SAVING FACE OR UPHOLDING 'RULE OF LAW': REFLECTIONS ON *ANTRIX CORP LTD.* V. *DEVAS MULTIMEDIA P. LTD.* (ARBITRATION PETITION NO. 20 OF 2011, DECIDED ON MAY 10, 2013)

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I. Introduction

August 16, 1996, when the Arbitration and Conciliation Act, 1996 ("*the Act*") was enacted, was probably a proud moment for the Indian legal system. It was a declaration by the Indian state announcing its arrival as an important player in the international world of business. It was also an attempt to project India as an 'arbitration friendly country' and to reiterate the readiness of the Indian legal system in to deal with international commercial disputes with efficiency and expertise.

Seventeen years down the line, the Indian legal system seems to be on the reverse track. Far from becoming mature, advanced and confident, it seems to have become weak and unduly defensive. In the world of business and law, the Indian state has earned the image of an 'arbitration hostile' jurisdiction[1]. Foreign arbitral tribunals are commenting on the tardy state of the Indian legal system.[2] The Indian state is facing threats of having to pay compensation or damages to the tune of billions of dollars to private contracting parties.[3]Additionally, the judiciary, as the case under consideration reflects, appears

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[1] The term "arbitration hostile jurisdiction" has emerged as a popular term to refer to India especially over the last two years. It has been used in formal and informal articles by law firms and LLPs while commenting on law of arbitration in India. For instance, *see*http://www.debevoise.com/files/Publicationdated September 7, 2012 ;http://www.nixonpeabody.com/files/152836_International_Arbitration_10_11_2012.pdf. *See also*, Melisa Malsake, *Supreme Court of India Limits Reach of Judiciary into International Arbitrations*, at http://m.insidecounsel.com/2012/10/30/supreme-court-of-india-limits-reach-of-judiciary-i

[2] White Industries Australia Limited v. The Republic Of India, UNCITRAL Arbitration In Singapore, Final Award delivered on November 30, 2011["*White Industries*"].

[3] In *White Industries* case the arbitral tribunal ruled that the Republic of India had breached its obligation to provide "effective means of asserting claims and enforcing rights" with respect to White Industries Limited's investment pursuant to the Bilateral Investment Treaty. It asked India to pay white industries a compensation amounting to

forced to resort to some face saving measures at the cost of avoiding important questions of law.

This article undertakes a critical analysis of a recent judgment of the Indian Supreme Court - *Antrix Corp Ltd.* v. *Devas Multimedia P. Ltd*[4] which is related to international commercial arbitration in India. This case is related to the scope and ambit of the powers of the Supreme Court under Section 11(6) of the Act. It deserves attention and causes concern for two reasons: first for the fact that faced with a peculiar situation, the Court offered a rather pragmatic solution while answering a reference on the questions of law relating to the above section; second for its reasoning process which raises some serious doubts about the role of the Supreme Court. The case suggests that far from being mature, assertive and legally sound, our judicial system is driven by the considerations of saving face in the global market.

A. Background of the Case

The case- *Antrix Corp Ltd. v Devas Multimedia P. Ltd.* reached the Supreme Court of India by an application by the petitioner, Antrix Corporation Ltd. ["*Antrix*"], the commercial arm of ISRO, Antrix filed this application because of the steps taken by Devas

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A$4.08 million, the fees and expenses of arbitrators in ICC arbitration (A$84,000), the White's cost in the ICC arbitration (A$ 500,000),the witness fees and expenses (A$ 86,246.82)together with interest thereon on each item mentioned above at the rate of 8% per annum from 24thMarch, 1998 till the date of payment,

In the current case, too, the major investors in Devas have initiated separate arbitration proceedings against Antrix at the Permanent Court of Arbitration at The Hague. Three companies- Columbia Capital/Devas (Mauritius) Ltd, Telecom Devas Mauritius Ltd and Devas Employees Mauritius Private Ltd which had invested in Devas through their Mauritius-based operations, are claiming damages citing a breach of a Bilateral Investment Protection and Promotion Agreement (BIPA) between India and Mauritius. See, Arindam Mukherjee, A Celestial War, Outlook, August 26, 2013, *available at*: http://www.outlookindia.com/article.aspx?287392

