CONVERSATION ON THE DEVELOPMENTS IN ARBITRATION, THE ARBITRATION BAR OF INDIA, AND CAREERS IN THE FIELD

Gourab Banerji[*]

The NUJS Law Review was pleased to host Senior Advocate Gourab Banerji for an exclusive interview discussing key developments in arbitration in India, select international developments in arbitration, the recently inaugurated Arbitration Bar of India and careers in arbitration for Indian law students. The interview was hosted on December 23, 2024. The questions for the interview were prepared by the Board of Editors of the Review in discussion with Mr Banerji. The interview was conducted by Nimesh Singh and Ranak Banerji, both Editors at the NUJS Law Review, who took the freedom to ask additional questions where necessary. The discussion in the interview was recorded and then transcribed, edited and finalised by the Members of the NUJS Law Review. The free-flow discussion has been divided into four indicative topics, each of which contains further sub-topics for ease of navigation. The Review collectively hopes that this edited transcript positively contributes to the discussions on arbitration in India.

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I. DOMESTIC DEVELOPMENTS IN ARBITRATION

A. CORE-II JUDGMENT

Ranak Banerji: Our first topic for discussion is domestic developments. The first set of questions relates to a development you recommended: the recent judgment of the Supreme Court of India ('SC') in *Central Organisation for Railway Electrification* v. *M/s ECI SPIC SMO MCML (JV) A Joint Venture Company* ('CORE-II').[1] In this judgment where you

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[1] Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 INSC 857 ('CORE-II').

led the arguments, the SC held that unilateral appointments and appointments of arbitrators from panels are invalid. However, commentators have raised certain concerns about how it may affect party autonomy when choosing arbitrators.[2] Accordingly, we wanted your opinion on how you believe the CORE-II judgement may affect party autonomy, which is one of the central premises of arbitration itself.

Gourab Banerji: So essentially, this is what the other side argued, but what we showed to the court was a reference to the *travaux préparatoires* of our law, along with some commentaries on the UNCITRAL Model Law on International Commercial Arbitration ('Model Law').[3] I think you may know that our Arbitration and Conciliation Act ('Act') is based to a large extent on the Model Law, so we showed some commentary for Article 18 and Article 19,[4] which is equivalent to our §§18 and 19.[5] We showed Article 18 cannot be derogated from.[6] Even the English Act has provisions that are non-derogable,[7] and Justice Indu Malhotra's judgment in *Union of India* v. *Vedanta Ltd*., where incidentally I was appointed as an Amicus, also says that certain provisions are "non-derogable".[8]

So, there is no such thing as unfettered party autonomy, and the reason really is because, after all, arbitration is a substitute for all kinds of judicial decisions, so some basic, shall we say, some basic fundamental principles cannot be contracted out of, one of which is §18 which is equal treatment for both the parties.[9] The real question in the case was whether Article 18 extends to Article 11, which covers appointments.[10] But, in fact, all five judges held that §18 does extend to the appointment process.[11] So, once you hold that, I don't think party autonomy being overridden is such a big deal. In fact, Article 18 is said to be the Magna Carta of arbitration law.[12] So, I don't believe the decision itself impacts the principle of party autonomy at all.

Ranak Banerji: Right. So, if we were to characterise it as such, could we say that the concept of equality of parties then ranks above the principle of party autonomy in arbitration?

Gourab Banerji: I would say yes; in fact, there are three principles mentioned in the English Act.[13] Of course, party autonomy is superseded by equality, and that is clear also

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[2] Suvigya Awasthy & Ankit Goel, *The Sealed Fate of Unilateral Arbitrator Appointment Clauses in Public-Private Contracts in India*: *Analysis of the Constitution Bench Judgment in*: *Central Organisation for Railway Electrification v. M/s ECI SPIC SMO MCML (JV)*, LEXOLOGY, November 12, 2024, available at https://www.lexology.com/library/detail.aspx?g=8296e05b-3e04-47a9-abdd-2863bef295dc (Last visited on January 1, 2025); Abhijnan Jha, *Play Hard But Play Fair*: *The Supreme Court Conclusively Rejects Unilateral Arbitrator(s) Appointments*, AZB & PARTNERS, November 15, 2024, available at https://www.azbpartners.com/bank/play-hard-but-play-fair-the-supreme-court-conclusively-rejects-unilateral-arbitrators-appointments/ (Last visited on January 1, 2025).

[3] UNCITRAL Model Law on International Commercial Arbitration, 1994 (United Nations).

[4] *Id*., Arts. 18, 19.

[5] The Arbitration and Conciliation Act, 1996, §§18, 19.

[6] UNCITRAL Model Law on International Commercial Arbitration, 1994, Art. 18 (United Nations).

