JUDICIAL INTERVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION: CRITIQUING THE INDIAN SUPREME COURT'S INTERPRETATION OF THE ARBITRATION AND CONCILIATION ACT, 1996

Ajay Kr. Sharma[*]

ABSTRACT

The role of the national courts in facilitating the process of international commercial arbitration cannot be undermined. However, an overzealous interventionist attitude must be shunned by the courts. Two of the sacrosanct foundational principles of arbitration viz., the competence-competence and party autonomy, should be respected by the courts in judicial proceedings initiated at all stages of arbitration including, at the pre and post arbitration stages. Though this is true for all arbitrations, the value of these principles accentuate in cases of international commercial arbitration, where the scope and expectation of judicial intervention is further diminished. The stakes and ramifications are also much higher in the international commercial arbitration, so the need for the courts to exercise caution is much greater. Judicial intervention in such cases is, however, laudable if it accelerates the international commercial arbitration process and not if it unjustifiably impedes the same in a proceeding to challenge the process or the consequential awards. Unfortunately, as seen from certain decisions of the Supreme Court of India, the top national court has been apparently parochial in its approach and imposed itself upon the arbitral process, running counter to the spirit of the national legislation viz., the Arbitration and Conciliation Act, 1996, and erring in its interpretation of the same. This paper does not call for circumscribing the judicial power of the Indian courts, but exhorts for this change in the judicial attitude, particularly of the Apex Court. In doing so, it seeks to evaluate the reasoning applied by the Court. This article is not only critical in its approach but also cites the imprimaturs of the Indian Supreme Court which appreciably exhibit the pro-enforcement arbitration bias.

I. Introduction

Among the prominent contemporary corporate dispute resolution options, arbitration undoubtedly is the first choice, not only internationally,[1] but also

[*] LL.B. (Delhi), LL.M. (Gold Medallist with Distinction) (ILI), PhD Candidate (NLUJ). Assistant Professor of Law and Executive Director, Research Centre on Transactional Law (RECENTLAW), National Law University, Jodhpur, India. Comments can be mailed to: aksharma@nlujodhpur.ac.in. This research paper is a part of the author's PhD research work. A previous version was presented in the National Seminar on Corporate Justice: Legal Challenges organised by the School of Corporate Law, Indian Institute of Corporate Affairs, Manesar, India (Nov. 2013). The author expresses gratitude to Harisankar K.S., his colleague at the NLUJ, for discussing and commenting on many of the views expressed in this paper. Any shortcomings are entirely attributable to the author.

amongst Indian business enterprises.[2] Party autonomy and Arbitral Tribunal's inherent power to determine the jurisdictional issues (referred generally to as the *competence-competence principle*) are key foundational stones in the success of building the whole process of arbitration. Intervention by the national courts, if excessive or too intrusive, can defeat the whole arbitration process, destroying its sanctity and benefits; and in the long term may lead to crumbling of the institution of arbitration in that country. This problem assumes more serious dimensions in case of International Commercial Arbitration (ICA)—which is at focus here—when we are dealing with parties who are indulging either in international trade or foreign investment. During the prevalent current account deficit crisis when the Indian government is seeking more Foreign Direct Investment (FDI) and greater exports, it should efficaciously tackle problems pertaining to the International Commercial Arbitration, including the systemic issues involved, to make it a viable and attractive dispute resolution option. The problems arising due to undue interference in ICA by the Indian courts may lead foreign investors to investor-state arbitration alleging against India violations of its pertinent International Investment Agreements. The White Industries award now provides a clear illustration of this, which should be a wake-up call for the Indian government for carrying out apt legal and institutional (including judicial) reforms in this area.[3]

This paper highlights and analyses the facet of problem concerning nature of power of the national courts to intervene in the arbitration process and its scope, at all stages including, for its initiation and at the awards enforcement stage.

---

[1] *See Corporate Choices In International Arbitration: Industry Perspectives,* PWC (2013), *available at* http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf (ranking international arbitration as the most preferred dispute resolution mechanism of the respondents surveyed).

[2] *See Corporate Attitudes & Practices Towards Arbitration In India*, PWC (2013), *available at* http://www.pwc.in/en_IN/in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf (highlighting that 91% of the respondent Indian companies, who have a dispute resolution policy, included arbitration instead of litigation for resolving their future disputes). An online survey (on Google drive) of 13 Indian corporate lawyers, working in some of the well-known Indian Law Firms, conducted by the author in the year 2012 indicates similar preference for arbitration by the Indian corporate lawyers for their overseas client making FDI in India. The responses to the author's survey showed that, as far as the Indian Corporate Lawyers surveyed are concerned, the most preferred dispute mechanism overwhelmingly suggested by 86% of them to their overseas investor clients was arbitration (arbitration abroad being preferred to arbitration in India). The least preferred dispute resolution option for 71% respondents was 'litigation in India'. Does this itself speak about the problems in adjudication through the Indian courts as perceived by the Indian lawyers? (on file with author).

[3] *See* White Industries Australia Ltd. v. Republic of India, Final Award (Nov. 30, 2011).

Arbitration intuitively is a boon for overburdened Indian courts, as it does not necessarily entail judicial intervention. The right attitude of the parties and the national courts displaying *bias* towards the arbitration is the key to success of arbitration. If the Indian courts, including its Supreme Court, adopt this attitude as part of its judicial policy, this will not only be in consonance with the principles of party-autonomy and *competence-competence,* but will also further the purpose behind the legislative enactments in the Arbitration and Conciliation Act, 1996 which sanctify these principles. If the judicial intervention becomes too obtrusive or large, this may ultimately defeat the avowed benefits in adopting arbitration over litigation, imposing higher costs and delays. The entire Indian judiciary should give primacy and impetus to international commercial arbitration (and arbitration as a whole) when *prima facie* parties have opted for the same, thus leaving it to the arbitral tribunal to decide jurisdictional challenges as a rule (subject to some rare and clear exceptional cases); and after the process culmination in an award, allow for the efficacious enforcement of the awards including the 'foreign awards'.

The interpretative role of the higher courts, particularly the Supreme Court, is very important in this regard, due to the doctrine of binding precedent followed by our courts.[4] This entails greater responsibility to interpret the enactments in the arbitration law in proper spirit furthering their legislative intention. This article, however, shows that there are Supreme Court decisions to the contrary. The impact of these decisions is a cause of concern and requires due attention. On the other hand, it is also important that the courts attempting in their zeal to minimise their judicial interference in arbitration should not overlook any mandatory statutory provision applicable or essential facts of the case at hand. Any such attempt may lead to unreasonable interpretation of the pertinent legal provision, which may also lead to unjust consequences. This article discusses several important provisions of the Arbitration and Conciliation Act, 1996, where judicial intervention is permitted, and their interpretation as reflected from the decisions of the Apex Court. The critique of these judicial decisions of the Supreme Court of India forms an important component of this paper. In fact, the courts should create a judicious balance between the conflicting interests of the parties involved and respond wherever their intervention is crucial and necessary, mostly to facilitate the arbitration process. Thus, the important litmus test is whether the judicial intervention has a catalytic effect, expediting the process of arbitration in a given case, while maintaining the sanctity of the foundational principles of arbitration? The correct answer on introspection should usually be in affirmative, as a negative answer is most likely to lead the

[4] *See also* INDIA CONST. art. 141; *See also* P. Ramachandra Rao v. State of Karnataka, A.I.R. 2002 S.C. 1856 (India) (discussing the significance of the 'doctrine of precedents and its binding efficacy' at length, and partially overruling certain Supreme Court decisions for *inter alia* running counter to the previous decision of a larger bench).

court to impede the process of arbitration, undermining not only the autonomy of the parties and the arbitral tribunal involved, but also the whole purpose and philosophy behind the Arbitration and Conciliation Act, 1996. This article thus highlights these imperatives pertaining to the international commercial arbitration scenario in India, so that the foreign investing and trading entities can formulate a proper dispute resolution policy.[5]

