NALSAR

ADR Review

VOLUME 1 | 2012

Articles & Essays

Comments

Published by
Mr. K.V. Satyanarayana Rao
Secretary, ICADR, A.P.

CITATION FORMAT

[VOLUME] NADR REV. (YEAR) PAGE

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FOREWORD

SIGNALLING NEW THINKING IN DISPUTE RESOLUTION

Prof. Martin Hunter*

India is a remarkable country. Its monuments, such as the iconic Taj Mahal, the 'Gateway' in Mumbai as well as the less well-known, but no less magical, Sun Temple in Odisha State, amongst many examples, are not only tributes to its various foreign rulers over the past centuries. They have been, and are, inspirational for its indigenous inhabitants. It is almost impossible to reject the proposition that the relics of earlier centuries – and millennia – have been the foundation for the growing strength of the nation in the 21st Century.

India has been an active centre for cross-border traders for many generations. The trading ports of the Gulf, to the West, and East Asia, have been visited by Indian trading ships for hundreds, perhaps thousands, of years. Although steeped in tradition, Indian businessmen have never been lacking in innovation. In the 21st century they have embraced technological developments to become world- class leaders in the field of information technology. At the same time, the nation has successfully adopted parliamentary democracy as well as the rule of law which, at its root, involves the protection of citizens from the autocratic rule of despotic tyrants.

Of course, India is not a complete model of perfection. In the 1940s Mahatma Gandhi said that India would not take its rightful place in the community of nations until the tribal people are fully assimilated into the mainstream of Indian society**.** Much meritorious work is currently in progress in this context, although there is still a long way to go.

The continuing success of India will also depend on how the nation copes with the infrastructure required for cross-border trade. Future development will

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* Prof. Martin Hunter has written extensively on international arbitration over the past 30 years and is a co-author of *Redfern & Hunter on International Arbitration, 5edn.* Formerly a partner at Freshfields for 27 years, he became a barrister in 1994 and joined Essex Court Chambers, where he continues to practise in the field of international arbitration. In 1995 he became a professor of international dispute resolution at Nottingham Trent University. He is currently an Emeritus Professor at Nottingham Trent University, and a visiting professor at King's College London, Central European University, Budapest, and University of Miami. Prof Hunter's honours and awards include LL.D(hc) KIIT University, Bhubaneswar, Orrisa State; TMC Asser Institute gold medal 1992 (for services to post-graduate legal education); and UK Jurists Award 2009 (for worldwide promotion of alternative dispute resolution mechanisms). He has served as an advocate, sole arbitrator, chairman or tribunal member on many occasions. He is chairman of the board of trustees of the Dubai International Arbitration Centre, and was previously deputy-chairman of the UK government's committee on arbitration law reform, which steered the English Arbitration Act 1996 through Parliament.

depend on both exports and imports. The country's ability to export not only manufactured goods, but also minerals and other mined resources in a sustainable way, will be an essential source of the wealth needed to pay for the energy required to fuel the forthcoming rapid expansion of the nation's presence in international markets.

The significance of these developments, and the consequences, cannot be overestimated. The so-called developed countries have, as part of their infrastructures, a complete 'kit' for participating in cross-border trade. Included in this 'kit', among other elements, is an advanced system of commercial law, as well as a legislature, judiciary and legal profession capable of looking across international boundaries with credibility. The Indian legal profession must be capable of performing at a sophisticated level in the realm of regulatory, comparative contract and procedural law, in order to advise its clients effectively, and to represent them in the resolution of disputes with foreign parties.

Since approximately the end of the Second World War, in 1945, international trade has expanded at a remarkable rate. The wealth of the developed countries has largely depended on it. In contrast, many developing jurisdictions have suffered from misinformation and misunderstandings. Many commentators have focused on the supposed failings of the judiciaries of developing countries, and the perceived inadequacy of their commercial laws and 'public policy'. However, the almost universal adoption of the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards should have largely put an end to such reservations. An international arbitration award made in a 'neutral' NYC country is enforceable in the courts of other NYC countries by a simple process, subject only to jurisdictional or 'due process' irregularities.

In the Indian context, what is needed is *not* an overhaul of Indian substantive commercial law, but a greater understanding of the New York Convention regime and its mechanisms for enforcement of an international arbitral awards made in other New York Convention countries. If this can be achieved, Indian commercial (and governmental) parties will develop a greater respect for the system of *international* arbitration; and this in turn will encourage reputable and responsible foreign traders to do business with Indian parties on fair terms, without 'building in' to their prices large contingency elements to cater for possible disputes where fair resolutions, including implementation of awards, cannot be predicted with confidence.

In order to create such a *nirvana*, the Indian legal profession must acquire the knowledge and confidence to be able to advise on, and represent their clients in, *international* arbitrations held in geographically 'neutral' New York Convention

countries. As the current President of ICCA, Jan Paulsson, stated in his 2008 John E C Brierley memorial lecture at McGill University[1]:

> *....International arbitration is no more a 'type' of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their nature is so great that their similarities are largely illusory. Sea elephants have no legs. They exist in an environment radically different from that of elephants. International arbitration is no less singular. This needs to be understood. The concept is as stark as the dichotomy between animals with legs and those without. Here is the difference: arbitration is an alternative to courts, but international arbitration is a monopoly – and that makes it a different creature....*

Domestic (or 'national') arbitration within any particular country tends to be a 'subset' of litigation in that country, with all the main players (the parties' counsel and arbitrators) based in the same jurisdiction, so that all the rules of procedure and cultural features are known to them. *International* arbitration is indeed a completely different animal. There are almost always three arbitrators, one chosen by each of the parties, usually of different nationalities, presided over by a chairperson of 'neutral' nationality. The applicable procedural rules may be those of an international arbitral institution, or they may be designed *ad hoc* for the particular case by agreement between the tribunal and the parties. Either way, they will be familiar only to people those who have acquired familiarity with them, either in a classroom or on-the-ground training, or a mixture of both.

Another, separate but related, area is the arbitration law of the place ('juridical seat') of the arbitration, which is usually contained in statute law. This gives rise to the question of whether states should enact a single statutory regime, or two – one adopting local procedural traditions, and the other complying with international standards. There is no clear single answer to this dilemma. It depends on the circumstances, and this is neither the time nor the place to present a detailed analysis of the merits of the alternative solutions. However, in summary, the statistics demonstrate that the 'dualist' countries out-number the 'monoist' countries; and that a number of the 'monoist' countries (including France, for example) include separate sections that apply to international and domestic arbitrations respectively in their single arbitration law statutes.

These features explain why the new **NALSAR ADR Review** is so important, and should be welcomed with open arms. The quality of the contributors, and their contributions, to this first issue is to be warmly applauded. The Journal, which will be published every year, undoubtedly signals a new and important development towards the understanding in India of the aims and mechanisms for the resolution of commercial disputes between Indian and foreign

[1] Published in the *Stockholm International Arbitration Review*, 2008:2, 1-20

parties, whether those disputes arise out of export or import transactions, and whatever their subject-matter. It is essential to keep in mind that it is almost never appropriate for two contracting parties of different nationalities to provide, in their transaction agreement, that any disputes between them should be resolved in the national courts of either of them.

- 25th November 2011.

KING OR ARBITRATOR:

EXPLORING THE INHERENT AUTHORITY OF ARBITRATORS TO IMPOSE SANCTION WITHIN THE FRAMEWORK OF THE 2010 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

Pedro J. Martinez-Fraga*

Abstract

The 2010 IBA Rules vest upon arbitrators the authority to impose sanction upon parties for their conduct in the taking of evidence without good faith. However the rules provide little guidance as to any criteria that should be referenced as part of a good faith determination concerning the taking of evidence. The author explores various grounds on which the application of good faith can vary in application, scope and meaning. The second part of the paper looks at whether there is a normative basis for arbitrators to impose Sanctions in the Form of Attorney's Fees and Costs as a Punitive Measure arising from an Absence of Good Faith under the Reliastar decision and Article 9, ¶ 7 of The Rules. The third part of the paper explains how transparency requirements within rules could lead to a more meaningful understanding of "good faith". The author believes that the principle of enhanced transparency is identified throughout four categories comprising the rules framework, namely (i) transparency concerning non-disclosure of requested documents,[1] (ii) transparency pertaining to greater access to original documents, (iii) transparency addressing expert witnesses[2] and Tribunal-appointed experts, and (iv) transparency regarding the conduct of the final hearing and oral testimony. Finally, the author suggests the approach of borrowing from the "transparency" requirements, as a transparency standard may meet the expectations of parties from different legal traditions.

"There is no such thing as a small issue; those matters that appear small by nature are but great concerns poorly understood"[3]

Santiago Ramón y Cajal
Los Tónicos de la Voluntad

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* The author is Partner at DLA Piper's International Arbitration and Litigation practice. The author would like to thank Professor Michael Graham of the University of Miami for his generous support and cogent analysis.

1 *See* Art. 3, para. 3(c)(i).

2 *See* Art. 5, para. 1(i) and ¶2(a)-(c).

3 SANTIAGO RAMÓN Y CAJAL, LOS TÓNICOS DE LA VOLUNTAD (1897) ("No hay cuestiones pequeñas; las que lo parecen son cuestiones grandes no compendidas.") (Translation by author.)

If international arbitration is to find its perfect workings, and assume the role in the realm of transnational contentions of a juridical counterpart to economic globalization, it must then be able to rely on a system of rules that may facilitate the conduct of the taking of evidence while fulfilling the expectations of parties from different and often disparate legal traditions and cultures. On May 29, 2010 the International Bar Association, which this contribution indiscriminately refers to as the "IBA", promulgated the Rules on the Taking of Evidence in International Arbitration.[4] While the effort indeed is laudable and helpful to bridging the chasm dividing mostly civil law and common law systems on the singular procedural issue of the taking of evidence in cross-border disputes, the Rules still represent an organic work in progress, notwithstanding that their first iteration appeared in 1991 under the title "Rules on the Taking of Evidence in International Commercial Arbitration". Specifically, the new Rules are vest arbitrators with the authority to sanction parties for their conduct in the taking of evidence without *good faith*. The mercurial and elusive nature of the doctrine of good faith even within the parameters of a single legal system, let alone in the context of comparative international law, renders the Rules unpredictable while engrafting upon the realm of "an arbitrator's inherent authority" unbridled scope in the application of punitive damages concerning a very particular procedural aspect of an international arbitration.

This effort limits itself to analyzing whether the new good faith rubric found in the Rules represents an *Americanization* or an internationalization of the Rules. In this connection, the article first explores the jurisprudence purporting to constitute a normative foundation for an arbitrator to impose sanctions in the form of taxing attorney's and arbitrator's fees to a party for conducting the taking of evidence in an international arbitration without exercising good faith. Because the Rules do not define the doctrine of good faith, the terms "relevance", "material", or even "evidence", considerable latitude and discretion is vested in the arbitral tribunal that now is charged with providing procedural contours and substantive content to these terms. The consequence of this drafting, while deliberate or by happenstance, is,

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4 *See* International Bar Association Rules on the Taking of Evidence in International Arbitration, Preamble (2010). The IBA Rules on the Taking of Evidence in International Arbitration (2010) will hereinafter be referred to as the "Rules", and the "IBA 2010 RULES" for citation. The IBA Rules on the Taking of Evidence in International Commercial Arbitration (June 1, 1999) shall be referred to as the "1999 Rules" or by reference to the "predecessor" Rules. References in the text and footnotes to specific provisions of the Rules (e.g., "Art. 2", or "Definitions") that do not specify which version, shall be to the 2010 version.

so it here asserted, an inordinate increase in the "inherent authority of arbitrators", a doctrinal tenet that in and of itself cries for development, definition, and sustained analysis. Accordingly, considerable attention is placed on the U.S. Second Circuit Court of Appeal's ruling in *ReliaStar Life Insurance Co. of New York v. EMC National Life Co.*[5]

Finally, it will be suggested that a conceptual point of departure for defining good faith may be available even within the Rules' own rubric in what is here identified as the principle of transparency. Even though this thesis does not purport or aspire to address the issues identified with the Rules' current configuration, it does suggest that meaningful advances are possible, if not altogether likely, by understanding and taking seriously the concept of transparency as an element that shall contribute meaningfully to meeting party expectations in the context of an international arbitration and thus not only preserve but also promote the principles that underlie and define most uniquely international arbitration: party-autonomy, uniformity, predictability, and transparency of standard.

1. A NEW STANDARD OF GOOD FAITH: AT LEAST A GOOD FAITH EFFORT TOWARDS A STANDARD

The 2010 IBA Rules on the Taking of Evidence in International Arbitration herald the novel introduction of the concept of *good faith* to the taking of evidence in international arbitration.[6] Although only referenced twice, the symmetry in the placement of the term on these two occasions is important and suggestive, as it is found in the *Preamble* and again in the final paragraph.[7] Having a good faith standard governing the taking of evidence

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5 564 F. 3d. 81 (2nd Cir. 2009).

6 Here it is important to emphasize that one meaningful distinction between the Rules and its predecessor is the omission of the word "commercial". Both the 1993 and 1999 predecessors referenced in their title and respective Preambles, the term "commercial" in their title: "The IBA Rules on the Taking of Evidence in International Commercial Arbitration". The omission of the word "commercial" in both the title and Preamble to the Rules (i.e., the 2010 iteration), suggests that the supplemental rules are also to be considered for use and application in treaty-based international arbitration, i.e. investor-state disputes premised on bilateral or multilateral investment treaties. The subtle, or perhaps not too subtle, modification merits noting.

7 *See* Preamble, para. 3:
The taking of evidence shall be conducted on the principles that each party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.
Art. 9, para. 1 reads:
The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
Similarly, Art. 9, para. 7 provides:

in international arbitration represents a significant amendment. As with the "relevant to the case and material to its outcome" test and its elements, however, the term "good faith" is nowhere defined. Unremarkably, this tenet is as elusive and contextually mercurial, if not more, than "relevant", "material", and "evidence".

Without purporting to exhaust every scenario, there are five grounds pursuant to which good faith as a legal principle may vary in application, scope, and actual meaning. The direct and explicit consequence of not having the term defined or otherwise conceptually bound to a formula that would bestow it with a uniform meaning is vesting the arbitral tribunal with even greater authority and discretion and, therefore, inversely diminishing the preeminence of the principle of party-autonomy but for strained constructions of the principle that would denaturalize and transform it based upon legal fictions that only serve to rationalize but not explain.[8] The appearance of *good faith* as a tenet in the third paragraph of the Preamble and in para. 7 of Article 9 raises more issues than it can possibly satisfactorily address with respect to uniformity, party-autonomy, transparency of standard, and predictability.

It is the first part of the single sentence comprising para. 3 of the Preamble that can, if at all, contextualize *good faith* and presumably help guide the arbitral tribunal and the parties in ascribing a meaning to the term. Any proposition that may be gleaned from the first part of the sentence, structured around a disjunctive, does little more than beg the question, "What does it mean for a party to act in *good faith* in the taking of evidence within the Rules' framework?"[9] This question is rendered all the

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If the arbitral tribunal determines that the Party has failed to conduct itself in good faith in the taking of evidence, the arbitral tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the Arbitration, including costs arising out of or in connection with the taking of evidence.

8 Superficially asserting that, because of the parties' autonomy in selecting or consenting to the Rules they somehow agreed to vest the arbitral tribunal with discretion to define substantively the scope and the application of the term "good faith" within the rubric of the Rules is a serious misapprehension of both the concepts of party-autonomy and consent. Quite regrettably, the use of legal fictions nearly hampers and obscures what in fact is an overreliance on the discretion and authority conferred to the arbitral tribunal.

9 The second part of the disjunctive concerns a due process issue addressing the parties' entitlement to reasonable lead time, notice of evidentiary hearings, merit determinations, and evidence on which the adverse party relies. The term "good faith" is not, and cannot be provided with precise meaning given the context in which it appears in this paragraph. *See* Preamble, para. 3.

Under a plain meaning analysis, Art. 9, para. 7 fares no better. The reference to "good faith" presupposes a defined term as that paragraph merely provides that "the arbitral tribunal

more puzzling because of the many propositions that would cause the term *good faith* to vary significantly in scope, meaning, and application.

At the very outset, the concept of *good faith* is contingent upon the legal tradition, culture, and system in which it appears. This meaning changes even far beyond the mere surface conceptual divides between common and civil law systems. Even within the framework of civil law jurisdictions, different meanings of *good faith* are recurring and readily discernible.[10]

Within the U.S. common law tradition, *good faith* varies in scope, application, and meaning, for example depending on whether it is used in a commercial context within the ambit of the Uniform Commercial Code (Hereafter "the U.C.C."), as an element of a fiduciary duty owed, or a factor to be weighed in evaluating a standard of care.[11]

Also, within the very discovery process, in the context of the U.S. common law, the factors to be analyzed for purposes of determining *good faith* themselves materially vary. This inquiry is fact-specific even though it takes place within the parameters of well-settled and established standards, norms, and jurisprudence.[12] It must likewise be observed that *good faith* in the conduct of litigation in itself requires a very specific understanding of the term. Finally, *good faith* in the conduct of an international arbitration has a meaning that does not necessarily fall within the realm of any of the four preceding scenarios.[13]

The third use of *good faith* identified, i.e., within the context of U.S. common law discovery, in itself is susceptible to being categorized into seven very specific and particular uses of the term that differ materially as to scope and meaning and application.

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determines that a Party has failed to conduct itself in good faith in the taking of evidence." Put simply, para. 7 does not provide any indicia from which the Parties, counsel, or the arbitral tribunal may infer an appropriate course of conduct defining good faith.

10 *See* e.g., J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991 Dartmouth Publishing Company). *See also* MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT (2006 Hart Publishing Limited).

11 E. Allen Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1962).

12 *See* e.g., William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1988-1989). *See also* Robert S. Summers, *General Duty of Good Faith-Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1981-82).

13 *See* e.g., Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985).

(i) Good faith in the designation of materials as confidential in conformance with a stipulation or otherwise enforceable decree.[14]

(ii) A good faith analysis as constituting the cornerstone of any determination of the extent to which parties have complied with a stipulation or other enforceable decree commanding that documents not deemed confidential be made available to all parties.[15]

(iii) Good faith in any consultation phase pursuant to which parties must so engage to attempt to resolve discovery disputes.[16]

(iv) Good faith in the exercise of disclosing the identity and location of persons who may have knowledge of or be in the custody of discoverable information.[17]

(v) Good faith in the understanding of timeliness requirements for discovery obligations that otherwise may prove to be sanctionable or conducive to a waiver of a privilege.[18]

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14 In this context the particular stipulation of decree would delineate the substantive meaning of the term.

15 *See* e.g., In re Ullico Inc. Litigation, 237 F.R.D. 314 (D.C. 2006): In this case, the court found that the defendant had engaged in bad faith designations of materials as confidential in direct and explicit violation of a stipulated protective order governing confidentiality designation of discovery materials. Accordingly, the defendant was required to remove the "confidential" designation from all documents it produced during discovery, to engage in a comprehensive review of these materials, and to re-classify or re-label them "in good faith" in conformance with the strictures enunciated in the governing protective order. Moreover, the defendant was instructed to ensure that all discoverable documents produced as "non-confidential" be provided to counsel in an orderly and uniform manner containing a single listing with their joint discovery database.

16 *See* e.g., In re Megan-Racine Associates, Inc., 189 B.R. 562 (Bkrtcy. N.D.N.Y. 1995).

17 *See* e.g., Fausto v. Credigy Services Corp., 251 F.R.D. 427 (N.D. Cal. 2008): In this case, the parties were required to inform opposing counsel as to the "identity and location of persons who know of any discoverable matter," thus commanding the parties to exercise a "good faith" effort to secure specific addresses and telephone information for individuals relevant and material to the cause.

18 *See* e.g., Pensacola Firefighters' Relief Pension Fund Bd. of Trustees v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 265 F.R.D. 589 (N.D. Fla. 2010). This jurisprudence is illustrative because the advisor to a public pension plan delayed in its obligation to produce a privilege log and the delay resulted in a waiver of the attorney-client privilege as to the fund's discovery requests. Significantly, the advisor averred that it had acted on a good faith understanding that the parties were to define the scope of production as a predicate to exchanging privilege logs and that the fund itself also had delayed in its obligation to comply with discovery demands. Critical to the Court's determination, however, was the advisor's uncontested failure to raise any good faith defense in response to the fund's document demand or as part of its answer to the

(vi) Good faith in conducting a consultation as a predicate to resorting to judicial intervention,[19]

(vii) Good faith in serving a document request,[20] and

(viii) Good faith in exercising self-disclosure requirements.[21]

The Rules provide no guidance as to any criteria that should be referenced as part of a good faith determination concerning the taking of evidence. Assuming a broad construction of the term "taking of evidence" or "[conducting] in *good faith* in the taking of evidence,"[22] it becomes necessary to conclude that the good faith requirement pervades all aspects of the Rules including consultation between the parties, voluntary self-disclosure, disclosure pursuant to a document request, the submission of expert reports, the disclosure of witness statements, and the disclosure of

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fund's motion to compel. Similarly, the advisor did not move for a protective order or an extension of time. Its obligation to comply with the discovery requests at issue were in no way contingent upon the fund's compliance with its discovery imperatives. The Court's good faith analysis fundamentally rested on the want of proactive measures on the advisor's behalf, such as the failure to secure an extension of time, move for a protective order, or timely raise good faith objections, as much as on the individual's untimely compliance. The "totality of circumstances" analysis for determining the scope, significance and application of good faith in this particular jurisprudence cannot be altogether severed from an objective set of rules that provided for possible avenues of relief and clear evidence of good faith.

19 *See* e.g., Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D.Md. 2008): By way of example, in this cause, the Court held that a predicate to in camera inspection is a good faith meeting in conference between the parties in an effort to resolve discovery disputes without Court intervention.

20 *See* e.g., M. Berenson Co. Inc. B. Faneuil Hall Marketplace, Inc., 103 F.R.D. 645 (D.C. Mass. 1984): The Court observed that, so long as the defendant lessor's requested information (i) was relevant to decisions of common questions in a class action, (ii) was not unduly burdensome, and (iii) was not available from representative parties, discovery directed at an unnamed plaintiff lessee class member could proceed as being in good faith. The mercurial nature of good faith as a substantive principle of law, is here exemplified. Availability of the information from representative parties, the quantity and nature of the request served, and compliance with the operative discovery standard, all formed factors that were considered in a good faith determination.

21 *See* e.g., Finley v. The Hartford Life and ACC. Ins. Co., 249 F.R.D. 349 (N.D. Cal. 2008): Here the Court bottomed a finding of bad faith (or the absence of good faith) in defendant's initial disclosure requirement by observing that the production of certain full-version surveillance video did not comport with a "reasonable inquiry" standard deemed determinative in an inquiry as to the imposition of sanctions. The analysis was particularly challenging because of the factual finding that an "administrative oversight" contributed to the non-disclosure. Critical, however, to the Court's holding was a factually intensive inquiry that underscored a paucity of "checks and balances" that otherwise would have ensured complete compliance. Indeed, the Court noted that a mere review of a filing cabinet by a clerk would have sufficed for purposes of meeting the "reasonable inquiry" standard dispositive of a good faith finding.

22 *See* Art. 9, para. 7.

evidence precipitated by newly disclosed evidence or a developing issue causing a party to rely on documentary or testimonial evidence that had not been previously submitted or identified. Recourse to the organic law, jurisprudence, or doctrinal writings of civil or common law traditions with developed authority on these particular aspects of the taking of evidence would seem to be not only helpful but indispensable as welcomed persuasive authority.

A critical novel issue under the Rules is whether an arbitral tribunal, pursuant to Article 9, para. 7, may impose the costs of the arbitration, "including costs arising out of or in connection with the taking of evidence", based upon a party's failure to act in good faith consistent with the Article 2, para. 2, subsections (a) through (e) consultation requirements. In keeping with this analysis, a party who does not cooperate during the consultation phase of Article 2, para. 2, subsections (a) through (e) in theory may be liable for a variety of costs pursuant to Article 9, para. 7.[23] The almost Ptolemaic conundrum of "saving appearances" by engrafting epicycle upon epicycle in what is ultimately a fruitless effort so as to attempt to present a coherent system, now begins to take form. The lack of parameters in defining the conduct of evidence further exacerbates the lack of substantive meaning accorded to the precept of *good faith*, even though this very principle represents the normative basis upon which the discretion of the arbitral tribunal is substantially broadened by providing it with the authority to sanction a party based upon the absence of good faith in the conduct of the taking of evidence.

The *good faith* component to the Rules, particularly as this principle is referenced in Article 9, para. 7, represents several principal contributions. At the outset, the Rules, at least superficially, *appear* to have been internationalized beyond the traditional U.S. common law *American Rule* in conformance with which each party to a judicial proceeding generally bears its own fees.[24] Although the Rules shy from articulating a prevailing party standard and instead understandably limits the sanctions to its scope and subject matter (i.e., the taking of evidence) concerning good faith and not a merits disposition, the *British Rule* in the tradition of which the non-

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23 It is pivotal to observe that Art. 9, para. 7 vests the arbitral tribunal with authority to tax "costs of the arbitration," and "costs arising out of or in connection with the taking of evidence" even though the latter category is identified as included in the former.

24 As shall be later asserted, a more sustained analysis, at least with respect to this narrow proposition, would lead to the conclusion that the Rules conform with an aberrant second-instance decision that does not even represent a minority view, but rather an aberrant holding.

prevailing party is responsible for fees and costs is somewhat[25] present in this new stricture.

The precept of party-autonomy is arguably diminished. But for engaging in an uncommonly broad definition of consent ascribed to parties by dint of having selected the Rules as supplemental to the General Rules and applicable mandatory laws, parties to an international arbitration have been divested of voluntarily determining the applicability of sanctions in the form of costs in connection with the taking of evidence.

Also, the arbitral tribunal has been accorded unbridled authority concerning the imposition of sanctions in the form of costs for lack of good faith in the conduct of the taking of evidence. The excessive nature of this authority, at least as is suggested in this effort, does not rest with the formal structure of Article 9, para. 7, or the very initial mention of good faith in para. 3 of the Preamble, but rather with the absence of substantive definitions or other guidance in determining the scope and applicability of these terms: "good faith" and "the taking of evidence".

Even though a distancing from the *American Rule* may first appear to constitute an *internationalization* of the Rules, this novel provision in Article 9, para. 7 is conceptually close, albeit not identical, to contemporary U.S. jurisprudence asserting that an arbitral tribunal is vested with inherent authority to tax a party for attorneys' and arbitrators' fees and costs upon a determination that "good faith" was lacking in the conduct of a case.[26] Pivotal to understanding whether Article 9, para. 7 of the Rules represents an "internationalizing" as opposed to an "Americanizing" contribution in the effort to craft "efficient [and] economical and [a] fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions",[27] is an application that the *British Rule* concerns situations addressing *compensation* in favor of a prevailing party, and not a *punitive* allocation of an obligation to pay such costs and fees as a result of bad faith in the conduct of a contentious proceeding. This distinction is paramount to the inquiry.

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25 The word "somewhat" has been inserted to temper the relationship between the Rules' stricture and the British Rule, which is premised on (a) prevailing party standing, and (b) the award of fees and costs as compensatory and not punitive damages.

26 ReliaStar Life Insurance Co. of New York v. EMC National Life Ins. Co., 473 F. Supp. 2d 607, 608 (S.D.N.Y. 2007) at 81. [Hereafter "Reliastar"]

27 *See* Preamble, para. 1.

1.1 *ReliaStar* and the Rules' Good Faith Requirement: Twins or Perhaps Strangers.

The United States Circuit Court for the Second Circuit's holding in *ReliaStar*[28] emphasizes that taxing a party with attorney's fees and costs for the entire arbitration premised on a finding that a party lacked good faith in the conduct of the arbitration, despite the parties' agreement in an arbitration clause that each shall bear its own costs and fees, constitutes a settled and well-recognized exception to the *American Rule*. This plainly stated assertion notwithstanding, it is here suggested that the principle of law announced in *ReliaStar* (i) is materially distinct from the *British Rule*, which singularly addresses compensatory and not punitive damages in the context of a strict merits determination, and (ii) is more than a shade off in presenting an articulation of the *American Rule*.

The facts configuring *Reliastar* are simple indeed. *EMC National Life Co.*, (Hereafter "EMC") was the successor in interest to *National Traveler's Life Co.*, (Hereafter "Natl. Traveler's") concerning separate but related binding reinsurance contracts. Both sets of contracts contained the identical terms and conditions and therefore for appellate purposes the Second Circuit collectively referred to them as the "Coinsurance Agreements".[29] At the district court level EMC petitioned to vacate entry of an arbitral award pursuant to which the tribunal had ordered it to pay attorney's fees and costs for both parties upon a finding that EMC had filed and prosecuted the underlying arbitration in *bad faith*. The U.S. District Court for the Southern District of New York in part vacated the award and held that each party would be responsible for its own attorney's fees and costs in keeping with the operative arbitration clause.[30] The District Court, perhaps unremarkably but in conformance with federal jurisprudence and the sacrosanct precept of party-autonomy, underscored the *American Rule* as dispositive.[31]

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28 ReliaStar, *supra* note 25 at 81.

29 ReliaStar, *supra* note 25 at 84.

30 *Id.* at 85. The arbitration clause at issue provided the following with respect to costs:
Each party shall bear the expenses of its own arbitrator, (whether selected by that party, or by the other party, pursuant to the procedures set out in Section 10.1) and related outside attorney's fees, and shall jointly and equally bear with the other party the expenses of the third arbitrator.

31 Despite the brevity of the District Court's published opinion the lower court's emphasis on party-autonomy is evident from its framing of the issue as "whether arbitrators have [exceeded their powers] 'focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." ReliaStar, *supra* note 25. Indeed the Court goes on to clarify this

The Second Circuit's early phase analysis in the opinion does engage in what regrettably may be construed as a boilerplate recitation of the proposition that "[t]he scope of an arbitrator's authority, thus 'generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission."[32] Very early in its analysis the Second Circuit reiterates the familiar grammar that it had "consistently accorded 'the narrowest of readings' to this provision of law, in order to facilitate the purpose underlying arbitration: to provide parties with efficient dispute resolution, thereby obviating the need for protracted litigation."[33] Following this line of thought the Second Circuit framed the issue as concerning "only whether, in light of the parties' agreement to arbitrate, the arbitrators were authorized to sanction bad faith conduct by awarding attorney's and arbitrator's fees".[34]

Notwithstanding the apt recitation of the dispositive standard concerning the extent to which a judicial tribunal should insinuate itself in a challenge to an arbitral award pursuant to Section 10(a)(4) of the FAA, the Second Circuit's use and understanding of precedent is lacking in rigor, the Court having premised its holding in the affirmative on eight tenets that cannot resist sustained analysis.

At the outset, the Second Circuit enunciated the principle that where "an arbitration clause is broad, arbitrators have the discretion to order such

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point by stating that "[i]n other words, the question is whether 'the arbitrator resolved an issue that the parties' agreement did not authorize them to resolve." *Id.* Quite aptly, the District Court underscores arbitrability within the context of party-autonomy and not the propriety of the arbitral tribunal's legal construction, factual understanding, or correct application of law and fact. In so reasoning, the District Court denied ReliaStar's contention that, despite the parties' unambiguous agreement that "[e]ach party shall bear the expense of its own arbitrator… and related outside attorney's fees" that, (i) this Section is but a regurgitation of a general rule that the parties superfluously adopted, (ii) the applicable substantive law – New York Law – provides for the availability of the awards in exceptional cases, and (iii) New York would permit an award of attorneys' fees in this case. *Id.* at 608-609.

Finally, noting that the arbitration article of the agreement is "clear as a bell", the Court observed and held that "[a]rbitration of a particular grievance will not be ordered where, 'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* at 609.

32 ReliaStar, *supra* note 25 at 85 (citing to Synergy Gas Co. v. Sasso, 853 F. 2d 59, 63-64 (2nd Cir. 1988)).

33 *Id.* (citing Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F. 2d 805, 808 (2d Cir. 1960)).

34 *Id.* at 86. The Court also framed the question for review as "whether the arbitrator's award draws its essence from the agreement to arbitrate since the arbitrator is now free merely to dispense his own brand of industrial justice." *Id.* at 85 (citing to Concourse Assocs. v. Fishman, 399 F. 3d 524, 527 (2d Cir. 2005)).

remedies as they deem appropriate."[35] The Second Circuit analytically justified this proposition by arguing that, "[i]t is not the role of courts to undermine the comprehensive grant of authority to arbitrators by prohibiting them from fashioning awards or remedies to ensure a meaningful final award."[36]

Second, in keeping with this principle, the Court concluded that an arbitral tribunal constituted pursuant to (i) "a broad arbitration clause", is vested with inherent authority to sanction a party whom the (ii) Tribunal deems to have conducted or prosecuted an arbitration in "bad faith."[37] The Court also concludes that such a sanction may take the form of attorney's fees, costs, and arbitrator fees.[38]

In addition, the Second Circuit observed that the Ninth Circuit Court of Appeals already had rejected a challenge to an arbitral award that found the non-prevailing party liable based upon an unambiguous recognition of the "bad faith exception" to the *American Rule.*[39] Thus, the argument says, the exception to the *American Rule* that is inherent in and endemic to judicial tribunals is conceptually indistinguishable and incompatible with the inherent authority of an arbitral tribunal. Equating judge and arbitrator, court and arbitral tribunal, as authorized to award punitive damages is a suspect line of reasoning.

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35 *Id.* at 86 (citing Banco de Seguros del Estado v. Mut. Marine Office, Inc., 344 F. 3d 255, 262 (2d Cir. 2003)). Notably the Court does not elaborate on the distinctions between a narrow, conventional, or broad arbitration clause.

36 *Id.* (citing Banco de Seguros, 344 F. 3d at 262).

37 *Id.* The jurisprudence is wholly devoid of any analysis or detail concerning what facts or omissions constitute "bad faith" in the context sub judice or in any other circumstance, thereby leaving the bench, the practicing bar, and parties negotiating arbitration clauses without any guidance.

38 *Id.* The Court's citation to Synergy Gas Co. v. Sasso, 853 F 2d 59 (2d. Cir. 1988), as analytical support for this proposition is disconcerting: In Synergy Gas the record is very clear that there was no provision in the arbitration clause pursuant to which the parties explicitly had agreed that each would bear and be responsible for its own costs and fees arising from the arbitration. See Synergy Gas at 60-61. The presence of such a clause constitutes a cornerstone of the ReliaStar jurisprudence, where a judicial tribunal unilaterally reconfigures a material term of an arbitration clause in direct and explicit defiance of the parties' will as expressed in the very arbitration clause at issue. Under no reasonable analysis can Synergy Gas be deemed helpful or persuasive, let alone finding precedent at all. Quite simply, it is materially distinguishable from ReliaStar.

39 Reliastar, *supra* note 25 at 87 (citing Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F. 2d. 1056, 1064 (9th Cir. 1991) (Observing that "Federal law takes an expansive view of arbitrator authority to decide disputes and fashion remedies…. In light of the broad power of arbitrators to fashion appropriate remedies and the accepted 'bad faith conduct' exception to the American Rule, we hold that it was within the power of the arbitration panel in this case to award attorney's fees.")

Three circumstances were identified pursuant to which the prevailing party may recover attorney's fees: (i) in situations where a binding arbitration agreement provides for such relief, (ii) where legislation or other positive law authorizes awarding attorney's fees to the prevailing party, and (iii) "if justified by circumstances *in which the losing party acted in bad faith*."[40] As to this third proposition it was noted that the underlying principles that arbitration holds and promotes may only be observed where parties conduct an arbitration in "good faith". The argument is thus developed to its final and logical conclusion with the postulate that "sanctions, including attorney's fees are appropriately viewed as a remedy within an arbitrator's authority to effect the goals of arbitration."[41]

Fifth, a very creative and novel interpretation was applied to clause 10.3 of the arbitration agreement at issue. The clause was construed as not imposing limits on the authority of arbitrators to fashion an award ordering one of the parties to pay attorney's fees and costs as a punitive sanction for bad faith conduct.[42]

The Second Circuit rejected EMC's contention that clause 10.3 of the contract limited the arbitral tribunal's authority to tax sanctions to the extent that those sanctions imposed on the non-prevailing party liability for payment of attorney's fees or the arbitral tribunal's fees. The analytical and synthetic consequences of this rationale are clear. The Court acknowledged as unpersuasive the assertion that the only reasonable interpretation of clause 10.3 is one in conformance with which an arbitral tribunal is deemed to have the inherent authority to issue an arbitral award that imposes sanctions so long as such sanctions are *not* in the form of attorney's fees or arbitrator's fees. [43]

Seventh, clause 10.1, which governed the appointment of arbitrators,[44] was contrasted with clause 10.3 for purposes of substantiating the proposition that the parties somehow had vested the arbitral tribunal with broad discretion as clause 10.3 does not contain any language proscribing

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40 Reliastar, *supra* note 25 at 87 (emphasis in original).

41 *Id.*

42 *Id.* at 88.

43 *Id.*

44 The clause states:
"Appointment of Arbitrators. In the event of any dispute or differences arising hereafter between the parties with reference to any transaction under or relating in any way to this Agreement as to which Agreement between the parties hereto cannot be reached, the same shall be decided by arbitration. Three arbitrators shall decide any dispute or difference….". *Id.* at 84.

or otherwise limiting the arbitral tribunal from issuing an award sanctioning a party by imposing the obligation to pay fees upon having conducted the arbitration in bad faith.[45]

Finally, the Second Circuit engaged in a rather sophistic analysis in stating that the mere recitation of the *American Rule* in the subject arbitral clause is not sufficient reason to justify limiting the arbitral tribunal's inherent authority to impose an award in part based upon the exception to the *American Rule*.[46]

2. REVISITING THE INHERENT AUTHORITY OF ARBITRATORS TO IMPOSE SANCTIONS IN THE FORM OF ATTORNEY'S FEES AND COSTS AS A PUNITIVE MEASURE ARISING FROM AN ABSENCE OF GOOD FAITH UNDER *RELIASTAR* AND ARTICLE 9, PARA. 7 OF THE RULES: IS THERE A NORMATIVE BASIS?

The Second Circuit's bold thesis that arbitrators have "inherent authority" to impose attorney's and arbitrator's fees as punitive sanctions for lack of good faith in the conduct of an arbitration lacks authority. Similarly, Article 9, para. 7 vesting the arbitral tribunal with authority to impose punitive sanctions in the form of "costs of the arbitration" and "costs arising out of or in connection with the taking of evidence", upon a finding that a party has failed "to conduct itself in good faith in the taking of evidence," engrafts upon the arbitral tribunal a sanctioning discretion that is even narrower—limited to the conduct in the taking of evidence—than that in *ReliaStar*, addressing the conduct of the arbitration presumably in its totality and not merely in connection with a single procedural phase of the proceeding. The Second Circuit cited its own opinion in *Synergy Gas* as binding jurisprudence with respect to this solitary precept.[47] The reasoning, however, is unsettling because *Synergy Gas* does not articulate the proposition for which the Second Circuit has cited it. Additionally, the factual architecture of *Synergy Gas* is materially different from that of *ReliaStar* most fundamentally because in *Synergy Gas* there was not at issue an arbitration clause that explicitly recited that each party to the arbitration was responsible for *its own* attorney's fees and costs, as unequivocally was the case in *ReliaStar*.

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45 *Id.* at 88.

46 *Id.*

47 Synergy Gas Co. v. Sasso, 853 F. 2d 59, 63-64 (2nd Cir. 1988) at 63.

Synergy Gas addresses the very particular question of whether a decision on the merits is a final decision within the meaning of 28 U.S.C. § Section 1291, when the availability or amount of attorney's fees had "not yet been determined."[48] Not surprisingly, a considerable part of the Second Circuit's entire effort in *Synergy Gas* is exclusively allocated to the scrutiny of this question, which is not reasonably related to *any* of the issues in *ReliaStar*. An additional factor that renders *Synergy Gas* inapposite to the holding in *ReliaStar* is that it concerns a labor dispute. It is for this reason that the Second Circuit recognized that imposing an obligation on an arbitral tribunal to award fees and costs as a *remedy* for contract violations is beyond the ambit of a reviewing tribunal.[49] *Synergy Gas* is scarcely applicable authority in support of the *ReliaStar* holding as binding precedent because under the facts of that case the parties had broadly stipulated that the tribunal would adjudicate all claims for relief including those arising from the arbitration.[50] It therefore becomes unclear how the Second Circuit's holding in *Synergy Gas* in any way lends analytical support to the *ReliaStar* tenet that an arbitral tribunal has the inherent authority to award a party attorney's fees and costs as a punitive sanction based upon absence of good faith in the conduct of the arbitration. The new definition of the inherent authority of an arbitral tribunal, which *ReliaStar* materially and conceptually reconfigures, can in no way find doctrinal support in *Synergy Gas Co.*

2.1 Jurisprudence from the Ninth and Eleventh Circuits cited by the Second Circuit in *ReliaStar does not* Support the Court's Novel Holding

Whether by happenstance or design the Second Circuit in *ReliaStar* held that the broad and inherent authority vested in an arbitral tribunal enjoys primacy over the doctrine of party-autonomy, even where party-autonomy is embodied and emphasized in an arbitration clause. Notably, the Court does not state that it is crafting new jurisprudence in this very narrow field. To the contrary, the Second Circuit purports to base its analysis on well-settled principles, in its view, constituting persuasive

48 *Id.*

49 *Id.* at 64-65. In fact, the Court contended that under New York C.P.L.R. Section 7513 (McKinney 1980) Section 7513 does not bar the award of attorney's fees but rather, "it merely does not grant authority to do so." *Id.* at 65.

