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REGULATING THE ARBITRATOR CONDUCT: THE NEED OF THE HOUR

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***Abstract*-- Sundaresh Menon CJ of the Supreme Court of Singapore in his keynote address delivered at the Chartered Institute of Arbitrators International Arbitration Conference in Penang, 22 August 2013, posed the following question: *"..should the courts be the ones setting out the boundaries of acceptable arbitrator conduct? How can this be preferable to the arbitration community taking the initiative to develop its own code which sets out clearly the conduct, disclosure standards, and due diligence obligations expected of arbitrators?"*. In the light of this statement, should there be greater "regulation" of the international arbitral community and if so, how should this be achieved? This paper underlines the need, issues and challenges in laying down the code of conduct for Arbitrators. It also provides discussion on the judicial response on the arbitrator code of conduct.**
Keywords: Arbitration, arbitrator conduct, institutionalized arbitration, international arbitration

INTRODUCTION

The 21st century has witnessed an exponential growth in technological and scientific advancements. The race for supremacy in all spheres has led to increased competition and while commercial disputes are emerging, coping with the huge burden of cases that are being racked up in the courts is a constant struggle for the dispute settlement mechanisms. For example, there are approximately a staggering 3 crore cases pending in the Indian courts[1].

Due to a surge in international transactions and cross border contracts, arbitration clauses are regularly finding their place in commercial contracts. One can even be so bold as to say that settlement of disputes by arbitration is one of the most popular and effective means of dispute resolution. However, in spite of its ever-increasing popularity, there are certain issues that need to be addressed in order to make it a more viable option to parties and to redress the lacunae in arbitration acts around the world and more particularly in India. Even though majority of the companies and corporates in India are increasingly opting for arbitration as a preferred mode of dispute settlement, it does not necessarily go on to indicate that they are a satisfied bunch. Despite incorporating an arbitration clause in their contract, they are still disappointed with the number of times they have to approach the court – be it for appointment of arbitrator, seeking interim measures, for setting aside an arbitral award or for enforcement of the award. Rising costs for arbitral sittings, paying hefty fees for counsels representing the parties before the tribunal, the not-so-short time consumed for culmination of arbitral proceedings, a number of lacunae have appeared as a roadblock to what was supposed to be a cost-effective and seamless method of dispute resolution without needing to approach the courts.

One such issue concerns the impartiality and fairness of an arbitrator and the desirability or otherwise of its regulation by the court. While code of conduct for an arbitrator is not one of the most important concerns, the thought still finds a place in the minds of the parties as to whether the arbitrator shall remain neutral and participate in the discourse of proceedings with fairness and impartiality. On the one hand efforts are being made to minimize the intervention of the court, while on the other hand a debate is going on over the role of the court in formulating a code of conduct for arbitrators. The Indian Arbitration Act[2] empowers the arbitral tribunal to determine its own rules of procedure, but there is divergent opinion that the conduct of arbitrators must be regulated by the court which should prescribe a code of conduct therefor, albeit with a view to uphold the faith of the disputing parties in the arbitral system.

[1] Ashwani Kumar (Law Minister); The Times of India; Article on Mar 7, 2013
[2] Indian Arbitration and Conciliation (Amendment) Act, 2015 (S. 19 – Determination of Rules of Procedure)

THE STATUS QUO

One of the biggest arbitral institutions in Asia, the Singapore International Arbitration Centre (SIAC), has an active caseload of 650 cases as of 31 March, 2017.[3] The number of new arbitration cases handled by SIAC in just the year 2016 were 343[4]. It is extremely commendable that the SIAC has been able to maintain such a quick disposal rate. A number of arbitration institutions are set up in India as well. Some of the prominent institutions that conduct institutional arbitration in India are listed below:

1. Delhi International Arbitration Centre (DIAC) – New Delhi
2. Mumbai Centre for International Arbitration (MCIA) - Mumbai
3. Indian Council of Arbitration (ICA) – New Delhi
4. Construction Industry Arbitration Council (CIAC)- New Delhi
5. LCIA India – New Delhi
6. International Centre for Alternative Dispute Resolution (ICDAR) – New Delhi
7. ICC Council of Arbitration – Kolkata

