

The Potential of Arbitrating Healthcare Disputes

Meenakshi Kalra¹, Vikas Gupta²

¹Ph.D. Research Scholar, Amity University, Noida, ²Associate Professor, PhD Supervisor, Amity University, Noida

Abstract

The speedy progress of trade in Global Health Services is limited by legal barrier. Advances in technology and cross-border movement of people and health services form legal ambiguities and uncertainties for businesses and consumers involved in transnational medical malpractice disputes. This requires for a uniform means of redress which is more flexible and predictable as compared to litigation in a court room. Therefore, the voluntary, flexible and legally binding nature of arbitration agreements across jurisdictions make this form of dispute resolution efficient and adaptive to changes in the health services industry. With careful making of an approach that accounts for arbitration cost, reasonable recovery amount and complementary mechanisms such as no-fault compensation, international arbitration of medical malpractice disputes will change the legal risks borne by businesses and consumers more fairly and efficiently.

This paper argue that most medical disputes are better resolved by alternative dispute resolution mechanisms which will contribute in improving patient safety by encouraging candid and comprehensive reporting of risks. It also argues that medical disputes and patient safety needs to be viewed through a new lens, namely patient autonomy. It discusses the scope of India flourishing in the field of Medical Tourism and also the challenges faced by the foreign patients and the scope of Arbitration in amicably resolving the medical disputes in a cost effective and in a swift manner.

Keywords: *Healthcare Services, Healthcare Disputes, Malpractices, Compensation, Settlement of Healthcare Disputes, Arbitration.*

Introduction

Globalization of Health Services: Health services have started to be increasingly globalized. This globalization is considered as a new phase of world economic integration. The globalization of health service has been facilitate by advancement in information and communication technology, liberalization of foreign investment, greater international mobility of patients and also demographic dynamics. As a result, health services are in the realm of multilateral trade negotiations under the World Trade Organization (WTO). India is one of

the major participants. The health sector is growing rapidly ever since the setting up of the WTO in 1995 with inclusion of the services sector. Indian health industry, valued at \$65 billion in 2012, is highly fragmented and conquered by private players. The healthcare sector of India is assessed to \$100 billion in size in 2015, growing 20 *per cent* per year. The industry is expected to touch \$280 billion by 2020¹. There will be rising demand for specialized and quality healthcare services. According to Investment Commission of India, the healthcare industry has brought about remarkable evolution of an added 12 *per cent* per year during the previous four years, motivated by a number of factors like, increase in life expectancy, rise in income levels and awareness of health insurance amongst the people.

Corresponding Author:

Meenakshi Kalra

PhD Research Scholar, Amity University, Noida, Amity University, Amity Road, Sector 125, Noida, Uttar Pradesh-201313

Ph : 9873448030

e-mail: meenakshikalra30@gmail.com

Material and Method

The research is Doctrinal in nature whereby both Primary and Secondary sources of data have been evaluated and analyzed for this research in aiming at

definite conclusion. The data comprises of different pattern including commentaries, digest, articles, writings in journals, Case Law so on and so forth.

Cross Border Delivery Services: Several reasons account for the surfacing and proliferation of cross-border delivery of health services. One of the major motivator is the lack of access to health care suffered by many patients in different parts of the world². In both developing and industrialized countries, patients in rural areas are often deprived of medical care, as hospitals and health care providers are located in urban areas³. Additionally, cross-border delivery of health services helps to alleviate the stresses and shortages of medical professionals associated with providing round the clock medical care⁴. Cross border trade in healthcare services includes e-health business or tele-health services to provide diagnostic services (tele-radiology), medical opinion and consultations (telemedicine), laboratory testing, transmission and doling out of specialized data and records (medical transcription), medical coding and medical billing). India is a leader in exporting medical transcription, tele-pathology and tele-diagnostic service⁵.