50 *Id.* at 64.

authority from the Ninth and Eleventh Circuits.[51] Reference to these decisions, however, is simply not helpful to the specific proposition that an arbitral tribunal enjoys inherent authority of imposing punitive sanctions in the form of fees and costs on a party based upon that party's absence of good faith in the conduct of the arbitration, even where the operative arbitration clause provides that each party to the arbitration is to bear its own fees and costs. Neither case from the Ninth and Eleventh Circuits upon which the Second Circuit in *ReliaStar* seeks to find normative support can be doctrinally reconciled with the operative proposition.[52]

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51 ReliaStar, *supra* note 25 at 87 (citing Todd Shipyards Corp. v. Cunard Line Ltd., et al., 943 F.2d 1056 (9th Cir. 1991) and Marshall & Co. v. Duke, 114 F.3d 188 (11th Cir. 1997).

52 As a point of departure, the Ninth Circuit in Todd Shipyards specifically held that the expansive view that has been taken of the power of arbitrators to decide disputes, coupled with the incorporation of AAA Commercial Arbitration Rule 43 by the parties, provided the arbitration panel here with authority to make the damage award." Todd Shipyards, 943 F.2d at 1063. Consequently, the actual binding stare decisis engrafted by the Ninth Circuit in Todd Shipyards amply acknowledges Rule 43 of the AAA as its normative basis. The expansive interpretation that the Ninth Circuit's jurisprudence has developed concerning the scope of arbitral authority and the discretion accorded to arbitrators. Pursuant to this analysis and operative facts, hardly may the Ninth Circuit's holding in Todd Shipyards be construed, even under the most favorable light, as consonant with or supporting the Second Circuit's command in ReliaStar.

The Second Circuit in ReliaStar makes no reference to the arbitral institution at issue in that case and, therefore, does not at all mention Rule 43 of the AAA. In addition, in sharp relief with the facts in ReliaStar, the parties in Todd Shipyards had not identified the American Rule in their arbitration clause. These two distinctions, without more, suffice for purposes of highlighting the conceptual debilities reflected in the Second Circuit's analysis seeking doctrinal support in the Ninth Circuit's holding in Todd Shipyards.

To be sure, the Ninth Circuit in dicta, referenced the American Rule by citing to jurisprudence in support of the proposition that "a Court may assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. at 1064 (emphasis added). The authority cited speaks to a judicial tribunal ("court") having the authority to impose the exception to the American Rule. It does not at all follow, as the Second Circuit seems to suggest, that an arbitral tribunal also be vested by reason of its own "inherent authority" with the normative standing to impose punitive sanctions in the form of attorney's fees for the lack of good faith in the conduct of an arbitration despite an arbitration clause explicitly providing for imposition of the American Rule as to fees and costs. Accordingly, the Second Circuit's use of Todd Shipyards as authority is flatly wanting in both rigor and applicability.

In this same vein, the Second Circuit in ReliaStar references Marshall & Co. as additional authority for its holding. Reference to this authority is even more opaque and enigmatic. In addition to the peculiarity of being a per curiam opinion, the Eleventh Circuit Court of Appeals did, however, note that "the parties agreed to submit the issue of attorney's fees and expenses to the panel so that enforceable 'bi-lateral' agreement exists." Marshall & Co., 114 F.3d at 189. This single distinction, without more, is enough to disavow Marshall & Co. of any type of authority that may under any reasonable hypothesis support the Second Circuit's pronouncement in ReliaStar. Furthermore, the Eleventh Circuit's fleeting assertion that "every judicial and quasi-judicial body has the right to award attorney's fees under the common law bad faith exception to the American Rule," is strictly dicta and materially distant from tracing the contours of the authority of an arbitration tribunal beyond parameters agreed to by the

2.2 In *Reliastar* the Court Erroneously Conceptualizes Interchangeably the Terms "Remedies" and "Punitive Sanctions" as well as "Arbitrator" and "Judge"

Irrespective of the Second Circuit's misapprehension of Eleventh and Ninth Circuit authority, its reasoning and holding is primarily flawed because the Court *a priori* assumed that jurisprudence commenting upon the role and authority of a judicial court and judge is conceptually indistinguishable and, therefore, equally determinative with respect to an arbitral tribunal and an arbitrator. The doctrinal consequences of this conceptual inaccuracy are significant and too vast to address in a single writing.

Viewing arbitrators and judges even with respect to a single narrow issue as indistinguishable entities, inevitably leads to flawed conclusions and a distancing from the most sacrosanct precepts that best configure arbitral proceedings. It is plainly acknowledged that there exists a body of law that vests a judge with authority to adjudicate whether in fact an exception to the *American Rule* is warranted.[53] A judge is but the extension of a sovereign's exercise of sovereignty through a judicial function, indeed an indicia of sovereignty itself, while an arbitral tribunal in international commercial arbitration is the consequence of a private contractual arrangement. The implementation of judicial resources and national legislative policies in furtherance of a sovereign's policy is quite distinct from the tasks of an arbitral tribunal, which is charged with the resolution of specific disputes consonant with a framework privately established by the parties' will with contractual parameters as to essential elements pertaining to the conduct of the arbitration. In applying law to fact a judicial tribunal necessarily must consider the public policy of the state and its legislative branch in particular in having enacted legislation. In this sense the judicial administration of justice is a "macro" exercise contemplating an

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parties as embodied by the very arbitration agreement. *Id.* Neither the Eleventh Circuit nor the Ninth Circuit authority relied upon the Second Circuit in ReliaStar are conceptually or doctrinally helpful in supporting the ReliaStar holding.

From the perspective of pure legal analysis, and the status of finding precedent, it would have been preferable for the Second Circuit to have identified the issue before it as one of first impression, and, therefore, the holding would only represent a possible new avenue of doctrinal development to be analyzed and restructured within the tenets of party-autonomy and inherent arbitral authority all within the context of the specific factual rubric comprising the ReliaStar jurisprudence. By focusing the case as one of first impression, the Second Circuit could have averted a construction of authority that is doctrinally unavailing.

53 ReliaStar, *supra* note 25 at 87.

undertaking beyond the immediate practical resolution of a dispute and entailing considerable concern for a common good that finds expression in the furtherance of policy in the context of adjudicating a dispute.

No theory of social justice or public policy forms part of the task with which arbitrators are charged. The practical resolution of a commercial dispute between private individuals at the periphery of the state's judicial system has no policy aspirations or requirements. This difference, defining the very normative bases of courts and arbitral tribunals, is central to understanding the role of arbitral tribunals as *ad hoc* "micro" administrators of dispute resolution. Thus, while the reason for being of arbitration as a legitimate dispute resolution mechanism in *pari materia* with judicial tribunals constitutes a matter of public policy, the practical exercise of arbitral tribunals is simply removed from this domain absent annulment and enforcement proceedings.

A judicial tribunal is also quite cognizant that justice be administered in conformance with appellate accountability and applicable comprehensive rules of civil procedure, evidence, and judicial administration, all of which are intrinsic to the exercise of sovereignty through a judiciary and none of which form part of an arbitration proceeding. Consequently, ascribing to an arbitral tribunal as part of its inherent authority, the right to award punitive damages in the form of attorney's fees and costs based on a finding of lack of good faith, irrespective of party-autonomy, denaturalizes the character of arbitration while misapprehending the status of courts as fundamental elements in the existence and exercise of sovereignty.

Certainly a judicial tribunal is authorized to fashion rulings consonant with the exception to the *American Rule* for purposes of imposing punitive liability on a party that has acted in bad faith (the absence of good faith) during the course of a judicial proceeding. There is simply no normative precept that, *a priori,* would lead to the same conclusion with respect to an arbitration tribunal.

ReliaStar is wrongly decided because (i) it misapprehends precedent from the Second Circuit, (ii) misapplies precedent from the Ninth Circuit, (iii) misconstrues precedent from the Eleventh Circuit ascribing an arbitral tribunal the same normative foundation as that of a judicial tribunal, and (iv) wrongly applies the concept of a "broad arbitration clause" as a pivotal principle defining the "inherent authority" of an arbitration tribunal in disregard of the parties' "arbitral will". Only pursuant to the authority

attributed to a "broad arbitration clause", without citation to law or doctrine, was it possible for the Second Circuit to reach this conclusion.

Similarly, the Article 9, para. 7 stricture authorizing an arbitral tribunal to impose "costs of the arbitration clause" including those "costs" arising out of or in connection with the taking of evidence, upon a determination that a party "has failed to conduct itself in good faith in the taking of evidence," is wanting in civil law or common law judicial underpinning. Even the broad categories of *Americanization* versus *internationalization* of the Rules, or *internationalization* by virtue of additional *Americanization,* become challenging to identify and define as to the workings of "good faith" within the Rules. Article 9, para. 7 appears to be a hybrid confection of the *British Rule* awarding fees and costs as compensatory damages (not punitive) to the prevailing party and a very unique reading of the exception to the *American Rule.* It is thus disconcerting from both theoretical and practical perspectives.[54]

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[54] There are six salient propositions that most eloquently identify the conceptual flaws in identifying the Art. 9, para. 7 good faith sanctioning stricture with either the American Rule or the British Rule. First, the Art. 9, para. 7 cannot truly be characterized as a codification of the British Rule, pursuant to which (i) attorney's fees and costs are awarded as a part of compensatory and not punitive damages to the (ii) prevailing party and not just any party irrespective of "prevailing status" that has acted in bad faith. In fact, "good faith", "bad faith" , and "lack of good faith", are not a part of the British Rule in any way.

The Art. 9, para. 7, punitive sanctioning authority may be viewed as an adaptation of the exception to the American Rule as articulated in U.S. common law. The challenge with this construction, however, is that the overwhelming majority view applies the American Rule exception to judicial and not arbitration proceedings. A further refinement to this point shall follow.

Third, Art. 9, para. 7 may perhaps be understood as a codification of the exception to the American Rule in conformance with the ReliaStar exegesis of the exception to the American Rule as (i) extending to an arbitral tribunal and thus amplifying its "inherent authority" particularly when constituted pursuant to a "broad arbitration clause" concerning the absence of good faith in the "conduct of the arbitration" and not just with respect to the conduct in the taking of evidence in the arbitration.

Fourth, a substantive and not a procedural principle was engrafted onto Art. 9, para. 7 with the introduction of the precept of the "good faith" without guidance to a standard or methodology to be followed by an international arbitration tribunal in meaningfully defining this elusive and mercurial principle.

Fifth, the scope and significance of what it means for a party not to conduct itself in good faith in the taking of evidence during the course of an international arbitration with respect to the narrow procedural activity of taking of evidence constitutes a fundamental challenge in the theoretical and practical use of Art. 9, para. 7.

Sixth, the scope of "taking of evidence" within the Rules' rubric further complicates the application of the "good faith" standard. Specifically, does the taking of evidence include the (i) consultation phase, (ii) self-disclosure requirement, (iii) supplemental disclosure strictures based upon the "expect to rely upon" standard, (iv) compulsory disclosure requirement pursuant to a

3. TRANSPARENCY AS A STEP TOWARDS DEFINING GOOD FAITH IN THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

Despite the absence of substantive or procedural guidance as to the precept of "good faith" for purposes of practically applying the Rules and understanding their theoretical grounding, the Rules contain greater "transparency" requirements that perhaps may lead to a more meaningful understanding of the term "good faith". Specifically, the principle of enhanced transparency is identified, albeit not referenced, throughout four categories comprising the Rules' framework: (i) transparency concerning non-disclosure of requested documents,[55] (ii) transparency pertaining to greater access to original documents,[56] (iii) transparency addressing expert witnesses[57] and Tribunal-appointed experts,[58] and (iv) transparency regarding the conduct of the final hearing and oral testimony.[59] The emphasis on transparency in these four categories may be suggestive of a possible definition of good faith contained within the Rules' very mechanics.

The Rules now provide that a party withholding production of otherwise disclosable documents on the specific ground that compliance would be burdensome is required to submit a "statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such documents."[60] As to documents maintained in electronic form, "the requesting Party may, or the arbitral tribunal may order, that it shall be required to identify specific files, search terms, individuals, or other means of searching for such Documents in an efficient and economical manner."[61] The requisite transparency attaching to non-production premised on burden and greater transparency pertaining to documents maintained in electronic form meaningfully contribute to the articulation of an "expectation" by parties and tribunals who have agreed to use the Rules. Appropriately contextualized, such an *expectation* may be conducive to the forging of a criteria for the principle of "good faith" within the meaning of the Rules.

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document request, and (v) compulsory practice as to the presentation or production of witnesses within the ambit of a party's control?

55 *See* Art. 3, para. 3(c)(i).

56 *See* Art. 3, para. 12(a)-(d).

57 *See* Art. 5, paras. 1(i) and 2(a)-(c).

58 *See* Art. 6, para. 4(a)-(d).

59 *See* Art. 5, para. 1, 2(a)(i), & 3.

60 *See* Art. 3, para. 3(c)(i).

61 *See* Art. 3, para. 3(a)(ii).

This expectation is further bolstered by the Rules' emphasis on access to (i) original documents, and (ii) original-language documents in addition to the translated exemplar. The Rules' new requirement for copies of documents to conform to the originals and for originals to be available for inspection at the tribunal's request, meaningfully contributes to greater transparency.[62] Moreover, translations of documents are to be submitted to the tribunal and to parties together with the originals and both translations and original-language documents are to be accordingly identified.[63] Access to original documents, in addition to documents that most likely have been translated as part of the arbitration process, reflects the parties' agreement to implement a system of rules premised on transparency. This transparency *expectation* may serve as a basis for developing substantive content for the "good faith standard" that the Rules articulate. Transparency, as a principle within the context of the taking of evidence, is easily rendered intelligible and because its very nature is transcultural, it is perfectly suitable as a first principle for evaluating parties in the taking of evidence in international arbitration.

Nowhere is the principle of transparency best exemplified than in the Rules' treatment of party-appointed experts in Article 5.[64] The Rules ensure submission of an expert report that now commands disclosure of the relationship that a party-appointed expert may have to any of the parties' (i) legal advisors or (ii) the arbitral tribunal.[65] Party-appointed experts also must provide a description of the instructions pursuant to which he or she is furnishing opinions and conclusions.[66] The expert report must contain a statement of independence and, if the report was translated, a statement identifying the language in which it was originally prepared.[67] The party-appointed expert also is required to provide documents upon which the expert relied, to the extent that such materials had not been submitted to the tribunal and the parties.[68]

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62 *See* Art. 3, para. 12(a).

63 *See* Art. 3, para. 12(d).

64 It should be observed that Art. 6, concerning "Tribunal-Appointed Experts", in large measure mirrors Art. 5. By way of example, Art. 6 , para. 4(a)-(g) is materially indistinguishable from Art. 5, para. 2(a)-(i). Therefore, the same transparency analysis pervading party-appointed experts is also applicable to tribunal-appointed experts.

65 *See* Art. 5, para. 2(a). The 1999 Rules lacked these disclosures.

66 *See* Art. 5, para. 2(b).

67 *See* Art. 5, para. 2(c) and (f).

68 *See* Art. 5, para. 2(e). The standard for disclosure in conformance with this provision is "reliance" and not "consultation". Presumably, those materials that the expert consulted but did not rely upon in providing her expert opinions and conclusions, need not be identified.

The new obligations that the Rules impose upon a party-appointed expert center on independence and subject matter impartiality, as evinced by having to submit affirmation of the expert's "genuine belief" in the opinions expressed in the expert report,[69] as well as the command to submit a description of instructions in connection with which the expert's opinions and conclusions were crafted.[70] The transparency requirements engrafted upon expert witnesses, although not stated in the Rules, should be construed as the type of substantive "good faith" precept that both parties and arbitrators expect of expert witnesses testifying within the confines of the Rules. Any violation of these transparency requirements can and should be construed as a violation of the Rules' good faith imperative.

While transparency as a criteria is hardly a substitute for a substantive definition of the term "good faith" within the context of the Rules, it does provide for some uniformity and universality concerning the affirmative exercise of good faith as well as acts and omissions that may only be construed as wanting in good faith to the extent that such conduct obstructs or hampers the disclosure and exchange of information. The emergence of the principle of transparency as a conceptual rubric towards a substantive understanding of good faith is but a modest point of departure. This point of departure, however, is a necessary development in an analytical journey that must be pursued if the Rules are to find their optimal theoretical expression and practical application.

4. CONCLUSION

The arresting absence of definition and specificity attendant to terms rudimentary to these criteria hampers the Rules' theoretical underpinnings and practical application by inordinately enhancing the scope of inherent arbitral authority at the expense of the most critical, almost sacrosanct principles that underlie international arbitration: *party-autonomy, uniformity, predictability* and *transparency of standard*. The Rules' normative foundation providing arbitrators with authority to impose sanctions on a party for not conducting the taking of evidence in good faith, within the Rules' framework, is inapposite to the *American Rule* good faith exception and to the *British Rule* premised on a prevailing party standard. If this use of good faith is to be analogized to any jurisprudence, it is likely to be to the Second

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69 *See* Art. 5, para. 2(g).

70 *See* Art. 5, para. 2(b). The issue of attribution also has been addressed by the Rules. Art. 5, para. 2(i) requires that "if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author" is now required.

Circuit's novel holding in *ReliaStar*; a case that itself is analytically suspect in its use precedent on the narrow issue of arbitral authority to impose sanctions based on lack of good faith. The mercurial and evasive nature of "good faith" itself, within a single legal system, let alone among disparate juridical traditions, only compounds and multiplies this problem.

A suggested approach in addressing the absence of any definition for "good faith" within the Rules' rubric is to borrow from the "transparency" requirements that now pervade the Rules as a principle susceptible to cross-cultural understanding and one that may meet the most fundamental expectations of parties from different legal traditions. Good faith in the taking of evidence is inextricably intertwined with transparency and may perhaps find theoretical support and functional application when understood through the prism of a "transparency" standard, as arbitral authority cannot be boundlessly enhanced as a consequence of uncertainty and lack of definition. Perhaps the experiment is one worth considering.

KICK-STARTING ARBITRATION IN INDIA

D. J. Khambata*

Abstract

Several major roadblocks have paralyzed arbitration in India; unless these are removed arbitration cannot replace commercial litigation in the country. There are 5 major problems identified in this paper that are prohibiting the improvement of Indian arbitration, which have arisen from sections in the Arbitration and Conciliation Act 1996. These 5 roadblocks have been considered by the courts in several cases, namely, Patel Engineering, The Sukanya Holdings case, the Saw Pipes Case, and the Venture Global Case, however the Supreme Court has not adequately dealt with many of the problems that have arisen with regard to provisions of the 1996 Act in these cases. The paper offers recommendations that the author believes will help resolve some of the roadblocks, and nudge arbitration towards swifter and more focused resolutions. These reformative actions include, mandating by amendment to the 1996 Act, the imposition of realistic and/or punitive costs by Arbitral Tribunals, setting overall time limits to arbitrations, and encouraging institutional arbitration.

"Give us the tools and we will finish the job"[1]

Arbitration in India faces five major roadblocks. These will have to be removed else arbitration will never be a viable alternative to commercial litigation[2]. These obstacles have paralyzed arbitration under the Arbitration and Conciliation Act 1996 (Hereafter "the 1996 Act"). These problems have arisen as a result of some of the provisions of the 1996 Act. Several of them are readily identified by association with the case in which the Supreme Court had to consider them:

(i) The *Patel Engineering* problem: a Court has to "finally" decide questions relating to the existence of the arbitration agreement and arbitrability at the stage of appointing arbitrators under Section 11 of the 1996 Act[3];

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* The author is presently serving as the Additional Solicitor General for India.

1 Winston Churchill.

2 A Commercial Division of High Courts Bill 2009 lies before Parliament. It provides for a "fast track" Court in each High Court to dispose of commercial causes of a value above Rs. 5 crores. With its passage the impetus to arbitrate commercial disputes will decline.

3 Section 11 problems were considered in the judgment of the Supreme Court in SBP and Company v. Patel Engineering Ltd., (2005) 8 SCC 168 [Hereafter "Patel Engineering"].

(ii) The *Sukanya Holdings* problem: the eclipse of an arbitration by a civil suit that covers the subject matter of the arbitration but where additional parties are added as defendants and these parties are not parties to the arbitration agreement[4];

(iii) The *Saw Pipes* problem: increasing judicial intervention under the limitless head of "public policy" to set aside awards under Section 34 of the 1996 Act[5];

(iv) The *Venture Global* problem: judicial review of foreign awards under the domestic award review provision i.e. Section 34 of the 1996 Act[6];

(v) The problem of *ad hoc* arbitrations: the provisions of the 1996 Act give license to arbitral tribunals to set their own procedures and time lines. This has led to lethargy in conduct and increasing formalization of unsupervised ad hoc arbitrations.

These problems are in a sense also symptomatic of the continuing struggle between judicial intervention and arbitral autonomy. The malaise that gripped arbitration in India had prompted Justice D.A. Desai to lament about the experience under the Arbitration Act 1940 (Hereafter "the 1940 Act") as one that *"has made lawyers laugh and legal philosophers weep"*[7].

1. WINDS OF CHANGE – THE 1996 ACT

The 1996 Act brought in fresh winds of change. A former Chief Justice of India[8] heralded the advent of the 1996 Act in ringing tones when he said *"the law in India relating to arbitration and conciliation has at last come of age."* The purpose of the 1996 Act was to make arbitration law in India *"more responsive to contemporary requirements"* and this was to be by facilitating quick and fair arbitration.

As the winds of globalization and liberalization swept across India, Parliament enacted the 1996 Act to deal in a consolidated manner with

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4 This was first permitted in Sukanya Holdings Private Ltd., v. Jayesh S.Pandya, (2003) 5 SCC 531 [Hereafter "Sukanya Holdings"] – and later this was extended to foreign arbitrations in Novartis Vaccines and Diagnostics Inc. v. Aventis Pharma, a judgment of the Bombay High Court dated 3rd October 2007 in Arbitration Petition No.302 of 2007 [Hereafter "Novartis Vaccines"].

5 This expansion of judicial review finds its source in the judgment of the Supreme Court in ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705 [Hereafter "Saw Pipes"].

6 Section 34 of the 1996 Act was first applied to foreign awards in Venture Global Engineering v. Satyam Computer Services, (2008) 4 SCC 190 [Hereafter "Venture Global"] although the seeds were laid in Bhatia International v. Bulk Trading, (2002) 4 SCC 105.

7 Guru Nanak Foundation v. Rattan Singh, AIR 1981 SC 2075.

8 Justice R.S.Pathak.

domestic and foreign awards. Part I of the 1996 Act (which was intended to govern domestic awards) was a virtual replica of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration, 1985. The Preamble to the 1996 Act is unabashed in its embrace of the UNCITRAL Model Law. Parts II & III of the 1996 Act more or less reproduced the provisions of the Foreign Awards (Recognition and Enforcement) Act 1961 (Hereafter "the Foreign Awards Act 1961") and the Arbitration Protocol and Convention Act of 1937 (Hereafter "the 1937 Act") and thereby implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (Hereafter "the New York Convention") and the Geneva Protocol 1923/Geneva Convention for the Execution of Foreign Arbitral Awards 1927 (Hereafter "the Geneva Convention"). Parliament was conscious that the supervisory role of courts in the arbitral process had to be minimized, that the arbitral procedure had to be fair and efficient and that arbitral awards should be swiftly enforceable as if they were decrees of a civil court.[9]

The 1996 Act has the following primary objectives:

(a) Globalizing and reforming the law of arbitration in India to synchronize it with international trends and so that economic reforms were not hindered;

(b) Restricting judicial intervention in arbitration and the review of awards to a minimum;

(c) Consolidating and simplifying the law of arbitration both for domestic and foreign awards;

(d) Facilitating enforcement of domestic awards by treating them as decrees of a civil court.

The Scheme of the 1996 Act emphasizes the need for judicial restraint in all aspects of arbitration:

(i) The interdiction against judicial intervention is contained in one pithy section which is Section 5: " .... *no judicial authority shall intervene except where so provided in this Part."* This edict runs as a leitmotif through various provisions of the 1996 Act;

(ii) Old issues of much contest are ironed out. For example a tribunal is expressly empowered to rule on its own jurisdiction by Section 16

9 The Objects and Reasons for the Bill introducing the 1996 Act are explicit in this regard.

which invests the tribunal with such power and incorporates into Indian law, the doctrine of Kompetenz - Kompetenz.

(iii) Section 16(5) emphasizes the need for the tribunal to continue its adjudication uninterrupted by objections to its jurisdiction. If the tribunal holds it has jurisdiction, it is required to proceed with the arbitral proceedings to their conclusion by making a final award. It is only if the tribunal accepts that it has no jurisdiction that it must then make an immediate order terminating the arbitration. Here again the role of the Courts is sought to be minimized. It is only in the case of an order rejecting jurisdiction that a direct appeal to the Court is provided under Section 37(2)[10]. No second Appeal is permitted from an order passed by a Court under Section 37.

2. APPOINTMENT OF ARBITRATORS: PATEL ENGINEERING AND ITS CONSEQUENCES

The first component of effective arbitration is the quick appointment of arbitrators. Recalcitrance of the defendant is common place in Indian litigation, encouraged as it is by woefully delayed disposals by Courts and by their reluctance to impose realistic and punitive costs. It is no different when it comes to appointing arbitrators. Most arbitrations in India are ad hoc arbitrations and therefore are denied the benefit of the conclusively and speed of institutional appointment of arbitrators. Once the defendant delays or refuses to appoint an arbitrator, recourse must be had under Section 11 of the 1996 Act either to the Chief Justice of the relevant High Court or, in the case of international commercial arbitration (which is arbitration involving at least one foreign party) to the Chief Justice of India.

A seven judge bench of the Supreme Court in *Patel Engineering*[11] decided that all questions of jurisdiction of the arbitral tribunal must be decided finally (to use the language of Section 11(7) of the 1996 Act) by that Chief Justice and could not be left to the decision of the arbitral tribunal whose jurisdiction was being questioned. The Supreme Court held that :

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10 This is a rare departure from the UNCITRAL Model Law which offers an appeal even from an order upholding jurisdiction. Parliament apparently did not provide for such an appeal to simplify and hasten the arbitral process.

11 (2005) 8 SCC 618.

> *"Therefore a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a preclude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator."*[12]

These decisions will include decisions as to whether the claim is barred or dead and whether the parties have concluded the transaction by recording satisfaction or settlement of their claims.

Only a solitary exception to this wide gamut of questions is carved out (in Para. 39) and it is that the Chief Justice may leave to the arbitral tribunal (to decide upon evidence and along with the merits) the question as to whether a claim made is one which comes within the purview of the arbitration clause. No doubt the merits of the dispute are always to be left to the arbitral tribunal.

Even under the 1940 Act, arbitrability of disputes was always held to fall within the ambit of an arbitration agreement. In *Renusagar Power Co. Ltd. v. General Electric Company*[13] the Supreme Court held that even questions as to the existence, validity and effect (scope) of the arbitration agreement could fall within an arbitrator's jurisdiction if the clause was of an appropriately wide amplitude. This was in a regime that had no statutory incorporation of the doctrine of Kompetenz – Kompetenz, as in Section 16 of the 1996 Act.

To a great extent *Patel Engineering* has undermined the provisions of Section 16 of the 1996 Act and has made it subject to Sections 8 and 11 of the 1996 Act. The enormous impact of this decision has resulted in a backlog in the appointment of arbitrators – hardly a portentous way of commencing arbitration. The subsequent decisions of the Supreme Court including *National Insurance Company Ltd. v. Boghara Polyfab Private Ltd.*[14] have not done much to alleviate the problems created by the judgment in *Patel Engineering*.

However in *Aurohill Global Commodities v. M.S.T.C.*[15] the Supreme Court directed that the arbitral tribunal must decide whether there existed a

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12 *Id.* para. 38.
13 AIR 1985 SC 1156, para. 25.
14 (2009) 1 SCC 267.
15 AIR 2007 SC 2706.

concluded contract and whether the alleged contract was *non est* and refused to decide these at all, much less "finally" in a Section 11 application. This decision runs counter to that in *Patel Engineering* and it is difficult to reconcile the two.

The Supreme Court's decision in *Patel Engineering* was subsumed by the conviction that a degree of finality on jurisdictional issues at the Section 11 stage was not only mandated by Section 11(7) but would expedite the arbitral process and insulate the award from jurisdictional challenges.

A divergent approach marked the Supreme Court's decision in *Shin Etsu Chemical Co. v. Aksh Optifibre Ltd.*[16] – a case not under Section 11 but one under Section 45 of the 1996 Act. *Shin Etsu* was decided almost contemporaneously with *Patel Engineering* but held that the role of a Court (in making a determination as to whether the arbitration agreement was *"null and void or inoperative or incapable of being performed"*) was far more restricted than the role assigned by Patel Engineering. *Shin Etsu* favored the prima facie approach. The Supreme Court held that if a Court prima facie felt that the arbitration agreement was not null, void or inoperative it should not interdict the arbitral process but should leave a detailed adjudication of that question to the Arbitral tribunal. The majority judgments[17] deferred to the principle of arbitral autonomy and the desirability of not imposing a lengthy and costly trial upon the parties pre-arbitration. It was held that the question necessarily had to be decided only after a full trial and for the Court to so decide at a pre-reference stage defeated the credo and ethos of arbitration. The minority judgment[18] held that decision of the question had to be on the merits, final and binding albeit directing the trial court to dispose of the application within two months and without recording oral evidence. The minority judgment also issued general directions requiring all Section 45 applications to be disposed of within 3 months.

3. THE *SHIN ETSU* APPROACH UNDER SECTION 11

The approach of the majority judgments in *Shin Etsu* is commendable and will, on a balance of factors, make for speedy and effective arbitration. It is an approach that is required even under Section 11. Section 11 of the 1996 Act should be amended to incorporate clear guidelines as to the

16 AIR 2005 SC 3766 [Hereafter "Shin Etsu"].

17 Mr. Justice B.N.Srikrishna and Mr. Justice D.M.Dharmadhikari.

18 Mr. Justice Y.K.Sabharwal.

circumscribing parameters when a Court decides the appointment of arbitrators. It must however be conceded that the public policy of speedy appointment is to some extent countered by the need to avoid a lengthy and wasted arbitration ultimately held to be without jurisdiction. An amended Section 11 could balance these two competing public interests as follows:

(i) In clear and patent cases of lack of jurisdiction, such as where, without much ado it can be found that the arbitration agreement does not exist, the final decision to refuse appointment and therefore to end the arbitration must be taken by the Section 11 Court itself;

(ii) In all other cases where the arbitration agreement is prima facie established (including cases of arbitrability of specific disputes and claims) it is practical to leave a detailed consideration of the issue of jurisdiction or arbitrability to the arbitral tribunal. This would mean that the Section 11 Court should appoint an arbitrator(s) specifying that the issue of jurisdiction/arbitrability will be decided by the arbitral tribunal itself in exercise of its powers under Section 16 of the 1996 Act;

(iii) Necessarily, the above approach will require modification of Section 11(7) of the 1996 Act to provide for finality only in case (i);

(iv) Where the Section 11 Court leaves issues or objections for the determination of the arbitral tribunal, there is need for an express power to be conferred upon the Court to give it the option of ordering that such issues or objections should be decided first as preliminary issues by the arbitral tribunal. This will help avoid subjecting parties to a lengthy and perhaps infructuous trial before the arbitral tribunal.

4. ARBITRATIONS IN ECLIPSE: *SUKANYA HOLDINGS*

Under the 1940 Act an arbitration stood automatically eclipsed if its entire subject matter was covered by a civil suit filed in court. This arose on a joint reading of Sections 34 and 35 of the 1940 Act and gave rise to several conundrums. A civil suit became the recourse of every recalcitrant defendant to which additional and unnecessary parties were added and it was ensured that the whole of the subject matter of the arbitration was covered by the suit. It would then be left to the Claimant in the arbitration to mount an application under Section 34 of the 1940 Act to seek stay of the suit. This was a lengthy, expensive and often unsuccessful exercise.

It was initially felt that Sections 5 and 8 of the 1996 Act had laid to rest these ghosts. However the Supreme Court in *Sukanya Holdings*,[19] without much reasoning, concluded that even under the 1996 Act, it was not possible to bifurcate a suit into its respective causes of action against those parties who were parties to the arbitration agreement and those who were not. Consequently that a suit on the same subject matter as an arbitration but with additional parties (whether necessary or unnecessary) could not be stayed or referred to arbitration under Section 8 of the 1996 Act. In other words a parallel civil remedy was allowed with all its consequences.

It is well settled that where a cause is pending before a public authority such as a Court, any parallel proceeding before a private forum would have to yield and would stand superseded to avoid the possibility of conflicting findings and multiplicity of proceedings. This decision came as manna from heaven for several defendants who proceeded to file contrived but composite suits against claimants in arbitration and other parties, almost invariably, unnecessary ones. *Sukanya Holdings* having made no distinction between the addition of necessary parties and unnecessary ones, the judicial authority entertaining an application under Section 8 of the 1996 Act had no option but to refuse to refer the suit to arbitration notwithstanding that it was covered by an arbitration agreement.

The *Sukanya Holdings* principle was extended to foreign arbitrations in *Novartis Vaccines & Diagnostics Inc. v. Aventis Pharma*[20]. The language of Section 45 of the 1996 Act is almost in *pari materia* with that of Article II (3) of the New York Convention and Section 3 of the Foreign Awards Act 1961. Thus a foreign arbitration could run the risk of a parallel suit in India on the same subject matter and of conflicting orders and decrees being passed by an Indian court. Any award resulting from that foreign arbitration would run the risk of not being enforceable in India on the ground that Indian public policy could not countenance a parallel private forum determining a matter that was the subject matter of a pending or disposed of Civil Suit before a court in India. Although the *Novartis Vaccines* decision admitted of the possibility of an application to delete unnecessary parties prior to an application under Section 45 of the 1996 Act, the burden of a lengthy and somewhat complicated hearing to have a parallel suit referred to arbitration, remained.

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19 (2003) 5 SCC 531.

20 Judgment of the Bombay High Court dated 3rd October 2007 in Arbitration Petition No.302 of 2007.

5. ONLY NECESSARY PARTIES CAN JUSTIFY A SUIT

A simple amendment to Sections 8 and 45 will easily resolve this imbroglio. A proviso can be added to each of them as follows:

> *"Provided that no such reference shall be made if the parties to the action who are not parties to the arbitration agreement, are necessary parties to the action."*

Such a proviso will ensure that where parties are added only to complicate an arbitration, they will be disregarded. On the other hand if the added parties are necessary that is to say they are parties in the absence of whom the Court would not be able to pronounce its decision, then a composite suit would be legitimate and would not be merely a means of avoiding arbitration.

6. THE RISING TIDES OF JUDICIAL REVIEW: *SAW PIPES* AND *VENTURE GLOBAL*

The scope of judicial intervention has always vexed the relationship between the reviewing court and the arbitration. Section 34 sets out the grounds on which an arbitral award may be set aside by a Court and it is under this provision that the boundaries of judicial intervention have been extended by the judgment of the Supreme Court in *Saw Pipes*.[21] In *Saw Pipes* the Supreme Court extended the scope of the expression "public policy" and consequently the ability to challenge an award to a point where the simplicity and focus of the 1996 Act has been lost. Later the Supreme Court crossed the Rubicon by allowing a Section 34 challenge to a foreign award[22]. The shackles of judicial restraint imposed by the 1996 Act have, for the moment, thus been thrown off.

7. PARLIAMENT'S ATTEMPT TO RESTRICT JUDICIAL REVIEW: SECTION 34 OF THE 1996 ACT

Under the 1940 Act an award could be set aside on, amongst others, the ground of an error of law on the face of the Award. Parliament intended to make the scope of review narrower by restricting the challenge to only a situation where the award was in conflict with the public policy of India. This sub served the objects of globalization of arbitration law and the synergizing of the approaches to foreign awards with those in respect of domestic awards.

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21 Saw Pipes, *supra* note 5.

22 Venture Global, *supra* note 6.

For the first few years after the 1996 Act, the approach of Courts in India to awards was deferential.[23] In *Konkan Railway Co. Ltd. v Mehul Construction Co.*[24] the Supreme Court after referring to the adoption of the UNCITRAL Model Law and the goal of the new liberalization policy of the Government of India the Supreme Court held that Parliament enacted the 1996 Act *"To attract the confidence of the International Mercantile community ..."* and that *"Under the new law the grounds on which an award of an arbitration could be challenged before the Court have been severely cut down ... "*. The Supreme Court held that "*.... the statement of objects and reasons of the Act clearly enunciates that the main objective of the legislature was to minimize the supervisory role of Courts in the arbitral process."*

In *Vijaya Bank vs. Maker Development Services Pvt. Ltd.*[25] a Division Bench of the Bombay High Court held that a mistake in the application of the substantive law of India would not render the award one in conflict with the public policy of India under Section 34(2)(e)(ii) of the 1996 Act. The narrower concept of "international public policy" was preferred even as regards a domestic award. The Supreme Court had enunciated this narrower concept in *Renusagar Power Co. Ltd. v. General Electric Co.*[26] in the context of a foreign award to hold that the expression "*public policy*" could not mean a contravention of law simpliciter. The Supreme Court had recognized the distinction made in certain legal systems (such as the French) between wider public policy for domestic awards and narrower public policy for foreign awards.

8. SAW PIPES: THE RIPOSTE

All this changed with the judgment of the Supreme Court in *Saw Pipes*.

(i) Facts: ONGC wanted pipes to case the tubes of its oil wells. It floated a tender. Bids were called for. The pipes were to be supplied on or before certain dates. Liquidated damages were payable @ 1% of contract price per week of delay subject to a ceiling of 10%. ONGC was entitled to deduct this amount from the bills for price of material submitted by Saw Pipes. Saw Pipes delayed delivery of the pipes till well after the due dates. ONGC

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23 Olympus Superstructure v. Meena Khetan, AIR 1999 SC 2102; Narayan Lohia v. Nikunj Lohia, AIR 2002 SC 1139, para. 18.

24 (2000) 7 SCC 201.

25 (2001) 3 Bombay Cases Reporter 652, para. 21 & 26.

26 AIR 1994 SC 860.

deducted large amounts from Saw Pipes' running bills. Saw Pipes made a claim for recovery of these amounts from ONGC. ONGC opposed. The matter was referred to arbitration.

(ii) The award: The arbitral tribunal held (after evidence was led) that ONGC had failed to prove it had suffered loss as a result of the delays in delivery. Hence ONGC was not entitled to the liquidated damages and could not have made any deductions from the running bills.

The arbitral tribunal followed the principles enunciated in a series of Supreme Court judgments viz. that the sum specified in the contract as liquidated damages was not payable as compensation, unless it was impossible for the Court to assess compensation; and the sum was a genuine pre-estimate of losses and not a penalty. These Supreme Court judgments were delivered by co-ordinate or larger benches than the bench that decided *Saw Pipes*. They were therefore binding on the *Saw Pipes* bench.

The Supreme Court in *Saw Pipes* however, effectively reconsidered the ratio of the aforesaid Supreme Court judgments[27] and restated what in its opinion was the correct law of liquidated damages.[28] Obviously, the Arbitral Tribunal could never have had the benefit of this restatement or reinterpretation of the law by the Supreme Court. Yet, having engaged in such reinterpretation the Supreme Court then held[29] that the Award on its face was erroneous with regard to a proposition of law and therefore violated Section 28(3) of the 1996 Act. The Supreme Court referred[30] to various judgments under the 1940 Act and before, which held that a patent error of law on the face of the award and which formed the basis of the award could result in an award being set aside. The Supreme Court applied this test to the award before it, held that the law as to liquidated damages had not been correctly applied by the Arbitral Tribunal and proceeded to consequently set aside the award[31].

The Supreme Court thus interfered with the award in *Saw Pipes* purely on the basis of a mistake (according to the Supreme Court) in the

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27 Saw Pipes, *supra* note 22, para. 44 - 52.

28 Saw Pipes, *supra* note 22, para. 46.

29 Saw Pipes, *supra* note 22, para. 55.

30 Saw Pipes, *supra* note 22, para. 56 - 60.

31 In fact, as para. 67 of the judgment shows the Supreme Court went much further and even reversed the Award on findings of fact to hold that in contracts of the nature of the contract being considered, it would be difficult to prove exact loss or damage suffered by reason of the breach thereof. Saw Pipes, *supra* note 22 at 742(b)-(c).

interpretation of law by the Arbitral Tribunal. This, it was said, was justified because the 1996 Act contained Section 28(1)(a), a provision absent from the Arbitration Act, 1940. The Supreme Court held that the meaning of the term "*public policy*" appearing in Section 34(2) (b)(ii) of the 1996 Act was wide enough, in the case of domestic awards to even incorporate a ground of patent illegality.

9. WHY SAW PIPES IS PLAINLY WRONG EVEN AS A MATTER OF LAW – A CHOICE OF LAW PROVISION IS MISREAD AS ONE INTRODUCING MISTAKE OF LAW AS A GROUND FOR REVIEW

Saw Pipes is based on a misinterpretation of Section 28(1)(a) of the 1996 Act. Section 28 applies to all domestic arbitrations held in India[32]. Section 28 also applies to international commercial arbitrations held in India[33].

International commercial arbitrations usually take place in a country that is neutral to the parties i.e. where neither party has a place of business or residence. The governing laws may differ depending upon:

(i) The law of the procedure of the reference to arbitration (the curial law);

(ii) The substantive law governing the dispute (the proper law);

(iii) The law governing the enforcement and recognition of the award.

