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The Journal for Dispute Resolution (JDR) is an open-access, annual, and peer-reviewed journal. The journal aims to provide a platform for engaging in discussions on various themes of ADR mechanisms in India and international jurisdictions.

The JDR welcomes submissions from all academicians, practitioners, and law students. JDR accepts submissions on a rolling basis. The Journal permits submissions in the nature of Articles, Case Comments, Legislative Comments, and Book Reviews falling within the scope of Alternative Dispute Resolution.

All submissions are required to be mailed in .doc/.dox format only & must be mailed only to jdr_cadr@mnlua.ac.in. They must conform to The Bluebook (21st Edition): A Uniform System of Citation.

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This volume owes its existence to the contributions and dedication of these individuals:

FOREWORD

– Dr. Justice Shalini Phansalkar Joshi
Former Judge, Bombay High Court

Access to justice is no more the prerogative of few. Dispensation of justice is also no more the privilege of the few. Justice cannot always be formal. Conversely, it has to be informal. It can no more be confined by the constraints of law. It is high time that people should get their cases decided on their own terms, in their own space, conducive to their environs, to suit their needs and convenience. It can be achieved only if the dispensation of justice is flexible and not rigid. For that, the methods for resolution of disputes also have to be myriad. One may call this system of resolution of disputes as alternate, additional, or appropriate. One thing is however certain, it is the demand of the hour and is bound to stay here. Hence, the need for discussions, deliberations, and research in this field is all the more.

I congratulate the editorial team of the Maharashtra National Law University, Aurangabad's 'Centre for Alternate Dispute Resolution' for publishing its first Volume of 'Journal For Dispute Resolution' on the different facets of ADR. Glad to know that this journal is a student-run and student-edited initiative. Participation of the young generation in this newly flourishing area of dispute resolution is both important and timely. This journal is a treasure trove of scholarly articles written by students on various themes and recent trends in the field of Alternate dispute resolution.

Arbitration is emerging as the major area of ADR. In the era of privatization and globalization it is gathering its roots and spreading its reach in commercial law. The very first article in the journal on the subject of 'Impartiality and Independence of Arbitrator: A Curious Case in MSME Act, 2006', studies the interplay between MSME Act 2006 and Arbitration & Conciliation Act 1996, with the analysis of the case laws. The use of emerging technology is going to change the face of arbitration to make it far more effective. The article on 'Blockchain Technology & Arbitration: An Invitation to a New Era' is an interesting read from that perspective. The hybrid use of the different alternative systems of dispute resolution, like, arbitration and mediation, is adding another dimension to ADR, which can be understood from the article 'The Challenges and Benefits of Using Hybrid Dispute Resolution Methods: Combining Arbitration and Mediation in Practice'.

One cannot deny the reality that today's age is of mediation and not litigation. It is no more necessary to elaborate on the advantages and benefits thereof as by this time everyone is aware of the same. What is necessary is to explore its use in different streams like sports or community mediation. The papers on the subject of 'Community Mediation in India: A Long Road for Enforcement?' and 'Mediation in the Domain of Sports Law' focus on these unexplored facets of mediation.

The papers on the subjects of 'Agreements of Confidentiality–A Critical Perspective' and 'Can the Constitutionality of Judicial Reference Override the Sanctity of Arbitration Proceedings?'- which discuss the judgment of *Bhaven Construction V. Nigam Pvt. Ltd. & Anr.,* reflect the varied interests and the updated knowledge of the students.

This Journal thus presents a range of diverse dimensions of different systems of dispute resolution. It seeks to facilitate conversations and explore the evolving legal responses to the ways and means by which this system of alternate dispute resolution can be made more effective for all concerned.

In a nutshell, the journal provides a valuable resource for those working, teaching, and researching, within and outside the legal discipline, enhancing engagement and dialogue. It is a must-read.

Dr. Smt. Justice Shalini Phansalkar Joshi

Former Judge Bombay High Court

EDITORIAL NOTE

—Indronil Choudhary

Dear Readers,

I address you as the *Student Editor-in-Chief* of the *'Journal for Dispute Resolution'* (JDR), An open access journal by *'Centre for Alternative Dispute Resolution'* (CADR, MNLU-A), with great delight and enthusiasm. As the future leading forum for scholarly discourses on *'Alternative Dispute Resolution'* (ADR), the Journal shall strive to inquire into and promote innovative approaches to dispute resolution, nurturing a greater appreciation for ADR's significance in modern society.

In recent years, *Alternative Dispute Resolutions* have garnered considerable attention as viable alternatives to traditional litigation. These dispute resolution techniques, which include *mediation, arbitration, negotiation,* and *conciliation*, are easily *adaptable, economical, and expedient.* In addition, they emphasise *collaboration, communication, and mutually acceptable* outcomes, which foster stronger relationships and reduce the load of the adversarial system of the nation.

In today's rapidly changing world, where diverse *perspectives, interests,* and *cultural* contexts intersect, it is essential to cultivate an *inclusive* and *equitable* dispute resolution environment. As such, the journal acknowledges the need to investigate and highlight *ADR* practises that can bridge *cultural, social,* and *economic* divides, thereby promoting communal harmony and justice.

As the *'Centre for Alternative Dispute Resolution'*, we shall remain committed to providing a forum for rigorous academic research, thought-provoking articles, case studies, and practical scholarships from academics, practitioners, and students. By showcasing cutting-edge research, emergent trends, and best practises, we hope to foment meaningful discourse and advance *ADR* theory and practise.

In the spirit of academic scholarship, we welcome submissions from academicians, students, and practitioners from a variety of fields, including *law, psychology, sociology, business, and international relations*. Our journal invites original research papers, articles, theoretical contributions, empirical studies, literature reviews, and book reviews that investigate various

facets of ADR, such as its theoretical foundations, legal implications, cultural considerations, practical applications, and emerging trends, annually through 'call-for-papers'.

In addition, we recognise the significance of experiential learning and the influence it can have on the development of future *dispute resolution professionals*. In light of this, we are pleased to publish student-written articles and reflections on ADR in the 1st Volume of the *Journal for Dispute Resolution*. It is essential to provide students with opportunities to engage with the field, exchange ideas, and contribute their unique perspectives to the ADR discourse.

As Student Editor-in-Chief, I am privileged to oversee a team of devoted students who are enthusiastic about *ADR* and committed to upholding the highest academic standards. We commit to *reviewing and selecting articles* with great care, ensuring the *integrity, originality, and relevance of the research published* in our journal. We seek to cultivate a constructive and supportive peer review process that not only enhances the quality of submissions but also provides authors with useful feedback.

I would like to thank the Hon'ble Vice-Chancellor, and the Hon'ble Registrar for providing us the opportunity to form *the Centre for Alternative Dispute Resolution*. My sincere gratitude, to our faculty advisor, whose guidance and expertise were instrumental in defining the vision of *JDR* and ensuring its success. My sincerest gratitude to the faculty conveners for their unwavering support and dedication to cultivating a research and innovation culture as teachers, editors, and mentors. Lastly, my heartfelt thanks to the *convener* for his leadership and to the *CADR* team for their immense contribution.

In conclusion, I encourage all *readers, academicians, professionals,* and *students* to actively contribute to our journal. Let us embrace the opportunities provided by *alternative dispute resolution* as we endeavour collectively for a more harmonious and equitable society. Together, we can pave the way for novel and transformative conflict resolution strategies.

Mr. Indronil Choudhary
Fifth Year Student, MNLU-A
Batch - 2018-2023

CONTENTS

IMPARTIALITY AND INDEPENDENCE OF ARBITRATOR: A CURIOUS CASE IN MSME ACT, 2006

—Rishab Joshi[1]

ABSTRACT

In the age of globalization and privatisation, Arbitration has become an accepted norm to resolve commercial disputes effectively and efficiently, wherein huge financial faculties of parties are at stake. Autonomy of parties, neutrality, independence, and impartiality of the Arbitrator along with the principle of Natural Justice, are the quintessential principle to arbitrate upon any contractual dispute(s). To that end, inter alia, Arbitration and Conciliation Act, 1996 also mandated Arbitral Tribunal's 'Impartiality' and 'Independence' during the course of the Arbitral proceedings. The present paper attempts to understand and analysis the duty of the arbitrator to disclose the 'Independence' and 'Impartiality' of arbitrator, in general; and the applicability of such duty to the arbitrable dispute falling in the extremities of the Micro, Small and Medium Enterprises Development Act, 2006. Furthermore, whilst conducting this investigation, the paper will also analyze the recent judgments, passed by Supreme Court of India as well as various High Courts, including the recent judgment delivered by Justice Subhasis Dasgupta, Judge High Court of Calcutta, in the case of Security Hitech Graphics Private Limited Vs. LMI India Private Limited[2].

Keywords- Impartiality, Independence, Bias, Arbitrators' Duty

1. INTRODUCTION

It is trite law that the arbitration is a gene of the contract, so the appointed arbitrator. In the wordsof Russell, an arbitrator is "*neither more nor less than a private judge of a private court. An arbitrator derives its powers wholly from the private law of contract and accordingly, the nature and exercise of these powers must not be contrary to the proper law*

[1] Rishab Joshi is a practicing advocate in the High Court of Delhi and the Supreme Court of India.
[2] CO. No. 1931 of 2022.

of the contract or the public policy, bearing in mind that the paramount public policy is that freedom of contract is not lightlyto be interfered with"[3].

The paramount principle governing the arbitration proceeding is that the arbitral dispute *must* be decided by the arbitrator(s), who, during the course of an arbitral proceeding, is/are impartial andindependent, both in terms of having any relations with either of the disputing parties or subject matter of dispute itself.[4] Therefore, neutrality and un-bias behavior of arbitrators is of utmost, not only for the legal sanctity and integrity of whole arbitral proceedings but also to test the arbitrator'scapability to adjudicate upon the dispute fairly and effectively.[5] Moreover, an unbiased arbitral proceeding is also subject to the principles of natural justice, which imbibes the *rule against bias* i.e., *Nemo Judex in Causa Sua* (no one can be a judge in their own cause).[6]

The Arbitration and Conciliation Act, 1996[7] [**"Arbitration Act, 1996"**] is the only statutory mandatewhich governs the whole practice of arbitration in India, from the initiation of arbitration proceedings till the execution of the award passed by the arbitral tribunal. In addition, there are various statutes that, *inter alia*, provide arbitration as an alternative mechanism to resolve the dispute. Such statutes include the Micro, Small and Medium Enterprises Development Act, 2006[8] ["**MSME Act, 2006**"], Industrial Disputes Act, 1947[9], etc.

There are various judgments of different High Courts and also the Supreme Court of India, which, *inter alia*, provide that special law would prevail over general law, thus the provisions of MSME,2006 would prevail over the Arbitration Act, 2006.[10]

In light of such proceedings, the present paper attempts to examine the applicability of the principle of impartiality and independence in arbitrable disputes which fall under the domain of the MSME Act. The author will also try to highlight the dilemma that judicial dictum left unanswered by bringing the principle of impartiality and independence under the MSME

[3] David Sutton, Judith Gill & Matthew Gearing, Russell on Arbitration 104 (20th ed. 1982).
[4] Nigel Blackaby, Constantine Partasides., Redfern and Hunter on International Arbitration (7th ed.; Oxford University Press, 2022), p.254.
[5] Alan Redfern, "The Importance of Being Independent: Laws of Arbitration, Rules, Guidelines—and a Disastrous Award" [2017] I.J.A.L. 23.
[6] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 5 SCC 808.
[7] Arbitration and Conciliation Act, No. 26 of 1996.
[8] The Micro, Small and Medium Enterprises Development. Act, 2006 Act No. 27 of 2006, Sec 18.
[9] The Industrial Disputes Act, 1947 Act No. 14 of 1947, Sec 10 A.
[10] See Part IV of the paper.

Act, 2006.

Therefore, in order to conduct the aforementioned investigation, the present paper is divided into five (5) parts. The coming part i.e. Part 2, briefly deals with the statutes governing the principle of impartiality and independence of Arbitrator. The next part will explore various judgments of the Supreme Court of India as well as of different High Courts on the applicability of the governinglaw of the Arbitration Act, 1996 to the MSME Act, 2006 in general and the applicability of impartiality and independence doctrine to MSME Act, 2006. Further, this part will also deal withthe recent judgment of the High Court of Calcutta in ***Security Hitech Graphics Private Limited v. LMI India Private Limited***[11]["**Hitech Graphics**"], wherein the single judge held that the arbitrator, appointed in the dispute governed by MSME Act, 2006, is liable to disclose all facts and circumstances which may give rise to the justifiable doubts. In the penultimate section, the investigation of the present paper will further be narrowed down and highlight the dilemma in judicial findings including the case of *Hitech Graphics* in terms of independence and impartiality in arbitration proceedings. The last section of this paper will provide the concluding remarks of the author.

2. LEGISLATIVE INTENTION OF IMPARTIALITY AND INDEPENDENCE OF ARBITRATOR: IN *DUBIO PRO* DISCLOSURE

The principles of independence and impartiality of arbitrators are an integral part of the rule ofbias, and in the words of Hunter and Redfren both of these principles are "*opposite sides of the same coin*".[12] The term '*independence'* refers to objectively keeping distance and disassociation not only from the disputing parties and their counsels but also from the co-arbitrator, if any.[13] An arbitrator not only be independent but also seem to be independent in all sense.[14]

Whereas, the phrase "*impartiality of arbitrator(s*)" denoted the cognitive state of an arbitrator, which is subjective and equally an abstract idea, thus, it is difficult to measure.[15] However, it can be churned out from the external conduct and comportment of the

[11] Security Hitech Graphics Private Limited V. LMI India Private Limited. 2022 SCC OnLine Cal 4092.
[12] Alan Redfern & Martin Hunter & Law And Practice of International Commercial Arbitration 201 (4TH Ed. 2004).
[13] Ibid.
[14] Hong-Lin Yu and Laurence Shore, Independence, Impartiality, and Immunity of Arbitrators – US and English Perspectives, International & Comparative Law Quarterly, Vol 5. No. 4 (2003).
[15] Supra Note 10.

arbitrator(s).[16] Impartiality imbibes "*absence of external control*" along with "*bias and predisposition towards any of the disputing party*".[17] Initially impartiality, as a ground of challenge, was not an explicit part of few of the arbitration rules, however, the same were amended to include the impartiality as a ground of challenge. Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018 recognized "*impartiality*" and "*independence*" as the two fundamental grounds to challenge the arbitrator.[18]

The international laws as well as Indian laws also do not provide the procedures to measure the impartiality and independence of the arbitrator(s). Howbeit, with the changing economic dynamics, various international and national jurisdictions have deducted a mechanism to keep a check on the impartiality and independence of arbitrator(s).

A. Precursors of Arbitration Act, 1996

Prior to the enactment of the Arbitration Act, 1996, the whole arbitration regime in India was governed by three (3) statutes namely- The Arbitration and Conciliation Act, 1940[19] [**"Arbitration Act, 1940"**],the Foreign Awards (Recognition and Enforcement) Act, 1961[20] and the Arbitration (Protocol andConvention) Act, 1937.[21]

Under Sec. 20 of the erstwhile Arbitration Act, 1940, the disputing parties were entitled to initiate arbitration proceedings by filing an application to such effect, before the Court of competent jurisdiction.[22] In addition, under Sec. 11 of the Arbitration Act, 1940, the competent Court was havingthe power to eliminate any of the arbitrator(s), either during the pendency of the arbitration proceedings or after the conclusion of the same, under certain grounds, which includes the case ofbias.[23]

Post globalization and privatization of 1991, the Law Commission advanced a proposal for the enactment of a new arbitration law, which should not only be in harmony with the international governing law on arbitration but also should be effective enough for the speedy and efficient disposal of commercial disputes. Thus, in furtherance of the said proposal, Arbitration Act, 1996 was enacted.

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[16] Ibid.
[17] Ibid.
[18] Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018, Rule 7.
[19] Arbitration and Conciliation Act, No. 10 of 1940.
[20] Foreign Awards (Recognition and Enforcement) Act, No. 45 of 1961.
[21] Arbitration (Protocol and Convention) Act, No. 6 of 1937.
[22] Supra note 16, Sec 20.
[23] Id, S. 11.

The Arbitration Act, 1996 is *Pari materia* and *parri passu* to two prominent international law governing arbitration- *first*, the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on International Arbitration[24]. The UNCITRAL provided Arbitration Rules which were widely recognized as Model Law in 1976. The Model Law was amended latelyin 2010. Part I of the Arbitration Act is fundamentally in harmony with the Model Law of 1976.

Second, the New Convention of 1958, whereby India is a signatory.[25] It was enacted to universally govern the enforcement and recognition of awards rendered by the Foreign Arbitral Tribunal.[26] Part IIof the Arbitration Act, is virtually similar to the New Convention of 1958.

Both Model Law of 1976 and the New York Convention, *inter alia*, deal with the arbitrator's duty todisclose. Under the Model Law, the arbitrator's duty to disclose is given under Art. 12 (1), wherebythe proposed Arbitrator *"shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence*".[27] Further the proposed arbitrator, *"from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him".*[28] Art. 12(1)of the Model Law provides special mandate wherein, arbitrators have to commit towards the "*Impartiality*" and "*Independence*", to safeguard the interest of disputing parties. Moreover, to strengthen the said mandate, under Art. 13(1) and (2)[29], read with Art. 12, the disputing parties have a right to challenge the arbitrator(s) on the grounds of *"justifiable doubts as to impartiality or independence"* and thus also provides a latitude to the arbitrator(s) to either withdraw or otherwise be subject to the outcome of such challenge.[30] To ensure the balance between partyautonomy and the principle of natural justice, Art. 13(3) provides an additional remedy to approachthe competent jurisdiction or other authority mentioned in Art. 6, to the party who fails before an arbitral tribunal in challenge.[31]

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[24] United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).
[25] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.
[26] Ibid.
[27] Supra note 22, Art.12(1).
[28] Ibid.
[29] Supra note 22, Art 13(1) and (2).
[30] Hasmukhlal Doshi v. J.M.L. Pendse, 2000 SCC OnLine Bom 242.
[31] Sunil Gupta, No Power to Remove a Biased Arbitrator Under The New Arbitration Act of India, 2000 (3) SCCJ 1 (2000).

Even under Art. II(1), II(3), and V(1)(d), New York Convention impliedly deals with the subject, by giving recognition and enforcement of the contracted terms and conditions by the parties to arbitrate, which include the duty of disclosure by the proposed Arbitrator.[32] Further, under Art. V(1)(b), New York Convention indirectly addresses the issue of bias by making award non-rendered by award not recognizable, in case the said arbitrator denied the opportunity of being heard to either of the disputing party.[33]

B. The Arbitration Act, 1996 and amended related thereto.

As per the Statement and Objects appended to the Bill furthered for the enactment of the Arbitration Act, 1996, the laws and principles entailed in arbitration had become obsolete therefore new law was proposed.[34] As already stated herein above, under Sec.11 of Arbitration Act, 1940, only before the competent Court, an application for removal could be filed by any of the disputing party.[35]Thus, whilst repealing the Arbitration Act, 1940, the Arbitration Act, 1996 through Sec. 13[36], deleted the safeguard provided in Sec. 11 of Arbitration Act, 1940[37] and redefined the procedure of challenge by curbing the provisions enshrined under the Model for the implementation of the erstwhile course altogether, thereto. Thus, the lawmakers made a significant departure in the Arbitration Act, 1996, both from the Model Law and the Arbitration Act, 1940.