[7] The Arbitration Act, 1996 (United Kingdom).

[8] Union of India v. Vedanta Ltd., (2020) 10 SCC 1, ¶¶92.3, 121 (per I. Malhotra J.).

[9] The Arbitration and Conciliation Act, 1996, §18.

[10] UNCITRAL Model Law on International Commercial Arbitration, 1994, Arts. 18, 19 (United Nations).

[11] The Arbitration and Conciliation Act, 1996, §18.

[12] UNCITRAL Model Law on International Commercial Arbitration, 1994, Art. 18 (United Nations).

[13] The Arbitration Act, 1996 (United Kingdom).

from the language if you see the language of §§18 and 19 of the Act.[14] §19 is subject to §18.[15] So, I would say yes, §18 overrides party autonomy.[16]

Ranak Banerji Right, sir. Next, we wanted to direct the discussion towards the dissenting opinions, which were written by Justice Hrishikesh Roy and Justice P.S. Narasimha, where they stated that this particular judgment in CORE-II makes the waiver provision under §12(5) of the Act ineffective because it is an *a priori* declaration that unilateral appointments are invalid.[17] So, sir, we wanted your thoughts on whether you believe that, practically speaking, the proviso to §12(5) of the Act is made ineffective by this judgment, or do you believe that it still operates with its exact intent that it was intended to operate with prior to this judgment?

Gourab Banerji: So, before I answer that question, let me tell you what happened when the judgment was pronounced because I was there. Justice Roy, in his own style, gave an example. I don't know whether it's on the official website or not — of 'cooking'— as to how judges 'cook up' judgments. He said that my judgment is a bit of this and a bit of that, a bit sweet, a bit salt and so I generally agree. Interestingly, all of them agreed on the fact that §18 of the Act applied across the board, which was a huge victory for us. But then, he said he had some different thoughts on the matter, so I wouldn't say it was a dissent in the true sense that he completely disagreed, like in *N.N. Global Mercantile (P) Ltd*. v. *Indo Unique Flame Ltd* ('NN Global').[18]

But, yes, you're right. There are some dissonant voices in both his judgment and that of Justice Narasimha, and normally, one wouldn't comment on dissent, but I have the highest respect for Justice Roy and Justice Narasimha. They are both exceptionally good, learned judges, and Justice Roy wrote the dissent in NN Global as well,[19] so he understands arbitration law well. Justice Narasimha has international experience in arbitration, so, obviously, whatever they have said is to be taken a little seriously. But I actually believe that this is a contradiction which they have found where none actually exists.

So, I disagree with them respectfully. If you see §12(5) of the Act, it permits *ex post facto* waiver; as I understand your question, the suggestion seems to be that §12(5) has been rendered redundant because the unliteral appointment of one arbitrator is *ex facie* bad. However, take a look at the 246th Report of the Law Commission of India ('Report') chaired by Justice A.P. Shah; I think it's paragraph sixty, if I'm not mistaken.[20] The idea around a §12(5) waiver was never a waiver of a unilateral appointment. In fact, if you look at the discussion a little earlier in the Report, I think it was Mr P.K. Malhotra, who was Secretary of the Department of Legal Affairs then, who raised a point that employee arbitrators of government should be exempted from §12, and the majority said that you couldn't really do that.[21] So, if

[14] The Arbitration and Conciliation Act, 1996, §§18, 19.
[15] *Id*.
[16] *Id*.
[17] For Justice Roy's dissent, *see* CORE-II, *supra* note 1, 60–71; For Justice Narasimha's dissent, *see* CORE-II, *supra* note 1, 71–97.
[18] N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 ('N.N. Global'), ¶¶298–456 (per H. Roy J.). Gourab Banerji was appointed as *amicus curiae* in this case.
[19] *Id*.
[20] LAW COMMISSION OF INDIA, *Amendments to the Arbitration and Conciliation Act 1996*, Report No. 246, ¶60 (August, 2014).
[21] *Id.*, ¶57.

you look at §12(5) and its proviso, it was meant to be in situations like family arbitrations where you have a joint name, say, an elder in the family you have blind faith in.

That's the expression that is used in paragraph sixty of the Report. So, if that is the case, then §12(5) was meant for that. Unfortunately, §12(5) was being used by some Public Sector Undertakings ('PSU') to try and bully contractors into signing off on the dotted line. Some PSUs actually had a proforma printout that the contractor was to sign after the dispute arose to waive away his right and permit the PSU to appoint whomever it chose. So, I don't think there is that inconsistency that Justice Roy and Justice Narasimha are saying. I actually think the majority judgment is a very progressive judgment which says unilateral appointments are bad. I mean, it could've gone either way, but I think this judgment is definitely a great positive. Of course, I would say that because I was for the respondent in the case, so maybe I am biased.

