APPEAL AGAINST THE ORDER OF THE CHIEF JUSTICE UNDER SECTION 11 OF THE ARBITRATION AND CONCILIATION ACT, 1996: AN EMPIRICAL ANALYSIS

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In 2005, a seven judge bench of the Supreme Court held[1] that an appeal would lie to the Supreme Court from an order of the Chief Justice of the High Court or his designate[2] passed under section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter Act or 1996 Act).[3] The court held that its decision to make the order of the designate is final but subject to appeal by special leave under Article 136 of the Constitution of India, 1950 (hereinafter Constitution)[4] which "would really be in aid of quick disposal of arbitration claims and avoid considerable delay in the process, an object that is sought to be achieved by the Act".[5] *Patel Engineering* brought about a sea change in the manner in which arbitral tribunals were constituted under the Act. The judgment has been criticised for the manner in which the Supreme Court put in place a new procedure for appointment of arbitrators in lieu of the procedure specified in the Act, thereby ignoring the objectives which the Act sought to achieve.[6] Contrary to the claims of the

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[1] S.B.P. & Co. v. Patel Engineering & Co., (2005) 8 S.C.C. 618(hereinafter *Patel Engineering*) (One judge dissenting).

[2] Except in case of international commercial arbitration, as defined, the application under section 11 of the Arbitration and Conciliation Act, 1996 is made to the Chief Justice of the relevant High Court. For the purposes of this paper, the authority hearing an application under section 11 of the Act shall hereinafter be referred to as "Designate" irrespective of whether the application is actually heard by the Chief Justice of the High Court or, as is usual, his designate.

[3] *Patel Engineering*, 8 S.C.C. 618; *See* R.S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 747-52 (Anirudh Wadhwaet al. eds., 2010) (hereinafter BACHAWAT) (discussing the implications of *Patel Engineering*).

[4] INDIA CONST. art. 136.

[5] *See Patel Engineering*, 8 S.C.C. 618, ¶ 43.

[6] *See* Ministry of Law and Justice, Government of India, *Proposed Amendments to the Arbitration & Conciliation Act, 1996: A Consultation Paper*, ¶ vii-viii (Apr., 2010), http://lawmin.nic.in/la/consultationpaper.pdf (hereinafter Consultation Paper); Badrinath Srinivasan, *Arbitration and the Supreme Court: A Tale of Discordance between the Text and Judicial Determination*, 4 NUJS L. REV. 639, 652-654 (2011); Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 Int. A.L.R. 13, 17 (2007);

Supreme Court of speedy disposal of arbitration claims, the judgment appears to devise a mechanism that would result in considerable delay in the constitution of the arbitral tribunal because it allows a party to approach the Supreme Court under Article 136 of the Constitution against a decision of the Designate, appointing an arbitrator.

The purpose of this paper is to examine the merit of the said appeal process, primarily using data derived from the reported decisions of the Supreme Court where special leave was granted. This paper proceeds as follows: In Part II, the decision of the Supreme Court in *Patel Engineering* on the right to appeal to the Supreme Court against the decision of the Designate is briefly analysed. Part III deals with the methodology of collection of data and the assumptions made as regards unavailable data. In Part IV, data collected and assumed is presented and inferences drawn from it are critically analysed from the perspective of its impact on Indian arbitration. Part V provides solutions to the current problems and concludes.

II

In *Patel Engineering*, the Supreme Court had to decide on the nature of function of the Designate under section 11 of the Act.[7] The issue was whether the Designate should decide any contentious jurisdictional issue before referring the parties to arbitration or would he merely perform an administrative function of appointing a suitable arbitrator without deciding on jurisdictional issues.[8] According to the court, when a statute confers power to the tribunal "to

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Aniruddha Sen, *The Role of the Court in the Appointment of Arbitrators - an Analysis with Reference to the Supreme Court of India's Decision in S.B.P. v. Patel Engineering*, 10 VJ 45 (2006).

[7] *See* The Arbitration and Conciliation Act, No. 26 of 1996, § 11.

[8] Prior to *Patel Engineering*, 8 S.C.C. 618, a three judge bench of the Supreme Court in Konkan Railway Corporation v. Mehul Constructions, A.I.R. 2000 S.C. 2821, had decided that the role of the Designate under section 11 was merely an appointing authority and all jurisdictional issues, including those pertaining to the validity of the arbitration agreement, were to be raised before the arbitral tribunal and not before the Designate; This was affirmed by a five judge Bench in Konkan Railway Corporation v. Rani Constructions, (2002) 2 S.C.C. 388; For the legal position prior to *Patel Engineering*, *see*, BACHAWAT, *supra* note 3 at 744-47; In the corresponding provision in the UNICTRAL Model Law on International Commercial Arbitration, 1985, article 11, the nature of the function of the court in appointing the arbitrator is an administrative decision; *See* UNCITRAL, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, 29, A/CN.9/264 (Mar. 25, 1985); *Also* s*ee* UNCITRAL, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* 61 (2012) http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last visited Jul. 7, 2012).

adjudicate" and makes its decision final, such decision is judicial in character[9] and the tribunal has to be satisfied of the existence of the conditions, known as jurisdictional facts for the exercise of its jurisdiction to appoint the arbitrator.[10] Since section 11(7) confers on the Designate the power to adjudicate and makes his decision final, the court held that while deciding an application under section 11, the Designate has to necessarily be satisfied of the existence of jurisdictional facts such as the existence of an arbitration agreement, existence of such agreement between the parties to the application etc. This, the court felt, would put an end to several issues relating to dispute even before the tribunal is constituted. Foreclosing all the remedies available from a decision of the Designate, such as a writ under Article 226 and consequent intra-court writ appeals, the Supreme Court held that the decision of the Designate would only be subject to an appeal by Special Leave under Article 136 of the Constitution.

