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Parallel litigation and arbitration

Anchal Kushwaha
Student, Amity Law School, Noida, India

Abstract
In order to give effect to the UNICITRAL model law on arbitration and due to radical change in the economy as a result of the new economic policy of 1991 the Arbitration and Conciliation Act, 1996 was enacted. This act provided a pragmatic legal basis for resolution of the commercial disputes outside the courts. It circumscribes the orders, the laws and consolidates the many legal norms pertaining to arbitration. On the other hand, parallel litigation is a dispute which generates multiple law suits. In this paper, the author has dealt with various aspects of both in detail. Although the two are often confused to be similar by a layman, these concepts are rather different. For the purpose of understanding these differences, the analysis here includes the meaning of these two concepts, the various types of arbitration, the amendment of 2016 to the Arbitration Act which brought about major changes in the field and the situations which can lead to a parallel litigation. At the end of this paper, any reader would be able to develop a proper understanding of what these two concepts are and how they are different from one another.

Keywords: arbitration, conciliation, litigation, tribunal

Introduction

What is Paralllel Litigation?

Parallel Litigation is a dispute that generates multiple lawsuits. It is not a new concept nor is it limited to controversial lawsuits generated by celebrities, as is the perception of most laymen. It can be categorized as an analysis of *Forum non conveniens*, wherein the court decides that another more appropriate forum exists in terms of jurisdiction where the case may be heard [1]. In the case of Sukanya Holdings v. Jayesh H. Pandya [2]. It was decided that if all parties to a civil suit are not privy to an arbitration agreement, therefore they cannot be referred to an arbitration at all. Apart from publicity generating law suits as described above, divorce actions have a long history of parallel lawsuits and conflicting judgments. The recent years have seen an expansion, both, in the increasing incidents and subject matter of the parallel lawsuits, perhaps fueled by the traditional motivations of the home court advantage and differing laws along with the expansion of personal jurisdiction rules in the last fifty years [3]. In spite of the increase, the vocabulary remains imprecise and ambiguous. Parallel litigation would seem to mean identical or mirror imaged lawsuits between the identical parties but is often used when the laws suits are not identical. Duplicative litigation has been defined as the simultaneous prosecution of two or more suits in which some of the parties or issues are so closely related that the judgment in one or the other way will have the res judicata effect on the other. The creation of large major business is often said to lead to a hard path of a proportionately large litigation. Most parties that engage in such businesses are required to enter into an agreement to resolve such disputes, should they arise, in an effective manner under a competent authority. Arbitration is the most cost-effective practice for resolution of a dispute. Some cases wherein parallel proceedings may occur are when a number of interconnected contracts are drawn up, but one of them fails to constitute an arbitration clause, in which case one party may sue via arbitral proceedings, and the other through litigation [4].

Parallel proceedings often lead to unnecessary delays and the consumption of scarce resources without providing adequate results with regards to the resolution of the conflict. Besides just conflicting judgments, these could also mean a difference in the award to the parties, thereby leaving them as an exercise in futility. Nevertheless, parallel proceedings do take place in cases which include international arbitrations, marital laws and other cases of a similar nature. In most cases, though, remedies sought by either party, and granted by either body can be questioned and contested [5].

Arbitration

Arbitration has historically performed well in helping two parties to a contract resolve their issues with the assistance of a third party. However, the evolution of arbitral proceedings and terms under which these can be undertaken has rendered the process expensive and the system lacking in trained professionals [6].