Conflict of law rules determine how the applicable laws will be chosen. Conflict of law rules may vary from one country to another. It is

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32 "28. Rules applicable to substance of dispute
(1) Where the place of arbitration is situate in India –
(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
(b) in international commercial arbitration –
(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
(iii) failing any designation of the law under sub-clause (ii) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.
(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

33 Section 2(1)(f) of the 1996 Act defines "international commercial arbitration" and such arbitrations require at least one non-Indian party.

not uncommon for the curial law applicable, to be determined to be different from the law applicable to the substance of the disputes or to the enforcement of the Award. One of the presumptions under conflict of law rules is that the law of the seat of the arbitration (the *lexi arbitri*) will usually be the curial law. But this is not always so, because parties can always contract say to hold an arbitration in India but apply the procedural laws of Singapore or that of an arbitral institution such as the International Chamber of Commerce (Hereafter "the ICC") which has its own procedure and rules. Determining the law applicable to the substance of the dispute is even more difficult and involves the process of ascertaining the proper law that governs the parties by applying various tests including the test of the law which has the closest nexus or connection to the disputes. All these determinations have far-reaching consequences, not all of which might have been contemplated by the parties when they decided to hold the arbitration in a particular neutral place.

Section 28 of the 1996 Act routinely incorporated what was there in Article 28 of the UNCITRAL Model Law. But this was as regards international commercial arbitration. As far as other arbitrations also held in India but between two Indian parties, Section 28(1)(a) did not leave the choice of the substantive law to the election of the parties but required the substantive law mandatorily to be Indian law. No risk therefore could arise of the arbitral tribunal applying the wrong substantive law. Under Part I of the 1996 Act the arbitral tribunal was not free to disregard the substantive law of India. Accordingly the arbitral tribunal was mandatorily to decide the dispute submitted to arbitration "*in accordance with the substantive law for the time being in force in India*." This was not one of the derogable provisions of the 1996 Act[34]. Thus the parties could not contract to the contrary. However the procedural law (the curial law) of the arbitration was still left to the choice of two Indian parties by contract.

Section 28(1)(a) of the 1996 Act is clearly only a choice of law provision. Parliament's intent was to offer a choice in respect of the applicable substantive law only in cases of international commercial arbitration (if held in India) but to deny that choice to an arbitration held in India between two Indian parties. It does nothing more than that. Indeed by using the term "*substantive law*" the Act leaves it open even to two Indian parties to adopt a foreign procedural law in an arbitration held in India.

Section 28(1)(a) does not require arbitrators to apply Indian

34 Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105.

substantive law without mistake. If Parliament had intended to introduce mistake of law as a ground of challenge into the 1996 Act, it could have done so easily and directly by incorporating the necessary explicit ground in Section 34.

The fact that Section 28(1)(a) is only a choice of law provision is apparent from 28(1)(b) which governs international communal arbitrations. The parties in such arbitration may provide for a foreign law to apply to the dispute. Foreign law is always a question of fact. If a patent mistake in application of foreign law will result in the award being set aside, this will in essence mean that the award is being set aside on grounds of a mistake (albeit patent) of fact! A mistake of fact has never been recognized in any jurisdiction, much less in India as constituting a ground to set aside an award. Even *Saw Pipes* recognizes that an error of fact (or law for that matter) is not an available ground of challenge under the 1996 Act[35].

10. GRAPPLING WITH MISTAKE OF LAW AS A NEW HEAD OF CHALLENGE

The mandate that the arbitrator is not free to apply a foreign law to the dispute and must apply only Indian substantive law does not introduce the ground of mistake of law as a challenge to an award. The Supreme Court in *Saw Pipes* construed Section 28(1)(a) as being a direction to decide the dispute without making any mistake in application of Indian law or without being contrary to the substantive provisions of Indian law[36]. The problem was that the 1996 Act provided no head under which such a challenge could be legally compartmentalized. The only recourse for the Supreme Court was to hold that an illegality in the award i.e. a mistake of law in the award would amount to something that was contrary to the public policy of India. The Supreme Court qualified its finding by requiring such illegality:

(i) To be "*patently*" in violation of some statutory provision that is on the face of the Award; and

(ii) To go to the "*root of the matter*".

Mistake of law leads to a vexed question. What of cases where there is no binding judgment and the parties chosen adjudicator, i.e. the arbitrator takes a plausible view of the law. Is such a view open to a review by a Judge? Is the legal decision of an arbitrator open to a full-fledged second

35 Saw Pipes, *supra* note 22, para. 55.

36 Saw Pipes, *supra* note 22, para. 13 & 15.

look by a judge of a Court of law? Is it fair that a bonafide interpretation of law by an arbitrator (who might often not be a lawyer), in whom the parties have reposed confidence and have agreed to refer their disputes including on law, should be substituted by the decision of a judge? The parties did not want a judge to decide their disputes. That is why they went to arbitration in the first place. Can a judge under Section 34 substitute his own interpretation of the law for that of the arbitrator on the basis that the arbitrator was, in retrospect, wrong and hence a patent illegality has resulted?

In a subsequent decision in the case of *Mc.Dermott International Inc. v. Burn Standard Co. Ltd.*[37] the Supreme Court extended the boundaries of interference by including within "*public policy*", two further heads i.e. whether the reasons are vitiated by perversity in evidence in contract and whether the award is vitiated by internal contradictions. The terms "*perversity*" and "*internal contradictions*" are undefined terms giving licence to a series of challenges.

11. THE PROBLEM WITH PATENT ERRORS

A patent error is self-evident and does not require any examination or argument to establish it. This is different from a mere mistake in applying or interpreting the law. A patent error of law must be manifest on the face of the award and must be based on a clear ignorance or disregard of the provisions of law[38]. *Saw Pipes* discloses that the Supreme Court undertook an extensive analysis of the law on liquidated damages and the need to prove loss. The Supreme Court effectively first interpreted and enunciated the law and then found the arbitral tribunal's application of such law to be erroneous. This process is inconsistent with a "*patent illegality*" and suggests that the Supreme Court did not exclude error of law when it referred to "*patent illegality*".

The other problem is that illegality or mistake of law will always be patent since the 1996 Act requires, unless otherwise agreed to between the parties, the award to state the reasons upon which it is based[39]. If reasons are to be given, then each award will always have to give not only factual, but also legal reasons and this necessarily would mean some statement of the law as the arbitrators understand it. All errors made in the appreciation

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37 (2005) 10 SCC 353.

38 Prem Singh v. Deputy Custodian General Evacuee Property, AIR 1957 SC 804; Basappa v. Nagappa, AIR 1954 SC 440; Sayed Yakoob v. K.S. Radhakrishnan, AIR 1964 SC 477.

39 Section 31(3).

of the law would hence inevitably be patent errors or patent illegalities.

12. How Deep is the Root of the Matter?

That leaves the second qualification introduced by *Saw Pipes* viz. that the illegality must go to the root of the matter and must not be of a trivial nature. Here too the Supreme Court has left the matter in limbo. It does not explain (and indeed even in later judgments has not explained) what it meant by an illegality going to the root of the matter. Does it mean that if the illegality forms part of the legal basis for deciding the matter, it goes to the root of the matter? What if there is more than one basis for arriving at the legal decision in an arbitration. If the illegality affects but one of these, and that one is the primary basis, would such an illegality be said to go to the root of the matter. What if the illegality affects the result? Whether trivial or not, would that go to the "*root of the matter*". What if there is another independent ground on which the result achieved in the award can be upheld. Can a patent illegality in an independent ground vitiate the award?

13. An Attempt at a Solution

Section 34 of the 1996 Act will have to be amended if these problems are to be resolved. One approach is to make express the areas in which judicial intervention is proscribed. The other is to clearly differentiate between the head of public policy and the head of error of law and to demarcate and limit their respective spheres of operation. Amendments to Section 34 could read something like this:

(a) An explanation could be added viz.

> "*For the purposes of this Section 'an award is in conflict with the public policy of India' only when the award is contrary to the fundamental policy of India or the national interests of India or fundamental concepts of justice or morality.*"

(b) Independently of "*public policy*" the following could be identified as grounds to set aside awards:

> *"(i) a serious error in a proposition of law appearing on the face of the award; or*
>
> *(ii) a conscious and manifest disregard of the law or of a prohibition against the concerned relief in the contract to which the arbitration agreement relates;*

(iii) and which error or disregard forms the only basis of the award or for any relief given in the award and which has caused or is likely to cause substantial injustice to the applicant."

The 176th Report of the Law Commission (2001) had suggested an additional ground of challenge if there was an error apparent on the face of the award giving rise to a substantial question of law. However what is a substantial question and what is not can often be a matter of the Chancellor's foot. One does however come across awards that are completely opposed to law such as allowing patently time barred or prohibited claims. A limited application of the manifest disregard doctrine of U.S. Courts may be allowed. Manifest disregard of the law is not the same as a mistake of law. It is rather a facet of misconduct which requires a finding that the arbitrators consciously ignored or refused to apply the applicable law although they were aware of it[40]. A Court must have the power to set aside such awards without having to resort to a residuary ground of "*public policy*". If we deny Courts that power we are in a sense compelling them to expand, rather than restrict, the unguided head of "*public policy*".[41] The proposed amendments are sufficiently caveated and should not be susceptible to expansion of review by legal ingenuity. It is hoped that these amendments will clearly delineate the limited operation of the head of "*public policy*".

(c) At the same time the section could indicate the areas that are immune from judicial review:

"*Provided however that an award shall not be set aside:*

(i) on the ground of a mere error of law or erroneous application of the law; or

(ii) *by interference with a finding of fact or by a re-appreciation of evidence.*"

(d) The law must encourage Courts to respect party autonomy and the jurisdiction of the Arbitral Tribunal. One way of doing this is to make specific provision for a compulsory remit of the matter to the Arbitral Tribunal in all cases of challenge (which the Court believes prima facie are sustainable). This should not include a remit in cases where the integrity of the Tribunal itself is challenged say on grounds of misconduct, bias, fraud or corruption.

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40 This was the principle accepted by the U.S. Supreme Court in Wilko v. Swan, 346 U.S. 427.

41 Public policy was famously described as "a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail." Burroughs J., Richardson v. Mellish, (1824 – 34) All E.R. 258.

14. *BHATIA INTERNATIONAL*: THE SLIPPERY SLOPE IN APPLYING DOMESTIC STANDARDS TO FOREIGN AWARDS

Under the 1937 Act and the Foreign Awards Act 1961 foreign awards were treated with judicial deference as required by the Geneva Convention and the New York Convention. In *Renusagar* the Supreme Court had applied a narrower standard of the term "*public policy of India*" whilst reviewing a foreign award that had come for enforcement and limited this to cases where the enforcement of the award would involve more than just a violation of law in India.

In *Bhatia International v. Bulk Trading S.A.*[42] the Supreme Court extended the benefit of Section 9 of Part-I (which gave Courts the power to grant interim reliefs in aid of arbitrations) to even foreign arbitrations on the premise that Part-I applied not only to domestic arbitrations but also to foreign arbitrations. This was a Trojan horse. If Section 9, which was in Part-I, was extended to foreign arbitrations then what of the rest of Part-I? The Supreme Court held that the provisions of Part-I applied to international commercial arbitrations (i.e. arbitrations involving at least one Indian party) although held outside India, if not excluded by express or implied agreement. In respect of such arbitrations even the non-derogable provisions of Part-I could be excluded[43]. In *Bhatia* the Supreme Court, however, did enter a caveat: to the extent that Part-II contained provisions the corresponding provisions in Part-I would not be applicable to foreign awards covered by Part-II. These would include the provisions for enforcement of foreign awards such as Sections 45 and 54.

This was a slippery slope. Part-II did not have a provision for challenging a foreign award. This was precisely because it is almost axiomatic under the New York Convention that a foreign award can be challenged in only one Court (to the exclusion of all others) and that such Court was invariably the Court with jurisdiction over the place of the arbitration. If the place of enforcement was different, as it often was, no question of the enforcing Court considering a challenge to the Award could arise.

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42 Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 [Hereafter "Bhatia"].

43 *Id.* para. 21.

15. THE VENTURE GLOBAL ENIGMA

It took only a few years for the next step to be taken and this was done in *Venture Global Engineering v. Satyam Computer Services Ltd.*[44]. In *Venture Global* the Supreme Court, following *Bhatia,* held that the entirety of Part-I of the 1996 Act was applicable even to a foreign award and that recourse to the provisions of Section 34 of the 1996 Act was available to challenge a foreign award in India. The Supreme Court held that to apply Section 34 to foreign awards was not inconsistent with the provisions of Section 48 (for enforcement of foreign awards) which fell in Part-II of the 1996 Act. The Supreme Court also held that the extended definition of Indian public policy as laid in *Saw Pipes,* could not be bypassed by taking the award to a foreign country for enforcement[45].

This was a definite departure from the New York Convention. The Convention's framers contemplated that the Convention's public policy defence should be construed narrowly. The United States Court of Appeals (Second Circuit) has held that arbitral awards should be denied enforcement only where the asserted public policy "*would violate the forum State's most basic notions of morality and justice*".[46] Distinguished writers have observed that *"not every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions or as having an absolute, universal value"*[47]. It is uniformly accepted that the New York Convention has a pro-enforcement bias[48]. Neither the New York Convention nor the UNCITRAL Model Law permit any review of the merits of an award.[49] The principle that the merits of the

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44 Venture Global, (2008) 4 SCC 190.

45 Venture Global, *supra* note 6, para. 33 & 35.

46 Parsons Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F. 2d.969 (2d Cir. 1974), I Y.B. Com. Arb.205 (1976).

47 FOUCHARD, GAILLARD & GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 996 (1999 Kluwer)

48 Paulsson, *May or Must under the New York Convention: An Exercise in Syntax and Linguistics,* 14(2) ARB. INT'L 227, 228 (1998); Van den Berg, *New York Convention of 1958 – Consolidated Commentary,* XXVIII Y.B. Com. Arb 562, 650 (2003); *See generally* Hanotiau and Caprasse, *Public Policy in International Commercial Arbitration, in* GAILLARD AND DI PIETRO (ED.), ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS. THE NEW YORK CONVENTION IN PRACTICE (2008 Kluwer)

49 REDFERN & HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 444 (4th ed. 2004 Oxford University Press), para. 10 - 33.

case cannot be reviewed by the enforcing Court is firmly entrenched as a cardinal limit beyond which judicial review is unacceptable[50].

This Laxman-rekha was recognized by the Supreme Court in *Renusagar* in the context of Section 7 of the Foreign Awards Act 1961 to hold that a party was not entitled to impeach an Award on merits.[51] Section 7 of the Foreign Awards Act 1961 (now repealed) is in *pari materia* with Section 48 of the 1996 Act.

An award must be challenged in the Court of the seat of the arbitration[52]. The language of Article V (1)(e) of the New York Convention (corresponding to Section 48(1)(e) of the 1996 Act) which refers to the setting aside of an award "*by a competent authority of the country in which, or under the law of which, that award was made*". The emphasized words have been held to refer to the procedural law governing the arbitration and not to the substantive law, i.e. a reference to the law of the suits of the arbitration[53]. Though *Redfern and Hunter* allow for the theoretical possibility that an award may be challenged under the law of a country other than in which the award was made[54], Prof. Van den Berg suggests that this provision of the New York Convention should be regarded as a "*dead letter*"[55].

In *Venture Global*, the Supreme Court could have, notwithstanding *Bhatia*, taken the view that Section 34 of the 1996 Act was not available to challenge a foreign award. Two courses were open to it viz:

(i) That the phrase *"……. under the law of which, that award was made ……"* necessarily referred to the law of the country of the curial law of the arbitration (which invariably was the law of the seat of the arbitration);[56]

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50 VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 269 (1981 Kluwer Law International): According to Van den Berg this is because the exhaustive list of grounds for refusing enforcement does not include mistake of fact or law by the Arbitral Tribunal.

51 Renusagar, *supra* note 14, para. 32-37.

52 Redfern & Hunter, *supra* note 50, para. 9-45 at 428.

53 International Standard Electric Corporation v. Bridas sociedad anonima petrolera industrial y commercial, 745 F. Supp. 172 (S.D.N.Y. 1990): "the phrase …….. undoubtedly referenced the complex thicket of the procedural law of arbitration obtaining in the numerous and diverse jurisdictions of the dozens of nations in attendance at the time the Convention was being debated".

54 Redfern & Hunter, *supra* note 50, para. 9-45 at 428.

55 Redfern & Hunter, *supra,* note 50 at 328.

56 This interpretation is well settled under the New York Convention. Several U.S. decisions to this effect were cited before the Supreme Court in Venture Global but not considered. *See* Venture Global, *supra* note 6, para. 15.

(ii) Alternatively that the provisions of Section 48 of Part II of the 1996 Act were special provisions and furnished the identical grounds for resisting enforcement as were provided by Section 34 of Part I (a general provision) for challenging an award. Hence the special provision in Section 48 for foreign awards would exclude the provision contained in Section 34.[57]

The above discussion leads, inexorably, to the following conundrums created by *Venture Global***:**

(a) Under the New York Convention, the UNCITRAL Model Law and the 1996 Act, an award can be challenged in only one Court (to the exclusion of all others). If a foreign award can be challenged in India (the enforcing country) that will lead to Courts of two countries entertaining separate challenges to the same foreign award. This is because the law of the lex arbitri (which is of the seat of the arbitration) will invariably permit a challenge. The grounds of challenge and the scope of review may well differ leading to the legal chaos of different results and conflicting findings. This will create a jurists' nightmare and a lawyer's paradise – not one of the objects of the 1996 Act;

(b) Section 48 of the 1996 Act will remain available even if recourse to Section 34 is permitted. Will Section 48 then be rendered otiose? Will there be two separate proceedings and judgments – one for challenge and the other for enforcement of foreign awards? It is reasonable to expect that the recalcitrant party will prefer to challenge under Section 34 since that gives him a more intrusive judicial review;

(c) Will the enforcing Court (in India) assume a jurisdiction to set aside foreign awards on the ground of "*patent illegality*" (in other words on the ground of mistake or error in applying the law). *Venture Global* in introducing the *Saw Pipes* concept of Indian public policy has permitted a review (albeit a limited one) on the legal merits of a foreign award. This runs counter to the letter and ethos of the New York Convention.

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57 This was the view taken by the Bombay High Court in Force Shipping v. Ashapura Minechem Ltd., (2003) 6 Bombay Cases Reporter 328; Jindal Drugs v. Noy Vallesina Engineering S.P.A. Italy, (2002) 3 Bombay Cases Reporter 554; Inventa Fischer v. Polygenta Technologies Ltd., (2005) 2 Bombay Cases Reporter 364.

It seems unlikely that the Supreme Court will reconsider *Venture Global*, much less *Bhatia International*. Yet we must not forget the warning given by the U.S. Supreme Court when it said that the United States:

> *"….. cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts."*[58]

16. PART I MUST BE RESTRICTED TO DOMESTIC ARBITRATIONS

Again a brief amendment is all that is required to resolve this problem. Section 2(2) of the 1996 Act can be amended to insert the word "only" to provide that Part I shall apply only where the place of arbitration is in India. A proviso can however be added to ensure that the facilitating and beneficial provisions in Sections 9 (interlocutory, protective and other orders in facilitation of an arbitration and an award) and Section 27 (making available the powers of a civil court for the purpose of summoning of witnesses and evidence) would be available whether or not the place of arbitration was India provided that an award when made would be enforceable and recognized in India under Part II of the 1996 Act.

17. THE CONDUCT OF ARBITRATION NEEDS OVERHAULING

When one apportions responsibility for the malaise that has gripped arbitration in India a disproportionate share is often attributed to what is perceived as the inclination of Courts to interfere with arbitration and awards. This is a dangerous and insular approach and will not lead to genuine reform of arbitration in India. One has to recognize the inherent weaknesses of the arbitral process in India if there is to be a real solution. You can't fix it unless you know what's broken. The structural problems stare us in the face and they are:

(i) An indifferent approach to the conduct of arbitrations: Any lawyer who has appeared in an arbitration conducted under the rules of organizations such as the ICC or the London Court of International Arbitration ("LCIA") or similar institutions will tell you of the difference between them and arbitrations in India. The former are tightly controlled and focused on completing the task in the shortest possible time. The latter often proceed at a leisurely pace. Hearings are conducted for sessions shorter than a full day and often in the

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58 M/s Bremer v. Zapata Offshore Co., 407 U.S. 1 (1972).

evenings or weekends as if to suggest that arbitration is something of lesser importance than 'real' work in Court. This is more often than not caused by accommodation seeking lawyers and softhearted arbitrators;

(ii) The lack of a dedicated Arbitration Bar: (i) above is also a symptom of the lack of a specialized arbitration bar. Arbitrations are given step motherly treatment by lawyers. This is far removed from the situation abroad where lawyers specialize and some devote themselves exclusively to arbitration;

(iii) The delays in disposal of arbitrations: Arbitration has long since ceased to be a genuinely alternative and speedier dispute resolution mechanism. Barring a few exceptions (usually where the tribunal is a sole arbitrator) most tribunals take years to make an award. This is as much due to (i) and (ii) above as it is to a near obsessive pre-occupation of some tribunals with procedural punctiliousness over substance and expedition. Evidentiary orders often enforce strict rules of evidence and procedure – despite Section 19(1) of the 1996 Act which frees arbitral tribunals from the rigours of the Code of Civil Procedure 1908 and the Evidence Act 1872. There is also perhaps an over adherence to rules of natural justice. Section 18 of the 1996 Act[59] is given undue precedence over Section 19.[60]

(iv) Costs : The reluctance of arbitrators to award actual or punitive costs, encourages a recalcitrant party to frustrate the arbitral process by delaying the arbitration and the award.

18. REFORMATIVE ACTIONS

We cannot hope for a miraculous transformation in the psyche of lawyers and arbitrators. Short of that the next best solution is to take some reformative action that will nudge arbitration towards swifter and more focused resolutions viz:

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59 "The parties shall be treated with equality and each party shall be given a full opportunity to present his case."

60 "Section 19 Determination of rules of procedure – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (V of 1908) or the Indian Evidence Act, 1872 (1 of 1872);
(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings;
(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate;
(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

(i) Mandating by amendment to the 1996 Act, the imposition of realistic and/or punitive costs by Arbitral Tribunals;

(ii) Setting an overall time limit to arbitrations say of two years (a relatively liberal period) for an award after which any party could approach the concerned Court for an order extending time for an award.[61] This too will require an amendment to the 1996 Act. An appropriate provision should also be made to cover pending arbitrations. The Court at that stage should be empowered to replace one or all of the arbitrators and to direct that the matter proceed from that stage before a new tribunal and on the basis of the evidence / material already on record. The amendment could also provide for empowering an order directing forfeiture of an Arbitrator's outstanding fees if the Court deems fit in the circumstances.

(iii) Encouragement of institutional arbitration : There is no easy way to do this. Parliament cannot make institutionalized arbitration compulsory. However the existence of effective arbitral institutions in India will have a ripple effect. When Indian parties witness the benefits of a supervising institution, more and more arbitration agreements will incorporate institutionalized arbitration. The benefits are tangible : swift appointment of arbitrators without a lengthy Section 11 hearing, close monitoring of the progress and conduct of the arbitration and greater credibility for the award. Arbitrators too will welcome the umbrella of an institution. Strict institutional rules and timelines will aid them in refusing indulgences sought by parties and lawyers and will give their procedural orders the security of the imprimatur of an arbitral institution.

There will of course remain a few other areas requiring legislative "tidying up" such as conferment of an express power upon arbitrators to decide questions of fraud, malafides, misconduct, misrepresentation and the like[62]. These are matters of detail. If the five major problems are addressed

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61 The 1940 Act had a time limit of four months (from entering upon a reference) in the Schedule to that Act. This was unrealistic. Parties had to file applications under Section 28 of the 1940 Act for enlargement of time to make an award. This often resulted in greater delays, for the arbitration was interrupted until the Court passed an order extending time. But since four months was unrealistic and Section 28 encouraged routine extension orders, matters were delayed. With a more realistic period of two years it is expected that the imposition of a time limit will encourage arbitrators to complete matters by setting stricter time constraints on lawyers.

62 This is necessitated by the Supreme Court decision in N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 which, applying law laid down under the 1940 Act, held that cases where there

arbitration can be kick started. The inherent strengths of Indian arbitration can then be uncoiled: a strong commercial and trial action bar, relatively affordable legal costs, a large body of able arbitrators and an experienced judiciary.

There are calls within the legal community for a more intrusive regime of judicial review of arbitrations and awards. To my mind this will be a retrograde step. The approach towards arbitration cannot be that of the Queen of Hearts in Lewis Carroll's Alice in Wonderland. We cannot afford to chop off the head of arbitration. Instead, by judicious parliamentary intervention, a seemingly lost cause can yet be salvaged. It is time the engine was repaired, but we badly need the tools. Let us vindicate the man who used to stand outside the Law Courts carrying a placard that read "Arbitrate Don't Litigate"[63]. The arbitral community of India must rise to the challenge. The alternative is too gloomy to contemplate.

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were allegations of fraud and malpractice could not be decided in arbitration but should be tried in a Court of law.

63 Re All India Groundnut Syndicate, (1944) 47 Bombay Law Reporter 420, Blagden, J., who recounts a story he heard from Lord Justice Goddard, says that the other side of the placard read "Beware of Lawyers" and that the man did not know what great favour he was bestowing upon lawyers when he exhorted litigants to arbitrate!

ARBITRATION IN INDIA: SEPARATING THE STREAMS

Prof. Doug Jones*

Abstract

The Arbitration and Conciliation Act 1996, despite being a welcome step towards combating the backlog of cases in Indian Courts, has not had the desired effect, and there is a great deal of room for improvement. There are two major challenges which need to be addressed in order to improve arbitration in India. The first is the culture of treating Indian arbitration and International arbitration in the same way. The second is the constant intervention of courts in the arbitral process. The author outlines several instances of controversial court interference. Although the object of the 1996 Act was to modernize arbitration in India, and move towards UNCITRAL model law, it has not had this effect. The author proposes that a separate legislative regime is required for international arbitration, by doing so India will be able to develop jurisprudence which is consistent with that of other nations where international arbitration thrives. The author proposes that a bifurcated system will allow courts to continue being more hands on with regard to Indian arbitration, and have a less interventionist approach to international arbitration.

1. INTRODUCTION

Litigation in India is exceptionally time-consuming and expensive and with an astronomical number of pending cases, the introduction of the Arbitration and Conciliation Act 1996 (Hereafter "the Act") and the subsequent reforms to the Act were a welcomed step in the effort to combat the backlog of cases and encourage the use of Alternative Dispute Resolution.[1] However, the Act has not had the desired effect and there is much room for improvement.

The main challenges have been first, that the culture in India is to treat domestic and international arbitration as the same when they should be treated differently. This paper will support the idea that separation into two streams, or a bifurcated system where international arbitration is treated differently, would be more desirable and improve India's global profile as a

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* The author is Partner at Clayton, Utz and is currently serving as President, Chartered Institute of Arbitrators. The author gratefully acknowledges the assistance provided in the preparation of this paper by Shomaice Zowghi, Legal Assistant, Clayton Utz, Sydney.

1 Indian Courts currently have an estimated backlog of 30 million cases and a delay of 15 years to dispose of a single matter. Also shortage of judges, just 11 for every 1 million people compared to 51 in UK and 107 in USA. *See also* N Dewan, *Arbitration In India: An Unenjoyable Litigating Jamboree!,* 3(1) ASIAN INT'L ARB. J. 99-123 (2007).

seat for international arbitration. Such a system operates in Australia where domestic and international arbitrations are covered by two separate pieces of legislation that cater to these two distinct fields.

Secondly, Indian courts tend to be too involved in arbitral proceedings and have a history of local protectionism. When disputes touch on Indian law, the Indian courts are quick to become involved and find backdoors around the Act, despite the introduction of the UNCITRAL Model Law provisions into the Act in an effort to reduce court intervention. A less interventionist approach to arbitration needs to be taken in order to bring practice in line with the intended objectives of the Act.

2. INDIAN INTERPRETATION OF THE ACT

Historically the Indian courts have revealed an alarming propensity for intervening in the arbitral process and have on many occasions interpreted the Act in a manner contrary to the underlying principles of international arbitration.[2] Some commentators have suggested that the Indian courts' approach has been seasoned by the history of injustice suffered by Indian parties in international arbitrations.[3] This injustice in some cases occurred because of the economic and political problems India has faced, notably its acute foreign exchange shortages, meaning that foreign travel was not easy for Indian nationals. Many arbitral awards were produced by international arbitration tribunals against Indian parties as a result of poor legal representation.[4] It has been suggested that, the foreign arbitrators, as a result of their unfamiliarity with Indian commercial culture, perhaps took an unfairly adverse view of the Indian parties' evidence.[5]

The object of the Act was to move away from the past and modernise domestic and international arbitration in India by implementing the UNCITRAL Model Law on International Commercial Arbitration (Hereafter "Model Law") in order to facilitate a pro-arbitration regime. It also reflected the global trend towards the acceptance of increased party autonomy and the preference for minimising judicial intervention except where it is either necessary to support the arbitration process or required by

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2 *See* Bhatia International v. Bulk Trading S.A., Venture Global Engineering v. Satyam Computer Services Ltd AIR, (2008) SC 1061, ONGC v. Saw Pipes, AIR 2003 SC 2629 and S.B.P & Co v. Patel Engineering, (2005) 8 SCC 618; *See also* S Sattar, *National Courts and International Arbitration: A Double-edged Sword?,* 27 (1) J. INT'L ARB. 51-73 (2010).

3 S Zaiwalla, *LCIA India: Will it change the International Arbitration Scene of India?*, 27 (6) J. INT'L ARB. 4 (2010).

4 *Ibid.* at 4.

5 *Id.*

public policy considerations.[6] It was hoped that the Act would facilitate a pro-arbitration culture in India as the implementation of the Model Law has done in other jurisdictions. The Indian Supreme Court itself has stressed the importance of arbitration in *State of J&K v. Dev Dutt Pandit*[7] at [23]:

> *"Arbitration is considered to be an important alternative dispute redressal process which is to be encouraged because of [the] high pendency of cases in the courts and [the high] cost of litigation. Arbitration has to be looked up to with all earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process".*

In reality however, the implementation of the Act is far removed from the ideals it sought to achieve. There are generally two categories of criticisms that are directed towards domestic arbitrations in India. First, there has been general dissatisfaction with arbitral tribunals and arbitral procedure. More often than not, retired judges are appointed as arbitrators and they are accustomed to formal rules of procedure and evidence by virtue of long tenures behind the bench. Consequently, arbitrations in India tend to become a battle of pleadings and procedure despite the fact that such procedure is not to be automatically applied to arbitration as per section 19(1) of the Act. The judiciary also tend to lack familiarity with international arbitration and this can have serious ramifications such as rulings that are inconsistent with the principles of international arbitration. Moreover, in proportion to the population, there is a shortage of available and skilled arbitrators and well-resourced arbitral institutions in India.[8] Further development of facilities, human resources and greater institutionalisation will increase domestic and international confidence in the Indian arbitration system.

Secondly, the courts have been very interventionist despite the introduction of the Model Law into the Act limiting judicial intervention. A number of judicial decisions have impinged on the attractiveness of arbitration as an alternative to litigation. The ruling in *Bhatia International v Bulk Trading S.A*[9] mandates the application of Part 1 of the 1996 Act, the application of which was previously reserved for arbitrations with their seat in India, to arbitrations involving an Indian party with their seat anywhere

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6 P Nair, *Surveying a Decade of the 'New' Law of Arbitration in India*, 23 (4) ARB. INT'L 699 (2007).
7 (1999) 7 SCC 399.
8 P Nair, *supra* note 7 at 699.
9 (2002) 4 SCC. 105.

in the globe, unless application of the Act is expressly or impliedly excluded by agreement. The ruling has since been misconstrued and misapplied by the Indian courts to fundamentally alter the nature of the Act and widen their jurisdiction by applying Part 1 of the Act to international commercial arbitrations irrespective of the proper law governing the arbitration agreement.[10] The most notable of such instances was in the case of *Venture Global Engineering v. Satyam Computer Services Ltd*[11] where it was held that if the provisions of Part 1 of the Act were applied to an international commercial arbitration, a challenge to the resulting foreign award is maintainable before Indian Courts on the grounds of domestic public policy. The right to challenge the award in Indian courts, according to the ratio of *Satyam*, is triggered by the presence of an "intimate and close nexus"[12] to India and its laws, which is a dangerous ratio if not read in restrictive terms. Commentators have argued that the failure on the part of Indian courts to understand the true import of the *Bhatia* decision has mired international commercial arbitrations held outside India in legal uncertainly in regards to the validity and enforceability of awards arising out of them in India.[13] Although there is some evidence of changing judicial attitudes in more recent decisions,[14] the impact of *Bhatia* and *Satyam* should not be understated as these cases undermine the validity and enforcement of foreign awards which in turn damages the very nature of international commercial arbitration as a means of dispute resolution.

Further instances of controversial court interference can be seen decisions of the Supreme Court in *ONGC v. Saw Pipes*[15] and *S.B.P & Co v. Patel Engineering*.[16] In *Saw Pipes* the Supreme Court held that an award could be set aside on public policy grounds if it was "patently illegal", that is, if

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10 INDTEL Technical Services v. WS Atkins Rails Limited, (2008) 10 SCC 308; Venture Global Engineering v. Satyam Computer Services Ltd, AIR (2008) SC 1061; Citation Infowares v. Equinox Corporation, (2009) 5 UJ 2066 (SC).

11 AIR 2008 SC 1061.

12 Venture Global Engineering v. Satyam Computer Services Ltd, AIR (2008) SC 1061 at 21 as per Tarun Chatterjee and P. Sathasivam, JJ.

13 R Sharma, *Bhatia International v Bulk Trading S.A.: ambushing International Commercial Arbitration Outside India*, 26(3) J. INT'L ARB. 357-372 (2009).

14 *See* Max India Ltd. v. General Binding Corporation, (2009) 3 Arb LR 162 (DEL) (DB); Dozco India P Ltd. v. Doosan Infracore Co. Ltd, (2011) 6 SCC 179; Videocon Industries Ltd. v. UOI, AIR 2011 SC 2040.

15 Videocon Industries, *Id.*: In this case it was held that an arbitral award could be set aside if it was patently illegal, that is, if a patently illegal award were allowed to be enforced, this would be in conflict with the public policy of India and therefore would be liable to be set aside by the courts.

16 (2005) 8 SCC 618.

the arbitral tribunal had committed an error of law. Through interpreting the concept of public policy to include error of law, the *Saw Pipes* decision went beyond the scope of the Act and created a new ground for setting aside arbitral awards. Although the decision was rendered in the context of domestic awards, it has severe implications for international arbitrations, since the Supreme Court did not specifically exclude foreign awards from its reasoning. Given that provisions regarding public policy with respect to setting aside and recognition and enforcement of foreign awards are essentially the same, it is uncertain whether the national courts will apply the same broad standards of public policy to the enforcement of foreign arbitral awards as well.[17]

The decision in *Patel Engineering* can be criticised on the basis that it is contrary to the principle of competence-competence as it dilutes the powers of tribunal to decide on its own jurisdiction while increasing the power of the Chief Justice. The decision also construes Section 16 of the 1996 Act in a way that allows the jurisdiction of the tribunal to be dependant on the decision of the Chief Justice. Within the obiter dicta of the case the Supreme Court, in seeking to interpret Section 8 of the Act, observed that if a matter is brought before a court and an objection is raised regarding the jurisdiction due to an arbitration agreement, the judicial authority is entitled to look into the validity of the arbitration agreement. The decision essentially brings about entirely new pathways of intervention for the national courts, which is antithetical to the ethos of the Act, that is, to limit judicial intervention and increase efficiency.

Subsequently, commentators have suggested that these decisions have worked to undermine the keys goals of arbitration, that is, speed and efficiency.[18] Another judgement in the same vein is *ITI Ltd v. Siemens Public Communications Network Ltd*[19] where a two-judge bench of the Supreme Court held that even though a second appeal cannot arise from an order of the appellate court made under Section 37 of the Act, a revision under Section 115 of the general law (the Code of Civil Procedure) would still lie against those orders. This decision has created another avenue for litigation that is contrary to Section 37 and completely nullifies the effect of Section 5 of the Act, which seeks to define and limit judicial intervention. Given that

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17 N. Darwazeh & R. Linnane, *Set Aside and Enforcement Proceedings: The 1996 Indian Arbitration Act Under Threat*, 7 INT'L ARB L. REV. 81, 86 (no. 3 2004).

18 P Nair, *supra* note 7 at 31 & 699.

19 (2002) 2 Arb. LR 246 (SC).

the courts are conferred with specific powers to entertain appeals, and a precise and exhaustive definition of these powers is made by the legislation, the Supreme Court ought to have restrained itself from making a decision that transgresses statutory lines. This type of intervention by the courts causes delays and expenses for the parties and negates the advantages of arbitration over litigation. Moreover it erodes the overarching principle of respecting the parties arbitration agreement and autonomy. Such cases can also inevitably lead to a loss of confidentiality as civil matters in court are made public, which is problematic as confidentiality is one of the major perceived benefits of arbitration from the parties' perspective.

Apart from decreasing domestic confidence in the system, the above mentioned criticisms of the arbitration landscape in India all have the effect of damaging India's reputation as a suitable jurisdiction for the seat of international arbitrations. The decisions also create confusion and chaos for foreign companies doing business in India, who seek finality of arbitrations and want to avoid national courts due to prolonged delays and costs in litigation.[20] Thus it has become risky for corporations to enter into arbitration agreements with Indian entities because law on what is an express/implied exclusion of the Act is murky. They would have to ensure that their seat of arbitration is outside India and that the provisions of Part 1 of the Act are expressly excluded. While the often-seen blanket dismissal of the Indian courts' attitude to arbitration is harsh, international parties will be less likely to choose India as the seat for arbitration if the system is not perceived as stable and organised, instead opting for competing jurisdictions. Minimising the likelihood of decisions which are inconsistent with generally accepted principles of international arbitration would help bring India's arbitration law in line with the aspirations of the Act.

3. Separating Legislation For International And Domestic Arbitration In India

India presently has an act which deals with both domestic and international arbitration, albeit one which draws on some sections of that combined act for international and some sections for domestic. In the author's view, international arbitration is of a fundamentally different character to domestic arbitration. International arbitration brings with it issues of international enforceability, minimal interference by the courts,

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20 S Sattar, *National Courts and International Arbitration: A Double-edged Sword?*, 27(1) J. Int'l Arb. 51-73 (2010).

processes and procedures which are an amalgam of legal systems from around the world and are necessarily different to Indian domestic arbitration and litigation procedure.

There is a strong case to be made for international arbitration to be governed by a separate legislative regime to that which governs Indian domestic arbitration. A separate international arbitration regime will encourage the development of jurisprudence in India consistent with that of other jurisdictions where international arbitration flourishes. At this stage of the development of domestic arbitration in India, it is suggested that it would be more helpful if the jurisprudence associated with regulating domestic arbitration was limited to the domestic issues facing it. Although it is possible for courts to draw distinctions between international and domestic arbitration when interpreting an act which deals with both, the separation of the legislation would encourage the courts to develop separate streams of policy and jurisprudence to be applied to international arbitration on the one hand and domestic arbitration on the other.

Different approaches are adopted around the world regarding combined or separate acts for international and domestic arbitration. Countries that enjoy a bifurcated legislative framework for international and domestic arbitration include Australia, Singapore, Belgium, Columbia, France and Switzerland. These systems recognise that different considerations, policies and levels of intervention apply to domestic and international arbitrations and that legislation should reflect these differences. In contrast some countries such as Hong Kong, Malaysia, Spain, the UK and New Zealand have a combined legislative framework where one piece of legislation governs both domestic and international arbitration

In Australia, there is a bifurcated system of arbitration whereby domestic and international arbitrations are covered by different Acts. This separation arises by virtue of the Australian Constitution. The Commonwealth can make laws with respect to international arbitration as its treaty obligations enliven the foreign affairs power.[21] However, the Commonwealth does not have a relevant head of power to make law with respect to domestic arbitration which is the purview of the States. Therefore the *International Arbitration Act 1974* (Cth) governs all international arbitrations and largely replicates the Model Law while the

21 Australian Constitution, Section 51(xxix).

States govern domestic arbitration under separate acts. Domestic arbitration in Australia was previously covered under the Uniforms Acts, however there has been recent implementation of domestic reform in Australia through the introduction of the *Commercial Arbitration Bill 2010 (Cth)* which is currently only enacted in New South Wales and Tasmania, although all other States and Territories have agreed to enact the legislation.

It applies the Model Law to domestic arbitrations in Australia and is based on upon a regime of mandatory and non-mandatory provisions. It is hoped that this will lead to a reform of the way in which domestic arbitrations are conducted in Australia by reference to the procedure and jurisprudence applicable to international arbitrations. Australia, however, does not presently suffer from the difficulties arising from the courts' view of international arbitration in India. Australian courts are receptive to arbitration and do not have a reputation for unwarranted intervention. The recent amendments to the domestic arbitration Act in Australia have even seen the introduction of mandatory stays where there is a valid arbitration agreement.[22] Thus, the policy considerations leading to the adoption of the Model Law for domestic arbitration in Australia are different to those of India. Notwithstanding these differences, even if very similar legislation was applicable to both domestic and international arbitration in India, the courts would be free to apply international considerations under the international legislation and domestic considerations under the domestic legislation. The combination of the two acts seems, it is suggested, to have been a contributing factor to the situation which most in India accept requires urgent reform.

4. Conclusion

In order for India to become a more desirable seat for international arbitration and for domestic arbitrations to be more effective and efficient, the Indian courts needs to curb their enthusiasm for intervention and better align themselves with the key objectives of the Model Law. The courts must at all times bear in mind the importance of party autonomy, the mandatory law of the jurisdiction and that its intervention should not violate the parties expressed intention to submit their dispute to arbitration. Moreover, a separate and less regulated approach needs to be taken to international arbitration. The functions and goals of domestic and international arbitration are distinct and if the Indian courts continue to

22 Commercial Arbitration Act 2011 (NSW), Section 8.

treat them in the same fashion, it will lead to a further loss of confidence in the system. It is suggested that having a separated or bifurcated approach to domestic and international arbitration by having two pieces of legislation, may be more efficient for India, as it will mean that they can continue their interventionist approach in domestic arbitrations, while taking a more hands-off approach to the regulation of international arbitration. Such an approach may work to undo some of the reputational damage that India has suffered as a result of the setbacks outlined above and make India a more attractive seat for international arbitration.

