THE CADR

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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 Special Edition of the Fourth 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!

DOMESTIC ARBITRATION

- Dhanya Jha and Vandana Ragwani

A petition under SARFAESI Act does not impede arbitration proceedings.

The Delhi High Court in the case of *Hero Fincorp. Limited* v. *Techno Trexim (I) Pvt. Ltd. & Ors* recapitulated that arbitration proceedings and a challenge under Section 17 of the SARFAESI Act can be contested concurrently. The contention placed before the court was with regard to the issue of whether SARFAESI proceedings would bar initiation of arbitration. To resolve this conundrum, the court placed reliance on the *M.D. Frozen Foods Exports Pvt. Ltd.* v. *Hero Fincorp Ltd.* judgment of 2017 which held that SARFAESI proceedings are in the nature of enforcement proceedings while arbitration is an adjudicatory process. Hence, even if a petition is filed against the secured creditor under section 17 of the SARFAESI Act, it would not bar the secured creditor from initiating arbitration proceedings. Read More

Future Group's plea to terminate arbitral proceedings initiated by Amazon dismissed by Delhi High Court.

The Future Coupons Pvt. Ltd. recently instituted a case to quash the Arbitral Tribunal's decision approving Amazon's request to alter its claims and seek repudiatory damages for breach of agreements entered into with Future Coupons has been dismissed by the Delhi High Court. The Delhi High Court dismissed a recently instituted case by Future Coupons Pvt. Ltd. to quash the Arbitral Tribunal decision. Through the impugned decision, the tribunal had approved Amazon's request to alter its claims and seek repudiatory damages for breach of agreements entered into with Future Coupons. The court determined that because the aforementioned order was interlocutory in nature, it was not subject to review under Article 227 of the Indian Constitution. Read More | Read Order

Arbitration clause in one agreement cannot be invoked for a subsequent agreement when no specific reference to the arbitration clause is made: Bombay High Court.

The Bombay High Court in the judgment of *JSW Steel Limited* v. *Bellary Oxygen Company Ltd. & Ors* gave a ruling regarding Section 7(5) of the **A&C Act**. The judgment held that the intended

effect of an arbitration agreement incorporated into a subsequent agreement would not come under Section 7(5) by a mere reference to another contract. In the present case, the parties executed a Shareholders Agreement which contained an arbitration clause. Further, the parties entered into a Second Agreement which contained multiple references to the Shareholders Agreement. However, there was no clear reference to the arbitration clause contained in the agreement. Therefore, the court ruled that the two agreements were independent with respect to the intention to arbitrate and there was no arbitration agreement between the parties. Read More

An invalid appointment procedure does not render the entire arbitration clause invalid.

The Delhi High Court held that the amendment to the procedure for the appointment as per the 2015 amendment does not invalidate the entire arbitration clause. The single judge bench clarified that an arbitration clause contains a number of elements, such as the process for choosing an arbitrator, the law governing arbitration, the law governing contracts, the seat and venue, etc., but the fundamental element to submit their dispute to arbitration remains constant. Therefore, solely because one of these elements is no longer valid does not render the entire arbitration clause invalid; rather, the invalid clause can be easily severed. Read More

A third party cannot be made a signatory to arbitration by using the Doctrine of Group of Companies.

The Delhi High Court has held that in a dispute between partners involving the partnership company, the Doctrine of Group of Companies cannot be used to compel a non-signatory third party to arbitration. The Court determined that a partnership cannot by virtue of its very nature, be compared to a company in order to apply the Doctrine of Group of Companies. Further, the single bench of Justice V. Kameswar Rao ruled that claims made against a party cannot be submitted to arbitration if they have a criminal component, such as fraud, forgery, or falsification, which could lead to penalties and criminal sanctions. Read More

Delhi High Court Rejects unilateral appointment of arbitrator in arbitration proceedings against IRCTC

In the case between the petitioner, a food stall vendor and IRCTC, the High Court of Delhi noted that it was not permissible for the respondent to appoint an arbitrator in terms of the procedure as laid down in the arbitration clause from its own panel, the Delhi High Court has allowed a petition u/s 11 of the A&C Act and appointed a sole arbitrator. The bench held, *"Any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule shall not be eligible to be appointed as arbitrator in view of Section 12(5) of the Act"* Read More

Unless the dispute is non- arbitrable, the issue of arbitrability should be dealt with by the arbitrator: Supreme Court.

