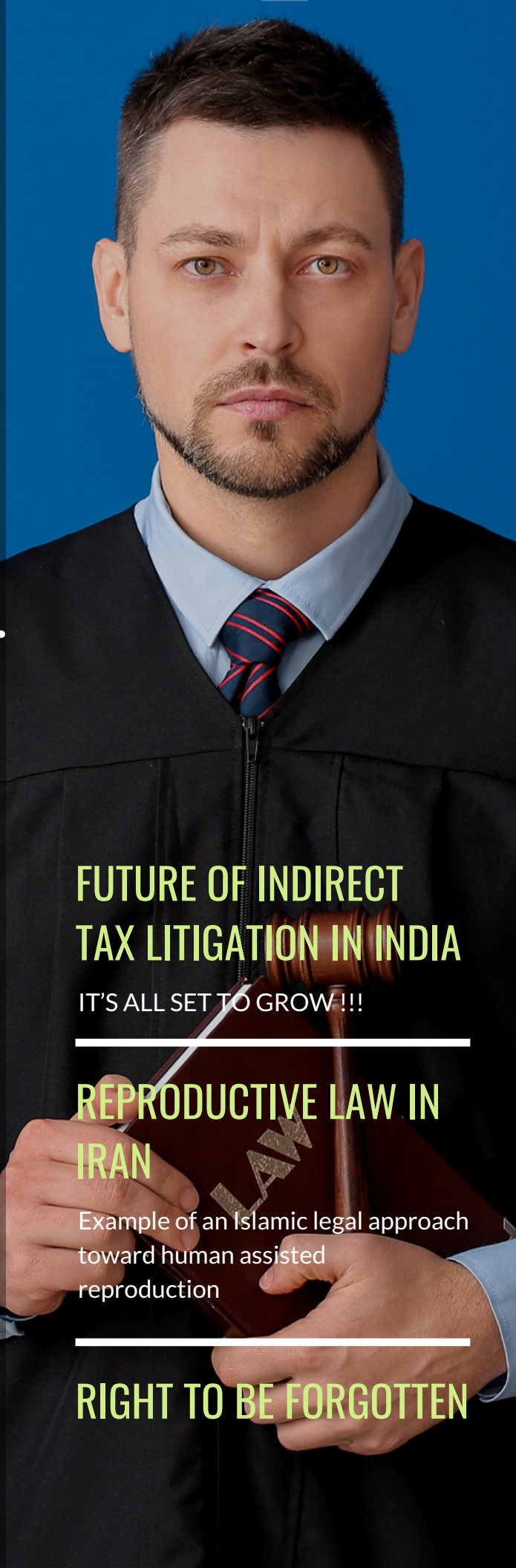
LEXTALK WORLD
MAGAZINE



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RIGHT TO BE FORGOTTEN

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Editor's Note

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"When you're at the edge of a cliff, sometimes progress is a step backward"

In legal parlance, where two parties are in conflict and there seems to be no solution other than heading straight for litigation in the court of law, the best possible outcome is to take the way of Arbitration. Especially with the growing complexities of interests and exchange, this form of dispute resolution is the order of the day. And there are major solutions that are resolved when the conflicting parties on a dispute opt for a mutually agreed method of Arbitration by hiring a professional neutral entity, whose only objective is to find a resolution. Arbitration is generally the most effective and efficient remedy for settling the disputes among the parties and does not require any lengthy procedure to follow and takes very little time to resolve the matter at an affordable cost in comparison with the other judicial processes.

Rapid globalization has meant a corresponding growth in the volume of international contracts with clauses providing for international arbitration. In turn, the availability and effectiveness of international arbitration have been seen by many as a spur to cross-border commerce and investment.

As the focus of the world economy has tilted towards the higher growth economies in emerging markets, the disputes brought to international arbitration are increasingly drawn from trade with and between emerging economies. Although the traditional centers of international arbitration in Western Europe and North America are busier than ever, they are facing strengthening competition from elsewhere. In particular, an increasing number of countries have modernized their arbitration laws and supporting judicial practices and an ever-widening choice of arbitral institutions worldwide now offer their services to potential customers.

This exciting but increasingly complicated legal landscape presents an array of choices to international parties as to how they manage and resolve their disputes. Business needs will always vary depending on the context, but some general guidance can be drawn from an analysis of those aspects of international arbitration which have typically been seen as most advantageous for international parties while minimizing perceived disadvantages of international arbitration.

In today's global business environment, and with modern transport and communication links, the parties may value the highest degree of neutrality in the process over any inconveniences of travel, preferring neutral arbitrators in a neutral venue, even if it is necessary for long-distance travel to be undertaken. Even so, international arbitration can often be flexible, and, where appropriate, hearings, or parts of hearings, can be held at a location away from the "legal" seat of the arbitration.

The September 2021 edition of the Lex Talk World magazine focuses on the opportunities and advantages of Arbitration over Litigation in detail along with other captivating and trending topics from the Legal Industry, to keep you updated and informed.

Kaushik Karmakar, Editor in Chief, Lex Talk World Magazine

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COVER STORY

Arbitration over Litigation – what makes it click?

The unbiased mode of solving the bottlenecks of cross-border disputes comes from the most preferred mode of resolution through International Arbitration. The ease of solving disputes between parties at litigation is becoming the most sought-after model in national as well as international courts of justice. This popular mode of dispute resolution is gaining ground due to the sheer methods involving sophisticated and faster means adopted by courts. But how does it work? Who decides the dispute? And according to what laws and processes?

The cover story of Lex Talk World magazine this month provides an introduction to international arbitration, its key characteristics, and how it works. It concludes with a comparison between arbitration and court litigation.

What is arbitration?

Arbitration is a method of dispute resolution that provides a final and binding outcome. It is generally regarded as an alternative to court litigation, the existence of a valid agreement to arbitrate should mean that state courts refuse to hear disputes falling within the scope of that agreement.

In arbitration, the parties submit a dispute to an appointed decision-maker (the arbitrator), or a panel of arbitrators (the tribunal). This is typically done by providing for arbitration in the contract (the arbitration agreement). The agreement should also cover the number of arbitrators, the legal place or seat of the arbitration, and the procedural rules that will govern the arbitration.

The tribunal will generally give its decision (the award) following a hearing during which each party will have the opportunity to present its position. If appropriate, arbitrations can be conducted on paper only, for example, where the sums or issues in dispute do not justify a hearing. Generally, the tribunal will decide the dispute following the law governing the relevant contract.

Why arbitrate?

Dispute resolution lawyers always advise clients to choose the method of dispute resolution (usually litigation or arbitration) which puts them in the strongest position should a dispute arise. Both litigation and arbitration have their advantages and disadvantages depending on the circumstances and, in particular, where the contracting parties are based or their assets are located.

The main benefits of arbitration are ease of enforcement of awards, the ability to choose who decides the dispute, procedural flexibility, and privacy. The neutrality that arbitration offers is also a key selling point. Contracting parties often want the dispute to be heard in their local courts where they have a perceived home advantage: international arbitration in a neutral country is the compromise.

Key concepts

The seat of the arbitration:

To understand how arbitration works, it is important to understand the significance of the seat of the arbitration. When parties agree to arbitration, they should specify the legal place – or seat – of the arbitration. Typically, parties specify a city, for example, London or Paris. The choice of the seat gives the arbitration a "nationality", so in this example, English or French. This is significant for several reasons: the legislative framework, involvement of the courts, and enforcement.

Dubai - The emerging capital of Arbitration of the world

Due to the most strategic location of UAE which is accessible from Europe, Asia, and Africa and the emerging center of trade, commerce, and exchange. In recent years the Government of UAE has also been extremely proactive in aggressively promoting the country as an epicenter for all business opportunities with patronization of knowledge and technological prowess.

Legislative framework

Most countries have legislation governing arbitrations that take place in their territory. This does not replace the procedural rules chosen by the parties to govern the arbitration (discussed below) but provides a framework in which those rules operate and may fill gaps not addressed in the rules. Many countries' national laws are based on the UNCITRAL Model Law on International Commercial Arbitration. The Model Law is intended to even out disparities between national laws and suggest a common standard for arbitral practice.

Most arbitration laws give the parties flexibility on matters such as the appointment of the tribunal and the procedures to adopt while providing a safety net where agreement is lacking. They also generally prescribe elements from which the parties cannot depart by agreement, including the more fundamental aspects of the process such as fairness of the proceedings and the duties of the tribunal.

Support of the courts

The national law will also give powers to the courts of the seat concerning certain aspects of the arbitration. Broadly speaking, these include issues such as the ability of the parties to apply to the national courts for support (for example an order to freeze assets or obtain evidence), the ability to challenge decisions of the tribunal and the award, and provisions on enforcement.

The national law, and the general attitude of the judiciary in a country, will determine how supportive or interventionist those courts will be. Interventionist jurisdictions, where courts interfere in the arbitral process to the detriment of its autonomy, are to be avoided.

Enforcement

The "nationality" of the arbitration extends to the award. So the award of a London-seated tribunal will be regarded as English. This is significant when it comes to enforcement. The country of the seat of the arbitration must ratify the New York Convention, an international treaty that provides for the reciprocal enforcement of arbitration awards in over 160 countries. Some state signatories to the Convention will only enforce awards made in countries that are also signatories to the Convention. This is expanded on below.