Legal Barriers to Consumption of Health Services Abroad:

- i. **Potentially Liable Parties:** There are several potential liable parties in a medical tourism claim: foreign health care providers, intermediaries, employers and insurers⁶. If a foreign health care provider allegedly caused injury and circumstances of treatment convene the elements of traditional malpractice frameworks, it is logical to pursue a malpractice claim against this defendant⁷. Just as with cross-border telemedicine claims, however, a plaintiff needs to overcome personal jurisdiction and forum non conveniens challenges. Although procedural legal barriers hinder pursuit of a foreign health care provider defendant, the difficulty of finding and proving theories of liability impede pursuit of the remaining potential defendants⁶. Finally, another category of potential barriers worth noting in determining potentially liable parties are charitable and government immunity for healthcare institutions⁸.
- ii. **Determining Appropriate Jurisdiction to litigate and Enforce a Claim:** As discussed above, the injured party may pursue a claim against a foreign health care provider in his residence state or the

defendant's domicile state. If a plaintiff chooses his residence state, he faces the challenge of establishing personal jurisdiction, defending forum non conveniens motions and implementing any favorable judgments in a foreign court. It is not likely the case if suit is brought in defendant's domicile, as issues regarding place of injury and whether it is in the chosen forum's interest are well established. The major drawbacks to such option, however, are similar to the challenges of defending a cross-border tele-medicine claim in a foreign court.

- iii. **Determining Choice of Law:** Even after jurisdiction is established, parties to dispute must deal with additional challenge of choice of law determinations. Depending on laws of the countries concerned, a court's selection may be essential in deciding the outcome and remedies available⁷. As discussed earlier, each court adopts a diverse approach to determining choice of law.

Determining Appropriate Jurisdiction to Litigate and Enforce a Claim: In addition to determining which parties are liable, the injured party also has the challenge of selecting the suitable forum that will litigate and enforce the claim. The selected court must have jurisdiction over the same, as jurisdiction grants the court authority to prescribe, adjudicate and enforce judgment against persons and property⁹.

- i. **Establishing Jurisdiction in Plaintiff's Domicile State:** Firstly, not only do common and civil law countries have diverse approaches to assert personal jurisdiction, but countries from each legal system may make different determinations from their counter-parts because of their own individual interpretation of laws in question¹⁰. In civil law countries, a defendant may be sued in his domicile and in any jurisdiction where he commits a tort. Furthermore, it is important to consider the existence of any commercial or civil agreements that a country is a party to, as such membership may affect its rules regarding jurisdiction qua the fellow member states¹¹.
- ii. **Establishing Jurisdiction in Defendant's Domicile State:** In disparity with the attempt to sue a defendant in plaintiff's domicile state, no jurisdictional issues bar's adjudication of a claim in defendant's domicile state¹². In common law countries, the physical presence of the defendant or defendant's property within its territory is

sufficient to exercise jurisdiction. Such relative ease in bringing forth a claim in this forum, however, may be curtailed by a defendant's domiciliary use of forum non conveniens for dismissal¹³. In the event that a foreign plaintiff successfully brings suit in a defendant's domicile court, he may face additional challenges. In particular, those patients belonging from industrialized countries are likely subject to more onerous burden of proof and relatively in-adequate legal protection afforded by developing countries¹⁴. Critics point out to India's failure to devote adequate resources to claims and label its Medical Council Act as —outdated and ineffective¹⁵.

Findings: The Case for Arbitration As an Appropriate International Dispute Resolution Mechanism for Cross-Border Health Services Claims.

The right to health is a fundamental part of human rights and of our understanding of life in dignity. The right to enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not fresh. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO)¹⁶. The 1948 Universal Declaration of Human Rights (UDHR) also mentions health as part of the right to an adequate standard of living. The right to health was yet again recognized as a human right in the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was presented before the UN General Assembly in 1966 and adopted in 1976. Finally, the right to health or the right to health care is recognized in around 115 constitutions. And six other constitutions set out duties in relation to health, such as the duty on the State to develop health services or to allocate a specific budget to them. The Constitution of India does not provide for the right to health as fundamental right. However the Constitution directs the State to take measures to develop the condition of health care of the people. Subsequent to the famous decision of *Keshavananda Bharti Vs State of Kerala*¹⁷, the Supreme Court has also permitted individual citizen to approach the courts directly for protection of their human rights. In a series of cases dealing with the substantive content of the right to life, the Supreme Court has observed that the right to live with human dignity includes the right to good health. The court, while reiterating its stand for providing health facilities, held that a healthy body is the very foundation for all human activities. In a welfare state, it is therefore the obligation of the State to