[1]Forum Non Conveniens". The Law.com and Black's Law Dictionary, 2nd Ed. Retrieved 13 September 2019.
[2]*Sukanya Holdings v. Jayesh H. Pandya* (2003) 5 SCC 531
[3]See G. Born, International Civil Litigation In United States Courts 459 (3d ed. 1996) (hereinafter BORN, International Civil Litigation)

[4]Ritvik Kulkarni, India's Treatment of Interconnected Agreements to Arbitrate, Arbitration Blog, (Dec. 12th, 2019, 03:15 p.m.), http://arbitrationblog.kluwerarbitration.com/2018/08/09/indias-treatment-interconnected-agreements-arbitrate/.
[5]Ibrahim Amir, Double Trouble: Parallel Proceedings in International Arbitration, Transitional Dispute Management, (Dec. 12th. 2019, 10:45 p.m.), https://www.transnational-dispute-management.com/downloads/tdm-young-ogemid-seminar2017-parallel-proceedings.pdf.
[6]Philip L. Bruner, Dual Track Proceedings In Arbitration And Litigation: Reducing The Peril Of "Double Jeopardy" By Consolidation, Joinder And Appellate Arbitration, (Dec. 12th, 2019, 12:50),

The Arbitration and Conciliation Act, 1996 was first promulgated by way of using an ordinance as a step in urgent economic reforms necessitated by the new economic policy [7]. 20 years later another ordinance was introduced which amended the 1996 act in order to bring it in line with the international standards. For the last few years, arbitration has become the optimal choice for resolution of commercial disputes. However, over the last two decades the process of arbitration, particularly ad-hoc domestic disputes, has become more alike the adversarial proceedings in India.

Accompanied by high costs due to insufficient number of trained and qualified arbitrators, this dispute resolution process has caused a growing sense of annoyance among those who make use of it. Due to these and other problems in 1996 Act, amendments were discussed by public authorities. Arbitration is a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes [8].

Arbitration is often used by parties to engage in tactics that are best described as dilatory in order to delay proceedings, prejudice the rights of the opposite parties, etc. by dissipating the assets or interfering with the functions of bodies where both parties hold high stakes. In these situations, the final relief granted by the tribunal is often unsatisfactory and meaningless, unless the rights of the parties can be secured in the pendency of these proceedings [9].

In many cases, parallel litigations are pursued when the arbitral tribunals lay outside of the country per Section 45 of the Act [10]. Parallel litigation and arbitration proceedings pose the risk of double jeopardy. In these cases, without a formal joinder possible, a piecemeal resolution of an existing dispute causes unbridled tension to parties, exposing them to an environment where they may treat one tribunal as subordinate to another [11].

Types of Arbitration

- Institutional Arbitration

This kind of arbitration involves a degree of permanency, modern rules of arbitration, high-quality technical support facility, better scrutiny of awards and high host time constraints. There is often also a lack of flexibility. This tends to be a more plus it is a technical version of arbitration [12]

- Ad-hoc Arbitration

"All disputes arising out of or in connection with this agreement shall be referred shall be referred to and determined by arbitration." This kind of arbitration involves a sense of own rule for the parties and greater flexibility. Further, it is less costly and less technical. Most parties choose this since it involves the UNCITRAL model rules, co-operation and higher effectiveness of parties and lower possibility of factual errors in award [13].

- Court annexed Arbitration

For a better understanding on this concept, one may refer to the court annexed Arbitration case of Salem Bar

Association v. Union of India [14]

"Some doubt as to a possible conflict has been expressed in view of use of the word "may" in Section 89 when it stipulates that "the court may reformulate the terms of a possible settlement and refer the same for" and use of the word "shall" in Order 10 Rule 1A when it states that "the Court shall direct the parties to the suit to opt either mode of the settlement outside the Court as specified in sub-section (1) of Section 89."

The intention of the legislature behind enacting Section 89 is that where it appears to the Court that there exists an element of settlement which may be acceptable to the parties, they, at the instance of the Court, shall be made to apply their mind as to opt for one or the other of the four ADR methods prescribed in the section. In case the parties do not agree, the Court shall refer them to one or the other of the said modes.

Amendment of 2016

Amendment to Section 9 (Interim Measures)

The amended section envisages that if the Court passes an interim measure of protection before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine [15]. Further, the Court shall not entertain any application under section 9 unless it finds that circumstances exist which may not render the remedy under section 17 efficacious.