Nonetheless, the Arbitration Act, 1996 provides few safety devices to protect the impartiality andindependence of the arbitral tribunal. The unamended Arbitration Act, 1996, even also under Sec.12(3) (a) read with Schedule V provided safeguard in case, where there is a "*justifiable ground*" which *may* create doubts as to the impartiality and independence of the proposed arbitrator[38], thensuch appointment can be challenged.[39] Nonetheless, as mentioned earlier, the said challenge can only be made before the arbitral tribunal, *sans* any right to approach a competent Court through appeal.

To further the neutrality, by maintaining the impartiality and independence of arbitrators, in

[32] Supra Note 23, Art. II(1), II(3) and V(1)(d).
[33] Supra Note 23, Art. V(1)(b).
[34] Sundaram Fin. Ltd. v. NEPC India Ltd., (1999) 2 SCC 479: AIR 1999 SC 56.
[35] Supra Note 20.
[36] Supra Note 5, Sec 13.
[37] Supra Note 17, Sec 11.
[38] Supra Note 5, Sec 12 (3) (a) read with Schedule V.
[39] Id, Sec 13.

arbitration proceedings, the 246th Law Commission Report ["**LC Report"**][40], *inter alia*, proposeda few amendments to the Arbitration Act, 1996. The proposed amendment by the LC Report became the bedrock of the Arbitration & Conciliation Act, 2015[**"2015 Amendment"**][41]which, *inter alia,* drastically transformed the landscape of arbitrators' appointments.

Under Sec. 11(8) of the present Arbitration Act, 1996[42], the Court has the power to appoint an arbitrator, and whilst exercising the said power, Court *may* direct the prospective arbitrator, in terms of Sec. 12(1)[43], to make disclosure with regard to any qualification and other consideration mandate by the disputing parties in the arbitration agreement for appointment of impartial and independent arbitrator(s) for effective and efficient disposal of dispute(s). Further, such disclosure*inter alia* includes disclosure of all relationships (be it personal, professional, financial or any otherwhich may give rise to '*justifiable doubts'*) of arbitrator, if any, with disputing parties or the subjectmatter of dispute.[44] Moreover, if the arbitrator fails to make requisite disclosure, then such an act would also constitute a ground of challenge, therefore, the 2015 Amendment, has widened the horizon of challenge to the arbitrator's appointment.

The 2015 Amendment is in harmony with the international practices and procedure given in the IBA Guidelines on Conflict of Interest ["**IBA Guidelines**"][45], wherein certain illustrations are given which may create a conflict of interest. These examples are separated into three (3) lists namely- Green List, Orange List, and Red List (which are further divided into lists of waivable and non-waivable)[46] In harmony with the lists given under IBA Guidelines, the 2015 Amendment also provided an exhaustive system to check on arbitrators, by providing fifth (5th), sixth (6th) and seventh (7th) schedules in the Arbitration Act, 1996. Among these, the 5th Schedule provides a list of circumstances that give rise to justifiable doubts with regards to the impartiality and independence of arbitrator(s). Thus, the 2015 Amendment, *inter alia*, specially catered to the issues of impartiality and independence of

[40] Law Commission of India, Report No. 246 - Amendments to the Arbitration and Conciliation Act, 1996, (2014).
[41] Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016.
[42] Supra Note 5, Sec 11.
[43] Id, Sec. 12(1).
[44] Shweta Sahu, Moazzam Khan & Payal Chatterjee, Legitimacy of Arbitral Appointments in India, Kluwer Arb. Blog (Nov. 3, 2018).
[45] HRD Corp. v. GAIL (India) Ltd., (2018) 12 SCC 471.
[46] Khaled Moyeed, Clare Montgomery & Neal Pal, A Guide To IBA:-The Revised Guidelines On Conflicts Of Interest, Kluwer Arb. Blog (Jan. 29, 2015).

arbitrator, Arbitration Act, 1996.

3. INDEPENDENCE OF ARBITRATOR UNDER MSME ACT –A CASE OF INTERPLAY AND CONFLICT

MSME's are one of the most important market sectors for the growth of the Indian economy. It isgoverned by the MSME Act, 2006 which was enacted with the objective to cater to the dispute between MSME-Buyer and MSME-Supplier, wherein buyer has defaulted in making timely payment to the supplier. The MSME Act, 2006 provides a mandate on the buyer to furnish payments within forty-five (45) days[47], and in case of failure, the buyer is liable to pay a sharp rateof interest.[48] With a view to provide a strong and equally efficient dispute resolution mechanism, MSME Act, 2006 has provided to refer a dispute to the "Micro and Small Enterprises FacilitationCouncil" ("**Facilitation Council**")[49]. The dispute resolution through the Facilitation Council is a tier-wise system,[50] wherein, at the first stage, through the process of conciliation, the Facilitation Council either itself tries to settle down the dispute or refers for conciliation to the center/institution.[51] In case, such conciliation fails, then the Facilitation Council either refers the dispute to the institution for deciding the dispute through arbitration within a given time frame ofninety (90) days as mentioned under Arbitration Act, 1996, or, itself decides the dispute.[52]

Further, under Sec. 24 of MSME Act, 2006[53] provides an overriding provision, which reads as follows:-

> *"24 Overriding effect- The provision of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

Thus, any arbitration or conciliation conducted under the MSME Act, 2006, should be done as perthe provisions of Arbitration Act, 1996. However, there are many judgments across

[47] MSME Act, 2006. Sec 15.
[48] Id, Sec 16.
[49] Id, Sec 17.
[50] Id, Sec 18.
[51] Id, Sec 18 (2).
[52] Id, Sec 18 (3).
[53] Id, Sec 24.

the board including the Supreme Court of India, wherein, apparent conflicts between the MSME Act, 2006 and Arbitration Act were observed, whereby there is an existence of an arbitration agreement in the dispute which also falls under the extremities of MSME Act, 2006.

After the enactment of the MSME Act, 2006 such conflict was first addressed by the Hon'ble High Court of Bombay, in 2010, in the case of ***M/s Steel Authority of India and Anr. v. MSEFC***[54] **["SAIL"],** wherein, *inter alia*, the issue before the Hon'ble Court was that-*"What would be the next step after such a reference is made when an arbitration agreement exists between the parties or not?"*. The Hon'ble High Court whilst validating the arbitration agreement, due to the existenceof a non-obstante clause in Sec 18 of the MSME Act, held as follows-

> *"We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Sections 15 to 23 including Section 18, which provides for a forum for the resolution of the dispute under the Actwould not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Sections 15 to 23 including Section18 notwithstanding anything contained in any other law for the time being in force. Section 18(3) of the Act in terms provides that where conciliation before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as arbitrationin pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There isno question of an independent arbitration agreement ceasing to have any effect becausethe overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration*

[54] M/s Steel Authority of India and Anr. v. MSEFC, AIR 2012 Bom 178.

conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

However, the Division Bench of Hon'ble High Court of Allahabad, in the case of ***Bharat Heavy Electricals Limited v State of U.P.***[55] took a different view from the ratio of *SAIL*, and held that *".....there may be an arbitration agreement between the parties, the provisions of Section 18(4) specifically contain a non-obstante clause empowering the Facilitation Council to act as an Arbitrator. Moreover, section 24 of the Act states that sections 15 to 23 shall have effectnotwithstanding anything inconsistent therewith contained in any other law for the time being in force."*[56] The same position was also adopted by the Hon'ble High Court of Punjab and Haryana[57]and the Hon'ble High Court of Gujarat.[58]

Further, in 2017, the Hon'ble High Court of Delhi in the case of ***Bharat Heavy Electricals Limited v. [59]The Micro and Small Enterprises Facilitation Centre*** also confirmed the opposite propositionlaid down in the case of *SAIL* by the High Court of Bombay and held that the MSME Act, 2006 has an overriding effect on arbitration agreement due to the existence of a non-obstante clause under Sec. 18 of MSME Act, 2006.[60] Moreover, in the case of ***Principal Chief Engineer v. M/s Manibhai and Brothers***[61] the Hon'ble Supreme Court of India further upheld the 2016 decision of Gujarat High Court[62], whereby it was held that the MSME Act, 2006 would prevail over the arbitration agreement.

However, later on, the various High Courts also adopted the "*first come first serve approach*" wherein, which law will prevail over who depends upon the facts that which course of action was adopted first- arbitration agreement or Facilitator Council under MSME Act, 2006. Like in the caseof ***Porwal Sales v. Flame Control***[63]**,** it was observed that when the jurisdiction of the Facilitator Council was approached then the jurisdiction of the arbitrator under the arbitration agreement would be ousted. However, if the MSME- Buyer invokes the arbitration agreement then the provisions of the MSME Act, 2006 will be of no avail. In

[55] Bharat Heavy Electricals Limited v State of UP, 2014 SCC OnLine All 2895.
[56] Id, para 8.
[57] The Chief Administrator Office COFMOW v MSEFC of Haryana, CWP 277/2015.
[58] Principal Chief Engineer v. M/s Manibhai and Brother, AIR 2016 Guj 151.
[59] Bharat Heavy Electricals Limited v. The Micro and Small Enterprises Facilitation Centre, 2017 SCC Online Del 10604.
[60] Id. See para 27-28.
[61] Principal Chief Engineer v. M/s Manibhai and Brothers, 2017 SCC OnLine SC 2109.
[62] Supra Note 56.
[63] Porwal Sales v. Flame Control 2019, SCC OnLine Bom 1628.

essence, if the buyer wants to oust the jurisdictionof the MSME Act, 2006 then he should invoke the arbitration agreement at the outset.

At the end of 2022, the Bench led by Hon'ble Justice UU Lalit, Judge Supreme Court of India in the case of ***Gujarat State Civil Supplies Co v. Mahakali Foods and Anr.***[64] ["**Gujarat State CivilSupplies**"] whilst endeavoring to provide the final wording on the issue of applicability of arbitralagreement, wherein the case also covered by MSME Act, 2006, held as follows:-

> *"28….. The submission therefore that an independent arbitration agreement entered intobetween the parties under the Arbitration Act, 1996 would prevail over the statutory provisions of the MSMED Act, 2006 cannot be countenanced. As such, sub-section (1) of Section18 of the MSMED Act, 2006 is an enabling provision that gives the party to a dispute covered under Section 17 thereof, a choice to approach the Facilitation Council, despitean arbitration agreement existing between the parties. The absence of the word 'agreement' in the said provision could neither be construed as casus omissus in the statute nor be construed as a preclusion against the party to a dispute covered under Section 17 to approach the Facilitation Council, on the ground that there is an arbitration agreementexisting between the parties. In fact, it is a substantial right created in favour of the partyunder the said provision. It is therefore held that no party to a dispute covered under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Facilitation Council under Section 18(1) thereof, merely because there is an arbitrationagreement existing between the parties."*[65]

A month after *Gujarat State Civil Supplies' case* of Supreme Court, the single judge of the High Court of Calcutta rendered the judgment of ***Hitech Graphics***[66]**,** which, hitherto, is the only explicitauthority which deals with the duty of an arbitrator to disclose to maintain impartiality and independence during the arbitration proceeding.

Hitech Graphics: - An expounded view

The facts of the case were that Security Hitech Graphics Private Ltd, approached the Hon'ble High Court of Calcutta in revision jurisdiction, against the Order dated 05.07.2022, passed

[64] Gujarat State Civil Supplies Co v. Mahakali Foods and Anr., 2022 SCC OnLine SC 1492.
[65] Id para 28.
[66] Supra 9.

by theLd. arbitrator in arbitral proceedings namely- *LMI India Private Limited v. Security Hitech Graphics Private Limited*, bearing number DL/10/M/SWC/00359, wherein Ld. Arbitrator, *interalia*, held that the 5th, 6th, and 7th Schedule of Arbitration Act, 1996 are inapplicable to referredarbitration proceedings under MSME Act, 2006.[67] This finding led to the issue that- *"whether anArbitrator, appointed, under the provisions of M.S.M.E.D. Act, 2006, is required to disclose his independence, and impartiality in the instant arbitration proceedings to clear justifiable doubts of theparties to arbitration proceedings, doing strict adherence to the 6th Schedule, in aid of Section 12(1)(2) of the Arbitration and Conciliation Act, 1996 or not."*[68\]

The Court affirmed the trite law that the special statutes would prevail over the provisions of generalstatutes.[69] The Court held that Sec. 18(3) of the MSME Act, 2006 provides a mandate that the arbitration should be conducted in a manner prescribed under Arbitration Act, 1996, as if it is initiated in furtherance of arbitration agreement given under Sec 7(1) of Arbitration Act, 1996.[70] Thus, the application of certain provisions, including the duty to disclose under Sec. 12 of Arbitration Act, 1996, will automatically follow in the arbitration proceedings commenced underMSME, Act, 2006 and the overriding provision contained under Sec. 24 of MSME Act, 2006 is not an absolute bar to prevent the arbitrator from making disclosure as per Schedule VI of ArbitrationAct, 1996.[71]

4. DILEMMA VIS-À-VIS IMPARTIALITY AND INDEPENDENCE OF ARBITRATOR IN MSME ACT, 2006

The various judgments of different High Courts, including the recent judgment of Calcutta High Court, have failed to address the most fundamental issues related to arbitration proceedings in general and issues related to impartiality and independence of arbitrator under the MSME Act, 2006,which touch the core of party autonomy. Party autonomy is the governing principle of contractualdisputes. The liberty to ascertain the terms and conditions and enter into any contractual obligations is fundamental to the principle of party autonomy. This liberty to decide is a non-meddling right, unless and otherwise, there is an explicit statutory bar. Parties, who were having a consensus in the procedure for the appointment of

[67] Id para 1.
[68\] Id para19.
[69] Id para 39.
[70] Id para 42.
[71] Id para 45.

the arbitrator, are entitled to execute such pre-determinedterms in Court. Further, the parties are also entitled to determine what kind of disclosures are required and what kind of disclosures can be waived off through the agreement.[72]

However, the Supreme Court, in the case of *Gujarat State Civil Supplies*, has erred in providing the overriding effect to MSME Act, 2006 over the arbitration agreement. Such errors were also committed by the Hon'ble High Court of Allahabad in *Bharat Heavy Electricals Limited v State of UP*[73], and the Hon'bleHigh Court of Delhi in *Bharat Heavy Electricals Limited v. The Micro and Small Enterprises Facilitation Centre*[74], as terms and conditions imbibed in arbitration agreements, are the reflectionof party autonomy, which is the bedrock of the whole arbitration process. If more weightage is being given to the statute than party autonomy to decide on any procedure including the appointment of an arbitrator, then the whole process of arbitration will be defunct.

Further, in the case of *Hitech Graphics*, the Single Judge was correct in providing that an arbitrator under MSME Act, 2006 is liable to disclose in writing about his impartiality and independence to maintain the sanctity and neutrality in the arbitration proceedings; and the non-obstante clause will not affect the applicability of arbitration. However, the Single Judge didn't venture to explore other situations whereby the parties, in the MSME dispute, under the agreement, decided that the proposed arbitrator has to disclose certain information, or is not liable to make any disclosure at all, then in such case what course need to be opted not only to maintain the impartiality and independence of arbitrator but also to protect the party autonomy, as various judgments say that the MSME Act, 2006 would prevail over the arbitration agreement.

In cases, where parties through agreement have decided the disclosure of such information which is not given under the Arbitration Act, 1996 to maintain independence and impartiality, then they can't enforce such an agreement due to the aforementioned rules. Therefore, in such cases, the parties have to double whammy, as neither the list of grounds that may be justifiable in the Arbitration Act, 1996 would be helpful for the party can enforce the agreement.

[72] Proviso Sec.12.
[73] Supra note 53.
[74] Supra note 57.

5. CONCLUSION

The MSME, Act 2006 is comparatively younger than the Arbitration Act, 1996. However, it is failing to meet its objective, which is to efficiently and effectively resolve disputes related to theMSME Act, 2006. This situation is also reflected in the data, which shows that since the inceptionof *MSME Samadhan System* in October, 207, only 25.4 percent of applications have been resolved to date through the Facilitator Council.[75] It is apparent the Facilitator Council is already burdenedwith colossal numbers of applications. Therefore, disallowing the applicability of the arbitration agreement to the dispute falling under the MSME Act, 2006, is creating more burden on the stakeholders of such disputes.

The divided approach of different High Courts to the disputes falling under the domain of the MSME Act, 2006, led to confusion on the applicability of party autonomy, which is the *grundnorm* of arbitration law. Therefore, to strengthen the principle of party autonomy to determine the terms and conditions of arbitration proceedings, including the points of disclosure, the intervention of the legislature by way of amendment under Chapter MSME Act, 2006 is required to provide liberty to decide the procedure of arbitration through agreement, which parties enjoys under Arbitration Act, 1996.

[75] https://www.financialexpress.com/industry/sme/msme-fin-whopping-rs-30000-crore-stuck-in-delayed-payments-to-small-businesses-in-nearly-5-years-govt-data/2643665/ .

BLOCKCHAIN TECHNOLOGY & ARBITRATION: AN INVITATION TO A NEW ERA

—Nikita Sharma[1]

ABSTRACT

*The application of new technologies has unquestionably affected the field of international arbitration. This article aims at introducing blockchain technology concerning arbitration and how it can be used to resolve disputes with the help of smart contracts. Blockchain Technology is a decentralized system that stores information digitally in a chain of blocks and makes it difficult to hack. Blockchain Arbitration can be of two types, off-chain, and on-chain. This article tries to figure out the potential future opportunities for arbitration concerning smart contracts and blockchain technology. This article discusses the first blockchain arbitration case, the "**Kleros Case**," as well as the current legal framework for blockchain arbitration at both the national and international levels. Further, it also examines how the existing provisions in the Indian Contract and Evidence Act can be interpreted in a way to accommodate the blockchain arbitration system. Additionally, it discusses enforcement issues and the enforceability of blockchain-based arbitral awards. In addition, it examines the advantages and disadvantages of the technology to determine whether or not it will aid in dispute resolution. The fact that it will offer a cost-effective and speedy dispute resolution is one of its primary benefits; the fact that there are no provisions in the laws to enforce it is one of its primary drawbacks. Even though the technology is safe and secure according to the data, hackers also discover new ways to hack computers with new technologies. Suggestions and the future of blockchain arbitration are also included in the article.*

Keywords- Blockchain Arbitration, Smart Contracts, Kleros Mexican case, Dispute Resolution, Legislative Framework.

[1] Nikita Sharma is a 4th Year B.B.A- LL.B Student at Symbiosis Law School, Nagpur, Symbiosis International (Deemed) University.

