THE CURIOUS CASE OF ARBITRATION OF TRUST DISPUTES

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Abstract

Arbitration provides a neutral forum chosen by the parties for resolution of disputes arising out of defined legal relationship. This note examines whether arbitration can be an effective tool for resolving Trust disputes or not. In a recent judgement, Jayesh Shah v. Kaydee Trust, Bombay High Court supported the 'deemed acceptance' doctrine and stated that with other obligations that stem from a Trust Deed, also stems the obligation to arbitrate, making the beneficiary 'party' to the arbitration agreement, even when they are not signatories to it. Such a proposition has been most respectfully disagreed to in this note. The legislators' intention of making express or implied consent of both parties is an obvious observation that cannot be conversely construed, as agreed by the Supreme Court in Jagdish Chander v. Ramesh Chander. Moreover, as per the provisions of the Arbitration & Conciliation Act, 1996, a beneficiary, is not a 'party' to the agreement, and if considered so, the same is not a valid arbitration agreement. The Delhi High Court has also expressed the same opinion in Ms. Chhaya Shriram v. Deepak C. Shriram. To resolve the issue of coexistence of arbitration agreement in Trusts, various foreign legal systems have made its position clear either by way of legislation or by interpretation by their courts. This note concludes by providing suggestions including an amendment in the 1996 Act.

IV. Introduction

An arbitration agreement is the foundation stone of arbitration. The Arbitration and Conciliation Act, 1996 [hereinafter "1996 Act"] contemplates two situations where persons apart from parties to an arbitration agreement can commence or continue the arbitration proceedings on behalf of the parties to the arbitration agreement. Firstly, in case of death of a party, Section 40 provides for the arbitration to be enforceable by or against the legal representative of the deceased. The agreement is not discharged on the death of a party and obligation to arbitrate arising from the arbitration agreement flows down to his legal representative. Secondly, Section 45 permits "any person claiming

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through or under him" to make a valid request before a judicial authority to refer the parties to arbitration, if a valid arbitration agreement exists. The rights and obligations arising from the agreement to arbitrate can be vested on to such a person. However, these provisions have limited application. The former is limited to situations of death of a party, whereas, the latter is applicable only on arbitrations on which Part II of the Act applies i.e. in international commercial arbitrations. This latter view is now fortified by the Supreme Court decision in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc.*[1]

Dilemma arises due to the absence of any such provision in Part I of the 1996 Act. Section 2(h) states that 'party' means a party to an arbitration agreement. Nevertheless, Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration.[2] Thus, persons who are not party to the arbitration agreement cannot take support of or be bound by such agreement with respect to Part I of the 1996 Act. They would be disentitled to enforce the agreement.

Such a tight spot is usually faced by beneficiaries under a Trust. Though a beneficiary is the pivot of a Trust Deed, whose rights and obligations are enveloped in the Trust Deed, he is still not eligible to opt for arbitration as a means to resolve disputes arising out of the Trust, as he is not party to the arbitration agreement.

Nature of trust deed: Is trust deed actually a contract?

The Indian Trusts Act, 1882 defines a Trust as "*an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner".* It is often proposed that a Trust Deed is not a contract. It is an instrument of unilateral transfer of property to the

[1] (2013) 1 SCC 641.
[2] *Id.*

Trustee, coupled with specific terms and conditions, and not a contract in the strict sense of the term.[3]

The American courts are also of the view that Wills and Trusts are not contracts.[4] The rationale primarily being that a Trust Deed does not rest on an exchange of promises. It merely requires the settler to transfer beneficial interest in property to a Trustee who, under the Trust instrument, holds it for the interest of the beneficiary.[5] If a Trust and contract were same in essence, the principles of contract law would spill over and affect the substantive areas of Trust law as well.[6]

On the other hand, it is also argued that the terms and conditions of a Trust are always discussed and negotiated between the Settlor and the Trustee. There is thus ample evidence of offer and acceptance, the most important attributes of any contract.[7] Moreover, the Trustee also often puts his signature on the Trust Deed, by which he agrees to his fiduciary obligations and to the undertaking to arbitrate any disputes arising under the Trust Deed.[8] Such a contention was also rejected by the Bombay High Court in *IDBI Trusteeship Services Ltd. v. Kiri Industries Ltd.*[9], stating that a Trust Deed is a species of a contract executed between the parties. Sir Arthur Underhill defines a Trust as, "*A Trust is an equitable obligation, binding a person (called the Trustee) to deal with property owned by him (called the Trust property, being distinguished from his private property) for the benefit of persons (called*

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[3] Commissioner of Income-tax, Kanpur v. Kamla Town Trust, AIR 1996 SC 620.
[4] Schoneberger v. Oelze, 96 P.3 d 1078 (Ariz. Ct. App. 2004); Robsham v. Lattuca, 797 N.E.2d 502 (Mass. App. Ct. 2003); In re Estate of Washburn, 581 S.E.2d 148, 152 (N.C. Ct. App. 2003).
[5] Schoneberger v. Oelze 96 P.3 d 1078 (Ariz. Ct. App. 2004).
[6] Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique,* 26 OHIO ST. J. ON DISP. RESOL. 627 (2011) [hereinafter 'Stephen Wills Murphy'].
[7] Bhagwandas Goverdhandas Kedia v. M/S. Girdharilal Parshottamdas, AIR 1966 SC 543.
[8] Lawrence Cohen, Marcus Staff, *The Arbitration of Trust Disputes*, 7 J. INT'L TRUST & CORP. PLANNING, 217 (1999) [hereinafter 'Lawrence Cohen, Marcus Staff'].
[9] Arbitration Petition No.1334 of 2012.

the beneficiaries) of whom he may himself be one, and any of them may enforce the obligation."[10] Even if the Trustee does not put his signature, an arbitration clause contained in such a Deed cannot be said to be invalid. By virtue of both parties being eye-to-eye, the arbitration agreement contained in it need not necessarily be signed by both the parties.[11]