In the case of *VGP Marine Kingdom Pvt Ltd* v. *Kay Ellen Arnold,* the Supreme Court reiterated that while considering application under Section 11(6) of the A&C Act, the dispute with respect to the arbitrability should be left to the arbitrator, unless on the face it is found that the dispute is not arbitrable. In this case, the Madras High Court dismissed an application to appoint an arbitrator on the ground that at the time when the application was filed there were already arbitral proceedings pending. The Apex Court bench observed that the High Court ought to have allowed the application and left the issue of arbitrability of dispute between the parties to the arbitrator. Read More

Vague application for appointment of arbitrator cannot be a ground for rejection of application.

The Gujarat High Court has ruled that the contention that the notice issued under Section 21 of the A&C Act, invoking the arbitration clause, is vague or bereft of material particulars, cannot be a ground to reject the application under Section 11(6) of the A&C Act, seeking appointment of an arbitrator. The court held that the provisions of Section 21 of the A&C Act do not even remotely suggest that the nature of dispute has to be enumerated or explained in the notice invoking the arbitration clause. Read More

Nomenclature of arbitration clause immaterial when essential elements of arbitration present

In the case of *Consolidated Construction Consortium Limited* v. *SDMC,* the Delhi High Court held that nomenclature of an arbitration clause is immaterial when all the elements are present. The bench held that an arbitration clause would not lose its character merely because the word 'mediation' has been used as its nomenclature. It held that, in construction of a contractual clause, the Court should be guided by the substance of the agreement between the parties rather than by the nomenclature employed. The Court expounded on the essential elements of an arbitration clause. Read More

INTERNATIONAL COMMERCIAL ARBITRATION

- Devanshu Mehra

Amazon moves to Supreme Court to seek recommencement of Arbitration Proceedings in the Future Retail Case

In a fresh phase in the dispute over Future Retail, Amazon has petitioned the Supreme Court to let the Singapore International Arbitration Center ("**SIAC**") resume its arbitration hearings. Gopal Subramaniam, senior counsel for Amazon NV Investment Holding LLC, highlighted Future Group's attempts to obstruct the legal process on November 17.

Future Group had contacted SIAC to request that the arbitration procedures be stopped. This request was turned down on June 28. The Delhi HC was then petitioned by Future to overturn the SIAC decision of stalling the arbitration proceeding but the same was denied. Read More

BharatPe moves to SIAC to enforce "Claw Back" of Ashneer Grover's Restricted Shares

Multiple persons with knowledge of the issue informed ET that BharatPe has approached the SIAC in an effort to recoup cofounder Ashneer Grover's restricted interest in the business. In a continuing legal fight with Grover, BharatPe has filed a civil lawsuit at the Delhi High Court and a criminal complaint with the Economic Offences Wing. This is the fintech company's third legal action against Grover this week. Read More

The Third Circuit agrees with the U.S. District Court on Jiangsu not being bound by the Chinese Court and the Arbitral Tribunal's decisions on arbitrability in a case against Angle World LLC.

Arbitration proceedings between Jiangsu Beier Decoration Materials Co., Ltd. and Angle World LLC were initiated in China regarding an MoU between the two parties. The MoU into question contained an arbitration clause that was not signed by Angle World. However, a Chinese court, keeping in view the correspondence exchanged between the parties, ruled that a valid agreement did exist under the Chinese law. Aftermath, an Arbitral Tribunal ruled that the MoU was breached by Angle World. However, when Jiangsu petitioned for the confirmation of the foreign award in the U.S. District Court the court held that Jiangsu was unable to establish the existence of an arbitration agreement under the New York Convention (NYC). It also held that Jiangsu was neither bound by the verdict of the Chinese court nor the arbitral tribunal on arbitrability. The Third Circuit, on appeal, analysed the contention under NYC and agreed with the decision of the District Court.