India has a relatively new arbitration legislation viz., the Arbitration and Conciliation Act, enacted in the year 1996, after repealing and substituting the old antiquated Arbitration Act, 1940. Under this legislation, 'international commercial arbitration' affords greater party autonomy to the parties, which allows them to derogate largely from the substantive Indian Arbitration Law compared to the 'domestic arbitration'. An international commercial arbitration under the 1996 Act can be categorised into two categories - ICA in India and outside India. If it is ICA in India, then Part I of the 1996 Act squarely applies and the award rendered in such an arbitration is a domestic award in distinction to a 'foreign award' which is only rendered in ICA outside India, with Part-II becoming relevant for its enforcement in India.[6]

---

[5] In fact, the past experiences and cultural differences may play an important role as a 'criteria for choices'. *See* Klaus Peter Berger, Arbitration Interactive: A Case Study For Students And Practitioners 29 (2002) (discussing how parties from China and many countries from the Pacific Rim prefer mediation compared to litigation and arbitration which are more rigid; citing Chinese philosophy which stresses upon loosing of face when the matter is litigated in courts.).

[6] An award delivered in 'international commercial arbitration' outside India may not necessarily be a 'foreign award', as per the definition of a 'foreign award' given in Sec. 44 for the purposes of 'enforcement of *certain* foreign awards' (viz., the 'New York Convention Awards' ('convention on the recognition and enforcement of foreign arbitral awards') as far as Sec. 44, contained in Ch. I, Pt. II concerns). The only insignificant alternative concerns enforcement of 'Geneva Convention Awards', which is conditionally covered within another definition of the term 'foreign award' under Sec. 53 for the purposes of Ch. II, Pt. II of the 1996 Act. However, as per Sec. 53 of the 1996 Act, Ch. II, Pt. II has no application to the foreign awards to which Ch. I, Pt. II applies. Though, the number of countries who have adopted the New York convention is overwhelming, the tally in the year 2013 standing at 149 (out of the 193 UN Member States), *see* http://www.newyorkconvention.org/new-york-convention-countries. However, there are certain nations which aren't covered by either the New York Convention or the Geneva Convention like, Yemen, Turkmenistan, Togo, Sudan, Namibia and Malawi. Section 44 reads: "In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

The statutory criteria for an arbitration to qualify as international commercial arbitration however poses problems due to the narrow judicial interpretation given by the Supreme Court of India. Initially, the qualification criteria for ICA under the 1996 Act are analysed in the second part of this article. This becomes important in cases where the 1996 Act applies. The third part of this article concerns the curtailment of the arbitral tribunal's powers, by the Indian courts, to determine certain jurisdictional issues by applying the *Kompetenz-Kompetenz (competence-competence)* principle. The fourth part indulges in the analysis of scope of intervention by the Indian courts ordering *interim measures* under Part-I of the Act with the help of the law laid down by the Indian Supreme Court in the widely acclaimed recent *BALCO* (2012) case,[7] replacing the field held till then by *Bhatia International*.[8] The penultimate part concerns the interpretational analysis of the (vague) ground of 'public policy' on which enforcement of the 'foreign award' is challenged against the party who is successful in arbitration outside India. Finally this article concludes with some suggestions for further improvement in this delicate area.

II. What is International Commercial Arbitration: A Case of Judicial Misinterpretation of the Statutory Definition

The distinguishing criteria between international commercial arbitration and purely domestic or national arbitrations are laid down in municipal arbitration laws delineating both the "international" and the "commercial" aspects of international commercial arbitration. The "international" criterion in "international commercial arbitration" required to be fulfilled is usually based on the two determinants viz., *nature of dispute* and *parties to the dispute*.[9] The former is the objective criterion focussing on the dispute's subject matter and the international character of the transaction in issue, while the latter is a subjective criterion whose focus is on the nationality of parties or their place of business.[10]

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette declared to be territories to which the said Convention applies." Clause (b) further restricts the scope of the definition of 'foreign award'. Thus, it can be concluded that, in case it is not a 'foreign award' as per the 1996 Act it cannot be enforced in India through the provisions of the Arbitration and Conciliation Act, 1996.

[7] Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc., (2012) 9 S.C.C. 552 (India) [hereinafter BALCO].

[8] Bhatia International v. Bulk Trading S.A., (2002) 4 S.C.C. 105 (India) [hereinafter Bhatia International].

[9] *See* ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 13-17 (4th ed. 2004) [hereinafter REDFERN ET AL.].

[10] *See* JULIAN D.M.LEW, ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 57-59 (2003).

The national laws either adopt one of these determinants or both of them in conjunction.[11] In fact, the UNCITRAL Model Law, under Article 1(3), blends the two criteria and adds a third criterion, based on chosen place of arbitration.[12] The 1996 Act, departing from the Model Law, adopts the subjective criterion in enacting the statutory definition of ICA in Section 2(f).[13] The Supreme Court of

---

[11] REDFERN ET AL., *supra* note 9, at 13-14 (citing Art. 1492 of the French Decree Law of May 12, 1981, being the French law on international arbitration, which adopts subject-matter criterion rather than nationality of the parties criterion by laying that: "an arbitration is international when it involves the interests of international trade."). It should be noted that the definition in French Law has undergone a change; *See* Art. 1504 of French Code of Civil Procedure, [Law 2011-48 of Jan. 13, 2011 on Reforming the Law Governing Arbitration](which defining 'international arbitration', states that: 'An arbitration is international when international trade interests are at stake.' From a non-French Lawyer's perspective on comparing Article 1504 of CCP with the erstwhile Art. 1492 it is arguable that the scope of the qualification criterion for 'international arbitration' has been narrowed down as international trade may not be at stake, in the sense that it may be adversely impacted, even if international trade interests do exist in a matter. This however may be an erroneous interpretation. An interpretation of the international trade interests at stake is given on basis of the "international trade interests" criterion including all economic transactions which are not confined to borders of one nation under the ambit of Art. 1504); Jean De La Hosseraye Et al., *Arbitration In France*, ¶ 2.2.1, at 337, http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_FRANCE.pdf.

[12] Arts. 1(3)(b)(i) and 1(3)(c) delineate on this third element. *See* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 19 (5th ed. 2009) (suggesting three pronged approach to the definition of 'international commercial arbitration') [hereinafter BLACKABY ET AL.]; *See also* REDFERN ET AL., *supra* note 9 (which had made a similar suggestion but initial classification was done into two categories only viz., 'the international nature of the dispute' and 'the nationality of the parties'); Article 1(3) of U.N. Comm. on Int'l Trade Law (UNCITRAL), Model Law On International Commercial Arbitration, U.N. Sales No. E.08.V4 (1985), reads as under:
"An arbitration is international if:
(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
(b) one of the following places is situated outside the State in which the parties have their places of business:
(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.".