Some authors are of the opinion that the law of Trusts is growing so radically that it can be subsumed within the law of contracts.[12] Some of the basic essentials that require to be fulfilled for the formation of a contract are also necessary for the construction of a Trust.[13] Both of them require consensus of both parties. No individual can be forced to act as a Trustee. The 'good faith' requirement and the inclination towards specific performance in contract law find its place in Trusts also, in the form of its fiduciary duty requirements.[14] Nevertheless, existence of a valid contract is a necessary condition for the operation of an arbitration clause contained in it.[15]

In essence a Trust does have a contractual nature. In such a contractual arrangement, however, beneficiaries' consent is nowhere involved in creation of the Trust or deciding the dispute resolution mechanism. He is often a minor when the Trust comes into being. Chapter VI of The Trusts Act, 1882 does enumerate various rights and liabilities of a beneficiary. Nevertheless, they are conferred upon without his consent, and usually even without his knowledge.

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[10] **SIR ARTHUR UNDERHILL, DAVID HAYTON,** UNDERHILL'S LAW RELATING TO TRUSTS AND TRUSTEES (2002).

[11] Jagdish Chander v. Ramesh Chander and Ors. (2) Arb LR 302 (SC)(2007); Unipack Industries v. Subhash Chand Jain and Ors. (1) Arb.LR 174 (Delhi) (2002); **DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING, RUSSEL ON ARBITRATION** (2007) (hereinafter 'David St John Sutton, Judith Gill, Mathew Gearing'); **MUSTILL& BOYD, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION** (2001) [hereinafter 'MUSTILL& BOYD'].

[12] Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 643 (1995) [hereinafter 'John H. Langbein'].

[13] John H. Langbein, *supra* note 12. a

[14] John H. Langbein, *supra* note 12, at 652-653.

[15] Union of India v. Kishorilal Gupta & Bros., 1 SCR 493 [1960].

Arbitration Agreement and its requirements

It is pertinent at this juncture to refer to the definition of 'arbitration agreement'. Section 2(b) of the 1996 Act defines an 'arbitration agreement' as an agreement referred to in Section 7 which is same as Article 7(1) of the UNCITRAL Model Law. It defines it as:

> *Arbitration agreement.- (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
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> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
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> *(3) An arbitration agreement shall be in writing.*
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> *(4) An arbitration agreement is in writing if it is contained in-*
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> > *(a) A document signed by the parties;*
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> > *(b) An exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
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> > *(c) An exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
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> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

Thus, existence of an arbitration agreement is a *sine qua non* for reference of a dispute to arbitration.[16] It must disclose parties' definite intention to refer disputes in respect of a defined legal relationship for arbitration.[17]Third party to the said arbitration agreement cannot by any stretch of imagination take advantage of the said arbitration clause and get

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[16] Maharshi Dayanand University v. Anand Coop L/C Society Ltd., 5 SCC 719 (2007); Wellington Associates Ltd. v. Kirit Mehta, (2000) 4 SCC 272.
[17] Unipack Industries v. Subhash Chand Jain and Ors., (1) Arb.LR 174 (Delhi) (2002).

it enforced.[18]A point of some formal importance emphasised by these provisions is that the reference should be by means of a written agreement.[19]Unilateral communication cannot be said to be a valid arbitration agreement.[20]The scope of Section 7 was expounded by the Supreme Court in *Jagdish Chander v. Ramesh Chander*[21], where Justice Raveendran set out the chief essentials of an arbitration agreement, as follows.

i. The arbitration agreement must spell out a clear intention and a sense of obligation of the parties to arbitrate. Even though there is no specific form, a mere likelihood of the parties agreeing to arbitrate in the future cannot be construed as a valid and binding arbitration agreement.

ii. Even if the word 'arbitration', or the like, are not mentioned in the agreement, it can still be construed as a well-founded arbitration agreement, if it contains all constituents of an arbitration agreement. They are:

    a) Agreement should be in writing.

    b) Parties should have agreed to refer any disputes between them to the decision of a private tribunal.

    c) Private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it.

    d) Parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

iii. The characteristic features of an arbitration agreement need not be spelt out where there is a specific and direct expression of intention of the parties to have the disputes settled by arbitration.

iv. However, mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or

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[18] General Manager, Oriental Fire & General Insurance Co. Ltd. and Anr. v. Mahendra Prasad Gupta, AIR 1983 Pat 190.

[19] Union of India v. Rallia Ram, AIR 1963 SC 1685; Chander Nath Ojha v. Suresh Jhalani, 8 SCC 628 (1999).

[20] Food Corporation of India v. Shri S.K. Sasan and Anr., decided on January 3, 2007 by Delhi High Court.

[21] 5 SCC 719 (2007).

> fresh consent of the parties for reference to arbitration. A mere hope that the parties may agree to arbitrate does not sufficiently qualify it as an arbitration agreement. It is merely an agreement to enter into an arbitration agreement in future.

The Parliament has made its intention clear that the agreement must be in writing, but not necessarily signed by both the parties.[22] It must be an agreement in which the terms agreed by the parties are reduced into writing.[23] However, signatures can be dispensed with in cases where a record is provided by exchange of letters, telex, telegram or other means of telecommunication or where statement of claims and defence is not denied by the other party.[24] It is required to be proved that such letters, telegrams, etc. were exchanged by the parties, i.e. mutually delivered and actually received by each other.[25]Though, some consent must be shown and signature is the minimum proof of that.[26] It is however not necessary that the agreement should be signed, if by subsequent conduct of the parties, the agreement stands affirmed.[27] The Supreme Court in *Great Offshore Ltd. v. Iranian Offshore Engineering & Construction Co.*[28] adopted a progressive approach to the requirements of Section 7 by opining that the court has to translate the legislative intention especially when viewed in light of one of the Act's main objectives' - to minimise the supervisory role of the courts in the arbitral process. The intention to arbitrate should not be foiled by formalities and adding technicalities disturb the parties "autonomy of the will", i.e. their wishes. Thus, courts are required to adopt a purposive interpretation in cases involving existence of arbitration agreement.

