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RGNUL

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ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. CADR's ultimate objective is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the First Edition of the Fifth Volume of its quarterly newsletter, "**The CADR Radar.**" The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. Additionally, the newsletter documents the events at CADR and the achievements of RGNUL students in ADR competitions. The CADR Radar is a one-stop destination for all that one needs to know about the ADR world; a "quarterly dose" of ADR News!

Domestic Arbitration

-Eshita Gupta

No Challenge under S. 34 if Insufficiently Stamped Arbitration Agreement Admitted into Evidence: Delhi High Court

The Delhi High Court concluded that under S. 34 of the A&C Act, the Court would not have the authority to intervene even if the Tribunal had misapplied the Stamp Act, 1899. The court held that even though a document that wasn't properly stamped shouldn't have been entered as evidence after it had been admitted, it could not be used to challenge the legality of the arbitral ruling. Read more

Non-consideration of a Clause in a Concession Agreement, Not an Error that goes into the Root of the Award, Cannot Amount to Patent Illegality: Delhi High Court

According to the Delhi High Court, the arbitral tribunal's failure to take into account a provision of the agreement between the parties cannot be viewed as a mistake that runs counter to the fundamental principles of Indian law. The court further stated that if the arbitrator's point of view is plausible, the same cannot render the arbitral result patently illegal. Read judgment

Finding of the Tribunal Regarding the Existence of the Arbitration Agreement Should Not Be Interfered with Unless it is Manifestly Clear that there was No Agreement: Calcutta High Court

The Calcutta High Court in the case of *Jaldhi Overseas PTE Ltd v. Steer Overseas Pvt Ltd* ruled that when exercising their authority under S. 48 of the A&C Act, courts are not permitted to reconsider the evidence or substitute their own judgment for that of the arbitral tribunal. It reaffirmed that the court need only make a preliminary ruling and that the scope of judicial interference at the stage of foreign award enforcement is confined to the grounds listed in S. 48. Read judgment

Objections under S. 36 of the Arbitration and Conciliation Act is Permissible only on Issues Relating To Patent or Inherent Lack Of Jurisdiction Of The Tribunal: Jharkhand High Court

The court held that S. 36 of the A&C Act objections are only valid where they relate to the tribunal's obvious or fundamental lack of jurisdiction. The court ruled that while only the grounds specified in S. 34 of the Act may be used to challenge an arbitral award, S. 47 of the CPC permits objections to be raised at the time the award is being enforced under S. 36 of the Act if those objections relate to the tribunal's lack of authority to make the award or when the award is non-est or a nullity in the eyes of the law. However, such a flaw in the award on the face of the record and not require any factual determination.

Read judgment

Supreme Court ruled that the Dissenting Opinion of an Arbitrator cannot be Treated as an Award if the Majority Award is Set Aside

The Supreme Court in the case of *Hindustan Construction Company Limited v. National Highways Authority of India* reaffirmed that an arbitration award cannot be modified by a court in accordance with S. 34 of the A&C Act. The panel of Justices S. Ravindra Bhat and Dipankar Datta stated that the court's narrowly defined authority under S. 34 of the Act allows it to interfere with an award without relying on clear illegality. The award was unanimous on most questions while, on others, there was a dissenting view of one of the arbitrators. Read more

Application for Removal of Arbitrator must be made before Same 'Court' as Envisaged in S. 2 (i) (e) & S. 42 of Arbitration Act: Calcutta High Court

The Calcutta High Court recently rejected an appeal made by M/S Gammon Engineers and Contractors Private Limited ("petitioners") under S. 11(6), 14 and 15 of the A&C Act, for the removal of an arbitrator while contesting their unilateral appointment. An earlier Section 9 claim for interim relief had been filed before the Jalpaiguri District Court; therefore, a single bench of Justice Shekhar B. Saraf concluded that a challenge for the withdrawal or removal of the arbitrator would not be maintainable before the High Court. Read judgment

Arbitration Clause cannot be Incorporated by Reference, without Clear Intention of Parties: Calcutta High Court

Recent pleas for interim relief made by Kobelco Construction Equipment India Private Limited under S. 9 of the A&C Act were denied by the Calcutta High Court. The petition for an interim injunction against the respondents was denied on the ground that the petitioners could not be permitted to include an arbitration clause by reference from the "Master" agreement to the "Settlement" agreement in the absence of a clear intention on the part of both parties. Read judgment

S. 29(A) of the A&C Act is only Concerned with the Arbitrator's Expeditious Conduct of the Matter: Delhi High Court

The Delhi High Court clarified the scope of S. 29A of A&C Act. The court emphasized that S. 29A does not address issues related to how arbitration proceedings are conducted or arbitral fees; instead, it only considers whether the arbitrator responded promptly. The court added that the respondent's arguments regarding the arbitration process, aside from the matter of prompt resolution, should be brought up before the arbitrator or in a request made pursuant to S. 34 of the Act when contesting the arbitrator's decision. Read more

To Claim the Loss of Profits due to Delay in Execution, the Contractor must Show that Loss of Works were due to Delay: Supreme Court

The Supreme Court's bench, consisting of Justice Sanjiv Khanna and Justice M.M. Sundresh, has ruled in the case of *Batliboi Environmental Engineers Ltd v. Hindustan Petroleum Corporation Ltd & Anr.* that in arbitration proceedings where a contract's execution is delayed and the contractor claims loss resulting from depletion of income, the contractor must demonstrate that there was alternative work available for him/her by submitting invitations to

tender that were rejected by the contractor due to inability to take on other work for record. The court held that through books of accounts, the decline in turnover must also be demonstrated. Read judgment

