ARBITRATION V/S. LITIGATION

By V.K. Ramabhadran

(1) In the ancient times in India there existed a system of Arbitration. It was in the form of Panchayat presided over by a Sarpanch. Although the word **"**Panch**"** in Sanskrit implies "five" there has been instances where Panchayat has been comprised even with eleven Judges. Respectful people from the villages were elected as **"**Panchas**"** and therefore the villages accepted in the fear of being excommunicated from the community.([1]) It is noteworthy to recall the words of Amberson Marten the then Chief Justice of Bombay High Court who commented thus:

"It (Arbitration) is indeed is a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer a matter to a panch is one of the natural ways of deciding many a dispute in India". ([2])

(2) Arbitration gives parties freedom of choice in choosing persons having the professional expertise with high integrity. Parties themselves can choose to nominate anyone of their choice or through the mechanism of trade Associations if the dispute pertains to one of such trades or through the mechanism of institution of Arbitration. Freedom of choice for the appointment of whom they consider to have a sound professional knowledge, whom they consider to be the person of integrity and who would abide with the principles of fair play, equity and justice. In most of the countries in so far as the domestic arbitration is concerned, it is

governed by statutory enactments permitting for appointment through Court in case one of the parties fail to appoint an Arbitrator or in case the institution fails to appoint such an Arbitrator. Any dispute which ultimately decided by persons of their choice is generally accepted by the parties in as much as they have full faith and confidence on the ability of the Arbitral Tribunal.

(3) Arbitrators having vast experience in the chosen field often grasp the issues quickly and are generally familiar and conversant with the customary usage of the trade. The witnesses demeanour is taken note of and in view of the continuity the Tribunal get to know of the parties as the case develops through the pleadings.

(4) Arbitration could be conducted in different ways. Unlike Court proceedings, where one has to follow a set of procedures mandatorily; Arbitration permits the parties to choose such procedures of which they are comfortable. **"**In procedural matters an Arbitral Tribunal is ultimately the servant of the parties even when they have chosen a set of rules that confer power on the Arbitral Tribunal to determine the procedures" ([3]). **"**If parties want "fast track" Arbitration they may have one. If they want to dispense with the disclosure of documents or evidence of witnesses they may do so. Indeed they may dispense with the hearing itself if they wish it.**"** ([4]) There is ample flexibility in the breadth and width of the procedures followed in Arbitration. Parties are entitled to dispense with the oral evidence by consent. There is no lengthy process of discovery in as much

as these are fairly short, quick and informal. "Procedures can be adopted to fit the dispute rather than the dispute being made to fit the available procedures".([5])

(5) Arbitrators though appointed by the parties do not represent the party themselves. Further before accepting the appointment in most jurisdictions the Arbitrator is supposed to disclose any interest which would have a bearing on the case in hand. Upon disclosure of interest if any of the parties object the concerned Arbitrator must recuse himself and even after raising objection for his removal if such an Arbitrator does not withdraw, aggrieved party is entitled to take recourse through the Judicial Forum. Generally in most of the common law jurisdiction, Judicial Forum would remove an Arbitrator if after making an assessment of the relevant circumstances come to the conclusion that there is real possibility of bias.([6]) Thus parties have confidence that the Tribunal which would ultimately adjudicate the disputes would do so in an impartial and in a fair manner. Failure to disclose interest by an Arbitrator would per se be perceived as evidence of partiality regardless of whether the actual bias was established. It is immaterial whether such disclosure leads to a biased opinion in favour of one party.

(6) In most jurisdiction, either the Arbitral Tribunal or the Judicial Forum or both have powers to secure the amount in dispute or to pass such interim orders so that status quo is maintained, pending the adjudication of disputes by the Arbitral Tribunal. Thus the interest of the Claimant is

secured so that subsequent to the Award the Claimant is in a position to enforce the Award successfully. In India, both the Arbitral Tribunal and the Judicial Forum have powers to pass such interim orders to secure the interest of the Claimant in case of domestic Arbitration. Even in case of International Commercial Arbitration where the seat of the Arbitration is outside India, as long as the arbitration agreement does not oust the application of the domestic statute of India interim orders securing the interest of the Claimants is granted by the Judicial Forum. Even in case of a maritime claim, Courts have upheld the rights of the parties to arrest the vessel pending disputes being adjudicated by the chosen Arbitral Tribunal in a foreign country. Such a power though not so expressly provided in the statute, the High Court of Bombay has followed the decision of Rena K ([7]) of the English Court and also the principles enunciated in the Arrest Convention, 1999.

