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JIGnyasa

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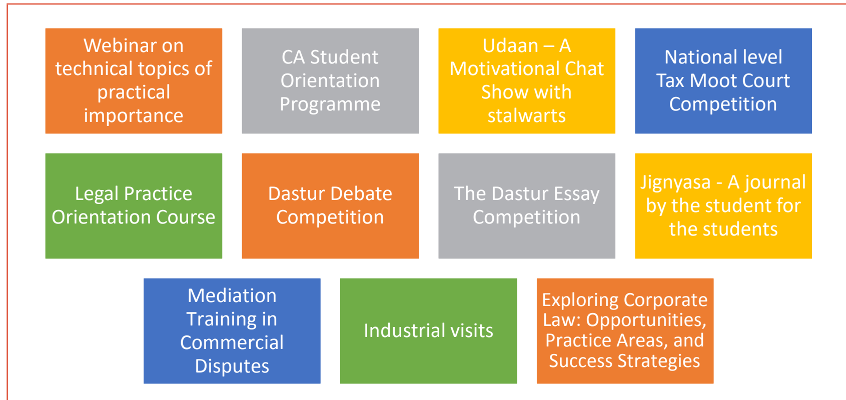

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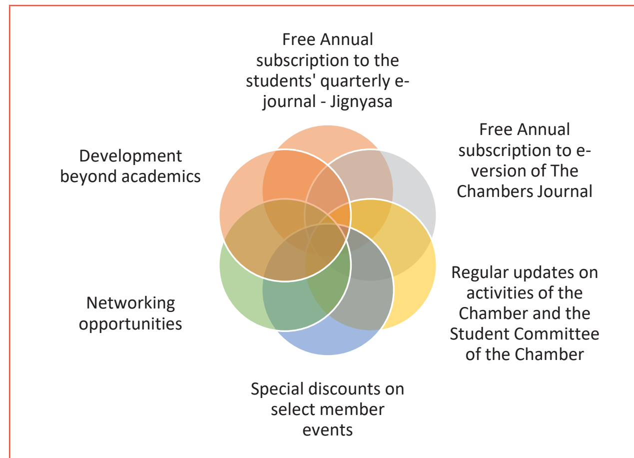

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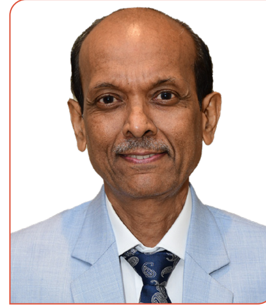

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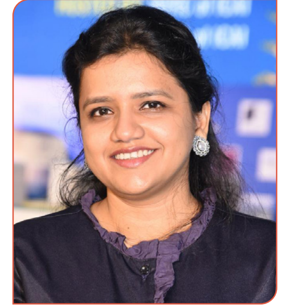

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CHARTING THE FUTURE OF ALTERNATE DISPUTE RESOLUTION: A PATHWAY FOR ASPIRING PROFESSIONALS

The landscape of dispute resolution is undergoing a remarkable transformation. The traditional court-centric approach is gradually giving way to Alternate Dispute Resolution (ADR) methods such as arbitration, mediation, conciliation, and their digital counterpart, Online Dispute Resolution (ODR). This paradigm shift offers students and young professionals in law, chartered accountancy (CA), and company secretarial practice (CS) a unique opportunity to create a niche in this evolving field.

The Future of ADR and ODR

ADR has emerged as a preferred mechanism to resolve disputes swiftly, privately, and cost-effectively. Governments and institutions globally are promoting ADR for civil and commercial disputes and in specialized areas such as tax, corporate governance, intellectual property, and cross-border transactions.

The digitalization of dispute resolution processes through ODR marks the next frontier. ODR combines the principles of ADR with technology, enabling parties to resolve disputes entirely online. With platforms offering AI-driven negotiation tools, video conferencing for mediation, and secure digital documentation for arbitration, ODR is particularly suited for a world increasingly reliant on remote interactions.

In India, the Digital India initiative and legal reforms such as the Mediation Act of 2023 signal a strong policy thrust toward institutionalizing ADR and ODR. For instance, the integration of ADR mechanisms in commercial courts and sectoral boards such as SEBI and NCLT reflects this momentum. By doing a critical analysis of a multitude of cases, ODR can start to identify the actual or possible stages at which disputes may arise so that both parties can be ready beforehand to address the problem.

The development of ODR in India is the product of several factors like fast digitization in India, the transition to online systems due to COVID, and the overburdened judiciary. The number of ODR start-ups has grown to more than fifteen in 2023 from merely three in 2018. In India, out of the total 28 states, 11 states have already conducted their Lok Adalats with the help of these ODR platforms, which has

resulted in the filing of more than 4 crore disputes. In 2020 even the RBI adopted ODR and advised Payment System Participants to incorporate the ODR system for addressing grievances and disputes.

The significance of ODR was realized further with its recognition on international platforms. A huge milestone was achieved in 2010 when the United Nations Commission on International Trade Law, in light of increasing cross-border transactions, established a working group of representatives from 66 countries to elaborate upon various aspects of ODR. International forums and organizations such as APEC (Asia-Pacific Economic Cooperation), the World Trade Organization, and the International Chamber of Commerce have also established frameworks for online dispute resolution mechanisms. One example is APEC's "e-BRAM" portal, which provides negotiation, mediation, and arbitration services. In today's era where globalization is at its peak, it is essential to take into account the necessity for effective mechanisms which can resolve cross-border conflicts. The global arbitration centres like the Mumbai Centre for International Arbitration and the London Court of International Arbitration are examples of institutionalizing such mechanisms.

Opportunities in ADR and ODR

The growth of ADR has opened diverse avenues for professionals:

1. **Mediators and Arbitrators:** Trained professionals with expertise in specific fields (e.g., taxation, corporate law) are in high demand to act as mediators and arbitrators.

2. **Institutional Roles:** ADR institutions such as the Indian Council of Arbitration (ICA) and Singapore International Arbitration Centre (SIAC) offer roles in case management, research, and procedural oversight.

3. **ODR Facilitators:** Opportunities exist in designing and managing technology-driven ADR platforms, blending legal expertise with technological innovation.

4. **Advisory Services:** Law firms and consulting companies increasingly require professionals skilled in ADR to assist clients in navigating dispute resolution mechanisms.

5. **Academic and Training Roles:** The expanding field necessitates educators and trainers to prepare the next generation of ADR specialists.

6. **Policy and Legislative Development:** Professionals with a keen understanding of ADR systems are well-positioned to contribute to legal reforms and policy frameworks such as in government think tanks like NITI AAYOG.

Creating a Niche: A Roadmap for Students

Law, CA, CS and CWA students possess a unique opportunity to contribute to and benefit from the expanding field of Alternative Dispute Resolution (ADR). To build a specialization in this domain, a structured approach is essential. First, acquiring foundational knowledge is crucial, which includes understanding key principles of ADR and familiarizing oneself with relevant statutes such as the Arbitration and Conciliation Act. To enhance your expertise in alternative dispute resolution (ADR), it is imperative to refine essential competencies such as negotiation, legal drafting, and public speaking. Pursuing specialized

courses and certifications in ADR and Online Dispute Resolution (ODR) can significantly bolster your competitive edge.

Gaining practical experience through active participation in ADR competitions, moot courts, and internships at arbitration tribunals or dedicated ADR institutions is crucial for acquiring applied knowledge. Additionally, networking is essential for career progression; attending seminars, webinars, and conferences facilitates connections with industry leaders and potential mentors.

Moreover, as ODR continues to gain traction, developing proficiency in technological tools such as artificial intelligence and blockchain has become increasingly pertinent. This expertise will ensure that emerging professionals remain versatile and competitive in the dynamically evolving landscape of dispute resolution.

Conclusion

Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) are increasingly recognized as essential components of contemporary dispute resolution frameworks rather than mere alternatives. The proliferation of complex commercial transactions and cross-border disputes necessitates a growing pool of adept professionals proficient in these methodologies. Legal scholars, Chartered Accountants, and Company Secretaries who actively engage with ADR and ODR can not only forge robust careers but also play a pivotal role in the advancement of the justice delivery system.

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The Importance of "Court" under the Arbitration and Conciliation Act, 1996

Arbitration is a method of dispute resolution that offers a faster alternative to traditional court proceedings. In arbitration, an 'Arbitrator' functions much like a judge, hearing the arguments of both parties and rendering a decision based on the merits of the case. Courts, on the other hand, often take longer time to reach judgments, making arbitration an attractive option for many.

Section of the Arbitration Act, 2015

The Arbitration and Conciliation Act, 1996 ('the Principal Act'), and the Arbitration and Conciliation (Amendment) Act, 2015 ('the Amended Act'), introduced several key changes to streamline arbitration processes in India. One significant change pertains to the definition of 'Court' under Section 2(1)(e) of the Act.

- Prior to this amendment this definition was as follows:

  "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not-include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

- Post Amendment the definition was dissected in two parts as follows:

  "Court" means—

  i. in the case of an arbitration **other than international commercial arbitration**, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

  ii. **in the case of international commercial arbitration**, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;

Explanation of Unamended Definition

As per the unamended definition, for domestic arbitration & international arbitration, jurisdiction is

vested with both district and high courts even over international arbitration matters, causing delays as lower courts were often ill-equipped to handle the complexities of such cases

Explanation of Amended Definition

As per the amended definition, for domestic arbitration, both the district court and the high court have jurisdiction. However, in cases of international arbitration, jurisdiction is exclusively vested in the High Court. Before the amendment, both district and high courts had jurisdiction over international arbitration matters, causing delays as lower courts were often ill-equipped to handle the complexities of such cases.

Rationale for the Amendment

The rationale for this amendment was to streamline the process, especially in international arbitration, where delays often occurred due to the involvement of lower courts unfamiliar with complex international disputes. The amendment aligns India's arbitration laws with global standards, positioning the country as a hub for international arbitration.

Key reasons for amending the definition of 'Court' include:

- To reduce delays in resolving international disputes.
- Lower courts are not equipped with knowledge to understand such complex international issues, where it may involve interlinking with other laws it makes difficult to understand and interpret the issue and this may be some time a time-consuming process.
- This amendment aims to meet the global standards related to arbitration and make India as Arbitration Hub.
- Amendment aimed to ensure quicker resolution, reduce judicial interference from lower courts, and enhance the credibility of India as a preferred destination for arbitration.
- Intended to centralize jurisdiction to the High Courts to ensure that more experienced and specialized judges would handle these cases.

Judicial Pronouncements which indicate change is needed for treating international disputes separately:

- The Supreme Court in the case of ***Bharat Aluminium Co. vs. Kaiser Aluminium Technical Services Inc*** **(2012) {BALCO Case}** held that arbitral proceedings held in foreign seated bench shall not apply unless agreed by both the parties. This judgment laid the foundation of High Court having autonomy of international arbitration & to reduce unnecessary judicial intervention and delays by lower courts.
- The second instance was in the case of ***Union of India vs. Reliance Industries Ltd. (2015)***, where in Supreme Court ruled that Part I of the Act, which provides for judicial intervention in arbitral proceedings, does not apply to foreign-seated arbitrations unless expressly agreed by the parties. The court emphasized the need to differentiate between domestic and international arbitration. The BALCO case clearly indicated that the role of courts in international arbitration needed to be limited to promote the autonomy of international arbitration. It laid the groundwork for the 2015 amendment, which granted jurisdiction over international arbitration to the High Courts to reduce unnecessary judicial intervention and delays by lower courts.

Conclusion

The 2015 amendment to the definition of 'Court' under the Arbitration and Conciliation Act was a necessary reform, aligning India's arbitration laws with internationally accepted standards. By centralizing jurisdiction within High Courts for international arbitration, the amendment has reduced delays, enhanced judicial efficiency, and reinforced India's position as a preferred destination for arbitration. This change is expected to foster greater foreign investment and confidence in India's dispute resolution mechanisms.

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Advocate

The Doctrine of "Waiver" under the Arbitration and Conciliation Act, 1996

Abstract

The doctrine of waiver is a legal principle that allows a party to voluntarily relinquish a known right or privilege, either through words or conduct. This principle rests on the premise that individuals or entities can choose not to enforce their legal rights, but only if they are aware of them and intentionally forgo them. In contract law, waiver can occur when one party fails to assert their contractual rights in a timely manner, thus signalling their intention not to enforce those rights. It is important to note that waiver must be clear and unequivocal, and courts often scrutinize whether the waiver was made knowingly and voluntarily.

This doctrine also has implications in constitutional law, where individuals may waive certain rights, such as the right to a jury trial or legal representation. However, not all rights can be waived, especially those that serve the public interest, such as statutory rights or constitutional protections designed to uphold justice and public order. Courts are careful to assess whether waivers undermine essential legal principles or public policy.

The idea is also applicable in a variety of other legal circumstances, ranging from litigation to statutory rights, where the deliberate surrender of a right can have far-reaching repercussions. Waiver, whether expressed or inferred, allows contracting parties to be more flexible within legal frameworks while also encouraging accountability and responsibility. This ensures that legal processes and commercial responsibilities are not hampered by procedural or technical disagreements that could have been resolved sooner.

The application of the doctrine of waiver is context-specific, with courts determining its validity based on the circumstances of each case. For a waiver to be enforceable, it must be intentional, explicit, and made with full knowledge of its consequences. In some cases, the doctrine of waiver may intersect with other legal principles like estoppel and acquiescence, making its interpretation complex.

Keywords: Waiver, Legal Rights, Contract Law, Legal Fairness, Constitutional Law, Public Policy, Arbitration.

I. Introduction

The doctrine of waiver, rooted in general contract law, allows the enforcement of terms different from those initially agreed upon in a contract without necessitating all the elements of a new contract (such as consideration) or the full criteria of estoppel (such as detrimental reliance). As defined by Black's Law Dictionary, waiver refers to the intentional or voluntary relinquishment of a known right.

In the context of arbitration law, Section 4 of the Arbitration and Conciliation Act, which mirrors the language of Article 4 of the UNCITRAL Model Law, addresses waiver of the right to object. It stipulates that if a party is aware of any non-compliance with provisions of the Act or the arbitration agreement that may be derogated from, and still proceeds with arbitration without raising an objection in a timely manner, that party is deemed to have waived their right to object. This principle emphasizes the importance of promptly raising objections during arbitration proceedings, to avoid later challenges on procedural grounds.