Liquidated Damages Provided in the Agreement cannot be Awarded to a Party in Absence of the Proof of Actual Loss: Delhi High Court

In the case of *Vivek Khanna v. OYO Apartments Investment*, the bench of Justice Manoj Kumar Ohri's has ruled that the amount agreed upon by the parties as liquidated damages would not relieve the party claiming liquidated damages from the burden of proving that it genuinely sustained a loss. The court ruled that the amount specified in the contract as liquidated damages is not a punishment but rather a pre-estimate of the loss that the parties believe they will likely experience in the case of a breach of the agreement. Read judgment

Doctrine Of Severability Applicable to Arbitral Awards, if Good Part can Survive on its Own: Allahabad High Court

In the case of *Hindustan Steelworks Construction Ltd v. New Okhla Industrial Development*, the Allahabad High Court ruled that the notion of severability can be used to separate the good parts of arbitral awards from the poor ones as long as they are distinct from one another and the court's conclusions are not substituted for those in the award. Furthermore, the Court upheld the finding of the Commercial Court that the Arbitral Tribunal had attempted to rewrite the terms of the contract between the parties by discarding the Supplementary MoU entered by them. Read judgment

Allahabad High Court dismissed an Application for the Appointment of an Arbitrator after 20 years

Justice Ashwani Kumar Mishra in the case of *Gurucharan Das v. Tribhuvan Pal & Ors.* held that an application for the appointment of an arbitrator made pursuant to Section 11(4) of the A&C Act is blocked by laches and delay because it was made more than 20 years after the dispute first arose. The Court dismissed the arbitration application holding that a stale claim from 20 years ago cannot be allowed to be revived. Read order

International Commercial Arbitration

-Diya Gaur

The English Court of Appeal Dismisses the Jurisdictional Challenge against the Enforcement of US $2.4 Billion Award by the National Iranian Oil Co.

In the case of *National Iranian Oil Company v. Crescent Petroleum Company International Limited and Crescent Gas Corporation Limited*, the court, in the absence of no real prospect of success, avoided the rehearing of the case by rejecting the appeal. NIOC has argued that one of the grounds for the claim of damages was not within the scope of the arbitration agreement by applying the principles of construction as per Iranian law. The court while applying the principles established in the case of *Okpabi v. Dutch Shell* which concerned an appeal of interlocutory jurisdiction, dismissed the appeal. Read more

State Immunity cannot be as a Ground by Nigeria to dodge the $70 million Arbitral Award

A UK Court of Appeal rejected the appeal by Nigeria against the $70 million arbitral award imposed against it owing to a bilateral treaty violation. In *Zhongshan Fucheng v. Nigeria*, investment treaty arbitration was initiated against Nigeria owing to a violation of its obligations under the bilateral investment treaty with China. Nigeria's plea for state immunity was rejected owing to the passing of the time limit of two and a half months. Read more

Tanzanian Government to Pay $109.5 Million in an Arbitration Proceeding Against Indiana Resources

In the case of the International Centre for Settlement of Investment Disputes, a World Bank Tribunal, has asked the Tanzanian Government to pay $109.5 million as compensation stemming from a breach of obligation towards Indiana Resources Limited, an international investor. The dispute stems from the cancellation of the nickel mining retention license of the investor by the Tanzanian Government in 2018. Read more

English Court refuses to Enforce a Foreign-Seated Arbitral Award on Grounds of Public Policy concerning Consumer Protection

In the case of *Payward Inc v. Chechetkin*, an English Court has refused to enforce the arbitral award citing concerns about consumer protection mechanisms and public policy violation if the same is concerned. The award was granted by Judicial Arbitration and Mediation Services, Inc. seated in California. The judgment stressed the importance of having a suitable forum for arbitration. Read more

Third-Party Funding for English Seated Arbitration comes under the ambit of Damage Based Agreements

The English Supreme Court in the case of *Paccar Inc v Road Haulage Association Ltd*, has held that funding of litigation proceedings is based on the share of recovery and will fall within the

scope of S. 58AA of the Courts and Legal Services Act. 1990. Through this judgment, the Supreme Court has confirmed this position as litigation funders provide 'claim management services' and would be covered under the legislation. Read More

Hong Kong Court sets aside HKIAC Award Upholding the Jurisdictional Challenge of the Claimant

In the case of *R v. A, B and C [2023]*, the Hong Kong Court held that a dispute relating to the proper parties in a dispute is a jurisdictional matter and the Hong Kong courts are competent to adjudicate upon the same. In the present case, there was a question of whether a challenge can be made to an order deciding the principal party to the suit. The question of who the parties to the suit and the joinder of parties would constitute jurisdictional matters to be decided by the court. Read more

English Court emphasises the Court's Discretion to Award Costs Ex-post-facto

English Court in the case of *Viking Trading OU v Louis Dreyfus Suisse SA*, awarded costs even though they were not initially sought. The application came after the dismissal of the earlier appeal by Viking Trading OU to challenge an arbitral award ordered against it. The applicant argued that the court does not have the jurisdiction as the same ended when the appeal was dismissed and the party is not entitled to any costs when the order does not mention it. Read more