The above amendments to Section 9 are certainly aimed at ensuring that parties ultimately resort to arbitration process and get their disputes settled on merit through arbitration. The exercise of power under Section 9 after constitution of the tribunal has been made more onerous and the same can be exercised only in circumstances where remedy under Section 17, appears to be non-efficacious to the Court concerned [16].

https://www.jamsadr.com/files/uploads/documents/articles/bruner_dual-track-proceedings-in-arb-lit_iclr_2014-31-537.pdf.

[7] See O.P. Malhotra and Indu Malhotra, The Law and Practice of Arbitration and Conciliation (lexisnexis Butterworths, Delhi, 2nd Edn., 2006).

[8] LRC CP 50-2008 at 2.12.

[9] Nishith Desai Associates, Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals, Nishith Desai, (Dec. 13th, 2019, 12:45), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Interim_Reliefs_in_Arbitral_Proceedings.PDF.

[10] thearbitration and Conciliation Act, 1996,26 of 1996, Acts of Parliament, 1996 (India)

[11] Ibid (7)

[12] M. K. Sharma, "Conciliation and Mediation", available at: www.delhimediationcentre.gov.in (last visited on 05.09.2010).

[13] ibid

[14] 2003 (1) SCC 49

[15] QMUL School of International Arbitration and White and Case, 2010 International Arbitration Survey: Choices in International Arbitration, available at http://www.arbitration.qmul.ac.uk/docs/123290.pdf; QMUL School of International Arbitration and pwc, 2006 International Arbitration Survey: Corporate Attitudes and Practices, available at http://www.arbitration.qmul.ac.uk/docs/123295.pdf. See also, Loukas Mistelis, Arbitraln Seats: Choices and Competition, KLUWER ARBITRATION BLOG (Nov. 26, 2010), available http://kluwerarbitrationblog.com/2010/11/26/arbitral-seats-choices-and-competition

[16] QMUL School of International Arbitration and White and Case, 2010 International Arbitration Survey: Choices in International Arbitration, at p. 9, 14, available at http://www.arbitration.qmul.ac.uk/docs/123290.pdf,.

Amendment to Section 17 (Interim Measures by Arbitral tribunal)

The old Act included lacunae wherein the interim orders of the tribunal were not enforceable. This Amendment worked by removing said lacunae and stipulates that an arbitral tribunal under Section 17 of the Act shall have the same powers that are available to a court under Section 9. It further said that the interim order passed by an arbitral tribunal would be enforceable as if it were an order of a court. The new amendment also clarifies that if an arbitral tribunal is constituted, the Courts should not entertain applications under Section 9 barring exceptional circumstances.

Interim Injuction

In the constant push and pull between courts and arbitral tribunals, sometimes, it is the parties that suffer a major loss of time, resources and finances. In the Indian scenario, it is possible for parties to ask for interim measures contrary to their arbitral award. This may be done either before or after it is pronounced, but not enforced. Section 9 of the Act elucidates the measures that the court can apply in case the arbitral award has not yet been enforced. Section 17 deals with measures that the arbitral tribunal can be approached for in the case where an arbitral award has been pronounced. The nature of interim relief that is sought by parties to an arbitration is based on the facts and circumstances of each individual case. The amendments made to the act have made it easier and more accessible for third parties and parties to the arbitral proceedings to seek interim reliefs to allow them to seek out a final relief from the tribunal.

For a court to pass an interim injunction, a party would be liable to apply to a court either prior to, during, or at any time after the arbitral proceedings in accordance with Section 9 of the Act [17], for:

1. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or
2. An interim measure of protection in respect of any of the following matters, namely: —

a. Preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
b. Securing the amount in dispute in the arbitration
c. The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and the authorization of any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
d. Interim injunction or the appointment of a receiver;
e. Such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has For the purpose of, and in relation to, any proceedings before it.

Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1) of Section 9 of the Act [18], the arbitral proceedings shall be commenced within a period of ninety days from the date of such an order or within such further time as the Court may determine.

In the case of Sundaram Finance Ltd. V. M/s. NEPC India Ltd [19]. The Supreme Court examined the issue of whether or not the court had jurisdiction to pronounce interim orders before the arbitral proceedings had commenced. It was held that it is no necessary that arbitral proceedings are pending in this case, but a notice invoking the arbitration clause must be issued before an application for protection under Section 9 is invoked [20].

Who can approach the Court for an Interim Injunction?

Section 9 also specifies that only a successful party – the party that is entitled to seek enforcement of an arbitral award – can apply to the court for protection in the terms specified in Section 9 (ii) of the Act. The Bombay High Court determined in the case of Wind World (India) Ltd. v. Enercon GmbH and others [21] that if an application is made at the insistence of an unsuccessful party, no occasion to grant interim measures will exist to aid the execution of the arbitral award, because the unsuccessful party will not be entitled to seek enforcement of the award at all under Section 36 of the Act [22]. The reason for this harsh measure is that Section 34 of the Act specifies that the court is not to act as a court of appeal or review the merits of a dispute at all. Therefore, the unsuccessful party in an arbitral proceeding cannot apply for interim measures.

Once an arbitral tribunal has been constituted, the Court may not entertain applications under sub-Section (1) of Section 9 of the Act, unless it finds that circumstances exist that will not render the remedy under Section 17 of the act as efficacious. This was specified in a judgment by the Division Bench of the Kerala High Court in the case of M Ashraf v. Kasim VK [23] where the court said:

"In such circumstances, it would not be proper for the court to reject the application merely on the ground that he has got efficacious remedy under Section 17 of the Act. The Court has to adopt a liberal approach. Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private & Ors [24] included such circumstances. A mere statement by the Court to the effect that the remedy provided under Section 17 of the Act is efficacious, without reference to the circumstances which make it so, is not sufficient to reject an application under Section 9(1) of the Act."

Parties may also apply for the same to the tribunal as long as the arbitral award has been pronounced, but not enforced as per Section 17 of the Act [25].

[17] Arbitration and Conciliation Act, 1996,26 of 1996, Acts of Parliament, 1996 (India)

[18] Ibid (10)

[19] AIR 1999 SC 565 SC.

[20] Prashanti Upadhyay, Interim Measures under Arbitration, Conciliation Act, Legal Service India, (Dec. 13th, 2019, 1:24), http://www.legalservicesindia.com/article/2176/Interim-Measures-under-Arbitration,-Conciliation-Act.html.

[21] 2017 SCC online Bom 1147 (para 18)

[22] Ibid (18)

[23] 2018 SCC Online Ker 4913.

[24] (2017) 7 SCC 678

[25] Ibid (18)

Which Court can be applied to for an Interim Injunction?

The court, under the Arbitration and Conciliation Act, 1996, is a district or High Court that has original jurisdiction to decide the subject matter that is taken to the arbitral tribunal. In the case of an international arbitration, a commercial dispute, for instance, where one party is not from India, only a High Court holds authority to be applied to under this Act. The judgement of the Supreme Court in the case of Bharat Aluminum Company c. Kaiser Aluminum [26] specified that only the court that is situated at the seat of the arbitration will have jurisdiction over the dispute. This specification of a seat meant that an exclusive jurisdiction had been granted to the courts of the particular seats to perform supervisory functions and to grant interim injunctions. This also meant that all other courts were deposed of their authority to try such cases in order to grant interim injunctions at the behest of the successful party, as was detailed by the Supreme Court in the case of Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private & Ors [27].