Post White Industries case, Indian Government is threatened with several notices under Bilateral Investment Treaties. Most recent example of this is the international arbitration initiated by Loop Telecom's investor Khaitan Holdings (Mauritius) Limited (KHML) against Indian government seeking damages of over USD 1 billion for 2G licences in which it had invested and were cancelled by Supreme Court on February 2, 2012, see: http://www.indianexpress.com/news/loop-telecoms-investor-files-international-arbitration-against-indian-govt/1176854/

[4] 2013 (2) ARBLR 226 (SC) (India).

Multimedia P. Ltd. ["*Devas*"] invoking the jurisdiction of the International Chamber of Commerce (ICC) to resolve its disputes under a contract with Antrix.[5] The dispute arose when Antrix refused to submit to this arbitration process initiated by the ICC contending that Devas' actions were in violation of the arbitration clause expressed in Article 20 of the contract. Instead, it filed an application under Section 11(4) read with Section 11(10) of the Act invoking the jurisdiction of the Supreme Court to appoint an arbitrator.

Article 20 of the agreement which dealt specially with arbitration stated,

a. *In the event any dispute or difference arises between the parties as to any clause or provision of the agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, hereto arising under or by virtue of these presents or otherwise in any way relating to this agreement, such dispute or difference shall be referred to senior management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an arbitral tribunal comprising of three arbitrators, one to be appointed by each party (i.e. Devas and Antrix) and the arbitrators so appointed will appoint the third arbitrator.*

b. *The seat of arbitration shall be at New Delhi in India.*

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[5] It is noteworthy that Devas and Antrix had entered into an agreement for allotment of the S- band spectrum. The contract provided for the launch of two satellites allowing Devas to establish a hybrid satellite and terrestrial communications network to supply wireless audio-visual, broadband and mobile internet service across India. Later, Antrix terminated the contract. Antrix justified the termination of the contract claiming that Indian policy had changed and that the allocation of the S-band spectrum to companies unconnected with India's space programme was now regarded as a risk to national security. It argued that this change in policy constituted a "force majeure" event, which was covered under Article 11 of the agreement.

c. *The arbitration proceedings shall be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL.*

Despite the aforementioned clause in the contract, as differences ensued between the parties after termination of the contract by Antrix, Devas preferred to make a unilateral reference to the ICC instead of 'exhausting the mediation process' as contemplated in the agreement. Devas sought constitution of an arbitral tribunal in accordance with the ICC rules of arbitration, and got Mr. V.V. Veedar, Queen's Counsel as its nominee arbitrator in accordance with the ICC rules. Having assumed jurisdiction, the ICC sent a letter to Antrix inviting it to nominate its nominee to complete the process of constituting a tribunal.

Considering the actions of Devas to be in violation of Article 20(a) of the agreement, Antrix refused to comply with the request of ICC. Consequently, while Devas had invoked the jurisdiction of the ICC on 29th June, 2011, the petitioner invoked the arbitration agreement in accordance with the UNCITRAL rules on the ground that Devas had invoked ICC rules unilaterally, without allowing the petitioner to exercise its choice. Having invoked the arbitration agreement under the UNCITRAL rules, the petitioner appointed Mrs. Justice Sujata Manohar, as its arbitrator and called upon the respondent to appoint its arbitrator within 30 days of receipt of the notice.

Antrix also informed the Secretariat of the ICC court that it had appointed its arbitrator, in accordance with the agreement between the parties, asserting that in view of Article 20 of the agreement, the Indian law, viz., the Act, would govern the arbitral proceedings. While Devas did not respond to this letter, ICC responded. Through its letter, the ICC informed Antrix that the International Court of Arbitration (ICA) will decide on its jurisdiction to deal with the referred matter. It also gave notice to Antrix to make its submissions before the ICA before a specified date.

