Maiden Issue

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Editor
Prof. M. Afzal Wani

IILM School of Law
IILM UNIVERSITY
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EDITORIAL

It is a matter of immense pleasure to put the maiden issue of the *IILM Law Journal,* April2023 in the hands of our respectful and responsive members of the legal Fraternity. As a new initiative, it is to provide opportunity to law researchers and those who are doing research in allied subjects, to publish their research, after *peer reviewing,* for the benefit of people interested in legal studies, social studies, legislation, judicial decisions and working of the law. The journal is expected to emerge as a vehicle for thought transmission in multiple dimensions across disciplines and sharing of concerns with critical thinking. Original focused studies with purpose, after appropriate choice of methodology, in preference to stereotypes, will be highly appreciated.

Researches for exploring traditional wisdom and historical context, scientific enquiry, apposite scrutiny and futuristic outlook will be a priority for this journal. Case comments, research notes, review articles, rejoinders and book reviews will be highly appreciated.

This maiden issue covers entries on the themes: Indian Constitutional Stance and Achievements on United Nations Sustainable Development Goals of Equality And Justice; Indian Approach to International Arbitration; India's Target to be a Carbo-Free Country; Data Protection vis-a-vis Right to Privacy In India; Medical Tourism and the Law in India; Collective Investment Scheme; Role of Judiciary in Prevention of Custodial Death with Special Reference to Human Right Jurisprudence; Enforceability of Non-Compete Covenants in Employment Contracts vis-a-vis Judicial Pronouncements in India, and the Movement of Criminal Law towards Equality and Justice for All Regardless of Gender. These are providing ideas for national development, international understanding, working of law in society, policy framing, legislation, judging, public administration, diplomacy, system-

management, regulation of technology and social reform. I wish the journal to contribute to Indian Jurisprudence as a rich plate form for projection of well researched factual situations and viable ideas and suggestions.

I am grateful to the contributors, advisors, reviewers and the members of the editorial committee of the journal for their efforts cooperation in bringing out this issue of the journal in a shortest possible period of time. Further, critical comments and constructive suggestions from any one for improvement are most welcome.

Thanks.

Prof. M. Afzal Wani
Editor

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INDIAN APPROACH TO INTERNATIONAL ARBITRATION –THE NEED TO FIND PEACE IN THE UNDECLARED WAR BETWEEN LEGISLATURE AND JUDICIARY

Saikat Mukherjee*

Abstract

The Arbitration and Conciliation Act of 1996 was enacted keeping in mind the contemporary developments in the field of arbitration in the world in general and in India in specific. The policy that went behind the formation of this law was one of much debate primarily because it was believed that the way it got extended to the Indian framework ensured that the rule of law principles suffered. Ever since then, a pattern has been seen whereby the judiciary tries to interpret the law in a method which is conflicting to the primary legislative intent thereby leading to a constant tussle between the legislature and the judiciary, at the expense of the law itself. The situation has only further worsened keeping in mind the insistence of the international community to adopt the "pro-arbitration" approach, something which itself is very subjective and which keeps on changing depending on the stakeholders in the game. In this background, India has so far not been able to reach the standards of being an "arbitration friendly" jurisdiction. This paper tries to bring out ways in which the judiciary and the legislature are responsible for complicating the jurisprudence surrounding arbitration in India and the ways in which the same can be mitigated so that the aim of India being an "arbitration friendly" jurisdiction can be met.

Key words – Arbitration, Rule of Law, Pro-arbitration approach, Foreign-seated arbitrations, Legislature.

