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Painting the Complete Picture: Issues Surrounding Art Arbitration in India

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The Status of Art Arbitrations in India

As per a 2018 report, the Indian art industry is plagued by legal ambiguities, forgeries and lack of transparency, and infrastructural support, making it a fertile ground for disputes. A steady increase in the number of high-net-worth individuals and a surge in online auctions have contributed to the growth of the Indian art market, which is estimated to reach a global turnover of USD 195-260 million in the 2020s. In December 2014, Justice Gururajan delivered an 81-page arbitral award, ending a four-year-long legal battle concerning the authenticity of a 126 years old *Raja Ravi Varma* painting in a one-of-its-kind arbitral precedent on art disputes in India.

Art lawyers and other stakeholders have time and again iterated the suitability of arbitration for resolving art disputes. Contracts signed between stakeholders in the Indian art industry frequently have arbitration clauses. Moreover, Indian legal practitioners expect an exponential increase in the popularity of such arbitrations owing to the opening of the Court of Arbitration for Art ("**CAfA**") at the Hague in 2018, and the option to include a CAfA arbitration clause in art contracts. This raises an inescapable question: will the existing arbitral jurisprudence in India provide a foundation strong enough to meet the requirements of the stakeholders in the art industry?

Sections 34 and 48 of the Arbitration and Conciliation Act **("1996 Act")** render an award arising out of an 'inarbitrable' dispute unenforceable in India. Art disputes generally include title and authenticity disputes, disputes arising out of testamentary matters, art fraud as well as copyright issues. In light of Booz-Allen, art disputes arising out of testamentary and succession matters are inarbitrable in India. Further, arbitrability of a dispute involving art fraud would depend on the facts as judicial precedent favours arbitrability of art fraud involving internal affairs of the parties while going against arbitrability of criminal charges and other complex art fraud cases.

While there is clarity regarding these issues, a few other potential issues arising out of art disputes merit a detailed analysis in light of the conflicting Indian arbitral

jurisprudence.

Arbitration of Artists' Resale Royalty Disputes

Since the monetary value of artwork generally grows with subsequent resale, visual artists remain at a huge disadvantage if they are not paid a share of the resale price. With the growing recognition of resale royalties around the world as a moral right of visual artists, resale royalty can also be incorporated as a contractual obligation in the sales contract. India has statutorily recognized the right to resale royalties under Section 53A of its Copyright Act which gives the Intellectual Property Appellate Board ("**IPAB**"), a quasi-judicial body, the power to resolve disputes concerning resale royalties. However, IPAB has remained dysfunctional for the majority of its existence and lacks the requisite infrastructure and personnel to effectively resolve disputes. Although IPAB's incompetence acts as an additional impetus for stakeholders in the art market to resolve disputes concerning resale royalties via arbitration, there are few hurdles in the path.

In *Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd.*, the Indian Supreme Court ("SC") ruled that disputes involving adjudication of action *in rem*, and disputes whose adjudication is exclusively reserved for public forums as a matter of public policy, are both inarbitrable. The question is whether contractual disputes concerning resale royalties pass the 'Booz-Allen test'.

Despite the lack of clarity on arbitrability of IP disputes, the recent judicial trend suggests that IP disputes arising out of contracts are arbitrable as long as the rights of third parties are not affected by the decision of the arbitrator. High Courts [1)] have also held that mere creation of forums under special enactments would not oust the jurisdiction of arbitral tribunal unless that particular enactment gives 'special powers to the tribunals which are not with the civil courts'. These decisions augur in favour of arbitrability of resale royalty disputes.

However, the SC seems to have disregarded this line of reasoning while determining arbitrability of trusts disputes. The Indian Trusts Act does not expressly confer 'exclusive jurisdiction' on the civil courts to adjudicate trust disputes. Nonetheless, the SC referred to several provisions of the Trusts Act that specifically conferred jurisdiction on civil courts to rule that the scheme of the Trusts Act was of such nature that it impliedly excluded arbitration of trust disputes.[2)] One can draw a similar analogy to IPAB as several provisions of the Copyright Act specifically confer jurisdiction on IPAB to adjudicate various copyright issues.[3)] Further, on some instances, courts have employed the same reasoning to rule that the Copyright Act impliedly confers 'exclusive jurisdiction' on IPAB to deal with matters entrusted to it by the Copyright Act.[4)] These decisions go against the arbitrability of resale royalty disputes, bearing testimony to the obscurity in the law on this issue.

Art Arbitration and the Antiquities and Art Treasures Act, 1972 ("AATA")

The Government of India enacted the AATA in 1972 to regulate the trading of antiquities and art treasures in India. Paintings older than 100 years have been classified as 'antiquities' under AATA. The age of the painting or artefact can be a decisive factor in resolving certain authenticity disputes.