Ranak Banerji: Sir, thank you so much for your answer. Now, coming to this particular point of PSUs, the proformas and the fact that the government is the biggest litigator in India, some commentators have highlighted that the CORE-II judgment will affect multiple arbitration agreements that are already in place between these PSUs and other private players.[22] They hypothesise that after this judgement, there is going to be a massive amount of redrafting that takes place where a lot of these PSUs function with such arbitrator appointments with panels from which the other contracting party has to appoint one. So, then, sir, here is a twofold question. First, do you think that such a redrafting exercise at a massive scale is necessary? And, if so, would you have any words of advice or recommendation as to how this particular redrafting should be done and what language should be employed so that it's not struck down due to the holding in the CORE-II judgement?

Gourab Banerji: First of all, I don't think there is any possibility of any massive redrafting, unlike many commentators may have pointed out because if you read the fine print, there is one portion in Chief Justice Chandrachud's judgment which says that for panels, this judgment will be prospective so there is a grey area there.[23] But be that as it may, so far as unilateral single arbitrator appointments are concerned, that has been held to be bad from *Perkins Eastman Architects DPC* v. *HSCC (India) Ltd*.[24] This had a massive impact on non-banking financial corporations and such, and other such bodies who try to insist that they will appoint their own arbitrator. So, I'll come to that separately, but to answer your question on the panel aspect, PSUs will have to rejig their arbitration process prospectively. What has happened has happened. So, I don't think it's going to be that big of a problem, but there are some straightforward solutions. One easy solution that I had, in fact, suggested to the Court was that the issue was not drawing up a panel; the issue was who drew up the panel. So, if you have institutions which have credible arbitrators on their panel, for instance, the government itself has set up the India International Arbitration Centre ('IIAC'),[25] then all you need to do is to have a clause which refers to the appointment of arbitrators to arbitral institutions. Whether

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[22] Vasanth Rajasekaran & Harshvardhan Korada, *Supreme Court Crystallises the Law on Independence and Impartiality of Arbitrators in Indian Law*: *An Analysis of the Verdict in CORE-II II*, SCC ONLINE, November 14, 2024, available at https://www.scconline.com/blog/post/2024/11/14/supreme-court-unilateral-appointment-arbitrator-independence/ (Last visited on January 1, 2025); Hima Lawrence & Abhinav Hansaraman, *Equality in Public-Private Contracts*: *The Supreme Court's Judgment in the CORE-II Arbitration Case*, SUPREME COURT OBSERVER, November 23, 2024, available at https://www.scobserver.in/journal/equality-in-public-private-contracts-the-supreme-courts-judgment-in-the-core-arbitration-case-strikingdown-unilateral-appointments/ (Last visited on January 1, 2025).

[23] CORE-II, *supra* note 1, 59, ¶168 (per D.Y. Chandrachud C.J.).

[24] Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2017) 4 SCC 665.

[25] The India International Arbitration Centre Act, 2019.

it's the IIAC or the International Arbitration and Mediation Centre ('IAMC'), that's one easy way of getting arbitration. Otherwise, you have your own panel as a PSU, which is no problem, but you can only appoint your arbitrator; the other side will nominate their nominee. I don't think it's a big problem. I think the problem is more of a mindset. Whether PSUs will want to do it or not is a separate question.

B. ARBITRAL INSTITUTIONS

Ranak Banerji: Right, sir; thank you so much for your response. You mentioned that one easy solution is that we could refer this particular arbitration to any of the arbitral institutions, such as the Mumbai Centre for International Arbitration ('MCIA') and the Delhi International Arbitration Centre ('DIAC'), and that actually brings us to our second point of discussion, which is institutional arbitration in India and its future. This discussion, we feel, is relevant due to the recent Draft Amendment Arbitration and Conciliation (Amendment) Bill, 2024 ('Draft Bill'),[26] on which public comments were invited.[27] It has a very strong focus on institutional arbitration and tries to refer matters to such institutions, so we would just generally want your opinion on a few things. First, do you think the Draft Bill currently does enough to promote the growth of arbitral institutes in India like the MCIA, the DIAC, the IAMC Hyderabad, and so forth? Second, could we see that, at some point, these centres grow enough to compete with foreign arbitral institutions such as the Singapore International Arbitration Centre ('SIAC'), the London Court of International Arbitration, the International Chamber of Commerce, etc?

Gourab Banerji: So, actually, my response to this is a little caveated because I was part of the Dr T. K. Viswanathan Committee, which was set up to take a relook at our arbitration law.[28] We gave our report sometime earlier this year, and some portions of it have been picked up and put into the Draft Bill. Some of the portions have not been picked up. As the Arbitration Bar of India ('ABI') and as its President, we have also put in representation regarding some proposed amendments. The first caveat is that the Draft Bill is a work in progress.