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Rule of Law in International Arbitration

Rule of law typically refers to the presence of procedural and substantive principles that tend to restrict the use of arbitrary power by governmental institutions.[1] In other words it can be defined as that collection of uniformly recognized values which are a sine qua non for the effective functioning of a politico-legal system. It mainly aims at ensuring that the citizenry, for whom the system exists in the first place have faith in the justice delivery mechanism of the country. Rule of law assumes an even greater importance in the field of international arbitration given the number of players and the varying foreign substantive laws at play. For these players to have the required trust and confidence in a country's dispute resolution mechanism, it is important for the country's legal procedure to be integrated. Such integrity is to be ensured through prospective application of the laws which are otherwise general in design and promise consistency of application.[2] Incorporation of poorly drafted provisions leading to unnecessary amendments alongside constant ignoring of intellectual research-based recommendations have led to these expectations being compromised. Moreover, in common law countries, courts (through the exercise of their "judge made laws") are entrusted with the duty of filing the gaps wherever necessary thereby ensuring that the development of law, to its fullest potential takes place. However, while exercising this power, it is imperative upon the judiciary to limit itself to the boundaries of the statute and not engage in unrestricted legal realism. This has been a practice being followed by some courts in India who on account of trying to mold the law to be so called "arbitration friendly", have altogether dumped the interpretation which the legislature might have intended. This tendency has led to a constant back and forth

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1 Naomi Choi, *rule of law – political philosophy,* BRITANNICA (April 25, 2017, 09:06 AM), https://www.britannica.com/topic/rule-of-law

2 Collen Murphy, *Lon Fuller and the Moral Value of Rule of Law,* 24 LAW AND PHILOSOPHY 239, 240 – 241 (2005)

between the judiciary and the law makers with the overturning of awards by the courts being an altogether common phenomenon.

These expectations from both the law-making organ as well as the law interpreting organ are fundamental in so far as the choice of law of the parties governing the arbitration is concerned even though the same may come at the expense of a system being "pro-arbitration", a term which itself is vague at worst and subjective at best. It is defined as system of international arbitration wherein the players ask themselves as to whether a practice or policy favors the practices of international arbitration or not.[3] From one perspective, a practice might appear to be pro-arbitration whereas from the other it might not. For example, there has been an ever-increasingcall for transparency in commercial international arbitration even though the same is opposed to the principles of confidentiality. By mandatory implementations of the "opt in" as opposed to the "opt out" confidentiality provisions, there has been constant attempts to try and forcefully make public the awards of arbitration even when the parties prefer otherwise.[4]

This paper attempts to emphasize on the need for remembering the rule of law principles while considering meeting the pro-arbitration values. Further, it will look to explore a recent example of the judiciary involving itself in creativity in the field of arbitration law and how the international community welcomed it as a pro-arbitration step. Thereafter, before concluding, it lays down the problems that are being faced due to the plethora of amendment being made to the law and the absolute necessity to have a clear thought process before amending the law any further.

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3 G.A. Bermann, *What does it mean to be 'pro-arbitration'?* 34 ARBITRATION INTERNATIONAL 338, 339 – 340 (2018).

4 Constantine Partasides & Simon Maynard, *Raising the curtain on English Arbitration,* 33 ARBITRATION INTERNATIONAL 197, 202 (2017)

The undefined position of law – arena for creativity

There stands no doubt to the claim that the Indian judiciary has played a leading role insofar as the development of jurisprudence surrounding arbitration in India is concerned. Very often, the same has been termed as even "pro arbitration". Although such activism by the judiciary is welcomed by those who consider that this will play a role in India becoming the go to international arbitration destination, others caution that the manner in which the developments are happening would end up having long term ramifications.

Reference here can be drawn to the enforcement and recognition of emergency awards. In the recent case landmark case involving ***Amazon,*** wherein the constitutional courts in India allowed the enforcement of India-seated emergency arbitration awards. It is worth noting that the same are not recognized by the law of land i.e., Section 17 of the Arbitration and Conciliation Act, 1996.[5] With this, the courts while going contrary to the legislative intent, placed wrong reliance on the jurisprudence in existence. Further it keeps open the question as to why foreign seated emergency arbitration awards not backed by law and require indirect enforcement.[6] Such interpretation keeps rule of law in the backseat and creates an uncertain environment for arbitration in the country on account of the constantly changing position of law. This creates a situation where international clients then look to other neutral destinations for seating their arbitrations, jurisdictions which promise stability of law as opposed to India.