Contending that Devas had failed to abide by the procedure for constitution of the arbitral tribunal as per the terms of the agreement, Antrix filed an application under Section 11(4) read with Section 11(10) of the Act requesting the Supreme Court to direct Devas to nominate its arbitrator. As Devas refused to comply with such a directive, Antrix requested the Court to appoint an arbitrator in exercise of its powers under

Section 11(6). Considering that the application involved important questions of law, the matter, which was initially being heard by the delegate of the Chief Justice, was referred to a larger bench for determination. The parties were requested to propose the questions of law to be considered by the larger bench.[6] They framed the following questions:

i) Where the arbitration clause contemplates the application of either ICC rules or UNCITRAL rules after the constitution of the tribunal, could a party unilaterally proceed to invoke ICC to constitute the tribunal and proceed thereafter?

ii) Whether the judgment of this Hon'ble Court in *TDM Infrastructure* v. *UE Development*[7] lays down the correct law with reference to the definition of international commercial arbitration?

iii) Whether the jurisdiction of the Court under Section 11 extends to declaring as invalid the constitution of an arbitral tribunal purportedly under an arbitration agreement, especially, where the tribunal has been constituted by an institution purportedly acting under the arbitration agreement?

iv)Whether the jurisdiction of an arbitral tribunal constituted by an institution purportedly acting under an arbitration agreement can be assailed only before the tribunal and in proceedings arising from the decision or award of such tribunal and not before the Court under Section 11 of the Act?

v) Whether, once an arbitral tribunal has been constituted, the Court has jurisdiction under Section 11 of the Act to interfere and constitute another tribunal?

vi) Whether arbitration between two Indian companies could be an international commercial arbitration within the meaning of Section 2(1)(f) of the Act if the management and control of one of the said companies is exercised in any country other than India?

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[6] The division bench which came to consider this case consisted of Justice Altamas Kabir, then Chief Justice of India and Justice Surinder Singh Nijjar.
[7] (2008) 14 SCC 271 (India).

vii)Whether the petition is maintainable in light of the reliefs claimed and whether the conditions precedent for the exercise of jurisdiction under Section 11 of the Act are satisfied or not?

Considering that most of the questions were resolved while the matter was pending, the question that came to be considered by the court was: "Whether Section 11 of the Act could be invoked when the ICC rules had already been invoked by one of the parties." After taking into consideration contentions from both the sides, it answered the above question in the negative.

The Court's decision: a pragmatic solution

Finding it inappropriate to exercise its powers under Section 11(6) and rejecting contentions of Antrix the Court stated,

"The matter is not as complex as it seems and in our view, once the arbitration agreement had been invoked by Devas and a nominee arbitrator had also been appointed by it, the arbitration agreement could not have been invoked for a second time by the petitioner, who was fully aware of the appointment made by the respondent. It would lead to an anomalous state of affairs if the appointment of an arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an arbitrator. In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an arbitrator under section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement."[8]

Suggesting a remedy alternate to Section 11(6) the court mentioned,

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[8] *Id.* at ¶31.(Paragraph numbers in this article are as indicated in the judgment) *available* at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=40399.

"Sub-section (6) of Section 11 of the Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-section (6) may be invoked by any of the parties. Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an arbitrator in terms of the agreement, his/its remedy would be by way of a petition under Section 13 and thereafter under Section 34 of the Act"[9]

Also, finding that the law well settled with respect to the issue under consideration, the court further stated,

"The law is well settled that where an arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an arbitrator is not maintainable. Once the power has been exercised under the arbitration agreement, there is no power left to, once again, refer the same dispute to arbitration under Section 11 of the Act, unless the order closing the proceedings is subsequently set aside."[10]

The Court suggested that the invocation of the ICC rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the Act. It held that arbitration petition no.20 of 2011 under Section 11(6) of the Act for the appointment of an arbitrator must, therefore, fail and the same was thus rejected. The Court however also held that it would not prevent the petitioner from taking recourse to the aforesaid provisions of the Act for appropriate relief.[11]

By rejecting the application by Antrix, the Apex Court declined to assume jurisdiction in accepting authority of the ICA to decide on its own jurisdiction. It directed Antrix to challenge the appointment of the arbitrator in front of the ICC itself. It did so, on the ground that it will not be proper for an Indian court to 'interfere' once one of the parties