The right to appeal from the decision of a court is not a matter of right but is a privilege granted by statute.[11] Statutes generally provide for the right to appeal to a higher forum. However, statutes may at times regulate[12] or even curtail the right to the litigant to go on appeal.[13] Such regulation or restriction does not affect the provisions of appeal to the Supreme Court[14] or the right to move the High Court under Article 226 for extraordinary relief under the Constitution.[15]As regards invocation of the extraordinary jurisdiction of the High Court, the Constitution empowers a High Court under Article 226 to issue "directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the purpose of enforcement of any of the rights conferred by Part III and for any other purpose." Although the scope of power of the High Court under the said provision is broad, there are grounds, imposed by the judiciary, on the basis of

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[9] *See* Province of Bombay v. Khushal Das, A.I.R. 1950 S.C. 222; A. K. Kraipak v. Union Of India A.I.R. 1970 S.C. 150 (discussing the difference between judicial and administrative decisions).

[10] *See Patel Engineering*, 8 S.C.C. 618, ¶ 8.

[11] Purshotam Das Goyal v. Hon'ble Mr. Justice BM Dhillon, A.I.R. 1978 S.C. 1014.

[12] For instance, the provision pertaining to appeal may provide that the party seeking to appeal is to deposit a portion or the entire amount in dispute before the court or other authority. *See*, Delhi Municipal Corporation Act, 1957, § 170(b) and Payment of Wages Act, 1936, § 17(1A), which provides that no appeal shall lie from the decision of the authority unless the memorandum of appeal is accompanied by a certificate by the authority to the effect that the appellant has deposited the amount payable under the direction appealed against.

[13] For instance, The Arbitration and Conciliation Act, No. 26 of 1996, § 11(7), provides that the decision of the Designate under section 11 is final.

[14] *See Patel Engineering*, 8 S.C.C. 618, ¶ 44-45.

[15] L. Chandra Kumar v. Union of India, A.I.R. 1997 S.C. 1125.

which High Courts refuse to exercise jurisdiction.[16] For example, in *Patel Engineering*, the Supreme Court held that a decision of the Designate cannot be challenged by way of a petition under Article 226.[17]

Article 136 provides for appeal by special leave of the Supreme Court from any judgment, decree, determination, sentence or order of any court or tribunal. Although the power of the Supreme Court to grant leave under this provision is virtually unlimited, the power has been exercised in extraordinary circumstances and is discretionary.[18] Thus, it appears that in *Patel Engineering*, the court provided for appeal under Article 136 only in special cases and not as a matter of course.

In *Patel Engineering*, appeal to the Supreme Court under Article 136 became necessary because the Designate would decide on the substantive issues in the dispute having a huge impact on the outcome of the dispute and the parties must be given a chance to challenge the same for errors. The moot point, however, is whether the Designate should be given the power to decide on substantive aspects in the first place. This, among other things, depends on the efficacy of the entire process devised by the Supreme Court in *Patel Engineering*. The endeavour here is to examine a part of that process-appeal under Article 136 from the order of the Designate. It is, however, acknowledged that assessment of the appointment process laid down by *Patel Engineering* is complete only by investigating the efficacy of the entire process and not merely the appeal. Nevertheless, this paper may be considered as a preliminary step towards empirical assessment of the efficacy of the process of constitution of arbitral tribunals in India.

III

For the purpose of the research, data has been collected from reported decisions of the Supreme Court since *Patel Engineering* in which appeals under Article 136 have been decided from the order of the Designate. Effectiveness of a judicial system is measured by the swiftness of the adjudicatory process, and the proportionality of procedures and costs to the nature of issues involved.[19] In the context of appeal under Article 136 from the order of the Designate, the factors indicative of the efficacy of the appeal process, apart from the correctness of decision-making (which is not within the scope of this paper), are as follows:

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[16] *Id.*

[17] *See Patel Engineering*, 8 S.C.C. 618, ¶ 25, 31.

[18] Pritam Singh v. The State, A.I.R. 1950 S.C. 169, ¶ 9; Mathai v. George (2010) 4 S.C.C 358, ¶ 5.

[19] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, ¶ 1(1995), http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/interim/chap1.htm (last visited Jul. 7, 2012).

- Duration taken to decide on whether the arbitral tribunal is to be appointed or not.
- The concept of proportionality of procedures to the issues involved is intricately linked to two aspects relevant to this paper: (1) what is the result of the determination of appeals by the Supreme Court from the order of the Designate; (2) even if the procedures are disproportionate to the issues involved, whether the vindicated party is duly compensated for the costs incurred in pursuing the process both before the Designate and the Supreme Court.[20]

There are two stages in appeals under Article 136 from the order of the Designate. In the first stage, the Supreme Court examines if special leave is to be granted for appeal from the decision of the lower court or tribunal. The court has the discretion to even refuse to grant leave. If the Supreme Court decides to grant special leave, the petition enters the second stage where it is treated as an appeal from the decision of the lower court.[21] This paper does not account those cases where the Supreme Court refused to grant special leave to appeal from the order of the Designate as such decisions are usually not reported in the law journals.[22] Although information on refusal to grant leave is available in the website of the Supreme Court, it is virtually impossible to sift through the website for the status of each of the petitions for special leave considering the number of civil Special Leave Petitions filed each year.[23] Cases where special leave was granted have been obtained through a free text search in two electronic databases- *Manupatra* and *Indiankanoon*.[24] In Manupatra, relevant decisions were listed using subject-matter search. "Arbitration" was taken the subject matter and "*Section 11*" was the primary search string employed. To check for omissions, the search string "*special leave*" was also employed under the same subject-matter. In *Indiankanoon*, the search strings used were "*arbitration 'Section 11'*" and "*arbitration 'Section 11' 'special leave'*". *Manupatra* and *Indiankanoon* were chosen to cover the maximum number of relevant decisions possible.[25]

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[20] *See* Part IV of this paper.