Secondly, no amount of legislation, in my view, will result in our institutions improving to compete with foreign institutions. Of course, the Draft Bill does try its best to persuade consumers of arbitration to push them towards institutions, and that's a very good thing. However, the issue here is not whether the Draft Bill will transform the situation. I think the issue is more about whether we have credible institutions and whether we can persuade users, including the Government, to use such institutions. That is the only way that we will be able to promote those institutions. Legislation can only go thus far.

Ranak Banerji: Right, sir, and that's understandable. Then, given that you also have massive international experience and have appeared in arbitrations in front of these international tribunals, where do you think our institutes lack administratively or structurally compared to these foreign institutes?

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[26] The Draft Arbitration and Conciliation (Amendment) Bill, 2024.

[27] Ministry of Law and Justice, *Inviting Comments on the Draft Arbitration and Conciliation (Amendment) Bill, 2024* (Issued on October 18, 2024).

[28] DR. T. K. VISWANATHAN COMMITTEE, *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit*, 2 (February 7, 2024).

Gourab Banerji: So, let me tell you where they don't lack. I'm on the MCIA Council and am a member of the IIAC Chamber of Arbitration. They have excellent rules, but admittedly, doing so is quite easy because all you need to do is to study the rules published by various bodies, and you come out with your own set of rules; MCIA will come out with its own set of rules soon for consultation. So, firstly, excellent rules.

Secondly, some institutions have decent, good infrastructure. I mean, the DIAC has exceptionally good infrastructure. For example, they do many more cases than any foreign institution does. DIAC conducts a hundred cases a day. You talk about SIAC and LCIA; they do 400–500 a year. I don't know the exact number.

So, our institutions have a lot of positives. I think the lack, if at all, is, so far as the panel of arbitrators is concerned. You also have very good people manning some of these institutions. So, you have people who have experience abroad as well, as in India, being party to these institutions. So, I don't think the problem is really with the structure or the infrastructure; it's with the human capital. It's just a question of convincing users that the system here is very good, and then there's, of course, the elephant in the room, which nobody talks about.

Many people go to foreign arbitration because they don't want to subject themselves to a court challenge here. That's not within any institution's power, though the Draft Bill does suggest a route of appellate tribunals;[29] we had suggested that in the expert committee. There was a long debate as to whether you can do that, what its reality is, and what its legitimacy is, but I see that the government has picked up that part of our recommendation.

Ranak Banerji: Right, sir, so if I were just to delineate it, it is more about human capital, but our institutes do have the structure and the infrastructure, too.

Gourab Banerji: I don't think there's any difficulty on that part. We have homegrown transcription services, which are world-class; we have individuals who are world-class, and we have the infrastructure. I can see some of it is lacking, but it will be pretty much there. I mean, it's just a question of investing some more money. But I think the real issue is still who the arbitrators are and, more importantly, how you can get out of court interference.

C. OFFICE MEMORANDUM OF THE MINISTRY OF FINANCE DISCOURAGING ARBITRATION

Ranak Banerji: Right, sir; thank you so much for the answer. Moving on, sir, from the point of institutional arbitration, it has to do with one very important domestic development, which a lot of international commentators have also picked up on. That is the Office Memorandum ('OM') by the Ministry of Finance,[30] which was circulated where it disincentivised PSUs from entering into contracts for arbitration where the claim value of the dispute was above INR 10,00,00,000. And, if I recall correctly, the OM recommended more consensual forms of dispute resolution, such as mediation,[31] in line with the recently passed Mediation Act.[32] However, this particular OM has been severely criticised for increasing or potentially increasing litigation in high-value claims later, and it has been short-sighted for the

[29] *See* the Draft Arbitration and Conciliation (Amendment) Bill, 2024, §26.
[30] Ministry of Finance, *Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement*, Office Memorandum No. F. 1/2/2024-PPD (Issued on June 3, 2024).
[31] *Id.*, ¶7(iv).
[32] The Mediation Act, 2023.

government to dissuade PSUs from entering into arbitration agreements.[33] So, we wanted your opinion on whether these commentators are correct: Would it increase litigation, would it be worse for the government in the long run, or rather optimistically, would it be better for mediation and consensual forms of dispute resolution?

Gourab Banerji: So, as you have mentioned, each and every arbitration practitioner has criticised this OM, but I think we need to take two steps back to understand why this OM was issued and what the way forward is. This OM was issued during a period when a number of adverse awards suffered by the government ran to very large sums. Now, this, in a sense, has happened because of §29A of the Act,[34] where otherwise arbitrations used to linger for many years; now, with the reforms, you have awards coming thick and fast. Obviously, there are awards that are worthy of being set aside as well, but I think if you look at the OM, it was effectively a knee-jerk reaction by the Ministry of Finance. It was not issued by the Law Ministry; it was issued by the Ministry of Finance.