[13] The Arbitration and Conciliation Act, No. 26 of 1996, § 2(f), INDIA CODE (1996) [hereinafter The Arbitration and Conciliation Act] reads thus: "'international commercial arbitration' means an arbitration relating to disputes arising out of legal relationships,

India in *TDM Infrastructure Pvt. Ltd.*,[14] applied a convoluted reasoning, completely disregarding the text of the enactment in the definition clause, thus erroneously interpreting the definition of 'international commercial arbitration' contained in the 1996 Act.[15] In *TDM Infrastructure*, the Supreme Court denied to consider the application under Section 11 of the 1996 Act providing for appointment of arbitrator by the Chief Justice of India or his nominees in an international commercial arbitration, by simply concluding that it was not a case of international commercial arbitration. The indispensable 'internationality' criterion as given in Sec. 2(1)(f) lays down four *alternative* conditions in its following sub-clauses. The third sub-clause clearly provides for "a *company or an association or a body of individuals whose central management and control is exercised in any country other than India*". The undisputed facts of this case were that the petitioner company, though registered under the Indian Companies Act, 1956, had Malaysian residents as its directors and shareholders, apart from its board of directors also sitting at Malaysia. The Supreme Court disregarded these crucial determinative facts and instead considered the country of incorporation as the criterion to decide the jurisdictional issue. The criterion in the preceding sub-clause (ii), which is separated from sub-clause (iii) with a disjunction 'or', lays down another alternative qualification for at least one of the parties seeking international commercial arbitration as: "a body corporate which is incorporated in any country other than India". This clearly shows that a body corporate, which should obviously include a company, should be incorporated outside India. Though Indian companies do not satisfy the condition laid down in sub-clause (ii), they can become eligible if they met the condition in sub-clause (iii), since sub-clause (ii) does not lay down the exclusive criterion. In fact, it appears that the legislative intention behind inserting sub-clause (iii) is to cover those Indian entities whose central management and control is outside India, thus rejecting

---

whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-

(i) an individual who is a national of, or habitually resident in, any country other than India; or

(ii) a body corporate which is incorporated in any country other than India; or

(iii) a company or ail association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) the Government of a foreign country;"

[14] TDM Infrastructure Pvt. Ltd. v. UE Development India Pvt. Ltd., (2008) 14 S.C.C. 271 (India) [hereinafter TDM Infrastructure].

[15] *See* JUSTICE R. S. BACHAWAT'S LAW OF ARBITRATION &CONCILIATION 104-05 (Anirudh Wadhwa & Anirudh Krishnan eds. 5th edn. 2010) (criticising the *TDM Infrastructure* judgment's interpretation on grounds of sacrificing the party autonomy and deviation from the clear legislative language used in the definition clause of 'international commercial arbitration'. The author goes on to suggest that the decision requires to be reconsidered on these grounds).

the incorporation criterion alone to determine nationality of a party for the purpose of regarding arbitration as an ICA.

The Court held that: "[t]he 1996 Act excludes domestic arbitration from the purview of International Commercial Arbitration. The Company which is incorporated in a country other than India is excluded from the said definition. *The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although Clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company.*The consequential result is that an Indian subsidiary of a foreign corporate cannot seek to indulge in 'international commercial arbitration' under the 1996 Act with another Indian entity or individual."[16] The second sentence of the extract herein cited is wrong, as the company incorporated in a country other than India is not excluded but included within the definition of the international commercial arbitration by virtue of Sec.2(1)(f)(ii). *However, even if this erroneous inference in the preceding excerpt is rectified and substituted with the proposed corrected version it does not resolve the flaw in the Court's reasoning.* There is a clear contradiction and conflict between the third and fourth sentences (italicised) reproduced above from the judgment. In fact, not only has the Court turned a blind eye to the alternative nature of (sub) clause (iii) but has also chosen conveniently to disregard 'company' from this clause, confining its coverage to merely other entities like association or body of individuals. The rhetoric conclusion viz., 'the consequential result...individual' is an illegitimate inference which simply does not follow from the premise in the previous sentences, leading the argument to fail logically.[17] This parochial judicial interpretation of the useful provision may also discourage foreign investors bringing both Greenfield-investment (by having Indian wholly owned subsidiaries) and Brownfield-investment (by incorporating Indian JV Companies/SPVs) from doing arbitration under the 1996 Act.

[16] TDM Infrastructure, *supra* note 14, ¶13.

[17] In fact, it appears to be a mixed case of *ignoratioelenchi* and *non-sequitur*; *See* Andrew Jay MClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 829 (text and footnotes 427 and 429) (1988) (discussing closely related fallacies of *non sequitur, ignoratioelenchi* and *red herring.* Explaining how the Aristotelian fallacy of *ignoratioelenchi* literally translates to 'ignoring the issue' or reaching 'irrelevant conclusion', and defining 'non sequitur' as a proposition which is represented as a consequence of some other proposition when in reality it is not so); *See generally* TRACY BOWELL & GARY KEMP, CRITICAL THINKING: A CONCISE GUIDE 99-147 (2002) (discussing 'rhetoric ploys and fallacies'); *See generally* IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 601-27 (9th ed. 1994) (discussing 'logic and law').

III. Undermining Competence-Competence Principle: Analysing certain Sec. 11 and Sec. 45 decisions.

The second problem concerns the sacrosanct principle in arbitration called *competence-competence*,[18] which is an inherent power of the arbitral tribunal.[19] Section 16 of the 1996 Act statutorily recognises this principle.[20] However, the threshold review by the courts, whose intervention is sought under various provisions of the 1996 Act to enforce the arbitration agreements, has limited this inherent power of the arbitral tribunal. One such key provision considered as a last resort measure, in cases of reluctance of a party to appoint its arbitrator nominee or to sort out differences of opinion between the parties or their arbitrators, is to appoint the members of the tribunal or presiding arbitrator respectively is Section 11. Section 11 gives considerable power to the Chief Justice of India (CJI) to make such appointments in such a limbo in cases of 'international commercial arbitration'. One of the leading pronouncements of the Indian Supreme Court on Sec. 11 is the 7-judge bench decision in *SBP & Co.* v. *Patel Engineering Ltd.*[21] This judgment settled the interpretation of Section 11, at least for now, by overruling the *Konkan Railway* cases.[22] It concluded that nature of function performed by the Chief Justice or his nominee (designate) under

---

[18] *See* BLACKABY ET AL., *supra* note 12, note 140, at 347 (stating that *Competence/Competence* is expressed in German as '*Kompetenz/Kompetenz*' and in French as '*compétence de la compétence*').

[19] *See id.* at 347 (describing the shorthand term *competence/competence* as 'the power of an arbitral tribunal to decide upon its jurisdiction' or 'its competence to decide upon its own competence'). Article 21(1) of the UNCITRAL Rules clearly provides for the power with the arbitral tribunal to rule on such objections which allege that it has no jurisdiction. Similar power is conferred under the International Chamber of Commerce (ICC) Rules, *see* Article 6(3) of the Arbitration and ADR Rules, 2012 (ICC), *available at*: http://www.iccwbo.org/products-and-services/arbitration-and-adr/, click: 'Rules'.

[20] The Arbitration and Conciliation Act, *supra* note 13, § 16(1), reads:

"The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

[21] SBP & Co. v. Patel Engineering Ltd., (2005) 8 S.C.C. 618 (India). For a detailed critique of this judgment *see* Pratyush Panjwani & Harshad Pathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?*, 2.2 INDIAN J. OF ARB. L. (Nov., 2013), http://ijal.in/sites/default/files/Harshad.pdf.

[22] Konkan Railway Corporation Ltd. v. Mehul Construction Co., 2000 (3) Arb. l.R. 162 (SC) (India) [hereinafter Konkan I]; Konkan Railway Corpn. Ltd. v. Rani Construction Pvt. Ltd., (2002) 2 S.C.C. 388 (India) [hereinafter Konkan III].

Section 11(6) was a judicial function and not an administrative one, as held by the *Konkan Railway* cases.[23] Further, the *SBP* Court restricted the scope of the power of delegation, precluding delegation to the district judge, in accordance with the normal rules of designation of judicial work in the courts. Thus, the CJI could only designate his responsibility to a Supreme Court Judge, and Chief Justice of a High Court to another judge of the High Court.[24] The Supreme Court restricted the power of the arbitral tribunal under Section 16, ruling out the possibility for the arbitral tribunal to decide on its own jurisdiction, re-opening these issues after being constituted by the CJI or his designate settling these jurisdictional issues. The paternalistic view of the Supreme Court precluding the creature from questioning the creator apparently curtails the legislative purpose behind Section 16.

