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Inaugural Delhi Arbitration Weekend 2023: The Weekend of Arbitration Debates

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The first-ever Delhi Arbitration Weekend (DAW) was held between February 16-19, 2023 and attracted a sizable number of participants including delegates from 14 countries. The DAW, which was conceptualized by the Delhi High Court and the Delhi International Arbitration Centre, also attracted the participation of senior members of the judiciary and government alike, including the Chief Justice of India DY Chandrachud and Union Minister of Law & Justice, Kiren Rijiju. The entire event was live-streamed and live-transcribed. Discussions over the course of 18 sessions facilitated the cross-pollination of thoughts and views of leaders in the field. This post highlights the discussions relating to public policy and post-Covid-19 changes in arbitral and dispute resolution practice.

The Oft-debated Public Policy

The unpredictable concept of 'public policy' was highlighted during two sessions: '*Taming the Unruly Horse: Public Policy in International Arbitration: India/UK/Singapore*' and '*Should Patent Illegality as a Ground Continue in Domestic Arbitration*'.

As readers may know, the concept of public policy is applied and interpreted differently in different jurisdictions (for example see here, here, here, and here). UK, Singapore, and India each have taken different approaches to this concept. Moreover, public policy forms a ground equally in India, the UK and Singapore to challenge an award or to resist its enforcement. While deliberating in the session titled '*Taming the Unruly Horse: Public Policy in International Arbitration: India/UK/Singapore*', Justice Ravindra Bhat pertinently pointed out that judges still grapple with issues relating to public policy and that the 1824 adage of J. Burrough that *public policy is very unruly horse and when you astride it you never know where will it carry you* is still relevant. While public policy is a ground to refuse the enforcement of a foreign award under the Geneva Convention 1927 and New York Convention 1958, neither of these conventions defines 'public policy.' Justice Bhat emphasized that the concept of public policy is subjective, jurisdiction-specific and facing continuous evolution. Different jurisdictions have interpreted public policy differently but sometimes the same jurisdiction has also interpreted it differently leading to uncertainty and inconsistency. Adding to Justice Bhat's comments, Vermon Flynn stated that public policy is uncertain not because it is not defined, but rather it is not defined because it is incapable of a definition.

Senior Advocate Darius J. Khambata highlighted that different courts have different views on national public policy owing to the different sets of economic, political, religious and social systems and hence the enforcing courts are under constant dilemma as to where to draw the line and give deference to arbitral tribunals. He echoed the sentiments of another speaker, Sherina Petit, and pointed out that some courts have adopted an interventionalist approach while others have adopted a pro-arbitration approach. For example, public policy in Singapore and the UK are quite similar as both have adopted a non-interventionalist and pro-arbitration approach. India also by and large adopted a narrow view of public policy. In India, public policy is well defined in the 1996 Act under Section 34(2)(b) itself thereby limiting the intervention of courts. Indian courts cannot delve into the merits while deciding public policy as "*merits are touch me not*" as was highlighted by Justice Hemant Gupta during his session.

In another DAW session, '*Should Patent Illegality as a Ground Continue in Domestic Arbitration*', the speakers also deliberated on public policy. Justice Hemant Gupta discussed the legislative history of public policy and how it has shaped in the statue. He stated that in India, the discussion around public policy started in 1994 with the judgment of ***Renusagar vs. General Electric Co.*** wherein the Court adopted a narrow interpretation of public policy and held that a foreign arbitral award would not be refused enforcement only because it is in violation of an aspect of Indian public policy. The court attempted to define public policy as (i) the fundamental policy of Indian law (ii) the interest of India (iii) justice or morality. Soon after, ***ONGC vs. Saw Pipes*** borrowed the approach of *Renusagar* to the public policy of a foreign arbitral award and applied it to domestic awards. In ***ONGC vs. Saw Pipes,*** the Court held that a domestic award can be set aside if the award is contrary to the substantive provisions of the Indian law or against the terms of a contract, thereby allowing the courts to look into the merits of an arbitral award which led to some controversy as this approach expanded the supervisory role of courts as envisaged under 1996 Act. Now, of course, the law stands dramatically changed with the decisions of the Supreme Court in ***Associate Builders*** and ***Ssangyong*** . Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015 to Section 34 to dispute the domestic arbitration award. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter and not a mere erroneous application of the law.

While enforcing a foreign arbitral award, judges become parochial as the award is in the jurisdiction which is moulded by the values, culture, and morality of that particular jurisdiction. But judges don't realize how it will affect international relations or international commercial relations. Deliberating on this aspect, Justice S. Murlidhar highlighted that while talking about the most basic notions of justice and morality, we should be expanding our horizons and not narrowing it, expanding with the view to adopting a minimalist approach.

However, as pointed out by Justice Gupta, public policy as it stands today is the '*subjective satisfaction based in objective criteria*'. Flynn also pointed out that one of the main challenges that still lie is to strike a balance between respect for the autonomy of the state and the finality of arbitration awards and interests in the state and the international community.