(7) Arbitration proceedings in both domestic and international are essentially private and confidential unlike litigation in Courts. Arbitration proceedings are not open to public. No person other than the parties and the legal advisors and the witnesses if any are entitled to remain present through any arbitration proceedings. This gives the parties a sense of confidentiality that “dirty linen may be washed but it can be washed discreetly and not in public”. “The informality attached to a hearing held in private and the candor it may give raise is an essential ingredient of Arbitration”. ([8]) English Courts have affirmed the confidentiality of the

Arbitration process. In an action in English Court where the disclosure of documents produced in Arbitration was sought, it was held thus:

"As between parties to an Arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment be some implied obligation on both the parties not to disclose or use for any other purpose any documents prepared for and used in the Arbitration or disclosed or produced in the course of Arbitration or transcripts or notes of evidence in the Arbitration or the Award and indeed not to disclose in any other way what evidence had been given by any witness in the Arbitration - save with the consent of the other party or pursuant to an order or leave of the Court. That qualification is necessary just as it is in the case of the implied obligation of secret between the bank and the customer. (**9**)

(8) The grounds of challenge are normally limited**:** that the arbitration agreement itself was not valid under the law to which parties are subject to or that the Tribunal has failed to follow the principles of natural justice or that the Tribunal has decided the disputes not submitted or not contemplated within the terms of agreement or that the Tribunal's award is contrary to the public policy of that country. Courts in case of challenge to arbitration award do not deal with merits of the case and do not re-appreciate the evidence. When a domestic Award is challenged, the role of Courts is generally supervisory in as much as the power to review vest with the Court only to ensure fairness. Intervention of the Court is envisaged in few circumstances only: fraud or bias by the Arbitrators,

violation of natural justice, etc. The Court cannot and will not correct errors of the Arbitrators. It can only quash the Award leaving parties free to begin Arbitration again if it is desired. The Arbitral Award could be set aside only if it is contrary to fundamental policy of law, justice or morality or if it is patently illegal or arbitrary. However, the Court has held that such patently illegality must go to the root of the matter. The public policy violation indisputably should be as unfair and unreasonable as to shock the conscience of the Court. What would constitute public policy is a matter depended upon the nature of transaction and nature of statute. ([10])

(9) The Award is rarely set aside except on limited grounds. Thus there is a finality of the Award and quick resolving of the dispute between the parties. In most jurisdictions parties are not entitled to enter into any agreement which would expand the scope of challenge to an Award than what is provided under the domestic statute. I however, understand that some of the circuit Courts in New York seem to have upheld the rights of the parties to expand the judicial review of the arbitration award.

(10) However, there is some limitation imposed upon the parties as there are quite a few non-arbitrable disputes. Notable among them are:

"(i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; and (v) testamentary

matters (grant of probate, letters of administration and succession certificate);"([11])

(11) Question then remains as to what is the role of Courts in case of disputes arising between the parties who have entered a valid arbitration agreement. Lord Mustill describes in a striking manner the relationship between the Courts and Arbitral Tribunal thus:-

"Ideally the handling by the Arbitrator of disputes should resemble a relay race. In the initial stages before the Arbitrators are seized of the disputes, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the Arbitrators take charge they take over the baton and retain it until they have made an Award. At this point, having no longer a function to fulfill the Arbitrators hand-back the baton, so that the Court can in case of need, lend its coercive powers to the enforcement of the Award**"**.

(12) International Commercial Arbitration is a way of resolving dispute which parties choose themselves, it is private, it is effective and in most parts of the world it is now generally accepted method of resolving the international business dispute.([12]) Parties have freedom to choose choice of law. In today's world, in very large number of commercial contracts parties from different countries and different nationals are involved. Right at the outset, parties could decide the choice of the venue, the choice of substantive law. The venue itself could be a neutral place. The curial law would

always be the law which prevails at the seat of the Arbitration though the substantive law may be quite different. In case of International Arbitration, the very fact, more often than not the place of seat of Arbitration is in a neutral territory gives parties comfort level rather than being unnerved by one of the parties litigating in its own country.