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5 Amazon.com NIV Investment Holdings LLC vs Future Retail Ltd, 2021 SCC OnLine SC 557

6 Dipen Sabharwal KC & Aditya Singh, *Supreme Court of India paves way for enforcement of emergency arbitration awards in India-seated arbitrations,* WHITE & CASE (Aug. 16, 2021, 05:13 PM), https://www.whitecase.com/insight-alert/supreme-court-india-paves-way-enforcement-emergency-arbitration-awards-india-seated

The Supreme Court of India made another attempt at trying to enhance party autonomy when it was faced with two questions. The first pertained to whether a non-Indian seat of arbitration can be chosen by two domestic Indian parties and secondly whether in such an award will be considered a "foreign award" with special reference to those instances where the subject matter of the contract itself is devoid of any foreign element. The apex court of the country answered both questions in the affirmative and for doing so interpreted the term "international" in two different ways under the same law.

There exists a dichotomy between foreign seated arbitrations and India-seated arbitrations insofar as the present Arbitration Act is concerned. The latter is covered by Part 1 of the act of 1996 whereas the former is covered by Part 2. Part 2 essentially looks to effectuate the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as well as the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. By the application of Section 2(2) of the 1996 Act, only certain parts of Part 1 are applicable on foreign seated arbitrations whereas for the majority parts, they remain mutually exclusive.

The term "international commercial arbitration" has been construed so under Section 2(1)(f) that a mere choice of a foreign seat would not automatically make an arbitration international. This position has remained both pre and post the 2015 amendment. Moreover, since the coming into force of the act of 1996, it can safely be said that India has embraced the definition of foreign award as provided under the New York Convention. Although this convention primarily deals with international commercial arbitration in the first place, it does not define the term per se. It only says that a foreign award will be that award which is obtained beyond enforcing countries territory. Article 1 of the said convention, read with Article 3[7] provides for the enforcement and

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I (1), June 10, 1958, 330 U.N.T.S 38.

recognition of foreign awards. The convention remains cautiously silent on what would the phrase *"arbitral awards not considered as domestic awards"* or "arbitral awards made in the territory of another state" mean thereby allowing the contracting state to decide for themselves.

In the landmark case of ***PASL Wind Solutions*** [8], the apex court of the country had provided its opinion on whether two Indian parties are entitled to have a foreign seat of arbitration and whether the award can be considered to be an international award. The appellant in the present matter had not at the outset objected to the order of the court which allowed two Indian companies to have an arbitration seated outside India in Zurich. However, when posed with an unfavorable order, they subsequently decided to raise the issue as late as at the stage of enforcement. At that point in time, this proposition was an unsettled position of law in India.

At this point, it must be remembered that the New York Convention applies to those international arbitration agreements which provide for foreign awards with a foreign element or flavors involving international commerce and trade[9]. Section 44 of the act of 1996 provides the basic elements that need to be present for an award to be referred to as a foreign award. The said section, on account of having the phrase "*unless the context otherwise requires*" clearly states that the rule mentioned herein under is the rule to be applied in normal circumstances unless the context requires something different. The argument before the court was that for the application of Section 44, the award under consideration must have been that of an international commercial arbitration. The court was faced with the question as to whether the term "*international commercial arbitration*" as defined under Section 2(1)(f) was to be extended to

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[8] PASL Wind Solutions Pvt Ltd vs GE Power Conversion (India) Pvt Ltd, 2021 SCC Online SC 331

[9] Gas Authority of India Ltd vs Spie Capag, 1993 SCC OnLine Del 561

the present situation or not. In its decision, it categorically stated that on account of Section 44 not being party central but rather seat centric as opposed to Section 2(1)(f) which is party centric, the definition provided in the latter cannot be extended to the former. Hence, with regards to Section 44, residence, nationality, or domicile becomes irrelevant.