An individual's legal rights, whether derived from the Constitution, statutory law, or a contract, grant them the power to assert claims or control the actions of others, compelling them to act or refrain from acting in a particular way. A key question that often arises is whether such rights can be waived. In the context of India and the United States, this issue has been explored with significant variation in the legal approach. Notably, in India, the doctrine of waiver does not apply to constitutional rights. As Justice Bhagwati observed, "Ours is a nascent democracy, and given our social, economic, educational, and political circumstances, it is the sacred duty of the Supreme Court to safeguard the fundamental rights which, for the first time, have been enshrined in Part III of our Constitution." This principle reflects the Court's commitment to ensuring that these rights are not only protected but are non-negotiable in India's constitutional framework, even in contrast to other democracies where the waiver of certain rights is permissible.

What is a Waiver under the Act of 1996?

Under the Arbitration and Conciliation Act, 1996, the concept of waiver is an important legal principle that plays a role in ensuring efficiency in arbitration proceedings. Waiver occurs when a party voluntarily relinquishes a known right, either their right to object to proceed with arbitration without raising an objection, or by failing to exercise it within a reasonable timeframe or by continuing with arbitration without raising objections.

Section 4 (Waiver of the right to object) explicitly states that if a party proceeds with the arbitration without promptly raising an objection regarding any non-compliance with the arbitration agreement or the Act, they are deemed to have waived their right to object later. For example, if a party becomes aware of a procedural irregularity but continues without protesting, they forgo the right to challenge it afterward. This provision emphasizes that a party's silence or inaction can be interpreted as a waiver, preventing them from later claiming violations of procedural rights.

Section 11 (Waiver in Appointment of Arbitrators) informs that If a party fails to raise concerns regarding the independence or impartiality of an arbitrator during the appointment process, they may be considered to have waived their right to challenge the appointment at a later stage. Objections must be raised promptly upon becoming aware of any potential conflict of interest.

Section 13 (Waiver in Challenging Arbitrators) deals with the process of challenging an arbitrator's appointment. A party that does not follow the prescribed procedure or fails to challenge the arbitrator within the stipulated time frame may be deemed to have waived their right to do so. Failure to challenge the arbitrator within the appropriate time period or as per procedure could result in waiver of the right to challenge the arbitrator at a later stage.

Section 14 (Waiver I Termination of Mandate) provides grounds for the termination of the mandate of an arbitrator if they are unable to perform their functions or fail to act without undue delay. If a party is aware of such grounds but does not raise the issue promptly, they may be deemed to have waived their right to invoke these grounds later.

Section 16 (Waiver of Objection to Jurisdiction) allows the arbitral tribunal to decide on its own jurisdiction. If a party has objections to the tribunal's jurisdiction, it must raise them at the earliest possible stage usually before submitting its statement of defence. Failure to do so is regarded as a waiver of the right to challenge the tribunal's jurisdiction later.

Provisions under Doctrine of Waiver

The idea of waiver is crucial to the timely and effective conduct of arbitration procedures under the 1996 Arbitration and Conciliation Act. The waiver principle is predicated on the notion that a party may forfeit certain rights or remedies if they are not promptly asserted or if they proceed with the arbitration procedure in spite of being aware of certain difficulties. Several clauses of the Act reflect this notion, stating that a party may forfeit certain rights or claims if they fail to act or raise an objection in a timely way. An overview of the Act's clauses that exemplify the doctrine of waiver is provided below:

Section 4 of the Act mandates that a party loses the right to object if it proceeds with arbitration after becoming aware of any non-compliance with the agreement or the Act without raising an objection promptly.

According to **Section 11**, if a party fails to raise objections about an arbitrator's impartiality or independence at the time of the appointment or promptly after becoming aware of such concerns, the party is deemed to have waived the right to challenge the arbitrator later.

Section 13 outlines the procedure for challenging an arbitrator. If a party fails to submit a challenge within the appropriate time frame or does not follow the correct procedure, they may be deemed to have waived the right to challenge the arbitrator at a later stage.

Section 14 provides grounds for the termination of an arbitrator's mandate if they fail to perform their functions or act with undue delay. If a party is aware of these grounds but does not object or take action in a timely manner, they are deemed to have waived the right to invoke these grounds later.

Section 16 gives the arbitral tribunal the authority to rule on its own jurisdiction. If a party has objections regarding the tribunal's jurisdiction, it must raise them as soon as possible. If the party fails to do so, the objection is considered waived, and the party cannot challenge the tribunal's jurisdiction later.

The doctrine of waiver under the Arbitration and Conciliation Act, 1996 emphasizes the importance of timeliness, urging parties to raise objections or challenges promptly during arbitration proceedings. If a party fails to act or object within the prescribed time frame, such inaction is deemed a voluntary relinquishment of their rights, effectively waiving their ability to raise those objections later. This principle is designed to prevent undue delays and ensure the efficiency of arbitration by requiring parties to assert concerns—whether related to procedural irregularities, impartiality of arbitrators, or jurisdiction—at the earliest opportunity. By promoting timely action and discouraging late-stage challenges, the doctrine of waiver helps maintain the integrity and expedience of the arbitration process.

II. Applicability and Law

When a party's right is conferred by legislation, the parties agree to waive their rights. The waiver of statutory rights improves public policy and morality since one cannot infringe on the rights of another by breaking public policy or morality.

1. Direct relationships between parties.
2. Legislation ensures that rights do not interfere with public rights.

The idea of waiver cannot be applied to fundamental rights entrenched in Part III of the Constitution. The fundamental rights guarantee of public policy cannot be subjected to the notion of waiver, hence waiver cannot apply to the provisions approved as constitutional policies.

The doctrine of waiver plays a critical role in various areas of law, ensuring that parties have the ability to make voluntary choices about their specific legal rights and obligations. For example, in contract law, the principle of waiver enables parties to negotiate contractual terms and freely decide which provisions they are willing to give up. However, skillfully navigating this legal concept is essential to safeguard one's interests and avert unintended repercussions.

1. **Contractual Waiver**

Consider a scenario where you enter into a lease agreement stipulating that rent is due on the 1st of each month. If the landlord consistently accepts rent payments on the 5th without raising objections, they may effectively waive their right to enforce the original due date. This creates an implied waiver of the strict deadline, which can significantly affect the overall tenant-landlord relationship.

2. **Criminal Law Waiver**

In criminal proceedings, the concept of waiver becomes especially relevant regarding fundamental rights. For example, upon arrest, a defendant is informed of their rights, including the right to remain silent. Should the defendant choose to speak with the police without invoking this right, they are considered to have voluntarily waived it. As a result, any statements made during such voluntary discussions may be used as evidence against them in court. Understanding the consequences of waiving fundamental rights is crucial for defendants in criminal matters.

3. **Waiver of Statute of Limitations Defence**

In a contractual dispute, if the defendant neglects to invoke the statute of limitations as a defence within the prescribed legal period (e.g., four years), despite knowing this requirement, they may be deemed to have waived their right to rely on that defence.

4. **Estoppel Through Conduct**

If a landlord, over several years, consistently allows a tenant to keep a pet despite a "no pets" clause in the lease, this repeated conduct could lead to an implied waiver of the clause. The tenant might reasonably expect that the landlord has waived their right to enforce the restriction. If the landlord later tries to enforce the clause, the tenant could argue estoppel, claiming that the landlord's prior conduct led them to believe the restriction had been waived.

5. **Waiver of Right to Counsel**

In criminal cases, when a defendant is informed of their right to legal representation but chooses to proceed without an attorney (opting to represent themselves "pro se"), they are knowingly and voluntarily waiving their right to counsel. This waiver must be explicit and is considered a significant relinquishment of a constitutional right.

6. **Waiver of Search and Seizure Rights**

In the context of search and seizure under the Fourth Amendment in the U.S., if law enforcement requests permission to search a person's home and the homeowner voluntarily consents, they waive their right to be protected against unreasonable searches and seizures. Such consent must be given knowingly and freely for the waiver to be valid.

The core principle of waiver is the voluntary and intentional surrender of a known right. This can be accomplished either through explicit declarations or actions that unmistakably demonstrate the intent to waive the right. It is crucial that the individual fully understands the implications of such a decision. Moreover, once a waiver is made, it can be challenging to retract, making it wise to seek legal counsel before deciding to waive any rights.

When it cannot be applied?

A waiver is a legal doctrine that entails relinquishing rights, and it is not applicable in few circumstances as fundamental rights are a matter of public policy and the same cannot be waived. The doctrine of waiver has no application on matters that are a part of constitutional policy. The Indian Constitution guarantees essential rights, which cannot be relinquished under the notion of waiver. If a waiver was involuntary—that is, the

product of coercion, force, or undue influence—it cannot be applied. A non-existent right cannot be covered by a waiver. A waiver cannot be used to enforce any legality. Rights that are part of public policy or interest cannot be waived. For instance, because they serve the public interest, sections 73 and 55 of the Indian Contract Act of 1872 cannot be waived.

What does not constitute waiver?

A no waiver clause ensures that a party's failure to enforce strict adherence to the terms of an agreement or exercise a right does not constitute a waiver. This contractual safeguard protects the parties' interests by preventing future claims of waiver based on prior inaction. A waiver, which is the voluntary relinquishment of a legal right or benefit, can be made explicitly or implicitly, either verbally or in writing. However, for a waiver to be valid, certain conditions must be met: it must be in writing, signed by an authorized representative of the waiving party, and created by the party seeking its enforcement. Even if a party does not enforce a term at any given time, this does not prevent them from insisting on strict compliance with that or other terms in the future.

Non-waiver provisions are crucial protections found in contracts that are intended to protect the parties' rights and remedies. These provisions make it clear that one party's omission or delay in using a certain right or remedy does not amount to a waiver of that right or remedy. They essentially stop a party from inadvertently giving up their contractual rights by waiting or failing to act. However, the language used, the specifics of the contract, and the relevant legal principles can all affect how effective non-waiver clauses are.

Features of Doctrine

Intension: It is a vital element because such a waiver must be intended. Waiver of rights might be express or inferred. Expressed waiver is done in writing or by delivering a statement or waiver. The implied waiver is determined by a person's conduct.

Knowledge: Knowledge here suggests that the individual giving off rights must be aware of the nature of such rights and the consequences of such waiver. It is not necessary to have a complete grasp of the rights/privileges, but to be informed about them.

Relevance: The doctrine of waiver is critical, and its failure to apply to constitutional rights serves as a significant check on legislative power. If the doctrine were to apply, it could force an individual to renounce his rights in exchange for some advantage supplied by the states.

Does participation in the arbitration process amount to a waiver?

The Supreme Court of India has not held non-participation in arbitration to be waiver of right to object in all cases regardless of whether the alleged waiver is of derogable or non-derogable provisions.

Section 4 of the Arbitration and Conciliation Act distinguishes between provisions that parties can derogate from and those they cannot. When an objection relates to derogable provisions, such as the composition of the tribunal or the venue in domestic arbitrations, it must be raised within the specified time limit, or, if no limit exists, without delay. Failure to participate in the proceedings may also be seen as a waiver of the right to object in certain cases, but this does not apply when the objection involves a non-derogable provision, such as the improper unilateral appointment of an arbitrator, which affects the core of the matter. Once a right to object is waived, it cannot be revived in subsequent proceedings, including those under Section 34.

Limitation or period to object

While the doctrine of waiver plays an essential role in streamlining arbitration, it is not without its limitations. Waiver cannot be applied arbitrarily, and the law ensures that certain conditions must be met for a waiver to be valid. These limitations are crucial to prevent abuse and to protect the fairness and integrity of the arbitration process.

For a waiver to be valid, it must be made knowingly and voluntarily. The party must be fully aware of the right they are relinquishing and the consequences of doing so. A waiver cannot be the result of coercion or undue influence. The party must also be fully aware of the right they are waiving and the consequences of doing so. A waiver made without proper understanding or knowledge of the right or the legal implications may be invalidated. One of the key limitations on waiver is that objections must be raised promptly. If a party becomes aware of any procedural non-compliance or breach of the arbitration agreement, they must object immediately or within a reasonable timeframe.

Certain fundamental legal rights or issues related to public policy cannot be waived. For example, a party cannot waive objections related to the arbitral award being in conflict with public policy under Section 34, which deals with setting aside arbitral awards. These objections, which might relate to fraud, corruption, or violations of basic principles of justice, are too significant to be subject to waiver. Similarly, if a party's challenge concerns the jurisdiction of the arbitral tribunal under Section 16, the waiver does not apply in cases where public policy or the basic tenets of justice and fairness are involved.

The scope of waiver is also defined by the terms of the arbitration agreement and the Act itself. If the arbitration agreement provides specific timelines or conditions for raising objections, the waiver operates within those parameters. The Act’s provisions may supersede any waiver if it contradicts the statute's mandatory norms. Waiving certain procedural rights does not eliminate the right to appeal under specific circumstances. For instance, a party can still challenge an arbitral award under Section 34 on grounds like illegality, fraud, or violations of natural justice, even if they waived their right to object on procedural grounds during the arbitration process.

Without a limitation/deadline, delays may be caused and uncertainty may prevail in matters arising out of arbitration processes, defeating the very purpose of the Act, 1996, that is, the expeditious resolution of disputes. The limitation period protects the finality of the Award, once the limitation period has passed, by binding the parties by a timeline for filing any claims relating to the Award[1]. It is balanced by these limitations to ensure that waivers are made in good faith, with full awareness, and without infringing upon essential rights or public policy. This prevents misuse while ensuring that arbitration remains an efficient and fair method of dispute resolution.

Objection with Full Knowledge

When a party proceeds with arbitration without objecting, even after being aware that a requirement under the agreement has not been met, this is known as a waiver of the right to object. Situations in which a party will-fully disregards Part I or any other provision under the arbitration agreement are covered by Section 4 of the Arbitration and Conciliation Act, 1996. Even after being aware that the agreement has violated Part I or any other requirement under the arbitration agreement, a party is considered to have waived its right to object if it does not object against the non-complying party within the allotted time frame and without undue delay.

The party forfeits the right to challenge the non-compliance in any further proceedings in domestic courts when an arbitration tribunal determines that the party has waived his right to do so. The only things that can be waived are objections to the non-mandatory sections of the applicable arbitration statute. There are several exceptions to this rule, though, and objections to the mandatory arbitration legislation provisions may also be dismissed. The Act's exceptions are found in Sections 16(2) and 16(3). The former states that a plea claiming that the Arbitral Tribunal lacks jurisdiction cannot be made after the defense statement has been submitted. According to Section 16(3), if an arbitral tribunal's jurisdiction is exceeded, an objection may be made as soon as the matter alleged to be

1. *Omaxe Ltd. vs. Joginder Singh Nijjar.*

beyond the scope of its authority is raised during the arbitral proceeding.