1. INTRODUCTION

The conventional dispute resolution system is being redefined by recent advancements in the field of blockchain arbitration. Blockchain is a technology that allows digital information to be stored in a public database as a chain of blocks. Distributed databases reside on multiple computers simultaneously, and as new recordings or blocks are added to them, they constantly grow. Blockchain, as the name suggests, is considered to be the most secure way of processing and storing information in a way to prevent it to be copied or hacked even by manipulating the system. Numerous transactions are contained in each series block. When a new transaction is made using blockchain, it gets registered to a ledger. A decentralized database (**DLT**) that is maintained by numerous parties is known as a distributed ledger technology.

The idea of "*Smart-Contracts*" serves as the foundation for blockchain arbitration. This idea was first put forth in the 1990s by Nick Szabo; however, it is only in the recent ten years that the growth of the smart contract has been so pronounced. By 2020, over two million smart contracts will have been deployed by Ethereum, one of the top providers of such services.
Blockchain technology arbitration is a decentralized online platform for resolving disputes in which members of the public serve as jurors.[2] Simply explained, smart contracts are algorithms based on the blockchain that come into effect when certain conditions are fulfilled. They are frequently used to automate the execution of a contract so that all parties can immediately be certain of the outcome without the need for a mediator or an unexpected setback.[3] By invoking the arbitration provision that is built into the smart contract, smart contracts make it possible for blockchain arbitration to store, verify, and automate the execution of rules (upon a specific occurrence that represents a breach of the agreement). There are two types of block arbitration: "*on-chain*" and "*off-chain.*" While "*off-chain*" refers to arbitration without the use of excessive automation, save to appoint an arbiter, "*on-chain*" refers to the employment of a smart contract in a traditional dispute resolution procedure.[4] The on-chain arbitration procedure is clearly outlined in Digital Dispute Resolution Rules, 2021 by the UK Jurisdictional Taskforce.[5] These rules will be used for and incorporated into on-chain digital relationships and smart contracts. The Rules have been developed after extensive consultation with lawyers, technical experts,

[2] Raghav Saha & Harshit Upadhyay, Blockchain Arbitration in India: Adopting the Hybrid Model Envisaged by Mexican 'Kleros' Case, India Corp Law, June 14, 2022.
[3] IBM, Smart Contracts (last visited Dec. 17, 2022).
[4] Darshan Bhora & Aisiri Raj, Blockchain Arbitration- The future of Dispute Resolution Mechanisms, Cambridge International law Journal, Dec. 16, 2020
[5] Digital Dispute Resolution Rules, 2021, 4, Apr. 22, 2021.

etc.

2. LEGAL FRAMEWORK ON BLOCKCHAIN IN ARBITRATION

With this backdrop, it is imperative to look into the legislative framework on the national and international levels regarding the use of Blockchain technology in arbitration to resolve disputes.

A. India

Although India currently lacks a formal legal structure to govern blockchain technology or smart contracts, India does have several laws in place, such as the Contract Act, IT Act, and Evidence Act, that can be used to enforce smart contracts there.

i. **The Indian Contract Act, 1870** – As per this act, if smart contracts are fulfilling the prerequisites of a valid contract, then they can be enforceable in India. But there can be possible problems such as that the court might not even take that as valid because the parties will not be aware of one another's genuine identities, and there is no law to enforce the order of the third party platform on the parties. Secondly, which court will be competent in the event of a contract breach is a question that arises when parties to a smart contract can be located anywhere in the world. This issue merits significant thought. The Indian Contract Act of 1870, however, makes no mention of the smart contract's legality or ability to be enforced.

ii. **The Information Technology Act, 2000** – Smart contracts are created using blockchain technology, which creates its hash key. Since no government-certified authority uses this hash key to authenticate the contract's validity, it violates Section 35 of the IT Act. Even while the IT Act does not expressly forbid blockchain-based authentication, it only accepts digital signatures from approved authorities. The Information Technology Act of 2000's Sections 43(A) and 72(A) and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, offer protection against security, privacy, and sensitive data breaches; however, due to the blockchain's highly decentralized structure, these laws do not apply to it.[6]

iii. **The Indian Evidence Act, 1872** – According to Section 65B, electronic contracts are legal and permissible in court. However, a legal digital signature from a government-certified authority must first be included in the contracts.

[6] Legal Service India, *Overview On Smart Contract Indian Law Perspective And Mechanism Of Dispute Resolution* (last visited Dec.17, 2022).

B. International framework

As far as the international legal framework is concerned, the two main legal frameworks supporting blockchain contracts are the UNCITRAL Convention on Electronic Communications in International Contracts ("**2005 Convention"**) and the UNCITRAL Electronic Model Law on Electronic Commerce (**"1996 Convention"**).

a. During the arbitration process, by allowing electronic data records and transactions, Articles 6 and 18 of the 2005 Convention emphasize the legitimacy of on-chain arbitrations and provide them with legal recognition.[7]
b. Data messages can be used to convey an offer and its acceptance, as per Article 11 of the UNCITRAL Model Law on E-Commerce, 1996, and their legal validity and enforceability must not be questioned. Furthermore, Article 2 makes it clear that these "*data communications*" encompass both electronic communication and computer- generated documents that aren't meant for communication.[8]
c. Contracts featuring automated performance clauses in which the parties concur to use self-executing technology systems devoid of human oversight to ensure performance are covered by Article 2.1.1 of the UNIDROIT Principles of International Commercial Contracts, 2016 ("**UNIDROIT"**).[9]
d. Distributed ledger technology was specifically taken into account in the UNCITRAL Model Law on Electronic Transferable Records, 2017, according to its explanatory notes.[10]
e. The Uniform Electronic Transactions Act (**"UETA"**) has been adopted and modified in numerous states to incorporate smart contracts and the blockchain. The 1999-adopted Uniform Electronic Transactions Act is known by the initials UETA. It was the first national initiative to establish state-by-state regulations for electronic transactions. This law decides if electronic signatures are legitimate and grant them the same legal status as physical signatures. Except for wills and testamentary trusts, UETA applies to both commercial and online transactions.[11]
f. On November 18, 2019, the UK jurisdiction taskforce of the Law Tech Delivery

[7] United Nations Convention on the Use of Electronic Communications in International Contracts, art. 6 and 18, Nov. 23, 2005.
[8] UNCITRAL Model law on E-Commerce, art. 2 and 11, June, 21. 1996.
[9] UNIDROIT Principles of International Commercial Contracts, art. 2.1.1, 2016.
[10] Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law, art. 1, para. 8 P. 23, July 13, 2017.
[11] Uniform Electronic Transactions Act, 1999.

Panel came to the following conclusion in a 46-page legal statement: "*Smart contracts are capable of satisfying the conditions of contracts in English law and are thus enforceable by the courts."* Technologies like private key encryption can be used to comply with statutory requirements for a signature.[12]

g. As already said above, the United Kingdom's Jurisdictional Taskforce has published the Digital Dispute Resolution Rules, 2021, a fresh set of arbitration guidelines for smart contracts and on-chain digital interactions.[13] Smart contract disputes can be settled outside of court supervision under the authority of the Digital DR Rules. The Digital DR Rules allow for the use of an automatic dispute resolution method to resolve disputes. Such conflicts may also be brought to an arbitrator or the opinion of an expert.

1. 'KLEROS' CASE (1ST BLOCKCHAIN ARBITRATION CASE)

Given this context, it is necessary to understand the first judgment of its kind in the history of blockchain arbitration, which was rendered in the Mexican "KLEROS" case.

For the first time in the history of blockchain arbitration, on May 28, 2021, Mexican courts upheld an arbitral decision that was based on a blockchain arbitration protocol ("Blockchain Arbitral Award"). In this instance, the Blockchain Arbitral Ruling was incorporated by reference into a conventional arbitration award to fully comply with the existing arbitration framework.

Factual Matrix

- Sept. 2020 - Two private parties agreed to a real estate leasing agreement on September 2020 for a property in Mexico, making the Mexican court responsible for resolving the dispute. According to the local civil regulations, the parties incorporated an arbitration clause in their agreement. They also set the procedures by which the arbitration should be conducted and appointed a single arbiter. According to the clause, "a*fter receiving the parties' claims, the arbitrator was to create a Procedural Order addressed to the decentralized justice platform "Kleros*," which would subsequently provide a judgment using its blockchain arbitration protocol". Kleros is a decentralized application running on Ethereum that offers decentralized arbitration services to its users. It was noteworthy to notice that the requirement required the arbitrator to incorporate the judgment from Kleros

[12] Michael Cross, Crypto assets and smart contracts valid in English law, Nov. 18, 2019.
[13] See, supra Note 5.

as the foundation for the ruling, declare his award in writing, state the date, place, and the arbitrator's name, and sign it.

- 03. 11. 2020 - Following the terms of the lease, the landlord initiated arbitration proceedings and filed a claim by mail. He sought to end the lease, collect back rent and interest, and have the tenant evicted for non-payment of rent. Under the guidelines, the arbitrator electronically notified the defendant, who promptly submitted a response in which it claimed that the rent had been paid in full and provided a digitized copy of a manuscript receipt that the landlord had reportedly issued.[14]

  The procedural order was created by the arbitrator once the disagreement had been founded, and it was given to Kleros together with the evidence presented by both parties for a decision to be made.

  After following its procedures in this case, Kleros concluded that the defendant had broken his commitment to pay the rent. This conclusion was reached unanimously by the three jurors. They also offered their justifications. Juror No. 1 observed that the third condition of the lease stipulated that any proof of rent payments must be accompanied by a bank deposit receipt to be admissible as evidence, which the defendant failed to do during the arbitration process. The defendant's signature on the payment receipt was presented to the jury, and juror number two questioned it. And Juror No. 3 provided both of the aforementioned justifications for their choice.[15]
- 20.04.2021 - The landlord filed a petition to the Mexican courts to have the arbitral decision recognized and enforced.[16]
- 26.04.2021 – The court mandated the landlord to provide true copies of the lease and the arbitral decision, or to explain why it is preventing them from doing so.

Decision

- 28. 05. 2021 - The Mexican Court acknowledged the arbitral action and gave the defendant a five-day business deadline to abide by the ruling, after which the decision will be enforced by public force.[17]

In the present case, the issue existed off-chain only, and to make the Blockchain Arbitral Award

[14] Maxime Chevalier, *Arbitration Tech Toolbox: Is a Mexican Court Decision the First Stone to Bridging the Blockchain Arbitral Order with National Legal Orders?* , Kluwer Arbitration Blog, (Mar. 4, 2022).
[15] Mauricio V. Carrera, *Accommodating Kleros as a Decentralised Dispute Resolution Tool for Civil Justice Systems: Theoretical Model and Case of Application, 17* ,2020.
[16] id. at 18.
[17] Carrera, *supra* note 13, at 18.

enforceable, it was still required to link it to the Mexican legal system despite using a blockchain arbitration protocol. The off-chain arbitrator then issued the award that included the Blockchain Arbitral Award after the on-chain jurors concluded. In effect, the off-chain arbitrator made the Blockchain Arbitral Award legal, which might not have been enforceable in a court of law under the current traditional arbitration system. The Mexican courts' recent decision is one example of how the current legal system could be used to give blockchain arbitration decisions legal status.

Recently, during the fourth International Conference on Arbitration in the Age of Globalization, which was held in Dubai, Justice D.Y. Chandrachud, spoke about embracing technological progress and incorporating it into the established arbitration process to increase effectiveness. To illustrate the technical developments in the area of business transactions, he used the idea of smart contracts. Artificial intelligence and technology are incorporated into business interactions. A smart contract, in which the terms and circumstances of the deal are encoded, is one example of how technology and contracts can work together. The contract would be automatically enforced if one of its conditions was broken. He argued that smart contract arbitration can be an effective replacement, with the caveat that algorithms are biased and may discriminate against consenting parties. Given the significant cost and time required for conflict resolution, smart contract arbitration appears to be a practical substitute for traditional arbitration, which is gradually but surely beginning to resemble the conventional court system.[18]

2. ARBITRAL PRINCIPLES

The aforementioned makes it clear that direct blockchain arbitral judgments are at odds with the current legal order. The hybrid paradigm used in the *Kleros case*, while maintaining the effectiveness of blockchain arbitration, addresses these irregularities. The pre-existing arbitral principles may serve as the foundation for the execution of hybrid arbitral judgments i.e., Party autonomy and *Ex Aequo et Bono* ("according to the right and good").

A. Party Autonomy:

As indicated by Article 19(1) of the Model Regulation, parties are allowed to settle on the intervention technique that the court will use however long as it doesn't struggle with the

[18] Sohini Chowdhury, *Smart Contract Arbitration: An Effective Alternative to traditional arbitration which has now started to resemble traditional litigation*, LIVE LAW, (Mar. 20, 2022, 9:26 AM).

material lex arbitri. Party independence has been considered by the High Court to be "the agonizing and coordinating soul of discretion" on various events. This is also reflected in section 19 of the Arbitration Act, which states that the parties are free to choose the tribunal's procedure.[19] In the Landmark BALCO case,[20] SC held that the choice of the applicable law to control the dispute's core issues is entirely up to the parties. Therefore, the parties can choose blockchain arbitration platforms to settle their differences, and an arbitrator will include the result in the arbitral award.

B. Ex Aequo et Bono:

This principle gives arbitrators the freedom to resolve a disagreement in a way that is consistent with their sense of justice and fairness rather than strictly applying the law. Section 28 cl. 2 of the Arbitration and conciliation act, explicitly provides for the same. The foundation of blockchain arbitration procedures is morality and rationality. As a result, they behave as per the ex aequo et Bono concept.

3. ENFORCEABILITY OF BLOCKCHAIN ARBITRATION AWARDS

To determine whether blockchain technology can be used in India, it is of the utmost importance to know whether awards made in this manner are enforceable.

The absence of the agreement's enforceability under the New York Convention has been a major hurdle in the enforcement of blockchain arbitration rulings. Article II (2)[21] of the said convention requires the arbitration agreement to be in ‘writing’ and ‘signed by the parties in letters or telegrams. In other words, when a dispute arises, the arbitration process uses blockchain technology to automate steps like triggering the provision, holding the arbitration, and issuing the decision. However, because a blockchain-based arbitration agreement and the final decision that will be issued are solely composed of code, the award will not be signed in the conventional sense.

Likewise, in the Arbitration and Conciliation Act, section 7, an arbitration agreement has to be in ‘writing’ to constitute it as valid.[22] Contrary to Article II of the New York Convention, Section 7 goes further to specify that a communication made via "*electronic means*" constitutes

[19] The Arbitration and Conciliation Act, 1996 § 19.
[20] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[21] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art II, June 7, 1959.
[22] The Arbitration and Conciliation Act, 1996 § 7.

a written agreement.

The Arbitration and Conciliation (Amendment) Act, 2015, Section 3 introduced the provision for "*electronic means*."[23] The amendment does not define the term "*electronic means*" however it can be interpreted that it might include 'Blockchain technology arbitral awards' in its ambit as per IT Act, 2000.

Article IV of the New York Convention requires that a party wishing to have an award recognized and enforced must submit either the original award and arbitration agreement or a certified copy.[24] When codes are used in arbitration agreements, enforcement courts will have difficulty confirming their form, even when they are provided a code. The code may not be readable.

Moreover, due to India's reciprocity reservation, only awards rendered in specific New York Convention Contracting States may be enforced in India, even though the country is a member of the Convention. In terms of the number of states that have signed the New York Convention, India has gazetted less than 1/3.[25] The arbitral award in blockchain arbitration as discussed above is done through smart contracts, and the arbitral award is then put at the parties' disposal on their laptops (in different countries). Given the reciprocity clause, this begs the question of whether India could execute such an award as the arbitral award in itself was not given in any one country.[26] Therefore, The Arbitration and Conciliation Act, if strictly interpreted, would prevent an award that is issued on the Internet from being enforced in India because the Central Government has not gazetted the Internet. But Indian laws are becoming increasingly arbitration-friendly, so such an interpretation would be in opposition to them.

Arbitration agreements traditionally are regarded as instruments entailing consent to arbitrate between the parties. Due to the absence of a mention of contemporary means of expressing consent in the New York Convention, it has generally been accepted that consent must be in writing. Though this can be achieved by referring to Article 9(3)(a) of the Electronic Communications Convention, which provides that form can be achieved by utilizing a mechanism to identify the parties and their intention contained in the case of electronic communication.[27] However, given the anonymity component of blockchain arbitration, this

[23] The Arbitration and Conciliation (Amendment) act, 2015.
[24] Convention, *Supra* Note 21, art IV.
[25] Ritika Bansal, *Enforceability of Awards from Blockchain Arbitrations in India,* Kluwer Arbitration Blog, Aug. 21, 2019.
[26] Sharath Mulia and Romi Kumari, *Blockchain Arbitration: The future of Dispute Resolution*, (Nov. 23, 2021),
[27] Gauthier Vannieuwenhuyse, Arbitration and New Technologies: Mutual Benefits,35.1, JOIA 119-130, (2018).

will not be sufficient in and of itself to decide consent. As a result, enforcement courts without the technology to authenticate codes and ascertain the parties' permission to the same may not initially discover sufficient consent.

In the Indian Arbitration Act, the provisions for enforcement of arbitral awards are given under sections 36 & 49 respectively and according to it, an application made for the enforcement of the award should also include the '*original copy'* of the award. This makes the enforcement difficult for Blockchain arbitral awards as there would be no original copy due to it being accessible to everyone on the network. However, it might be claimed that the Act also permits the original award's copies to be provided to the Court that has been "*duly certified*." The blockchain's structure theoretically prevents anyone from just changing the decision, as a result, a copy of the award that was retrieved from the blockchain would be legally certified.

Further, a domestic award must also be stamped as per Section 36 of the Arbitration Act to be enforced.[28] A written arbitral award should be stamped, according to Section 3 of the Stamp Act and Schedule I, Article 12 of the Act[29]. The Stamp Act as of now does not provide for '*Electronic means of stamping*' for a written arbitral award. Moreover, in the Registration Act, section 17, in the case of domestic awards affecting immovable property rights, they must be registered. Upon duly stamping and/or registering an award, the Court can enforce it.[30]

Therefore, providing the enforcing Court with direct blockchain access would not be sufficient because awards must also be properly stamped and/or registered before they can take effect.[31] In domestic awards, during the process of stamping and registering the document, direct access can be granted to confirm the original award. Hence, when filing a claim under Section 36 of the Arbitration and Conciliation Act, the copy of the award that has been officially stamped and/or registered may be regarded as the "*original.*"

Lastly, there are several difficulties with enforcing blockchain-based arbitration agreements and awards rendered in the metaverse. However, the New York Convention may well provide the solution. A party may take advantage of a more advantageous treaty or regime that is in effect where the award has been submitted for recognition and enforcement under Article VII(1). This brings up the topic of the Model Law on Electronic Communications Convention

[28] The Arbitration and Conciliation Act, 1996 § 36.
[29] The Indian Stamp Act, 1899, § 3.
[30] The Registration Act, 1908 , § 17.
[31] M. Anasuya Devi v. M. Manik Reddy, (2003) 8 SCC 565.

or Electronic Commerce Convention. Article 5 states that if an instrument is in the form of a data message, it should not be invalidated. Furthermore, according to Article 7(1)(a), the requirement for a signature can be satisfied if a technique is utilized to confirm a person's identity and agreement to the details in data transmission.[32] A contract or any communication need not be proven in a certain manner, according to Article 9(1). Additionally, Article 9(2) states that where national laws may require the contract to be in writing, that condition is met if the material in the contract is reachable in a way that makes it "*useful for subsequent reference.*" [33]

In this regard, it can be argued that due to its decentralized structure, blockchain-based arbitration agreements, including information on the parties and the content, can be easily validated by courts without risk of fraud.

