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WEBINAR REPORT ON

Alternative Dispute Resolution in the Regulatory Regime

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Forum of Indian Regulators (FOIR) Centre,
Indian Institute of Corporate Affairs (IICA)

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Speakers



Mr Tariq Ahmed Khan

Registrar, International Arbitration and Mediation Centre

Tariq Khan is currently working as the Registrar of the International Arbitration and Mediation Centre. He is a former Partner of a leading arbitration law firm in India. He has been practising as an advocate primarily in the Delhi High Court and Supreme Court of India.

He has significant experience in domestic and international arbitrations, commercial disputes, writs, MSME disputes, Insolvency & Bankruptcy cases, and arbitration-related litigation. He has been listed in the Forbes Legal Power list, 2020-2021 as one of the top individual lawyers below ten years of practice and was the youngest lawyer listed in BW (Business World) Legal 40 under 40, 2020. He has been recognized as an arbitration Expert by SCC Online and has more than 50 publications to his credit. He also qualified for the conference round of Judge Advocate General, Indian Army.

Tariq is skilled in international and domestic arbitrations, MSME disputes, writs, commercial, employment, insolvency, and bankruptcy laws. He represented some of the biggest global players in various disputes including construction, supply, joint venture, oil & gas, infrastructure, and renewable energy space. Also, represented leading domestic players in high-stake project disputes involving issues relating to defective works, breach of contract, loss of profits, liquidated damages, prolongation, escalation, delay, indemnities, and illegal termination of the contract.

He is frequently invited to speak at various law conferences and events by domestic bar associations, law schools, and Alternative Dispute Resolution Centers amongst other organizations. He has been teaching arbitration as a guest faculty for the past seven years in some of the prominent law schools of India.

Speakers



Mr Yilli Dautaj
Partner, Der Juridik

Yilli Dautaj is a partner at DER Legal. He has experience practising, teaching, and researching various jurisdictions – including India, Sweden, the USA, the UK, Turkey, and Ireland. Ylli is an adjunct professor at Penn State Law, teaching International Arbitration. He is also a guest lecturer on Uppsala University's LL.M program on Investment Treaty Arbitration and an Assistant Editor on the Kluwer Arbitration Blog's Investment Arbitration team. Moreover, he has taught at three of India's premier law schools, Jindal Global Law School, Nirma University, and Gujarat National Law University.

Ylli has published extensively, including in reputable journals such as Brill Research Perspectives; Indiana Journal of Global Legal Studies; Manchester Journal of International Economic Law; Bologna Law Review; Stockholm Arbitration Yearbook; Cardozo Journal of Conflict Resolution; and Dispute Resolution Journal, Cornell International Law Journal, etc.

Convenor & Moderator



Dr Abha Yadav

*Associate Professor, School of Competition Law & Market Regulation
and Director Forum of Indian Regulators (FOIR) Centre,
Indian Institute of Corporate Affairs (IICA)*

Dr Abha Yadav (PhD) is a faculty at IICA who leads research and capacity-building initiatives at the School of Competition Law & Market Regulation. She is also the Director of the Forum of Indian Regulators (FOIR) Centre at IICA which is the knowledge and capacity-building hub for the Central and State government regulators of the country. She steers policy discussions, thematic discourses and enhancement of capacity-building initiatives that are an integral and vibrant part of this unique Centre. She serves as Course Director of the prestigious Certificate Course in Competition Law and Advanced Professional Course in Competition Law and Market Regulation.

She is faculty for Competition Law, Law and Public Policy, Freedom of Information, Regulatory Affairs, Laws for Women, Regulatory Impact Assessment, Labour laws etc. She is a recipient of the prestigious Fox International Fellowship at Yale University, U.S.A. and the Lok Sabha of India Fellowship. She is an eminent scholar who has lectured widely on various legal issues in India and internationally.

Participants Profile

Officials from regulatory bodies across India, researchers, experts in the power sector & FOIR Member Organization's representatives facilitated the session with their kind presence.

66 participants attended the webinar.



Program Outline & Flow

The Forum of Indian Regulators (FOIR) and the School of Competition Law & Market Regulation, Indian Institute of Corporate Affairs (IICA) organized the third quarterly webinar of FOIR titled "Alternative Dispute Resolution in the Regulatory Regime" on 20th January 2022. The webinar aimed to explore the viability of Alternate Dispute Resolution mechanisms within the regulatory regime and how would it assist in ensuring unhindered growth of the regulatory sector. The participants of the conference include members and officials from various regulatory bodies in India, students, working professionals and FOIR member organizations.