While inaugurating the MCIA in 2016, the then Chief Minister of Maharashtra, Mr. Devendra Fadnavis said, "the London Court of International Arbitration and Singapore International Arbitration Centre each accounts for 30% of cases that involved Indian businesses. The businesses not only lose their precious money but also lot of time in these arbitrations. I am sure MCIA will attract these cases and also businesses world-over to help make India one of the top arbitration centres in the world". [5]Foreign arbitral institutions such as the ICC and LCIA have since long been present in India. Recently, SIAC emerged as the numerounochoice for most parties arbitrating India-related disputes offshore. Foreign institutions in India have not fared as well. LCIA India established its presence in India in New Delhi with high hopes in 2009, but shut its doors a mere seven years later in the year 2016. SIAC has established a marketing office in Mumbai, but has not opened an Indian branch.

Arbitration is gaining popularity as a dispute settlement mechanism owing to the flexibility of arbitral proceedings and the numerous options available to the parties to choose a neutral and feasible seat of arbitration and place of hearing. The speed, privacy and affordability of an arbitration proceeding add up to the plus points of choosing arbitration over expensive and time-consuming litigation. Despite all of this, arbitration is still not totally free from interference by the courts. Be it the appointment of an arbitrator or the setting aside of an award, the court is involved. The freedom of the parties to nominate arbitrators of their choice eventually leads, in some cases, to a question as to the independence, impartiality and neutrality of the arbitrator. It is at this juncture that we are faced with an important question. Is it the courts that should issue guidelines as to acceptable arbitrator conduct? Or do we leave setting the boundaries of acceptable conduct of arbitrators to the experts themselves? Let us not forget that the courts are already overburdened and adding on them this responsibility of an extra task would just result in increasing pending litigation.

The backing for institutional arbitration from the Indian government owes as much to the desire to take away the heavy workload from the Indian courts, as it does to strengthenand facilitate the working of the onshore arbitration system. Despite the unfortunate death of the London Courtof International Arbitration in India, the increased support for institutional arbitration in India is unmistakable. One embodiment of this is in the creation and the promotion of the MCIA launched in Mumbai in 2016. The MCIA is backed by the Government of Maharashtra as part of its broader initiative to set up an international centre in the financial capital of the country. Taking this a step ahead, the Government of Maharashtra recently made institutional arbitration mandatory[6] for all cases of a value of more than five crore INR (approx. US$770,000).

ISSUES IN ARBITRATOR CONDUCT

As quoted by M. C. Chagla, J., "An arbitrator must show uberrima fides to the parties. Highest faith should be shown by the arbitrator. He must disclose all facts that are likely to be calculated to bias him in any way in favour of one or the other party. A circumstance or a fact may not in fact bias him. He may have too strong a character, too deep a sense of justice to be influenced by extraneous consideration. But the question is not what

[3] www.siac.org.sg

[4] *Ibid*

[5] https://www.livemint.com/Politics/fCQ5hnLtdpXKyzxiaH945I/Devendra-Fadnavis-inaugurates-Indias-first-international-ar.html

[6] https://indianexpress.com/article/business/economy/maharashtra-government-makes-institutional-arbitration-mandatory-for-contracts-above-rs-5-crore-4604321/

is likely in fact to happen but what is likely to lead or is calculated to lead to a particular result[7]."

As Sundaresh Menon, CJ of the Singapore Supreme Court, pointed out in his keynote address at the Chartered Institute of Arbitrators International Arbitration Conference in Penang, the arbitral community has witnessed a considerable increase in size due to the large number of global players now involved in arbitration[8]. These new entrants from different and diverse jurisdictions have brought with them varied concepts of arbitrator conduct. The absence of a written code of conduct for arbitrators implies that arbitrators used to be governing themselves as per self-prescribed rules and standards. Also, challenges against arbitrators were rare. This can be gathered from the New York Convention[9], which is totally silent on arbitrator misconduct.