4. IS IT BENEFICIAL OR DANGEROUS?

Now, with the knowledge of the information and legal framework of Blockchain Arbitration, it becomes imperative to look into the promises and pitfalls of the same, to make an informed decision on whether to implicitly introduce blockchain arbitration in the system or not.

A. Benefits of Blockchain Arbitration

i. **Systematic Records** - An easy-to-use tool in the system creates a synopsis and briefs of a case in a matter of seconds. There will be a lot of benefits for both parties and the Tribunal from this. Since every record is accessible online on the blockchain, the parties can also search for the cases on which they have relied and presented before the Arbitral Tribunal. The documents are not at risk of being lost. Documents and evidence will be arranged chronologically by the AI tool.

ii. **Arbitral Awards ease** - Award preparation can be made easier by blockchain tools. By using these tools, we ensure that all necessary ingredients are included in the award which makes it reasonable and enforceable. Award preparation will continue while the arbitration is taking place on the blockchain.

iii. **Data Protection** - Information can be securely stored on the blockchain. Both the Arbitral Court and each party to the procedures should validate each block.

[32] UNCITRAL Model law on E-Commerce, art. 5, 7. (1996).
[33] Id., art. 9.

Unauthorized changes, alterations, or deletions of the data are not permitted. An Arbitral Tribunal and the party to the proceedings must authenticate it before it can be done. Since no third party is involved, there is very little chance that data or information will be compromised.

iv. **Cyber Intrusions** - Blockchain technology in arbitration will help in the prevention of cyber intrusions in Arbitration, which was evident in July 2015 when a hearing for a contentious maritime border arbitration between China and the Philippines took place, the Permanent Court of Arbitration in The Hague (PCA) website was hacked, (Republic of *Philippines v. People's Republic of China*). The website had malicious code inserted in it, posing a data breach risk to everyone who accessed a specific page devoted to the issue.[34] Due to their inherent properties of immutability, data encryption, and operational resilience, blockchains have the potential to enhance cybersecurity by thwarting fraud and detecting data tampering.

v. **Confidentiality** - The best option for ensuring greater levels of confidentiality for the parties to an international arbitration procedure is to use private permissioned blockchains.[35] In any instance, additional security measures are required to enable authentication, authorization, and encryption to adequately safeguard data access in private permissioned blockchains to preserve secrecy.[36] As a result, private permissioned blockchains would be able to offer international arbitration with a highly confidential platform, thereby reducing the chance of sensitive material being leaked to the opposing party or the general public.

vi. It obviates the need for human intervention, facilitating faster and more cost-effective dispute resolution. Using AI techniques, parties can even foresee how the Arbitration Award would turn out. Based on experience, the parties can estimate the likely damages. When both sides are equally at fault, this may enable the parties to reach a compromise resolution to their conflict.

B. Pitfalls of Blockchain Arbitration

i. The foremost pitfall of blockchain technology in arbitration is that arbitral awards given

[34] Claire Morel de Westgaver, '*Cybersecurity in International Arbitration – A Necessity And An Opportunity For Arbitral Institutions*', Kluwer Arbitration Blog, Oct. 6, 2017, http://arbitrationblog.kluwerarbitration.com/2017/10/06/cyber-security.

[35] Ibrahim Shehata, Three Potential Imminent Benefits of Blockchain for International Arbitration: Cybersecurity, Confidentiality & Efficiency (Oct. 2018), ed. 31, Y.A. Rev.

[36] 2018 International Arbitration Survey: The Evolution of International Arbitration, Queen Mary University of London, https://arbitration.qmul.ac.uk/research/2018/ (Last Visited Dec. 23, 2022).

in the case won't be compulsorily enforceable in the courts of law due to no legal vacuum. The New York convention itself does not recognize such awards and their enforcement.

ii. The fundamental premise of confidentiality forms the basis of arbitration. If a neutral third-party acts as an intermediary in dispute resolution, data privacy may be a major concern despite the robust security provided by the blockchain. Moreover, Oral hearings, which are a part of the present justice system, would not be required in an on-chain arbitration and conflict with the principles of natural justice.

iii. It is challenging to hold data controllers accountable because the General Data Protection Regulation's (GDPR) requirements are presently under-equipped to govern the intricate aspects of blockchain's decentralized operation[37]. The traceable aspect of blockchain is also at odds with the "right to be forgotten" Article 17 of the GDPR.[38]

iv. In Blockchain arbitration, it is difficult to determine the awarding country as parties are virtually connected and probably might be in different countries. Therefore, it will be difficult in the absence of details of the country, to trace the awarding country for the enforcement of the award in India.[39]

v. Conventional contracts typically allow the parties to mutually alter the clauses to suit their needs. However, smart contracts do not provide this kind of flexibility. Since a blockchain is fundamentally unchangeable, it would be difficult, time-consuming, and expensive to modify the contract. Similarly, it is currently difficult to terminate smart contracts.[40]

vi. Another obstacle is that the parties to the contract will need to turn the agreement into a code with the help of a technical expert. This presents an additional risk of who will be responsible if the code contains a bug and is hacked.

From the above points, it is evident that the benefits are more, so it should be incorporated into the legal system in the future but the disadvantages although less, shouldn't be ignored.

5. CONCLUSION: THE WAY FORWARD

Due to the fact that the entire legal system in India was designed to support the dispute

[37] Regulation (EU) 2016/679 of Apr. 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, 2016 O. J. (L. 119).
[38] id., at 44.
[39] supra Note 26.
[40] Asmita Kaur and Irith Kapur, Blockchain Arbitration: A primer , 1, Lex Forti L.J. (2020). https://lexforti.com/legal-news/wp-content/uploads/2020/07/Blockchain-Technology.pdf.

settlement of written and paper-based contracts, Indian law does not accept blockchain arbitrations. The norms of natural justice may also be violated by blockchain arbitrations since they might not allow for oral hearings or supplementary filings. Because of this, the idea of blockchain arbitration in the Indian context may currently seem far-fetched[41]. Moreover, some people believe that as blockchain technology develops and smart contracts become increasingly complete and self-executing, a new era of "*dispute resolution by contract without a neutral third party*" will emerge. This will take the concept of "*privatization of dispute resolution*" to its extreme by eliminating the use of a neutral third party (conciliator, mediator, arbitrator). However, such a promise—or even the promise of a dispute-free environment—should be met with caution. **In the future**, it should be expected subsequently that the Indian and international framework should be molded in a manner to incorporate Blockchain arbitration and its enforcement. Blockchain technology and smart contracts have the potential to change how paperwork and dispute resolution are handled. To create a structure that is more effective, economical, and automated, the principles must be integrated, implemented, and recognized with arbitration. Although the blockchain greatly enhances data security, it is important to keep in mind that hackers constantly improve their skills and that no technology is perfect. To keep up with the challenges posed by recent developments in unethical hacking, the blockchain system needs to be made sufficiently dynamic.

One idea is to train lawyers and make clients mindful of this innovation, so this innovation can be used by the nations in the impending time. As stated earlier, arbitral awards made directly on the blockchain are incompatible with the existing legal framework. Therefore, it is recommended that adopting the hybrid model incorporated in the landmark Kleros case with the aid of pre-existing arbitral principles and maintaining the effectiveness of blockchain arbitration can resolve these contradictions.

Lastly, with a number of disputes being piled up due to time-consuming processes, the incorporation of blockchain technology can help in faster and quicker resolution of disputes. It is a fundamental shift in the legal industry that necessitates increased discussion across the tech and legal sectors.

[41] Manohar Samal, Arbitrability of Smart contracts in India, https://www.indicpacific.com/post/arbitrability-of-smart-contract-disputes-in-india (Last visited Dec. 17, 2022).

COMMUNITY MEDIATION IN INDIA: A LONG ROAD FOR ENFORCEMENT?

—Himanshu Dubey[1]

ABSTRACT

"The notion that ordinary people want black-robed judges, well-dressed lawyers, and fine courtrooms as setting to resolve their dispute is incorrect. People with problems like people withpain, want relief, and they want it as quickly and inexpensively as possible," said former Chief Justice of the US Supreme Court, Warren Burger. The legal system in the third world today demands an alternative dispute resolution process for speedy redressal. In a democratic country like India, the current Mediation Bill, 2021 comes as a ray of hope for its judicial system, buthow far the bill provides a descriptive and supportive structure to the judiciary? Historically, thepractice of 'Community mediation' was observed in rural villages of India, through the practice of Panchayat but its legal recognition has gained attention to the current Mediation Bill, 2021. This paper attempts to throw light on the current mediation bill and analyzes the adoption of 'Community Mediation' as an alternative dispute resolution process in India. The paper further elucidates the practice of 'Community Mediation' in the United States of America and attempts to provide a comparative study and suggestions for the current Mediation Bill 2021.

1. INTRODUCTION

In today's era, the phrase "*contempt of cour*t" awakens a rather peculiar meaning outside the courtroom. As per many critics, from reflexive lawyers to dissatisfied clients, the promise of justice through litigation is an empty one; it is a distant abstraction compromised by the inequities and alienating humdrum of professionalized courtroom practice[2]. Henceforth, two alternative conceptions have been said to characterize legal history: justice according to the

[1] Himanshu Dubey is a fourth-year law student at O.P Jindal Global University, Sonipat.
[2] George Pavlich, 'The Power of Community Mediation: Government and Formation of Self Identity' Vol. 30,Wiley on the behalf of law and Society Association, 707, 707- 708 (1996).

law (*formal justice*), and justice without law (*informal justice*)[3]. The legal systems across the globe, currently aim to bridge the gap between this formal justice and informal justice Traditionally, the distribution of formal justice was considered a responsibility of our courtroom systems. For example, in pre-independent India, the formal system of justice was considered a responsibility of royal courtyards of the princely states, whereas the informal system of justice was considereda responsibility in a system called the *panchayat system*, whereby respected village elders assisted in resolving community disputes, but this practice was lately identified in independent India.

Post-independence, another dispute resolution process gained significant momentum, since its re-introduction in the 1980s, the *Lok Adalat.* Historically, the concept of Lok Adalat in India was practiced by the tribal people for dispute resolution, and its re-introduction in the Legal Service Authorities Act, 1987, received favorable attention from the litigants in India. In essence, Lok Adalat may be compared to settlement conferences as they are traditionally conducted in the United States of America, except that the neutrals in Lok Adalat are senior members of the Bar[4].

Such a practice of the informal justice system was later termed "*Alternative dispute resolution*",a practice of resolving disputes in different ways without a trial process. The practice of dispute resolution can be observed through its practiced methods like negotiation, mediation, conciliation, to Arbitration, and the most evolving practice in recent times continues to be the method of mediation. The practice of mediation, which further extends to court-annexed mediation, community mediation, and institutional mediation, to international mediation has recently gained a separate legal standing in the judicial system of India, through the introduction of the mediation bill of 2021. However, the idea of enforcing community mediation shall be a challenge for a democratic and diverse country like India.

Compared to a first-world country, like the United States of America, dispute resolution has beenevolving in its judicial system since the late 1970s, through the community mediation movement.In the US, community mediation advocates have valued community training, social justice, empowerment, and local control before establishing it as an alternative to a

[3] Deborah Baskin, 'Community Mediation and Public/Private Problem' Vol. 15, Social Justice/Global Option, 98,98-99 (1988).
[4] Anil Xavier, Mediation is here to stay! , Vol. 15,Indian Yearbook of International Law and Policy, 363, 372-373,(2009).

formalized justice system. Additionally, Community mediation has become increasingly institutionalized and has undergone various degrees of co-optation in its evolving relationship with the court system, with the establishment of the national association of community mediation[5]. However, in a developing country like India, the process of community mediation has failed to gain attention in the Indian legal system. This paper shall attempt to elucidate on a comparative study of the evolution of community mediation in the judicial system of the United States and India. The paper shall further dwell on the proposed mediation bill in the Indian parliament and provide recommendations for amendments to the laws on community mediation in India. The first part ofthe paper elucidates the practice of Community Mediation in India, and the United States and further makes a comparative Analysis of Community Mediation in both countries and provide recommendations for the current Mediation bill, 2021.

2. COMMUNITY MEDIATION IN INDIA

In India, the term "*community*" is defined as a way and system of living through social interdependence, which is continually imagined, invented, and re-invented[6]. Community mediation in India has been prevalent in different forms in village societies through the mediatory assistance of elders or peacemakers. Several village societies have had an informal group of elders to mediate disputes, but the first formal institution to resolve disputes through an informal way was *Panchayat*, a system through which designated elders living in the village assisted in resolving community disputes, including issues like repayment of the debt, domestic violence, theft, infertility, religious discord, and business problems, which continues in many villages and societies till today[7].

In India, Community mediation is defined as a constructive process of addressing differences between individuals, families, and varied groups of communities. The practice of community mediation is voluntary, flexible, and informal, a private process that maintains confidentiality is speedy, efficient, and economical, and additionally helps in creating long-term interests and relationships. According to the Pew Research Center, almost 97.6% population falls under the category of the low-income or middle-income group, and this

[5] Patrick G. Coy and Timothy Hedeen, 'A stage of Social Movement Co-optation: Community Mediation in theUnited States' Vol. 46, Taylor and Francis Ltd, 405, 405- 406 (2005).
[6] Kudrat Dev and Ajay Pandey, 'Chapter 12: Community Mediation and Citizen Empowerment', 305, (Conciliationand Mediation in India, 2021.
[7] Anil Xavier, 'Mediation: its Origin and growth in India' 27 Hamline J Pub L & Pol'y 275 (2006).

gives rise to the idea that a substantial number of cases, out of 10.7 million cases were pending before the district and *taluka* level courts, were filed by this very category of people, and therefore, parties in this category are in need of a speedy trial, and will also be hesitant in investing heavily in the litigation process, resembling the importance of community mediation in India[8].

In India, the judiciary aims to bridge the gap between formal and informal justice systems, through which the process of an efficient and faster justice system shall prevail across the nation-state, and to promote the practice of community mediation, the state has established Delhi Dispute Resolution Society ("**DDRS"**), which aims to rejuvenate community mediation locally in India. Another such example can be the People's Mediation Society ("**PMS"**) initiative of launching *PeaceGate* resolution app in collaboration with the Indian Institute of Arbitration and Mediation, through which, any citizen or community member can a PMC, and request mediation by submitting an online mediation form or by registering a dispute on the *PeaceGate* app[9].

A. C*ommunity Mediation as per Mediation Bill, 2021*

As stated above, India will soon have a comprehensive statute for the aspects of mediation practice, processes, and institutions, but how far the current mediation bill, talks about community mediation? The term community mediation is defined in Chapter 10, Section 44 of the Mediation Bill, 2021[10], as any dispute that may affect the peace, harmony, and tranquility amongst the residences or families of any area or locality may be settled through community mediation with prior mutual consent of both the parties to the dispute. This definition as laid in the Mediation Bill is plausible as it includes a wider definition of community mediation, as it becomes necessary to define community mediation for a democratic and diverse nation-state likeIndia, where the ethnicity and religious demography are stretched in different parts of the country. Subsequently, Section 44 subsections (2) to (6), of the mediation bill, focus on the procedure for referring the dispute to mediation, if there is no concerned 'authority' in a region, as defined in the legal service authorities act, 1987[11]. However, Section 44 subsection (5) of the Mediation Bill, shall require a proposition

[8] Disha Surpuriya, 'Community Mediation in Urban India', Center for Alternate Dispute Resolution RGNUL (Nov.5, 2022, 6:23PM).
[9] Ibid (4) Pandey.
[10] Mediation bill, S. 10, 2021 (India).
[11] Mediation bill, S. 44, 2021 (India).

for amendment of the mediation bill as the section stipulates who may be included in a permanent panel of mediators as constituted by the authority, district magistrate, or sub-divisional magistrate.

The section states that a '*person of standing and integrity who are respectable in the community'* may be included in the permanent panel of mediators, however, this clause should be objected to on the grounds that if a person, who is respectable in the community, may possess professional, personal, or financial circumstances, which may manipulate the community mediation, *for example, if a person who is appointed in the permanent panel of mediators, to resolve a dispute between a husband and wife,maybe a brother of the wife or a close colleague of the husband, and such person may not disclose his identity, it may affect and nullify the community mediation completed and shallaffect the trust of the general public on such form of community mediation, as identified insection 44 subsection (5), clause (a) of the proposed mediation bill*.

Additionally, the process of community mediation is defined in Section 45 of the Mediation Bill,which states that after the sessions of community mediation have taken place, the settlement agreement shall be reduced in writing, with the signatures of parties, and should be authenticatedby mediators, and if mediation fails, it has to be drawn in writing for the reasons of such failures and a report should be submitted to the authority, or the district magistrate, or sub-divisional magistrate, and the parties, involved in the said community mediation[12].

However, this clause should be objected to on the grounds that in a diverse country like India, where the process of litigation takes years, the practice of a such form of community mediation can hinder the processof resolution of disputes. If a community mediation fails, the application should be made to the nearest community mediation service provider or directly to the district court, that holds the said jurisdiction, and after the petition is made, the court or the mediation service provider shall provide a special mediation session, within the presence of a retired judge, through which theaim of maintaining speedy trials without affecting relations shall be achieved.

Further, it can also be noted that as per Section 45 subsection (3) of the Mediation Bill, 2021, theprocess of community mediation is based on a flawed understanding of Indian society.

[12] Mediation bill, S. 45, 2021 (India).

Subsection (3) of Section 45 of the Mediation Bill states that if no settlement agreement arrives between the two parties, a failure report may be submitted by the mediator to the authority or to the district magistrate or the sub-divisional magistrate, as the case may be[13], but this clause should be amended as a district magistrate or the sub-divisional magistrate represents the Government itself, and therefore, the failure of community mediation will eventually result into further delay maintaining peace and harmony in the community, for example*, if one of the party is the Central or State Government, and the other party comes from lower or marginalized communities, the idea of enforcing community mediation will eventually fail, and will result into the enforcement of litigation as if the first community mediation fails, and the report is sent through the respective magistrates, who are already a government representative, and therefore,the report may be presented in a biased form to the court, which would therefore, result in failure of the concept of community mediation*. Henceforth, this sub-section should be amended, and the concept of private community mediation centers should be introduced, through which theprocess of preparation of a report for a failed community mediation should be followed, which will result in an unbiased report of a failed community mediation.

Nevertheless, community mediation in India is faced with adverse challenges like the problem offunding, sustainability, lack of awareness about community mediation, lack of representativenessof community mediators due to major problems like language and cultural barriers, and lack of community mediation training institutes[14]. The idea of community mediation continues to evolve but evolves with certain major challenges.