Variation in the Award Enforcement when it comes in conflict with National Public Policies

In an earlier unpublished award by ICC which has now been uploaded on Yearbook Commercial Arbitration available on Kluwer Arbitration Database, the sole arbitrator dealt with the intersection of public policy provisions and enforcement of an award. The respondent's contention that the given arbitration agreement was invalid due to UAE law which declares the exclusive jurisdiction of UAE courts in matters between a principal and an agent was dismissed. The rationale put forward was that while New York Convention provided for refusal of enforcement award on grounds of public policy but not all public policy provisions could be read into every arbitration taking the variety of provisions of different countries into account. (vol. XLVII, 2022) Read more.

INVESTMENT ARBITRATION

- Aditi Garg

Dutch Court Rejects the RWE and Uniper's Claims for Compensation over Netherland's Coal phase-out Policy

The Dutch Court in Hague has denied the claims of 1.4 billion and 1 billion euros by energy giants RWE and Uniper respectively over the 2019 law that aims to ban the use of coal for power

generation by 2030. While the companies claimed that the law places a disproportionate burden on the companies, the Dutch court ruled it to be proportionate, giving sufficient transition period to the companies to realize revenue and mitigate damages. The RWE has also instituted arbitration proceedings at the ISCID under the Energy Charter Treaty (ECT) while Uniper had also started such ICSID proceedings but the same is reported to be withdrawn on the request of the German government. Read more

Irish Supreme Court Holds CETA's Enactment Incompatible with the Constitution of Ireland; Provides a Solution through a Change in Irish Arbitration Law

The Irish Supreme Court declared that the Canada-EU Trade Agreement (CETA) cannot be enacted without the violation of the Constitution of Ireland. The judgment pointed out the effect of CETA on judicial sovereignty through the CETA tribunal rulings superseding the decisions of domestic courts in identical cases or may be not following the core values of Ireland. However, the court suggested changes in the Irish rules about arbitration awards to break the impasse without going in for a referendum for making changes to the Constitution. The conflict between the decision of national courts and arbitration tribunals is a commonplace but the Irish court's suggestion of reconciliation between the two is a welcome step at making arbitration an efficient dispute resolution method. Read more

Singapore Court of Appeals upholds Sanum and Lao Holdings Awards, Rejecting the Bad Faith allegations

The Appellants, Lao Holdings NV and Sanum Investments Ltd., in the appeal, applied for the dismissal of Singapore International Commercial Court's (SICC) two arbitral awards in favour of Respondents, Government of the Lao People's Democratic Republic. . The SICC had upheld the dismissal of the Appellant's claims by arbitral tribunals and had refused to set aside the award. The present appeal was based on two grounds: (i) arbitration proceedings were not in accordance with the express agreement and, (ii) the Appellants were not afforded a reasonable opportunity to be heard on determinations made in the BIT Awards. However, the present court found that the procedure adopted by tribunal courts discharging their duty of construction of provision of an agreement was correct. In case of second ground, the court found that there was no breach of

principles of natural justice and the appellants had opportunity to address and did address the conclusion of bad faith by the tribunals. Read more

UAE Signs a Settlement Agreement with the Swedish Investor in an ICSID Claim

The ICSID proceedings in *Amir Masood Taheri v. The United Arab Emirates* came to a conclusion with parties signing a settlement agreement. The claim by Iranian-Swedish National arose out of denial to renew his residency permit by the UAE in 2011. The claimant alleged the violation of UAE-Sweden BIT on the Promotion and Reciprocal Protection of Investments. The claimant sought protection of his alleged investments in the UAE between 1999 and 2009 in the field of import-export and distribution of optical discs, as well as the trading of general commodities. However, the claimant agreed to drop the case in the backdrop of the state challenging the authenticity of some of his evidence. Read more

Permanent Court of Arbitration Awards Around $105 mn in Damages under Barbados-Venezuela BIT

PCA tribunal awarded around $105 million in damages with respect to a claim filed by a Barbados company, Venezuela US, S.R.L against the Bolivarian Republic of Venezuela under the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments. The claimant pursued the matter alleging arbitrary or discriminatory conduct, expropriation along with violation of provisions related to fair and equitable treatment and umbrella clause under the BIT. The tribunal agreed with the claims of arbitrary or discriminatory conduct only and rendered its award. Read more

