

# CADR NEWSLETTER

THE OFFICIAL NEWSLETTER OF  
CENTRE FOR ALTERNATIVE DISPUTE RESOLUTION,  
RGNUL, PUNJAB

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## ABOUT US

The Centre for Alternative Dispute Resolution, RGNUL (CADR-RGNUL) is a research centre dedicated to research and capacity-building in ADR. The ultimate objective, at CADR, is to strengthen ADR mechanisms in the country by emerging as a platform that enables students and professionals to further their interests in the field.

In its attempt to further the objective of providing quality research and information to the ADR fraternity, the CADR team is elated to present the third Issue of the Third Volume of ‘The CADR Newsletter’. The Newsletter initiative began with the observation that there exists a lacuna in the provision of information relating to ADR to the practicing community. With an aim to lessen this gap, the Newsletter has been comprehensively covering developments in the field of ADR, both national and international. The CADR Newsletter is a one-stop destination for all that one needs to know about the ADR world; a ‘monthly dose’ of ADR News!



# ADR UPDATES

## ARBITRATION

### DOMESTIC ARBITRATION

#### 1. DISPUTES ARE NOT ARBITRABLE AFTER SECTION 7 INSOLVENCY AND BANKRUPTCY CODE IS FILED: SUPREME COURT

The Apex Court in *Indus Biotech Pvt. Ltd. v. Kotak India Venture (Offshore Fund) & Ors.* reaffirmed the NCLT's decision, holding that "In a situation where the petition under Section 7 of IB Code is yet to be admitted and, in such proceedings, if an application under Section 8 of the Act." Thus, Arbitration reference is not maintainable if filed after admission of Insolvency Resolution under Section 7 of the IBC.

[Read more](#)

#### 2. THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021 TO REPEAL THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2020

The Central Government notified The Arbitration and Conciliation (Amendment) Act, 2021, under which:

- Section 36 of the Act has been extended to include that the court shall stay the award unconditionally in certain cases.
- Section 43J of the Act has been substituted and the new section states that the qualifications, experience and norms for accreditation of arbitrators shall be specified by the regulations.
- Schedule VIII of the Act has been omitted.

[Read more](#)

#### 3. SUPREME COURT OVERRULES N.V. INTERNATIONAL VERDICT: SHORT DELAY IN FILING APPEALS UNDER SECTION 37 OF THE ACT CAN BE CONDONED IN EXCEPTIONAL CASES

The 3-judge bench comprising RF Nariman, BR Gavai and Hrishikesh Roy in *Government of Maharashtra v. Borse Brothers Engineers and Contractors Pvt. Ltd.* held that "in a fit case in which a party has otherwise acted bona fide

and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned.”

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#### 4. CURRENT LEGAL FRAMEWORK SUFFICIENT FOR EMERGENCY ARBITRATION, NO AMENDMENT NECESSARY: DELHI HIGH COURT

In the Amazon-Future case, the Delhi High Court held that “The Emergency Arbitration is a very effective and expeditious mechanism to deal with the Emergency Interim Relief Application.” Thus, the Court observed that the current legal framework satisfactorily recognised emergency arbitration and did not require an amendment in that regard.

[Read more](#)

#### 5. IS IT COMMON FOR DELHI POLICE TO ACCOMPANY BANK RECEIVERS TO ENFORCE ARBITRAL ORDER AGAINST BORROWER WITHOUT APPROACHING COURT: DELHI HIGH COURT

The Delhi High Court in *Tarun Krishnan Aggarwal v. SHO PS Hanu Qazi* directed Delhi Police to clarify if it was commonplace for them to accompany bank receivers to enforce orders passed by arbitrators without approaching an executing court. The High Court also asked Kotak Mahindra Bank if its receivers take police help without approaching the court.

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## INTERNATIONAL COMMERCIAL ARBITRATION

### 1. ARBITRATION AWARD VIOLATING PLAINTIFF'S STATUTORY RIGHT TO WORK OVERTURNED

In *Brown v. TGS Management Co.*, the California appellate court agreed with the plaintiff that the “confidentiality provisions” of the employment agreement would illegally restrain him from working in statistical arbitrage after leaving TGS. The court held that the arbitrator exceeded his powers by passing an award “that violates a party’s unwaivable statutory rights or that contravenes an explicit legislative expression of public policy” and reversed the judgement.