The globalization of arbitration in the sense of an increasing number of international entrants opting for settling of disputes by arbitration tells us that these different attitudes are not all in consonance with the notion of impartiality and independence that was expected of the old arbitral institutions. A survey conducted by Schellenberg Wittmer indicates that 68% of the respondents have experienced some sort of ethical misconduct[10]. The absence of a common code of conduct or governing set of rules to lay down a framework within which to operate poses difficulties and may also ultimately question the integrity of arbitral institutions and arbitrators around the world. A good example to demonstrate this is the fact that *ex parte* communication with an arbitrator is mostly prohibited, but, in China, where the arbitrator may also mediate in the same dispute, it will not be seen as something that is objectionable and against prescribed standards[11].

The parties to an arbitration proceeding are posed with an important question. It is a question that determines the way the whole proceeding is conducted, and that is, 'who to trust with the case?' For the arbitration to be successful, it is most essential that the parties have faith in the impartiality and integrity of the arbitrator. As we have seen, an arbitrator may not necessarily be a person belonging to the legal fraternity. The person appointed to be an arbitrator might be a person with a degree in engineering or management. It is not the case that the non-legal background of an arbitrator is a disqualification for him/her sitting as an arbitrator. This is one aspect where the parties are given the freedom and the autonomy to choose their own arbitrator. Do these people, who are not bound by any ethical code, also follow the self-prescribed code of conduct of the arbitrators? Do these people with a non-legal background stand in a position to be questioned as to improper conduct? Do these people take extra care so as to ensure that there is not even an iota of doubt or any reasonable doubt in the minds of the parties that can lead to successful challenge proceedings that are already increasing at an alarming rate, by the aggrieved party against the arbitral award[12]? The need for an international code of conduct for arbitrators is felt even more considering the fact that the outdated IBA guidelines[13] are not legally binding and, are sometimes rejected by courts over different jurisdictions. For international arbitrators belonging to a jurisdiction different from the *lexarbitri,* arbitrator standards would be quite different and there is a lack of consistency that would need to be addressed especially in sensitive areas such as what to disclose and the scope of an arbitrator's due diligence obligations as regards conflicting interests[14].

The present day arbitral institutions incorporate ethical rules into their arbitral rules regarding the qualifications of an arbitrator and the way the hearings are conducted. It must be noted that very few arbitral institutions have a separate and an exclusive code of conduct for arbitrators. *'Uberrimae*fidei' should be the guiding principle for an arbitrator. In practice, however, a fact may be of a material interest in the subject matter for an arbitrator from one jurisdiction, but it may not necessarily be the same for another. How do you identify material interest? How do you identify facts that demand disclosure, non-disclosure of which may lead to a challenge by the aggrieved party? There is no comprehensive list or a code of conduct prescribing facts that demand disclosure or facts constituting material interest in the subject matter. The main objective of arbitration, i.e., a speedy and effective means of justice, may be well-founded on wafer thin bases if international arbitrations turn into long lasting and expensive litigation concerning the finality of an arbitral award.

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[7] *Satyendra Kumar v. Hind Constructions Ltd.;* AIR 1952 Bom 227

[8] Gary Born and Thomas R. Snider, *A Code of Conduct for Counsel in International Arbitration*, Kluwer Arbitration Blog.

[9] Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958.

[10] http://www.swlegal.ch/Publications/Newsletter.aspx

[11] Catherine Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, Michigan. J. Int'l. Law (Winter 2002) Vol. 23, No. 2, at p 363.

[12] David Hacking, *Challenges: Theirs is to Reason Why*, 1(6) Global Arb. Rev. (2006)

[13] IBA Guidelines on Conflicts of Interest in International Arbitration; Approved on 22 May 2004 by the Council of the International Bar Association

[14] Emilio Cardenas & David W. Rivkin, *A Growing Challenge for Ethics in International Arbitration*.