Further, the court also laid emphasis on Section 2(2) of the act as per which certain provisions of Part 1 would be applicable when there is a foreign place of arbitration involved in an international commercial arbitration. The court categorically held that both parts of the act are mutually exclusive of each other, and that Section 2(2) does not allow bridging of the two parts.[10] It reasoned that the clause is a seat-centric one and not a party.[11] Further, it also opined that those provisions of Part 1 of the Act which typically apply to international commercial arbitrations which are foreign seated including provisions for court ordered interim reliefs will be applicable only between Indian parties.[12] In a nutshell, the court has essentially provided two different definitions for Part 1 and Part 2 as well as for Sections 2(2) and 2(1)(f) of Part 1.

Although, these varying definitions are considered pro-arbitration on account of them being in favor of party autonomy, the question is at what cost? Typically, when a statute provides a definition section, the intent of the legislature is that the words as defined be construed only in that manner for the entire statute or at least that particular chapter even though the definitions might be contrary to what they mean in the common parlance. For example, Section 44 of the act uses the phrase "*in this chapter*" which indicates the fact that "*international commercial arbitration*" as construed in Section 2(1)(f) might not be the same as in Chapter 1 of Part 2.[13] Even if one

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10 PASL, supra note 10, at 38 & 50.

11 Id. at 38.

12 Id. at 38 & 100.

13 Id. at 60.

is to consider otherwise, it is a settled proposition of law that the text of the statute, on account of it containing inter-related parts must be construed as a whole. Further, it is also a settled position that a word must have only one meaning in the entire statute wherever compatible unless a different meaning is expressly provided.[14] A decision of the Rajasthan High Court of the year 2020 is worth noting in this regard. It held that typically a definition clause is not just restricted to any particular chapter but rather extends to the whole of the act. If it is construed otherwise, then the results would be absurd and abnormal.[15] This holding was contrary to the one of the Supreme Court in the PASL case wherein even within the same part, two different definitions were accorded.

The ruling of the Rajasthan High Court was not without relevant judicial precedents.

In the case of ***Atlas Exports Industries Ltd vs Kotak and Co***[16], a foreign award between two Indian parties in arbitration was enforced under the Foreign Awards (Recognition and Enforcement) Act, 1961. The decision was pertaining to Sections 23 and 28 of the Indian Contract Act with regards to the fact that not providing the ordinary remedy available under Indian Law would be contrary to what the general principles of public policy would provide. It further held that since the parties had chosen to not raise the contention at hand prior to or during the arbitration or before the High Court hence they were estopped from raising the same before the Supreme Court for the first time. Moreover, this particular matter had a foreign element involved because the goods in question were supplied by a Hong Kong based company through and Indian company from Hong Kong itself.

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14 ANTONIN SCALIA & BRYAN GARNER, READING LAW – THE INTERPRETATION OF LEGAL TEXTS 274 – 282 (2012).

15 Barminco Indian Underground Mining Services LLP vs Hindustan Zinc Ltd., 2020 SCC OnLine Raj 1190.

16 Atlas Exports Industries Ltd vs Kotak and Co, (1997) 7 SCC 61.

In another landmark case of ***Sasan Power***[17], the High Court of Madhya Pradesh expressed its approval of two Indian companies arbitrating outside India. This was a case wherein all rights, obligations and liabilities of an American company were assigned via an assignment agreement to the Indian subsidiary of the American Company in an agreement between the American Company and an Indian Company. It was argued on behalf of the Indian Company that since post assignment the essence of the contract now rested between two Indian companies hence Part 2 of the Act of 1996 would not be applicable at all. However, the court held that a foreign element was indeed involved because the dispute necessitated the perusal of the rights as well as the obligations of the American company under the initial agreement as well as the assignment agreement.

In the matter of ***GMR Energy Ltd vs Doosan Power Systems India***[18], the Delhi High Court opined that Indian parties are normally free to choose a non-Indian seat of arbitration. However, in doing so it incorrectly relied on the Sasan Power Ltd case which exclusively dealt with the involvement of a foreign element in arbitration[19]. Moreover, in the matter before the Delhi High Court as well, there was the presence of a foreign element because the defendant per se was the wholly owned subsidiary of its Korean counterpart which had entered into a MOU with the plaintiff and had subsequently negotiated a payment schedule of the outstanding debt. Hence, one can conclude that the two Indian parties choosing a foreign seat was based on the involvement of a foreign element.

