video-conference(Last visited on 21st July, 2020)

[51]Live Law News Network,Plea in SC against use of foreign apps like zoom, skype etc for video conferencing, Live Law, (19th April 2020, 9;57 AM) https://www.livelaw.in/top-stories/plea-in-sc-against-use-of-foreign-based-apps-like-zoom-skype-etc-for-video-conferencing155461(Last visited on 21st July, 2020)

[52]Source: PTI, No "virtual hearings" via video conferencing post COVID-19 lockdown: BCI urges CJI, Outlook, (29thApril, 2020, 8:25 PM) https://www.outlookindia.com/newsscroll/no-virtual-hearings-via-video-conferencing-post-covid19-lockdown-bci-urges-cji/1818724(Last visited on 21st July, 2020)

of required infrastructure are two of the biggest impediments in making the virtual hearings a reality in India.

4. Proposed Solutions

The pandemic has forced us to change our thinking as well our lifestyle. Innovation is the need of the hour and our justice delivery system cannot be immune to these changing times. A perfect blend of technology, innovation and ADR mechanisms could be one of the probable solutions to this problem.

4.1 ALTERNATE DISPUTE RESOLUTION (ADR)

4.1.1 The Jurisprudence behind ADR in India

In the year 1989, Justice Malimath Committee was set up to look and dwell upon the alternatives to dispute resolution. In the report the committee conducted an extensive survey of the working of the court system in India. The main focus area of the report was to delve deeper and determine the factors that cause a delay in the delivery of justice. It made recommendations for reducing the arrears and to provide speedy justice to the indigent at a low cost, as well as setting up of ADR mechanisms as a workable alternative to court litigation. Thereafter, an amendment to Section 89 of the Civil Procedure Code 1908 was made, which has bestowed statutory recognition on Alternative Dispute Resolution mechanisms.

Section 89 and the corresponding rules were inserted by Act No. 46 of 1999(w.e.f . 1.7.2002).[53] But the section contained some anomalous drafting errors due to some typing or clerical mistake. It was in the leading judgment of *Afcons Infrastructure Ltd v Cherian Varkey Construction Company Pvt. Ltd* [54] that the correct interpretation was comprehensively explained. Para 7 of the judgment made it amicably clear that if Section 89 was to be read in a literal sense then it would be tormenting for a trial court judge. "It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-section (1). It has mixed up the definitions in sub-section (2). Despite the typical or the clerical error, the intent behind introducing Section 89 was crystal clear. Despite the shambles in the language of the statue the intent of Section 89 is apparent, pellucid and sound." It was further discussed in *Salem*

[53] Code of Civil Procedure 1908, Section 89 of the Code of Civil Procedure, Available at http://legislative.gov.in/sites/default/files/A1908-05.pdf (Last Visited on 21st July 2020)

[54] 8 SCC 24 (2010).

Advocate Bar Association v Union of India[55] that the intent of the Parliament in introducing Section 89 and Rules 1-A to 1-C in Order X in The Civil Procedure Code to guarantee that disputes were resolved through the mechanism of ADR was upheld, with all the ambiguity as the object of Section 89 was laudable. The necessity to reduce the pendency and burden upon the courts by resorting to alternative dispute resolution (ADR) is well envisaged in the code. Para 18 and 19 of the judgment (Afcons) clearly demarcate the disputes which are suitable for ADR and those which are not suitable. Suitable disputes include disputes in relation to contracts, matrimonial disputes, consumer disputes, disputes between employer and the employee among others. Similarly disputes which are not suitable include representative suits, criminal offenses, disputes in relation to election to public offices, disputes where there is an involvement of specific and serious allegations of fraud, fabrication of documents, forgery etc. Similarly Para 27 of the judgment clearly states that if the matter is referred to Arbitration then the decision of the Arbitration tribunal is final and binding, as it becomes an independent proceeding. Similarly, the award passed by the Arbitral tribunal is executable like decree of court. Para 28 of the judgment discusses about the other four ADR processes. The court remarked that since all the other four are non adjudicatory in nature, the ultimate control and jurisdiction lies with the court only.

4.1.2 The importance of ADR in maintaining commercial relationships especially during Covid era

As the governments round the world are combating the battle to contain the spread of Covid-19, the scale of the economic disruption and its impact on the business cannot be relegated. With India coming into the stage of unlocking its economy, the effects of the lockdown are still being felt and it would take a considerable time and joint effort on parts of all the stakeholders to revive the economy. The judicial set up in the country has also shaken up as Covid-19 has caused major roadblocks in settlement of disputes as also there would be out and out growth of further legal altercations on account of the lockdown imposed. The contractual obligations especially those which were to be performed during the lockdown period were not performed. Litigation as a method of dispute settlement mechanism might be the most common option but the situation caused by Covid-19 and the subsequent lockdown might force the normal Indian litigant to look beyond the doors of the courtroom and look for other alternative mechanisms to resolve the disputes. The time has come to dwell upon the Alternative modes of Dispute Resolution.

[55] 1 SCC 49 (2003).

The Afcons Judgment[56](*supra*) has already demarcated the list of offenses which can be referred for ADR proceedings. With the advent of Covid-19 and the subsequent lockdown which was imposed, it is pertinent that disputes regarding these matters would arise and if traditional methods of dispute resolutions are applied, then with the kind of infrastructure that our traditional judicial set up has, it would take an eternity to adjudicate on these matters. And the most important aspect is the fact that litigation would result in one of the party losing and feeling hard done of the conditions which were not in his hand. Businesses must deliberate on the fact that Covid-19 is a bad patch and occasional, whereas maintaining business relationship is vital for sustaining the business from long-term perspective. So far, thought has been given as to how contracts might have provided for the current situation.

4.1.3 Proposed modes of ADR to resolve commercial disputes

4.1.3.1 Mediation

In these prevailing situations, Mediation is perhaps the best suited mechanism to resolve the business disputes mutually. It provides the parties with an easy and cost-effective mechanism that seeks to maintain business relations by putting forth an agreeable solution. Mediation is a mechanism which helps in repairing the strained relationships especially commercial relationships. In the case of individuals there is always the scope of talking to each other and reconciling the disputes but in the case of big multinational giants the situation is a little complex. There is an involvement of big guns , power play, no connection and there is nothing personal between parties. In this whilst of technological world they might have executed the agreement on mail, or on a video conference. There is complete absence of any personal connection leaving no or little scope for negotiation. In such cases, a trained mediator comes to picture whereas the parties and their representatives do not take a stand and just come to watch the process. The mediators are experts in communicating with the representatives of the parties. Mediation is all about facilitating or assisting negotiation between the parties. The role of the mediator is just limited to facilitate the communication process to help the parties in reaching an agreeable solution. Mediation works between the parties because it gives them a chance to come to a settlement without compromising their rights. Even the Chief Justice of India, SA Bobde has called for making pre-litigation mediation mandatory, especially in cases of commercial disputes. In an interview to ET, Justice Bobde said, “All (commercial) matters could be made to first go through pre-litigation mediation. So if there is a commercial problem

[56] 8 SCC 24 (2010)

or dispute between two businesses, they could first undergo pre-litigation mediation. If it cannot be solved, then they can approach the courts."[57]

In the contemporary legal world commercial contracts contain a clause that mandate pre litigation arbitration. There are barely any commercial contracts where dispute resolution clauses emphasize on the adoption of other mechanisms of alternate dispute resolution which include mediation or conciliation as a predecessor to litigation or arbitration.[58] While the courts are putting their best foot forward to adapt to the changing scenarios, there is forthcoming menace approaching of a rise in the litigations being initiated on account of increasing defaults by contracting parties. To stay relevant in the business and to maintain the commercial relationships in these times it is the need of the hour to seriously consider mediation as an alternate dispute resolution mechanism.

4.1.3.2 Conciliation

Generally, mediation and conciliation are used as indistinguishably; however India recognizes conciliation as a different method of ADR mechanism.

According to Black's Law Dictionary, Conciliation is defined as "The adjustment and settlement of a dispute in a friendly, unantagonistic manner. Used in courts before trial with a view towards avoiding trial and in labor disputes before arbitration." [59] In simpler terms Conciliation involves the settling of disputes arising out of a legal relationship between parties without the interference of the Court, through conciliator(s) appointed by the parties. In case of conciliation proceedings, the conciliator plays an active role in contrast to a mediator as he proposes the amicable solutions for the parties involved in the proceedings. The job of the conciliator is to bring about an amicable resolution of the dispute between the parties by convincing them to reach a settlement. Section 66 of the Arbitration and Conciliation Act provides that the conciliator is not bound by the Indian Evidence Act or the Code of Civil Procedure.[60] This makes the process of Conciliation even more lucrative for the commercial

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[57] Ajmer Singh,, Commercial disputes should go through mediation first Bobde,The Economics Times 14th November 2019, https://economictimes.indiatimes.com/news/politics-and-nation/commercial-disputes-should-go-through-mediation-first-bobde/articleshow/72048517.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, Last Visited on 17th July, 2020

[58] Sangeeta Bharti,Conciliation an Effective ADR, India Legal live 20th June ,2020 https://www.indialegallive.com/special-story/conciliation-an-effective-adr-mechanism , Last Visited on 17th July 2020

[59] https://www.latestlaws.com/wp-content/uploads/2015/04/Blacks-Law-Dictionery.pdf Last Visited on 17th July 2020

[60] The Arbitration and Conciliation Act 1996 , Section 66 of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Last Visited on 17th July 2020)

players as they are not bound by the technical nature of adducing evidence and following the statutory requirements. Similarly, Section 67 [61] of the Act provides for the Role of the Conciliator which is to accommodate the parties in *an unfettered and unbiased manner* in their attempt to reach an amicable settlement of dispute. The mechanism of conciliation is governed by principles of objectivity, fairness and justice, consideration to rights and obligations of the parties, usages of trade and surrounding circumstances to the dispute and basic principles of natural justice. The conciliator is authorized to make proposals for a settlement at any stage of the proceedings. After a settlement agreement is signed between the parties, it is final and binding having the same status and effect as that of an arbitral award (Sections 73 and 74).[62]

4.1.3.3 Arbitration

Arbitration has always been a preferred mode of dispute resolution when it comes to complex commercial matters. The governing law of arbitration is the Arbitration & Conciliation Act, 1996 (A&C Act). One of the major reasons for choosing arbitration is the flexibility it offers in regard to time and procedure of conduct of proceedings. A fundamental strength of arbitration is its efficiency. Unlike traditional court hearings, strict timelines are followed.[63] Section 29A(1)[64] of the A&C Act specifies that in case of arbitrations other than international commercial arbitration, the award shall be made within a period of 12 months from the date of completion of pleadings under Section 23(4). Under Section 19[65], the parties are free to choose the procedure to be followed by the arbitral tribunal as it provides that the tribunal is not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. The most important advantage is that the parties have the liberty to select their Arbitrator(s) having specialised knowledge which is beneficial in disputes involving technical matters.[66]

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[61] The Arbitration and Cancelation Act 1996, Section 67 of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Last Visited on 17th July 2020)

[62] Arbitration and Conciliation act, 1996, Section 73 of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Last Visited on 17th July 2020)
The Arbitration and Conciliation Act 1996, Section 74 of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Last Visited on 17th July 2020)

[63] Divyam Agarwal and Saumay Bhasin, COVID-19 and reforms in the arbitration process, CNBC TV18, (4th June, 2020, 06:07 PM), https://www.cnbctv18.com/views/covid-19-and-reforms-in-the-arbitration-process-6070881.htm (Last visited on 18th July, 2020)

[64] Arbitration and Conciliation act, 1996, Section 29A of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Available at 18th July 2020)

[65] Arbitration and Conciliation act, 1996, Section 19 of the Arbitration and Conciliation Act, Available at http://legislative.gov.in/sites/default/files/A1996-26.pdf (Last Visited on 18th July 2020)