Four Distinct Settings for Parallel Litigation

The problems and tactical opportunities of parallel litigation or related litigation occur in four settings [28]:

- Within the same jurisdiction
- Between the states
- Between the state and federal systems
- International scenarios

In the U.S judicial system where federal courts and state courts run in parallel paths, it may be easy to manage a multiplicity of suits within the federal system. It is possible to consolidate these proceedings as long as they are within the federal system. When a multiplicity of proceedings exists in the state system as well, it becomes problematic for the courts to consolidate the cases pending before federal courts with the ones in state courts. Mechanisms to consolidate cases between states is nonexistent as was detailed in the case of Smile Direct Club and their multiplicity for proceedings in relation to IPO related securities lawsuits [29].

The individual states' and the federal courts' approaches to these conflicts are similar in many instances and identical in case of some. In spite of such similarities, this study avoids consolidation of different jurisdiction approaches because of the danger of quickly concluding that the law is homologues when it is not.

In many jurisdictions, there have been too few cases to permit the development of a well-considered policy for dealing with the jurisdictional conflicts. Moreover, the emergence of a more cohesive international community may cause further change in the law.

The court's authority and willingness to remedy duplicative litigation draws on a number of conflicting doctrines and policies, which include, and are not limited to, honoring the plaintiff's choice of forum, favoring the lawsuit which was filed first, reluctance to dismiss an action that has proper jurisdiction and venue, avoidance of waste, convenience to parties, respect paid to coordinate courts and governments.

Litigants who find themselves in parallel litigation may choose from five responses:

1. Do nothing and continue to litigate both cases,
2. Transfer and consolidate,
3. Dismiss,
4. Stay
5. Antisuit injunctions [30].

Conclusion

In a judicial situation where a comity of courts is a largely validated concept, the issue of a court being a coram non judice is painfully relevant. This is due to the power-play between courts and tribunals, when it comes to the resolution of disputes.

However, the reasons behind parties choosing to invoke arbitration rather than court proceedings are quite clear. Not only are arbitral proceedings quicker, transparent and more efficient, but they also bestow a certain amount of choice onto the parties with regard to choosing their arbitrators. This gives them some amount of control on the quality of the arbitral award sought and the fairness of it. Some parties who fear that the arbitration may not be going their way often use litigations and parallel proceedings to delay the process of the meting out justice by creating hurdles that end in inconclusive judicial decisions and conflicting arbitral awards.

This situation, as much as the statutes are trying to prevent it, arise often enough.

In such a case where an interim order or injunction is to sought, only a successful party may apply for this to a court, in order to ensure that frivolous litigations are not put in place to delay the process of justice.

The author does hereby conclude that arbitration as a method of dispute resolution is more efficiently utilized than parallel litigation. The reason that the author states this is because of the status quo in India. People opt more for arbitration as compared to the parallel litigation method. The primary reason for this is because, except the Act, there is no separate authority or governing council. Mediation under the authority of the Act is undertaken directly under the supervision of the civil courts and Arbitration by agreement between parties, the court, and, under the amendment of 2019[31], the Arbitration Council. The best part of the conciliation is that the third party can also be a blood relative to ensure that the proceeding goes off without a hitch and in a transparent manner.

The amendments to the Act of 1996 are explicitly put in place to bring surety to the power of arbitral tribunals under Section 17 of the Act, at par with that of the courts as given in Section 9 of the Act. Arbitral tribunals, according to the UNCITRAL Working Group have acknowledged that though the Model Law does not delve into the standards to be adopted by the arbitral tribunal[32], tribunals have been given a broad mandate to determine when interim

[26] (2012) 9 SCC 552

[27] (2017) 7 SCC 678

[28] See Princess Lida of Thum & Taxis v. Thompson, 305 U.S. 456, 466 (1939); Laker Airways Ltd. V. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984). "7See infra Part IV.A.

[29] Kevin lacroix, Multiplied and Parallel Litigation: The Mess that Cyan has Wrought, Dando Diary, (Dec. 13th 10:00), https://www.dandodiary.com/2019/11/articles/securities-litigation/multiplied-and-parallel-litigation-the-mess-that-cyan-has-wrought/.