WHAT DOES IT TAKE TO BE AN INTERNATIONAL ARBITRATION CENTRE?

Michael Hwang, S.C*

Abstract

This paper aims to describe the hallmarks of a successful international arbitration center. The author lays down seven characteristics which are fundamental for a nation to become an international arbitration center. The first characteristic is good arbitration law. Any country which has a successful international arbitration center will have acceded to the New York Convention, and should have up to date law reflecting international standards. The second characteristic is having arbitration friendly judges. If a country does not have judges who apply the law in accordance with generally accepted international standards, it is unlikely that it will be a favorable international arbitration center. The Third characteristic is the presence of a good arbitration center. The author identifies that every nation which is a successful international arbitration center, has a famous administering institution. The author points out that India does not have any such arbitration center, which enjoys international recognition. The fourth characteristic is a strong arbitration bar. Any successful arbitration center should have a sufficient number of qualified arbitration practitioners to handle arbitration cases. The fifth characteristic is training for arbitrators. An international arbitration center must have facilities to train practitioners. The sixth characteristic is that the city must be arbitration friendly. There must be govt. support, both financial and otherwise to develop sufficient infrastructure. Finally, the location of the arbitration center is important. Clients and practitioners must be able to conveniently go for their hearing. Immeasurable benefits can be derived from having an international arbitration center in a city, and the development of such a center is worthy of study.

* The author is Senior Counsel and Chartered Arbitrator operating based in Singapore and London. He may be reached at michael@mhwang.com.

This short paper describes, from an objective viewpoint, the hallmarks of a successful international arbitration centre. It does not purport to recommend that India develops such an international arbitration centre as that is a decision for India to make having regard to its own needs and priorities. However, it may assist in that decision for the distinguishing characteristics of such a centre to be understood.

1. GOOD ARBITRATION LAW

It is a pre-condition of an international arbitration centre that the country in which the centre is located must have acceded to the New York Convention (Hereafter "NYC") as (at the latest count) the NYC has been signed by 146 countries. It is unheard of for an international arbitration centre to emerge if it is located in a country that does not recognize the NYC. A good example of this is Dubai, which had a (largely domestic) arbitration centre under the auspices of the Dubai Chamber of Commerce and Industry (Hereafter "DCCI") for several years, but its development as an international arbitration centre was held back by the refusal of the United Arab Emirates (Hereafter "UAE") to accede the NYC. Since UAE's accession in 2006 Dubai has developed tremendously as a major international arbitration centre in the Gulf region with new filings at the Dubai International Arbitration Centre (Hereafter "DIAC") of over 430 cases in 2010, a figure which would be envied even by Singapore and London, which only had filings at their respective national arbitration centres in the region of 200 for the same year. India of course has acceded to the NYC since 1960.

The next pre-requisite is to have an up-to-date arbitration law reflecting the common international standards of international arbitration practice. It is fortunate that there is a universally applicable Model Law that can be adopted as a basis for all aspiring international arbitration centres, namely the UNCITRAL Model Law, which was first promulgated in 21 June 1985 and has since formed the basis for virtually all new or reformed arbitration laws passed after that date. Notable exceptions are England and Wales, which rely on their own Arbitration Act 1996 (but Scotland has its own arbitration legislation based on the Model Law). In the USA only a minority of states have adopted the Model Law, with the Federal Arbitration Act still being the primary arbitration legislation at Federal level. In Asia, the list of countries that have adopted the Model Law is endless, but two exceptions stand out: China and India. Although China

International Economic and Trade Arbitration Commission (Hereafter "CIETAC") has the highest filings of international cases in the world year after year (over 1350 cases in 2010, although the majority of them were from domestic companies, which include foreign joint ventures), it is not generally considered a major international arbitration centre. This is because the vast majority of cases are between international parties (often in the guise of Chinese incorporated companies) and Chinese parties arising out of transactions within China where international parties have limited alternative choices to have their cases heard outside China owing to strong moral and commercial pressure from their Chinese counterparties. So the number of arbitrations that are heard in CIETAC do not form the basis for a generalization that Beijing will make a successful international arbitration centre in the sense of hearing cases which have nothing to do with the forum.

India is the other major Asian country that has declined to adopt the Model Law as such, although it has adopted portions of the Model Law in its Indian Arbitration and Conciliation Act 1996. It is not my function in this short paper to discuss the efficacy of the Indian Arbitration Act (particularly in the eyes of non-Indian parties), but it is sufficient to say that India's arbitration legislation is not (in its current state) likely to attract any foreign parties to arbitrate in India unless compelled by commercial or other pressures to do so. In other words, one of the reasons why two non-Indian parties are unlikely to arbitrate in India would be the way in which the Indian Arbitration Act has been drafted (or at least as it has been interpreted by the Indian Courts).

2. ARBITRATION-FRIENDLY JUDGES

A good arbitration law is a necessary, but not sufficient, condition for a successful international arbitration centre. A good arbitration law can make a good international arbitration centre only if the laws are applied properly by the country's judges in accordance with generally accepted international principles of international arbitration. Judges must be pro-arbitration in this sense:

(a) Judges must not feel that arbitration is the enemy of the courts but a legitimate alternative means of dispute resolution so as to give the community a wider choice of methods of dispute resolution: arbitration is therefore part of the system of justice administered in the country alongside the national courts.

(b) Judges must realize that their role is only to intervene in arbitration to support the tribunal, and not to supplant its jurisdiction unless, on the true construction of the arbitration agreement or on other (exceptional) valid legal grounds, the tribunal has no jurisdiction to hear the case.

It is not the court's role to second guess a tribunal's decision when arbitral awards are challenged in the courts because the power of setting aside is limited to certain grounds, which are mainly technical, jurisdictional or involve a violation of the rules of procedural fairness. A commonly invoked ground (viz. contrary to public policy) is strictly and narrowly defined in other Model Law countries, and does not in any event afford the courts a right of appellate review on the merits of the case because they have no such power of appellate review, but only a power to set aside awards in the narrowly defined circumstances set out in Article 34 of the Model Law.

These principles are well understood by the courts in major international arbitration centres like France, Hong Kong, England and Wales, Switzerland, USA, Sweden, Singapore, Korea and Japan. Again, this is not a place to discuss the merits of the well-known decisions of the Indian courts setting aside tribunal decisions, except to say that they have not been well received by the international arbitration community outside of India.

3. A GOOD ARBITRATION CENTRE

Theoretically, arbitrations can be held on an *ad hoc* basis, i.e. without an administering institution. But there is no major arbitration centre that does not also have a famous international arbitration centre. Paris of course has the International Chamber of Commerce (the "ICC", which is not a French institution, but is a global centre based in France); London has the London Court of International Arbitration; Stockholm has its Chamber of Commerce; Zurich and Geneva have their respective Chambers of Commerce; Hong Kong has the Hong Kong International Arbitration Centre; Dubai has the DIAC (as well as the newly established LCIA-DIFC Arbitration Centre); Beijing has CIETAC as well as the Beijing Arbitration Commission; and Singapore has the Singapore International Arbitration Centre (Hereafter SIAC"). While there are arbitration centres in India, it is fair to say that, at present, they do not enjoy either widespread national

support or significant international recognition (the preference apparently being for ad hoc arbitrations simply relying on the Indian Arbitration Act).

4. Strong Arbitration Bar

It is not coincidental that the strongest international arbitration centres also produce the strongest arbitration bars (London, Paris and New York). Switzerland handles less heavy international arbitration cases as counsel simply because of the relatively small size of its law firms, but the arbitration experience of that country is spread very wide, and year after year Swiss arbitrators prove to be in the greatest demand compared to other nationalities in arbitrations held under the auspices of the ICC. A good international arbitration centre should have a sufficient group of locally qualified arbitration practitioners who can be appointed as arbitrators, as well as a sufficient number of locally qualified arbitration practitioners, both to initiate and handle arbitration cases to be heard in the courts of that arbitration centre. Further, it is important that such locally qualified arbitration practitioners are competent to handle applications to the local court for appropriate court relief in the specific areas reserved for the local court to intervene, e.g. jurisdictional challenges, interim reliefs, challenges to arbitrators and setting aside applications.

This at least should not be a major problem for India, as it has many able arbitration practitioners, most of whom can sit as arbitrators and others of whom can act as arbitration counsel. However, it is important that those who sit as arbitrators do not conduct arbitrations in the same way as court proceedings, because the hallmark of arbitration is to provide an alternative method of dispute resolution to litigation in court, and such alternative method must be more expeditious and economical than litigation without sacrificing the essence of justice. For the same reason, it is also important for arbitration advocates to understand this principle and not try to argue arbitration cases as if they were litigation cases.

It has been noted that this is a factor which leads some parties not to choose New York or another American venue as a seat, for fear that the counsel engaged for the case (as well as some of the arbitrators) might be in the classical mould of the American litigation lawyer, with his emphasis on discovery and detailed cross examination (which will be even more detailed than in an American trial owing to the lack of depositions in arbitration). This perception may be unfair, as there are experienced arbitration counsel in the major American cities, and New York is still a great arbitration centre, but such perceptions can make the difference to some parties'

choice of venue, and this is a point that Indian arbitration advocates would do well to remember.

It is significant that the great international arbitration centres of the world are also those cities which have a substantial core of competent and experienced local arbitration practitioners. London, Geneva, Zurich, New York (despite the perceptions mentioned above) and Paris are of course the prime examples and, to a lesser extent, Dubai, Singapore and Hong Kong.

5. Training for Arbitrators

Most international arbitration centres also run training facilities for arbitration practitioners, both junior and senior. The most well-known of these are:-

(a) The Chartered Institute of Arbitrators (which has a worldwide reach)

(b) The International Chamber of Commerce (mainly holding courses in France but in selected cities elsewhere as well)

(c) The London Court of International Arbitration (mainly in the UK but also regularly in selected overseas centres)

(d) Singapore has the Singapore Institute of Arbitrators as well as a branch of the Chartered Institute of Arbitrators offering practitioners courses leading to international recognized qualifications as arbitrators. Both universities, National University of Singapore and Singapore Management University, also offer academic courses in arbitration.

(e) Hong Kong has very much the same picture as Singapore with training available both at practitioner as well as academic level.

The real problem is the training of judges who hear arbitration matters coming before the court. This is not so much of a problem in mature international arbitration centres, where judges know their exact role and where a rich body of case law has laid down well defined principles for them to follow. In countries with less arbitration exposure, judges can (and often do) get it wrong, thereby making their arbitration centres less attractive. Countries whose national courts have attracted international criticism for their arbitral decisions include Thailand, Malaysia, Philippines and Bangladesh.

In Singapore the SIAC used to organize orientation courses for retired judges to inculcate in them the principles and practices of arbitration so that they could fully appreciate the differences between the two modes of dispute resolution. This is also a necessary condition for other judges to

become more acceptable as international arbitrators. The President of the Chartered Institute of Arbitrators has recently reported that retired judges score relatively low marks when taking the examinations set by the Chartered Institute of Arbitrators, so retired judges should appreciate that there is quite a bit to learn about arbitration, and that judicial practices and procedures cannot automatically be applied in arbitration without adaptation; some may even need to be abandoned.

6. ARBITRATION FRIENDLY CITY

An international arbitration centre needs to be nurtured with the support of its government. Governments must give attractive financial and other support to their international arbitration centres by making immigration and employment pass regulations easy to navigate for foreign arbitration practitioners, whether as arbitrator or as counsel. Horror stories have emanated from Thailand about anti-arbitration measures being implemented by the authorities, but then Thailand is generally considered as an anti-arbitration country, even though its international arbitration law is founded on the Model Law. Things have reached a stage where international arbitrations which have been fixed for hearings in Thailand have been moved out of that country because of political instability in the country as well as the lack of immigration and employment passes to allow participants to come and work in Thailand for the purposes of their arbitration.

In addition, the centre must be located in a place where things work. For example, there must be a proper hearing venue (at least in hotels with adequate hearing and breakout rooms) if not a dedicated arbitration centre, good international and internal communications, consistent power supply, good hotels and restaurants, adequate security and availability of translators and court reporters and minimal (if any) air pollution. The provision of a well-appointed and well organized arbitration hearing centre makes an enormous difference to the popularity of the city as an arbitration venue. This has been the experience of Singapore, whose caseload increased dramatically after the establishment of a dedicated arbitration building known as Maxwell Chambers: all those who have held hearings in this facility (including many Indian parties and lawyers) have marvelled at its facilities and organization and have spread word of "the Maxwell Experience" far and wide.

There are really no dedicated arbitration centres operating to international standards in India, but this is a problem that can be resolved

fairly easily in the medium term. Another problem is the attitude of some major users to the appointment of international arbitrators whose fees appear high to local practitioners, particularly when they are compared to those of the retired Supreme Court judges as arbitrators. By international standards, Indian arbitrators' fees are modest, but by definition, international arbitrations involve arbitrators with foreign parties who are entitled to appoint arbitrators of their choice, and those arbitrators come carrying their own market charges. If international arbitration is to proceed with each side having counsel and arbitrator of their choice, then the fee structure would have to be what the international marketplace will bear.

The question of allocation of fees at the end of the case by way of an order for costs is a separate issue, and can be determined according to local standards if thought appropriate, but it is not possible to grow an international arbitration centre Unless it is accepted that the fees of international arbitrators need to reflect their market rates. Another important principle of international arbitration is that the Chair of a 3-person Tribunal should not be the same nationality as either of the parties. This principle is not yet recognized in India, where the courts routinely appoint a retired Indian judge as the Chair, despite the fact that one of the parties is Indian.

Cost is also a factor, but obviously not a determining one, since the most famous centres are also the most expensive (London, Paris, Geneva, Hong Kong). But it helps an emerging centre if it can say that it has acceptable facilities for an international arbitration at a fraction of the cost of the most expensive centres – this is currently one of Malaysia's main attractions for the Kuala Lumpur Regional Arbitration Centre.

It is not merely the question of being a modern city. There are cities which are relatively modern, but are not particularly attractive to foreigners who have the choice of where they want to hold their arbitration. It is probably one of the reasons why Jakarta is not yet a major international arbitration centre, because it is simply not a destination of choice for various reasons, even though there are many substantial disputes with Indonesian parties which have arbitration clauses (if the seat were Bali it would be a different story). There are a significant number of Indonesian arbitrations held in other centres such as Geneva or Singapore. India is undoubtedly a strong tourist destination, so this factor should not prove an obstacle in the development of major Indian cities as international arbitration centres.

7. LOCATION – TYRANNY OF DISTANCE

All things said and done, an international arbitration centre must be a place where arbitration practitioners and their clients can conveniently go for their hearing. These principles are best illustrated by the present lack of popularity of Sydney, Melbourne and Auckland, each of which can easily fulfill all the preceding criteria as an international arbitration centre but do not achieve the success they deserve simply because of their distance from the centres which generate arbitration business. The only hope for Australasian centres is if the volume of Asian cases develops to the point where parties can find some justification for holding some of them in Oceania, as opposed to other Asian arbitration centres like Singapore and Hong Kong.

8. CONCLUSION

These are the main factors that make for a successful international arbitration centre. It brings with it immeasurable benefits for the city in which the centre is located – revenue from the parties and their legal team and witnesses raising local arbitration and advocacy standards, enhancement of a city's image as a business centre and many more. The development of such a centre is worthy of study, as Singapore has learnt to its benefit and as Mauritius seeks to become the next developing arbitration centre in this region.

ARBITRATION IN INDIA: THE CHALLENGES OF THE 21ST CENTURY

Hon. Chief Justice Christopher Gardner, QC*

Abstract

Despite an evident increase in domestic and international contracts in India, the demand for speedy resolution of disputes arising from such contracts has not been answered by arbitration in the Indian context. The Arbitration and Conciliation Act 1996 was passed with the intention of limiting judicial intervention in the arbitral process, however this too has not been the case. Between 1996 and 2007 there have been at least 565 challenges to domestic awards. The Indian courts have not been helpful, allowing awards to be set aside under certain circumstances. Yet another problem could be the attitude of Indian lawyers, who the author feels may be more comfortable with a litigation system. In order to move forward courts must be wary of interfering in arbitrations where reasoned awards have been given by accredited arbitrators.

On returning to India after an absence of eight years to attend the Commonwealth Law Conference in Hyderabad and revisit the Law Institute of West Bengal in Kolkata, I was struck by the vast increase in the number of motor vehicles, advertising hoardings and ongoing construction, and by the omnipresent mobile phone. All of these evidenced the growth in the Indian economy and a concurrent increase in both domestic and international commercial contracts.

How then, I wondered, was the demand for the speedy resolution of disputes generated by such contracts being met? Had the courts been able to shed their backlog and delays, which surely would not be tolerated by commercial enterprises? I soon discovered that this was not the case. A one hundred year old Indian lawyer, who is still in practice, when addressing the Commonwealth Law Conference, spoke of only one thing, namely the unacceptable delays in the determination of court cases. I was informed that there are 27 million cases pending in the lower courts and 4 million in the higher courts, and that some cases can take 15 years to come to final resolution. However learned and erudite the final judgment may be, I

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* The author is a Chartered Arbitrator and part time Chief Justice of the Falklands and British Indian Ocean Territory. This piece was originally intended to be addressed to the students of NALSAR University of Law on the eve of the Commonwealth Lawyers Conference, 2011 held in Hyderabad, but for a variety of unfortunate circumstances could not. Publication of this address in the maiden volume of this journal is an attempt to reach all those, and more who but for the intervening circumstances would be audience to it.

anticipated that this would be of little interest to commercial organisations that needed their disputes to be resolved quickly, so that they could continue to trade with the minimum amount of disruption.

I, therefore, fully expected to find that Arbitration would have been embraced as the efficient and speedy method of commercial dispute resolution. However, when attending the LCIA Seminar on International Commercial Arbitration in Hyderabad, I soon discovered that this was not the situation. The title of the afternoon session that I chaired, "Judicial Intervention and the Role of the Courts," revealed one of the reasons.

The whole rationale of arbitration is party autonomy, in which the parties to a contract decide that, in the event of a dispute arising between them, they will resolve it outside the court system. They choose to have their dispute decided by an independent third person appointed by them. The reasoned award, produced in a time span of their own choosing, is final and binding and disposes of the dispute, thereby enabling the parties to return to and get on with their commercial enterprises.

I believed that it was in recognition of these requirements that the Arbitration and Conciliation Act 1996 was passed, with the intention of limiting judicial intervention in the arbitral process. However, between 1996 and 2007 there were no less than 565 court challenges to domestic awards, 16.63% of which were successful and 4.96% of which resulted in a modified award. Indeed the Supreme Court in 2003 in *Oil and Natural Gas Corporation v. Saw Pipes Ltd.*[1] held that an award may be set aside if it violates the public policy of India, in that it is contrary to:

1. the fundamental policy of Indian Law
2. the interest of India
3. Justice or morality
4. or is patently illegal

The result has been a lack of confidence that arbitral awards will not be challenged in the Indian courts, where such a challenge results in a stay of execution. If this occurs, then the whole rationale of dispute resolution by arbitration rather than litigation is undermined. This decision contrasted with that in *Narayan Prasad Lohia v. Nikunj Kumar Lohia*,[2] where it was held that if an award was in accordance with the agreement of the parties, it may not be set aside by the court. It has been suggested that the decision in

[1] (2003) 5 SCC 705.
[2] AIR 2009 SC 1531.

ONGC is confined to domestic awards, unlike the *Renusgar Power Plant case*, involving a foreign award, which considered that there should be a narrow interpretation of "public policy." However, in *Venture Global Engineering v. Satyam Computer Services Ltd,*[3] it was held that, as it was open to the parties to exclude, expressly or impliedly, the whole of Part 1 of the Act, a failure to do so would result in the whole of Part 1 applying, including to a foreign award. So it is feared that a foreign award can be challenged on the merits, especially where some connection with the subject matter of the contract, for example the place of manufacture or distribution, is within India, on the ground that it violates public policy, even when there are enforcement proceedings in other jurisdictions.

A number of reasons have been put forward for the stance that some of the courts have taken. Some assert that judges are suspicious of the arbitral process or are not comfortable with the idea of their jurisdiction being outsourced to other tribunals, where the decision makers who may not be lawyers.

Of course, other jurisdictions are no strangers to judicial intervention. In *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan,*[4] The Times 5 November 2010, the Supreme Court in London held that, where an English court was asked to enforce an arbitral award made against a non-signatory to the contract containing the arbitral clause, whom the arbitral tribunal had determined had been a party to the contract, the Court would, if the enforcement claim was challenged, determine anew the question as to whether that non-signatory had been a party.

The dispute related to an agreement between Dallah and the Pakistani statutory corporation for the development by Dallah of pilgrim facilities in Mecca (which in fact were never constructed). The arbitral tribunal, namely the International Chamber of Commerce in Paris, held that, the statutory corporation no longer being in existence, the Ministry of Religious affairs, although not a signatory, had been a party to the agreement and made an award against the Ministry, which Dallah sought to enforce in London. The Ministry had not sought to challenge the award before the supervisory court in France.

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[3] (2008) 4 SCC 190.
[4] [2010] UKSC 46.

Giving the lead speech Lord Manse held that, as arbitration is consensual, an arbitral tribunal's decision as to the existence of its jurisdiction could not bind a party who had not submitted the question of arbitrability to the tribunal. The tribunal's own view as to its jurisdiction had no legal or evidential value when the issue was whether the tribunal had any legitimate authority in relation to the government at all. In visiting the question anew of whether the government had been an unnamed party to the agreement, which had to be determined under French law and therefore was dependent on the common intention of the contracting parties, the Court would examine carefully and with interest the reasoning and conclusion of the arbitral tribunal.

Therefore, a desire of the parties to a contract to agree that their resolution of disputes should be final and not challengeable, has not been completely accepted by the Courts, and this has led to uncertainty of outcome.

In saying this I do not seek to ignore the fact that the courts perform an essential function in arbitration by being the mechanism by which an award can be enforced, but the effect of these decisions has resulted in one commentator remarking that arbitration in India is not for the faint hearted.

When, in our Session at the Seminar, Professor Doug Jones, President of the Chartered Institute of Arbitrators, explained that in the United States the Courts essentially refused to interfere with arbitral awards on any basis, and I asked the delegates whether they would like the Indian courts to adopt a similar approach, there were no takers. I believe that this evidences a further reason as to why Arbitration has not burgeoned in India along with its economy. I suspect that many Indian lawyers feel more comfortable with a litigation system and an adjournment culture that they know well, and fear that the rewards for them in arbitral proceedings would not be comparable. If there is such an attitude, then I consider it to be short sighted. If, as I was informed is the case, lawyers are having to advise their commercial clients that arbitral clauses in international contracts should be so drafted as to try to exclude the jurisdiction of the Indian courts, with the choice of the seat of the arbitration being, for example, Singapore or London, instead of Delhi or Mumbai, then it seems to me that it is inevitable that Indian lawyers will lose out. Further, such attitudes mitigate against the development of a specialism in arbitral practice amongst lawyers with Supreme Court rights of audience in India so that, in the event of a court challenge, the parties are obliged to instruct a new set of lawyers who have not taken part in the arbitration. Further, as one commentator

commented, even if you have a brand new football stadium, it is of little use unless you also have well-trained players and referees who know the rules of the game. So there is a need for a pool skilled, trained and honest arbitrators, as well as well equipped arbitral locations within India. A number of Arbitral Institutions are taking measures to provide these by opening Indian offices, and by providing arbitral qualifications for their members, seek to ensure quality control and expertise and genuine independence.

I was told in Kolkata that, if the parties are unable to agree on an arbitrator, by law that choice is made by the Chief Justice of the State. The choice is often of a retired judge, who may have little experience of arbitral procedures, and so seek to apply a quasi court procedure, with its attendant delays.

Clearly, those who determine international contractual disputes, some of which are very complex, need to be informed and familiar not only with the terms and exigencies of such contracts, but often with the subject matter of the dispute, so as not to be too dependent on the experts. The result has been for those entering into commercial contracts preferring to appoint as arbitrator someone who they consider will have the attributes required, and who will be able to meet the requirements of the parties as to timing etc. If a large enough pool of such trained and respected arbitrators is available in each state, then it may be this problem can be overcome without a change in the law being necessary.

My fear is that these matters, which are undermining the arbitral process within India, may lead those considering trading with India to be, at best, wary and, at worst, reluctant to do so. If that is the case, then I believe that Indian commercial organizations will demand a change from the present situation.

It would be wrong, however, to suggest that no measures are being considered to effect that change. A requirement that challenges to arbitral awards should be incepted in the High Court, as opposed to the District Court, is being mooted, as is a suggestion that a court challenge should not result in an automatic stay of enforcement, for which a separate application would have to be made. Arbitration now forms part of the training given to High Court Judges. The Commercial Division of High Courts Bill proposes that a special division should be established in each of the 28 High Courts, with a speedier procedure to deal with applications to set aside awards in commercial disputes worth in excess of Rs 5 cores. It is hoped, therefore,

that commercial courts, staffed by judges with the necessary experience, and with procedures that ensure a timely, efficient and reasoned determination of commercial disputes will be established and that this will be achieved in less than a millennium, which was the estimate of one Indian lawyer that I spoke to.

Until they have been, the courts must be very wary of interfering in arbitrations where reasoned awards have been given by accredited arbitrators. To this end the arbitral institutions must train and provide expert panels of arbitrators, create efficient and modern centres of arbitration, where lawyers regularly appear and develop expertise in the conduct of arbitral disputes. These need to be equipped to an international standard, so that the hearings are almost paper-free, with monitors that are able to display any document under consideration. When I visited the Supreme Court some years ago, a former Chief Justice would indicate to the parties that a hearing was over by picking up and slamming down on the bench the case papers. What he would have done if there was a paperless hearing, I am not sure! There should be simultaneous recording and, where necessary, translation. In these days of highly developed means of communication, in which India is playing its part, the younger lawyers, and the international clients that they represent, will expect nothing less.

These, then, are the challenges that must be addressed in both litigation and arbitration if dispute resolution procedures are going to cope with, and keep up with, the demands of the massive increase of international trade. India should not, nor does it deserve to be, left behind.

INTERNATIONAL ARBITRATION IN INDIA-AN OVERVIEW FROM ABROAD

Sarosh Zaiwalla*

Abstract

Criticism of arbitrations with a seat in India has become common place. Complaints generally tend to relate either to the intervention of courts in India, or with the conduct of arbitrators. This piece first looks into the history of arbitration in India, in order to better understand the reason for the above mentioned criticism. Prior to the 1980's or even the early 1990's most arbitrations featuring an Indian party had London as the seat for the arbitration. It was not till the 1980's that Delhi started featuring as a seat for international arbitration, when the Govt. of India found that many of its corporations were involved in London Maritime Arbitrations. With the open door trade policy that India adopted in the 1990's the situation changed drastically. Although Indian courts have been criticized a great deal for their attitude towards arbitration, this blanket dismissal of the Indian Courts' attitude is often unjust. Further, the article examines and provides analysis on the most common criticism against Indian courts, namely (i)Where a party applies to the Court in India to appoint an Arbitrator the Court normally appoints retired Judges only. (ii)Those retired Judges still think they are Court Judges. They conduct the Arbitration like Court cases and are very slow in finalising the references.(iii)The Arbitrators are not always independent and they are in communication with their appointers (iv) Some of the Arbitrators are subject to a cloud of corruption.

Friday 4 March 2011 saw over 1,000 well-known International Arbitration practitioners from around the world gather at The Shilla Hotel in Seoul. The occasion was the International Bar Association's (IBA) 15th Arbitration day, and the hot topic was the question of whether there should be a common Code for Arbitrators to follow.

A renowned practicing advocate from India in the audience stood up and shared a personal recent experience concerning a former Chief Justice of India who had been acting as an Arbitrator. It seemed that Counsel for the Defendant had upset this Arbitrator so seriously that he refused to

* The author is the founding partner of Zaiwalla & Co and has been involved in over 1000 International Energy, Maritime and Construction Arbitrations in London and Worldwide. He is a former member of the International Court of Arbitration of the ICC, Paris, (1990 – 2002) and a CEDR (Centre for Effective Dispute Resolution) mediator.

proceed further with the reference until a written apology was tendered to him. The apology was not forthcoming, and the Arbitrator steadfastly refused to continue the Arbitration. The Claimant was shocked by the behavior of the Arbitrator.

Those gathered at Seoul also expressed their shock at this Indian Arbitrator. Criticism of Arbitrations with a seat in India has become a common feature of International Arbitration conferences. The complaints normally relate either to interventions by the Court or to the way the Arbitrators behave and conduct the arbitrations. One therefore needs to consider why this is so, and what needs to be done to remedy an impression that is not doing any good for India's international image as a major potential economic power. One major question arises: why is it that a small city state like Singapore has been able within a short time to develop a very popular and acceptable international Arbitration centre, while India and many other countries have failed to do so? This article attempts to deal objectively with the criticism which one often hears about how arbitrators and Courts in India deal with International Arbitration.

The object of every International Arbitration is to obtain a fair resolution of dispute by an impartial tribunal without unnecessary delay or expense. The parties to International Arbitrations select their own judges and the Arbitrators are employees of the parties, providing a bespoke dispute resolution service in keeping with the above objective. Why has the international Arbitration community in India not so far been able to satisfy the International community that Arbitrations with a seat in India can meet these objectives?

One needs to analyze the history before suggesting a remedy.

1. INTERNATIONAL ARBITRATION WITH A SEAT IN INDIA

International Arbitration is a relatively recent phenomenon in India. Until the late 1980s, or even the early 1990s, the seat of almost all Arbitrations featuring Indian parties was London. During this period, these parties were almost exclusively State Government parties. Because of the socialistic pattern of the Indian economy in those years, international trade was regulated mainly through State Government channels.

During the 1970s, India suffered a severe food deficit. The United States government agreed to supply food grain to India under United States PL 480 law. This supply of food grain by the USA was on an FOB basis, so the Indian Government had to charter every year a large number of ships

to bring the grain cargo from the United States. The Charter parties always included Arbitration clauses that would feature a seat in London. This resulted in hundreds of International Maritime Arbitrations in London, in which either the Government of India or one of its State Corporations were parties. Occasionally, there were also International Arbitrations involving Defense contracts and the purchase or sale of commodities.

During these years, Indian Arbitrators or lawyers were not really involved in International Arbitrations. Of those who did try to get involved, many had their fingers burnt by the Tribunals. It must be said, to the credit of the English Courts, that in those few cases the English court did not hesitate to intervene to undo any injustice done to the Indian parties by International Arbitration Tribunals. The two classic cases which come to mind are *Steel Authority of India v. Hind Metals*[1] and *Indian Oil Corporation v. Coastal Bermuda*[2] In the Steel Authority of India case, the Indian party was represented at the London Arbitration hearing by no less a person than Mr. Ashok Sen, who was at that time one of the leading members of the Indian Bar, and who also served as a Minister for Law and Justice under three different Indian Prime Ministers. The Tribunal's Chairman was an eminent English Queen's Counsel. The award went against the Steel Authority, who then challenged it in the English Court. The judge Mr. Justice Hobhouse, in remitting the Award back to the Tribunal, said in his Judgment that "....*the function of any Tribunal, including an Arbitration Tribunal, is to separate the wheat from the chaff and to endeavour to arrive at a fair and just conclusion notwithstanding the lack of assistance they may be getting from one or more of the parties' representatives".* The reference to 'lack of assistance' from the parties' legal representatives was of course to Mr Ashok Sen.

In the Indian Oil (IOC) case Mr. Justice Evans, whilst refusing to enforce a London International Arbitration Tribunal's Award made by three eminent English Queen's Counsels, said in his Judgment "....*I feel impelled by the evidence placed before me to conclude that there was a lamentable failure by IOC's representatives at the arbitration, collectively, to appreciate what the issues were....*" The representatives of the IOC to whom the Judge referred were Indian lawyers.

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1 [1984] Lloyds Vol 1 page 405.

2 [1990] 2 Lloyds 407.

These two judgments compellingly indicate that, until the early-1990s, there was practically no legal expertise available in India in respect of International Arbitrations.

2. THE CHANGE OF SCENE

In the mid to late-eighties, the Government of India finally appreciated the large number of London Maritime Arbitrations in which the Indian Government's Corporations were involved. As a result, they attempted to insist in future contracts that New Delhi was to be the seat of arbitrations. This was strongly resisted by ship owners, but economic compulsion often caused them to agree to Arbitrations in New Delhi, with a compensatory increase in freight rate to cover any loss to them which resulted from agreeing that the arbitration seat was to be in India.

This meant that, whilst the non-Indian ship owners had technically agreed to arbitration in India for charter parties, they invariably settled disputes because they had already obtained a compensatory cover by obtaining a higher freight rate in respect of any loss relating to delayed payment demurrage or 10% balance freight. Consequently, this attempt by the Indian Government to insist on arbitration in India in all international government contracts was not at that time on any view a success.

3. INDIA'S OPEN DOOR TRADE POLICY

The situation changed drastically in the early 1990s. By then the Soviet Union had collapsed. From that point on, the Indian Government adopted an open-trade policy which completely revolutionized the Indian economy. Private Indian companies became free to trade directly with their foreign counterparts and to enter into joint ventures without the Indian government's intervention. There was for some time a tussle between the foreign parties and the Indian parties on the question of whether the Arbitration agreements in the contract should have a seat in India or abroad. In the end, more and more foreign investors, seeing the economic opportunities, began to agree to Arbitration in India in their contracts with Indian partners. As this change took place, the Indian Legal fraternity began to be involved in International Arbitrations. Today, at least in the major Indian Cities, there is first class legal knowledge and experience available for International Arbitrations.

There is now a sea change in the caliber of legal representations available in India to conduct international arbitrations. Not long ago I sat in Bombay over five weeks with two distinguished arbitrators Mr. Harish

Salve and Sir Anthony Evans in a complicated and technical international arbitration. The legal representation which the both sides produced before us could match and compete with the best law firms and advocates in London or Singapore. We found that the Counsels on both sides had prepared their cases so thoroughly with full research.

4. INDIAN COURTS AND INTERNATIONAL ARBITRATIONS

The Indian Courts have been subject to criticism for their attitude towards Arbitration. Some elements of this criticism are fair, but the often-seen blanket dismissal of the Indian Courts' attitude to Arbitration is harsh. As can be seen from the above two cases, the English Courts have never hesitated to set aside or remit the Award where the Court found that there was gross injustice, or that the arbitrators had simply not applied the proper law. The internationally criticized Judgement of the Indian Supreme Court in *Venture Global Engineering v. Satyam Computers Services Ltd.*,[3] was decided on its own unusual facts and raised questions of illegality of the performance of the Award in India. What the Supreme Court did in the *Satyam case* was to find a legal route to nullify the Award where Indian Law was intentionally disregarded.[4] It is therefore somewhat unfair to cite the Satyam Judgment to criticize the Indian judiciary as a whole in so far as its attitude to International Arbitration is concerned.

The Indian Courts' approach has to some extent been seasoned by a history of gross injustices suffered by Indian parties in International Arbitrations. This injustice in some cases occurred because of the economic and political problems India has faced, notably its acute foreign exchange shortages, meaning that foreign travel was not easy for Indian nationals. As a result, many of these Arbitration awards were produced by International Arbitration Tribunal against Indian parties as a result of poor legal representation. Sometimes, the foreign Arbitrators, as a result of their unfamiliarity with Indian commercial culture, took an unfairly adverse view of the Indian parties' evidence.

Consequently, the only remedy available to those Indian parties was to obtain justice from the Indian Courts. This in turn required the Indian Courts to scrutinize carefully the International Arbitration Awards whenever the Indian Court's assistance was required to enforce them. It is

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3 [C.A. No.309 of 2008].

4 Sarosh Zaiwalla, *Commentary on the Indian Supreme Court Judgment in Venture Global Engineering v. Satyam Computers Services Ltd.*, 25(4) J. INT'L ARB. 507-512 (2008).

necessary to recognize that International Arbitrations with a seat in India are comparatively modern phenomena, and therefore the Courts naturally feel inclined to keep an eye on their development.

5. INDIAN ARBITRATORS

The general criticisms that one hears of International Arbitrations with a seat in India are as follows:

i) Where a party applies to the Court in India to appoint an Arbitrator the Court normally appoints retired Judges only.

ii) Those retired Judges still think they are Court Judges. They conduct the Arbitration like Court cases and are very slow in finalizing the references.

iii) The Arbitrators are not always independent and they are in communication with their appointers.

iv) Some of the Arbitrators are subject to a cloud of corruption.

Each of these criticisms require careful examination.

5.1 The Court appoints only retired Judges

The common complaint one hears is that the High Court and the Supreme Court always appoints retired Judges when they have to nominate an arbitrator pursuant to an application by a party. Those retired Judges in turn will only appoint another retired Judge as a third Arbitrator. It is not uncommon at International Arbitration forums to hear that there is a mafia-style cooperation amongst these retired Judges to support each other.

The general criticism which one hears is that sitting Judges appoint retired Judges in the hope that this trend will continue when they retire so that they will be appointed as Arbitrators when they are no longer on the bench. Whether this impression is correct or not, this needs to be addressed by the Chief Justice of India. The Courts must be open to consider appointing distinguished individuals and International Arbitrators from India and abroad who are not retired Judges.

One also sometimes hears of elements of ego involved in the approach of the retired Judges. Some of the retired Judges feel that it would be beyond their standing were they to have a third arbitrator who is not somebody equal or higher than them. This, it is suggested, is a remnant of the old colonial approach. As the French philosopher Voltaire said that

"*the greatness of the great mind lies in its humility*". The retired Supreme Court and High Court Judges would do well to remember this.

I recall one such incident when I was sitting as an Arbitrator with a former Chief Justice of India(now deceased) for whom I had highest personal regards. Our Chairman and third Arbitrator was Lord McKenzie Stuart, a former Chief Justice of the European Court of Justice (ECJ). Some twenty minutes into the hearing I received a handwritten note from the former Chief Justice saying "you have insulted me. You sat on the right of the Arbitrator where I should have sat because I am senior to you." I passed the note to the Chairman and asked what I should do? Should I change seats immediately? The last thing I wanted to do was to hurt the Chief Justice in any way because he and I had been very close and I had enormous respect for him. Lord McKenzie Stuart wrote on the note telling me to stay where I was. At the coffee break I changed my place and sat to the left of the Chairman. The Chairman found the objection foolish and politely made this known to the Chief Justice. The former Chief Justice was so upset by this comment from Lord McKenzie Stuart that throughout the arbitration hearing, which lasted some four weeks, he did not speak with the Chairman. In International Arbitrations the eminent Arbitrators act in most humble of ways. There is no rule who should sit on the right or left of the Chairman.

I am also aware of at least one other case where a retired Judge of the Supreme Court of India, sitting with a non-judge arbitrator from Chennai, told his colleague that he would never agree to the appointment a third arbitrator who is not a retired Supreme Court Judge, because that would offend his dignity. These sorts of things should never happen. It gives an impression to the International community that Indian retired Judges who act as Arbitrators are more concerned about protecting their ego than doing justice. Recently the English Supreme Court of Appeal in the case of *Hashwani v. Jivraj*[5] held that the Arbitrators are employees of the parties contracted to provide their service and they are no different from other individuals who provide services.

Indian Chief Justices of the High Court Chief and Supreme Court should not hesitate to appoint non-retired Judges as Arbitrators. Unless the Indian Courts changes their approach of appointing only retired Judges as Arbitrators, the feeling will remain that some sort of mafia-style

5 [2010 EWCA Civ 712].

arrangement exists between the Judges and the retired Judges. Retired Judges who act as Arbitrators should be respected for their intelligence and ability to do justice and not just because they are retired Judges.

5.2 Arbitration trials ought to be informal

The common complaint one hears is that the retired Judge Arbitrator conducts the Arbitration reference very slowly. Hearings are often fixed only to be adjourned. In International Arbitrations, parties come from abroad for the hearings, requiring great time and cost only to find that the Arbitrator has adjourned the hearing. This causes tremendous inconvenience to the foreign parties. This practice needs to be stopped; Arbitrators must fix hearings in the daytime, say from 10am to 6pm, and must continue the hearing on a day to day basis until it is over. Adjournment should be only granted in exceptional cases and if granted, unless there are very good unavoidable reasons to which the parties seeking adjournment has not contributed, the Tribunal should award wasted costs of the hearing to the party responsible for the adjournment.

The Indian Arbitrators must also recognize that the Arbitration Tribunal by its very nature is a more informal Tribunal than a law Court. Therefore strict rules of procedure are not required to be followed. The procedure required must be of course fair to both sides and that is something which the arbitrators must ensure. One other important traits which one sees in International Arbitration is the sense of humor which is displayed time and again by Chairman of the Tribunal to defuse a sticky situation between the parties. That of course is an art which some arbitrators normally have but some may well need to develop.

5.3 Independence of Arbitrator

> "*What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.*"

These are the words of Lord Steyn, an eminent Judge of the English House of Lords, on the issue of apparent bias on the part of an Arbitrator, be it a party-appointed Arbitrator or a third Arbitrator.

The apparent or unconscious bias of an Arbitrator has now been a source of several judicial pronouncements in the High Courts of various Jurisdictions. In 2005, the English High Court in the case of *A.S.M.*

Shipping Ltd. of India v. T.T.M.I. Ltd of England[6], removed a third Arbitrator who was an English Queen's Counsel on the grounds of apparent bias, because he had appeared as Counsel at a Court hearing on the instructions of one of the instructed Solicitor's firms against a witness who was also a witness in a separate matter.