U.K. Court Grants an Anti-suit Injunction to give effect to a Foreign-seated Arbitration Agreement

An English court in order to enforce the arbitration rights arising out of a foreign seated agreement passed an interim negative anti-suit injunction in the context of civil proceedings carried out in Arbitrazh Court in the Russian Federation. The claimant approached the English court due to the absence of an equivalent relief in the stipulated seat of arbitration which was Paris in the present case and as required by Article II(3) of the New York Convention, the Russian court will not grant a stay order in favour of arbitration. The court held that England, Russia and France share an obligation to uphold the arbitral bargain. Read more

U.K. Supreme Court rejects Mozambique's Claims as Falling Outside the Scope of Arbitration Agreements while interpreting Section 9 of the Arbitration Act 1996

In the case of *Republic of Mozambique v Privinvest Shipbuilding SAL and others*, the U.K. Supreme Court has rejected the claims of Mozambique on the grounds that the commerciality or the monetary value concerning the supply contracts was not a matter that should be dealt with by legal proceedings and cannot be referred to arbitration under Section 9 of the Arbitration Act,1996. The court also held that for the purposes of an application under section 9, if the 'matter' in question is not fundamental to the claim or peripheral to the subject matter of legal proceedings, then a stay order cannot be made. Which kind of a matter should be identified as an essential element is a question of judgment and common sense. Read more

Paris Arbitral Tribunal Rules in Favour of Malakoff in Water Plant Dispute

In a dispute concerning allegations of breach of joint venture agreements regarding a seawater desalination plant between Malakoff and Algerian Energy Company, an arbitral tribunal in Paris has ruled in favour of Malakoff. The tribunal has held that there has not been a breach of obligations of the joint venture agreement and ordered the dismissal of claims against Malakoff. Read more

Investment Arbitration

-Ishani Chakraborty

UN Member States adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Code of Conduct for Arbitrators in International Investment Disputes during its 56th annual session in Vienna. The Code has been under development since 2017 in the context of UNCITRAL Working Group III (ISDS reform) and the recently amended ICSID Rules and Regulations. The Secretariats of UNCITRAL and ICSID worked jointly on the Code during this period. The Code reinforces the duty of independence and impartiality, regulates double-hatting (i.e. the practice of sitting as an arbitrator in one case and a party representative or expert in another), and lists specific disclosure requirements. Also addressed are obligations related to the confidentiality of proceedings, reasonable fees and expenses, and the role and duties of tribunal assistants. Read more

India rejects Hague Court Order on Indus Water Treaty

India's rejection of The Hague-based Permanent Court of Arbitration (PCA)'s July 6 ruling declaring itself "competent" to consider and determine disputes raised by Pakistan against two hydroelectric projects in India's Jammu and Kashmir did not come as a surprise to those following the case closely. India had already decided to boycott proceedings at the PCA and gave enough indications in January that it wanted to escalate the water conflict with Pakistan over sharing of Indus Basin water resources, which is governed by the 63-year-old Indus Water Treaty (IWT). India's reiteration of its demand for modifying the treaty bilaterally, without involving any third party has at the same time also created a deadlock. Pakistan looks unlikely to accept India's demand at this point. Read more

Four Countries initiate ICJ Proceedings against Iran over Downing of Ukraine Passenger Plane

Canada, Sweden, Ukraine and the United Kingdom (UK) filed a joint application Tuesday instituting proceedings against the Islamic Republic of Iran before the International Court of Justice (ICJ) claiming that Iran has violated its obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (otherwise known as the Montreal Convention) as a result of Iran's involvement in the shooting down of a civilian aircraft over Ukraine on January 8, 2020. Ukraine International Airlines Flight PS752 was shot down by military personnel of Iran's Islamic Revolutionary Guard Corps, with all 176 passengers and crew aboard the flight, many of whom were nationals and residents of the applicant states, killed in the crash. The applicants stated that Iran "failed to take all practicable measures to prevent the unlawful and intentional commission of an offence described in Article 1 of the Montreal Convention, including the destruction of Flight PS752," and "subsequently failed to conduct an impartial, transparent, and fair criminal investigation and prosecution consistent with international law." Read more

To Take Off, Go Air must get Relief from Singapore Court

Even as bankers to the defunct Go First Airlines have agreed to infuse fresh funds to revive the carrier, an order from the Singapore arbitration court expected later this month is crucial for Go First's survival. If the court does not grant Go First relief and direct Pratt & Whitney (P&W) to replace faulty engines, the airline cannot fly, possibly putting the whole recovery process into jeopardy, people familiar with the process said. While the Singapore International Arbitration award had directed P&W to dispatch around 20 engines by December 2023, the engine maker had subsequently challenged it citing payment failure by the airline and the ongoing global supply chain shortage. In its petition which was reviewed by ET, P&W has claimed that the airline owes it over $100 million. A person aware of Go First's business plan said that current trends show that a minimum of six engines could fail by November 2023. Read more

How SEBI's New Dispute Redressal Mechanism empowers Investors

ODR, according to experts, will help investors initiate mediation and arbitration proceedings against various intermediaries. Till now, investors could settle their disputes at IGRC, but this was possible only against a limited set of intermediaries."ODR can make arbitration and mediation less time-consuming and more cost-effective, as there is now an online mechanism available that allows seeking arbitration against a number of intermediaries," says Sandeep Parekh, managing partner of Finsec Law Advisors. SCORES, which is largely used by investors seeking redressal of complaints against stock brokers, is a comprehensive redressal system, which allows investors to escalate their complaint (see graphic) in a time-bound manner. In the final stage, the complaint is reviewed directly by SEBI and an investor who is not satisfied by Sebi's review can now opt for ODR. Read more