The choice of seat is therefore important as it dictates the legislative framework within which the arbitration will precede the level of support the courts of the seat will provide and the enforceability of any award. The most popular seats selected in international arbitration include London, Singapore, Hong Kong, Paris, and Geneva.

Institutional, or ad hoc?

It is the procedural rules of arbitration that govern the conduct of the arbitration, especially in its early stages. In deciding which rules to apply, parties have to decide between institutional or ad hoc arbitration.

Institutional arbitration

Institutional arbitration involves incorporating the rules of the selected institution into the arbitration clause by reference. That institution will then administer the arbitration. Institutional rules are designed to set out a framework for the proceedings comprehensively from beginning to end, so are better suited to cater for contingencies that might arise. This is particularly useful where a counterpart is refusing to co-operate in the arbitral process.

There are many institutions to choose from. Popular institutions include:

- The International Court of Arbitration at the International Chamber of Commerce (the ICC);
- The Singapore International Arbitration Centre (the SIAC);
- The Hong Kong International Arbitration Centre (HKIAC);
- The London Court of International Arbitration (the LCIA); and
- The China International Economic and Trade Arbitration Commission (CIETAC).

Ad hoc arbitration

Ad hoc arbitration is conducted under rules adopted for the specific dispute, without the involvement of an arbitral institution. The parties can draft the arbitral rules themselves. However, they usually either leave the rules to the discretion of the arbitrators or they adopt rules specially written for ad hoc arbitration.

Ad hoc arbitration lacks the "support net" of an institution and depends for its full effectiveness on a spirit of co-operation between the parties which is usually lacking by the time disputes have arisen. The potential problems of arbitration more generally, such as the ability to delay proceedings, are more likely to arise in ad hoc arbitration. The parties will also have to deal with additional administrative issues, such as negotiating the tribunal's fees. In addition, certain jurisdictions only recognize institutional arbitration. Although the use of ad hoc arbitration avoids the need to pay fees to an institution, unless the parties are sophisticated users of arbitration or trade practice dictates the use of ad hoc arbitration, institutional arbitration is to be preferred.

Key characteristics of international arbitration

Consensual

Arbitration is a voluntary and consensual process. Unlike national courts, an arbitral tribunal will not have inherent jurisdiction to decide a dispute. An arbitral tribunal will only have jurisdiction if all parties to the dispute have agreed to submit their disputes to arbitration. Parties will usually provide for this by inserting an appropriately drafted arbitration clause into their agreement.

One important consequence of the consensual nature of arbitration is that, unlike court judges, arbitrators are often unable to join additional parties to the dispute resolution procedure or consolidate related arbitral proceedings. Arbitral institutions have revised their rules to address this, but it can still be more difficult to join a third party or consolidate two disputes in arbitration than court litigation - in appropriate circumstances, third party defendants can be joined to court litigation without their consent if they fall within the jurisdiction of the court.

Neutral

Arbitration can offer dispute resolution in a neutral forum. Although the courts of the seat where the arbitration is situated may have some role to play in supporting and policing the arbitration, it is generally left to the arbitrators to determine the process to be followed and the merits of the dispute. Often, tribunals will comprise arbitrators of different nationalities, which adds to the neutrality of the process and the decision.

Choice

The parties to an arbitration have considerable choice in determining how, where, by whom, and in what language their dispute is resolved. Of particular importance to the parties is the choice of decision-maker. Unlike commercial litigation where disputes are resolved by state-appointed judges, parties to arbitration may select their arbitrator. This is especially advantageous in the context of a technical matter that requires particular expertise, or where parties are from different jurisdictions and each wants to appoint an arbitrator from their jurisdiction.

Privacy and confidentiality

Arbitration is particularly advantageous for commercial parties because of the privacy and confidentiality that it can offer. Hearings generally take place in private. Parties can agree that the hearing and evidence, and any other material created or disclosed in the proceedings, be kept confidential and that they (and the arbitrators) will not disclose any information about the arbitration. In comparison, court documents and hearings are generally public.

Finality

Most arbitral laws do not allow for the award to be challenged except in very limited circumstances. In addition, the choice of certain institutional rules can further limit the parties' scope to challenge the award. This means that parties avoid the cost of protracted appeal processes.

Enforceability

The ease of enforcement of arbitral awards is viewed as a key advantage of arbitration. Enforcement is facilitated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (the New York Convention). A contracting state is obliged to recognize arbitration awards as binding and to enforce them following its procedural rules. Over 160 countries have ratified the Convention, including most of the world's leading trading nations.

A contracting state may only refuse to enforce an award if:

- A party to the arbitration agreement was under some incapacity;
- The arbitration agreement was not valid;
- A party was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case;
- The award goes beyond the scope of the submission to arbitration;
- The composition of the arbitral tribunal or the arbitral procedure was not under the agreement of the parties;
- The award is not final and binding or has been set aside;
- The subject matter of the award is not capable of settlement by arbitration under the law of the contracting state; or
- It would be contrary to public policy to enforce the award.

These provisions are incorporated into the national law of contracting states.

Analysis shows that arbitral awards are usually complied with voluntarily. Where enforcement proceedings are necessary, the New York Convention greatly assists award creditors, although it should be noted that not all states have a good track record of compliance with their obligations under the Convention.

How it works

Agreement to arbitrate

As arbitration is a consensual dispute resolution mechanism, a necessary precursor to any arbitration is a valid agreement to arbitrate. This is commonly dealt with by inserting a clause into the principal contract between the parties obliging them to resolve any dispute arising "out of or in connection with" that contract in arbitration. There are several key aspects of the arbitral process that may be agreed upon in the arbitration provision itself including:

- The place (i.e. seat) and language of the arbitration;
- The number of arbitrators; and
- The procedural rules that will govern the arbitration.

Drafting an effective arbitration clause is key. If the dispute falls outside the scope of the clause, or if the clause is invalid for uncertainty, parties could find themselves before the very national court they hoped to avoid.

An arbitration clause in a contract operates as a self-contained contract. This means that, even if the main contract is invalid, the clause will still stand and bind the parties, unless it is itself invalid for some reason.

Appointment of the arbitrators

The appointments will be made by the terms of the arbitration agreement or, if silent, the rules of the relevant institution or national law. It is standard for disputes to be referred to one or three arbitrators. Where three arbitrators are to be appointed, it is common for each party to nominate one and for the relevant institution or the two chosen arbitrators to nominate the third arbitrator who will act as chairman. If a sole arbitrator is appointed, absent party agreement, it is usual for that appointment to be made by the institution or, if ad hoc, a designated appointing authority.

Fees

Fees will usually be paid, at least in part, up-front upon the appointment of the tribunal. If the arbitration is being administered by an institution, a fee will also be payable to that institution. The rate of fees varies but they are usually calculated either by reference to the time spent by the tribunal members or the value of the dispute.

The powers and duties of the tribunal

The principal duties of the tribunal are to determine the dispute fairly and efficiently, adopt suitable procedures for the particular case and ensure that time and costs are not expended unnecessarily. To discharge these duties the arbitrators have a range of powers deriving from:

- The arbitration agreement;
- The procedural rules;
- The applicable national law.

The procedure

The procedural rules of the different arbitral institutions vary. In general terms, they provide the procedural framework for the arbitration from start to finish and, in particular, cover: commencement of the arbitration, the constitution of the tribunal, the conduct of the proceedings, rendering of decisions, and determination of costs.

The institutions revise their rules to keep pace with the perceived needs and desires of the users of arbitration. Certain institutions provide a fast-track mechanism for disputes under a certain value. And increasingly institutions are revising their rules to provide for early determination/summary disposal.

The procedures adopted, although different, typically provide the parties with an opportunity to put forward their case via written submissions together with any documentary, factual and expert evidence. Certain institutions, for example, the ICC, favor a Memorial approach that requires a party to provide legal submissions and evidence at the same time. Others, for example, the LCIA, prefer a staged approach that requires an exchange of submissions, followed by an exchange of documentary evidence and then factual and expert evidence.

Where appropriate, there will be interim hearings to agree on timetables and other interlocutory hearings. The arbitration will usually conclude in a hearing in the seat chosen or at a different venue if agreed by the parties. The award itself should ideally be delivered within six months, although often takes longer. Here the institution can add value by encouraging the tribunal to deliver the award promptly.

Awards and challenging awards

The award in arbitration is equivalent to the judgment in litigation. It is "final and binding" subject to limited rights of challenge. Generally, the award must be in writing, be signed by all the arbitrators, contain reasons, and state the seat of the arbitration and the date the award was handed down. Once the tribunal has issued its award it is functus officio and has no further authority to act.

Unlike court judgments, awards cannot generally be challenged except in very limited circumstances. These include where there has been a serious irregularity affecting the tribunal, the proceedings, or the award which has caused injustice to one or more of the parties. So, for example, where the tribunal exceeded its powers, failed to conduct proceedings following the agreed procedure, or where the award is ambiguous or was obtained by fraud.