Canadian Bank brings ICSID claim against Peru

As a contractor seeks new counsel to defend a judgment in a different dispute with the Andean state, a Canadian bank has filed an ICSID action against Peru over a nearly 15-year-old tax issue. The 2009 Canada-Peru free trade agreement provides the legal basis for the Bank of Nova Scotia's complaint. On November 15, ICSID registered the claim. The controversy began with a 1999 lawsuit filed by Sunat, the tax office of Peru, against Banco Wiese, which Scotiabank Peru, a subsidiary of the Canadian bank, bought in 2005. Sunat alleged that Banco Wiese had improperly increased its

tax credit to pay less IGV through false gold transactions (a general sales tax similar to VAT). Read More

MEDIATION

- Diya Gaur

Advertisement dispute between Parle and Britannia Referred to Mediation

The ongoing dispute, *Parle Products Private ltd.* v. *Britannia Industries ltd.,* originating as a consequence of the advertisements of *Milk Bikis,* a product of Britannia, alleging that the video advertisement being featured in television commercials and presented in print media is disparaging *Parle-G*, the biscuit brand of Parle products. A relief of permanent injunction has been sought by Parle in this light. While noting the references being made to *Parle-G* in the advertisements, the court directed the parties to refer the dispute to the Delhi High Court Mediation and Conciliation Centre considering Britannia is willing to amicably resolve the matter. The court has also directed that the print advertisement shall not be republished until the settlement is explored. Read More

Abu Dhabi launches the World's First Virtual Mediation Centre in the realm of Metaverse

Abu Dhabi Global Market (ADGM) Arbitration Centre has unveiled the World's first virtual mediation center in the metaverse on the outlines of its digital-first strategy. It is predicted to increase the reach and efficiency of mediation as a selected form of dispute resolution. The service will provide a more immersive experience by unraveling a first-of-its-kind mediation proceeding in the world of the metaverse. The programme aligns with UAE's commitment to reduce the carbon footprint of international dispute resolution by resolving disputes on a global scale without traveling and furthering sustainability. Read More

Mediation to be done at Panchayat level in Karnataka

With the aim to relieve some of the burden on the judiciary, the Karnataka state government intends to train individuals at the gram panchayat level to act as mediators for resolving civil and non-cognizable matters. According to the data gathered from National Judicial Data Grid, Karnataka has more than 19 lakh pending cases as of 28th October. The intricacies and modalities of the initiative

are being thought out. Though the proposal is being applauded as a significant move, experts are skeptical about its functioning. Read More

Copyright Infringement Dispute between Pocket FM and Kuku FM Referred to Mediation

In *Mebigo Labs Private Limited* v. *Pocket FM Private Limited & Anr.,* an audiobook by the name 'Mossad: The Greatest Mission of the Israeli Secret Service' was made available by Pocket FM, and was subsequently removed from its platform after Mebigo Labs, which runs Kuku FM alleged that it has exclusive copyright over the audio version of the book. The Delhi High Court directed the respondent that the audiobook, based on Israeli Intelligence Agency, is not made accessible or communicated on its platform in any way until the dispute is settled. The High Court referred them to mediation after the parties expressed their willingness to resolve the dispute amicably. Read More

Lawyers' Strikes In India: A Balanced Approach Through Adr

- Pratham Malhotra & Aishwarya Singh Vishnoi

1. Introduction

"*On the slightest pretense strikes and/or boycott calls are resorted to. The judicial system is being held to ransom. Administration of law and justice is threatened. The rule of law is undermined,*" stated a three-judge bench of the Supreme Court in *Ex-Capt. Harish Uppal vs Union Of India (2002)*. The Court ultimately held in this case that lawyers have no right to strike, engage in a boycott, or even call for a token strike with the sole exception of a circumstance where the Bar or the Bench's dignity, integrity, and independence were in jeopardy. The aforementioned position of law, which imposes a strict ban on lawyer's strikes, has been repeatedly reaffirmed by courts throughout the country as such strikes have a tremendous impact on the judicial system.