[66] Kiran Bhardwaj, Recent Developments And Impact Of Changes In Arbitration, Indian Legal, (23rd June, 2020, 6:11 PM), https://www.indialegallive.com/top-news-of-the-day/news/recent-developments-and-impact-of-changes-in-arbitration (Last visited on 18th July, 2020)

Due to the harm caused by Covid-19 to the world's economy and business relationships, huge numbers of commercial disputes are emerging as parties are finding it difficult to respect their contractual obligations. To resolve the same, most parties would prefer an expeditious resolution system.[67] In such cases, arbitration comes to the rescue of the parties. Arbitration is well positioned to respond and adapt swiftly to the challenges posed by Covid-19. The major international arbitral institutions were swift and prompt to find ways to maintain access to justice in a timely and efficient manner through arbitration.[68] Generally, the arbitral institutes can broker an agreement between the parties in 2-3 successive meetings which is far less than other dispute resolution methods.[69] Taking into account the problem of adhering to the strict time limits in times of Covid-19, the Supreme Court has extended the period of limitation in all proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not w.e.f. 15th March 2020 till further order/s.[70] Since the order covers general as well as special laws, it becomes clear that the order applies to A&C Act as well. A further order was passed by the Supreme Court, specifically in relation to A&C Act on 6th May, 2020.[71] In *Rategain Travel Technologies v Ujjwal Suri*[72], the Delhi High Court relying upon the order dated 06.05.2020, held that the limitation under the Arbitration Act has been extended by the Supreme Court and directed that the parties in cases concerning arbitration law will have a period of two weeks, after the lockdown is lifted, to approach the court if required.[73]

[67]Riya Dani, Role of Expedited Arbitration and Party Autonomy in Covid-19 related Supply-Chain Disruptions, VIA Mediation and Arbitration Centre, https://viamediationcentre.org/readnews/NDg1/Role-of-Expedited-Arbitration-and-Party-Autonomy-in-Covid-19-related-Supply-Chain-Disruptions (Last visited on 18th July, 2020)

[68]Andrew Battisson, Sherina Petit, Tamlyn Mills, Katie Chung and Clinton Slogrove, Institutional responses to the COVID-19 pandemic, International Arbitration Report 6 (Issue 14, June 2020), https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report---issue-14.pdf?la=en-in&revision=(Last visited on 22nd July, 2020)

[69]KS Legal & Associates, Alternative Conflict Resolution Mechanisms Amidst COVID-19, Mondaq, (16th July, 2020) https://www.mondaq.com/india/trials-appeals-compensation/966136/alternative-conflict-resolution-mechanisms-amidst-covid-19 (Last visited on 18th July, 2020)

[70]In Re: Cognizance For Extension Of Limitation, Suo Motu Writ Petition (Civil) No(s).3/2020, Supreme Court of India, Order dated 23.03.2020, https://main.sci.gov.in/supremecourt/2020/10787/10787_2020_1_12_21570_Order_23-Mar-2020.pdf(Last visited on 22nd July, 2020)

[71]In Re: Cognizance For Extension Of Limitation, Suo Moto Writ (Civil) NO. 3 of 2020, Supreme Court of India, Order dated 06.05.2020, https://districts.ecourts.gov.in/sites/default/files/Solemn%20Order%20dated%2006%2005%202020%20in%20Suo%20Moto%20Writ%20%20Civil%203%20of%202020%20in%20connection%20with%20Cognizance%20for%20Extension%20of%20Limitation.pdf(Last visited on 22nd July, 2020)

[72]O.M.P. (Misc) No. 14 of 2020, Delhi HC, decided on May 11, 2020.

[73]Ankoosh Mehta, Ria Lulla & Kritika Sethi, Supreme Court's Continuous Battle with Covid-19, India Corporate Law - A Cyril Amarchand Mangaldas Blog, (21st May, 2020) https://corporate.cyrilamarchandblogs.com/2020/05/supreme-courts-continuous-battle-with-covid-19/(Last visited on 18th July, 2020)

4.1.3.4 Lok Adalats

In the Covid -19 era Lok Adalats can be of great importance especially after the courts of the land are looking to take them online. In a recent development, Chhattisgarh High Court along with Legal Services Authorities pioneered E-Lok Adalats in the state during the lockdown and were able to dispose off more than 2200 hundred matters which were pending for more than 5 years.[74] This is quite a welcome development as cases relating to partition claims, motor accident claims, unpaid bank loans, compoundable offences etc can be easily resolved using the Online e-Adalats. The main focus of a Lok Adalat proceeding is trying to reach an cordial compromise between the parties. Lok Adalats cannot adjudicate on the issues nor can it influence the parties to decide in a certain way. It encourages accepted arrangements. Also, disputes are not only settled but it also helps in maintaining the friendly relationship amongst the parties as the settlement is reached with the mutual consent of both the parties and results in a win-win situation for both the parties. As discussed above maintaining commercial relationships is of utmost importance in the Covid -19 era and Lok Adalats perfectly fit in the bill.

Authors' Perspective

Businesses must deliberate on the fact that Covid-19 is a bad patch and occasional, whereas maintaining business relationship is vital for sustaining the business from long-term perspective. Mediation and Conciliation could turn out to be a useful method to address disputes. Both Mediation & Conciliation provide a mechanism to resolve their disputes amicably without straining their commercial relationships. Since both of them provide a win–win situation for the parties, it is best suited for resolving commercial disputes .E-Lok Adalats can be used to settle petty disputes without getting tangled into the web of litigation.

Similarly, arbitration furnishes an easy and efficient solution for dispute resolution during the time of Covid-19. The parties decide the procedure mutually, they can mutually decide upon a procedure which suits the needs of both the parties.

4.2 ODR: THE FUTURE OF DISPUTE RESOLUTION

The world is witnessing a pandemic like situation and conditions would be far from normal in the near future. Indian judicial system has always been guilty of delays in administration of

[74] Dhananjay Mahapatra,Chhattisgarh becomes first state to start e-Lok Adalats, Times Of India**, 11th July 2020** http://timesofindia.indiatimes.com/articleshow/76912410.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited on 24th July 2020)

justice and litigation has always been a costly affair for the common Indian person. Even though the Supreme Court has allowed for online filling of cases[75] yet we cannot neglect the fact that judiciary is already overburdened and is heavily clogged with tons of cases.[76] Another key factor which is to be kept in mind is the fact that that the lower courts lack the infrastructure[77] to keep track with these advancements. India now has over 504 million active internet users or those who have accessed the internet in the last one month.[78] These statistics along with the prevailing conditions in the world have forced the Indian authorities to ponder over a dispute resolution mechanism that uses technology to facilitate the resolution of disputes between the parties. The mechanism is known as Online Dispute Resolution or ODR.

4.2.1 Jurisprudence of ODR

Online Dispute Resolution (ODR) is often referred as a form of ADR which takes advantage of the speed and convenience of the Internet and ICT.[79][80]ODR can be a very useful tool in reducing the burden on the judicial set up in the country especially in the coming months where we will see an increase in the number of commercial and financial disputes. India has not been alien to the concept of Online Dispute Resolution as even before pandemic situation Online Arbitral proceedings were being conducted. The legal backing for ODR can be easily found in Section 19 of the Arbitration & Conciliation Act.[81] Section 19 mandates that the tribunal is not bound and governed by the provisions of Code of Civil Procedure[82] and Indian Evidence Act[83] and is free to decide upon the procedure to be followed in conduct of such proceedings. This makes online or live conduct well within the legal domain. No one can challenge such

[75] Soni Mishra,Supreme Court unveils e-filing module to facilitate online filing of cases, The Week 15th May 2020,https://www.theweek.in/news/india/2020/05/15/supreme-court-unveils-e-filing-module-to-facilitate-online-filin.html (Last Visited on 21st July 2020)

[76] Advocate Karan Singh, Online Dispute Resolution (ODR): A Positive Contrivance to Justice Post Covid- 19, Indian Law Watch,12th May 2020, https://indianlawwatch.com/practice/online-dispute-resolution-odr-a-positive-contrivance-to-justice-post-covid-19/ (Last Visited on 21st July 2020)

[77] Soibam Rocky Singh, Backlog of cases due to lack of judicial infrastructure, The Hindu, , 26th July 2018, https://www.thehindu.com/news/cities/Delhi/backlog-of-cases-due-to-lack-of-judicial-infrastructure/article24515317.ece (Last Visited on 21st July 2020)

[78] Nandita Mathur, , India now has over 500 million active Internet users: IAMAI,Live Mint05th May 2020, https://www.livemint.com/news/india/india-now-has-over-500-million-active-internet-users-iamai-11588679804774.html (Last Visited on 21st July 2020)

[79]Dr. Pablo Cortés,What should the ideal ODR system for e-commerce consumers look like? The Hidden World of Consumer ADR: Redress and Behaviour, CSLS Oxford, 28 October 2011, https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf (Last Visited on 21st July 2020)

[80] ICT-Information &Communication Technology

[81]Supra n 62

[82] The Code of Civil Procedure, 1908 available at http://legislative.gov.in/sites/default/files/A1908-05.pdf (Last Visited on 21st July 2020)

[83] Indian Evidence Act,1872 available at http://legislative.gov.in/sites/default/files/A1872-01.pdf (Last Visited on 21st July 2020)

proceeding merely on the ground of being an online resolution proceeding. ODR mechanisms may make use of services like email, text-messaging software, audio/video conferencing software for communication or other automated systems like blind bidding between the arbitrator/mediator and the disputants. As per September 13, 2018 notification issued by the Department of Justice, Ministry of Law Justice, Government of India, there were more than three crore pending cases in various courts. Out of these 46%of total cases involved either Government Departments or Government Bodies. In the above-mentioned notice, it was advised to the departments to reduce their litigation and settle their disputes through ADR and ODR[84]. Further, the department provided a list of agencies providing ADR andODR services.

4.2.2 Benefits of ODR

ODR mechanisms are cost effective and provide speedier resolution of disputes as compared to traditional forms of litigation. The proceedings in ODR mechanism are completed in a time bound manner and do not drag for years. Similarly it allows parties sitting in remote areas of the world to communicate via telephones or video conferencing modes to settle their disputes and it dispenses away with physical presence of the parties which is quite crucial in these times considering the pandemic like situations. ODR can be very useful in resolving money lending disputes, real estate disputes, commercial disputes, disputes relating to dishonor of cheques and disputes between employers and the employees which are critical for revival of the economy.[85]ODR provides a more flexible solution as it can be initiated at any point of a judicial proceeding even before a judicial proceeding begins. Similarly proceedings under ODR can also be terminated if the parties in conjunction decide that it is not leading to a workable solution. Basically ODR mechanism offers all the benefits offered by a normal ADR process over the traditional litigation, the only difference being that parties are not physically present in the proceedings and disputes can be resolved by sitting at a place convenient for the parties concerned.

4.2.3 Major Platforms providing ODR Services

Some of the major Indian platforms providing ODR services include **Centre for Alternate Dispute Resolution Excellence (CADRE), Centre for Online Dispute Resolution (CODR), Better Business Bureau, National Arbitration and Mediation, Square Trade,**

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[84] Online Dispute Resolution Through Mediation, Arbitration, Conciliation, Etc., available at: https://doj.gov.in/page/online-dispute-resolution-through-mediation-arbitration-conciliation-etc (last visited on 21st July 2020

[85] Online Dispute Resolution,Drishti IAS,8th June 2020, https://www.drishtiias.com/daily-updates/daily-news-analysis/online-dispute-resolution (Last Visited on 21st July 2020)

SAMA(Space for Resolution) and many new players are entering into providing ODR platforms.