The Court in this Judgment rejected the suggestion that an Advocate appearing in Court following what is known as the *"cab rank rule"* could differentiate between the neutral judicial function and the partisan advocacy function.

After the English High Court Judgment in the A.S.M. case it has now become very normal for Advocates (Counsel) who are sitting as Arbitrators to make full and frank disclosure of any connections that the they have not only with either of the parties but also with parties' legal advisors, which could influence the test of a lay bystander in forming a perception about his neutrality.

The test now adopted by the English Court is the one laid down by Lord Hope in *Porter v. Magill*[7]

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased*".

It could be said that the informed observer of today can perhaps be expected to be aware of the legal and cultural traditions of their own Jurisdiction, as was said in *Taylor v. Lawrence*[8] per Lord Wolf CJ. He may not, however, be wholly uncritical of this culture. It is more likely, that in the words of Kirby J. in *Johnson v. Johnson*[9], he would be *"neither complacent nor unduly sensitive or suspicious*".

In another case, *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] QB 451 the English Court of Appeal on the issue of bias said that "*if in any case there is real ground for doubt, that doubt must be resolved in favour of recusal."*

In the same case the Court also said that:

> "*...nor will the reviewing court pay attention to any statement by the judge [defined to include any judicial decision maker such as an arbitrator] concerning the impact of any knowledge on his mind or his decision: the*

6 [2005] EWHC 2238 (Comm).
7 [2002] AC 357 at para. 102-103.
8 [2002] EWCA Civ 90 at [61].
9 [200] 201 CLR 488 at 509.

insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced his decision"

It is trite law that an Arbitrator must be wholly independent of the parties, but there is still doubt in many commercial parties' mind about the degree of the Arbitrator's independence. Only recently, my firm needed to appoint an Arbitrator for a large Indian family international business group. The head of the family sent me a message asking whether, with regards to the Arbitrator and our fees, we could agree to get a share of the Award. When I explained to him that the Arbitrator has to be totally independent, and would not be concerned about actually supporting his case, he was surprised. He genuinely believed that his appointed Arbitrator would argue his case, and that he could discuss his case with his Arbitrator. This does suggest that some misconceptions still remain in the mind of many commercial men in India as to the role of the Arbitrator. Where necessary the legal fraternity will need to educate their client on the role of the arbitrator which is to be independent of his appointer.

5.4 Corruption

One cannot avoid confronting the perception that corruption exists amongst some Indian Arbitrators. Recent reports in Indian and international newspapers concerning suspicions against Mr. Balakrishnan, the former Chief Justice of India, have done no good for attempts to build confidence among the International community that Indian Arbitrators will be able, without any exceptions, to deliver justice fairly.

No amount of law will change that perception. London, Singapore and other Arbitration centers have monitored and maintained higher standards of fairness through self-regulation, amongst the Arbitrators community and by the legal fraternity, rather than by statutes of Parliament. If there is even a whisper of dishonest conduct on the part of any Arbitrator, the whole of the Arbitrator's community will immediately be informed in its own way. Thereafter, unless the Arbitrator comes clean, no Arbitrator will be willing to deal with him and if he is appointed as an Arbitrator his task will become very difficult. Equally, members of the Bar will not remain quiet.

The situation in case there is even a whisper of improper conduct on part of the Arbitrator is dealt with very quietly and discreetly without

making too much noise, so as to avoid humiliating the person concerned or airing the community's dirty laundry in public. A word is had in the corrupt Arbitrator's ear to the effect that he is not welcome and should not accept any more appointments. If he accepts this advice, his suspected dishonesty will not be made public. This has worked well in Singapore, England and many other jurisdictions. Member of the Bar and the judiciary keep a vigilant eye out to spot any dust of corruption or improper conduct by the Arbitrator and weed it out without making any fuss.

A suggestion of corruption on the part of a Judge or Arbitrator is never easy to make. Even more difficult is the duty of those members of the Bar who may have conflicting interests to bring them out in the open and deal with them as I have suggested above. However, I hope that members of the Indian Bar will recognize the need to do so in the interest of India progressing towards being a world economic power, and being accepted by the world as such. The price of such honest actions by members of the Indian Bar would be small, and the prize will be large. With all respect, it is a point which Indian advocates who come across any corrupt arbitrator might do well to keep in mind.

6. CONCLUSION

Finally, all of us who were born in India, no matter where we are now, remain Indian at heart, and are well wishers of India. We are all proud of India's achievement so far, and we believe that we have a duty as fellow Indians to speak up without any fear or favor when we see issues which need to be addressed however great the risk that it may offend a few. India has the potential and the intellectual power amongst its judicial and legal talents to become one of the major world centres of International Arbitration. This means not only Arbitrations where one of the parties is Indian, but also where International businessman will choose India for dispute resolution in their contracts, despite the fact that they have no connection with India or Indian Law. That is what happens in arbitration centers like London, New York and Paris. We owe it to India to pave the way towards achieving this goal.

LAW IN A PLURALIST ASIA: CHALLENGES AND PROSPECTS: CONCILIATION AND MEDIATION IN FAMILY COURTS-INDIAN AND SINGAPORE PRACTICE

Dr. Y.F. Jayakumar*

Abstract

This paper explores the use of mediation and conciliation as effective means for resolution of family disputes both in India and Singapore. India has several personal laws, the Hindus, Muslims, Parsis, Christians, and Jews all have separate laws to govern them. Access to justice is a fundamental right, however justice delayed is justice denied. Several groups have suggested that family courts be set up with a focus of conciliation in order to better deliver justice. The author suggests numerous changes to the procedure followed by family courts. Singapore too is a very pluralist country. The piece briefly discusses the Community Mediation Center (CMC) concept which is being applied in Singapore.

Family lays foundation to social life, provides basics to human life and passes the inheritance to the material life. There can be lasting peace and harmony in the society only as long as the family is well – preserved and nurtured to survive the onslaughts of time and adversity. The change in life style, busy working hours of the spouses, long distance of working place and high cost of living in the cities are some of the factors contributing to matrimonial discard. Problems arising out of divorce, dissolution of marriage, dowry, domestic violence, child care, custody of children, extra-marital relations, non-resident marriages, on-line marriage agreements, inter-country marriages, inter-country adoptions, test-tube babies, surrogate motherhood and other related matrimonial and legal issues affect the human life and bring about great stress and strain in the inter-personal relationships of the members of the family. The result is negative emotions, such as, ego, hate, guilt, bitterness, greed malice, distrust and fear. These emotions reach an aggravated form in a legally contested case, where the pleadings follow the traditional fault-oriented approach which only serves to widen the gap between the parties. Therefore, it is universally accepted that conciliation and mediation are approved devices to be used in resolving the family disputes.

Maintenance of peace and harmony is the paramount consideration in resolving family disputes. The Indian Family Courts Act, 1984 and The Singapore Women's Charter create an obligation on the family courts to

* Associate Professor & Head, Department of Law, Osmania University.

endeavor to effect reconciliation or settlement between the parties to the family disputes. Conciliation and mediation have emerged as the most powerful ADR process in India and Singapore. The paper will address the interlinked areas of both the countries to use conciliation and mediation as an effective means of resolving the family disputes.

1. CONCILIATION AND MEDIATION

Conciliation and Mediation are old institutions deeply rooted in the social tradition of Asian culture and values. These are considered as effective and meaningful alternatives to litigation through courts for resolution of disputes with the help of a neutral third party. 'Conciliation may be described as a method by which the parties to a dispute use the services or take the assistance of a neutral and impartial third person or an institution as means of helping them to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution'[1]. On the other hand 'mediation is an informal and non-adversarial process in which a neutral third person, the mediator, encourages and facilitates disputing parties to reach a mutually accepted and voluntary agreement'[2]. Mediation is effectively a 'without prejudice' process, whereby the parties to a dispute are assisted by a neutral third party to resolve the dispute on terms which hopefully all will find acceptable.[3] Mediation is a new option for resolving disputes which is well established today and cannot be ignored.[4]

In Finer's Report, Conciliation in respect of family disputes is defined as "assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in divorce or a separation, by reaching agreements or giving concerns or reducing the areas of conflict upon the custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fee and every other matter arising from their breakdown which calls for a decision and future arrangements".[5]Conciliation is generally used as synonymous for mediation, though there is a slight difference between

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1 R.D. RAJAN, A PRIMER ON ALTERNATIVE DISPUTE RESOLUTION 47 (2005 Barathi Law Publications).

2 *Ibid.*

3 PETER D' AMBRUMENLI, MEDIATION AND ARBITRATION 41 (1997 Universal Law House).

4 MARCUS STONE, REPRESENTING CLIENTS IN MEDIATION 6 (1998 LexisNexis)

5 *See* Report of the Committee on one parent families, 1974. *See also* LISA PARKINSON, FAMILY MEDIATION 7 (1997 Sweet and Maxwell).

them. If third party is involved informally but without, being provided by any law that can be called mediation. Mediation may called a non-statutory conciliation.[6] Brown & Marriott categorically write that "the term mediation as tended to be used interchangeably with conciliation though mediation has become the preferred term. Sometimes mediation is understood to involve a process in which a mediator is more pro-active and evaluative than in conciliation. But sometimes the reverse usage is employed. There is no national or international consistency of usage of these terms"[7] Therefore, the author strongly holds an opinion that the terms conciliation and mediation can be used interchangeably because both the techniques result in a mutually agreed settlement of disputes between the parties. In the context of family disputes the mediator is always perform the role of a counselor or conciliator.

2. PLURALIST INDIA AND ITS PERSONAL LAWS

In India there are various religious, cultural and ethnic groups which have their own characteristic approach and attitude towards the question of family relationship. As a result, India is country having a number of personal laws. Each community has its own personal law. The majority Hindu community has its own personal law.[8] Similarly minorities like Muslims[9], Christians[10] Parsis[11] and Jews[12] have their separate personal laws. All these communities claim their laws to be divine in their origin. However, in the recent times, these laws have undergone certain changes through legislative and judicial process.

One of the unique features of Indian Constitution is that not withstanding the adoption of a federal system and existence of union and state legislatures in their respective areas it has provided for a single integrated system of courts to administer both Union and State laws. The judicial hierarchy in India consists of a Supreme Court at the apex and the High Courts in various states, and other lower sub-ordinate courts to the

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6 MADABHUSHI SRIDHAR, ALTERNATIVE DISPUTE RESOLUTION 270 (2006 LexisNexis).

7 HENRY J. BROWN and ARTHUR L. MARRIOTT, ADR PRINCIPLES AND PRACTICE 127(1999 Sweet and Maxwell).

8 Governed by Hindu Marriage Act, 1955; Hindu Succession Act, 1956; Hindu Adoption and Maintenance Act, 1956; Hindu Minority and Guardianship Act, 1956.

9 Governed by Shariat (Application) Act, 1937; Dissolution of Muslim Marriage Act, 1939; Wakf Act, 1954; Muslim Women(Protection of Rights on Divorce) Act,1986.

10 Governed by Christian Marriage Act, 1872; Indian Divorce Act, 1869 (Renamed as Divorce Act, 1869); Indian Succession Act, 1925.

11 Governed by Parsi Marriage and Divorce Act, 1939.

12 Governed by Customary law of Jews.

respective High Courts.[13]The sub-ordinate courts play an important role in civil and criminal matters apart from the other specialized categories of disputes like motor vehicle accident claims, consumer disputes, juvenile disputes, family disputes, etc.

3. FAMILY COURTS IN INDIA

Access to justice is one of the fundamental rights guaranteed under the Constitution of India[1414] and also a statutory right under Legal Service Authority Act, 1987. Justice delayed is justice denied therefore justice must be speedy, satisfactory and affordable. The system collapses at a point when expeditious trial is not attempted while affected parties suffer at large. According to Justice P.Sada Sivam as on July, 2009 there were 53,000 cases pending before the Supreme Court, 40 lakh cases before the High Courts and 2.7 crore cases before the sub-ordinate courts[15]. As per the studies conducted in Mumbai and Delhi, 40% of the marriages are heeding towards divorce. There are also cases of misuse of provision like Section 498A of Indian Penal Code, Protection of Women from Domestic Violence Act, 2005, Section 125 Code of Civil Procedure, child custody laws, etc. There are issues like alimony which become the topic of great controversy and cause harassment to families[16]. Institutions like family counseling centers, non-governmental organizations, child welfare institutions, women welfare organizations, State Redressal Cells, International Centre for Alternative Dispute Resolution (ICADR), etc. are playing a crucial and significant role in redressing the family disputes in addition to the Courts and other fora established under the Code of Civil Procedure, 1908, Family Courts Act, 1984 and Legal Service Authority Act, 1987.

Several associations of women, other organizations and individuals have urged, from time to time, that the Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report[17](1974) has also stressed that in dealing with

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13 Y.F. Jayakumar, *Constitutional parameters of Judicial Power in India – A Critical appraisal of doctrine of precedent* 2 KUJLS 130 (2001).

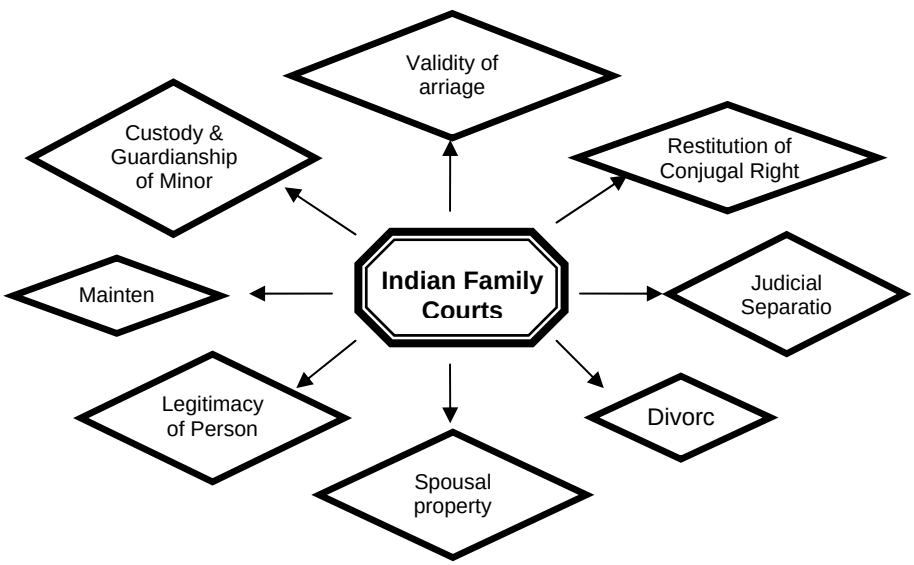
14 Article 21 of the Indian Constitution

15 The Hindu, Sunday, December 13, 2009 p. 6.

16 *See*, "Family Courts in India; an Overview" *available at* http://www.legalserviceindia.com/article/1356-Family-Courts-in-India [last visited 25th November, 2011]

17 59th Report.

disputes concerning the family, the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and it should make reasonable efforts at settlement before the commencement of trial. The Code of Civil Procedure was amended in 1976 to provide for special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts to continue to deal with the family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was therefore felt, in the public interest to establish family courts for speedy settlement of family disputes.[18] The following diagram will help us to understand the functions carried out by the family courts in India.



4. THE TRIAL PROCEDURE IN FAMILY COURTS

The Preamble of the Family Courts Act, 1984 itself refers to the obligation of the Family Court to endeavor to effect a reconciliation or settlement between the parties to the family disputes. The proceedings of

18 See the Statement of objects and reasons, The Family Courts Act, 1984.

the Court at the initial stage will be informal. Section 9 of the Act envisages the method to be adopted for a settlement. The role of the Judge of a Family Court is very important. He is expected to give an impression to the parties that he is their well-wisher and his endeavor would be to settle the dispute amicably. The Judge of a Family Court shall assist and persuade the parties to come to a settlement rather than continue to be at loggerheads. In this connection, he may take the help of experts and counselors.

- The concept of Family Court essentially implies the minimizing or even discarding of the adversarial procedure. Less formal rules have to be framed.
- The rules should be framed in simple language clearly indicating the whole range of procedures from the commencement of an action to its conclusion, including the means of enforcing judgments, decrees and orders.
- Flexibility of rules should be the hallmark of the procedure so that diverse and at times, complex problems of familiar conflicts are covered.
- As far as possible, standard forms should be framed in such a manner as to be adaptable to the circumstances of each case.
- Pleadings should be simple and should not have the traditional fault-oriented approach.
- Pre-trial processes should be designed in such a manner as to provide dignified means for the parties to reconcile their differences or to arrive at amicable settlements without the need of trial.
- Facilities for legal advice should be made available to each litigant so that he or she may become aware of the rights and responsibilities and where children are involved an early opportunity should be provided to ensure that their rights are adequately protected.
- Issues between the parties should be determined without any prejudicial delay. This is particularly significant when the Court is concerned with the placement of children.
- The language, conduct, documentation and legal representation should be simple, shorn of all technicalities.

- Pre-trial documentation of the pleadings should be such that issues between the parties are clearly defined. This will help to avoid frivolous litigation, encourage pre-trial negotiation and settlement.
- One of the objectives of the Family Court system is to encourage and to enable the parties to go into a process of reconciliation, failing which the family Court Judge should have the power to pass consent orders if parties have been able to come to some settlement without any formal hearing or trial of issues.

In every suit or proceedings relating to the matters concerning the family, the court shall make an endeavor in the first instance, where it is possible to do so consistently with the nature and circumstances of the case, to assist the parties in arriving at a settlement in respect of the subject matter of the suit. If in any such suit it appears to the Court that there is a reasonable possibility of settlement between the parties, the Court may adjourn the proceedings for such period as it thinks fit to enable attempts to be made to effect such settlement.[19]

5. ARBITRATION AND CONCILIATION ACT, 1996

It governs conciliation of disputes arising out of legal relationship, whether contractual or not and to all proceedings relating thereto. The parties may agree for sole conciliator or appoint one each or have a third conciliator[20] The law requires conciliators to be independent and impartial and to be guided by principles of objectivity, fairness and justice[21] The conciliator and the parties are bound to keep confidential, all matters relating to the conciliation proceedings. But conciliator should disclose the substance of the information about any fact relating to the dispute from one party to the other party.[22] Cooperation of parties with the conciliator is insisted.

The role of the conciliator/s is to assist the parties to reach an amicable settlement of the dispute. The procedure of conciliation commences with the acceptance of the proposal made by the other party inviting to conciliate and identifying the issues. After the appointment of the conciliator by the parties, the conciliator may request each party to submit brief written statement. He may invite the parties to meet him and

19 Civil Procedure Code, 1908, Order XXXIJ-A Rule 3 inserted by the Act of 1976.
20 Section 64, Arbitration and Conciliation Act, 1996.
21 *Ibid.* Section 67.
22 *Id.* Section 70.

has discretion to conduct the proceedings according to the expediency of the situation [23] .He may take administrative assistance with the consent of parties[24] He may make a proposal for settlement at any stage of conciliation proceedings. The proposal might be reformulated in the light of observation of parties[25] if the parties reach an agreement the drafting of the settlement agreement will be done. Such settlement has the same status and effect as an arbitral award[26] .The Conciliators are prohibited from acting as arbitrator, counsel representative or witness[27] .The conciliation proceedings comes to an end with the settlement of dispute or conciliators declaration that no further effort of conciliation was justified[28]

6. SECTION 89 OF THE CIVIL PROCEDURE CODE

The newly inserted Section 89 provides, "where it appears to the court that there exist element of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for (a) arbitration (b) conciliation (c) judicial settlement including settlement through *Lok Adalat*, or (d) Mediation". This compels the Court to put a serious effort in the direction of ADR. Further , the Court has role in enforcement of the award or settlement also. As stated in the objects and reasons for the amendment. "It is only after the parties fail to get their disputes settled through any one of the alternate dispute resolution methods that the suit shall proceed further in the court in which it was filed." The purpose is to assist the litigants to avail cheap, quick and effective method of dispute resolution instead of undergoing elaborate process of court trial.[29]

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23 *Id.* Section 69.
24 *Id.* Section 68.
25 *Id.* Section 73.
26 *Id.* Section 74.
27 *Id.* Section 80.
28 *Id.* Section 76.
29 P.ESHWARA BHAT, LAW & SOCIAL TRANSFORMATION IN INDIA 875 (2009 Eastern Book Company).

7. CONCILIATION IN FAMILY DISPUTES-OTHER STATUTORY INSTITUTIONS

Apart from the family courts there are other judiciary institutions like *Lok Adalat* and *Gram nyayalayas* to deal with family disputes effectively. The Legal Services Authorities Act, 1987 enacted to constitute legal service authorities for providing free and competent legal services to the weaker sections of the society and to organize *Lok Adalt* to ensure that the operation of legal system promoted justice on the basis of equal opportunity. This Act has put *Lok Adalat* on statutory footing. All the provisions of the Act have been extended to all the states and union territories. The system of *Lok Adalat* which is an innovative mechanism for alternative dispute resolution has proved effective for resolving disputes in a spirit of conciliation outside the courts. The *Lok Adalat* shall have jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal or revenue court or any tribunal constituted under law for the time being in force in the area for which the *Lok Adalat* is organized for pre-litigation conciliation and settlement.[30]

The Govt. of India passed Gram Nyayalayas Act, 2009 keeping in mind the nature of disputes in rural areas which includes disputes about possession, ownership of property, boundary disputes, problems of cultivation, debts, marketing and petty family disputes. These could be better resolved by rural community's collective participation rather than a heap of procedural complexities. Gross root level courts, *Gram Nyayalaya* required gross root participation in administration of justice according to law with an awareness of local interest and local customs.[31]

8. SINGAPORE LEGAL SYSTEM AND FAMILY COURTS

The Singapore legal system is a rich tapestry of laws, institutions, values, history and culture. Right from the establishment of East India Company. in 1819 to its independence 1965, Singapore's legal development had been linked with British colonial administration. The Common law is one important strand of the Singapore political – legal fabric. Singapore has inherited the English Common Law tradition and thus enjoys the attendant benefits of stability and certainty and in the British System. She shares similar English common law roots with some her neighbourers such

30 *See* The Legal Services Authority Act, 1987.

31 *See* for details Gram Nyayalayas Act, 2009.

as India, Malesia, Brunae and Mayanmar though the details of the application and implementation will differ according to each country's specific needs and policies.[32] According to the Singapore Civil Law Act[33] the Singapore Courts are empowered to administer the common law as well as equity concurrently. The practical effect is that a claimant can seek both common law remedies (damages) and equitable remedies (including injunctions and specific performance) in the same proceedings before the same court. Apart from the common law and equity, the Syariah court also administers Muslim law in specific personal legal matters governing marriage, divorce, nullity of marriage, judicial separation under the Administration of Muslim Law Act[34] in respect of Muslims or persons married under Muslim law with respect to issues of inheritance and succession Muslims in Singapore are governed by Islamic texts.

The great efficiency and strength of Singapore judiciary has won her several accolades and a strong international reputation. Strict case management and alternative dispute resolution methods have reduced drastically backlog cases which had plagued both Supreme Court and sub-ordinate courts. The Hon 'ble Chief Justice Chan Sek Keong, since his appointment with effect from 11th April, 2006, has focused an implementing initiatives to enhance access of justice and the development of substantive jurisprudence in Singapore. Bail Court was established in 2007 to deal exclusively the bail matters. In March, 2009, a Supreme Court organized a successful open house, 'The Living Court house' as the highlight of its out reach efforts to remove , in the words of Chief Justice Chan Sek Keong, the mysterious atmosphere where strange rituals and exchanges are seen to take place between judges, counsel and witnesses.[35]

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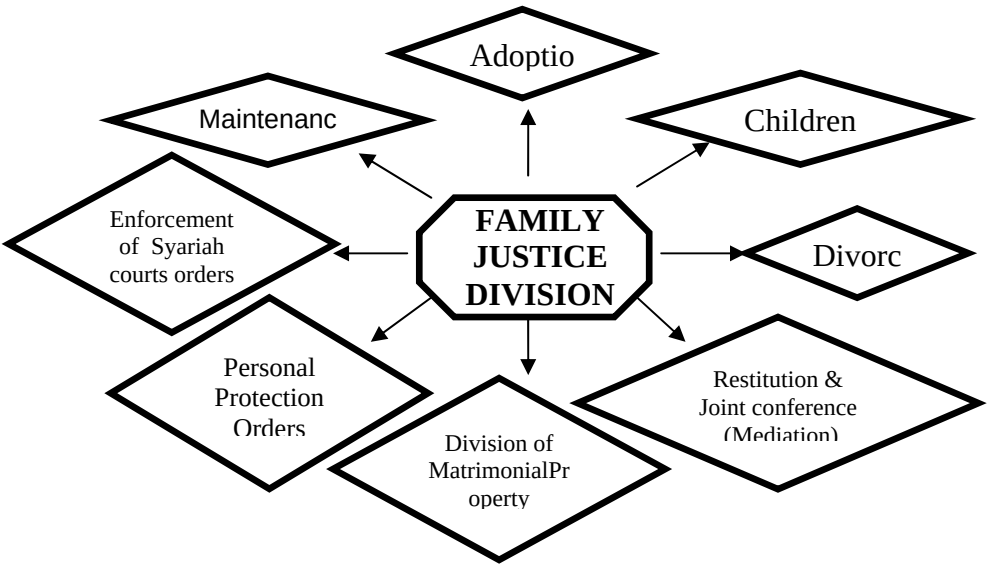
32 *See*, "The Singapore Legal System" *available at* http://www.singaporelaw.sg/content/LegalSyst1.html [last visited 23rd November, 2011]

33 Cap 43, 1999 Rev Ed.

34 Cap 3, 1999 Rev Ed.

35 *Supra* note 32.

FAMILY COURT IN SINGAPORE



9. CONCILIATION AND MEDIATION IN SINGAPORE FAMILY COURTS

In Singapore Mediation in the Family Court is governed by court-connected mediation. The Women's Charter (Cap 353) imposes a duty to consider the possibility of reconciliation for parties to divorce or judicial separation proceedings. Justice Yong Pung How while introducing mediation to the Courts said that "Perhaps, it is time for us to take a fresh look at the way by which disputes and conflicts are presently resolved. We should provide an alternative path to civil justice such as mediation in addition to the traditional adjudication path. Once a variety of dispute resolution mechanisms is put into place, we can begin to match the forum to the case instead of matching the case to the forum. This can be done by conducting an early assessment of the case at the filing stage during which the nature of the dispute, the relationship of the disputants and the nature of the relief sought are considered, before assigning the most appropriate

forum by which the dispute can be resolved."[36] Further, he explained that "the distinguishing feature of mediation is that the parties themselves decide the outcome of their dispute. This is on terms acceptable to both of them, as opposed to the zero-sum outcome of the adjudication process, which is premised on the adversarial model of dispute resolution where the "winner takes all". In the context of most Asian societies, this is particularly important as it ensures that no one should come away with the feeling that he has lost face. The third party intervener does not impose a decision but uses the structured process to assist the parties. Because mediation emphasizes co-operative or what is termed as "win-win" solutions, it is useful in civil disputes. It is especially so in matrimonial disputes involving the division of matrimonial assets and the custody of children, as it avoids costly trials and possibly even more costly appeals thereafter, Mediation exists of course in many forms. But our own experience has shown that, once litigation has begun in the first heat of dispute, the possibility of early settlement is often precluded. This is because neither party is willing to offer to talk, lest this should be thought by the other party to be a sign of weakness. An initiative by the court gets over this primary difficulty. This also allows settlement conferences to be held at the earliest possible stage of the proceedings so as to minimize costs."[37] The relevant provisions of Women's Charter reads as under:

Duty of judge to consider possibility of reconciliation

Section 49 (1) A court before which----

(a) Proceedings for divorce or judicial separation;

(b) Proceedings, instituted by a party to a subsisting marriage, under section 59,65,66 or 69 are being heard shall consider, from time to time, the possibility of a reconciliation of the parties.[3838]

(2) If, during such proceedings, it appears to the judge from the nature of the case, the evidence in the proceedings or the attitude of the parties that there is a reasonable possibility of a reconciliation of the parties, the judge may do all or any of the following:

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36 *See* Judge Liew Thiam Leng "Alternative Dispute Resolution in Singapore" a*vailable at* http://app.subcourts.gov.sq/data/files/file/e-adr/PAPER%20FOR%20 [last visited 23rd November, 2011]

37 *Ibid.*

38 Section 59, deals with summary way of deciding the property disputes of wife and husband, Section 65, 66 & 69 deal with Protection Order, Expedited Order, Maintenance Order respectively.

(a) Adjourn the proceedings to give the parties the opportunity to consider a reconciliation or to enable anything to be done in accordance with paragraph (b) or (c);

(b) With the consent of the parties, interview them in chambers, with or without their solicitors, as the judge thinks proper, to assist in a possible reconciliation; and

(c) Nominate a Conciliation Officer or some other suitable person or organization to assist in considering a possible reconciliation.

(3) If, not less than 14 days after an adjournment under sub section (2), either of the parties requests that the hearing be proceeded with, the judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another judge, as the case requires, as soon as practicable.

(4) Where a judge has acted as conciliator under subsection 92(b) but the attempt to effect a reconciliation has failed, the judge shall not except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another judge.

(5) Evidence of anything said, or of any admission made, in the course of an endeavour to effect a reconciliation under this section shall not be admissible in any court.

Court may refer parties for mediation or to attend counseling

Section 50 (1) A court before which any proceedings under this Act (other than proceedings under section 104) are being heard may give consideration to the possibility of a harmonious resolution of the matter and for this purpose may, with the consent of the parties, refer the parties for mediation by such person as the parties may agree or, failing such agreement, as the court may appoint.

(2) A court before which any proceedings under this Act (other than proceedings under section 65 or 66) are being heard may, if it considers that it is in the interests of the parties or their children to do so, at any stage in the proceedings direct or advise either or both of the parties or their children to attend counseling provided by such person as the Minister may approve or as the court may direct.

(3) Failure to comply with any direction or advice referred to in subsection (2) does not constitute a contempt of court.

(4) Evidence of anything said, or of any admission made, in the course of any mediation or any counseling under this section shall not be admissible in any court.

It is pertinent to note that between June 1994 and December 2008, the subordinate courts mediated 80,016 civil cases with a success rate of 90.4% (i.e.72,366 cases). For small claims and these are additional figures, the number mediated between 2002 and 2008 was 6103, with a success rate of 85.7%(5229 cases). For maintenance cases, the number mediated between 2000 and 2008 was 3907, with a success rate of 97% (3785 cases). For family violence cases, the number mediated between 2002 and 2008 was 1126, with a success rate of 79% (891 cases). For other family court cases, including Syariah Court maintenance orders, the number mediated from 2006 upto 2008 was 1701, with a success rate of 89% (1506 cases). These results are really admirable.[39]

10. FAMILY DISPUTES AND COMMUNITY MEDIATION CENTERS

In 1997 a committee on alternative dispute resolution was set up to explore the possibilities and make recommendations in ADR process.[40] The Committee recommended the introduction of less expensive and non-adversorial method of dispute resolution to suit the needs of Singapore society. Accordingly Community Mediation Centers (CMCs) were established. The CMCs deal with a fair number of family disputes apart from social conflicts like quarrels between neighbours nuisance complaints common corridor complaints, noise pollution complaints, water leakage and seepage problems, etc.[40]

Under the Community Mediation Centers Act (Cap 49A), a magistrate, upon receiving a complaint, may refer the complaint to a Community Mediation Centre if he is of the opinion that the matter may be more appropriately resolved by mediation and if the parties are agreeable to such a referral.

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39 Speech delivered by Chief Justice Chan Sek Keong on 16 April, 2009 at SMU, Centre for Dispute Resolution *available at* http.//app.supreme court.gov.sg/default.aspx?pgid = 284. [last visited 23rd November, 2011]

40 S. Jayakumar, the Law Minister appointed the committee under the Chairmanship of Associate Professor Ho Peng Kee.

Court –based mediation is practiced in the subordinate courts in Singapore. In fact, a Singapore Courts Mediation Model has been developed. The model was created with the diverse ethnic and cultural backgrounds of Singaporeans and present day social conditions, in mind. The model involves a Settlement Conference presided over by a Settlement Judge. The Settlement Judge plays a pro-active role in guiding the parties and offering advice and suggestions on possible solutions. The directive and evaluative approach was adopted as it is believed that Singaporeans are less vocal in a formal setting. Given the foregoing, a greater degree of intervention is required in order to facilitate negotiations.[41] In the words of Chief Justice Chan Sek Keong "we believe that mediation is positive in relieving congestion in Courts, and in providing cost savings, "face" savings and other benefits . In addition, resolving social and community disputes through mediation will bring about a less fractious and more harmonious society. But we cannot succeed in these goals, unless we believe in mediation as a force for good".

11. CONCLUSIONS

India and Singapore legal systems are greatly influenced by oriental and common law jurisprudence with multi religious, cultural and ethnic characteristic approach and attitude towards family and family relationship. The Family Courts Act 1984 and the Women's Charter gave statutory recognition to conciliation and mediation in resolving the family disputes. The significant feature of the conciliation and mediation in respect of family dispute resolution in both the countries is regulated by the courts. The advantage of this system is that it is directive in nature, voluntary, consensual, flexible and acceptable to both the parties. Judge being mediator commands public confidence and respect. The recent legal reforms towards judicial conciliation and mediation in India and Singapore reflect a clear shift from traditional means of litigation to ADR for improving access to justice. The newly enacted provisions and policies on mediation have created a window of opportunity for promoting access to justice for all through reducing the cost and expediting the process of family disputes. The institutions of conciliation and mediation structurally and functionally are of great success in both the countries but in India the provisions of mediation remain largely unused because of lack of motivation of the concerned and partly due to the fact that being used to

41 Chan Sek Keong, *supra* note 39.

adversarial system the judges presiding over family courts are completely ignorant about mediation. Therefore, it needs considerable re-orientation of lower judiciary towards mediation and requires adequate institutional support. This problem may not be perceived in Singapore legal system because of its economic, social and technological support/developments.

PROPOSED REFORM (?) TO ARBITRATION LAW IN INDIA

Anirudh Krishnan*

Abstract

It is clear that the Ministry of Law and Justice has the intention to turn India into an international hub for arbitration. This is evident from the Consultation paper which was published by the govt, which lays down amendments to the Arbitration and Conciliation Act 1996. The paper looks at some of these amendments and tries to elaborate upon them and provide suggestions. The paper looks at an amendment to S. 2(2) amendment to s.11, an amendment to s.12, an amendment to s.28, an amendment to s. 34 & an amendment to s. 38. The author feels that the introduction of implied arbitration agreements in the case of contracts with a high consideration value could help. It is the authors belief that such implied agreements would help reduce the number of litigants that approach the court to litigate about the validity of the arbitration agreement. The consultation paper is a work in progress, and still requires certain modifications.

The Ministry of Law and Justice's (Hereafter "Law Ministry") drive to make India a global hub for arbitration is evident from the Consultation Paper published by it (Hereafter "Consultation Paper") setting out a proposal for a series of amendments to the Arbitration and Conciliation Act, 1996 (Hereafter "Act"). These amendments address some of the primary challenges that arbitration in India faces today. While some of these amendments are welcome, there are a few which may fail the cost-benefit test.

1. BRIEF HISTORY TO THE PROPOSED AMENDMENTS

Pursuant to the amendments suggested by the 176th Law Commission Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced.[1] The Bill was then analyzed by the Justice D.P. Saraf Committee and the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice. [2] The latter reached the conclusion that the amendments sought to be made provided scope for excessive judicial intervention, which defeated the primary objectives of

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* The author is an alumnus of NALSAR, University of Law, Hyderabad & University of Oxford. He is an Advocate of the Madras High Court and is one of the two Chief-editors of the 5th edition of Justice R.S.Bachawat's Law of Arbitration and Conciliation, published by LexisNexis Butterworths Wadhwa Nagpur.

1 Consultation Paper, at 1.

2 Consultation Paper, at 2.

arbitration. In this light the Bill was withdrawn. [3] However, to address number of lacunae prevalent in the Act, the Law Ministry recently came up with the Consultation Paper which proposed certain amendments to the Act. [4]

2. SCOPE AND OBJECTIVE OF THIS PAPER

This paper attempts to elucidate the amendments to the Act proposed in the Consultation Paper by the Law Ministry with a brief explanation of the underlying reasons behind each amendment. The paper only provides an overview of the Consultation Paper rather than an analysis analyzing each amendment in depth. The author has analyzed a number of these issues in other publications to which references have been drawn.

3. PROPOSED AMENDMENTS TO THE ACT-AMENDMENT TO SECTION 2(2): POSITION OF LAW FOLLOWING *BHATIA* AND ALLIED CASES

When posed with the question of whether Part I of the Act (which governs domestic arbitrations) applies to arbitrations conducted outside India, the Supreme Court, in *Bhatia International v. Bulk Trading S.A.*[5] (Hereafter "*Bhatia*"), held that

a) Part I mandatorily applies to all arbitrations held in India, and

b) Part I applies to arbitrations conducted outside India unless expressly or impliedly excluded.[6]

The Supreme Court, in *Bhatia* reasoned that Section 2(2) of the Act which provides that "This Part shall apply where the place of arbitration is in

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3 *Ibid.*

4 *Id.*

5 (2002) 1 Arb LR 675. This case involved a contract between the parties which provided for an arbitration in Paris, following the rules of the International Chamber of Commerce. Neither the proper law of the contract nor the proper law of the arbitration agreement was specified. Disputes arose between the parties and pending arbitration, the Respondent sought to file an application under Section 9 before the Courts at Madhya Pradesh seeking an injunction order restraining the Petitioner from alienating / transferring its property. The issue thus was whether a Section 9 application would lie with respect to an arbitration conducted outside India. If it could be proved that Part I applies to arbitrations conducted outside India, then it would follow that the Section 9 application could be filed. The issue thus was whether or not Part I would apply to such arbitrations.

6 The Supreme Court, in *Bhatia*, held "Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions."

India" does not imply that Part I would "only" apply when the place of arbitration was in India. The Supreme Court relied on a questionable contextual interpretation of the provisions of the Act.[7] However, one valid reason provided by the Supreme Court was that if such an interpretation was not given to Section 2(2), it would leave a party remediless in the case of an arbitration conducted outside India where a party would not be able to apply for interim relief even though the assets of the other party was located in India.

The Supreme Court (in *Bhatia* and subsequent cases[8]) therefore concluded that pursuant to Sections 9, 11 and 34 (located in Part I of the Act) Indian Courts are competent to provide interim relief pending arbitration, appoint arbitrators and set aside arbitral awards even if the arbitration was conducted outside India. These powers exist unless Part I was expressly or impliedly excluded. An implied exclusion cannot be presumed where the:

a) Seat[9] of the arbitration is abroad and the proper law[10] of the contract and arbitration agreement is not specified,[11]

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7 The Supreme Court reasoned thus:
"Whilst the submissions (in favour of Part I not being applicable to arbitrations conducted outside India) … are attractive one has to keep in mind the consequence which would follow if they are accepted. The result would:-
a) "amount to holding that the Legislature has left a lacunae in the said Act. There would be a lacunae as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention (hereinafter called a non- convention country). It would mean that there is no law, in India, governing such arbitrations.
b) lead to an anomalous situation, inasmuch Part I would apply to Jammu and Kashmir in all international commercial arbitrations but Part I would not apply to the rest of India if the arbitration takes place out of India.
c) lead to a conflict between sub-section (2) of Section 2 on one hand and sub-sections (4) and (5) of Section 2[4] on the other. Further sub- section (2) of Section 2 would also be in conflict with Section 1 which provides that the Act extends to the whole of India.
d) leave a party remediless inasmuch as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all."

8 Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd., (2008) 3 Arb LR 391; Citation Infowares Limited v. Equinox Corporation, 2009(5) UJ 2066 (SC); Venture Global Engineering v. Satyam Computer Services Ltd, (2008) 1 ARB LR 137 (SC).

9 Section 3 of the English Arbitration Act 1996 defines the seat as follows:
"the seat of the arbitration" means the juridical seat of the arbitration designated—(a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the

b) Seat of the arbitration and proper law of arbitration agreement is not specified and the proper law of the contract is foreign.[12]

The jurisprudence on this area has led to an increased court intervention in arbitrations conducted outside India and acted as a disincentive to parties who seek to include arbitration clauses in their contracts. More over the resulting position of law is anomalous.

For instance, pursuant to the ratio of *Bhatia*, Part I of the Arbitration and Conciliation Act 1996 is applicable to arbitrations conducted outside India unless it is expressly or impliedly excluded. Section 2(7) states that an arbitral award "made under this Part (i.e. Part I) shall be considered as a domestic award". Thus if an arbitration is conducted outside India in a country which is a signatory to the New York Convention or the Geneva Convention and Part I is not excluded, it follows that since Part I is applicable the award is a "domestic award". However, the award would also qualify as a "foreign award"[13] under Sections 44 and Section 53 if the

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parties, or determined in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

The seat of the arbitration is normally the venue of the arbitration unless another place is expressly stipulated as the seat or there exists clear and unmistakeable proof of evidence to the contrary. *See* Shashoua v. Sharma, [2009] EWHC 957 (Comm.)