[30] Ibid(29)

[31] The Arbitration and Conciliation (Amendment) Act, 2019, No. 33 of 2019, Acts of Parliament (India)

[32] Nishith Desai Associates, Interim Reliefs in Arbitral Proceedings: Powerplay between Courts and Tribunals, Nishith Desai, (Dec. 13th, 2019, 12:45),

injunctions and relief is necessary. This differs from case to case on the judgment of the arbitrators as decided in the case of Lanco Infratech Ltd. v. Hindustan Construction Company Ltd.[33]

In the case of State Bank of India v. Jet Airways (India) Ltd.[34] the court decided that foreign courts cannot effectively intervene in or create parallel proceedings in the proceedings of an Indian company.[35] In this case, it was observed that insolvency proceedings against Jet Airways had already commenced in the Netherlands, and if a corporate insolvency resolution proceeding under the ambit of the Insolvency and Bankruptcy Code[36] was instituted by the NCLT in India, two parallel proceedings would exist for the same company in two parts of the world, causing delays and confusion.

The major issue that parties could face in the case of parallel litigation are that of the principle of double jeopardy[37]. This principle relies on the competence of the courts to conclude similar findings from the facts of a case. Here, for the unsuccessful party, the maxim 'nemo debet bis vexari, si constat curice quod sit pro una iti eadem causa" becomes of importance. No man can be punished for the same offence more than once. Therefore, once a measure or an arbitral award has been pronounced, it can only be appealed in the tribunal designated. Neither does the proceeding go to a court, and nor does it have to be decided by a myriad of judicial authorities. Its enforcement is the duty of the seat designated to do so.

Therefore, it becomes increasingly clear that the interlocked and interdependent arbitration proceedings and litigations can only exist at the same time when the party that is successful in the arbitration seeks protection, or questions the efficacy of the arbitral award. In case circumstances have arisen that have not been considered by the arbitral tribunal while making an award to the parties and this can be proven, interim relief should and must be sought from the courts.

The faith in our judicial and quasi-judicial bodies in the nation must be protected by avoiding conflicting and contradictory judgments from different bodies. The arbitration clauses in contracts must be made airtight to avoid further dalliance with the delay of justice to any party in an arbitral proceeding.

References

1. Born G. International Civil Litigation in United States Courts 459 (3d Ed.) (Hereinafter Born, International Civil Litigation, 1996.
2. Dual Track Proceedings in Arbitration and Litigation: Reducing The Peril Of "Double Jeopardy" By Consolidation, Joinder And Appellate Arbitration Philip L Bruner Fciarb, Chartered Arbitrator
3. QMUL School of International Arbitration and White and Case, International Arbitration Survey: Choices in International Arbitration, 2010.
4. Malhotra OP, Indu Malhotra. The Law and Practice of Arbitration and Conciliation (LexisNexis Butterworths, Delhi, 2nd Edition, 2006.
5. Sharma MK. "Conciliation and Mediation", available at: www.delhimediationcentre.gov.in
6. QMUL School of International Arbitration and White and Case, International Arbitration Survey: Choices in International Arbitration SCC Online, 2010.
7. Law of Arbitration and Conciliation by Justice R.S. Bachawat
8. Arbitration: Procedure and Practice by Ashwini K. Bansal International Arbitration: Law and Practice by Gary B. Born

[33] (2016) 234 DLT 175

[34] CP 2205 (IB)/MB/2019

[35]Vaish Associates Advocates, Page 8, Between the Lines, Vaish Law Dec. 13th, 2019, 14:10), https://www.vaishlaw.com/wp-content/uploads/2019/08/Between-the-Lines-July-2019.pdf.

[36]The Insolvency and Bankruptcy Code, 2016, No. 31 of 2016, Acts of Parliament (India).

[37]Shipra Arora, Double Jeopardy in India, Legal Service India, (Dec. 13th, 2019, 15:00), http://www.legalservicesindia.com/article/1633/Double-Jeopardy-in-India.html.