Chief Justice Chandrachud highlighted that various pronouncements have changed the dynamics of the role of courts as envisaged in the 1996 Act by allowing Indian courts to venture into the merits of an arbitral award. He stated that even though these cases haunted India for a long period of time and led it to be considered an anti-arbitration jurisdiction, India has now emerged from the shadows of those decisions through the 2015 legislative amendments. In particular, the 2015

amendment defines the term public policy in a restrictive manner and in line with international practice by inserting an explanation to Section 34 of the Indian Arbitration and Conciliation Act, 1996. Hence, as pointed out by Senior Advocate Darius J. Khambata, *public policy may act as an unruly horse, but "With the firm horseman in saddle, Public policy can be controlled*."

Changing Contours of Arbitration Proceedings: Post- Covid- 19 Scenario

Arbitration in the post-Covid-19 scenario remained a hot topic during the DAW. Post Covid- 19 scenario of arbitration was well deliberated by Justice Chandrachud in the inaugural session of DAW, as well as by Justice Sanjay Kishan Kaul in the closing session and also in the session, *Reimagining Arbitration in A Post-Covid World: Right to Physical Hearing.*

Undoubtedly, Covid- 19 posed an unprecedented challenge to the justice delivery systems. However, Justice Kaul looked at the silver lining by highlighting in the closing session of DAW that **"**in the middle of every difficulty, lies an opportunity".

Covid- 19 acted as a catalyst in the adoption of technology in legal systems the world over and India was no exception. Justice Kaul mentioned that, with the onset of the pandemic, the courts as well as the entire international arbitration community adopted the transition to the justice delivery system based on the e-filing of pleadings and written submissions and conducting virtual hearings.

Justice Chandrachud, while discussing the advantages of remote hearings, highlighted that the stakeholders have realized the advantages of remote hearings and that the practice of remote hearings is here to stay in both domestic and international arbitrations. He mentions that remote hearing comes with many advantages, for instance, the parties bear significantly lower costs because they are not required to fly the arbitrators, lawyers, in-house counsel and witnesses amongst others to the venue of the arbitration. It also becomes significantly easier to settle upon hearing dates as the long-distance travel time is eliminated.

Though the speakers in some of the sessions concurred with that view, they agreed that as with any new system, there are limitations that need to be addressed. The issue raised that deserves attention as regards the fallibility of technology is that virtual platforms used for these hearings may not be as secure as users may believe, thereby creating vulnerabilities to hackers or other mischief makers who may be able to hack into the hearing platform and access sensitive data. Senior Advocate Pinky Anand highlighted the concern about the remote cross-examination as it may be difficult to discern the demeanour of witnesses which may impact the reliability of witnesses. Constantine Partasides KC echoed the concern comparing remote examination "*to a man playing a piano with gloves on*".

Against this backdrop, Justice Badar Durrez Ahmed raised the question, of whether post covid period be a completely physical scenario or can hybrid scenario be adopted. While concluding, Justice Ahmed agreed that the potential solutions would be to allow for a combination of in-person and virtual hearings depending upon the exigencies which prevail at the time. The ultimate goal, according to him is an equal opportunity" and "fair hearing" irrespective of the procedure for the conduct of arbitration. Justice Chandrachud highlighted that, keeping pace with the need for virtual hearings several Institutional arbitral tribunals have framed rules for conducting virtual hearings. He suggested that the arbitral institutions in India should also draft and adopt a protocol on virtual hearings tailored to an Indian context in order to make the process of arbitration more efficient.

Lord Peter Goldsmith KC delivered the special address where he highlighted the need for an efficient and reliable and final way for resolving disputes owing to India's rise as a global economic power with increasing investment both inside and outside the country.

The Union Law Minister, Kiren Rijiju, provided workable suggestions to make India an international arbitration hub like the establishment of various arbitral institutions in non-metro cities and the introduction of various AI tools. While lauding courts for their initiative to go paperless, he assured full Government support and effort to keep the law on arbitration relevant to the changing times, considering how India is already advancing to become an international hub for arbitration.

Concluding Remarks

One common viewpoint persisted amid these thought-provoking discussions: the need to establish India as a centre for international arbitration. Each speaker offered a variety of approaches in which India might become increasingly attractive to foreign parties for dispute resolution while also sharing their expertise and lessons learned from the practice of arbitration. One of many approaches shared was for India to adopt a variety of procedures from other jurisdictions that have consistently improved arbitration standards in order for it to gradually rise as an international arbitration hub. These thoughts were echoed by Union Minister of Law & Justice, Kiren Rijiju and Justice Sanjay Kishan Kaul in the closing session wherein they brought forth numerous other suggestions and shared their vision of making India a preferred seat for international arbitration globally. To conclude, it can be said that, while the way forward to achieving our mission is to idealize structural changes, but it is also necessary to educate the people of the community on the existing pitfalls in the arbitration sector. The inaugural DAW certainly delivered on this final aspect.

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