[21] The Supreme Court Rules, 1966, Rule 11, Order XVI.

[22] In some cases, such decisions have been reported; *See* ACC Limited v. Global Cements Limited, (2012) 7 S.C.C. 71; Dakshin Shelters P. Ltd. v. Geeta S. Johari, (2012) 5 S.C.C. 152.

[23] A case number search in the case status website of the Supreme Court (http://www.courtnic.nic.in/courtnicsc.asp) reveals that about 35980 civil SLPs were filed in 2011 alone. Nevertheless, it is acknowledged that information from those cases where special leave was refused is significant.

[24] Manupatra (subscription required) is accessible from http://www.manupatra.com/ and Indiankanoon is accessible from http://www.indiankanoon.org/.

[25] It is acknowledged that some decisions might have been left out in the list of decisions analysed here; *See*

Further, even the available decisions do not provide complete information relevant for the present undertaking. For instance, most of the decisions do not provide information pertaining to the date of filing of the petition for special leave to appeal or the date of filing the application under section 11. Therefore, certain assumptions have been made as regards the unavailable data. Although these assumptions are, to some degree, arbitrary and militate against the purpose of relying on data-objectivity, it is felt that these are necessary to construct a picture that is most closely relatable to reality and would not drastically affect the ultimate inference drawn from the data collected. Hence, gaps in data have been supplied with re-constructed data based on the below assumptions. These assumptions have been made in such a way that the re-constructed data most closely resembles the real data.

1. Most judgements of the Supreme Court do not record the date of notice of arbitration. In the absence of the date of notice of arbitration, the date of filing of the application under section 11 is taken, wherever available. This assumption may hereinafter be called as the "Same Day Assumption". Except for certain High Courts such as the High Courts of Bombay, Karnataka, Andhra Pradesh and Punjab & Haryana, websites of most High Courts do not provide information on the date of filing of the application under section 11. In the absence of reliable data on the date of filing of the said application, the judgment of the Designate, wherever available, has been perused. In some cases, the judgment of the Designate reveals relevant information that is not found in the judgment of the Supreme Court. In the absence of data on the date of filing, the last date of the year in which the application was filed has been assumed to be the date of filing of the application. This assumption may hereinafter be called as the "Last Day Assumption".
2. The date of filing of the Special Leave Petition is rarely available. Unlike the websites of certain High Courts, the Supreme Court's website does not provide information on the date of filing of the Special Leave Petition. In such cases, this paper relies on the limitation period for filing of Special Leave Petitions. Article 133(c) of the Schedule to the Limitation Act, 1963 prescribes a period of ninety days from the date of the order of the High Court to appeal to the Supreme Court by special leave.[26] A further period of thirty days is assumed for the receipt of certified copy of the Designate's Order. Therefore, the Special Leave Petition is assumed to have been filed one hundred and twenty days

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https://docs.google.com/spreadsheet/ccc?key=0Akvjce3P3PrBdGZqbWhrRC1abHVwQzExQ1U0elRaeEE (last visited Jul. 3, 2012) for a list of petitions that have been considered for the purposes of this paper.

[26] *See* The Limitation Act No. 36 of 1963, § 17(2).

after the date of order of the Designate. This assumption may hereinafter be called as the "Limitation Assumption".In a few cases decided prior to *Patel Engineering*, there were writ petitions under Article 226 filed against orders of Single Judges. After *Patel Engineering*, Special Leave Petitions were filed from the orders of the High Court.[27] In such cases, the date of filing of the Special Leave Petition is calculated as per the above methodology not from the date of the order of the Designate but from the date of the decision in the writ petition. There are also cases where the court has condoned the delay in the filing the Special Leave Petition.[28] In most cases, the judgment records the number of days of delay. These have been added to the one hundred and twenty day period. In cases where there is no data on the number of days of delay, the Last Day Assumption has been adopted.

IV

The Need for Appeal: The Supreme Court has granted special leave to appeal in about eighty three petitions since *Patel Engineering* was decided.[29] These eighty three petitions also include several petitions by a single party against another party for appointment of arbitrator but in respect of different arbitrations.[30] Out of those eighty three petitions, the Supreme Court upheld the order of the Designate in twelve (14%) and reversed the same in the remaining seventy one cases (86%). The percentage of cases in which the decision of the Designate was reversed is indicative of the necessity of the appeal process in the extant scheme of appointment of arbitrators. This inference is based on the assumption that the Supreme Court was correct in reversing the decision of the Designate. Even assuming that the Supreme Court was right in doing so only in 50% of the cases of reversal, the number of petitions rightly reversed comes to thirty six constituting 43% of the total number of petitions, which is a significant figure. Thus, the Supreme Court seems to act as a forum for correction of error

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[27] For instance, in CMC v. Unit Trust of India, A.I.R. 2007 S.C. 1557, the application under section 11 was disposed of on 29.11.2002, but a writ petition was filed against the said order dated 29.11.2002. The writ petition was dismissed on 03.10.2003. The SLP was filed from the decision of the High Court dated 03.10.2003. In such cases, the SLP Assumption has been employed not from the date of the order of the Designate but from the decision of the High Court pursuant to the writ petition.