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[9] *Id.* at ¶32, *emphasis added.*
[10] *Id.* at ¶33.
[11] *Id.* at ¶34.

to the contract had already approached the ICC, whether "rightly or wrongly"[12]or "notwithstanding the fact that one of the parties had proceeded unilaterally in the matter"[13]. Rejecting the application of the petitioner the Court stated, that once the provisions of the ICC rules of arbitration had been invoked by Devas the proceedings initiated thereunder could not be interfered in a proceeding under Section 11 of the Act."[14]

Refusing to assume jurisdiction under Section 11(6) was probably the most pragmatic and workable 'legal' solution. It was pragmatic considering the fact that two years had elapsed by the time the Supreme Court came to decide the arbitration petition.[15] It perhaps would not have been expedient to go ahead with the constitution of a tribunal when an authorized international institution had already been moved, whether "rightly or wrongly" and had initiated the process of constituting a tribunal.

But was this reference to the larger bench of the Supreme Court merely for resolving the dispute or was it about seeking answers to the 'questions of law'? On a closer reading of the judgment it becomes clear that the court did not answer any questions of law. Instead, the first reading of the judgment leaves one wondering whether there was any question of law which actually deserved consideration by a larger bench of the Supreme Court.

The above doubt in this case arises because on the one hand the judgment enlisted seven questions which apparently were suggested by the parties for the Court's consideration and on the other hand, soon after enlisting these questions, the Court stated that most of the above questions had been resolved on their own while matter was pending. Can questions of law which needed to be referred to a larger bench get resolved automatically during course of time, and if that is the case could they have been considered as questions of law at all? However, leaving the reader with the above questions, the Court went to frame another question which in its view was the main question that remained to

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[12] *Id.* at ¶30.
[13] *Id.* at ¶16.
[14] *Id.* at ¶34.
[15] The petition was filed by Antrix in August 2011.

be decided. It noted that the main question that remained to be decided was "Whether Section 11 of the Act could be invoked when the ICC rules had already been invoked by one of the parties".[16]

Strangely enough, soon after raising the above question the Court went on to notice that not only was the issue simple but it also remarked that the law relating to it was well settled. At one point, it also stated that parties were *ad idem* and that the Supreme Court cannot determine the validity of the arbitral tribunal while acting under Section 11(6) of the Act.[17] As it is obvious, the above observations leave the reader wondering that if the current case was about a question of law with respect to which law is already settled, why the matter needed to be referred to larger bench at all.

Critical analysis of the case reveals that the matter needed to be referred to a larger bench because it did raise some important questions of law which deserved deliberation by the Supreme Court. The unfortunate situation is that far from deliberating on those questions, the Court reduced its judgment to an exercise of giving a legal colour to a pragmatic solution.

Pragmatism at the cost of unanswered questions of law

While discussing the scope of Section 11, it cannot be denied that *Kompetenz-Kompetenz*[18] is a well-established and an internationally accepted principle in international commercial arbitration. It has been one of the important principles advocated by UNCITRAL Model law ["*the Model Law*"] with the aim of limiting intervention of courts in arbitration proceedings. One cannot deny that it is well settled that national courts must refrain from initiating parallel proceedings of constituting a new tribunal when the power to make a reference under the arbitration agreement has already been exercised by one of the parties to the contract.

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[16] *Supra* note 8, at ¶12.
[17] *Id.* at ¶22.
[18] Translated in English as '*competence-competence*' and in French as '*competence de la competence*', this principle establishes that arbitral tribunals have the jurisdiction. In other words, they have the competence to determine upon their own jurisdiction. *See*, DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS 740 (2006).

Considering that the Act is based on the Model law, the principle of *Kompetenz- Kompetenz* finds expression in Section 16 of the same. Courts in India have also held on many occasions that whenever there is a dispute between the contracting parties relating to the existence of an arbitration agreement and one of the parties makes a reference to arbitration, the tribunal should be given an opportunity to decide on the question of its own jurisdiction.[19] The law certainly can be considered settled and the issue under consideration can be considered simple if the issue is whether Section 11 of the Act can be invoked when the ICC rules have already been invoked by one of the parties under the arbitration agreement.