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17 Sasan Power Ltd vs North American Coal Corporation., 2015 SCC OnLine MP 7417

18 GMR Energy Ltd vs Doosan Power Systems India., 2017 SCC OnLine Del 11625.

19 Shalaka Patil & Jeet Shroff, *Delhi High Court's Decision in GMR vs Doosan: Two steps forward, two steps back?,* KLUWER ARBITRATION BLOG (Jan. 01, 2018, 12:21 PM), Delhi High Court's decision in GMR v. Doosan: Two steps forward, two steps back? - Kluwer Arbitration Blog

Through this journey, one realizes that the PASL case was one of the first where without the involvement of a foreign element, a foreign seat of arbitration was chosen by two completely Indian parties. Relying on the GMR Energy judgement and that of Sasan Power, the apex court of the country ended up overruling the Bombay High Court decision in the case of ***Addhar Mercantile Private Ltd vs Shree Jagadamba Agrico Exports Private Ltd***[20] as well as the case of ***Seven Islands Shipping Ltd vs Sab Petroleums Ltd***[21]. In both these decisions, the Bombay High Court had relied heavily upon the judgement in the case of ***TDM Infrastructure Private Ltd vs UE Development India Private Ltd***[22] and essentially did not allow two India parties to be subjected to a foreign law of arbitration.

In the case of Addhar Mercantile, two Indian parties had entered into an arbitration agreement whereby the seat for arbitration was kept as either Singapore or India with the rider that English law would apply in case of the former. The Bombay High Court, in line with the judgement of TDM Infrastructure held that Indian parties should be subjected to the Indian law and that any deviation from the same would be opposed to public policy. It further held that the arbitration is to be conducted as per Section 28(1)(a) of the act in India itself. What must be understood is that the matter per se did not talk about the law governing the arbitration but rather the choice of the substantive law. The court in the matter of PASL was succinctly silent on the question of two Indian parties wanting to choose a non-Indian substantive law. However, the overturning of the Addhar judgement might be seen as the parties being given the option of choosing the foreign substantive law in a non-international foreign arbitration.

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[20] Addhar Mercantile Private Ltd. vs Shree Jagadamba Agrico Exports Private Ltd., 2015 SCC OnLine Bom 7752

[21] Seven Islands Shipping Ltd vs Sah Petroleums Ltd., (2012) 5 Mah LJ 822.

[22] TDM Infrastructure Private Ltd. vs UE Development India Private Ltd., (2008) 14 SCC 271

The court in the case of PASL also looked to answer the question as to whether the choosing of a foreign seat for arbitration by two Indian parties would be opposed to public policy or not under Section 23 of the Indian Contract Act. It firstly opined that the term "*public policy*" as mentioned under Section 23 is a relative concept which is subject to modifications depending upon the advancement in science and technology. The parties freedom to contract must be balanced viz-a-viz there being an undeniable harm to the general public. In terms of the provisions of Section 28, the court held that the provision does not make any reference to the nationality of the parties as such. Further, in the absence of Section 28(1)(a) of the act of 1996 making any reference to the conducting of arbitration between two Indian parties in a foreign seat, such an interpretation should not be automatically provided.

While looking to provide justification, the court laid emphasis on the principles of international comity, Section 48 of the Arbitration Act of 1996 as well as the balance of convenience between freedom to contract and the harm caused to the public. It further held that since there is per se no contravention of public policy of India or provisions of Indian law, party autonomy should prevail. However, one must keep in mind that parties do not have a right to waive off the right to challenge an award under Section 34 by mutual consent.