A division bench of the Supreme Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*, delineated the scope of Section 16 power, in light of *SBP* decision as follows:[25]

> *"It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which*

---

[23] The Arbitration and Conciliation Act, *supra* note 13, § 11(6) reads thus: " Where, under an appointment procedure agreed upon by the parties,-
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

[24] *See also* Justice S.M. Jhunjhunwala, *Settled Law Unsettled*, 4.1 ARB. L. REP. (SUPP.) (2006) (pointing out how the benefits of arbitration over litigation may be offset when a person residing in a remote *taluka* will have to come to file his Section 11 application). In case of ICA the costs will be further enhanced, as the application will be filed in the Supreme Court at New Delhi. Furthermore, in case of determination of 'preliminary facts', which appears to be a somewhat mandatory exercise to be undertaken under Section 11, this may lead to a mini-trial before the commencement of arbitration with large litigation expenses and other attendant costs.

[25] National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., A.I.R. 2009 S.C. 170, ¶ 16 (India). Further, the court in ¶ 17 has emphasised that the object of the 1996 Act is, "expediting the arbitration process with minimum judicial intervention" should guide the Chief Justice or his designate when he chooses to either decide these jurisdictional issues or leaves them to the Arbitral Tribunal.

the arbitration clause is found is null and void and if so whether the invalidity extends to the Arbitration clause also."

One of the recent Sec. 11 judgments of the Indian Supreme Court, where the court showed pro-enforcement bias, is the judgment of *Antrix Corporation* v. *Devas Multimedia.*[26] Showing a pragmatic approach, the court held that the arbitration agreement (or clause) can be invoked only once, as was done by the respondent *Devas* in this case, and not a second time, as the petitioner *Antrix* tried to do, though being aware of initiation of arbitration proceedings by the respondents. In *Antrix-Devas*, the agreement between the parties had an arbitration clause providing for arbitration as a dispute resolution mechanism, after failure of mediation to resolve their disputes within three weeks, by a three-member arbitral tribunal having New Delhi as the seat of arbitration. Furthermore, the arbitration proceedings, as per this clause, were to be conducted in accordance with the rules and procedure of the ICC or UNCITRAL. This disjunctive choice created a conflicting scenario between the parties.

Pursuant to the dispute having arisen, without exhausting the mediation option, the respondent unilaterally requested for arbitration under the ICC Rules, and nominated Mr Veedar, QC, as its nominee arbitrator, in accordance with these rules. The petitioner repeatedly insisted on mediation, whereas the respondent was adamant on proceeding with the arbitration which it had commenced, and called upon the petitioner to join the arbitration. Subsequently, the petitioner without joining in the arbitration proceedings commenced by the respondent initiated its own arbitration proceedings by appointing Ms Sujata Manohar, a former judge of the Supreme Court of India, as its arbitrator nominee in accordance with the UNCITRAL Rules. At this stage, the petitioner served notice to the respondent to appoint its arbitrator within thirty days to join the arbitration proceeding commenced by the petitioner. Thus, two parallel arbitration proceedings had been initiated by independent invocation of the arbitration clause by both the parties, leading to an anomalous situation. The basic question was, which of the two proceedings should be allowed to continued, as one of them had to trump over the other. Understandably, as the respondent did not join the petitioner's arbitration, the petitioner took to litigation under Section 11(6) approaching the Supreme Court to appoint an arbitrator for *Devas* in accordance with the UNCITRAL Rules. The strategy of the petitioner was to use the Indian Supreme Court to nullify the respondent's first mover advantage by obtaining sanction for its version of arbitration proceedings, and seeking its judicial enforcement, consequentially prevailing over the respondent's proceedings. Appreciably, the Supreme Court disappointed the

[26] Antrix Corporation v. Devas Multimedia, 2013 (2) Arb. L.R. 226 (SC) (India).

petitioner by showing a pro-arbitration approach thereby preventing the abuse of Section 11 jurisdiction. If the Court had not taken this view, an anomaly would have resulted, as the Chief Justice's nominee would have replaced the arbitrator already appointed under the ICC Rules.

Instead, to assuage the petitioner's grievance, the Supreme Court suggested Section 13 and subsequently Sec. 34 as the appropriate provisions of the 1996 Act which could be invoked by it in case of dissatisfaction with the arbitrator's selection by the respondent.[27] Thus, the arbitration proceedings commenced by the petitioner got vitiated, and as a necessary implication of the Court's judgment, the petitioner would be required to join the ICC Arbitration commenced by the respondent, though there was no such express direction by the Court.

Some questions, though not answered in the judgment, need to be analysed here in light of this judgment. Does invoking the arbitration clause by either party preclude exercise of Sec. 11 jurisdiction by the Court? The answer to this is clearly in the negative. The Supreme Court prevented the misuse of Sec. 11 by the petitioner in this judgment. Sec. 11 is meant to provide for judicial interference in case a party is resisting enforcement of a valid arbitration clause, to which it had initially agreed. In this case, the respondent was not resisting the same, in fact, it had invoked the same. Sec. 11 proceedings can be initiated, as per the clear language of the enactment, even post appointment of the arbitrator nominees by the parties, if the parties or their nominee arbitrators disagree on the choice of the third arbitrator, in case it needs to be appointed. Thus, even in this case if the parties do not sort out their acrimony while proceeding with the ICC Arbitration, such a disagreement may arise in appointing the third arbitrator to constitute the three member arbitral tribunal, as required according to the arbitration clause. In that event *Antrix-Devas* judgment should not preclude

[27] *See* Nidhi Gupta, *Saving face or upholding 'Rule of Law': Reflections on Antrix v. Devas Multimedia P. Ltd.*, 2.2 INDIAN J. OF ARB. L. (Nov., 2013), *available at* http://ijal.in/sites/default/files/Nidhi%20Gupta.pdf. (critiquing the suggestion of the Sup. Ct., in ¶ 32 of the judgment, where it is said that, "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 1996 Act." The author opines that, suggestion to *Antrix* to invoke Section 13 is inappropriate, because *Antrix* has challenged 'the constitution of the arbitral tribunal itself and the validity of the tribunal constituted by the ICC' and that the ICC Rules would govern ICC Arbitration. Furthermore, the author comments on limited application of Section 34, only in a case where the seat of arbitration in this arbitration is India. Otherwise, Section 48 or 57, as the case may be, are suggested by the author as the proper alternatives to Section 34).

invoking Section 11 jurisdiction once again, as the cause of action will be different then.

One more Section 11 judgment can be discussed with benefit. This judgment in *Schlumberger Asia Services Ltd.* v. *Oil and Natural Gas Corporation Ltd.*[28] was delivered in the year 2013 by the Indian Supreme Court. The Judge, being the Chief Justice's nominee, exercising Section 11(6) powers, delivered an interesting order constituted according to the arbitration clause, disregarding the already appointed petitioner's nominee arbitrator and petitioner's prayer to appoint the respondent's nominee arbitrator and (curiously) the third presiding arbitrator. The arbitration clause, as submitted, clearly provided for the 3-member arbitral tribunal, with each party appointing one arbitrator each and the third arbitrator appointed by these two arbitrators. The petitioner is a foreign company, incorporated and registered under the law of Hong Kong, and the respondent, a well-known Indian Pubic Sector Enterprise, is registered under the Indian Companies Act, 1956. Petitioner had its project office at Mumbai (India).