3. COMMUNITY MEDIATION IN THE U.S.

The relevance of Community mediation and its evolution saw a stagnant rise in the late 1970s, through the community mediation movement in the United States. Although, the enforcement of community mediation in the judicial system of the United States began in 1964, when the term community mediation was embedded within the civil rights act, of 1964, to address racial, ethnic,class, and gender inequalities, throughout the courts and legal action[15].

[13] Mediation bill, S. 45(3), 2021 (India).
[14] Ibid (4) Pandey.
[15] D.G Mawn and Julie Shedd, State of Community Mediation, report of National Association of CommunityMediation, 3, 3- 4 (2019).

The term '*Community mediation'* in the United States is often described as a process for resolving disputes with the help of a third party, an impartial mediator, where the role of the mediator's role is to facilitate the process and help the parties to reach a mutually acceptable resolution for the matter that brought them to the process of mediation[16]. The definition of community mediation in India can be seen as similarly drawn from the concept of community mediation in the United States.

Historically, the roots of community mediation in the United States can be traced back to "*The pound conference on popular dissatisfaction with the Administration of Justice*", held in St. Paul, Minnesota, in 1976, where the legal community gathered to discuss its concerns about the rising costs and delays involved for those seeking justice in the courts of the United States and further,a light on mediation and negotiation was focused by the then Chief Justice of the United States, Warren Burger[17]. The outcome of the Pound conference resulted in the formation of a task force, for the purpose of developing proposals for judicial reforms in the United States, through whichit recommended funding of a pilot project in the establishment of neighborhood justice centers incertain states of the United States. The courts diverted the matters like small claims and criminal disputes to these community-based centers, which are staffed by trained and volunteered mediators, and from the period of 1980s to 2005, community mediation centers were established all over the United States.

Another accomplishment in the promotion of community mediation in the United States was the establishment of the National Association for Community Mediation (**NACM**) in 1993, a bodyto support the maintenance and growth of community-based mediation programs and processes; to present a compelling voice in appropriate policymaking, legislative, professional and other arenas, and to encourage the development and sharing of these efforts[18]. The United States focused on establishing community mediation from the beginning itself, and therefore, today it holds 500 community mediation centers and 20,000 trained community mediators across the states.

Although, the growth of Community mediation centers (**CMC**) and their practice of community mediation developed in the clouds of civil unrest of the 1960s, Community mediation centers do not provide social justice as typically defined as its purpose is to create

[16] Cheryl Cutrona, 'Chapter 5: Community mediation in the United States', Moving towards a Just peace: Themediation Continuum, (Springer,2014).
[17] Ibid(13).
[18] Ibid(13).

a supportive and safe environment that encourages free and open expressions of everyone's respective truth.

As mentioned above, the federal government focused on the development of community mediation by embedding community relation services, within the Department of Justice through the 1964, civil rights act. Subsequently, various programs like the Philadelphia municipal court arbitration tribunal (1969), the Columbus night prosecutors' Program (1971), and the Institute of Mediation and conflict resolution in Manhattan (1975), were one of the programs through which law students across the United States were trained to mediate conflicts in 30 minutes time slots[19]. After the Pound conference, the judicial partnership made by the legal community and the American bar association resulted in the formation of 'neighborhood justice centers', through which the citizens can access dispute resolution services and actively participate in crafting speeding, cheaper, and more appropriate solutions than the formal justice system through the litigation process.

Community mediation in the United States is also involved with the second path of community self-determination. Community-focused mediation centers were established under the presumption that people can resolve their conflicts on their own. Through this path, community conciliation mechanisms were viewed as participating in the prevention and early intervention ofconflicts. The citizens and the federal government of the United States viewed mediation as an empowerment tool for individuals and communities, as the process allowed the individuals to take back control over their lives from a government-run institution like the courts. An example of one such early community-based model includes the Rochester American Arbitration Association Community Dispute Service Project (1973), a broad-based response to conflicts in the community resulting from evolving racial discrimination in the community[20].

The expansion of the need for community mediation centers was driven by the factors like self-determination by its citizens, the importance laid by the judicial system of the United States, financial funding by the federal government, and the trust driven by the formalized judicial system of the states. *The United States does not have any formal legalized common law like the upcoming mediation bill of 2021, regarding mediation*. Yet, the community mediation centers handle 400,000 disputes annually, and 75% of these mediation centers

[19] 'Community Mediation Basics', Resolutions System Institute, (Nov 17, 2022, 9:13pm)
[20] Community Mediation Center, (Last visited Nov. 7, 2022).

provide mediation for small claims courts and 49% of civil courts, henceforth, demonstrating a continued connection between community mediation and courts, and thereby bridging the gap between a formalized judicial system to an informal judicial system[21].

The most plausible factor is that within the growth of community mediation, each community has adopted a model that is culturally appropriate and sustainable for that community. The community mediators use different methods that facilitate participants to advocate for their needs; **Mediation** (a voluntary process through which mediators aim to resolve the conflict between participants), **Facilitation** (Facilitating conversations between large or small communities), **Training and conflict coaching** (the root cause of community mediation is a belief that people can resolve conflicts on their own), **Restorative justice** (its aim is on how to best repair the harm that was done as opposed to the law broken), and **Conciliation** (a process where the conciliator goes back and forth between the parties in conflict to try to bring about resolution)[22].

4. ANALYSIS

Although the term "*Community Mediation*" is not new to a civilized state like India, it has failedto gain momentum of growth in the formal judicial system of India, as compared to the growth ofCommunity mediation in the United States. However, the Introduction of India's mediation bill 2021, in the Indian parliament has answered the recognition of a dispute resolution mechanism as a parallel justice system for India. *Nevertheless, the introduction of the bill is merely an announcement of a parallel road construction that goes to the path of justice through aninformal justice system.*

Additionally, It can be noticed that the structure of regulatory bodies for mediation in India is similarly drawn from the approaches laid by the United States which includes the formation of the Mediation Council of India, and its sub- bodies which include Mediation service providers and Mediation training institutes, but in a unified judicial system, there should be an establishment of a department of dispute resolution within the Ministry of Law and Justice, through which a set of awareness drives should be launched across India, through the funding of the Indian Government.

The Mediation Bill, 2021, has defined community mediation[23] as a form of mediation but

[21] Ibid (16) N.A..
[22] Ibid (16) N.A..
[23] Mediation bill, S. 44, 2021 (India).

does not dwell into the identification of various dispute resolution methods of community mediation like Mediation, Facilitation, training and conflict coaching, Restorative justice, and conciliation as identified by the community mediation Centers and National Association for Community Mediation of the United States.

The practice of community mediation in India can be seen as a cost-effective dispute resolution process, especially for disputes arising from smaller towns and villages, where a said party cannot afford an expensive and time-consuming litigation process. Section 6, Subsection (1) of the Mediation Bill, 2021, makes it mandatory for any party before filing any suit or proceedings of civil or commercial in nature in any court, shall take steps to settle the disputes by pre-litigation mediation and it further makes it mandatory for the parties to attend at least two mediation sessions before withdrawing from mediation and moving for filing of a civil suit. However, mandating a pre-litigation mediation would require the availability of trained mediators, and therefore, it is advised that mandating pre-litigation mediation shall be driven through the idea of opening a phased- manner mandatory pre-litigation mediation by mandating pre-litigation mediation for a certain category of disputes. For a diverse nation like India, the enforcement of pre-litigation mediation shall be driven through a phased manner by initially enforcing it in the Supreme Court of India, and subsequently to the High Courts. Additionally,the government through the help of the Non-Governmental Organizations and the sessions courtshould establish mediation centers in the villages and smaller towns, where the clause mandatingmediation for two sessions should be increased to at least 4 mediation sessions as such idea of mandating pre-litigation mediation will be initially imposed and challenged by the local regional political groups in India and will use the means of manipulating smaller towns and villages against the idea of mandating pre-litigation mediation for any civil matters.

The Current Mediation Bill, 2021 also enforces the establishment of the Mediation Council of India, which shall regulate the appointment of mediators and shall issue specific regulations and guidelines for devising the practice of Community Mediation in India. However, as per Section 53 of the Mediation Bill, 2021, the Council must take approval from the Central Government before issuing such regulations, and such rule is neither enforced by the Bar Council of India (except when prescribing the conditions for non-citizens to practice as advocates) nor for National Medical Commission. Such mandatory provisions may reduce

the important role of the Mediation Council of India to its nominal. Additionally, the Central Government (agencies, corporations) may also be a party to the mediation proceedings. Such government provisionsmay be observed as an intervention of executive authorities in the judicial bodies of India, and they may affect a formal community mediation proceeding in towns, villages, or cities.

As India steps into the field of mediation and aims to expand its approaches by recognizing community mediation, the following recommendations are made:

i) There should be the training of Community Mediators by the mediation service providers, and only Community mediators should be authorized to mediate the conflict assimilarly drawn from the practice of Community Mediation in the United States.
ii) There should be the establishment of a Dispute Resolution Department in the Ministry of Law and Justice in the Indian Government, through which essential awareness programs of community mediation should be launched in Rural and Urban India.
iii) The Bill should be amended and the clause on the methods of dispute resolution in community mediation like Mediation, Facilitation, Training and Conflict Coaching, Restorative justice, and Conciliation should be added in chapter X of the Mediation Bill as similarly practiced in the United States.
iv) For a democratic, and diverse nation-state like India, the Mediation Council of India should establish separate state councils like the Delhi Mediation Council, which shouldbe regulated by the Mediation Council. The aim of such councils should be to adopt a model that is culturally appropriate and sustainable for that community and should train the mediators as per that model, similar to the model of training community mediators in the United States.

    The Mediation Bill should also allow the community mediators to mediate the compoundable offenses affecting the community, which are less grievous in nature and should go through the process of mandatory pre-litigation mediation, thereby demonstrating a continued connection between community mediation and the Courts.
v) India should also focus on the establishment of self-determination in community mediation.

The recognition of Community Mediation by the Indian parliament through the

mediationbill has attained attention but its adaptation and implementation should be considered as per the democratic and culturally diverse structure of India with the involvement of suggestions from judicial institutions like the Supreme Court of India, and High Courts.

5. CONCLUSION

The recognition of community mediation through the Mediation Bill has approved the establishment of the practice of dispute Resolution in Urban and Rural India. Yet, the success of Community mediation can be debated due to the problems highlighted in the current mediation bill. The practice of Community Mediation in the United States can largelybe categorized as one of the most structured community mediation in the world. Whereas, thepractice of Community Mediation in India is yet to gain momentum of its growth, and can largely be affected due to cultural and linguistic diversities.

AGREEMENTS OF CONFIDENTIALITY – A CRITICAL PERSPECTIVE

—Kanishk Tiwari[1]

ABSTRACT

It is a fact that the privacy of an individual has to be given utmost importance since it forms part of an individual's Fundamental Rights enshrined in the Constitution, as held by the Hon'ble Supreme Court in K.S. Puttaswamy v. UOI. The two primary methods of ADR i.e., Arbitration and Conciliation in India are governed by Arbitration and Conciliation Act. The privacy aspect in proceedings governed under this particular statute relates to the principle of maintaining confidentiality (by virtue of confidentiality clause and agreement) in respectof divulging the procedural information received by either of the parties to the dispute or the institution as a whole. Although the principle of confidentiality has been imbibed in the statute since its inception in 1996 under Section 75 of the Act, the extent of applicability is only so far as the Conciliation proceedings under the Act are concerned. To review the institutionalization of Arbitration in India, a committee under the chairmanship of Justice B.N Srikrishna was formed in 2017, based on the recommendation of which, the existing lacuna of extension of confidentiality principles to Arbitration proceedings was resolved by the introduction of Section 42A to the Arbitration and Conciliation Act in 2019. The author of this research paper would aim to critically analyze in its entirety, the confidentiality principles existing in respectof Arbitration proceedings in India. Further, an attempt would be made to holistically give suggestive remarks to the issues identified during the analysis, pertaining to real-world implementation of confidentiality agreements and clauses in its true letter and spirit.

AIMS AND OBJECTIVES

- To analyze the Confidentiality Agreements in its entirety including the effect on these agreements or clauses in case of any change in the contract (void, voidable).

[1] Kanishk Tiwari is a third year law student pursuing B.A.LL.B. (Hons.) at Maharashtra National Law University, Nagpur.

- To analyze the significance of Confidentiality Agreements vis-à-vis the Right to Privacy as afundamental right.
- To shed light on the comparison between Confidentiality Agreements as executed in Indian Law with reference to execution of such Agreements in other major jurisdictions across the world (with special emphasis on common law).

RESEARCH QUESTIONS

- What is the effect on the validity of an Arbitration Agreement under different scenarios of a contract being declared void or illegal?
- Whether the object behind the introduction of confidentiality agreements in Indian Arbitration mechanisms ensures effective enforcement of one's Fundamental Right to Privacy as well as make the overall Arbitration mechanism more robust?
- What is the difference between the effectiveness of Confidentiality Agreements in the International Domain and other jurisdictions especially the United Kingdom?

RESEARCH METHODOLOGY

The research method used to write this paper is doctrinal in nature, the paper uses deductive reasoning for its research. The data used for the purpose of conducting research is mostly secondary, in the form of Research Journals, Articles, Established Case Laws, and Definitions. The sources of research also consist of the theoretical knowledge the researcher possesses as a student of Clinic – I (Alternative Disputes Resolution).

RESEARCH HYPOTHESIS

The recent amendment of 2019 has been ideally introduced by the parliament based on the B.N Srikrishna committee report, to incorporate Section 42A which extends the confidentiality principles to the Arbitration Proceedings. However, the language used in Section 42A has been alleged to be vague, giving rise to various drawbacks. The study concentrates on a limited number of identified drawbacks inter-alia Actors in the Arbitration proceedings for the purpose of confidentiality; Disclosure for other necessary purposes other than for enforcement of Arbitral award; and no mention of consequences in case of breach of Section 42A. The paper would attempt to prove how the aforementioned drawbacks might result in diminishing the value of Confidentiality Agreements and making them infructuous, falling short of achieving the intended results of the Legislature.

1. INTRODUCTION

In contemporary times, the courts of law are crammed with an estimated case pendency of over 4.5 cr.[2] The Alternative Dispute Resolution mechanisms, which (ideally) promise swift disposal of cases and delivery of justice in consonance with Article 21 of the Constitution; without any hectic of being entrapped in litigation battles that span an average of 7-10 years; are becoming a preferred choice of the parties to the disputes, especially in civil cases. Thus, India has witnessed a substantial rise in the usage of ADR mechanisms with special reference to Arbitration as one of the preferred ADR methods. It is a fact that the privacy of an individual has to be given utmost importance since it forms part of an individual's fundamentalrights enshrined in the Constitution, as held by the Hon'ble Supreme Court in ***K.S. Puttaswamy v. Union of India***.[3]

The two primary methods of ADR i.e., Arbitration and Conciliation in India are governed by Arbitration and Conciliation Act.[4] The privacy aspect in proceedings governed under this particular statute relates to the principle of maintaining confidentiality (by the virtue of confidentiality clause and agreement) in respect of divulging the procedural information received by either of the parties to the dispute or the institution as a whole.

Although the principle of confidentiality has been imbibed in the statute since its inception in 1996 under Section 75 of the Act[5], the extent of applicability is only so far as the Conciliation proceedings under the Act are concerned thus, giving rise to a contention of applicability of confidentiality principles to the proceedings of Arbitrations which are also governed under the same Act. To review the institutionalization of Arbitration in India, a high-level committee under the chairmanship of Justice B.N Srikrishna was formed in 2017[6], based on the recommendation of which, the existing lacuna of extension of confidentiality principles to Arbitration proceedings was resolved by the introduction of Section 42A in the 2019 amendment to the Arbitration and Conciliation Act.

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[2] PTI, over 4.70 crore cases pending in various courts: Govt, THE ECONOMIC TIMES (Mar. 25, 2022, 09:27 PM)
[3] (2017) 10 SCC 1.
[4] The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[5] Id. at Section 75.
[6] Justice B.N. Srikrishna, Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, MINISTRY OF LAW AND JUSTICE, 1, 3 (2017).

2. THE MEANING OF CONFIDENTIALITY

Confidentiality in general usage is understood as an obligation upon someone to keep the information secret. The Arbitration and Reconciliation Act, 1996 does not define the term confidentiality. However, the Black's Law Dictionary defines the term *"confidential*" as "*entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret*"[7]

It is not a hidden fact that confidentiality as a concept has been ingrained in legal practicein India. The client-attorney privilege exercised throughout the world is one of the prime examples of confidentiality practice being followed across the world. The legal validation of client-attorney privilege is conferred by Section 126 of the Indian Evidence Act, 1872 wherein the limitation has been put on the counsels from divulging any information provided by the clients.[8] The attorney privilege is to the extent that even public authorities such as police have to follow due process in case they want to conduct an investigation against an attorney since the investigation might result in a breach of confidentiality.

Other than in general disputes, in the case of arbitration proceedings, confidentiality has been givena lot of importance. This is due to the possibility that certain parties in a dispute may not want certain accusations of misrepresentation, ineptitude, a lack of resources, and their trade secrets made public. Due to the secrecy, it offers to provide, parties choose arbitration in these situations.

3. THE INTENT BEHIND INTRODUCING SECTION 42A

The overall object behind introducing Section 42A along with Section 43K, can be traced back to the ratio behind recommendations made by the High-Level Committee (hereinafter "**HLC**") under the chairmanship of Justice B.N Krishna. The role played by various factors based on which the recommendations were made by the HLC shall now be discussed.

A. The International Law Aspect Behind the Introduction of Confidentiality Clause

It is to be noted that the Arbitration and Conciliation Act, 1996 [hereinafter "**the Act**" or "**the A&C Act**"] has majorly been adopted from UNCITRAL Model law which is the benchmark

[7] 4 HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 370 (St. Paul West Publishing Company 1971).
[8] The Indian Evidence Act, 1872, § 126, No. 1, Acts of Parliament, 1872 (India).

criteria of arbitration across the world. However, it is pertinent to mention that UNCITRAL Model law does not contain any provisions or rules regarding the confidentiality of arbitration proceedings.

It is often termed that the UNCITRAL Model law has largely been directly adopted by the Indian legislature in the form of the A&C Act 1996. Hence, in such a situation, without giving due heed to the other jurisdiction laws going beyond the traditional common law, certain things and elements specifically required for catering to the needs of Indian society and those which are relevant to the Indian legal system ought to have been missed.