[28] *See* Union of India v. Talson Builders, (2008) 12 SCALE 752; Municipal Corporation, Jabalpur v. Rajesh Construction Co. A.I.R. 2007 S.C. 2069.

[29] This, as stated previously, does not include unreported decisions and those cases in which the Supreme Court refused to grant special leave. The number of petitions is as on 15 May, 2012.

[30] *See* Northern Railway Administration, Ministry of Railway, New Delhi v. Patel Engineering Company Ltd, 2008 (10) S.C.C. 240; Bharat Sanchar Nigam Ltd. v. DhanurdharChampatiray, (2010) 1 S.C.C. 673.

committed by the Designate in deciding the application for appointment of arbitrator.[31] Considering the substantial impact that the Designate's determination might have on the ultimate outcome of the dispute, the appeal process appears to play a crucial role in eliminating errors in the *Patel Engineering* regime.[32]

Time Taken for Constituting the Arbitral Tribunal: A direct consequence of *Patel Engineering* is to add another tier to the already protracted process of constitution of the arbitral tribunal.[33] Apart from doing so, it considerably delayed the said process by holding that the Designate had to decide finally on certain aspects, such as the validity of the arbitration agreement etc. These decisions are not mere administrative decisions but are substantive decisions having a significant impact on the end result of arbitration. As stated earlier, this necessitated another tier of determination to ensure correctness thereof. Therefore, viewing the appointment structure laid down by *Patel Engineering*, the appeal process is important for the reasons discussed in this paper previously. This does not mean that the entire structure of appointment of arbitrator as provided for by *Patel Engineering* is ideal for arbitration in India. The function of appointment of

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[31] The function of the appellate court in correcting errors has been called the error correction function or the review for correction function of the courts. Correcting errors through appeal process is cheaper in ensuring adjudicatory accuracy than by increasing the quality of the trial courts. *See*, David P. Leaonard, *The Correctness Function of Appellate Decision- Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L. A. L. REV. 299 (1984); Steven Shavell, *Appeal Process as a Means for Error Correction*, 24 J. LEGAL STUD. 379 (1995); MauritsBarendrecht, Korine Bolt, Machteld de Hoon, *Appeal Procedures: Evaluation and Reform* 12-13 (Nov., 2006), Tilburg Law & Economics Center Discussion Paper No. 2006-031, http://ssrn.com/abstract=942289 (last visited Jul. 2, 2012) (hereinafter *Appeal Procedures*); Charles M. Cameron & Lewis A. Kornhauser, *Decision Rules in a Judicial Hierarchy*, http://ssrn.com/abstract=628522 (last visited Jul. 8, 2012); STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 450-56 (2004); ROBERT COOTER& THOMAS ULEN, LAW & ECONOMICS (2004). For a survey of Law and Economics literature on appeals, *see*, ENCYCLOPAEDIA OF LAW AND ECONOMICS,*VOLUME V: THE ECONOMICS OF CRIME AND LITIGATION* (BoudewijnBouckaert&Gerrit de Geest eds., 2000).

[32] In the absence of data on cases in which special leave to appeal from the order of the Designate was refused, the efficacy of the appeal process cannot be accurately evaluated because the number of reversals should ideally be compared with the number of cases in which the Designate's order was not reversed. The latter would include cases in which special leave was refused and also the cases in which special leave was granted but leave was refused.

[33] There is no empirical research on the duration taken for the courts in India to appoint the arbitrator on an application under section 11 of the 1996 Act. However, considering that the Designate has to decide on jurisdictional questions such as those pertaining to the existence of the arbitration agreement post- *Patel Engineering*, the process of appointment would be more intricate and lengthier.

arbitrator by the Designate as a mere referring body than that of a judicial body as envisaged in *Patel Engineering* seems to be more efficient. This portion of the paper leans in favour of the said argument by looking at the duration taken for a final decision on the constitution of arbitral tribunal in cases where special leave to appeal from the Designate's decision has been granted.

Anecdotal evidence from outside India suggests that it takes around two to five months for the constitution of arbitral tribunal[34] in *ad hoc* arbitrations with constitution in institutional arbitrations taking considerably lesser time in view of the in-built mechanism by which the institution itself appoints arbitration as a default procedure.[35] Ideally, it should take about the same time for the constitution of tribunal in India.[36]Anecdotal evidence suggests that it takes over twelve months for the Designate to decide on an application under section 11 of the Act.[37] Apart from the determination by the Designate, in cases where special leave to appeal has been granted from the Designate's decision, there is considerable delay in constitution of the arbitral tribunal. This segment of the paper deals with the duration taken by the courts to decide finally on the application to appoint arbitrator.

Out of the eighty three petitions considered, only in three cases did it take twelve months or less for the completion of the entire process of appointment and appeal. In *BSNL v. Subash Chandra Kanchan,*[38] the matter was decided within eight months from the date of application under section 11 till the final decision

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[34] This does not include cases where more than three arbitrators constitute the arbitral tribunal.