After the dispute had arisen the petitioner issued a legal notice in the year 2008, invoking the arbitration clause, detailing the dispute. In the same notice it was importantly also mentioned that the petitioner had appointed its nominee arbitrator, and now it called upon the respondent to appoint its nominee arbitrator, failing which the petitioner was to take legal steps for appointing respondent's arbitrator instead. Notably, the arbitration clause itself provided for a post request period of thirty days to be provided to the other party to appoint its nominee, failing which it clearly designated the Chief Justice of India, in case of international commercial arbitration, as the authority who 'shall appoint arbitrators/presiding arbitrator'. Thus, the parties in essence had contractually agreed to the invocation of Sec.11 under the said circumstances, as clear from the arbitration clause. After the respondent failed to appoint its nominee arbitrator, the petitioner first sent a reminder in the year 2009, and another one in 2010, and yet another one in the year 2012, giving thirty days period, as prescribed in the arbitration clause, in each of these reminders. These constant reminders were disregarded by the respondent. In reply to the notice sent in the year 2012, the respondent plainly denied any liability towards the petitioner. Subsequent to this, the petitioner filed a Sec. 11(6) petition whose disposal culminated in the judgment which is being discussed. The respondent resisted this petition on the ground that it was barred by limitation and that it raised dead claims.

Perhaps, showing considerable respect for the *competence-competence* principle (though not expressly mentioning or discussing it), despite the observations of a

[28] Schlumberger Asia Services Ltd. v. Oil and Natural Gas Corporation Ltd., (2013) 7 S.C.C. 562 (India).

seven judge bench of the same court in *SBP & Co.* that the Chief Justice or his nominee 'can decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected', the judge chose not to decide the respondent's above objections leaving it to the arbitral tribunal to decide them. This approach of the Court is laudable. However, much good was undone when it decided to appoint all the three members of the arbitral tribunal as discussed previously. It apparently exceeded its jurisdiction by constituting the entire arbitral tribunal by designating two retired judges of the Indian Supreme Court as the arbitrators and a former Chief Justice of India as the presiding arbitrator/chairman. This clearly has adverse implications for the petitioner also. While exercising the powers under Sec. 11 the judge erroneously disregarded not only the petitioner's nominee, and the petitioner's plea, but also the arbitration clause to the extent it provided for the manner of appointment of the third arbitrator.

Thus, it would have been more equitable for the Judge to only appoint an arbitrator on behalf of the respondent. The judge, as per the arbitration clause, should have also directed that the two arbitrators should appoint a presiding arbitrator. Since, before the Court, there was no question concerning appointment of the third arbitrator, which could have only arisen when the two arbitrators failed to reach a mutual agreement with respect to the choice of the third arbitrator, the Court erred in prematurely appointing the presiding arbitrator on its own. Thus, in substance, the judge imposed his will on both the parties by appointing three retired justices of his court as members of the arbitral tribunal. As a whole, this decision compromised on party autonomy and on the autonomy of the arbitrators to choose the third arbitrator, making the arbitration clause a casualty in the end.

Next, let us converge on Section 45, contained in Chapter I of Part II of the 1996 Act dealing with the "power of the judicial authority to refer parties to arbitration" when it is seized of a matter in respect of which the parties have made an (arbitration) agreement referred to in the Section 44 i.e., to which the New York Convention Applies.[29] An academic commentator opines, that due to the expression "*an* agreement" in Sec.45, this provision has no application where

[29] The Arbitration and Conciliation Act, *supra* note 13, § 45 reads: " *Notwithstanding anything contained in Part I* or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, *shall*, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, *unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*" This *non-obstante* clause in Section 45 is important, for *inter alia*, it makes the exercise of judicial power under Sec. 45 independent of the Part I provisions in the 1996 Act. *See also* supra note 6 for the text of Section 44.

there is a plurality of agreements which converge on disputes arising 'out of a single transaction or a series of transactions which are inextricably linked with each other.'[30] However, the Supreme Court of India has, in a recent decision, concluded otherwise *albeit* not without difficulties. A three-judge bench decision of the Indian Supreme Court in the *Chloro Controls*,[31] thus marks an important contribution to Section 45 jurisprudence. The court applied the 'Group of Companies Doctrine' to make a reference to arbitration under Sec. 45, in accordance with the arbitration clause of the principal joint venture (JV) agreement, to direct even associated non-parties to arbitration, overriding the dispute resolution clauses in the other ancillary agreements.

The following are the facts shorn of details of the complex corporate structure of the entities involved. A United States Corporation (the foreign JV Partner) and an Indian Company (Indian JV Partner) formed a 50:50 Indian JV Company registered under the Indian Companies Act, 1956. The principal purposes of this JV were designing, manufacturing, importing, exporting and marketing of gas and electro-chlorination equipment. Towards achieving these objectives several ancillary agreements were executed post the principal or the 'mother agreement' (as the Court called it), which was the shareholders agreement.

There were in all six such ancillary agreements which were executed, including a supplementary collaboration agreement whose sole purpose was to fulfil the conditions to obtain governmental approvals. Some of these agreements had variations in the parties, and out of these agreements three of these agreements contained a distinct arbitration clause each.

The arbitration clause in the principal agreement, to be invoked in case of failure of negotiations to settle their dispute, provided for dispute resolution by arbitration according to the ICC Rules by three arbitrators designated in accordance with these rules. Place of arbitration was London and arbitration proceedings were 'to be governed by and subject to English laws'.[32] The other agreements were anticipated in the principal agreement itself and on execution were appended to the shareholder agreement. The 'international distributor agreement' (an appended agreement) did not contain an arbitration clause, but instead had a jurisdiction clause,[33] conferring jurisdiction to federal courts and state courts in the Eastern District of Commonwealth of Pennsylvania, United

[30] *See* P. C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 923 (7th ed. 2009) [hereinafter P. C MARKANDA].
[31] Chloro Controls (I) Pvt. Ltd. v. Severn Trent Water Purification Inc., (2013) 1 S.C.C. 641 (India) [hereinafter Chloro Controls].
[32] *See id.* ¶ 21.
[33] *See id.* ¶ 26.

States, for the parties to litigate. On the other hand, Managing Directors Agreement neither contained an arbitration clause nor a jurisdiction clause. The Exports Sales Agreement, between the JV Co. and the foreign JV partner, however had a specific arbitration clause. This clause provided for settlement of any dispute arising out of or connected with the agreement by arbitration in accordance with the Rules of American Arbitration Association. Place of arbitration was fixed as Pennsylvania and it talked about judgment upon award to be entered by a competent court. Thus, noticeably, this arbitration clause was different from the one in the principal agreement. Similarly, the same parties executed the Financial and Technical knowhow Agreement, and the Trademark Registered User Agreement also. The former contained an arbitration clause similar to the principal agreement providing for arbitration, subject to the English Law, in London, according to the ICC Rules. The latter agreement did not contain an arbitration clause.

A suit was commenced by the Indian collaborators seeking the Mumbai High Court's declaration to validate the JV agreements and delineate their scope. Meanwhile, during the suit's pendency, the foreign JV partner served a notice to the Indian parties to terminate JV agreements and sought from the High Court the reference of the matter to arbitration instead. Though, the single judge of the High Court disallowed the plea of the foreign JV partner, on intra court appeal, the division bench made the reference to arbitration under Section 45 of the 1996 Act. This order was impugned *inter alia* before the Supreme Court. The reference under Sec. 45 was resisted primarily on the ground that the three of the major agreements (referred to previously as the ancillary agreements) did not have an arbitration clause, and one had a jurisdiction clause. It was thus contended, that due to indefiniteness and uncertainty, the arbitration clause in the principal agreement (i.e., *shareholder agreement*) was unenforceable. Plea against bifurcation of causes of action was also made on basis of a previous Indian Supreme Court pronouncement in *Sukanya Holdings*.[34]

As this matter concerns Chapter I of Part II of the 1996 Act, dealing with the arbitration under the New York Convention, the Indian Apex Court went on to liberally construe Sec. 45 to achieve the legislative intent favouring arbitration, as reflected in Sec. 45. The Court accorded priority to the Chapter I of Part II stating that it was unaffected by Part I of Act.[35] While interpreting the phrase 'at the request of one of the parties or *any person claiming through or under him'* in Sec. 45, the Court rightly extended the scope of the expression 'any person' beyond 'the parties' who are signatories to the arbitration agreement.[36] This is in

[34] Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 S.C.C. 531 (India).
[35] Chloro Controls, *supra* note 31, ¶ 59.
[36] *See id.* ¶ 64.

accordance with the literal meaning of the enactment. Furthermore, the expression 'shall' in Sec.45 was interpreted to impose a mandatory duty on the Court to make a reference upon fulfilment of the statutory conditions.[37] Thus, the right of a party under Sec.45 to obtain a judicial order of reference to arbitration was interpreted as a conditional one, subject to satisfaction of certain statutory preconditions contained in Sections 44 and 45, and not an absolute right.