One such missing element was that of confidentiality in arbitration proceedings. Since A&C Act is a relatively new and developing legislation, the HLC under Justice B.N Srikrishna's chairmanship took due cognizance of the fact that confidentiality provision must be included within the statute withstanding the newly provided significance to "*Right of Privacy"* as a fundamental right.[9]

The Lok Sabha debate is also relevant in considering the intent behind due acceptance of recommendations made by HLC whereby former Law Minister Ravi Shankar Prasad whilst introducing amendment to the Act in 2019, has specifically pointed out the vision of the current government is to promote and make India, the hub of institutional Arbitration for which ensuring of privacy in a booming economy like India is very important.[10]

B. Foreign Legislations and Institutional Mechanisms – A Precedent for Introducing Confidentiality Clause

The Committee took into consideration the provisions pertaining to confidentiality across various prominent jurisdictions, especially the common law countries. The recommendation by HLC highlighted how common law jurisdictions like Hong Kong and Singapore provide for confidentiality protection through explicit statutory references.

a. **Hong Kong precedent** – Hong Kong's Arbitration Ordinance (**HKAO**) under Section 2D4 provides a statutory right for a litigant to request a court to hear arbitration-related proceedings in a confidential manner. Additionally, Section 2E5

[9] K.S. Puttaswamy v. UOI, (2017) 10 SCC 1.
[10] Ravi Shankar Prasad (Hon'ble Law Minsiter), *Motion for consideration of the Arbitration and Conciliation (Amendment) Bill , 2019 as passed by Rajya Sabha*, 17TH LOK-SABHA DEBATES (2019), https://loksabha.nic.in/Debates/Result17.aspx?dbsl=1666.

of HKAO allows for a party to restrict the reporting of court decisions concerning arbitral proceedings.

b. **Singapore precedent** – Singapore International Arbitration Act **(IAA)** under Section 226 and Section 237 of the act provides identical protection as that of HKAO.

An important point that was taken into consideration by the committee was the fact that the U.K. jurisdiction which forms the basis of common law, their Arbitration Act does not contain any express provision for confidentiality, however, English Courts consider arbitration to be a private means of dispute resolution and consider "*an obligation of confidentiality to be implied in the arbitration agreement between the parties*." Hence, even without any express provision, confidentiality is taken care of in U.K. arbitration proceedings. Contrary to this, Indian Legal does not have any kind of implied confidentiality obligation placed upon by any conventional practice or for that matter any statute.

Now, these common law jurisdictions which happen to be the hub of International and Institutional arbitration become one of the primary evaluation criteria for the introduction of confidentiality in the Indian legal system, by the High-Level Committee and Indian Legislature. Further, emphasis shall be put upon the ease of doing business objective of the government where the ease of dispute resolution in a speedy manner while ensuring the privacy of disputed transactions (wherever needed) happens to be one of the important criteria for determining a country's overall economic and business investment viability. Hence, it became imminent that such confidentiality clauses were introduced in the legal system. Now, since the intent behind the introduction of confidentiality clauses by way of bringing an amendment is clear, it is pertinent to analyze the provision for any drawbacks and lacunae in implementing it.

4. INDIAN PROVISIONS RELATING TO CONFIDENTIALITY

Based on the scrutiny done by the Committee under the chairmanship of Justice B.N Srikrishna, the following recommendation was presented:

"A new provision may be inserted in Part I of the ACA providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority."[11]

Hence, based on recommendation, the legislature introduced Section 42A providing for a

[11] Justice B.N. Srikrishna, supra note 5, at 72.

confidentiality obligation upon the concerned parties to the dispute which shall now be analyzed.

The provision reads: **Confidentiality of information**. — "*Notwithstanding anything contained by any other law for the time being in force, the arbitrator, the arbitral institution and the parties to the arbitration agreement shall maintain the confidentiality of all arbitral proceedings except award where its disclosure is necessary for the purpose of implementation and enforcement of an award*."[12]

Breaking down the Section for determining the essentials and exceptions, the following parts identified are relevant for further discussion.

i. **Non-Obstante Nature of this Section** – The term "*notwithstanding*" implies that legislature has made this section non-obstante thereby confining confidentiality obligations to the arbitrator, arbitral institution and parties to the arbitration whilst excluding all interested third parties to the arbitration.

ii. **Express Exceptions –** An exception to the confidentiality obligation in cases when disclosure is required for the enforcement or challenge of an arbitral award is provided. Furthermore, the introduction of Section 43K requires the Arbitration Council of India, which has been introduced by this section, to keep an electronic depository of arbitral awards and any other data as may be specified by the rules of the Arbitration Council of India. Although, the rules regarding the same have not been notified yet.

The blanket confidentiality obligation placed upon the concerned parties with only one express exception, completely neglecting the probable circumstances (to be analyzed in the Critical Analysis part) in which genuine disclosure of arbitration details is required, has brought the whole amendment into the realm of criticism by the scholars. These drawbacks shall now be identified and deliberated upon.

5. CRITICAL ANALYSIS/ LIMITATIONS

There have been myriads of possible circumstances which have been neglected by the legislature while introducing this section. The intent when looked at from the ease of doing business as well as constitutional perspective of privacy, was idealistic. However, the execution of the same by the usage of vague language and improper expressions in the section has led to this section becoming infructuous.

a. Exclusion of "other parties" from confidentiality obligation

[12] The Arbitration and Conciliation Act, 1996, § 42A, No. 26, Acts of Parliament, 1996 (India).

According to the provision, the only parties who are required to adhere by the concept of confidentiality are arbitrators, the arbitral institution, and parties. However, there is no discussion of witnesses, stenographers, or anybody else who is a witness to the arbitration procedures in this section. Therefore, they are not bound by the confidentiality guaranteed under this section, which presents a significant drawback in the implementation of the legislative intent of maintaining confidentiality in arbitration proceedings.

b. Court Intervention Restriction

Under Section 9 of the ACA, 1996, the parties to the arbitration may request injunctive remedy and interim relief from the court in relation to the arbitration. Further, the Arbitrator's mandate may be terminated by invoking Section 14 of the Act. There is a good chance that parties will depend on confidential information from the arbitration proceedings in all these kinds of scenarios. There are other provisions also other than mere enforcement of Arbitral awards where court intervention may be sought. However, the provision does not take into account any of those possibilities.

c. Third-Party references

In the case of *Mahanagar Telephone Nigam Ltd v. Canara Bank,*[13] the Supreme Court of India permitted non-signatories to claim, a reference to an arbitration proceeding by demonstrating their degree of involvement in the case.

In such a scenario where, third-party involvement is permitted based on the test of proving the third party's likeliness and involvement of being affected by a certain arbitration, completely restricting access to the confidential information which may be useful for proving the involvement in the dispute, again stands in direct contradiction to the established rule. This is due to the fact that the nature of section 42A is Non-Obstante resulting in a blanket ban on divulging information. Hence, a balance is required to be struck between the interests of the parties involved and confidentiality.

d. Requirement of Public Interest Test

It is a known fact that the Constitution of India permits even the restriction of Fundamental Rights under certain exceptions and reasonable restrictions if in any manner the blanket exercise of the Fundamental Rights might not be in the Public Interest or against the national security among other reasonable restrictions provided for in the Constitutional provisions.

Drawing an analogy from this reasonable restriction provision, it is the need of the hour that the "Public Interest test" is introduced as a legitimate exception in the Indian Legal system so far as confidentiality in Arbitration proceedings is concerned. The test was propounded by the

UK and Singapore courts and implies that disclosure of arbitral proceedings may be allowed or disallowed based on the interest of the public at large involved. The public interest test has been upheld by the English Courts in the case of ***The Chartered Institute of Arbitrators v. B.***[14]Further, Singaporean courts have also upheld the test in the case of ***AAY v. AZV.***[15]

e. Domestic Laws Conflict

There are various provisions including the Companies Act, and SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, which mandate companies to make disclosures periodically to check the overall performance of the company. Further, other regulations requiring disclosure have been provided across a wide spectrum of laws. However,a loophole is created by Section 42A which can be used as an escape route by these companies to refuse disclosures in the garb of complying with the blanket ban provision provided by Section 42A.

f. Put the Party's Autonomy in Question

Party autonomy is one of the areas which has led to a substantial growth of Arbitration as a choice of dispute resolution. However, the mandatory confidentiality clause completely neglecting the party autonomy again presents a problem.

g. Missing Consequences

Everything set aside, when it comes to consequences of breach of the mandatory obligation placed upon them by the Section, no mention as to remedy has been provided in the Act. This presents a situation where the whole Section itself can be described as a "*toothless tiger*".

6. CONCLUSION

The author aimed through the paper to analyze in its entirety the new confidentiality provision inserted in the Arbitration and Conciliation Act. The hypothesis presented by the author was that the Section failed to address certain problems viz. Actors in the Arbitration proceedings for the purpose of confidentiality; Disclosure for other necessary purposes other than for enforcement of Arbitral award; and no mention of consequences in case of breach of Section 42A. Based on the analysis it is asserted by the author that the hypothesis has proven to be true, which has resulted in diminishing the value of this section as well as its utility, completely going against the intended result of the legislature. Since it is relatively a new provision, no disputes have arisen as of now, however, it's a matter of time before the drawbacks start showing their effect and courts become piled up with cases pertaining to those drawbacks. Hence, legislature being the primary policy-making body should take cognizance of the fact

[14] [2019] EWHC 460 (Comm).
[15] [2012] SGHC 116.

that certain lacunae prima facie exists in the provision, and rectify the same in a speedy manner.

7. SUGGESTIONS

a. **Providing a Complete Overhaul** – The whole provision must be re-visited by an expert committee while taking into consideration the needs of the Indian Legal System and Society.
b. **Introducing Public Interest Test** – It is suggested that the exceptions should not be very restrictive, and it should be left open to the courts and their discretion to decide wherever it is required that disclosure in public interest (based on the public interest test) of proceedings may be made based on guidelines set by the legislature.
c. **Self-Contradiction rectification –** it has been analyzed above that although limited court intervention is much appreciated withstanding that one of the objectives of arbitration was itself that there would be minimal court interference. However, wherever parties require for the purpose of Justice delivery, interference of court, in such scenarios exclusively restricting the disclosure for the purpose of enforcement of award contradicting the other remedies such as those given in several sections like Section 9, Section 14, etc. may result in impediment in justice dispensation mechanism in place. Hence, the confidentiality provision should be modified to make it not in itself contradictory to other provisions of the Arbitration Act as well as other essential domestic laws such as the companies act.

The above-mentioned suggestions are based on the study conducted and are not exhaustive in nature.

THE CHALLENGES AND BENEFITS OF USING HYBRID DISPUTE RESOLUTION METHODS: COMBINING ARBITRATION AND MEDIATION IN PRACTICE

—Roopali Garg and Gurjant Singh Cheema[1]

ABSTRACT

In recent years, hybrid dispute resolution approaches, which combine aspects of arbitration and mediation into a single process, have grown more popular as a means to settle disagreements in a manner that is both more efficient and cost-effective. On the other hand, putting these strategies into effect comes with its fair share of difficulties as well as advantages. This article explores the benefits and drawbacks of using hybrid methods for the resolution of disputes. Some of the potential benefits include the potential for increased efficiency, improved communication and collaboration between parties, and the ability to tailor the process to the particular requirements of the dispute. In addition, problems such as the possibility of misunderstanding and doubt regarding the procedure, as well as the need for practitioners to have specific training, are also mentioned in this article. In the end, the use of hybrid dispute resolution methods is a complex and nuanced issue that requires careful consideration of the specific needs and goals of each dispute, as well as the skills and expertise of the practitioners who are involved. This is because hybrid dispute resolution methods combine aspects of traditional dispute resolution methods with more modern alternatives.

1. INTRODUCTION

Recent years have seen a rise in the use of blended conflict resolution procedures, which combine negotiation and arbitration. In addition to being flexible, efficient, and cost-effective, these methods provide a variety of other benefits. Yet, there are downsides to these approaches that must be weighed before they are used. There are a few different ways to settle a legal disagreement, and each has its advantages and disadvantages. The goal of negotiation is for both sides to walk away from the table having achieved what they both consider to be a win. However, in arbitration, an objective third party renders a final and legally binding judgment

[1] The authors are advocates practising in Punjab and Haryana High Court.

about the issue. The parties to a dispute might choose between negotiation and arbitration as part of a blended approach to conflict resolution.[2]

Flexibility is a major benefit of using a variety of methods to resolve a conflict. The parties may adapt the procedure to their interests by combining negotiation and arbitration, each of which has advantages and disadvantages. In certain cases, this may make the process more malleable and flexible, ultimately benefiting everyone involved. Blended methods may help parties save time and resources since they let them make the best of both approaches.

Cost efficiency is another major benefit of using a combination of conflict resolution methods. Costs associated with alternative dispute resolution mechanisms like negotiation and arbitration are often lower than those of the judicial system. Parties may save money and cut down on the total cost of dispute resolution by using blended strategies, which enable them to make the most of both procedures.

There are several potential downsides to using a mixed approach to conflict resolution that need to be thought through first. One major negative is that they need **extensive collaboration and coordination** on the part of all parties involved. Although both negotiation and arbitration are intended to be malleable and responsive to the needs of the parties involved, they may be challenging to implement if the parties are unwilling to cooperate.

The employment of both negotiation and arbitration might be **confusing**, which is another negative of mixed conflict resolution methods. Both procedures have their advantages and disadvantages, and it's not always easy to tell which one would work best in a given situation. Because of this, settling disagreements may take longer than necessary.

The expenses of using a combination of conflict resolution methods might be difficult to control, which is another negative. While both negotiation and arbitration are more cost-effective than going to court, they still may not be ideal. If the parties are unable to agree on how to divide the expenses of the procedure, this might become an issue.[3]

Overall, there are many positive aspects to using a combination of conflict resolution methods.

[2] Vakhtang Giorgadze, Can hybrid mechanisms bridge gaps in arbitration and mediation? KLUWER ARBITRATION BLOG, (Jan. 15, 2023, 9:28 PM).
[3] Id.

Still, there are costs associated with using them that should be weighed carefully before widespread use. There are a number of drawbacks to this approach, including the fact that it calls for an excessive amount of cooperation and coordination between the parties involved, the fact that it can be tricky to know when to resort to negotiation or arbitration, and the fact that it can be costly to implement. Despite these caveats, when implemented appropriately and in conjunction with adequate preparation and communication, blended conflict resolution strategies may be an efficient means of settling disagreements.

2. TYPES OF HYBRID DISPUTE RESOLUTION METHODS

Hybrid dispute resolution methods involve the combination of two or more dispute resolution processes, such as arbitration and mediation. These methods are becoming increasingly popular as they offer a number of benefits, such as increased flexibility, efficiency, and cost-effectiveness. However, they also present challenges that must be addressed to be successful. There are several types of hybrid dispute resolution methods, including Med-Arb, Arb-Med-Arb, Med-Arb-Conc, and other hybrid methods.

a. **Med-Arb-** Med-Arb is a type of hybrid dispute resolution method in which the same person acts as both a mediator and an arbitrator. In this method, the parties first attempt to reach a settlement through mediation. If the parties are unable to reach a settlement, the mediator then acts as an arbitrator and makes a binding decision on the dispute. This method is useful when the parties are not able to reach a settlement through mediation, but are willing to accept a binding decision from the mediator[4].
b. **Arb-Med-Arb-** Arb-Med-Arb is another type of hybrid dispute resolution method. In this method, the parties first attempt to reach a settlement through mediation. If the parties are unable to reach a settlement, the dispute is then referred to arbitration. If the arbitration process does not result in a resolution, the parties can then return to mediation to try to resolve any remaining issues. This method is useful when the parties are not able to reach a settlement through mediation but are willing to accept a binding decision from an arbitrator.
c. **Med-Arb-Conc-** Med-Arb-Conc is a type of hybrid dispute resolution method that involves the use of mediation, arbitration, and conciliation. In this method, the parties first attempt to reach a settlement through mediation. If the parties are unable to

[4] Dilyara Nigmatullina, The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study, Vol. 33, JOURNAL OF INTERNATIONAL ARBITRATION, July 2016.

reach a settlement, the dispute is then referred to arbitration. If the arbitration process does not result in a resolution, the parties can then use conciliation to try to resolve any remaining issues[5]. This method is useful when the parties are not able to reach a settlement through mediation or arbitration but are willing to use conciliation to try to resolve any remaining issues.

d. **Other hybrid methods-** Other hybrid methods include the use of mediation and negotiation, mediation and litigation, and arbitration and litigation. These methods can be used in various combinations depending on the specific needs of the parties involved.

3. BENEFITS OF USING HYBRID DISPUTE RESOLUTION METHODS

A. Combination of Advantages from Both Arbitration and Mediation

The use of both mediation and arbitration to resolve disputes is very effective. To do this, either mediation or arbitration might come first. To get a final and binding decision, the parties may first agree to participate in mediation before agreeing to switch to arbitration. In the event of a disagreement, the terms of a contract might spell out the steps to be taken. Combining mediation with arbitration gives the parties more options for reaching a settlement. Mediating and arbitrating disputes may assist parties to achieve a legally enforceable agreement when negotiations break down. For both mediation and arbitration, the parties have the option of using the same neutral third party. In this manner, settling a disagreement won't set the parties behind financially, and they may keep working on their case with little disruption. The parties may save time and effort by keeping the same neutral partner throughout the proceedings. In the event of a disagreement, the mechanism for resolving it will either be mutually agreed upon by the parties or included in the applicable contract[6].

When mediation and arbitration are used together (called "**med-arb**" for short), the same neutral party is often present, allowing for a more thorough judicial examination. Even if confidentiality is compromised during mediation, the neutral party may learn information about one of the parties that might influence his or her choice after the arbitration process has been taken over[7]. Although a neutral party may be certain that they will not learn any details about

[5] William H. Ross, Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration, Vol. 25 (2), THE ACADEMY OF MANAGEMENT REVIEW, April, 2000.
[6] Id.
[7] Bobette Wolski, Arb-Med-Arb (and MSAs): A Whole Which Is Less than, not Greater than, the Sum of Its Parts?, 6(2) CONTEMP. ASIA ARB. J. 249, 257 (2013).

the other, sometimes this is impossible to avoid. They are prohibited from learning of or using any information deemed to be secret during the arbitration process.

In a combined mediation and arbitration process, parties often avoid discussing the concerns openly out of fear of influencing the final, binding verdict. They are notoriously cagey with information and often withhold key details. In a purely mediated dispute, the parties are free to debate the issues at hand, reach an agreement on a resolution, or come up with an alternate solution without fear of legal repercussions. However, when arbitration is involved, any or both parties may attempt to exert influence over the impartial third party by participating in conferences with the arbitrator in an effort to persuade him or her to reach a conclusion in favour of their side. Therefore, judicial review is crucial to determine whether or not the neutral partner has made a really impartial judgement[8].

Conflicts are resolved by a mix of mediation and arbitration when both parties agree to it, and occasionally parties use this as a threat to the mediators to get them to work quickly and efficiently to obtain a binding conclusion. To put it simply, med-arb is not a new method for settling disputes; rather, it combines the best features of mediation and arbitration. As a result, parties have been able to resolve their differences amicably and avoid needless legal battles.

B. Efficient and Cost-Effective

Fast and inexpensive settlement of conflicts is the most significant feature of efficient and cost-effective dispute resolution. Mediating, arbitrating, and negotiating are all viable options for doing this. Through mediation, a third-party facilitator assists disputing parties in reaching an agreement. Many people find this approach more convenient than going to court because of the lower costs and lack of formality. Arbitration is another popular means of conflict resolution. Arbitration is a procedure whereby a third-party neutral decides a dispute by weighing the facts given by both sides. This is favoured since it is quicker and cheaper than going to court[9].