(13) If there is no agreement to arbitrate, one of the parties, in case of a dispute would commence litigation in the country in which the company is carrying on business and the other party would likewise commence litigation in its own country. This would involve stay of one of the proceedings and that would again depend upon the domestic law of respective country. By the time one of the proceedings is stayed, there would be huge expenses incurred towards the costs of litigation. The procedures may or may not be the same in both the countries. Faced with such a scenario the parties are often frustrated with prolonged litigation and at the end of the day even if one party is successful it is unable to enjoy the fruits of the success in as much as the process of enforcing and executing the decree is extremely cumbersome. If there is no reciprocal arrangement between countries, the judgment pronounced by a competent Court adjudicating the disputes between two litigating parties, is not binding and final in the country where the losing party is carrying on business. Even if such reciprocal arrangement exists, nevertheless the foreign judgment is open to challenge on the grounds: that the Court which passed the judgment was not a competent Court, or that the foreign Court decided the issues contrary to the domestic law of which the

unsuccessful party was subject to, that the procedures adopted by the foreign Courts are against principles of natural justice or that the judgment has not been given on the merits of the case or that the judgment has been obtained by fraud.

(14) In case of an Arbitration once the Award becomes final at the seat of the Arbitration, in that the unsuccessful party having challenged and failed or the time for challenging the Award has expired, the successful party is entitled to enforce the Award against the assets of the losing party in any country wherever the asset is. The only caveat is; that the country where the enforcement is sought, ought to have ratified either the New York Convention or the Geneva Convention on the enforcement of Foreign Award. The challenge to the Foreign Award could only be made on limited grounds: that the Tribunal lacked jurisdiction as there was no valid arbitration agreement or the Tribunal violated the principles of natural justice or the Tribunal adjudicated such disputes which was beyond the submissions of disputes to Arbitration or that the Award was contrary to the public policy of the country where the enforcement is sought.

(15) A narrow meaning has been given to the term "public policy" when Foreign Award is sought to be enforced as the Award had attained finality. A foreign Award by definition is subject to double exequatur. In this context it is apposite to quote. Lord Mustill on Commercial Arbitration has stated thus:-

”Mutual recognition of Awards is glue which holds the International arbitrating community together, and this will only be strong if the enforcement Court is willing to trust, the (New York Convention on Enforcement of Foreign Award) assumes that they will trust the supervising authorities of the chosen venue. It follows that if, and to the extent that the Award has been struck down in the local Court it should as a matter of theory and practice be followed when enforcement is sought as if to the extent it did not exists”.

(16) Thus is the local Court which is in control of seisin of the proceedings. It is the local Court which would decide on the legal challenge to the Award and thus when the legal challenge fails and it attains finality the scope for challenge of such an Award in a country where the successful Claimant is seeking to enforce the same is very limited.

(17) Lastly an important aspect in support of the Arbitration is the costs factor. The procedure itself is shorter. Technicalities of the Court procedures are dispensed with. Parties having agreed to abide by their own chosen method of procedures, the arbitration process is completed within a short span of time. This in turn reduces the legal costs.

(18) A Claimant, in absence of any Arbitration agreement and in absence of an agreed choice of Judicial Forum is obliged to take recourse to the Courts of the Defendants home country where he is carrying on business. Such a Court would be alien to the Claimants in every sense of the word. The

Claimants would not be familiar with the procedures and practices. The Claimants would not be accustomed to foreign language. Then the difficulty in choosing the right set of lawyers to represent the member faces innumerable difficulties in terms of translation of documents, costs involved in witness action and the attendant difficulties which may raise due to language barrier. Lastly the Courts in the Defendants country may or may not be accustomed with the International Commercial transactions and may not be adequate to deal with them. That apart the litigation in several of the developing countries takes a long period of time with the result the entire process and litigation itself become infructuous.

(19) Having discussed several points in favour of Arbitration it is not entirely without any drawbacks. Success of any system would largely depend upon the quality and capability of persons who are appointed as Arbitrators. In most jurisdiction Final Awards of the Arbitral Tribunal could never be impeached on merits in as much as the court would not examine the evidential value threadbare and thus the decision of the Tribunal become virtually final. There is virtually no scope for review. So also in case of series of chain of contracts, viz. disputes under a charter-party between a ship owner and a time charterer on the one hand and the time charterer and the voyage charterer on the other, the proceedings may or may not be consolidated and tried together with the result two Arbitral Tribunals could come to a diametrically different conclusion. Moreover, if one of the parties in such a situation is not party to arbitration agreement, such other party would take recourse to Judicial Forum. However, if no

arbitration agreement exists between the parties, courts would have consolidated all the suits between all the parties together and thus would have avoided conflicting decisions.