India and Iran drop Foreign Arbitration Clause in Chabahar Port Issue

In a move aimed at boosting India-Iran commercial relations, Tehran and New Delhi have agreed to drop the clause for arbitration in foreign courts concerning the Chabahar port, which had been a hurdle for the framing of a long-term agreement around the facility, the Iran Daily has reported. This major development also coincided with the decision of the BRICS grouping to admit Iran along with five other countries. "We have agreed that disputes at Chabahar will not go for commercial arbitration in foreign courts but take investment arbitration or any other mode of dispute settlement. This would prevent Iran from having to amend its Constitution," an informed source told the Iran Daily in Tehran. Both sides have agreed to pursue arbitration under rules framed by the UN Commission on International Trade Law (UNCITRAL) which is favoured by India over other international trade arbitration mechanisms. India in the recent past had described UNCITRAL as the "core legal body under the U.N. system in the field of international trade law". Read more

Jus Mundi and ICSID announce Partnership to expand access to International Investment Arbitration Expertise

Jus Mundi, the leading international law and arbitration research engine, is excited to announce its partnership with the International Centre for Settlement of Investment Disputes, the premiere institution dedicated to resolving international investment disputes. This collaboration aims to provide Jus Mundi users and the public with a deeper understanding of the ICSID dispute settlement process and the development of international law on foreign

investment. As part of this partnership, Jus Mundi will host a selection of ICSID online resources on its platform. This will allow users worldwide to access a range of specialized texts on international investment law and investment dispute resolution procedures, including The History of the ICSID Convention, Practice Notes for Respondents in ICSID Arbitration, and The ICSID Caseload - Statistics. Read more

UN Member States adopt ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Disputes

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Code of Conduct for Arbitrators in International Investment Disputes during its 56th annual session in Vienna. The Code has been under development since 2017 in the context of UNCITRAL Working Group III (ISDS reform) and the recently amended ICSID Rules and Regulations. The Secretariats of UNCITRAL and ICSID worked jointly on the Code during this period. The Code reinforces the duty of independence and impartiality, regulates double-hatting (i.e. the practice of sitting as an arbitrator in one case and a party representative or expert in another), and lists specific disclosure requirements. Also addressed are obligations related to the confidentiality of proceedings, reasonable fees and expenses, and the role and duties of tribunal assistants. Read more

Mediation

-Nidhi Ngaihoih

$6 Billion sent to Mediator Qatar for US-Iran Prisoner Swap

When $6 billion of unfrozen Iranian funds were wired to banks in Qatar, it triggered a carefully choreographed sequence that led to as many as five detained U.S. dual nationals leaving Iran and a similar number of Iranian prisoners held in the U.S. flying home. The agreement was the culmination of months of diplomatic contacts, secret talks and legal manoeuvring, with Qatar at the heart of negotiations. Doha hosted at least eight rounds of clandestine indirect meetings between Tehran and Washington since March 2022. The earlier rounds were devoted chiefly to Tehran's nuclear dispute with Washington, but over time the focus shifted to prisoners as the negotiators realised that nuclear talks would lead nowhere due to their complexity. The first public glimpse of the deal came on August 10 when Iran allowed four detained U.S. citizens to move into house arrest from Tehran's Evin prison. A fifth was already confined at home. A month later, Washington waived sanctions to allow the transfer of Iran's funds to banks in Qatar, which will have a monitoring role to ensure Iran's clerical rulers spend the funds on non-sanctioned goods. Read more.

The Mediation Act, 2023 gets President's Assent

The Mediation Act, 2023 received the President's assent and was published in the Gazette of India on September 15. The Mediation Bill came into force on December 20, 2021, and was referred to a Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice headed by Sushil Kumar Modi. On July 13, 2022, the committee submitted its report to the Rajya Sabha chairperson. The Rajya Sabha and Lok Sabha approved it on August 1 and 7, respectively. Individuals are urged by the Act to make an effort to resolve civil or commercial disputes via mediation before resorting to any court or tribunal. After two mediation sessions, a party may withdraw from the process. The mediation process itself should be completed within a period of 180 days, with the possibility of an additional 180-day extension if the parties agree. The Mediation Council of India will be developed to oversee the mediation process. Its duties include registering mediators and recognizing mediation service providers and mediation institutes that train and certify mediators. Certain disputes, like those involving criminal prosecution or affecting the rights of third parties, are deemed inappropriate for mediation. If needed, the Central Government may amend this list. If the parties agree, they can appoint any individual as a mediator. If they are unable to reach an agreement on the mediator, they can seek the guidance of a mediation service provider, who will appoint a mediator from its panel of qualified mediators. Successful mediation agreements will be legally binding and enforceable in the same way as court judgments. The Act has been criticized for making participation in pre-litigation mediation mandatory, which goes against mediation's traditional voluntary nature. Another significant issue is that the Mediation Council, which is in charge of regulating the profession of mediators, lacks adequate representation of experienced practitioners, in contrast to other professional regulators such as the Bar Council of India (BCI). Furthermore, the Council necessitates prior approval from the Central Government for

its regulations, raising concerns about the settlement agreements reached through international mediations held outside of India. Read more.