However, the law cannot be considered settled and the issue cannot be seen as simple when the issue to be decided is whether Section 11 can be invoked by one of the parties to the contract for enforcement of an arbitration agreement when the other party has initiated the process of constituting a arbitral tribunal in violation of the terms of the agreement?

In more general terms the main question for Court's consideration was,

> "*Whether the Courts in India can consider the validity of an arbitral tribunal under Section 11(6) of the Act, particularly when the said tribunal has assumed reference at the request of one of the parties to the contract acting unilaterally in violation of the terms of the contract though purporting to be acting under the contract?"*

And, the above question, as is evident, can neither be considered simple nor can the law with respect to it be considered well settled. There are no available precedents which address the above-mentioned question. Nor do any of the leading works on international commercial arbitration offer an answer to these questions. This was undoubtedly one of

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[19] Gas Authority of India Ltd. v. Keti Construction (I) Ltd. (2007) 5 SCC 38 (India); SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618 (India). Some of the recent cases which explicitly endorse this principle are: Indian Oil Corporation Ltd. v. SPS Engineering Ltd., (2011) 3 SCC 507 (India); Reva Electric Car Co. Private Limited v. Green Mobil, (2012) 2 SCC 93 (India); Today Homes and Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust and Anr. 2013 (2) ARBLR 241 (SC) (India).

the unprecedented situations in front of the Court and that is why, as it is apparent, the reference was made to the larger bench.[20]

However, apparently because of the reason of time lapse, the Court refrained from responding to the above question. By doing so, it not only made it possible for Devas to take benefit of its own wrongs, it also has set a precedent for one of the parties to pre-empt the rights of the other in arbitration agreements.

Thinly veiled attempts to cover pragmatism

The Court, as the above analysis shows, refrained from answering any questions of law. Instead, the whole judgment reads like a thinly veiled attempt to maintain an appearance of answering some questions of law and justify in legal terms what is being called here as a pragmatic solution. While the Court did not find it appropriate to decide on the validity of the arbitral tribunal, that too an international one, once it had come into existence, it leaves one wondering what made it completely ignore the fact that by invoking jurisdiction of the ICC, Devas had violated the arbitration agreement on two counts:

(i) It refused to exhaust the mediation process contemplated under the agreement by choosing not to comply with the requirement of referring the dispute to the 'senior management of both parties' as mentioned in the agreement;

(ii) It unilaterally[21] and without prior notice[22] to Antrix made a reference to ICC for constitution of an arbitral tribunal and an appointment of an arbitrator whereas, as

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[20] One can presume that had it been possible to decide the petition soon after ICC accepted the reference, the Court could have answered this question of law in the affirmative by assuming jurisdiction under Section 11(6). This was a situation where the arbitration agreement envisaged a procedure for appointment of arbitrators and constituted a tribunal, and one of the parties had failed to abide by that procedure. This could have been a legal ground strong enough for exercising power under Section 11(6). – Do we need authority for this suggestion?(this suggestion is not based on any authority, as it author's suggestion. It is in fact pre-empting an argument/issue and also to some extent giving an opinion about the legal position in this case.

[21] The Court, in ¶29, took note of the fact that Devas acted unilaterally in addressing request for arbitration to ICC.

per the agreement, neither the choice of ICC was definitive nor did the agreement confer, in clear terms, any authority on one of the parties to the contract to invoke jurisdiction of the ICC for constitution of a tribunal.

It is true that Devas was claiming to have acted in terms of the agreement. There were some ambiguities in the arbitration clause, Article 20(a), which needed to be addressed before it could be said firmly how the arbitration agreement was to be executed. The arbitration agreement did raise a complex issue relating to the interpretation of its terms.