I think many within the other branches of the government, though they may not admit it, were blindsided as well. They really didn't know what had happened. But, once the government does something, it tends to defend it. The ABI has put up a very strong representation. We are trying to understand how to go about this, but I mean, the reality is that the government has genuine concerns. There are problems within the system. I think it's an overreaction, and I think the solution here has to be more nuanced than just saying withdraw the OM because that's not how the government works. Once you put in something, you don't switch it over.

I also think that what one hears from the government is that they had a few good results in mediation, but the industry has taken it very badly. Forget about arbitration commentators; the industry has taken it very badly; large players in the industry are really disappointed because, for them, when they go and sign up on tenders, there is no arbitration clause now. There will inevitably be disputes three to five years down the line. You will not get relief from the commercial courts because they are overburdened. Then what is the solution?

Mediation may not solve such problems. There are some aspects that can be mediated, and it's very difficult to mediate when the government is concerned, and large sums of money are involved. This may even encourage extra-constitutional means. What is the answer? So, I think once the government is persuaded that this may not be such a good solution, then some via media will have to be worked out. I don't think one can challenge this OM in court. I am not sure if one would succeed if they did. We have to get around this in some fashion. Karnataka has also, I think, brought in a similar OM. Having said all this, there are genuine concerns in government. I hear a lot of senior lawyers from the government who feel that the problems within the system also need to be addressed.

Ranak Banerji: Right, sir, so you said that these senior lawyers point to certain problems in the system. Could you give us a few examples of these problems?

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[33] Nandakumar Ponniya, Ashish Chugh & Nicholas Tan, *India*: *To Arbitrate or Not? New Guidelines for Arbitration and Mediation in Contracts for Domestic Public Procurement*, BAKER MCKENZIE, July 2, 2024, available at https://insightplus.bakermckenzie.com/bm/dispute-resolution/to-arbitrate-or-not-new-guidelines-for-arbitration-and-mediation-in-contracts-for-domestic-public-procurement (Last visited on January 1, 2025); Mani Gupta & Pranav Malhotra, *Letting The Cat Out Of The Bag? Does The Finance Ministry OM Finally Reveal Government's Mistrust Of Arbitration?*, MONDAQ, July 4, 2024, available at https://www.mondaq.com/india/arbitration-dispute-resolution/1488396/letting-the-cat-out-of-the-bag-does-the-finance-ministry-om-finally-reveal-governments-mistrust-of-arbitration (Last visited on January 1, 2025).

[34] The Arbitration and Conciliation Act, 1996, §29A.

Gourab Banerji: You see, there are systemic problems. I have appeared for the government and for many PSUs in multiple arbitrations and am aware of these systemic issues, like the lack of personnel who have moved on from public sectors once the dispute comes to the arbitration; there are issues of evidence and issues of correspondence. There are some issues where the arbitrators are perceived rightly or wrongly as pro-industry. Sometimes, serious allegations are made. One can say that you may be a bad loser, but in some cases, the allegations may be genuine. These are issues that require addressing, and I think one simple way of addressing many of these issues is to have institutional arbitration, where you have a credible institution and a credible panel of arbitrators.

II. INTERNATIONAL DEVELOPMENTS IN ARBITRATION

Ranak Banerji: Right, sir, that's perfect. Thank you so much. With that, we come to the end of our questions on domestic developments. If it is all right, I will let Nimesh take over because he has found certain international developments currently in the world of arbitration, and he would love your thoughts.

Gourab Banerji: Hi Nimesh, go ahead.

A. IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION

Nimesh Singh: Morning, sir; thank you, Ranak. Sir, with the introduction of the recent changes to the International Bar Association ('IBA') Guidelines on Conflicts of Interest in International Arbitration ('IBA Guidelines') that were introduced earlier this year,[35] we had a few questions. Sir, since a majority of Schedules 5 and 7 of the Act have been inspired by the IBA Guidelines,[36] we find that there is no "Non-Waivable Red List" equivalent in the Act, but features very prominently in the IBA Guidelines.[37] With the proviso to §12(5) of the Act, do you think unfettered party autonomy is being allowed to waive off any conflict with arbitrators in line with larger international practice, or do you feel that a non-waivable schedule will be required at some point in the future within our arbitration process?

Gourab Banerji: This is a much more difficult question than what I was being asked earlier. I think we had a bit of a discussion on this, but it is not reflected in the expert committee recommendations.[38] I think the question here is more about how often you can amend the law, and one thought was that instead of putting this schedule, one could have it by way of notification because IBA continuously revises its guidelines. After all, they are only guidelines; they are soft laws, just by way of interest.