Introduction to the Webinar

The program began with a welcome speech by Dr Abha Yadav (Associate Professor, School of Competition Law & Market Regulation & Director, FOIR Centre, IICA). She began the webinar by giving a brief introduction about the relevance of the topic highlighting the importance of learning and adapting the Alternative Dispute Resolution mechanisms in the regulatory regime in India. Alternative Dispute Resolution (hereinafter referred to as ADR) in general parlance, is defined as a set of approaches and techniques aiming at the resolution of disputes in a non-confrontational way. Within the ambit of ADR, a broad spectrum of techniques falls including arbitration and adjudication, where an external party is appointed to provide a solution to the situation at hand and negotiations - involving party-to-party engagement to reach a mutually accepted resolution. With the global liberalization of international trade and investment, the pace of cross-border commercial disputes increased, making it cumbersome to have a strong dispute resolution system. In these times, alternate dispute resolution mechanisms emerged as a globally preferred efficient and quick mode of dispute settlement. In certain sectors, ADR opts over the litigation process where the risk and costs involved are potentially highly detrimental to consumers.

The ever-changing global institutional reality is that it has profoundly altered the premises of regulatory governance and raised key emerging concerns about increased complexities in securing collective problem-solving capacity. Within the regulatory sector, the disputes are multifaceted ranging from the market structure, infrastructure, and market competition to consumer-related issues and other related-technical issues (interconnection, investment, trade etc.) When addressing disputes, it is the goal of regulators to resolve the dispute promptly and in a way that avoids service disruptions and minimizes welfare loss among stakeholders. The traditional court litigation process is usually considered a pro-longed means of resolving disputes, as most laws do not take into account the changing social norms and rapid technological advances in telecommunications, and also court litigation is costly and time-consuming.

While regulators are independent, they must be accountable for their decisions. Thus, regulatory decisions are subject to appeal. Often, due to delays in the traditional judicial process, some vested interests use the normal appeal and review process to delay the implementation of regulatory decisions. Thus, Alternative Dispute Resolution (ADR) procedures such as mediation, conciliation, and arbitration, can be used quite extensively in dealing with regulatory disputes. Thus, the need of the hour is to refine Indian dispute resolution processes to cope with the growing complexities in the regulatory sector and disputes therein. Globally, the processes followed under ADR have come forward as the most conducive dispute settlement mechanism as its system of functioning is confidential, time-sensitive and enables long-term commercial relationships.

The flexibility of the ADR processes may assist or complement the standard court-based or regulatory-based adjudication process and may act as a stand-alone measure. The Apex court while discussing the significance of ADR in the recent landmark case “Uttarakhand Purv Sainik Kalyan Nigam Ltd. Vs. Northern Coal Field Ltd”, stated that the legislative intent underlying the Arbitration Act is to ensure party autonomy and minimal judicial intervention in the arbitral process. The above brief on the theme of the webinar was followed by introduction of the speakers by Dr Abha.

Presentation by Speakers

Mr Tariq Khan, the first speaker, highlighted the relevancy of the theme in light of the dearth of literature on the application of ADR in the regulatory mechanism. As far as regulatory bodies who have adapted to ADR in India are concerned, Real Estate Regulatory Authority (RERA) Maharashtra and RERA Uttar Pradesh are the few regulators who have established conciliation centres and have recognized conciliation as a mechanism to settle any dispute arising between the builder and buyer. The power of forming such an institution for resolving the dispute arises from Section 32 (g) Real Estate (Regulation and Development) Act, 2016 “measures to facilitate amicable conciliation of disputes between the promoters and the allottees through dispute settlement forums set up by the consumer or promoter associations”.

Highlighting the positive impact of institutionalizing conciliation as a dispute resolution mechanism, Mr Khan quoted the facts which he collected from another conference with Maharashtra RERA and stated that, the success rate of these matters that were resolved through conciliation is over 75% for three years under voluntary conciliation. However, as per the analysis of Mr Tariq, the data had a declining success ratio in the matters that were referred for conciliation by the authorities. During the pandemic, there have been certain changes in the functioning of the regulatory authorities. Whereas some authorities were not ready for virtual platforms, many authorities did not have the requisite infrastructure to take the matters virtually which lead to delays in the disposal of matters. Therefore, ADR can be a mechanism to deal with such sort of delays. However, due to a lack of literature and judicial precedents, it is still not recognizable which matter can be referred to for ADR. The major issue pertains to the arbitrability of the matter and if there is an arbitration clause in that particular matter then one should consider it for adjudication by the regulator or for arbitration.

Speaking of arbitrability, Mr Tariq Khan spoke in detail about the “arbitrability of a matter”. Arbitral tribunals have been considered capable of arbitration of any sort of matter. It would not be wrong to say that arbitration has become a preferred and primary mode of dispute resolution, especially in commercial matters. Any dispute that can be adjudicated by a civil court can be put for arbitration as well. If there is a valid arbitration agreement and the parties to the agreement want to go for arbitration then the dispute is absolutely capable to be put for arbitration.