guarantee the creation and the sustaining of conditions congenial to good health. Thus, the right to health, along with various other civil, political and economic rights, is afforded protection under the Indian Constitution as a Fundamental Right¹⁸. Arbitration, being closely inter-connected in promoting and protecting people's rights, empowering them and thus improving their health, it could be said that resolution of disputes by way of Arbitration is also a fundamental Human Right. In my view, Arbitration would definitely come under underlying determinants of health. In view of the fact that it is one of the most sacrosanct and valuable right of a citizen and equally sacrosanct and sacred responsibility of the State, every citizen is entitled to look towards the State to perform obligation with top priority. Right to resolve conflicts by amicable method of Arbitration, which directly affects the health of the community, will attract a priority programming for the State. Present substantive legal principles have yet to provide adequate theories of liability for injuries and damages arising from innovations in medical care and delivery of health services. Such legal uncertainties and ambiguities need a uniform means of redress which is more flexible and predictable than litigation in a court room. In light of such needs, arbitration provides a potential solution, as it is an ADR mechanism that has been successfully utilized on an international level¹⁹ and is more efficient and adaptive to changes in the health services industry than litigation but has the authority and binding force of a court decree.

Conclusion and Suggestions

Arbitration of Cross-Border Medical Malpractice Claims Offers an Efficient and Effective Method to Achieve the Goals of Accurate Judgments, Just Compensation and Deterrence of Negligent Medical Care.

i. Binding and Enforceability: The greatest advantage of arbitration over litigation in resolving cross-border disputes is the enforceability of arbitration agreement and award in foreign jurisdiction. These agreements and decisions are binding on parties, jurisdictions empowered by legislation enabling courts to enforce arbitration awards and countries which are members to various regional and international treaties recognizing other members' arbitration awards.

Alternatively, in the occasion a country is a non-signatory to the treaties in question, arbitration

agreements and awards may still be enforced under customary law through Friendship Commerce and Navigation Treaties (FCN treaties). Member countries of FCN treaties will enforce arbitration awards of member countries so long as enforcement does not violate a member country's public policy. When an award is made in a state that is neither a member of an FCN treaty nor any relevant commercial arbitration treaty, enforcement may be sought under the principle of comity.

- ii. Arbitrators Expertise:** Another key attribute of arbitration is its process of selecting qualified decision-makers for assessing complex, specialized cases such as medical malpractice claims. Arbitrators are more appropriate decision-makers than juries because parties to the dispute most often select arbitrators who have a background and expertise in the subject matter of the dispute. In the global and ever growing industry of health services, it is vital to have decision-makers who are neutral and independent and are able to adapt to existing substantive legal principles, to new conflicts and ambiguities which arise from constant transformations in medical care.
- iii. Neutral and Fair:** In addition to providing predictability in the decision-making process and a neutral medium for aggrieved parties, arbitration offer a quicker, efficient and flexible approach to resolve unique or particular issues of medical malpractice claims in exchange to traditional court proceedings for the following reasons. First, discovery time and procedures are restricted by the arbitrator or relevant procedural rules, which also means that parties require an arbitrator's acquiescence to take depositions. Second, there is no jury since the arbitrator also acts as a fact finder in the decision-making process and, usually has expertise in the area of the dispute. Third, the arbitrator has wide discretion for his decisions, but is bound to pursue the procedural and substantive rules of law as inscribed in the arbitration agreement. Finally, the grounds on which a party may appeal are much more restricted to those provided in an appellate court and such limited appellate rights may aid to quicker and more certain resolution of the dispute. As a result of such truncated measures, aggrieved parties who succeed, receive a greater portion of the judgment and in an earlier time frame than in litigation.