Government to pay Fee of Empanelled Mediators in Consumer Cases

Empanelled mediators in consumer cases will now be paid a fee in the range of Rs 3,000-5,000 by the government which will lead to the settlement of more complaints through mediation cells, as announced by the Consumer Affairs Ministry. The ministry took a decision in this regard after a series of consultations with various stakeholders and during regional workshops held in the north-eastern and northern states. It was observed that a substantial number of cases are not resolved through mediation because the parties in the disputes are observed to be reluctant to pay the fee of the mediator. Based on the suggestions, the ministry has "decided to pay the fees of the empanelled mediator from the Consumer Welfare Fund."According to the Consumer Affairs Ministry release, the amount of dispute, or the fee of the mediator as set by the President of the Commission, or the fees announced by the Ministry, whichever is least, will be paid to the mediator. Read more.

SC directs Centre to look into Mediation Process over Sutlej-Yamuna link ("SYL") Canal Dispute

The Supreme Court directed the Centre to look into the mediation process over the SYL canal dispute. The bench of justices Sanjay Kishan Kaul CT Ravikumar and Sudhanshu Dhulia also came down heavily on the Punjab government over their approach to the issue and asked them to cooperate in the process. The court directed the Centre to survey the portion of the land allocated to Punjab. The court also directed the Centre to look into the mediation process. The court listed the matter for further hearing in January 2024. The problem stems from the controversial 1981 water-sharing agreement after Haryana was formed out of Punjab in 1966. For effective allocation of water, the SYL canal was to be constructed and the two states were required to construct their portions within their territories. While Haryana constructed its portion of the canal, after the initial phase, Punjab stopped the work, leading to multiple cases. In 2004, Punjab government had passed a law unilaterally cancelled the SYL agreement and other such pacts, however, in 2016, the apex court had struck down this law. Later, Punjab went ahead and returned the acquired land – on which the canal was to be constructed – to the landowners. Read more.

Ex-CJI Ramana appointed Member of Singapore's International Mediator Panel

Former Chief Justice of India (CJI) NV Ramana has been appointed as a member of the prestigious International Mediator Panel of Singapore International Mediation Centre (SIMC). A letter of appointment was presented to him by George Lim, Chairman of SIMC, on August 29 in Singapore. Justice Ramana took part in the 'Singapore Convention Week', the annual convention organised by Singapore's Ministry of Law, United Nations Commission on International Trade Law (UNCITRAL) and over 20 partner organisations. During his tenure as the CJI, Justice Ramana spoke about the importance of mediation in removing the burden in the justice delivery system. He also spoke about how mediation should be made mandatory as a first step for dispute resolution and also suggested that a law be framed in this regard. Read more.

Sophie Turner, Joe Jonas to start 4-day Mediation to resolve Issues amid Custody Battle for Daughters

Singer Joe Jonas and actor Sophie Turner are turning to mediation to work through the custody battle for their two children. The mediation comes after Sophie sued her estranged husband for wrongful retention of their kids, alleging that he was withholding their children's passports and notallowing them to return to her native England. Although judge Katherine Polk Failla set a January 2 trial date, the mediation aims to solve many of Sophie and Joe's custody issues. Read more.

Qantas CEO ordered into Mediation with Union to decide Compensation for Sacked Workers

A federal court judge has ordered the new Qantas chief executive, Vanessa Hudson, to attend mediation proceedings with a union chief to settle compensation and penalty claims, with the bill for illegally outsourcing 1,700 workers potentially running into the hundreds of millions of dollars. In July 2021 the federal court ruled Qantas's outsourcing of the workers was in part driven by a desire to avoid industrial action, which is a breach of the Fair Work Act. Read more.

'Hamas receives Mediation offers following Operation Aqsa Typhoon,' says Hamas Figurehead

In the wake of Operation Aqsa Typhoon, Husam Badran, a Hamas figurehead, revealed that the organization had received mediation efforts from multiple countries, including Egypt and Qatar. These nations reached out to Hamas in an attempt to facilitate negotiations and reduce tensions in the region. Badran's statement indicated that despite these mediation attempts, there are currently no indications of an imminent ceasefire or period of calm in the ongoing conflict. Read more.

Severability of Illegality and Intent: *Sunil Kumar Jindal v. Union of India*

-Namisha Choudhary & Jugaad Singh

INTRODUCTION

Independence and impartiality of the arbitrators are the hallmarks of a successful arbitration mechanism and have to be ensured in any arbitration between the parties. The Indian Arbitration and Conciliation Act of 1996 (the Act) provides for sufficient safeguards under s.12 for the grounds to challenge the appointment of an arbitrator. The VIIth Schedule provides further guidance with regards to the relationship between the arbitrator and the parties, dispute and interests in the dispute, all of which can be made a ground for challenging the appointment.

Section 12(5) of the Act, read with the VIIth Schedule, makes the unilateral appointment of a sole arbitrator void ab initio. The same was also held by the SC in the *Perkins Eastman* judgement. These insertions in the Act have ensured the weeding out of discrepancies in the appointment of an arbitrator, which could be highly detrimental to the rights of the parties, which was earlier absent.