Section 24 of AATA makes it incumbent on the Archaeological Survey of India ("**ASI**") (or an Expert Advisory Committee in the proposed 2017 bill) to determine whether an object is antiquity or not. In fact, in the arbitration concerning the *Raja Ravi Varma* painting, the arbitrator while deciding the question of authenticity gave precedence to the ASI certification over the opinion of the buyer's experts.

The ASI's incompetence is apparent from a number of cases where it did not employ any forensic tests to check the age of the artifact and declared certain items as 'antique' by 'merely looking at them'. It has also been criticised for being short-staffed and riddled with red tape. In light of the above, parties ought to have the freedom to appoint experts who employ techniques that stand up to the parameters of the art market. Section 26 of the 1996 Act gives the parties and the arbitral tribunal the power to appoint an expert for assistance in deciding specific issues. However, in cases where the tribunal fails to refer the question of authenticity to ASI or does not rely on ASI's opinion, there is a likelihood of the resultant award being successfully challenged.

In 2019, the SC ruled that in case of conflict, provisions of AATA will override the provisions of a general enactment covering the same aspect. In that case, the SC gave primacy to the ASI's power under Section 24 in case of a prosecution under the Customs Act. The SC has previously ruled in favour of special enactments while dealing with conflicts with the 1996 Act (see here and here). Following this line of reasoning, Section 24 of AATA, being a special provision, would override the right to appoint experts under Section 26 of the 1996 Act. Consequently, reliance upon any expert opinion on the age of the concerned work will be in contravention of the ASI's statutory power. Now, the question arises whether such contravention would be fatal to the validity of the award? It is settled law that a 'mere contravention of substantive laws of India' does not amount to a breach of public policy of India. However, if a law relates to 'core values of India's public policy' or protects its national interest, its violation would constitute a violation of India's public policy. In the authors' opinion, the correct view would be to not elevate Section 24 of AATA to the pedestal of public policy. Despite this, in April 2020, the SC in *NAFED v. Alimenta* refused to enforce a foreign award as it was made in contravention of a government order prohibiting exports, which, according to the SC was part of India's 'public policy relating to export'. A similar argument can be made on these lines to bring AATA within the ambit of public policy. AATA was enacted in line with India's policy to preserve its cultural heritage. The government intended to exercise control over the trading of antiquities[5] and conferred the power to determine whether an object is an antiquity on ASI. Thus, a future court may rely on NAFED to opine that the power of the ASI to decide the status of antiquities is a matter within the fundamental policy of India in preserving its cultural heritage. Such a view amounts to excessive judicial interference and is bound to harm the future of art arbitration in India.

Conclusion

A major step towards tapping into the economic potential of Indian art is understanding and strengthening the dispute resolution mechanism for dealing with it. Courts themselves are of the opinion that they are not best suited to resolve art authenticity issues.[6)] A decision given by a specialised art tribunal is far more likely to be revered and accepted by the art market.

Unfortunately, the existing arbitral jurisprudence in India is woefully inadequate to support the art industry. The newly added Section 42A in the 1996 Act on confidentiality of arbitral proceedings has been rightly criticized for being marred by vagueness. Considering how much people "prize their anonymity" in the art world, such equivocal provisions will prove to be a dampener for parties wishing to arbitrate their art disputes.

Such ambiguities undermine the utility of arbitration agreements in art transactions. Thus, art lawyers need to factor in these considerations while advising their clients on contractual terms. Further, positive legal developments in areas such as expert training and confidentiality will go a long way in supporting the incipient art industry of India.

References

↑1 EROS International v. Telemax Links India Pvt. Ltd., 2016 (6) Arb L.R. 121 (Bom.), ¶ 16; H.D.F.C. Bank Ltd. v. Satpal Singh Bakshi, (2013) I.L.R. 1 Delhi 583, ¶ 14.

↑2 see paras 54-58 of the decision.

↑3 See for example, Copyright Act, ss. 6, 11, 12, 19A, 31, 31A, 31B, 31C, 31D, 32, 33A and 53A.

↑4 Data Infosys Ltd. and Ors. v. Infosys Technologies Ltd., 2016 S.C.C. OnLine Del. 617; Music Choice India Private v. Phonographic Performance, 2009 S.C.C. OnLine Bom. 121.

↑5 See, ss. 3, 7, 13, 14, 19, 24 of AATA.

↑6 Thome v. The Alexander & Laura Calder Foundation, 890 N.Y.S.2d 16, 26 (N.Y. App. Div. 2009).