As can be very pertinently seen from above, this approach of the judiciary can be concluded as pro arbitration and pro-party autonomy to a large extent although the same comes at the cost of deviating from the primary legislative intent. It also creates a large pool of questions which then come up for litigation. Moreover, since the act keeps getting amended and judicial pronouncements keep getting overturned by subsequent matters, the position of law remains unsettled. In this background, it is imperative for the judiciary and the legislature to work side by side in order to create a more suitable environment for arbitration.

Well thought out provisions –the need of the hour.

The approach of the Indian legislature in the field of arbitration has created an air of instability surrounding the entire mechanism in India. This has resulted in India not being seen as a preferred destination for arbitration by foreign parties. Moreover, the ongoing tussle between the judiciary and the legislature has added fuel to fire. Reference here can be drawn to the Amendment Act of 2015[23]. This particular amendment did away with the erstwhile automatic stay on enforcement of arbitral awards. It also made certain important changes to the factors present erstwhile for setting aside arbitral awards. However, it failed to clarify as to whether these changes as to whether it would be applicable prospectively or retrospectively. The judicial proceedings subsequently clarified that it should be made prospectively applicable to all such court proceedings which have commenced post the amendment coming into force and that the same would be without regard to the time when the arbitration had commenced. This position however got reversed by the amendment of 2019 which looked to deal with those court proceedings which had begun after the amendment but were based on arbitrations initiated prior to the amendment. The difference of opinion between the legislature and the judiciary was seen to continue as Section 87 of the act of 1996, inserted via the Amendment of 2019 was struck down by the Supreme Court[24] on account of it being unconstitutional.

Reference can also be made to the Ordinance of 2020 which acted as the precursor to the Amendment Act of 2021, which so far fortunately has not resulted in a tussle. Via this amendment, Section 36 of the Act of 1996 got amended. It now made it compulsory for

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[23] Suraj Prakash, Aditya Chauhan and Keshav Tibarewalla, *Recourse against Arbitral Awards in India: Navigating Murky Waters,* 51 INT'L COM. ARB. REV., 52, 60 – 66 (2021)

[24] Hindustan Construction Company Ltd vs Union of India., 2019 SCC OnLine SC 1520.

the courts to stay the award unconditionally if it found prima facie that the contract between the parties, the arbitration agreement, or the award itself was induced by corruption/fraud. Such an amendment which was anyway forcefully introduced first via an ordinance came as a surprise to all interested parties primarily because it wasn't believed that any change to the arbitration law in India was needed[25]. Some even called the amendment suspicious since it was introduced in a hasty manner just prior to the hearing for enforcement in the case of Antrix Corporation Ltd vs Devas Multimedia Private Ltd[26], a case wherein an award had been passed against the Indian government by the Permanent Court of Arbitration at Hague. Given the retrospective effect of the amendment, the suspicion appears to be well founded. Such an approach from the Indian law makers by putting the rule of law on the backseat has essentially pulled India back by a few decades in its in its dream of becoming a global arbitration-friendly seat.

Moreover, it appears that the legislation has been drafted rather hastily since it is next to impossible to have prima facie understanding of whether corruption/fraud has taken place or not without listening to detailed arguments[27]. Without there being a mandatory requirement of security or any other pre-condition, parties would then look to abuse the procedure of law in order to derail enforcement. Further, through this amendment, the legislature has created an altogether separate class of cases i.e., those involving corruption or fraud by attaching a proviso the Section 36. This in itself creates new issues of interpretation because typically under Section 36, the court had the option of

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25 Payaswini Upadhyay, *A Change to the Arbitration Law Whose Purpose Is Unclear,* BQ PRIME (Nov 24, 2020, 12:48 PM), A Change To The Arbitration Law Whose Purpose Is Unclear (bqprime.com)

26 Gary Born, Steven P, S Irani, *Recent Amendments to Arbitral Laws: India and Singapore,* WILMERHALE (Dec. 15, 2020, 05:23 PM), Recent Amendments to Arbitral Laws: India and Singapore | WilmerHale

27 Id.

attaching conditions before ordering stay of enforcement. The mandate on staying of the award in case of corruption or fraud has essentially done away with the power of the judiciary to attach any conditions before ordering a grant of stay[28].