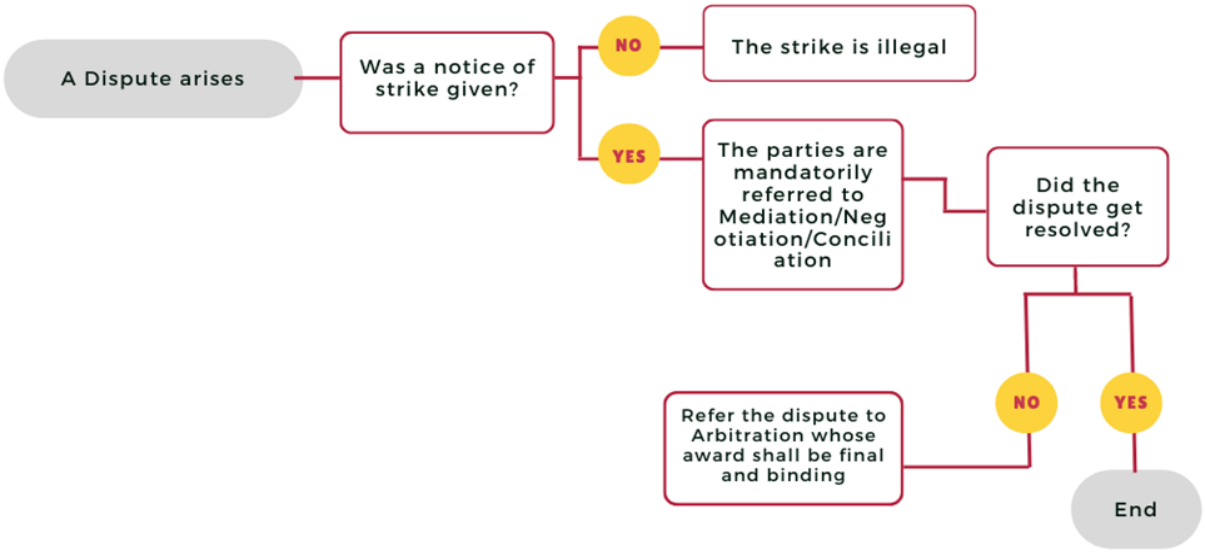
However, lawyer's strikes have continued unabated despite the various judicial pronouncements on the issue. This dire situation was examined by the Law Commission of India in its 266th report, which, after presenting its observations regarding the number of days wasted due to strikes and their reasons, recommended an amendment to the Advocates Act, 1961. The amendment aimed to penalize any strikes by lawyers and made them liable for losses suffered by their clients during the pendency of the strike. The report was not well received by the Bar Council of India ('BCI'), which termed it "*draconian, anti-lawyer and undemocratic*." Therefore, the ban on strikes by lawyers remains un-codified and exists only in Judicial pronouncements, which by themselves are rarely enforced. The recent strike in Sambalpur district of Odisha, which took a violent hue and ultimately led to suspension of license of 29 lawyers and paved way for the reprimand by the Supreme Court, is a glaring reminder of the need for a balanced approach that adequately addresses the issues of the striking lawyers while maintaining the efficient working of the judicial system.

2. Taking a Balanced Perspective: ADR's potential to curb strikes

Arbitration, coupled with other Alternative Dispute Resolution ('ADR') mechanisms, has the potential to solve the above-mentioned problem. Since the previous judgements alone in this regard could not resolve the issue, a different approach must be taken, i.e., codifying the rules and regulations regarding strikes in the Advocates Act. The BCI may act as the drafting authority, and within the rules, there must exist a hybrid/multi-tiered Arbitration clause wide enough to cover all or any disputes that may lead to a strike by lawyers. The proposed dispute resolution process, as provided for in the clause, shall work in the following way (*Figure 1*):

First, taking inspiration from Section 22 of the Industrial Disputes Act 1947, the lawyers must serve a notice of strike to the other party that provides in detail, the dates, concerns, and reasons behind the strike. The notice must be served within the time limit provided for in the rules and immediately after serving the same, the parties are mandatorily referred to a Mediation/Negotiation/Conciliation. Any strike during the pendency of adjudication proceedings would be prohibited. If an agreement is reached, it shall be binding upon the parties, and the dispute resolution process shall come to an end.