Comparison Chart

BASIS FOR COMPARISON	ARBITRATION	LITIGATION
Meaning	Arbitration implies a non-judicial process in which a neutral third party is appointed for the resolving disputes between parties.	Litigation refers to a formal judicial process wherein the parties under dispute go to the court for its settlement.
Nature	Civil	Civil or criminal
Proceeding	Private	Public
Place	Decided by the parties	Court
Decided by	An arbitrator who is chosen by the parties mutually.	A judge who is appointed by the court.
Cost	Low	Comparatively high
Appeal	Not possible	Possible

Hi,

The recent upsurge of the Covid 19 pandemic has put all of us in a tight and crippling situation. We are getting news of some of our most near and dear ones and their families getting affected.

It has become a scary situation, hence wearing a mask, maintaining social distancing, avoiding crowded places, washing hands with liquid detergents or soap, and staying at home unless compelled to go out has become the new norm to follow, to break the chain of contagion. Only if we follow these guidelines we could emerge victorious together over the pandemic.

This message is just a feeling of concern and sincere hope that all of us stay healthy, fit and safe from this pandemic while we try our best to innovate and continue to bring an order of discipline in working remotely from our homes keeping our spirits high.

Hence, please stay safe, secured and follow the protocol to beat the contagion.
Best Regards

FUTURE OF INDIRECT TAX LITIGATION IN INDIA – IT'S ALL SET TO GROW !!!

by Puneet Bansal

Introduction of Goods and Services Tax

Till 2017, India had a complex Indirect Taxation system with plethora of taxes like Excise Duty, Service Tax, VAT etc. The multiplicity of taxes led to the cascading effect impacting the cost of goods & services, tedious compliances, and protracted disputes, the burden of which fell on the Common man. This gave rise to evolution of GST – a uniform tax subsuming all Indirect Taxes.

All stakeholders welcomed GST with multifold expectations. Taxpayers expected simplified law and free flow of credits, common man expected overall reduction in price of goods and services, lastly, the Government expected buoyancy in revenue collections. Overall, everyone expected a better experience than previous regime.

Implementation of GST

The onset of GST witnessed the Government adopting a pro-active and expeditious approach in addressing challenges faced by taxpayers. The GST Council (the Constitutional Body to implement & oversee GST) convened series of meetings and the Government also issued plenteous Notifications & Clarifications to address several issues and concerns raised by the Taxpayers.

Transitional credit – the Saga continues

The introduction of GST also witnessed the Government allowing transition of pre-GST credits earned by Taxpayers into new regime. This step was well appreciated by Taxpayers. However, this joy was short lived as law contained multiple restrictions like eligibility of certain credits for transition etc. which led to complete chaos and set-back for Taxpayers. This got further worsened by Government's IT Portal (GST Portal) which was non-functional and marred with never-ending technical glitches. All cumulative led to complete failure of transition of pre-GST credits and paved way for first set of litigations in GST regime. Soon thereafter, the issues multiplied and the Courts across the country, were flooded with cases relating to transitional credit on account of technical glitches on GST Portal. That apart, there were multiple challenges to constitutional validity of restrictions in transitional credit provisions. The magnitude of these disputes was so huge that the disputes are arising till date and are expected to take many more years to settle.

Anti-profiteering – Entangled law

With implementation of GST, the Government took bold decision to significantly reduce effective rate of tax on large number of products with a hope that it would reduce cost of such products in hands of Common man. To ensure that Taxpayers pass on benefit of reduced tax rates to end consumer, the Government introduced anti-profiteering provisions and set up National Anti-Profiteering Authority ('NAA'). Despite significant international experience on such set of regulations, implementation of these provisions in India faced significant challenges due to lack of clear guidelines on computation of incidence of reduction in taxes compounded by ambiguous provisions. Consequently, even the validity of anti-profiteering regulations was challenged before the Courts in multiple cases. In nutshell, NAA was an unsuccessful venture which got entangled amidst the law.

4 years - 1400 advance rulings, 200 anti-profiteering rulings, 1100 High Court judgements & 50 Supreme Court judgments and these are multiplying!!!

To address need for providing timely clarity to Taxpayers, the Authority for Advance Ruling (AAR) was set up across India. Unlike earlier laws, GST law allowed Taxpayers to seek ruling even on existing transactions and not just proposed ones. This concept was welcomed by Taxpayers since if well-implemented, it could have eliminated scope of future disputes. However, this delight of Taxpayers was short-lived primarily due to constitution of the AAR comprising of only Tax Officers without any Judicial Member which led to pro-revenue approach. The AARs also took contrary views on same issue in different States and refrained from addressing many issues on grounds of being beyond their jurisdiction. Surprisingly, this led to the authority which was constituted to curb litigation, became hub of one.

Further, the poor draftsmanship of GST law has also led to manifold interpretational issues ranging from issues relating to taxability, applicable rate of tax on goods and services, availability of Input Tax Credit to procedural aspects. Due to this, soon after introduction of GST, the High Courts started dealing with challenge to constitutional validity of several provisions under GST law like GST on intermediary service, GST on Ocean Freight on reverse charge basis, validity of bar on claiming ITC on construction services etc. This was further coupled with numerous litigations relating to detention of goods due to procedural infractions in Electronic-Way ('E-way bill') bill system etc. Even several refund related litigations are pending at Appellate Authority level due to absence of robust IT system for submission & disbursal of refund claims, all of which in all likelihood will be settled at high forums only. This brings to one of the biggest misses under GST law - the constitution of Goods and Services Tax Appellate Tribunal ('GSTAT') Basis pre-GST laws experience, disputes relating to interpretation of legal provisions rarely get resolved at Adjudication or Appellate Authority stage and most of them are resolved at Appellate Tribunal level or higher forum. Therefore, constitution and effective working of an Appellate Tribunal cannot be emphasized enough for smooth implementation of GST law. One of the important yet vexed issues under GST law is the constitution of GSTAT which has been challenged on multiple grounds like appointment of advocates and members of Indian legal services as judicial or technical members; absence of judicial member, location of GSTAT in a State etc. With the Madras High Court rendering constitution of GSTAT as invalid, even this issue seems to have drifted into oblivion with no clarity coming from Government on its constitution and Taxpayers waiting for resolution of issues piling up due to its non-constitution.

To add to taxpayers' agony, the authorities have resorted to coercive measures like cancellation of registration, attachment of bank account, freezing of Electronic Credit Ledger, arrest etc. in an indiscriminate manner. These measures which were supposed to be adopted in exceptional circumstances and limited situations as provided by the Legislature, have become handy tool for authorities to harass genuine Taxpayers. Resultantly, in less than 4 years, these issues have reached to the Supreme Court which has intervened and laid down guidelines for their limited recourse by the authorities!

Disputes under GST – all set to grow!!!

To sum up, GST was introduced by the Government with great fanfare and commitment to provide simplified law & foster 'ease of doing business'. However, callously drafted legislation, poorly implemented IT system, lack of proper redressal mechanism and lopsided approach of the authorities, has defeated all such noble intentions. Unfortunately, just like erstwhile laws, GST law too has caused and likely to cause many litigations across various forums across the country. For this reason, it is not Good and Simple Tax as was expected to be on its inception. Given all, there is a dire need for Government to work on above areas and until then, disputes under GST are all set to grow!!!

REPRODUCTIVE LAW IN IRAN: EXAMPLE OF AN ISLAMIC LEGAL APPROACH TOWARD HUMAN ASSISTED REPRODUCTION

Infertility is one of the most known malfunctions of human body, with a history as old as human being existence. During centuries and ages, this disorder was thought to be irresistible divine curse without any way out to enjoy child bearing. Initiation of medical procedures that increase the possibility of pregnancy, like IVF(In-Vitro Fertilization) and IUI(Intra-Uterine Insemination) and its spread during the late 20th century ruined the ancient belief about infertility. This disorder is now being treated as an illness and infertile couples seek severely for medical solutions instead of giving up and bonding their condition to supernatural causes. In treatment procedures like IVF and IUI, there is no need for a third party involvement.

But, in cases where the couple lack capability of reproduction without any third party gamete or womb, third party assisted reproduction emerges. Here, many legal and ethical issues arise. The most significant one is the recognition of parentage for the spring of third party assisted reproduction. In countries with secular legal system, the complexity is far less. the actual family takes precedence and the courts do not involve in the biological origin of the fetus or his/her bond with the surrogate. However, this approach is not accepted in legal systems based on ideological concerns. In Islam, for example, the parentage is a key concept with gross effects on inheritance and other financial and non-financial rights and duties of a family member. So, contrary to the secular laws, there is no room for contractual consent and free will in determining the legal parents.

It is obvious that benefitting of third party assisted reproduction procedures in an Islamic legal system may lead to some dilemma about the parentage and role playing of actors in the resulted family. For instance, in an embryo donation treatment, it is not clear whether the donors are real parents or it is the intended parents who enjoy and undertake paternity rights and obligations. Some Muslim scholars believe in paternity of genetic parents, while others think the delivery of child is the criteria for paternity and hence, introduce the biological mother who delivers the baby as the real mother. The controversy even intensifies when a Muslim scholar seeks for the real father, particularly in the case of surrogacy.