4.2.4 Major Breakthrough meeting by NITI Aayog:

Recently, the NITI Aayog, in association with Agami and Omidyar Network India, brought together key stakeholders in a virtual meeting for advancing ODR in India.[86] The major agenda of the meeting was to reach a Multi- stakeholder agreement to work in collaboration to scale the level of ODR in India. Some of the key suggestions from the meeting included:

1. It is imperative to add ADR and ODR mechanisms in the system so that various industries can make use of such mechanisms.
2. Making ODR or ADR voluntary will defeat the purpose of so it is desired that in certain categories of disputes it should be made mandatory, especially in high volume repeatable disputes like disputes arising out of Motor Vehicles Act, cheque bouncing, insurance claims.[87]
3. More acknowledgment should be given to the ODR mechanisms so that the idea of ODR mechanism should reach the common litigant.

4.2.5 Noble Practice: Singapore's Community Justice and Tribunals System (CJTS)

Community Justice and Tribunals System (CJTS) is one of a kind dispute resolution cum information portal that is in practice in Singapore.[88] It provides a variety of services; before an aggrieved person files a claim, he has to conduct an-Assessment of his case to ensure he is ready to proceed. When a claim is filed online, the claimant is guided by the CJTS throughout the filing process including the submission of required documents. The portal then assists the claimant to pay the fee as well as to select date of preference for court appearance. After that process, the portal gives access to the claimant to either opt for e-Negotiation, e-Mediation or the traditional process. With effect from 7 January 2019, all Employment Claims Tribunal (ECT) cases were mandated to be filed and managed by the CJTS system.[89] The only pre-requisite for signing in to CJTS for a Singapore citizen is a SingPass[90] (or CorpPass for

[86]NITI Aayog, Agami and Omidyar Network India,**Catalyzing Online Dispute Resolution In India,** 12th June 2020, https://niti.gov.in/catalyzing-online-dispute-resolution-india (Last Visited on 21st July 2020)
[87] Nandan Nilekani**,** Co-founder and Non-Executive Chairperson, Infosys speaking at Niti Ayog meeting onCatalyzing Online Dispute Resolution In India,12th June 2020, https://niti.gov.in/catalyzing-online-dispute-resolution-india (Last Visited on 21st July 2020)
[88]https://www.statecourts.gov.sg/cws/ECT/Pages/Using-the-Community-Justice-and-Tribunals-System.aspx
[89]https://www.statecourts.gov.sg/cws/ECT/Pages/Using-the-Community-Justice-and-Tribunals-System.aspx
[90] Launched in March 2003, Singapore Personal Access (or SingPass) allows users to transact with over 60 government agencies online easily and securely. Managed by the Government Technology Agency (GovTech),

business entities). In cases where a person is not eligible for either of the passes, an application can be moved for a temporary CJTS Pass.

Authors' Perspective

The first thing which is mandatory for the development of a successful ODR mechanism in India is to create awareness about ODR, not only among the legal stakeholders but also amongst the common public who are ultimately the consumers of justice. Similarly, the legal fraternity especially the advocates should be taken into confidence that ODR mechanism is not a threat to their profession but is actually on opportunity for them. Advocates are the first point of contact for any common litigant involved in any legal dispute and if the advocate, by reason of his own vested interest, misguides about ODR then chances of that litigant opting for ODR or any other alternative dispute resolution mechanism are miniscule. Infrastructure can be created within some years but building trust and credibility takes generations. A concentrated effort is needed to change the mindset of the common litigant. Efforts have started. Now it is time to put foot on the accelerator so that justice is delivered in a desired time frame and at an affordable cost. Otherwise Justice delayed is equivalent to justice denied only.

4.3 IMPARTING TRAINING AND IMPROVING INFRASTRUCTURE TO MAKE ONLINE COURTS A REALITY IN INDIA

4.3.1 Potential of Online Courts in India:

While the online courts (virtual hearings and e-filings) have faced some hindrances, the efforts of judiciary to deliver justice in times of Covid-19 are commendable. The need to digitalise judicial functions has been a long sought after objective since technology has entered our lives. Online courts will reduce the cost of justice and will also provide better accessibility to the persons seeking justice. They will lead to in increase in the efficiency in judicial functioning. It will also have a positive impact on the productivity of the lawyers as the requirement to go to court will decrease substantially.[91] While stressing on the importance of virtual courts, the apex court noted that the need of administration of justice cannot be allowed to be crumbled

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the SingPass system is reviewed regularly, and there are many on-going security enhancements to ensure that a secure SingPass service is delivered to our users. Text taken from website: https://www.singpass.gov.sg/singpass/common/aboutus (Last Visited on 21st July 2020)

[91]Kirit Javali (Advocate, Supreme Court), The Wheels of Justice Delivery Mechanism: An Introspection, The SCC Online Blog, (6th July, 2020), https://www.scconline.com/blog/post/2020/07/06/the-wheels-of-justice-delivery-mechanism-an-introspection/ (Last visited on 21st July, 2020)

during a pandemic. [92] The incredible performance of the Apex Court through video-conferencing during the times of Covid-19 shows the potential of Indian courts to work virtually. According to the data released by the Supreme Court on 3rd June, 2020, a total of 617 benches of Supreme Court sat during the pandemic and heard matters through the mode of video-conferencing which included 293 benches for main matters and 324 for review petitions. Approximately 25,000 video links were shared with advocates for the virtual court hearings. Almost 670 judgments were delivered by the Court during this period. Emphasising on the efficiency of virtual courts, the Apex Court observed that "one virtual court can hear as many as 40 matters, instead of 20, through video-conferencing in a day".[93]

While appreciating the performance of the top court of the country, it must not be forgotten that the courts of the lower judiciary are not equally blessed to have access to similar facilities. The problems faced by the courts and the lawyers owing to virtual courts have already been highlighted. However, the inevitable thrust towards online courts in India can be perceived to be a blessing in disguise, if we try to make the most of it. The potential and the subsequent advantages of online courts are manifold, only if we are able to adapt to the same in a timely manner. It has been pointed out by Dr. Lalit Bhasin, President, Society of Indian Law Firms that to use technology in judicial functions, considerable work is required to be done.[94]

4.3.2 Need to have full utilisation of E- Courts Infrastructure

The E-Courts Mission Mode Project (E-Courts Project [95]) was launched to unite judicial functions with the technology and its main focus was on developing technological infrastructure for the District and Taluka courts of India. As per the data available from National Informatics Centre, a total of 627 District Courts, 3093 Court Complexes and 6645 Court Establishments have been digitalised under the E-Courts Project.[96] While it seems that the necessary infrastructure for virtual courts is in place, it is also a fact that it is highly under-utilised. Only a handful of advocates and litigants opt for the e-filing feature of the courts. As

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[92]Source:PTI, SC defends 'virtual courts system' during COVID-19 pandemic, says it ensured justice, The New Indian Express, (2nd May, 2020, 11;48 PM), https://www.newindianexpress.com/nation/2020/may/02/sc-defends-virtual-courts-system-during-covid-19-pandemic-says-it-ensured-justice-2138432.html(Last visited on 21st July, 2020)

[93] Preeti Ahluwalia, A Supreme Benchmark, India Legal (27th June, 2020, 3:49PM), https://www.indialegallive.com/top-news-of-the-day/a-supreme-benchmark(Last visited on 21st July, 2020)

[94] Dr. Lalit Bhasin, Covid-19 and its Impact on the Legal System, Legal Era, (10th April, 2020), https://www.legaleraonline.com/articles/covid-19-and-its-impact-on-the-legal-system(Last visited on 21st July, 2020)

[95]*Supra* n 45

[96] National Informatics Centre, eCourts Services Transforming Judiciary for Effective Justice Delivery, InformaticsVol28 No.1 (July 2019) 22 https://informatics.nic.in/uploads/pdfs/340be9b6_info_julyupdated05082019.pdf(Last visited on 21st July, 2020)

per the available data, only 600 cases have been filed through the e-filing module in the Punjab and Haryana High Court and about 50 cases have been filed in the Delhi High Court through the e-filing module.[97] As compared to actual number of physical filings done in the first six months of 2019 (around 1.9 lakhs[98]), the number of e-filings are almost negligible. The reasons for this severe under-utilisation could be unfriendly user interfaces or lack of training for actual users.[99]

4.3.3 Need to impart proper training

Lack of awareness and training is one of the biggest reasons for opposing the online courts. It has been suggested repeatedly that there is an impending need to impart training to make people; especially the judges and the advocates become familiar with the system of e-filing and online courts. While emphasising on the fact that most of the advocates are not properly aware about the technology, it was suggested by Mr. Manan Kumar Mishra that some advocates can learn and adapt to the technology if proper training is given.[100] Madan Lokur, former Supreme Court judge has also recommend the organisation of awareness and training programmers for the lawyers, litigants, judges and court officers for India's smooth transition towards online courts. He also stressed that there is a need to strength the infrastructure by providing proper access to technology and making the systems more user-friendly.[101]

Authors' Perspective:

The importance of physical courts and physical hearings cannot be undermined. It is a well accepted fact that online courts cannot fully replace the physical courts. However, a blend of online and physical courts can provide an easy solution to the problem of accessibility to justice in times like this as well as for future. The complex commercial disputes involving important questions of law can be taken up in physical hearings, rest can be adjudicated through the mode of online courts.

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[97] Innovations: Phase II eCourts Project, eCourts India, 33https://ecourts.gov.in/ecourts_home/static/manuals/FINAL%20INNOVATIONS%20IN%20PHASE%20II.pdf(Last visited on 21st July, 2020)

[98] Jai Brunner&Balu Nair, Digitising Filings, Supreme Court Observer (20th April, 2020), https://www.scobserver.in/beyond-the-court/digitising-filings (Last visited on 21st July, 2020)

[99] Virtual Courts in India: A Strategy Paper, VIDHI Centre for Legal Policy, (April 2020) 20 https://vidhilegalpolicy.in/wp-content/uploads/2020/06/20200501_Strategy-Paper-for-Virtual-Courts-in-India_Vidhi-1.pdf(Last visited on 21st July, 2020)

[100]Supra n49

[101]Supra n 46

5. CONCLUSION

The judicial system has been hit by the pandemic on a very large scale. The compulsions associated with following the norms of "social distancing" have left the administrators of justice with no other choice but to close down the temples of justice "physically". But as they say, adversary is the mother of invention and desperate times call for drastic measures. If we look at the pandemic with a positive outlook, it may have given us the opportunity to transform our justice delivery system for the better. The judiciary is already inclining towards technology to ensure that the justice delivery system does not crumble. Tough time as it may, it has shown us not only the importance of online courts but also our potential when it comes to delivery of justice. Supreme Court is leading all other courts by example by being the first one to adopt online hearing mechanism. The Supreme Court after receiving numerous memorandums from the Bar Council of India has proposed to start two more courts on the digital platform — chamber judge hearings and registrar hearings.[102] The proceedings before these two courts are usually mechanical and attended by junior counsels. This would allow them to get a chance to appear and generate work. The rest of the courts, including Delhi High Court, are following suit. Similarly, opening of the E-Seva Kendras to facilitate the e –filling process by the Lower courts is an appreciated step. By allowing the online filling of cases, Supreme Court has added a new segment to the judicial history of the country.[103] All the stakeholders in the legal world are also noticing the shift in the judicial system and are trying to adapt to the same promptly. At the same time, efforts should be made towards encouraging the use of ADR and especially ODR mechanisms. These mechanisms are not only cost effective but also efficient in resolving the disputes within a stipulated time frame. In stimulating the use of ADR and ODR techniques, the role played by the advocates is very crucial. They should try to convince their clients to opt for such mechanisms, whenever applicable to make dispute resolution easier and speedy. A separate course in ADR and ODR mechanisms, with special emphasis on their advantages, especially for the young lawyers can prove to be very useful in increasing the recourse to these mechanisms.