The above examination demonstrates the advantage of an international arbitration framework in resolving the legal complexity of cross-border medical malpractice claims. By itself, arbitration goes remote in eliminating many of the legal ambiguities and hurdles of litigation in traditional court systems. But this paper has also confirmed that another major advantage of arbitration is its adaptable and inclusive capacity to make the most of complementary mechanisms that further reduces contestable issues of liability and redress. This is a key advantage when addressing disputes involving conflicting medical malpractice regimes, expectations of recovery and business practices. The suggestion of a two –step dispute resolution mechanism employing no-fault compensation and arbitration has the potential to accommodate a wide range of claims and businesses and consumers from diverse economies and backgrounds. It offers an efficient and fair negotiation by reducing contestable issues of liability and offering several routes of reliable redress to the fullest extent viable.

Conflict of Interest: Meenakshi Kalra and Dr. Vikas Gupta, Asst. Professor declare that they have no Conflict of Interest.

Source of Funding: No funding, the funding if any is from Own/Self sources.

Ethical Clearance: Not required.

References

1. Gupta Amar, Gantz DA., Sreecharana Devin, et al. Evolving Relationship between Law, Offshoring of Professional Services, Intellectual Property and International Organizations. 21 INFO. RESOURCES MGMT. J.2008; 103.
2. Lior Herman. Assessing International Trade in Health Care Services,.European Centre for Intl Pol. Econ.(UK), Working Paper No. 03, 2009, (Internet) [cited 2020 Jan19]Available from : URL; <http://www.ecipe.org/publications/ecipe-working-papers/assessing-international-trade-in-healthcare-services/pdf>.
3. Gupta Amar. The 24-hour Knowledge Factory: Can IT Replace the Graveyard Shift?. Computer 2009; 42: 66.
4. Smith RD, Chanda R., Tangcharoensathien V. 'Trade in Health related Services'.Lancet, 2009;

- 373- 9663, 593–601.
5. Nathan Cortez. Recalibrating the Legal Risks of Cross-Border Health Care. 10 *Yale J. Health Pol., L. & Ethics* 1, 4 2010.
 6. Bales JF, DeMarco LA. Selected Topics in Medical Malpractice Litigation. 1993;669 *PLI/COMM* 381-448.
 7. Restatement (Third) of Foreign Relations Law of the United States. 1987; 401.
 8. Gary BB. Reflections on Judicial Jurisdiction on International Cases. 17 *J. Intl & comp. L.* 1, 1987:14.
 9. Paul RD. Human Rights Law Meets Private Law Harmonization: The Coming Conflict. 30 *Yale j. Intl.*2005; 211; 259-260.
 10. Harvard Law Review Association (UK), State-Court Jurisdiction. 73 *Harv. L. Rev.*1960; 911- 913.
 11. Walter WH. Forum Non Conveniens And Retaliatory Legislation: The Impact On The Available Alternative Forum Inquiry And On The Desirability of Forum Non Conveniens As A Defense Tactic. 56 *u. Kan. L. Rev.* 2008;609.
 12. Cortez Nathan. Patients without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care. 83 *Ind. L.J.* 2008; 106.
 13. Dr. Puteri NJK. Medicine Beyond Borders: The Legal And Ethical Challenges. 28 *med. & L.*2009; 446. Burkett Levi. Medical Tourism Concerns, Benefits and the American Legal Perspective. 28 *J. Legal med.*2007; 223- 229.
 14. World Health Organisation, ‘The Right to Health’– Fact Sheet No. 31
 15. Kuszler PC. ‘Global Health and the Human Rights Imperative’. *Asian Journal of WTO and International Health Law and Policy.* 2(1),
 16. Khan SL. ‘Right to Health’.*SCJ.*1995; 2: 29-34, 2007; 99-124: 111-112 1.
 17. Vincent Vs UOI. AIR 1987 SC 990
 18. Neil Martha. International Arbitration Has Become a Lucrative Field After a Decade of Disfavor. 88-*sep a.b.a. j.* 2008:26- 28.
 19. Biukovic Ljiljan. International Commercial Arbitration In Cyberspace: Recent Developments. 22 *nw. J. Int’l l. & bus.* 2009;319: 344.