[Read more](#)

### 2. UBER ARBITRATION CLAUSE IS UNCONSCIONABLE: SUPREME COURT OF CANADA

In *Uber Technologies Inc. v. Heller*, the Supreme Court of Canada while upholding the Ontario Court of Appeal’s decision reiterated that Uber’s arbitration agreement is “invalid and unenforceable”. The court further confirmed the “competence-competence” principle and created an exception to the rule of “arbitral referral”.

[Read more](#)

### 3. GRANTING OF INDEMNITY COSTS WHERE AN ARBITRAL AWARD IS UNSUCCESSFULLY CHALLENGED IS NOT A DEFAULT RULE: SINGAPORE HC

In *BTN v BTP*, the Singapore High Court re-affirmed that an unsuccessfully challenged arbitral award does not qualify as an exceptional circumstance for granting indemnity costs. The court further held that resisting enforcement of the arbitral award is not in itself an exceptional circumstance as well.

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### 4. PRE-CONDITIONS TO ARBITRATION ARE NOT MATTERS OF JURISDICTION: ENGLISH HIGH COURT

In *Republic of Sierra Leone v. SL Mining Ltd*, the English High Court refused to set aside an arbitral award even when it was alleged that the defendant had failed to observe the agreed pre-conditions to arbitration agreed upon in the agreement. The court further held that such alleged non-compliance was a question of admissibility of the claim and not of the jurisdiction of the tribunal.

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### 5. LIMITS OF POST-AWARD COURT INTERVENTION CLARIFIED BY MALAYSIAN HIGH COURT

In *Danieli & C Officine Meccaniche SPA v Southern HRC Sdn Bhd*, the Malaysian High Court ruled that the power of the courts in relation to arbitral awards is limited by Section 38 of the Arbitration Act, 2005. It was for the first time in recent years that a Malaysian Court had clarified the aforementioned limits of judicial intervention after an arbitral award had been passed.

[Read more](#)

#### 6. MALAWI ACCEDES TO THE NEW YORK CONVENTION

On 4 March 2021 Malawi became the 167<sup>th</sup> State party to the New York Convention after acceding to it. As per Article XII (2), the convention will come into force for Malawi on 2 June 2021.

[Read more](#)

#### 7. AMENDED ICDR ARBITRATION AND MEDIATION RULES COME INTO FORCE

The revised Arbitration and Mediation Rules released by the International Centre for Dispute Resolution (ICDR) came into force on March 1, 2021. The said rules will be applicable to any arbitration or mediation which commence after March 1 unless it has been agreed otherwise.

[Read more](#)

#### 8. ALTERNATIVE SERVICE OUTSIDE THE HAGUE SERVICE CONVENTION OF AN ORDER FOR ENFORCEMENT UPHELD BY THE ENGLISH HIGH COURT

In *M v N*, the English High Court reiterated its earlier decision and allowed “alternative service” outside the “Hague Service Convention” (HSC) of an order that enforces an arbitral award under Section 66(1) of the Arbitration Act, 1996. The decision is consistent with the English Court’s “pro-enforcement policy” and re-affirms the availability of alternative service outside the HSC.

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#### 9. PRINCIPLES OF HALLIBURTON ON ARBITRATOR BIAS APPLIED BY THE ENGLISH COURT

The English Commercial Court in *Newcastle United Football Company Limited v The Football Association Premier League Limited*, set aside an application for removing an arbitrator under Section 24 of the Arbitration Act, 1996. The court also explained the principles of arbitrator bias laid down in the landmark judgement of *Halliburton Co v Chubb Bermuda Insurance Ltd.* and held that the principles need to be applied in practice.

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## 10. ACICA 2021 ARBITRATION RULES RELEASED

Revised Arbitration Rules have been released by the Australian Centre of International Commercial Arbitration (ACICA) which are due to come into force in April 2021. Given the recent surge of arbitration cases in Australia, the 2021 ACICA rules will act as a guiding point for the future of arbitration.

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## INVESTMENT ARBITRATION

### 1. ICSID CLAIM AGAINST LATVIA DISMISSED OVER FAILURE TO POST SECURITY FOR COSTS

Recently, an ICSID claim against Latvia by a Ukrainian scrap metal investor was dismissed over a failure to post security for costs – after failing to disqualify the entire tribunal for supposedly making “sarcastic and derogatory” remarks towards him.