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[102]Bhadra Sinha, ,Supreme Court could opt for combination of physical and virtual hearings after summer break,The Print14 June, 2020, https://theprint.in/judiciary/supreme-court-could-opt-for-combination-of-physical-and-virtual-hearings-after-summer-break/441503/ (Last Visited on 23rd July 2020)

[103]Dhananjay Mahapatra , Times of India, Combination of virtual, physical courts will be way forward:Times of India 18thMay,2020 http://timesofindia.indiatimes.com/articleshow/75796059.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst (Last Visited on 23rd July 2020)

As the country tries to get back to normal, the norms of social distancing would continue for an indefinite future. The importance of open physical courts cannot be overlooked. However, the need of the hour is to forge a model legal system that incorporates online courts as well other dispute resolution modes. A hybrid mechanism embodying physical courts, online courts, and ADR and ODR systems can prove to be a viable solution. As **Angie Engstrom** once said ***"Every choice makes a difference as we get ourselves unstuck and move towards the life we desire. Select your choices wisely."*** The choices we make during this pandemic era will decide our future course of life. If administrators of justice make a wise choice then these choices can lead to overcoming two prominent problems of the Indian Judicial system, i.e., high pendency of cases and low access to justice. The starting so far has been quite positive and we hope that this horrendous night shall be followed by a new dawn.

LEGAL BASES AND PRACTICAL CONDITIONS FOR THE DEVELOPMENT OF THE ENDOGENOUS GROWTH MODEL OF VIETNAM'S SOUTHEAST REGION IN THE CURRENT CONTEXT OF INTERNATIONAL AND REGIONAL INTEGRATION

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ABSTRACT

Based on the analysis results of a number of different sources of original materials and secondary documents by qualitative and quantitative methods, the article proves that the Southeast area is not only one of Vietnam's current socio-economic regions that fully converges all the necessary scientific, legal bases, and objective conditions as well as subjective realities to be able to successfully develop their own model of endogenous growth, but also become the ideal growth model for all of other regions, the economic engine of the entire Southern Vietnam, and the main driving force for the country's development in the coming time. The most important of these are the increasing demands for regional connectivity, the fragmentation of local economies, the concentration of regional space, the similarity of socio-economic conditions, and the support of both the central government and the people of the entire country. Nevertheless, the Southeast region's strategic geographic location in the heart of Southeast Asia, the favorable natural conditions, natural resources, and population, the country's most modern infrastructure are the most decisively subjective factors. At the same time, the economic driving force function of the whole country with a potential consumption market and the relatively equal development level among localities of the area is really the lever for the Southeast region's economy to take off in the coming years. However, in order to turn these theoretical opportunities into development practices in the current conditions of Vietnam, the Southeast region's provinces and cities needs a comprehensive regional institution and a system of unified policy mechanisms, specific development strategies, a system of more centralized resources to deal with internal problems, a more rational budget allocation mechanism between central government and local

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administration, and regional economic linkage institutions as well as interregional relationships with other social-economic regions of the entire country.

Key words: *legal basis, scientific condition, endogenous growth model, Southeast region, Vietnam*

1. Introduction:

Vietnam's Southeastern region is administratively composed of six centrally run provinces and cities in alphabetical order of the first letter: Bà Rịa-Vũng Tàu, Bình Dương, Bình Phước, Đồng Nai, Ho Chi Minh City, and Tây Ninh. Although this is one of Vietnam's two socio-economic regions with the smallest natural area, it has been the most developed economic center and contributed the most to the national economy as well as the national budget for decades.[2] With a level of socio-economic development outperforming most of the remaining socio-economic regions of the country and an economic potential which is much stronger than the general level of the whole country, the Southeast region's localities is not only scheduled to become an economic fulcrum for many other regions, but also build their own model of endogenous growth to both promote inherent potentials and advantages and develop unique regional characteristics.[3] However, Vietnam's Southeast region cannot develop on its own and solve all the related questions by itself in the ongoing process of industrialization, modernization, and international integration at the presence as well as in the future. Therefore, the Southeast provinces must strengthen intra-regional linkages and develop interregional relationships to move forward in a sustainable manner on the one hand, but it is also expected by stakeholders and set its own target to become a driving force for the economic development of the entire Southern Vietnam on the other hand.[4] Furthermore, the Southeast region is also the largest regional economy, the strongest economic center of the country, and Vietnam's best region with a lot of the most modern socio-economic development indicators. It has in practice not only been the busiest urban center, one of the three growth poles, one of the biggest key economic regions, but also the largest gateway

[2] Viện Chiến lược phát triển, *Báo cáo nghiên cứu phân vùng phục vụ quy hoạch giai đoạn 2021-2030,* Dự thảo, 33 (Hà Nội, July 2018).

[3] Hà Anh, *Phát huy tiềm năng, thế mạnh vùng Đông Nam Bộ và đồng bằng sông Cửu Long,* BÁO ĐIỆN TỬ ĐẢNG CỘNG SẢN VIỆT NAM (Aug. 14, 2019, 23:22 PM), available at: http://dangcongsan.vn/kinh-te/phat-huy-tiem-nang-the-manh-vung-dong-nam-bo-va-dong-bang-song-cuu-long-531821.html, accessed on May 5, 2020.

[4] Xuân Khu, *Thành phố Hồ Chí Minh xây dựng quan hệ bền vững với các đối tác ASEAN,* DÂN TỘC VÀ MIỀN NÚI (Aug. 7, 2018, 16:01 PM), available at: https://dantocmiennui.vn/thanh-pho-ho-chi-minh-xay-dung-quan-he-ben-vung-voi-cac-doi-tac-asean/178636.html, accessed on Sept. 5, 2020.

for international trade of Vietnam for decades.[5] Based on the current reality and existing potentials, The Southeast region has been given hope and trusted by both the central government and the local people throughout Vietnam to become an economic engine and driving force for the development of the whole country.[6] The recent development practice has proven that the Southeast region is completely worthy of the national beliefs, the expectations of both the central and local governments, and its inherent position.[7] However, in the context of today's extensive regionalization, globalization, and international integration, the Southeast localities have not only excellentlly finished their functions, tasks, and historic missions of the economic locomotive and driving force of the country, but have also been able to become one of the largest and most modern economic centers of Southeast Asia and even Asia.[8] In practice, the distance from Ho Chi Minh City to Hanoi (about 1,719.1 km) is geographically even much farther than that from Ho Chi Minh City to Phnom Penh (around 227.5 km) and almost double the distance from Ho Chi Minh City to Bangkok (867.3 km). Meanwhile, the distance from Ho Chi Minh City to Hanoi is 1,140 km by air, but this distance to Kuala Lumpur is 1,014 km, to Singapore is 1,085 km, to Yangon is 1,322 km only.[9] It means that Vietnam's Southeast region is geographically located in a central position and socio-economically possess a lot of favorable conditions to become one of the the leading innovative urban hubs of ASEAN countries.[10] However, what scientific, legal, practical, and subjective bases could offer the Southeast regions enough

[5] An Tôn, *Đông Nam Bộ hoàn thiện hạ tầng giao thông để phát triển,* HÀ NỘI MỚI (Apr. 26, 2020, 7:00 AM), available at: http://hanoimoi.com.vn/tin-tuc/Xa-hoi/965742/dong-nam-bo-hoan-thien-ha-tang-giao-thong-de-phat-trien, accessed on Sept. 5, 2020.

[6] VL, *TP.Hồ Chí Minh giữ vững vị trí đầu tàu kinh tế của cả nước,* BÁO ĐIỆN TỬ ĐẢNG CỘNG SẢN VIỆT NAM (July 10, 2018, 18:27 PM), available at: http://dangcongsan.vn/thoi-su/tpho-chi-minh-giu-vung-vi-tri-dau-tau-kinh-te-cua-ca-nuoc-489955.html, accessed on Sept. 5, 2020.

[7] Phan Văn Khải, *Thành phố Hồ Chí Minh đi hàng đầu trong sự nghiệp công nghiệp hoá, hiện đại hoá, tiến kịp các thành phố lớn trong khu vực,* TRANG TIN ĐIỆN TỬ ĐẢNG BỘ THÀNH PHỐ HỒ CHÍ MINH (Feb. 16, 2004, 15:07 PM), available at: https://www.hcmcpv.org.vn/tu-lieu/van-kien-dai-hoi-dai-bieu-dang-bo-tphcm-lan-thu-vii/thanh-pho-ho-chi-minh-di-hang-dau-trong-su-nghiep-cong-nghiep-hoa-hien-dai-hoa-tien-kip-cac-thanh-1076918825, accessed on Sept. 5, 2020.

[8] Đỗ Trà Giang, *Thành phố Hồ Chí Minh: Hướng đến trung tâm tài chính khu vực và quốc tế,* TRANG TIN ĐIỆN TỬ ĐẢNG BỘ THÀNH PHỐ HỒ CHÍ MINH (Oct. 18, 2019, 07:58 AM), available at: https://www.hcmcpv.org.vn/tu-lieu/van-kien-dai-hoi-dai-bieu-dang-bo-tphcm-lan-thu-vii/thanh-pho-ho-chi-minh-di-hang-dau-trong-su-nghiep-cong-nghiep-hoa-hien-dai-hoa-tien-kip-cac-thanh-1076918825, accessed on Sept. 5, 2020.

[9] *Thành phố Hồ Chí Minh nằm ở đâu?* CỔNG THÔNG TIN ĐIỆN TỬ CHÍNH PHỦ THÀNH PHỐ HỒ CHÍ MINH (July 1, 2011, 01:10 PM), available at: http://tphcm.chinhphu.vn/thanh-pho-ho-chi-minh-nam-o-dau, accessed on Sept. 5, 2020.

[10] Thanh Huyền, *TP.HCM sở hữu tiềm năng để trở thành trung tâm tài chính quốc tế,* ĐẦU TƯ ONLINE (Oct. 16, 2019, 16:05 PM), available at: https://baodautu.vn/tphcm-so-huu-tiem-nang-de-tro-thanh-trung-tam-tai-chinh-quoc-te-d109202.html, accessed on Sept. 5, 2020.

conditions to successfully build its own model of endogenous growth in the current context of extensive international integration, worthy of the driving force for the development of the entire Southern Vietnam, the economic leader of the country, and one of the largest economic centers of Southeast Asia and what needs to be done in order for the Southeast region to quickly realize these specific targets and maintained its admirable position in the decades to come? These questions have partly been discussed by the authorities and attempted to answer by scientific communities in many different forms and degrees, but there are still a number of issues that have not been thoroughly resolved and a lot of arguments have not yet really been united by common voices. It is for this reason based on the results of analyzing several different sources of documents by qualitative and quantitative methods as well as the interdisciplinary and specialized approaches, the article points out the outstanding advantages and inherent disadvantages of the Southeast region in the construction of its own model of endogenous growth and in the transformation to the leading economic hub of the entire Southern Vietnam, the whole country, and Southeast Asia and at the same time proposes some policy implication solutions for the development of Vietnam's Southeast region into one of Asian remarkable economic centers in the near future.

2. Literature review and database:

Although the endogenous growth model of Vietnam's Southeast region has not yet been a familiar topic of domestic and foreign scholars, there have been some initial studies on this issue. The most typical of these is the master thesis on *Agricultural Product Consumption Market in the South East (Through a survey mainly in Dong Nai)* by Hòang Thị Ngịc Loan in 2000,[11] the research work on *Finding solutions to develop the Southeast area* of Vũ Nguyên in 2017,[12] the doctoral dissertation on *Factors affecting the attraction of foreign direct investment: Research on the Southeast economic region* of Cao Tấn Huy in 2019,[13] the articles on *The southern key economic region concentrates all the best conditions for the economic development* of Chí Kiên

[11] Hoàng thị Ngọc Loan, *Thị trường tiêu thụ nông sản Miền Đông Nam Bộ (Qua khảo sát chủ yếu ở Đồng Nai)*, Luận văn thạc sĩ khoa học kinh tế, Chuyên ngành: Kinh tế chính trị xã hội chủ nghĩa, Mã số 5.02.01 (Học viện Chính trị quốc gia Hồ Chí Minh, Hà Nội, 2000).

[12] Vũ Nguyên, *Tìm giải pháp phát triển vùng Đông Nam Bộ,* TRANG THÀNH PHỐ HỒ CHÍ MINH (Sept. 28, 2017, 16:38 PM), available at: https://nhandan.com.vn/tin-chung1/tim-giai-phap-phat-trien-vung-dong-nam-bo-305046/, accessed on Sept. 5, 2020.