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[22] Jagdish Chander v. Ramesh Chander and Ors., 2007 (2) Arb LR 302 (SC); Unipack Industries v. Subhash Chand Jain and Ors., (1) Arb LR 174 (Delhi) (2002).
[23] Babaji Automotive v. Indian Oil Corpn.Ltd., 1 Arb LR 566, 569 (2006).
[24] **JUSTICE S.B. MALIK, COMMENTARY ON THE ARBITRATION AND CONCILIATION ACT** (2011); Section 7(2)(b) of Arbitration & Conciliation Act, 1996.
[25] Mikesh Corporation v. Picotee Exports, (1) Raj 182 (Bom) DB (2010).
[26] Owners and Parties Interested in the Vessel MV Baltic Confidence v. State Trading Corporation of India, 7 SCC 473 (2001).
[27] Smita Conductors Ltd. v. Euro Alloys Ltd., 7 SCC 728 (2001).
[28] 14 SCC 240 (2008).

Mustill and Boyd in their book on *Commercial Arbitration*[29] have laid down the attributes which are necessary for considering an agreement as an arbitration agreement. The same have also been upheld by the Supreme Court in the case of *KK Modi v. KN Modi*[30]. It was held that among the attributes which must be present are:

1. The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.
2. The jurisdiction of the tribunal to decide the rights of the parties must derive from their consent, or from an order of the Court or from a statute, the terms of which make it clear that the process is to be arbitration.
3. The agreement must contemplate that substantive rights of the parties will be determined by the agreed tribunal.
4. The tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal being fair and equal to both sides.
5. The agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law
6. The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

It is hereby important to understand that a beneficiary, who has no role to play in the formation of the agreement, cannot have possibly agreed to any such terms contained in it. Consequently, he cannot invoke or be bound by the arbitration clause imbibed in a Trust Deed. The purpose of forming a Trust is to provide assistance to the beneficiary, and not to burden him with an obligation to arbitrate. He cannot be dragged into arbitration without assenting to the terms of the arbitration agreement.

Arbitrability of trust disputes

Irrespective of whether a valid arbitration agreement exists or not, it is important that the subject matter of the dispute is arbitrable. Subjects or disputes which are deemed by a

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[29] **MUSTILL& BOYD,** *supra* note 11.
[30] AIR 1998 SC 1297.

particular national law to be incapable of resolution by arbitration or are of such a nature that they cannot be adjudicated in a private forum are deemed to be non-arbitrable. Both international arbitration conventions and national law provide that agreements to arbitrate such non-arbitrable matters need not necessarily be given effect[31] and that arbitral awards concerning such matters need not necessarily recognized.[32] The issue of arbitrability can arise at three stages in arbitration. First, on an application to stay the arbitration; second, in the course of arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction; and third, on application to challenge award or to oppose enforcement.[33]

The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by private arbitration should not be given effect.[34]What can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.[35] The types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. He cannot make an award which is binding on third parties.[36]

The Supreme Court in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Ors.*[37]highlighted the different meanings of 'arbitrability' in different contexts:

i. Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved

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[31] **D. ROEBUCK & B. DE FUMICHON, ROMAN ARBITRATION 772-778 (2004).**
[32] *Id.,* at 2863-2864.
[33] **DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING**, *supra* note 11, at 15.
[34] **GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION** 768 (2009) [hereinafter 'BORN'].
[35] Haryana Telecom Limited v. Sterlite Industries India Ltd., (5) SCC 688 (1999).
[36] **DAVID ST JOHN SUTTON, JUDITH GILL, MATTHEW GEARING,** *supra* note 11, at 28.
[37] AIR 2011 SC 2507 [Hereinafter 'Booz Allen'].

by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).

ii. Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

iii. Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal.

The 1996 Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force."[38]

The well recognized examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

It has been interestingly noticed by the Supreme Court that all the above mentioned cases relate to actions in rem.[39] A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against

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[38] *Id.*
[39] *Id.*

specific individuals.[40]Rights in rem being rights exercisable against the world at large, disputes relating to the same are incompatible for private arbitration and are generally adjudicated in public forums. On the other hand, rights in personam relate to specific individuals, hence are considered to be amenable to arbitration.[41]Parties are free to choose their own arbitrators.[42]

Whether Trusts give rise to rights that are in rem or in personam has been a matter in question in numerous cases adjudged by the Supreme Court.[43] Through a series of decisions, it has settled that the nature of Trusts is that of giving rise to rights in rem.[44]This view has further been fortified by the well-known scholar, Mulla, who is of the view that Indian law does not recognize equitable estates.[45]On the other hand, English law is also clear on this matter, believing that the right of beneficiary's interest is a *right in personam* against the Trustee and only misleadingly appears to be a right in rem.[46]

Nonetheless, it is the opinion of the author that the Supreme Court has created confusion as to the arbitrability of disputes in the *Booz Allen* judgment, by stating incoherently that all disputes with relate to rights in rem cannot be adjudicated in a private forum i.e. an arbitral tribunal. On the other hand, it also stated that this is not an inflexible rule as disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable. Such perplexity in a situation where a number of arbitrations with subject matter of the dispute being rights in rem[47], including

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[40] *Id.*; HDFC Bank Ltd. v. Satpal Singh Bakshi, 193 DLT 203 (2012); Tata Capital Financial Services Limited v. M/s. Deccan Chronicle Holdings Limited and Anr., (2) ARBLR 181 (Bom) (2013).

[41] **MUSTILL& BOYD,** *supra* note **11.**

[42] Section 10 of 1996 Act.