The person who is currently chairing the IBA Arbitration Committee is Chiann Bao, who is a very well-known arbitrator. She and I were having a discussion over coffee in Singapore, and she was really impressed by the fact that India had actually put this in the statute. They are showing off this development to various other countries and hoping that they will do the same. But to answer your question, I think one can always tweak the list and have a "Non-Waivable Red List", but the reality is, if somebody under the proviso to §12(5) of the

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[35] IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024).
[36] The Arbitration and Conciliation Act, 1996, Sch. V & IV.
[37] IBA Guidelines on Conflicts of Interest in International Arbitration, 15–16 (May 25, 2024).
[38] DR. T. K. VISWANATHAN COMMITTEE, *Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996 to Make it Alternative in the Letter and Spirit* (February 7, 2024).

Act agrees with open eyes, then he agrees. It is a very thin balance between party autonomy and due process.

So, then, where do you draw the line? We've drawn the line at a particular point. The IBA Guidelines draw it at a slightly different point. It's a matter of policy. And I think we don't really need to tinker with it at the moment. It's not such a big development that requires a complete adoption. It will require an amendment to the schedule, so there's always that issue.

Nimesh Singh: Thank you so much, sir. On a related point, the IBA Guidelines have a "Green List" to provide illustrations as to what is not considered a conflict or what is not a situation that warrants disclosure by arbitrators or potential arbitrators.[39] Do you think incorporating a similar list within our schedules would once again help India, particularly with respect to potentially reducing the number of applications to arbitrator challenges that our courts currently receive?

Gourab Banerji: I am completely against the "Green List". I think it is really now that the culture is just to disclose. The idea is that the arbitrator should disclose, even if he thinks it's fine. So, as I sit as an arbitrator, if there is any whiff, you should disclose. I mean, after all, you're substituting for a judicial authority. So, there are enough guidelines around what I don't want; I don't think you should have a separate green list in our schedule. As an arbitrator, one knows what one is required to disclose, and unfortunately, many of our arbitrators do not treat disclosure under §12 of the Act seriously. It's a real problem because disclosure under §12 of the Act is not merely due to conflicts but also to availability and time.[40] That is something that arbitrators completely ignore, and that's a real problem. So, in short, I am not a "Green List" fan.

Nimesh Singh: That makes sense. I think promoting a culture where disclosure takes priority is indeed important for an arbitrary landscape, which brings me to my final question on the IBA Guidelines, with a particular emphasis on a recent amendment that it makes. One of the key changes that 2024 introduced was replacing "law firm" with "law firm" or "employer" when discussing potential relationships between arbitrators and the parties or counsel. This modification, in the view of a lot of commentators, reflects the changing natures of employment structures within the law itself, once again, on related lines: do you think similar changes should be incorporated in our schedule to reflect this changing international practice?

Gourab Banerji: I don't think it's really necessary because I think if you are employed by somebody, you should pretty much disclose. The highlighted change is really in the context of large international law firms, large international setups with multiple group companies, and such. So, I think our arbitrators, domestically, are not at this level of sophistication. So, I don't think this deserves a tweak at the moment. I think we can wait for a few more iterations of the IBA Guidelines and then think of tweaking it.

B. SIAC RULES 2025

Nimesh Singh: Yes, that makes sense. Thank you, sir. This now brings me to the next element within international developments that we wanted to cover. This is the Seventh Edition of the SIAC Rules ('SIAC Rules') that are intended to take force from January 1, 2025.[41] SIAC Rules, like most other international arbitral rules, also provide for provisions on

[39] IBA Guidelines on Conflicts of Interest in International Arbitration, 19 (May 25, 2024).
[40] The Arbitration and Conciliation Act, 1996, Sch. V.
[41] The Arbitration Rules of the Singapore International Arbitration Centre, 2025.

emergency arbitration, which has also been given judicial recognition in India. A significant update that the 2025 rules seek to make is the introduction of protective preliminary orders,[42] which could potentially allow parties to file applications and obtain protective preliminary orders without notice to the other side. Do you think such *ex parte* orders would firstly, be enforceable in India? And, should a foreign party come with a foreign emergency arbitral award to India?

Gourab Banerji: So hang on now; the last portion is a little tricky. So far as the rules are concerned. I mean, this is a power that an emergency arbitrator ought to exercise in some circumstances. And I think our institutions here will also follow suit by making appropriate amendments. That's the first part.