Section 11 of the Act deals with the procedure for the appointment of an arbitrator, which is often left up to the consent of the parties. However, if a party fails to act as required under the agreed-upon procedure, a party may request the competent court to provide for the appointment of an arbitrator. Working off these fundamental tenets of arbitration laid out in the Act, the authors wish to analyse the recent judgement by the Bombay High Court in *Sunil Kumar Jindal v. Union of India* which has held that the illegality of the appointment procedure does not render the entire arbitration agreement invalid.

FACTUAL MATRIX

In the year 2017, the parties had entered into three connected agreements. The agreements all contained dispute resolution clauses which referred all disputes to arbitration. The appointment of the arbitration was to be done unilaterally and no other person other than the one nominated by the respondent would be able to act as an arbitrator.

Subsequently, disputes arose between the parties in all the agreements and the petitioner filed an application under s. 11(6) of the Act for the appointment of an arbitrator.

The respondents objected to the maintainability of the petition by stating that the arbitration clause provided for a conditional reference to arbitration, the condition being the unilateral appointment of the arbitrator by the respondent, which the petitioners failed to comply with. The respondents submitted that due to the failure of the petitioner to comply with the appointment procedure, the entire arbitration mechanism had become invalid, signifying their reluctance to arbitrate and for the court to appoint an arbitrator.

The petitioner argued that the invalidity of the appointment procedure under Section 12(5) cannot render the entire arbitration process invalid. They submitted that the Court can sever the illegal portion of the agreement as the intention to arbitrate is evident.

JUDGEMENT

Responding to the petition, the Hon'ble Bench of Justice Avinash G. Gharote in the case of *Sunil Kumar Jindal v Union of India*, held that mere invalidity of the appointment procedure of the arbitrator does not render the entire agreement as invalid.

The court observed that while the insertion of Section 12 (5) of the Act makes the appointment of an arbitrator illegal on the grounds of impartiality and independence, it is pertinent to keep the intention of the parties in mind. The intention of the parties to settle the dispute through arbitration is of utmost importance, and a mere procedural invalidity shall not render the entire agreement illegal.

Distinguishing between the two clauses in the agreement, the court observed that the choice to arbitrate is one thing and the choice of an arbitrator is another. There needs to be a clear distinction between the two things, and both the clauses are distinct and severable from each other. The court further held that in cases where the arbitration clause is partially declared illegal, the courts can sever the clause and retain the remaining clause which is legal and valid, when the parties' intention to arbitration is clearly evident.

The Court held that Section 12(5) of the Act was introduced to incorporate principles of impartiality and independence in the process of appointment of arbitrators. Thus, an arbitration clause in an agreement cannot be interpreted in a literal sense so as to exclude the arbitration itself.
Furthermore, it was observed by the court that the illegality of the appointment of an arbitrator shall not have an effect on the intention of the parties to choose arbitration. Section 12(5) only renders the choice of an arbitrator as illegal and not the choice of arbitration. Thus, mere illegality of appointment shall not render the entire agreement as invalid.

The Bombay High Court emphasised on the limitation of application of 12(5) only to the choice of arbitrator and allowed the petition.

ANALYSIS

The judgement by Bombay High Court in the instant case sheds light on two important principles of arbitration: The Doctrine of Severability and the Intention of the Parties.

- *Doctrine of Severability:*

According to the doctrine of severability , if the underlying agreement is rendered invalid, it will not have any effect on the primary arbitration clause. Similarly, the invalidity of the arbitration agreement will not affect the underlying agreement.Thus, the requirements for the validity of the arbitration agreement differ from those required for the validity of the underlying main agreement. The doctrine originated from the case of *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Company Limited*, where the House of Lords severed the unlawful part of an agreement and retained the valid part.

The doctrine derives its principle from Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, 1985, adopted by Section 16 of the I Act. The apex court in a plethora of judgments has reiterated that the invalidity of a contract or any of its clauses doesn't hamper the separate existence of an independent arbitration clause.

The case of Sunil Kumar Jindal casts clarity upon the severability principle. The Bombay High Court has reasoned its judgement demarcating the two choices in the agreement- the choice of an arbitrator and the choice of an arbitration. By applying the widely accepted doctrine, the judgement falls in line with the existing law providing room for modifications and contractual interpretations in terms of severable clauses.

- *Intention of the Parties:*

Another principle that this judgement brings into light is the 'intention of the parties'. The intention of the parties, at all stages, must be taken into consideration. Thus, intention, when clearly stated, is a crucial element for the arbitration proceeding.

In the instant case, the Bombay High Court highlighted that even when the choice of arbitrator has been regarded as illegal, the intention to arbitration still remains and the parties shall not undermine such intention.

The court in this judgement substantiated that when it is clear that both parties intend to resolve their disputes through arbitration, they should not be allowed to deviate from this choice for any reason. Thus, intention must be respected at all stages.

CONCLUSION

The case of *Sunil Kumar Jindal v. Union of India* illuminates the essential principles of arbitration, specifically the Doctrine of Severability and the Intent of the Parties.

The Doctrine of Severability, deeply ingrained in international and Indian arbitration law, establishes that the invalidity of the underlying agreement does not affect the arbitration clause within it, and vice versa. This principle safeguards the independence of the arbitration process. The Bombay High Court's judgement in this case aligns with this doctrine, providing a clear and sound application of the severability principle, distinguishing between the choice of an arbitrator and the choice of arbitration, and allowing for the retention of the valid part of the clause.