This rule, which is based on the idea of good faith, mandates that any objections to noncompliance be made as soon as the problem is identified and without undue delay. Avoiding interruptions or objections at different points during the arbitration procedure is the goal. An objection will not be considered later if it is not raised promptly, unless the party can give a good basis for the postponement. This reduces disruptions during arbitration and guarantees more seamless proceedings.

Jurisdiction

Under the Arbitration and Conciliation Act, 1996, jurisdiction in the context of waiver plays a significant role in ensuring the smooth conduct of arbitration proceedings. According to Section 16, the Kompetenz-Kompetenz principle, the arbitral tribunal has the authority to rule on its own jurisdiction. If a party objects to the tribunal's jurisdiction, such objections must be raised at the earliest possible stage, typically before submitting the statement of defense. Failure to do so results in a waiver of the right to object, meaning the party cannot raise the issue later in the proceedings or during a challenge to the arbitral award under Section 34. However, objections concerning non-derogable aspects, such as the tribunal's core authority or improper appointment of arbitrators, cannot be waived. This principle of waiver prevents parties from delaying proceedings by raising jurisdictional issues at later stages without valid justification.

III. Case Law

In this case, the Supreme Court of India discussed the doctrine of waiver in relation to proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC).

The issue arose when the debtor, **Ambuj A. Kasliwal**[2], contended that Kotak Mahindra Bank had waived its right to initiate proceedings against him due to certain prior actions and conduct. The debtor argued that because the bank had entered into certain settlement negotiations and agreements previously, it amounted to a waiver of their right to later invoke the IBC proceedings.

The Court held that for the doctrine of waiver to apply, there must be a clear and intentional relinquishment of a known right. The Court emphasized that waiver cannot be presumed and must be express or clearly implied from the conduct of the parties.

The Court stated that a creditor's right to initiate insolvency proceedings under the IBC cannot be waived unless it is unequivocally demonstrated that the creditor consciously relinquished the right. The Court found that the mere fact that the bank engaged in settlement discussions did not amount to waiver. Engaging in negotiations or considering alternate remedies does not extinguish the right to initiate legal proceedings unless there is a specific, intentional act of waiver.

The Supreme Court rejected the argument that Kotak Mahindra Bank had waived its right to initiate proceedings under the IBC, as no express or implied waiver was established. The Court reinforced the principle that waiver of legal rights must be intentional and cannot be lightly inferred.

This case reaffirmed that the doctrine of waiver under IBC should be applied with caution, especially in the context of financial claims and creditor rights under the insolvency framework.

In another case of **M/s McDowell & Company Ltd.**[3], the appellant, raised the contention regarding certain tax assessments, arguing that the tax authorities had waived their right to challenge particular claims due to previous conduct or inaction. The appellant contended that since the tax department had accepted certain tax positions in

2. *Kotak Mahindra Bank Pvt. Ltd. vs. Ambuj A. Kasliwal, SCC Online SC 95 (2021).*
3. *M/s McDowell & Company Ltd. vs. Commissioner of Income Tax, Karnataka Central, Bangalore, Civil Appeal No. 3893 of 2006.*

prior assessments, they had effectively waived their right to reassess or challenge the transactions at a later stage, the Supreme Court of India touched upon the doctrine of waiver while dealing with tax-related issues under the Income Tax Act, 1961

The Court, while discussing the doctrine of waiver, clarified that statutory rights, particularly those related to taxation, cannot be waived easily. The Court highlighted the following principles:

- **Statutory Obligations:** The Court emphasized that obligations imposed by statute, especially under taxation laws, are mandatory and cannot be waived by either party. A waiver cannot operate to excuse a statutory authority from fulfilling its duty under the law.
- **Public Interest and Waiver:** The doctrine of waiver, when it comes to public rights or obligations, must be applied with caution. The Court stated that individual parties cannot waive their tax obligations or statutory liabilities, as it involves public interest, and the waiver of such rights could lead to unjust enrichment or loss to the public exchequer.
- **Previous Conduct:** The Court held that the acceptance of tax positions in prior years does not automatically create a waiver for future assessments. Each assessment year is separate, and the authorities are not bound by their actions from previous years if the law requires reassessment or correction.

The Supreme Court rejected the argument that the tax authorities had waived their right to reassess the company's transactions. It clarified that statutory obligations, especially in tax matters, cannot be waived simply based on prior conduct. The doctrine of waiver has limited applicability when it comes to statutory duties, particularly in matters of public interest like taxation.

This case underscores that the doctrine of waiver cannot be easily invoked to prevent statutory authorities from performing their legal duties, particularly in contexts involving public revenue and taxation laws.

IV. Conclusion

The doctrine of waiver holds immense significance, particularly in regulating the interaction between individuals and the State. Its non-application to constitutional rights is a vital mechanism for limiting legislative power and safeguarding citizens from undue influence. If this doctrine were allowed to apply to constitutional rights, individuals could be coerced or lured into waiving these fundamental protections in return for short-term benefits, creating a dangerous precedent. Such a scenario would disproportionately empower the State, enabling it to chip away at the core liberties that define a democracy.

Moreover, the imbalance in bargaining power between the State and individuals could lead to widespread erosion of rights, especially for vulnerable populations who may feel compelled to exchange their constitutional protections for immediate advantages. In keeping constitutional rights beyond the scope of waiver, the legal system upholds the principle that these rights are not merely privileges but essential elements of justice that cannot be compromised. This serves to fortify the rule of law and maintain a balance between state authority and individual freedoms, ensuring that fundamental rights remain absolute and non-negotiable, irrespective of circumstance or incentive.

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Statutory Arbitration under the MSMED Act : An Analysis of the Dispute Resolution Process for Small and Medium Enterprises

Abstract

The paper breaks down the dispute resolution process as provided under the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) and how it differs from the Arbitration and Conciliation Act, 1996, thereon invalidating the existence of an arbitration agreement and/or clause, by referring disputes to the Facilitation Council under MSMED Act. However, by way of several judgments as held by different courts, it is evident that the MSMED Act preceded the Arbitration and Conciliation Act, 1996 highlighting its role in the rapid dispute resolution process at reasonable costs and promoting fairness in small businesses. However, despite several attempts to implement a fair and quick dispute resolution mechanism, the MSMED Act has faced disadvantages like procedural delays, and rising costs thereby prompting a need for a much more efficient and effective mechanism.

Introduction

In recent decades, India's legal system has made significant progress in offering efficient and accessible dispute resolution mechanisms, especially for commercial matters. This aligns with global trends towards more streamlined legal processes. One notable development is Alternative Dispute Resolution (ADR), which provides a non-judicial approach to settling disputes between parties in commercial and civil cases by way of arbitration, mediation or conciliation. However the entire arbitration mechanism is entirely not a new concept to India. Preceding the British colonization, the elders in the villages and the panchayats on a routine basis settled disputes between the villagers by way of discussion and coming down to agreeable solutions. India's arbitration law has evolved over time, with the Arbitration and Conciliation Act, 1996 being the most recent and comprehensive codification. Prior to this, there were the Arbitration Act, 1940 and the Indian Arbitration Act, 1899, which laid the groundwork for modern arbitration practices in India. With the emergence of globalization and industrialization the various facets of alternate dispute resolution i.e. arbitration, mediation and conciliation has come into picture with an attempt to avoid prolonged judicial procedures. Customarily the arbitration process begins with an arbitration agreement formed with the consent of the parties, but Indian law along with several other types of arbitration, allows for statutory arbitration mandating arbitration for the parties without an agreement. There has been a splurge of small-scale enterprises with the coming of globalization. The Indian government in order to contain the heavily competitive market introduced the Micro, Small, Medium Development Enterprises Act 2006, to facilitate the growth and development

of small enterprises. The Government of India by way of several statutes paved the way for invoking arbitration to mitigate the disputes faced by the small enterprises by way of arbitration without an arbitration clause.

A Comprehensive Breakdown

There has been a constant and evident lack of funding and payments being made to small scale industries by large industries, and in order to aid that, the Government of India introduced the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act 1993. This provision gave way for statutory arbitration to be done by the Industry Facilitation Council as constituted by the State Government. The Council will enable the provision of Arbitration and Conciliation Act in those cases where small scale industries will refer their disputes to the said Council, and such disputes will be settled by way arbitration as if the recommended arbitration or conciliation were pursuant to an arbitration agreement as according to Section 7 of the Arbitration and Conciliation Act 1996 (Section 6 of Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act 1993). This power of the Facilitation Council was further substantiated by the Hon'ble Supreme Court in the case of ***Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd. & Anr (2004)***, where it was held that the Facilitation Council was fully empowered to exercise powers under the Arbitration and Conciliation Act, 1996 even if there is an absence of the arbitration agreement between both the parties[1].

Subsequently in 2006, the Government of India brought in a new Act namely, The Micro, Small and Medium Enterprises Development Act, on 16th June 2006 to broaden the protection as provided to micro small and medium enterprises, thereon repealing the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act 1993.

The new Act i.e Micro, Small and Medium Enterprises Development Act, 2006, also provided for a Micro, Small and Medium scale Enterprises Facilitation Council, where disputes with regard to micro, small and medium enterprises will be referred to the Council and the same will be resolved by way of arbitration or conciliation as if the recommended arbitration or conciliation were pursuant to an arbitration agreement as according to Section 7 of the Arbitration and Conciliation Act, 1996 (Section 18 of Micro, Small and Medium Enterprises Development Act, 2006). This provision also ensures the fact that existence of an arbitration agreement is not mandatory to invoke arbitration proceedings by the parties in dispute. The Hon'ble Supreme Court in the case of ***Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd 2018*** stated that even if there is an arbitration agreement existing, the sellers under MSMED Act can bypass that agreement and approach the Facilitation Council in order to resolve disputes[2].

The Hon'ble Allahabad High Court in a writ petition challenging the refusal of facilitation of a counterclaim, held that the arbitration thereon as conducted by the Facilitation Council is nothing short of a regular arbitration proceeding and the same is to be treated in pursuance of an arbitration agreement as per Section 7 of Arbitration and Conciliation Act, 1996. Thus, the parties referred to arbitration by way of Section 18 of MSMED Act will be entitled to all the provisions and protections enshrined under Arbitration and Conciliation Act, 1996.

1. *Secur Industries Ltd. vs. Godrej & Boyce Mfg. Co. Ltd. & Anr (2004) 3 SCC 447.*
2. *Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd (2018) SCC Online SC 1492.*

However, with time there arose a conflict between the MSMED Act and the Arbitration Act. wherein, the small suppliers faced difficulties with regard to procedural difficulties, exclusive powers given to the Council, subsequent rise in costs and multiple irregularities. The Hon'ble Supreme Court of India in ***M/S. Silpi Industries vs. Kerala State Road Transport (2021)*** established that the MSMED Act, as a special law, takes precedence over the Arbitration and Conciliation Act, 1996[3]. This ruling was further reinforced by the Telangana High Court in ***M/s. Lignite Power Pvt. Ltd. vs. M/S. Totale Global Private Ltd (2024),*** where it was determined that sellers protected under the MSMED Act can choose to resolve disputes through a designated authority, regardless of any existing arbitration agreement[4].

This led to a conflict between the judicial interpretation between statutory rights and contractual agreements with respect to commercial disputes including the subject matter under the MSMED Act. Therefore, since the procedure of conciliation is a pre-requirement of arbitration and the MSMED Act mandates either a Council regulated conciliation or to any alternate dispute resolution procedure, in that case the council can refer the dispute to be arbitrated with jurisdiction extended nationally, in case the conciliation fails. But in such cases there will be a strict 90 days resolution timeline for such transferred disputes.

In disputes under MSMED Act the Facilitation Council in many instances takes complete control over the entire arbitration proceeding, which further overrides any previous arbitration agreement. There has been a chain of multiple complaints from MSMEs themselves as vide amendments in MSMED Act, the time period pertaining to the arbitration under Section 18 was eliminated resulting in unnecessary delay of proceedings along with huge costs. In such delays the Courts on the other hand are hesitant enough to interfere with the delays thereon invalidating the sole purpose of Section 18 of MSMED Act to resolve disputes effectively.

Then again, Section 80 of Arbitration and Conciliation act restricts on the duality of the role played by conciliators, and such provision is thereon blatantly violated by the Facilitation Council where members are eligible to act as arbitrators, mediators and conciliators in the same matter. Hence, such a situation creates a clear bias on the MSMED Act thus going against the Arbitration and Conciliation Act and compromising on the fairness in the process of arbitration.

Important Judgments

1. ***Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd (2018)***

   The Hon'ble Supreme Court of India in this case examined the role of MSMED Act which was enacted to promote and develop micro, small and medium enterprises. The Court upon relying on two maxims leges posteriores priores contrarias abrogant (later laws override earlier conflicting laws) and generalia specialibus non derogant (general laws do not override special laws) stated that the by reason of the MSMED Act (a special law) being enacted after the Arbitration and Conciliation Act, 1996, (a general law) will thereby supersede the Arbitration and Conciliation Act, 1996. Section 18 of the MSMED Act includes a non-obstante clause which means that it is intended to supersede the other existing laws. As a result, once the statutory mechanism under Section 18 is activated, it trumps any private agreements amongst parties, since such agreements cannot contradict statutory provisions. The Court also stated that Section 80 of the Arbitration and Conciliation Act, 1996, which prevents a conciliator from acting as an

3. *M/s. Silpi Industries vs. Kerala State Road Transport (2021) SCC OnLine SC 3694, MANU/SC/0390/2021.*
4. *M/s. Lignite Power Pvt. Ltd. vs. M/s. Totale Global Private Ltd (2024) 18 SCC 790.*

arbitrator, is thereon superseded by Sections 18 and 24 of the MSMED Act, thereby enabling the Facilitation Council to act as an arbitrator and conciliator simultaneously. The Court affirmed that Section 18 of MSMED Act aligns with the Arbitration and Conciliation Act, 1996, the provisions of which will apply on the arbitration and conciliation proceedings before the Facilitation Council[5].

2. ***M/S. Silpi Industries vs. Kerala State Road Transport (2021)***

The Hon'ble Supreme Court of India in this case stated that the MSMED Act was introduced with the aim of providing a dispute resolution mechanism between the parties engaged in MSMEs. The time limits with regard to filing of claims under the MSMED Act should be in line with the Limitation Act, and such arbitration proceedings are to be treated in the same way as it is provided under Arbitration Act. The parties under such dispute can also file for counter claims, in similarity to the Arbitration Act. The Court opined that the MSMED Act being a special law will preside over the Arbitration Act being a general law. It was also held that the MSME should be registered before the supply of goods or services in order to be able to claim the benefits under MSMED Act. In essence the Supreme Court provided for a balance between the Arbitration Act and the MSMED Act[6].