10 The arbitration and the substance of the dispute are governed by the theory of proper law of contract, or in the case of the former the proper law of the arbitration agreement. *See* Shipyard R.S. v. Ship Management T.S, Yearbook of Commercial Arbitration, Vol. XXXI (2006), James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd, [1970] AC 583. The proper law is determined in accordance with the general principles of the conflict of laws, namely the law chosen by the parties or, in the absence of such choice, the law of the country with which the agreement is most closely connected. *See* Halsbury's Laws of England, para. 1206; *See also* Buyer (Poland) v. Seller (Poland), Yearbook of Commercial Arbitration, Vol. XXX(2005), Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg *AG,* [1981] 2 Lloyd's Rep 446, Vita Food Products Inc v. Unus Shipping Co Ltd, [1939] AC 277 [1939] 1 All ER 513, PC; Lloyd v. Guibert, (1865) LR 1 QB 115; R v International Trustee for the Protection of Bondholders AG, [1937] AC 500, [1937] 2 All ER 164, HL; Tzortzis v. Monark Line, A/B [1968] 1 All ER 949, [1968] 1 WLR 406, CA; James Miller & Partners Ltd v. Whitworth Street Estates (Manchester) Ltd, [1970] AC 583; Altmann v. Austria, Yearbook of Commercial Arbitration, Vol. XXXI(2006), p.13. For more details refer to ANIRUDH WADHWA & ANIRUDH KRISHNAN (ED.), JUSTICE R.S.BACHAWAT'S LAW OF ARBITRATION AND CONCILIATION 2207-2213 (2010 LexisNexis Wadhwa Nagpur).

11 Bhatia International v. Bulk Trading S.A, (2002) 1 Arb LR 675.

12 Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd., (2008) 3 Arb LR 391, Citation Infowares Limited v. Equinox Corporation, 2009(5) UJ 2066 (SC*),* Venture Global Engineering v. Satyam Computer Services Ltd, (2008) 1 ARB LR 137 (SC)

13 Sections 44 of the Act read with Article 1(1) of the New York Convention stipulates that for an award to qualify as a "foreign award":

A) the award must be rendered in a foreign country, or

B) the award must not be considered to be a domestic award; and

country in which the award is rendered has reciprocal arrangements to enforce awards passed in countries signatories to the New York Convention/ Geneva Convention.[14]

3.1 Proposed amendment to fill this lacuna

The Law Ministry, ostensibly in light of the above stated factors, has proposed that Section 2(2) of the Act be amended to read as follows:

"Section 2(2)- This Part shall apply ***only*** where the place of arbitration is in India.

Provided that provisions of Section 9 and Section 27 shall apply to international commercial arbitration where the arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act."

If such an amendment would go through, Part I would no longer be applicable to arbitrations conducted outside India. However, the Indian Courts would be competent to award interim relief in aid of such arbitrations and also assist in obtaining evidence in such cases.

The Parliament should additionally clarify what the term "where the place of arbitration is in India" means. A provision similar to the definition of "seat of arbitration" would be helpful.[15] In the absence of such a provision, the issue of whether the "place of arbitration" would be India even if a few hearings are conducted in India remains a moot point.

3.2 Amendment to Section 11

While parties have autonomy in appointing the arbitrators, in case the parties are not able to amicably agree on the arbitral tribunal, the Chief-Justice of the High Court[16] and the Chief-Justice of India (in the case of international commercial arbitrations) are granted the power to appoint the arbitrator(s) by Section 11(6)[17] and (9)[18] of the Act respectively.

C) the award must be rendered in a country that has been notified by the Indian Government as one which has reciprocal provisions for implementation of NYC.

14 For a more in depth analysis of this topic, refer to ANIRUDH WADHWA & ANIRUDH KRISHNAN ED. JUSTICE R.S.BACHAWAT'S LAW OF ARBITRATION AND CONCILIATION 2257-2258 (2010 LexisNexis Wadhwa Nagpur).

15 *Supra* note10.

16 "(T)he reference to "Chief-Justice"…shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate.". *See* Section 11(12)(b) of the Act.

17 Section 11(6) states "Where, under an appointment procedure agreed upon by the parties –
(a) a party fails to act as required under that procedure; or

The jurisprudence relating to Section 11 has off late been dominated by the Supreme Court's decision in *SBP Co. v. Patel Engineering*[19]("*Patel Engineering*"). The Supreme Court, while ruling on the nature of the Chief-Justice's power under Section 11 overruled *Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.*[20]. The Supreme Court declared the power of the Chief Justice of the High Court to appoint an arbitrator under Section 11(6) and the Chief-Justice of India under Section 11(9) to be a judicial power. The position of law was summarized thus:

> "i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
>
> ii) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court.
>
> (iii) In case of designation of a judge of the High Court or of the Supreme Court, the power that is exercised by the designated, judge would be that of the Chief Justice as conferred by the statute.
>
> (v) Designation of a district judge as the authority under Section 11(6) of the Act by the Chief Justice of the High Court is not warranted on the scheme of the Act.
>
> (vii) Since an order passed by the Chief Justice of the High Court or by the designated judge of that court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution of India to the Supreme Court.
>
> (xi) Where District Judges had been designated by the Chief Justice of the High Court under Section 11(6) of the Act, the appointment

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(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. "

18 Section 11(9) states "In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities."

19 (2005) 8 SCC 618.

20 (2002) 2 SCC 388.

orders thus far made by them will be treated as valid; but applications if any pending before them as on this date will stand transferred, to be dealt with by the Chief Justice of the concerned High Court or a Judge of that court designated by the Chief Justice.

(xii) The decision in *Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd.* (2000) 2 SCC 388 is overruled."[21]

Following these observations by the Supreme Court, the power under Section 11(6) of the Act could be delegated only to any other Judge of the High Court and the power under Section 11(9) of the Act could only be designated to any other judge of the Supreme Court.

These observations rendered redundant the provisions in Sections 11(4), (5), (7), (8) and (9) which permit the Chief Justice (of the High Court and Chief Justice of India in case of Section 11(9)) to delegate their power to "a person or institution". Such a situation would be to the detriment of institutional arbitration which is the flavour of the globalized arbitration world today.[22] The Law Ministry has proposed to correct this position by transferring the power conferred by these sections from the Chief Justice to the High Court[23] (and Supreme Court in the case of Section 11(9)) and granting the High Court the discretion to delegate the power to any person or arbitral institution.[24]

Since the power is transferred to the High Court, it is now a possibility that an order passed by a single judge of the High Court would be subject to an appeal before a division bench. To pre-empt such an appeal, the Law Ministry has proposed that a provision stating that "no appeal including a

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21 For an in-depth analysis of this decision refer to ANIRUDH WADHWA & AIRUDH KRISHNAN ED. JUSTICE R.S.BACHAWAT'S LAW OF ARBITRATION AND CONCILIATION 744-754 (2010 LexisNexis Wadhwa Nagpur)

22 *See* Nassib G. Ziadé, *Reflections on the Role of Institutional Arbitration Between the Present and the Future,* 25(3) 427-439 ARB. INT'L (2009); Dr. Ottoarndt Glossner, *The Institutional Appointment of Arbitrators,* 12(1) ARB. INT'L 95-98 (1996); Stockholm: Institutional Arbitration: Future Challenges and Trends, A contribution by the ITA Board of Reporters; Anne Véronique Schlaepfer and Christian Girod, Chapter 1 – *Institutional vs. ad hoc Arbitration, in* GABRIELLE KAUFMANN-KOHLER AND BLAISE STUCKI ED. INTERNATIONAL ARBITRATION IN SWITZERLAND: A HANDBOOK FOR PRACTITIONERS 5 – 14 (2004 Kluwer Law International).

23 It is proposed that the term High Court shall be "construed as a reference to the "High Court" within whose local limits the principal civil court referred in clause (e) of sub-section (1) of Section 2 is situate and in cases where the High Court itself is the principal civil court, then that High Court. See Consultation Paper, at 21 (proposed section 12(b)).

24 This amendment also expressly recognizes the position in *Patel Engineering* that an order passed pursuant to an application under Section 11 is a judicial order.

letter patent appeal shall lie against such decision". However, such a provision does not preclude a special leave petition before the Supreme Court under Article 136 of the Constitution of India. A mere statutory provision cannot take away a constitutional right.

The most interesting proposal, however, states as follows:

"(13) Notwithstanding anything contained in foregoing provisions in this Section, where an application under this Section is made to the Supreme Court or High Court as the case may be for appointment of arbitrator in respect of "Commercial Dispute of specified value", the Supreme Court or the High Court or their designate, as the case may be shall authorize any arbitration institution to make appointment for the arbitrator.

Explanation- For the purpose of this sub-section, expression "Commercial Dispute" and "specified value" shall have same meaning assigned to them in the Commercial Division of High Court Act, 2009.

(14) An application made under this Section for appointment of arbitrator shall be disposed of by the Supreme Court or the High Court or their designate, as the case may be as expeditiously as possible and endeavour shall be made to dispose of the matter within sixty days from the date of service of notice on the opposite party."

Therefore, where an application is filed before the High Court or Supreme Court for appointment of arbitrators to resolve any "commercial dispute"[25] of a value greater than Rs 5 crores[26], the power of appointment shall be mandatorily delegated to an arbitral institution. Such a clause would go a long way in reducing the burden on the judiciary.

The imposition of a sixty day time limit to dispose off an application under Section 11 is also welcome. However, such a provision would be difficult to implement. The Courts may take upto sixty days to transfer the application to an individual or arbitral institution and the latter may not be

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25 Section 2(1) of the Commercial Division of High Courts Bill, 2009 defines "commercial dispute" as follows " "'commercial dispute' means a dispute arising out of ordinary transactions of merchants, bankers and traders such as those relating to enforcement and interpretation of mercantile documents, export or import of merchandise, affreightment, carriage of goods, franchising, distribution and licensing agreements, maintenance and consultancy agreements, mercantile agency and mercantile usage, partnership, technology development in software, hardware, networks, internet, website and intellectual property such as trademark, copyright, patent, design, domain names and brands and such other commercial disputes which the Central Government may notify."

26 This value may be increased by a notification issued by the Central Government in consultation with the relevant State Government. See Section 7 of the Commercial Division of High Courts Bill, 2009.

able to dispose off the application within the sixty day period. Perhaps, setting a time limit much less than sixty days (say thirty days) for the Court in case it plans to delegate its power (or is mandated to do so under Section 11(13)) to an individual or an arbitral institution would be a step in the right direction.

3.3 Amendment to Section 12

Section 12 of the Act contemplates that an arbitrator discloses to the parties any circumstances that "give rise to justifiable doubts as to his independence or impartiality".[27] Such an obligation is a continuing obligation through the arbitration.[28] A challenge to the impartiality of the arbitrator is also based on the same grounds, i.e "existence of justifiable doubts as to his independence or impartiality".[29]

Therefore, an arbitrator possesses large amount of discretion in that he reveals only such information that he believes gives rise to justifiable doubts as to his independence and impartiality. Non-disclosure of material facts by a partial arbitrator would make it very difficult to challenge the independence of that arbitrator under the present statutory regime.

The Parliament therefore has sought to broaden the scope of the disclosure obligation of the arbitrator to mandate a disclosure of "any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence and impartiality".

While, *ex facie*, the provision seems to be widely drafted requiring the arbitrator to disclose every minute detail regarding his association with the parties or their counsel, the fundamental problem has not been addressed. The inclusion of the underlined phrase means that the discretion still lies with the arbitrator and he may decide to not reveal some information on the ground that such information is not "likely to give rise to justifiable doubts as to his independence and impartiality".

One other aspect that ought to have been addressed was the case of bias in employer-employee arbitrations where the arbitrator is often a senior officer of the employer. Clauses providing for such appointments are often

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27 *See* Section 12(1) of the Act.
28 *See* Section 12(2) of the Act.
29 *See* Section 13(3) of the Act.

forced upon the employees. The employees would greatly benefit from a statutory prohibition of such clauses.[30]

3.4. Amendment to Section 28

Section 28(3) provides that while deciding the case, the arbitral tribunal "shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction". The Supreme Court, in *ONGC Ltd v. Saw Pipes Ltd.*[31] (Hereafter "*ONGC*"), held that if the arbitral tribunal ignored a term of the contract, the award would fall foul of Section 28(3) and would be liable to be set aside under Section 34 (on the basis that it would be against public policy).

To overcome this situation, the Law Ministry has proposed to modify the language of Section 28(3) to require the arbitral tribunal only to "take into account" the terms of the contract. It is highly unlikely that such an amendment would make any difference to the interpretation of the Courts.

3.5 Amendment to Section 31

The Law Ministry has suggested that the default percentage of interest to be paid on the sum payable pursuant to the arbitral award from a fixed 18% to a varying interest rate, which would be one percent greater than the "current rate of interest" as defined in the Interest Act, 1978. This very practical amendment is to ensure that the interest payable varies according to the market conditions.

3.6 Amendment to Section 34

The Law Ministry has suggested two sets of amendments to Section 34.

3.6.1 Limiting the scope of "public policy"

The decision in *ONGC* opened the floodgates so far as judicial interference in arbitrations are concerned. The Supreme Court, in *ONGC* declared that:

> *"Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be given a wider meaning…. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such*

30 The Supreme Court, in Union of India v. Singh Builders Syndicate, (2009) 2 ARB LR 1(SC) made observations pointing to the need for such a statutory provision.

31 (2003) 5 SCC 705.

award/judgment/decision is likely to adversely affect the administration of justice…(the) award could be set aside if it (sic) contrary to:--

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy."

An award would therefore be patently illegal if it violated any statutory provision.

The Law Commission had recommended that the term "public policy" be defined to echo the wording in *ONGC* but exclude the term "patent illegality".[32] Following this the, the Law Ministry has recommended the insertion of an Explanation to Section 34 that states that an award would fall foul of public policy only if

"the award is contrary to

(i) fundamental policy of India, or

(ii) interests of India. Or

(iii) justice or morality".

Presumably, this would reduce judicial interference under the guise of the award being "patently illegal".

However, the Parliament has decided to treat international commercial arbitrations and domestic arbitrations differently. There is a proposal to include "patent illegality" as a ground for setting aside a domestic arbitral award.

The result would be that there would be no change in grounds for setting aside a domestic arbitral award, whereas awards rendered in an international commercial arbitration cannot be set aside on the ground that the arbitral award is patently illegal. The reason for this difference in treatment probably is because Indian Courts have come in for a fair amount of criticism abroad for

a) exercising jurisdiction and hearing Section 34 applications even where the arbitration is conducted outside India;[33] and

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32 *See* 176th Law Commission Report.

33 The Queen's Hench Division of the High Court of England expressly disagreed with the view taken by the Indian Courts. *See* Shashoua v. Sharma, [2009] EWHC 957 (Comm): [2009] 2 All

b) setting aside arbitral awards on grounds not stated in the New York Convention, very often by going into merits.[34]

The Parliament hopes to address the second issue by narrowing the grounds of challenge for awards rendered in an international commercial arbitration.

3.6.2 Incorporating grounds based on unsuccessful applications under Sections 13 and 16

Where an unsuccessful challenge is made to the

a) appointment of an arbitrator under Section 13 on the grounds that the agreed procedure was not followed,

b) competence of the arbitral tribunal to hear the case under Section 16, there exists a statutory right for the unsuccessful party to challenge the award on the same grounds.[35]

However, there is no such ground specified under Section 34 for challenging an arbitral award on the grounds stated above. For this purpose, the Law Ministry, following the recommendation of the Law Commission of India[36], has proposed to include a provision in Section 34 to incorporate these grounds of challenging an award. Such a provision is clarificatory in nature and does not substantively change the law in any way.

3.7 Substitution of Section 36

Section 36 which deals with enforcement of arbitral awards provides that pending an application for setting aside the award under Section 34, the arbitral award cannot be enforced. However, the Law Commission had observed that this led to the losing party filing frivolous applications under Section 34 to impede enforcement proceedings.[37]

To overcome this problem it is proposed that a Section 34 application will not act as a stay on the enforcement of the arbitral award unless the party which files the Section 34 application files a separate application for a

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ER (Comm) 477). *See also* Sarosh Zaiwalla, *Commentary on the Indian Supreme Court Judgment in Venture Global Engineering v. Satyam Computers Services Ltd.*, 25(4) J. INT'L ARB. 507 – 512 (2008). This problem would be solved by the amendment to Section 2(2). *See* heading "Amendment to Section 2(2)".

34 *See* Promod Nair, *Surveying a Decade of the 'New' Law of Arbitration In India,* 23(4) ARB. INT'L 699 – 739 (2007); Sumeet Kachwaha, *The Arbitration Law of India: A Critical Analysis*, 1(2) ASIAN INT'L ARB. J. 105 – 126 (2005).

35 *See* Sections 13(5) and 16(6) of the Act.

36 *See* 176th Law Commission Report.

37 *See* 176th Law Commission Report.

grant of a stay. The separate application would be decided after taking into consideration the merits of the Section 34 application.[38]

This provision may result in an extra set of judicial proceedings. Unless the Section 34 application is wholly frivolous, it would be unfair on the party filing the Section 34 application if the Court permits enforcement of the award.

4. ARBITRATION RELATING TO COMMERCIAL DISPUTES OF SPECIFIED VALUE

Pursuant to the Commercial Division of High Courts Bill, 2009, an application under Section 34 relating to "commercial disputes"[39] of a specified value (Rs 5 crores)[40] would lie before the commercial division of the High Court. Consequently all appeals from a Section 34 application (under Section 37 of the Act) would lie before the Supreme Court.[41]

5. IMPLIED ARBITRATION AGREEMENT IN COMMERCIAL CONTRACTS OF HIGH CONSIDERATION VALUE

It is proposed that all "commercial contracts" with a consideration of value Rs 5 crores or more shall be deemed to contain an implied arbitration clause ("implied agreement") which states:

> *"All disputes (except (here specify the excepted disputes, if any) arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of (here specify the name of the approved arbitral*

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38 The amended Section 36 would read as follows:
" Enforcement of award-
(1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of sub-sections (2) to (4), the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.
(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).
(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:
Provided that the Court shall, while considering the grant of stay, keep in mind the grounds for setting aside the award."

39 *Supra* note *26*.

40 *Supra* note 27.

41 Pursuant to Section 13 of the Commercial Division of High Courts Bill, 2009 an appeal from the Commercial Division of the High Court shall lie before the Supreme Court.

institution) by one or more of the arbitrators appointed in accordance with the said Rules".

Such a clause would be implied in the absence of an express exclusion of it. Any different arbitration clause between the parties would be modified in the lines of the above clause.[42]

The rationale behind such a clause is to reduce the number of instances where parties litigate on the validity of the arbitration agreement.[43] The second line of reasoning seems to be to promote institutional arbitration.[44]

However, this provision is a recipe for more litigation. A "commercial contract" is defined to mean "every contract involving exchange of goods or services for money or money's worth and includes carriage of goods by road, rail, air, waterways, banking, insurance, transactions in stock exchanges and similar exchanges, forward markets, supply of energy, communication of information, postal, telegraphic, fax and Internet services, and the like." The term "the like" makes the definition wide. Numerous disputes are likely to arise regarding the scope of the term "commercial contract". For instance an employment contract would be a contract involving exchange of services for money; however it might be argued that an employee does not provide any services towards his employer. Similarly, a works contract may or may not fall within the above definition.

Determining the exact consideration of the contract may also be a difficult task, especially when the consideration is non-pecuniary in nature (say in the form of stock whose value is fluctuating in nature).

Furthermore, this provision also takes away the autonomy of parties with respect to adopting ad-hoc arbitration.

6. CONCLUSIONS

While some of the amendments are the need of the hour so far as arbitration in India is concerned, the Consultation Paper seems to propose a number of potentially controversial amendments.

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42 *See* Consultation Paper at 36.

43 *Ibid.*

44 *Id.*

The Consultation Paper is still work in progress and it is hoped that the flaws pointed out in this piece are ironed out before the Amendments are finally put before Parliament.

THE NEW FRENCH ARBITRATION LAW: AN ANALYSIS

Alipak Banerjee & Soumyajyoti Biswal *

ABSTRACT

The new arbitration law demonstrates France's determination to enhance its position as a leading choice of arbitral seat and reflects its intention to maintain its role at the forefront of international arbitration. The researchers have made an attempt to understand the newly incorporated provisions and its effect in the context of modern day international arbitration. For the sake of clarity, the researchers have divided this article into three parts. Part I would emphasise on the rationale as to why amendments were made in the French arbitration law. Part II would seek to analyse the various changes proposed in the new arbitration regime in France with broad headings like arbitration agreements; arbitral tribunal, arbitral proceedings; role of the court; enforcement and recognition. Part III will conclude the paper.

1. JUSTIFICATION FOR THE NEW LAW

1.1 Introduction

Finally, after a relatively long preparation over a decade, France published its greatly anticipated new arbitration law on 14 January, 2011.[1] This reform comes after a gap of thirty years, under the new regime France will establish her position as one of the most arbitration friendly jurisdictions in the world. The new laws which have been enacted will be applicable to international arbitration agreement provided they were entered into after 1 May 2011 and that the proceedings were seated in France.[2] In the present legal scenario French arbitral tribunals appointed and arbitral awards rendered after this date will also be affected. The material alteration arising of this new development derives its authority

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* The authors are V & IV Year law students pursuing their BA LL.B (Hons.) program from KIIT Law School, KIIT University. The authors can be reached at alipakbanerjee@gmail.com & soumyajyotibiswal@gmail.com.

1 *See* White and Case LLP et al., *Insight: International Arbitration,* (January 2011) *available at* http://www.whitecase.com/files/Publication/1e1e8b6a-46f7-4a85-9447-2b7eff5e3436/Presentation/PublicationAttachment/70f14e8e-ec6b-4be0-86c3-49b18552671e/alert_New_French_Arbitration_Law_January_2011.pdf [last visited, 25th November 2011].

2 *See* Herbert Smith LLP et al., *The French Arbitration Law*, (Number 102, February 2012) *available at* http://www.herbertsmith.com/NR/rdonlyres/23DA827F-727B-4514-A94B-6680AF67C967/18119/Newsletter102EFebruary2011.pdf [last visited, 25th November 2011].

from a decree dated 13 January 2011, which replaces the existing text of Book IV of the *French Code of Civil Procedure (*Hereafter *"CCP")* (collectively, the "New Law").[3] The spirit of the New Law is faithful to the French policy of *'favor arbitrandum*[4]'. It achieves to strengthen the French arbitration law by incorporating new provisions, including a significant number of contributions from French case law from over the last thirty years, and clarifying and simplifying provisions that were open to interpretation. France's pro-arbitration laws, an obvious reason for this is that the headquarters of the International Chamber of Commerce, one of the leading arbitral institutions, are based in Paris and seem likely to remain there.

The new law, which has been embodied in Articles 1442 through 1527 of the *French Code of Civil Procedure (CCP),* serves dual purpose, i.e. governs both domestic and international arbitration. French law has thus maintained the dualist approach which distinguishes between domestic and international arbitration, continuing to allow a much more flexible regime for international arbitration. This reform had long been advocated by the *French Arbitration Committee (CFA)*, which issued a first draft in 2006[5]. This process gained a new momentum in 2009 when the French Ministry of Justice took up the effort to meet this endeavour. The proposed draft underwent a number of further amendments and it benefited immensely from the feedback of the Council of State (Conseil d'Etat) before it was adopted in January 2011.

1.2 Reasons for Reform

France has been very proactive in enacting a favourable set of laws on arbitration; they are looked at as arbitration friendly nation. They institutionalized arbitration as early as in 1981, soon followed by the Netherlands in 1986, Switzerland in 1987, and England in 1996. The admittedly more conservative UNCITRAL Model Law was adopted in 1985. French courts had in turn shown an extreme pro-arbitration bias as regards all aspects of arbitration. The role of French court has been

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3 The "décret no°2011-48 portant réforme de l'arbitrage" was published on 14 January 2011 in France's Official Journal. The new provisions will comprise Articles 1442 to 1527 of the French Code of Civil Procedure (CCP).

4 Favor Arbitrandum is a latin maxim used to describe a country whose has a pro-arbitration regime in their domestic jurisdiction.

5 *See* 2006 Revue De L'arbitrage 499, with a commentary by Jean- Louis Delvolvé, the chair of the Working Group, with Professor Pierre Mayer chairing the group's international arbitration subcommittee.

supervisory in nature; they made it a point not to intervene in arbitration proceeds unless it is absolutely essential. Furthermore, their role was confined to limited scrutiny of the arbitral award when seized of an action to set aside or an action to enforce an award.[6]

The primary impetus for the new reforms was therefore not intended to improve the existing sets of rules which had already qualified France as one of the most preferred places where an international arbitration can be conducted but the perceived need, and on the contrary the new changes seeks to address the abundant case laws which have been decided in last thirty years by French courts, to render French law on arbitration even more readily accessible to foreign practitioners.

The reform keeps with the long-standing tradition of innovative and arbitration-friendly arbitration law in France, which has contributed to establishing Paris as one of the world's most popular seats of arbitration.[7] Now that these changes have been made, arguably French law can be characterized today, alongside Swiss law, as the law that has implemented the pro-arbitration policy to its fullest extent. Party autonomy is the essence of arbitration and with this philosophy in mind, it can be submitted that the new French law has broadened the scope of the parties' freedom with respect to all aspects of arbitration. Article 1447[8] codifies the fundamental principle of the autonomy of the arbitration agreement, according to which the arbitration clause remains unaffected even if the underlying contract is found void. In common parlance, and after analyzing the arbitration laws in many jurisdictions of the world as it stands today, it can be concluded that in most places there arises a conflict between the arbitral tribunal and national courts. On the contrary the new French law is a departure from other jurisdictions and it rejects any such conflict and it argues in favour of a fine tuning between both systems. Only in exceptional circumstances where the parties have decided otherwise, in their arbitration agreement directly or through their choice of arbitration rules providing for a different regime, French law has shown no resistance to the notion that the courts'

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6 Emannuel Gaillard, *France Adopts New Law On Arbitration,* Newyork Law Journal, Volume 245 – No. 15 (Monday January 24, 2011).

7 Maxi Scherer and Gary Born, *Long-Awaited New French Arbitration Law Revealed*, (15 January, 2011) *available at* http://kluwerarbitrationblog.com/blog/2011/01/15/long-awaited-new-french-arbitration-law-revealed/ [last visited, 25th November 2011].

8 The provision states *"[t]he arbitration agreement is independent from the contract it relates to."*

involvement in arbitration matters is subordinate to the authority of the arbitral tribunal.[9]

2. ANALYSIS OF THE NEW PROVISIONS

2.1 Arbitration Agreements: The French Liberal Approach as Reaffirmed

The Decree reaffirms case law determining that the arbitration clause survives on its own and that it is independent of the contract in which it is found[10], in essence an agreement to arbitrate is not affected by the inefficacy which is broadly understood as inexistence, invalidity or termination of the contract itself. The well-known internationally recognized principle of *kompetenz-kompetenz* is also reaffirmed both in its positive sense[11] as well as in its negative sense[12].

A very significant change can be identified under the *New Law*, when we learn about the abolition of any formal requirement (such as writing) for arbitration agreements.[13] It also enshrines in French national law the principle of the severability of arbitration clauses, according to which an arbitration clause will not be affected by the avoidance or invalidity of the contract in which it is included.[14] Furthermore, the new law argues in favour of effective harmonization of arbitral proceedings as against French national courts. In essence, whilst the New Law reaffirms the independence of the arbitral process from French court influence, it also recognizes and reinforces the role and powers of French courts to take measures in aid of arbitration.

2.2 Arbitral Tribunals: the constitution of the tribunal is facilitated and the role of *"supporting judge"* is formalized

The new law recognizes and elaborates on the concept of a *"supporting judge",* meaning a judge acting in support of the arbitration (known as the *"juge d'appui").* The President of the Paris Court of First Instance has centralized jurisdiction to facilitate arbitration proceedings at all stages and

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9 *Id.* note 6.

10 *See* Art. 1447 of the French Code of Civil Procedure (CCP).

11 Art.1465: "The arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction")

12 Art. 1148: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.")

13 *See* Art. 1507of the French Code of Civil Procedure (CCP).

14 *See* Art. 1447 of the French Code of Civil Procedure (CCP).

to hear disputes relating to (i) the constitution of the tribunal, (ii) the resignation, inability to serve, or abstention of arbitrators and (iii) the extension of the deadline by which arbitrators shall hand down their award.[15] The role of the "supporting judge" is particularly important in this case because cases which are not conducted under the protective umbrella of institutional arbitration often requires external help from national courts in order to have effective arbitral proceedings.

The other important breakthrough in the Decree was when France was introduced as a forum with universal jurisdiction in cases involving a denial of arbitral justice. As a consequence, a party with a valid agreement to arbitrate that has not been successful in having its claims heard by arbitrators could bring an action before the President of the Paris Court of First Instance in order to have an arbitral tribunal constituted, even if such claims have no link with France. It should be noted that French domestic courts retain exclusive jurisdiction to issue orders of attachment and orders to produce documents held by third parties.

2.3 ARBITRATION PROCEEDINGS: THE POWERS OF ARBITRATORS ARE CLARIFIED AND STRENGTHENED

The arbitral tribunal's has been widely empowered, which includes inter alia, the power to order document production, including imposing penalties for noncompliance, as well as provisional or interim measures (with the exception of attachments).[16] Moreover, a fairness principle inspired by the Common law principle of estoppel is introduced into the Decree: *"A party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity."*[17]

The limits to the broad freedom granted to the parties to organize the arbitration procedure as they see fit are that the arbitral tribunal shall *"ensure that the parties are treated equally"* and shall *"uphold the principle of due process".*[18] Secondly, a good standard of swiftness and good faith is codified for

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15 Cleary Gottlieb et al., *New French Arbitration Law*, (May 6, 2011) *available at* http://www.cgsh.com/files/News/6c5b0c08-5451-4d46-a84c-fe5397813b9d/Presentation/NewsAttachment/35361a6e-29fe-4579-aac0-092ad90a89ba/CGSH%20Alert%20-%20French%20Arbitration%20Act.pdf [last visited, 25th November 2011].

16 *Ibid.*

17 *See* Art. 1446 of the French Code of Civil Procedure (CCP).

18 *See* Art. 1510 of the French Code of Civil Procedure (CCP).

arbitrators (as well as for the parties), which requires that they must act *"diligently"* and *"in good faith"* in the conduct of the proceedings.[19] Finally, once again the wide power conferred on the tribunal reaffirms the supremacy of arbitration tribunal and gives them an effective tool to adjudicate cases.

2.4 ARBITRAL AWARDS: THE EFFECTIVENESS AND BINDING FORCE OF AWARDS ARE REINFORCED

According to the new law a decision shall be reached by a majority of votes if the arbitration agreement and the applicable arbitration rules are silent on this issue. Where no majority can be reached, and in order to take a proper recourse to such types of deadlock situations, the new rule states that the president of the arbitral tribunal may, in this case, decide alone. Regarding notification of awards, the Decree departs from the traditional civil procedure rule (according to which notification is made by bailiff). The parties may agree to alternative and less cumbersome channels, such as certified mail or even e-mail. The time limit to bring a claim for interpretation of the award, rectification of typographical mistakes or for omission to rule on a certain issue is rendered to three months from the day of such notification. Unless the parties agree otherwise, arbitrators are required to hand down their decision on this type of claim within three months.

2.5 CHALLENGES TO AWARDS: THE OPTION TO WAIVE AND NO AUTOMATIC STAY OF ENFORCEMENT

There were two major developments into the French law concerning arbitral awards. In the *first* instance, parties have been given an option to waive their right to bring set-aside proceedings, either expressly and by special agreement. It goes on to say that such waiver may be agreed upon at any given time by the parties and that there are no conditions pertaining to the parties' nationalities or residence. As a word of abundant caution, it is nevertheless possible for parties to appeal against an arbitral award; however such an appeal may only be based on the limited grounds provided for at Article 1520. This development is a break from the past, such an advanced approach to arbitral proceedings rendering arbitral award and the enforceability of such awards in absolute terms by giving the parties

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19 *See* Art. 1464 of the French Code of Civil Procedure (CCP).

an option to waive off their rights speaks a lot about France's commitment to preserve the arbitration culture.

Second, in order to expedite enforcement of awards in France and to avoid frivolous challenges, the initiation of an action for setting aside an award will no longer automatically stay the enforcement of an arbitral award. However, this will not prejudice a party from applying to the court and seeking a specific order staying enforcement in cases where enforcement would be highly detrimental to the rights of that party.

The point to be noted here is that such claims seeking to set aside such awards shall be brought within one month of notification of the award (three months, if the party resides outside of France), whereas under the old rule, the time-period would only start to run from notification of the award with exequatur. This is an important development that will reinforce the finality of arbitral awards at all levels.

2.6 ROLE OF NATIONAL COURTS IN FRANCE

Court assistance is not a new concept in arbitration, especially where one of the parties doesn't co-operate in the arbitral process, such as appointment of the tribunal etc. In such instances a pragmatic approach would be either to take up the matter with national court, to appoint an arbitral tribunal under the supervision of the court. The other feasible alternative can be to knock the doors of an arbitral institution, which would aid the process with sets of institutional rules and guidelines. Most modern laws existing in various jurisdictions, which includes the French law prior to the reform; had provisions where court assistance could be taken for the purpose of constitution of an arbitral tribunal. Keeping this view in mind, four distinct features under the new regime can be noted for our consideration. *First*, the president of the Paris Tribunal (*de grande* instance), who has got centralized jurisdiction in France to rule on motions relating to the appointment of arbitrators, is now characterized as the 'judge acting in support of the arbitration' *("juge d'appui")* following an expression used in Swiss arbitral practice.[20] *Second,* the parties' recourse to French courts is open only on a subsidiary basis, namely in instances where the parties have not chosen a "person responsible for administering the arbitration".[21] When the arbitration is conducted under the auspices of an institution such as the International Chamber of Commerce or the International Centre for

20 *See* Article 1505 of the French Code of Civil Procedure (CCP).

21 *See* Article 1452 (1) of the French Code of Civil Procedure (CCP).

Dispute Resolution, or pursuant to the UNCITRAL Rules, French courts will not intervene at all. In cases of institutional arbitration the administering authority will hear any challenges to the arbitrators, unlike what would happen in the Netherlands for example, French courts will not second-guess its decisions regarding the arbitrators' independence and impartiality prior to the review of the award at the end of the arbitral process.[22] *Third,* the judge acting in support of arbitration, who has supervisory jurisdiction, will not make any substantive assessment on the validity or scope of the arbitration agreement. Its role is confined to appointment of an arbitrator in the defaulting party's stead or resolves the difficulty relating to the constitution of the arbitral tribunal after having verified that the arbitration agreement is not *"manifestly void"* or *"manifestly non-applicable." Fourth,* French law now formally recognizes that the jurisdiction of French courts acting in support of the arbitration extends not only to the traditional instances where the parties have selected France as the place of the arbitration, French law as the law applicable to the procedure or French courts as the courts having jurisdiction in these matters, but also to circumstances in which a party *"is exposed to a risk of denial of justice"* even when the case at hand has no connection whatsoever with France.[23] [24] In essence, this gives a very wide power to French court to take up cases even if they have not originated from France and administer justice in the interest of those who have been aggrieved.

Another interesting development emerging under the new regime is that French courts will also be available to assist in evidentiary matters, where the arbitral tribunal, by definition, is constrained to address their orders to the parties to the arbitration only. In such instances, third parties who may withhold evidence relevant to the dispute brought to arbitration can be ordered by French courts to produce such evidence at the request of one of the parties. However, courts will order such production only when the party requesting the measure has obtained the *"arbitral tribunal's invitation" to seek th*e courts' assistance[25]. The supremacy of the arbitral tribunals authority with respect to dispute submitted to arbitration and to uphold the principle of party autonomy (will of the parties expressed in the

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22 *Id.* note 6

23 *See* Art. 1505(4) CCP). For a first recognition of this original jurisdictional ground in French case law, see State of Israel v. NIOC, Court of Cassation, Feb. 1, 2005, 2005 REVUE DE L'ARBITRAGE 693.

24 *Id.* note 6.

25 *See* Art. 1469 of the French Code of Civil Procedure (CPC).

agreement by agreeing to arbitrate) could not have been expressed in better terms.

Only in exceptional circumstances like assisting the constitution of arbitral tribunal or in evidentiary matters, French courts will not interfere in the conduct of the arbitral process. Article 1465 of the Decree thus reinforces the golden rule of arbitration, according to which arbitral tribunals have the power to decide on any matter relating to the arbitration, including issues relating to the constitution of the tribunal or their own jurisdiction.[26] This also means that, prior to any determination by the arbitral tribunal itself, courts that would have jurisdiction in the absence of an arbitration agreement will refrain from deciding the matter and will defer the same to the arbitral tribunal.[27] In other words, in a situation where no arbitral tribunal has been constituted, French court will be entitled to rule on the dispute only when a prima facie examination of the agreement renders it to be void or manifestly not applicable.

Where an arbitral tribunal has been properly constituted, the court shall automatically decline its jurisdiction and defer the matter to the concerned tribunal, without prejudice to the parties' right to seek a review of the award at the end of the arbitral process. This is nothing more than recognition of the rule of supremacy in favor of the arbitrators.[28]

2.7 RECOGNITION AND ENFORCEMENT OF AWARDS: STRIVING FOR EXPEDIENCY

Substantial changes have not been made under the amended French law with regard to enforcement of awards. The Decree codifies and modernizes French law related to recognition and enforcement issues. *First*, it confirms that exequatur is an ex parte proceeding. *Second*, exequatur may be granted merely upon presentation of a copy of the award. It will no longer be necessary to present the original award.[29]

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26 The arbitral tribunal has exclusive jurisdiction to rule on objections to its authority.

27 S*ee* Art. 1448: "When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been vested to hear the dispute and if the arbitration agreement is manifestly void or manifestly not applicable".

28 *See* Emmanuel Gaillard and Yas Banifatemi*, Negative Effect of Competence-Competence: The Rule of Priority in Favor of the Arbitrators, in* E. GAILLARD, D. DI PIETRO(ED.), ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 257 *(2008 Cameron May).*

29 *Id.* note 6.

Under the new regime, French courts may, as before, review awards rendered in France in international matters and awards rendered abroad on the basis of five limited grounds. The new law has not introduced any substantive change in this respect, but has slightly rephrased those grounds that are now contained at Article 1520 CCP and which cover circumstances where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; (2) the arbitral tribunal was not properly constituted; (3) the arbitral tribunal ruled without complying with its mandate; (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.

Additionally, two significant changes were introduced by the new law in relation to the enforcement and review of arbitral awards. The first concerns the effect of an action to set aside or challenges to enforcement orders on the enforceability of the award. Under Article 1526, "neither an action to set aside an award nor an appeal against an enforcement order suspends enforcement of an award." As a result, an award rendered in France will now be immediately enforceable even where it has been subjected to an action to set aside. Only in rare circumstances may the president of the Court of Appeal, when seized of an action to set aside, suspend the enforcement of the award or subject its enforcement to certain conditions, namely when such enforcement would seriously prejudice the rights of one of the parties.

The second modification which have been introduced by the present reforms in French arbitration law concerns the possibility offered to the parties, provided they so state specifically, to waive any action to set aside the award[30]. Unlike the laws prevalent in Switzerland, Belgium or Sweden where such waiver is available only when none of the parties have their domicile, habitual residence or business establishment in that country, French law does not limit the parties' right to waive an action to set aside. The exercise of such right, however, is without prejudice to the French courts' review of an arbitral award when a party seeks to enforce such award in France, in which case the five limited grounds of Article 1520 CCP will apply. In granting to the parties to an arbitration, without any limitation based on localization, the freedom to waive an action to set aside, French law thus manifests once more its philosophy according to which the place where the arbitration is conducted, as opposed to the place where

30 *See* Art. 1522 of the French Code of Civil Procedure (CPC).

enforcement of the award is sought, is not the most relevant feature of an international arbitration.[31]

2.8 CONFIDENTIALITY PRESUMPTION

A final noteworthy modification introduced by the new law is that relating to the confidentiality of arbitral proceedings. Article 1464(4) CCP provides, in relation to domestic arbitration, that *"subject to legal requirements and unless otherwise agreed by the parties, arbitral proceedings shall be confidential."* It is to be noted that this provision has no equivalent in international matters, which means that French law (unlike English law, for example) has made the choice to assume as a matter of principle that international arbitration is not confidential as far as parties are concerned.

If the parties to an international arbitration, conducted in France, are desirous to benefit from a confidentiality regime, they must so agree in the arbitration agreement or at the outset of the proceedings perhaps more importantly, they should also determine contractually the consequences of any failure by one of the parties to abide by the agreed confidentiality requirement. This reversal of the traditional confidentiality presumption as regards the arbitral process, which would apply in all international matters, commercial or otherwise, constitutes a significant change in the context of the increasing demand for transparency, in particular in investment arbitration.[32]

3. CONCLUSION

The new changes can be described as innovative and trend-setting. France was known throughout the world for its pro-arbitration approach, particularly international commercial arbitration and the recent developments will further their cause to a great extent. The New Law strengthens French arbitration regime and confirms modernistic approach, keeping in step with the changes in arbitration over the last 30 years. This long-awaited reform makes French arbitration law more efficient and clearer to domestic users as well as to the foreign parties. Evidently, it is intended to maintain France's status as a preferred venue for international arbitration. In all likelihood this significant development will reinforce

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31 *See* Emannuel Gaillard, *"France adopts new law on arbitration",* NEWYORK LAW JOURNAL, VOL 245 – NO. 15 (Monday January 24, 2011).

32 *See* EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010 Martinus Nijhoff).

France's dominant position as an arbitration-friendly jurisdiction where arbitral proceedings may proceed without domestic court's interference, but where the aid and support of domestic courts remains available when needed.

UNNECESSARY IMPLICATIONS AND INDIAN ARBITRATION LAW: A CRITICAL ASSESSMENT OF *VIDEOCON INDUSTRIES LIMITED V. UNION OF INDIA*

Jagdish John Menezes*

Abstract

A recent pronouncement of the Supreme Court of India in Videocon Industries Ltd. v. Union of India [2011 (5) SCALE 678], has once again touched on two controversial issues regarding change in the seat of an international commercial arbitration, and on the implied exclusion by the parties of the application of Part I of the Arbitration and Conciliation Act, 1996. While the former issue is resolved easily by distinguishing between the seat of arbitration and the venue of proceedings, the decision on the latter issue remains dicey since the Court relies on the parties choosing a foreign proper law of arbitration to determine that Part I has been impliedly excluded. This decision thereby provides another criterion for determining the issue, adding to the list already expounded by the Court in earlier decisions. Accordingly, the paper in its analysis, ultimately develops an acceptable judicial formula, to determine when such implied exclusion of Part I of the Act has been made by the parties.