INTERVENTION BY THE COURT

Let us examine a few judgments given by the courts to see how arbitrator conduct is being dealt with. In the case of *Dato Dr Muhammad Ridzuan bin Mohd Salleh & Anor v Syarikat Air Terengganu SdnBhd*[15], unknown to the plaintiffs, the arbitrator was appointed as a non-independent non-executive director and member of the credit review committee of the financier in the project, after the proceedings had started and before he had made the awards. The arbitrator did not disclose this fact to the parties. The Court considered that "human nature being what it is, the arbitrator would be most uncomfortable to have to decide on the claims of the parties for there is a natural tendency and a dangerous one at that, for him to gravitate towards a decision that would best promote the interest of the bank. Even if he is uninfluenced by it, the parties might not think so. What was not given to the parties and in this case more particularly the plaintiffs was that right to decide whether or not to challenge the arbitrator's continuing arbitration on the ground that there is a likelihood that he may not be impartial or independent". The court set aside the award.

In *Conoco Phillips v Bolivarian Republic of Venezuela*[16], a challenge was brought by the respondent against an arbitrator as the arbitrator's old law firm, of which he was a partner, had merged with another law firm that was representing the applicant in various other disputes. Upon being informed of this conflict, the arbitrator decided to leave his firm. The tribunal found that there was an obligation of disclosure on the part of the arbitrator if he knew about the merger and that any failure of such disclosure could be construed as raising a reasonable suspicion of bias.

In *OPIC Karimum v Bolivarian Republic of Venezuela*[17], an arbitrator's appointment was challenged on the ground that the same person had acted as an arbitrator five times in the three preceding years for the respondent. In this case the tribunal was of the opinion that multiple appointments were likely to affect the ability of an arbitrator to remain independent while deciding the matter.

INTERVENTION- IS IT UNDER THE PURVIEW OF THE COURT?!

In another code of ethics, the ABA-AAA[18], in its Preamble, lays down that, "Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This code recognizes these fundamental differences between arbitrators and judges[19]."

In the *Commonwealth Coatings Corporation*[20], a theory was advanced by theCourt as saying that the role of the judiciary should be minimal when it comes to deciding the partiality and independence of arbitrators since such determinations of bias are best left to the parties who are the "true architects of their own arbitration processes[21]." It was accepted that it is the parties to the dispute and the arbitral proceedings who are in a better position to address the ethical standards by their own capacities.

In order to avert situations of judges having to decide on partiality where it is evident and where the parties could have decided at the initial stage by considering whether the arbitrator was the apt choice, the relevant law should be strictly applied.[22] The parties have the option to accept or reject the appointment of the arbitrator after learning of the relevant facts. But for the parties to be able to do this, the arbitrator has to disclose even those facts which he may not think are likely to raise doubts about his independence.[23]

The objective of settling commercial disputes amongst the parties through alternative dispute settlement mechanisms such as arbitration, instead of going through the usual legal remedies by approaching the Civil Courts, is basically to provide a much speedier, flexible and cost effective remedy. The intention of the

[15] [2012] 3 MLJ 737 at [35]
[16] ICSID Case No ARB/07/30, (27 February, 2012)
[17]ICSID Case No. ARB/10/14, (5 May, 2011)
[18] AAA-ABA (American Bar Association-American Arbitration Association) Code of Ethics
[19] Preamble, 2004 ABA-AAA Code of Ethics
[20]393 U.S. 145 (1968)
[21]*Commonwealth Coatings*, 393 U.S. at 151
[22]Orsi, Silvano Domenico. "Ethics in International Arbitration: New Considerations for Arbitrators and Counsel." The Arbitration Brief 3, no. 1 (2013): 92-114.
[23]Stephen R. Bond, *The Selection of ICC Arbitrators and the Requirement of Independence,* 4 Arb Intl 300, 304–05 (1988) (describing disclosure obligations under the ICC Rules)