Despite the appreciable problem solving approach highlighted in the above judgment, it had some discursive aspects which could have been eliminated or reduced in the judgment. While interpreting Sec.45, it also provided for a threshold review by the courts, before referring dispute to arbitration, by giving a clear finding that arbitration agreement was 'valid, operative and capable of being performed'.[38] This imposition of a mandatory duty upon a Sec.45 court clearly does not augur well for '*competence-competence'* principle, which was discussed in the preceding paragraph of the judgment, but, the Court concluded that the above interpretation of Sec.45 does not permit any ambiguity and is according to the legislative mandate. It may be argued here that it should be read as a discretionary power of the court, rather than a mandatory duty, under Sec.45 to do a threshold review on a challenge to the validity of the arbitration agreement. Even Sec.48 exists for post-award challenges during the enforcement of a "foreign award", where the court has an opportunity for reviewing *inter alia* validity of the arbitration agreement after the arbitral tribunal has completed its task. The Court further noticed that an application for appointment of arbitral tribunal under Section 45 would also be governed by Section 11(6). Though Sec.11 was not in issue it was discussed along-with the *SBP& Co.* judgment. It appears that the Court confused itself between the scope of Sec.45 and Sec.11, and so mixed up the two provisions. To interpret the scope of Sec.45 jurisdiction, the Court adopted the Sec.11(6) standard by relying on the *SBP & Co.* judgement.[39] Referring to *Fouchard Gaillard Goldman on International Commercial Arbitration*, the Court cited the so-called negative effect of *'Kompetenz-Kompetenz'* rule,[40] which was that it deprived courts of their jurisdiction.[41] The basic question is whether this should be viewed as a merit of the *kompetenz-kompetenz* rule or its demerit. After all, when the courts adopt 'pro-arbitration bias' it is indeed proper not to curtail the arbitral tribunal's autonomy. We must note that one of the editors of the authority relied on by the Court also advocates, that the level of

[37] *See id.*
[38] *See id.* ¶ 78.
[39] *See id.*, ¶ 127-28.
[40] *See,* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 2 (Emmanuel Gaillard & John Savage eds. 1999).
[41] Chloro Controls, *supra* note 31, ¶ 129.

threshold review by the courts should be restricted to what he calls the 'prima facie test'.[42] The prima facie test is explained in the following words:[43]

> *In reality, prima facie means prima facie. The court seized of the matter can assess the arbitration agreement on its face. It can determine if the agreement exists as between the parties and has been entered into in circumstances which are not manifestly aberrational. Nothing further is required and any argument going beyond such a simple assessment on the basis of generally accepted practices should be left to the arbitrators to decide in the first instance.*

Though the Court, to justify threshold judicial review requirement under Sec.45, noted absence of a provision like Sec.16 in Chapter I of Part II of the 1996 Act, it strangely sought justification from Sec.11(7) of the same Act to lend finality to judicial determination under Sec.45.[44] It also justified this rendering of finality on the basis of furthering cause of justice and it being in interest of parties.[45] A counterview can be that the court, through its threshold review, does not do any favour to the parties and the tribunal by taking upon itself to decide 'objections going to the root of the matter'.[46] Rather, it should focus on reducing delays and expeditiously refer the matter to arbitration, except in the rarest cases which stand patently and clearly disqualified, rather than indulging to adjudicate the 'complex issues' involved, as termed by itself. A commentator points out to some of the problems which may be encountered by the trial court seeking to give a final finding on these issues pertaining to the validity of the arbitration agreement at the Sec.45 stage like: difficulties, unfeasible scenario of proving foreign law through affidavits, enormous expenditure of time and money.[47] An interventionist court can defeat the usual benefits of the arbitration process under the guise of doing a threshold review leading to the opposite results than intended, as delineated by the Supreme Court. When parties have chosen arbitration as their preferred mode of dispute resolution party autonomy needs to be respected and given full play. Thus, the scope of the same should be kept to minimum possible, and the phrase 'valid, operative and capable of being performed',[48] should be read as analogous terms extending to only the *prima facie* review to be done in the manner and to the extent described above. Despite

---

[42] Emmanuel Gaillard, *The Urgency of not Revising the New York Convention, in* 14 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 693 (Albert Jon Van Den Berg ed., 2009).
[43] *See id.*
[44] Chloro Controls, *supra* note 31, ¶130.
[45] *Id.*, ¶ 131.
[46] *Id.*
[47] *See* P. C. MARKANDA, *supra* note 30, at 925.
[48] Chloro Controls, *supra* note 31, ¶ 131 (the court laid Sec.45 standard to check whether 'agreement is null and void, inoperative and incapable of being performed.').

these observations in the dicta, it can be said that the Court held that the disputes arising from and referring to multiparty agreements are capable of being referred to arbitration, under Sec.45, in accordance with the agreement between the parties as per their intention.[49] This is an important takeaway lesson for the foreign investors contemplating a similar scenario in an investment deal.

In a recent 2014 decision rendered by the Indian Supreme Court in *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd.,*[50] the Court had an opportunity to examine correctness of an order of a division bench of the Bombay High Court issuing an injunction restraining the arbitration by ICC at Singapore. The dispute concerned the part payment totalling the amount of 125 crores,[51] made by the respondent (*MSM)* to the appellant (*WSGM)* during 2009 under a 'facilitation deed' between these parties. The respondent now sought to recover this amount, and thus sent a legal notice to the appellant through its lawyers on June 25, 2010, claiming the said 'facilitation deed' to be voidable at option of *MSM* in 'view of the false representations and fraud played by *WSGM*', and also simultaneously conveyed in the same clause its decision to rescind the 'facilitation deed' with immediate effect.[52] On the same day, *MSM* filed its first suit in the Bombay High Court for recovering the said sum of money paid to *WSGM* and sought a declaration from the court that the 'facilitation deed' was void. Three days later, on June 28, 2010, *WSGM* responded by invoking the arbitration clause (numbered 9 and titled 'governing law') in the 'facilitation deed' sending a request for arbitration to ICC Singapore, which gave a notice to the respondent, *MSM,* to tender its reply to *WSGM's* arbitration request. *MSM* resisted this move of *WSGM* and in response filed a second suit in the Bombay High Court on June 30, 2010, claiming *inter alia* a declaration that since the said 'facilitation deed' was rescinded the appellant *WSGM* 'was not entitled to invoke the arbitration clause in the facilitation deed'.[53] In this second suit, an application seeking temporary injunction against the *WSGM* for continuing with the arbitration proceedings initiated by them was also filed by *MSM*. The single judge dismissed this application of MSM. This order was challenged in appeal by *MSM* before a division bench of the Bombay High Court which allowed the appeal, granting temporary injunction, as sought by *MSM.* Against this decision of the division bench *WSGM* preferred an appeal before the Supreme Court which culminates in the judgment under discussion.

---

[49] *See id.*, ¶ 162.

[50] World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd., Civil Appeal No. 895/2014*,* Supreme Court of India (Unreported) (India), *available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=41175* [Hereinafter "World Sport Group case"].

[51] 1 crore = 10 million.

[52] World Sport Group*, supra* note 50, ¶ 25.