Disputes may also be settled via negotiation, which is a time- and cost-saving alternative. It's a way for everyone involved in the conflict to work together to find a resolution that works for

[8] Toshio Sawada, Hybrid Arb-Med:Will West and East Never Meet?, 14(2) ICC INTL. CT. ARB. BULL. 29, at 29 (Fall 2003).
[9] Barry Leon & Alexandra Peterson, Med-Arb in Ontario: Enforceability of Med-Arb Agreement Confirmed by Court of Appeal, 2(1) NYSBA NEWYORK DISP. RES. LAW. 92, 93 (2009).

everyone. In many cases, this alternative is chosen over going to court since it is quicker and cheaper. The parties may benefit from negotiation because they can choose the conclusion of the disagreement on their own terms.

The employment of modern technological methods is also crucial to the quick and inexpensive settlement of disputes. In order to speed up the settlement process, technology may be employed to improve communication between the parties. One such technique that takes advantage of modern communication and negotiating tools is known as online dispute resolution ("ODR"). Consumer disputes, small claims court cases, and workplace disagreements are all good candidates for ODR[10].

However, these are not the only strategies available for quick and cheap conflict resolution. The usage of ADR providers is one such instance. Alternative ADR providers are businesses that focus on settling lawsuits quickly and cost-effectively. They may facilitate conflict resolution via mediation, arbitration, or other means. Providers of ADR services also often provide education and tools meant to aid in conflict resolution between parties.

The use of early neutral assessment is another method that has shown to be both useful and economical in resolving disputes. An impartial third party examines the issues at hand and makes a recommendation on the merits of the case, but this recommendation does not have any legal weight. It's common practice to use this strategy so that the parties may achieve an agreement more quickly and cheaply.

Ultimately, companies, organizations, and people need access to conflict resolution services that are both quick and affordable. Mediation, arbitration, negotiation, and the use of technology are only some of the options available for quick and cheap resolution of conflicts. Experts from ADR services and early neutral evaluation ("ENE") firms may also be of great aid in settling lawsuits quickly and cheaply. In order to save time and money, the parties to a disagreement might use efficient and cost-effective conflict resolution processes[11].

C. Preservation of Relationships

The process of coming to a settlement or an agreement between parties who are engaged in a

[10] Ellen E. Deason, Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review, Vol. 5, No. 12, ARBITRATION LAW REVIEW, 2013.
[11] Id.

conflict or disagreement is referred to as dispute resolution. It is possible for it to take on many other forms, such as mediation, arbitration, and negotiation. The maintenance of existing connections is an essential component of any conflict resolution process. This indicates that the parties concerned should make an effort to preserve or enhance their connections with one another even when they are engaged in a disagreement with one another. The importance of maintaining connections as part of the conflict resolution process may be attributed to a number of factors. To start, it makes communication and negotiating easier to carry out successfully. It is far more probable that the parties to a disagreement will be able to achieve a settlement that is advantageous to both of them if they can communicate clearly with one another and keep their relationship cordial. Second, it helps to prevent potential disputes in the future[12].

When parties make an effort to maintain their connections with one another throughout a disagreement, they increase the likelihood that they will be able to collaborate in the future without engaging in more conflict. Third, it contributes to the preservation of mutual respect and trust between the parties. When parties make an effort to preserve their connections, they increase the likelihood that they will continue to demonstrate the trust and respect that are essential to productive dialogue and negotiation.

In conflict resolution, maintaining connections may be accomplished in several different ways. One of the most important strategies is to keep one's attention fixed on the overarching objective, which is to end the conflict. The parties involved need to make an effort to understand each other's points of view and interests in order to locate areas of common ground. This may assist to prevent assaults on an individual's character and defensiveness, both of which can be detrimental to relationships. During the whole process of conflict resolution, the parties involved should make every effort to maintain communication that is both open and honest. This may assist to create trust and respect between the parties, which increases the likelihood that they will be able to agree on how to resolve the conflict[13].

Utilizing facilitators who are impartial third parties is an additional key method for maintaining relationships throughout the settlement of disputes. Mediators and arbitrators may assist to keep the process focused on resolving the issue rather than engaging in personal attacks or defensiveness. They can also help to foster dialogue and discussion between the parties

[12] Ellen E. Deason, Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality, 35 U.C. DAVIS L. REV. 33 (2001).
[13] Id.

involved in the conflict. In addition, impartial third-party facilitators may assist in maintaining confidentiality, which can be essential for maintaining relationships and preventing recurring problems[14].

Last but not least, it is essential to keep in mind that maintaining connections is a continuing effort and not simply a one-time occurrence in order to be successful. Even after the conflict has been resolved, the parties involved should continue to focus on preserving and developing their relationships with one another. This may include doing follow-up meetings or check-ins, as well as taking measures to forestall the occurrence of disputes of a similar kind in the future.

The maintenance of relationships is an essential component in the process of conflict resolution. In the middle of a conflict, parties may seek to preserve or enhance their relationships by concentrating on shared objectives, keeping open and honest communication, using neutral third parties as facilitators, and continuing to work on relationships even after the issue has been settled. This might result in improved communication and negotiation, fewer future disputes, and more trust and respect amongst the persons involved[15].

4. CHALLENGES OF USING HYBRID DISPUTE RESOLUTION METHODS

A. Potential Conflicts of Interest

ADR approaches have grown in popularity in recent years, but hybrid conflict resolution methods that combine them with conventional litigation have also gained traction. The use of such strategies isn't without its problems, though, and conflicts of interest are only one of them. When an individual or group has competing interests, or when fulfilling one interest might damage or jeopardize the other, a conflict of interest exists. When the same party participates in both ADR and conventional litigation (Litigation), a conflict of interest may arise in the setting of hybrid dispute resolution. Since they have a vested interest in the outcome of the case, a mediator who is also an expert witness in the case may be biased toward giving evidence that supports their function as a mediator. Related lawsuits involving the same person or organisation may also lead to conflicts of interest. For instance, a mediator may be biased toward the parties they've dealt with in the past if they've been engaged in several instances

[14] Klaus Peter Berger, Integration of Mediation Elements into Arbitration: 'Hybrid' Procedures and 'Intuitive' Mediation by International Arbitrators, 19 ARB. INT'L 387, 391 (2003).
[15] Gabrielle Kaufmann-Kohler & Fan Kun, Integrating Mediation into Arbitration: Why it Works in China, 25 J. INT'L ARB. 479, 480-86 (2008).

with the same parties or the same subject matter. This may cause problems with the fairness of the settlement process and damage the reputation of those involved.

The same individual or group participating in both the ADR and conventional litigation processes may have a conflict of interest if they stand to gain financially from the case's conclusion. As an example, if a mediator has financial links to one of the parties, they may be biased toward that side rather than acting in the best interest of everyone concerned.

It is crucial that all parties participating in the dispute resolution process do their due diligence on any individual or entity that will be handling their case. One way to do this is to research the mediators and attorneys involved to see whether they have a vested interest in the outcome of the case.

It is also crucial in hybrid dispute resolution that all parties be able to communicate freely and openly about any possible conflicts of interest, and that there be a mechanism in place for any party to voice concerns about such conflicts. As a result, this may improve the likelihood that the settlement process will be equitable and respectful to all parties. Using a mix of traditional and non-traditional strategies for settling legal disagreements might provide positive results.

The integrity of the dispute resolution process may be undermined and unjust results may result if parties are not made aware of the possibility of conflicts of interest. To lessen this risk, the parties should disclose any possible conflicts of interest and do extensive research on the backgrounds of any individuals or organisations that may be engaged in the dispute settlement process[16].

B. Potential for Delays

One potential source of delays in hybrid dispute resolution methods is the fact that these methods often involve multiple stages or steps. For example, a hybrid dispute resolution process might begin with mediation, followed by arbitration if the parties are unable to reach a settlement. This can lead to delays if the mediation stage is not successful, as the parties must then move on to the next stage of the process[17]. Additionally, if the arbitration stage is also unsuccessful, the case may need to be litigated in court, which can add even more time to the process.

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[16] Thomas J. Brewer & Lawrence R. Mills, Med Arb: Combining Mediation and Arbitration, 54-NOV. DISP. RESOL. J. 32, 34 (Nov. 1999).
[17] Supra Note 9, at 28, 30.

Another potential source of delays in hybrid dispute resolution methods is the fact that these methods often involve multiple parties or representatives. For example, a hybrid dispute resolution process might involve a mediator, an arbitrator, and attorneys for each party. This can lead to delays as each party and representative must coordinate their schedules and availability in order to participate in the process. Additionally, if any of the parties or representatives are not available at the same time, this can lead to further delays as the process is put on hold until they are able to participate.

Additionally, delays can also arise when parties are not fully committed to the process or the outcome[18]. In hybrid dispute resolution methods, the parties have a choice of whether to proceed to the next stage of the process or not. Sometimes, one or both parties may choose to delay the process, either because they are not satisfied with the outcome of the previous stage, or because they are not committed to the process. This can lead to delays as the parties try to negotiate a resolution or as they move on to the next stage of the process.

Finally, delays can also arise when parties are not fully committed to the process or the outcome. In hybrid dispute resolution methods, the parties have a choice of whether to proceed to the next stage of the process or not. Sometimes, one or both parties may choose to delay the process, either because they are not satisfied with the outcome of the previous stage, or because they are not committed to the process. This can lead to delays as the parties try to negotiate a resolution or as they move on to the next stage of the process.[19] Hybrid dispute resolution methods present potential for delays that can be caused by multiple stages, multiple parties, lack of commitment and other factors. However, these challenges can be overcome by selecting the right process, choosing the right people, making sure that everyone is committed to the process and outcome, and being flexible and open to alternatives. It is also important to keep in mind that the goal of hybrid dispute resolution methods is to provide efficient and cost-effective solutions to disputes, and that any delays should be balanced against the potential benefits of these methods.

C. The Complexity of The Process

The intricacy of the procedure is one of the primary obstacles when using hybrid approaches

[18] Gerald F. Phillips, Same Neutral Med-Arb: What Does the Future Hold? 60-JUL. DISP. RESOL. J. 24, 28 (May-July 2005).
[19] Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, SOCIAL SCIENCE RESEARCH NETWORK at 28, Chart E (2013).

for the settlement of disputes. This complexity may be caused by a variety of causes, such as the need of navigating several procedural stages, the participation of multiple parties and stakeholders, and the requirement of integrating various forms of evidence and testimony.
For instance, a hybrid method of conflict resolution may consist of both the conventional lawsuit and the mediation processes. In this scenario, the parties would be required to traverse not just the official court procedure but also the informal mediation process, both of which may be time-consuming and complicated for all parties involved[20]. Additionally, the parties would need to be prepared to present various forms of evidence and testimony in each forum, which may be problematic not just for the parties but also for the conflict resolution specialists who are engaged.

Managing the involvement of many parties and stakeholders, as well as their expectations, is another obstacle that must be overcome when using hybrid approaches for the settlement of disputes. In many disagreements, there may be more than one party engaged, and each of these parties may have their own unique interests and goals. Keeping track of all of these competing priorities and ensuring that everyone feels heard and represented can be a complicated and challenging endeavour, especially when many strategies for conflict resolution are being used at the same time.

The need of integrating various kinds of evidence and testimony might make the use of hybrid conflict resolution techniques particularly problematic. In addition, this can make the use of hybrid dispute resolution methods particularly challenging. For instance, in a hybrid procedure for conflict resolution that includes both litigation and arbitration, the parties may be required to submit various kinds of evidence and testimony in each of the respective forums. This might make things unclear for the parties concerned and also provide extra obstacles for the experts who are participating in the conflict resolution process[21].

The employment of hybrid conflict resolution approaches may, despite these problems, also provide a number of advantages to the parties involved. For instance, parties may be able to reach a settlement that is both more expedient and less expensive if they use a variety of approaches to the resolution of disputes and combine them. In addition, the use of hybrid approaches may be an aid in ensuring that all parties have a chance to have their views heard

[20] Id.
[21] Jeffrey W. Stempel, Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards, 5 PENN ST. Y.B. ARB. & MEDIATION 1 (2013).

and that the settlement of the dispute takes into account all pertinent facts.

It is important for all parties involved in the dispute, as well as professionals who specialise in the resolution of disputes, to carefully consider the specific needs and goals of the dispute and to devise a process that is both transparent and well-structured and that incorporates all of the relevant elements in order to maximize the benefits and minimize the challenges of using hybrid dispute resolution methods. In addition, it is essential to make certain that all parties are provided with enough information, education, and support on the process, as well as that they are in possession of the resources and assistance required to properly engage in the process.

The employment of hybrid approaches for the settlement of disputes may bring a number of advantages; nevertheless, it also poses a number of obstacles, especially in terms of the level of complexity presented by the process[22]. Parties and experts in the field of conflict resolution may guarantee that hybrid techniques are employed in a manner that is efficient, effective, and fair for all parties involved if they first recognise these problems and then take steps to overcome them.

5. CONCLUSION

The use of hybrid dispute resolution methods, which combine aspects of arbitration and mediation, has become increasingly popular in recent years as a way to resolve disputes more expediently and cost-effectively. In conclusion, hybrid dispute resolution methods combine elements of arbitration and mediation. These approaches have the potential to offer a variety of advantages for the parties concerned, including the capacity to adjust the process to the particular requirements of the dispute, enhanced efficiency, better communication and cooperation, and so on. Nevertheless, there are difficulties involved with putting these strategies into effect, which are something that must be carefully examined.

The possibility of misunderstanding and doubt about the procedure is one of the most significant obstacles. The fact that the parties aren't sure what to anticipate or how the procedure will be carried out may be a source of irritation and discontent for everyone involved. Additionally, in order for practitioners to properly use hybrid conflict resolution approaches, they may need specific training. This may add to the complexity of the process as well as the associated costs. Hybrid conflict resolution systems provide an additional potential difficulty

[22] Id.

in that, if not managed appropriately, they might lead to a lack of consistency and fairness in the settlement process. For instance, if the parties are unable to reach a consensus on the procedure, or if the process itself is not carried out in an appropriate manner, the conclusion may not be fair or just.

In spite of these obstacles, the use of hybrid approaches for conflict resolution may bring substantial advantages, particularly in the case of complicated conflicts. It is crucial to highlight that the choice to adopt a hybrid strategy should be based on a comprehensive examination of the particular circumstances of the dispute as well as the requirements of the parties that are involved. This is something that should be kept in mind. In addition, it is advised that practitioners undergo specific training on how to properly utilise these approaches, and that the process be handled fairly and consistently. It is important that the procedures be used.

In light of the growing popularity of hybrid conflict resolution approaches, further study is required in order to get a deeper understanding of the difficulties encountered and the advantages enjoyed when putting these methods into reality. This study might involve case studies to investigate the efficacy of hybrid conflict resolution approaches in a variety of different sorts of disputes, as well as surveys to collect feedback from practitioners and parties who have utilised these methods. In addition, research might also investigate the influence that hybrid dispute resolution approaches have on the outcomes of conflicts, in addition to the financial and time savings that are connected with these methods.

In **conclusion**, hybrid approaches of conflict resolution may confer a variety of advantages on the parties and practitioners involved, but they also bring with them a set of complications. The decision to use a hybrid approach should be based on a careful assessment of the specific circumstances of the dispute and the needs of the parties involved, and practitioners should receive specialised training. In addition, the decision should be based on the fact that hybrid approaches have become increasingly popular recently. Additional study is required to better understand the advantages and limitations that these strategies provide when used in reality.

CAN THE CONSTITUTIONALITY OF JUDICIAL REFERENCE OVERRIDE THE SANCTITY OF ARBITRATION PROCEEDINGS?

(Case Comment on Bhaven Construction v. Nigam Pvt. Ltd. & Anr.[1])

—Nehal Tapadia[2]

1. INTRODUCTION

This judgment is a landmark as it recently raised a very important issue of the *interplay between the entirety of arbitration proceedings and the limits to judicial interference*. A significant issue that arose in the present case was the maintainability of a petition filed under ***Articles 226 and 227 of the Constitution***[3] pertaining to setting aside of an award by the Arbitral Tribunal under ***Section 16***[4] of the Arbitration and Conciliation Act, 1996.

It is evident that ***Arbitration Act, 1940***[5] introduced arbitration in India as an Alternative Dispute Resolution process. It was later codified, institutionalized, and standardized through the Arbitration and Conciliation Act 1960 after taking into consideration International Commercial Arbitration Models like the **UNCITRAL**[6]. Subsequently, as the years passed by, there were various amendments made to the act. Initially, when the act was enacted, it was significant in its character of introducing arbitration as an alternative to litigation in order to reduce the burden of the courts. Hence, this was a diversion from the traditional route of Justice. The motive was simple:*Minimal interference of the Judiciary.*

In the present case, though the court held non-maintainability of the petition under Article 226/227 ofthe constitution when arbitral proceedings are being considered as there exists a non-obstante clause under ***Section 5***[7] of the act, yet, it elucidated situations of **'exceptional rarity**' where interference of the High Courts in the arbitration proceedings under Articles 226 and 227 of the Constitution of India is permitted. The definition of 'exceptional clarity' was defined to be situations when either of the parties has not been provided with a remedy

[1] 2021 SCC OnLine SC 8.
[2] Nehal Tapadia is pursuing her LL.M. in Alternative Dispute Resolution from Jindal Global Law School, OP JindalUniversity, Sonipat.
[3] The Constitution of India, Act No. 1 of 1950, ss. 226 & 227.
[4] The Arbitration and Conciliation Act, Act No. 26 of 1996, ss. 16.
[5] The Arbitration Act, Act No. 10 of 1940.
[6] UNCITRAL Model Law on International Commercial Arbitration, United Nation Commission on InternationalTrade Law 1985.
[7] Supra 2, at ss. 5.

or when a party experiences bad faith by the hands of the other party.

2. BACKGROUND

In the following case, for the manufacturing and the supply of bricks, there was a contract betweenExecutive Engineer Sardar Sarovar Narmada Nigam Limited and Bhaven instructions, the Respondent, and the Appellant. As per Clause 38 Agreement, an arbitrator had to be appointed ina case when a dispute subsequently arose. The dispute, in this case, was regarding non-compliance of terms and conditions agreed for payment. Hence, to SSSN Ltd. a notice was sent forappointment of an arbitrator in accordance with Section 38 of the Act. However, this notice was contested on two grounds:

i) Though Clause 38 called for a sole arbitrator, it also mentioned the disputes to be adjudicated in accordance with the Arbitration Act, 1940 or a modification to the statute, thereof. As a consequence of the same, Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992 was passed by the State of Gujarat and hence the disputes were to be resolved in lieu of this statute.
ii) In the present case, the arbitration proceeding was time-barred because as per Clause 38, the arbitration had to be appointed within 30 days of the defect liability period but that didnot happen and hence, neither party was entitled to claim.

Irrespective of this, sole arbitrator was appointed by Bhaven Constructions, the Appellant. As a result, there was an application filed under Section 16 of the Arbitration Act by the respondent, questioning the jurisdiction of the sole arbitrator. However, the Section 16 Application was rejected by the Sole Arbitrator. SSSN Ltd. then went to the Gujarat High Court and filed a SpecialCivil Application under Article 226 and 227 of the Constitution. The court here cited the reasoningmentioned in ***Konkan Railway Corp. Limited & Ors. v. M/S. Mehul Constructions***[8] and the application to be not maintainable. Aggrieved by this, a Letter Patent Appeal was filed by SSSN Ltd. before the Division Bench of Gujarat High Court. On the grounds of the contract being a *'Work Contract,'* this Appeal was allowed by the Gujarat High Court. Hence, the special leave petition was filed in the Supreme Court challenging the inherent powers of the High Court surpassing the objective of the ArbitrationAct.