Considering these problems, although assisted reproductive medicine is vastly applicable in secular systems, Islamic countries with mostly banned it. However, as a country with Shi'a majority, Iran seems to be a unique exception in Muslim world that despite its ideological law, practices all methods of assisted reproduction even those involve third party intervention. There is only one brief law called "embryo donation to infertile couples' act" passed in 2003 by Iranian parliament. According to the law, each Iranian infertile couple enjoys the right to have access to an embryo of a fertile couple, subject to proof of applicants' infertility.

Although Iranian law did not regulate other methods of assisted reproduction like IVF and IUI, gamete donation and surrogacy, all these treatments are common and being applied. It seems that Iranian legislator intentionally did not discuss other ways of infertility treatment, in order to avoid the Islamic controversies about parentage, child custody and inheritance.

This tolerant approach toward infertility treatment, has made Iran as one of the main destinations of Muslim infertile couples of other countries. Although benefitting from donated embryos is banned for non-Iranians, IVF, IUI, surrogacy and even gamete donation are accessible. This has made Iran a fertility hub in the region and attracts hundreds of Muslim patients across the middle east to visit Iran and enjoy the treatment annually.

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LEXTALK WORLD
TALK SHOW
with

BRUNDA LAVU

MANAGING PARTNER AT ATLASIP LEGAL

LexTalk World interviews Ms. Brunda Lavu. Brunda is a Lawyer whose practice focusses on trademarks and copyright. She graduated her BA. LLB (Bachelors of Arts and Law) from Bangalore Institute of Legal Studies, India. Immediately after graduation, she began practiced in the Andhra Pradesh High Court for a year. Thereafter, she pursued her LLM (Masters in Intellectual Property Law) from University of Washington School of Law, Seattle, United States of America. Recently, in the year 2020, she set up her own firm namely AtlasIP Legal based out of Gurgaon. She deals with trademark clearance searches, prosecution of trademark applications until the stage of registration of the trademark.

Interview

Host: Please brief us about your journey as a Legal professional so far.

Brunda: I always had an aspiration to become a lawyer. I was inspired by my uncle who then was then a senior counsel and now a Supreme Court Judge. So, I adopted the usual course of doing my 5 year law course. I took up my law course from Bangalore Institute of legal studies, Bangalore. During law school, in 1-2 moot court competitions, I happened to have worked on trademark/copyright cases which made me become interested in Intellectual Property Law. Hence, while pursuing law, I had enrolled for a diploma course in Intellectual Property Law from National Law School, Bangalore. That's where my IP Journey began and I was able to understand the nuances of the IP law to be specific. After graduating from law school, I practiced in the Andhra Pradesh High Court, i.e. In Hyderabad for a year under a senior lawyer Mr. Adi Narayana Rao. Thereafter, I decided to pursue my LLM abroad in Intellectual Property Law from Washington School of Law, Seattle. While pursuing my LLM, I interned at the Washington Attorney General's office in the IP department under the Assistant Attorney General. I primarily worked on trademark and copy right matters apart from other legal matters. This internship experience enriched my IP knowledge and gave me exposure to the practical side of IP.

When I moved back to India, for two years, I assisted start-up clients on copyright, trademark related matters, advice and all other related agreements that are required for the clients. Thereafter, I wanted to develop a forte and a niche practice in IPR, so I joined an IP boutique firm based out of Delhi where I worked for 4 years primarily on trademark, and copyright.

In the meanwhile, I had been approached by few fortune 500 companies in India for assistance on trademark matters, hence I decided to set up my own law firm and that's how emerged my Law firm AtlasIP Legal based out of Gurgaon. In a short span of time, we were able to gain trust not only of Indian clients but also of clients from other foreign countries across the world.

Host: Tell us about your most memorable case?

Brunda: Last year, at the beginning of pandemic when the courts started functioning virtually, we have obtained a temporary injunction for one of our fortune 500 Company client in a trademark infringement case on the basis that the client's mark is well-known registered mark. We were able to stop the infringer from continuing to infringe upon our client's well-known mark. Having successfully obtained an ad-interim injunction so swiftly that too in such unprecedented times is something of a memorable nature.

Host: How do you look at Opposition, Brand Enforcement in 2021 and how it's going to change 5 years down the line?

Brunda: As you are aware, every week, The Indian Trademark Office publishes certain number of applications in its journal which are open for opposition. You would be surprised to know that in 2020 which is a Covid year and still continuing, out of say as an example 2000 trademark applications, on an average atleast 400 applications are being opposed. In this regard, I would say that brand owners are becoming more and more aware regarding brand protection and are opting to file oppositions as a first step to block a mark similar to theirs from proceeding towards registration.

In the next five years to come, with more and more awareness among the brand owners, we may likely see a surge in the number of opposition cases. With the complete digitization of the Trademark Process and Procedure, Trademark Office aims to overcome/reduce the huge backlog of pending opposition cases. I expect that the Trademark Registry is likely to provide a faster turnaround time in all new proceedings as well as conclude pending opposition proceedings.

And some of our clients have reported that their trademarks have been infringed the most online in 2020/2021. As more number of businesses go online, there is more scope for infringement online, and hence we at our firm, keep coming up with innovative ways to identify such infringements and tackle them efficiently. Also, the commercial courts especially Delhi, Bombay, Chennai and Kolkata have been proactive in passing swift interim orders in intellectual Property matters which is a sign of relief for the brand owners.

Host: What is your observation with respect to time-lines on trademark registration in India post introduction of Trademark Amendment Rules, 2017

Brunda: As per my observation, Indian Trademark Office has become swifter with respect to trademark registration. In a straight-forward case, when no objections are raised by the Trademark Office, and no oppositions are filed, we can expect registration of a mark in about 5-6 month's time. Also, show-cause hearings in prosecution cases especially in international cases i.e applications filed through Madrid designating India are being appointed within 8-12 months in order to keep pace with the rest of the countries in the world. Additionally, this year (2021), the hearings are being held through video conferencing method, hence, the trademark applications are also being disposed off accordingly without any pendency.

Host: What are considered as strong trademarks for registration and how best to adopt them for one's business.

Brunda: This is very basic but a very important step. When a trademark is being adopted by an entity/individual for their business , it is recommended to adopt strong marks that are fanciful, arbitrary or unusual marks in nature. Fanciful marks for example are Kodak for cameras, Google for online services, Rolex for watches, Xerox for copier machines etc. These are invented/coined marks and they don't carry any meaning to them. They are randomly invented marks which has no correlation to the descriptive nature/characteristics of the goods/services offered under the mark. Hence, they are considered as the strongest form of marks to obtain trademark protection in India. However, it is also equally important and highly recommended to conduct a pre-filing search in that particular classification of goods/services to determine if the proposed mark already exists on the Indian Trademark Office records to eliminate the possibility of adopting an identical/similar mark for the same set of goods/services.

Second category of strong marks are arbitrary marks. These marks although are generic/commonly used terms in nature but when used for goods/services that are totally unrelated to their nature/characteristics, they are considered arbitrary in nature. For example: Apple for computers and Dove for chocolates/soaps are considered as highly strong and distinctive marks.

Secondly, it is advisable for fresh law graduates to not limit or compartmentalized themselves into specific areas of law practice when they have just begun venturing into the field. This is because it is advantageous to absorb knowledge from varied areas of legal practice before deciding on specific preferences. Reason being, having varied experience also enhances one's lawyering skills and it is advisable to do so at the beginning of one's career.

Hence, do not start off with a limited mindset that you are purely going to practice civil or family law instead take on the sea of experience on varied areas before finalizing your specific preferences. This would clearly make you stand out in the legal arena amongst your counterparts.

Thirdly, be committed and disciplined in any tasks assigned. This is important as it would be a determining factor on how one climbs the career ladder. Hence, no tasks should be considered too small or minute in value, instead complete each task with utmost dedication as this would speak well of one's maturity and confidence.

Lastly but not least, ethics. As a lawyer, having such values are imperative. Professional ethics are key to ensuring an accountable legal profession. Hence, it is vital as pillars of justice, lawyers conduct themselves with integrity in the performance and delivery of legal services. Firmly entrenching yourself with such principles at the onset of one's career and holding on to them would assist one as a lawyer towards their journey in this very challenging yet rewarding, and diverse profession.

It would also be advantageous for young lawyers to continuously learn and upskill themselves, never to stop learning. Do not be too steadfast in your ways, if there are alternative methods which improve the efficiency on how a legal task can be completed then it should ideally be leveraged.

Host: What is your advice for young lawyers who are considering options on whether to select the path towards being an in house counsel or a private law firm?

Josephine: Working in-house versus working at a private practice law firm might be very different. To begin with, in-house lawyers have only one client: the organization for which they work. That means there's no need to bring in new clients or be a rainmaker.

Hence, you do not have to worry about billable hours because your lone client covers your compensation.

In-house lawyers are also required to anticipate possible issues and prevent them from occurring. While law firm practitioners quickly learn to notice legal difficulties in a commercial deal, an in-house lawyer will collaborate more closely with business personnel to define business terms, identify legal issues, and determine what type and level of risk is acceptable.

Those in the position of general counsel are more likely to act as trusted business consultants and frequently report directly to the CEO. In-house lawyers may benefit from having a broad understanding of business or a thorough understanding of a single industry. Litigation is something in-house lawyers may not do much of as when companies need help preparing for a trial, they frequently turn to external counsel assistance.