[53] *Id.,* ¶ 5.

The basic contention of the appellant *WSGM*, based on the judicial authorities cited by it endorsing *Kompetenz-Kompetenz* principle enshrined in Sec. 16, was that unless the arbitration clause itself, apart from the underlying contract, was assailed as vitiated by fraud or misrepresentation, the Arbitral Tribunal, and not the court, will have the jurisdiction to decide all issues including the validity and scope of the arbitration agreement.[54] According to the appellant, here the 'facilitation deed' was assailed as vitiated by fraud or misrepresentation, but the arbitration clause (or *agreement,* to use Sec. 45 terminology) contained in it was not made out to be 'null and void' on basis of the factual allegations of fraud or misrepresentation alleged by the respondent;[55] and it stood independent of and separate from the 'facilitation deed'. Thus, in essence, to support its argument the 'principle of separability' was invoked by the appellant. The respondent, on the other hand, contended that, 'the arbitration agreement was *inoperative or incapable of being performed* as allegations of fraud could be enquired into by the court and not by the arbitrator.'[56] After an elaborate discussion on the interpretation of the terms *null and void, and inoperative or incapable of being performed*, which are used in Sec. 45, the court rightly concluded that:[57]

---

[54] *Id.,* ¶ 9.

[55] *See id.* ¶ 12 (the appellant further contended, that it has denied these allegations of respondents before the Bombay High Court in its affidavit-in-reply and gave gist of its defence taken before the High Court).

[56] *Id.,* ¶ 26; *See also* Elaine Wong, *Procedural Issues Resulting from a Fraud Claim in International Commercial Arbitration: An English Law Perspective*, KLUWER ARB. BLOG (Jan. 24, 2014), http://kluwerarbitrationblog.com/blog/2014/01/24/procedural-issues-resulting-from-a-fraud-claim-in-international-commercial-arbitration-an-english-law-perspective (discussing, *inter alia* how in England due to absence of public policy that accusations of fraud are decided by courts these issues can fall within the scope of arbitration agreement subject to its wordings; and (erroneously) citing Fiona Trust v. Privalov against [2007] UKHL 40 (instead of the correct name Premium Nafta Products Ltd. v. Fili Shipping Company Ltd.) in which the application of the doctrine of separability was explained and affirmed by the House of Lords). *See also id.*, ¶ 24, where the Sup. Ct. cites correctly the House of Lords decision as Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. [2007] UKHL 40 and excerpts from the same to explain the principle of separability. *See also* Abhinav Bhushan & Niyati Gandhi, *The Back and Forth of the Arbitrability of Fraud in India*, KLUWER ARBITRATION BLOG (Feb. 13, 2014), http://kluwerarbitrationblog.com/blog/2014/02/13/the-back-and-forth-of-the-arbitrability-of-fraud-in-india (discussing *inter alia* the above *WSGM v. MSM judgment* and "direct impeachment" test requiring 'allegation of fraud to be made specifically targeting the arbitration agreement for the dispute to go before courts when a standard arbitration agreement is contained in the main contract'; and criticising the approach of the Sup. Ct. in subscribing to a literal interpretation of the arbitration agreement by looking at its scope).

[57] *Id.,* ¶ 29.

> *the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator.*

The Apex Court further correctly observed, that Sec. 45 'did not empower a court to decline reference to arbitration on the ground that another suit on the same issue is pending in the Indian court'.[58] So, allowing the appeal and restoring the single judge's decision, it held that the dispute should be decided by the arbitrator in accordance with the arbitration agreement viz., clause 9 between the parties. Despite the appreciable approach of the Supreme Court in relying on Sec. 45, in letter and spirit, the delay in disposal of this appeal is a cause of concern, considering that the Special Leave Petition to appeal, under Art. 136 of the Indian Constitution, was filed way back in the year 2010. It is suggested that in such matters, when the legislative policy and provisions clearly call for reference to arbitration, the Supreme Court should without any delay expeditiously dispose of such commercial cases. Any inordinate delay in reference to the arbitration may, apart from huge litigation costs and undermining the efficacy of arbitral tribunal's autonomy, in certain cases, cause numerous avoidable problems for the arbitral tribunal, and result in pyrrhic victories in arbitration.

IV. Interim Measures— Is BALCO really better than Bhatia International?

In *Bhatia International,* the Apex Court held that in cases of arbitration, including ICA held in India Part I including, Section 9 applies,[59] and the parties can mutually agree to derogate only from the derogable provisions (which Section 9 is not). It also held, that in cases of arbitration held outside India but in a convention country, Pt. II would apply (unless, parties agree to derogate from the derogable provisions) and those provisions of Pt. I would apply to which the parties do not mutually agree in their arbitration agreement to derogate from, expressly or impliedly. Moreover, the Court also stated, that in ICA held outside India in a non-convention country too, the parties can have benefit of Pt. I provisions unless, they derogate expressly or impliedly from them. Thus, party autonomy was fully respected, in ICA outside India, to the extent that the parties could choose to derogate from all the provisions of Pt. I or seek to obtain benefit of them, like Sec. 9.

---

[58] *Id.,* ¶ 33.

[59] The Arbitration and Conciliation Act, *supra* note 13, § 9 (provides for certain useful interim measures by Court obtainable by a party before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced.).

Perhaps the reasons for being uncharitable to apparently expansive supervisory evolved in *Bhatia International* are due to the difficulties in discerning the 'implied exclusion' of Pt. I, which many courts were reluctant to do so, at least initially.[60] There was inconsistency in the approach of courts, and this culminated in apparently anti-ICA *Venture Global,*[61] which allowed challenge to a foreign award under Section 34, pertaining to Pt. I. A 5 judge bench in *BALCO* (2012),[62] by overruling *Bhatia International,*[63] *and Venture Global* has precluded application of Part I to ICA where the seat is outside India. *BALCO* has been praised from all quarters.[64] The premise of the Court i*n BALCO* regarding attributing the aim and objective of the 1996 Act as enforcement of the UNCITRAL Model Law,[65] does not appear to be correct, on basis of its reliance upon the statement and objects of reasons appended to the bill,[66] and the preamble to the 1996 Act.[67] In fact, the said position does not follow from the two interpretative aids relied upon by the Court, as both the statement of objects and reasons and the preamble explicitly only 'take into account' the UNCITRAL Model Law while enacting the 1996 Act which is a 'consolidating and amending' law.

By overruling *Bhatia International,* has the Supreme Court jeopardised the enforceability of those awards rendered outside India which do not get covered within the statutory definitions of a 'foreign award' under Part II or Part III? This and other problems were pointed out by the Supreme Court in *Bhatia*

---

[60] *See* Harisankar K.S., *Supervisory Jurisdiction of Indian Courts in Foreign Seated Arbitration: The Beginning of a New Era or just the end of Bhatia Doctrine?,* 3 THE ARB. BRIEF 56, 58 *et. seq.* (2013), *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1034&context=ab [hereinafter Harisankar K. S.].

[61] Venture Global Engineering v. Satyam Computer Services, (2008) 4 S.C.C. 190 (India).

[62] BALCO, *supra* note 7.

[63] Bhatia International, *supra* note 8.

[64] *See e.g.,* Gary B. Born and Suzanne A. Spears, *International Arbitration and India: 'A truly excellent judgment!'*, 1.1 INDIAN J. OF ARB. L. 4, 7-8 (2012) (highlighting, the *BALCO* court's emphasis on: the Pt. I of the 1996 Act adopting the territorial principle; the law of the arbitral seat governing the conduct of arbitration; and 'that an annulment action may be brought outside of the arbitral seat only in the very rare circumstances of the parties having agreed upon a procedural law other than that of the arbitral seat.' Also, discussing the prospective application of the *BALCO* judgment; and most importantly opining on its pro-business impact by stating, that '[o]n a practical level, knowing that the arbitrations with Indian parties seated outside of India will not be subject to interference by local courts will encourage parties to do business on more favourable terms with Indian parties.').