legislature is for the courts to confine themselves to their other functions and to minimize their intervention in arbitral proceedings or arbitral matters, and that is revealed by examining the provisions of the various arbitration statutes around the world. For example, S. 5 of the Indian Arbitration Act[24] explicitly minimizes court intervention. Further Article 34 of the UNCITRAL Model Law[25] provides for minimal grounds for setting aside an arbitral award, of which illegality of the award is certainly not a threshold that is to be achieved. It becomes crystal clear that when the parties have intended to resolve their disputes through arbitration, there has to be minimum intervention by the Courts and especially with this being the legal position, the Courts should refrain from setting out any boundaries, rules, guidelines or codes for conduct of arbitrators.

CONCLUSION AND SUGGESTIONS

The existence of various codes of conduct for arbitrators and counsel or ethics for arbitrators is not disputed. What needs to be seen is whether these age-old guidelines cater to the needs of the new arbitral community.

An award of the arbitral tribunal is treated like a decree of the Court under the Indian Arbitration Act[26]. Under the circumstances, the tribunal itself has to impose on it some restrictions (and those have to be self-imposed restrictions), to keep alive the faith of the contracting parties in the arbitral proceedings. This can be done from the very beginning of the proceedings. Only a person with exceptionally good knowledge of the subject matter involved in the dispute, and having an unparalleled and unblemished record of high morals should be appointed as the sole arbitrator or the umpire. The Arbitrators must be made more accountable. It is accepted that the arbitrator is a human and that humans make mistakes. There may be a human error in appreciation of the facts and of the law by the arbitral tribunal or there may even be a minor error in the award, but, any omission regarding voluntary disclosure of any form of pecuniary interest or as laid down by Justice Ang in Para 15 of the judgment in *PT Central Investindo v FranciscusWongso and others*[27], any kind of bias, whether apparent, imputed or actual, in the subject matter must be dealt with very seriously. The Arbitrator found guilty of not disclosing material interests in the subject matter involved in the dispute must be permanently debarred from acting as an arbitrator. Such an arbitrator may not be paid any arbitral fees as prescribed in various arbitration statutes and laws.

The International Chamber of Commerce (ICC), the SIAC, CIETAC and other experienced arbitral institutions are best suited to draft a universal code of conduct that governs the conduct of arbitrators. It is important that such code be a binding code and also carry judicial force. Developing such a code of conduct must be left to the domain of these institutions with the ICC and the Courts must refrain from encroaching on spheres reserved for such experts to govern, which the legislature in its true wisdom has kept outside the purview of the Court.

In order to formulate a pool of arbitrators for a panel, focus on five aspects is extremely crucial-

a) training the arbitrators, and more importantly, the ones not possessing any judicial background, so that their awards can withstand judicial scrutiny;
b) formulating a system of blacklisting arbitrators that are trying to go above and beyond their purview and scope, and delve upon issues on which they don'tpossess expertise,
c) developing a dedicated bar,
d) developing special and designated Arbitral Tribunals in the same way as commercial benches and courts, at all levels of the judiciary
e) having specialized institutions for appointment of arbitrators as is done in other jurisdictions like Hong Kong and U.S.A. For example, in California there is a system where every Court has an arbitral panel attached to it. India can also take cues from such a model or alternatively judicial academies in India can formulate a panel of trained arbitrators who can work at the basic level with the Courts.

What is essential is the continuous support from the judiciary in terms of its non-interventionist and pro-enforcement stance[28]. The maxim 'juiciest just dicer, non dare' best expounds the role of the court. And that is to interpret the law, and not to make the law.

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[24] The Arbitration and Conciliation (Amendment) Act, 2015 (S.5 - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.)

[25] A. 34 of the UNCITRAL Model Law; 'Application for setting aside as exclusive recourse against arbitral award'

[26] Supra Note 15

[27] [2014] SGHC 190

[28] KanishkVerghese; *Arbitration in Asia: The next generation?* (Asian Legal Business) *; July 1, 2014*