[43] Rambaran Prosad v. Ram Mohit Hazra and Ors., AIR 1967 SC 744; Bai Dosabai v. Mathurdas Govinddas and Ors., AIR 1980 SC 1334; Narandas Karsondas v. S.A. Kamtam and Anr., AIR 1977 SC 774.

[44] *Id.*

[45] **MULLA, THE TRANSFER OF PROPERTY ACT** 472 (2006).

[46] **MAITLAND, EQUITY; A COURSE OF LECTURES** 117 (2011)..

[47] Union of India v. Prince MuffakamJah and Ors., (4) SCALE 566 (1994); J.G. Engineer's Pvt. Ltd. v. Calcutta Improvement Trust and Anr., AIR 2002 SC 766; Bhai Hospital Trust and Ors. v. Parvinder Singh and Ors., AIR 2002 Delhi 311; Brigadier Man Mohan Sharma, FRGS (Retd.) v. Lt. Gen. Depinder Singh, (4) ARBLR 533 (SC) (2008).

in Trusts has been seen in the past, is not quite welcomed. Moreover, in none of such cases the question of arbitrability was raised. Thus, it can be logically concluded that Trust disputes are not in arbitrable per se. A situation of dilemma is faced when non-parties to arbitration agreement contained in the Trust Deed wish to exploit it.

Arbitration of Trust Disputes: Judicial Decisions

International arbitrations often make reference to extension of an arbitration agreement to non-signatories. The rationale for such a reference being that it is not an extension, but identification of true parties that consented to the agreement to arbitrate. Notwithstanding lack of signature, the party's actions constitute its consent to agreement.[48]One arbitral award puts this clearly as:

> *"The question of whether persons not named in an agreement can take advantage of an arbitration clause incorporated therein is a matter which must be decided on a case-by-case basis, requiring a close analysis of the circumstances in which the agreement was made the corporate and practical relationship existing on one side and known to those on the other side of the bargain, the actual or presumed intention of the parties as regards rights of non-signatories to participate in the arbitration agreement and the extent to which and the circumstances under which non-signatories subsequently became involved in the performance of the agreement and in the dispute arising from it."*[49]

Such joinder of parties is permitted in the Indian scenario only under Section 45 of the 1996 Act contained in its Part II dealing with international commercial arbitrations, where reference to arbitration can be made by persons claiming through or under a party to the arbitration agreement.[50]

In a recent case decided before the Bombay High court, *Jayesh Shah v. Kaydee Family Trust*[51], an arbitration agreement was entered into in Clause 20 of the Trust Deed which

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[48] **BORN**, *supra* note 34, at 1139; **B. HANOTIAU, COMPLEX ARBITRATION** (2006).
[49] Interim Award in ICC Case No. 9517.
[50] *Supra* note 1.
[51] Arbitration Application 278 of 2012, decided on March 6, 2013. MANU/MH/0739/2013 [Hereinafter 'Jayesh Shah'].

provided for arbitration of all disputes "*regarding the interpretation of any of the clauses of provisions or the contents of this Trust Deed or between the Trustees, or the Trustees and beneficiaries, or the beneficiary inter se regarding the rights, titles or interest flowing or arising from this Trust Deed or consequential thereto*…" Dispute arose between the beneficiaries for non-payment of due share of the Applicants from the amounts received by way of lease rent by leasing out the Trust premises. As a result of the refusal of the Respondents to appoint an arbitrator, the Applicants i.e. the beneficiaries filed an application under Section 11(6) of the 1996 Act.

The Applicants deem it to be their right to file an application under the said provision for appointment of arbitrator as they are 'parties' to the arbitration agreement under the doctrine of 'deemed acceptance'. This doctrine implies that by accepting the benefits under a Trust, a beneficiary accepts to be bound by all obligations, including the obligation to arbitrate.[52] This theory is based on the principles of Benefit Theory, also known as Conditional Transfer Theory.[53] "A beneficiary takes what he takes under the Trust purely by the bounty of the Settlor; he is not entitled to anything as of right apart from the provisions of the Trust; he must take the benefits subject to the conditions which are in the Trust and abide by them."[54]

Paragraph 10 of the judgment states that *"beneficiaries under the said Trust Deed are not only claiming through the Trustees when they were minor, but are claiming independently under the Trust Deed after attaining the age of majority and are thus, entitled to agitate the dispute having arisen between the applicants beneficiaries and the Trustees as well as beneficiaries inter se by invoking arbitration clause recorded in the Trust Deed"*. Moreover, the arbitration clause in the Trust Deed itself

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[52] Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment*, *in* 41ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, UNIVERSITY OF MIAMI SCHOOL OF LAW (2007); Gerardo J. Bosques-Hernandez, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective*, REVISTA PARA EL ANÁLISIS DEL DERECHO (2008), *available at:* http://www.raco.cat/index.php/InDret/article/viewFile/124284/172257 accessed ?

[53] Stephen Wills Murphy, *supra* note 6.

[54] Lawrence Cohen, Marcus Staff, *supra* note 8.

provided *inter alia* for resolution of disputes between "*beneficiary inter se*" by arbitration. Thus, the Bombay High Court resorted to a harmonious construction of Clause 20 to show evidence of the fact that the beneficiaries are also parties to the arbitration agreement within the 1996 Act.

With due respect, it is submitted that accepting the proposition of the Bombay High Court would imply the beneficiaries to be future parties to the contract, and consequently a futuristic arbitration agreement. Intention to refer matter to arbitration should be express or implied. It cannot be uncertain or meaningless.[55] Above all, the principle criticism against such an approach is that the recognition of such a line of thought would be against the spirit of the 1996 Act.