In comparison private law firm practice, subject to whether they are small tier, middle tier or large tier, as a junior associate it is imperative to recognize that your customers are the lifeblood of your business. Likewise, have a deep understanding of the client's requirements and be willing to go above and beyond to achieve those requirements. Ideally, find a more senior partner or associate who is ready to mentor you. The law firm serves as a training ground for you. Take advantage of any accessible professional development opportunities.

Additionally, recognize that you may not be working on the most intriguing projects as a new associate. If you do good work, things will improve. You'll be trapped spinning your wheels if you do bad job. Develop a friendly, extroverted personality. It will help you keep your current customers happy while also attracting new ones. Also be aware that working for a large legal firm is not a conventional 9-to-5 job.

Taking into considerations the differences as highlighted above, as a junior associate just starting out, it would be advisable to evaluate how these practices may be more appealing and then decide on preferences. Nevertheless, one could always seek experience in both before finally deciding on the path preferred.

THE RISE OF VIRTUAL HEARINGS

Cambridge University in 2020 announced the word of the year as "quarantine". It won't take a genius to understand, why so? Words such as "lockdown", "quarantine", "pandemic" or "new normal" weren't even used much, as compared to the way they were used in the past year. It was on March 11th, 2020, when the World Health Organisation declared the coronavirus crisis as a global pandemic. Since then, it has already made us re-evaluate our choices. From the way we socialize with others or conduct business to the way we resolve disputes and administer justice. With the breakthrough of mass vaccination drives all around the globe, a ray of hope was seen, that things would go back to normal. However, the question was raised, what would that "normal" look like?

Covid-19 has had a dramatic effect on work practices across every industry, and law is no exception. The pandemic turbocharged the adoption of technology across the sector, from switching to remote working to exploring virtual ways to deliver services, many developments were witnessed. Figures show that more than 85% of hearings were held virtually during the UK's first nationwide lockdown. But it was also known that these temporary changes to our lifestyles and the economy would be reversed as soon as it is safe to do so. Therefore, many questioned whether the resolution of disputes and the administration of justice should ever go back to the point where in-person hearings are the norm.

The biggest transformation which the legal industry witnessed was the introduction of virtual courtrooms. With this, people could now attend court hearings from remote areas, making the legal process easy, while at the same time promoting social distancing. Therefore, through this article, we shall try to comprehend whether the innovation of digital justice will outlast the pandemic, or will it fall out of favor, in time?

If we consider the legal industry, COVID-19 wasn't the reason which resulted in the introduction of technology in this sector. But undoubtedly, the pandemic accelerated the process to facilitate the conduct of virtual hearings. Virtual hearings were a major hit in the industry due to many reasons. .

- **A cost-effective experience**

Cost-effectiveness and efficiency are perceived as the key benefits of conducting virtual hearings. Virtual hearings also provide the benefit of better advocacy, as remote platforms facilitate more interaction between counsel, solicitors, and clients during the hearing through the use of live chat functions.

- **Ease in the interim application**

An interim application involves asking the court to do something, by applying for an order or a direction. The word "interim" is used, as it is something that you need to ask for before the full trial of the claim. Interim applications are those areas where virtual hearings come into their own, particularly where they concern commercial parties and urgent, semi-urgent, applications, such as injunctions. Hearings of less than one day which do not involve a jury or cross-examination should be virtual.

- **Promotion of hybrid hearings**

Well, this concept isn't entirely new. In English courts, the cross-examination of witnesses or experts located in other jurisdictions by video-link was a relatively common occurrence in civil disputes, pre-COVID.
However, the pandemic has shown that many more types of hybrid hearings are also possible. As norms of social distancing are important for people to follow, such forms are more desirable, as they will allow the counsel to make submissions in person while permitting some in-person cross-examination by allowing busy clients to attend remotely as needed.

Let us now witness how virtual hearings are being perceived in different parts of the world.

- In the United Kingdom, a case study was conducted by Baker McKenzie and KPMG, to find the views of people on virtual hearing. The following points were concluded in the survey.

    1. Virtual hearings were mostly preferred for interim applications. About 70% of respondents preferred a virtual hearing for the interim application in which they are involved. About 65% believed that all hearings of less than one day, not involving a jury or cross-examination, should be virtual
    2. In-person hearings are preferred for final hearings. 3.
    3. The majority of respondents 55% were in favor of "hybrid" hearings, which enable some participants to be present in the court or hearing room while others participate by video or telephone conferencing.

- In India too, the lockdown of the entire nation, caused the legal sector to attain the system, where there was no requirement to visit a court in person. To attain this, India launched the e-courts project, under the plan of National Policy and Action Plan for Implementation of Information and Communication Technology (ICT) in the Indian Judiciary-2005. The vision of the plan was simple, to bring technological advancements in the working of courts.

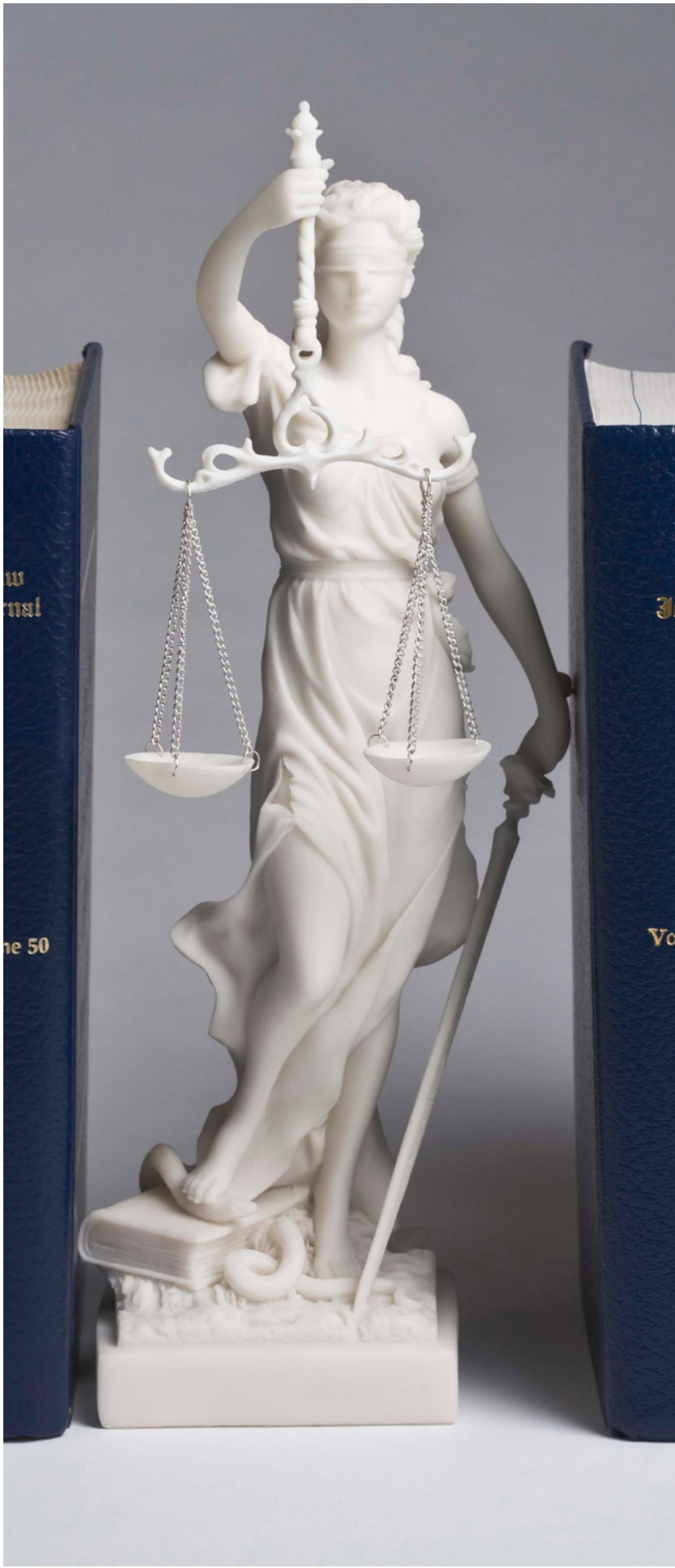
On 26th July 2019, Delhi's first virtual court was launched at the Tis Hazari Court. The procedures followed in these courts are simple and convenient. The case comes directly to the Virtual Court which is presided by a Metropolitan Magistrate. Then, a summon is generated and the same is notified to the accused via email or SMS. Then the accused can go to the website and if he pleads guilty, then the fine amount will be displayed. Once the payment of the fine is made, the case will automatically be disposed of. In case the accused wants to contest the traffic challan, then the case will be dealt with by the Regular court, as per the territorial jurisdiction.

Apart from this, the Supreme Court of India also announced that e-filing would be made available 24/7 and court proceedings shall take place via video conferencing.