The Intention of the Parties is another pivotal aspect emphasised in this judgement. It underscores that the clear intent of the parties to resolve their disputes through arbitration should not be undermined or circumvented by any reason. This underscores the importance of respecting the parties' intentions throughout the arbitration process.

In conclusion, the *Sunil Kumar Jindal* case reinforces the significance of maintaining the integrity and purpose of arbitration agreements, highlighting the principles of severability and party intent. This judgement sets a robust precedent for the arbitration community, ensuring that arbitration remains a reliable and efficient method for dispute resolution, with the parties' intentions at its core.

Events @ CADR

Upcoming Events

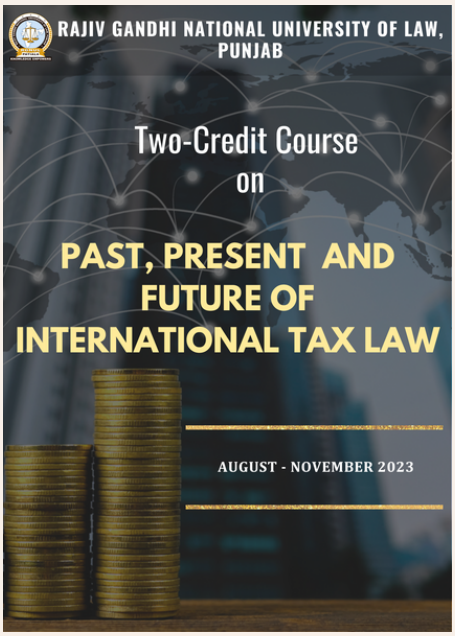
3rd RGNUL National Negotiation Competition, 2023

Centre for Alternative Dispute Resolution is all set to organize the "third edition" of its flagship National Negotiation Competition from November 3 - November 5, 2023. This year, the competition is being conducted in association with Shardul Amarchand Mangaldas & Co. and Dr. PC Markanda Chair on ADR. SCCOnline joins us as the Media Partner, EBC as Knowledge Partner and Justice Kuldip Bhandari Foundation as the Chief Advisory Partner. The 3rd NegComp will be held in an in-person mode, at the lushful campus of RGNUL in Patiala, Punjab. The last date for the final registration and payment is October 22, 2023.

Ongoing Events

Two-Credit Course on International Tax Law

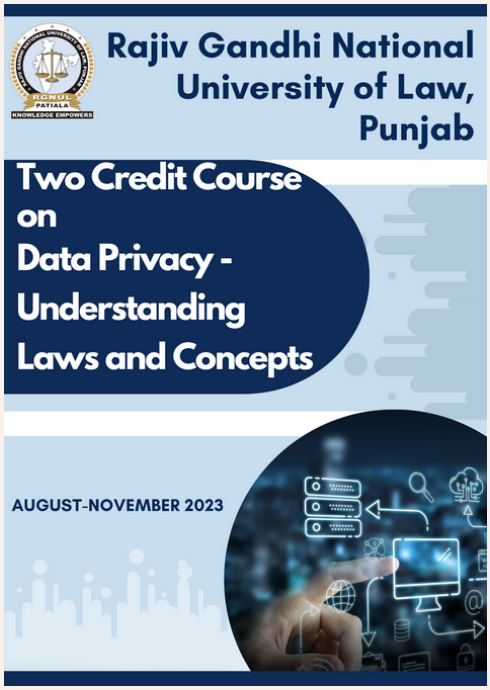
With the enrollment of 90+ participants, the Centre for Alternative Dispute Resolution has been conducting the weekly sessions of the Two-Credit Course on Present, Past and Future of International Tax Law since August. This course is designed with the intent to equip law students with detailed knowledge of international tax and double tax avoidance agreements.



The resource person for the course, Ms Prerna Peshori, heads the advisory practice at Peshori Consultants. She is an expert advisory to various foreign and Indian corporates as well as HNIs with respect to cross-border transaction advisory, inbound and outbound investment advisory, transfer pricing, and handling tax litigation. She has also been training CAs, lawyers and AUDIT students.

The participants shall be awarded the Certificate of Completion on successfully clearing the assessment test.

Two-Credit Course on Data Privacy



With the enrollment of 180+ participants, the Centre for Alternative Dispute Resolution has been conducting the weekly sessions of the Two-Credit Course Data Privacy- Understanding Laws and Concepts since August. This course has been designed to make students understand the data privacy laws around the globe and how Indian laws are shaping up.

The resource person for the course, Mr Harshad Tekwani is a qualified CA, Certified Fraud Examiner, Bachelor in Law and Bachelor in Commerce with more than 11 years of Experience in Risk & Governance, Trade, Anti-Corruption & AML Compliance Audits, Internal Audits, Forensic Audits, SoX Compliance, Privacy Risk Assessment, Privacy Impact Assessment, Data Privacy Audits.

The participants shall be awarded the Certificate of Completion on successfully clearing the assessment test.

2nd RGNUL Arbitration Essay Writing Competition, 2023

In September, 2023, the Centre for Alternative Dispute Resolution announced the 2nd RGNUL Arbitration Essay Competition, 2023 in collaboration with Centre for Trade and Investment Law, Government of India.

The intent of Essay writing competition is to provide young writers a platform to test their adroitness for writing and an opportunity to explore a wide range of challenging and interesting questions beyond the routine college curriculum.