However, more importantly, can this be enforced? I appeared for Amazon in *Amazon.com NV Investment Holdings LLC* v. *Future Retail Ltd*. ('Amazon'),[43] and we had an emergency award in our favour, which Justice Nariman of the SC said could be enforced.[44] And I think that was a very bold decision, and certainly, in the absence of a specific provision, it was a matter of interpretation of §17 of the Act. It was certainly a major step forward. So, if it is a domestic arbitration, if it is seated in India, hypothetically under SIAC Rules, which was, in fact, the case in Amazon, you had an emergency arbitrator giving an *ex parte* interim order. I would say that, in view of the judgment in Amazon, it would be enforceable under §17 of the Act.

However, if it was a foreign award or an order by an emergency arbitrator, then the situation would be much less clear. There have been some judgments where an emergency award has been brought to India and enforced. I think the last one was *Avitel Post Studioz Ltd*. v. *HSBC PI Holdings (Mauritius) Ltd*.[45] We have not yet adopted the 2006 Amendment to the Model Law in the Act,[46] which would permit foreign interim emergency awards to be enforced. So, I mean, if somebody does this, I think the answer will be then to take that *ex parte* order and file a petition under §9 of the Act and try and enforce it through that process. It should be okay. But, I mean, the whole point of that may be lost in so far as the fact that then you will obviously have to give notice to the other side.

Nimesh Singh: Indeed, sir. But sir, in the enforcement proceedings itself, how feasible, or how likely do you think the other side can succeed with the argument or, generally, how do you think the court would view this objection that this entire process of preliminary protective orders was based without hearing the other side itself?

Gourab Banerji: I, frankly, don't think that's a big problem because you can, in theory, get §9 *ex parte* orders under our Act currently. So §§9 and 17 of the Act are the same. §17 covers emergency award if you want *ex parte* relief if you made out the grounds. I don't think that simply the fact that notice was not given to the other party will be enough to displace the emergency award. Of course, the courts will look at the merits of whether an emergency *ex-parte* order deserves to be issued. For instance, if a ship is sailing away, and you want to arrest the ship, then you would obviously go for an *ex parte* order. So it depends on the facts.

Nimesh Singh: Of course, sir. So, our last question on the SIAC Rules is that many of the changes that these rules intend to make are focused on improving the efficacy and

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[42] *Id*., Sch. I, Cl. 25–34.
[43] Amazon.com NV Investment Holdings LLC v. Future Retail Ltd., (2022) 1 SCC 209.
[44] *Id*., ¶45 (per R. F. Nariman J.).
[45] Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2024) 7 SCC 197.
[46] UNCITRAL Model Law on International Commercial Arbitration (Amendment), 2006.

transparency of arbitration. So, in your view, what are some key takeaways that perhaps our domestic institutional rules could get from this changing international landscape? Or do you think that from a rule perspective, our institutions are doing just fine?

Gourab Banerji: From a rule perspective, see, this is like a race. Every time an institution comes out with some innovation, the other institutions then put it in. And that's true for our domestic institutions also. So, it's a question of incremental improvement. If you look at the SIAC rules, I mean, what have they got? They've got the usual; I wouldn't say usual, they've got expedited procedure, they've got the summary procedure, they've got different sorts of procedure, which our domestic institutions are now contemplating as is it something we can emulate. These are all innovations with a view to persuade parties to sign up to the rules. So, they are obviously consumer-specific.

So, if you, as an Indian institution, are offering a similar bouquet of rules, then obviously, it will be a plus point in the overall landscape. The SIAC Rules, obviously, have been publicised with great fanfare. MCIA is now, I know, in the process of revamping its rules. I'm sure a lot of these rules you will see in the MCIA setup, IIAC, and the AIAC, which regularly update their rules. This is, as I said, just a way to attract consumers towards your institution, and so we should, as domestic institutions, obviously, look at this carefully and incorporate as much of it as is relevant to our Indian scenario.

III. ARBITRATION BAR OF INDIA

Nimesh Singh: Right, sir. Thank you so much. This brings me to the question of institutions in your role as the president of the ABI.[47] Sir, we would be very grateful if you could please let us know the role and vision of the ABI, particularly what your role as President of the ABI has been so far.

Gourab Banerji: The idea was that, and this was something that was being discussed for a long time, there is a need for a specialised arbitration bar. We have improvements in the legislation. The courts are much more pro-arbitration. Infrastructure has improved dramatically. So, all that was really left in the puzzle was human capital, and the idea was to have a professional, specialised bar that would focus on arbitration. The idea is basically to have to, not to restrict it to a select few in the metros, but to have more tier two and tier three cities being involved, generally, in promoting arbitration domestically.

I think we need to focus on our domestic markets instead of being seduced by international commercial arbitration. So that's really the mission. And the idea here is we are now, and the main point is it's now been set up. We have the Attorney General and the Solicitor General of India as patrons, and it's good that the government is also involved in some fashion; after all, they are one of the main users of arbitration. The idea is to have the younger generation think about this as a career. We've had one session in Bombay. We are planning on having events in maybe Bangalore, Hyderabad, etc., just to understand what it is that people want from us. Then, we will decide what is to be done, maybe focus on some degree of ethics, some standards, and some lobbying to have the government introduce better arbitration laws and practices. That's the idea.