E. Beneficiary as a "Party"

As already discussed, Section 7 of the 1996 Act defines an arbitration agreement as "an agreement by *the parties* to submit to arbitration all or certain disputes ... which may arise *between them*". Even in the absence of statutory provisions to this effect, settled law in most jurisdictions provides that it is the parties to the agreement and not other persons who are bound by that agreement.[56]

Meaning and scope of "party" cannot be expanded in the garb of harmonious construction in a manner that goes against the essence of the Act. Since, the meaning of the term was not given in the 1940 Act, it has been the subject matter of dispute of a number of judicial decisions under Section 20 of the 1940 Act as well.[57]These decisions stated that the person who challenges the existence of the agreement must be understood as having reference to a person who is put forward as being a party to an arbitration agreement, but who does not admit its existence. It is thus apparent that the

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[55] Nilesh C. Sanghavi v. Rakesh v. Zaugada, (1) Arb.LR 179 (Bom.) (2008).
[56] United Steelworks of Am v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (U.S. S.CT. 1960); Bridas SAPIC v. Government of Turkmenistan, 345 F.3d 347, 353-54 (5th Cir. 2003); Intertec Contracting A/S v. Turner Steiner Int'l, SA 2000 WL 709004 (S.D.N.Y. 2000).
[57] C.M. MathuKutty v. VareeKutty, AIR 1950 Mad 64; Vallabh Pitte v. Narsingdas Govindram Kalani, AIR 1963 Bom 157 (DB); Ram Nagina Singh v. Thakur Ram Janki, AIR 1976 All 21.

definition has been introduced in the 1996 Act for the purpose of making it clear that non-parties to contract have no rights under Arbitration Agreement,[58] and it leaves no scope for reading into an implied arbitration agreement into it. The new Act has been crafted in a way to make it crystal clear that all the rights under the 1996 Act have been given only to parties to the arbitration agreement, including the right to appoint an arbitrator under Section 11.

However, in the *Jayesh Shah* judgment of the Bombay High Court, mere statement in the Trust Deed that disputes between *"beneficiaries inter se"* should be resolved by arbitration is not sufficient to qualify as an arbitration agreement. Requirements under Section 7 must be met with. The Madras High Court is of the view that a general reference stating that all disputes would be referred to arbitration cannot be reasoned to be a valid arbitration agreement.[59]

Besides, the 'deemed acceptance' doctrine is not a well-accepted principle in India. It has been criticized by the Delhi High Court in *Ms. Chhaya Shriram v. Deepak C. Shriram and Ors.*[60] It has stated that no doubt that a beneficiary can have benefits of the Trust only in accordance with the terms of the Trust, but he is granted benefits by the Trust not out of any contract between him and the Trustee or the Settlor. He is not made beneficiary out of his choice but because of the desire of the Settlor. It further stated that Settlor and Trustees together cannot enter into a contract on behalf of the beneficiaries. Any dispute between the beneficiaries can be referred to the arbitration only if there is an independent arbitration agreement between the beneficiaries for referring the dispute to the arbitration. Howsoever comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation.[61]

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[58] **P.C. MARKANDA, LAW RELATING TO ARBITRATION & CONCILIATION** (2003).
[59] Sankar Sealing Systems P. Ltd. v. Jain Motor Trading Co., AIR 2004 Mad 127.
[60] 150 (2008) DLT 673 (NULL).
[61] Union of India v. Kishorilal Gupta & Bros. 1 SCR 493 (1960); See also National Insurance Co. Ltd. v. BogharaPolyfab Pvt. Ltd. AIR 2009 SC 170.

In the case of *Jagdish Chander v Ramesh Chander and Ors.*[62], Clause 16 of the Partnership Deed provided that disputes would be referred for arbitration "*if the parties so determine*." It was held that the expression "determine" indicates that an arbitration agreement will be deemed to exist only if the parties resolve to have so after due consideration. Thus, first and foremost, there has to be an agreement with *consensus ad idem* between the parties.[63] Where there is no consensus on the terms and conditions, there is no concluded contract.[64] *"When there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. A mere possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, does not constitute a valid and binding arbitration agreement."*[65]

In the case of *Alice Marie Vandepittee v. Preferred Accident Insurance Company of New York*[66], the Privy Council stated that on equitable principles only a person who is a party to a contract can sue on it. However, a party to a contract can constitute himself a Trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The action should be in the name of the Trustee. If however he refuses to sue, the beneficiary can sue, joining the Trustee as a defendant. Similarly, the beneficiary cannot himself bring into play the arbitration clause contained in a Trust Deed. It is the sole right of the parties to the arbitration agreement. In situations where the beneficiary wishes to resolve disputes through arbitration and not in public forum, it is the Trustee who must initiate such an action on behalf of the beneficiary. Sections 36 and 43 of the Indian Trusts Act, 1882 give the Trustee a right and power to do so for the benefit of the Trust property. Section 36 gives the Trustee a general authority to do all acts which are reasonable and proper for the execution of his duties as a Trustee and are in the interest of the beneficiary. Additionally, Section 43 specifically gives the Trustee the power to submit disputes to arbitration, if he thinks fit.

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[62] (2) Arb LR 302 (SC) (2007).
[63] Taipack Ltd. v. Ram Kishore Nagar Mal, (3) Arb LR 402 (Del) (2007).
[64] United Bank of India v Ramdas Mahadeo Prashad, 1 SCC 252 (2004).
[65] *Supra* note 62.
[66] AIR 1933 PC.