[Read more](#)

### 2. TOYOTA RENEWABLES CLAIM AGAINST SPAIN LARGELY DISMISSED BY AN ICSID TRIBUNAL

A €258 million Energy Charter Treaty claim against Spain brought in by the Toyota group over Spain’s renewable energy reforms have recently been largely dismissed by an ICSID tribunal.

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### 3. INDIA SEEKING TO CHALLENGE CAIRN’S BILLION-DOLLAR INVESTMENT TREATY AWARD

India has reportedly applied to a Dutch court to challenge an investment treaty award requiring India to pay US\$1.2 billion plus interest to Scotland’s Cairn Energy plc in compensation for a retroactive tax demand.

Cairn Energy had moved courts in nine countries to enforce its USD 1.4 billion arbitral award against India, which the company won after a dispute with the country's revenue authority over the retroactively applied capital gains tax.

[Read more](#)

### 4. SHELL AND ENI HELD NOT GUILTY IN NIGERIAN BRIBERY CASE

A Milan court has found oil giants Shell and Eni, as well as Eni CEO Claudio Descalzi, not guilty of paying millions in bribes to Nigerian officials to obtain prospecting rights to a valuable oil field off the coast of Nigeria over a decade ago, charges that have prompted ICSID proceedings.

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### 5. GERMANY SETTLES WITH VATTENFALL ENDING A DECADE LONG LEGAL BATTLE

One of the most widely monitored investor-state arbitrations in past years appears to be coming to a close, with the German government agreeing to a multibillion-euro settlement agreement with Vattenfall, Sweden's largest utility company, to settle an ICSID claim worth up to €7 billion over nuclear energy phase-out.

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## 6. NEW PROCEDURAL RIGHTS AS INDONESIA-SINGAPORE BIT GETS RATIFIED

Back in 2014, Indonesia announced its intention to put an end to "all of its 67 bilateral investment treaties" (BITs) and since then, the state has actively sought to re-negotiate several of them. On 9 March 2021, the Indonesia-Singapore BIT came into force after being ratified by both States. The treaty

offers comprehensive investment rights while also protecting the state's ability to regulate by targeted carve-outs. It includes provisions on corporate social responsibility, anti-bribery and corruption as well. The ratification of this treaty puts long-awaited investor security and new procedural rights into effect, which could help both countries' economic recovery.

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# MEDIATION

## INTERNATIONAL MEDIATION

### 1. THE CITY OF PHILADELPHIA'S EVICTION DIVERSION PROGRAM USES MEDIATION TO PREVENT EVICTIONS

Owing to the rise in problems to both tenants and landlords, during the Covid pandemic, the City of Philadelphia's Eviction Diversion Program has started utilizing the process of mediation to resolve eviction issues. As of 5 January 2021, the city had received around 1120 completed applications for mediation. Out of the 463 landlord/tenant pairs that participated, 317 came to a resolution and agreement.

[Read more](#)

### 2. MEDIATION AMONGST JORDAN ROYALS SUCCESSFULLY DE-ESCALATED A POLITICAL CRISIS IN JORDAN

Mediation between King Abdullah of Jordan II, and his half-brother Prince Hamzah successfully resolved and de-escalated a potential political crisis. The mediation took place at the Royal Hashemite Court. Malik R. Dahlan, a professional mediator, issued a statement stating the success of the meditation.

[Read more](#)

### 3. AUTHORITIES IN SINGAPORE COULD MAKE MEDIATION COMPULSORY IN CASE OF NEIGHBOUR DISPUTES

An inter-agency committee in Singapore is in the process of reviewing the Community Dispute Management Framework, which helps in resolving the dispute between neighbours. The review is said to focus on increasing the taking up of community mediation to resolve disputes, as said by the Second Minister for Law, Edwin Tong, in the Parliament. With a rise in reports of "neighbourhood nuisance" due to the changes brought about by Covid, this issue became vital.

[Read more](#)

### 4. THE UK GOVERNMENT TO PROVIDE £500 TAX-FREE VOUCHER FOR MEDIATION TO DIVORCING COUPLES

The UK government in a bid to reduce the pressure on the courts, amidst the Covid-19 pandemic, has decided to provide £500 tax-free vouchers for mediation to divorcing couples. This scheme is provided in order to assist the couples in the matters of custody, maintenance arrangement, and division of

assets, sans the involvement of litigation. At present, ₹ 1 Million has been set aside, to help 2000 couples, on a first-come-first-serve basis.