The top 3 entries stand a chance to secure internships with CTIL. The winner shall be awarded a cash prize of Rs. 10,000. The results will be announced on 21st November, 2023 (tentatively).

4th Surana & Surana RGNUL International Arbitral Award Writing Competition, 2023

The Centre for Alternative Dispute Resolution opens the registration for 4th Edition of its flagship and one of the kind, Arbitral Award Writing Competition, in collaboration with Surana & Surana International Attorneys. The Competition is open to the students who are pursuing their B.A. LLB/ LLM/ Ph.D/ M.Phil or any other Undergraduate or Masters courses in any university across the World.

The registrations are open. The last date for the submission of the final draft is November 14, 2023.

For more details: www.rgnulcadr.in

Completed Events

One Day National Seminar: Sports Law in India

The Centre for Alternative Dispute Resolution successfully organised the one-day National Conference on Sports Law in India: Issues, Perspectives and Challenges in collaboration with the Centre for Business Laws and Taxation, RGNUL. The inaugural ceremony was marked by the presence of Guest of Honour, Prof. (Dr.) Amaresh Kumar and Chief Guest, Prof. (Dr.) Nishtha Jaswal, Vice Chancellor, Himachal Pradesh National Law University.

The conference saw the participation of the Academicians, Professionals, Research Scholars and Students, from all over India, physically as well as virtually. The seminar involved various technical sessions wherein experts and participants discussed and debated various aspects of sports and the legal provisions regulating such aspects.

RGNUL Intra Client Counselling Competition, 2023

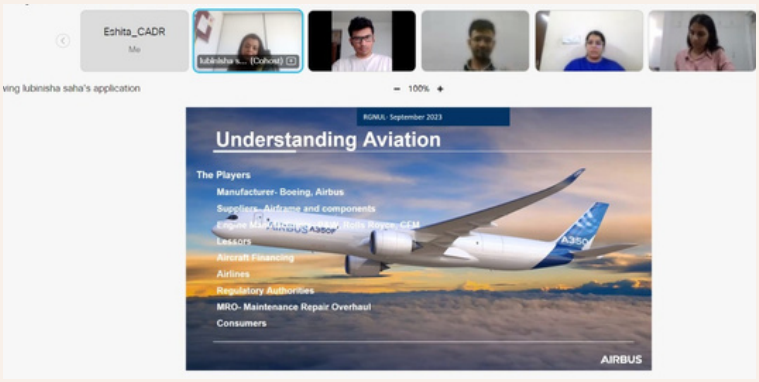
In pursuance of its objectives to promote the skills of the students of RGNUL and to provide them with a platform to showcase their prowess, the Centre for Alternative Dispute Resolution organised the Intra Client Counselling Competition, 2023 over the span of 3 days (September 1- 3). The short and crisp proposition revolved around criminal law, giving the required space to the participants to showcase their skills. The competition saw the participation of more than 200 students from different batches of the University.

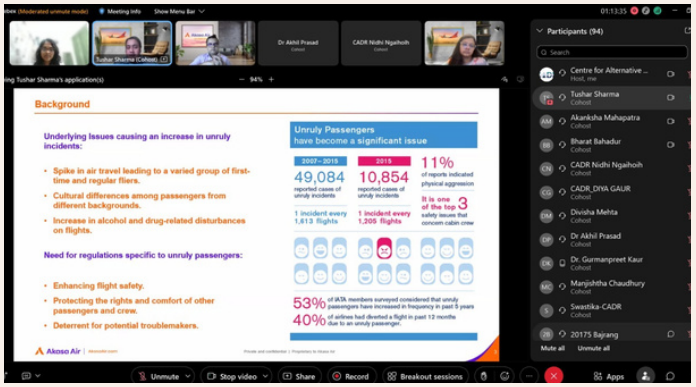





Certificate Programme on Aviation and Defence Laws

The Centre for Alternative Dispute Resolution successfully organised the **Certificate Programme on Aviation and Defence Laws** in association with the **General Counsels' Association of India.** Spread over a course of 4 days (Sep 8 - Sep 11) and 5 sessions, the program received a great response with nearly 120 plus people registering for the programme. The panellists included Mr. Shashank Jain, General Counsel for Vistara, Ms. Hoysala Grandhi, Legal Specialist GMR Group, Mr. Bharat Bahadur, General Counsel for Akasa Airways, Dr. Akhil Prasad, Board Member, Group General Counsel & Company Secretary for Boeing India and Ms. Lubinisha Saha, Head of Legal & Compliance – South Asia & International for Airbus. The topics discussed ranged from regulatory framework and leasing to National Civil Aviation Policy 2016 and Vision 2040.





Achievements

Students of Rajiv Gandhi National University of Law bring Laurels to the University, bagging top positions at ADR Competitions

The team comprising Dhanya Jha and Nidhi Ngaihoih from the Batch of 2026 emerged as **WINNERS** in the Negotiation segment of **Madhyastham UPES ADR Fest'23,** held on 16th and 17th September, 2023 in Dehradun. We congratulate the team for the achievement and wish them best for their future endeavours!

The team comprising Garima Thakur and Shashwat Ambashta from the Batch of 2027 emerged as **RUNNERS-UP (Negotiators Category)** in **Mediation Championship India** hosted by GNLU in collaboration with PACT and SAM & Co. We congratulate the team and wish them all the best for their future endeavours!

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