The major issue was whether there can be applicability of Arbitration proceedings as a

[8] (2000) 7 SCC 201.

subjectmatter under Article 226/227 of the Constitution. If yes, under what circumstances?
The Supreme Court here dismissed the stance given by the Gujarat High Court and protected the sanctity of the arbitration process.

3. ARBITRATION: A SELF-CONTAINED CODE

The court in the present case enumerated the Arbitration Act to be a self-contained code. This stance of the court is agreeable because the Arbitration Act is a product of international instruments and hence cohesion must be provided to the same. The non-obstante clause mentioned under Section 5 of the Act protects the intention of the Act as provided under the Preamble, that being, minimum judicial interference and adoption of UNCITRAL Model Laws. Further, there does no exist any requirement of extra-statutory mechanism because the Framework of the act is sufficient to address most of the issues. This is also evidenced through Section 34[9] of the Act which uses the word 'only' to enumerate the entirety of the Code as it mentions the recourse to court only when the filing of application is required to set aside an order.

4. INTERPLAY BETWEEN A CONSTITUTIONAL RIGHT AND A LEGISLATIVE ENACTMENT

Here, the Supreme Court was on a balancing stick. In cases like L. Chandra Kumar v. Union of India[10], it had held the powers of the High Court to issue orders and direction to be paramount within the hierarchy of the Indian legal framework and no parliamentary legislation can curtail this. These powers also form part of the Basic Structure Doctrine[11]. While on the other hand, in cases like Nivedita Sharma v. Cellular Operators Association of India[12], it held that when there exists a forum of grievance redressal through legislative enactments like the Arbitration Act, a Section 226/227 petition cannot be entertained ignoring that specific enactment.

Taking into consideration the two mentioned cases, the Supreme Court elaborated that though there would exist judicial interference, it would not go beyond the established procedure within the enactment. Further, fairness and being just is espoused by the provision of the Arbitration

[9] Supra 2, at ss. 34.
[10] AIR 1997 SC 1125.
[11] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[12] (2011) 14 SCC 337.

Act, and hence judicial intervention was limited to only those exceptional circumstances where either a party is not provided with remedy or when there exists mala-fide intention or denial of good faith. Reliance was also attached to the decision by ***Justice Deepak Sibal*** in ***M/s. Deep Industries Limited v. Oil and Natural Gas Corporation,***[13] in which he provided for a restricted right of Appeal under ***Section 37***[14] of the Arbitration Act, and if not so, it would lead to derailment of the entire arbitration proceedings.

5. CONCLUSION

This judgment states a very important aspect that limits the inherent powers of the High Court within the Constitution. It advocates the power of the Courts under Article 227 to be pervasive and broad and hence, there should not be interjection to the arbitration proceedings by the High Courts at this stage. This also adds to the authenticity of the arbitral proceedings by attaching the elements of trust and faith. The case of ***Michigan Rubber v. State of Karnataka***[15] can be considered as an important precursor as it established the two conditions where judicial intervention under Article 226 can be warranted i.e., when there is *display of mala-fide intent and impact to public interest.* *Minimal judicial interference* and *party autonomy* are internationally acclaimed principles of the Arbitration Process which has been upheld by the Court in the present case. Lastly, through this decision, the Supreme Court supports the ***Kompetenz-Kompetenz Principle*** i.e., the power of the Tribunal under Section 16 of the Act to determine and adjudicate its own jurisdiction and hence any challenge first, ought to be determined by the tribunal and can be challenged under Section 34 only after the passing of the final award.

[13] (2019) SCC Online SC 1602.
[14] Supra note 2, at ss. 37.
[15] 2012 AIR (SC)(Civ) 2626.

MEDIATION IN THE DOMAIN OF SPORTS LAW

—Kartikeya Chaturvedi[1]

Since a sportsperson retires earlier than other professionals, the vocation of sports has a limited lifespan. Therefore, it is crucial for a sportsperson to fully utilise those years of peak health. The professional life of a sportsperson can, however, occasionally be derailed by a long-running legal fight. This highlights the significance of quickly resolving legal conflicts while still providing each party with a fair opportunity to be heard, which is how alternative dispute resolution in sports came to be.

Any disagreement inside a sports association or between sports associations that has been or is eligible to be addressed to the Tribunal under this Agreement is referred to as a ***"sports dispute"***[2]. Common methods of solving such disputes are arbitration or mediation. Sports mediation is one of the most recent alternatives which is suggested rather than going to court.

Mediation in sports disputes is becoming increasingly popular. There is more than one way of solving disputes, litigation being one, and the second being mediation**.** Participants have the chance to settle disagreements amicably and for the sake of the sport through mediation (at least when the parties are negotiating in good faith). Sports-related issues are typically settled through mediation rather than through regular courts, where the settlement is made solely by an independent mediator in light of the particular facts of the case. The parties typically invest a lot of time and money into putting together and conducting a case before the courts, in addition to the fees for their own attorneys. In addition, a legal battle can make it harder for the parties to work together in the future.

Sports mediation is a quicker, less expensive, and less risky alternative to arbitration and judicial proceedings. Sports mediation that focuses on finding solutions enables the parties to examine their ongoing connections and future cooperation, financial factors, and alternatives that address underlying concerns or needs. The main ***features of mediation*** that makes it an amicable mode of settling disputes are as follows:

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[1] Kartikeya Chaturvedi is a second-year student pursuing B.A.LL.B. (Hons.) from LLYOD Law College, Greater Noida.

[2] Lawinsider.com.

- Parties make and own the decision in the entire process.
- Assistance is given by an independent and a non-biased mediator.
- Negotiation can be done by parties which cannot be done in courts. A judge cannot split the difference. The parties can do whatever they want.
- Confidential process rather than litigation which is usually an open process.
- Beneficial for athletes and clubs also as they do not have time for prolonged proceedings.
- Cheaper process.[3]

A confidential and private intake session is typically available to the mediator at the beginning of the mediation, sometimes a day or two sooner. Additionally, a joint session is typically held during which the parties can present their respective perspectives. Controlling arrogant openings and ensuring that conversation in a combined session is fruitful present challenges for a mediator.

The majority of sports organisations, whether at the club, state, or national level, contain provisions in their bylaws addressing complaints and disciplinary issues.[4] A grievance is a complaint made by one person or group of people (or possibly more than one) against another person or group of people. When a person or organisation is "charged" with breaking the rules, such as the constitution and regulations, it is known as a disciplinary matter and a penalty may be levied. Following a tribunal or equivalent hearing conducted in accordance with the principles of natural justice, the problem may be resolved with penalties ranging from a warning to a fine, with expulsion serving as the final consequence. It is undoubtedly not the Board's job to try to settle a dispute in any way. Inherently conflicted board members are unable to act impartially when the interests and reputation of the club or sport are at stake because they will all know one or both parties.

If your club or sport's constitution calls for the board to serve as the arbitrating body—or even the president or chairman—you should seek assistance on how to alter it. By using mediation, no one from the team or sport is required to get engaged at all. Despite the lack of clearly defined and legally binding sports legislation in this nation, the government of India passed the **National Sports Development Code of India** in 2011 (the **"National Sports Code**"), which was the brainchild of Ajay Maken, the country's then-minister of sports and youth affairs. In

[3] Negotiation and Mediation, Peter J. Carnevale.
[4] https://www.playbytherules.net.au/complaints-handling/mediation.

Indian Olympic Association v. Union of India[5], the Division Bench of the Honorable Delhi High Court recognised the NSDC's legitimacy and legality.

A number of cases involving athletes who felt wronged by their names not appearing on the national teams for renowned competitions like the Commonwealth Games, Paralympic Games, etc. have been heard in court. It was crucial for courts to use caution while becoming involved in such selection procedures since doing so might harm India's "ethos" of sports. The Hon'ble Delhi High Court highlighted its worries regarding the effect of such litigations on the performance and preparation of players prior to a competition in *Swastika Ghosh* (supra). The court stated that it is crucial that there be no doubt in the players' thoughts before an international event since such doubt could negatively affect their performance. In ***Punjabi University vs Union of India***[6], the Hon'ble High Court went on to opine that if the power of judicial review were to extend to areas such as sports, it would have an adverse impact on it.

Even in ***Shumel v. Union of India***[7], when the court was contacted regarding a challenge to the national team's selection for the 2010 CWG, the Court firmly stated that the decision regarding the procedure for evaluating the qualifications of various candidates cannot be within the purview of courts. It should be left up to the professionals in that area of sport. The court stressed the significance of the sportsperson's current form as a crucial factor in the decision-making process, regardless of what may have been the sportsperson's past success.

Furthermore, the writ courts cannot be seen as an appeals court where sportsmen opt to contest selection committee judgments only because those judgments do not sit well with them. In order to preserve the independence of administrative organisations in fields as sacred as sports, courts have upheld the extremely narrow scope of judicial involvement in the realm of sports.

Sports is a big business and big businesses always have disputes. Blackshaw observes that alternative dispute resolution (ADR), which includes mediation, "*due to the unique qualities and dynamics of sport, which are summed up in the term "specificity of sport," lends itself to the resolution of sports-related conflicts.*[8]" Sports mediation will be especially helpful in cases where the parties to the conflict stand to gain from maintaining a connection even after the

[5] (2014) 212 DLT 389 (DB).
[6] W.P (C) 6008/2011.
[7] 2010 SCCOnline Del 4706.
[8] I Blackshaw, 'ADR and Sport: Settling Disputes Through The Court Of Arbitration For Sport, The FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center' (2013) 24 Marquette Sports Law Review 1, 1.

conflict has been resolved. Numerous sports disputes involve long-standing associations between clubs and athletes, who will continue to meet regularly even after the conflict has been resolved. Many issues involving sports are just business disputes where a sportsperson or a sporting group is involved.[9] A contract dispute is a typical example of this. It has been laid down in the case of ***M/s Patil Automation Pvt. Ltd. and Others v. Rakheja Engineers Pvt. Ltd.***[10] that Section 12A of the Commercial Courts Act, 2015 is mandatory. *According to Section 12-A any suit which does not contemplate any urgent relief shall not be instituted unless the party exhausts the remedy of pre-instituted mediation. The provision gives the parties a three-month deadline for completion of mediation, which can be further extended by two months with the consent of the parties. The mediation period will not be counted for the purpose of limitation under the Limitation Act*.[11]

Psychologists have noted that during the private intake interviews with the parties, lawyers frequently do not devote enough time[12]. That is frequently a result of financial restrictions. The mediator should take advantage of the intake session to determine the parties' true motivations and goals.

Grabowski also makes the *distinction between sports talks and other types of negotiations*, pointing out that in a typical commercial disagreement, there are typically two sides, each of whom is pursuing its own objectives. However, there are others in the background of sports discussions who might have a stake in the points of contention. These include the fans and sporting organisations[13]. Government interest in donations to sporting organisations and the need for good administration may also exist.

Now, **a sports mediator** is a person who has expertise in sports law and conflict resolution, even if having legal training for mediators is not a formal prerequisite. It would typically be advantageous if the mediator has prior experience in the sports sector where the conflict has arisen. A mediator with expertise from the football industry who is knowledgeable about how the football industry functions, for instance, would likely have a better foundation to help the parties settle their disagreement than a mediator without experience from the football industry.

[9] Peter Agardey, Mediation in Sports disputes, Lexology, (August 19th 2022, 4.10 PM).
[10] 2022 SCC Online SC 1028.
[11] 2022 Livelaw (SC) 678.
[12] Peter Agardey, Mediation in Sports disputes, Lexology, (August 19th 2022, 4.16 PM).
[13] M Grabowski " Both Sides Win : Why using Mediation would improve pro sports" (2014) 5 Harvard Journal of Sports and Entertainment Law 189, 193-194.

The competitive spirit and the fervor for the sport can overflow. One instance is the expulsion of Mr. Ragless from the Southern Branch of the South Australian Field & Game Association (a clay target shooting club). “Mr. Stokes was to blame”, he said. There were at least seven court battles engaged in the case (the latest being *Stokes v. Ragless*[14]). One can only guess as to whether all of that expense and suffering may have been spared with an early mediation. In mediation, a party can exclaim, "That's not fair!" That would not be allowed in a court setting, where the majority of speaking is done by the attorneys and the conversation is regulated by procedure and technicalities.[15] Some disagreements stem from the rules of non-profit athletic organisations. In these debates, it is important to keep in mind that some of the participants, possibly the neighbourhood association leaders, are well-intentioned amateurs. They are not necessarily wise businesspeople. The rules of their associations may have been written by those same people. **Lord Denning** suggested that rules should not be a literal construction but according to the spirit, the purpose that lay them. He said “*The Courts would instruct "Let us look at the Rules" if a dispute developed between a voluntary group and its members. They then found themselves in an awkward situation. Usually as a result of the Rules' complexity. The Rules of these associations are the worst ever in terms of drafting.*[16]*…”*

In sports mediation, what can be said about a settlement reached by the parties can be agreed upon. This could be done through a news release or a note issued to the appropriate people. The disclosure could attest to the existence of mediation and the parties' private settlement. They might also mention that a new contract has been negotiated if the connection is still active, like in a sponsorship dispute. In contrast, all of the evidence is presented publicly during a legal proceeding, and the ruling's justifications are made public.[17]

A leading example of mediation in sports law is the dispute of the National Hockey League in 2012 with the NHL Players Association over the terms of the collective bargaining agreement. The league locked out the players because the two parties couldn't come to an agreement on player revenue-sharing and were separated by nearly $200 million. Weeks of postponed games extended into months, and the possibility of another postponed season grew. (The NHL's full 2004–2005 season was canceled as a result of a related disagreement.) According to USA Today, a breakthrough occurred when federal mediator **Scot L. Beckenbaugh** entered the

[14] Stokes v Ragless, [2019] SASCFC 31 (Supreme Court of South Asia).
[15] Peter Agardey, Mediation in Sports disputes, Lexology, (May 31 2018).
[16] Lord Denning, The Discipline of Law , Pg 149-150 (Boston and Butterworths , 1979).
[17] Peter Agardey, Mediation in Sports disputes, Lexology, (May 31 2018).

picture. After tense face-to-face negotiations, Beckenbaugh split the parties and conducted shuttle diplomacy for around 12 hours, visiting each side, in turn, to determine which areas they might be willing to compromise on. A win-win agreement that depended on the topic of player pensions was reached after sixteen more hours of discussion. NHL players were permitted by the agreement, whose careers were short-lived reconcile upon short-term salary issues in return for peace of mind regarding their long-term financial future. According to the website SB Nation, mediator Beckenbaugh received "hero's praise" from NHL players, management, fans, and the sports media for finding a way to bring the sides together in a way that served each side's interests.[18]

Let's look at a few examples to better grasp the sports dispute procedure:

Every year, there are a number of leagues and tournaments in India, whether it be for football, basketball, badminton, cricket, or any other sport. Let's say that during a game in the Indian Premier League, a dispute between two players develops. If this happens, there are two possible outcomes: either both players can file lawsuits against one another in court, or they can choose an alternate dispute resolution system. The most important factor in any player's career dispute is their time, which will be lost if they take the case to court for 4-5 yrs but in mediation, there is easy dispute resolution and also it being a confidential manner it will also help in maintaining a professional relationship for a long term.

Another example could be supposed that in the Indian Super League, an auction of players is going on there arises a dispute in the player-transfer-agreement between the team and the player. Here, the player has the choice of moving to court or else opting for an out-of-court settlement. In order to save time, the player should opt for ADR, be it arbitration or mediation.[19]

Most of the world's organisations for resolving sports disputes are now actively encouraging parties to consider mediation first. Even the **World Intellectual Property Organization**, which offers sports industry clients assistance with intellectual property disputes, supports mediation. It is crucial to take into account mediation as a practical method of settling conflicts in sports while also safeguarding the relationships between the parties because connection growth is such a crucial component of the athletic company. About 70% of mediation cases are successful, which is incredibly high. *Mediation is typically quicker than arbitration, according*

[18] Katie Shonk, Sports disputes could be efficiently settled through mediation (28th June 2022).
[19] LLBMania.com, (last visited August 19th 2022, 11.27 AM).

to studies done by the European Union. By privatising conflict resolution, the legislative, treasury, and court administrations hope to lessen the judiciary's burdensome caseload and cut costs for the court infrastructure in addition to the mediation's substantive advantages. The problem facing legislators in Europe and everywhere in the world in the future will be to create differentiated procedures that will allow the correct conflict to be resolved by the right dispute resolution system. This calls for a deeper comprehension of the duties and obligations of the government and the people in resolving social disputes.[20]

In order to book a mediation, one or both parties must first get in touch with the sports mediator. Prior to the mediation meeting, the sports mediator will brief the parties and assist them as they negotiate a resolution. Along with receiving a mediation agreement that needs to be signed and returned, the parties will also be told about the mediator's role in the proceedings. The agreement specifies, among other things, that sports mediation is optional and that either party may stop participating at any moment. The neutrality of the sports mediator will be made clear, and the parties will be reminded of their obligation to maintain the confidentiality of any information obtained during the sports mediation. once the terms of the mediation are laid down.

A joint session with the mediator and both parties will often begin sports mediation. One shall examine the case's actual elements in the joint session and make an effort to identify the parties' respective interests. Following that, one will typically hold caucus meetings, which include the mediator speaking with each party separately. It is crucial that the parties in such caucus sessions inform the mediator of all relevant details of the disagreement, including any interests or points of view that they do not want the opposing party to know about. The goal is for the parties to be able to more easily advise the mediator about their interests by participating in such caucus meetings. The mediator has a duty of confidentiality and will notify the relevant facts only with the prior consent of the parties. Even if the sports mediation fails, it might still be beneficial to the parties. Through mediation, the parties are able to better understand one another's points of view, which may help them subsequently come to a compromise.[21]

If the disputes involve contractual obligations between players, clubs, sports associations, athletic boards, etc., mediations are typically used to resolve them. The main objective of mediation is to instead of continuing to debate about their points of view, which may or may

[20] Dr Felix Steffek LLM (Cambridge), June 2012, Mediation in the European Union: An Introduction.
[21] EASportslaw.com (last visited 19th August 2022 , 11.37 AM).

not satisfy either side, to help the parties comprehend their interests in the disagreement. The parties may also appeal the mediation decision.[22]

Hence it can be concluded that mediation is growing popular in sports law and can act as an effective means of dispute resolution in upcoming future which will benefit both the players and the sports agencies that are involved in any dispute.

[22] Devika Javaraj, Scope of mediation in Sports Disputes.

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MAHARASHTRA NATIONAL LAW UNIVERSITY, AURANGABAD

Nath Valley Rd., Kanchanwadi, Aurangabad, Maharashtra 431005

www.mnlua.ac.in