At this juncture, one can also refer to Section 42A of the Arbitration Act which was added via the 2019 Amendment itself. This section puts a positive obligation of confidentiality on parties, institutions, and arbitrators to the only exception of disclosing the information if the same is required for enforcement of the award. It appears so that the exception to confidentiality can be extended to the cases involving "public interest" as well despite the fact that Section 42A contains a non-obstante clause. Reference here can be drawn to the case of ***R.S. Sravan Kumar vs Central Public Information Officer***[29] wherein the Central Information Commission had allowed an application under the Right to Information Act to know the fees charged by the legal team arguing for Antrix Corporation Ltd in an international arbitration. The said entity is the commercial wing of Indian Space Research Organization (ISRO). Such divulgence of information on the ground that the authority is a public entity is directly against the wordings of Section 42A.

Party autonomy in an arbitration proceeding is paramount. Hence, there needs to be a fine balance between the principles of confidentiality and transparency. Blind adherence to transparency would directly come in the way of promoting party autonomy. The Report of the Srikrishna Committee[30] which had advocated for the introduction of the provision in the first place provided no guidelines to understand the limits on confidentiality. The report

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[28] R.S. Sravan Kumar vs Central Public Information Officer, 2019 SCC OnLine CIC 9981

[29] Justice B.N. SriKrishna, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India,* MINISTRY OF LAW AND JUSTICE (July, 30, 2017) MergedFile (legalaffairs.gov.in)

does lay emphasis on the duty of confidentiality as seen in UK and Singapore as well as draws inference from the Ordinance on Hong Kong Arbitration, yet the provision does not incorporate within its ambit, the exceptions allowed in the common law countries. Further, it does not allow the courts the room to formulate such exceptions. As a result, this provision has been at the receiving end of much criticism not only for the aforementioned reasons but also for not having an opt out option or not being applicable to witnesses.

Given the presence of numerous such provisions which stink of ambiguity, the legislature has had to amend the law multiple times. Moreover, the ambiguity in the law mandates parties to undergo lengthy litigation which defeats the very purpose of ADR mechanism in the first place. Hence, there is a need for the legislature to have proper discussions and be appreciative of recommendations before introducing amendments to the law.

Conclusion

There stands no doubt that the interpretation given by the court to ambiguous provisions of the law governing arbitration in Indiais often appreciated by the arbitration community as being "pro-arbitration". Although the same might be appreciated by various stakeholders of the game on account of them being inclusive enough, the same has come at the expense of legitimacy, certainty, predictability and most importantly stability. By going against the legislative intent, the upholders of rule of law have essentially shaken the very foundation of the principle. On the other hand, equal blame is to be taken by the legislature as well because it has brought about multiple amendments to the law on arbitration in India without understanding the need for discussion. This is the primary reason why the judiciary has had to interfere time and again in the interpretation of the law.

When it comes to making India the hub for international arbitration,

emphasis lays on the shoulders of both the judiciary and the legislature. The policy surrounding arbitration in India should be to further the legitimacy of the mechanism of alternative dispute resolution and should be based on the countries own legal system and values. The status requires emphasis on rule of law and not rule of the so-called pro-arbitration lobby because the only way India would progress in its aims of becoming the hotbed of international arbitration is by being a jurisdiction which promises stability of law backed by the principles of rule of law.

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About the Journal

IILM Law Journal (IILMLJ) is a ***peer reviewed journal*** of the IILM School of Law, IILM University, Knowledge Park-II, Greater Noida, Uttar Pradesh-201306at a distance of just 30 km from the Supreme Court of India connected by Noida Express Way. With an open airy location and delightful sentinel building, amidst the faculties of technology, management and liberal arts, its main feature is a holistic academic atmosphere in interdisciplinary settings.Students have an opportunity to excel to meet professional requirement at all possible levels. Experiential learning at the core of the academic programming with finely defined outcome. The present journal is a humble attempt to proceed ahead with the hope of developing best research and writing skills.

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