Even if the proposition of 'deemed acceptance' is considered to conceivable, in the *Jayesh Shah* case, the beneficiaries were minors when the agreement was entered into. As per Section 10 of the Indian Contract Act, 1872, such an agreement would be void *ab initio*.[67] Thus, no arbitration agreement can become binding on them because they were not even competent to enter into an agreement.[68]Meaning thereby, even if they consented to an agreement to arbitrate, they are not bound by such an agreement. Capacity to make an arbitration agreement is co-extensive with the capacity to contract under the law. Existence of statutory or equitable exceptions to this rule does not impinge upon its general fundamental character.[69]

Position of third parties in arbitration

Alan Redfern and Martin Hunter have opined that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than in a series of separate proceedings.[70] The main purpose of alternative dispute resolution is to reduce burden of courts. However, in proceedings before national courts, it is generally possible to join additional parties or to consolidate separate sets of proceedings. In arbitration, however, this is difficult, sometimes impossible, to achieve this because the arbitral process is based upon the agreement of the parties.[71]

The theory of implied consent was discussed by the Supreme Court recently in *Chloro Controls (I) P. Ltd. v. Severn Trent Water Purification Inc.*[72], which may be applied to bind non-signatories to an arbitration agreement. The circumstances must demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties. The principle that the rights and obligations of an arbitration

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[67] Mohri Bibi v. Dharmodas Ghose, 30 Cal. 539 (1903).
[68] *Supra* note 58.
[69] Patanjal and Anr. v Rawalpindi Theatres (P) Ltd., AIR 1970 Delhi 19.
[70] **ALAN REDFERN AND MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION** (2004).
[71] *Supra* note 1.
[72] *Supra* note 1.

agreement apply only to the agreement's parties is a straightforward application of the doctrine of privity of contract, recognized in both civil and common law jurisdictions.[73]

he question whether third parties to arbitration agreement can be joined as a party to the arbitration or not, was adjudged by the Supreme Court for the first time in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr.*[74] Application was filed under Section 8 of the 1996 Act by the appellant against another party to the arbitration agreement contained in a partnership Deed. The application also named twenty three other defendants, the purchasers of flats, who were not parties to the partnership Deed.

The Supreme Court held that where a suit is commenced in respect of a matter which falls partly within the arbitration agreement and partly outside and which involves the parties, some of whom are parties to the agreement while some are not, the subject matter of the suit could not be referred to arbitration, either wholly or by splitting up the causes of action and the parties. The court refused to join the non-signatories and refer them to arbitration.[75]This view was reaffirmed by the Supreme Court later in *India Household & Health Care Ltd. v. LG Household & Health Care Ltd.*[76]

The Supreme Court further fortified its view in *Indowind Energy Ltd. v. Wescare (I) Ltd.*[77]when a matter relating to lifting of corporate veil in the context of arbitration was faced by it. Wescare (I) Ltd., the respondent and Subuthi Finance Ltd., promoter of the appellant company, entered into an arbitration agreement. Respondent filed an application under Section 9 of the 1996 Act, which was dismissed on the ground that Indowind was not a party to the Agreement, and had not signed or ratified the Agreement. Subsequently, Wescarefiled an application under Section 11 (6) of the 1996 Act before the Madras High Court. The application was allowed by the Chief Justice holding that the case was a fit one for lifting the corporate veil, and that Subuthi and Indowind are "one and the same party".

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[73] **BORN,** *supra* note 34.
[74] (2003) 5 SCC 531.
[75] (2003) 5 SCC 531, 535-537.
[76] (2007) 5 SCC 510.
[77] (2010) 5 SCC 306.

However, the Apex Court was not of the same opinion, and refused to lift the corporate veil. According to the court each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two companies a single entity and nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. The court also noticed that the parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, showed that the parties did not intend that Indowind should be a party to the agreement. Absence of any document signed by the parties under section 7(4) (a) of the 1996Act meant non-existence of any arbitration agreement between the parties.

The question dealt by the Apex Court in *S.N. Prasad Hitek Industries (Bihar) Ltd. v. Monnet Finance Ltd. & Ors.*[78], was whether a guarantor is bound by an arbitration clause in a contract that has not been executed by him or not. The Court held that in the absence of valid arbitration agreement which satisfies the requirements of Section 7 of the 1996 Act, an award against the appellant cannot be enforced merely on the fact that he stood as the guarantor. Supreme Court clearly stated that if there is a dispute between a party to an arbitration agreement, with other parties to the arbitration agreement as also non-parties to the arbitration agreement, reference to arbitration or appointment of arbitration can be only with respect to the parties to the arbitration agreement and not the non-parties.

In *Deutsche Post Bank Home Finance Ltd. v. Taduri Sridhar &Anr.*[79], the Supreme Court had to answer the question of non-signatory in the context of multiplicity of agreements. The respondent filed an application under Section 11 of the 1996 Act on account of disputes arising under the one of the agreements, to which the appellant was not a party. Supreme Court applied the principle in *S.N. Prasad's* case and held that reference to arbitration or

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[78] (2011) 1 SCC 320.
[79] (2011) 11 SCC 375.

appointment of an arbitrator can only be with respect to the parties to the arbitration agreement and not the non-parties.[80]

However, in *P.R. Shah, Shares & Stock Broker (P) Ltd. v. M/s B.H.H. Securities (P) Ltd.*[81], Supreme Court allowed a non-signatory to be joined as a party to the arbitration, as the claim was incidental and connected to claim against the members and was permitted under Bye-law. The same view was also affirmed in *Cox & Kings Ltd. Vs. Indian Railways Catering & Tourism Corporation Ltd. &Anr.*[82]

In conclusion, it can be said that a non-signatory to an arbitration agreement, as in the *Jayesh Shah* case, the beneficiary cannot be allowed to succeed in his application under any provision of the 1996 Act. However, he may be allowed join as a party to arbitration between the Settlor and Trustee in a dispute in relation with the Trust.

Comparison with wills

A contrast may also be drawn between a Trust and a Will. In *Ms. Chhaya Shriram v Deepak C. Shriram and Ors.*[83],the Delhi High Court stated that a testator may provide for an arbitration clause for any dispute between the beneficiaries of the Will. Notwithstanding that the beneficiaries obtain benefits out of the Will, by reason of such beneficiaries not being party to the Arbitration Agreement, such a clause cannot be binding on them. Similarly, settler and Trustees can create a Trust and specify who will be the beneficiaries under the Trust but they cannot create a binding contract between the beneficiaries with respect to settlement of disputes.