[13] Cao Tấn Huy, *Các yếu tế tác động đến thu hút đầu tư trực tiếp nước ngoài: Nghiên cứu vùng kinh tế Đông Nam Bộ,* Luận án tiến sỹ, Chuyên ngành: Kinh tế chính trị, Mã số: 62 31 01 02 (Học viện Chính trị Quốc gia Hồ Chí Minh, Hà Nội, 2019).

in 2020,[14] and *Tourism development in the Southeast: Taking the people as the center* of Lê Đức Hoành in 2020.[15] Although all the above-mentioned works have more or less mentioned the formation and development of the Southeast region's economic space, no studies have set out the target and successfully solved the endogenous growth model of the Southeast region in the current context of intensive regionalization, globalization, and international integration as an independent scientific project.

It is therefore along with the inheritance of the research results in the above-mentioned works, this paper utilizes a futher system of different primary and secondary sources to give a more comprehensive picture on the formation, development, and future prospects of the Southeast region's model of endogenous growth in the new international context. *Firstly* is the statistics of the authorities and the regional economic development strategy of Vietnam's state management apparatus related to this issue. The most noticeable of these are the *Press Release on the Results of the General Population and Housing Census in 2019* of the General Statistics Office,[16] *The Zoning Research Report for the planning of the period of 2021-2030* by the Institute of Development Strategy in 2018,[17] and *The General Census of Population and Housing at 0:00, April 1, 2019: Implementation organization and preliminary results* of the Central Population and Housing Census Steering Committee in 2019.[18] The *second* is the statistics of the authorities and the related research results of foreign scientific circles. The most frequently used of these are *Country Profile: China, August 2006* of Library of Congress in 2006[19] and *Indian States and Capitals - GK in PDF* in 2016.[20] *The third* are the sources of updated and diversified information of Vietnam's newspapers and news agencies on the endogenous growth models in

[14] Chí Kiên, *Vùng KTTĐ phía Nam tập trung mọi điều kiện tốt nhất để phát triển kinh tế,* BÁO ĐIỆN TỬ CHỈNH PHỦ NƯỚC CỘNG HÓA XÃ HỘI CHỦ NGHĨA VIỆT NAM (June 19, 2020, 17:20 PM), available at: http://baochinhphu.vn/Chi-dao-quyet-dinh-cua-Chinh-phu-Thu-tuong-Chinh-phu/Vung-KTTD-phia-Nam-tap-trung-moi-dieu-kien-tot-nhat-de-phat-trien-kinh-te/398478.vgp, accessed on Sept. 5, 2020.

[15] Lê Đức Hoành, *Phát triển du lịch Đông Nam Bộ: Lấy người dân làm trung tâm,* TẠP CHÍ TÀI CHÍNH (Jue 29, 2020, 08:10 PM), available at: http://tapchitaichinh.vn/su-kien-noi-bat/phat-trien-du-lich-dong-nam-bo-lay-nguoi-dan-lam-trung-tam-324878.html, accessed on Sept. 5, 2020.

[16] Tổng cục Thống kê, *Thông cáo báo chí Kết quả Tổng điều tra Dân số và Nhà ở năm 2019,* TRANG THÔNG TIN ĐIỆN TỬ TỔNG CỤC THỐNG KÊ (Dec. 19, 2019, 14:43 PM), available at: https://www.gso.gov.vn/Default.aspx?tabid=382&ItemID=19440, accessed on Sept. 4, 2020.

[17] Viện Chiến lược phát triển, *supra* note 1.

[18] Ban Chỉ đạo tổng điều tra dân số và nhà ở Trung ương, *Tổng điều tra dân số và nhà ở thời điểm 0 giờ ngày 01 tháng 4 năm 2019, Tổ chức thực hiện và kết quả sơ bộ* (Nhà xuất bản Thống kê, Hà Nội, 2019).

[19] Library of Congress. *Country Profile: China, August 2006*, LIBRARY OF CONGRESS, 28-29 (2006), available at: https://www.loc.gov/rr/frd/cs/profiles/China.pdf, accessed on May 3, 2020.

[20] *Indian States and Capitals - GK in PDF*, ReferenceGlobe (2016), available at: https://referenceglobe.com/userfolders/RG3397/abc.pdf, accessed on May 3, 2020.

the Southeast region over the past few years. The most typical of these are the articles on *Dividing the country into 7 regions, Long An and Tiền Giang belong to the Southeast region* of Ngọc An in 2019,[21] *Southern key economic region: Need a new mechanism to break through* by Trần Vũ Nghi in 2016,[22] and *Bringing the whole HCMC region into a major center of Southeast Asia* in 2017.[23]

3. Methodology and research methods

After nearly three and a half decades of reform, Vietnam's economy has achieved a number of very positive achievements. Vietnam's current economy is not only an attractive market and destination for many foreign investment flows, but also a bright spot and a new growth pole of Asian nations.[24] However, the growth model that relies heavily on exploiting available natural resources and taking advantage of the quantity of human resources in exchange for rapid growth is no longer totally suitable for the current model of green growth and sustainable development.[25] At the same time, the development orientation which stresses theoretically first on the national aggregate interests has created serious inequalities between economic sectors and bigger gaps between social strata. In such a situation, localities compete to implement various development policies to protect their inherent interests to the maximum extent possible and simultanepusly increase their ability of resistance to negative impacts of the general mechanisms. Nevertheless, Vietnam's division into so many different small administrative units not only makes the bureaucracy even more cumbersome and ineffective, but the national

[21] Ngọc An, *Chia cả nước thành 7 vùng, Long An và Tiền Giang thuộc Đông Nam bộ,* TUỔI TRẺ ONLINE (Jan. 10, 2019, 17:06 PM), available at: https://tuoitre.vn/chia-ca-nuoc-thanh-7-vung-long-an-va-tien-giang-thuoc-dong-nam-bo-20190110160514174.htm, accessed on May 5, 2020.

[22] Trần Vũ Nghi, *Vùng kinh tế trọng điểm phía Nam: Cần cơ chế mới để đột phá,* TUỔI TRẺ ONLINE (Dec. 23, 2016, 09:51), available at: https://tuoitre.vn/vung-kinh-te-trong-diem-phia-nam-can-co-che-moi-de-dot-pha-1240993.htm, accessed on May 5, 2020.

[23] P.T., *Đưa cả vùng TPHCM thành trung tâm lớn của Đông Nam Á,* DÂN TRÍ (Dec. 26, 2017, 21:06), available at: https://dantri.com.vn/xa-hoi/dua-ca-vung-tphcm-thanh-trung-tam-lon-cua-dong-nam-a-20171226210412948.htm, accessed on May 4, 2020.

[24] Hoàng Phương, *Kinh tế Việt Nam: Điểm sáng của châu Á,* NGƯỜI LAO ĐỘNG (July 9, 2020, 09:44 AM), available at: https://nld.com.vn/thoi-su-quoc-te/kinh-te-viet-nam-diem-sang-cua-chau-a-20200708212540933.htm, accessed on Sept. 5, 2020.

[25] Trương Bá Thanh và Bùi Quang Bình, *Đổi mới mô hình tăng trưởng kinh tế Việt Nam trong thời kỳ mới,* TẠP CHÍ TÀI CHÍNH (Nov. 7, 2016, 10:27 AM), available at: http://tapchitaichinh.vn/nghien-cuu--trao-doi/trao-doi-binh-luan/doi-moi-mo-hinh-tang-truong-kinh-te-viet-nam-trong-thoi-ky-moi-114387.html, accessed on Sept. 5, 2020.

economy is also seriously fragmented, because each locality functions as an independent and separate economy.[26]

However, no single locality can fully satisfy all of its own development needs as well as maximize its inherent potentials and advantages for further advancements by itself. It is therefore believed that regional integration has become an indispensable need of all Vietnam's current local economies. In that circumstance, Vietnam's Southeast region emerges as a model for sustainable regional economic development and is capable of becoming a fulcrum for many other regions of the country on the basis of a relatively coherent regional space and a number of similar characteristics in terms of natural conditions, socio-economic structure, infrastructure, cultural traditions, and level of development. Nevertheless, how will the Southeast region's localities build their own endogenous growth models to harmonize all three goals, namely the economic driving force of Southern Vietnam, the country's economic locomotive, and one of Southeast Asian largest economic centers. Based on the analysis of the available natural conditions, the prescribed legal foundations, and recent development practices of the region's localities, the paper compares the existing conditions with the proposed objectives and projects of constructing an endogenous growth model to confirm that the Southeast region not only fully converges the necessary prerequisites to fulfill its objectives, but also becomes an ideal endogenous growth model for both Vietnam and Southeast Asia in the years to come.

To realize those basic goals, the paper uses a system of different qualitative and quantitative methods as well as interdisciplinary and specialized approaches. While quantitative methods allow the research to make claims and conclusions based on specific figures, data, and facts, qualitative methods provide the study's arguments with widely recognized synthetic research results and practically proven laws of development. For example, the claim that Vietnam is not a big country in terms of territorial area, but divided into many provincial administrative units is the result of a comparison of the Vietnamese facts with published research results on government systems of many countries around the world. Furthermore, to conclude that the demand for regional integration is obviously rising in Vietnam is based firmly on recent development trends of localities throughout the country as well as the fragmented practice of isolated local economies of the S-shaped country. Moreover, the research is also conducted by

[26] Ngọc Thúy, *Mô hình tăng trưởng của Việt Nam: Để tránh "mỗi tỉnh là một nền kinh tế,"* Vn Economy (May 11, 2010, 09:14 AM), available at: http://vneconomy.vn/thoi-su/mo-hinh-tang-truong-cua-viet-nam-de-tranh-moi-tinh-la-mot-nen-kinh-te-20100510081437833.htm, accessed on Sept. 5, 2020.

different interdisciplinary and specialized methods. The most representative of these are the historical and logical methods. For instance, to make the point that the development of the Southeast region's model of endogenous economy is not only a temporary decision, but also a long-term development process, the paper employs a series of state decisions and policies on the development of the southern key economic region from 1997 to 2020 on the basis of chronological order and historical logic.

4. Lawful Bases & Practical Cornerstones of Developing the Southeast Region's Model of Endogenous Growth:

4.1. Objectively scientific, legal, and practical bases

Although regional economy and economic zone development are no longer a strange phenomenon for almost all countries on the earth, but to be able to develop successfully the endogenous growth model of a certain number of regions, it is necessary to meet some basic prerequisites. The most typical of these are the scientific bases and theoretical premises, development strategies and state regulations, and inherent natural conditions as well as the objective factors impacted from the outside. In this regard, there are many objectively scientific, legal, and practical bases to develop the Southeast region's models of endogenous growth, but the most important are the five key conditions as follows:

Firstly, the inevitable need for regional economic development is getting higher not only in Vietnam, but also in many other developed countries of the current world. In the era of globalization of the Industrial Revolution 4.0, almost no country or economic institution can survive normally and thrive on their own without external relationships. The provinces, cities, and localities of Vietnam's Southeast region could not be exempted from these general rules. In addition to transportation and human social relationships in everyday life, no localities or economic institutions can provide themselves with all the necessities and essential supplies for the usual development of a modern economy. It is therefore clear that the expansion of exchange and trade of goods between localities and nations is not only extremely urgent, but is also vital in the current circumstance of the Industrial Revolution 4.0.