[47] ARBITRATION BAR OF INDIA, *ABI Council*, available at https://arbitrationbarofindia.com/abi-council.php (Last visited on January 1, 2025).

IV. CAREERS IN ARBITRATION

Nimesh Singh: Thank you so much, sir. So now we have a few brief questions on careers and arbitration. Over to you, Ranak.

Gourab Banerji: Not so brief; according to me, this is the most important part of this discussion.

Ranak Banerji: Right, Sir. Thank you so much. As you stated, the ABI is looking to promote arbitration domestically, and that, too, for the younger generation. So you just want to generally ask if there are any opportunities for students that we can see being offered by the ABI, opportunities to interact, opportunities to intern, etc.

Gourab Banerji: So we've not really formulated anything with the ABI as of yet, but there are a lot of arbitration practitioners who are very keen to pass on their knowledge and their expertise to the younger generation. I mean, I receive multiple inquiries on a daily basis. But there are a lot of opportunities. At the ABI, we are setting up a separate committee to look into what can be done in terms of education and training. So we'll have to see where that goes

Ranak Banerji: Right, sir. And so on the point of these multiple opportunities in arbitration, we see that often, as a law student, we are faced with these confusing choices of whether we want to intern at a counsel's chambers, whether we want to join the disputes team of a law firm which practices arbitration, or whether we want to join a policy research cell which may be conducting research on arbitration. It can become confusing for us to pick between these, so would you have any suggestions or recommendations as to what each category may have to offer and how we should go about sorting between these multiple opportunities?

Gourab Banerji: I think that there cannot be a simple answer to that. It depends on your inclination as an individual. Some people might like litigation. Some people may like policy. I think you have to dip your toes into every possible opportunity and see whether it works for you. And why arbitration? At the stage where one is a student, despite this being an era of specialisation, I actually think that young students are thinking of specialist careers far too early in the day. I think it's much more important that you have a general, well-rounded understanding of what is going on rather than immediately setting yourself up as an arbitration lawyer. So I would say that quite apart from the three that you mentioned, you should look much wider, at least till you graduate, try everything, criminal, civil, whatever comes your way, and then pick what you think you like.

Ranak Banerji: Right, sir, that makes complete sense. Then just a question on pursuing these careers after graduation, because a lot of our scholarship are penultimate and final year law students. What we have seen is that India, currently as a jurisdiction, lacks any very strong practice in investment arbitration, and we don't really hear too much about this particular field. However, due to our moots and competitions, we have been exposed to this area of law and may be interested in it. Recently, I came across this one article in which you were appointed as a nominee arbitrator in the *CTF Holdings S.A.* v. *Ukraine* arbitration.[48] So,

[48] CTF Holdings S.A. v. Ukraine, ICSID Case No. ARB/24/35; BAR AND BENCH, *Gourab Banerji Appointed Nominee Arbitrator in CTF Holdings SA v. Ukraine BIT Arbitration*, October 29, 2024, available at https://www.barandbench.com/news/gourab-banerji-appointed-nominee-arbitrator-in-ctf-holdings-sa-v-ukraine-bit-arbitration (Last visited on January 1, 2025).

then, the question that arises is how does an Indian law graduate go about involving themselves in the world of investment arbitration.

Gourab Banerji: So I have a very, shall we say, jaundiced view of investment arbitration. Though I've been nominated and have represented the Republic of India in investment arbitrations, I think that there is a glamour element to it because it is an intersection of arbitration and public international law. So, it suits both fields, but the number of ongoing investment arbitrations is quite limited. So when you hear from people that they are specialists in international investment arbitration, one question you should always ask is, how many have you actually done, and you will find, to your surprise, that the answers may be either in single digits or zero.

So, my thinking here is that one should think long and hard before super specializing. This is almost like a surgeon specialising in just the hand. I mean, there are surgeons I know in the US who just do that. So yes, it's a very interesting area. There are a number of courses, a lot of which teach investment arbitration, and some here as well. But if you want to be a specialist in Indian investment arbitration, there may be ten lawyers in India who have done this. And really, if you want to do this, then, unfortunately, the firms that really do it are essentially English, European, or American. That's where it is. But frankly, I would not think that it's something that you should absolutely specialise in at this stage of your career. That's a personal view.

Ranak Banerji: Sir, with that, we are at the end of our interview; thank you so much. I thank you for the brilliant time; we learned so much. Thank you so much.

Gourab Banerji: It went off well; thank you.