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is said to be an invitation for businesses to adopt ODR in India. It will highlight the need for such a mechanism and the actions that can be taken.

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## **DOMESTIC MEDIATION**

### **1. THE SUPREME COURT OF INDIA ASKS THE CENTRE ITS STATUS ON A MEDIATION CENTRIC LEGISLATION**

In a plea by the Youth Bar Association of India (YBAI) seeking directions to provide mandatory pre-litigation mediation across the country, the Supreme Court asked the Centre its status. The YBAI claimed that of all the methods available, pre-litigation mediation would serve the best purpose. It prayed for an institutionalized pre-litigation mediation model.

[Read more](#)

### **2. NITI AAYOG TO LAUNCH ITS ‘ONLINE DISPUTE RESOLUTION (ODR)’ HANDBOOK**

NITI Aayog, in association with Agami and Omidyar Network India, and with the support of ICICI Bank, Ashoka Innovators for the Public, Trilegal, Dalberg, Dvara, NIPFP, is set to launch its first-of-its-kind ‘Online Dispute Resolution (ODR)’ handbook. This handbook

## IN CONVERSATION WITH: *MR. SUBHASH BHUTORIA*

### MR. SUBHASH BHUTORIA



Mr. Subhash Bhutoria is a partner, and head of IPR and Art Law practice at Krida Legal, a full-service law firm based in New Delhi, India. He is also an Arbitrator at the Court of Arbitration for Art, Netherlands (CAfA).

Mr. Bhutoria's practice is mainly focused in the field of IPR, technology and law, fashion, consumer and personal injury laws. An alumnus of National Law University, Jodhpur (NLUJ), he has represented leading art galleries, creative professionals, publishers and fashion and lifestyle brands over the years!

Excerpts from the Conversation:

1. 'ART LAW', AND MORE SPECIFICALLY 'ART ARBITRATION', IS AT A VERY NASCENT STAGE IN INDIA AND THE JURISPRUDENCE ON THE SUBJECT IS STILL EVOLVING. HOW DID YOU COME ACROSS THE FIELD OF ART ARBITRATION, AND HOW HAS BEEN YOUR EXPERIENCE WITH THE WORLD OF ART LAW AND/OR ART LAW ARBITRATION?

**SB:** Through my practice of Intellectual property laws, I have had the opportunity to represent various visual and performing artists since 2009, but my experience of ADR/ arbitration in art is of about 2-3 years.

Art and cultural property is an established domain, yet the legal practice is niche. Besides, Intellectual property laws, the domain majorly deals with laws relating to insurance, contracts and even crime. Both, special provisions in general laws and special statutes are enacted for protecting art, cultural property and heritage of India. However, disputes seldom see light of the day, also because of lack of legal awareness and fear of lengthy legal proceedings. With growing awareness, trans-border outreach and convenience offered by ADRs, arbitration in art disputes is likely to increase. Even in its

limited form, I am hopeful that arbitration would be preferred way of dispute resolution in art domain.

**2. WITH THE ESTABLISHMENT OF THE COURT OF ARBITRATION FOR ART (CAFA) IN 2018, ART ARBITRATION IS STEADILY GAINING LIMELIGHT ACROSS THE GLOBE. HAVING BEING APPOINTED TO THE CAFA POOL OF ARBITRATORS YOURSELF, HOW DO YOU VIEW THIS DEVELOPMENT FROM THE PERSPECTIVE OF THE ART COMMUNITY IN INDIA?**

**SB:** It is an honour as well as a great responsibility to be appointed as an Arbitrator at CAFA. While working with artists and galleries, I have realized that one cannot always have the same approach as is required in a regular court proceeding. Under these circumstances, institutions such as CAFA play a vital role, in resolving disputes, without affecting the relationship between the parties. Also, specialized ADRs are highly efficient and cost effective and hence should be preferred over court or legal proceedings.

**3. WHAT IS YOUR VIEW ON THE LEGAL ENVIRONMENT IN INDIA, WITH REFERENCE TO ADR. DO YOU THINK IT IS**

**CONDUCTIVE TO THE GROWTH OF ADR IN GENERAL?**

**SB:** Of course, it is. Besides having comprehensive laws, we have robust infrastructure and human resource to support ADRs/ arbitrations, in India. Also, ODRs and e-arbitration, because of their outreach, could tremendously increase the ADR practice in India. Besides, both the legislature and courts are encouraging out of court settlement of disputes. In fact, Commercial Courts Act, 2015 has made pre-litigation mediation, mandatory in case an urgent relief is not sought. This is quite encouraging.