The main contention of Antrix was that the agreement contemplated an ad-hoc tribunal in accordance to the provisions of the Act. It argued that the reference for constitution of a tribunal was to be governed by Indian law, that is, the Act. Thus, the proper law of the arbitration agreement was Indian law given the fact that by virtue of Article 19 of the contract, parties had Indian law as the proper law of the contract[23]. It further contended

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[22] The petitioner contended that it came to learn that Devas had approached the ICC and had nominated Mr. V.V. Veedar, as its nominee Arbitrator, upon receipt of a copy of the respondent's request for arbitration forwarded by the ICC. By the said letter, the petitioner was also invited to nominate its nominee.

[23] The agreement between Antrix and Devas included a governing law clause in Article 19 which stated, "this agreement and rights and responsibilities of the parties hereunder shall be subject to and construed in accordance with the law of India."
The position advocated by Antrix with respect to the connection between the proper law of contract and the proper law of the arbitration agreement is a position, well accepted in India as well as internationally. For instance *see*, 65 (John Sutton and Judith Gill eds., 2003);; DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS 715-716 (2006). Rule 57 dealing with governing law for arbitration agreement states:
The material validity, scope and interpretation of an arbitration agreement are governed by its applicable law, namely: (a) the law expressly or impliedly chosen by the parties, or (b)in the absence of such a choice , the law which is most closely connected with the arbitration agreement, which will in general be the law of seat of arbitration.
With respect to Indian law, the pronouncement by the Supreme Court in National Thermal Power Corporation v. Singer Company, (1992) 3 SCC 551 (India) remains an authority on the above issue.

that reference to the ICC for the constitution of an arbitration tribunal was in violation of the agreement. The agreement envisaged, first, the constitution of an arbitral tribunal and then it was for the tribunal to choose the ICC or the UNCITRAL rules for conducting the proceedings. In contrast to the above, the contention of Devas was that its steps to invoke the jurisdiction of the ICC were in accordance with the agreement since the choice of ICC rules in the arbitration agreement for conduct of arbitration proceedings included reference to ICC for the constitution of the tribunal. Devas contended that since the arbitral tribunal had been constituted under the ICC rules, any objection as to whether or not the tribunal had been properly constituted would have to be raised before the arbitral tribunal itself. It is only in case of such an objection that the arbitral tribunal would have to decide as to whether a tribunal was required to be constituted before application of the ICC or UNCITRAL rules, inasmuch as, according to the agreement, the claimant in the arbitration has the right to choose any of the two rules when commencing the arbitration. (Para 19)

There was some substance in the contentions of Devas as one can have a valid difference of opinion on whether the choice of ICC or UNCITRAL rules for conduct of arbitration proceedings would include reference to arbitration or not. Moreover, choice of Indian law as the proper law of contract, New Delhi as a seat of arbitration and ICC or UNCITRAL rules as rules for the conduct of proceedings created an ambiguous situation which needed further clarification either by the parties or, in case of disagreement between the parties, by the Court. It is a well-accepted principle of international commercial arbitration that the choice of seat implies the choice of law that governs the arbitration proceedings.[24] Choice of New Delhi as the place for arbitration entailed that Indian law that is, the Act, would govern the arbitration proceedings. If Indian law was to be taken as the proper law of the arbitration agreement and Indian law was also to be taken as the law to govern arbitration proceedings, a valid question could arise about the applicability of the ICC or UNCITRAL rules altogether. With respect to this arbitration agreement, an important question that needed further consideration of

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[24] *Id.* Also *see*, Bharat Aluminium Company and Ors. v. Kaiser Aluminium Technical Service, Inc. and Ors., (2012) 9 SCC 552 (India).

the parties or the tribunal or the Court was whether the choice of ICC rules for conduct of the arbitration proceedings could mean exclusion of the Act.