1. BRIEF INTRODUCTION

Courts describe themselves as finishers, refiners, and polishers of legislations, which are given to them in conditions requiring varying degrees of further processing.[1] But the contours of judicial refinement are not drawn out, and hence, such refinement itself often creates more muddle than before. The decision of the Supreme Court in *Bhatia International v. Bulk Trading S.A.,* [2] is a case in point, conferring jurisdiction on Indian Courts over international commercial arbitrations, with which they may have the most tenuous connection. Subsequent decisions have sought to streamline the impact of this decision, though arguably with little success.

This piece assesses the impact of a recent pronouncement in *Videocon Industries*[3], both on the issues of change in the seat of arbitration, and implied exclusion by the parties of the application of Part I of the

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* IV Year, BA LL.B (Hons.), NALSAR University of Law.

1 Corrocraft Ltd. v. Pan American Airways AIR 1975 SC 1951; Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105, [Hereafter "Bhatia"].

2 Bhatia, *supra* note 1.

3 Videocon Industries Limited v. Union of India, 2011 (5) SCALE 678 [Hereinafter "Videocon"].

Arbitration and Conciliation Act, 1996[4]. Part II briefly discusses the decision of the Court. Part III examines the issue of change in the seat of arbitration, and whether the seat was so changed by the parties in *Videocon Industries*. Part IV analyses the issue of implied exclusion of Part I of the Act, ultimately developing a formula, to determine when such implied exclusion has been made by the parties. Finally, Part V is a concluding note.

2. THE DECISION IN VIDEOCON INDUSTRIES LTD. V. UNION OF INDIA

The case came before the Supreme Court by way of a special leave petition. The facts were that on 28th October, 1994, a Production Sharing Contract ("PSC") was executed between the Government of India and a consortium of four companies, granting the latter a licence to explore and produce the hydrocarbon resources owned by the Government.

Clauses 33, 34 and 35 of the PSC concern resolution of disputes by arbitration. Clause 33.1 and 33.2 specified Indian law as the proper law of contract. Clause 34.3 stated that disputes which could not be resolved within 21 days ought to be submitted to arbitration. Clause 34.12 specified Kuala Lumpur as the seat of arbitration, while the proper law of arbitration as English law. Clause 35.2 clarified that the contract could not be amended except by an instrument in writing, signed by all parties.[5]

Sometime in 2000, a dispute arose regarding certain cost recoveries and profit, and was referred to an arbitral tribunal under Clause 34.3. The tribunal was to hear the matter on 28th March, 2003, but due to the outbreak of SARS, it shifted the place of its sittings initially to Amsterdam, and thereafter to London. Subsequently, around ten sittings were held in London, until finally, a partial award was passed on 31st March, 2005. The Government challenged the order before the High Court of Malaysia, and requested that the remaining sittings be conducted in Kuala Lumpur. However, the High Court rejected the request and declared that the remaining proceedings would take place in London.

The Government thereafter filed a petition under Section 9 of the Arbitration Act in the Delhi High Court for stay of the arbitral proceedings. Videocon objected to the maintainability this petition, pleading that Courts in India could not provide interim relief. The Single Judge, relying on the decision in *Bhatia*[6], held that the High Court has requisite jurisdiction.[7]

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4 Hereafter "Arbitration Act".

5 Videocon, *supra* note 3, para. 3.

6 Bhatia, *supra* note 1, para. 1.

The matter came before the Division Bench comprising R.V. Raveendran and G.S. Singhvi, J.J. In light of the factual matrix, the Bench framed two questions for consideration. *First*, whether the tribunal had shifted the 'seat' of arbitration from Kuala Lumpur to London; and *second*, whether there was an implied agreement between the parties to exclude the application of Part I of the Act.

Videocon argued that the Government should have sought relief from the English Courts, as the Delhi High Court's jurisdiction had been impliedly excluded by the parties by designating English law as the law governing the arbitration. Moreover, the seat of arbitration had been shifted to London by the Tribunal, and the Government was now estopped from arguing it had not agreed to such shifting. The Government, in response, contended that the seat could only be changed by amending the PSC as per Clause 35.2 and the Tribunal had no authority to shift the seat itself. Moreover, as five parties were involved in the PSC, the consent of all these parties was required to shift the seat.

In answering the first question, the Court noted that the PSC was entered into between five parties, specifying Kuala Lumpur as the 'seat' of arbitration. If the parties were to amend the PSC, they could do so only as per Clause 35.2 through a written instrument. Recalling its decision in *Dozco India Ltd.*[8], the Court concluded that there was no transfer of seat but only shifting of venue of sitting to London for convenience, due to the SARS outbreak.

On the second question, the Court examined its decision in *Bhatia*[9], where it was said that Part I would apply even to international commercial arbitrations held outside India, unless the parties expressly or by implication excluded the Part. The Court further considered the Gujarat High Court's decision in *Hardy Oil and Gas Co.*[10], where the parties had specified the proper law of arbitration as English law. It concluded that the High Court in that case had correctly applied the ratio of *Bhatia*[11] and found that the provisions in Part I were impliedly excluded by the parties. Similarly, in the present case, the Court concluded that a petition under Section 9 was not maintainable, since English law had been chosen as the proper law of

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7 Videocon, *supra* note 3, para. 8.

8 Dozco India Ltd. v. Doosan Infracore 2010 (9) UJ 4521 (SC) [Hereafter "Dozco"].

9 Bhatia, *supra* note 1.

10 Hardy Oil and Gas Ltd. v. Hindustan Oil Exploration Co. Ltd., (2006) 1 GLR 658 [Hereafter "Hardy Oil"].

11 Bhatia, *supra* note 1.

arbitration. The Court accordingly allowed the appeal and dismissed the petition of the Government.

3. CHANGE OF THE SEAT OF ARBITRATION

The issue regarding whether the parties had in fact changed the seat of the arbitration, arose because of the outbreak of SARS in March 2003; consequently the proceedings were shifted first to Amsterdam, and thereafter to London. In October 2003, the Tribunal passed an order which read: *"By consent of parties, seat of the arbitration is shifted to London."* All sittings of the Tribunal were in London thereafter. The Delhi High Court deemed that since there was no governing procedural law, it being the Court having the closest connection to the parties and dispute, would have jurisdiction to provide interim relief. The Supreme Court however, concluded that the seat remained as Kuala Lumpur, since *first,* consent of all parties was needed to amend the PSC; and *second,* the venue for hearings may be changed by the parties as per their convenience without disturbing the juridical 'seat' of arbitration.

The decision of the Delhi High Court in relying on apparent uncertainty of the seat of arbitration, to itself interfere in the proceedings seems unwarranted, since Clause 34.12 unequivocally spelt out the seat and proper law of arbitration. It is also unclear why the Supreme Court went into the question of change in the seat of arbitration, which was irrelevant to the primary issue of interim relief. The possible explanation is that parties raised the issue in the hearing before the Court. The Court's conclusion is legally well-founded; however considering the terms of the consent order passed in October 2003, by the Tribunal, the issue merits deeper consideration:

3.1 Difference Between 'Seat' and 'Venue' of Arbitration-Basis of Court's Reasoning

The choice of 'seat' is significant as in the absence of specific agreement between the parties, the law of that jurisdiction is the *'lex arbitri'* or 'curial law', governing the conduct and procedure of the arbitration.[12] There is only one 'seat' of arbitration, designated as such either in the arbitration agreement or the terms of reference or the minutes of proceedings or any other way.

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12 Karaha Bodas Co., LLC v. Perusahan Pertambang Minyak Dam Gas Bumi Negara, 364 F 3d 274, 291-92 (5th Cir 2004).

This does not imply however, that the Tribunal must hold all its meetings at this designated seat. Particularly for international commercial arbitrations, it is not unusual for hearings to be at different places, either for the Tribunal's own convenience or for the convenience of the parties or their witnesses.[13] This is in fact an advantage of arbitration over the Courts, as parties may shift proceedings to suitable venues rather than being required to go to place where the Court is situated. *But* in such circumstances, each move of the Tribunal does not signify change in the seat of arbitration.[14] The legal place of arbitration remains the same even if the physical place changes, unless of course, the parties agree to change it.[15]

This is the distinction between the 'seat' and 'venue' of arbitration. The seat is the geographical location to which the arbitration is ultimately "tied" or "legally attached". The venue, on the other hand, is the convenient location where the tribunal, partly or fully, conducts its hearings.[16] Such distinction has been recognized by several arbitral institutions,[17] allowing the Tribunal, in consultation with the parties, to change the location of the proceedings, should it become unduly difficult to carry on at the agreed place, without affecting the legal significance of the chosen seat.[18]

In its decision, the Supreme Court notably applied English law to substantiate its conclusion, which it regarded as the law governing the arbitration. Section 3 of the English Arbitration Act, 1996, refers to the juridical seat of arbitration; and contemplates such location to be a particular State or territory, associated with a recognizable and distinct system of law. This seat cannot be changed except by one of the mechanisms envisaged in Section 3[19]; therefore the parties had to have

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13 Bay Hotel and Resort Ltd. v. Cavalier Construction Co. Ltd., 2001 UKPC 34. [Hereafter "Bay Hotel"]

14 ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF THE INTERNATIONAL COMMERCIAL ARBITRATION 93 (4th ed., 2006 Oxford University Press) [Hereafter "Redfern & Hunter"].

15 Union of India v. Mc Donnell Douglas Corp., [1993] 2 Lloyd's Rep 48.

16 ERNEST WETTON, RUSSELL ON ARBITRATION 84, 85 (23rd ed., 2007 Sweet & Maxwell); Naviera Amozonica Peruana S.A. v. Compania Internationacional De Seguros Del Peru, [1988] 1 Lloyd's Rep. 116 (CA) [Hereafter "Naviera"].

17 *See,* e.g. Article 14(2) of the ICC Rules; Article 3(d), Rules of Procedure, Institut de Droit International; Pierre Lalive, *On the Transfer of Seat in International Arbitration, in* JAMES A.R. NAFZIGER, LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOUR OF ARTHUR T. VON MEHREN 515 (2002 Transnational Publishers). [Hereinafter "Lalive"].

18 Lalive, *Id.*

19 Dubai Islamic Bank v. Paymentech Merchant Services Inc., (2001) 1 Lloyd's Rep 65.

themselves changed or authorized any change to the seat of arbitration made by the Tribunal. In fact, as pointed out by the Court, Clause 35.2 required the consent of all parties for any modifications to the PSC. There was no consent however, of all the five parties to the agreement. Even if the law of the seat were to be applied, i.e. Malaysian law, Section 22(3) of the Malaysian Arbitration Act, 2005, allows the Tribunal to meet at any other appropriate place for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of evidence, unless the parties otherwise agree. This provision is similar to Section 20(3) of the Indian Act and further justifies the distinction between the seat and a venue of arbitration, based on which the Court arrives at its conclusion on the issue.

4. CONCESSION MADE BEFORE THE TRIBUNAL – LEGAL IMPLICATION

The Supreme Court noted that the order of the Tribunal, October 2003, states that the parties have consensually agreed to "*shift the seat of arbitration to London.*" The use of the term "seat of arbitration" raises an interesting issue that challenges the reasoning adopted by the Court, discussed above. Considering that these parties would have engaged skilled and experienced legal counsel, and that the agreement was reached during the proceedings and recorded by the Tribunal, it can be argued that the parties did intend to shift the 'seat' and not simply 'venue' of arbitration to London. This argument is strengthened by the fact that the Tribunal initially shifted to Amsterdam, and issued various directions on 29th and 30th June, 2003; on 19th August, it revised the time schedule and decided to meet thereafter in London. Finally, on 30th October, the said consent order containing reference to the 'seat' of arbitration being shifted to London was specifically passed.

It is a settled proposition of law that the manner of performance of a contract can be altered even extra-contractually by an undertaking given in a court of law. A consensus among the parties to change the seat need not necessarily be reflected in an amendment to the PSC, as per Clause 35.2. For that matter, counsels appearing on behalf of the Government often make concessions in cases concerning contractual issues, but these need not comply with the requirements of Article 299 of the Constitution. The Supreme Court has repeatedly recognized circumstances when compromises and concessions can be made without amending the contract,

based on the implied authority of the counsels.[20] In fact, in *Byram Pestonji Gariwala*[21], it was held that there was no need for the signature of the parties themselves, and a compromise in writing and signed by the party's counsel was sufficient.[22]

Accordingly, it seems plausible that in the peculiar circumstances described above, the parties in fact, at the sitting in October 2003, decided to shift the 'seat' of arbitration itself, for reasons best known to them, and the Tribunal recorded such consensus in its order.

5. IMPLIED EXCLUSION OF PART I OF THE ARBITRATION ACT, 1996

In *Bhatia International*[23], the Court had held that the presumption that Part I of the Act applies to international commercial arbitrations outside India as well, may be rebutted by an express or implied agreement to the contrary between the parties. However, the Court did not settle the contours of implied exclusion i.e. what choices must be made by the parties to establish such exclusion of Part I. Several decisions thereafter have drawn out these conditions, including *Videocon Industries*[24]; yet each decision has had its share of criticism. An effort is hence warranted, to examine these conditions and arrive at an acceptable judicial formula for determining such implied exclusion.

5.1 Decisions post Bhatia International: Situations of implied exclusion

Prior to *Bhatia*[25], there were conflicting decisions of different High Courts on the applicability of Part I of the Act, to international commercial arbitrations held outside India.[26] The Supreme Court settled the issue,

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20 Pushpa Devi v. Rajinder Singh, AIR 2006 SC 2628; Jamilabai Abdul Kadar v. Shankarlal Gulabchand, AIR 1975 SC 2202 [Hereinafter "Jamilabai"].

21 Byram Pestonji Gariwala v. Union Bank of India, AIR 1991 SC 2234.

22 This is despite an amendment brought about to Rule 3, Order XXIII, Code of Civil Procedure, 1908, following Jamilabai explicitly requiring compromises to be signed by the parties themselves.

23 Bhatia, *supra* note 1.

24 Videocon, *supra* note 2.

25 Bhatia, *supra* note 1.

26 *See* East Coast Shipping v. MJ Scrap (1997) 1 Cal. HN 444 [Cal HC], Marriot International Inc. v. Ansal Hotels Ltd., AIR 2000 Del 377 (DB) [Del HC]: holding that it cannot be applied. *Contra* Dominant Offset Private Ltd. v. Adamovske Strojirny A.S, (1997) 68 DLT 157 [Del HC]; Olex Focas (P) Ltd. v. Skodaexport Co. Ltd., 1999 (Suppl.) Arb LR 533 [Del HC]; Cullior Food Science Inc. v. Nicolas Piramal India Ltd, (2003) 4 RAJ 239 (AP) [AP HC]; Froniter Drilling AS v. Jagson International Ltd., 2003 (6) Bom CR 299 [Bom HC].

primarily arguing that a party would be left remediless, if he could not seek interim relief, particularly where the property was situate in India. However, since the decision was not confined to Section 9 of the Act, subsequent decisions widened the application to other provisions of Part I, where it is arguably inappropriate to interfere with the arbitral proceedings.

In *Venture Global*[27], the Court allowed a party, under Section 34, Part I, to invoke the bar of public policy to set aside a foreign award, although Part II of the Act is devoted to enforcement of such awards. In both *Indtel*[28] and *Citation Infowares*[29], the issue was whether the Indian Court could appoint the arbitrator under Section 11 of the Act. The parties had designated the proper law of contract as that of England and USA respectively and it was argued that this constitutes implied exclusion as required under the *Bhatia*[30] rule. The decision of the Court in *NTPC v. Singer Company*[31] was relied on; where it held that held that the proper law of arbitration is *presumed* to follow the proper law of contract.[32] However, the Court differentiated from *Singer*[33], explaining that the presumption operates only when a seat of arbitration is chosen, to allow the inference that the parties intended all aspects of their relationship to be governed by the law of that country. These decisions may be criticized for their interpretation of the Act; however, they did add certainty in that an implied exclusion requires parties to designate the seat of arbitration outside India and specify that their relations are governed by that seat's Arbitration Act.[34]

A year later, in *Dozco*[35], the terms of the impugned clause were identical to those in the agreements in *Indtel*[36] and *Citation Infoware*[37], specifying Korean law as the proper law of contract. The only distinction was that a seat of arbitration had been designated as Seoul. The Court concluded that

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27 Venture Global Engineering v. Satyam Computer Services, AIR 2008 SC 1061.

28 INDTEL Technical Services v. WS Atkins PLC, 2008 (10) SCC 308 [Hereafter "Indtel"]

29 Citation Infowares Ltd. v. Equinox Corporation, (2009) 5 UJ 2066 (SC) [Hereafter "Citation Infoware"].

30 Bhatia, *supra* note 1.

31 NTPC v. Singer (1992) 3 SCC 551. [Hereafter "Singer"].

32 *See* James Miller & Partners Ltd. v. Whitworth Street Estates Ltd. [1970] AC 583.

33 Singer, *supra* note 31.

34 The decisions are also consistent with the view of English Courts that no interim relief can be granted for foreign arbitrations and that where the proper law of contract English law, the procedural law can be presumed to be English as well. See for instance Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd., [1993] 1 All ER 664, 684 [HL]; Bay Hotel, s*upra* note 13.

35 Dozco, *supra* note 8.

36 Indtel, *supra* note 28.

37 Citation Infoware, *supra* note 29.

that the designation of the seat of arbitration and foreign law constitutes an *"express exclusion of Part I of the Act"*. It is submitted that such situation cannot constitute 'express' exclusion, as the reference in *Bhatia*[38], envisages an explicit statement that 'Part I does not apply', in contrast to an exclusion by 'necessary implication'.[39] This distinction may be one of mere semantic importance, considering that *Indtel*[40] and *Citation Infoware*[41], to which the Court referred, were decided on lack of 'implied exclusion'. Nevertheless, the conclusion is that the seat being specified, the curial law is presumed to be the law of the seat, and hence, Part I cannot apply.

The Court in *Videocon Industries*[42], considered a decision of the Gujarat High Court, in *Hardy Oil Co*[43]. There the proper law of contract was Indian law, but the proper law of arbitration was English law. The High Court held a Section 9 Petition to be non-maintainable as the choice of a foreign law over the arbitration, impliedly excludes Part I. Accordingly, the Supreme Court determined that Clause 34.12 of the PSC which designated English law as the law governing the arbitration agreement amounted to an implied exclusion of Part I.

It is submitted that the Court's reliance on *Hardy Oil Co*.[44] overlooks the fact that there the law governing the 'arbitration' was designated whereas in the present case, it was the 'law governing the 'arbitration agreement'. The distinction between these two terms is that the former carries the privilege of deciding the mandatory rules of procedure, provisions for interim measures and appointment of arbitrators, etc. The latter is relevant only as regards disputes concerning validity of the arbitration agreement, such as attestation, registration, manner of communication, etc.[45] and is to that extent of lesser importance in ascertaining the parties' intent to impliedly exclude Part I. Perhaps a full appreciation of this distinction by the Court would have made its task in

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38 *Bhatia*, *supra* note 1.

39 *See* Tamil Nadu Electricity Board v. Videocon Power Ltd., (2009) 4 MLJ 633 (Mad). In this case the law governing arbitration agreement was English, and seat was Singapore, and the Court again termed it an express exclusion of Part I.

40 Indtel, *supra* note 28.

41 Citation Infoware, *supra* note 29.

42 Videocon, *supra* note 3.

43 Hardy Oil, *supra* note 10.

44 *Ibid.*

45 Redfern & Hunter, *supra* note 14 at 130.

deciding implied exclusion much harder, since unlike in *Dozco*[46], the parties here had chosen Indian law as the proper law of the contract itself.

The varied selection of governing laws by parties, and the discrepancies in application of these laws by the Court[47] to decide the question of implied exclusion necessitate the development of a formula to determine the issue. This is based on certain general principles, factual similarities and most importantly, practical implications which arise from these judicial decisions.

5.2 Developing an acceptable judicial formula for determining implied exclusion

The basic principle of international commercial arbitration is that of party autonomy to choose the law and the procedure to be applicable to disputes between them.[48] In developing a formula to determine when the parties have impliedly made a choice to exclude Indian Law, the three relevant systems of law for arbitration must be borne in mind:

a. The proper law of contract, i.e. the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.
b. The proper law of the arbitration agreement, i.e. the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.
c. The curial law, i.e. the law governing the conduct or procedure of the arbitration proceedings.

In the majority of the cases all three will be the same, but the proper law of contract often differs from the other two, and occasionally, the proper law of arbitration may differ from the curial law.[49] Having determined these three components, it is to be seen which would affect the ascertainment of implied exclusion, based on the various judicial pronouncements:

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46 Dozco, *supra* note 8.

47 *See,* e.g. Max India Ltd. v. General Binding Corporation, (2009) 3 Arb LR 162, 183-184 (Del-DB). The Court decided maintainability based on the "appropriate forum"; Shivnath Raj Harnarain (India) Ltd. v. Abdul Ghaffar Rehman, AIR 2008 SC 1906. Here the award by the Tribunal had been passed, challenged and set aside in Singapore, the Court held that it was an exception to the reasoning in Bhatia, and only the Singapore Court could subsequently appoint an arbitrator.

48 Singer, *supra* note 31.

49 Naviear*, supra,* note 16.

a. *The proper law of contract*: The decisions of the Court in *Indtel*[50] and *Citation Infoware*[51], show that the proper law of contract being foreign does not amount to an implied exclusion of Part I. Moreover, in *Videocon Industries*[52], the PSC was held to impliedly exclude Indian law, though that was the proper law of contract. Hence, this component is itself irrelevant to determine implied exclusion.

b. *The seat of the arbitration and the curial law:* An arbitration, whose 'seat' is in India, is one 'held in India', as per Section 2(2) of the Act, and Part I would necessarily apply. Thus, the seat of arbitration must be a place outside India, as a condition precedent for implied exclusion. However, as per *Bhatia*[53], this by itself does not suffice to establish implied exclusion. The curial law, as per *Dozco*[54], can be presumed to be the law of the seat of arbitration, unless there is an express agreement otherwise, since that is the jurisdiction most closely connected with the proceedings. But again, *Dozco*[55] clarifies that this component being foreign is insufficient to establish implied exclusion.

c. *The proper law of the arbitration agreement:* The decision in *Videocon Industries*[56] suggests that this component is determinative, i.e. that the arbitration agreement must be governed by foreign law to establish an implied exclusion. As pointed out earlier, the law governing the arbitration agreement is distinct from the law governing the arbitration; the Supreme Court appears to have ignored this distinction in *Videocon Industries*[57]. Since the Court has relied on *Hardy Oil Co.*[58], where implied exclusion was established by the law governing the arbitration, it is submitted that presently, either of the two systems being foreign law would be sufficient. This is supported by the view in *Sumitomo Heavy Industries*[59]; that *"the law which would apply to the filing of the award, to its enforcement and to its setting aside would be the law governing the agreement to arbitrate and the performance of that agreement"* i.e. the law governing the

50 Indtel, *supra* note 28.
51 Citation Infoware, *supra* note 29.
52 Videocon, *supra* note 3.
53 Bhatia, *supra* note 1.
54 Dozco, *supra* note 8.
55 *Id.*
56 Videocon, *supra* note 3.
57 *Id.*
58 Hardy Oil, *supra* note 10.
59 Sumitomo Heavy Industries Ltd. v. ONGC Ltd. 2010 (3) Arb. LR 151 (SC), para. 16 [Hereafter "Sumitomo"]

arbitration agreement is presumed to be the law governing the arbitration.

Still, party autonomy permits a distinct choice for both systems of law. Hence, where the parties choose either the law governing the arbitration agreement or the proper law of arbitration to be Indian law, while the other as foreign law, it is submitted that the question of implied exclusion is unclear because of the language used in *Videocon Industries*[60]. Equally uncertain is the application of the proposition in *Singer*[61], that the proper law of arbitration is presumed to follow the proper law of contract. Since *Sumitomo Heavy Industries*[62], compounds the presumption, on a plain view, it seems that if the seat and proper law of contract is foreign, and neither the law governing the arbitration nor law governing the arbitration is explicitly specified to be Indian law, the implied exclusion of Part I is established. Interestingly though, both *Indtel*[63] and *Citation Infowares*[64], explicitly disagree that specifying a foreign proper law of contract is sufficient.

Thus, a two step formula may be developed: *first,* the seat of the arbitration must necessarily be outside India. *Second,* the law governing the arbitration agreement must be foreign, or in its absence, the law governing the arbitration must be foreign.

6. IN CONCLUSION

The Arbitration Act has been in force for about fifteen years, during which time the Supreme Court has steadily carved for the Courts a larger role in different stages of the arbitration. This includes granting interim injunctions, reviewing arbitral awards on grounds of public policy and appointment of arbitrators. The decision in *Bhatia*[65] is heavily criticized as another instance of unwarranted judicial intervention in the arbitral process; particularly because Section 2(2) provides that Part I shall apply only when the place of arbitration is in India, and was not there in the 1940 Act. It seems to have been added to identify a domestic arbitration, as Part II of the Act now concerns foreign awards. It should have hence followed as a necessary implication that Part I does not apply where the place of

60 Videocon, *supra* note 3.
61 Singer, *supra* note 31.
62 Sumitomo, *supra* note 59.
63 Indtel, *supra* note 28.
64 Citation Infoware, *supra* note 29.
65 Bhatia, *supra* note 1.

arbitration is not in India[66], particularly keeping in mind that Section 5 prohibits judicial intervention in the arbitration unless expressly permitted by the Act. The Court has since tried to rationalize the application of Part I to international commercial arbitrations, and *Videocon Industries*[67] is another instance of that effort. Despite knotty application of criteria for determining implied exclusion of Part I, a two-step formula may be developed, centred on the law governing the arbitration agreement/arbitration, as discussed above.

Nevertheless, parties may well prefer to properly define clearly all relevant systems of law in their arbitration agreements, to avoid unintended applications of different jurisdictions. Court rulings that re-label the intention of contracting parties militate against the very model of party autonomy, fundamental to the alternate dispute resolution system.

7. ADDENDUM

After this piece was submitted, I have come across another Supreme Court decision, *Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Co. Ltd.*,[68] reported just last month, which validates my proposed two-step formula, and for which I hurriedly pen down a brief addendum. The case relates to the construction of a national highway. A dispute had arisen between the parties, after the Respondent terminated the agreement, and sought to recover from certain bank guarantees given by the Appellant. The arbitration clause, in Clause 27 of the contract, designated Singapore as the seat of the arbitration, and Singapore International Arbitration Centre (SIAC) Rules as the proper law of arbitration. In Clause 28 of the contract, the proper law of contract was specified as Indian law. The issue was whether interim relief could be sought from Indian Courts under Section 9 of the Arbitration and Conciliation Act, 1996. The Appellant, having been refused relief by both the Trial Court and the High Court came up in appeal, and argued that Clause 27 did not explicitly or implicitly exclude the application of Part I of the Act; moreover the proper law of arbitration agreement should follow the proper law of contract. The Court refused to accept this argument. Though the decision did not refer to *Videocon Industries*, it did refer to *Citation Infowares, Indtel* and *Bhatia*. The Court reasoned, co-incidentally, in

66 ANIRUDH WADHWA AND ANIRUDH KRISHNAN EDS., LAW OF ARBITRATION AND CONCILIATION 115 (2010 LexisNexis Butterworths Wadhwa).

67 Videocon, *supra* note 3.

68 2011 (9) SCALE 567

the same sequence as the proposed formula: first, the seat of arbitration was outside India i.e. Singapore and; second, although the law governing the arbitration agreement was not specified, the proper law of arbitration was specified as the SIAC rules. Therefore, it concluded that Part I of the Act had been excluded by implication. This decision accordingly vindicates the position taken in this piece.

ANNEXURE-I*
AMENDMENTS TO THE ARBITRATION & CONCILIATION ACT, 1996-A CONSULTATION PAPER

Introduction:

1. The Arbitration and Conciliation Act, 1996 enacted in 1996 is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Copy of the Act is annexed as Annexure-I. The Act is based on the Model Law adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985. The objects and basis of the said Act is to speedy disposal with least court intervention. Some of the objects, as mentioned in the Statement of Objects and Reasons for the Arbitration and Conciliation Bill, 1995 are as follows:
   (a) to comprehensively cover international commercial arbitration and conciliation as also domestic arbitration and conciliation;
   (b) to minimise the supervisory role of courts in the arbitral process;
   (c) to provide that every final arbitral award is enforced in the same manner as if it were a decree of court.
2. In the year 2001, the Law Commission of India undertook a comprehensive review of the working of the said Act and recommended many amendments to the Act in its 176th Report submitted to the Government. Summary of recommendations made in the report is annexed as Annexure-II.

   The Government after considering the recommendations of the Report and after consulting the State Governments and certain institutions, decided to accept almost all the recommendations. Accordingly the Arbitration and Conciliation (Amendment) Bill 2003 was introduced in Rajya Sabha on 22nd December, 2003. A copy of the Bill is annueal herewith as Annexure-III.

   It may be stated that in July 2004, Government constituted a Committee under the Chairmanship of Justice Dr.B.P.Saraf to make in-depth study of the implications of the recommendations of the Law

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* Reference to the Consultation Paper has been made repeatedly by various works published. Hence the Editorial Board thought it thought it expedient to append the same for reader's convenience. Please note that this is not the full version of the Consultation paper. The full version is available at http://lawmin.nic.in/la/consultationpaper.pdf [last visited 25th November 2011].

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Commission made in its 176th Report and all aspects relating to the Arbitration and Conciliation (Amendment) Bill, 2003. The report submitted by the said Committee is annexed as Annexure-IV.

3 The Bill was then referred to the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee after taking oral evidence of eminent advocates and the representatives from trade and industry, Public Sector Undertakings, representatives of this Department, submitted its report to the Houses of Parliament on 4th August, 2005. The Committee was of the view that the provisions of the Bill gave room for excessive intervention by the Courts in the arbitration proceedings and emphasized upon the need for establishing an institution in India which would measure up to international standards and for popularizing institutionalized arbitration. The Committee further expressed the view that since many provisions of the Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering the recommendations of the Committee. Copy of the report is annexed as Annexure-V.

4 In view of the large number of amendments recommended by the Committee and because many provisions of the Bill were contentious, the said Bill was withdrawn from the Rajya Sabha. At that time it was decided that a new legislation will be brought in Parliament after undertaking an in depth examination of the various recommendations of the Committee.

5 As we know that main purpose of the 1996 Act is to encourage an ADR method for resolving disputes speedy and without much interference of the Courts. In fact Section 5 of the Act provides, "Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (i.e. Part I), no judicial authority shall intervene except where so provided in this Part." However, with the passage of time, some difficulties in its applicability of the Act have been noticed. The Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. Further, in some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of such a legislation. Therefore, it becomes necessary to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved.

6 The following sections of the Act and interpretation by courts have given rise to difficulties which require to be addressed:

(A) Application of Part I-Section 2(2) –

(i) The 1996 Act covers both domestic arbitration (where both parties are Indian national) as well as international commercial arbitration where at least one party is not an Indian national. The Act of 1996 has been divided in three Parts. Part I entitled, "ARBITRATION" and there are 10 Chapters containing Sections 2 to 43. Part II entitled, "Enforcement of certain Foreign Awards" and contains Chapter I & II containing Sections 44 to 60. Chapter I of part II deals with "New York Convention Awards" and Chapter II deals with 'Geneva Convention Awards". Part III (Sections 61 to 81) deals with 'Conciliation'. Part IV (Sections 82 to 86) provides for Supplementary Provisions.

Section 2(2) provides for applicability of Part I. Existing Section 2 (2) reads as follows: **"Section 2(2): This part shall apply where the place of arbitration is in India."**

(ii) There are conflicting views of the Courts in India about applicability of Part I in respect of International Commercial Arbitration where seat of arbitration is not in India. In a case before the Delhi High Court (Dominant Offset Pvt. Ltd. Vs. Adamouske Strojirny AS, (1997) 68 DLT 157) the petitioners entered into two agreements with a foreign concern for technology transfer and for purchase of certain machines. The agreement carried an arbitration clause which provided that the place of arbitration would be London and the arbitration tribunal would be International Chamber of Commerce in Paris. The parties having developed a dispute, a petition was filed in the High Court of Delhi with a prayer for reference to arbitration in terms of the Arbitration Clause for enforcement of the agreement. The Court extensively studied the provisions of the Act so as to see whether it was a matter coming under Part I of the Act. The Court held that Part I of the Act applies to International Commercial arbitration conducted outside India. The Court opined that Section 2(2) which states that "Part I shall apply where the place of arbitration is in India" is "an inclusive definition and does not exclude the applicability of Part I to those arbitrations which are not being held in India". The Court also held that the application under Section 11 for the appointment of arbitrators could be treated as a petition under section 8 for reference of the

parties to arbitration. This decision was followed in Olex Focas Pvt. Ltd. Vs. Skodaexport Company Ltd. AIR 2000 Del.161. In this case the High Court allowed relief under Section 9 (interim measure by Court) and ruled

"A careful reading and scrutiny of the provisions of 1996 Act leads to the clear conclusion that sub-section (2) of Section 2 is an inclusive definition and it does not exclude the applicability of Part I to this arbitration which is not being held in India. The other clauses of Section 2 clarify the position beyond any doubt that this Court in an appropriate case can grant interim relief or interim injunction."

However, Court added that courts should be extremely cautious in granting interim relief in cases where the venue of arbitration is outside India and both parties are foreigners.

(iii) The Calcutta High Court in East Coast Shipping Vs. MJ Scrap (1997) 1 Cal. HN 444 took a different view and held that Part I of the Act would apply only to arbitrations where the place of arbitration is in India. In a subsequent decision of Division Bench of the Delhi High Court in Marriott International Inc.Vs. Ansal Hotels Ltd., AIR 2000 Del 377 (DB) Delhi High Court endorsed the view expressed by the Calcutta High Court. The Division Bench referred the another decision reported as Kitechnology N.V. Vs. Union Gmbh Plastmaschinen (1998) 47 Del. RJ 397 in which the Single Judge of Delhi High Court held that where none of the parties to the agreement was an Indian and the agreement was to be covered by German Law which provided arbitration to be held at Frankfurt, Section 9 of the Act will have no applicability and the Court will have no jurisdiction to pass an interim order in that matter.

(iv) A division Bench of the Calcutta High Court in White Industries Australia Ltd V. Coal India Ltd. held that an award published and rendered in accordance with ICC Rules in Paris (though the proceedings were held, for the convenience of the parties, in London) could be challenged in a proceeding initiated in a court in India under Section 34 of the Act since the contract between the parties stipulated that the "agreement shall be subject to and governed by the laws in force in India except that the Indian Arbitration Act of 1940 shall not apply". A division bench speaking through the Chief Justice A K Patnaik of Chhattishgarh High Court in Bharat Aluminium Company Limited v Kaiser Aluminium Technical Services, Inc. however took a contrary view.

(v) However, Supreme Court in the case of Bhatia International Vs. Bulk Trading (2002) 4 SCC 105 has held that in absence of the word 'only' in Section 2(2), part I of the Act would apply to arbitration held outside India, so long as the law of India governed the contract. The decision in Bhatia International though was not concerned with enforcement of arbitral award, certain principles laid down therein with regard to application of the provisions contained in Part I of the Act in respect of arbitration proceedings that are held in Paris in accordance with the Rules of the International Chamber of Commerce (ICC), have far reaching consequences.

(vi) In Bhatia International the question was whether an application filed under Section 9 of the Act in the Court of the third Additional District Judge, Indore by the foreign party against the appellant praying for interim injunction restraining the appellant from alienating transferring and/or creating third party rights, disposing of, dealing with and/or selling their business assets and properties, was maintainable. The Additional District Judge held that the application was maintainable, which view was affirmed by the High Court. The Supreme Court, reaffirming the decision of the High Court, held that an application for interim measure could be made to the courts of India, whether or not the arbitration takes place in India or abroad. The Court went on to hold that "the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to 'foreign awards'. The opening words of Sections 45 and 54, which are in Part II, read 'notwithstanding anything contained in Part I'. Such a non obstante clause had to be put in because the provisions of Part I apply to Part II".

Supreme Court referred to similar provision in UNCITRAL Model law. Article 1(2) of the UNCITRAL Model Law reads as follows:

"(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

Supreme Court highlighted the word 'only' and observed as follows:

"Thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of arbitration is in the territory of that State. Significantly, in Section 2(2) the word "only" has been omitted. The omission of this word changes

the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this subsection is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India."

(vii) The Supreme Court observed that if the part I of the Act is not made applicable to arbitration held outside India it would have serious consequences such as (a) amount to holding that the Legislature has left a lacunae in the said Act. There would be lacunae as neither Part I or II would apply to arbitrations held in a country which is not a signatory to the New York Convention or the Geneva Convention. It would mean that there is no law, in India, governing such arbitrations.; (b) leave a party remediless in as much as in international commercial arbitrations which take place out of India the party would not be able to apply for interim relief in India even though the properties and assets are in India. Thus a party may not be able to get any interim relief at all.

(viii) The Supreme Court made certain observations in respect of International commercial arbitration which take place in a non-convention country. The Court observed that international commercial arbitration may be held in a non-convention country. Part II only applies to arbitrations which take place in a convention country. The Supreme Court referred to the definition of international commercial arbitration which is defined in Section 2(f) of the Act and held that the definition makes no distinction between international commercial arbitration which takes place in India or those take place outside India. The Supreme Court also observed that Sections 44 and 53 define foreign award as being award covered by arbitrations under the New York Convention and the Geneva Convention respectively. Special provisions for enforcement of these foreign awards are made in Part II of the Act. To the extent part II provides a separate definition of an arbitral award and separate provision for enforcement of foreign awards, the provision in Part I dealing with these aspects will not apply to such foreign awards.

(ix) The court finally concluded that "the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial

arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply".

(x) Supreme Court also stated in their judgment that 1996 Act does not appear to be a well drafted legislation. In view of this Supreme Court observed that the High Courts of Orissa, Bombay, Madras, Delhi and Calcutta cannot be faulted for interpreting the provisions in the different manner.

(xi) It may be mentioned that Supreme Court in the case of Shreejee Traco(I) Pvt. Ltd. Vs. Paper Line International Inc (2003) 9 SCC 79 considered the scope of part I of the Act in respect of appointment of an arbitrator under Section 11(4) in a case where the agreement provided that any disputes or claims would be submitted to arbitration in New York. The Supreme Court after referring Section 2(2) held, "on a plane reading of this provision it is clear that Parliament intended the provisions of Part I to be applicable where the place of arbitration is in India." The Supreme Court also held as follows: "So far as the language employed by Parliament in drafting sub-section (2) of Section 2 of the Act is concerned, suffice it to say that the language is clear and unambiguous. Saying that this Part would apply where the place of arbitration is in India tantamounts to saying that it will not apply where the place of arbitration is not in India. For the foregoing reasons it is held that the petition under Section 11(4) of the Act is not maintainable before the Chief Justice of India or his designate."

(xii) A two-judge bench of the Supreme Court[1], reiterating its decision in Bhatia International held that a award made in England through a arbitral process conducted by the London Court of International Arbitration, though a foreign award, Part I of 1996 Act would be applicable to such award and hence the courts in India would have jurisdiction both under Section 9 and Section 34 of the Act and entertain a challenge to its validity. It is of some significance that both in Bhatia International as well as in Venture Global Engineering case, the provisions under the Arbitration Act invoking the provisions contained in Part-I thereof had been initiated by foreign parties against

1 *Venture Global Engineering* v *Satyam Computers Services* 2008(1) SCALE 214.

the Indian parties, though the proceedings of the arbitration wee held abroad and the culmination of which undoubtedly are foreign awards.

(xiii) The factual background of the case was thus: Venture Global Engineering (VGE, a company incorporated in USA had entered into a joint venture with Satyam Computer Services (Satyam) to constitute an Indian company-Satyam Venture Engineering Company Limited (SVES).. The two companies had equal shares i.e. 50-50 in the joint venture (SVES). They had also entered into share holder's agreement, which inter alia provided that "the share holders shall at all times act in accordance with the Company Act and other applicable Act/Rules being enforced in Indian at any time". In February disputes arose between the parties, which were referred to sole arbitration of Mr. Paul Hannon, appointed by the London Court of International Arbitration and the award made in England, directed Venture to transfer its 50% shares in SVES to Satyam. Satyam filed a petition before the US District Court, Eastern District Court of Michigan for recognition and enforcement of the award, which was contested by Venture. Venture filed a Civil Suit in the Court of the First Additional Chief Judge, City Civil Court, Secunderabad, seeking a declaration for setting aside the award and for a permanent injunction on the transfer of shares under the award. The City Civil Court, though initially, granted an order of injunction, at the intervention of Satyam, finally rejected the plaint. An appeal was preferred by the Venture before the High Court of Andhra Pradesh, was also unsuccessful. Venture, therefore, approached the Supreme Court. Relying upon the decision in Bhatia International[2], contending inter alia that in terms of the declaration of law by Supreme Court, Part I of the Act would also apply to foreign awards and hence the courts in India had jurisdiction to entertain a challenge to the validity of the award and that in view or the over-riding provision contained in the Share Holder's Agreement, Satyam cannot approach the US Courts for enforcement of the award. On behalf of the Satyam, it was contended that since, the award made in England thus was a foreign award, no suit or other proceedings can lie against such award in view of Section 44 of the Act and that an application for setting aside such an award under Section 34 of the Act could not lie in any event. A two-judge bench, which heard the case, felt that Bhatia International decided the principal issue namely that since the parties did not, by

[2] 2002 4 SCC 105

agreement, exclude the provision of Part-I of the Act from being made applicable to arbitration proceedings in England, the provisions of the Part-I would apply even to foreign award and hence the courts in India can entertain a challenge to the validity of such an award. Accepting the contentions of Venture, the court held: "That the provisions of Part I of the Act would apply to all arbitrations including international commercial arbitrations and to hold that where such arbitration is held in India, the provisions of Part-I would compulsorily extent permitted by the provisions of Part-I. IT is also clear that even in the case of international commercial arbitration held out of India provisions of Part-I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. We are also of the view that such an interpretation does not lead to any conflict between any of the provisions of the Act an there is no lacuna as such."