Conclusion

The Hon'ble Supreme Court of India under the aid of the Latin legal maxim Generalia Specialibus Non Derogant which directly translates to "general things do not derogate from specific things" aims to solve the conflict between the MSMED Act 2006 and the Arbitration and Conciliation Act 1996. Wherein, the Arbitration Act is a general law by reason of it looking after dispute resolution in totality in multiple civil matters, but on the other hand, the MSMED Act is a special law as it governs arbitration of disputes pertaining to micro, small and medium enterprises under the garb of Section 18 of the said Act. Therefore, the MSMED Act being a special law will have precedence over the Arbitration Act. owing to such understanding, the statutory rights under the MSMED Act can in no way be negated by any Arbitration agreement. The rationale behind this is that statutory remedies in law are substantive rights, and parties in dispute cannot contract out such substantive rights through a private agreement.

The arbitration procedure provided under the MSMED Act is an important advancement in the legal framework of India and such procedure holds the potential of providing a significant aid in the dispute resolution process.

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Public Policy as a Ground for Setting aside Arbitral Award: A Detailed Analysis of Section 34 of The Arbitration and Conciliation Act, 1996

Abstract

This paper scrutinizes the complex interplay between public policy and the annulment of arbitral awards under Section 34 of the Arbitration and Conciliation Act, 1996. While the act aspires to establish a regime of minimal judicial intervention in arbitration, the judiciary's expansive and often ambiguous interpretation of "public policy has engendered significant challenges to the sanctity of arbitral awards. The 2015 amendments aimed to elucidate the grounds for annulment, particularly in relation to "fundamental policy" and "patent illegality"; however, ambiguities persist. Pivotal rulings such as Renusagar Power Co. and ONGC vs. Saw Pipes illuminate the judiciary's evolving stance, reflecting the tension between enforcement of arbitral award and necessity of safeguarding public interest. This paper critically evaluates recent judicial interpretations and developments advocating for a more refined understanding of a public policy that differentiates between public good and mandatory law. Such clarity is imperative to uphold the integrity of arbitration as a preferred mechanism for dispute resolution in India, ensuring the system functions effectively within the confines of established legal principles.

Keywords: Arbitration, Public Policy, Arbitration and Conciliation Act, Judicial Intervention, Indian Jurisprudence, Fundamental Policy, Patent Illegality, Arbitral Award, Enforcement, Legal Framework.

1. Introduction:

Arbitration has longstanding historical significance in India, traceable to ancient and medieval periods. The concept of "Panchayati Raj" exemplifies this practice, wherein a 'Panch' adjudicates disputes between parties. However, it is not unusual for the disputing parties to express dissatisfaction with the order or relief granted by the 'Panch'. Modern arbitration law fulfills a comparable function, providing a formalized framework for dispute resolution that seeks to ensure fairness and uphold the rights of all parties involved.

The Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") enacted with an intention to consolidate and amend the existing Domestic Arbitration Laws, International Commercial Arbitration Laws and other matters of similar nature. The primary intention of the Act was 'Minimum Judicial Interference'[1]. However, there are instances when the court has to interfere in the arbitration matters for e.g. when the parties

1. Arbitration and Conciliation Act, 1996, Section 5

fail to appoint an arbitrator themselves, the court appoints one. Another instance is when the parties are unsatisfied with the arbitral award and they approach the court in order to set aside the same.

Section 34 of the Act deals with setting aside of an Arbitral Award by the way of filing an application before the competent court. Section 34(2) talks about the grounds on which the arbitral award can be set aside by the court. One of the grounds for setting aside the arbitral award as specified under Section 34(2) is if "the arbitral award is in conflict with the public policy of India".

The term "public policy" is nowhere defined in the Act, in fact the Hon'ble Supreme Court in numerous cases has held that the term "public policy" is like an "untrustworthy guide" or an "unruly horse". This is because the scope of "public policy" is wide that anything under the sun can be termed as public policy and therefore can be used as a ground to set aside an arbitral award, further making the judgement arbitrary in nature.

2. What is Public Policy?

After the suggested additions of the 246th Law Commission Report, the Act was amended in 2015[2] which gave clarifications regarding the instances when an arbitral award is in contravention to the "public policy in India". An award is in contravention to the public policy of India only if:

a. The making of that award was induced by fraud or corruption

b. The award is in violation of Section 75 (confidentiality of all matters) or Section 81 of the Act (admissibility of evidence in other proceedings).

c. The award is in contravention with the fundamental policy of Indian law.

d. The award is in conflict with the most basic notions of morality and justice.

The concept of "public policy" has always been vague, it indicates matters which concerns public good and public interest. However, it is interesting to note that what is good or what is bad, what is public good, what is public interest or what is injurious or bad has always varied from time to time[3]. For setting aside an arbitral award it has to be shown that the enforcement of the said arbitral award is injurious to the larger public interest of public good[4]. As aforesaid, the term "public policy" is nowhere defined in the Act and therefore it becomes important that the said term is understood in a context.

2.1. Interpretation of "public policy" by Indian courts

The courts have time and again interpreted the meaning of "public policy" in the light of the Arbitration Act of 1872 and its constitutional provisions. The scope of "public policy" has constantly been widened through plethora of judgements as Section 34(2) has been interpreted too widely.

In the landmark case of ***Renusagar Power Co. Ltd. vs. General Electric Co.***[5], the Hon'ble Supreme Court of India for the first time expounded the concept of "public policy" in the context of enforcement of foreign award. The court observed that the term "public policy" can be understood in a broader as well as a narrower sense. It went on to establish dichotomy between the application of public policy to the domestic arena and the international arena. The Hon'ble Supreme Court addressed the meaning of the term "public policy" with respect to Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961,

2. Law Commission of India, Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996 (August, 2014). http://www.scconline.com/DocumentLink/N7O69Zxv
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5. *Renusagar Power Co. Ltd. vs. General Electric Co., AIR 1994 SC 86.*

specifically in relation to the enforcement of an arbitral award issued by the International Chamber of Commerce[6]. The Court noted that the concept of public policy in India should be interpreted narrowly within the framework of private international law, while also considering the pro-enforcement stance promoted by the 1958 New York Convention, which eliminated the requirement of double exequatur. A foreign award would not be enforced by the courts in India only on the ground of public policy if such enforcement is contrary to:

i. fundamental policy of Indian law

ii. interest of India

iii. Justice or morality

The Hon'ble Supreme Court of India, in the case of ***ONGC vs. Saw Pipes Ltd.***[7] – the ground of "public policy" was widened and the court added a new ground "Patent illegality" in addition to the grounds mentioned in the Renusagar case. The main issue in this case was whether the courts can set aside an award which was "patently illegal" or in contravention to the provision of the Act. The Hon'ble Supreme observed that "the concept of public policy connotes some matter which concerns public good and the public interest." However, if the impugned award is prima facie in violation of the statutory provisions then it can be considered to be against the public interest which therefore will be in violation of the public policy.

In 2011, the Supreme Court in ***Phulchand Exports Ltd. vs. OOO Patriot***[8] held that the "patent illegality" standard from Saw Pipes applies to foreign awards under Section 48 of the 1996 Arbitration Act, allowing Indian courts to deny enforcement on these grounds. However, the Court did not clarify why it overlooked distinctions between foreign and domestic awards or depart from Renusagar.

This ruling was overruled in 2013 by the Supreme Court in ***Shri Lal Mahal Ltd. vs. Progetto Grano Spa***[9], which reaffirmed the Renusagar standard. It confirmed that only the grounds for public policy from Renusagar apply to foreign awards, limiting challenges to their enforcement in India.

2.2. The amendment of 2015

The 246th Law Commission Report[10] highlights that Section 34[11] of the Arbitration and Conciliation Act, 1996 provides a comprehensive list of grounds for challenging an award, primarily focusing on procedural issues rather than substantive ones. Previously, the Commission noted that Section 34 should clearly state that an award cannot be overturned solely due to a tribunal's legal error or because a court has a different interpretation of the evidence. Now, the Commission has recommended that Section 34 explicitly clarify that "assessing whether there is a violation of the fundamental policy of Indian law should not involve a review of the merits of the case."

In 2015, the Arbitration and Conciliation (Amendment) Act introduced significant revisions to Section 34, following recommendations from the 246th Law Commission Report. These amendments aimed to limit court interference with arbitral awards based on "public policy." Specifically, they included the addition of Explanation 2 to Section 34(2) and the new Section 2A. *Explanation 2* of the Section 34(2) states – *"For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of*

6. Ibid.
7. *ONGC vs. Saw Pipes Ltd. 2003 (5) SCC 705.*
8. *Phulchand Exports Ltd. vs. OOO Patriot (2011) 10 SCC 300*
9. *Shri Lal Mahal Ltd. vs. Progetto Grano Spa (2014) 2 SCC 433*
10. Supra 2.
11. The Arbitration & Conciliation Act, 1996, Section 34.

Indian Law shall not entail a review on the merits of the dispute."

In the case of ***Associate Builders vs. Delhi Development***[12], the court held that the judicial approach to any arbitral award requires a fair and reasonable approach. The said arbitral award has to be interpreted with the ideas of morality and justice. The court further went on to say that the arbitral award can be set aside if "it shocks the conscience of the court." The Supreme Court in the case of ***Venture Global LLC & Ors. vs. Tech Mahindra Ltd. & Ors***[13], was of the view that the court cannot act as an appellate body to determine the illegality of the award. It can neither examine the facts of the case in order to figure out the merits of the case. An arbitral award can be set aside only on the grounds specified under Section 34 of the Arbitration Act.

2.3. *The question of public policy with respect to Foreign Arbitral Award*

In the case of ***Vijay Karia vs. Prysiman Cavi E Sistemi SRL***[14], the award debtor sought to prevent the enforcement of foreign awards issued by the London Court of Arbitration, arguing that they violated Indian public policy by contravening the Foreign Exchange Management Act, 1999 (FEMA). The court, while examining this issue, clarified the differences between the legal frameworks of FEMA and its predecessor, the Foreign Exchange Regulation Act, 1973 (FERA). It noted that FEMA is designed to manage foreign exchange, whereas FERA focused on regulating it. Additionally, the court pointed out that FEMA does not have provisions that void transactions, unlike FERA, which included explicit provisions for such actions. Further, the court held that the violation of the fundamental policy of Indian Law must amount to breach of some legal principle which basic to Indian and not susceptible to compromise.

3. Recent Developments

In the case of ***NHAI vs. M/s Ssangyong Engineering & Construction Co. Ltd***.[15] a dispute aros between the parties with respect to the payment due, accordingly, the respondent invoked arbitration. The Delhi High Court reiterated that the scope of Court's interference under Section 34 of the Act is very narrow and the award can only be set aside if the grounds are met. The court noted that as the respondent is a foreign entity and the award is passed in an International Commercial Arbitration, it cannot be challenged on the ground of 'Patent Illegality'. The Court ruled that if the arbitral tribunal fails to address an issue that is fundamental to the case, the resulting arbitral award would be considered contrary to public policy. Consequently, such an award could be annulled under Section 34 of the Arbitration and Conciliation Act[16].

Recently, in the case of ***Union of India Through Garrison Engineer AF vs. M/s. Yauk Engineers***[17] the Allahabad High Court has held that interference in an arbitral award on the ground of violation of public policy can be done if it is against the substantive provisions of the Act. In this case, a dispute arose between the parties and the arbitral award was awarded in favour of the Respondent. An appeal was filed in the Allahabad High Court on the ground that the arbitrator had no jurisdiction to award the amount beyond the terms of the contract between the parties. The Court determined that a party engaged in arbitration cannot be held liable for actions that were legal at the time they

12. *Associate Builders vs. Delhi Development MANU/SC/1076/2014.*
13. *Venture Global LLC and Ors. vs.Tech Mahindra Ltd and Ors MANU/SC/1373/2017.*
14. *Vijay Karia. vs. Prysiman Cavi E Sistemi SRL, MANU/SC/0171/2020.*
15. *NHAI vs. M/s Ssangyong Engineering* & *Construction Co. Ltd. 2024 LiveLaw (Del) 463.*
16. Ibid.
17. *Union of India Through Garrison Engineer AF vs. M/s. Yauk Engineers 2024 SCC OnLine All 1046*

were taken, even if those actions are subsequently penalized. It was asserted that the principle of legality cannot be applied retrospectively unless explicitly stated. The Court further noted that retroactive amendments to arbitration laws could lead to extended dispute resolution processes, increased costs, and heightened unpredictability and uncertainty for the parties involved.

The Court referenced ***Ratnam Sudesh Iyer vs. Jackie Kakubhai Shroff***[18], where the Supreme Court ruled that, barring mutual agreement from the parties, the amendments of 2015 do not apply to arbitration proceedings initiated prior to the amendment's effective date, even if such proceedings began under Section 21 of the Arbitration and Conciliation Act. The Court emphasized that the pre-amendment Section 34, as it existed in 2006, permitted the annulment of arbitral awards on the grounds of contravening public policy in India. The Court further noted that the interpretation of 'public policy' is inherently complex, subjective, and dependent on specific contextual and factual circumstances.

4. Analysis

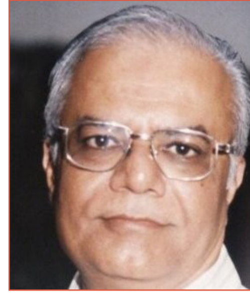
The series of judgments referenced undermines the fundamental principle of arbitration, which seeks to minimize judicial intervention as outlined in Section 5[19] of the Arbitration and Conciliation Act. When parties choose arbitration to resolve their disputes, it indicates their desire to avoid litigation. The broad interpretation of public policy enables the losing party to contest arbitral awards on multiple grounds, effectively undermining the arbitration process. Consequently, any challenge to an award should be limited to the specific grounds outlined in Section 34[20] of the Act.

5. Conclusion

In various jurisdictions, courts recognize that public policy should not be conflated with domestic mandatory law. If an arbitral award contradicts mandatory laws, enforcement may be denied. However, many countries now distinguish between public policy and mandatory law, allowing agreements that violate such provisions to be enforced.

International public policy is assessed through state laws on foreign arbitral awards, but courts could benefit from adopting a transnational perspective. This approach encompasses universal standards on unacceptable conduct, such as slavery and corruption. By incorporating transnational public policy, defined by globally recognized legal and moral principles, courts can enhance their understanding of international public policy and promote a unified framework for enforcing foreign arbitral awards.