- In UAE, the coronavirus crises made it important for legal representatives to consider cautiously proper and choices for the productive, opportune and practical dispute resolution processes. It required them to concentrate on modifying their business relationship, re-arranging the agreement, or discovering alternative ways to determine and resolve their conflicts, The past year witnessed a lot of changes in the leading arbitration institutes, including the Dubai International Arbitration Center, DIFC-London Chamber of Commerce, ADGM-International Chamber of Commerce, to promote virtual hearing.
- However, in the USA, the condition was viewed as a black-white situation. Kimberly Mueller, chief judge of the U.S. District Court for the Eastern District of California spoke in an interview, “I’ve become persuaded that the video conferencing by Zoom for civil scheduling conferences, civil law in motion, and quite a bit of criminal pre-trial work is good enough and equivalent to seeing someone in person”. Moreover, a survey which was conducted in more than 30 states which included federal judges, lawyers, and other court staff concluded that digital transformation in courts is probably going to stay.

Even with all these advantages, virtual hearing isn't a one-size-fits-all approach as it cannot be used for every hearing. Many are of the view, virtual hearings work better in disputes involving technical or substantive legal issues as opposed to disputes with a greater evidential content, where physical presence might take on more significance. There is also a concern about whether virtual hearings can provide the "full" court experience.

Even after all this, virtual hearings can connect judges, arbitrators, counsel, and witnesses from remote locations. It has allowed a level of flexibility that was previously unavailable. When these features are mixed with the benefits of cost-effectiveness and efficiency, it is likely to prompt more people to encourage the possibility of resolution or determination of disputes through a remote forum. It is very much clear that virtual hearings are here to stay, but only time will tell the form they'll take.



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TESTIMONIALS

I would take my opportunity to thank LexTalk World from the core of my heart for organizing the mesmerizing event in Dubai. The people I've met there have been more amazing than ever and I truly had a great time at the conference talking with the lawyers from different jurisdictions, learning from the legal talks, and having a really good time while also working on my networking. The conference showed what well-coordinated teamwork is capable of putting up. I would be extremely happy to be with LexTalk in future events and conferences.

- Khan Khalid Adnan Managing Partner at Khan Saifur Rahman & Associates

The event was truly outstanding! In fact, bringing all people together under the same roof and getting permission for events during this pandemic era was next to impossible but you guys did the same. LexTalk World again proved that if you believe in yourself, the entire universe will start believing you. Kudos to your entire team.

- Raghvendra Verma Group Head, Legal, Compliance and Company Secretary, ISON Group

Thanks so much for inviting me and staging an interesting event with plenty of cross-jurisdictional collaboration which made it a really interesting 2 days. . I think many subjects require a lot of deeper analysis and discussion and the event was successful in raising people's awareness about issues and inspiring them to dig further into their network, research topics and get a better grip on how to deal with some of these issues.

- Wayne Barnett Lead Senior Counsel at SAP

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HOW WILL BIDEN'S VACCINE PLAN WORK FOR US WORKERS?

As 2021 rolled out, vaccination drives have started in many countries at full scale. Particularly in the U.S, the deadly virus was estimated to have killed approximately 80,000 Americans, just in the first month of 2021. After its introduction in early 2021, the month of April witnessed many countries conducting a full-scale vaccination drive, by making it free and accessible to all people. Following this, the United States reported that about 30% of Americans were completely vaccinated by 29th April 2021.

Every country is performing at its utmost ability against the raging virus. US president, Joe Biden recently announced the new covid mandate policy, which is being accounted as the United States' till date most aggressive effort to promote the vaccine drive.

Since its introduction, the policy has received diverse reviews. While many criticized the move, by claiming that the president did not stand true to his earlier promise, the others appreciated the government's step by saying it is to fight against the highly contagious delta variant which kills almost thousands of Americans every day. While bringing this mandate in force the president spoke, "We're going to protect vaccinated workers from unvaccinated co-workers. We're going to reduce the spread of Covid-19 by increasing the share of the workforce that is vaccinated in businesses all across America."

This approach is said to affect many companies, both public and private, as it not only mandates vaccines but also eliminates the previously available testing options for federal government employees, including those in the healthcare sector. People who will fail to comply with the new approach will be heavily fined.

Where is the vaccination mandatory, with no testing option?

1. Federal employees and contractors who work for the government will be given a timeline for 75 days to get vaccinated.
2. Health care workers. Earlier the mandate was only for employees at U.S. nursing homes who received federal funding. The said mandate will include employees at the hospitals, dialysis centers, ambulatory surgical settings, and home health agencies, which makes about 17 million healthcare workers. However, it estimated more than half of this population, i.e., 64% of hospital staff, 62.7% of nursing home staff, and 54.7% of workers at dialysis facilities, have already been vaccinated.

3. The staff at head start programs which are run by the federal government has also been ordered by the government to get vaccinated.
4. Schools run by the Bureau of Indian Affairs and the Department of Defense also lie in this category.
5. For private workers, the timeline for getting vaccinated will begin after the issuance of the policy by the Department of Labor. When the policy will be issued, they will be given 50-90 days to get vaccinated.

Where vaccination is mandatory, with an option of testing?

1. U.S. workers, which constitute more than 80 million, will be given an option to submit weekly COVID test reports to prove they are not carrying the virus. Still, the president has ordered the Department of Labor to create a new rule requiring any company with more than 100 employees to mandate vaccines for their employees or weekly Covid tests for workers who cite religious or health reasons for not getting vaccinated. The rule will be implemented by the Labor department's Occupational Safety and Health Administration.
2. The policy will apply to every public sector state and local government worker, including educators and school staff.
3. The plan will exclude legally recognized persons, such as those who are disabled or with religious objections. Title VII of the Civil Rights Act forbids discrimination against any employee based on an "individual's race, color, religion, sex, or national origin." A very small number of religious groups in the United States have a theological objection against vaccines, which is said to interfere with their divine providence.
4. The policy will also exempt those, allergic to the ingredients used to make the particular vaccine.

Consequences for violating the policy

The new policy by the Biden government found many supporters, with 62% backing this idea. Still among the 29% of Americans who weren't vaccinated, 82% of them did not plan on getting any life-saving shot. As vaccines are free and accessible to all, the Biden government appealed to all to get their shot.

Federal workers who refuse to get vaccinated will first receive counseling, which can further lead to termination if they persist in refusing. Considering how companies are currently pressurized to maintain their workflow, a reduction in its employees, can lead to various consequences for the firm. Though the new OSHA rules might take time to get implemented, the companies can face a penalty of up to $13,600. With the enforcement of this new policy, president Joe Biden quoted, "this matter is not about freedom or personal choice, but it's about protecting ourselves and those around us."

RIGHT TO BE FORGOTTEN

Author

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Founder Partner,
AP Law Chambers

Introduction

Amidst the current demanding and strenuous circumstances, work from home (WFH) has become synonymous to our daily routine. Resultantly, most of the businesses have shifted to an online mode of working rather which has increased the data of each company and individuals to be posted and shared on the internet. This data can be used for multiple purposes, but the data principal can have a detrimental effect if it is used for any other purpose for which no consent was provided by such data principal. In an unpleasant situation as a result of misuse of such data, the data principal might face problems of embarrassment, social hostility, etc, due to his personal data usage. In the case of K.S. Puttuswamy v. Union of India ('Puttuswamy'), the Supreme Court in its Nine-Judge Constitution Bench unanimously held that the Right to Privacy is a fundamental right of every individual under Article 21 of Right to life and personal liberty of the Indian Constitution. It was also held that the Right to privacy is not an absolute right and can have reasonable restrictions. However, in recent times, a lot of personal data have been leaked as well example, Air India, Dominos Pizza, etc, which directly infringes the Right to privacy of the customers. Therefore, privacy cannot be protected ab initio, but a right to individuals could be granted to erase their data that might be harmful.

Origin of Right to be Forgotten

The right to be forgotten emerges from the Right to Privacy. From an international perspective, the Right to Privacy was first traced in the various treaties and Conventions. The European Convention on Human Rights (ECHR), 1950, International Covenant on Civil and Political Rights (ICCPR), 1966, talks that there should not be any interference in individual privacy. A data protective directive was also passed by the European Parliament in 1995, which aimed at giving people the Right to Privacy and the Right to be forgotten. Articles 6(1)(e) and 12(b) of the directives talk about the personal data should be used only to achieve the purpose of collecting the data and allows the erasure of data that doesn't comply with the directive, respectively. Therefore, the Right to be forgotten is a facet of the Right to privacy.

This Right to be Forgotten was acknowledged recently in 2014 after the popular case of Google Spain v. Agencia Española de Protección de Datos ('Google Spain case'). In the Google Spain case, the European Court of Justice introduced a new right i.e., "Right to be Forgotten". The court interpreted the data protection directive of 1995 and held that the data principle/subject can ask the search engines to compel their personal information from the online database.

Therefore, it was implicitly recognized right for the first time since 1995. There was a lot of criticism where critiques argued that the right to privacy was given overrides the right to information. Even a few Indian authors argued that a balance between the right to privacy and the right to information will be a win-win situation for both the data principal and the public. But however, this balance was very difficult to attain and it will depend on a case-to-case basis. The European Union (E.U.) adopted a new General Data Protection Regulation (GDPR) in 2016, which came into effect in 2018. Article 17 of GDPR lays down the right to erasure or be forgotten, wherein the data principal is allowed to demand erasure of his personal data on certain conditions like withdrawal of consent, data being used unlawfully, etc. However, this right to be forgotten is not absolute and has certain conditions attached to it, wherein in certain situations it becomes impossible to exercise this right like to uphold the right to freedom and Right to Information or when such data is necessary for public health.