**4. DO YOU BELIEVE THAT ALL IPR DISPUTES ARE DE FACTO NON-ARBITRABLE? WHAT ARE YOUR VIEWS ON THIS IN LIGHT OF THE RECENT MADRAS HIGH COURT JUDGMENT IN *SANJAY LALWANI V. JYOSTAR ENTERPRISES*, ON THE APPROACH OF THE COURTS REGARDING ARBITRABILITY OF IPR DISPUTES?**

**SB:** The term IPR dispute has wide connotation and as per my understanding of the judgment, causes for action, which are in rem, are non-arbitrable. I don't think this and other judgments put a blanket ban on all kinds of dispute involving IP rights such as royalty or license fees related disputes. Moreover, the

Commercial Courts Act mandate pre-litigation mediation in IPR matters, which indicates that ADRs are not restricted in IPR disputes. In context to art business, the disputes arise mostly from breach of contract, which are generally arbitrable claims.

**5. LEARNING FROM YOUR WONDERFUL EXAMPLE, ANY ADVICE TO STUDENTS AND YOUNG PROFESSIONALS WHO MIGHT BE INTERESTED IN ART LAW, AND POSSIBLY ART ARBITRATION IN THE FUTURE.**

**SB:** Art and cultural property is a distinct field and is less explored as a legal practice. I

recommend professionals and students to acquaint themselves with the domain, to build a career in art law. One can also enrol into professional programs on art law, offered by leading international universities, to gain better knowledge about the field. Art and cultural property law is a vast domain involving human rights, commercial transactions, insurance, intellectual property, money laundering, white collar crimes, dispute resolution et al. and hence one can consider specializing in any of the said areas of her/ his interest.

# HIGHLIGHTS OF THE MONTH

## 3<sup>RD</sup> RGNUL SPORTS AND ENTERTAINMENT LAW MEDIATION COMPETITION - 2021

The 3<sup>rd</sup> RGNUL Sports and Entertainment Law Mediation Competition 2021 was efficaciously hosted by the CADR and PACT from 6<sup>th</sup> to 8<sup>th</sup> March through the means of virtual platform ZOOM. Singapore International Mediation Institute (SIMI) and Krida Legal were the Chief Knowledge Partner and Chief Advisory Organisation respectively along with Straus Institute for Dispute Resolution, Markanda Advocates, Centre for Mediation and Conciliation and Mediator Network acting as Knowledge Partners for the event.

The competition spanned for three days, witnessed an intense battle among 34 teams from over 24 esteemed law colleges of India in the niche field of sports and entertainment law mediation that resulted in super-standard enriching sessions. With 70+ expert assessors from around the globe evaluating the participants and giving their valuable feedback helped the participants gain a wholesome experience and made the competition a huge accomplishment. The team comprising of **Shubhangi Nangunoori** and **Thirivikram Balaji** from **Symbiosis Law School, Hyderabad** were adjudged as the **Best Negotiation Team** of the competition and **Sharmila Adyanthaya** from **Kirti P Mehta School of Law, NMIMS, Mumbai** was declared to be the **Best Mediator** of the competition.



## RGNUL STUDENTS' ACHIEVEMENTS

The CADR has always encouraged and promoted the students of RGNUL to take part in various national and international ADR competitions and these continuous efforts have time and again yielded delightful results in the form of various achievements and the month of March was no different.

The entire CADR team takes immense pride in congratulating Anushka Nayar and Srishti Kaushal for winning the Best Negotiation Team award at the **SK Misra Memorial International Mediation and Negotiation Competition 2.0**, along with Anushka emerging as the 'Best Speaker' of the final rounds and Jisha Garg being adjudged as a 'Semi-finalist mediator' in the same competition.

We would also like to extend our heartiest congratulations to the budding team of Pratham Malhotra, Paitoshvir Singh and Pravertnafor winning the 'Best Mediator Team' award at the **9th NLIU INADR Mediation Tournament 2021**. Lastly, CADR also congratulates the team comprising of Dikshi Arora and RachitSomani for ending up as the 'Runners-up' in the Client Counselling competition at the **4<sup>th</sup> edition of the Amity National Alternative Dispute Redressal Tournament 2021**.

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Vice-Chancellor, RGNUL, Punjab

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