18. *Ratnam Sudesh Iyer vs. Jackie Kakubhai Shroff 2019 SCC OnLine SC 2081.*
19. Supra 1.
20. Supra 11.



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Finality and Enforcement of Arbitral Awards under the Arbitration and Conciliation Act, 1996

Introduction

The need for efficient dispute resolution in India has grown significantly, but securing a court judgment or arbitral Award is often just the beginning. Challenges arise when the opposing party withdraws or refuses to participate, complicating enforcement. Objections related to costs or jurisdiction add further complexity.

In India, enforcement of decrees is governed by the Code of Civil Procedure, 1908 (CPC), while arbitral Awards are enforced under the Arbitration and Conciliation Act, 1996, alongside the CPC. Both domestic and Foreign Awards are treated as court decrees, and proper service of the opposing party is essential to avoid objections. The enforcement process may involve actions such as attachment, notice, arrest, or appointing a receiver, while adherence to natural justice principles remains crucial.

Enforcements of Arbitral Awards

An Award holder must wait three months after receiving the Award before applying for its enforcement and execution. During this time, the Award can be contested under Section 34 of the Act. Once this period has passed, if the court determines that the Award is enforceable, there can be no further challenges regarding its validity at the execution stage.

Before the Arbitration and Conciliation (Amendment) Act, 2015 ("Amendment Act"), filing an application to set aside an Award would automatically result in a stay on execution proceedings. However, under the Amendment Act, a party seeking to challenge an Award must file a separate application to request a stay on its execution.

Enforcement of Foreign Awards

India is a signatory to both the New York Convention (1958) and the Geneva Convention (1927) on the enforcement of Foreign arbitral Awards. If a party receives a binding Award from a country that is a signatory to these conventions and recognized by India, the Award can be enforced in India.

Enforcement involves two steps: first, filing an execution petition with the court, which will check if the Award meets the legal requirements. Once confirmed, the Award is treated like a court decree. However, challenges may arise, such as objections from the other party and the need to submit original or authenticated copies of the Award and the Agreement .

Conditions for Enforcement of Arbitral Awards — Domestic and Foreign

Enforcement of a Foreign Award may be refused, and a domestic Award may be set aside if the

Award debtor provides the court with proof (for a Foreign Award) or demonstrates based on the arbitral tribunal's record (for a domestic Award) that:

- The parties involved in the Agreement were under some form of incapacity;
- The Agreement is not in accordance with the law the parties intended to apply, or with the law of the country where the Award was made (particularly relevant for Foreign Awards);
- Proper notice regarding the appointment of the arbitrator or the arbitral proceedings was not given, or the party against whom the Award was made was unable to adequately present their case;
- The Award exceeds the authority granted by the Agreement or submission to arbitration;
- The Award addresses matters beyond the scope of what was submitted for arbitration;
- The composition of the arbitral authority or the arbitral procedure violates the terms of the Agreement;
- The composition of the arbitral authority or procedure does not comply with the law of the country where the arbitration took place;
- The Award (specifically for Foreign Awards) is not yet binding on the parties or has been annulled or suspended by a competent authority of the country where it was made or under whose law it was issued.

Enforcement of a Foreign arbitration Award may be refused, and a domestic Award may be set aside, if:

- The subject of the dispute cannot be settled by arbitration under Indian law, or
- Enforcing the Award would go against India's public policy.

A Foreign Award conflicts with India's public policy if:

1. It was influenced by fraud, corruption, or violated sections 75 or 81 of the Arbitration Act,
2. It goes against the core principles of Indian law, or
3. It contradicts basic ideas of morality or justice.

When deciding if an Award violates Indian law, the court will not re-examine the case's merits.

For domestic Awards (except those from international commercial arbitration), the court can set them aside if they have clear legal errors visible on their face. However, a domestic Award will not be overturned just because of a legal mistake or a fresh review of evidence.

How Courts Examine Awards

The grounds for challenging the enforcement of a Foreign Award are specific and cannot be expanded by the courts.

In certain situations, a court may still refuse to enforce the Award even if one of the listed grounds under Section 48 of the Arbitration Act is proven.

When enforcing the Award, the court only needs to confirm its validity on a basic level, without re-examining the details or merits of the case. The court's role is not to conduct a full appeal of the tribunal's decision but simply to review it.

First, the court must determine if the Award is enforceable, and if it is, it will then enforce it like any other court decree, following the procedures outlined in the Civil Procedure Code (CPC).

Judgements related to the enforcement of the Arbitral Award

The Supreme Court in ***Oil and Natural Gas Corp vs. Saw Pipes Ltd***. expanded the grounds for challenging an arbitral Award under Section 34

of the Arbitration Act, 1996. The court ruled that an Award could be set aside if it violated the law, including incorrect application of liquidated damages, or if it was "patently illegal" under public policy. This expanded the scope of public policy beyond the earlier narrow interpretation in ***Renu Sagar Power Co vs. General Electric Corp.***, which limited challenges to fundamental policies of Indian law.

The decision in Saw Pipes was criticized for allowing courts to review Awards on their merits, similar to an appellate court, which contradicts the Arbitration Act's goal of minimizing judicial interference. Later cases, like ***McDermott International Inc vs. Burn Standard Co Ltd***, tried to limit this effect, emphasizing that courts should only intervene in extreme cases like fraud or bias and not correct arbitrators' errors.

Some High Court rulings, including the Bombay High Court in ***Indian Oil Corp Ltd vs. Langkawi Shipping Ltd***, rejected a broad reading of Saw Pipes. They argued that such an interpretation would undermine the Arbitration Act's intent to restrict courts' interference and maintain the finality of arbitral Awards. These High Court judgments maintain that the original principles limiting judicial review still hold, even after Saw Pipes. The Gauhati High Court, following a Bombay High Court decision, held that the Supreme Court's ruling in the ***ONGC vs. Saw Pipes*** case did not override or negate earlier judgments on arbitration. The court reaffirmed the established principles regarding an arbitrator's authority, the assessment of damages, and the limited scope of judicial interference. The Saw Pipes decision has been rightly criticized for contradicting the language and intent of the Arbitration Act, 1996. By expanding judicial review, it risks delaying enforcement and negating the purpose of choosing arbitration—avoiding court delays. This ruling has even led some parties to move arbitration outside India to avoid delays in enforcement due to excessive judicial review.

Conclusion

When viewed comprehensively, India does not appear to be a jurisdiction with an anti-arbitration stance, nor does it exhibit a significant bias against Foreign parties. Despite the occasional interventionist tendencies and the scope of judicial review, the data indicates that Indian courts generally exercise restraint in interfering with arbitral Awards. By this standard, India can be considered an arbitration-friendly jurisdiction.

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Inarbitrable Disputes

I. Introduction

Arbitration, under the Arbitration and Conciliation Act, 1996 ("A&C Act"), is a popular way to resolve disputes outside of court. It relies on both parties agreeing to settle their issues through a private mechanism, giving up their right to go to court. The foundation of arbitration includes creating a contract, respecting the parties' choices, and mutual agreement. This makes arbitration a practical alternative to traditional court cases.

Arbitrability refers to the question of whether a dispute can be settled through arbitration, instead of going to court. Some kinds of disputes such as criminal matters, matrimonial cases, etc. are kept outside the purview of arbitration on grounds of public interest. Key factors that determine whether a dispute is arbitrate include the applicable laws, the terms of the arbitration agreement, and the nature of parties to the arbitration agreement.

Courts have developed various tests and frameworks over time to determine what disputes can be arbitrated. Since there are no strict rules, judges' interpretations play a big role in defining arbitrability.

This article delves into the scope of arbitrability in India, highlighting key judicial precedents that shape its contours. Part II of this article deals with the evolution of the Booz Allen test followed by Part III which deals with the judicial interpretations that followed. Part IV highlights the expansive fourfold test in the Vidya Drolia case which has shaped the understanding of what disputes can be resolved through arbitration. This is followed by Part V & VI which deals with the legislative amendments and future challenges and directions respectively.

II. The Booz Allen Test: A Basic Guide

The Supreme Court in ***Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. [(2011) 5 SCC 532]*** set the rules for deciding if a dispute can be settled through arbitration. The main question was whether arbitration could resolve a case about enforcing a charge or mortgage. The Supreme Court said it could not and **identified three conditions** for a dispute to be referred to arbitration:

1. The disputes must be capable of adjudication and settlement by arbitration
2. The disputes must be covered by the arbitration agreement; and
3. The parties must have agreed to refer the dispute to arbitration.

The Court, among other things, **laid down six categories of disputes as incapable** of being settled by arbitration:

1. Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

2. Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
3. Guardianship matters;
4. Insolvency and winding up matters;
5. Testamentary matters; and
6. Eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

Whether a dispute is arbitratable depends on the type of rights involved. ***Rights in personam*** (rights between specific individuals, like in contracts) can be settled through arbitration. However, ***rights in rem*** (rights against the world, like property rights) need to be handled by courts. The Court also stated that secondary rights in personam that come from rights in rem can be arbitrated. This means some disputes cannot be arbitrated because of the nature of the rights involved.

Since 2011, the **Booz Allen test** has formed the **guiding principle** for determining the arbitrability of disputes in India, setting a benchmark for subsequent deliberations on arbitrability and holding the field of law on arbitrability **until the Vidya Drolia decision**.

III. After Booz Allen: Further Developments and Changes

After the Booz Allen test, Indian courts have encountered complex cases that need more clarity on what disputes can be arbitrated. Issues like fraud, taxation, and insolvency are still being debated. By building on the Booz Allen test, the Supreme Court has developed the rules on what can be arbitrated and defined the limits of arbitration.

In the case of ***N. Radhakrishnan vs. M/s Maestro Engineers [(2010) 1 SCC 72***], the Supreme Court ruled that when fraud and serious malpractices are alleged, only the court can resolve the matter, not an arbitrator. The Court noted that fraud, financial malpractice, and collusion have criminal implications, and since an arbitrator's power comes from the contract, their authority is limited. Courts are better suited to deal with serious and complex allegations and can provide a wider range of solutions to the parties involved.

Later, the decision of the Supreme Court in ***A Ayyasamy vs. A Paramasivam & Others [(2016) 10 SCC 386***] clarified that allegations of fraud are arbitrable as long as it is in relation to simple fraud. In this case, the Supreme Court noted that the decision in ***Swiss Timing Ltd. vs. Organizing Committee, Commonwealth Games 2010, Delhi [(2014) 6 SCR 514***] did not overrule Radhakrishnan and held that: (a) allegations of fraud are arbitrable unless they are serious and complex in nature; and (b) unless fraud is alleged against the arbitration agreement, there is no impediment in arbitrability of fraud. The judgment differentiates between 'fraud simpliciter' and 'serious fraud' and concludes that while 'serious fraud' is best left to be determined by the court, 'fraud simpliciter' can be decided by the arbitral tribunal. In the same vein, the Supreme Court has held that an appointed arbitrator can thoroughly examine the allegations regarding fraud.

In the case of ***Shri Vimal Kishor Shah vs. Jayesh Dinesh Shah & Others [(2016) 8 SCC 788***], the Supreme Court looked at the Indian Trusts Act, 1882. The Court decided that any disputes related to trust deeds must be handled by civil courts, not through arbitration. The Indian Trusts Act, 1882, is a complete set of rules that covers all issues related to trusts and specifically states that civil courts should resolve these disputes. This decision added a seventh exception to the types of disputes that cannot be settled through arbitration.

The Supreme Court has set a standard for deciding what can be settled through arbitration in the Booz Allen case and other rulings. However, lower courts have had different views on this. Here are some examples:

- ***Rakesh Kumar Malhotra vs. Rajinder Kumar Malhotra [(2014) SCC Online Bom 1146***]: The Bombay High Court ruled that disputes about oppression and mismanagement (shareholders' claims against the company)

under the Companies Act of 1956 cannot be arbitrated. This is because some of the reliefs sought affect the public interest and were beyond the arbitrator's authority.

- ***Eros International Media Ltd. vs. Telemax Links India (P) Ltd. [(2016) SCC Online Bom 2179***]: The Bombay High Court decided that contractual rights related to copyrights can be arbitrated since they are personal rights. However, claims for copyright ownership, which affect the public interest, cannot be arbitrated.
- ***Lifestyle Equities CV vs. Q.D. Seatoman Designs Pvt. Ltd. and Others [(2017) 8 MLJ 385***]: The court ruled that a request for a permanent injunction (a personal right) can be arbitrated, but a request for a declaration of copyright ownership (a public right) cannot.

In the aforementioned cases, courts focused on the type of relief requested rather than the rights and interests of the parties to decide if arbitration was suitable. The Booz Allen approach lets parties avoid arbitration by asking for reliefs that are not typically arbitrable. This test is not always effective, especially when the relief could actually be settled through arbitration. The Supreme Court has clarified that the guidelines from Booz Allen are not strict rules to be followed without question.

IV. The Vidya Drolia Case: Changing What Can Be Arbitrated

In 2019, the Supreme Court made a significant ruling in the ***Vidya Drolia and Ors vs. Durga Trading Corporation [(2021) 2 SCC 1]*** case. This ruling clarified what types of disputes can be settled through arbitration. The Court specifically looked at landlord-tenant disputes under the Transfer of Property Act, 1882 (TPA). It decided that just because a special law exists for certain disputes, it does not automatically mean they cannot be arbitrated. This decision expanded the range of cases that can be resolved by arbitration.

The Court introduced a fourfold test to determine if a dispute cannot be arbitrated:

1. If the dispute involves rights that affect everyone (actions in rem) and not just individual rights (rights in personam).
2. If the dispute affects third-party rights, has a widespread impact, needs centralized decision-making, and cannot be properly resolved through mutual agreement.
3. If the dispute involves essential government functions and public interests, making mutual resolution unenforceable.
4. If the law explicitly or implicitly states that the dispute cannot be arbitrated.

The Supreme Court said that landlord-tenant disputes under the TPA involve individual rights arising from broader rights and can be arbitrated. However, disputes like insolvency, patents, trademarks, and probate matters, which affect everyone and grant exclusive rights, cannot be arbitrated. Similarly, criminal cases and matrimonial disputes, which involve state functions, are also non-arbitrable.

By applying the aforesaid tests in ***Vidya Drolia***, the Supreme Court went on to expressly overrule the following judicial pronouncements with an aim to foster a conducive environment for alternative dispute resolution:

In ***N. Radhakrishnan vs. Maestro Engineers*** (mentioned above), the Madras High Court stated that only a civil court should handle cases with serious fraud and malpractices, not an arbitral tribunal. However, the Supreme Court in Vidya Drolia disagreed, saying fraud cases can be handled by arbitration if they are part of a civil dispute, unless the fraud invalidates the arbitration agreement.