Nevertheless, if a resolution is not reached within a prescribed time limit, then we shall move to the *second* step, i.e., referring the dispute to Arbitration, whose award shall be final and binding upon the parties. The Arbitration clause in the Advocates Act, which is inserted through an amendment along with the other relevant rules, shall clearly provide the necessary details such as the mode of appointment of arbitrators (that ensures impartiality), the number of arbitrators, and the seat of Arbitration, which can be the place where the cause of action arose. If the lawyers fail to give reasonable notice or abide by the process, their strike would be illegal, and they shall be liable to pay the requisite fine with compensation to aggrieved persons. Therefore, a strike would be held as legal and justifiable only when reasonable notice of strike was given and the other party refused to initiate or cooperate in the adjudication proceedings. The below-mentioned figure briefly summarizes the resolution process:



3. To strike or not to strike: Addressing the limitations

Unfortunately, the above-mentioned process faces certain practical difficulties as one crucial question needs to be addressed before it is implemented: Are all disputes that lead to strikes by lawyers capable of being resolved through Arbitration or any other ADR mechanism?

To answer this question, various reasons why strikes have been organized in the past must be closely examined. According to the law commission, "*the Strike by advocates or their abstinence from the Court were hardly for any justifiable reasons. It could not find any convincing reasons for which the advocates resorted to strike or boycott of work in the courts. The reasons for strike call or abstinence from work varied from local, national to international issues, having no relevance to the working of the courts.*" Heavy rains, a bomb blast in a Pakistan school, amendments to Sri Lanka's constitution, and inter-state river water disputes were further cited by the commission as some of the reasons why lawyers previously conducted strikes. Clearly, the dispute resolution process, as discussed here, is not meant to deal with the aforementioned issues. Any such strike must be strictly prohibited, and a ban on the same ensures the protection of the clients' interests.

Similarly, a strike against a judgement or a particular legislation cannot be held reasonable as appropriate legal remedies are available to the lawyers. The Allahabad High Court, while dealing with the issue of frequent strikes by lawyers in Uttar Pradesh in *Manoj Kumar and others v. Civil Judge (Junior Division), Deoria and others (1997),* has rightly observed that:

"*[T]he judiciary and Bar are both accountable to the public, and they must behave in a responsible manner so that cases are decided quickly and thus the faith of the public in the judiciary is maintained..... The lawyers must realize that litigants, witnesses, etc., often come from distant places at heavy expense and it is most improper that they have to go away because of strikes by lawyers. The judiciary exists for the people and not for lawyers or Judges.*"

However, strikes are justifiable in some instances even where the judicial system's dignity, integrity, or independence is not at stake. For instance, a strike due to a notice issued by the government that impacts the interests of the lawyers, working conditions of the district court, low wages, long hours and unsatisfactory work conditions and environment for Legal Aid Counsels and Public Prosecutors, etc. In 2019, BCI, Bar Council of Delhi (BCD) and District Bar Association organized a strike after an altercation between lawyers and police personnel at Delhi's Tis Hazari Court Complex escalated and resulted in grave violence, including a lawyer getting shot. Delhi High Court suggested that the responsible members of the Bar and the police conduct a joint meeting to resolve their differences amicably, and subsequently, the strike was called off. Though criminal matters are not adjudicated

through ADR, this situation clarifies that resolving disputes amicably through discussion and dialogue can help deal with the issue of strikes. For example, Gujarat High Court Advocates' Association strike over the transfer of Justice Nikhil Kariel was withdrawn peacefully on a meeting with members of the Supreme Court Collegium, including CJI D Y Chandrachud promising through examination. If such dialogue does not work, the matter can be finally settled through Arbitration, provided that the dispute is arbitrable.

It is of paramount importance that legitimate concerns of lawyers be swiftly addressed so as to not pose hindrances in administration of justice. Moreover, the Allahabad HC in an order issued in *Suraj Pasi v. State of U.P,* highlighted the dire and direct impact of strike on the fundamental rights of the accused persons-prisoners right to a speedy trial.

4. Conclusion

In the situations mentioned above, where the traditional legal remedies do not work or are not available, strikes are the only way to pressure the concerned authorities. A blanket ban on any strikes by lawyers, labelling all strikes as unjustifiable and setting a very high threshold for a justifiable strike as the Court did in *Harrish Uppal*, renders the lawyers with genuine grievances in exploitative positions. Thus, a hybrid/multi-tiered Arbitration clause in the Advocates Act offers a much-needed balanced perspective on the issue. Meticulous drafting and planning can iron out any inconsistencies or practical difficulties. In sum, such a clause can go a long way in resolving a problem that results in direct denial of justice to the country's citizens.

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