(20) There have been occasions when one of the parties file legal proceedings in Court and the other party may seek stay of the suit on the ground that there exists a valid Arbitration agreement between the parties. Such issue could arise either in case of domestic Arbitration or in case of International Commercial Arbitration where the seat of the Arbitration itself is held in a different country. In case of domestic Arbitration Courts have decided the issue finally and the Arbitral Tribunal is not called upon to decide such issue. However, in case of an International Commercial Arbitration where the seat of Arbitration is held outside the country, the Supreme Court of India has held that any application if made to the Court seeking stay of the suit when the Claimant, instead of proceeding with the Arbitration has initiated legal proceedings in the domestic Court, it was held that the Court has to decide the issue "after arriving at the prima facie satisfaction that there exists an arbitral agreement which is not null and void, inoperative or incapable of being performed". That appears to be the view of the Swiss Court, the French Court and Hong Kong Court. The Court however, held that the issue as to whether there exists a valid Arbitration agreement could be re-agitated again after the successful Claimant files the Award and seeks its enforcement. ([13]) However, under the English Arbitration Act the Court is empowered to rule on the issue of jurisdiction with the

agreement of the parties or if the parties do not agree, with the consent of the Arbitral Tribunal. ([14]) The American approach also favour traditional approach of final review by the Court. ([15]) Thus there appears to be divergent views by the Courts of different countries.

(21) In case of International Commercial Arbitration where the seat of Arbitration is held in a neutral country, the applicable substantive law and the curial law are often not without any difficulties specially if the Arbitration Agreement itself do not expressly state the applicable law. Recently the High Court of Delhi (India) had to deal with a complex issue wherein under the Arbitration agreement the juridical seat was in Kuala Lumpur though the Arbitration itself was held in London and both the litigating parties were from India. Union of India (UOI) as the owner of natural resources including the Petroleum entered into a Production Sharing Contract (PSC) with the consortium of four companies including Videcon Petroleum Limited (VPL). The relevant clauses of PSC are reproduced below:

33.1 Indian law to govern subject to provisions of Article 34.12, this contact shall be governed and interpreted in accordance with the laws of India.

34.12. The venue of sole expert Conciliation or Arbitration proceedings pursuant to this Article, unless the parties otherwise agrees shall be Kuala Lumpur , Malaysia and shall be conducted in English language…….. Notwithstanding the provisions of Article 33.1, the Arbitration Agreement contained in this Article 34 shall be governed by the laws of England".

Dispute arose between the parties and PSE. Arbitration case was registered before the Arbitral Tribunal at Kuala Lumpur and fixed for hearing. However, before the hearing could take place Malaysia was hit by outbreak of epidemic SARS. Accordingly after consultation and keeping in mind the convenience of all concerned and to ensure that the proceedings were not delayed, the Tribunal held sittings at Amsterdam in the first instance and later the parties agreed to shift the seat of Arbitration to London. The Tribunal passed an Award in March, 2005 and the unsuccessful Claimant challenged the Award before the Malaysian High Court. The Defendants being UOI challenged the partial Award before Malaysian High Court for setting aside the Award. VPL sought to question the jurisdiction of Malaysian High Court on the ground that "the seat has shifted to London". Since further proceedings in the matter were to take place and since the epidemic in Kuala Lumpur was over UOI requested the Tribunal to hold the hearing in Kuala Lumpur being the juridical seat of Arbitration which was opposed by VPL. The Arbitral Tribunal decided that further sitting be held at London from June, 2006 to July, 2006. UOT aggrieved by the Tribunal's order filed legal proceedings in India seeking a declaration that "seat of Arbitration is Kuala Lumpur". In the meanwhile, the High Court of Malaysia dismissed UOI partial challenge to the Award on the ground that "the seat of the Arbitration has been shifted to London". UOI filed a notice of Appeal in Malaysia. In the meanwhile the local Court in India decided in favour of the Plaintiffs by holding that seat of the Arbitration is Kuala Lumpur. Against the said decision VPL filed an Appeal before the Supreme Court of India. While the Petition was pending before

the Supreme Court of India, VPL filed a claim Petition before the High Court of Justice, Queen's Bench Division Commercial Court London. VPL however, did not disclose this fact before the Hon'ble Supreme Court of India. While the matter was pending before the Supreme Court UOI was served with notice of claim Petition filed by VPL before the London Court. UOI brought to the notice of the Supreme Court of India by contending that the question whether the seat of Arbitration continued to be Kuala Lumpur or the same has been shifted to London has to be decided by the Supreme Court. UOI also filed similar application before the Court in London by pointing out that the London Court did not have jurisdiction to hear the claim juridical seat and they further contended that they were not submitting to the jurisdiction of England and Whales. In May 2011 Supreme Court of India held that "mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and then to London did not amount to change in the juridical seat of Arbitration and negated the contention of VPL that the seat of Arbitration has been shifted to London. The Supreme Court so held by taking into account Section 3 of the English Arbitration Act, 1996 which defines "seat of Arbitration means juridical seat of Arbitration" which could be designated by the parties to the Arbitration. However, the Supreme Court dismissed the Petition filed by VIL by holding that Indian Court has no jurisdiction since under Article 34.12 the Arbitration agreement was to be governed by the laws of England. Subsequent to the decision rendered by the Hon'ble Supreme Court of India, UOI through correspondence called upon VPL to withdraw the proceedings filed by them before the English Commercial Court.