[35] Huang Tao and Dai Yue, *Forum Shopping in China: CIETAC vs. UNCITRAL*, http://www.chinalawinsight.com/2011/07/articles/dispute-resolution/forum-shopping-in-china-cietac-vs-uncitral/ (last visited May 20, 2012); ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper* (Oct. 22, 2004), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf; It is not clear if it takes the same amount of time for constitution of tribunals with more than three members. Considering the procedures involved in nomination of a tribunal with more than three members, it is presumed in this paper that the anecdotal evidence does not include tribunals with more than three members.

[36] In this paper, the said figure of two to five months is taken as the ideal time taken for the constitution of the arbitral tribunal in *ad hoc* arbitrations.

[37] Herbert Smith LLP, *Dispute Resolution and Governing Law Clauses in India-Related Commercial Contracts* 5 (2012), http://herbertsmitharbitrationnews.com/wp-content/uploads/2012/05/9691-Dispute-resolution-and-governing-law-clauses-in-India-related-commercial-contracts.pdf (last visited May 17, 2012).

[38] BSNL.v. Subash Chandra Kanchan, A.I.R. 2006 S.C. 3335.

by the Supreme Court on appeal under Article 136. In *APS Kushwaha v. Municipal Corporation,*[39] it took eleven months for the entire issue to be decided by the Designate and the Supreme Court. In *Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra,*[40] the time taken from the application to the Designate till the decision of the Supreme Court was eleven months. Even in that case, the matter did not end in the Supreme Court as the court remanded the matter to the Designate for fresh consideration of the application.

The following table represents the time taken from the date of application to the Designate till the date of final disposal by the Supreme Court of appeal from the order of the Designate:

Time taken (Months)	**Petitions from date of appointment to final disposal by Supreme Court**	**Petitions from date of arbitration notice to final disposal by Supreme Court**[41]
Up to 12	3	2
13-36	40	38
37-60	17	18
61-84	15	15
Over 84	8	10
Total	83	83

In about forty petitions for special leave (40% of the total petitions); it took more than three years (36 months) for the appointment process to be complete from the date of application to the High Court. In about twenty three petitions (28%), it took more than five years (sixty months) for the process of appointment be complete. If reckoned from the date of notice of arbitration, the scenario is graver. It is apparent that not even in a single case has it taken five months or lesser for deciding on the constitution of the tribunal. While it should normally take an upper limit of five months for constitution of the tribunal from the notice of arbitration, the courts have taken years to do so. The data presented above shows that the appeal process as provided for in *Patel Engineering* is deeply flawed.

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[39] APS Kushwaha v. Municipal Corporation, A.I.R. 2011 S.C. 1935.

[40] Bharat Rasikla lAshra v. Gautam Rasiklal Ashra, A.I.R. 2011 S.C. 3562 .

[41] The objective of this portion of the paper is to compare the available anecdotal evidence on the time taken to constitute the tribunal from the date of invoking arbitration. The date of invocation of arbitration is unfortunately not recorded in several decisions. In order to present a complete picture on the time taken for constitution of arbitral tribunal from the available data, this papers employs the Same Day Assumption, as discussed in Part III.

Remission: Out of these eighty three petitions, the Supreme Court has reversed the order of the Designate in about seventy one cases. In these seventy one petitions, the court has finally disposed of the application for appointment of arbitrator only in about twenty nine petitions. In the remaining forty two petitions, the court has remitted the matter either to the Designate either for fresh consideration or for mere nomination of the arbitrator or to the authority designated in the arbitration agreement for nomination.

The process of appointment of arbitrator is already protracted considering the nature of adjudication by the Designate. The Supreme Court has remitted several petitions to the Designate for fresh consideration or appointment of arbitrator, thereby delaying the process of appointment even further.[42] *Union of India v. Talson Enterprises*[43] is a typical instance that exemplifies the problem with remitting the matter back to the Designate. In that case, arbitration was invoked by Talson Enterprises in August, 2000. Due to the delay by Union of India in nominating the arbitrator, Talson Enterprises applied to the Designate in 2003 for the appointment of arbitrator. The arbitrator was appointed in February, 2006. Union of India filed a petition for special leave against the Designate's order 264 days after the expiry of the limitation period for preferring a Special Leave Petition. The Supreme Court condoned the delay and granted special leave to appeal. In its order in September, 2008, the court set aside the order of the Designate appointing arbitrator and then remanded the matter back to the Designate for fresh consideration. It took more than eight years for the matter to be decided by the Supreme Court, which only sent the parties back to the Designate for fresh consideration of the matter.

Final Resolution of Dispute: Out of the eighty three petitions, only in about three petitions has the court finally dealt with the dispute itself leaving no scope for further litigation. In *Union of India v. Master Construction,*[44] the Supreme Court held that the contract and the arbitration clause stood discharged thereby disallowing arbitration and at the same time finally resolving the dispute. Similarly, in *BSNL v. Telephone Cables Limited*[45] and *Union of India v. Onkar Nath Bhalla & Sons,*[46] there

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[42] *See* Om Construction Co. v. Ahmedabad Municipal Corporation, A.I.R. 2009 S.C. 1944 (where instead of remanding the matter to the Designate after reversing the Designate's decision, the Supreme Court observed, "*[r]emitting the matter to the High Court would only mean another round of litigation, whereas if the appointment is made by us, the matter will achieve finality, which would ultimately be beneficial for all concerned*", and appointed the arbitrator.).