In ***HDFC Bank Ltd. vs. Satpal Singh Bakshi [2012 SCC Online Delhi 4815***], the Delhi High Court, following the Booz Allen case, ruled that issues under the Debt Recovery Tribunal (DRT) could be arbitrated, effectively replacing civil courts. However, the Supreme Court in Vidya Drolia disagreed, stating that disputes under the DRT, created by the Banks & Financial Institutions Act, 1993, are

non-arbitrable due to the special powers given to the Tribunal.

The Apex Court reversed the decision in ***Himangni Enterprises vs. Kamaljeet Singh Ahluwalia [(2017) 10 SCC 706***] stating that tenancy issues under the Transfer of Property Act (TPA) cannot be settled through arbitration. It reaffirmed this stance in Vidya Drolia, clarifying that landlord-tenant disputes covered by specific laws like rent control are not arbitrable unless those laws give special forums exclusive authority to handle such cases.

Furthermore, the Court placed reliance on Vidya Drolia in the case of ***Suresh Shah vs. Hipad Technology India Private Limited [(2021) 1 SCC 529***], where the courts reiterated that special statutes that grant special protection against eviction to tenants in land tenancy matters bar the remedy of arbitration, giving exclusive jurisdiction to the forum specified under the statute.

Recently, in the case of ***N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and Ors. [(2021) 4 SCC 379***], the Supreme Court was dealing with a question as to whether an allegation of fraudulent invocation of a bank guarantee is an arbitrable dispute. After analysing the law and discussing judicial precedents, some of which are referred above, the Court held in no uncertain terms that the civil aspect of fraud is arbitrable. The only exception is where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract and impeaches the arbitration clause itself.

Notably, the Court emphasized that, in contemporary arbitration practice, tribunals are used to examining voluminous documents. The Court made this statement in the backdrop of the earlier view that civil courts alone are best placed to deal with complex matters involving voluminous evidence. The Court in the strongest terms held that allegations of fraud as a ground to assert non-arbitrability is ‘a wholly archaic view, which has become obsolete, and deserves to be discarded’.

The Court concurred with earlier decisions to observe that the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions, can be adjudicated only by a court of law. Since it may result in a conviction, these matters fall within the realm of public law.

On the specific question of invocation of bank guarantee, the Court held the dispute to be arbitrable since it arose out of disputes between parties *inter se* and did not fall in the realm of public law.

These developments signal a broader acceptance of arbitration within the Indian legal system, highlighting the importance of providing parties with the autonomy to determine how to resolve their disputes. The Supreme Court's rulings indicate a willingness to embrace arbitration, particularly in commercial contexts, while maintaining judicial oversight in exceptional circumstances where public interests or specific statutory provisions are at stake.

V. Who determines arbitrability?

The question of "who decides arbitrability – court or arbitral tribunal?" is critical and extensively discussed in Indian law. With the 2015 introduction of Section 11(6A) of the A&C Act, courts are limited to examining if an arbitration agreement exists. Before this amendment, courts had broader powers. Section 11(6A) aimed to restrict court powers solely to confirming if a valid arbitration agreement exists, thereby reducing judicial interference.

However, a 2019 amendment resulted in the omission of Subsection (6A) of Section 11 of the A&C Act. In Vidya Drolia, the court ruled that despite the removal of Section 11(6A), it still guides the court's role at the referral stage. The court only examines an arbitration agreement if it is clearly non-existent or invalid, supporting the principle that arbitrators decide their own jurisdiction. Later, in ***DLF Home Developers Ltd. vs. Rajapura Homes Pvt. Ltd. [(2021) 16 SCC 743***], the Supreme Court emphasized that courts should not act mechanically but should thoughtfully apply Section 11(6A) to avoid taking over the arbitrator's role.

In 2023, ***NTPC Ltd. vs. SPML Infra Ltd. [(2023) 9 SCC 385***] reinforced that the court's role under Section 11(6A) is very narrow. Generally, the Arbitral Tribunal should be the first to decide all questions of non-arbitrability. Only in rare cases should the Referral Court reject claims that are clearly non-arbitrable, as guided by Vidya Drolia.

In 2024, ***SBI General Insurance Co. Ltd. vs. Krish Spinning [2024 INSC 532]***, the Supreme Court addressed the scope of the A&C Act. The Court clarified that when appointing an arbitrator under Section 11, the referral court should only check if there is a *prima facie* arbitration agreement and whether the Section 11 notice has been issued within 3 years of the Section 21 notice. The Court emphasized that issues like "accord and satisfaction" are for the arbitral tribunal to decide, not the referral court, unless the parties agree otherwise. The reduced scope of scrutiny by the referral court shows that the question of whether the dispute is arbitrable must be left to be decided by the arbitral tribunal.

VI. The Role of Legislative Amendments

The legislative framework governing arbitration in India has also evolved in conjunction with judicial interpretations. Amendments to the A&C Act, aimed at streamlining the arbitration process and enhancing its effectiveness, have contributed to a more favorable environment for arbitration.

In 2015, the introduction of Section 11(6A) aimed to limit the role of courts in determining the existence of arbitration agreements, minimizing judicial intervention. Although this provision was later omitted, its principles continue to guide courts in evaluating arbitrability.

The Supreme Court has clarified that, despite the deletion of Section 11(6A), the court's role in the referral stage remains confined to assessing the existence of a valid arbitration agreement. Courts are encouraged to limit their inquiries to situations where it is manifestly clear that the arbitration agreement is invalid or non-existent, reinforcing the principle of competence-competence—the notion that arbitral tribunals should primarily determine their jurisdiction.

The evolution of jurisprudence in relation to inarbitrable disputes has led to a burgeoning body of case law that reflects the changing dynamics of arbitration in India. Courts have increasingly recognized the need for a balanced approach, allowing parties the autonomy to resolve their disputes while safeguarding public interests and statutory mandates.

As the legal landscape continues to evolve, ongoing dialogue and collaboration among stakeholders will be essential in navigating the complexities of arbitration law. By addressing the challenges that arise and refining the legal framework, India can continue to foster a culture of arbitration that promotes access to justice and effective dispute resolution.

VII. Challenges and Future Directions

Despite the progress made in expanding the scope of arbitrability, challenges remain. Certain sectors, particularly those governed by specialized statutes, may continue to encounter resistance to arbitration. The evolving nature of disputes, especially in emerging areas such as technology, environmental law, and consumer protection, may also present new challenges in determining arbitrability.

Furthermore, the balancing act between facilitating arbitration and safeguarding public interests will remain a central concern for courts. As more parties turn to arbitration, it will be crucial for the legal framework to adapt to the complexities of modern disputes while ensuring that fundamental rights and public policy considerations are respected.

In conclusion, the landscape of inarbitrable disputes in India has undergone significant transformation, particularly following the Vidya Drolia ruling. The establishment of clear criteria for determining arbitrability has empowered parties to engage in arbitration confidently, promoting efficient and effective dispute resolution. The ongoing evolution of arbitration law reflects a broader commitment to enhancing access to justice while ensuring that significant legal and public interests are duly considered in the resolution of disputes.

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A Comprehensive Overview of Mediated Settlement Agreements

What is a Mediated Settlement Agreement?

The word *'mediated'* is derived from Latin word *'medus'* meaning *'middle'*[1]. It therefore follows from the etymology that a mediator, in the context of law, is a neutral third party who settles a dispute between disputing parties. Drawing an analogy from cricket, mediator functions like a third umpire, who settles the dispute between two teams (two parties in legal context) on an expeditious basis, so that the time, energy and the legal costs are minimized. The mediation provides an alternative resolution mechanism as opposed to the traditional litigation process.

Mediation v/s Negotiation v/s Arbitration

The concept of Arbitration, Mediation and Conciliation are all different but are confused by many. They are also similar in many ways as they provide disputing parties various options to settle their dispute by alternate dispute resolutions (ADR) as against the traditional litigation route. The following table will reflect the basis of their nature, outcome and processes:

Mediation	Negotiation	Arbitration
In mediation, neutral third party, called a mediator, 'helps' the parties reach a mutually acceptable agreement.	Negotiation is a discussion held between parties to reach a consensus by themselves without any mediator or arbitrator.	In Arbitration, an independent person, called an 'arbitrator' appointed mutually or by Court, makes a binding decision based on the evidence presented by the parties.
The purpose of a mediator is to 'propose' an amicable settlement and to arrive an agreement.	The purpose of negotiation is to reach at a solution mutually acceptable to both the parties.	Arbitration is similar to a trial and is used for similar matters but is private and confidential.

1. Vocabulary[dot]com

Mediation	Negotiation	Arbitration
Mediation is a sub-type of negotiation unlike court proceedings.	Negotiation is usually used when the matters relate to the persons who are related to us, for e.g., family, friends etc. Negotiation, therefore, can be emotionally taxing.	Arbitration is often used in labour, business, family, and separation disputes.

An Overview of Regulatory Framework for Mediation in India

Before, we understand the framework of the Act (as defined hereunder), there are various statutes which encourage mediation inter se between the disputing parties so that the matter is not escalated further and settles peacefully between the parties themselves.

Section 89(1) of the Code of Civil Procedure, 1908 is one such statute which permits the courts to suggest arbitration, conciliation, judicial settlement, or mediation for dispute resolution. This is well accepted and implemented by the courts. Mediation centers have been set up across India. Despite this provision, private mediation lacked proper structure and legal recognition, discouraging participation.

To address the above situation, the Mediation Bill 2021 was proposed to enhance the effectiveness of mediation and provide a comprehensive legal framework for it.

About the Act

The Mediation Act of 2023 (the "Act") received the assent of the President and was notified in the Gazette of India on September 15, 2023. The purpose of the Act in terms of its objects is to promote and facilitate mediation, especially institutional mediation, for the resolution of disputes, commercial or otherwise; to enforce mediated settlement agreements; to provide for the registration of mediators; to encourage community mediation; to promote online mediation as a cost-effective process; and for matters connected therewith or incidental thereto.

Agreement for Mediation

Section 4 of the Act provides for a mediation agreement to be an agreement in writing by or between parties and anybody claiming on their behalf who may enter into a written mediation agreement to agree to settle all or certain disputes. This understanding may be included in a separate document or in the form of a clause in the contract. Any signed document by the parties qualifies as an agreement to mediate the disputes.

However, there are certain disputes, similar to the one mentioned under the Indian Arbitration Act, 1996, which cannot be referred to mediation and re listed under the First Schedule to the Act, These excluded disputes are in the nature of criminal disputes, disputes expressly barred under any law, disputes where minors are involved, matrimonial disputes between husband and wife, proceedings initiated by the statutory authorities against professionals, etc.

A mediator is a person of any nationality who is appointed as a mediator, provided that such a person possesses the qualifications, experience and accreditation prescribed under the Act. The parties also have the liberty to select the mediator and the procedure for appointment. If the parties are unable to select the mediator or the procedure, the claiming party may make an application to a mediation service provider to appoint a mediator.

Online Mediation

With the parties' written consent, online mediation, including pre-litigation mediation, may be conducted at any stage of the mediation process under this

Act. This includes using of computer networks and electronic forms, such as secure chat rooms, encrypted email services, and video or audio conferences. The online mediation will be conducted under conditions that guarantee the confidentiality and integrity of the proceedings at all times. The mediator may take such necessary action in this regard that he sees proper.

Mediated Settlement Agreement

Section 19 provides the definition and parameter of a mediated settlement agreement to include an agreement in writing between some or all of the parties resulting from mediation in respect of some or all of disputes authenticated by the mediator and it may also extend beyond the dispute referred to mediation and includes mediation proceedings conducted online.

The mediation proceedings under the Act shall be completed within a period of 120 days from the date first fixed for first appearance of parties before the Mediator. However, this may be extended for a further period not exceeding 60 days.

Registration of Agreements

Mediated settlement agreements, excluding those reached through court or tribunal mediation, Lok Adalat, or final awards from the Permanent Lok Adalat under Section 21 or Section 22E of the Legal Services Authorities Act, 1987, may be registered at the discretion of the parties with an authority established under that Act or any other body designated by the Central Government. The registration will follow specified procedures, and the authority or body will issue a unique registration number for these settlement agreements. It must take place within 180 days of receiving an authenticated copy of the agreement, but it can still be registered after this period for a specified fee. The registration process does not affect the parties' rights to enforce or challenge the settlement agreement.

Non-Settlement Report

Where no agreement is arrived at between the parties within the period of 120 days, a non-settlement report must be submitted by the Mediator with the institution or the parties, as the case may be, without disclosing the reasons for non-settlement.

Confidentiality

Parties and participants involved in mediation are obligated to keep confidential several aspects, including statements, proposals, documents, and any other communication exchanged during the mediation. Moreover, recording mediation proceedings through audio or video is prohibited to ensure confidentiality. Importantly, the information discussed during mediation cannot be used as evidence in court, arbitration, or any legal proceedings. This extends the protection under “without prejudice privilege” to parties to encourage them to engage in candid discussions towards an amicable settlement.

Conclusion

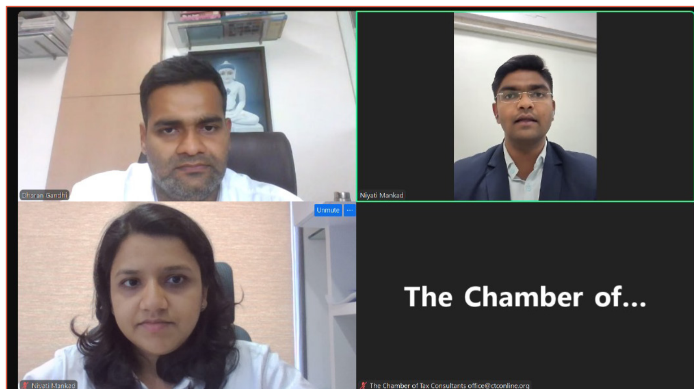
In India, alternate dispute resolution system such as 'mediation' holds immense importance due to its high potential to ease out the existing burden on the judiciary. One will have to wait and watch and understand as to the urge of the parties going forward for mediation without involving the court and settling disputes within the time framework. The Act is surely a step forward in settlement of dispute outside the precincts of the court.