Secondly, Vietnam is administratively divided into a number of provinces and cities under the direct management of the central government, but many of these administrative units are relatively modest in terms of natural area, population size, and economic potential. For instance, the whole of China is composed of only 22 provinces (sheng), 5 autonomous regions

(zizhiqu), 4 central cities (shi), and 2 special administrative zones: Hong Kong and Macau.[27] The United States of American Government also manages only 50 states,[28] while the Russian Federation has locally been administrated by 7 federal districts since 2000 with 89 local jurisdiction areas.[29] At the same time, the majestic India also controls only 36 local administrative units with 29 states and 7 alliance regions.[30] In such a situation, in spite of having a natural area equivalent to that of Vietnam, but Germany is locally governed by 16 states only,[31] while Japan is divided into 47 prefectures.[32] It means that Vietnam is not a major country on the earth, but the number of local government system ranks among the most of the current world. The fact that localities build their own economies according to their own specific development strategies has partly limited the ability to promote internal synergy as well as maximize the available potentials of each region and the whole country. It is for this reason convinced that regional economic development will partly contribute to limiting the situation of separation and isolation of Vietnam's current system of local administrations.

Thirdly, the regional economy should include many localities located close to each other in a geographical space and is connected by several economic ties. This is an advantage of Vietnam's Southeast region. For example, Vietnam's North and South Central Coast region has a length of more than 1,300 km from North to South. The reality shows that economic linkages and cooperation between the northernmost provinces of the region such as Thanh Hóa and Nghệ An and the southernmost ones such as Bình Thuận and Ninh Thuận have been nearly non-existent. For this reason, the Ministry of Planning and Investment has proposed to separate the North and South Central Coast region into the North Central region and the South Central region to increase the total number of Vietnam's economic regions to seven ones.[33] Similarly, despite belonging to the Central Highland region, Kon Tum's economic links with Đà Nẵng have been

[27] Library of Congress, Federal Research Division, *supra* note, at 28-29.
[28] United Nations, *The United States of America, country profile,* Johannesburg Summit 2002, UNITED NATIONS, 138 (2002), available at: https://www.un.org/esa/agenda21/natlinfo/wssd/usa.pdf, accessed on May 3, 2020.
[29] Library of Congress, *Country Profile: Russia, October 2006,* LIBRARY OF CONGRESS, 20 (2006), available at: https://www.loc.gov/rr/frd/cs/profiles/Russia-new.pdf, accessed on May 3, 2020.
[30] *Indian States and Capitals - GK in PDF, supra* note 19.
[31] Library of Congress, *Country Profile: Germany, April 2008*, LIBRARY OF CONGRESS, 18 (2008), available at: https://www.loc.gov/rr/frd/cs/profiles/Germany-new.pdf, accessed on May 3, 2020.
[32] *Local self-government,* WEB JAPAN (2020), available at: https://web-japan.org/factsheet/en/pdf/e10_local.pdf, accessed on May 3, 2020.
[33] Thảo Nguyên, *Phân vùng kinh tế - xã hội: Liên kết để cùng phát triển,* KINH TẾ & ĐÔ THỊ (Feb. 18, 2020, 09:04 AM), available at: http://kinhtedothi.vn/phan-vung-kinh-te-xa-hoi-lien-ket-de-cung-phat-trien-365440.html, accessed on May 3, 2020.

more than those of Đắk Nông and Lâm Đồng. By contrast, Lâm Đồng has had more economic ties with Ho Chi Minh City than with Kon Tum for years. This proves that the economic zoning according to regional natural characteristics is not really reasonable. Instead, the economic zoning should be based on key economic regions. In this aspect, Vietnam's Southeast region is not only encapsulated in a relatively close space, but is also a key economic center and the driving force for the development of the whole country. The construction of the Southeast region's model of endogenous growth is therefore also very advantageous.

Fourthly, the policy of developing the Southern key economic region becomes one of the economic locomotives of the whole country. At the end of 1997 and beginning of 1998, Vietnam's Prime Minister respectively approved the Decision No. 747/1997/QĐ-TTg, Decision No. 1018/1997/QĐ-TTg, and Decision No. 44/1998/QĐ-TTg on the master plan on socio-economic development of the three national key economic regions up to 2010. According to these decisions, the Southern key economic region includes: Ho Chi Minh City, Bình Dương, Bà Rịa-Vũng Tàu, and Đồng Nai. On the 20th-21st June 2003, the Government of Vietnam decided to expand the boundary of the region by three more provinces: Tây Ninh, Bình Phước, and Long An in the Notice No. 99/TB-VPCP dated on the 2nd July 2003 with a total natural area up to 23,994.2 km2 (7.3% nationwide) and 12.3 million people in 2002 (15.4% nationwide). On the 10th October 2007, Tiền Giang was added to the Southern key economic region by the Decision No. 159/2007/QĐ-TTg of the Government of Vietnam.[34] On 20th July 2012, the Government of Vietnam issued Decision No. 943/QĐ-TTg on the master plan for socio-economic development of the Southeast region up to 2020.[35] This fact shows that the construction and development of the Southeast region's model of endogenous growth has not only derived from the practical needs and available potentials of this region, but has also been part of the overall socio-economic development strategy of the whole country and based on solid legal cornerstones.

Fifthly, the strategic geographical position of the Southeast region is not only within Vietnam, but also in Southeast Asia. The Southeast region possesses a number of significant

[34] *Tổng quan về quá trình hình thành các vùng kinh tế trọng điểm*, CỔNG THÔNG TIN ĐIỆN TỬ CHÍNH PHỦ NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM, available at: http://chinhphu.vn/portal/page/portal/chinhphu/noidungvungkinhtetrongdiemquocgia?articleId=10000721, accessed on May 4, 2020.

[35] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực,* TRANG THÔNG TIN ĐIỆN TỬ LOGICSTICS VIỆT NAM (Sept. 22, 2017, 12:54 PM), available at: http://logistics.gov.vn/nghien-cuudao-tao/bao-cao-phat-trien-ha-tang-dong-nam-bo-dieu-kien-cho-su-phat-trien-logistics-cua-khu-vuc, accessed on May 5, 2020.

advantages on the path to become an economic hub not only of Vietnam, but also of Southeast Asia and is also able to reach the whole Asian region. Ho Chi Minh City is nearly 1,730 km by road from Hanoi capital, located at the international crossroads between the maritime routes from North to South, East to West, and is the focal point of Southeast Asia.[36] On the occasion of the 40th anniversary of Ho Chi Minh City named after President Hồ Chí Minh, the city's leaders set out the target of striving by 2020 Ho Chi Minh City must become one of Southeast Asia's major economic, financial, commercial, and scientific-technological centers.[37] In 2017, the Government of Vietnam decided to plan Ho Chi Minh City region into an important area and position in Southeast Asia and Asia.[38]

In summary, Vietnam's Southeast region is one of the most dynamic, modern, and developed key economic regions in the country. These achievements are not only obtained due to inherent natural factors, but the construction of the Southeast region's model of endogenous economy is also based on different scientific, legal, and practical bases and objective facts. On the 23rd January 2018, the Ministry of Construction, the People's Committee of Ho Chi Minh City, and leaders of other provinces in the region announced *the Adjustment of construction planning of Ho Chi Minh City area until 2030 and the vision to 2050.* One of the main goals of this project is to play an increasingly important role in Southeast Asia.[39] In practice, Ho Chi Minh City area is currently a major urban center with a high rate of urbanization and good quality of life, a dynamic economic center with high and sustainable growth, and relatively competitive both at home and abroad.[40] All of the above important prerequisites and bases allow the Ho Chi Minh City area to be able to successfully build its own model of endogenous growth in relation to other economic regions of the country as well as Southeast Asia.

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[36] *Vị trí địa lý*, THÀNH PHỐ HỒ CHÍ MINH (Nov. 2, 2011, 16:00 PM), available at: http://www.hochiminhcity.gov.vn/thongtinthanhpho/gioithieu/Lists/Posts/Post.aspx?List=9efd7faa%2Df6be%2D4c91%2D9140%2De2bd40710c29&ID=5495&Web=9d294a7f%2Dcaf2%2D456d%2D8ca0%2D36b393b8c052, accessed on May 4, 2020.

[37] PV. *TP.HCM phải trở thành một trong những trung tâm lớn của Đông Nam Á*, THẾ GIỚI & VIỆT NAM (July 2, 2016, 12:00 AM), available at: https://baoquocte.vn/tphcm-phai-tro-thanh-mot-trong-nhung-trung-tam-lon-cua-dong-nam-a-32149.html, accessed on May 4, 2020.

[38] P.T., *supra* note 22.

[39] D.N.Hà, *Vùng TP.HCM sẽ là trung tâm kinh tế lớn ở Đông Nam Á,* TUỔI TRẺ ONLINE (Jan. 23, 2018, 13:56 PM), available at: https://tuoitre.vn/vung-tp-hcm-se-la-trung-tam-kinh-te-lon-o-dong-nam-a-20180123120819994.htm, accessed on May 4, 2020.

[40] P.T., *supra* note 22.

4.2. Subjective factual bases

In addition to the external scientific, legal, and practical bases, Vietnam's Southeast region also converges not only enough, but also excessively internal inherent subjective practical conditions in order to build successfully the model of endogenous growth and becomes an ideal regional economic development model for other regions throughout the country. It is at the same time also the bases for the Southeast region to assume its mission and excellently finish the task of an economic locomotive to lead the remaining regions of the country to advance faster and further in the process of industrialization and modernization of the country.

The first is the natural geography, natural resource, and population. Vietnam's Southeast region has a total natural area of 23,564 km2 (7.3% of the whole country) and a population of more than 17 million people (18.17% of the country).[41] The natural area of the Southeast region is in practice only larger than that of the Red River Delta region and much smaller than that of Vietnam's remaining regions, but contributes to 35.90% of the country's GDP.[42] According to the latest proposal of the Ministry of Planning and Investment in 2019, Vietnam's Southeast region would be composed of 9 provinces and cities,[43] including: six present Southeastern provinces plus Lâm Đồng, Bình Thuận, and Ninh Thuận. According to this project, it is predicted that by 2030, the population of the whole region would reach the number of about 24-25 million people, of which there would be around 18-19 million urban people and 18-19 million people of working age.[44] Additionally, Vietnam's Southeast region also possesses rich resources of oil and gas reserves of up to approximately 4-5 billion tons, 485-500 billion m3 of gas, is one of the four key fishing grounds of Vietnam with fish reserves of about 290-704 thousand tons (40% of Vietnam's Southern Sea), and agricultural land strengths.[45] These are very basic natural conditions for Vietnam's Southeast region to build its own model of endogenous growth.

The second is the infrastructure for the region's socio-economic development. The Southeast region is Vietnam's only current economic zone that fully converges all the necessary conditions and inherent advantages to develop a modern industry and advanced services as well as take the lead in the country's industrialization and modernization. Vietnam's Southeastern

[41] Hà Anh, *supra* note 2.
[42] Viện Chiến lược phát triển, *supra* note 1, at 33.
[43] Ngọc An, *supra* note 20.
[44] P.T., *supra* note 22.
[45] *Vị trí địa lý, điều kiện tự nhiên vùng Đông Nam Bộ,* DÂN TỘC VÀ MIỀN NÚI (Apr. 3, 2017, 14:38 PM), available at: https://dantocmiennui.vn/xa-hoi/vi-tri-dia-ly-dieu-kien-tu-nhien-vung-dong-nam-bo/130930.html, accessed on May 5, 2020.

economic region not only possesses a fairly synchronous infrastructure system, but is also home to a number of training institutions, research institutes, and healthcare facilities of high quality. In addition to a network of satellite towns connected by modern transportation system, the Southeast region is also Vietnam's leading industrial center with a dense network of efficient industrial parks and advanced leading industries.[46] It is thanks to the modern infrastructure system that the Southeast region has currently the highest rate of urbanization in the country[47] with 62.8% of urban population.[48] With the current rate and momentum of growth, it is expected that the urbanization rate of Vietnam's Southeast region will reach around 70-75%[49] in the coming years. A solid and modern infrastructure foundation is one of the great advantages for the construction of Ho Chi Minh City region's model of endogenous growth.