The legal framework in India

In the Indian context, at present, there is no specific law that protects the personal data of data principals and which recognizes their right to be forgotten. Currently, only the Information Technology Act, 2000 and the rules under its deal with data protection very briefly. After the Puttuswamy judgement and introduction of GDPR in the European Union, a need was felt in India as well to have separate legislation on data protection and granting the right to be forgotten to the data principal, which was similar to the right to erasure in the GDPR. Therefore, a committee was formed, headed by Justice B.N. Srikrishna, which gave a draft on Personal Data Protection in 2018.

This was the first time in India where the right to be forgotten was given statutory recognition. The draft was introduced by the government as a Bill in the Parliament with some minor changes in the draft of 2018 as Personal Data Protection Bill, 2019 ('PDPB'). However, the Bill could not be passed and was referred to the Parliament's Committee for giving their inputs on the Bill for further changes. Section 20 of the PDPB allows the data principal a right to be forgotten in which they can restrict the continued disclose of their personal data in certain situations. These situations are:

1. Data has served its purpose;
2. Data principal wants to withdraw his consent; and
3. When disclosure of personal data violates any existing legislation.

An application has to be filed by the data principal to the Adjudicating Officer who is appointed under Section 62 of PDPB by the Central Government. It is then upon the Adjudicating Officer to decide whether this right should be exercised which includes the sensitivity of personal data, its role in public life and the nature of disclosure. However, if the GDPR is compared with the PDPB, the right to get the data removed in GDPR can be done by connecting with the controller of data, whereas in India, it is the right with the Adjudicating officer and not with the data controller.

Indian Judiciary on Right to be Forgotten

At present, as the PDPB is yet to be enforced, there have been certain judicial precedents in India that talk about the Right to be Forgotten.

1. In the case of Dharmraj Bhanushankar Dave v. State of Gujarat('Dave case'), the Petitioner seek remedy under Article 226 of the Indian Constitution for removal of the judgement from Indian Kanoon and other online databases as it was a 'non-reportable judgement'. Petitioner further claimed that this has violated his Right to life and personal liberty guaranteed by Article 21 of the Indian Constitution.

The court observed that "The judgement in appeal is part of the proceedings and the said judgement is pronounced by this Court and therefore, merely publishing on the website would not amount to same being reported as the word "reportable" used for judgement is in relation to it being reported in a law reporter." Therefore, there was no legal basis on which the court would have ordered the removal of this judgement.

2. The Karnataka High Court dealt with the similar issue of Right to be Forgotten in the case of Sri Vasunathan v. The Registrar General. A writ petition was filed by a father who seeks the order to block his daughter's name from an earlier order passed by the same court. This case was filed because the judgement was freely available on online platforms which affected the goodwill and reputation of his daughter in society. The Court found that "This would be in line with the trend in western countries of the 'right to be forgotten' in sensitive cases involving women in general and highly sensitive cases involving rape or affecting the modesty and reputation of the person concerned." So, the court ordered the registry to hide her name from the case and ensure that it does not reflect her name in the public domain.

3.In order concerning the case of Beena T. Cherian v. Chief Information Commissioner in February 2017, the Kerala High Court ruled in favor of Right to be Forgotten. This was a similar case to the Dave case, where the case was filed for protecting the identity of the individual in previous cases available on online search engines including Google and Indian Kanoon. The court directed Indian Kanoon to remove the name of the person from all such orders.

4.In a recent case of Zulfiqar A. Khan v. Quintillion Businessman Media Pvt. Ltd.& Ors. ('Zulfiqar case'), where the Delhi High Court adjudicated on the matter seeking removal of some posts from The Quint which were posted in wake of the #MeToo movement. The order was passed by a single-judge bench (Justice Singh) who found that the Right to be Forgotten is a facet of the right to privacy. Therefore, the court ordered the immediate removal of all such content from the website which had the petitioner's name on it. Also, the right to erasure was used against third parties in this order. However, this order faced a lot of criticism especially for failing to balance the 'Right to Privacy' and 'Right to Information' and 'Right to Freedom of Speech'.

5.The Orissa High Court faced an issue that dealt with the Right to be Forgotten. In the case of Subhranshu Rout v. State of Odisha, Justice S.K. Panigrahi discussed the applicability of the Right to be Forgotten which lacks legislative backing in India. So, without clear legislation on this, it was difficult for the court to adjudicate on technical nuances. The court dealt with this issue because the accused had uploaded sexual assault data on social media and the victim wished for the removal of such data. The case was not filed in form of a Writ Petition, so the victim couldn't get appropriate benefits from the court. However, Justice Panigrahi recognized that the right to privacy of the victim is being violated and there is an urgent need to have appropriate legislation to protect the personal data of data principals. Therefore, this case will be an obiter, instead of having a precedential value.

The recent order passed by the Delhi High Court - Custom v. Jorawar Singh Mundy

Mr. Jorawar Singh Mundy ('Petitioner') was an American citizen by birth. The Petitioner seeks for removal of an earlier reported judgement by the Delhi High Court in the case of Custom v. Jorawar Singh Mundy ('Custom Case'), so he filed a writ petition under Article 226 of the Indian Constitution. The Custom Case was filed against the Petitioner when he had visited India in 2009, under sections 21(c), 23 read with 28 and 29 of Narcotics Drugs and Psychotropic Substance Act, 1985 ('NDPS Act') for shipment of narcotic drugs and psychotropic substances. The trial court acquitted the Petitioner in its verdict on 30th April 2011. An appeal was filed by the concerning authorities in the Delhi High Court, but the it affirmed the decision of a trial court in its judgement on 29th January 2013. The Petitioner returned to the US for pursuing graduation in law. He faced a huge disadvantage in getting a job opportunity as the Delhi HIGH COURT decision was freely available on the internet, and all the details of that case could easily be found with just a Google search. Therefore, he sent a legal notice to Google India Private Ltd., Google LLC, Indian Kanoon, and vLex.in. However, only vLex.in acted upon the notice and deleted the judgement from its portal. As the judgements were not withdrawn from other portals, the Petitioner filed a writ petition in Delhi HIGH COURT, requesting for deleting the judgements from all respondent sites under his Right to be Forgotten which is the facet of Right to Privacy.

Delhi High Court : Interim Order

The Delhi High Court on 12th April 2021, headed by Justice Singh, a single judge bench, passed an interim order in the favour of the petitioner. The Court considered the issue of whether their previous order can be removed from the online platform considering the Right to Privacy of the Petitioner on one hand, while Right to Information of the public along with maintaining transparency in judicial records on the other. The issue requires checking which right overrides the other. A similar question had to be considered by the Adjudicating Officer given under the PDPB, 2019 while deciding whether the restriction on continued disclosure of personal data overrides the right to freedom of speech and expression as well as the Right to Information of the public. The court while passing the order briefly touched upon the judgement of the Supreme Court in the Puttuswamy case, and the earlier orders of different High Court in the Subhranshu case and Zulfiqar case.

The Court while in its reasoning mentioned that in the case of where Petitioner was charged under NDPS, the charges against him couldn't be proved but he suffered irreparable prejudice in his social life and career prospects. Therefore, the court took a minimalistic approach and held that prima facie the Petitioner should be granted some interim protection. In its order the Delhi High Court directed the Google India Private Ltd. and Google LLC to remove the Custom Case judgement from the Google search and Indian Kanoon was directed to block the judgement of Custom Case from being accessed until the next date of hearing.

Analysis of Delhi High Court Order

Basis the Order passed, there are several observations made as follows, in relation to the Order passed, and its critical analysis.

1.It is observed, that the Judge made a prima facie review of the question under deliberation. There was no effort taken by the court for deriving a balance between the right to privacy of the petitioner including the right to be forgotten as its facet and the public's right to freedom of speech and right to information along with maintaining transparency in the judicial records. Such a situation where there is a visible lack of balance will lead to many cases being filed in the court for the removal of judgements available on the internet due to their right to privacy.

2.The Puttuswamy judgements through all the opinions on the fundamental right to privacy provide that it is a fundamental right that is not absolute. The PDPB through section 20 provides that there needs to be a balancing exercise where it is to be shown that the right to privacy overrides the right to information and the right to freedom of speech of the public along with the State's legitimate interest to portray such information.

3.Advocate Gautham Bhatia, a Yale-Oxford Rhodes Scholar in his blog on talked about the fundamental right to privacy and its application. He was of the view that it is not possible to have a 'horizontal application' (Exercising individual rights against the private person instead of the State) in the case of the right to privacy. Instead, the application of all the fundamental rights has a 'vertical application' (exercising of individual rights against the State). Therefore, it is not justified to have filed a case under the writ jurisdiction where the remedy is sorted from private entities. So, the order of the Delhi High Court seems to be unreasonable as they can't direct private entities like Google or Indian Kanoon until the constitutional question is adjudicated.