Report on E-Certificate Course on Practical Income Tax & Litigation

— **Mr. Akash Shirore**
Student of MNLU, Mumbai

Course Overview and Participation

The E-Certificate Course on Practical Income Tax & Litigation, organized by the Chamber of Tax Consultants (**'CTC'**) in collaboration with Government Law College, Mumbai, was a resounding success. Held from August 2 to September 30, 2024, the course attracted more than 205 participants from across India, including Manipur, Haryana, Himachal Pradesh, Madhya

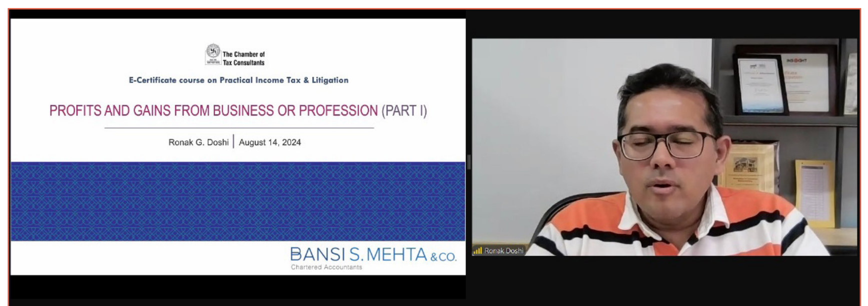


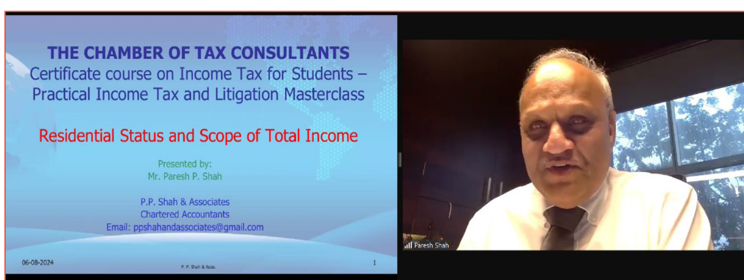
Pradesh, Delhi, NOIDA, Bangalore, Chennai, and Gujarat, as well as Mumbai.

The participants represented a diverse array of backgrounds, including law, CA, and CS students, professionals, business owners, and educators. The support and leadership of Dr. Smt. Asmita Adwait Vaidya, Principal of Government Law College, Mumbai, were instrumental in the smooth execution and outreach of the course.

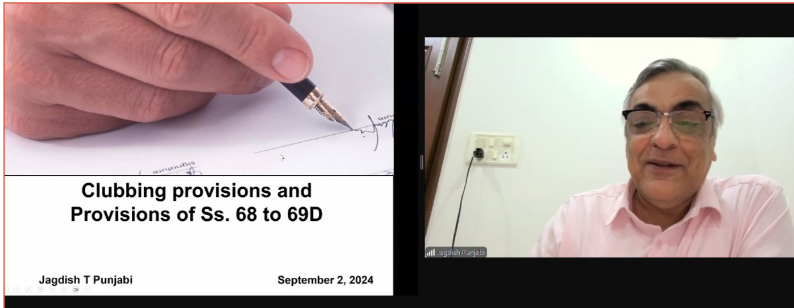
Inaugural Panel Discussion

The course commenced with an inaugural panel discussion on August 2, 2024, setting a high benchmark for the sessions to follow. Hon'ble Mr. Justice Abhay Ahuja of the Bombay High Court graced the event as Chief Guest. The discussion was





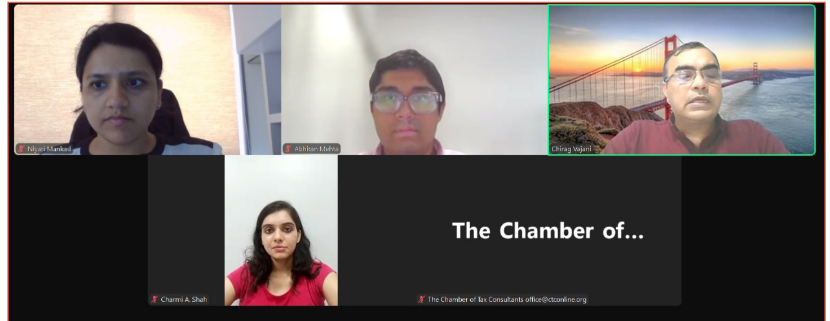
skillfully moderated by Advocate K. Gopal, Vice President of the ITAT Bar Association and Past President of the CTC. The distinguished panelists apart from Justice Ahuja included Dr. K. Shivaram, Senior Advocate and CA Jayant Gokhale. Their insights and shared experiences made the inaugural session an

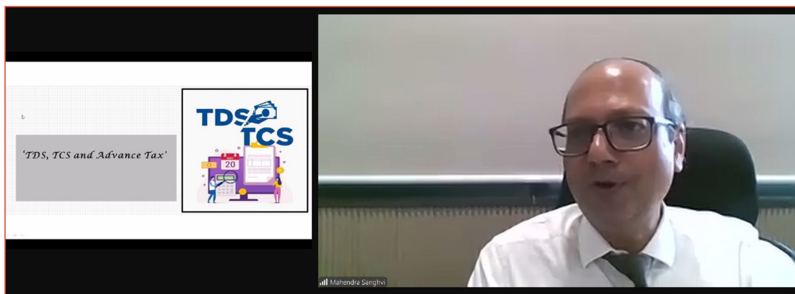


inspiring and thought-provoking start for the participants.

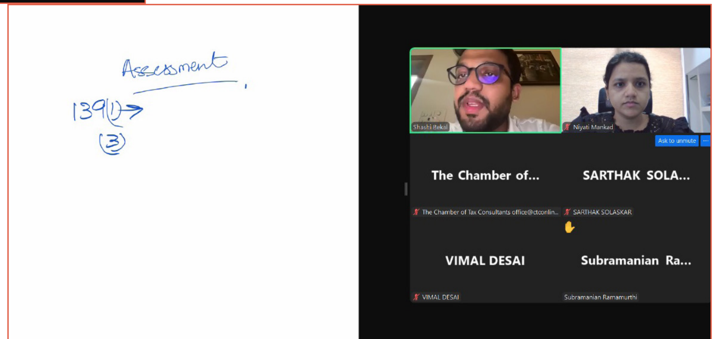
Comprehensive Curriculum and Session Highlights

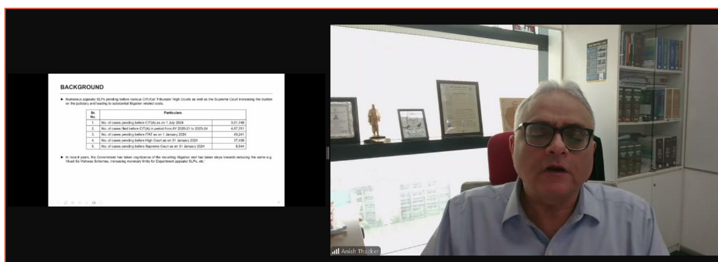
Spanning over 26 meticulously planned sessions, the course covered an extensive range of topics, offering participants a deep dive into the field of income tax law. The curriculum balanced foundational concepts with advanced issues, ensuring practical exposure to tax representation and hands-on experience in drafting.





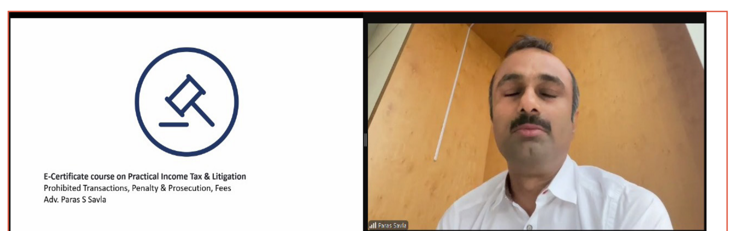
Among the many highlights were two distinguished guest lectures. The first was delivered by CA Anish Thacker, who spoke on *"Alternative Dispute Resolution (ADR) in Tax."* His session provided an essential perspective on ADR mechanisms in tax law, which are increasingly relevant in contemporary practice. The second lecture, presented by Hon'ble Mr. Justice Abhay Ahuja, titled *"Advocacy & Drafting: A Judicial Perspective,"* offered valuable insights into effective courtroom advocacy and drafting from a judicial standpoint, greatly enriching the learning experience.



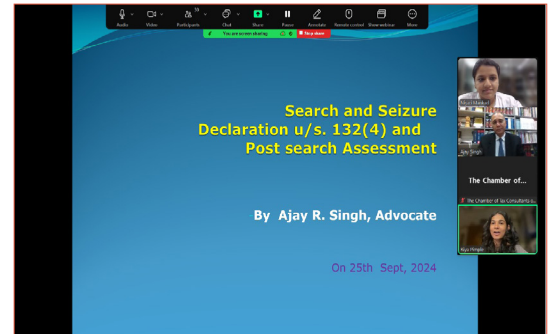


Distinguished Faculty and Contributors

The course featured a stellar roster of faculty members who brought a wealth of expertise and practical experience to the sessions. These included many past presidents of CTC such as Dr. K. Shivaram, Senior Advocate; CA Jayant



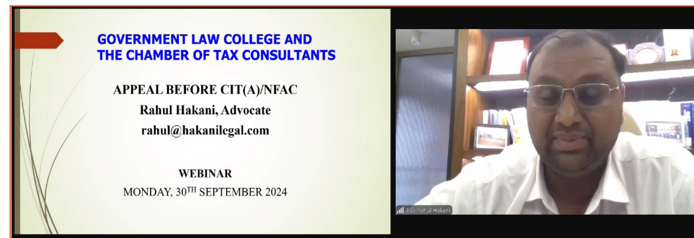
Gokhale, CA Akbar Merchant, CA Mahendra Sanghavi, CA Anish Thacker, Advocate Ajay Singh, among others



The curriculum was crafted by a team of dedicated professionals – Advocates – Devendra Jain, Paras Savla, Rahul Hakani, Niyati Mankad and Chartered Accountants – Abhitan Mehta and Sashank Mehta.

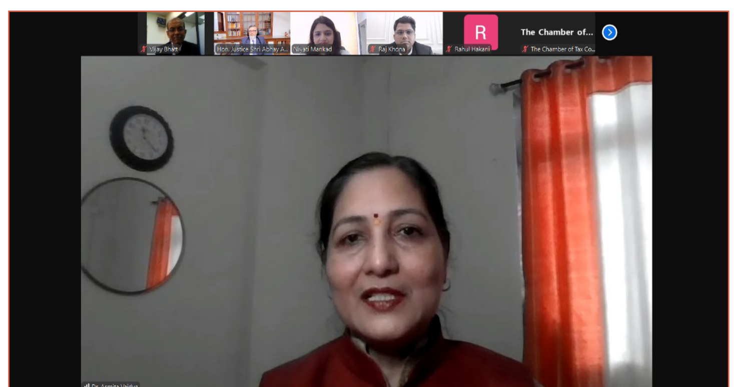
Guidance from the esteemed Advisory Board, including Senior Advocate K. Shivaram, CA Pradip Kapasi, **and** CA Jayant Gokhale, ensured the course's academic rigor and practical relevance.

Special gratitude is extended to Advocate Ajay Singh, Advisor to the Student Committee and Past President of the CTC, his steadfast support and guidance throughout the course. It is also noteworthy that the idea for this course originated during the tenure of Mr. Haresh Kenia, whose vision and leadership were pivotal in bringing this program to life. His contribution continues to inspire such impactful initiatives.



Accessibility and Flexibility for Participants

To ensure accessibility, all sessions (except the hybrid inaugural panel discussion) were conducted virtually via Zoom. Recordings of the sessions were uploaded to the Zoho platform, granting participants access to the materials until December 2024. This flexibility allowed participants to revisit the content at their convenience, enhancing their learning experience.



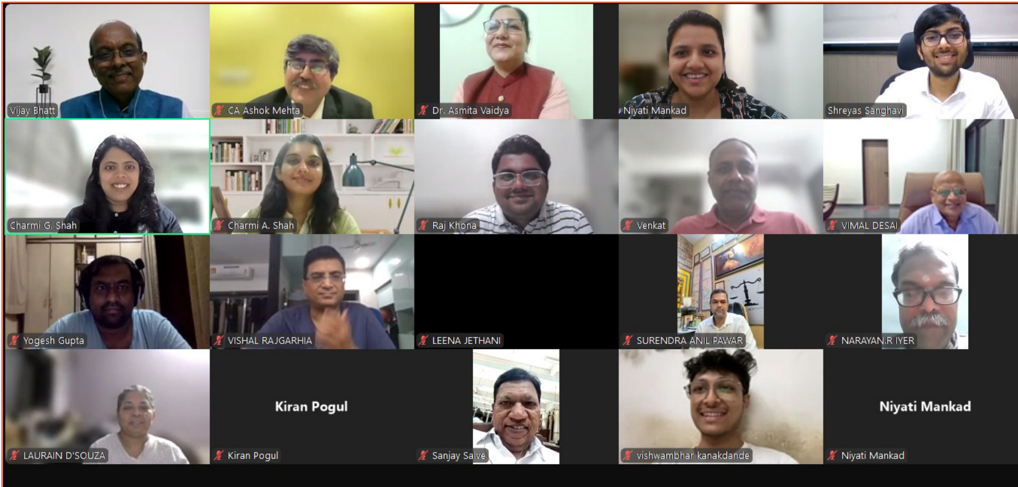
Gratitude and Encouragement for Future Participation

The success of this course is a testament to the dedication of the CTC Student Committee and its leadership. The committee extends its heartfelt gratitude to all faculty members, contributors, and participants for their enthusiastic involvement. Their commitment played a crucial role in making this program a remarkable achievement.

Participants are encouraged to remain connected with the Chamber of Tax Consultants and to take part in future initiatives that focus on advancing professional skills and knowledge in taxation and allied fields.

Conclusion

The E-Certificate Course on Practical Income Tax & Litigation has not only expanded participants' understanding of income tax law but has also fostered professional networks across India. This achievement underscores the Chamber of Tax Consultants' unwavering commitment to providing high-quality educational opportunities. We eagerly look forward to organizing more impactful programs in the future.

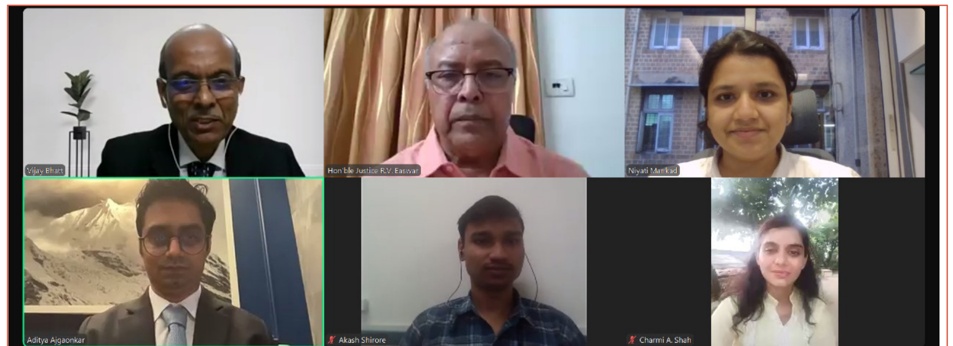


Report on Episode 8 of Udaan with Justice R.V. Easwar, hosted by Adv. Aditya Ajgaonkar

— **Mr. Akash Shirore**
Student of MNLU, Mumbai

"We didn't enter our Senior's chamber with our slippers on ... we left them outside like it was a temple."