The above-mentioned doubts and ambiguities in the agreement indicate the need for further consensus and clarity between the parties before initiating arbitration proceedings. However, these ambiguities were not sufficient to gloss over the fact that the agreement neither reflected a clear preference for institutional arbitration over ad-hoc arbitration, nor did it give authority to any one of the parties for unilateral action. Moreover, one of the parties to the agreement had failed to fulfill the condition precedent for initiation of arbitration, which is, referring the case to the senior management. In such a situation, it cannot be denied that the invocation of ICC rules by Devas amounted to violation of the agreement. [25]

It cannot be understood from the judgment as to why the Court ignored the important question, "where the arbitration clause contemplates the application of either the ICC rules or the UNCITRAL rules after the constitution of a tribunal, could a party unilaterally proceed to invoke the ICC to constitute a tribunal and proceed thereafter?". What made the Court justify the actions of Devas and shift the blame, in effect, on Antrix for initiating parallel proceedings while being aware of the fact that the appointment of an arbitrator by the ICC was not known. It is further unknown as to what made it so tolerant and forgiving towards Devas as it stated,

"In view of the language of Article 20 of the arbitration agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of

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[25] On the one hand Devas was contending to have acted in accordance with the terms of the arbitration agreement in invoking the jurisdiction of the ICC, On the other hand some other contentions of Devas as mentioned in the judgment contradict the above claim. For example paragraph 18 of the judgment mentions:
On behalf of Devas it was submitted that the choice of an institution under whose auspices the arbitration was to be held, would have to be made once the arbitral tribunal had been constituted. It was contended that what was intended by the arbitration agreement was the formation of an ad-hoc tribunal which would have to follow one of the two procedures prescribed. (emphasis added.)

the ICC or UNCITRAL, Devas was entitled to invoke the rules of arbitration of the ICC for the conduct of the arbitration proceedings."[26]

It remains unclear as to what the basis was for the Court to draw the inference that Devas was entitled to invoke rules of arbitration of the ICC for the conduct of the arbitration proceedings. How the courts come to the conclusion that "where the parties had agreed that the procedure for the arbitration would be governed by the ICC rules, the same would necessarily include appointment of an arbitral tribunal in terms of the arbitration agreement and the said rules"[27] Is rather unclear. It is difficult to understand the compulsions of the Court to support Devas leading it to ignore important issues relating to the proper law of the contract and the proper law of the arbitration agreement. What reasoning made it reach such misleading and contradictory conclusions about the proper law of the contract and the proper law of the arbitration agreement is quite unknown. Making passing references to the above issue the Court mentioned at one place in the judgment, "Article 19 in clear terms provides that the rights and responsibilities of the parties under the agreement would be subject to and construed in accordance with the laws in India, which, in effect, means the Arbitration and Conciliation Act, 1996."[28] On the other hand, appearing to contradict the above statement at another point the court stated, "Article 19 of the agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. *There is, therefore, a clear distinction between the law which was to operate as the governing law of the agreement and the law which was to govern the arbitration proceedings."*

Even after reading the whole judgment one is confused as to how and in what sense the choice of law of India as the proper law of contract could, in effect, mean the Actor, what inference is to be drawn from the statement that there is clear distinction between the governing law of the arbitration agreement and the law to govern the arbitration proceedings.

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[26] *Supra* note 8, at ¶34, emphasis added.
[27] ¶34.
[28] *Id,* at ¶24 emphasis added.

On reading this case, it also becomes difficult to understand as to what made the Court suggest the remedy of Section 13 and Section 34 to Antrix. Perhaps, this happened since in the course of defending its pragmatic solution, the Court somehow confounded the issue of appointment of the arbitrator to constitute the arbitral tribunal with that of the process for challenging the appointment of the arbitrator.[29]

Having done so, the Court seems to have overlooked the fact that the remedy of Section 13 may not be appropriate in the given situation since Section 13 of the Act has nothing to do with the validity of an arbitral tribunal.[30] Section 13 of the Act provides possibilities for challenging the appointment of an arbitrator whereas the concern of Antrix was not merely challenging the appointment of the arbitrator or replacing one

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[29] One gets the impression that the Court confounded the issue of validity of tribunal with that of appointment of arbitrator as it stated,
"In our view, while the petitioner was certainly entitled to challenge the appointment of the arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the Act. While power has been vested in the Chief Justice to appoint an arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the Act, the Chief Justice cannot replace one arbitrator already appointed in exercise of the arbitration agreement." at ¶31.