Interestingly, in the same year, the Rajasthan High Court stated in *Raghu Nandan Sharma v. Vijay Kumar and Ors.*[84]that an "Arbitration clause incorporated by a father in his will, is binding on the sons after his death, even if they are not the signatories of the will and it shall be treated as arbitration agreement as defined under Section 7 of 1996 Act." It is

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[80] *Id.*
[81] (2012) 1 SCC 594.
[82] Special Leave Petition (Civil) Nos.965-967 of 2012.
[83] *Supra* note 60.
[84] AIR 2008 Raj 160.

submitted that the proposition of the Rajasthan High Court cannot be considered to be good law as it is against the spirit of the 1996 Act. It relied on the 1939 judgement of the Calcutta High Court[85], which was passed before the enactment of the Arbitration Act of 1940 and 1996. Thus, it does not hold water in the present legal scenario.

Legal Position in Other Countries

It is apparent that an arbitration clause in a Trust Deed is not an arbitration agreement within the meaning of Section 7 for the beneficiaries to settle disputes by way of arbitration. This leaves them in a position where they cannot refer disputes to arbitration despite an arbitration clause in the Trust Deed. In such circumstances, it is apposite to look at the legal position in other countries and adopt the same in the Indian Act.

F. USA

Arbitration clauses in Trusts and Wills are called "donative arbitration clause", as they are inserted by the contracting parties to force the beneficiaries to arbitrate their disputes. However, difficulty is faced by courts in enforcing such a clause by reason of the inherent problem in such arbitrations. Beneficiaries and Trustees do not sign the will or Trust itself, and thus under current law those parties cannot be bound by any arbitration provision contained therein.[86]However, a small group of commentators argue that such clauses should be enforceable, and a smaller group of states, like Hawaii, Florida, and Arizona, have legislation to that effect.[87]

Few states like Hawaii, Florida, and State of Washington already have legislations in place to have an arbitration clause in Trust Deeds enforceable. State of Washington adopted the Trust and Estate Dispute Resolution Act in 2000. It does not directly deal with

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[85] Raj Kumar v. Shiva Prasad Gupta, AIR 1939 Cal 500.
[86] Stephen Wills Murphy, *supra* note 6.
[87] Michael P. Bruyere & Meghan D. Marino, *Mandatory Arbitration Provisions: A Powerful Tool to Prevent Contentious and Costly Trust Litigation, but Are They Enforceable?*, 42 REAL PROP. PROB. & TR. J. 351 (2007); Gerardo J. Bosques-Hernandez, *Arbitration Clauses in Trusts: The U.S. Developments and a Comparative Perspective* (2008), *available at:* http://www.raco.cat/index.php/InDret/article/viewFile/124284/172257 accessed ?; Robert W. Goldman, *Simplified Trial Resolution: High Quality Justice in a Kinder, Faster Environment, in* 41ST ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING, UNIVERSITY OF MIAMI SCHOOL OF LAW (2007).

arbitration clauses contained in the Trust Deed, but creates an alternate dispute resolution system that applies to Trust matters and is designed to promote the same.

UK

On the other hand, the English Arbitration Act, 1996 has gone one step ahead and has included in its definition of "party" under Section 82.2 "any person claiming under or through a party to the agreement." However, till date there has been no case before the English courts, where it has be adjudged whether or not beneficiaries are bound by the arbitration clause in a Trust Deed.

ICC

The ICC has not been able to arrive at a comprehensive conclusion in relation to third-party beneficiaries being bound by the contract and thereby the arbitration clause contained it. In one case it has held them to be bound by it, even if they did not sign it.[88] On the other hand, some courts and tribunals have dissected the language of the arbitration agreement holding that they were not drafted so as to extend to third-party beneficiaries.[89]

Specifically, the International Chamber of Commerce has also considered the issue of arbitration under Trust Deeds. In 2006, the ICC's Commission on Arbitration decided to set up a taskforce to examine the issues which arose in Trust arbitrations. It suggested the following "ICC Clause for Trust Disputes", which was approved by the Commission and published in the Bulletin of the Court in 2008.

> *"All disputes arising out of or in connection with the Trust created hereunder shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or*

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[88] Final Award in ICC Case No. 9762 of 2004, XXIX Y.B. Comm. Arb. 26 (ICC Int'l Ct. Arb.).

[89] Final Award in ICC Case No. 9839 of 2004, XXIX Y.B. Comm. Arb.66 (ICC Int'l Ct. Arb.); Brantley v. Republic Mortgage Insurance Co. 424 F.3d 392 (4th Cir. 2005); Zurich Am. Insurance C. v. Watts Indus. Inc. 417 F.3d 682 (7th Cir. 2005); McCarthy v. Azure 22 F.3d 351 (1st Cir. 1994); Hugh Collins v. Int'l dairy Queen Inc 2 F.Supp.2d 1465 (N.D. Ga. 1998).

more arbitrators appointed by the ICC International Court of Arbitration, in accordance with the said Rules."[90]

However, most jurisdictions find a judicial recognition of the fact that Trusts and arbitration cannot coexist. A few of such foreign judgements are discussed below.

1. In a Swiss judgment[91] involving a Lichtenstein Trust the Court of Appeals of Switzerland stated that "a potential beneficiary of a Trust is not a party to a Trust agreement. Also, due to the absence of a written arbitration agreement as required by the New York Convention, according to which the contract or the arbitration clause must be signed or contained in an exchange of correspondence or telegrams, it cannot be understood to constitute a valid arbitration agreement."