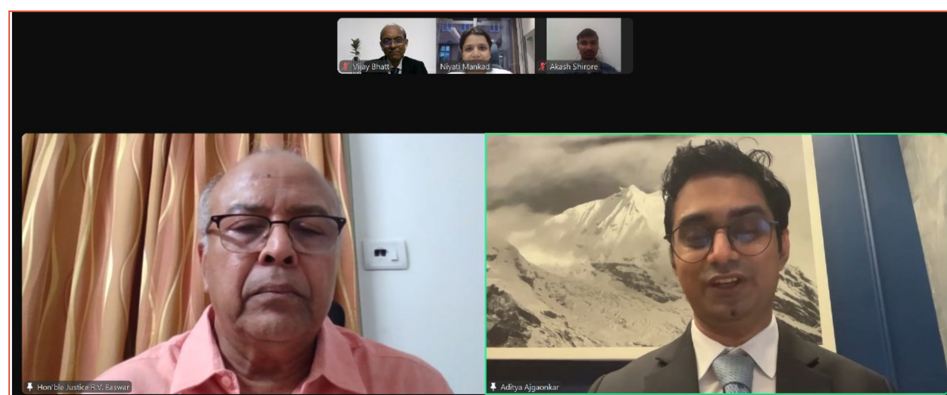
-Dr. R.V. Easwar



The Student Committee of the Chamber of Tax Consultants (**'CTC**') hosted an insightful and inspiring session as part of their Udaan series, titled "Learning Today, Leading Tomorrow." This online event was conducted on the 23rd of October 2024, from 6:00 p.m. to 7:00 P.M. The guest speaker for the session was Justice Shri R.V. Easwar, Former Judge of the Delhi High Court and Senior Advocate, as the esteemed guest speaker. Hosting the session was Adv. Aditya Ajgaonkar, Counsel and member of the CTC Student Committee.

About the Speaker

Justice R.V. Easwar has had a distinguished legal career that spans decades, marked by significant contributions to the field of tax law. His journey has taken him from being a junior lawyer to serving as a Member and later President of the Income Tax Appellate Tribunal (**'ITAT'**). He was then elevated as a judge of the Delhi High Court and chaired the 2016 Direct Tax Reform Committee. Now practicing as a Senior Advocate, he continues to be a formidable force in the legal community, sharing his experience and insights with students, practitioners, and the judiciary alike. Known for his in-depth expertise in taxation, he has taught, argued, and adjudicated numerous cases over the years, establishing himself as a mentor and a thought leader in the Indian legal community.



About the Session

The session was aimed at providing students and young professionals with valuable insights into building a successful career in law, more particularly in taxation. The host had a candid conversation with Justice Easwar, who shared his experiences and reflections on his time as a legal professional. From his early days as a junior lawyer to his prestigious roles on the bench and now as a Senior Advocate, Justice Easwar's journey serves as an inspiration for aspiring legal professionals. Skillfully steering the conversation, the host, Mr. Aditya Ajgaonkar, engaged Justice Easwar with insightful and on-point questions, creating a dynamic and enriching experience for the audience.

Key Highlights of the Discussion

Justice Easwar was open and forthright in answering questions, covering a wide array of topics related to his career and the evolving landscape of tax law in India. Here are some of the key points discussed:

1. **Early Days in the Legal Profession:** Justice Easwar began by recounting his early years in law. He emphasized the respect and reverence with which junior lawyers approached their seniors, a point illustrated by him recollecting the fact of junior lawyers removing slippers outside the chamber, akin to entering a temple. This anecdote resonated deeply with the audience, showcasing the respect embedded in traditional legal mentorship.

2. **Tenure at ITAT and Judiciary Experience:** Justice Easwar delved into his roles as a Member and President of the ITAT, where he gained extensive experience in adjudicating complex tax matters. He also spoke about his tenure as a judge at the Delhi High Court, shedding light on his approach to delivering judgments and the importance of balancing law and justice in tax-related cases.

3. **Insights on Direct Tax Reforms:** As the chairperson of the Direct Tax Reform Committee in 2016, Justice Easwar offered a unique perspective on the evolution of tax law. He discussed the changes he advocated for, the challenges faced in implementing reforms, and his views on areas where further improvements are needed.

4. **Thoughts on Current Tax Administration and Tribunal Reforms:** Justice Easwar shared his views on the recent reforms on the tenure of the members of the ITAT, advocating for longer terms to ensure continuity and expertise. He also discussed the faceless assessment scheme introduced by the government, highlighting both its advantages and potential drawbacks. This segment provided attendees with a nuanced understanding of contemporary challenges in tax administration.

5. **Reflections on Changes Needed in the Income Tax Act:** Justice Easwar articulated his concerns regarding certain outdated provisions in the Income Tax Act and suggested modifications that would make the tax system more equitable and efficient. His recommendations underscored his deep commitment to fairness and clarity in tax legislation.

Impact on Attendees

The session was immensely well-received, with students expressing newfound enthusiasm for tax law. One young law student who had previously interned with Mr. Ajgaonkar shared how the program demystified the field, making tax law seem less intimidating. This sentiment encapsulates the positive influence Justice Easwar had on the audience, inspiring a generation of future tax professionals.

Reflections of the Host

Mr. Aditya Ajgaonkar, who has had the privilege of working with Justice Easwar as his mentee, described the session, in his LinkedIn post, as a memorable experience, affectionately titling it "*There and Back Again.*" His gratitude and admiration for Justice Easwar's mentorship were evident, and he expressed hope that the audience would derive as much value from the conversation as he did.

Conclusion

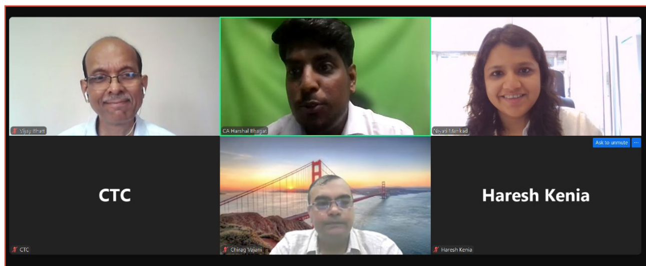
The Udaan session with Justice R.V. Easwar was a remarkable blend of mentorship, wisdom, and inspiration. It provided attendees with a rare opportunity to learn from one of the country's most respected legal minds. Justice Easwar's reflections on his career, his insights into the challenges of tax law, and his vision for a better tax system left a lasting impression, encouraging students to pursue a career in tax law with renewed vigor and purpose.

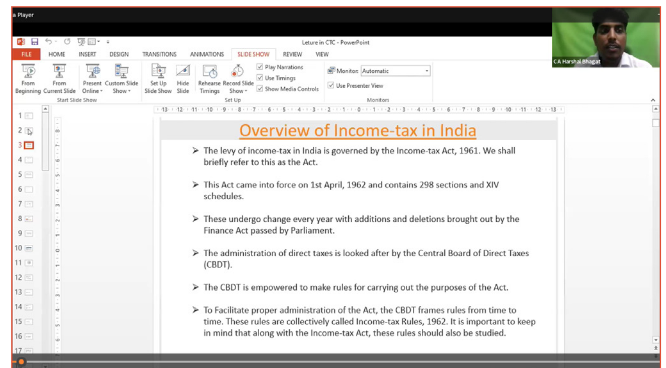
Webinar on Articleship Accelerator : Tax & Audit Essentials

— **Ms. Riya Pimple**
Student of Pravin Gandhi College of Law

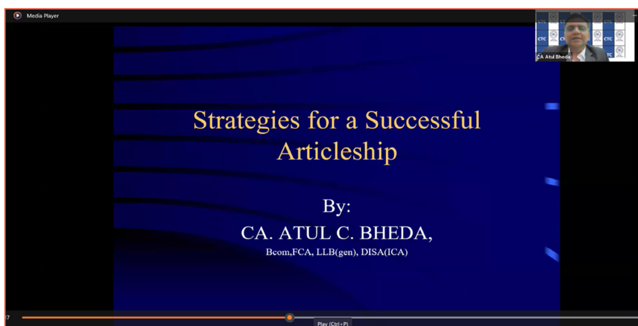
The “Articleship Accelerator: Tax & Audit Essentials” webinar, hosted on an online platform- Zoom, was a comprehensive and insightful session aimed at providing essential knowledge and strategies for students and early-career professionals embarking on their articleship journey in the fields of tax and audit. Led by a panel of experienced speakers—CA Harshal Bhagat, CA Atul Bheda, CA Raj Khona, CA Yogesh Amal, and CA Mehul Shah—the webinar covered a range of critical topics designed to help attendees build a strong foundation for success during their articleship and beyond.

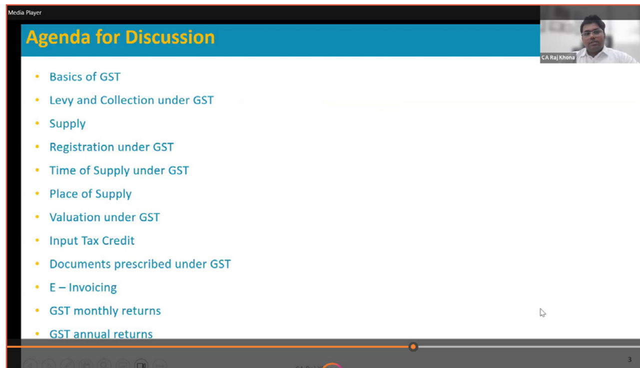
The session began with a deep dive into Income Tax basics, including key concepts in income tax laws, return filing procedures, and an introduction to TDS/TCS regulations. The speakers emphasized the importance of understanding these concepts thoroughly, as they form the core of the tax-related tasks that articleship trainees will encounter. In addition, the session provided valuable insights on Advance Tax Strategies, offering practical advice on how trainees can optimize their tax planning and execution to enhance their effectiveness during their training. The webinar also covered the Basics of GST and procedures for filing the Annual Return, crucial areas for professionals working with indirect taxes or handling corporate clients.





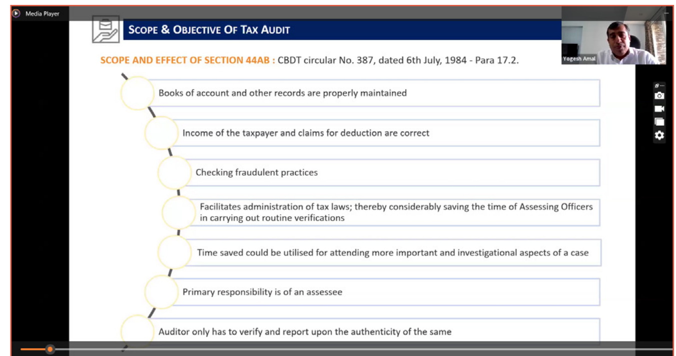
A significant portion of the webinar focused on the essentials of Tax and Statutory Audits. The speakers—CA Harshal Bhagat, CA Atul Bheda, and CA Raj Khona—shared practical insights into the Do’s and Don’ts of both Tax Audits and Statutory Audits, highlighting key mistakes to avoid and the importance of following best practices in audit documentation, compliance, and reporting. They emphasized the need for professionalism, accuracy, and attention to detail throughout the audit process, providing invaluable tips to help attendees navigate real-world audit challenges. The session also discussed the growing role of technology in the tax and audit landscape, including automation tools and data

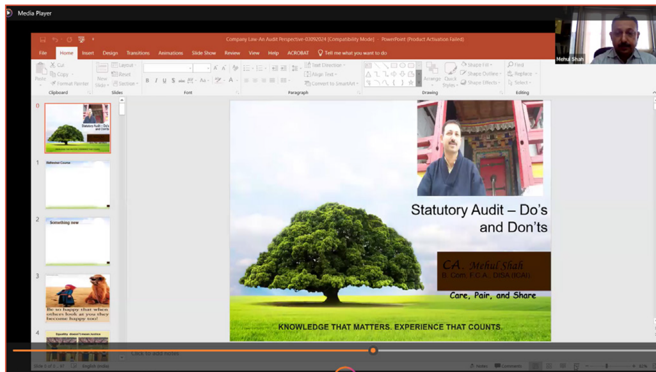




analytics, which are transforming traditional audit practices and improving efficiency.

In conclusion, the "Articleship Accelerator: Tax & Audit Essentials" webinar was a highly informative and practical session that provided attendees with both theoretical knowledge and actionable strategies for excelling in tax and audit during their articleship. The speakers shared their extensive expertise on vital topics such as income tax return filing, GST compliance, tax audits, and statutory audits, equipping participants with the skills and knowledge necessary to handle complex tasks and meet industry standards. The session emphasized the importance of continuous learning, staying updated with regulatory changes, and leveraging technology to enhance efficiency. With these insights, attendees were empowered to maximize their articleship experience, develop their technical and soft skills, and lay a strong foundation for a successful career in tax and audit.





FORTHCOMING PROGRAMMES

Sr. No.	Event	Tentative Months
1.	Udaan Episode 9 with Justice Akil Kureshi	December 16, 2024
2	Unlocking Mergers & Acquisition: Legal, Regulatory, and Practical Perspectives jointly with PGCL, Mumbai	January 4 & 5, 2025
3	2nd National The Chamber of Tax Consultants Indirect Tax Moot Court Competition, 2026 Jointly with ILS Law College, Pune	January 24, 25 & Feb. 8, 2025

The Chamber of Tax Consultants

Estd. 1926

Vision Statement

The Chamber of Tax Consultants (The Chamber) shall be a powerhouse of knowledge in the field of fiscal laws in the global economy.

The Chamber shall contribute to the development of law and the profession through research, analysis and dissemination of knowledge.

The Chamber shall be a voice which is heard and recognised by all Government and Regulatory agencies through effective representations.

The Chamber shall be pre-eminent in laying down and upholding, among the professionals, the tradition of excellence in service, principled conduct and social responsibility.

Unveiled by **Shri S. E. Dastur,** Senior Advocate on 30th January, 2008.

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