[43] Union of India v. Talson Enterprises, (2008) 12 SCALE 752.

[44] Union of India v. Master Construction, 2011(2) Arb LR 105 (SC) (hereinafter *Master Construction*).

[45] BSNL v. Telephone Cables Limited, AIR 2010 SC 2671 (hereinafter *Telephone Cables*).

[46] Union of India v. Onkar Nath Bhalla & Sons, (2009) 7 SCC 350 (hereinafter *Onkar Nath Bhalla*).

was no live dispute since the contractor therein had waived his claims as per the contract on submission of the final bills. This statistic is important for the reason that although decision by the Designate on jurisdictional facts may lead to rejection of the application to appoint the arbitrator for non-existence of arbitration agreement, such a decision does not put an end to the dispute between the parties or prevent the applicant from approaching the civil courts. For instance, in *State of Orissa v. Bhagyadhar Dash,*[47] the Supreme Court only set aside the appointment made by the Designate in favour of the contractor for the reason that the dispute was not covered by the arbitration clause. This does not prevent the contractor from filing a civil suit to pursue his claim.

The duration taken to dispose of these three petitions is as follows:

Case	**Time (months (from application to Designate)**	**Time (months (from notice of arbitration)**
Master Construction	123	127
Telephone Cables	25	31
OnkarNathBhalla	28	68

As apparent from the above table, it has taken not less than two and a half years (from the date of notice of arbitration) for the judiciary to decide the dispute finally in the three cases. In *Master Construction*, the statistic is more alarming. The courts have taken more than ten years to decide the simple question as to whether the arbitration agreement stood discharged.

Thus, the appeal process is capable of preventing further litigation, whether through arbitration or in the civil courts, in only three out of eighty three petitions considered, that is, about 4.2%.

Costs: Awarding costs in civil litigation to the successful party is a principle well-recognised in courts throughout the world and in India.[48] Following are the general principles on costs in civil litigation pertaining to recovery of money:

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[47] State of Orissa v. Bhagyadhar Dash, A.I.R. 2011 S.C. 3409.

[48] Although there are provisions in India for awarding costs to the successful party in civil litigation, there is a general discontent on the usefulness of these provisions; in Ashok Kumar Mittal v. Ram Kumar Gupta, (2009) 2 S.C.C. 656, a two judge Bench of

1. The object of awarding costs in litigation is to indemnify the successful party for the amount expended in pursuing the litigation.[49]
2. The quantum of costs depends on the complication of the subject-matter.
3. In general, costs shall follow the event. In other words, costs are to be awarded to the successful party. Courts, however, are empowered to disallow claims for cost when there are justifiable reasons for not doing the same. In such cases, the courts are to record the reasons in writing.[50]
4. A court can award costs even if it holds that it has no jurisdiction to try the suit.
5. Courts are also empowered to award costs to indemnify a party for expenses incurred where the other party fails to take an action which was required of him on a particular date and obtains an adjournment.[51]
6. Courts have the power to award punitive costs for false or vexatious suits or proceedings.[52]

From the sample of eighty three petitions, the Supreme Court awarded costs only in one petition.[53] This constitutes about 1.2% of the total petitions. It is surprising that the court, as a matter of course, does not award costs while deciding these appeals made pursuant to special leave granted by the Supreme Court. Parties incur significant costs in these appeals.[54] Further, considering that the Supreme Court is empowered to decide finally on several substantive aspects of the dispute, the costs are particularly high as compared to a case where the Supreme Court had to merely appoint an arbitrator without deciding on the substantive aspects. The reason for the relatively high costs is due to the complication of the nature of proceedings. Such costs include cost of

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the Supreme Court held: "*The present system of levying meagre costs in civil matters (or no costs in some matters), no doubt, is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a 'buying-time' tactic. More realistic approach relating to costs may be the need of the hour. Whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and should engage the urgent attention of the Law Commission of India*."

[49] Anandji Haridas and Co. Pvt. Ltd. v. State of Gujarat, (1977) 0 G.L.R. 271.

[50] CODE CIV. PROC., § 35(2).

[51] CODE CIV. PROC., § 35B.

[52] CODE CIV. PROC., § 35A; it may be noted that costs as contemplated in sections 35 and 35B are compensatory in nature while costs under section 35A are punitive in nature. The CPC prescribes a limit of Rs. 3,000 in respect of costs imposed under section 35 A while there is no such prescribed limit for costs awarded under section 35 or 35B. Even in such cases, only reasonable costs are awarded. *See* Salem Advocate Bar Association, Tamil Nadu v.Union of India, A.I.R. 2005 S.C. 3353, ¶ 37.

[53] Khiviraj Motors v. The Guanellian Society, 2011(4) Arb LR 123 (SC).

[54] *See Appeal Procedures*, *supra*, note 34 at p. 8-9 (for a discussion on costs in appeals and the argument that costs incurred in appeals are more than in the first instance).

engagement of senior counsel for hearings, conferences, documentation, travel and stay costs, etc.[55] Despite the magnitude of costs incurred; it is surprising that the Supreme Court does not award costs while deciding on appeals under Article 136 from the order of the Designate.