2. In *Lo v. Aetna International Inc.*[92], the question that arose before the U.S. Federal District Court was whether an arbitration clause in a Deed of Trust subject to Hong Kong law was an agreement to arbitrate under the New York Convention or not. The Trustee was also one of the beneficiaries of the Trust in question. Unlike all other cases, here the beneficiary had signed the Deed and

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[90] TASKFORCE ON TRUSTS AND ARBITRATION, ICC ARBITRATION CLAUSE FOR TRUST DISPUTES, 9 ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 19 (2008).

[91] Decision was affirmed by the Swiss Supreme Court in SCD 4C.94/2005, judgment of 14 September 2005.

[92] US Federal District Court, William Lo v. Aetna International Inc., judgment of 29 March 2000, 2000 LEXIS 22531.

even that was not enough to establish a contractual obligation to arbitrate disputes, because she had not signed as beneficiary but as Trustee.

3. *EMM Capricorn Trustees Limited* v *Compass Trustees Limited*[93], the Royal Court of Jersey held that a Trust instrument containing an exclusive jurisdiction clause should not be given the same weight as one in a contract, and that the policy considerations that justified parties being held to a contract to which they had freely agreed did not apply to beneficiaries of a Trust who had never been parties to the agreement between the Settlor and the Trustee.
4. *Hal Rachal, Jr., v John W. Reitz*[94], Supreme Court of Texas determined whether an arbitration agreement contained in a Trust Deed of an *inter vivos* Trust was binding on the beneficiaries or not. The First Instance and Court of Appeals held that by reason of the Trust beneficiaries not having consented to any binding arbitration provision contained in an enforceable contract, they cannot be bound it. The Supreme Court, on the other hand, supported the deemed acceptance doctrine, and stated that a beneficiary acquiesces to the obligation to arbitrate while he acquiesces to other aspects of the Trust document. He cannot pick and choose which parts of the Trust he wishes to accept.

5. *In re Mary Calomiris*[95], a dispute arose in relation to a marital Trust. Question arose as to the existence of an agreement to arbitrate. It concluded that no such agreement existed, as a Trust is not a contract, and so is not a Will.

6. In a recent Californian case, *Diaz v. Bukey*[96], it was held that under Californian law, there had to be a written arbitration agreement for the Trustee to be able to compel the beneficiary to arbitration.

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[93] [2001] J.L.R. 205.
[94] (No. 11-0708 May 3, 2013).
[95] District of Columbia Court of Appeals, In re Mary Calomiris, judgment of 2 March 2006, 894 A 2d 408.

The incompatibility of an arbitration agreement with Trusts is known to most foreign courts and thus they do not permit them to be on the same plane. This has been done either by express legislation or by construction by the court. Trusts being an equitable obligation, courts have taken away the option to arbitrate disputes from beneficiaries, unless they have themselves consented to an arbitration agreement.

Conclusion & Suggestions

For arbitrators, motion to join non-signatories creates a tension between two principles: maintaining arbitration's consensual nature, and maximizing an award's practical effectiveness by binding related persons.[97]Analysis of the growth of the 1996 Act from the 1940 Act, as well as the various provisions of the 1996 Act brings to light the unequivocal intention of the drafters of the form of arbitration they targeted. Section 2 clause (b) and (h) read with Section 7 of the 1996 brings out a clear picture of an arbitration agreement and who can be construed to be a party to it. It leaves no scope for reading the doctrine of 'deemed acceptance' into it. *Consensus ad idem* is *sine qua non* not only for an arbitration agreement, but any agreement in general. Parties must be eye-to-eye on the terms of the agreement. A beneficiary, who has no say in the formation of a Trust Deed, cannot have possibly agreed to an arbitration clause in it, neither expressly nor impliedly. Thus, it is the opinion of the author that the Bombay High Court is incorrect in admitting the application under Section 11 of the 1996 Act by the beneficiary in the *Jayesh Shah* judgement.

There is an inherent problem of incompatibility of arbitration clauses with Trusts and Wills. Even though the drafters of the agreement lucidly indicate their inclination towards taking any dispute arising thereunder to the private forum of arbitration, the same becomes difficult when the situation so arises. The inconsistent approaches taken by different courts further add to the dilemma of uncertainty. Therefore, this calls for the legislator to take a step ahead and resolve such ambiguity. The legislator must add a

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[96] California Court of Appeals 2 Dist., Diaz v. Bukey, judgment of 10 May 2011.
[97] William W. Park, *An Arbitrator's Dilemma: Consent, Corporate Veil and Non-Signatories*', *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION, p.3 ¶1.09 (2009).

proviso to Section 7 stating explicitly the position of third parties to an agreement to arbitrate, whether they can invoke to provisions of the 1996 or not.

Keeping in mind the objective of the 1996 Act, it would be appropriate to amend the Section 2(h) of the 1996 Act to create a provision for "persons claiming through or under" the party to the arbitration agreement to invoke the provisions of the 1996 Act on his behalf under Part I of the Act for domestic arbitrations, as already exists under Section 45 for Part II. Alternatively, a provision may be added in Part I of the 1996 Act creating an exception for beneficiaries under Trusts and Wills, even though they are not parties to arbitration agreement, to succeed in proceedings under the 1996 Act. On the other hand, the legislator could also amend the Indian Trusts Act, 1882 to include an explicit provision for arbitration, making it a statutory arbitration clause. Such a clause must ensure that it removes the confusion whether a beneficiary who is not a party to the arbitration agreement can take assistance from it or not. It is significant herein that such a provision is not inconsistent with the spirit of the 1996 Act. Until any such steps for amendment are taken up by the legislator, it is suggested for the time being, that other forms of alternative dispute resolution mechanisms, mediation in particular is encouraged, as it more appropriately suited for resolution of disputes relating to Trusts and Wills.

Easier said than done, contradictory opinions will continue to be made by courts until the legislator intervenes with a solution. However, since Trusts are an equitable obligation, it is also a duty of the courts to maintain harmony among various laws and avoid any sort of inconsistency.