The most contentious issue is the subject matter arbitrability, that is, whether the dispute that is involved can be settled by arbitration or it needs to go before a specific regulator or specific forum for remedies. Historically, several disputes in India have been considered non-arbitrable. The first case has been Allen Hamilton case. Broadly, some of the disputes that are not arbitrable are criminal offences, matrimonial disputes or guardianship matters, insolvency and winding up matters, testamentary matters, eviction or landlord dispute, patent, trademark, copyright, antitrust, bribery are certain examples of non-arbitrable matters.

The foundation for the test of arbitrability was laid down in the Supreme Court judgment in *Booz Allen & Hamilton Inc v SBI Home Finance Limited & Ors* (2011) 5 SCC 532. It was a 2011 judgement, wherein the Supreme Court said the test can be on two different thresholds. First, Right in Personam and second Right in Rem. The right in personam pertains to the rights of an individual and does not include the rights of the public at large, whereas, the right in rem affects the rights of the general public. So, if there is a dispute in a matter which touches upon a dispute of an individual, the same can be adjudicated for arbitration. However, the dispute touching the rights of the general public or class of individuals cannot be adjudicated by a private forum. It has to be necessarily adjudicated by a court of law.

This judgment did categorise what is arbitrable and what is not, however, it still has a lot of lacunas. In *A. Ayyasamy vs A. Paramasivam & Ors*, the case is related to the arbitrability of fraud. The aggrieved party pleaded that the matter involves elements of fraud and the case being criminal in nature, the process of arbitration cannot be followed. To prove the same number of adjournments were taken, which caused a delay in the disposal of the matter in issue. Therefore, the court held that only a case of 'serious fraud' involving 'criminal wrongdoing' is an exception to arbitration. On the basis of the burden of proof, the onus lies on the party trying to avoid arbitration to show that the dispute was not arbitrable.

As far as intellectual property disputes are concerned Bombay High Court judgement *EROS International Media Limited v. Telexmax Links India Pvt Limited* (2016) can be referred to. Copyright is an issue which affects the public at large, however, the court here stated that, if the dispute pertaining to a particular damage is concerned then the same is arbitrable. In arbitration, the quantum of the damages can be very well decided.

The Supreme Court in the matter *Himangni Enterprises Vs. Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706, stated that if there is a tenancy dispute which is arising out of the Transfer of Property Act and there is no special rent legislation like Delhi Rent Control Act applicable, then it will be arbitrable but if there is a special forum then the same is not arbitrable. The issue here is that if there is an arbitration clause in a matter, then it should be referred to a respective regulator or be referred for arbitration. For instance, the Competition Act states that the matters pertaining to competition under the Act would be dealt with by the Competition Commission of India (CCI). Now the question arises if there is an arbitration clause in a matter pertaining to antitrust activity would the same be dealt with by the Competition Commission of India (CCI) or resolved through arbitration?

Referring to the judgment by the Delhi High Court in the *Union of India v. Competition Commission of India*, (2012) since the matter pertains to the public at large and as it is the obligation of CCI to deal with anti-competitive matters, the same shall be referred by CCI and if there is an arbitration clause it will not be executable. Delhi High Court in another matter, *HDFC Bank Ltd. vs. Satpal Singh Bakshi* 2012 SCC Online Del 4815 held that a dispute concerning the debt recovery tribunal may be considered for arbitration, only if the same has been referred by the concerned regulator.

Supreme Court in the case of Gujarat Urja versus Essar power limited (2016) stated that these are Special Acts and have an overriding effect over anything that is inconsistent with the Acts. For example, Electricity Act or The Competition Act being special legislation have overriding effect on any other law that is inconsistent with the said Acts.

One of the major challenges, as highlighted by Mr Khan in the adaptation of ADR in the regulatory regime, is the absence of legislation to promote ADR among the regulatory authorities. The new Draft Bill of The Mediation Act, 2021 recognized mediation and conciliation as measures to resolve disputes, especially which are commercial in nature.

Mr Khan critically analyzed the new Mediation Draft Bill, stating that it adapts the Singapore conventions, which loses on the worldwide enforceability of a decree. Another criticism of the draft is, that the council lacks a professional mediator. The person meditating should be trained to resolve the dispute efficiently as the same can create a huge difference in the delay in adjudicating the matter.

Presentation by Mr Yilli Dautaj on the theme, “Insolvency and Arbitration – stuck somewhere between party autonomy and non-arbitrability”

During the course of the presentation, Mr Dautaj dealt primarily with the following points:

- From Hostility to Pro-Arbitration
- Subject-Matter of Arbitration.