It may be noted that although the 1996 Act empowers the arbitral tribunal to award costs, such a power is restricted merely to the costs expended in relation to the arbitration proceedings and not costs incurred prior to the constitution of the arbitral tribunal. Section 31(8) of the 1996 Act empowers the tribunal to fix "costs of arbitration". Proceedings under section 11 and appeal from the order of the Designate are pre-arbitration proceedings. Therefore, the provision does not empower the tribunal to award pre-arbitration costs including costs relating to appeal under Article 136 from orders of the Designate.[56]

V

The process of appointment of the arbitral tribunal under section 11, currently in vogue in India, is a creation of a seven judge Bench of the Supreme Court. Unless there is an amendment to the Act, the possibility of the said process being replaced by an efficient process through a decision of a larger bench is miniscule. Amendments to the Act are overdue. Since 2001, there have been several proposals to initiate process for amendment of the Act.[57] These proposals have not fructified into amendments.

In 2010, the Ministry of Law and Justice, Government of India came up with a Consultation Paper discussing the proposed amendments to the Act. The Consultation Paper has criticised the process of appointment of arbitrator laid down in *Patel Engineering* for being contrary to the spirit and language of the Act.[58] The Consultation Paper seems to suggest institutional arbitration as the solution to the current problems in Indian arbitration, including those pertaining to constitution of the tribunal. In promoting institutional arbitration, the

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[55] *See* Priya Sahgal and Kaveree Bamzai, *Rich Lawyers: The New Nawabs*, INDIA TODAY, Dec. 4, 2010 (for a discussion on the fee charged by prominent senior advocates).

[56] *See* Thermospares India v. BHEL, (2006) 2 Arb LR 404 ("*The legal cost before the Arbitrator can always be awarded by the Arbitrator but not cost in respect of the High Court proceedings*.").

[57] Law Commission of India, *176th Report on the Arbitration and Conciliation (Amendment) Bill, 2001* (Sep. 12, 2001), http://lawcommissionofindia.nic.in/arb.pdf; The Arbitration and Conciliation (Amendment) Bill, 2003 (as introduced in RajyaSabha), http://lawmin.nic.in/legislative/arbc1.pdf (last visited Jun. 13, 2012); Saraf Committee on Arbitration, *Report on Implications of the Recommendations of the Law Commission in its 176th Report Regarding Amendment of the Arbitration and Conciliation Act, 1996 and the Amendments Proposed by the Arbitration and Conciliation (Amendment) Bill, 2003*, Consultation Paper, ¶ A(xviii).

[58] *See* Consultation Paper at 15-22.

Consultation Paper seems to put the blame squarely on *ad hoc* arbitrations for the extant problems. No doubt, institutional arbitration can be an effective mode of arbitration. However, this should not lead to step motherly treatment to *ad hoc* arbitrations, which parties may prefer to choose over institutional arbitration. According to the Consultation Paper, in an application under section 11 for appointment of arbitrator in a 'commercial dispute of specified value,'[59] the Supreme Court (in case of international commercial arbitration) or the High Court shall authorize any arbitration institution to make appointment for the arbitrator.

The proposed amendments to section 11 are neither adequate nor apt solutions to the current problems. Following are the reasons:

- The question relating to the scope of determination by the relevant court under section 11 is intricately linked to the scope of the power of the arbitral tribunal to determine its own jurisdiction. Section 16 explicitly provides that the arbitral tribunal is competent to rule on its own jurisdiction, including on issues relating to the existence or validity of the arbitration agreement. Thus, the text of the Act seems to suggest that all questions related to the existence and validity of the arbitration agreement is to be decided by the tribunal and not by the Designate. Considering the above data, such an approach seems to be preferable to the procedure as laid down in *Patel Engineering*, where the Designate decides on certain questions relating to the existence of the arbitration agreement. *Patel Engineering* suggests that where the Designate mechanically appoints arbitrator without considering the respondent's genuine contention of the non-existence or of the arbitration agreement, the respondent has to wait till the final award is passed and apply for setting the award aside.[60] The impact of the delay in letting the Designate decide such questions must be balanced with the injustice that may be caused in a few cases where the Designate acts without deciding on jurisdictional issues and refers to arbitration a dispute when there is no arbitration agreement. In the latter cases, the tribunal is empowered to decide on such questions. If the tribunal finds that there was no arbitration agreement, it should be empowered to award compensatory

[59] The Commercial Division of High Courts Bill, under sections 2(1)(a) and 7(1), define a Commercial Dispute of Specified Value to mean a Commercial Dispute whose value in a suit, appeal or application is Rupees five crores of more; *See* Consultation Paper at 167-168.

[60] *See Patel Engineering*, 8 S.C.C. 618, ¶ 30; *also see*, Arvind Datar, *Introduction to the Fifth Edition* in BACHAWAT at ix, xviii (arguing that *Patel Engineering* was right in providing the Designate the power to decide on the jurisdictional issues).

costs and interest on such costs in favour of the respondent who has been dragged to arbitration in the absence of an agreement to arbitrate.[61]