The third is the economic basis for the development of the internal growth model. Vietnam's Southeast area is the country's most important driving economic region. In 2017, the Southeast provinces alone contributed to approximately 45% of GDP, nearly 60% of total national budget revenue, and about 50% of total industrial production value, export turnover, and state budget of the whole country.[50] GRDP per capita of the Southeast region is two times higher than that of the national average[51] and GDP is nearly 2.5 times higher than that of the national average,[52] while the economic growth rate is always around 1.3[53] to 1.6 times[54] higher than the average one of the entire country. In addition, the Southeast area has also been the region attracting the largest number of foreign investment capital in the country right from the moment the country started the implementing of the renovation policy. As of August 2016, Vietnam's Southeast region has attracted 11,537 foreign investment projects with a total capital of 140.2 billion USD, accounting for 57.4% of the total number of projects and 48.4% of the total FDI

[46] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, Supra* note 34.
[47] Hà Anh, *supra* note 2.
[48] UNFPA Việt Nam. *Kết quả tổng điều tra dân số và nhà ở năm 2019,* UNFPA VIỆT NAM (Dec. 19, 2019), available at: https://vietnam.unfpa.org/vi/news/k%E1%BA%BFt-qu%E1%BA%A3-t%E1%BB%95ng-%C4%91i%E1%BB%81u-tra-d%C3%A2n-s%E1%BB%91-v%C3%A0-nh%C3%A0-%E1%BB%9F-n%C4%83m-2019, accessed on May 5, 2020.
[49] P.T., *supra* note 22.
[50] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ,* SỞ QUY HOẠCH - KIẾN TRÚC THÀNH PHỐ HỒ CHÍ MINH (Oct. 2, 2017), available at: https://qhkt.hochiminhcity.gov.vn/goc-nhin/can-tam-nhin-quy-hoach-moi-vung-kinh-te-dong-nam-bo-114.html, accessed on May 5, 2020.
[51] Hà Anh, *supra* note 2.
[52] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[53] Hà Anh, *supra* note 2.
[54] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.

capital of the country.[55] In the period of 2016-2018, Vietnam's Southeast region had an export turnover of 262.7 billion USD[56] (nearly 60% of the country).[57] If the openness of the economy is measured by the share of exports to GDP, Vietnam's Southeast region has an openness index of nearly 110%, while that of the whole country is only around 70%.[58] For this reason, the Southeast region is not only considered as the focal center for services and commerce of regional and international stature, but also as the largest industrial and international integration center of Vietnam.[59] It is thanks to such a strong economic potential, the development investment rate of Vietnam's Southeast region is up to 50% of GDP. This figure is 1.5 times higher than that of the national average.[60] On that basis, on the 23rd January 2018, Vietnam's Southeast region was determined to become the center for a modern economy, commerce, finance, scientific research, high quality services, and large-scale high-tech and specialized industries of both Vietnam and Southeast Asia.[61]

Fourthly, Vietnam's Southeast region is a large and potential consuming market. In 2019, the region population was amounted to around 17,828,907 people and the population density of the Southeast region was 757 people per km^2.[62] This reality makes the Southeast region become the second most densely populated one in the country (757 people per km^2), but had the highest average population growth rate of the nation (2.37% per year) in the period of 2009-2019.[63] This figure is twice as high as the average rate of Vietnam's population growth.[64] The Southeast region has been the annual ideal destination for approximately two-thirds of the total number of nationwide internal migrants with 1.3 million people per year.[65] This is clearly a potential consuming market for commodity productions, but the attractiveness of the Southeast market mainly comes from the size of the economy as well as consumers' spending ability. The Southeast region has been Vietnam's largest consuming market in many fields for decades. For

[55] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, supra* note 34.
[56] Trúc Giang, *Đánh giá giữa kỳ kế hoạch KTXH vùng Đông Nam Bộ và Đồng bằng Sông Cửu Long,* ĐẦU TƯ ONLINE (Aug. 31, 2018, 14:47 PM), available at: https://baodautu.vn/danh-gia-giua-ky-ke-hoach-ktxh-vung-dong-nam-bo-va-dong-bang-song-cuu-long-d87169.html, accessed on May 7, 2020.
[57] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[58] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, supra* note 34.
[59] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[60] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, supra* note 34.
[61] D.N.Hà, *supra* note 38.
[62] Ban Chỉ đạo tổng điều tra dân số và nhà ở Trung ương, *supra* note 17, at 67, 89.
[63] UNFPA Việt Nam, *supra* note 47.
[64] Ban Chỉ đạo tổng điều tra dân số và nhà ở Trung ương, *supra* note 17, at 49.
[65] UNFPA Việt Nam, *supra* note 47.

instance, in two months of November and December 2019, the Southeast region was the largest cement consumer of the country with 1,487,423 tons, while the Red River Delta just stopped at 1,091,497 tons.[66] At the same time, GRDP per capita of the Southeast region in 2018 was $5,289 per person.[67] With its income rate that is 2 times higher than that of the national average, the Southeast region is Vietnam's market of the largest purchasing power. This is in practice one of the most important conditions for the Southeast localities to develop its own model of endogenous growth.

Finally, the level of development is relatively equal among the localities and is higher than that of the national average. In addition to Tây Ninh and Bình Phước, which are in the process of integration, Đồng Nai, Bình Dương, Bà Rịa-Vũng Tàu, and especially Ho Chi Minh City have all been strong economic centers of the country and have relatively high levels of economic growth for years. On that general ground, the Southeast region's economic development level is generally higher than that of the whole country in the most key industries and important fields such as high-tech industry, high-quality tourism services, telecommunications technology, finance and banking, scientific research, and human resource training.[68] Ho Chi Minh City alone is not just a nuclear city and center for economy, knowledge, and modern multi-functional integrated science on a par with Southeast Asia's leading cities,[69] but is also the host of nearly 40% of the country's scientific staff. This is not only a strategic advantage of Vietnam's Southeast region, but also a place of high-quality human resource training for other economic areas of the nation.[70] While 23.1% of the country's labor force has been trained from at least the elementary or higher level with degrees and certificates, this rate in the Southeast region is 27.5%.[71] That is in reality one of the core factors for the process of building the Southeast region's model of endogenous growth.

In conclusion, the Southeast region is one of Vietnam's rarest areas which is capable of fully satisfying all the real subjective conditions to successfully build its own model of endogenous economic growth in the context of unpredictable developments of the domestic and

[66] TPX, *Sản lượng tiêu thụ xi măng cuối năm 2019 của các vùng miền tại Việt Nam*, CÔNG TY CỔ PHẦN XI MĂNG TÂN PHÚ XUÂN (Feb. 8, 2020), available at: http://tpx.vn/san-luong-tieu-thu-xi-mang-cuoi-nam-2019-cua-cac-vung-mien-tai-viet-nam-id3141.html, accessed on May 7, 2020.
[67] Trúc Giang, *supra* note 55.
[68] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[69] D.N.Hà, *supra* note 38.
[70] Trần Vũ Nghi, *supra* note 21.
[71] Tổng cục Thống kê, *supra* note 15.

international situation. Vietnam's Southeast region not only possesses abundant inherent natural resources, but its population is also capable of providing the regional economy with quality human resources as well as a large consuming market. Nevertheless, modern infrastructure and facility conditions also contribute to giving the Southeast region the position of Vietnam's leading center for tourism, industrial services, information technology, telecommunications and logistics... with a system of largest airports and seaports in the country.[72] However, the remarkable and outstanding development of the Southeastern economic region is the factor which allows the localities in the region to successfully build their own model of endogenous growth. All of these developments prove that Vietnam's Southeast region is not only the nucleus of the South's key economic zone, the economic center of the South Vietnam, and the economic engine of the whole country, but can also establish its own model of endogenous growth in the general development strategy of the country.

4.3. Some suggestions and solutions

Based on the above analysis, the article offers some policy implication solutions as follows:

The first is the mechanism and institutions: there should be regional institutions to govern and manage the development of the whole region. At present, provincial presidents of the region's localities alternately assume the task of operating the common affairs in terms. However, as this is a position of consultation and information synthesis, the actual effect of this operating model is not as effective as expected. One side of the problem is that the current concept of the economic zone is not an official administrative unit in Vietnam's political system,[73] but there are on the other hand no clear mechanisms and specific regulations on the role of executive and leadership of economic zones' heads.[74] It is therefore urgent to build appropriate regional economic institutions in parallel with the issuance of clear regulations on operational mechanisms as well as specific functions and tasks of each position, unit, and agency in the regional institutions as soon as possible.

The second is to identify a number of specific central targets and detailed implementation roadmaps to realize those goals. One of the tasks that need to finish immediately is to clearly rebuild the development plan of the Southeast region on the basis of the general master plan of

[72] Hà Anh, *supra* note 2.
[73] Thảo Nguyên, *supra* note 32.
[74] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.

the whole country. It is necessary to determine whether the Southeast region should remain as it is at the moment or develop into the Southern key economic zone or include Ninh Thuận, Bình Thuận, and Lâm Đồng. Weaknesses in the planning are considered as one of the main obstacles for Vietnam's current economic regions, including the Southeast economic region.[75] Improving the quality of regional planning is therefore of vital importance to the issue of regional resource allocation in order to maximize the inherent advantages within the whole region.[76] Based on the general strategy of the entire region, the localities can identify their potentials, advantages, and plan their development strategies in a consistent and synchronous manner with the whole region.[77]

The third is to focus resources on solving intense economic problems and pressing social questions within the region. In this regard, Vietnam's Southeast region is facing a number of hot issues. The *first* is the free migration problem with around 1.3 million people per year.[78] The *second* is the question of the country's lowest birth rate (1.39 children per woman) in Ho Chi Minh City.[79] The *third* is the degradation and overload of the infrastructure, especially the transport infrastructure and projects of significant regional linkage.[80] A lot of important roads in the Southeast region have become overloaded[81] with the pace of the rapid economic development of the regions' economies. The *fourth* is the issue of climate change. Ho Chi Minh City is predicted to be one of the country's most negatively affected regions due to climate change. It is for this reason recommended that the Southeast region develop regional space towards balance, sustainability, and adaptation to the maximum extent possible to the negative impacts of climate change in parallel with the strengthening of regional linkages with standards of advanced and synchronous technical infrastructure.[82] The *fifth* is that the Southeast region's growth rate is tending to decrease gradually and the development gap with other economic areas of the nation is in danger of significant narrowing. There is not as much room to increase capital

[75] Hà Nguyễn, *"Trọng điểm" của Vùng kinh tế trọng điểm,* ĐẦU TƯ ONLINE (July 30, 2019, 15:29 PM), available at: https://baodautu.vn/trong-diem-cua-vung-kinh-te-trong-diem-d104558.html, accessed on May 4, 2020.
[76] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, supra* note 34.
[77] Thảo Nguyên, *supra* note 32.
[78] UNFPA Việt Nam, *supra* note 47.
[79] *Id*.
[80] Hà Nguyễn, *supra* note 74.
[81] Phương Nam, *Hạ tầng giao thông Đông Nam Bộ: Chủ động giải bài toán khó,* HÀ NỘI MỚI (Jan. 10, 2020, 06:51 AM), available at: http://www.hanoimoi.com.vn/tin-tuc/giao-thong/955187/ha-tang-giao-thong-dong-nam-bo-chu-dong-giai-bai-toan-kho, accessed on May 5, 2020.
[82] D.N.Hà, *supra* note 38.

and labor resources in the Southeast area as in the regions, which have not undergone this primitive period of industrialization.[83] If these questions are not paid enough attention soon and challenges are not addressed definitively, they would be significant obstacles in the construction of the Southeast region's model of endogenous growth.