Mr Dautaj explaining the need and objective behind the ADR mechanism stated that in many jurisdictions, competition law, insolvency etc. are treated as non-arbitrable. However, matters pertaining to commercial contracts are arbitrable to reduce the burden on the civil courts. Highlighting, the expanding arbitrability in the US, Mr Dautaj stated following Pro-Arbitration case laws that pushed ahead arbitration and its scope.

- Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942)
- The Bremen v. Zapata Off-Shore Co, 407 U.S. 1 (1972)
- Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)
- Mitsubishi Motors Corp. v. Soler Chrysler-Playmouth, Inc, 473 U.S. 614 (1985)
- Societe Nationale Algerienne v. Distrigas Corp., 80 B.R. 606 (D. Mass. 1987)

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4. Insolvency & Arbitration: Stuck Between a Rock and a Hard Place

- Pro-Arbitration
- Pro-Debtor
- To be or not to be, that is the question

In India, Arbitration and subject matter of arbitrability were pushed further in K Bharat Aluminium Company v. Kaiser Aluminium Technical Services Ltd. (2012) 9 SCC 552 and Union of India v. U.P. State Bridge Corporation Ltd (2015) 2 SCC 52. Mr Dautaj also threw light on insolvency sector and arbitration.

Way Forward:

1. The governing statutes of the regulatory bodies in India should be amended to promote the application of ADR in matters involving rights in personam
2. Awareness of ADR in the party. trained mediators and conciliators for efficiently resolving the issues.

Question/Answer Round

Post the presentation, Dr Abha thanked the speakers and then the house was left open for the participants for questions and answer. The participants raised the following questions:

1. As under Section 86 Code of Civil Procedure, 1908, a dispute can be referred for arbitration, so if few prayers are only referred to arbitration, and the arbitrator delays, what is the recourse available with the regulators?

Responding to the question, Mr Tariq stated that, once the matter is referred for ADR, then the matter is governed by the ADR Act. Under Section 29A of the Act, there is a time limit of 1 year for pronouncing of the award. The parties claiming relief should reach out to the court for an extension.

2. Another question was raised by one of the participants pertaining to matters that are arbitrable in the Electricity Sector since the Electricity Act states that all the matters can be referred for Arbitration.

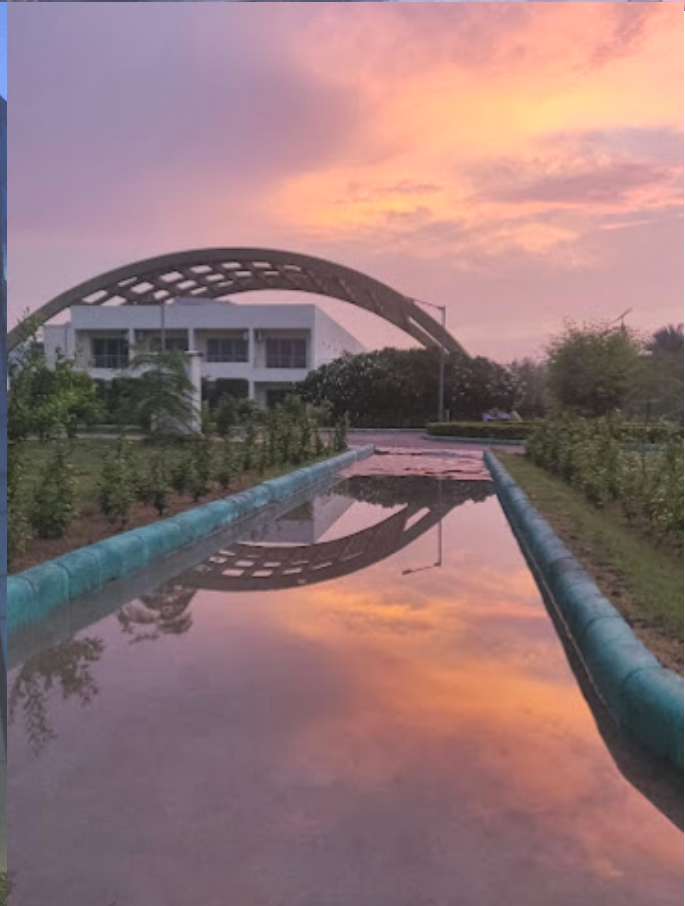
Answering the question, Mr Khan stated that the regulators have complete discretion in deciding whether the matter should be referred for arbitration or not. Although, if the party wants to go for arbitration and the regulator does not allow the same, the commission will have to state in writing the reason for not allowing arbitration and going against the will of the parties. The same order can later be challenged before the appellate tribunal.

Vote of Thanks

The webinar ended with a vote of thanks from Dr Abha Yadav. She thanked the esteemed speakers and participants for sharing their knowledge and their experiences. The efforts of FOIR and IICA for the conference were much appreciated by the panellists and the participants.

For Queries and Feedback:

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