- There is no provision in the Act for awarding costs in favour of the party successful in an application under section 11 of the Act. Although the arbitral institution appointing the tribunal would award costs in relation those commercial disputes of designated value, costs expended in proceedings under section 11 in cases that are not commercial disputes of designated value do not come within the purview of section 31(8). Therefore, the arbitral tribunal does not have the power to take such expenditure into consideration while awarding costs. Four, many jurisdictions grant the Chief Justice the power to nominate arbitral institutions to exercise the function of constituting the arbitral tribunal. For instance, the Singapore International Arbitration Act expressly gives the power to the Chief Justice to designate arbitral institutions to act as appointing authorities.[62] However, in *Patel Engineering*, the Supreme Court has held that a decision under section 11 constituting the arbitral tribunal is a quasi-judicial decision and that the Designate shall determine the existence of the jurisdictional facts for appointing the arbitrator. The proposed amendment in the Consultation Paper does not seek to alter the existing state of affairs but merely provides that the nomination of the specific arbitrator in case of commercial disputes of specified value shall be done by the arbitral tribunal designated by the relevant court. Even in such cases, the court is mandated by *Patel Engineering* to decide on the existence of jurisdictional facts before appointing the arbitral institution for nomination of the arbitrator.[63] Thus, in addition to the existing procedure, an additional procedure of nomination of the arbitrator by the arbitral institution is provided for by the amendment. It does nothing to address the inefficiencies created by the existing process of appointment. Thus, it appears that the proposed amendments would fail to cure completely the problems regarding the constitution of arbitral tribunal in India.
- The Consultation Paper specifically necessitates the relevant court to nominate only an arbitral institution for appointment when such role of

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[61] This, of course, requires substantial re-look into the law on awarding costs and interest in adjudication; Ashok Kumar Mittal v. Ram Kumar Gupta, (2009) 2 S.C.C. 656.

[62] Singapore International Arbitration Act, art. 8(2), provides that the Chairman, SIAC or any other person as the Chief Justice would be entitled to act as appointing authority in case of failure of party-appointed procedure.

[63] *See Patel Engineering*, 8 S.C.C. 618, ¶ 16 (holding: "*where a Chief Justice designates not a Judge, but another person or an institution to nominate an arbitral tribunal, that can be done only after questions as to jurisdiction, existence of the agreement and the like, are decided first by him or his nominee Judge and what is to be left to be done is only to nominate the members for constituting the arbitral tribunal.*").

> appointing the arbitrator is and can be performed even by a particular office such as the Secretary General of the Permanent Court of Arbitration, the President of Indian Road Congress, etc.

Therefore, in the short term, it would do well for the Supreme Court to adopt the following measures to make the appointment process more efficient.

One of the fundamental problems with appeal from the order of the Designate is that the proceedings are treated as if they are adjudication on the merits of the case. Consequently, the Supreme Court remits the matter for fresh consideration by the Designate or for the appointment of arbitrator. The first reform that the Supreme Court should undertake is to recognise that the said appeal is only an appeal from the order of the Designate regarding appointment of arbitrator and refrain from remitting the matter for fresh consideration or for appointment of arbitrator.[64] Instead, the court could itself consider the matter where necessary and appoint the arbitrator if there is an agreement to arbitrate. It may be noted that the litigants may be from a particular region or the arbitration agreement may provide for a particular city as the venue of arbitration. In such a case, it makes sense to nominate an arbitrator from that region. It may not be possible for the Supreme Court to appoint an arbitrator from its list of arbitrators satisfying the said criteria. If it appoints an arbitrator outside the said criteria, the litigants may have to bear the costs of stay and travel of the said arbitrator. To prevent such a scenario, the Supreme Court could get the list of arbitrators that each High Court maintains and appoint an arbitrator who satisfies the said criteria.[65] This would eliminate the need for remitting the matter to the Designate for the appointment of the appropriate arbitrator.

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[64] This chiefly involves determination of the existence or non-existence of the arbitration clause.

[65] The High Courts and the Supreme Court rarely appoint arbitrators who are not retired judges. As regards the Supreme Court, it appears that the Registry of the Supreme Court does not maintain any list of qualified people as arbitrators. The selection and qualification of the retired judges who are to appear as arbitrators are shrouded in mystery. In a reply to an application under the Right to Information Act, 2005, for information pertaining to the existence of a list of persons who could be appointed by the Supreme Court as arbitrator, process of nomination of a specific person by the Designate, and the existence of eligibility criteria for nomination as an arbitrator, the Registry of the Supreme Court replied that no such list is maintained by the Supreme Court; Letter Dy. No. 224/RTI/12-13/SCI from Additional Registrar &Central Public Information Officer to S. Badrinath (29.05.2012) (on file with the author); Considering that there is lack of transparency in the nomination of specific retired judges as arbitrators, the Supreme Court and the High Courts should take measures to ensure transparency regarding the same.

Considering the significant costs expended in the appeal from the Designate's order, it is important that a party is duly compensated for costs incurred. The Act does not deal with awarding costs in relation to the appeal under Article 136 from the Designate's order. As discussed in the preceding part, the tribunal is not empowered to take into consideration such costs in arriving at the costs in relation to the arbitral proceedings. Nevertheless, in view of the wide powers of the Supreme Court to do complete justice in proceedings before it,[66] the court is not prohibited from awarding costs to the successful party. Therefore, the Supreme Court should award costs in favour of the party successful in the appeal to duly indemnify the said party for the costs incurred. This would go a long way in making the appointment process just.[67]

This paper deals with only those cases in which the Supreme Court granted leave to appeal from the decision of Designate. A critique of the process of appointment as laid down in *Patel Engineering* would be complete only after a comprehensive analysis-empirical and otherwise- of the process of appointment and not merely a part thereof. Yet, considering that the appeal procedure is a part of the process of appointment of arbitrators, the above figures are indicative of the weakness of the entire process of appointment. If India aspires to have an efficient system of arbitration, the process of constitution of the arbitral tribunal should be revamped comprehensively.

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[66] See India CONST. art. 142(1). .

[67] *See Appeal Procedures*, *supra*, note 34 at 33 (arguing that awarding costs in appeals influences the decision on whether or not to file appeal).