Fourthly, the budget mechanism between the central government and the local administrations should be fairer in order to create more advantageous conditions for positive actors. Although the Southeast region's budget revenue reached 1,639,215 billion VND and contributed up to over 50% of the country's total budget revenue in the period of 2016-2018,[84] this region was invested only around 18.5% of the whole country's total investment capital. Since 1 January 2017, Ho Chi Minh City has been entitled to retain the budget revenue ratio of 18% only,[85] Bình Dương 36%, Đồng Nai 47%, Bà Rịa-Vũng Tàu 64%, while this rate of Cần Thơ has been 91%.[86] This investment rate of the central budget is not only incompatible with the great contributions of the Southeast region, but also cannot meet the development investment needs of the largest economic center of the country.[87] It is therefore suggested that the Government of Vietnam needs to redefine the rate of local budget regulation for the Southeast region to ensure its correspondence to the main contributions of each locality's budgets to the central budget on the one hand, but ensures simultaneously development investment resources for the regions that are on the rise on the other hand.[88]

The fifth is the development of inter-regional relations between the Southeast region and other areas at home and abroad. Although the Southeast localities are located in the region with the country's highest level of economic development, they cannot supply and consume all the essentials of modern life by themselves. It is therefore clear that the integration of the internal region and the linkage with other economic areas is inevitable to the extent that it cannot be otherwise optional.[89] As for the Southeast region, it is necessary to redefine the internal structure of the whole area of the Southeast region, the Southern key economic region, and the Ho Chi Minh City area. It is essential to emphasize the thinking of regional development and to put the

[83] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[84] Trúc Giang, *supra* note 55.
[85] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[86] Trúc Giang, *supra* note 55.
[87] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[88] Trần Vũ Nghi, *supra* note 21.
[89] Thảo Nguyên, *supra* note 32.

development strategy of each locality in the long-term plan of the whole region.[90] This fact shows that although the Southeast region possessed a lot of favorable conditions for the successful construction of its own growth model, there is also no shortage of opportunities for cooperation and linkage with other regions within Vietnam and overseas.

In summary, the Southeast region plays a particularly important role in Vietnam's socio-economic development.[91] However, in order for the Southeast region to both become a model of endogenous growth and fulfill the mission of the nation's leading economic drivers, the regions' localities need to overcome the current situation of discrete linkage.[92] It is at the same time urgent to experiment specific mechanisms and policies that are suitable for the promotion of potentials and advantages as well as the long-term economic development strategies[93] of the whole region. However, resource shortages, deteriorating infrastructure, and the absence of an appropriate institution for regional cooperation and integration are critical internal problems in the construction of the Southeast region's current model of endogenous growth.[94] One of the reasons why the regional linkage institutions of the Southeast localities have not been developed corresponding to the economic development level of this region is because the proportion of central budget regulation to major local economies of this area is still largely illogical. However, the increasingly low development space and the shortening development gap with other regions are the greatest challenges for the current construction efforts of the Southeast region's model of endogenous growth.

5. Conclusion:

To conclude, the Southeast area is one of Vietnam's very few current economic regions which are capable of fully converging the necessary factors to be able to successfully build its own model of endogenous growth. Part of this is due to the need for connectivity and cooperation in the context of the globalization of the Industrial Revolution 4.0, but Southeast Asia's central geographic location is the most notable objective factual premise. It should be noted, however, that the state's strategy for regional economic development and key economic regions is decisive, despite the excessive subdivision of the sub-national institutions is the factor

[90] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[91] Trần Vũ Nghi, *supra* note 21.
[92] *Cần tầm nhìn quy hoạch mới vùng kinh tế Đông Nam bộ, supra* note 49.
[93] Hà Anh, *supra* note 2.
[94] *Báo cáo: Phát triển hạ tầng Đông Nam Bộ - Điều kiện cho sự phát triển logistics của khu vực, supra* note 34.

that sets the most pressing and urgent requirements for the formation of regional institutions and relationships. In this regard, Vietnam's Southeast region possesses a certain number of advantages because of the spatial concentration and proximity of the constituent units. Nevertheless, the Southeast localities' modern, synchronous, best-class infrastructure system in Vietnam and its outstanding contributions to the entire national economy are in practice attractive to the strategy of building the model of endogenous growth. Similarly, the relatively equal level of development between constituent parts and the overall economic potential, which is much higher than that of the whole country, are also considerable advantages. However, the situation of limited financial resources in the context of the largest contribution to the central budget has significantly reduced the growth opportunities of the country's economic locomotive. In such a context, clearly defining the driving role of the leading economic center[95] together with a system of railway and network of convenient transportation to link the local satellite towns[96] is seen as the optimized solution. All of these factors prove that even though the Southeast region has fully converged the prerequisites for the construction of its own model of endogenous growth, but the realization process will be a challenging road as long as the posed questions are not thoroughly and promptly resolved.

[95] Thảo Nguyên, *supra* note 32.
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COMMENTARY:

NEITHER BODY LANGUAGE NOR 'ODOUR': THE ARGUMENT FOR NON-PREJUDICIAL TREATMENT OF WITNESSES IN ARBITRATION PROCEEDINGS PARTICULARLY IN THE ERA OF VIRTUAL HEARINGS.

By Professor Steve Ngo[1]

The despicable COVID-19 pandemic has put all of us from various industries and professions in a survival mode by turning to technology to keep us going. It is remarkable how well people can adapt to prevailing circumstances and change whenever necessary; just a year ago, the general population may not have heard of online video telephony and work collaboration platforms more so than in the last eight months of this year, and also how the resistance to its use previously has dissipated. Hitherto, I do not think there is anything we can thank the pandemic for, although it further spurs technological acceptance and adoption. Also, during this pandemic time, we have observed an increase in the discussion on the subject of body language of witnesses in virtual arbitration. This topic is not new but I supposed the pandemic has encouraged more discourse on various aspects of virtual arbitral hearings more so than before. Needless to say, I am rather concerned specifically with some of the theories promoted because any misconception if not keep in check but perpetuated too often, too widely, might engender into the *de facto* new 'standard' for examining witnesses in commercial arbitration.

As it is, the current conduct of international commercial arbitration is not one that is particularly easy to follow. We have seen the adoption of processes and procedures commonly found in common law court litigation in the conduct of current international commercial arbitration. There is a likelihood that a non-English speaking practitioner from a civil law jurisdiction involved international arbitration today might be perplexed by some of the jargons used and certain aspects of the procedures. Someone once asked me, who is "Mr Scott" in the Scott Schedule, something ubiquitous in contemporary arbitration practice. The ensuing anti-climax reaction after seeing a Scott Schedule for the first time tend to be, 'Oh, it's just another Microsoft Excel table, a "Claim/Defence Schedule" with columns!' Unfortunately, many of us

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are 'guilty' for not making arbitration today simpler to understand, but this is a discussion for another time.

Nevertheless, in recent times, I have observed the existence of and attended some webinars relating to techniques in virtual arbitration and cross-examination of witnesses. They are an eye-opener and in part the reason for writing this short commentary. One such webinar relates to how to cross-examine witnesses in arbitration and reading the body language. Another webinar I attended, demonstrates the conduct of a virtual hearing with the actors portraying themselves as formidable advocates; in doing so, they were fairly successful in showing 'Hydra rearing its ugly heads' in the cross-examination of witnesses. At the outset the counsels attempted to disturb the mental equilibrium of the witnesses with their vexatious requests such as asking for the web camera to be turned around the room three-hundred-and-sixty-degree, questioning the poster on the office wall, asking about the scribbles on the whiteboard, that stack of documents on the table, etc.

A simulation like the above is educational and rather entertaining but in my humble opinion can also be worrying. I dread the prospects of new entrants and arbitration students making personal notes while watching these acts, potentially embedding them into their mind as the gospel. I imagined the worst-case scenario of personal notes like, "INTERNATIONAL ARBITRATION HEARING – step 1, ask the witness to turn in a circular motion in two revolutions, holding the camera in the left hand with the right hand up in the air to show that he/she is not hiding anything. Exposing the hidden body language." Alright, I admit being a tad too harsh here, but is not emulation part and parcel of our learning journey?

For the record and unequivocally, I do not have anything against these training. I applaud these initiatives wholeheartedly. However, I am rather concerned with any attempts seen as contributing to the further judicialisation of arbitration when intrinsically, this method of dispute resolution alternative to courts is what its creators and users intend it to be. Here is the key thing to take note; arbitration is not court litigation.

I am conscious that there might be different schools of thought here; some might argue that riling up witnesses is perfectly acceptable to throw them off balance during oral hearings thus affecting their testimony. Others may say counsels must act hard to expose the witnesses' true colours as the body language would reveal it all. Indeed I can agree that not all witnesses are

angels but can we strike a balance here and are some of these techniques or practices relevant to arbitration? According to the science of body language, how a person touches his/her face, the position of the clasped hands or even eye movements are said to mean something. Since when do we expect arbitrators to be psychoanalysts and psychologists?

In avoiding a detailed and protracted argument, here are the key salient points of my case for non-prejudicial treatment of witnesses in arbitration in the context of body language. Firstly, international commercial arbitration involves parties coming from a myriad of background, culture and legal traditions. Witnesses could be making their oral submissions via interpreters as the English language may not be their first language thus this can affect their composure. Secondly, not many witnesses of fact or expert witnesses are regular participants in arbitration (or litigation) hence they may be nervous or displaying 'adverse' body language. Finally, testifying before a web camera in virtual arbitration is not without its challenges; the uncertainty as to whether one can be heard clearly and possibly also technical problems can mar the performance.

Further and in reality, an oral hearing is not an indispensable and mandatory constituent of arbitral proceedings; arbitration can be conducted based on documents only. Recently on 9 April 2020, the ICC International Court of Arbitration released an "ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic" emphasising that the ICC Rules provides that the tribunal may adopt appropriate procedural measures and after consulting the parties may, among others, identify whether the entirety of the dispute or discrete issues may be resolved on the basis of documents only, with no evidentiary hearing.

It is sometimes said that good arbitrators may already have a good understanding of the dispute even before the oral hearings, not because they are making presumptions but because these days written submissions tend to be very well prepared and would have addressed all the necessary issues. Some observers went to the extent of suggesting that the tribunal hears the parties at oral hearings largely because this is what the parties want. However, in striking the balance, I think oral hearings are useful and I like to think that good arbitrators would not be easily swayed by theatrics and rhetoric; truth and reality can be very different from H/Bollywood movies showing courtroom dramas. Overzealous counsels being hard on the witnesses might result in the latter getting sympathy from the tribunal instead.

I would further argue that whilst the duties of arbitrators include deciding on the veracity of evidence presented before them, their primary role is as the arbiter of the disputes as a whole where they need to look at the big picture. Throughout the proceedings, they may encounter doubts but the good arbitrators should practice and promote magnanimity. Moreover, in arbitration, most disputes are argued largely on facts and technical points. Testimony of the witnesses during the oral hearing stage, being the last lap of the arbitral proceedings, arguably would not be a major game-changer for the entire arbitration. It is what it is, no amount of sweat or tears, in other words, body language, should be expected to change any facts.

Ultimately it is all down to the arbitrators acting also as effective managers of the arbitration. As the ancient Greek philosopher, Socrates said, the essential qualities of a good judge are: "To hear courteously; to answer wisely; to consider soberly, and to decide impartially." Lady Justice is blindfolded to personify impartiality and that no one should be judged according to his/her looks, stature or status. Arbitrators too should be 'blind' to the parties and look beyond their physical attributes; how they look, talk or move- the body language. In taking the argument further, perhaps witnesses testifying remotely should have the option of not been seen but only heard?

Even if testimony by the parties may 'smell fishy' and the tribunal may even smell a rat, they need not be prejudicial but to continue arbitrating the dispute magnanimously with an open mind. Incidentally, we would have heard of commodity arbitration which has its historical roots in adjudication, where the arbitrators examine products in dispute by way of "look-sniff". However, I do not think this should apply, whether literally or metaphorically, outside the domain of commodity arbitration.

I shall now end. I am cognizant of the fact that this discussion could potentially elicit a strong reaction of dissent from the proponents of body language in arbitration. I do apologise for causing any unnecessary distress. However, one thing I will say to arbitration users; expect your arbitrators to see and 'smell' you not. No prejudice or sentiment should influence their decision making. An arbitrator exists simply because of your disputes and as an edifice of fairness and impartiality, he/she should neither favours nor disfavours any party.