4.The Supreme Court in the case of R. Rajagopal v. State of Tamil Nadu held that the court records are public documents and the fundamental right to privacy cannot be used to prevent publication of court records. Even though this judgement came much before the Puttuswamy case, but to date, this law is a good law and it can be changed only after a re-examination of the case after the Puttuswamy case. Therefore, at present, it is settled law. So, the Delhi High Court has allowed blocking their earlier judgement from the online database is in direct contravention of the Supreme Court's decision.

5.The position of law that was held in the Dave case by the Gujarat High Court contradicts with the position of law in the Delhi High Court's order in the Mundy case. This conflict between the decisions of various High Courts often leads to judicial incoherence and confusion.

Conclusion

The Right to be Forgotten has emerged from the Right to Privacy all over the world. In India, this right is recognized by the PDPB wherein it allows the data principal to get his personal information deleted from the online database. However, this Bill is still pending in Parliament for approval since 2019. Also, the concept of Right to be Forgotten should not confused with the Right to Erasure, which is also provided the PDPB. Right to Erasure provides the right to (i) get corrected inaccurate or misleading personal data, (ii) get completed any incomplete personal data, (iii) get updated personal data that is out-of-date, and (iv) get erased personal data which is no longer necessary for the purpose for which it was processed. However, under PDPB the Right to be Forgotten, every data principal shall have the right to restrict or prevent continuing disclosure of personal data (relating to such data principal) by any data fiduciary if such disclosure meets any of the following conditions in relation to the personal data: (i) has served the purpose for which it was collected or is no longer necessary; or (ii) was made on the basis of the data principal's consent and such consent has since been withdrawn; or (iii) was made contrary to the provisions of the personal data protection act or any other law in force, Unlike the Right to Erasure, a Data Principal's Right to be Forgotten can only be enforced by an order of the Adjudicating Officer under the PDPB.

The above observation made shows that the order passed by Justice Singh at prima facie is conflicting to certain precedents as well as some of the constitutional rights. The fact that the judicially recognized right to be forgotten is being given more importance than the constitutional right guaranteed under Article 19(1)(a) of the Indian Constitution seems to be unreasonable. Nonetheless, it is the first time the court has allowed erasure of the data where the charges involved the NDPS act, which had the potential to harm the reputation of individuals. To prevent the harm to reputation as agreed by various judges dealing with the right to be forgotten, a personal data protection act that explicitly talks about this right is the need of the hour.

LexTalk World Talk Show with Dikshat Mehra

Principal Associate at Rajani Associates

LexTalk World interviews Dikshat Mehra. Dikshat is a Principal Associate working with Rajani Associates, Advocates & Solicitors in their Commercial Litigation & Alternative Dispute Resolution Team. Dikshat graduated in 2012 from K.C Law College, Mumbai. Dikshat has over 9 years of extensive experience on advising clients on a variety of Corporate & Commercial Litigation disputes, Insolvency/Restructuring & Bankruptcy related matters and IP related disputes, majorly Trademark & Copyright related matters.

Interview

Host: Please brief us about your journey as a Legal professional so far and brief us about you expertise?

Dikshat: I always wanted a career, where I could make a difference. After completing my Second Year College, I applied to a Pune Law College with great enthusiasm, but due to some technical glitch I could not get into the College. I was very disheartened and quickly concluded that Law was not for me.

I then did my Bachelor in Management Studies and simultaneously started working in my own family business of Textiles.

But sometime in my second year of Management, I still felt that I had inclination towards Law and hence made another attempt for the same.

My parents and my best friend pushed me and supported me with my decision and helped me to find and recognise my passion and strength and thus, my journey in the legal field of especially being a first generation lawyer started and there was no looking back.

I am truly humbled and grateful to God, my Guru and my family to having found my calling and realised that Law was always meant to be.

I was fortunate in my early years to get the opportunity to work across various facets of law like Commercial Litigation, White Collar Crimes, Securities Market litigations, Corporate Law, IPR matters, etc., but my expertise lies in Commercial Litigation, Insolvency and Arbitration which I enjoy the most. I have been lucky enough to be mentored by the best in the industry ,including the partners at our firm (both past and present) and learnt various ropes and tricks of law.

Host: Tell us about your most memorable cases and what are your takeaways from there?

Dikshat: As a professional lawyer, the obvious answer could be where I argued the best on a particular case, or drafted the best document, but for me the Corporate Hijacking is one case which was very challenging and also time was of great essence as everything just happened overnight and we filed the case within 48-72 hours, winning that case was a highlight.

The fact that the above case could help me stand out in the industry makes it one of the memorable cases that I have worked on. It helped me to grow as an individual and adapt quickly as per changing situations.

Commercial Litigation and Arbitration have always been my strength.I cannot divulge a lot about my other cases due to confidentiality and nature of the case in Arbitrations , but I enjoyed working on the Franchise Agreement case and also the case of Enforcement of Foreign Judgment in India which is an ongoing case. It is very exciting to have this exposure, strategise and research at every step.

The essence of the cases is never to get enamored by the top line number of cases in terms of monetary value. I have worked with various clients on small ticket value matters to large ticket value matters, the thing that matters the most is to serve the client capably, honestly and responsibly. I always believe that being proactive is the key to success.

Host: How do you look at Commercial Litigation, IBC & Arbitration in 2021 and how its going to change 5 years down the line

Dikshat: India is one of the fastest growing economies of the world. Let's first talk about the last 5-6years, where a lot of things have changed and the seeds are sown to reap the benefit in the years to come.

We as an economy are only going to grow onward and upward from here as the foundation have been built. Things are changing, If you look at acts like the Commercial Act, 2015, the Arbitration Act, 1996 has been amended a few times to keep up with international law.

We are all taking small steps and working towards the vision of making India the hub of arbitration. Streamlining the various facets of law, recognizing priorities and leading to quick relief for cases is the key. I personally want to improve and ease the appointment procedure for arbitration as this affects the tenure of the case. There have been amendments, where the arbitrator has to be appointed by the institution, but the amendment has not come into play yet, but once it comes into play,

I believe the process will get seamless, streamlined and quicker. And I also think Technology is going to play a huge role and things are shaping in the same direction. Having the luxury of using technology and being in front of various judgments all over India with a click has really helped us. While the culture and the market for litigation in India has traditionally been known to be slow and cumbersome when compared with foreign countries.

Internationally, people do not encourage trials because of the cost associated with it, while in India currently the trial procedure goes on for years and I think with change in commercial laws, things will change for the better. We will cross all the hurdles, learn and adapt quickly like we have always done and also survived the pandemic situation.

I also strongly feel that in our country, we should focus on mediation and it should be given more statutory recognition. This will help resolve things quickly. With growing technology and amendments across various facets of laws, the process will be faster in the years to come. There will be a different outlook and mindset change in terms of law and justice.

Host: If there is any element you would like to change in Indian Arbitration regime, what would it be as a part of the improving process?

Dikshat: The first thing that comes to my mind is the appointment of the arbitrator. Starting off with a scenario when two parties cannot decide on the arbitrator, they need to file an application before the High Court, or Supreme Court as the case maybe for appointment of an arbitrator.

The application is then pending because of the backlog and things are not up to speed. This could take a year to commence and then it kills the purpose of going in for arbitration in the first place.

There has been an amendment that has taken place where you can have arbitration institutions to appoint arbitrators and you do not have to come to the Court. Hoping the amendment takes place soon here as well.

The second thing that I would like to say is the rules of evidence in arbitration. Arbitration being informal, is not when you are bound by the normal rules of the Court and this should be taken into consideration. Having worked on international arbitrations, I strongly feel domestic arbitration does require this change. Having said that forums like Indian Arbitration Forum are a step in the right direction.

The lawyers are accepting such Forum rules in domestic arbitration and this will bring a lot of change in the landscape of arbitration regime in India coupled with growing technology.

Host: What are Important Skills for any Lawyer handling commercial litigation matters?

Dikshat: I believe skills are developed over years, but a few things that hold high regard are being a voracious reader and being updated. My mentors have always told me that law is vast like an Ocean and we should know how to grapple it and face different situations, we will be able to do only, if we are well read and updated with things to apply in different situations being thrown at us. Read, learn, analyze and strategise are the key building blocks. Understanding clients problem and guide them to reach the best solution.

One should be able to understand, relate instances, adapt as per the situation and apply their learning to give the best to their clients.

Also be abreast with all current scenarios, practical knowledge and amendments to be able to strike a conversation and advice the clients with best quick solutions. To stand out from the crowd, one needs to be able to manage time effectively, be a multi-tasker. Also having excellent communication, negotiation skills and an eye for detail is a must.

Host: What do you think about Artificial Intelligence in the law of field?

Dikshat: I would want to say that we should remove the fear that Artificial Intelligence will replace lawyers in next 10 years.

Artificial Intelligence is here to complement lawyers and help us to make the process easier. Over the years it has always made things easier in terms of documentation and is further here to ease things. It is a complete boon, I must say. But, sometimes in disputes, emotions do play an important part where Artificial intelligence, possibly takes a back seat. Artificial Intelligence is going to do a job of a balancing act. Turnaround drafts, filing cases, proof-reading will become easier. Artificial Intelligence is here to stay and grow, but not to replace lawyers.

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