[65] BALCO*, supra* note 7, ¶ 45.

[66] *Id.,* ¶ 38.

[67] *Id.,* ¶ 39.

International,[68] as noticed/reproduced in *BALCO*.[69] *Bhatia International*,[70] (as noticed in ¶49 of *BALCO*) gave an option to parties involved in an ICA outside India to exclude by agreement even all provisions of Part I of the 1996 Act. What if the parties failed to make such exclusions? Then, the rules or law chosen by the Parties was to prevail over Part-I in cases of conflict between them, as made clear by the Supreme Court in *Bhatia* itself.

The outright exclusion of *BALCO* would clearly leave parties, where seat is outside India, remediless under Pt. I.[71] However, a view anticipates the positive outcomes it may have in promoting India as a seat of arbitration for parties seeking benefits of Pt. I.[72] Will *BALCO* pressurise the parties to choose India as a seat of arbitration, even against their wish, just because they seek to benefit from Pt. I remedies? This approach to promote India as a destination for ICA doesn't seem to be right. We should develop our arbitral institutions, competence and attitudes of arbitration professionals rather than seeking to benefit from arm-twisting interpretative results. In any case, *Bhatia International* was being perceived as counterproductive decision because of creating ample opportunities for judicial interference under Pt. I. To what extent *BALCO* will efficaciously serve the purpose of being pro-ICA decision, only time will tell; and an elaborate cost-benefit analysis study to examine its judicial impact is the need of the day.

V. Refusing (or Resisting) Enforcement of 'Foreign Awards': 'Public Policy' Ground

Perhaps, the most haunting thing for a party in whose favour an arbitration award has been rendered, which may have attained finality, is the setting aside of the award by a national court where the victorious party seeks to enforce the same. This will reduce the award in ones favour to merely a pyrrhic victory. Thus, the national courts need to be vigilant particularly in cases of foreign awards, when the defeated party on different grounds stalls their enforcement. One such ground under the Indian Arbitration and Conciliation Act, which has

[68] Bhatia International, *supra* note 8, ¶ 18.
[69] BALCO, *supra* note 7, ¶ 48.
[70] Bhatia International, *supra* note 8, ¶ 32.
[71] *See* e.g., Harisankar K.S., *supra* note 60. In BALCO, *supra* note 7, the Supreme Court in ¶167 does not agree with the view that their opinion would lead parties without remedy. Instead, the court suggests that the parties, in that case, pursued remedy in England to its logical conclusion. For the parties voluntarily choosing seat of the arbitration outside India, the apex court merely said that 'they are impliedly also understood to have chosen the necessary incidents and consequences of such choice.' This all-or-nothing approach of BALCO is a far cry from the more flexible approach of the court in *Bhatia International, supra* note 8.
[72] *See* Harisankar K. S., *supra* note 60.

an element of vagueness making it difficult to define its scope, is the ground of the arbitral award being in conflict with the 'public policy of India'.[73] The same ground is there in two provisions viz., Sections 34(2)(b)(ii) and 48(2)(b) in Parts I and II respectively. The basic question is, whether the standard of review similar under both the provisions, as there is literal similarities? In *ONGC v. SAW Pipes*,[74] the Supreme Court had an occasion to interpret the former provision viz., Section 34(2)(b)(ii), and it did so expansively, as per so called "broad view". Earlier, the Apex Court in the *Renusagar* case,[75] laid down the criteria for refusal to enforce a 'foreign award', on the ground of public policy, if the enforcement would be contrary to: (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality. The *ONGC* Court added one more ground of patent illegality i.e., when 'the award is contrary to the substantive provisions of law or the provisions of the (1996) Act or against the terms of the contract.' Notably, though *Renusagar* dealt with enforcement of foreign award and concerned interpretation of Section 7(1)(b)(ii) of the Foreign Awards Act, the Court in *ONGC* used the said judgment's 'public policy' criteria to interpret Section 34(2)(b)(ii), which does not concern enforcement of foreign awards, and expanded the same. Was it comparing apples with oranges? *Renusagar*'s narrow approach adhered to the 'international' public policy standard compared to the *ONGC's* subjective broad 'domestic' public policy standard.[76] In *Phulchand Exports*,[77] the Supreme Court again re-examined the foreign award on merits.

However, more recently in *Shri Lal Mahal Ltd.* v. *Progetto Grano Spa*,[78] a 3-judge bench of the Supreme Court used Renusagar's narrow criteria to interpret the Section 48(2)(b), noting that though "the concept of 'public policy in India' is same in nature in both the Sections,[79] but, in our view, its application differs in degree in so far as these two Sections are concerned".[80] Thus, it found the application of the 'public policy' doctrine more limited for the purposes of Section 48(2)(b) compared to Section 34(b)(ii), dealing with domestic arbitral

---

[73] *See also* Arpan Kr. Gupta, *A New Dawn for India-Reducing Court Intervention in Enforcement of Foreign Awards*, 2.2 INDIAN J. OF ARB. L. (Nov., 2013), http://ijal.in/sites/default/files/Arpan%20Gupta.pdf.

[74] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., (2003) 5 S.C.C. 705 (India).

[75] Renusagar Power Co. Ltd. v. General Electric Co., A.I.R. 1994 S.C. 860 (India) (a 3 Judge bench).

[76] *See* Harisankar K.S., *Second Look at the Foreign Award forbidden on Enforcement—Indian Supreme Court*, KLUWER ARB. BLOG (Aug. 1, 2013), http://kluwerarbitrationblog.com/blog/2013/08/01/second-look-at-the-foreign-award-forbidden-on-enforcement-indiansupreme-court.

[77] Phulchand Exports Ltd. v. O. OO. Patriot, (2011) 10 S.C.C. 300 (India).

[78] Shri Lal Mahal Ltd. v. ProgettoGrano Spa, (2013) 8 SCALE 489 (India) [hereinafter Lal Mahal].

[79] The Arbitration and Conciliation Act, *supra* note 13, §§ 34(2)(b)(ii), 48(2)(b).

[80] Lal Mahal, *supra* note 78, ¶ 25.

award. The Court did not hesitate to overrule *Phulchand Exports*, though one of the judges in the *Shri Lal Mahal* bench was also present in the *Phulchand* bench. Thus, laudably, in exercising power under Section 48(2)(b) the Supreme Court refused to 'exercise appellate jurisdiction over the foreign award' nor it chose to 'enquire as to whether, while rendering foreign award, some error has been committed'.[81] Thus, after a series of flip-flops the interpretation regarding Section 48(2)(b) appears to have been finally settled, at least for time being.

VI. Conclusion

It can be argued that if India wants high standards of protection for its nationals investing or trading abroad, it should not be prejudiced to the similar demands about protection and certainty from the foreign nationals investing or trading in India. We have seen in this paper through analysis of various judicial imprimaturs of the Indian Supreme Court, that how despite a rather inconsistent judicial approach, attempts have been made time and again to adopt a non-interventionist judicial attitude displaying pro-arbitration bias, particularly in cases of ICA outside India. If past holds the key to predict the future in this regard, one apprehends, the future does not seem very certain; as unsettling of law by future decisions is a veritable problem. This paper does not undermine the importance of judicial intervention, which may be vital and indispensable; it only stresses upon the need to strike a delicate balance so as the efficiency of arbitration process is not adversely affected; along-with preservation of the foundational pillars of the arbitration expressed in the principles of party autonomy and *competence-competence*. Attempts to do Justice by the Indian Judiciary should not mete out injustice to the International Commercial Arbitration. This would be in consonance with the purpose and spirit of the 1996 Act, and would help India flourish as an important ICA destination in South Asia.

[81] *Id.*, ¶ 45.