However, VPL declined to withdraw and therefore the Solicitors wrote: Any legal issues arising from the judgment of the Supreme Court of India are matters for English Court to determine at the hearing". In view of the position adopted by VPL, UOI filed legal proceedings in the High Court of Delhi for a declaration that perpetual injunction to restrain VPL from pursuing the claim in London in relation to the issue which according to UOI was finally determined by the Supreme Court of India. The Hon'ble High Court of Delhi by its Judgment delivered on 5th March, 2012 (**16**) has restrained VPL from proceeding with their application in the Commercial Court in London. The matter rests there. I do not know whether, despite the order of injunction VPL has proceeded with their application before the Commercial Court in London and whether VPL has simultaneously challenged the order passed by the High Court of Delhi before the Court of Appeal.

(22) The Judgment of the High Court of Delhi is not without any precedence. Way back in the year 1987 wherein in case of a domestic Arbitration resulting in an Award in India the successful Claimants being Weston Company (**17**) of North America sought for the confirmation of the Award by filing Plaint in a District Court in USA. The unsuccessful party being Oil & Natural Gas Corporation (ONGC) (A Public Statutory Corporation at the relevant time now a body corporate) filed a civil suit in India to restrain Weston Company of North America from proceeding with the legal proceedings in USA. In an extraordinary case the Supreme Court of India

did restrain Weston Company of North America from proceedings with the Plaint before District Court in USA.

(23) In case of domestic disputes it may be debatable as to whether Arbitration or Litigation is the preferred choice of resolving disputes. It would also depend upon the efficiency and competence of the professional Arbitrators who based on their experience in resolving disputes in a professional manner would achieve reputation over a period of years. It would also depend upon how swift the Tribunal resolves the disputes and how long it takes to resolve the disputes in domestic Courts. However, in case of international transactions overwhelming view is to resolve the disputes through Arbitration. In the International context in fact there is not much of a choice left. Unlike the disputes which are resolved by the domestic Courts, there are no international Courts to resolve the disputes in an International Commercial Arbitration involving parties from two different countries of different nationals. Ultimately the choice is between the domestic Courts and the International Arbitration.

V. K. RAMABHADRAN

([1]) Law relating to Arbitration by P.C. Markanda

([2]) *Chanbasappa Gurushantappa v/s. Baslinagyya Gokurnaya Hiremath 29 BOMLR 1254*.

([3])*Commentary by Alan Redfern in law and practice of International Commercial Arbitration*

([4]) International Commercial Arbitration by Alan Redfern

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([5]) *Article 20.6 of the Rules of Arbitration of International Chamber of Commerce.*

([6]) *ASN Shipping Ltd. (India) v/s. TT MI Limited 2005 (EWHC) 2238*.

([7]) *Rena K – (1978) 1 Lloyds Report 545*

([8]) *Hassneh Insurance v/s. Steuart J. Mew (1993) 2 Lloyd 243).*

([9]) *Dolling - Baker v/s. Merrettt (1990) 1 WLR. 1205*

([10])Mcdermott International Inc. v/s. Burn Standard Company & Ors. (2006) 11 SCC 181.

([11]) *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd, (2011) 5 SCC 532*.

([12]) *Eric Robin in an Article captioned "Evaluation of International Arbitration over the past years"*

([13]) Shin-Etsu Chemical Company Ltd, v/s. Akash Opti Fibre Ltd. & Anr. (2005) 7 SCC 234.

([14]) *Fouchard Gaillard Goldman on International Commercial Arbitration.*

([15]) Complek Telecomm v/s. IVD Corp. XXII Y. B. Comm. ARB. 905

([16]) *Union of India v/s. Videcon Industries Ltd. (2012 (1)) ARB LR 416 Delhi*.

([17]) *Oil & Natural Gas Corporation Ltd. v/s. Weston Company AIR 1987 SC 675*