(xiv) The reason, which persuaded the court that a challenge to foreign award can lay in India, was the fact that an award, which is otherwise opposed to Public Policy of India and thus not enforceable even under the New York Convention, can be enforced, by a party by seeking its enforcement of such an award in another country. It is in view of such apprehension, the court observed:

"In any event, to apply Section 34 to foreign international awards would not be inconsistent with Section 48 of the Act, or any other provision of Part II as a situation may arise, where, even in respect of properties situate in India and where an award would be invalid if opposed to the public policy of India, merely because the judgment-debtor resides abroad, the award can be enforced against properties in Indian through personal compliance of the judgment-debtor and by holding out the threat of contempt as its being sought to be done in the present case. In such an event, the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes – (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, it it is patently illegal. This extended definition of public policy can be by-passed by taking the award to a foreign country for enforcement."

(xv) The Supreme Court in Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.,(2008) 10 SCC 308, while referring Bhatia International observed as follows:

37. The decision in Bhatia International case[1] has been rendered by a Bench of three Judges and governs the scope of the application under consideration, as it clearly lays down that the provisions of Part I of the Arbitration and Conciliation Act, 1996, would be equally applicable to international commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication, which is not so in the instant case.

(xvi) It is evident from the above discussion that there is no uniformity in judicial decisions in respect of applicability of Part I of the Act in respect of cases where the seat of arbitration is not in India. As per Bhatia Interenational (Supra) ans Satyam Computors, in cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, exclude all or any of its provisions. The result is that all the provisions of Part I including provisions relating to appointment of arbitrator (Section 11), challenge of arbitration award (Section 34) would also be applicable to International Commercial Arbitration where seat of arbitration is not in India. However, in view of the observations made by the Supreme Court in **Shreejee Traco(I) Pvt. Ltd. Vs. Paper Line International Inc (2003) 9 SCC 79**, no provisions of Part I would apply to cases where the place of arbitration is not in India.

(xvii) It may be stated that it is the broad principle in International Commercial arbitration that a law of the country where it is held, namely, the Seat or forum or laws arbitri of the arbitration, governs the arbitration. However, if all the provisions of Part I are not made applicable to International Commercial arbitration where the seat of arbitration is not in India, some practical problems are arising. There may be cases where the properties and assets of a party to arbitration may be in India. Section 9 of the Act which falls in Part I provide for interim measures by the Court. As per Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim injunction etc. If provision of Section 9 is not made applicable to International Commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts.

These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.

(xviii) There is an another aspect which relates to enforcement of arbitration award rendered in a non convention country i.e. a country which is not signatory either to New York convention or to the Geneva convention. In Bhatia International Supreme Court referred to definition of International Commercial Arbitration provided in Section 2 (1)(f) and held that the definition makes no distinction between international commercial arbitrations held in India or outside India. An international commercial arbitration may be held in a country which is a signatory to either the New York Convention or the Geneva Convention (hereinafter called "the convention country"). An international commercial arbitration may be held in a non-convention country. The said Act nowhere provides that its provisions are not to apply to international commercial arbitrations which take place in a non-convention country. Part II only applies to arbitrations which take place in a convention country.

(xix) In this regard we may point out that an award to be a 'foreign award' has to be made in the territory of a foreign State notified by the Central Government as having made a reciprocal provision for enforcement of New York Convention or Geneva convention. The Supreme Court in Badat & Co. v, East India Trading Co. (1964) 4 SCR 19 was dealing with a case that arose before the Foreign Awards (Recognition and Enforcement) Act, 1961 became applicable. The court held as follows.

"Before we do so, it would be desirable to examine the position regarding the enforcement of foreign awards and foreign judgments based upon awards. Under the Arbitration Protocol and convention Act, 1937 (6 of 1937), certain commercial awards made in foreign countries are enforceable in India as if they were made on reference to arbitration in India. The provisions of this Act, however, apply only to countries which are parties to the Protocol setforth in the First Schedule to the Act or to Awards between persons of whom one is subject to the jurisdiction of some one of such powers as the Central

Government being satisfied that the reciprocal provisions have been made, may, by notification declare to be parties to the Convention, set forth in the Second Schedule to the Act. It is common ground that these provisions are not applicable to the awards in question. Apart from the provisions of the aforesaid statute, foreign awards and foreign judgments based upon awards are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the common law on grounds of justice, equity and good conscience. 33. It will thus be seen that there is a conflict of opinion on a number of points concerning the enforcement of foreign awards or judgments, based upon foreign awards. However, certain propositions appear to be clear. One is that where the award is followed by a judgment in a proceeding which is not merely formal but which permits of objections being taken to the validity of the award by the party against whom judgment is sought, the judgment will be enforceable in England. Even in that case, however, the plaintiff will have the right to sue on the original cause of action. The second principle is that even a foreign award will be enforced in England provided it satisfies mutatis mutandis the tests applicable for the enforcement of foreign judgments on the ground that it creates a contractual obligation arising out of submission to arbitration. On two matters connected with this there is difference of opinion. One is whether an award which is followed by a judgment can be enforced as an award in England or whether the judgment alone can be enforced. The other is whether an award which is not enforceable in the country in which it was made without obtaining an enforcement order or a judgment can be enforced in England or whether in such a case the only remedy is to sue on the original cause of action. The third principle is that a foreign judgment or a foreign award may be sued upon in England as giving good cause of action provided certain conditions are fulfilled one of which is that it has become final."

(xx) Thus it is well established that the awards rendered in countries with which India does not have reciprocal arrangements cannot be enforced in India as if it were a decree. Perhaps Badat's case was not brought to the notice of the court in Bhatia International v Bulk Traders S A case, which is why observations pertaining to non-convention countries came to be made. As stated above provisions of Part II which deals with enforcement of foreign award, is not and cannot be made applicable to an international commercial arbitration

which takes place in non-convention country and where there is no reciprocal agreement between that country and Central Government. Not only this, foreign award must be given in one of those territories in respect of which reciprocal arrangement has been made. Section 44 of the Arbitration and Conciliation Act, 1996 defines the term 'foreign award". According to Section 44, an arbitral award is a foreign award if it is made in pursuance of an agreement to which New York Convention [reproduced in First Schedule to the Act] applies and made in a territory to which the New York convention applies on the basis of reciprocity.

(xxi) Section 44 reads as follows:

"44. Definition-In this Chapter, unless the context otherwise requires, 'foreign award' means an award of differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 —

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in First Schedule applied, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

(xxii) It may also be pointed out that Clause (3) of Article 1 of New York convention on the Recognition and Enforcement of Arbitral Awards permits the signing, ratifying or acceding State to declare on the basis of reciprocity that it will apply the convention made only in the territory of another contracting State. India has made reservation and declared that convention will apply only on the basis of reciprocity.

(xxiii) Therefore, when an International arbitral award is made in a country or territory in respect of which there is no reciprocal arrangement between Central Government and Government of that country, it cannot be enforced under the Arbitration and Conciliation Act, 1996. For the purpose of enforcement of such an arbitral award party has to file a civil suit in India.

(xxiv) It is part of the law of arbitration in several countries to allow a few provisions of their arbitration statutes to apply to international

arbitrations held outside their countries. Section 2 (1) & (2) of the English Arbitration Act, 1996 reads as follows: 2. Scope of application of provisions.-

(1) The provisions of this Part apply where the seat of arbitration is in England and Wales or Northern Ireland.

(2)The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined

(a) Section 9 to 11 (Stay of legal proceedings, & c), and

(b) Section 66 (enforcement of arbitral award."

(xviii) In order to remove the difficulties stated above, it is proposed to amend Section 2(2) of the Arbitration and Conciliation Act, 1996 as follows:

(2) This part shall apply only where the place of arbitration is in India. Provided that provisions of Sections 9 and 27 shall also apply to international commercial arbitration where the place of arbitration is not in India if an award made in such place is enforceable and recognized under Part II of this Act."

(B) Amendment in Section 11

(i) Section 11 of the Act provides for appointment of arbitrators. Sub Sections (4) to (12) deal with appointment of Arbitrator by the Chief Justice or any person or institution designated by him when the parties fail to appoint an Arbitrator or where the arbitration is to be held with three Arbitrators, and the two appointed Arbitrators fail to agree on the third Arbitrator within the stipulated time.

(ii) The scope and effect of these provisions had been the subject mater of several decisions rendered by the Supreme Court. In Adur Samia (P) Ltd Vs Peekay Holdings Ltd (1999) 8 SCC 572, a Bench of two learned Judges of the Supreme Court held that the Chief Justice or any person or institution designated by him acts in administrative capacity under section 11 of the Act and hence an order passed in exercise of such power, does not attract the provisions of the Article 136 of the Constitution.

(iii) A two Judge Bench referred the case in Adur Samia (P) Ltd Vs Peekay Holdings Ltd. for reconsideration to the Bench of three learned Judges.

A three-judges Bench in Konkan Railway corp. Ltd. Vs Mehul Construction Co. (2000) 7 SCC 201 affirmed the view taken by the two-Judge Bench in Adur Samia (P) Ltd Vs Peekay Holdings Ltd., holding that the order passed by the Chief Justice or his designate under section 11 of the Act was an administrative order not amenable to the jurisdiction of the court under Article 136.

(iv) Subsequently, a Bench of two Judges in Konkan Railway Corp. Ltd Vs Rani Construction (P) Ltd., (2000) 8 SCC 159 referred to a larger Bench of the said decision of three Judge Bench for reconsideration. Thereafter, a Constitution Bench consisting of five learned Judges in Konkan Railway Corp. Ltd. Vs Rani Construction (P) Ltd. (2002) 2 SCC 388 affirmed the decision of the three-Judge Bench in Konkan Railway Corp. Ltd. Vs Mehul Construction Co. holding inter-alia that the order of the Chief Justice or his designate under section 11 nominating an Arbitrator is not a adjudicatory order and that neither the Chief Justice nor his designate acts as a Tribunal and hence any order passed by them can not be a subject matter of appeal by Special Leave under Article 136. The Constitution Bench also held that since the Chief Justice or his designate is not required to perform any adjudicatory function and that, the order nominating an Arbitrator would be amenable to challenge under section 12 read with section 13 of the Act. Since the exercise of the power is purely administrative in nature, it does not contemplate a response from the other party and hence a notice to the opposite party is not necessary.

(v) Subsequently, the decision of the Constitution Bench has been reconsidered by the larger Bench consisting of seven-Judges in SBP Co. Vs. Patel Engineering Ltd (2005) 8 SCC 618. The Court overruled the decision in Konkan Railway Corp. Ltd. Vs Rani Construction (P) Ltd. (2002) 2 SCC 388 rendered by five learned Judges and held that the power exercised by the Chief Justice of the High Courts or the Chief Justice of India under Section 11(6) of the Act is judicial power and not an administrative power and that such power, in its entirety, could be delegated only to another Judge of that Court. The Supreme Court concluded as follows:

(a) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.

(b) The power under Section 11(6) of the Act, in its entirety, could be delegated, by the Chief Justice of the High Court only to another Judge of that Court and by the Chief Justice of India to another Judge of the Supreme Court.

(c) In case of designation of a Judge of the High Court or of the Supreme Court, the power that is exercised by the designated Judge would be that of the Chief Justice as conferred by the statute.

(d) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

(e) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

(f) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court.

(g) There can be no appeal against an order of the Chief Justice of India or a Judge of the Supreme Court designated by him while entertaining an application under Section 11(6) of the Act.

(h) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

(vi) The Supreme Court held that the Chief Justice or the designated Judge will have the right to decide preliminary aspects as regards his own jurisdiction to entertain the request, existence of a valid arbitral

agreement, the existence or otherwise of a live claim, the existence of the conditions for the exercise of the power and on the qualifications of the Arbitrator. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter nominating an Arbitrator but the order appointing an Arbitrator could be passed only by the Chief Justice or the designated Judge. Even designation of a District Judge as the authority under Section 11(6) of the Act was not warranted under the scheme of the Act. The order passed by the Chief Justice of the High Courts or by the designated Judge of that Court being a judicial order, is appealable under Article 136 of the Constitution to the Supreme Court but no such appeal would lie against the order made by the Chief Justice of India or a Judge of the Supreme Court designated by him. Where the Arbitral Tribunal is constituted by the parties without taking recourse to Section 11 of the Act, the Arbitral Tribunal will have the jurisdiction to decide all the matters as contemplated by Section 16 of the Act.

(vii) The decision of the Supreme Court has rendered the provisions contained in sub-section (4), (5), (7), (8) and (9) of Section 11 with regard to appointment of Arbitrators by any person or institution designated by the Chief Justice of India and totally ineffective. It may be pointed out that question of appointment of arbitrator by the Chief Justice arises only when a party fails to appoint an arbitrator or where the two appointed arbitrators fail to agrees on the third arbitrators.

(viii) This is clearly contrary to the objective of the Act that is, to encourage litigants to take recourse to the alternative dispute resolution mechanism by Arbitration. Institutional Arbitration, throughout the world, is recognized as the primary mode of resolution of international commercial disputes. Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. When party have not named any institution or when they fail to an agreement on the name of any Institution, the Chief Justice instead of choosing an arbitrator may choose an Institute and the said institute shall refer the matter to one or more arbitrator from their panel. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the

International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration. The following advantages accrue in the case of institutional arbitration in comparison with ad hoc arbitration:

(1) In ad hoc arbitration, procedures will have to be agreed to by the parties and the arbitrator. This needs cooperation between the parties. When a dispute is in existence, it is difficult to expect such cooperation. In institutional arbitration, the rules are already there. There is no need to worry about formulating rules or spend time on making rules.

(2). In ad hoc arbitration, infrastructure facilities for conducting arbitration is a problem, so there is temptation to hire facilities of expensive hotels. In the process, arbitration costs increase. Getting trained staff is difficult. Library facilities are another problem. In institutional arbitration, the arbitral institution will have infrastructure facilities for conduct of arbitration; they will have trained secretarial and administrative staff. There will also be library facilities. There will be professionalism in conducting arbitration. The costs of arbitration also are cheaper in institutional arbitration.

(3). In institutional arbitration, the institution will maintain a panel of arbitrators along with their profiles. The parties can choose from the panel. It also provides for specialized arbitrators. While in ad hoc arbitration, these advantages are not available.

(4). In institutional arbitration, many arbitral institutions have an experienced committee to scrutinize the arbitral awards. Before the award is finalized and given to the parties, it is scrutinized by the experienced panel. So the possibility of the court setting aside the award is minimum. This facility is not available in ad hoc arbitration. Hence, there is higher risk of court interference.

(5) In institutional arbitration, the arbitrator's fee is fixed by the arbitral institution. The parties know beforehand what the cost of arbitration will be. In ad hoc arbitration, the arbitrator's fee is negotiated and agreed to. The Indian experience shows that it is quite expensive.

(6) In institutional arbitration, the arbitrators are governed by the rules of the institution and they may be removed from the panel for not

conducting the arbitration properly, whereas in ad hoc arbitration, there is no such fear.

(7) In case, for any reason, the arbitrator becomes incapable of continuing as arbitrator in institutional arbitration, it will not take much time to find substitutes. When a substitute is found, the procedure for arbitration remains the same. The proceedings can continue from where they were stopped, whereas these facilities are not available in ad hoc arbitration.

(8) In institutional arbitration, as the secretarial and administrative staff is subject to the discipline of the institution, it is easy to maintain confidentiality of the proceedings. In ad hoc arbitration, it is difficult to expect professionalism from the secretarial staff. Institutional arbitration is an arbitration administered by an arbitral institution. The parties may stipulate in the arbitration agreement to refer an arbitral dispute between them for resolution to a particular institution. The Indian institutions include the Indian Council of Arbitration and the International Centre for Alternative Dispute Resolution. International institutions include the International Court of Arbitration, the London Court of International Arbitration and the American Arbitration Association. All these institutions have rules expressly formulated for conducting arbitration. These rules are formulated on the basis of experience and hence, they address all possible situations that may arise in the course of arbitration.

(ix) Institutions of international repute not only provide a time and cost effective mechanism but also enable the parties to resolve their disputes in a cordial and informal atmosphere of arbitration and continue their relationship even after such disputes have arisen. It has, therefore, become imperative to amend the law so as to bring it in conformity with the desired objectives underlying the statute. This proposal also fully accords with the recommendations made by the Parliamentary Committee.

(x) It is therefore proposed that Section 11 of the Arbitration and Conciliation Act, 1996 may be amended to the limited extent as follows:

(a) In sub-Section (4) in clause (b) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(b) In sub-Section (5) for the words, 'by the Chief Justice or any person or

institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(c) In sub-Section (6) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(d) For sub-section (7), following sub-section shall be substituted namely:

(e) "A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the High Court or the person or institution designated by it shall be final and no appeal including a letter patent appeal shall lie against such decision."

(f) In sub-Section (8) for the words, 'by the Chief Justice or any person or institution designated by him" the words "by the High Court or any person or institution designated by it" shall be substituted.

(g) In sub-Section (9) for the words, " the Chief Justice of India or any person or institution designated by him" the words " the Supreme Court or any person or institution designated by it" shall be substituted.

(h) In sub-section (10) for the words, "The Chief Justice", the words, High Court" shall be substituted.

(i) In sub-Section (11), for the words, "the Chief Justice of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be", the words, "different High Courts or their designates, the High Court or its designate to which the request has been first made under the relevant subsection shall alone be" shall be substituted.

(j) For sub-section (12) following sub-section shall be substituted, namely:

"12(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to 'High Court" in those sub-sections shall be construed as a reference to the "Supreme Court".

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal civil court referred in clause (e) of sub-Section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to that High Court."

(l) After sub-section (12), following sub-sections shall be inserted, namely:- "(13) Notwithstanding anything contained in foregoing provisions in this Sections, where an application under this Section is made to the Supreme Court or High Court as the case may be for appointment of arbitrator in respect of 'Commercial Dispute of specified value', the Supreme Court or the High Court or their designate, as the case may be shall authorize any arbitration institution to make appointment for the arbitrator.

Explanation:-For the purpose of this sub-section, expression 'Commercial Dispute" and "specified value" shall have same meaning assigned to them in the Commercial Division of High Court Act, 2009."

(14) An application made under this Section for appointment of arbitrator shall be disposed of by the Supreme Court or the High Court or their designate, as the case may be as expeditiously as possible and endeavour shall be made to dispose of the matter within sixty days from the date of service of notice on the opposite party."

(C) Amendment in Section 12

(i) Section 12 deals with grounds of challenge to the appointment of an arbitrator while Section 13 deals with the challenge procedure. Section 12(1) provides that a person who is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing "any circumstances likely to give rise to justifiable doubts as to his independence or impartiality". Sub-section (2) of sec. 12 lays this responsibility on the arbitrator even during the course of arbitration proceedings. Sub section (3) of sec. 12 enables a party to challenge the arbitrator only if (a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or (b) he does not possess the qualifications agreed to by the parties. Sub section (4) refers to one's own appointed arbitrator and he can be challenged only for reasons of which he becomes aware after the appointment is made.

(ii) Section 12 reads as follows:

12. Grounds for challenge.—
(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his

independence or impartiality.
(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him."
(3) An arbitrator may be challenged only if
(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
(b) he does not possess the qualifications agreed to by the parties.
(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reason of which he becomes aware after the appointment has been made."
(iii) So far as sec. 12(1) is concerned, it is said that the "circumstances" which the arbitrator is to disclose are those which he considers relevant so as to raise a justifiable doubt as to his independence or impartiality. After all, the circumstances are mostly within his personal knowledge and unless there is an obligation to disclose all relevant facts, without limiting them to those which, in his view,. can raise justifiable doubts, there is likelihood of an unfair adjudication.
(iv) The earlier ICC Rules required the arbitrator to disclose:
"Whether there exists any past or present relationship , direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind."
Business or professional relationship or connection with subject matter of arbitration or its outcome or prior connection with some dispute have been treated as important matter to be disclosed by the arbitrators. It is a matter of propriety of Arbitrator. International Bar Association has approved guidelines on conflict of interest in International Arbitration. Copy of these guidelines are annexed as Annexure-VI. The Law Commission in its 176th Report recommended substitution of Section 12 (1) as follows:
(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,
(i) such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality."

In view of this it is proposed to empower the Central Government to prescribe by rules guidelines on conflict of interest on the lines of IBA guidelines. Sub-Section (1) of Section 12 is proposed to be substituted as follows:

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances

(i) such as the existence of any past or present relationship, either direct or indirect, with any of the parties or any of their counsel, whether financial, business, professional, social or other kind or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to his independence or impartiality; and

(ii) such other circumstances as may be provided in the Rules made by the Central Government in this behalf."

(D) Amendment in Section 28

Section 28 deals with rules applicable to substance of the dispute. It reads as follows: 28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India,—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,—

(i) the Arbitral Tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under sub-clause (ii) by the parties, the Arbitral Tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The Arbitral Tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the Arbitral Tribunal shall decide in accordance with

the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Supreme Court in Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd.,(2003) 5 SCC 705**,** considered a question whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 28 , which affects the rights of the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be — whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Supreme Court opined that reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34. The Supreme Court finally held that if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be patently illegal, which could be interfered under Section 34.

It may be pointed out that European Convention on Commercial, Arbitration that entered into force on April 21, 1961, in Article VII it is stated that, "the arbitrators shall into account of the terms of the contract and trade usages." In order to overcome the situation arises due to Supreme Court decision in ONGC case, it is proposed to substitute Sub-section (3) of Section 28 as follows:

(3) In all cases, the arbitral tribunal shall take into account the terms of

the contract and trade usage applicable to the transaction."

(E) Amendment in Section 31 (7)(b) regarding rate of interest:

There are three stages of grant of interest in the arbitral proceedings under the Act-(i) pre reference; (ii) pendent lie and (iii) post award. Clause (a) of sub-section (7) of Section 31 empowers the arbitral tribunal to include in the sum for which award is made interest at such rate as it deems reasonable on the whole or any part of the money, for whole or any part of the period between the date on which the cause arose and the date on which award is made, provided (a) there is no agreement between the parties prohibiting the award of such interest by the arbitral tribunal; and (b) the arbitral award is for the payment of money. As provided in clause (b) of sub-section (7) of Section 31, unless the arbitral award otherwise directs, the rate of interest shall be 18 per cent per annum from the date of award to the date of payment. This is a salutary provision in the statute which is intended to deter parties from raising frivolous disputes by putting them on notice that interest on the amount directed to be paid is payable.

However the interest at the rate of 18% per annum in the present economic scenario appears to be too harsh. It would be reasonable to prescribe rate of interest 1% higher than current rate of interest rate fixed by the Reserve Bank of India. Therefore, it is proposed to substitute clause (b) of Sub-Section (7) of Section 31 as follows:

"(b) A sum directed to be paid by arbitral award shall carry interest at the rate of one percent higher then the current rate of interest from the date of award to the date of payment.

Explanation-The expression "Current rate of interest" shall have same meaning as assigned to it under clause (b) of Section 2 of the Interest Act, 1978."

(F) Amendment in Section 34 for providing meaning of "public policy of India" and for harmonising it with Sections 13 and 16.

<u>Public Policy</u>

(i) As per existing Section 34(2)(b)(ii) an arbitral award may be set aside by the Court if the arbitral award is in conflict with the public policy of India Section 34 provides that an arbitral award may be set aside by a court on certain grounds specified therein. The grounds mentioned in cl. (a) to sub-section (2) of section 34 entitles the court to

set aside an award only if the parties seeking such relief furnishes proof as regards the existence of the grounds mentioned therein. The grounds are: (1) incapacity of a party; (2) arbitration agreement being not valid; (3) the party making the application not being given proper notice of appointment of arbitrator or of the proceedings or otherwise unable to present his case; (4) the arbitral award dealing with the dispute not falling within the terms of submission to arbitration; and, (5) composition of the tribunal or the arbitral procedure being not in accordance with the agreement of the parties.

(ii) Clause (b) of Sub-Section (2) of Section 34 mentions two grounds which are, however, left to be found out by the court itself. The grounds are: (1) the subject matter of the dispute not capable of settlement by arbitration that is to say, the disputes are not arbitrable; and (2) that the award is in conflict with the public policy of India. All these ground are common to both domestic as well as international arbitral awards.

(iii) The Supreme Court in the case of ONGC v Saw Pipes Ltd. Vs. (2003) 5 SCC 705 examined the scope and ambit of jurisdiction of the Court under section 34 of the Act. It was held that if the award is (a) contrary to the substantive provision of law, or (b) the provisions of the Act, or (c) against the terms of the contract, it would be patently illegal which could be interfered u/s 34. Supreme Court further held that phrase "public policy of India" use in Section 34 is required to be given a wider meaning and stated that the concept of public policy connotes some matter which concerns public good and the public interest. The award which is on face of it, patently in violation of statutory provisions cannot be said to be in public interest.

(iv) In ONGC v. Saw Pipes Ltd. reiterating several principles of construction of contract and referring to the contractual provisions which were the subject-matter of the arbitral award, the court ruled that "in the facts of the case, it can not be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act". Culling out the ratio from the decisions rendered under the 1940 Act, the court held:

"It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to

it for adjudication then the court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (b) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally".

(v) The decision in ONGC case, though rendered by a bench of two Hon'ble judges, has far reaching consequences. Firstly, the decision construes the new Act, as, in its entirety (Sections 2 to 43), laying down only rules of procedures (vide para 8 of the judgment). It rules that "power and procedure are synonymous" and that "there is no distinction between jurisdiction/power and the procedure". Referring to Sections 24, 28 and 31 of the Act and construing the words "arbitral procedure" in Section 34(2)(v) (and after observing that all the provisions appearing in part I of the Act lay down arbitral procedure) it concludes that "the jurisdiction or the power of the Arbitral Tribunal is prescribed under the Act and if the award is de hors the said provisions, it would be, on the face of it, illegal".

(vi) Construing the phrase "public policy of India" appearing in Section 34(2)(b)(ii), the court held that in a case where the validity of the award is challenged on the ground of being opposed to "public policy of India", an wider meaning ought to be given to the said phrase so that "patently illegal awards" could be set aside.

The court distinguished the earlier decision in Renu Sagar case on the ground that in the said case the phrase "public policy of India" appearing in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 was construed which necessarily related to enforcement of foreign award after it became final. Though the court accedes that "it is for the Parliament to provide for limited or wider jurisdiction of the court in case where award is challenged", it still holds that, in its view, a wider meaning is required to be given to the phrase "public policy of India" so as to "prevent frustration of legislation and

justice". Stating the reasons in support of its view the court held that "giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice".

(vii) This decision had been the subject matter of public debate and criticism in various fora. The Law Commission of India also suggested an amendment to the Act by insertion of Explanation II to Section 34 of the Act.

Accordingly in order to nullify the effect of above decision of the Supreme Court, it is proposed that the existing Explanation in section 34 be renumbered as Explanation 1 and after that Explanation as so renumbered the following Explanation shall be inserted.

"Explanation II-For the purposes of this section "an award is in conflict with the public policy of India" only in the following circumstances, namely:

When the award is contrary to the

(i) fundamental policy of India; or

(ii) interests of India; or

(iii) justice or morality.""

Harmonising Section 34 with Sections 13 and 16 –

It may be pointed out that Section 13 deals with the procedure for challenging an arbitrator. Sub-section (1) recognizes the freedom of the parties to agree on a procedure for challenging an arbitrator. Sub-Section (2) provides a supplementary procedure for challenging an arbitrator. The reasons for such a challenge are exhaustively laid down in Section 12. As provided in sub-section (3), unless the arbitrator challenged under sub-section (2) withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on challenge. Sub-section (4) provides that if a challenge under any procedure agreed upon by the parties or under procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. However, as provided in subsection (5) the party which challenges the appointment of the

arbitrator may file an application for setting aside such an arbitral award in accordance with Section 34. Hence, until the arbitral award is made after the challenge to the appointment of arbitrator being unsuccessful, the party challenging the appointment of arbitrator cannot make any application to the Court in connection with challenge to the appointment of the arbitrator nor the court can entertain any such application. However in section 34 there is no specific mention of such a ground for setting aside an arbitral award.

Similarly as provided in Section 16, the arbitral tribunal may rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction can be raised as per sub-section (2) and a plea that the arbitral tribunal is exceeding the scope of its authority can be raised in terms of sub-section (3). As provided in sub-section (5), the arbitral tribunal can decide on these pleas and where the tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award. However, as per sub-section (6) a party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34. An appeal lies under Section 37 against the order of the arbitral tribunal accepting the plea under sub-section (2) and (3) of Section 16. However, no appeal is provided against an order rejecting such plea. The only right that the petitioner has in such a case is to challenge the award under Section 34 after it is made.

The Law Commission in 176th Report considered the question whether it was desirable to provide for an appeal under section 37 to court against decision of the arbitral tribunal rejecting the plea of bias or disqualification under section 13. After due deliberation, the Law Commission was of the view that there should not be an immediate right of appeal under section 37 against the decision of the tribunal rejecting the plea of bias or disqualification under section 13.

The Law Commission in its 176th Report also considered the request from certain quarters for a right of appeal to the Court against an order of the arbitral tribunal rejecting the objections in regard to the existence or validity of the arbitration agreement under sub-sections (2) and (3) of section 16.

The Law Commission rejected the request for providing appeal against an order refusing a plea of want of jurisdiction.

Section 34 does not enable the parties to question the decision of the arbitral tribunal made under Section 13 (2) rejecting a plea of bias or to question the decision of the said tribunal made under Section 16 (2) or (3) rejecting a plea of want of jurisdiction on the part of the arbitral tribunal. Though the existence of these remedies was referred to in Sections 13 (5) and 16 (6), these remedies were not included in Section 34 and further the use of the word 'only' in section 34 (1) contradicted what was stated in sections 13 and 16. Therefore, the Law Commission, recommended insertion of a clarification in section 34 by way of an explanation that an applicant, while seeking to set aside the award, can attack the interlocutory order of the arbitral tribunal rejecting a plea of want of jurisdiction, as permitted by section 16(6).

In stead of insertion of another Explanation as proposed by the Law Commission, it would be appropriate to have a substantive provision in Section 34 for providing separate ground for challenging the arbitral award. Therefore, it is proposed to add following sub-clause (iii) in clause (b) of Sub-section (2) of Section 34

"(iii) the application contains a plea questioning the decision of the arbitral tribunal rejecting –

(a) a challenge made by the applicant under sub-section (2) of section 13; or

(b) a plea made under sub-section (2) or sub-section (3) of section 16,";

(G) Insertion of new Section 34A

Law Commission while suggesting amendment in Section 34 also recommended that in case of domestic arbitration, new ground for challenges viz. mistake appearing on face of award may be made available. Accordingly it recommended for inserting a new Section 34A.

It is desirable to provide some recourse to a party aggrieved by a patent and serious illegality in the award which has caused substantial injustice and irreparable harm to the applicant. It is a delicate task to strike a balance between two equally important but conflicting considerations, namely giving finality to the arbitral award and redressing substantial injustice caused by some patent and serious illegality in the award. As no tribunal is infallible, it is desirable to provide some recourse to a party who has suffered substantial injustice due to patent and serious

illegality committed by the arbitral tribunal. It is true that whatever expression is used in the grounds of recourse to take care of such situation, the possibility of abuse thereof by a disgruntled party cannot be ruled out. However, one cannot lose sight of the ground realties.

There is no denying the fact that the overall scenario in the field of arbitration is not as ideal as it should be. As pointed by Lord Mustill, arbitration has become a business, often involving very large sums, and bringing in its train substantial monetary earnings for all concerned and there has been a concurrent decline in the standards of at least some of those who take part in it. It is no good wringing hands about this, for it is a fact to be faced, and part of facing is to recognise that some means must be found of protecting this voluntary process from those who will not act as they have agreed or as is expected of them. Here lies the need for providing some ground of recourse in case of patent and serious illegality causing substantial injustice.

In this context it may be necessary to refer to the case of **Sikkim Subba Associates v. State of Sikkim (2001) 5 SCC 629,** wherein the arbitrator awarded an astronomical sum as damages without any basis or proof of such damages as required by law in total disregard to the basic and fundamental principles, is a glaring example of misuse of power by the arbitrator and the need for some recourse at least in such extreme cases. In that case, the arbitrator made an award determining a sum of over Rs.33 crores with proportionate costs and future interest at the rate of 12% p.a. on the said amount as the amount payable by the State of Sikkim to the organizing agents of the lottery. The Supreme Court set aside the award on the ground of gross illegality. The grave nature of the illegality in the award in that case is evident from the following observations of the Supreme Court:

"The arbitrator who is obliged to apply law and adjudicate claims according to law, is found to have thrown to the winds all such basic and fundamental principles and chosen to award an astronomical sum as damages without any basis or concrete proof of such damages, as required in law".

"Though the entire award bristles with numerous infirmities and errors of very serious nature undermining the very credibility and objectivity of the reasoning as well as the ultimate conclusions arrived at by the arbitrator, it would suffice to point out a few of them with necessary

and relevant materials on record in support thereof to warrant and justify the interference of this Court with the award allowing damages of such a fabulous sum, as a windfall in favour of the appellants, more as a premium for their own defaults and breaches."

"The manner in which the arbitrator has chosen to arrive at the quantum of damages alleged to have been sustained by the appellants not only demonstrates perversity of approach, but per se proves flagrant violation of the principles of law governing the very award of damages. The principles enshrined in Section 54 in adjudicating the question of breach and Section 73 of the Contract Act incorporating the principles for the determination of the damages, are found to have been observed more in their breach."

It is therefore proposes that that an additional ground of challenge, namely, "patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant" may be added as a ground for recourse in case of purely domestic awards. Accordingly, it is proposed to insert a new Section 34A as suggested by the Law Commission with some changes:

"34A. Application for setting aside arbitral award on additional ground of patent and serious illegality.

(1) Recourse to a Court against an arbitral award made in an arbitration other than an international commercial arbitration, can also be made by a party under subsection (1) of section 34 on the additional ground that there is a patent and serious illegality, which has caused or is likely to cause substantial injustice to the applicant.

(2) Where the ground referred to in sub-section (1) is invoked in an application filed under sub-section (1) of section 34, while considering such ground, the Court must be satisfied that the illegality identified by the applicant is patent and serious and has caused or is likely to cause substantial injustice to the applicant."

(H) SUBSTITUTION OF SECTION 36

Existing Section 36 deals with enforcement of an arbitral award. It reads:

"36. Enforcement. Where the time for making an application to set aside the, arbitral award under section 34 has expired or such

application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

Section 36, as it stands now, provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of section 34 to set aside the award.

The Law Commission in their Report had observed that parties are filing applications to set aside the award even though there is no substance whatsoever in such applications and, to put a stop to this practice, proposed the amendment of section 36 by deleting the words which say that the award will not be enforced once an application is filed under sub-section (1) of section 34.

To give effect to the above recommendation of the Law Commission, the Amendment Bill of 2003 sought to substitute the existing section 36.That was is a very good provision. It will have a salutary effect on the expeditious execution of the awards. It provided that an award will be enforceable after the period fixed for filing applications under section 34 has expired, unless the court stays its enforcement. The court is vested with powers to refuse stay or grant stay subject to conditions. While granting stay, the court can impose conditions, keeping the scope of interference in applications under subsection (1) of section 34 in mind. The manner of imposing conditions and interim measures has also been specified. Therefore, it is proposed to substitute Section 36 as follows:

"36. Enforcement of award.

(1) Where the time for making an application to set aside the arbitral award under sub-section (1) of section 34 has expired, then, subject to the provisions of subsections (2) to (4), the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court.

(2) Where an application is filed in the Court under sub-section (1) of section 34 to set aside an arbitral award, the filing of such an application shall not by itself operate as a stay of the award unless, upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of sub-section (3).

(3) Upon filing of the separate application under sub-section (2) for stay of the operation of the award, the Court may, subject to such conditions as it may deem fit to impose, grant stay of the operation of the arbitral award for reasons in brief to be recorded in writing:

Provided that the Court shall, while considering the grant of stay, keep in mind the grounds for setting aside the award.

(4) The power to impose conditions referred to in sub-section (3) includes the power to grant interim measures not only against the parties to the award or in respect of the property which is the subject-matter of the award but also to issue ad interim measures against third parties or in respect of property which is not the subject-matter of the award, in so far as it is necessary to protect the interests of the party in whose favour the award is passed.

(5) The ad interim measures granted under sub-section (4) may be confirmed, modified, or vacated, as the case may be, by the Court subject to such conditions, if any, as it may, after hearing the affected parties, deem fit."

(I) Arbitration relates to Commercial Disputes of specified value-

In the Amendment Bill of 2003 it was proposed to insert a new chapter IXA, comprising sections 37A to 37F, to provide that every High Court shall, constitute an Arbitration Division in the High Court to deal, irrespective of pecuniary value, with the applications under sub-section (1) of section 34 to set aside awards under the principal Act, new and pending, and enforcement of awards under the principal Act, new and pending.

The object of that amendment was to avoid the present procedure at two levels, one in the subordinate courts (or original side of High Court) and another by way of appeal to or in the High Court. Now, by a separate law it is proposed to constitute Commercial Division in the High Court. In the said law it is also proposed that the said Commercial Division will also entertain applications under Section 34 and Section 36 and appeals under section 37 of the Arbitration and Conciliation Act, 1996 where the arbitration relates to "Commercial Disputes" of specified value. For this purpose, consequential amendment for amending definition of 'Court' in Section 2 of the Arbitration Act is also being amended. As the application under Section 34 would be filed

before the Commercial Division of the High Court, appeal against order passed by the Commercial Division under Section 37 would lie before the Supreme Court. For this purpose, the Lok Sabha has passed the Commercial Division of High Courts Bill, 2009. Copy of the Bill is annexed as Annexure-VII.

J-Suggestion for Insertion of provision for implied arbitration agreement in commercial contract of high consideration value

We have received a suggestion from certain quarters that after the judgment delivered by Seven Judge Bench of Supreme Court in the case of S.B.P. Company Vs. Patel Engineering Ltd.(2005) 8 SCC 618, a situation has arises to the effect that in the matter of appointment of arbitrator, the role of arbitration institution has become almost nil. As held by the Supreme Court in aforesaid case, the Chief Justice or the designated Judge would be entitled to seek only the opinion of an institution in the matter of nominating an arbitrator if need arises, but the order appointing arbitrator could only be that of the Chief Justice or the designated Judge. Supreme Court has further held that before appointing an arbitrator the Chief Justice or the designated Judge will have a right to decide certain preliminary issues including the issue of existence of a valid arbitration agreement.

Standing Committee of the Parliament in its report on the Arbitration and Conciliation (Amendment) Bill, 2003 has recommended to promote institutional arbitration.

In order to avoid raising of an issue of existence of a valid arbitration agreement and also to promote institutional arbitration, it has been suggested by certain persons that in respect of commercial contract of high threshold value, there should be a deemed arbitration clause in every such contract, unless the parties expressly and in writing agree otherwise. To achieve this object, insertion of following clause in the Arbitration and Conciliation Act, 1996 has been suggested:

(i) Unless parties expressly and in writing agree otherwise, every commercial contract with a consideration of specified value(Rs. 5 crore or more) shall deemed to have in writing specified arbitration agreement.

(ii) Specified Arbitration Agreement as referred in clause (i) shall contain following clause:

"All dispute s(except (here specify the excepted disputes, if any) arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of (here specify the name of the approved arbitral institution) by one or more of the arbitrators appointed in accordance with the said Rules."

(iii) Any arbitration agreement that differs from the said clause will stand modified along the lines of the specified arbitration agreement.

(iv) Where the parties have failed to mention the Approved Arbitral Institution, High court will authorize to an Approved Arbitral Institution to appoint arbitrator within 30 days of the reference made to it by either party for this purpose.

(v) In this Section "Commercial Contract" shall mean every contract involving exchange of goods or services for money or money's worth and includes carriage of goods by road, rail, air, waterways, banking, insurance, transactions in stock exchanges and similar exchanges, forward markets, supply of energy, communication of information, postal, telegraphic, fax and Internet services, and the like."

It may be pointed out that for inserting aforesaid provisions in the Arbitration & Conciliation Act, 1996, many provisions of the Act including Section 7 (which deals with arbitration agreement), Section 8, Section 2(1)(b) have to be amended.

Comments are invited on the feasibility and necessity of insertion of aforesaid provisions in the Act.

Comments are invited on aforementioned proposed amendments in the Arbitration & Conciliation Act, 1996. Any other suggestion regarding amendment in the said Act may also be sent within 30 days. The comments can be sent to Adviser to Union Minister for Law & Justice at vnathan@nic.in or to the following address:

T.K. Viswanathan
Adviser to Minister for Law & Justice,
Ministry of Law & Justice
Room No 404, "A" Wing, 4th Floor
Shastri Bhavan,
New Delhi 110001.

VOL. 1 NALSAR ADR REVIEW 2012

Published by

Nalsar University of Law
'Justice City', Shameerpet, R.R.Dist.
Hyderabad - 500078, A.P. INDIA.
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