[30] Section 13 of the Act provides the procedure for challenging the appointment of an arbitrator. Titled as "Challenge procedure" the Section states: (1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. (4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. (5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34. (6) Where an arbitral award is set aside on an application made under sub-section (5), the court may decide as to whether the arbitrator who is challenged is entitled to any fees.

arbitrator appointed by ICC with another. Instead, its concern was with the constitution of the arbitral tribunal itself and the validity of the tribunal constituted by the ICC.[31]

Another important issue that has been overlooked by the court is that in suggesting the remedy under Section 13, it is doing something contradictory and paradoxical to its basic stance in this case. It suggested the remedy of Section 13 while directing Antrix to abide by the proceedings initiated by the ICC and take up its challenge before the ICA. It seems to have escaped the notice of the Court that the basis of the above directive to Antrix was the exercise of choice by Devas in favour of the ICC rules and that by suggesting the remedy of Section 13, it was suggesting an application of Indian law, the Act, to an ICC arbitration in which the parties had presumably agreed to be governed by ICC rules.

It also seems to have escaped the notice of the Court that under the Act, Section 34 is a provision for challenge to the domestic awards. Its availability to Antrix was subject to the ICA deciding on India as a seat of arbitration.

Once Antrix is referred to arbitration to the ICC, the only remedy available to it would be submitting to the ICA to challenge its jurisdiction. In case the challenge fails, it has to wait till the final award, and then make a challenge to the award at the time of its enforcement in India depending on the nature of the award. In other words, if the ICA decided for arbitration in India, the challenge could be made under Section 34 and in case it decided for a seat outside India, the challenge could be made under Sections 48 or 57 of the Act as the case may be.[32]

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[31] According to Section 16 of the Act, validity of an arbitral tribunal can mainly be challenged before the tribunal and in case the tribunal rejects the challenge, the remedy is available under Section 34 in case of domestic arbitrations. Further, according to the Act, the court has the opportunity to look into the validity of the arbitral tribunal under Section 8 and Section 45 in case of domestic arbitration and international arbitration respectively, and then under Section 11(6), albeit in a limited way, while faced with a request for constitution of an arbitration tribunal.

[32] In the aftermath of Bharat Aluminium Company and Ors v. Kaiser Aluminium Technical Service, Inc. and Ors (2012) 9 SCC 552 (India), the award will be considered a

Conclusion

As the above analysis demonstrates, it is true that in this case a difficult situation confronted the Court; the legal issue involved was indeed complex. Considerable period of time had elapsed and assumption of jurisdiction to deliberate on the validity of the arbitral tribunal under Section 11(6) would have probably fed further into the negative image of 'arbitration hostile' country.

But did considerations of 'image' warrant such a defensive positioning and weak reasoning by the Apex Court? Moreover, isn't the above situation a making of a tardy legal system in India? Was the root of the problem not in the fact that it took two years for the Apex Court to decide the arbitration petition especially in a matter which was in furtherance of national interest and national security?[33] Were these considerations compelling enough to let a defaulting party benefit from its own wrong? Has the Apex Court not established a wrong precedent which dilutes the sanctity of an arbitration agreement and does this not go against the basic principle of party autonomy? Has the court not sacrificed the values of predictability and certainty- the values integral to the 'rule of law' regime?

Undoubtedly none of the above questions yield to easy answers. Moreover, these are the questions which can induce deep discomfort and should preferably be ignored. However, how long can a nation of the stature of India perpetuate ignorance to vital issues? Answers will have to be sought in all in case India actually aspires to be an important player in the global market.

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foreign award if the seat of arbitration is outside India irrespective of the fact that subject matter of the dispute is governed by Indian law or it is closely connected with India.

[33] The gap of two years and then forcing of Antrix to submit to the ICA's jurisdiction is also a cause of concern considering the basic subject matter of dispute. The dispute was concerning allocation of spectrum and the deal was cancelled because of reasons of national security and strategic interests. It was a dispute which could have been and should have been best decided in our country under supervision of the Indian courts considering that Indian courts would be best placed to protect national interest. Making Antrix submit to the ICC, location of arbitration and the supervisory powers of court over that arbitration were compromised. Moreover, once the ICC decides for a place outside India as a seat of arbitration, the award will be a foreign award which can be challenged on much limited grounds.